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## Beyond Babel: Achieving the Promise of Our American Constitution

André LeDuc

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# BEYOND BABEL: ACHIEVING THE PROMISE OF OUR AMERICAN CONSTITUTION

ANDRÉ LEDUC\*

## ABSTRACT

This Article completes a therapeutic treatment of the originalism debate. The long-running debate over constitutional originalism is *pathological*, more confused than insightful or important. This Article completes the course of therapy by sketching the constitutional discourse and practice we may hope for after the debate over originalism is transcended and left behind. In so doing, it disarms the final defense of the participants in that debate in that they have no alternative. Only by sketching what that alternative is can its existence be proved, and the ideopolises of the protagonists finally be reconstructed. This Article shows the constitutional theory and criticism we may aspire to if we are freed of the bonds of the debate over originalism and its underlying assumptions.

First, the Article outlines what a post-debate constitutional decision process would look like if the judicial decision makers no longer felt compelled to articulate their opinions in the vocabulary of that debate. Second, it describes what constitutional scholarship could look like without the constraints of the *Weltanschauung* shared by the protagonists in the originalism debate. Third, the Article gives currency to the claim that abandoning the debate about originalism can revive the public discourse about our Constitution, what it says, what it does not say, and what it should say. Fourth, and finally, the Article suggest how abandoning the perspective of the debate about constitutional originalism frees even the principal protagonists in that debate to engage with the American Constitution—and with those who would apply the Constitution very differently—in a more direct and powerful way. The framework of the originalism debate constrains and distorts the argument and discourse rather than enriches it. At all of these levels, leaving the debate over constitutional originalism behind gives us a revived constitutional discourse and a more robust American Constitution.

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#### I. BEYOND THE ORIGINALISM DEBATE

Can we ever hope to leave the unhappy originalism debate behind? It has been taken as a given of our constitutional landscape for nearly a half century. Yet, yes, we can. Indeed, we must. We can because the debate is grounded on implausible tacit philosophical premises. It is more a creature of confusion than a matter of significant, substantive disagreement.<sup>1</sup> We must if we are to grapple forthrightly with the constitutional questions that matter. We need robust discussion over the substantive constitutional choices facing the Republic rather than an academic debate that seeks to delegitimize certain types of argument based upon flawed ontological premises.<sup>2</sup> But to move beyond the debate over originalism requires that we have a compelling alternative to the siren call of originalism and the apparent alternatives, like the Living Constitution, law as integrity, and judicial minimalism, among others, defended by its critics.

This Article sketches what that alternative future looks like, not as a matter of theory<sup>3</sup> but as a matter of practice.<sup>4</sup> By practice I mean simply the accepted constitutional argument, decision, and commentary as undertaken and accepted by the judges empowered to decide constitutional cases, the advocates who appear before them, and the individuals participating in the commentary about those arguments and decisions as a matter of law.

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<sup>1</sup> See André LeDuc, *The Anti-Foundational Challenge to the Philosophical Premises of the Debate over Originalism*, 119 PENN. ST. L. REV. 131, 189-202 (2014) [hereinafter LeDuc, *Anti-Foundational Challenge*]. I am not denying that originalists and their critics disagree about substantive constitutional matters, only that their disagreements about originalism and its alternatives are important or fruitful.

<sup>2</sup> By endorsing an important role for constitutional discussion, I do not mean to suggest that such public discourse encompasses all issues that must be considered in the public, political sphere or to disregard the important limitations on the role of courts as agents of change, only to assert the importance of a robust substantive constitutional discourse. See generally, e.g., GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991).

<sup>3</sup> The theoretical arguments are presented in André LeDuc, *The Ontological Foundations of the Debate over Originalism*, 7 WASH. U. JUR. REV. 263, 263-67 (2015) [hereinafter LeDuc, *Ontological Foundations*]; LeDuc, *Anti-Foundational Challenge*, *supra* note 1; André LeDuc, *Striding Out of Babel: The Promise of Our American Constitution*, HAMLIN MITCHELL L. REV. (forthcoming 2016) [hereinafter LeDuc, *Striding Out of Babel*].

<sup>4</sup> Aficionados of the philosophical debate about the mind-body problem will recognize this strategy as reminiscent of the gambit of the eliminative materialists in the 1960s. See generally Richard Rorty, *Mind-Body Identity, Privacy, and Categories*, 19 REV. METAPHYSICS 24 (1965). Here the strategy is to describe how we might come to stop talking about original intentions and understandings—whether to affirm them as privileged in constitutional argument—or to reject them as unprivileged in favor of other sources of privileged constitutional argument.

When Robert Bork proclaims that there is no alternative to originalism, he could only be right, not as a matter of necessity, as he sometimes claims,<sup>5</sup> but as a contingent, historical fact. The Constitution is a matter of historically contingent social practice and that practice encompasses arguments beyond those privileged by originalism.<sup>6</sup> Similarly, originalism's critics have not offered an account that joins the demands of a relatively accessible and transparent theory of constitutional interpretation and adjudication with a plausible account of our constitutional doctrine and have generally failed to recognize the legitimate place of originalist arguments.<sup>7</sup>

If *Brown v. Board of Education*<sup>8</sup> and *Loving v. Virginia*<sup>9</sup> are the cliffs over which originalism may be pushed by its critics,<sup>10</sup> then the specter of lawless judges acting with unfettered discretion to advance their political ends has been the cliff over which Professors Tribe, Dworkin, and Sunstein and Justices Brennan and Breyer, together with most of the rest of originalism's critics, have been dangled or thrown by the originalists.<sup>11</sup> The critics are, after all, the doctrinal heirs of the Warren Court and they generally do not reject the constitutional decision-making of that Court.<sup>12</sup>

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<sup>5</sup> See ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 251-59 (1989) [hereinafter BORK, *TEMPTING*] (arguing that the claims of originalism are necessarily true). In his earlier statements of originalism Bork admittedly did not make this strong modal claim. See generally Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L. J.* 1 (1971). For a fuller discussion of this argument and the objections to it, see André LeDuc, *Originalism's Implications*, section II.D (Sep. 1, 2015) [hereinafter LeDuc, *Originalism's Implications*] (unpublished manuscript) (on file with author).

<sup>6</sup> See CASS R. SUNSTEIN, *RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA* 73 (2005) [hereinafter SUNSTEIN, *RADICALS*] (arguing implicitly that there could be a possible world in which originalism would be a sensible theory of constitutional decision-making, but that that world is not ours). See generally PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* (1982) [hereinafter BOBBITT, *FATE*]; GEORG WILHELM FRIEDRICH HEGEL, *PHENOMENOLOGY OF SPIRIT* (A.V. Miller trans., 1977) (1807) (seminal philosophical account of how our conceptual framework is historical, not absolute and unchanging).

<sup>7</sup> Even Philip Bobbitt, generally so catholic in his approach to permissible forms of constitutional argument, appears hard-pressed to explain why historical and textual arguments privileged by the originalists ought to be persuasive or authoritative. BOBBITT, *FATE*, *supra* note 6, at 9 (“At first, one must notice how odd is that the original understanding in any field of study should govern present behavior.”). It is possible that Stephen Sachs’s account of originalism that attributes originalism’s force to the inertia of law may offer an account of the force of historical argument. See Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 *HARV. J. L. & PUB. POL’Y* 817, 818-22 (2015).

<sup>8</sup> 347 U.S. 483 (1954).

<sup>9</sup> 388 U.S. 1 (1967).

<sup>10</sup> See GREGORY BASSHAM, *ORIGINAL INTENT AND THE CONSTITUTION: A PHILOSOPHICAL STUDY* 106 (1992) (characterizing *Brown* as posing an insuperable challenge for originalism).

<sup>11</sup> See, e.g., BORK, *TEMPTING*, *supra* note 5, at 251-59 (defending the claim that the apparent alternatives to originalism are indeterminate and therefore fundamentally flawed as legal theories).

<sup>12</sup> See, e.g., STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 66-74 (2005) [hereinafter BREYER, *ACTIVE LIBERTY*] (endorsing an expansive

Originalism's critics have not been aided by their metaphors of the living, unwritten, and invisible Constitution<sup>13</sup>—nor should those metaphors have been persuasive. Those metaphors tacitly devalue the importance of the constitutional text, as well as the historical expectations, intentions, and understandings at adoption or amendment.<sup>14</sup> Moreover, those metaphors also devalue and undermine the formality of the writtenness of the constitutional text and the weight attributed to this feature of the Constitution in our culture. As is so often the case, vocabulary is important in this debate, revealing the tacit commitments that make the entire debate both possible and ultimately fruitless as well.<sup>15</sup>

Despite our constitutional hopes and aspirations, there is no indication that the debate over originalism is coming to a resolution<sup>16</sup> or even petering out on its own.<sup>17</sup> It continues unabated.<sup>18</sup> Some might suggest that Jack Balkin's *Living Originalism* and Scott Soames's theory of deferentialism<sup>19</sup> reflect a post-debate synthesis

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right to privacy). Some critics of originalism, like Cass Sunstein, also distance themselves from the jurisprudence of the Warren Court.

<sup>13</sup> See, e.g., DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010); AKHIL REED AMAR, *AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* (2012); LAURENCE H. TRIBE, *THE INVISIBLE CONSTITUTION* (2008) [hereinafter TRIBE, *INVISIBLE*].

<sup>14</sup> They tacitly devalue the history and text of the Constitution and the arguments from that text and history because they substitute a vocabulary of an evolving and fluid Constitution. See ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 141 (Amy Gutmann ed., 1997) [hereinafter SCALIA, *INTERPRETATION*] (mocking Tribe's terminology of constitutional temporal flux).

<sup>15</sup> See ROBERT B. BRANDOM, *Vocabularies of Pragmatism: Synthesizing Naturalism and Historicism*, in *PERSPECTIVES ON PRAGMATISM: CLASSICAL, RECENT, AND CONTEMPORARY* (2011); see also ROBERT B. BRANDOM, *ARTICULATING REASONS: AN INTRODUCTION TO INFERENCE* 70 (2000) (describing Oscar Wilde's rejection of the term "blasphemy" at trial and the importance of vocabulary in carrying tacit substantive propositional commitments).

<sup>16</sup> See, e.g., Symposium, *The New Originalism in Constitutional Law*, 82 *FORDHAM L. REV.* 371 (2013); Ryan C. Williams, *Originalism and the Other Desegregation Decision*, 99 *VA. L. REV.* 493, 494-96 (2013) (arguing that originalism cannot justify the decision in *Bolling v. Sharpe* on the basis of an analysis different from those that have been advanced in the debate over whether *Brown* can be reconciled with originalism); Brian A. Lichter & David P. Baltmanis, *Foreword: Original Ideas on Originalism*, 103 *NW. L. REV.* 491, 491-94 (2009).

<sup>17</sup> See, e.g., Stephanos Bibas, *The Limits of Textualism in Interpreting the Confrontation Clause*, 37 *HARV. J.L. & PUB. POL'Y* 737, 741-42 (2014); Richard A. Epstein, *Beyond Textualism: Why Originalist Theory Must Apply General Principles of Constitutional Law*, 37 *HARV. J.L. & PUB. POL'Y* 705 (2014); Eugene Volokh, *Textualism and District of Columbia v. Heller*, 37 *HARV. J.L. & PUB. POL'Y* 729 (2014); see also *supra* authorities cited note 16.

<sup>18</sup> See, e.g., Sachs, *supra* note 7; JACK M. BALKIN, *LIVING ORIGINALISM* (2011) [hereinafter BALKIN, *LIVING ORIGINALISM*]; Lawrence B. Solum, *Semantic Originalism* (Ill. Pub. Law & Legal Theory Research Papers Series No. 07-24), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1120244](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244); see also *supra* authorities cited notes 16 & 17.

<sup>19</sup> Scott Soames, *Deferentialism: A Post-Originalist Theory of Legal Interpretation*, 82 *FORDHAM L. REV.* 597 (2013) [hereinafter Soames, *Deferentialism*].

(Soames asserts as much for his constitutional theory)<sup>20</sup> along the lines advocated here. Such a view might appear supported by Balkin's fusion of a theory of originalism with a commitment to unenumerated rights,<sup>21</sup> including the right to abortion.<sup>22</sup> The synthesis (or perhaps, mere conjunction) of an originalist methodology with the politically liberal assertion of a constitutional right to abortion might suggest that the stakes of the debate over originalism have largely been redefined, with the result that the debate itself will in turn collapse.<sup>23</sup> Mainstream originalists have been cautious in welcoming Balkin into the fold.<sup>24</sup> *Living Originalism* does not signal the transcendence of the originalism debate. Balkin appears to believe that there is a fact of the matter about original understandings that is dispositive as to the resolution of contemporary constitutional questions.<sup>25</sup> Moreover, any such armistice in the debate over originalism based solely upon the consequences derived from originalism will likely be fragile and tentative. There can be no resolution or transcendence of the debate until the shared ontological premises of the debate are discarded, because those premises make the debate possible.<sup>26</sup>

What is the payoff if we adopt this strategy? The therapeutic approach entails that the description of the alternative, post-debate world is as important an element in the project as any of the other steps in the therapy.<sup>27</sup> The claim that the originalism

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<sup>20</sup> *Id.* at 597-98 (arguing that only after the meaning of a legal provision has been determined ought its intent or purpose become relevant). It is not clear that Soames's approach to constitutional meaning would satisfy the originalists, because he looks beyond semantics in determining the meaning of the authoritative constitutional text. *Id.* at 598 ("As with ordinary speech, [what the law asserts or stipulates] is usually *not* a function of the linguistic meaning alone; it is a function of meaning plus the background beliefs and presuppositions of participants.").

<sup>21</sup> See BALKIN, *LIVING ORIGINALISM*, *supra* note 18, at 208-18.

<sup>22</sup> See Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMM. 291, 312-13 (2007) [hereinafter Balkin, *Abortion*] (arguing that *Roe v. Wade* may be defended on originalist grounds by looking to the original meaning of the Fourteenth Amendment, rather than its originally expected application, and understanding that *Roe* protects liberty and enforces equality as required by that amendment).

<sup>23</sup> See STRAUSS, *supra* note 13 (arguing that the original understandings can also be turned against conservative interpretations of the Constitution).

<sup>24</sup> See, e.g., Steven G. Calabresi & Livia Fine, *Two Cheers for Professor Balkin's Originalism*, 103 NW. U. L. REV. 663, 665-68 (2009) (expressing caution with respect to Balkin's purported endorsement of originalism on the grounds that Balkin's concept of framework originalism may permit the federal government too much power).

<sup>25</sup> See BALKIN, *LIVING ORIGINALISM*, *supra* note 18, at 14.

<sup>26</sup> See generally LeDuc, *Ontological Foundations*, *supra* note 3; LeDuc, *Anti-Foundational Challenge*, *supra* note 1; but see BRIAN LEITER, *Why Quine Is Not a Postmodernist*, in NATURALIZING JURISPRUDENCE: ESSAYS IN AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY 137, 139 n.6 (2007) (denying the anti-foundationalist claim that the controversy over the scope and legitimacy of judicial review is rooted in a representational theory of language or an empirical theory of legal propositions).

<sup>27</sup> I invoke the celebrated metaphor of the constitutional conversation here not in any strong descriptive sense but only to take an agnostic position about the best characterization of the therapeutic strategy that I am proposing. And, as has been pointed out by Sanford

debate is pathological is a claim that the protagonists in the debate are imprisoned by in part because they cannot imagine or articulate an alternative.<sup>28</sup> Thus, the task is to outline what such a world would be so that the protagonists can not only see it is preferable, but so that they can see it as *possible*. The power of the tacit premises and assumptions of the originalism debate is such that the very possibility of an alternative is not always recognized.<sup>29</sup>

The conclusion of the originalism debate offers the promise that we may reconnect legal scholarship with the work of the courts<sup>30</sup> and perhaps even with political discourse within the public sphere of the Republic. That connection to the public sphere has long been largely missing.<sup>31</sup> While the debate over originalism has certainly sounded both in the legal academy and in the public, political, and judicial

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Levinson, the legal nature of constitutional law, with its element of coercive force, distinguishes such discourse, at least in its authoritative case, from ordinary conversation.

<sup>28</sup> The apparent need to continue the debate over originalism has various sources. As a *sociological* matter, the number of law professors tenured as a result of their contribution to the debate likely adds substantial inertia to the continuing controversy. At a more conceptual level, the grip of the tacit ontological commitment to an objective, independent Constitution ought not to be underestimated. See generally LeDuc, *Ontological Foundations*, *supra* note 3.

<sup>29</sup> The possibility and nature of progress in our normative thinking, whether moral or political, and its relation to argument, is thoughtfully explored in Kwame Appiah's *The Honor Code*. While Appiah does not expressly adopt the therapeutic approach advocated in this Article, his approach is generally supportive of the strategy adopted here in its express acknowledgment that the instances of moral progress he describes was not a matter of making new or stronger arguments, just as I argue that moving beyond the debate about originalism will not occur as one side or the other makes new or more compelling arguments within the conceptual context of that debate. While his focus is upon a concept of moral *revolution* and I am agnostic on the question whether the strategies I am developing are normal or revolutionary, that difference is not central to the commonality of our shared approach. See generally KWAME ANTHONY APPIAH, *THE HONOR CODE: HOW MORAL REVOLUTIONS HAPPEN* (2010).

<sup>30</sup> The dissociation of constitutional scholarship from the work of the courts and, indeed, the irrelevance of that work for some has been widely remarked and a variety of conclusions derived therefrom. See generally, e.g., Marc O. DeGirolami & Kevin C. Walsh, *Judge Posner, Judge Wilkinson, and Judicial Critique of Constitutional Theory*, 90 NOTRE DAME L. REV. 633 (2014).

<sup>31</sup> I have in mind, for example, not historical classics like *The Federalist Papers*, but, for example, DANIEL PATRICK MOYNIHAN, *THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION* (1965) (highlighting the crisis in African American families arising from absent fathers) and the REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968). See also WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* (1999). What is striking, I believe, is the relative absence of similar works in the past couple decades, except at the margins. See, e.g., J. Harvie Wilkinson III, *Cry, the Beloved Constitution*, N.Y. TIMES (Mar. 11, 2012), <http://www.nytimes.com/2012/03/12/opinion/cry-the-beloved-constitution.html>; see also RICHARD A. POSNER, *PUBLIC INTELLECTUALS: A STUDY OF DECLINE* (2002) (articulating a Posnerian account of the decline). Edward Kleinbard's recent attack on United States federal fiscal policy may stand as an important counterexample. See EDWARD D. KLEINBARD, *WE ARE BETTER THAN THIS: HOW GOVERNMENT SHOULD SPEND OUR MONEY* (2014) (arguing that federal fiscal policy must be assessed in its entirety, without the traditional silos for the analysis of taxation and for spending).

spheres,<sup>32</sup> the debate by its terms has been dissociated from a discussion of constitutional good and the choices we face with respect thereto. The historicism of originalism purports to divorce our constitutional practice from the pursuit of the constitutional good by the current constitutional actors—judges, legislators, presidents, and citizens—except in advocating the procedural commitments of originalism. The historicism of originalism purports to divorce our constitutional practice from the pursuit of the constitutional good by the current constitutional actors—judges, legislators, presidents, and citizens—except in advocating for the procedural commitments of originalism. Correspondingly, the efforts by critics of originalism to discredit such textual and historical arguments fail to recognize such arguments as a central part of our constitutional practice.<sup>33</sup>

Without the dominating procedural focus of the originalism debate, we may hope to engage with the substantive constitutional doctrinal questions that confront the Republic and its citizens. Many recognize that we live in a novel national security world<sup>34</sup> and many of us share a concern that the discourse of the public sphere with respect to the constitutional issues that thereby arise is not developing as the Republic needs and deserves.<sup>35</sup> Without the distraction of the methodological constraints defended by protagonists on both sides of the debate over originalism we may hope to make explicit those questions and issues and begin the dialogue that may generate solutions.<sup>36</sup> We cannot be bound to a methodology that commits us to

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<sup>32</sup> Most notably, in claims made by the Reagan Department of Justice and regularly in the confirmation process, particularly in confirmation hearings for Supreme Court nominees. *See, e.g.*, Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, to be an Associate Justice of the Supreme Court of the United States Before S. Comm. on the Judiciary, 111th Cong. 59 (2009), <http://judiciary.senate.gov/hearings/testimony.cfm> (opening statement of the Hon. Sonia Sotomayor) (“[My judicial philosophy is] [S]imple: fidelity to law.”); Edwin Meese III, *Toward A Jurisprudence of Original Intent*, 11 HARV. J.L. & PUB. POL’Y 5 (1988).

<sup>33</sup> Stephen Sachs offers perhaps the best account of why such historical arguments have the force that they have. He argues that originalism is a theory of change in law, and that originalism reflects a commitment to the persistence of law in the absence of a legitimate change thereof. *See* Sachs, *supra* note 7.

<sup>34</sup> *See, e.g.*, JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* (2009) (describing the extent to which national security concerns and fear of terrorism led to apparently illegal counterterrorism actions and policies); RICHARD A. POSNER, *NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY* (2006) [hereinafter POSNER, *SUICIDE PACT*]; JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11* (2006) (defending a broad interpretation of the President’s power based upon the War Powers Clause and the concept of the unitary executive).

<sup>35</sup> *See, e.g.*, KLEINBARD, *supra* note 31 (arguing that the partisan disarray in the federal government’s legislative policymaking fails to recognize the extent to which legislative paralysis makes *de facto* choices seemingly inconsistent with our shared national values); *see generally* PHILIP BOBBITT, *THE SHIELD OF ACHILLES: WAR, PEACE, AND THE COURSE OF HISTORY* (2002) (exploring the geopolitical implications of the growing inability of the traditional nation state to maintain the integrity of its boundaries against threats and protect its citizens and predicting the demise of the modern nation state).

<sup>36</sup> *See* BOBBITT, *FATE*, *supra* note 6; *see also* DENNIS PATTERSON, *LAW AND TRUTH* 129, 149–50 (1996) [hereinafter PATTERSON, *TRUTH*] (endorsing Bobbitt’s claim that the debate over the legitimacy of judicial review is grounded on a shared philosophical error).

find those solutions only in the original understandings or expectations or, alternatively, that precludes us from finding them there, or that prohibits us from forging them today within our constitutional practice.

We have the potential to achieve a constitutional law that answers some of our questions and, through our constitutional processes, allows us to articulate and ultimately impose upon our fellow citizens and residents our shared fundamental democratic, republican, and constitutional commitments. We can do all of that without either recreating the excesses of the jurisprudence of the Warren Court or without appealing to the implausible reductionism of the originalists. In so doing, we can capture and preserve the force of our American Constitution.<sup>37</sup>

I proceed then to conclude a therapeutic<sup>38</sup> path by which to move beyond the paralyzing status quo defined by the debate over originalism.<sup>39</sup> In doing so, this

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<sup>37</sup> I also join those who have lamented the loss of responsibility for upholding the Constitution by the non-judicial branches of the state. *See, e.g.*, MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999) (arguing for a popular constitutionalism in which the people take a more assertive and important role in constitutional decision-making than at present); LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 *GEO. WASH. L. REV.* 1119, 1126 (1998). It is less likely that the judiciary has usurped the role as the exclusive guardians of the Constitution than that the legislative and, to a perhaps lesser extent, the executive branch have abdicated that role. Those important actors must be encouraged to reassume their constitutional responsibility to uphold the Constitution, too. It is natural to wonder whether this aspiration is no more realistic than, for example, Dean (now Justice) Kagan's expression of hope in 1995 that Supreme Court nominees would engage in a public discourse about substantive constitutional issues in their nomination hearings. *See* Elena Kagan, *Confirmation Messes, Old and New*, 62 *U. CHI. L. REV.* 919, 935-38 (1995) (reviewing STEPHEN L. CARTER, *THE CONFIRMATION MESS* (1994)). Professor (now Justice) Kagan's view was, and is, unrealistic because the goal of a confirmation hearing, from the President and the nominee's perspective, is to secure confirmation of the nominee; substantive discussion cannot advance this goal at the present time, and may easily operate to diminish the probability of confirmation. Justice Kagan came to understand this herself, too, as evidenced by her own testimony at her Supreme Court confirmation hearings. *See generally* Confirmation Hearing on the Nomination of Elena Kagan, to be an Associate Justice of the Supreme Court of the United States Before S. Comm. on the Judiciary, 111th Cong. (2010). The view expressed here will be more realistic only if sophisticated political actors will determine that they have an interest in such different behavior. How would such a change arise? It is unlikely that even fervent moral exhortation from the legal academy, whether from the Left, the Right or both would have much effect. One could imagine enacting general civil or criminal sanctions on political actors for violations of the Constitution, but the threshold resistance to such enactment would appear very great. Even if enacted, however, the questions of standing and other practical issues of enforcement would appear serious. More importantly, providing civil or criminal penalties for unconstitutional actions by elected or judicial officials would appear to constitute an undesirable expansion of state sanctions, more likely to lead to more partisanship than to good faith attention to the requirements of the Constitution. So while we might in the abstract prefer a political constitutional culture in which elected and unelected government officials took greater responsibility for acting in conformity to the Constitution that does not appear easy to achieve.

