

# Striding out of Babel: Originalism, Its Critics, and the Promise of our American Constitution

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# STRIDING OUT OF BABEL: ORIGINALISM, ITS CRITICS, AND THE PROMISE OF OUR AMERICAN CONSTITUTION

André LeDuc\*

This Article pursues a therapeutic approach to end the debate over constitutional originalism. For almost fifty years that debate has wrestled with the question whether constitutional interpretations and decisions should look to the original intentions, expectations, and understandings with respect to the constitutional text, and if not, what. Building on a series of prior articles exploring the jurisprudential foundations of the debate, this Article characterizes the debate over originalism as pathological. The Article begins by describing what a constitutional therapy is.

The debate about originalism has been and remains sterile and unproductive, and the lack of progress argues powerfully for the conclusion that a successful resolution of the debate is not likely to be achieved by any of the protagonists. Instead, the debate should be abandoned.

At a conceptual level, there are a variety of sources for the pathology of the debate, but a series of tacit ontological and other jurisprudential assumptions play a central role. The Article explains why neither side in the debate over constitutional originalism can hope to prevail. Any hope to revive or reconstruct the debate seems at once implausible and unlikely to deliver any significant doctrinal or methodological payoff to our American constitutional law. If we articulate the tacit premises of the debate, we can recognize why the debate over originalism reflects more confusion than substantive disagreements. As we do so, we begin to see the way forward beyond the debate. Making the source of the debate's disagreements appear confused rather than important also provides ample motivation to move on. This Article concludes by arguing that such a postdebate constitutional discourse and practice is indeed possible, as well as desirable.

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#### INTRODUCTION: WHY THERAPY?

The second most interesting and important question with respect to the decades-long debate over originalism is why it is still going on. After all, who doesn't want it to be *over*? The most important and interesting question is whether we can end the debate. Two questions, rarely asked and never before answered.<sup>1</sup>

This Article answers both questions: we may end the unhappy debate over originalism and move beyond it by employing a therapeutic approach. That therapeutic approach recognizes that simply continuing to develop the arguments that have been made in the debate within the framework that informs the protagonists' stances is a dead end.

The debate over originalism has dominated and haunted American jurisprudence for half a century.<sup>2</sup> Other celebrated jurisprudential controversies—like the

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<sup>1</sup> Dworkin and Marmor, in their proclamations of the end of originalism, tacitly or directly express surprise that the debate continues. See ANDREI MARMOR, INTERPRETATION AND LEGAL THEORY 155 (rev. 2d ed. 2005) [hereinafter MARMOR, INTERPRETATION] (“The widespread attraction of ‘originalism’ is one of the main puzzles about theories of constitutional interpretation.”); Ronald Dworkin, *Bork’s Jurisprudence*, 57 U. CHI. L. REV. 657, 659, 674 (1990) (book review) [hereinafter Dworkin, *Bork*] (arguing that Bork’s purported defense of originalism in *The Tempting of America*, which Dworkin characterizes as “generally regarded as confused and unhelpful,” in fact highlighted the shortcomings, concluding that “Bork’s defense of the original understanding thesis is a complete failure”). A decade later, Marmor was more cautious in his dismissal of originalism. See generally ANDREI MARMOR, THE LANGUAGE OF LAW 132–36, 152–55 (2014) [hereinafter MARMOR, LANGUAGE OF LAW]. In asserting that the question has never been answered, I am excluding answers from both sides of the debate that proclaim victory, as those claims have repeatedly proven unfounded or premature.

<sup>2</sup> One of the most insightful accounts of the debate comes from a contemporary intellectual historian. See DANIEL T. RODGERS, AGE OF FRACTURE 232–42 (2011). Professor Rodgers’s reading of the current state of the debate is different from mine, but his account of the key elements—including the anachronicity of originalism and its origin in response to the Warren Court—is largely congruent with the analysis here. The voluminousness of the debate has been often remarked. See, e.g., GREGORY BASSHAM, ORIGINAL INTENT AND THE CONSTITUTION: A PHILOSOPHICAL STUDY 15 (1992) [hereinafter BASSHAM, PHILOSOPHICAL STUDY] (“extraordinary outpouring of literature” since 1977); DENNIS J. GOLDFORD, THE AMERICAN CONSTITUTION AND THE DEBATE OVER ORIGINALISM 13 (2005) [hereinafter GOLDFORD, DEBATE] (citing Michael J. Perry, *The Legitimacy of Particular Conceptions of Constitutional Interpretation*, 77 VA. L. REV. 669, 673 (1991)) (“the truly voluminous literature”); James A. Gardner, *The Positivist Foundations of Originalism: An Account and Critique*, 71 B.U. L. REV. 1 (1991). As early as 1989, the voluminous nature of the debate

Hart-Dworkin debate over legal positivism<sup>3</sup>—have been far less important as a practical matter by comparison. Moreover, the debate has not been confined to the academy, but has been at least as important in the judicial sphere.<sup>4</sup> How one thinks about constitutional interpretation shapes the ways in which one thinks that constitutional cases should be argued and decided. It also shapes the desired qualifications for appointments to the Supreme Court. The practical importance of this debate entails its philosophical importance.<sup>5</sup> But the debate over originalism is at a dead end.

Originalism asserts that the United States Constitution should be interpreted, construed, and applied according to its original understanding or intent.<sup>6</sup> Implicitly or

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had already drawn comment. See Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085, 1086 (1989) [hereinafter Farber, *Perplexed*].

<sup>3</sup> See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 15–45 (1977); H.L.A. HART, *THE CONCEPT OF LAW* 88, 91 (1961). But see Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1 (2009) [hereinafter Berman, *Originalism*] (arguing that originalism shares the feature of inconsistent, competing versions for which the originalists criticize non-originalists).

<sup>4</sup> See CASS R. SUNSTEIN, *RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA* 23 (2005) [hereinafter SUNSTEIN, *RADICALS*] (quoting and criticizing both principal 2004 presidential candidates' statements on the proper canons of constitutional interpretation); William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 706 (1976) [hereinafter Rehnquist, *Living*] (“[T]he living Constitution is genuinely corrosive of the fundamental values of our democratic society.”); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 851–54 (1989) [hereinafter Scalia, *Lesser Evil*] (acknowledging potential objections by leading academic constitutional commentators to originalism on the basis of Rawlsian political philosophy and the “values that are fundamental to our society” but concluding that, on balance, originalism offers the strongest theoretical foundation for constitutional interpretation and, by implication, decision (quoting Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 227 (1980))); GOLDFORD, *DEBATE*, *supra* note 2, at 2 (noting that Senator Orrin Hatch has publicly articulated an originalist position).