<sup>38</sup> The novel strategy needed here is therapeutic because the conflict between originalism and its alternatives is pathological. It reflects errors and confusions, not important substantive constitutional disagreements that may be resolved merely by argument. Instead, we have to recreate the constitutional ideopolises of the participants in the debate, and then adduce evidence that may lead them to feel comfortable to move beyond those stances. For a more

Article breaks with the participants in the debate, each of whom is committed either to the triumph of originalism or to its rejection. I complete this *therapeutic* strategy with respect to the debate over originalism by showing how an alternative stance can permit a revitalized constitutional discourse in the courts, in the academy, and in the public sphere.

*A. Foundations for a Post-Originalism Debate Constitutional Practice*

The originalists and their critics do not contemplate a world in which the Constitution is a matter of practice, rather than an objective thing that can provide us answers. I have argued elsewhere against that assumption and defended a therapeutic strategy for the debate over originalism, arguing that there is no constitutional gold standard independent of the hurly burly of our constitutional argument and decision.<sup>40</sup> That constitutional practice is enough to give currency to our constitutional claims. The detailed, charitable account of the debate I have elsewhere offered ought to have given both sides reason to seek new alternatives behind the sterile exchanges that constitute the originalism debate. But the failure of the existing debate does not alone show that there is an alternative or what such an alternative might be.

The final therapeutic step is to begin to imagine the world of constitutional decision-making and interpretation without the dualisms of the originalism debate. There are two elements in that exercise. We must first identify what we would give up in abandoning the originalism debate. We must also recognize what we would gain. If we abandon the originalism debate, we must concede that the originalist strategy of delegitimizing other modes of argument must be abandoned.<sup>41</sup> The originalists must concede that prudential, structural, doctrinal, and ethical arguments are legitimate and legitimating—even if and when unconvincing. Their critics must acknowledge the place of historical and textual arguments, because no constitutional theory can delegitimize those forms of argument again even if the critics want to argue against the conclusions such arguments would yield in particular cases. In the place of such wholesale, methodological challenges to various modes of argument, we must return to a retail method of constitutional argument. Each constitutional

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complete discussion and contextualization of this therapeutic strategy, see LeDuc, *Striding Out of Babel*, *supra* note 3.

<sup>39</sup> See André LeDuc, What Were They Thinking? (July 15, 2014) (unpublished manuscript) (on file with author) [hereinafter LeDuc, What Were They Thinking?]; see also André LeDuc, Originalism's Claim (July 15, 2014) (unpublished manuscript) (on file with author) [hereinafter LeDuc, Originalism's Claim]; André LeDuc, *Political Philosophy and the Fruitless Quest for an Archimedean Stance in the Debate over Originalism*, 85 UMKC L. REV. (forthcoming 2016) [hereinafter LeDuc, *Political Philosophy*]; André LeDuc, *The Relationship of Constitutional Law to Philosophy: Five Lessons from the Originalism Debate*, 12 GEO. J.L. & PUB. POL'Y 99 (2014) [hereinafter LeDuc, *Philosophy and Constitutional Interpretation*].

<sup>40</sup> See generally LeDuc, *Striding Out of Babel*, *supra* note 3.

<sup>41</sup> The anti-foundational arguments made here would also foreclose other delegitimization strategies that challenge existing kinds of argument that are part of our constitutional practice, too. Because historical and textual arguments are accepted modes of constitutional argument, the frequent disdain and disregard for those arguments as of little weight is also wrong.

question must be addressed on its own.<sup>42</sup> That does not mean that we must abandon the rules of constitutional law.<sup>43</sup> We can both address each case and recognize the importance of consistency and general rules by continuing our constitutional decision practices.

An alternative to originalism must satisfy two conditions. David Lewis long ago reminded us that when philosophy conflicts with our ordinary ways of speaking and thinking, it is usually philosophy that is mistaken.<sup>44</sup> That same caution applies at least equally to theories of the Constitution. Both the originalists and their critics purport to discredit established modes of constitutional argument under their more theoretically consistent accounts of the Constitution. The inconsistency of the accounts offered by the originalists and most of their critics is powerful evidence that our theoretical claims are flawed. Thus, first, an account of our Constitution, our constitutional debates, and our constitutional law must give an account that is, at least at some level, both accessible to, and compelling for, our citizens.<sup>45</sup> Second, it must also give a theoretically defensible account of our constitutional history and our constitutional law that engages and persuades our constitutional elites, composed of the senior members of the federal judiciary and the constitutional commentariat.

Many of the alternatives to originalism fail to provide a constitutional theory that provides the requisite transparency and accessibility. For the ordinary citizen, thinking about the Constitution at a commonsensical level, doctrines of “the Living Constitution,” “the invisible Constitution,” and “the minimal Constitution,” or the myth of Hercules as judge and philosopher, fail the first test. That is, all of these very thoughtful and sophisticated theories, championed by able constitutional scholars or judges, are difficult to reconcile with either the intuitions or the judgments of the citizen on the street, or with her aspirations.<sup>46</sup> The ways in which such theories

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<sup>42</sup> In asserting that each case must be addressed on its own, I am not asserting that considerations of consistency and fit that arise out of precedent and doctrine more generally are inapposite. The claim is only that a methodological first strike cannot delegitimize any of the accepted modes of constitutional argument that might otherwise be available.

<sup>43</sup> See generally Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989) [hereinafter Scalia, *Rules*] (exploring the central role of general rules in modern law and associated concepts of justice).

<sup>44</sup> DAVID K. LEWIS, CONVENTION 1 (1969) (cautioning philosophers tempted to defend philosophical theories inconsistent with our ordinary understandings and practices).

<sup>45</sup> In suggesting that any account of the Constitution and constitutional argument must be accessible to the Republic’s citizens, I am not suggesting that there is no place for experts in our constitutional practice. Not every citizen need be equally able to appear as an advocate before the Supreme Court, for example. But the account of constitutional law and decision-making must be comprehensible by the citizens and, at least as importantly, that constitutional law story must resonate with them. For a good account of these constitutional roles, see BALKIN, LIVING ORIGINALISM, *supra* note 18, at 59-73.

<sup>46</sup> Jack Balkin offers one of the most sensitive accounts of the multiple roles of the Constitution in his theory of framework originalism. See *id.* In so doing, he recognizes the aspirational role of the Constitution and the evolution of the Constitution over time, as well as the importance of that possibility in political and constitutional discourse. The original Constitution’s treatment of slavery is only the most obvious and celebrated example of this possibility. Although Balkin has given the anti-foundational stance careful attention, Balkin appears to remain committed to the more traditional view that propositions of constitutional law correspond to facts. See BALKIN, LIVING ORIGINALISM, *supra* note 18; see also Jack M.

diverge are several, but they all stem from the fundamental intuition that our Constitution is limited and the role of our judges in implementing that law is also limited, but not necessarily minimal. That is one of the reasons why the derision of Judge Bork and Justice Scalia is so persuasive. Many citizens were and remain surprised and unsettled by the far-reaching results that the modern federal courts stand prepared to order in the name of our Constitution. Others focus upon the failure of the Constitution to deliver justice, beginning with the Constitution's original failure to free the slaves, and, indeed, the fundamental support it provided for the continuing enslavement of African Americans.

It does not follow, however, that we need go so far as Sunstein<sup>47</sup> in making a preeminent virtue out of minimalism. What can tell us when a decision like *Brown*, *Griswold*, *Roe*, *Youngstown Sheet and Tube*, *Korematsu*, or *Lawrence* is correct, and when it is not? That question does not have a simple answer. The force of the anti-foundational, anti-representational analysis of our constitutional law denies an answer that is as seemingly simple as that offered by originalism and the other representational theories that call upon us to discover the constitutional facts out there in the world.

Yet we are not relegated to the purgatory of Justice Stewart's response to the definition of obscenity,<sup>48</sup> for a couple of reasons. First, we do not know the answer when we see it, in the sense of employing our faculty of constitutional perception. In

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Balkin & Sanford Levinson, *Constitutional Grammar*, 72 TEX. L. REV. 1771 (1994) (exploring the relationship of the descriptive and the normative in Philip Bobbitt's *Constitutional Interpretation* and arguing that Bobbitt's distinction is untenable). Balkin appears to reject the anti-foundationalist position because he is committed to a privileged role for the original understanding. Balkin is clear that his is a theory of semantic original meaning. See BALKIN, LIVING ORIGINALISM, *supra* note 18, at 12-13. He believes, however, that where the constitutional language is that of broad principle, that the methods of constitutional construction are more open-ended than mere semantic analysis, encompassing all of Bobbitt's modes. See *id.* at 4. Like many originalists, Balkin takes for granted that he can identify the level of generality at which the language of a provision of the Constitution speaks. See *id.* at 14. There are reasons to be skeptical of that optimism. See LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 73-80 (1991) [hereinafter TRIBE & DORF, READING] (defending the claim that constitutional texts cannot, within their four corners, determine the level of generality at which they are to be understood or applied). While I have defended an argument why Tribe and Dorf are mistaken in their claim, it is not clear how Balkin thinks he has rebutted the claim that there is a problem of generality. He never addresses the theory of meaning he is relying on, or the anti-foundational challenge directly.

<sup>47</sup> See generally CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 35-48 (1998) [hereinafter SUNSTEIN, LEGAL REASONING].

<sup>48</sup> See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (famously acknowledging that it might be impossible to articulate a theory of, or standard for, obscenity, but claiming to "know it when I see it"). Bobbitt makes a cryptic, and seemingly provocative, claim when he touches on the structure of pornography. See PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 162 (1991) [hereinafter BOBBITT, INTERPRETATION] (citing Nabokov on the formulaic nature of pornography, and suggesting that a constitutional rule of decision that generated determinable outcomes would strip judicial decision-making of its crucial element of judgment). It would be interesting to know whether any of Bobbitt's readers were persuaded by the Nabokov citation.

a sense, that is a jurisprudential version of the private language error.<sup>49</sup> We know constitutional truths by participating in a practice among the constitutional community that accepts propositions and the arguments that support those propositions, as well as the arguments that follow from them.

Second, and more importantly, the way we know propositions of constitutional law is by trying them on, discussing them, and arguing for or against them with our community. The discussions and that community have many levels. We ordinarily focus almost exclusively upon the Supreme Court and the elite law faculties. But the relevant constitutional communities are more numerous and more diverse. Elected officials and citizens are also part of the conversation and the argument, each in different ways.<sup>50</sup> But just as we can look back and identify the errors in the Warren Court's constitutional jurisprudence, so, too, we can correctly anticipate that a minimal Constitution would prove ultimately inadequate and incomplete. For example, the move from *Naim v. Naim*<sup>51</sup> to *Loving v. Virginia*<sup>52</sup> was an important and proper constitutional step, and one that would be discouraged or barred by a minimalist canon.<sup>53</sup> The force of a judicial decision cannot be entirely clear unless and until the argument for that decision and its rationale are expressly announced. That is one of the important performative dimensions of a judicial decision.<sup>54</sup> Thus, while a minimalist approach may have a place in our constitutional jurisprudence—and there is a reading of *Brown* as a minimalist or, at least, incompletely theorized decision—minimalism cannot be our exclusive mode of constitutional argument or decision.

The anti-representational, anti-foundational account of constitutional law advanced by Bobbitt and endorsed and developed by Dennis Patterson<sup>55</sup> is hardly a common, intuitive account. Does the sophistication of that account count against the theory then? The complex account of constitutional law defended here is not a

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<sup>49</sup> See LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* §§ 269-317 (G. E. M. Anscombe trans., 1953) (classical argument against the possibility of a private language on a variety of grounds, including that a rule cannot be followed privately). Just as we cannot have a private language, we do not have a private Constitution. The Constitution is a matter of its public understanding and the social and political practices that make it up.

<sup>50</sup> A classic analysis of the popular Constitution is SANFORD LEVINSON, *CONSTITUTIONAL FAITH* (1988) [hereinafter LEVINSON, *CONSTITUTIONAL FAITH*].

<sup>51</sup> 350 U.S. 891 (1955) (per curiam) (declining to find a federal question in challenge to anti-miscegenation law).

<sup>52</sup> 388 U.S. 1 (1967) (finally striking down Virginia's anti-miscegenation statute on equal protection and due process grounds).

<sup>53</sup> Indeed, it was the Court's unprincipled minimalism in the aftermath of *Brown* that appears most reprehensible today. It was, after all, the celebrated minimalist Justice Frankfurter who resisted so long and successfully the Court confronting the suspect constitutional status of the South's anti-miscegenation laws. In hindsight, that choice by Justice Frankfurter has not been judged favorably by many.

<sup>54</sup> Announcing the rationale for a decision enriches the statement of such a legal rule and enhances its ability to provide procedural regularity, thus enhancing the procedural fairness as well as substantive justice. See generally Scalia, *Rules*, *supra* note 43.

<sup>55</sup> PATTERSON, *TRUTH*, *supra* note 36, at 169-72 (generalizing Bobbitt's account of constitutional law to an account of law generally).

contribution to an argument as to what the Constitution should be applied to do; it is a jurisprudential theory of what the task of constitutional adjudication consists in. The complexity of the jurisprudential account defended here is not directly itself needed to make the arguments that we ordinarily deploy in the process of judicial constitutional decision-making. At most, the theory explains why the reductionist theories of the originalists and of Judge Posner, for example, or the elaborate philosophical theory of Dworkin are mistaken in their challenge to certain types of constitutional argument, broadly practiced today, as illegitimate. If that distinction between an account of constitutional argument and an argument in that constitutional practice is valid, then the complexity and counter-intuitiveness of this account does not stand as a clear disqualification. Indeed, to the extent that Bobbitt's theory of constitutional law, like Wittgenstein's philosophy of language, leaves everything as it is,<sup>56</sup> then the account would appear to have the marked merit of being an account of our constitutional practice that aptly describes that practice without need for radical revision.<sup>57</sup>

### B. Thinking about Constitutional Cases: Reimagining Practice

It is helpful to consider the argumentative strategies that would be available to originalists and their critics in such a new world by considering three important and controversial recent Supreme Court cases and to imagine what such cases would look like without the overlay of the continuing originalism debate.<sup>58</sup> I will sketch these cases only very lightly, highlighting rather than developing the threads of my argument that the opinions (and decisions) would likely improve substantially in a post-debate world.

The first case is *United States v. Jones*.<sup>59</sup> For lawyers educated in the past several decades and consumers of popular television and cinema crime dramas,<sup>60</sup> *Jones* is hardly a surprising case: a unanimous Court held that when the police attach a GPS tracker to the personal automobile of an individual they execute a search subject to

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<sup>56</sup> WITTGENSTEIN, *supra* note 49, at § 124. Wittgenstein thus denies that there are profound philosophical problems that require, or even deserve, solution, only confusions arising from mistaking what language is about. See PATTERSON, TRUTH, *supra* note 36, at 181 (“In short, when it comes to law, I wish to leave everything as it is.”).

<sup>57</sup> Contrast, for example, the radical revision of our constitutional doctrine that originalism would appear to require. See generally SUNSTEIN, RADICALS, *supra* note 6; RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004) [hereinafter BARNETT, LOST] (arguing for substantial changes to our constitutional law, principally limiting the powers of the federal government and a more expansive understanding of personal freedoms).

<sup>58</sup> In a sense, Fried undertakes such an analysis when he examines some recent cases. See Charles Fried, *On Judgment*, 15 LEWIS & CLARK L. REV. 1025, 1043-46 (2011) [hereinafter Fried, *Judgment*]. I am grateful to Professor Fried for having made a copy of this article available before publication.

<sup>59</sup> 132 S. Ct. 945 (2012).

<sup>60</sup> In such police procedural dramas, the reading of *Miranda* warnings and the securing— or denial—of warrants for physical searches and electronic surveillance are staples of the plots. See LAURENCE TRIBE & JOSHUA MATZ, UNCERTAIN JUSTICE: THE ROBERTS COURT AND THE CONSTITUTION 305-06 (2014) [hereinafter TRIBE & MATZ, UNCERTAIN JUSTICE].

the warrant requirements of the Fourth Amendment.<sup>61</sup> The police suspected an individual of criminal drug activity and in the course of their investigation obtained a warrant that permitted them to attach a GPS tracker to the identified vehicle while in the District of Columbia and within ten days of the date the warrant was issued.<sup>62</sup> The police failed to comply with the terms of the warrant, attaching the GPS tracker to the vehicle in Maryland and only on the eleventh day after the warrant was issued.<sup>63</sup> *Jones* is nevertheless a surprising case, because the Court revived the trespass theory of *Olmstead v. United States*<sup>64</sup> and required three, strongly divergent opinions to reach its result.<sup>65</sup> (*Jones* may be a strong argument itself for abandoning the debate over originalism, but the exploration of that question is beyond the scope of this Article.)<sup>66</sup>

The Court's opinion, authored by Justice Scalia, held that the installation of the GPS tracker on the defendant's automobile constituted a trespass and, under the reasoning of *Olmstead*, an impermissible search.<sup>67</sup> Justice Scalia invested significant effort into resurrecting the tort-based Fourth Amendment of *Olmstead* and, purportedly, of the Founding. To do so, he had to gloss over the nearly half-century of Fourth Amendment jurisprudence that focused upon the expectations of the defendant, not upon her property rights.<sup>68</sup>

Why was it important to Justice Scalia to move away from such established doctrine? First, the basis on which Justice Scalia decided the case appears to hew more closely to his originalist precepts. As his opinion emphasizes, the Fourth Amendment, on adoption, was generally understood in terms of trespass theory.<sup>69</sup> Justice Scalia's argument does not tie back into the text of the Fourth Amendment. His most careful attention to the text of the Fourth Amendment appears when he asserts that it is "beyond dispute" that an automobile constitutes an effect.<sup>70</sup> There is no discussion whatsoever in the Court's opinion as to what the terms "secure" and

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<sup>61</sup> *Jones*, 132 S. Ct. at 949.

<sup>62</sup> *Id.* at 948.

<sup>63</sup> *Id.*

<sup>64</sup> 277 U.S. 438, 466 (1928) (holding that a telephone wiretap installed in a physical location outside the premises or control of the defendant did not constitute a trespass and therefore was not an impermissible search under the Fourth Amendment).

<sup>65</sup> *Jones*, 132 S. Ct. at 948; *id.* at 954 (Sotomayor, J., concurring); *id.* at 957 (Alito, J., concurring).

<sup>66</sup> The exchange between two of the originalists on the Court, Justices Scalia and Alito, approaches the absurd in this case. It cannot but call up Marx's celebrated assessment of the pattern of history on the elevation of Louis Napoleon: "[A]ll facts and personages of great importance in world history occur, as it were twice . . . the first time as tragedy, the second as farce." KARL MARX, *THE EIGHTEENTH BRUMAIRE OF LOUIS NAPOLEON* 15 (International Publishers 1963) (1852).

<sup>67</sup> *Jones*, 132 S. Ct. at 949-50.

<sup>68</sup> *Id.* at 950.

<sup>69</sup> *Id.* at 949 (citing English case law contemporaneous with the adoption of the Fourth Amendment for the grounding of that protection in property law).

<sup>70</sup> *Id.*

“unreasonable” were understood to mean.<sup>71</sup> Thus, the Court’s opinion is fully consistent with all three of the principal branches of originalism: the new, original understanding originalism, original expectations originalism, or classic original intentions originalism.<sup>72</sup> Second, because the Fourth Amendment protects the people from *unreasonable* searches and seizures, it presents the same kinds of hazards for originalism as the Eighth Amendment. In interpreting the Fourth Amendment Justice Scalia faced the same specter that figured so prominently in the exchanges among Justice Scalia, Tribe, and Dworkin at Princeton.<sup>73</sup> Thus, it was important for Justice Scalia to articulate more fully an originalist account of the Fourth Amendment in a case confronting new technology where there appeared to be a consensus or perhaps unanimity that the warrant requirement applied.<sup>74</sup>

Justice Sotomayor concurred in the decision but sought to distance her reasoning from Justice Scalia’s revitalization of *Olmstead’s* trespass theory.<sup>75</sup> Justice Sotomayor emphasized both the robust post-*Katz v. United States* expectation-of-privacy line of Fourth Amendment jurisprudence and the earlier line based on tort theory.<sup>76</sup> She also articulated a theory that explains why GPS monitoring poses novel Fourth Amendment challenges and suggested how the Court should view future questions regarding such “surreptitious” surveillance.<sup>77</sup> The technology that permits GPS monitoring (and related digital data gathering) permits massive amounts of information to be obtained about individuals, their activities, and their likely beliefs almost invisibly and at little marginal cost. Justice Sotomayor suggested that we need a Fourth Amendment theory that emphasizes the expectations of privacy at the core of “associational and expressive freedoms”<sup>78</sup> and the practical, prudential issues

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<sup>71</sup> Justice Scalia makes a brief textual argument that the litany “persons, houses, papers, and effects” recited in the Amendment “reflects its close connection to property.” *Id.* That argument glosses over the first item in the list, persons, which would not appear property-related because even the persons of slaves, although property, are not the persons whose rights are protected by the Fourth Amendment. Moreover, it is far from clear that the confidentiality or privacy interest in papers protected by the Amendment is limited to cognizable property interests. Thus, the textual argument that Justice Scalia makes reinforces the character of his argument as little reliant on the constitutional text.

<sup>72</sup> Thus, this case counts as evidence in favor of my claim that such distinctions are more formal than substantial. *See* LeDuc, *Originalism’s Claim*, *supra* note 39, at section II.C.

<sup>73</sup> *See generally* SCALIA, *INTERPRETATION*, *supra* note 14; Ronald Dworkin, *Comment*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 115 (Amy Gutmann ed., 1997) [hereinafter Dworkin, *INTERPRETATION*]; Laurence Tribe, *Comment*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 65 (Amy Gutmann ed., 1997) [hereinafter Tribe, *INTERPRETATION*].

<sup>74</sup> *See* TRIBE & MATZ, *UNCERTAIN JUSTICE*, *supra* note 60.

<sup>75</sup> *Jones*, 132 S. Ct. at 954 (Sotomayor, J., concurring) (“Of course, the Fourth Amendment is not concerned only with trespassory intrusions on property.”).

<sup>76</sup> *Id.* at 954-55.

<sup>77</sup> *Id.* at 955-57. Although Justice Sotomayor emphasized the covert nature of GPS tracking surveillance, it is not entirely clear how such surveillance differs from other more long-standing forms of surveillance—most of which is also covert.

<sup>78</sup> *Id.* at 955-56.

raised by the new technology.<sup>79</sup> Justice Sotomayor also raised the question of how the traditional exception to the warrant requirement for personal information voluntarily disclosed to a third party, on the basis that there is no expectation of privacy with regard to such information, applied to digital metadata and other forms of electronic information.<sup>80</sup> Increasingly, a wide variety of locational and other metadata is available to cellular telephone service providers, and Justice Sotomayor posed the question of how our expectations of privacy and the protections afforded by the Fourth Amendment are to be understood.<sup>81</sup>

Justice Alito concurred only in the judgment and also broke sharply with Justice Scalia's reasoning.<sup>82</sup> Justice Alito characterized the Court's holding as "unwise . . . [with] little if any support in current Fourth Amendment case law; and . . . highly artificial."<sup>83</sup> Justice Alito would apply the Fourth Amendment to prohibit such warrantless GPS tracking on the basis of the whether the defendant's reasonable expectations of privacy were violated.<sup>84</sup> In the case of anything more than "relatively short-term monitoring," he found that a warrant was required because a defendant would have had a reasonable expectation of privacy with respect to such information.<sup>85</sup> Justice Alito argued that the Court's precedent demonstrates that trespass was neither necessary nor sufficient to find a search subject to the Fourth Amendment warrant requirement.<sup>86</sup> He mocked the Court's suggestion that the use of a GPS tracking device might be analogized to a constable secreting herself in a coach:

The Court suggests that something like this might have occurred in 1791, but this would have required either a gigantic coach, a very tiny constable, or both—not to mention a constable with incredible fortitude and patience.<sup>87</sup>

Justice Alito's footnote captures the implausibility of Justice Scalia's forced originalist analysis because there simply was no eighteenth-century analogue to GPS monitoring. Justice Alito instead proposed a doctrinal argument that relied on the Court's Fourth Amendment *Katz*<sup>88</sup> jurisprudence with respect to electronic surveillance.<sup>89</sup> As Justice Alito noted, the Court's reliance on common-law tort

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<sup>79</sup> *Id.* at 956-57.

<sup>80</sup> *Id.* at 957.

<sup>81</sup> *Id.* at 957. Justice Sotomayor's question proved prescient when Edward Snowden subsequently revealed the magnitude of telecommunication data being routinely captured by federal security services without the benefit of a warrant.

<sup>82</sup> *Id.* at 957 (Alito, J., concurring).

<sup>83</sup> *Id.* at 958.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 964.

<sup>86</sup> *Id.* at 960.

<sup>87</sup> *Id.* at 958 n.3.

<sup>88</sup> *Katz v. United States*, 389 U.S. 347 (1967).

<sup>89</sup> *Jones*, 132 S. Ct. at 959-60.

concepts appeared similar to the Court's earlier reluctance to apply the protections of the Fourth Amendment to electronic surveillance because of the absence of physical intrusion.<sup>90</sup> Justice Alito argued that grounding the constitutional right on the common-law tort doctrine created anomalies and discontinuities in Fourth Amendment law that were neither necessary nor desirable.<sup>91</sup>

Justice Alito did not directly address why he was willing to abandon or compromise his originalist jurisprudence—except insofar as his mockery of Justice Scalia's analysis suggests that he tacitly concluded that such an originalist analysis was untenable. Certainly, on its face, new originalism's distinction between interpretation and construction is not helpful in any relevant way. Perhaps simply drawing out the context necessary to construct an originalist analysis is enough to call that analysis into question.

The three opinions in *Jones* are shaped by a number of factors, but the ongoing debate over originalism is an important element in all three. In the case of the Court's opinion by Justice Scalia, the analysis is informed by his commitment to the original understandings, intentions, and expectations with respect to the constitutional text. Justice Scalia wants to show that a robust originalist Fourth Amendment is sufficient to restrict warrantless GPS tracking. Justice Scalia also wants to challenge the post-*Katz* Fourth Amendment doctrine that he regards as inconsistent with the original understanding.<sup>92</sup> But in so doing, he pays scant attention to the constitutional text or to its original understanding. By contrast, Justice Sotomayor uses the case as an opportunity to articulate an expansive Fourth Amendment theory. That theory relies upon doctrinal and ethical arguments, although the latter are invoked only tacitly.<sup>93</sup> Finally, perhaps most interestingly, Justice Alito directly challenges Justice Scalia's originalist defense of the decision, mocking the notion of a very small eighteenth-century constable secreted in a very large coach. Instead, Justice Alito wants to apply the Fourth Amendment to prohibit such warrantless GPS tracking on the basis of whether the defendant's reasonable expectations of privacy were violated. Justice Alito was prepared to follow the Court's historic Fourth Amendment jurisprudence—albeit more narrowly than Justice Sotomayor would articulate—and apply that law. He does not appear to believe that such doctrine ought to be applicable only if (if at all, perhaps) the originalist interpretation of the Fourth Amendment is unavailable. But none of the opinions address these methodological stakes directly or forthrightly.

Now consider what the *Jones* opinions and decision might have looked like if the arguments made in this Article were accepted, and the worldview imposed upon us by the ongoing debate over originalism were forsaken. If we imagine *Jones* decided with the full array of constitutional arguments available to the Court, and without the

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<sup>90</sup> *Id.* at 959.

<sup>91</sup> *Id.* at 961-62. The majority responded to this challenge by noting that it did not make the tort law analysis an exclusive test for a violation of the Fourth Amendment. *Id.* at 953 (majority opinion).

<sup>92</sup> Thus, while Justice Sotomayor characterizes the *Katz* jurisprudence as enlarging the historic analysis of the Fourth Amendment protections, Justice Scalia characterizes that jurisprudence as deviating from the historic analysis. *Id.* at 950; *id.* at 955-57 (Sotomayor, J., concurring).

<sup>93</sup> Justice Sotomayor does not expressly couch her arguments in such terms.

methodological claims against particular modes of constitutional argument made by the protagonists in the debate, the case becomes simpler and the opinions more compelling. The issues in *Jones* would appear to implicate potential textual, structural, doctrinal, prudential, and ethical arguments; it might also implicate historical arguments.<sup>94</sup> The historical arguments that might have been made could have looked to the historical origins of the Fourth Amendment in the colonial experience of criminal law enforcement practices of the British colonial authorities and the common law.<sup>95</sup> But if the Court did not seek to decide *Jones* on the basis of a historical argument or, indeed, even to consider such arguments, the forced analogy that it implicitly constructs, and which the concurring opinion calls out and lampoons, would not be necessary. If historical arguments cannot provide us guidance to decide the case, other modes may be deployed with more force.

Justice Sotomayor's concurring opinion does a good job making the doctrinal argument for the result in *Jones*.<sup>96</sup> The prudential arguments that might be made against the result in the case get short shrift, however, by the majority and by the concurring opinions.<sup>97</sup> Because the law enforcement authorities had, in fact, obtained a warrant but then proceeded to disregard its terms, the Court may have concluded that the facts of *Jones* demonstrated that requiring warrants for such new forms of surveillance presented a manageable challenge for law enforcement. Prudential arguments might emphasize the greater threat that the Republic now faces because of the rise of global terrorism and the availability of portable and easily deployed weapons of mass destruction, but those were not the facts presented in *Jones*. Thoughtful commentators find those risks to create powerful arguments,<sup>98</sup> and as prudential arguments they have a place in constitutional adjudication.<sup>99</sup> At the end of the day, sufficiently compelling prudential arguments are unlikely to be disregarded; at most they may simply be masked. Those prudential arguments therefore deserved a broader articulation and exploration in *Jones*.<sup>100</sup> Such a discussion would strengthen the opinion and the decision, whether it changed the result, or not.

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<sup>94</sup> To the extent that the technological changes that made the question of *Jones* possible, the historical argument would appear less powerful. This insight is captured by Justice Alito's concurring opinion, as discussed above. The problem of technological change, while traditionally addressed by originalists, undoubtedly poses important challenges for them. See generally LeDuc, *Originalism's Implications*, *supra* note 5, at section II.D (discussing the treatment of constitutional flux in the debate over originalism).

<sup>95</sup> See, e.g., AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 64-75 (1998) (arguing that the historical understanding was very different from modern Fourth Amendment doctrine).

<sup>96</sup> See *Jones*, 132 S. Ct. at 954 (Sotomayor, J., concurring).

<sup>97</sup> See *id.* at 945 (majority opinion); *id.* at 954 (Sotomayor, J., concurring); *id.* at 957 (Alito, J., concurring).

<sup>98</sup> See generally GOLDSMITH, *supra* note 34 (describing the expansive reading of the War Powers Clause and the concept of the unitary executive in designing antiterrorism programs in the early twenty-first century); POSNER, *SUICIDE PACT*, *supra* note 34, at 68.

<sup>99</sup> See generally BOBBITT, *FATE*, *supra* note 6, at 59-74.

<sup>100</sup> See POSNER, *SUICIDE PACT*, *supra* note 34, at 150-52 (developing prudential arguments for permitting modestly invasive governmental surveillance while preserving other traditional civil liberties).

Most importantly, the opinions in *Jones* ought to have engaged with the opposing positions in a more thoughtful way. Because the proponents were committed to their respective methodological stances in the originalism debate, they could not engage persuasively the opposing arguments. That claim may appear puzzling, because on their face *all* of the opinions appear to address and engage the arguments made in the other opinions.<sup>101</sup> Thus, for example, Justices Scalia and Alito directly engage with respect to the question whether there was a meaningful analogue to GPS tracking in the eighteenth century—the constable of small stature secreted in the large coach, as Justice Alito styles it.<sup>102</sup> Justice Scalia asserts that such a possibility is not difficult to imagine.<sup>103</sup> Justice Scalia has allowed his originalist exuberance to get the better of his judgment. Such a hypothetical not only was not contemplated at the time the Bill of Rights was adopted—it could not have been contemplated. Students of original meaning originalism will be puzzled by the absence of inquiry into the original understanding of the meaning of “effect” and of “search” in the opinions of either Justice Scalia or Justice Alito—and the absence of any such inquiry by Justice Thomas.

The issues raised are more fundamental than that formulation may suggest. Justice Sotomayor’s opinion articulates the novel Fourth Amendment issues that GPS tracking presents. Those issues make *Jones* more interesting and important than my introductory characterization acknowledges. Justice Sotomayor is correct when she emphasizes the cost efficiency of such surveillance, the wealth of data captured for law enforcement, and the ability to conduct such surveillance without customary community awareness.<sup>104</sup> None of that is captured in the exchange between Justices Scalia and Alito. It is not captured, of course, because neither is engaged by Justice Sotomayor’s argument. While disagreeing about the possibility of an originalist answer to the question presented in *Jones*, neither Justice Scalia nor Justice Alito wants to inquire into the constitutional import of the wealth of data captured by GPS tracking or into the fundamental elements that inform an analysis of the expectation of privacy in our society.<sup>105</sup> Those questions require a decision-making approach far less formal than that each employs. That is the critical sense in which, despite the pretense of engaging in argument with the claims presented by the other opinions, there is little meaningful exchange.

If we posit the transcendence of the ongoing debate over originalism, the opinions that would be written, I submit, would look very different. Justice Scalia could make his argument for the application of the Fourth Amendment based upon

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<sup>101</sup> See, e.g., *Jones*, 132 S. Ct. 945, 953 (majority opinion); *id.* at 955 (Sotomayor, J., concurring) (criticizing Justice Alito’s willingness to disregard the trespass foundation for Fourth Amendment protection); *id.* at 959-62 (Alito, J., concurring).

<sup>102</sup> *Jones*, 132 S. Ct. at 959 n.3 (Alito, J., concurring).

<sup>103</sup> *Id.* at 951 (majority opinion).

<sup>104</sup> See *id.* at 955-56 (Sotomayor, J., concurring). As the National Security Agency’s telephone surveillance program reveals, other digital surveillance techniques also deliver very intrusive and efficient surveillance results to the policy and security services.

<sup>105</sup> While Justice Alito employs the concept of the reasonable expectations of privacy in his concurrence, he does so cautiously, noting, among other concerns, its circularity. Moreover, unlike Justice Sotomayor, he does not explore in any detail the fundamental challenges modern technology poses to traditional privacy rights.

the long-standing understanding that he champions. He could expressly engage on the weaknesses in a Fourth Amendment jurisprudence grounded on an analysis of expectations of privacy. Indeed, he could engage Justice Sotomayor's claim that expectations of privacy—and the right to control the publication or dissemination of personal beliefs and other personal information—is a fundamental part of our associational and expressive freedoms. Those arguments could be engaged directly and substantively, rather than ignored on the basis of an originalist methodological stance. The result would be a stronger and more persuasive opinion. Correspondingly, Justice Alito would have a stronger opinion if he engaged Justice Sotomayor's argument more directly. Justice Alito might have explored how third-party access to such electronic information ought to be taken into account in determining the scope of the Fourth Amendment. Thus, while Justice Alito acknowledged some of the salient features of the new technology, he did not articulate what the implications of those features ought to be for purposes of the Fourth Amendment warrant requirement.

Finally, consider the opinions in *Jones* under Sunstein's minimalist approach. That approach would discount or dismiss my criticism of the gaps in the Justices' analysis and argument for their respective positions. All three Justices agree on the result. Sunstein's enthusiasm for incompletely theorized agreements might suggest that there was no need for the three opinions and no need for Justice Scalia to engage even in the limited way that he did with the concurring opinions. Such a stance is not plausible. The theoretical differences among these three decisions warrant, in our constitutional law practice, acknowledgment and articulation. By appealing to the nature of our constitutional practice, I am appealing to that practice as operating, at least in part, in the space of reasons. It may be that Sunstein would allow the articulation of the competing theories in *Jones* even under his minimalist theory. That theory focuses on cases in which there are substantive disagreements about outcomes, as well as disagreements about principles and theories.<sup>106</sup> In *Jones*, the disagreement was only about principles and theories. But those disagreements foreshadow disagreements as to outcomes in other cases. Sunstein would not endorse anticipating those outcome disagreements by engaging on the clear disagreements over theories and principles.

Sunstein's minimalism sacrifices the richness of our constitutional practice in its effort to avoid the hard constitutional questions. Argument is central to our constitutional practice, and the arguments that the Court endorses or rejects fundamentally shape our understanding of the decision of a case. The rule of a case encompasses and is informed by the arguments that support it and even by the arguments that are rejected for it. Moreover, expressly articulating the foundations and arguments for a constitutional decision better enables that decision to be understood and assessed.

Second, consider the controversial and important decision<sup>107</sup> *National Federation of Independent Business v. Sebelius* (*NFIB*).<sup>108</sup> That case considers several

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<sup>106</sup> See SUNSTEIN, *LEGAL REASONING*, *supra* note 47, at 35-48.

<sup>107</sup> A wide array of commentators promptly anointed *NFIB* as a landmark case. See, e.g., TRIBE & MATZ, *UNCERTAIN JUSTICE*, *supra* note 60, at 54-55 (asserting that *NFIB* "ranks among the most anticipated and controversial [Supreme Court] decisions in American history.").

<sup>108</sup> 132 S. Ct. 2566 (2012).

constitutional questions relating to the enactment of the Affordable Care Act, including whether such Act was within the power of Congress to enact under the Commerce Clause.<sup>109</sup> In relevant part, the Affordable Care Act requires individuals to secure at least a minimal level of health insurance,<sup>110</sup> and imposed a penalty if such insurance were not obtained.<sup>111</sup> Additionally, the Act required states to expand their Medicaid coverage,<sup>112</sup> failing to do so would result in the loss of all of a state's Medicaid funding.<sup>113</sup> The Court addressed the validity of both parts of the Affordable Care Act in *NFIB*.<sup>114</sup> Turning first to the individual insurance mandate and associated penalty, the Court tested the imposition of such obligations first under the Commerce Clause and then under the Taxing Power.<sup>115</sup> The Court held that the imposition of a financial penalty for an individual's failure to obtain insurance was invalid under the Commerce Clause.<sup>116</sup> In so holding, the Court distinguished between regulating commerce and requiring that persons engage in commerce.<sup>117</sup> The Court held that the individual mandate imposed a requirement that individuals who might otherwise not be participating in commerce subject to regulation enter into such commerce by purchasing insurance.<sup>118</sup> By so characterizing the operation of the Affordable Care Act, the Court held that it exceeded Congress's power under the Commerce Clause.

The Court upheld the penalty enforcing the individual mandate, however, as a valid exercise of the federal government's Taxing Power.<sup>119</sup> The analysis of the question whether the penalty on individuals under the Act qualified as a tax was somewhat technical but ultimately did not turn on a formal analysis, but on a substantive analysis that the amount of the penalty and the extent to which individuals would choose to pay the penalty rather than purchase insurance demonstrated that the imposition was a tax rather than a penalty.<sup>120</sup>

Justice Ginsburg would have upheld the imposition on individuals who failed to obtain insurance under the Commerce Clause.<sup>121</sup> Justice Ginsburg argued in dissent that the Court's Commerce Clause jurisprudence traditionally upheld legislation with respect to activities substantially affecting interstate commerce if such legislation

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<sup>109</sup> *Id.* at 2578-79.

<sup>110</sup> 26 U.S.C. § 5000A(a) (2012).

<sup>111</sup> *Id.* § 5000A(b) (2012) (designated as a shared responsibility payment).

<sup>112</sup> 42 U.S.C. § 1396a(A)(10)(A)(i)(VIII) (2012).

<sup>113</sup> *Id.* § 1396d (2012).

<sup>114</sup> *NFIB*, 132 S. Ct. at 2566.

<sup>115</sup> *Id.* at 2584.

<sup>116</sup> *Id.* at 2590-91, 2593.

<sup>117</sup> *Id.* at 2590-91 (“[W]e have never permitted Congress to anticipate that activity itself in order to regulate individuals not currently engaged in commerce.”).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 2600.

<sup>120</sup> *Id.* at 2596-600.

<sup>121</sup> *Id.* at 2609 (Ginsburg, J., concurring in part and dissenting in part).

had a rational basis.<sup>122</sup> Justice Ginsburg asserted that the individual insurance mandate handily met those tests.<sup>123</sup> She dismissed the majority's attempt to distinguish legislation requiring persons to enter into interstate commerce from legislation regulating such commerce in the case of uninsured persons under the United States health care system.<sup>124</sup>

Four Justices would have held the individual mandate invalid.<sup>125</sup> In an unusual step, apparently signaling an emphasis on, or intensity with respect to, the dissent, all four Justices asserted authorship.<sup>126</sup> The dissent would have invalidated the individual mandate,<sup>127</sup> and in so doing, effectively eviscerated the Act, because without mandatory coverage the regulatory requirement of universal availability despite pre-existing conditions would be unworkable.<sup>128</sup> The dissent argued that the Affordable Care Act "impressed into service . . . healthy individuals."<sup>129</sup> It was this power to command that the dissent would deny.<sup>130</sup>

The Court also addressed the requirement that states expand their Medicaid coverage or forfeit existing federal financial support.<sup>131</sup> At issue was whether withholding federal funding to induce the states to adopt certain changes was a valid exercise of the federal government's spending power.<sup>132</sup> The Court struck that requirement down on the basis that while the federal government may provide incentives to the states to adopt federally favored policies,<sup>133</sup> it cannot coerce the states to do so.<sup>134</sup> The Court found the financial cost to a state of not implementing

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<sup>122</sup> *Id.* at 2616-18.

<sup>123</sup> *Id.* at 2617.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 2642 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

<sup>126</sup> *TRIBE & MATZ, UNCERTAIN JUSTICE, supra* note 60, at 238.

<sup>127</sup> *NFIB*, 132 S. Ct. at 2642 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

<sup>128</sup> Free riders who obtained insurance only at or approaching the hospital could operate without restriction under such a regime. In such a case, the cost of insurance would need be substantially increased because of the absence of premiums paid by healthy insureds.

<sup>129</sup> *NFIB*, 132 S. Ct. at 2646.

<sup>130</sup> Somewhat puzzlingly, the dissent suggested that there were financial incentives or coercive measures that Congress could have chosen that would have been permissible, including surcharges or the denial of tax credits when the free riders ultimately enter the system. It is hardly clear that the dissent is correct in its policy judgment that these methods would work, and there are many reasons to doubt that they would. *Id.* at 2647.

<sup>131</sup> *NFIB*, 132 S. Ct. 2566 at 2601-05 (majority opinion).

<sup>132</sup> *Id.*

<sup>133</sup> *See South Dakota v. Dole*, 483 U.S. 203 (1987) (upholding a federal statute reducing a state's federal highway funding if it failed to raise its minimum drinking age on the basis that such reduction nevertheless allowed the states to make their own decisions on the issue— notwithstanding that all states did, in fact, make such changes in order to preserve such full funding).

the expansion of Medicaid to be so large as to be coercive.<sup>135</sup> Accordingly, the loss of Medicaid funding for states that chose not to expand coverage was struck down.<sup>136</sup> Justice Ginsburg, joined only by Justice Sotomayor, would have upheld the requirement upon the states that they expand Medicaid coverage as a valid exercise of the federal spending power.<sup>137</sup> Justice Ginsburg emphasized that the Court had never previously limited the federal spending power and that the Medicaid statute expressly made continuing funding subject to compliance with all applicable requirements.<sup>138</sup>

*NFIB* has aroused and, as of this writing, continues to arouse, intense controversy.<sup>139</sup> Only the implications of the originalism debate and its tacit foundations are relevant here, however. I want to begin by exploring briefly the claims, made by the Left<sup>140</sup> and the Right,<sup>141</sup> in the Court<sup>142</sup> and in the academy,<sup>143</sup> that the issue underlying the constitutional controversy in *NFIB* was the nature of freedom in our constitutional republic. Both sides in the debate treated the Affordable Care Act as constraining individual freedom; the disagreement was about whether such governmental intrusion by the federal government was permissible. Two questions warrant exploration. First, if that account is correct, how does that controversy translate into a question of constitutional law? Second, does that account undermine this Article's claims about the role of the debate over originalism and its claim that abandoning the debate over originalism would allow us to reconstruct our constitutional discourse?

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<sup>134</sup> *NFIB*, 132 S. Ct. at 2604-05 (“In this case, the financial ‘inducement’ Congress has chosen . . . is a gun to the head [of the states] . . .”). In the case of individuals, it is easy enough to understand the coercive force of a gun put to the head by another, but in the case of a sovereign state the metaphor is not as perspicuous as the Court may have assumed.

<sup>135</sup> *Id.* Again, the critical concept of coercion of a sovereign was not articulated or defended.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 2609 (Ginsburg, J., concurring in part and dissenting in part).

<sup>138</sup> *Id.* at 2630.

<sup>139</sup> Dean Martha Minow famously remarked about the opinions in *NFIB* that “[r]eading the two opinions . . . is a bit like traveling between two countries speaking different languages.” Martha Minow, *Affordable Convergence: “Reasonable Interpretation” and the Affordable Care Act*, 126 HARV. L. REV. 117, 121 (2012); see also JOSH BLACKMAN, UNPRECEDENTED: THE CONSTITUTIONAL CHALLENGE TO OBAMACARE (2013).

<sup>140</sup> See, e.g., TRIBE & MATZ, UNCERTAIN JUSTICE, *supra* note 60, at 68 (arguing that all of the opinions in *NFIB* “rest on contradictory views of American freedom and federalism.”).

<sup>141</sup> See, e.g., Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate Is Unconstitutional*, 5 N.Y.U. J. L. & LIBERTY 581 (2010) [hereinafter, Barnett, *Commandeering*].

<sup>142</sup> See, e.g., *NFIB*, 132 S. Ct. at 2609 (Ginsburg, J., concurring in part and dissenting in part) (characterizing the Court’s authoritative interpretation of the Commerce Clause as “crabbed.”).

<sup>143</sup> TRIBE & MATZ, UNCERTAIN JUSTICE, *supra* note 60, at 68.

Both the Left and the Right claimed that *NFIB* presented a question of the nature of freedom in our Republic.<sup>144</sup> Randy Barnett, a leading proponent of the New Originalism, defends originalism from the foundation of a libertarian, natural law foundation.<sup>145</sup> Barnett argues that there is a fundamental distinction between doing and not doing, and that the requirement of the Act that individuals purchase health insurance (subject to the exceptions noted above) or face a monetary penalty, is constitutionally impermissible because it mandates action rather than prohibiting action or conduct.<sup>146</sup> Acts of commission and acts of omission are distinguished in Thomist philosophy and that distinction may underlie the distinction between action and inaction.<sup>147</sup> But that distinction had not previously figured in the constitutional jurisprudence of the Commerce Clause.<sup>148</sup>

The distinction between action and inaction is initially both appealing and intuitive. We think that we know the difference between action and inaction and we think that that distinction makes a difference in a variety of important contexts. For example, our intuitions about the difference between action and inaction factors prominently in widely shared intuitions about the differences between the questions raised by the various iterations of the trolley problem.<sup>149</sup> That philosophical problem asks us to consider the circumstances in which we would act to save five lives while allowing or causing one person to die. The extent to which the action directly or necessarily results in the death of the one figures prominently in the intuitions of many as to the propriety of such actions.<sup>150</sup> Taking an action that is intended or must result in the death of an individual is ordinarily thought to be importantly different from a failure to take an action that would save an individual's life. The distinction between action and inaction is important in the law, too. Tort and criminal law

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<sup>144</sup> See Barnett, *Commandeering*, *supra* note 141, at 605; see also TRIBE & MATZ, *UNCERTAIN JUSTICE*, *supra* note 60, at 52-87.

<sup>145</sup> BARNETT, LOST, *supra* note 57 (articulating a natural law theory of originalism); see also RANDY E. BARNETT, *THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW* (2000) [hereinafter BARNETT, LIBERTY].

<sup>146</sup> Barnett, *Commandeering*, *supra* note 141, at 605.

<sup>147</sup> While the concepts of *acts* of omission and of commission are distinguished, both are treated as types of acts. It is notable that even those Justices who are, and Justice Scalia who was, generally sympathetic with elements in such philosophy failed to acknowledge or address that foundation.

<sup>148</sup> Defenders of the Court's decision would assert that imposing such a general obligation under the authority of the Commerce Clause was unprecedented; critics would emphasize that such a distinction was without precedent in the Court's Commerce Clause jurisprudence.

<sup>149</sup> See PHILIPPA FOOT, *The Problem of Abortion and the Doctrine of Double Effect*, in *VIRTUES AND VICES* 19, 23 (1978) (posing the so-called trolley problem: under what circumstances, if any, should one act to save multiple human lives at the cost of one other life).