<sup>5</sup> For classical statements of this pragmatist perspective, see WILLIAM JAMES, *PRAGMATISM* 18 (Thomas Cross & Philip Smith eds., Dover Publications 1995) (1907) (“The pragmatic method is primarily a method of settling metaphysical disputes that otherwise might be interminable. . . . If no practical difference what[so]ever can be traced, then the alternatives mean practically the same thing, and all dispute is idle. Whenever a dispute is serious, we ought to be able to show some practical difference that must follow from one side or the other’s being right.”); see also JOHN DEWEY, *RECONSTRUCTION IN PHILOSOPHY* vii–xli (Beacon Press 1948) (1920). For a contemporary pragmatist statement of this emphasis upon practical consequences, see Robert B. Brandom, *A Hegelian Model of Legal Concept Determination: The Normative Fine Structure of the Judges’ Chain Novel*, in *PRAGMATISM, LAW, AND LANGUAGE* 19, 19–20 (Graham Hubbs & Douglas Lind eds., 2014) [hereinafter Brandom, *Legal Concept Determination*] (describing the implications for a theory of law of skepticism regarding our ability to determine the meaning of authoritative legal texts).

<sup>6</sup> Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 23–25 (Amy Gutmann ed., 1997) [hereinafter Scalia, *INTERPRETATION*]; MARMOR, *INTERPRETATION*, *supra* note 1, at 155.

explicitly, that commitment is contrasted with contrary commitments—to interpret and construe the Constitution prudentially or as we would understand it today, for example.<sup>7</sup> Originalism’s critics deny that originalism was intended or understood by the Founders to be the right approach to the Constitution.<sup>8</sup> They variously deny that originalism is possible, that it is coherent, and that it is prudent.<sup>9</sup>

Originalism distinguishes itself from strict construction on the basis that originalism admits interpretations that encompass the full meaning of the constitutional text.<sup>10</sup> Originalism is also to be distinguished from textualism because it is focused on the original *historical understandings* of the text, not the text itself.<sup>11</sup> Moreover, in the case of those forms of originalism that privilege historical expectations or intentions with respect to the text, originalism is twice removed from the text itself.

New Originalism distinguishes itself from traditional or original forms of originalism in two ways. It privileges the historical public understanding of the meaning of the constitutional text;<sup>12</sup> the private understandings or intentions with respect to that text are irrelevant.<sup>13</sup> It also recognizes that the constitutional text may not appear to readily answer our contemporary constitutional questions.<sup>14</sup> In those cases, New

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<sup>7</sup> Critics of originalism have not suggested that the text or the original understanding of that text is irrelevant. But they have generally denied exclusive, privileged, or final authority to the text’s original understanding or intentions. No attempt will be made to catalogue the critics of originalism. Some originalists, like Judge Bork, believe that the varieties of criticism—and their general inconsistency with each other—themselves generate an argument against such criticism and in favor of originalism. See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 254 (1990) [hereinafter BORK, *TEMPTING*]; Scalia, *INTERPRETATION*, *supra* note 6, at 44–45. *But see* Berman, *Originalism*, *supra* note 3 (arguing that originalism equally presents multiple, inconsistent variations).

<sup>8</sup> See, e.g., H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985) (asserting that there was no original understanding that the Constitution would be interpreted according to its original understanding).

<sup>9</sup> See, e.g., SUNSTEIN, *RADICALS*, *supra* note 4, at 65–78.

<sup>10</sup> See Scalia, *INTERPRETATION*, *supra* note 6, at 37–38 (conceding that “[originalist interpretation] is not strict construction, but it is reasonable construction”).

<sup>11</sup> *Id.* at 38.

<sup>12</sup> Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 620 (1999) [hereinafter Barnett, *Originalism*].

<sup>13</sup> BORK, *TEMPTING*, *supra* note 7, at 144 (asserting that public understandings, not private understandings, are dispositive and giving the hypothetical example of a letter from George Washington to his wife articulating and endorsing an idiosyncratic understanding of the constitutional text that should be given no weight).

<sup>14</sup> See Scalia, *INTERPRETATION*, *supra* note 6, at 45–46 (“Sometimes (though not very often) there will be disagreement regarding the original meaning; and sometimes there will be disagreement as to how the original meaning applies . . . .”); Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 471 (2013) [hereinafter Solum, *Constitutional Construction*] (“Irreducible ambiguity, vagueness, contradictions, and gaps create constitutional questions that cannot be resolved simply by giving direct effect to

Originalists call for constitutional construction to resolve such remaining constitutional controversies.<sup>15</sup> Constitutional construction's general notion is that some constitutional texts may be interpreted according to their original understanding;<sup>16</sup> other constitutional texts are more indeterminate.<sup>17</sup> The more indeterminate texts require more than interpretation for their application to the constitutional controversies presented by constitutional cases.<sup>18</sup>

The debate has been sustained and voluminous, and it shows no sign of subsiding.<sup>19</sup> Moreover, the debate has been marked (marred) by extravagant claims and intemperate, shrill rhetoric.<sup>20</sup> As early as 1971 a leading originalist, Robert Bork, noted that the debate about constitutional adjudication theory had become "lengthy and often acrimonious."<sup>21</sup> An important critic, Laurence Tribe, has also noted the unhappy tone of the debate.<sup>22</sup> Indeed, Amy Gutmann's sensible and provocative strategy of assembling Justice Scalia, Dworkin, and Tribe (among others) for an exchange on

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the rule of constitutional law that directly corresponds to the communicative content of the constitutional text. Such cases are underdetermined by the meaning of the text . . .").

<sup>15</sup> Solum, *Constitutional Construction*, *supra* note 14, at 469 (calling for construction "when the meaning of the constitutional text is unclear, or the implications of that meaning are contested"). *See generally* Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 95 (2010) [hereinafter Solum, *Interpretation-Construction Distinction*] ("I shall argue that the distinction [between interpretation and construction] is both real and fundamental—that it marks a deep difference in two different stages (or moments) in the way that legal and political actors process legal texts.").

<sup>16</sup> Solum, *Constitutional Construction*, *supra* note 14, at 458.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 469.

<sup>19</sup> *See, e.g.*, FRANK B. CROSS, *THE FAILED PROMISE OF ORIGINALISM* (2013) (arguing that originalism has not demonstrated a meaningful constraint on judicial decision); William Baude, *Originalism as a Constraint on Judges*, 84 U. CHI. L. REV. (forthcoming 2018) [hereinafter Baude, *Originalism as a Constraint*] (describing the originalist movement away from the questionable claim that originalism provides an external constraint to the more limited claim that originalism constrains in the space of reasons and Baude's positivist claims and the semantic and linguistic claims of the New Originalism more generally); William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079 (2017) [hereinafter Baude & Sachs, *Law of Interpretation*]; Richard H. Fallon, Jr., *The Meaning of Legal "Meaning" and Its Implications for Theories of Legal Interpretation*, 82 U. CHI. L. REV. 1235 (2015) [hereinafter Fallon, *Meaning*].