<sup>150</sup> See DAVID EDMONDS, *WOULD YOU KILL THE FAT MAN? THE TROLLEY PROBLEM AND WHAT YOUR ANSWER TELLS US ABOUT RIGHT AND WRONG* (2013) (recent exploration of the burgeoning trolley problem—and its closely related fat man on a bridge or in the mouth of a cave problem—thinking).

distinguish action and inaction in prescribing standards of conduct.<sup>151</sup> Thus, distinguishing action and inaction has played an important role in law and in our thinking more generally about the proper rules for human behavior.

But it is less clear why such a distinction should figure in the delimitation of the federal government's authority under the Commerce Clause. One argument made by the Court<sup>152</sup> and in the academic literature<sup>153</sup> is that if the Commerce Clause power extends to inaction then there can be no meaningful limit to that power,<sup>154</sup> and the absence of such a limit is inconsistent with the fundamental premise that our federal government is a government of limited powers.<sup>155</sup> The flaw in the argument is that the government in *NFIB* did not regulate just *any* inactivity. It claimed the authority to regulate certain inactivity with significant financial consequences for inactive individuals who did not conform to the regulatory requirements.<sup>156</sup> The Court would not need to endorse Sunstein's position on judicial minimalism to be confident that it could uphold the Affordable Care Act's treatment of the failure to obtain insurance without finding itself committed to the position that the federal power under the Commerce Clause is without limitation. The dissent also questioned whether describing the failure to purchase insurance could properly be best described as inaction.<sup>157</sup> I want to explore only the second argument here.

The claim that a failure to purchase insurance is a failure to act—to purchase insurance—is plausible and engaging. But when individuals choose not to purchase

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<sup>151</sup> See Barnett, *Commandeering*, *supra* note 141, at 606, n.98.

<sup>152</sup> *NFIB v. Sebelius*, 132 S. Ct. 2566, 2587-91 (2012).

<sup>153</sup> Barnett, *Commandeering*, *supra* note 141, at 607 (arguing that the authority to mandate activity “would open the door for an infinite variety of mandates in the future.”).

<sup>154</sup> I have charitably restated the *reductio* as proving only that there is no meaningful limit to federal power (although some of the protagonists assert the conclusion less precisely) because there are, of course, certain kinds of activity and inactivity that are not a matter of commerce. See generally DEBRA SATZ, *WHY SOME THINGS SHOULD NOT BE FOR SALE: THE MORAL LIMITS OF MARKETS* (2010). Narrowing the objectionable conclusion in this manner would not diminish the force of the argument, were it correct. The range of goods and service bought and sold in the marketplace is sufficiently great that the ability to require the purchase or sale of any good bought or sold in the market would still accord the federal government very great authority under the Commerce Clause.

<sup>155</sup> Despite its widespread assertion, this proposition is not easily traced back to the constitutional text or to the central historical documents of the Founding. Thus, the discussion of the powers of the federal government in *The Federalist Papers* emphasizes the ability of the states and, ultimately, the people to prevent arrogation of power by the federal government. See generally THE FEDERALIST NO. 28 (Alexander Hamilton). Thus, when Randy Barnett addresses the question of the scope of the federal authority under the Commerce Clause, his historical argument is tenuous and strained. See BARNETT, *LOST*, *supra* note 57, at 274-76.

<sup>156</sup> For a description of these consequences, see *NFIB*, 132 S. Ct. at 2610-11 (Ginsburg, J., concurring in part and dissenting in part).

<sup>157</sup> See *id.* at 2611 (describing the choice not to insure as a decision to be a free rider by shifting potential health care costs to other participants in the health care system as patients or providers).

insurance, they are choosing certain other consequences.<sup>158</sup> For example, given the federal and state regulatory system applicable to hospital emergency rooms,<sup>159</sup> the individual is making a complex choice relating to how any future emergency room care will be provided. If the individual has the financial ability to pay for such treatment, she will pay the rack rate for such services at that time, effectively self-insuring. If the individual does not have the ability to pay for such services, she will receive basic care at the expense of others within the health care system, in all likelihood those with insurance. If the individual dies immediately or emigrates from the United States without need or opportunity for medical services to be rendered such an individual will also have self-insured against a risk that never arises. Thus, this conduct and choice is akin to making a bet, playing an informal lottery. The decision in *NFIB* and the four dissenters would simply characterize such a choice and the consequences that flow from it as inaction.

Actions, inaction, and other events may generally be described in many different ways. It is not clear that characterizing such an individual choice as inaction is the best *relevant* or *salient* characterization. In Newtonian physics force must be exerted on an object with mass to change the motion of that object, whether at rest or in motion. By analogy, it would appear that in the absence of insurance it would require an action to obtain insurance, and that inaction would result in the continued absence of insurance. But consider Cass Sunstein's paternalistic nudge strategy.<sup>160</sup> What if the default for individuals otherwise without insurance were made inclusive in some onerous form of federal health insurance (or private insurance assigned, say, by lottery) by operation of law, and that such insurance could be declined by an individual by making an affirmative election out of such coverage? Such a regime would be like the Medicare system, albeit with an opt-out option. Assume, moreover, that an individual could make such election freely, except that the consequence would be that financial tax or penalty provided for the uninsured by the Affordable Care Act.

The analysis of the Court and the four dissenters suggests that such a Sunsteinian approach would be permissible under the Commerce Clause. Under that regulatory regime, the event triggering the imposition of the penalty is the affirmative act out of the otherwise mandatory default health insurance coverage. It might be argued that such a default approach simply makes the trigger appear to be an act, and that the election out is really inaction. The assumption is that in the state of nature that serves as the benchmark for measuring action and inaction healthcare is uninsured. But that assumption appears somewhat arbitrary and conceptual to provide the foundation for the determination of the scope of the federal authority under the Commerce Clause.

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<sup>158</sup> *See id.* at 2610-11. Of course, individuals may also find themselves in such a position without having considered such possibilities or potential outcomes; in such a case it is more difficult to characterize such individuals as having made a choice.

<sup>159</sup> *See id.* at 2611.

<sup>160</sup> *See generally* RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (2008) (defending the design of governmental regulations that establish default choices and other non-binding measures that result in better outcomes); *see also* SARAH CONLY, *AGAINST AUTONOMY: JUSTIFYING COERCIVE PATERNALISM* (2012) (defending an expanded role for the state to limit individual freedom where empirical evidence shows that individuals fail to act rationally in their own self-interest).

That example makes me doubt that the action-inaction distinction is a compelling basis on which to determine the scope of such authority.

The highly formal reasoning in *NFIB* and the inability of the various opinions to engage the arguments proffered appears to reflect some of the same weaknesses that have affected the debate over originalism and appear to derive from the same sources. Both sides assumed that there was an objective answer to the questions about the scope of the Commerce Clause and the scope of the freedom accorded individuals in the Republic. Those assumptions helped make the arguments in *NFIB* as unpersuasive as they were.

Second, to the extent that the disagreement in *NFIB* was grounded in different conceptions of liberty, that source of the controversy is not inconsistent with the account of the debate over originalism that I am defending. I am not arguing that ontological and philosophy of language disagreements are the exclusive source of constitutional controversy. Indeed, I think that there are also fundamental differences of political philosophy<sup>161</sup> as well as other jurisprudential differences<sup>162</sup> that help shape the debate. There are also substantive differences about the Constitution in our constitutional controversies. Indeed, much of the argument here is that transcending the sterile methodological disputes in the originalism debate permits us to address the substantive issues directly, clearly, and forthrightly.

The disagreements about the nature of liberty and the relationship of individual freedom to the state were shaped and channeled by the premises of the debate over originalism. All sides in the constitutional controversy over the Affordable Care Act tacitly accepted that there was an independent constitutional answer to be determined or found, not a constitutional choice to be made.<sup>163</sup> Many of the protagonists in the struggle over the constitutionality of the Affordable Care Act joined that controversy as participants in the debate over originalism. As a result, that substantive controversy was viewed, in substantial part, from within the methodological perspectives of the protagonists in the debate over originalism. Thus, when Chief Justice Roberts intoned in judgment that the Act intruded too far into the freedom of citizens, “[t]hat is not the country that the Framers of our Constitution envisioned,”<sup>164</sup> he tacitly assumed that there was an answer to the question he faced in the Constitution, not that he faced a constitutional choice that must be made. The

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<sup>161</sup> See generally LeDuc, *Political Philosophy*, *supra* note 39.

<sup>162</sup> See generally André LeDuc, *Paradoxes of Positivism and Pragmatism in the Debate about Originalism*, OHIO N. U. L. REV. (forthcoming 2016); André LeDuc, *The Nature of our Constitutional Practice: Unstated Premises about Formalism and Interpretation in the Debate over Originalism* (Feb. 18, 2015) (unpublished manuscript) (on file with author) (exploring the tacit premises about positivism, formalism, and the nature of constitutional interpretation that figure importantly in the debate over originalism).

<sup>163</sup> See generally *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012). When the Court obviously chooses a specification (as it did, for example, in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), when it articulated a temporal standard to determine when a Senate recess would or might be long enough to permit the President to invoke the Recess Appointments Clause) it does not employ express language of choice, but it does eschew purporting to find the rule in the constitutional text.

<sup>164</sup> *NFIB*, 132 S. Ct. at 2589. The focus was on what was originally expected, not on an original understanding of the constitutional text. See generally Dworkin, *INTERPRETATION*, *supra* note 73.

notion that we can consider and assess the constitutional status of alternative holdings in *NFIB* on the basis of their fit with the country envisioned by the Founders is, like the question of the Founders' view of the Fourth Amendment's application to GPS tracking devices, entirely implausible and faintly comic. As a result, the arguments made were not principally intended to defend such a choice and rebut the claims of those who would make a different choice; they were rather to prove that the underlying originalist Constitution provided for the result reached.

Finally, let us imagine what the opinions in *NFIB* would look like if they were written without the parameters and constraints of the debate about originalism. The two issues decided in the case would appear to implicate textual, historical, doctrinal, structural, and prudential arguments. In a world in which the various forms of constitutional argument were not being called into question by the debate over originalism, we may anticipate that the various modes of argument would receive a fuller and more complete deployment. Two points warrant particular mention.<sup>165</sup> First, the distinction between action and inaction pressed into service by both the Court and the dissent would have warranted and received more careful scrutiny. The majority appealed to the concept as if it were obvious that such a distinction would undermine the foundational principle of limited federal powers. The dissent similarly emphasized the importance of the distinction but offered no further explanation of why that distinction ought to matter.<sup>166</sup>

It may be that the government mishandled the briefing and oral argument in *NFIB*, and that its failure to acknowledge that its power under the Commerce Clause to mandate standards was not unlimited appeared to create the claim to an unlimited authority under the Commerce Clause.<sup>167</sup> The Solicitor General ought to have acknowledged that the authority claimed is not unlimited and that the authority to mandate that individuals act is derivative of the consequences their choices have on

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<sup>165</sup> Two less central points are worth noting as well. First, whether the individual mandate implicates an ethical argument. While it might for those of certain faiths, such belief-based objections to the mandate were recognized in the Act and an exception from the obligation provided. 26 U.S.C. § 5000A(d)(2) (2012). There would not otherwise appear to be a question that would implicate ethical argument in *NFIB*. The individual mandate would appear to present the potential to raise such issues but would not appear to actually present such issues because of the statutory faith-based exclusions; the provision for the expansion of Medicaid, coupled with the financial penalty for failures to do so, whether that provision is best characterized as an incentive or as a coercive measure, would not appear to implicate the kinds of matters that fall within the ambit of ethical argument.

Second, does the analysis by the Court and the other Justices confirm Sunstein's argument for minimalism? For example, the federal legislation in *NFIB* raises real federalism questions, and, in particular, the question of drawing the line between coercion and incentive—a potentially difficult line, in any world—in the context of our federal system. Alternatively, an explanation of why such a distinction is unnecessary, incomplete or misleading would appear analytically valuable. The Court's discussion of this question appears thin and unenlightening. It is hard to believe that saying more would be saying too much, *pace* Sunstein. So the lengthy opinions in *NFIB* do not appear to support Sunstein's argument. *See generally* SUNSTEIN, LEGAL REASONING, *supra* note 47; *see also* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999) [hereinafter SUNSTEIN, ONE CASE].

<sup>166</sup> *See NFIB*, 132 S. Ct. at 2647 (Scalia, J., dissenting).

<sup>167</sup> Certainly the dissent so suggests. *Id.*

commerce within the accepted ambit of the federal authority. Absent such consequences, the federal government has no authority under the Commerce Clause. There is, thus, no real specter of an unlimited federal authority.

None of this, on its face, however, appears to implicate the originalism debate. Nevertheless, the originalism debate—or at least, the penumbra of the originalism debate—reaches the judicial decision-making in *NFIB*. The competing concepts or conceptions of freedom<sup>168</sup> underlying the controversy over the Affordable Care Act implicate fundamental premises about and foundations of our democratic republic. Chief Justice Roberts reflected this understanding when he appealed to the vision of the Founders.<sup>169</sup> But he did so only in a formulaic way, in the manner of the claims made often by the originalists in the debate, not in a manner that might have persuaded the Justices holding an opposing view. Similarly, the concurring opinion found no need to engage meaningfully with the Court's claims about the Founding vision. That appeal, if concretized in the context of the challenge to the Affordable Care Act, could potentially have been very powerful. Made in *NFIB* only as an abstract claim, like the claim about freedom, do not tie back easily into the constitutional text. That casualness is mirrored by a corresponding insensitivity in originalism's critics' disregard for the arguments from history and text.

Second, the Court employed another emotionally powerful concept—the notion that the federal government had enacted legislation designed to coerce the sovereign states to expand their Medicaid coverage—to support a holding that the Affordable Care Act's mechanism to support and achieve expanded Medicaid coverage was invalid.<sup>170</sup> Like the Court's appeal to the distinction between action and inaction, that concept of coercion was not well defined. The Court never defined what measure or metric of financial incentive became coercive or even the measure—absolute dollars, relative dollars by reference to a state's budget, relative dollars by reference to spending on a particular category or function, or some other measure—that would be employed to test coercive effect.<sup>171</sup>

In a world without the ongoing originalism debate, Randy Barnett would not suddenly endorse the individual mandate or the proposed expansion of Medicaid, nor would Justice Ginsburg necessarily abandon her endorsement of the Affordable Care Act's expansion of Medicaid by depriving states that failed to enact the required expansion of their federal funding. There are substantial, substantive differences between them. But the constitutional arguments that would be made on both sides ought to be more persuasive if all sides in the debate would accept that their opinions, to be effective, must ultimately be persuasive—not merely explanatory of

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<sup>168</sup> The notions of freedom of the protagonists in *NFIB* were so different that I am unsure whether they were different “*concepts*” or different “*conceptions*.” See RONALD DWORKIN, *LAW'S EMPIRE* 71 (1986) [hereinafter DWORKIN, *EMPIRE*].

<sup>169</sup> See *NFIB*, 132 S. Ct. at 2589.

<sup>170</sup> *Id.* at 2604.

<sup>171</sup> Compare *id.* (referring to total dollars and federal support as a percentage of a state's overall budget), with *id.* at 2639-41 (Ginsburg, J., concurring in part and dissenting in part) (exploring the complexities of the hypothetical counterfactual analysis of the majority purporting to measure whether a financial inducement was coercive and concluding that such a determination likely required a court to make judgments that rendered such a question non-justiciable).

the particular position adopted.<sup>172</sup> Thus, the debate over originalism and the acknowledgment that neither position can persuade the other side likely has a corrosive effect more generally in our contemporary judicial argument and public discourse.

The third and final case I consider here, *National Labor Relations Board v. Noel Canning*,<sup>173</sup> was also highly controversial.<sup>174</sup> It presented a classic separation of powers question. The question at issue was whether the National Labor Relations Board had been authorized to act when it satisfied its requisite quorum only by including members who had been purportedly properly appointed under the Recess Appointments Clause.<sup>175</sup> If such appointments were invalid, then the requisite quorum was absent, and the Board's action was invalid. In a unanimous decision, the Court held the appointments were invalid, and therefore that the Board's action was invalid and without legal force or effect.<sup>176</sup> But the Court and the concurring Justices, in an opinion by Justice Scalia, differed fundamentally in their analysis. The Court determined that the Senate was not in recess as a result of the pro forma sessions it held while it remained, as a substantive matter, in recess.<sup>177</sup> In the absence of a recess, the President could not invoke his authority under the Recess Appointments Clause.<sup>178</sup> Thus, the Court recognized an important role for the Recess Appointments Clause that the concurring Justices would deny.<sup>179</sup> It is this split in the Court that I want to explore here in the context of the debate over originalism and the foundations that underlie it.

The case presented three questions regarding the Recess Appointments Clause.<sup>180</sup> First, what is a recess of the Senate for purposes of this clause? Second, does the Clause apply only to vacancies that arise during the recess? Third, is there a durational requirement for Senate recesses that must be satisfied before the Clause applies? *Noel Canning* was a case of first impression for the Court, which had not been previously presented with a question under the Recess Appointments Clause.<sup>181</sup>

The Court addressed the question of whether the Clause applied only to Senate recesses between sessions, or whether the Clause also applied to recesses within

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<sup>172</sup> When we recognize the constitutive role of inference, the giving and contesting of reasons and arguments for outcomes, in our Constitution, weaknesses in that process, including a failure to acknowledge and address opposing arguments can be recognized as a fundamental failing.

<sup>173</sup> 134 S. Ct. 2550 (2014).

<sup>174</sup> See, e.g., Linda Greenhouse, *Tragedy or Triumph*, N.Y. TIMES (Sept. 3, 2014), <http://www.nytimes.com/2014/09/04/opinion/tragedy-or-triumph.html>.

<sup>175</sup> *Noel Canning*, 134 S. Ct. at 2557-58.

<sup>176</sup> *Id.* at 2557.

<sup>177</sup> *Id.* at 2575.

<sup>178</sup> *Id.* at 2578.

<sup>179</sup> See *id.* at 2577 (asserting that Justice Scalia “would basically read [the Recess Appointments Clause] out of the Constitution.”).

<sup>180</sup> U.S. CONST. art. II, § 2, cl. 3.

<sup>181</sup> *Noel Canning*, 134 S. Ct. at 2560.

sessions of the Senate.<sup>182</sup> As a problem of original understanding, this question faced the challenge of distinguishing between intra-session recesses and inter-session recesses, as the Senate did not apparently take significant intra-session recesses in the first years of the Republic.<sup>183</sup> The first intra-session recess appointment the Court could find only arose during the Civil War.<sup>184</sup> Nevertheless, when the Senate began to take significant recesses within its annual sessions, as those sessions became lengthier, no distinction appeared to be drawn between inter-session recesses and intra-session recesses.<sup>185</sup> Justice Breyer, writing for the Court, found the ambiguous language of the Clause, coupled with the long-standing practice of the executive branch, decisive.<sup>186</sup> The Court therefore found that the Clause applied to intra-session recesses as well as inter-session recesses and to vacancies that had arisen before the recess.<sup>187</sup> Nevertheless, while the historical practice adduced by the Court appears well settled (albeit arising long after the Clause was adopted), the Court's textual interpretation appears somewhat forced. It appears forced because of the absence of intra-session recesses in the first several decades of the Republic. Justice Breyer also made a prudential argument in favor of the conclusion that the Clause ought to apply to pre-existing vacancies in order that the work of the federal government should proceed.<sup>188</sup>

In light of the Court's determination that the Senate was not in recess when the President purported to exercise his power under the Recess Appointments Clause, it may not be entirely clear whether the Court's other conclusions with respect to the scope of the Clause stand as precedential holdings or merely as dicta.<sup>189</sup> The Court styled its finding that the Clause applies with respect to pre-existing vacancies and to intra-session recesses holdings.<sup>190</sup> As a logical matter once the Court determined that Senate was not in recess, the inapplicability of the Recess Appointments Clause followed directly. Thus, the determinations as to the other two questions were not necessary for the Court's disposition of the case. On the other hand, if the questions before the Court are reordered, then determining whether the Clause applies to pre-existing vacancies becomes necessary, and such conclusion appears more like a holding than like dictum. Holdings and dicta are not necessarily distinguished on the basis of limiting holdings to the smallest set of necessary conclusions for decision. A recognition of the performative roles of constitutional judicial decisions and opinions

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<sup>182</sup> Each house of Congress, including the Senate, is organized into two sessions, each corresponding roughly to a calendar year of the two-year term of the Congress.

<sup>183</sup> *Id.* at 2561-62 (“[Pre-Civil War history] shows only that Congress generally took long breaks between sessions, while taking no significant intra-session breaks at all . . .”).

<sup>184</sup> *Id.* at 2562.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 2564.

<sup>187</sup> *Id.* at 2567.

<sup>188</sup> *Id.* at 2568.

<sup>189</sup> For a contemporary discussion of this distinction—and its practical and theoretical limitations, see FREDERICK SCHAUER, THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING 180-84 (2009).

<sup>190</sup> *Noel Canning*, 134 S. Ct. at 2567.

highlights the distinction between holdings and dicta, which play different performative roles.

Justice Scalia, joined by Chief Justice Roberts and Justices Thomas and Alito, concurred in the judgment, but argued that the President may fill only vacancies arising during a particular Senate recess during that recess under the Recess Appointments Clause.<sup>191</sup> Justice Scalia argued that the language of the Clause was clear and the historical practice was sufficiently uncertain as to offer an insufficient basis in any event to override the language of the Clause.<sup>192</sup> Justice Scalia began with the ordinary “plain meaning” of the language of the Recess Appointments Clause.<sup>193</sup> He concluded that while in ordinary parlance “to recess” may be equivalent to “to adjourn,” in the constitutional context, the use of the definitive participle “the” before “recess” in the text confirms a more restrictive use.<sup>194</sup> Justice Scalia also found support for a restriction of the Clause to vacancies arising during a Senate recess in the Pay Act of 1863.<sup>195</sup>

Neither the Court’s opinion nor the concurring opinion by Justice Scalia acknowledged the uncertainty associated with the results of their respective inquiry into the original understanding of the Recess Appointments Clause. Because of the tacit interpretative stances adopted, neither fairly considered that the historical interpretative question posed might simply not have an answer. As has been often pointed out, the ontological commitments of originalism commit it to the belief in the existence of historical facts.<sup>196</sup> That is a belief that is not shared with professional historians.<sup>197</sup> Professional historians recognize that the available historical evidence may not permit us to answer all questions that may be posed about the past and that the risk that the evidence is inadequate or unavailable is increased when questions are imposed rather than chosen—as occurs in constitutional disputes. Had the Justices been willing to acknowledge that possibility, both the Court’s opinion and Justice Scalia’s concurring opinion might have welcomed additional forms of argument to help resolve the questions at hand.

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<sup>191</sup> *Id.* at 2592 (Scalia, J., concurring).

<sup>192</sup> These are independent arguments for Justice Scalia, either of which is sufficient to reach the conclusion he defends.

<sup>193</sup> *Id.* at 2595 (“A sensible interpretation of the Recess Appointments Clause should start by recognizing that the Clause uses the term ‘Recess’ in contradistinction to the term ‘Session.’”).

<sup>194</sup> *Id.* at 2596.

<sup>195</sup> *Id.* at 2613-14.

<sup>196</sup> See SCALIA, INTERPRETATION, *supra* note 14, at 45.

<sup>197</sup> See, e.g., Laura Kalman, *Border Patrol: Reflections on the Turn to History in Legal Scholarship*, 66 FORDHAM L. REV. 87 (1997) (writing long after Wofford and Kelly, Kalman concludes that the Court had continued to write bad legal history, overstating its conclusions and presuming that the questions it faces have historical answers); Suzanna Sherry, *The Indeterminacy of Historical Evidence*, 19 HARV. J.L. & PUB. POL’Y 437 (1996); Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 147-49 (1965) (arguing that the Supreme Court’s use of history is not strong as measured by the standards of professional historiography); John G. Wofford, *The Blinding Light: The Uses of History in Constitutional Interpretation*, 31 U. CHI. L. REV. 502 (1964).

Imagine the *Noel Canning* opinions in a post-originalism debate world, with all of the modes of argument available. Doctrinal argument would appear of limited importance because of the novelty of the question presented.<sup>198</sup> Historical, textual, structural, and prudential modes of argument would likely be fruitful.<sup>199</sup> The historical arguments available in *Noel Canning* are a little unusual, because the history effectively begins almost a century into the existence of the provision. But that later history, as the Court notes, shows a consistent pattern of recess appointments, during intra-session recesses as well as inter-session recesses, and extending to both existing vacancies and new vacancies arising during the recess.<sup>200</sup> What does that historical practice show about how the case ought to be decided, if anything? Justice Scalia discounts any serious implication in favor of holding that such established practice is permitted.<sup>201</sup> But he does so, at least in part, because such practice arose so long after the original adoption of the Recess Appointments Clause in 1789.<sup>202</sup>

*Noel Canning* is a good example of the improvements that we can make to our constitutional decision-making if, after moving past the debate over originalism, we are freed of the tyranny of finding or constructing answers to our constitutional questions in particular modes of argument. Justice Scalia's historical argument has a necessarily forced character, as does Justice Breyer's opinion for the Court. Reading the two opinions together, it appears clear that the historical evidence for the interpretation of the Recess Appointments Clause is hardly unambiguous. Important evidence can easily be adduced for very different historical understandings. While the Court has to decide the case (or decline to decide the case, leaving a lower court decision in place), it does not need to confine itself to a single mode of argument, and certain modes, in certain cases, may be more relevant or decisive.

The structural arguments would appear important in *Noel Canning*, because *Noel Canning* raises important questions about the relationship of the executive and legislative branches and, to a lesser extent, their relationship with the judicial branch. The Recess Appointments Clause gives the President a potentially controversial means to appoint the senior staff necessary to run the federal government. As the Court makes clear in *Noel Canning*, that power has been used extensively for many decades by many Presidents.<sup>203</sup> Removing that authority from the President would

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<sup>198</sup> *Noel Canning* thus provides a sharp contrast with *Jones* and *NFIB*, which presented questions arising in doctrinally well-developed areas of the law (the Fourth Amendment and the Commerce Clause, respectively). It might be, of course, that there is analogous doctrine that ought to be deployed in answering the questions presented in *Noel Canning*, but without ruling that possibility out, I cannot explore it here.

<sup>199</sup> Ethical arguments would not appear implicated by the questions in *Noel Canning* because the issues of separation of power and the allocation of authority between the executive and legislative branches do not implicate the fundamental character of the Republic or the relationship between the state and the individual.

<sup>200</sup> *Noel Canning*, 134 S. Ct. 2550, 2589 app. B (listing the recess appointments made).

<sup>201</sup> See *id.* at 2592 (Scalia, J., concurring) (pejoratively characterizing the Court's opinion as adopting an "adverse-possession theory of executive authority").

<sup>202</sup> *Id.* at 2601 (emphasizing that the first intra-session recess appointment did not occur until 1867 or 1868).

<sup>203</sup> *Id.* at 2564 (majority opinion).

have a potentially significant impact on the balance of power between the executive and legislative branches.<sup>204</sup> Recognizing that authority would have a similar impact, albeit in the form of respecting the current status quo. But Justice Scalia is right that a decision by the Court also implicates separation of power issues.<sup>205</sup> It is not immediately apparent how structural arguments ought to bear on the questions presented in *Noel Canning*. How ought the power of the President be balanced against the responsibility of the Senate to confirm presidential appointments? When we pose that question we must acknowledge the pervasive concerns about the current confirmation process.<sup>206</sup> These structural arguments and their associated concerns ought to be addressed expressly by examining the structural arguments available for the various positions.

Prudential arguments would also appear potentially important in *Noel Canning*. The ability to make executive branch appointments goes to the heart of the ability of the President to discharge her responsibilities to execute the law. Unfortunately, that abstract statement of principle does not capture the balance struck in the constitutional text that requires judges and certain other presidential appointments to be confirmed by the Senate. Standing alone, prudential concerns prove too much, suggesting that Senate confirmation is inconsistent with the ability of the President to act most effectively. To be persuasive, a prudential argument must be cast in a manner that respects the balance incorporated into the Constitution's requirement of senatorial confirmation of certain appointments. Yet prudential arguments should be part of the separation of powers jurisprudence because we properly ought to take into account concerns about the effectiveness of the federal government. Just as the Constitution is not a suicide pact, neither ought it gratuitously throw sand in the gears of government. In any case, prudential arguments as well as structural arguments ought to be considered with respect to the questions presented in *Noel Canning*, recognizing that such arguments stand *pari passu* with the historical, textual, and prudential arguments.

These three decisions were chosen because of their stature, not because of any particular importance within the debate over originalism or particular reliance upon originalist or anti-originalist arguments. They are representative of hard, controversial cases that reach the Court. They nevertheless present three examples of how our constitutional decision practice could be improved if we dispensed with the decisional theories underlying the debate over originalism.

In *Jones*, the Court wrestled with the constitutional implications of a new technology. Only Justice Sotomayor incorporated into her constitutional analysis any significant analysis of the nature of the new technology.<sup>207</sup> She found the new

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<sup>204</sup> Indeed, to the extent that the Senate is now customarily in session before a President is inaugurated, an application of the Recess Appointments Clause to vacancies arising only during a Senate recess could prevent a newly inaugurated President from filling his cabinet, although there might be political reasons why the Senate would not fail to confirm such appointments.

<sup>205</sup> *Noel Canning*, 134 S. Ct. at 2593-94 (Scalia, J., concurring). How the Court decided *Noel Canning* had important implications for the balance of power between the President and the Senate with respect to filling senior positions within the executive branch.

<sup>206</sup> See Kagan, *supra* note 37. Those worries have not diminished since Justice Kagan expressed concerns about the process.

<sup>207</sup> See *United States v. Jones*, 132 S. Ct. 945, 955-56 (2012) (Sotomayor, J., concurring).

technology to pose particularly new challenges to the protections provided by the Fourth Amendment.<sup>208</sup> Justices Scalia and Alito found themselves side-tracked into a formalistic exchange about how the original understandings, expectations, and intentions would have treated the installation of a GPS tracker by the police.<sup>209</sup> Ironically, there may have been insights to be garnered from the original understandings and expectations. For example, it might be that the original understanding and expectation of the rights protected by the Fourth Amendment would indicate that surveillance in the public sphere was outside the scope of the warrant requirement. Or it might be that the Founders attached little import in this context to the difference between the private and public spheres. In that event, absent the trespass that Justice Scalia focused upon in his analysis, there would not be protection under the Fourth Amendment. So to criticize the originalist arguments made is not to foreclose other more relevant originalist arguments.<sup>210</sup> For example, an important argument that could have been made with respect to the text and historical understanding of the Fourth Amendment relates to the general understanding of the relationship between the people and the state. An argument might be made, on terms similar to that invoked by Chief Justice Robert in *NFIB*, that a world that permits warrantless searches like that in *Jones* “is not the country that the Framers of our Constitution envisioned.”<sup>211</sup> Explaining why and how, in a manner that goes beyond the passing invocation of the Framers by Chief Justice Roberts, would have been a valuable argument to have had fully presented in *Jones*. None of those arguments or the reasons to reject the other arguments proffered in defense of the opposing readings of the Fourth Amendment warrant requirement were adequately or directly explored by the Court or by the concurring opinions.

In *NFIB*, the Court broke important new ground with respect to the Commerce Clause and with respect to federalism. Those steps warranted a more direct analysis of the new constraints imposed upon the federal spending power than the Court or Justice Scalia’s dissent provide. How those constraints were to be reconciled with the prior precedent that appears to provide no such limit warrants a fuller analysis. The facile invocation of the novel concept of coercion applied by one sovereign to another sovereign appears insufficient for that task.<sup>212</sup> The decision in *NFIB* also invites an exploration of the limits imposed upon the Commerce Clause and the critical role played in the analysis of the purported distinction between an act and a

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<sup>208</sup> *Id.*

<sup>209</sup> *Id.* at 950 n.3 (majority opinion); *id.* at 959 n.3 (Alito, J., concurring).

<sup>210</sup> Part of my criticism here is grounded on the suspicion that the argumentative strategy that Justice Scalia adopts is generated by his methodological goal of establishing an originalist jurisprudence in the Supreme Court. See Antonin Scalia, *Foreword*, in ORIGINALISM: A QUARTER CENTURY OF DEBATE 43-44 (Steven C. Calabresi ed., 2007); see also SCALIA, INTERPRETATION, *supra* note 14. By constructing an analysis of the Fourth Amendment that relied only upon trespass, Justice Scalia sought in his opinion to construct a Fourth Amendment theory that could potentially limit the doctrinal development arising from *Katz* that focused on expectations of privacy—not a doctrine easily reconciled with an originalist stance. See TRIBE & MATZ, UNCERTAIN JUSTICE, *supra* note 60, at 238.

<sup>211</sup> Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2589 (2012).

<sup>212</sup> *Id.* at 2604 (characterizing the potential loss of federal funding by the states as “a gun to the head”).

failure to act.<sup>213</sup> The Court (and the opinion by Justice Scalia and three of his colleagues) emphasizes that distinction, and relies heavily on it in holding that the Affordable Care Act exceeded the federal government's authority under the Commerce Clause.<sup>214</sup> It is an intuitive distinction—freighted, however, with tacit philosophical assumptions of action theory—that are far less compelling than the Court assumed. Without them, the bright line that the Court sought to draw appears problematic.

Finally, in *Noel Canning* the Court confronted an important question of separation of powers and of the division of authority and power among the branches of the federal government.<sup>215</sup> Like *Jones* and *NFIB*, it produced multiple opinions and intense controversy within the Court. As in those cases, too, the quality of the argument within the split opinions of the Court would have been enhanced as to their substance and persuasive force if those opinions had not been written within the context of the ongoing debate over originalism. The “gravitational effect” that Barnett asserts exists for originalism<sup>216</sup> also exists for the originalism debate. Indeed, the effect is sufficiently great that it is perhaps not unlike a black hole.

Critics may note that I have offered little in the way of a substantive criticism of the decision of any of these three cases or, indeed, of the alternative decisions that the concurring and dissenting opinions would have reached. Does it follow that a post-debate constitutional practice leaves everything as it is, much as Wittgenstein asserted philosophy does?<sup>217</sup> If so, then what is the significance of leaving the originalism debate behind? While I have eschewed engaging substantively in making a judgment as to the argument or decision of these three cases, I have done so to avoid obscuring the fundamental claim here that a constitutional practice that proceeds with the benefit of all of these modes of argument, rather than rejecting some proper subset of them on methodological or theoretical grounds, gives a richer and more powerful Constitution. There will often or always be disagreements about how those various arguments should be made and, ultimately, a judgment about their respective force. But that practice will not leave everything as it is. We can have a stronger and more robust practice of constitutional argument and decision-making if we abandon the debate about originalism together with its underlying tacit premises and assumptions. The debate over originalism is part of the problem, not part of the solution.

### C. *New Directions in the Academy*

We may anticipate similarly positive implications for the practice of constitutional theory in the academy if we can transcend the originalism debate. We may return to the doctrinal and other questions raised by the adjudication of

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<sup>213</sup> *Id.* at 2587.

<sup>214</sup> *See id.* at 2587-91; *id.* at 2649 (Scalia, J., dissenting).

<sup>215</sup> I use the preposition *among* because in addition to raising the question of the scope of the Recess Appointments Clause, the case also required a determination of how the Court would approach such a dispute implicating the division of power between the legislative and executive branches.

<sup>216</sup> *See generally* Randy E. Barnett, *The Gravitational Force of Originalism*, 82 *FORDHAM L. REV.* 411 (2013).

<sup>217</sup> WITTGENSTEIN, *supra* note 49, at § 124.

constitutional questions under our American Constitution. That is an opportunity that has been compromised by the ongoing debate over originalism.

Dramatic evidence of the costs imposed by the debate over originalism came about a decade ago when Laurence Tribe announced that he could not complete the third edition of his renowned constitutional law treatise.<sup>218</sup> He did not expressly attribute the source of his inability to the debate over originalism or even to originalism itself. The principal reason Tribe stated for his decision was that there no longer was a discernible deep structure to American constitutional law.<sup>219</sup> Tribe suggests that the level or degree of flux is such that even a gifted theorist and constitutional visionary like himself<sup>220</sup> could, in Hegelian terms not generally expressly part of his constitutional commentary<sup>221</sup> or his treatise,<sup>222</sup> mistake a mere thesis for a synthesis.<sup>223</sup> With an attempt to identify the deep structure of our constitutional law “utter hubris were it not so manifestly quixotic.”<sup>224</sup> Unwilling to prepare a mere “serviceable hornbook-like treatment,” Tribe has conceded authorial defeat.<sup>225</sup>

Professor Tribe’s conclusion warrants note, both for its force, and because of the source, of course. If and to the extent that it were true, Tribe’s verdict would appear to preclude his project of conceptual constitutional doctrinal analysis. To the extent that Tribe’s judgment is right, what are its implications for the originalism debate? To what extent does that conclusion arise out of the originalism debate and its tacit premises? First, and most obviously, Tribe’s account suggests that the debate over originalism reflects fundamental disagreements over the nature of the Constitution, constitutional interpretation, and constitutional adjudication. Conceptualizing Bork

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<sup>218</sup> See Laurence H. Tribe, *The Treatise Power*, 8 GREEN BAG 2d 291 (2005) [hereinafter Tribe, *Treatise Power*]. For a representative assessment of that work, see LEVINSON, CONSTITUTIONAL FAITH, *supra* note 50, at 40.

<sup>219</sup> Tribe, *Treatise Power*, *supra* note 218, at 295-96. The general decline in treatise writing by law professors has been frequently remarked, and Tribe’s decision may initially appear just another instance of this more general development.

<sup>220</sup> *Id.* at 295 (“I do not have, nor do I believe I have seen, a vision capacious and convincing enough to propound as an organizing principle for the next phase in the law of our Constitution.”).

<sup>221</sup> See, e.g., TRIBE, INVISIBLE, *supra* note 13; LAURENCE H. TRIBE, CONSTITUTIONAL CHOICES (1985).

<sup>222</sup> While Tribe organizes his treatise by references to models of the Constitution that were dominant in different periods, he never suggests that the transition from one model to the next was best understood in Hegelian evolutionary terms. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW (2d ed. 1988) [hereinafter TRIBE, CONSTITUTIONAL LAW].

<sup>223</sup> Tribe, *Treatise Power*, *supra* note 218, at 296 (“what once looked like a synthesis becomes at best a new thesis”). Certainly there are Hegelian elements to Tribe’s constitutional narrative. It could be read as describing, through the alternative models that Tribe identifies and articulates, the historical evolution of the constitutional world spirit along the lines of Hegel’s own *Phenomenology*. See generally HEGEL, *supra* note 6.

<sup>224</sup> Tribe, *Treatise Power*, *supra* note 218, at 296. It would take a more sophisticated student of Greek tragedy than I to be assured that hubris cannot be quixotic.

<sup>225</sup> The second volume of the third edition of Tribe’s *American Constitutional Law* has indeed never yet appeared.

or Justice Scalia's Constitution would not appear a difficult task for Tribe.<sup>226</sup> Similarly, the critics of originalism do not appear to articulate or commit to a constitutional interpretation that Tribe could not conceptualize.<sup>227</sup> Thus, it may appear that Tribe is tacitly suggesting that the debate over originalism is embedded in our constitutional doctrine and decisions, contributing to the absence of a coherent deep structure for current American constitutional law. That is not what Tribe intends, however, because he is one of originalism's most vigorous critics, and attributes few if any explanatory virtues to it.<sup>228</sup> The absence of a deep structure in contemporary constitutional doctrine may appear simply to be Tribe's restatement of a Borkian claim: that there is no consensus among those who argue against originalism as to the alternative.<sup>229</sup> That is not what Tribe intends, however, because he is committed to the position that there are answers to questions of constitutional interpretation.<sup>230</sup>

The disarray in the conceptualization of American constitutional law may demonstrate that we are at a particularly creative stage in our nation's constitutional evolution.<sup>231</sup> It is plausible that doctrinal complexity and disarray accompanies shifting paradigms in our constitutional narrative and theory.<sup>232</sup> That is not the implication Tribe intends, because the import of his observation is that the development of our constitutional doctrine has reached an impasse.<sup>233</sup> Alternatively, Tribe's judgment may demonstrate, as Farber and Sherry suggest, that the academy has been distracted by constitutional high theory to the detriment of efforts toward working through less abstract doctrinal questions.<sup>234</sup> The absence of meaningful

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<sup>226</sup> See generally *TRIBE & DORF, READING*, *supra* note 46.

<sup>227</sup> Indeed, Tribe offers a fairly succinct statement of his understanding of Dworkin's Constitution—and his own reasons for rejecting that constitutional theory. See *Tribe, INTERPRETATION*, *supra* note 73, at 72; see also *TRIBE & DORF, READING*, *supra* note 46, at 17-18 (rejecting Dworkin's methodology of constitutional interpretation as too open ended and unconstrained by law).

<sup>228</sup> See generally *Tribe, INTERPRETATION*, *supra* note 73.

<sup>229</sup> See *BORK, TEMPTING*, *supra* note 5, at 251-59.

<sup>230</sup> *TRIBE & DORF, READING*, *supra* note 46, at 18-19 (distinguishing the methods of proof for propositions of constitutional law from those for propositions of mathematics).

<sup>231</sup> The possibility that we are at a moment of marked constitutional discontinuity, akin to one of the earlier constitutional revolutions, would be equally unattractive to most originalists as well as their critics. For the originalists, the possibility of a radical break with the historic Constitution would be unpalatable, except for the boldest among them. For their critics, the specter of the originalists' constitutional theory becoming the new orthodoxy is substantively unattractive.

<sup>232</sup> See generally *THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1962) (defending a now classic but still controversial account of fundamental changes in scientific theories incorporating the concepts of paradigms and paradigm shifts that cannot be explained simply on the basis of empirical evidence or experimental results).

<sup>233</sup> See *Tribe, Treatise Power*, *supra* note 218, at 295.

<sup>234</sup> See *DANIEL A. FARBER & SUZANNA SHERRY, DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS 165-66* (2002) [hereinafter *FARBER & SHERRY, DESPERATELY SEEKING*]. In fairness, it should be acknowledged that Tribe is not

attention to much of the work in the legal academy from the judiciary (or from practicing lawyers making arguments in court) may be evidence for Farber and Sherry's claim.<sup>235</sup> Thus, Tribe has been able to bridge the gap between theory and practice. But the goal of theory making is express, and Tribe's judgment reflects a pessimism as to its current possibility.

Without the constraints of the ongoing debate over originalism we may return to the substantive constitutional problems of democracy, limits on democratic choice, executive power, delegation of power, freedom of speech, equal protection, federalism, and the limits of federal power. Many of these questions are doctrinal; but others may implicate structural or prudential arguments and concerns. For example, one of Jack Balkin's most interesting substantive constitutional arguments is against the long-standing doctrine narrowly interpreting the Privileges or Immunities Clause.<sup>236</sup> Balkin challenges that existing doctrine not only on the basis that it has effectively eviscerated the rights protected under that Clause<sup>237</sup> but also on the basis that a broader construction is a better construction of the original text.<sup>238</sup> Charles Fried complements his account of the importance of doctrine with an argument for the importance of judgment.<sup>239</sup> The substantive claims Balkin and Fried make deserve our attention more than the effectively methodological debate over originalism. They deserve our attention because they do not generate empty debates grounded on tacit confusions and untenable stances. They deserve our attention because of their importance to the Republic and to its citizens.

Two examples from contemporary constitutional scholarship show how our constitutional argument and discourse might be enriched if we move beyond the debate over originalism. These scholars' works stand as examples of what may be accomplished in a post-originalism debate world, even though both of these scholars have joined that debate.<sup>240</sup> Moreover, neither would likely subscribe to the account I

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among the examples of excessively conceptual constitutional theorists cited by Farber and Sherry.

<sup>235</sup> See *id.* at 160-68.

<sup>236</sup> See BALKIN, *LIVING ORIGINALISM*, *supra* note 18, at 190-219. Balkin is not, of course, the first to argue that the Privileges and Immunities Clause jurisprudence went badly awry beginning in the *Slaughter House Cases*. See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 22-30 (1980) [hereinafter, ELY, *DEMOCRACY*]. But Balkin develops that argument programmatically as part of a project to revivify a Privileges or Immunities Clause jurisprudence. See BALKIN, *LIVING ORIGINALISM*, *supra* note 18, at 190-219. Indeed, Balkin would find the right to bear arms within the scope of the Clause and, in one of the most celebrated or notorious uses of the Clause, Balkin would protect a woman's right to choose to have an abortion within the ambit of the rights protected thereunder. *Id.* at 214-19; Balkin, *Abortion*, *supra* note 22. Kurt Lash takes a more modest view of the scope of the Clause. See KURT T. LASH, *THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENS* (2014).

<sup>237</sup> See BALKIN, *LIVING ORIGINALISM*, *supra* note 18, at 190-91.

<sup>238</sup> See *id.* at 208-12.

<sup>239</sup> See CHARLES FRIED, *SAYING WHAT THE LAW IS: THE CONSTITUTION IN THE SUPREME COURT* 184-200 (2004) [hereinafter FRIED, *SAYING*]; see also Fried, *Judgment*, *supra* note 58.

<sup>240</sup> See, e.g., Fried, *Judgment*, *supra* note 58; SUNSTEIN, *RADICALS*, *supra* note 6; Cass R. Sunstein, *What Judge Bork Should Have Said*, 23 *CONN. L. REV.* 205 (1991).

am offering here.<sup>241</sup> But self-consciousness is not always a necessary predicate for action.<sup>242</sup> Moreover, in selecting these two examples, I do not endorse the analysis they propound, but only offer them as examples of an alternative to participation in the largely methodological debate over originalism.<sup>243</sup> Nor are these examples consistent among themselves; Posner's pragmatism and Fried's conservative emphasis on doctrine and judgment are competing modes of analysis and argument. That is a source of strength, not weakness, because our constitutional law largely reflects historical and ongoing tensions, disagreements, and arguments about the relationship of the federal government to the states, the separation of powers, and the relationship of the citizen to the state, among others. Those arguments and the resolution of those arguments constitute our constitutional law. That sometimes the unsettled nature of our constitutional law ought to be reflected in our understanding of that law (and the defense of propositions of that law) as clearly as is the currently settled elements of our law.<sup>244</sup>

### 1. Richard Posner and the National Security Constitution

The challenges we face as a people, as a society, and as a state are radically different, from those faced on adoption of the Constitution or the ratification of the Reconstruction Amendments. Our constitutional law needs to engage in defining the role of the executive in the modern state of security, non-state military and terrorist threats, and easily portable weapons of mass destruction. To the extent that our thinking about national security remains trapped in the eighteenth century, and endeavor to answer our modern questions on that template, we may not necessarily be unable to do so, but we make our task far harder and put a premium on artificial and scholastic reasoning. One work that highlights both the need of our constitutional theory to engage the great questions of our generation and the difficulties in carrying out such an exercise with only the tools of original understanding jurisprudence is John Yoo's *The Powers of War and Peace*.<sup>245</sup>

Yoo has thought long and hard, both in the academy and in the Justice Department as the author of the now rightly condemned "waterboard opinion, about

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<sup>241</sup> Judge Posner would not agree with my strategy because he is committed to a prudential mode of argument and addresses other modes of argument somewhat grudgingly, recognizing the attraction they have for others. Fried would not likely endorse the use to which I put his analysis because he has never expressly committed to a pluralist account of constitutional argument let alone to the kinds of anti-foundational arguments I have presented and because of his endorsement of many of Dworkin's claims that I would reject.

<sup>242</sup> From Kierkegaard to Freud to Sartre a host of modern explorations of the ways in which we proceed to act and to otherwise lead our lives simply without self-awareness or even on the basis of self-deception abound.

<sup>243</sup> I have selected these examples in part because I am not entirely in agreement with their substantive views, but they are nevertheless good examples of approaches that break free from the debate over originalism. Of course, many of these authors have also participated in that debate, too.

<sup>244</sup> But since Hegel we have understood that self-consciousness with respect to action changes the nature of the act and the actor, and self-consciousness is an important part of our constitutional argument and practice.

<sup>245</sup> YOO, *supra* note 34 (defending a broad array of presidential powers under an expansive reading of the War Powers Clause and the concept of the unitary executive).

the needs of our Republic in addressing the threat it faces from terrorists.”<sup>246</sup> His originalist approach to this problem requires him to address the immediate, sweaty questions of how we may and should respond, constitutionally, to this crisis by looking to the political and constitutional thought of the eighteenth century. Al Qaeda is not the Barbary pirates, and we should not confuse the two, or approach our constitutional choices as if we are trapped in the world of the Barbary pirates.<sup>247</sup> Nevertheless, Yoo endeavors to answer the relevant questions concerning executive power, not with respect to the constitutional law that we have, but solely by looking to a reconstruction of the original understanding of the original Constitution.<sup>248</sup> His work is a *tour de force*,<sup>249</sup> but in light of the very different conclusions about the original understanding that other careful scholars like John Ely have come to,<sup>250</sup> it is hard not to remain at best unsatisfied by his analysis. It seems artificial (because the national security concerns we face today are so different from those of the late eighteenth century) and so uncertain (because any purported answers rely upon such attenuated evidence and face the challenge of anachronicity).<sup>251</sup>

Yoo’s analysis and prescriptions may be compared with those offered by Judge Posner.<sup>252</sup> Judge Posner rejects originalism as a pragmatist.<sup>253</sup> Accordingly, his approach to many of the same pressing, practical questions that Yoo addresses is very different. Judge Posner can bring an array of tools and techniques to his problem precisely because of the instrumentalist conception of law. His approach to the problems of combating terrorism within the limits imposed by the Constitution seems almost designed to mock the originalists. Thus he begins with a claim about the source of constitutional rights:

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<sup>246</sup> See generally GOLDSMITH, *supra* note 34 (analyzing the legal arguments surrounding permissible interrogation techniques, but also acknowledging the place of moral luck).