<sup>20</sup> *See* SUNSTEIN, *RADICALS*, *supra* note 4, at 54 (characterizing Judge Douglas Ginsburg's characterization of critics of originalism: "He writes as if those who reject originalism reject the Constitution itself. They're lawless."); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 1 (1971) [hereinafter Bork, *Neutral Principles*].

<sup>21</sup> Bork, *Neutral Principles*, *supra* note 20, at 1. Others have echoed that assessment. *See* Laurence H. Tribe, *Comment*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 72* (Amy Gutmann ed., 1997) [hereinafter Tribe, *INTERPRETATION*].

<sup>22</sup> Tribe, *INTERPRETATION*, *supra* note 21, at 72.



originalism ultimately fell flat.<sup>23</sup> Not even the quiet splendor of Princeton University could catalyze a respectful and constructive exchange.

The debate has been declared over many times.<sup>24</sup> Nearly two decades ago, writing in the *University of Chicago Law Review*, Ronald Dworkin proclaimed the end of originalism as a plausible, mainstream theory of constitutional interpretation: “[Bork’s] arguments are so weak, and Bork’s apparent concessions to his critics so comprehensive, that his book might mark the end of the original understanding thesis as a serious constitutional philosophy.”<sup>25</sup> More recently, Andrei Marmor, one of the leading legal philosophers of his generation, was equally dismissive of originalism.<sup>26</sup>

Justice Sotomayor’s confirmation hearings deepen our unease with the terms on which the debate is carried out and, more importantly, our concerns with our constitutional discourse more generally. Those hearings confirmed the urgency of the remedial therapeutic task. In those hearings, Justice Sotomayor characterized her decisional stance simply as one of fidelity to law.<sup>27</sup> Those hearings reflect the

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<sup>23</sup> *A Matter of Interpretation* prints the papers presented at a Princeton University conference at which Justice Scalia presented the principal paper on which Laurence Tribe and Ronald Dworkin, among others, commented. When I assert that the exchange falls flat, I should note that the volume publishing Justice Scalia’s remarks, the comments thereon, and Justice Scalia’s replies have been very frequently cited and provide a more precise statement of certain views of the protagonists. Nevertheless, absent from the exchange is any real sense of intellectual engagement or enthusiasm for dialogue.

<sup>24</sup> See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980) [hereinafter ELY, *DEMOCRACY*]; Dworkin, *Bork*, *supra* note 1, at 674 (“[W]e are entitled, on the evidence of [*The Tempting of America*], to store the theory [of originalism] away with phlogistonism and the bogeyman.”).

<sup>25</sup> Dworkin, *Bork*, *supra* note 1, at 661. Other critics were equally dismissive. See Richard A. Posner, *Bork and Beethoven*, 42 *STAN. L. REV.* 1365, 1369 (1990) [hereinafter Posner, *Bork*] (“Bork’s militance and dogmatism will buck up his followers and sweep along some doubters but will not persuade the rational intellect.”); see also ELY, *DEMOCRACY*, *supra* note 24, at 11–42; John Hart Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 *IND. L.J.* 399, 412 (1978) [hereinafter Ely, *Allure and Impossibility*] (categorically rejecting an interpretivist theory limited to the language of particular clauses of the constitutional text).

<sup>26</sup> MARMOR, *INTERPRETATION*, *supra* note 1, at 155–56 (“[I]t is quite a mystery why originalism still has the scholarly (and judicial) support it does.”). Similarly, Sunstein asked, in 2005, “Is Fundamentalism Self-Defeating?” and “Is Fundamentalism Coherent?” before concluding “Why Fundamentalism Is Indefensible.” SUNSTEIN, *RADICALS*, *supra* note 4, at 65–73. Randy Barnett remarks on the resilience of originalism with his customary humor: “Originalism was thought to be buried in the 1980s with critiques such as those by Paul Brest and Jeff Powell. . . . Yet an originalist approach to interpretations has—like a phoenix from the ashes or Dracula from his grave, depending on your point of view—[thrived] . . . .” Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 22 *CONST. COMMENT.* 257 (2005) [hereinafter Barnett, *Trumping*] (citations omitted).

<sup>27</sup> See Judge Sonia Sotomayor, Testimony at United States Senate Judiciary Committee (July 13, 2009) (transcript available at <https://www.judiciary.senate.gov/imo/media/doc/soto>)

continuing sterility of the discourse about constitutional interpretation and decision, as the members of the Senate Judiciary Committee vainly try to have the nominee articulate her substantive constitutional commitments, and the nominee responds with platitudes and the promise to be an impartial arbiter of constitutional disputes.<sup>28</sup> The debate and, more generally, our public discourse about constitutional adjudication, exhibit the symptoms of *pathology*.

The debate also shapes the argument of constitutional cases in the courts, but the judicial participants in the originalism debate adopt more complex arguments in their opinions than their theoretical claims might suggest.<sup>29</sup> *United States v. Jones*<sup>30</sup> provides an instructive example of the role that the originalism debate sometimes plays to contextualize the arguments and decisions of contemporary constitutional cases.<sup>31</sup> In that case, the Court confronted the question of whether the warrant requirement of the Fourth Amendment applied to the attachment of a global positioning satellite (GPS) device to a criminal defendant's automobile.<sup>32</sup> It unanimously held the requirement to apply.<sup>33</sup>

The opinions in *Jones* reflected the constraints imposed by the perspectives of the protagonists in the debate and the metrics that the debate employs.<sup>34</sup> Although each member of the Court would have held that the warrant requirement applied, the reasoning invoked to reach that result varied widely.<sup>35</sup> Thus, for example, Justice

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mayor\_testimony\_07\_13\_09.pdf) [https://perma.cc/LA5F-J7FH] (“[My judicial philosophy] is simple: fidelity to the law.”). It is hard to give much content to this anodyne assertion; it is hard to imagine a nominee proclaiming a judicial philosophy of *infidelity* to law. See Ronald Dworkin, *Justice Sotomayor: The Unjust Hearings*, N.Y. REV. BOOKS (Sept. 24, 2009), <http://www.nybooks.com/articles/2009/09/24/justice-sotomayor-the-unjust-hearings/> [https://perma.cc/2YXC-G76F] [hereinafter Dworkin, *Unjust Hearings*]; see also *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of John G. Roberts, Jr., characterizing the role of a judge as like that of an umpire, consistent with the originalist aspiration to decide cases simply by applying the historical linguistic understandings of the constitutional text).

<sup>28</sup> See Dworkin, *Unjust Hearings*, *supra* note 27.

<sup>29</sup> See *infra* notes 30–40 and accompanying text.

<sup>30</sup> 565 U.S. 400 (2012).

<sup>31</sup> See André LeDuc, *Beyond Babel: Achieving the Promise of Our American Constitution*, 64 CLEV. ST. L. REV. 185, 197–204 (2016) [hereinafter LeDuc, *Beyond Babel*].