<sup>247</sup> The motivation of al-Qaeda is different, the tools available to it are very different, and its relationship to any sovereign is different than those of the Barbary pirates. Those fundamental differences arise from a variety of sources, including technological, social, religious, and political change.

<sup>248</sup> Yoo is express in relying upon the original understandings with respect to the provisions of the Constitution, and like so many originalists and their critics, he suggests that such reliance upon the original understanding secures legitimacy and avoids interpretative problems presented by other forms of originalism. YOO, *supra* note 34, at 27-28.

<sup>249</sup> Thus, for example, Yoo seeks to distinguish the power to declare war from the power to make war. The latter he attributes to the President; the former to Congress. Missing, of course, is any indication why the seemingly far less important power should be expressly provided for, and the far more important power to make war simply attributed to the executive branch by implication. Moreover, as Judge Posner nicely remarks, Yoo appears committed to the reversal of *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579 (1952), as that exercise of presidential power would also seem to fall within the scope of his argument, although Yoo does not acknowledge this issue. See POSNER, SUICIDE PACT, *supra* note 34.

<sup>250</sup> See JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH 3, 139 n.4 (1993).

<sup>251</sup> See generally LeDuc, What Were They Thinking?, *supra* note 39, at section II.A.3.

<sup>252</sup> See POSNER, SUICIDE PACT, *supra* note 34.

<sup>253</sup> See RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 26-29 (1990) [hereinafter POSNER, PROBLEMS OF JURISPRUDENCE].

It is natural to think that constitutional rights are rights stated in the text of the Constitution of the United States. But it is wrong, not completely but in an important sense. Constitutional rights are created mainly by the Supreme Court of the United States by “interpretation” of the constitutional text.<sup>254</sup>

Thus, Judge Posner has stated a variety of controversial claims: (1) that originalism is mistaken, (2) that interpretation is a misleading or overly restrictive concept within which to cabin constitutional adjudication, and (3) that constitutional precedent, howsoever properly defined, is a source of authoritative constitutional rights and law.<sup>255</sup> All of this is consistent with the views he has articulated in his jurisprudential writings.<sup>256</sup> Moreover, Judge Posner employs the broad-ranging methods that he has endorsed as a legal pragmatist. While Judge Posner is prepared to make technical and doctrinal arguments,<sup>257</sup> he is equally prepared to ground those arguments on a very practical approach to what works and what does not<sup>258</sup> based upon his own assessment of the nature of the threat that the Republic faces.<sup>259</sup>

The result is not easy to score on basis of whether or not the analysis yields a result more liberal or more conservative, more solicitous of civil rights and civil liberties, or more attentive to the needs of national security. There are certainly gaps in some of Judge Posner’s analysis. Few are likely to be any more persuaded by his glossing over *Korematsu* than of an analysis of equal protection that left readers uncertain as to the legitimacy of *Plessy v. Ferguson*. Judge Posner is not long delayed looking for the answers in the eighteenth-century Constitution to the constitutional questions regarding national security that we face at the dawn of the twenty-first century.

Stripped of its stylistic excesses,<sup>260</sup> Judge Posner’s analysis makes a valuable contribution to the analysis of the constitutional and legislative issues that we face

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<sup>254</sup> POSNER, SUICIDE PACT, *supra* note 34, at 17.

<sup>255</sup> *Id.* Ironically, in this initial laying down of markers we see Posner trapped in his traditional representational epistemology, despite his purported mastery of the modern texts. Thus, he assumes that there is a meaningful contrast to be drawn between being in the text and being understood to be in the text through our practices of constitutional law. Like Achilles (and like Hercules) he imagines that the constitutional text can grab us by the throat and make us acknowledge the truth of statements about constitutional law. See Lewis Carroll, *What the Tortoise Said to Achilles*, 4 MIND 278 (1895) (classical demonstration of the limits of logic). Judge Posner has picked a fight not only that he cannot win and that needlessly distracts us from the otherwise insightful analysis he has on offer, but does so on a phantom playing field. See *id.*

<sup>256</sup> See generally POSNER, PROBLEMS OF JURISPRUDENCE, *supra* note 253.

<sup>257</sup> See POSNER, SUICIDE PACT, *supra* note 34, at 3-4 (noting the limited scope of the *Posse Comitatus* act, and its inapplicability in certain cases of emergency).

<sup>258</sup> See *id.* at 147.

<sup>259</sup> One cannot but be reminded of Dworkin’s earlier assessment of another of Judge Posner’s works. “Judge Posner’s book is characteristic of that phenomenally prolific author’s virtues and defects. It is clear, erudite, punchy, knock-about, witty, and relentlessly superficial.” RONALD DWORKIN, JUSTICE IN ROBES 266 n.11 (2006).

<sup>260</sup> For example, when Judge Posner betrays his commitment to his law and economic roots and refers to the President “buying” the power to violate the Constitution by expending

today with respect to national security. His methodology appears far more persuasive and, indeed, politically viable than a method that confines its analysis to the views or understandings of the Founders or Ratifiers. That limited conclusion is not to assert that such a prudential analysis would always be more persuasive with respect to constitutional decision-making, or even that it would always be more persuasive with respect to current constitutional questions implicating national security.<sup>261</sup> Nor is it to assert that there is a meaning of the Constitution that Judge Posner has correctly determined as to which there is a fact of the matter, and which would be inconsistent with an originalist interpretation, argument, or decision.<sup>262</sup>

Judge Posner's approach in *Not a Suicide Pact* is possible because it is not seriously constrained by the jurisprudential arguments he has advanced in the originalism debate. While much of the argument (following the implicature of the work's title) emphasizes pragmatic considerations,<sup>263</sup> Judge Posner is also sensitive to doctrinal<sup>264</sup> and even, at least to some degree, ethical<sup>265</sup> issues that are raised by the new national security challenges that the Republic faces. For example, in defending an argument that very harsh methods should be available to elicit or extract information from terrorists, Judge Posner acknowledges the force of the public resistance to the use of torture by the state.<sup>266</sup> He engages that argument and offers a set of arguments that are designed to respond to the counterarguments from those who would strike down some of the more aggressive techniques he defends on the grounds that they violate the Eighth Amendment.<sup>267</sup> We do not have to agree with Judge Posner's position or be persuaded by his arguments (or even to believe that his unsubstantiated empirical claim that torture is sometimes helpful)<sup>268</sup> to acknowledge that Judge Posner recognizes and respects the various modes of argument deployed in this constitutional context.

Judge Posner's approach is, above all, to an American constitution. He is generally cognizant and respectful of the historical context and practice within which

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political capital; this metaphor is unlikely to illuminate the analysis or to resonate with many of us. POSNER, *SUICIDE PACT*, *supra* note 34, at 154-55. But I also have in mind the proliferation of florid adverbs, adjectives, and normative nouns.

<sup>261</sup> Indeed, inherent in Judge Posner's prudential analysis is the notion that it may apply most forcefully only in certain limited circumstances. *See id.* at 12-13.

<sup>262</sup> Posner always appears content to make his arguments, however forcefully and self-assuredly, in the context of an ongoing argument and discourse with other participants. *See id.*

<sup>263</sup> *See id.* at 27 (emphasizing the value of legal pragmatism).

<sup>264</sup> *See id.* at 17 (noting that constitutional rights arise, in an important sense, not directly out of the constitutional text, but out of Supreme Court decisions in the course of constitutional interpretation).

<sup>265</sup> *See id.* at 78-84 (discussing *Rochin v. California*, 342 U.S. 165 (1952), which held that the police could not pump the stomach of a suspect without obtaining a warrant, and the definition of torture).

<sup>266</sup> *Id.* at 82-83.

<sup>267</sup> *Id.* at 82-87.

<sup>268</sup> The most recent, publicly available assessment of the benefit of torture suggests otherwise. *See generally* S. REP. NO. 113-288 (2014) (Conf. Rep.).

constitutional adjudication occurs.<sup>269</sup> While it may be tempting to dismiss Judge Posner as simply articulating a prudential reading of the Constitution with respect to national security issues, to employ Bobbitt's modalities, that reductive characterization may be somewhat misleading. Judge Posner's focus, while prudential, offers persuasive (if not necessarily determinative) arguments for that approach with respect to his subject. That is an important and valuable contribution. Moreover, it is not clear that Judge Posner is committed to the proposition that his approach to constitutional questions arising with respect to national security demonstrates the superiority or exclusivity of prudential arguments in general.<sup>270</sup> Rather, a prudential analysis appears particularly powerful in the national security context. Indeed, in the context of the right to carry arms guaranteed by the Second Amendment, for example, Judge Posner has been indifferent to prudential argument.<sup>271</sup>

## 2. Charles Fried, Doctrine, and Judgment

Charles Fried has generally tempered his criticism of originalism,<sup>272</sup> but has remained one of the few conservative constitutional scholars to have continued to insist on a more complex canon of constitutional interpretation than originalism offers.<sup>273</sup> Fried's constitutional theory is also richer than that of many of its critics. Fried's account of the Constitution and constitutional reasoning is proudly conservative; his constitutional theory and analysis is comfortably within a Burkean intellectual tradition that expressly values the accomplishments of the past.

Fried's response to the problem of the Warren Court—as well, less expressly, as that of originalism—has two elements. First, he seeks to remind us of the importance

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<sup>269</sup> In this respect Judge Posner's scholarship sometimes departs from the good sense of his decision-making. Thus, for example, when Judge Posner discusses *Korematsu*, it is not clear that he would reject the approach upheld in that case except to the extent that constitutional doctrine has evolved inconsistently with it. See POSNER, SUICIDE PACT, *supra* note 34, at 116-17.

<sup>270</sup> Of course, as a founder of the law and economics movement and a fervent utilitarian, Judge Posner gives less weight to ethical argument. See Richard Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637, 1639 (1998).

<sup>271</sup> See *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012) (finding a state statute prohibiting individuals from carrying guns in public unconstitutional and disregarding the costs associated with that conclusion). Judge Posner may have understood his decision to be governed by precedent and therefore prudential arguments that had been earlier unpersuasive ought not to be adduced as determinative. See *id.* at 939-49.

<sup>272</sup> See CHARLES FRIED, ORDER AND LAW: ARGUING THE REAGAN REVOLUTION —A FIRSTHAND ACCOUNT 61-65 (1992) [hereinafter FRIED, ARGUING]. But see Fried, *Judgment*, *supra* note 58 (criticizing the mechanical nature of Justice Scalia's originalist style of decision).

<sup>273</sup> See FRIED, SAYING, *supra* note 239, at 184-200; see also Charles Fried, *Constitutional Doctrine*, 107 HARV. L. REV. 1140 (1994) [hereinafter Fried, *Doctrine*] (describing the temporality of our existence, and its importance for constitutional doctrine); see also FRIED, ARGUING, *supra* note 272. There is a little irony in characterizing Fried as defending a conservative Constitution because he denies that constitutional doctrine can be reduced to, or mapped onto traditional political perspectives. FRIED, SAYING, *supra* note 239, at 241-42.

and complexity of constitutional doctrine.<sup>274</sup> That complexity plays at least three roles in Fried's account of constitutional law. The complexity of our constitutional law demonstrates that there are constitutional authorities beyond the austere text of the Constitution.<sup>275</sup> Fried does not spend much time articulating the ontological nature of that edifice.<sup>276</sup> He does, however, sketch out the notion that the temporal extension of constitutional doctrine is grounded in our own temporal nature.<sup>277</sup> That is, put somewhat simplistically, we require a continuity in the narrative of our constitutional doctrine in the same way we construct and live a continuous, coherent narrative of our own selves.<sup>278</sup> For Fried, the continuity of our constitutional doctrine is demanded for the same reasons that we insist upon continuity and coherence in our own life choices.<sup>279</sup>

An initial ontological question is whether Fried's emphasis upon, and claims for, doctrine can be reconciled with Bobbitt's account of the practice of constitutional argument. Put another way, is Fried ontologically committed to the status of constitutional doctrine independent of our practice? Or can that articulation of constitutional doctrine be recharacterized as describing the kinds of doctrinal arguments that are proper within our constitutional practices? Fried's articulation of doctrine is not inconsistent with Bobbitt's ontology; Bobbitt includes doctrinal argument as one of the six modes of constitutional argument.<sup>280</sup> While Fried emphasizes the importance of doctrine, he nowhere claims exclusivity or priority for doctrine.<sup>281</sup> Fried's focus on constitutional doctrine does not entail that such doctrine be accorded an independent ontological status. We can talk about such doctrine and debate its claims and its strengths and its weaknesses without attributing such status to it.

Nevertheless, because of Fried's endorsement of a variety of Dworkin's views,<sup>282</sup> it may be questioned whether Bobbitt's account can be thus reconciled with Fried's

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<sup>274</sup> See generally Fried, *Doctrine*, *supra* note 273.

<sup>275</sup> See FRIED, SAYING, *supra* note 239, at 3.

<sup>276</sup> See Fried, *Doctrine*, *supra* note 273, at 1140-41.

<sup>277</sup> *Id.* at 1144 ("The solution to the paradox [of reconciling the demands of reason with the requirement of action] at every level begins by noticing that we are time-extended, not punctual, beings."). Here Fried is identifying the need to construct a narrative of our life and of our aspirations, and to account for how our choices have unfolded, with our successes and our failures.

<sup>278</sup> *Id.* at 1144-47.

<sup>279</sup> *Id.* at 1144-48 (describing doctrine as exemplifying constitutive reason, rather than instrumental reason).

<sup>280</sup> BOBBITT, FATE, *supra* note 6, at 39-58.

<sup>281</sup> Indeed, to the extent that Fried's account of constitutional doctrine is accompanied by an account of the importance of judgment, which appears expressly contrasted with historical and other *techné* and linked, in the case of good judgments, with wisdom, Fried's theory would appear inconsistent with such a claim of exclusivity, as such a claim would trivialize the account of judgment. See Fried, *Judgment*, *supra* note 58.

<sup>282</sup> For example, Fried has characterized Dworkin's work both as instructive and foundational to his own. See FRIED, SAYING, *supra* note 239, at 249 n.1; see also Fried,

own. Dworkin, after all, apparently would reject Bobbitt's account, as we have explored at some length.<sup>283</sup> Dworkin's rejection of that account is based upon his insistence upon the objectivity of values.<sup>284</sup> If there is nothing more than our constitutional social practices, then there would appear to be no place for Dworkin's objective standard. There is only our inter-subjective practice.<sup>285</sup> Put another way, Dworkin believes that the truth of propositions of constitutional law arises from the correspondence of those propositions with Dworkin's objective constitutional world.<sup>286</sup> That world includes value theories that articulate political obligations.<sup>287</sup> Fried would not apparently treat propositions of constitutional law as true by correspondence. Such propositions are rather expressions of value or performatives that make constitutional choices.<sup>288</sup> Nevertheless, his exposition of the nature of constitutional doctrine appears to recognize its fundamentally social character, ungrounded on objective facts of the world.<sup>289</sup>

Second, Fried's constitutional doctrine, and its obvious inherent complexity, is evidence for Fried that constitutional law cannot be reduced to political doctrine, or to a series of political choices.<sup>290</sup> The doctrine cannot be so reduced because the elements that it incorporates, the factors that it enumerates, and the distinctions that it draws appear fundamentally removed from ordinary political concepts and values. Moreover, traditional measures of political profiles do not adequately capture the doctrinal positions of the Supreme Court Justices.<sup>291</sup>

Third, Fried relies upon the complexity of constitutional doctrine to help make his case for the importance of judgment.<sup>292</sup> The complexity of the doctrine he

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*Doctrine*, *supra* note 273, at 1156-57 (endorsing the aptness of Dworkin's infamous chain novel metaphor).

<sup>283</sup> See Ronald M. Dworkin, *Objectivity and Truth: You'd Better Believe It*, 25 PHIL. & PUB. AFF. 87 (1996) [hereinafter Dworkin, *Objectivity*] (asserting the existence of objective standards and the existence and importance of an objective world); see also LeDuc, *Anti-Foundational Challenge*, *supra* note 1.

<sup>284</sup> See Dworkin, *Objectivity*, *supra* note 283, at 88-89.

<sup>285</sup> See DONALD DAVIDSON, *Three Varieties of Knowledge*, in SUBJECTIVE, INTERSUBJECTIVE, OBJECTIVE 205 (2001) (calling out for attention and analysis the relationship of the three forms of our knowledge: objective, subjective, and intersubjective).

<sup>286</sup> *Id.*; see also RONALD DWORKIN, *THE PHILOSOPHY OF LAW* 5 (1977) [hereinafter DWORKIN, *PHILOSOPHY*].

<sup>287</sup> DWORKIN, *PHILOSOPHY*, *supra* note 286.

<sup>288</sup> See Fried, *Judgment*, *supra* note 58, at 1025, 1039-40 (invoking the concept of a category mistake in the case of failures to distinguish between the proper role of judicial decision and matter of fact). Fried's important point can be restated without either the concepts of questions of fact or category mistakes.

<sup>289</sup> In making this claim, I have in mind Fried's emphasis on the role of judgment in adjudication. See FRIED, *SAYING*, *supra* note 239, at 6-10 (describing the evolution of judicial doctrine).

<sup>290</sup> See *id.* at 241-42.

<sup>291</sup> See TRIBE & MATZ, *UNCERTAIN JUSTICE*, *supra* note 60, at 4; see also FRIED, *SAYING*, *supra* note 239, at 241-42.

<sup>292</sup> See Fried, *Judgment*, *supra* note 58.

describes, the various arguments that may be constructed from it, and the tacit recognition in that doctrine of the varying considerations that are implicated by the case at hand, grounds Fried's claim that a judge tasked with deciding a case must often, in the end, make a choice in order to make a decision. But that exercise of judgment is necessary, on Fried's account, because of the complexity of the questions presented and the competing interests, values, principles, and interpretations that must be addressed, as to which no algorithm offers a decidable procedure for resolution.<sup>293</sup>

More recently, Fried has articulated more fully an account of constitutional law that emphasizes the role of judgment in adjudication and more directly criticizes the limitations of an originalist approach.<sup>294</sup> The place of judgment in our constitutional adjudication is receiving greater emphasis in part in contrast to the decisional algorithms purportedly endorsed by the originalists.<sup>295</sup> While Fried recognizes that there are better and worse doctrinal choices, at the bottom Fried's account calls for the judge to make a judgment in the case presented.<sup>296</sup> There is not an algorithm, or a decision process, that can substitute for that human role, in which a great many intangibles factor into the quality of the decision, through what we call judgment. Fried agrees with this central tenet of Bobbitt's analysis, without, however, exploring the relationship of his account to Bobbitt's.<sup>297</sup> Fried understands, as judge, advocate, and as professor, the critical<sup>298</sup> and perhaps necessary<sup>299</sup> role of the intermediation of doctrine in the adjudication of constitutional cases. That intermediation is directly and fundamentally challenged by originalism in its claim to the exclusive authority of the constitutional text.<sup>300</sup> It is that rejection of the role of constitutional doctrine—or at least its devaluation—by originalism that Fried himself rejects.<sup>301</sup>

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<sup>293</sup> *See id.*

<sup>294</sup> *See id.*; *see also* FRIED, SAYING, *supra* note 239.

<sup>295</sup> Justice Scalia, for example, offers an account of constitutional judicial decision-making that makes it appear almost mechanistic. *See* SCALIA, INTERPRETATION, *supra* note 14, at 45 (characterizing the task of the originalist judge to determine original understandings as being “easy to discern and simple to apply”).

<sup>296</sup> *See* Fried, *Judgment*, *supra* note 58, at 1043-44 (“It is striking that some of Justice Scalia's most powerful and convincing opinions do not depend on originalist arguments—whether of the intent or meaning variety—but are applications and manipulations of, or extrapolations from existing precedents, doctrines, or principles.”); *see also* BOBBITT, INTERPRETATION, *supra* note 48, at 166-67 (describing a conversation between Judges Hand and Friendly on the necessity, in the end, of making a decision).

<sup>297</sup> *See generally* Fried, *Judgment*, *supra* note 58.

<sup>298</sup> *See* Fried, *Doctrine*, *supra* note 273, at 1144, 1148-51.

<sup>299</sup> *Id.* Judgment is necessary insofar as it cannot be replaced with another method or process. *Id.*

<sup>300</sup> *See, e.g.*, BORK, TEMPTING, *supra* note 5, at 155-56.

<sup>301</sup> *See* FRIED, ARGUING, *supra* note 273, at 61-5. Barnett's reconciliation of precedent with originalism might suggest that Fried was too quick to reject originalism as inconsistent with constitutional doctrine. A more sympathetic reading would recognize that Fried is unwilling to accept the limits on doctrine that Barnett would apply. While Barnett obviously recognizes a more robust role for non-originalist doctrine than does Judge Bork, for example, it would appear a much less robust role than Fried is committed to. For Fried, doctrine is the articulated

In *Saying What the Law Is*, Fried explores a series of critical contemporary constitutional issues in ways that are always thoughtful and often persuasive. His Constitution is perhaps unique, both for its non-originalism,<sup>302</sup> its conservative approach to economic issues,<sup>303</sup> its vision of a limited federal government<sup>304</sup> attentive both to the demands of federalism<sup>305</sup> and requirements of the modern state,<sup>306</sup> and its deep commitment to civil liberties.<sup>307</sup> One need not agree with Fried's substantive interpretations to admire the careful, precise, and closely reasoned analysis. For example, addressing the permissibility of self-imposed affirmative action programs to combat the legacy of racial discrimination, Fried argues that the Court would have been well-served to imposed deadlines on the continued use of such programs.<sup>308</sup> Whether one agrees with that conclusion, it reflects a measured approach to the goal that such programs have, the realities that give rise to them, and the perils that many see inherent in such affirmative action programs.

Part of what makes Fried's analysis so engaging and important is precisely his commitment to the importance of constitutional doctrine and his articulation of the role of judgment. His argument is engaging because his careful and detailed account of the development of constitutional doctrine fits the facts. His account of judgment—and the associated claims as to recent decisions that exemplify good and

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core of the Constitution; while it is not invulnerable to challenge based upon the constitutional text or its original understanding, Fried is not willing to concede the priority of the original understanding, intentions or expectations. That priority, as shown earlier, is required not only under Barnett's originalism but also more generally. See BARNETT, LOST, *supra* note 57; see also FRIED, ARGUING, *supra* note 272, at 61-5.

<sup>302</sup> See FRIED, ARGUING, *supra* note 272, at 61-5.

<sup>303</sup> See FRIED, SAYING, *supra* note 239, at 178-82 (arguing that common-law concepts of property interests have properly informed the interpretation of the prohibition on uncompensated takings of the Fifth Amendment, which, in its broad language, required specification).

<sup>304</sup> *Id.* at 58-59 (exploring and tacitly endorsing the limitation of the legislative branch to the making of laws and the executive to enforcing the laws, with the limitations thereon imposed by *Youngstown Sheet & Tube*).

<sup>305</sup> *Id.* at 32-35 (describing the Court's modern efforts to articulate the limits of the federal government's power to regulate state and local governments, from the short-lived approach of attempting to exempt from regulation of "traditional governmental functions" in *National League of Cities v. Usery*, 426 U.S. 833 (1976), to the narrower prohibition of "commandeering" the machinery of non-federal governments in *New York v. United States*, 505 U.S. 144 (1992)).

<sup>306</sup> FRIED, SAYING, *supra* note 239, at 55-68 (acknowledging that the tripartite division of the federal government under the Constitution is a rough fit with the modern welfare state and the growth of powerful independent administrative agencies).

<sup>307</sup> *Id.* at 184-200 (concluding that the Court in its contemporary recognition of liberty interests "has not gone too far in its protection of liberty under the Due Process Clause. Perhaps it has not gone far enough.").

<sup>308</sup> *Id.* at 240.

bad judgment—is powerful.<sup>309</sup> It is a compelling description of what the cases look like because constitutional cases present hard questions that require both attention to doctrine and the exercise of judgment.<sup>310</sup>

It may not be enough simply to outline the case for the exercise of judgment without offering a fuller account of how that faculty operates, and the parameters within which it must be exercised. It is important because the role of judgment has been so clearly minimized or overlooked by the originalists<sup>311</sup> and by most of their other critics.<sup>312</sup> Thus, while Judge Bork outlines the role of historical research and the role of logic, he does little to suggest an active role for judgment. The exercise of judgment is inconsistent with Bork's originalism because he seeks a theory that cabins judicial discretion and he views the exercise of judgment as opening the way to judicial discretion in a manner that he wants to block.<sup>313</sup> As Fried notes, attention to the necessary exercise of judgment, and the extent to which it precludes simplistic, political reductions, demonstrates the autonomy of constitutional law.<sup>314</sup> That proof may appear somewhat tentative, for it is always possible for someone to offer an account of how the Supreme Court decides cases that make a hash of doctrine. But even such theories, howsoever precisely they may account for decisions in the past or howsoever accurately they may predict the outcomes in the future, miss the critical internal point of view of law. For an element of that internal point of view is doctrinal; as Fried notes expressly, judges purport to articulate and apply doctrine in their decisions.<sup>315</sup> Thus, it is unclear that any such theory, even if it predicted outcomes more clearly than any doctrinal statement, could replace doctrine in our constitutional practice.

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<sup>309</sup> See Fried, *Judgment*, *supra* note 58, at 1043-46 (criticizing *District of Columbia v. Heller* and *McDonald v. City of Chicago* and praising *Loving v. Virginia* and *Lawrence v. Texas* not on the basis of the mode of argument each endorse, but upon the wisdom or judgment reflected in the decision and in the argument).

<sup>310</sup> It may be helpful to compare Fried's account of judgment in constitutional decision-making with Bobbitt's notion of conscience. Both appear to be employed to give an account of how cases are decided. Both appear to describe an innate human faculty, although judgment, for Fried, is clearly informed and sharpened by training. See Charles Fried, *The Artificial Reason of the Law Or: What Lawyers Know*, 60 TEX. L. REV. 35, 38 (1981) ("My thesis holds that law is a distinct subject, a branch neither of economics nor of moral philosophy . . . ; it is that subject which law professors should expound and law students study."); see also BOBBITT, INTERPRETATION, *supra* note 48; Fried, *Judgment*, *supra* note 58, at 1043-46.

<sup>311</sup> See SCALIA, INTERPRETATION, *supra* note 14, at 45; see also *supra* text accompanying note 295.

<sup>312</sup> Posner, for example, does not appear to accord judgment a key role in his account, see POSNER, SUICIDE PACT, *supra* note 34, at 17, and Dworkin's account appears largely to reduce judgment to a philosophical exercise of theory construction, see Dworkin, *Objectivity*, *supra* note 283.

<sup>313</sup> See SCALIA, INTERPRETATION, *supra* note 14, at 44-45 (describing the alternative to originalism as unfettered judicial discretion).

<sup>314</sup> See FRIED, SAYING, *supra* note 239, at 241-42.

<sup>315</sup> See *id.*

Fried's emphasis upon the place of doctrine in our constitutional law may be challenged on two grounds. First, Justice Scalia has challenged directly the notion that common-law methods of making legal judgments are appropriate with respect to constitutional questions in a democratic constitutional republic.<sup>316</sup> Justice Scalia argues that such decision-making usurps the power of the democratically elected legislature or executive.<sup>317</sup> Justice Scalia's argument of usurpation—a reprise of Bickel's counter-majoritarian difficulty—is that any judicial inquiry beyond what a constitutional provision was understood to have meant when adopted arrogates to the judicial branch powers reserved to the people and their elected representatives.<sup>318</sup> That argument is admittedly simple, intuitive, and tempting. But Fried may ask what alternative there can be to the articulation of doctrine that goes beyond the constitutional text and its original understanding. The courts are presented with complex and difficult questions, and it is not possible to begin each question anew, on the almost blank slate of the constitutional text. Once constitutional doctrine is created, as it must, how can it not be authoritative? To strip it of such authority is, as Fried emphasizes, to strip the adjudicative function of its constitutive role.<sup>319</sup>

The originalists thus face an unhappy choice. They must either deny doctrine such a place, and begin the inquiry in each constitutional case, at the beginning, armed only with the constitutional text and the question of its original understanding, or privilege such doctrine and acknowledge that such precedent as authoritative independent of the original understanding of the text. Originalists might respond that they do not reduce the role of judges to practicing history. The task of identifying relevant precedent and assessing its force is included in the judicial role.<sup>320</sup> But most originalists view that task as largely adjunct to the fundamental mission of originalist interpretation.<sup>321</sup>

Second, Fried has no apparent ambition to construct a grand constitutional theory of the type criticized by Professors Farber and Sherry.<sup>322</sup> Nevertheless, in Fried's emphasis upon the importance of doctrine within our constitutional law,<sup>323</sup> it may

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<sup>316</sup> SCALIA, INTERPRETATION, *supra* note 14, at 9-14 (characterizing the common law method as a "recipe for usurpation").

<sup>317</sup> *Id.*

<sup>318</sup> *Compare id.* (arguing that constitutional questions of interpretation usually have an answer as to the original understanding), with ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH (1962) (arguing that the important, hard constitutional questions generally do not have clear answers as to the original understanding).

<sup>319</sup> See Fried, *Doctrine*, *supra* note 273, at 1144-51. But Justice Scalia's response would likely be that the alternative is the discovery of the original semantic understanding of the constitutional text and the application of that text to the case at hand. There is no room in that account for a privileged place for doctrine.

<sup>320</sup> See SCALIA, INTERPRETATION, *supra* note 14, at 139-40; see also BORK, TEMPTING, *supra* note 5, at 157-58.

<sup>321</sup> See SCALIA, INTERPRETATION, *supra* note 14, at 139-40. Thus Justice Scalia characterizes his account of the force of precedent as a pragmatic exception to his originalist theory rather than as an integral part thereof.

<sup>322</sup> See FARBER & SHERRY, DESPERATELY SEEKING, *supra* note 234.

<sup>323</sup> Fried, *Doctrine*, *supra* note 273.

appear that he is simply endeavoring to elevate one of Bobbitt's modalities of constitutional argument, the doctrinal, to pride of place.<sup>324</sup> That is an unfair reading, however, because while Fried's emphasis is upon doctrine, it is unaccompanied by any stronger claim as to the theoretical primacy of that doctrine in constitutional argument. His work is intended, as I read it, as a reminder not of the primacy or exclusivity of doctrine, but only of its importance.<sup>325</sup> If that non-exclusive reading of Fried's claim is correct, then his account is wholly consistent with Bobbitt's account of the independent modalities of constitutional argument.<sup>326</sup>

### 3. Conclusion

These promising threads in the legal academy point the direction toward the reconstruction of our constitutional analysis in the academy, once we are freed of the blinders imposed by the debate over originalism. First, and most importantly, these works engage on the substance of the constitutional questions and controversies. Second, in so doing, they generally do not assume that there is a methodological strategy that can provide an answer, or can even provide an argument in support of such answer. To the extent that these works do make such methodological arguments,<sup>327</sup> the better, more charitable reading is to treat those arguments or assumptions as only vestiges of the unhappy history of the debate over originalism.

In the Introduction I suggested that abandoning the debate about originalism would permit the revitalization of constitutional scholarship. The account of our constitutional practice that I have defended recognizes the role of theory and conceptual analysis in the assessment and development of doctrine, in particular, and constitutional argument in general.<sup>328</sup> With that role recognized, coupled with the recognition that, at least in theory, constitutional scholars in the academy have an institutional competitive advantage in their opportunity to give more extended consideration to such questions, the constitutional academy ought to be positioned to make a more meaningful contribution to our constitutional practice. The failure of contemporary constitutional scholarship has not been volume, after all, it has been *content*. But the ultimate success of legal scholarship to resurrect a meaningful role will also be subject to the willingness of the Court to recognize the potential contribution of scholarship. Only if and when constitutional scholarship returns to a focus on substantive constitutional law rather than the methodological claims of the debate about originalism will we learn whether that promise can be realized.

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<sup>324</sup> See BOBBITT, FATE, *supra* note 6. *But see supra* text accompanying notes 281-290.

<sup>325</sup> Fried's account of doctrine, after all, leaves room for, and, indeed, requires, the exercise of the faculty of judgment in judicial decision. *See* Fried, *Judgment*, *supra* note 58.

<sup>326</sup> *See* BOBBITT, FATE, *supra* note 6, at 7-8, 93-119; *see also* Fried, *Judgment*, *supra* note 58.

<sup>327</sup> *See, e.g.*, Cass R. Sunstein, *The Minimalist Constitution*, in *THE CONSTITUTION IN 2020* 42 (Jack M. Balkin & Reva B. Siegel eds., 2009) [hereinafter Sunstein, *CONSTITUTION 2020*] (defending Sunstein's arguments for deciding constitutional cases on narrower, less theoretical grounds).

<sup>328</sup> That role also encompasses methods that identify and untangle semantic or conceptual confusion.

*D. The Public Sphere after the End of the Originalism Debate*

The potential for a reconstruction of the Constitution in the public sphere is perhaps even more important than the promise of a revitalized constitutional theory in the academy. That is because of the relative importance of the two domains in our democratic republic. The end of the originalism debate would permit us to revive our constitutional discourse within the public sphere of the Republic. The initial inquiry into that possibility must explore the proper nature of constitutional discourse in the public sphere. I want to confine the focus here on a revived constitutional discourse to questions of constitutional law. I want to exclude, for example, important but collateral questions with respect to our talk about the desirable features in a Supreme Court nominee, how the nominating process ought to be conducted with respect to a nominee's constitutional jurisprudence, and if and how the Constitution ought to be amended.<sup>329</sup> The focus here is only on what the Constitution says as a matter of law.

Two examples suggest how the conversation might unfold in a post-debate world in the absence of the constraints of the overhanging debate over originalism and its underlying assumptions. The first question is the relationship of the First Amendment to the political process and the permissible role of campaign finance regulation in federal elections. In *Citizens United v. FEC*<sup>330</sup> the Supreme Court struck down certain federal limitations on campaign financing, including limitations on corporate contributions.<sup>331</sup> But it left intact other important limits.<sup>332</sup> The decision to invalidate limits on corporate campaign spending has been strongly criticized.<sup>333</sup> That case presented a number of complex substantive and procedural issues. The simplest defense of the decision is based upon the straightforward and intuitive notion that more speech—particularly more political speech in the public sphere—is always better.<sup>334</sup> That argument reaches only speech that stands on its own and is not intended to drown out other voices, but that concern is not presented in the recent campaign finance regulation cases.<sup>335</sup> Even the enormously increased level of political campaign spending and advertising is not intended to crowd out other voices.

The proponents of campaign finance regulation present both an affirmative case for such regulation and attempt to rebut the First Amendment argument that such regulation is constitutionally impermissible. For example, Ronald Dworkin, who has

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<sup>329</sup> See JOHN PAUL STEVENS, *SIX AMENDMENTS: HOW AND WHY WE SHOULD AMEND THE CONSTITUTION* (2014).

<sup>330</sup> 558 U.S. 310 (2010).

<sup>331</sup> *Id.* at 371.

<sup>332</sup> See *id.*

<sup>333</sup> See President Barack Obama, Address Before a Joint Session of the Congress on the State of the Union (Jan. 27, 2010); see also ROBERT C. POST, *CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION* (2014); Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581, 581 (2011).

<sup>334</sup> For an account and rebuttal of this argument, see POST, *supra* note 333, at 62-65, which articulates and emphasizes the potentially countervailing principle of maintaining electoral integrity.

<sup>335</sup> See *Citizens United*, 558 U.S. at 349-50.

defended freedom of speech against those who would restrict it if and to the extent it qualifies as hate speech or pornography,<sup>336</sup> has argued that freedom of speech may be restricted if such a restriction implements a legitimate distributive goal.<sup>337</sup> Because he subsumes freedom of speech within the general principle of equality, he would not interpret the First Amendment with those who are characterized as interpreting it as an absolute.<sup>338</sup> In the case of campaign advertising and financing, those distributional goals or other constitutional principles may be controlling.<sup>339</sup>

The regulation of campaign finance and the debate in the public sphere about the permissibility of such regulation raises a number of fundamental issues for the Republic. My interest here is not in defending a substantive resolution of these debates or a theory of free speech insofar as applicable to campaign finance regulation. Instead, I want to focus here only on the process, the tone, and the goals inherent in such public constitutional discourse and how they would be different without the ongoing originalism debate and its underlying foundations. Again, I think the originalism debate and its underlying premises have compromised the public conversation. The tone is strident and the opposing sides in the debate hardly seem to want to persuade one another. That tone has been dominant not just in the Justices' opinions in *Citizens United*, but also in the discourse in the public square.<sup>340</sup>

Some of that indifference arises from the accepted understanding in the originalism debate that the divergent objective Constitutions to which each side of the debate commits are incommensurable. The protagonists in the debate have conceded that they will be unable to convince their opponents in the debate. Even when the disagreements are not fundamentally about original understandings, at least in any textual or semantic sense,<sup>341</sup> the conventions of contemporary constitutional argument permit the opposing protagonists to advance arguments that are not expected to convince the opposing position. This seems clear in *Noel Canning*, for example, as discussed above.

The discussion of the requirements of the First Amendment with respect to campaign financing has been substantially shaped by the originalism debate and its underlying assumptions. That discussion has assumed that there is an answer to the question of what the First Amendment requires that may be discovered by constitutional research and analysis. Once discovered, alternative conclusions must be rejected as false. The commitment to the existence of such an answer arises out of the tacit ontological assumptions of originalism. On the anti-originalist side of the

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<sup>336</sup> See RONALD DWORKIN, *Mackinnon's Words*, in FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 238 (1996) [hereinafter DWORKIN, FREEDOM'S LAW].

<sup>337</sup> RONALD DWORKIN, IS DEMOCRACY POSSIBLE HERE? PRINCIPLES FOR A NEW POLITICAL DEBATE 69-70 (2006).

<sup>338</sup> Of course, even those who purportedly interpret the First Amendment as an absolute do not do so. See, e.g., ELY, DEMOCRACY, *supra* note 236, at 3 (noting that Justice Black's constitutional jurisprudence is more nuanced than has been often thought).

<sup>339</sup> See POST, *supra* note 333, at 62-65 (articulating the principle of ensuring electoral integrity).

<sup>340</sup> See, e.g., BREYER, ACTIVE LIBERTY, *supra* note 12, at 132.

<sup>341</sup> The disagreements might be about expectations and intentions independent of the semantic meaning of the constitutional text.

debate, defenders of limitations like those struck down in *Citizens United* make prudential and ethical arguments accompanied by half-hearted arguments from original understanding.<sup>342</sup> Missing is a forthright acknowledgment that the ways in which our world has fundamentally changed—technologically, economically, socially, and politically—to make appeals to the Founders’ expectations and understanding of little help in resolving the question whether campaign finance and the role of corporations in political campaign financing may be regulated within the limits of the First Amendment. Only with a recognition of the ontological commitments—and the error of those commitments—can we hope to have a robust constitutional dialogue about campaign finance regulation. The formalism of the current debate is sterile and inadequate.

The second example of constitutional discourse and argument in the public sphere that I want to explore relates to the role of the Constitution with respect to economic inequality. The problem of inequality as a constitutional issue surfaced nearly fifty years ago in the heyday of the Warren Court and the exuberance of the liberal legal academy.<sup>343</sup> At that time, there were some suggestions that the Constitution provided a path toward the mitigation of the extent to which inequality, some race-based, some not, infects American society.<sup>344</sup> The focus of such strategies was on employing the Equal Protection Clause of the Fourteenth Amendment to assure a minimum level of economic resources for all individuals.<sup>345</sup> The arguments for such economic constitutional rights proved as controversial as any arguments made by the Left in the constitutional space.<sup>346</sup> The principal objection made to such arguments was that they left our constitutional law untethered to text or history and without meaningful constraints.<sup>347</sup>

More recently, Martha Nussbaum has championed a similar expansive approach to the definition of individual constitutional rights.<sup>348</sup> Nussbaum describes her

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<sup>342</sup> See *Citizens United v. FEC*, 130 S. Ct. 876, 948-52 (2010). For a more enthusiastic appeal to the original understandings with a different interpretation, see *Citizens United v. FEC*, 550 U.S. 310, 388-93 (Scalia, J., concurring) (2010).

<sup>343</sup> See, e.g., Charles Black, *The Unfinished Business of the Warren Court*, 46 WASH. L. REV. 3, 19 (1970); Frank I. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 9 (1969) (arguing that the Constitution ought to be understood as requiring the state to protect against “certain hazards which are endemic in an unequal society” rather than required to mitigate inequality itself).

<sup>344</sup> See, e.g., DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 188 (1993); MICHAEL S. HARRINGTON, *THE OTHER AMERICA* 80-81 (1962); GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* 828-29 (1944).

<sup>345</sup> See, e.g., Michelman, *supra* note 343, at 33.

<sup>346</sup> See BORK, *TEMPTING*, *supra* note 5, at 207; Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 362 (1981).

<sup>347</sup> See SCALIA, *INTERPRETATION*, *supra* note 14, at 44-45; BORK, *TEMPTING*, *supra* note 5, at 251-59.

<sup>348</sup> See Martha Nussbaum, *Foreword: Constitutions and Capabilities: “Perception” Against Lofty Formalism*, 121 HARV. L. REV. 4, 6 (2007) [hereinafter Nussbaum, *Capabilities*] (arguing that an appropriate and important task of a nation’s constitution is to assure its citizens the resources and opportunities to develop a core set of capabilities). See generally,

approach as identifying the particularly human capabilities that a society ought to commit to make available to all of its members.<sup>349</sup> Styled a capabilities approach<sup>350</sup> to fundamental rights, Nussbaum argues that such rights ought to be protected as a matter of constitutional law.<sup>351</sup> While claiming that certain of such rights have been well protected in our constitutional law, she acknowledges that others, particularly related to social and economic rights, have generally received short shrift.<sup>352</sup> One of the doctrinal impediments that Nussbaum articulates to a broader recognition of rights to other capabilities is formalism.<sup>353</sup> She argues that such formalistic reasoning may be invoked to disregard the practical realities of human experience that ought, ultimately, to be the touchstone of our theory and practice of constitutional rights. In particular, she dismisses the cautious invocation of concerns about institutional competence to restrain expansive interpretations of constitutional rights.<sup>354</sup>

At the outset, it is important to explore the extent to which Nussbaum casts her claims as constitutional legal claims rather than as constitutional *desiderata*. On their face, derived from philosophical arguments about persons and justice, they may seem to parallel the arguments that Dworkin made decades before<sup>355</sup>—and be similarly vulnerable to challenge from originalists and others.<sup>356</sup> While Nussbaum recognizes that her project sounds strong themes of constitutional change,<sup>357</sup> she presents her theoretical arguments, at least in part, as providing legal arguments.<sup>358</sup>

Nussbaum's intent to make legal arguments figures most clearly in her criticisms of particular cases decided by the Court in the 2006 Term. Nussbaum is highly critical of the Court's decision in *Gonzales v. Carhart*.<sup>359</sup> The Court there addressed

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MARTHA C. NUSSBAUM, *CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH* (2011).

<sup>349</sup> Nussbaum, *Capabilities*, *supra* note 348, at 6.

<sup>350</sup> *Id.* at 7.

<sup>351</sup> *Id.* (proposing to employ the capabilities approach as a method for understanding the foundations of our constitutional law).

<sup>352</sup> *Id.*

<sup>353</sup> *Id.* at 96-97.

<sup>354</sup> *Id.*

<sup>355</sup> See DWORKIN, *FREEDOM'S LAW*, *supra* note 336; DWORKIN, *EMPIRE*, *supra* note 168, at 225-66.

<sup>356</sup> See SCALIA, *INTERPRETATION*, *supra* note 14, at 45 (questioning *which* philosophy one ought to look to if it were to be recognized as a source of constitutional law); Tribe, *INTERPRETATION*, *supra* note 73, at 72; SUNSTEIN, *LEGAL REASONING*, *supra* note 47, at 35-50 (arguing for the judicial use of incompletely theorized decisions).

<sup>357</sup> Nussbaum, *Capabilities*, *supra* note 348, at 8-9 (arguing that her "theoretical approach has deep ties to the common law tradition of legal reasoning"). Nussbaum also concedes that the theory of rights she is defending encompasses rights "not embodied" in the Constitution. *Id.* at 8.

<sup>358</sup> When Nussbaum turns to stoic concepts of the person her argument is clearly moving beyond only authorities of American constitutional law. See *id.* at 10-11.

<sup>359</sup> See Nussbaum, *Capabilities*, *supra* note 348, at 84-87 (discussing *Gonzales v. Carhart*, 550 U.S. 124 (2007)).

the question of whether a statute prohibiting so-called partial birth abortions was permissible under the Constitution.<sup>360</sup> In particular, Nussbaum challenges the apparent factual predicates on which the Court's opinion proceeds.<sup>361</sup> She argues that the Court viewed the relevant facts formalistically and generally failed to acknowledge the facts widely accepted as true within the medical community, and finds support for her criticisms in Justice Ginsburg's dissenting opinion.<sup>362</sup> For example, she calls out Justice Kennedy's claim that some women who choose abortion come to regret that decision;<sup>363</sup> Nussbaum suggests that the available empirical evidence shows such women to be the exception rather than the rule.<sup>364</sup>

With the English translation, publication, and runaway commercial success of Thomas Piketty's *Capital in the Twenty-First Century*<sup>365</sup> in 2014 and the increasing attention being made to the stagnation of wages for the middle class and the increasing share of income and wealth earned and held by the most affluent members of our society,<sup>366</sup> the issue of economic inequality is receiving more attention in the public sphere.<sup>367</sup> Does that discourse about inequality in the public sphere have a constitutional dimension? If so, is that dimension different from the largely orphaned analysis defended by Frank Michelman and others in the 1960s?<sup>368</sup> More importantly, are the arguments today more persuasive than those offered in the past?

Nussbaum's capabilities approach would assert that the state has a responsibility for providing certain resources to its citizens; that duty is not limited, as Michelman argued, to mitigating the hazards of inequality. Nussbaum's argument has an attractive directness that Michelman's argument lacks, but it also must endorse a level of substantive constitutional content that Michelman's more cautious theory avoids. Nussbaum may appear to be codifying and constitutionalizing a particular philosophical stance in a substantive manner that many constitutional theorists have argued against.<sup>369</sup> Nussbaum would probably deny that such normative, philosophical premises ought not to inform constitutional analysis rather than deny that she has incorporated such premises.<sup>370</sup> Unless her philosophical arguments can

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<sup>360</sup> *Carhart*, 550 U.S. at 135-136.

<sup>361</sup> Nussbaum, *Capabilities*, *supra* note 348, at 86-87.

<sup>362</sup> *Id.*

<sup>363</sup> *Id.* at 86.

<sup>364</sup> *Id.* at 86, n.386.

<sup>365</sup> THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* (Arthur Goldhammer trans., 2014).

<sup>366</sup> See generally GEORGE PACKER, *THE UNWINDING: AN INNER HISTORY OF THE NEW AMERICA* (2014).

<sup>367</sup> See, e.g., KLEINBARD, *supra* note 31.

<sup>368</sup> See *supra* text accompanying notes 341-42.

<sup>369</sup> The most celebrated statement of this position is Justice Holmes's dissent in *Lochner*. See *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) ("The 14th Amendment does not enact Mr. Herbert Spencer's Social Statics."). For a more recent, originalist statement of this position, see SCALIA, *INTERPRETATION*, *supra* note 14, at 45.

<sup>370</sup> Nussbaum would appear prepared to defend such normative constitutional content. In her *Foreword* to the *Harvard Law Review*'s analysis of the Supreme Court's decisions in its

be translated into accepted modes of constitutional arguments her strategy would appear questionable as a matter of legal argument.

*E. Reimagining the Contributions of the Principal Protagonists*

Finally, we may re-imagine the analysis of the leading protagonists in the debate in a post-debate world. Such a counterfactual analysis is by no means simple. Justice Scalia's traditional riffs on the necessity or righteousness of original understanding would be lost, or at least focused on the context of the specific constitutional question at hand. Moreover, in a world of competing modes of argument, the requirements for an effective argument would have dictated that Justice Scalia's affirmative originalist arguments be accompanied by an express defense as to why the alternative modes of arguments ought to be rejected in the case at hand.<sup>371</sup> It would be necessary to engage on all the modalities of constitutional argument. That broader express range of argument would have made Justice Scalia's arguments and opinions more, not less, powerful and persuasive. Moreover, when Justice Scalia's judgment led him away from textual and historical arguments he would have been free to do so directly and forthrightly. Will such a post-originalist debate world do violence to Justice Scalia's substantive jurisprudence? Critics on the Left may be disappointed; one of the implications is that such broader range of proper and permissible argument need not lead Justice Scalia away from his emphasis upon historical and textual argument. If Bobbitt be correct that the modalities of constitutional argument cannot be reconciled with any algorithm or higher modality of argument, then Justice Scalia would be free to continue to concentrate his argument in the historical and textual modes. One benefit of such a catholic theory and practice of constitutional argument is that Justice Scalia's snarky dismay at his colleagues' arguments from prudence, structure, precedent, and ethics would be forfeit. For the reasons argued above with respect to the tone of the debate over originalism,<sup>372</sup> would be no small step forward.