<sup>32</sup> *Jones*, 565 U.S. at 404–05.

<sup>33</sup> *Id.* at 404; *id.* at 413 (Sotomayor, J., concurring); *id.* at 431 (Alito, J., concurring).

<sup>34</sup> 565 U.S. 400. See generally LeDuc, *Beyond Babel*, *supra* note 31, at 197–204 (discussing the implications of the originalism debate on the opinions in *Jones*).

<sup>35</sup> See *Jones*, 565 U.S. at 404–13; *id.* at 413–18 (Sotomayor, J., concurring) (discussing the potentially significant implications of developments in surveillance technology for the scope of the protections afforded by the Fourth Amendment without much concern for eighteenth century linguistic understandings); *id.* at 418–31 (Alito, J., concurring) (criticizing the Court's efforts to ground its decision with respect to the government's use of GPS trackers on eighteenth century understandings).



Scalia was at pains to ground the Court's holding that the warrant requirement applied in the original understanding of the Fourth Amendment, rather than in the Court's later doctrine interpreting that requirement based upon defendants' reasonable expectation of privacy.<sup>36</sup> Justice Alito mocked Justice Scalia's efforts to ground the Court's decision in the original eighteenth century understanding.<sup>37</sup>

That case could have been decided more persuasively if the opinions and decision had not been pawns in the ongoing debate.<sup>38</sup> The Justices' opinions are attuned to that debate and are shaped by it. For example, without the debate, it would be hard to imagine the silly exchange between Justices Scalia and Alito over the eighteenth century analog of a twenty-first century GPS tracker.<sup>39</sup> Just as important, the stakes imposed on the choice between prudential and doctrinal arguments on the one hand, and textual and historical arguments on the other, distract from the exercise of judgment in *Jones* but add no informative direction to the required exercise of judgment.<sup>40</sup>

The debate continues for two principal reasons. First, it is based upon flawed premises and on distinctions and concepts that are confused or, at least, unhelpful.<sup>41</sup> Both sides assume an ontologically independent Constitution, thinking that they disagree only about the nature of that Constitution and the nature of the language that expresses that Constitution.<sup>42</sup> I have previously traced the genealogy of the debate and the source of its unfruitfulness in the protagonists' shared tacit premises about the ontology of the Constitution and the nature of propositions of constitutional law.<sup>43</sup> The assumption that there is an ontologically independent Constitution distinct from our practice of constitutional law is erroneous.<sup>44</sup>

Second, originalists and their critics remain committed to their respective positions because the competing constitutional theories play important, if misguided, roles in their respective constitutional arguments and jurisprudence.<sup>45</sup> Both sides of

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<sup>36</sup> See *id.* at 404–06 (majority opinion).

<sup>37</sup> *Id.* at 420 n.3 (Alito, J., concurring).

<sup>38</sup> See LeDuc, *Beyond Babel*, *supra* note 31, at 201–04 (arguing that stripping away the conceptual framework of the originalism debate would have permitted a more direct engagement by the justices of the opposing arguments).

<sup>39</sup> *Jones*, 565 U.S. at 420 n.3 (Alito, J., concurring).

<sup>40</sup> LeDuc, *Beyond Babel*, *supra* note 31, at 201–02 (emphasizing the importance of the kinds of issues raised by Justice Sotomayor for Fourth Amendment jurisprudence).

<sup>41</sup> See André LeDuc, *The Ontological Foundations of the Debate over Originalism*, 7 WASH. U. JUR. REV. 263, 335–36 (2015) [hereinafter LeDuc, *Ontological Foundations*].

<sup>42</sup> See *id.* at 334–36.

<sup>43</sup> See *id.*; André LeDuc, *The Anti-Foundational Challenge to the Philosophical Premises of the Debate over Originalism*, 119 PENN ST. L. REV. 131 (2014) [hereinafter LeDuc, *Anti-Foundational Challenge*]; see also 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>44</sup> See LeDuc, *Anti-Foundational Challenge*, *supra* note 43, at 187–89.

<sup>45</sup> See LeDuc, *Ontological Foundations*, *supra* note 41, at 297–305.

the debate believe that their theoretical stances discredit the kinds of constitutional arguments made by the opposing protagonists.<sup>46</sup>

The competing theories and accounts of constitutional law and the decisions that comprise the debate do not give us a better understanding of the Constitution or of our constitutional practice. Debating originalism does not revivify our constitutional decisional practice or galvanize the constitutional arguments we already make; instead, debating originalism constrains and distracts that constitutional practice. The debate distracts us because it invites or requires us to contextualize those controversies within the false parameters of the debate. Moreover, the debate offers no promise of resolution.<sup>47</sup> There is no argument yet to be discovered that will bring the debate to a triumphant conclusion for the originalists or for any of their myriad critics.

Yet the debate can be brought to a conclusion, not with the triumph of either position in the debate, but with a therapeutic deflationary approach that leads both sides to recognize that the debate is at a dead end. The entire debate and its associated theoretical constructs are best abandoned rather than pursued or defended, respectively. Progress calls for the debate to be transcended in favor of more fruitful and insightful constitutional theory and practice.<sup>48</sup>

Progress requires not a brilliant new argument from one side or the other to win the debate, but instead a therapeutic strategy that will enable the protagonists to transcend how the debate has been conducted and the terms in which it has been couched, and to recognize the debate as fruitless and unhelpful.<sup>49</sup> A companion piece, *Beyond Babel*, completes the project by describing what our constitutional practice would look like without the brooding omnipresence of the debate.<sup>50</sup>

The nature and history of the unhappy debate suggest a therapeutic solution to the problem. Originalism fails to win over its critics, and its critics fail to win over the originalists.<sup>51</sup> We are not well-served by continuing the debate.

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<sup>46</sup> See, e.g., *id.* I have offered an argument against the effectiveness of that strategy. See LeDuc, *Philosophy and Constitutional Interpretation*, *supra* note 43.

<sup>47</sup> See, e.g., STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 132 (2005) [hereinafter BREYER, *ACTIVE LIBERTY*]; Mark Tushnet, *Heller and the New Originalism*, 69 OHIO ST. L.J. 609, 623 (2008) [hereinafter Tushnet, *New Originalism*]; BASSHAM, *PHILOSOPHICAL STUDY*, *supra* note 2, at 15.

<sup>48</sup> See *infra* Parts I, II, III, and IV.

<sup>49</sup> See *infra* Part I.

<sup>50</sup> See LeDuc, *Beyond Babel*, *supra* note 31.

<sup>51</sup> Even seemingly fundamental questions appear immune to resolution. For example, the question of whether originalism is consistent with *Brown v. Board of Education* appears unresolved. See Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 2–3 (1955) [hereinafter Bickel, *Original Understanding*]; Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 957–62 (1995) (making a valiant but ultimately unsuccessful effort to rebut Bickel's claim that the drafters and adopters of the Fourteenth Amendment did not understand it to prohibit racially segregated schools and thus to save the original understanding of the Fourteenth

This Article will apply a therapeutic approach to the debate over originalism. Therapy is required for the debate and, properly done, is more effective than argument alone.<sup>52</sup> Moving beyond the debate requires both a recognition and a richer account of its pathology than is generally presented—or admitted—by the protagonists,<sup>53</sup> as well as a path beyond the debate. The pathology has gone unrecognized by the protagonists because their conceptual commitments blind them to the unfruitfulness of their stance and because they are caught up in the arguments of the debate. What is required is careful attention to the debate's shared premises and respective errors. Argument on the contested terms of the debate alone has proven insufficient.

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Amendment from the charge of a fundamental underlying racism consistent with racially segregated public schools); see also Michael J. Klarman, Brown, *Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1884 (1995) (rebutting McConnell's historical claims); Ryan C. Williams, *Originalism and the Other Desegregation Decision*, 99 VA. L. REV. 493, 495 (2013) [hereinafter Williams, *Other Decision*] (citing recent claims by new originalists that *Brown* is consistent with the original understanding of the Fourteenth Amendment). If readers were perplexed when Daniel Farber attempted to summarize the debate over originalism, twenty-five years later they are likely downright flummoxed. See Farber, *Perplexed*, *supra* note 2, at 1086. While Farber did a fine job twenty-five years ago, in the intervening years the debate has grown more complex and dramatically more voluminous. See, e.g., JACK M. BALKIN, LIVING ORIGINALISM 3–20 (2011) [hereinafter BALKIN, LIVING ORIGINALISM]; ROBERT W. BENNETT & LAWRENCE B. SOLUM, CONSTITUTIONAL ORIGINALISM: A DEBATE (2011) [hereinafter BENNETT & SOLUM, ORIGINALISM]; Brian A. Licher & David P. Baltmanis, *Foreword: Original Ideas on Originalism*, 103 NW. U. L. REV. 491 (2009); Williams, *Other Decision*, *supra*. The protagonists seem increasingly cognizant that they no longer can reasonably hope to persuade the other side. See, e.g., BREYER, ACTIVE LIBERTY, *supra* note 47, at 132 (“I hope that those strongly committed to textualist or literalist views—those whom I am almost bound not to convince—are fairly small in number.”). Justice Breyer never explains why he doubts the efficacy of his argument, but his caution is instructive as to the nature of the debate. At the least, it confirms the pathology described below. See *infra* Part I. Tushnet has expressed similar pessimism. See Tushnet, *New Originalism*, *supra* note 47, at 623 (discounting the rhetorical power of his argument).

<sup>52</sup> For two classical statements of therapeutic strategies, see MARTHA C. NUSSBAUM, THE THERAPY OF DESIRE: THEORY AND PRACTICE IN HELLENISTIC ETHICS 13–40 (1994) [hereinafter NUSSBAUM, THERAPY] and RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE 6–7 (1979) [hereinafter RORTY, MIRROR] (describing a classic goal of innovative conceptual thinking as setting aside prior problems in favor of a new vision); see also *infra* Part III (exploring what more is required for therapy).

<sup>53</sup> The methodology of the protagonists in the debate has gone largely unnoticed and unanalyzed. But see PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION xix–xx (1991) [hereinafter BOBBITT, INTERPRETATION]; 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); BRIAN LEITER, *Why Quine Is Not a Postmodernist*, in NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY 137, 139 (2007) [hereinafter LEITER, *Quine*] (denying that the debate over the legitimacy of judicial review is driven by a mistaken theory of truth or that propositions of constitutional law are statements about the world).

The traditional role of therapy is to bring subjects or patients to a potentially painful and resisted understanding.<sup>54</sup> In the context of constitutional theory and jurisprudence, therapy seeks to reconstruct the conceptual pathologies<sup>55</sup> that result in empty debates and unproductive analytical practices.<sup>56</sup> In Jonathan Lear's felicitous phrase, we must reconstruct the *ideopolises* of the protagonists in the debate.<sup>57</sup> But the therapeutic project is also a social project; part of the pathology of the originalism debate relates particularly to the way that constitutional theorists and Supreme Court justices relate to other theorists and justices who hold different constitutional views.<sup>58</sup> Therapy here must be a group therapy as well as an individual therapy. And it is not clear whether therapy is even possible for the apparently unwilling and unreceptive participants in the originalism debate.

The task is thus to discover how to transcend this debate. To do this, I will reconstruct the positions of originalism and its critics, and allow those positions, as safe and as appealing as they may feel to the protagonists, to reveal their inherent confusions or, at least, their fruitlessness for our constitutional theory and practice. This task is *therapeutic*.<sup>59</sup>

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<sup>54</sup> See generally HEINZ KOHUT, HOW DOES ANALYSIS CURE? (Arnold Goldberg & Paul Stepansky eds., 1984) (offering a complex account of the therapeutic process under psychoanalytic theory); JONATHAN LEAR, THERAPEUTIC ACTION: AN EARNEST PLEA FOR IRONY (2003) [hereinafter LEAR, THERAPEUTIC ACTION].

<sup>55</sup> Therapy needs to proceed within and without the framework of a pathological behavior. As the therapy starts, the therapist must acknowledge and work within the patient's pathological feelings and beliefs as she begins to build the trust and common ground from which the patients can be led to stronger ground. In the case of an intellectual debate like that over originalism, therapy requires understanding what is compelling about each side of the debate, how the two sides are failing to engage, and what the respective sides seek from their conflicting positions.

<sup>56</sup> See RORTY, MIRROR, *supra* note 52, at 6–7 (arguing that anti-Cartesian arguments undermine contemporary philosophical projects to construct theories of reference).

<sup>57</sup> See generally Jonathan Lear, *An Interpretation of Transference*, 74 INT'L J. PSYCHOANALYSIS 739 (1993), reprinted in OPEN MINDED: WORKING OUT THE LOGIC OF THE SOUL 56, 69–73 (1998) [hereinafter Lear, *Transference*] (exploring how successful therapy requires the therapist to establish a connection with the patient by acknowledging the claims and commitments that bind the patient).

<sup>58</sup> See LeDuc, *Beyond Babel*, *supra* note 31, at 197–220; see also SUNSTEIN, RADICALS, *supra* note 4, at 54 (noting that some originalists treat their opponents as if they were lawless).

<sup>59</sup> The strategy of moving beyond mere argument in legal theory is not novel. Duncan Kennedy characterized his account of the history of American classical legal theory as an "intervention." DUNCAN KENNEDY, THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT ix (2006) (characterizing his work as an intervention without explaining what that would mean or entail in the context of legal history). Daniel Farber and Suzanna Sherry sound a theme of irrationality in their criticism of grand theory, but never adopt a therapeutic strategy like that pursued here. See DANIEL A. FARBER & SUZANNA SHERRY, DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS 1, 168 (2002) [hereinafter FARBER & SHERRY, DESPERATELY SEEKING].