More importantly, however, the result would be more persuasive opinions, because by acknowledging and addressing other modes of argument such opinions could persuade a broader audience. In other cases recognition of the other modes of argument might lead either to the recognition that a different conclusion is warranted, or might lead to a different basis on which to defend a result reached on an originalist argument. The clearest example may be Bork and Justice Scalia's use of precedent almost as a *deus ex machina* to rescue them from untenable

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2006 Term, Nussbaum assesses those decisions against the normative commitments of the capabilities approach. Nussbaum, *Capabilities*, *supra* note 348, at 7. That approach would not be important absent a commitment to such normative content.

<sup>371</sup> See, e.g., *Lee v. Weisman*, 505 U.S. 577, 631 (1992) (Scalia, J., dissenting) (elaborately chronicling the historical practice of religious prayer at public and governmental functions and occasions and inferring the meaning of the First Amendment from those practices); *Maryland v. Craig*, 497 U.S. 836, 864-65 (1990) (Scalia, J., dissenting) (looking to the eighteenth-century meaning of "to confront the witnesses against him"). I discuss *Maryland v. Craig* more fully in LeDuc, *Originalism's Claim*, *supra* note 39, at section II.E (exploring some of the textual issues that Justice Scalia's account elides).

<sup>372</sup> See LeDuc, *Originalism's Claim*, *supra* note 39, at section II.E.

implications of their originalist theory.<sup>373</sup> The starkest example may be Justice Scalia's confidence that lashing is constitutionally impermissible as cruel and unusual punishment.<sup>374</sup>

Support for my claim that constitutional practice would be richer and more robust in a post-debate world comes from Fried's suggestion that some of Justice Scalia's strongest opinions are those in which he freed himself of the leg irons of originalism (paraphrasing a bit).<sup>375</sup> Those comments suggest the directions that would have become available to Justice Scalia to revivify his constitutional analysis and to reconnect it with the public discourse we so desperately need. Justice Scalia might have been able to make a persuasive case that confrontation under the Sixth Amendment requires that accused see the witness against him, not merely that the witness be identified and available for cross-examination without relying only upon eighteenth-century practice, for example.

Dworkin's constitutional analysis and argument could also be stronger in such a world. Dworkin's claim to special, philosophical expertise in constitutional analysis would be denied in such a world, and stripped of such Herculean talents, Dworkin might choose to confine himself to articulating the unities of value theory,<sup>376</sup> rather than the requirements of constitutional law. Not only must that claim be rejected, but Dworkin's more general claim to incorporate moral theory into constitutional cases must also be rejected.<sup>377</sup> Indeed, Dworkin has himself occasionally distinguished his jurisprudential analysis from his legal analysis, despite his jurisprudential theory of law as integrity.<sup>378</sup> Before he was a jurist, Dworkin was a fine lawyer.

An example of Dworkin's constitutional analysis that stands on its own may be his analysis of the requirement of constitutional equal treatment. Dworkin argues that mere treatment equally is insufficient and instead treatment must be of persons

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<sup>373</sup> The prohibition on segregated public schools in *Brown* and the decisions limiting or prohibiting lashing would appear to stand as examples of such use. See Antonin Scalia, *Originalism: The Lesser Evil*, 57 CIN. L. REV. 849, 861 (1989) [hereinafter Scalia, *Originalism*]; see also BORK, *TEMPTING*, *supra* note 5, at 157-59. It is hard to imagine that any originalism—or other constitutional theory—that would reverse *Brown* or permit lashing as a criminal punishment would be a plausible or attractive account of our Constitution. *But see* SCALIA, *INTERPRETATION*, *supra* note 14, at 139-40. The power of our substantive commitments to certain constitutional outcomes in the face of potentially inconsistent constitutional theory bears analysis and may help confirm the jurisprudential claims I have made elsewhere, but I cannot explore that line of analysis here.

<sup>374</sup> See Scalia, *Originalism*, *supra* note 373, at 861 (making a modest defense of originalism largely without the more sweeping claims Justice Scalia has come to defend).

<sup>375</sup> See Fried, *Judgment*, *supra* note 58, at 1043-46.

<sup>376</sup> See, e.g., RONALD DWORKIN, *JUSTICE FOR HEDGEHOGS* (2011) (arguing for a unified theory of objective value).

<sup>377</sup> See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 149 (1977) [hereinafter DWORKIN, *TAKING RIGHTS SERIOUSLY*]; see also Christopher L. Eisgruber, *Should Constitutional Judges Be Philosophers?*, in *EXPLORING LAW'S EMPIRE: THE JURISPRUDENCE OF RONALD DWORKIN* 5 (Scott Hershovitz ed., 2006) (arguing that a purely philosophical approach, which incorporates moral philosophy into the core of constitutional interpretation, to the exclusion of historical argument, does not adequately support Dworkin's theory of law as integrity).

<sup>378</sup> See DWORKIN, *EMPIRE*, *supra* note 168, at 225-66.

as equals<sup>379</sup> might be an example of a subtle and perhaps compelling distinction that warrants careful consideration as a reading of the constitutional text. Nevertheless, much of his work has been at a level of abstraction and theory that appears inconsistent with the kind of analysis that we are urging in the next generation of constitutional thinking. In the post-originalism debate world would Dworkin be entitled to his commitment to a theory of law as integrity in his constitutional interpretation? To the extent that law as integrity is grounded on a foundational, representational theory, Dworkin's philosophical theory need be modified or abandoned. But the task of articulating constitutional doctrine or defending the constitutional decisions that Dworkin endorses need not be abandoned. His substantive constitutional theory may well remain intact.

To the extent that Dworkin's distinctive strategy in constitutional interpretation is to make express reference to moral theory,<sup>380</sup> the question arises whether that strategy can be reconciled with Bobbitt's acknowledgment of the importance of ethical argument.<sup>381</sup> Bobbitt, of course, distinguishes his concept of ethical argument from moral argument.<sup>382</sup> Thus, to the extent that Bobbitt's account would exclude arguments from moral theory, just as it would exclude classically political arguments,<sup>383</sup> Dworkin's interpretation would apparently need radical reconstruction.

If Dworkin abandons his philosophical defense of his claims about equality and autonomy<sup>384</sup> as a matter of constitutional argument, what is left? He would no longer be able to sneer at the originalists as philosophical naïfs.<sup>385</sup> That canard does not have the force that Dworkin imagines.<sup>386</sup> Dworkin would no longer be able to reach outside the law to philosophy to claim support or justification for the constitutional decisions he wants to endorse.<sup>387</sup> That said, theory is important in constitutional interpretation and adjudication and Dworkin is as able as any to tease out the

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<sup>379</sup> DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 377, at 227.

<sup>380</sup> See Rebecca L. Brown, *How Constitutional Theory Found its Soul: The Contribution of Ronald Dworkin*, in *EXPLORING LAW'S EMPIRE: THE JURISPRUDENCE OF RONALD DWORKIN 5* (Scott Hershovitz ed., 2006).

<sup>381</sup> See BOBBITT, FATE, *supra* note 6, at 94.

<sup>382</sup> *Id.* at 94-95.

<sup>383</sup> See Philip Bobbitt, *Is Law Politics?*, 41 STAN. L. REV. 1233, 1240 (1989) (review essay about MARK TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW) (defending the claim that constitutional law has a particular domain and cannot simply be reduced to a matter of political choice or power).

<sup>384</sup> See generally DWORKIN, FREEDOM'S LAW, *supra* note 336; DWORKIN, EMPIRE, *supra* note 168 (arguing that legal positivism must be rejected because legal interpretation, including constitutional interpretation, requires appeal to, and the harmonization with, moral principles); DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 377 (arguing that judicial decision requires the application of principles, rather than simply the application of legal rules or the weighing of competing interests like a legislative decision make, although Dworkin may later have moved away from this dichotomy).

<sup>385</sup> See Dworkin, INTERPRETATION, *supra* note 73, at 117 n.6.

<sup>386</sup> See generally LeDuc, *Philosophy and Constitutional Interpretation*, *supra* note 39 (arguing that philosophy cannot provide answers to constitutional controversies).

<sup>387</sup> See generally DWORKIN, EMPIRE, *supra* note 168, at 97-98.

implications of theory. But to play as a constitutional interpreter he must descend from the Mt. Olympus of philosophy and abandon his claim that his philosophical sophistication and his associated philosophical premises ground his constitutional analysis and conclusions more firmly than, for example, the originalists. But Dworkin's doctrinal and ethical arguments can still be made forcefully in such brave new world.

Recasting Dworkin's central arguments in the post-debate, anti-foundational, multi-modal world of constitutional practice that I have described here requires one of two strategies. First, Dworkin might challenge Bobbitt's rejection of natural law arguments as a permissible mode of constitutional argument.<sup>388</sup> Dworkin might defend such a mode of argument as a continuing part of our accepted constitutional practice. The role that such argument played historically certainly creates a foundation for such an argument.<sup>389</sup> But since *Lochner*<sup>390</sup> was discredited, it is certainly not clear that natural law argument has been accepted in our constitutional practice. Second, Dworkin might recast his expressly moral arguments as ethical arguments, in Bobbitt's sense. Both strategies are possible and would appear to offer the promise of making Dworkin's arguments more legal—and more persuasive.

Sunstein's constitutional argument could be stronger in such a world, too. If Sunstein abandoned his methodological claim that judicial decisions ought to be minimalist and the appeal to principle muted or rejected, he could acknowledge the place of ethical argument and other, principled claims that has been central, if rare, in our constitutional jurisprudence.<sup>391</sup> From that stance he would be more likely to give *Brown* its due and to recognize the force of *Heller*, for example.

Finally, as noted above, Laurence Tribe has announced<sup>392</sup> that he can no longer produce his celebrated constitutional law treatise.<sup>393</sup> The reason is the disarray in the articulation of constitutional law in the current Supreme Court.<sup>394</sup> That reservation has not prevented him from continuing to otherwise engage actively in our constitutional discourse and argument.<sup>395</sup> But Tribe's claim is inconsistent with his occasional recognition that our constitutional law is not simply a matter of identifying, following, or conforming to rules.<sup>396</sup> The tension and the sometimes

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<sup>388</sup> See Philip Bobbitt, *Reflections Inspired by My Critics*, 72 TEX. L. REV. 1869, 1916 (1994) (arguing that such natural law arguments do not figure frequently or prominently in contemporary arguments in constitutional adjudication).

<sup>389</sup> See generally Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law* (pts. 1 & 2), 42 HARV. L. REV. 149 (1928), 42 HARV. L. REV. 365 (1929).

<sup>390</sup> *Lochner v. New York*, 198 U.S. 45 (1905).

<sup>391</sup> See generally BOBBITT, FATE, *supra* note 6, at 125-36.

<sup>392</sup> Tribe, *Treatise Power*, *supra* note 218, at 292, 294-95.

<sup>393</sup> TRIBE, CONSTITUTIONAL LAW, *supra* note 222.

<sup>394</sup> Tribe, *Treatise Power*, *supra* note 218, at 292-293. See generally TRIBE & MATZ, UNCERTAIN JUSTICE, *supra* note 60.

<sup>395</sup> See, e.g., TRIBE & MATZ, UNCERTAIN JUSTICE, *supra* note 60; TRIBE, INVISIBLE, *supra* note 13.

<sup>396</sup> Tribe's plaintive cry about the disarray in our constitutional doctrine is one of the important reasons that I have elsewhere characterized Tribe as rejecting the anti-

inconsistency in our contemporary constitutional doctrine and decisions is indicative of the competing arguments that are made or which implicitly underlie that doctrine and decision. Tribe may be tacitly drawing on ontological assumptions about the nature of the Constitution that would characterize the Constitution as ontologically independent of us.<sup>397</sup> Tribe seems to be asserting that the noumenal Constitution has become obscured and difficult, if not impossible, to articulate. Absent such an erroneous ontological assumption it is unclear why an exegetical treatise is impossible or devalued. Tribe's treatise is at least as important in a world freed of the shackles of the originalism debate and its underlying foundations. The value of that treatise does not arise from its correct representation of the objective Constitution.

## II. OUR AMERICAN CONSTITUTION

Four conclusions should be drawn expressly from this final step in the therapeutic project. First, there is a plausible important alternative constitutional mission for the courts, the legal academy, and the public if we abandon the debate over originalism. Prior articles outlined the contradictions inherent in the debate and the implausibility of the unstated premises on which it was based.<sup>398</sup> This Article has shown how promising our constitutional culture could be if we abandoned that fruitless debate. Without the constraints of keeping score within the overhanging debate about originalism and without the temptation of global, methodological strategies to delegitimize the arguments and approaches of the opposing positions, protagonists on both sides of the debate can engage substantively about the constitutional questions the Republic and its citizens face. We can articulate and debate the constitutional controversies we face recognizing that in the end the Court (and the other, less authoritative constitutional actors) can and must decide those questions on the basis of the array of constitutional arguments that comprise our constitutional decision process. Readers must judge for themselves whether such a constitutional culture and self-conscious practice promises to be more engaging than the practice we have now that is overshadowed by the acrimonious, scholastic, and seemingly never-ending debate over originalism.

Second, a post-debate culture accords a more robust place for the public in our constitutional discourse. Constitutional decision is not a matter only for the experts in arcane legal history of the eighteenth century or the artificial and nuanced puzzles of contemporary analytic philosophy, or for those who have mastered the intricacies of two centuries of constitutional doctrine—although some of those participants in our constitutional discourse have an important role to play. The citizenry has a central place in our constitutional discourse and decision-making, and not only in moments of constitutional crisis.<sup>399</sup> Their role is to understand what the Constitution

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representational, anti-foundational account that I have endorsed. See LeDuc, *Anti-Foundational Challenge*, *supra* note 1.

<sup>397</sup> See generally *id.*

<sup>398</sup> See *id.*; LeDuc, *Ontological Foundations*, *supra* note 3; LeDuc, *Philosophy and Constitutional Interpretation*, *supra* note 39.

<sup>399</sup> But see generally 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1993) (defending a theory of constitutional change in which *de facto* amendments to the Constitution may be adopted at moments of constitutional crisis by the will of the people outside the purportedly exclusive processes provided for by Article V).

provides and, at some level, to act in compliance with it. That understanding—and the argument about matters of constitutional controversy—cannot and should not be disassociated from the substantive normative questions at the heart of many such disputes. At the same time, that argument cannot be reduced to an argument about such normative questions; the historical understanding and the semantic and pragmatic import of the constitutional text are both relevant and potentially determinative with respect to contemporary constitutional questions. The requirements imposed by the Constitution figure in our political debate and discourse in the public sphere—although not all such discourse and debate implicates constitutional issues. For example, in the 2012 presidential elections and, in all likelihood, in the 2016 election cycle the United States policy on immigration has figured prominently in the campaign debate. Contemporaneously, a number of recent state laws have been struck down, in whole or in part, for constitutional infirmities.<sup>400</sup> The constitutional constraints on United States immigration policy can be and ought to be a part of that conversation and debate. The policy debate ought to be informed by the constitutional parameters and the policy debate, including the prudential concerns that shape that debate, ought also to inform the resolution of the constitutional questions that are a part of that debate.

Third, it is important to note the limits on what I have argued here. In defending the benefits of renewed attention to doctrine, I do not mean to deny Sunstein's claim that we must acknowledge the limits of constitutional law as an element of our political society. We must recognize and acknowledge the primacy of democratic politics.<sup>401</sup> But Sunstein's jurisprudential claims for privileging minimal, incompletely theorized constitutional decisions and opinions is largely irrelevant to the constitutional questions I have been addressing. Even if we acknowledge the primacy of democratic politics in the executive and legislative branches of the federal government, there will always be judicial constitutional questions for the Court. Those questions will likely arise from a variety of sources. Some will arise from working out the implications of fundamental principles. Some will arise from the evolution of our political society and new ways in which government does or does not seek to meet the needs of its citizens. Some will arise from technological and other changes in the world. Some will likely arise as particular doctrines or precedents of our constitutional law appear increasingly unsatisfactory or wrongheaded.

Those constitutional questions presented to the courts will be different, and the methods of adjudication different, from the problems properly presented to the legislative and executive branches. Dworkin was right to emphasize the difference between the modes of argument deployed in legislation and adjudication, even if he erred in his description of the arguments available in constitutional adjudication.<sup>402</sup> The legislative and the executive branch, after all, are engaging in governing; they are seeking to accomplish various goals, within the framework of the Constitution—

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<sup>400</sup> See, e.g., *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 2046 (2015) (invalidating a state law denying bail to alleged illegal immigrants under the Fourteenth Amendment); *Rodriguez v. Robbins*, 715 F.3d 1127 (9th Cir. 2013).

<sup>401</sup> Sunstein, *CONSTITUTION 2020*, *supra* note 327, at 37.

<sup>402</sup> See DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 377, at 82-84.

or, potentially, without regard for the Constitution.<sup>403</sup> The judiciary is charged only with adjudicating the controversies brought by a party with standing that come before it. As a result, it is not just as Dworkin notes that judges cannot consider certain policy questions (or, at least need give such arguments less weight than the legislature would, for example) but that the judiciary must weigh principles of the Constitution (or provisions thereof) more heavily.<sup>404</sup>

It will remain judges' task to make the arguments and judgments necessary to articulate our constitutional doctrine and decide our constitutional cases. That may be done sometimes, but not always, on a minimalist basis, but it need not be done on a minimalist basis.<sup>405</sup> As Bork suggests, *Griswold* could perhaps have been decided with the same result on the basis that the Connecticut criminal statute struck down was no longer valid and enforceable under the Equal Protection Clause because that law had fallen into desuetude.<sup>406</sup> That would have been a far more minimalist, and less controversial approach. It would also, of course, have been a very different decision. In light of the place of *Griswold* and its progeny in our constitutional jurisprudence, it is not clear that such a more limited rationale for the decision would have been more desirable.

*Brown*, for example, required a fundamental, principled shift in the constitutional theory and practice of the Equal Protection Clause if it were to have the effect the Court intended, just as almost a century before, Justice Taney and the Court concluded in *Dred Scott* that the interpretation and practice of the Privileges or Immunities Clause required such a fundamental interpretation.<sup>407</sup> *Brown* could not have been effectively decided as an entirely minimalist decision.<sup>408</sup> There was an

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<sup>403</sup> While the President and members of Congress all swear an oath to uphold the Constitution—and, in the case of President Obama on his inauguration in 2009, more than one—and many are attentive to constitutional directives, there are occasionally circumstances in which the cost of constitutional compliance may appear too high and the Congress or the President is prepared to ignore or test the constitutional limits on action. See JEFFREY TOOBIN, *THE OATH: THE OBAMA WHITE HOUSE AND THE SUPREME COURT* (2012) (describing the re-administration of the President's oath of office in 2009); see, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 589 (1952) (holding that no constitutional authority existed for the President, acting as Commander in Chief, to take control of the privately-owned steel mills located in the United States).

<sup>404</sup> DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 377, at 82-84.

<sup>405</sup> The potentially minimalist decision in *Heller* (at least in Sunstein's view) might have been decided (perhaps more forthrightly, if more controversially) in a less minimal way.

<sup>406</sup> BORK, *TEMPTING*, *supra* note 5, at 96. The doctrine of desuetude, while perhaps not yet fallen into desuetude, is certainly far from robust, so a decision on such a basis would also have been novel, if conceptually more limited. The doctrine of desuetude has, however, historically been very narrowly applied.

<sup>407</sup> It is not clear that Sunstein acknowledges the need ever for broader decisions—or that such broad, principled decisions can ever be proper. If there are good faith disagreements within a political community on fundamental values, each commanding substantial support, it is not clear that Sunstein would permit a court to select a winner. Yet it is hard to believe that in all circumstances there cannot be a winner entitled to a decision in its favor or that a court would not owe a decision in favor of such a party's position.

<sup>408</sup> Even as it was decided, *Brown* was incompletely theorized in certain respects. *Brown* did not expressly articulate the principle that segregated facilities or racial discrimination was

important advance in our constitutional law when the Court subsequently moved from its desperate prudential reasoning in *Naim*<sup>409</sup> to avoid confronting state anti-miscegenation laws to that reading of the Equal Protection Clause that the Court forthrightly pronounced in *Loving*<sup>410</sup> in striking down such laws. The decision in *Loving* was important, not simply because of its outcome, as the first case striking down a southern anti-miscegenation law, but for its holding and reasoning about the scope of the Equal Protection Clause. Sunstein perhaps underestimates both the hard work of constitutional law that remains to be done,<sup>411</sup> and the importance of that work,<sup>412</sup> within our existing adjudicative and argumentative practices. The work is important because, among other reasons, the always careful and sometimes creative analysis of constitutional doctrine is the means by which we constitute the corpus of our most fundamental law. That law shapes the lives of our citizens and the course of our political society and culture.

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inherently inconsistent with the Equal Protection Clause. Thus, the particular psychological harm identified as resulting from racially segregated public schools provided a narrower ground of decision than a broader, more fully principled rationale would have provided. The broader, more principled reading that we now find in *Brown* is in part shaped by the broader force that decision has acquired over time.

<sup>409</sup> *Naim v. Naim*, 350 U.S. 891 (1955) (per curiam). I characterize this reasoning as desperately prudential because the Court repeatedly refused to consider the manifest constitutional question presented, affirming the state's denial of the petitioner's rights, on the purported basis of inadequate pleadings that the state refused to permit to be redressed. See *Naim v. Naim*, 90 S.E.2d 849 (Va. 1956) (final state judicial action, denying the petitioner the ability to reopen the record in the trial court). The plaintiff in *Naim* was denied review in the Supreme Court on procedural grounds. See *Naim*, 350 U.S. at 355. Subsequent historical research has demonstrated that the Court's refusal to hear the case was driven by prudential concerns forcefully argued by Justice Frankfurter. See generally Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court 1948-1958*, 68 GEO. L. REV. 1 (1979) (referring to correspondence among the Justices, principally a memorandum authored by Justice Frankfurter, to describe how Justice Frankfurter's prudential arguments led the Court to decline to address state prohibitions on interracial marriage for many years after *Brown* was decided).

<sup>410</sup> 388 U.S. 1 (1967) (finally, thirteen years after *Brown*, striking down Virginia's prohibition on interracial marriage). For an important acknowledgment of the importance of *Loving* see Fried, *Judgment*, *supra* note 58, at 1044 (characterizing *Brown* as vulnerable until the reasoning of *Loving* was articulated). Indeed, after *Brown* was decided, some constitutional theorists denied that the protections of the Fourteenth Amendment extend to prohibit state anti-miscegenation statutes. See Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 58 (1955) (arguing that the Fourteenth Amendment would not reach state anti-miscegenation statutes).

<sup>411</sup> See SUNSTEIN, ONE CASE, *supra* note 165; SUNSTEIN, LEGAL REASONING, *supra* note 47, at 38-41 (suggesting that a minimalism permits constitutional decisions to be made and accepted on a narrow basis without the need for consideration of the implications of broader principles).

<sup>412</sup> To the extent that the Supreme Court adopts a minimalist approach and foregoes the statement of broader principle, it forfeits the opportunity of expressive leadership; Sunstein would perhaps argue that in our democratic republic that role is better played by our democratically elected representatives.

Fourth, and finally, Professor Tribe's plaintive cry<sup>413</sup> ought not to be, and cannot be, ignored. But Tribe's new reservations about the theoretical or doctrinal coherence of constitutional doctrine, like the limited aspirations of Sunstein's theoretical minimalism, are misplaced. There cannot be a definitive or controlling conceptual synthesis of a law whose very legitimacy is simply a matter of making and choosing among various forms of argument in a practice that is discrete but hardly independent of the political society within which it unfolds. The goal of constitutional interpretation and criticism is not simply, nor even primarily, the construction of grand theory and comprehensive paradigms. Outcomes and theory, at the retail level of doctrine, are important because there is no alternative. The articulation of doctrine, and the exploration of the ways in which the different types of constitutional argument bear on questions like those surrounding the current constitutional issues of national security and federalism, for example, present a complex task for the courts and for the legal academy. That task requires attention to doctrine and to the practice of constitutional argument, not to philosophical theory. It requires practical reasoning and it requires, above all, judgment. The time for ontological or other philosophical distractions—whether express or only implied—including those that underlie the relentless and misguided debate over originalism—is past.

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<sup>413</sup> Tribe, *Treatise Power*, *supra* note 218, at 292.