Therapy is needed for the originalism debate for many of the same reasons we resort to therapy in other contexts: to cure a pathology. The debate over originalism is pathological, not healthy and robust. This is an important distinction because there is certainly a sense of stalemate in the current discourse, despite its increasing intensity and stridency<sup>60</sup>—or, in the case of Dworkin, increasingly icy irony<sup>61</sup>—and without apparent significant advances in the debate.<sup>62</sup> Healthy debates either persuade one side or prompt responsive counter-arguments;<sup>63</sup> the originalism debate does neither.

Moreover, to the outside observer, there is an even more fundamental sense that the alternatives that the two sides describe are incomplete. On the originalist side, the claim to privilege original understandings, intentions, or expectations is manifestly inaccurate as a description of constitutional argument.<sup>64</sup> Original understandings, intentions, and expectations may sometimes play a privileged role in constitutional argument and decision, but they are sometimes less important than prudential, structural, doctrinal or other arguments.<sup>65</sup>

On the critics' side, the failure to recognize how often such original understandings and expectations are, as a matter of our constitutional decisional practice,

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<sup>60</sup> See, e.g., Scalia, INTERPRETATION, *supra* note 6, at 44–47; see also Berman, *Originalism*, *supra* note 3, at 8 (characterizing strong originalism as mistaken and arguing that the inability of originalism's critics to agree on an alternative theory is not a decisive defense of either weak or strong originalism).

<sup>61</sup> Ronald Dworkin, *Comment*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 115 (Amy Gutmann ed., 1997) [hereinafter Dworkin, INTERPRETATION] (beginning his response to Justice Scalia: “Justice Scalia has managed to give two lectures about meaning with no reference to Derrida or Gadamer or even the hermeneutic circle . . . . These are considerable achievements.”).

<sup>62</sup> The development of what has been termed “new originalism” might appear to be an exception, but it is not. See, e.g., KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW (1999) [hereinafter WHITTINGTON, INTERPRETATION]; see also KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 1–2 (1999) [hereinafter WHITTINGTON, CONSTRUCTION] (introducing and defending a political concept of constitutional construction to supplement originalist constitutional interpretation). For criticisms of the significance of new originalism, see Andrew B. Coan, *The Irrelevance of Writeness in Constitutional Interpretation*, 158 U. PA. L. REV. 1025 (2010); see also Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. U. L. REV. 703 (2009) [hereinafter Kay, *Constitutional Interpretation*]; Tushnet, *New Originalism*, *supra* note 47, at 612 (remarking that substantially all of the same evidence adduced by the “old” originalism is also relevant to the “new” originalism).

<sup>63</sup> Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 616–17 (1982).

<sup>64</sup> See generally BALKIN, *LIVING ORIGINALISM*, *supra* note 51; PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1982) [hereinafter BOBBITT, FATE] (describing the six canonical modes of constitutional argument).

<sup>65</sup> See LeDuc, *Beyond Babel*, *supra* note 31, at 197–220 (describing the historical, textual, doctrinal, structural, prudential, and ethical arguments made in three recent Supreme Court decisions).



compelling and controlling leads to a similarly constricted and implausible description of our constitutional decisional practice.<sup>66</sup> The prudential arguments made by Richard Posner or the philosophical arguments made by Ronald Dworkin leave no place for the historical and textual arguments of originalism to be dispositive of a constitutional case.<sup>67</sup> The battle over originalism is thus joined over two incomplete and misleading accounts of constitutional practice and over a question of privilege for particular modes of argument that sometimes appears forced and artificial. It appears forced and artificial because the framework of the debate does not always provide alternative opposing arguments that offer a fruitful way to conceptualize the arguments in a constitutional case. *United States v. Jones* is a good example of the limits of the debate's constitutional metrics.<sup>68</sup>

Both the debate and our public discourse about constitutional adjudication exhibit the symptoms of *pathology*. I am suggesting not simply that the tone of the debate is acrimonious and counterproductive; this criticism could be met with the introduction of merely a modest dose of collegiality and humility. Rather, the debate about originalism is stalemated, and the protagonists are unable or unwilling to engage meaningfully with their opponents.<sup>69</sup> Moreover, the stalemate has infected and corrupted the discussion of important constitutional questions in the public sphere.<sup>70</sup> With therapy, and a more direct engagement by the protagonists, we may suggest lines of inquiry to re-engage the debate's participants, and even provide ways to resolve or transcend the debate.<sup>71</sup> If we reconstruct the respective ideopolises of the originalists and their critics, we may yet find a path forward.<sup>72</sup>

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<sup>66</sup> See *infra* notes 79–80 and accompanying text. Dworkin and Sunstein are two of the most critical theorists with respect to the force of originalist arguments. See RONALD DWORKIN, *LAW'S EMPIRE* 373 (1986) [hereinafter DWORKIN, *EMPIRE*] (characterizing Bork's argument from moral skepticism (or, more properly relativism) as "singularly inept"); SUNSTEIN, *RADICALS*, *supra* note 4, at 15–19.

<sup>67</sup> See LeDuc, *Beyond Babel*, *supra* note 31, at 204–20 (discussing the prudential considerations and doctrinal arguments made in the Court's opinions). See generally BOBBITT, *FATE*, *supra* note 64.

<sup>68</sup> 565 U.S. 400 (2012). For other examples, see LeDuc, *Beyond Babel*, *supra* note 31, at 204–20.

<sup>69</sup> The recent book by Robert Bennett and Larry Solum does not stand as a counter-example to this claim. See generally BENNETT & SOLUM, *ORIGINALISM*, *supra* note 51. Each author is largely working out the implications of his own position. The result is a debate in name only.

<sup>70</sup> See CHRISTOPHER L. EISGRUBER, *THE NEXT JUSTICE: REPAIRING THE SUPREME COURT APPOINTMENTS PROCESS* 186–91 (2007) (criticizing the current confirmation process and suggesting reforms); Elena Kagan, *Confirmation Messes, Old and New*, 62 U. CHI. L. REV. 919 (1995) (reviewing STEPHEN L. CARTER, *THE CONFIRMATION MESS* (1994)) (urging nominees to explain their substantive constitutional positions in a more forthcoming manner); see also Dworkin, *Unjust Hearings*, *supra* note 27.

<sup>71</sup> See *infra* Part IV.

<sup>72</sup> See generally Lear, *Transference*, *supra* note 57, at 69–73.



At the same time, any therapeutic stance must expect and anticipate a transference response from both sides of the debate. Transference, in a context like this, is the projection onto the therapist of beliefs from the patients' pathological ideopolises.<sup>73</sup> In the case of the originalism debate, this will generally include efforts to assimilate my therapeutic stance into the framework of the debate itself. Part of the therapeutic claim here is that such an assimilation, by either side of the debate, is fruitless or impossible.

An ideopolis is an array of concepts and commitments within which, and pursuant to which, constitutional jurists and theorists articulate their decisions and their theories.<sup>74</sup> The extent to which those positions are concepts or conceptions, legal, moral, political, or philosophical, consistent or inconsistent, complete or incomplete, need not concern us. What is common to all the participants is a set of conceptual pathologies or confusions that ground—and fuel—the debate.<sup>75</sup>

The originalists find two primary benefits in the ideopolis they have constructed. First is the ability to refute and reject the excesses of the Warren Court.<sup>76</sup> Second, and more important, is that their ideopolis purports to construct constraints on constitutional interpretation, and with those constraints, to create certainty in interpretation.<sup>77</sup> For its proponents, originalism offers both methodological and substantive benefits as an account of the Constitution.<sup>78</sup>

The anti-originalists, too, find two primary benefits in their own ideopolis: first is the prospect of progress and perhaps even perfection, transcending our imperfect contemporary constitutional world.<sup>79</sup> Second, to the extent that our constitutional argument and law includes structural, prudential, and doctrinal arguments, originalism's critics argue that their account of the Constitution is more descriptively accurate than that defended by the originalists.<sup>80</sup>

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<sup>73</sup> See *id.*

<sup>74</sup> See *id.*

<sup>75</sup> See André LeDuc, *Making the Premises about Constitutional Meaning Express: The New Originalism and Its Critics*, 31 BYU J. PUB. L. 111, 119–20 (2017) [hereinafter LeDuc, *Constitutional Meaning*]; LeDuc, *Anti-Foundational Challenge*, *supra* note 43.

<sup>76</sup> See, e.g., RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 407–18* (1977) [hereinafter BERGER, *GOVERNMENT BY JUDICIARY*]; BORK, *TEMPTING*, *supra* note 7, at 262–63; Antonin Scalia, *Response*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 149 (Amy Gutmann ed., 1997) [hereinafter Scalia, *Response*].

<sup>77</sup> See, e.g., BORK, *TEMPTING*, *supra* note 7, at 251–59.

<sup>78</sup> See, e.g., *id.*; Scalia, *INTERPRETATION*, *supra* note 6, at 45–46.

<sup>79</sup> See Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981) (finding that identifying and criticizing such anomalies is not enough; otherwise, the originalism debate would have been over long ago).

<sup>80</sup> See BOBBITT, *FATE*, *supra* note 64; SUNSTEIN, *RADICALS*, *supra* note 4, at 15–19 (describing where originalism would take constitutional doctrine).

Resistance in therapy is a familiar concept,<sup>81</sup> and it also operates here.<sup>82</sup> In this context, my strategy is to reconstruct the central arguments that have been at the core of the decades-long debate.<sup>83</sup> In so doing, I have explored the foundations, philosophical and otherwise, that support the debate. Neither the originalists nor their critics hold a tenable stance with respect to the debate's core issues. Most fundamentally, the debate cannot be over something that both originalists and their critics assume, nor can the truth (or falsity) of propositions of constitutional law be something that both sides assume.<sup>84</sup> When the debate and its erroneous assumptions are properly understood, we can see that neither side can establish a position with important practical or theoretical consequences for our constitutional law.

A therapeutic strategy will not resolve the debate on the terms on which the debate has been carried out. Instead, therapy will permit the protagonists and the rest of us to move beyond the debate to more fruitful and productive tasks and arguments in our constitutional practice. Transcending the debate will not usher in a period of constitutional peace. The substantive disagreements about the Constitution will not be dissolved. They will remain as deep and intense as before; but the disagreements and the arguments invoked in support of one decision or another will be stripped of their place in the debate.

The most we can hope for on the Court and in the academy is that by recognizing the legitimacy of the disparate modes of canonical constitutional argument, both sides in the debate will come to recognize the need to engage the arguments advanced in the substantive disagreements more directly and more fully. We cannot hope that everybody will "just get along" because the sources of constitutional controversy are too numerous and too rooted in our fundamental political, moral, and ideological differences. But we can hope that the disagreements will be acknowledged and articulated, not in the vocabulary of the originalism debate, but in the accepted modes of constitutional decisional argument. Given the contemporary tone of the conflicting opinions from the members of the Court,<sup>85</sup> that change would be no small improvement in our constitutional law and practice.

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<sup>81</sup> See, e.g., ANNA FREUD, *THE EGO AND THE MECHANISMS OF DEFENCE* 8–9 (Cecil Baines trans., rev. ed. 1966) (*locus classicus* description of resistance and transference as psychological defenses encountered in psychoanalysis by the analysand to block the dismantling of the pathological psychological structures).

<sup>82</sup> We see resistance in the originalism debate from both sides. With respect to many of the critics of originalism, there is a refusal to recognize the pull of originalism and in some cases, a refusal to recognize the coherence of originalism.

<sup>83</sup> See, e.g., LeDuc, *Anti-Foundational Challenge*, *supra* note 43; LeDuc, *Ontological Foundations*, *supra* note 41; André LeDuc, *Competing Accounts of Interpretation and Practical Reasoning in the Debate over Originalism*, U.N.H. L. REV. (forthcoming 2017) [hereinafter LeDuc, *Practical Reasoning*].

<sup>84</sup> See generally Ronald Reagan, U.S. President, *The Investiture of Chief Justice William H. Rehnquist and Associate Justice Antonin Scalia at the White House* (Sept. 26, 1986), *reprinted in ORIGINALISM: A QUARTER-CENTURY OF DEBATE* 95 (Steven G. Calabresi ed., 2007).

<sup>85</sup> See LeDuc, *Beyond Babel*, *supra* note 31, at 197–220.

The balance of this Article pursues the therapeutic strategy sketched above. Space precludes a recounting<sup>86</sup> of how originalism arose as a reaction to the constitutional jurisprudence of the Warren Court, and why originalism's critics are committed to rejecting originalism and its assault on that jurisprudence.

Part I of this Article summarizes an assessment of the debate that I have offered in prior articles.<sup>87</sup> I argue that the debate is stalemated and the blossoming complexity and sophistication of the arguments advanced by the protagonists merely obscures the sterility of the exchanges. I briefly recapitulate my argument that the originalists and their critics are tacitly committed to certain philosophical premises that support their claims and make the debate possible.<sup>88</sup> Moreover, an alternative, anti-representational, anti-foundational account of constitutional discourse and practice rejects those premises and saps the foundations that make the debate possible.<sup>89</sup>

My alternative account of our constitutional law is anti-foundational because it treats our constitutional law as being without conceptual or theoretical premises that are needed to support or legitimize it. Such support is neither necessary nor possible. My account is also anti-representational, an even more controversial claim, because its account of constitutional language denies that the terms of constitutional language represent the world, and that propositions of constitutional law are made true by facts about the Constitution-in-the-world.<sup>90</sup> I have articulated that position and defended my claims in a companion article.<sup>91</sup> I also summarize my meta-philosophical claim that we need not build our postdebate constitutional life on express or implied controversial philosophical premises.<sup>92</sup> Without that claim, it may appear

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<sup>86</sup> For representative classic genealogies of originalism that look to the reactions to the Warren Court, see BORK, TEMPTING, *supra* note 7, at 69–100 (describing the Warren Court as embracing a manifestly political role in its constitutional jurisprudence, rather than applying the Constitution according to its original understanding); Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 599–600 (2004) [hereinafter Whittington, *New Originalism*] (distinguishing modern forms of originalism from the reactionary, early originalism); see also BOBBITT, FATE, *supra* note 64, at 3; Edwin Meese III, *Toward a Jurisprudence of Original Intent*, 11 HARV. J.L. & PUB. POL'Y 5, 10 (1988).

<sup>87</sup> See LeDuc, *Anti-Foundational Challenge*, *supra* note 43; LeDuc, *Ontological Foundations*, *supra* note 41; see also *infra* Part I.

<sup>88</sup> See *infra* Section II.B.

<sup>89</sup> See generally BOBBITT, FATE, *supra* note 64 (arguing that six modes of argument comprise our constitutional law practice); BOBBITT, INTERPRETATION, *supra* note 53, at xix–xx; LeDuc, *Anti-Foundational Challenge*, *supra* note 43 (articulating and defending an anti-foundational account of our constitutional law and practice in the context of the debate over originalism). *But see* LEITER, *Quine*, *supra* note 53, at 139 (denying that the debate over the legitimacy of judicial review is driven by a mistaken theory of truth or the claim that propositions of constitutional law are statements about the world).

<sup>90</sup> See generally LeDuc, *Anti-Foundational Challenge*, *supra* note 43.

<sup>91</sup> See generally *id.*

<sup>92</sup> See *infra* Section II.B. For a more complete presentation of that argument, see generally LeDuc, *Philosophy and Constitutional Interpretation*, *supra* note 43. This meta-philosophical

that my constitutional theory is no more certain than the controversial contemporary philosophy of language, epistemology, and ontology.<sup>93</sup> That uncertainty would appear troubling, because it would appear to compromise the mission of the Constitution.<sup>94</sup>

Part I of this Article continues by describing the pathological symptoms of the debate. I articulate those symptoms in a charitable manner that the protagonists in the debate, from both sides, may acknowledge. This is no small task.

Part II of this Article describes the elements of a therapeutic approach more precisely, and proceeds to apply them to the originalism debate.

Part III addresses the resistance and transference that my therapeutic project may trigger. It rebuts the objections that proponents of the debate may offer—that the debate cannot be abandoned, but that it can be rehabilitated even in the face of my criticism. The very possibility of therapy may be challenged by the protagonists on the grounds that the debate does not exhibit symptoms of pathology, or that any pathology is only with respect to the opposing position. I will explain why I think this defense is neither promising nor productive. What are we saving the originalism debate *for*?

Part IV concludes by sketching the promise of a post-debate world.

## I. THE PATHOLOGY OF THE ORIGINALISM DEBATE: SYMPTOMS AND SOURCES

### A. *The History of the Debate: Sterility and Stalemate*

The first step in the therapeutic strategy is to recapitulate the history of the debate, and to describe the stalemate over the role of the original understandings, intentions, and expectations. That narrative must also record the failure of the debate to offer theoretical insight into constitutional questions. The protagonists on both

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claim is a claim about the nature of our constitutional law and about the nature of philosophy. It denies philosophy a claim to be the ultimate arbiter of the claims of reason. In an analogous context, Bernard Williams has famously defended a challenge to the power and scope of philosophical argument in the context of ethical reasoning and practice. *See generally* BERNARD WILLIAMS, *ETHICS AND THE LIMITS OF PHILOSOPHY* (1985).

<sup>93</sup> The ongoing philosophical controversy is reflected in several sources. *E.g.*, 3 RICHARD RORTY, *Antiskeptical Weapons: Michael Williams versus Donald Davidson*, in *TRUTH AND PROGRESS: PHILOSOPHICAL PAPERS* 153–63 (1998) (arguing that Michael Williams’s argument against skepticism commits him to epistemological projects that should be abandoned); BERNARD WILLIAMS, *TRUTH AND TRUTHFULNESS: AN ESSAY IN GENEALOGY* 58–59, 128–31 (2002); RONALD DWORKIN, *JUSTICE IN ROBES* 40 (2006) [hereinafter *DWORKIN, ROBES*] (asserting that Rorty’s position is an incoherent anti-realist position); Bernard Williams, *Auto-da-Fé*, *N.Y. REV. BOOKS* (Apr. 28, 1983) (reviewing RICHARD RORTY, *CONSEQUENCES OF PRAGMATISM (ESSAYS 1972–1980)* (1982)); *see* LeDuc, *Anti-Foundational Challenge*, *supra* note 43, at 180–86.

<sup>94</sup> *See* Scalia, *INTERPRETATION*, *supra* note 6, at 45 (dismissing the notion that philosophical theories must ground constitutional interpretation).

sides of the debate have sometimes remarked on the absence of theoretical engagement with the opposing positions and often demonstrated disdain and disregard for those positions.<sup>95</sup> The implications of that failure to engage have been either ignored or misunderstood.<sup>96</sup>

The originalism debate has reached a stalemate.<sup>97</sup> That stalemate is one of the most important markers or symptoms of the debate's pathology. There are two aspects of the stalemate. First, the arguments made by the protagonists on both sides of the debate have convinced very few opponents.<sup>98</sup> Second, the arguments have not evolved in a way that makes them more powerful, as opposed to simply more sophisticated—or arcane. To be sure, both sides of the debate have made new arguments.<sup>99</sup> But those arguments, for all their sophistication and cleverness, will not persuade the opposing side.<sup>100</sup> Nearly half a century of history provides the proof of that claim. If that were going to happen, it would have happened long ago. The debate over originalism is, in the vernacular, scholastic.

The protagonists might argue that I fail to adequately acknowledge the progress that has been made in the controversy and the increasing sophistication of the debate.<sup>101</sup> Originalists would likely cite two principal developments. The first, and

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<sup>95</sup> See, e.g., Dworkin, *INTERPRETATION*, *supra* note 61, at 117 (describing originalism's lack of attention to the important relevant work in contemporary analytic philosophy of language); Barnett, *Originalism*, *supra* note 12, at 613; Dworkin, *Bork*, *supra* note 1, at 659, 674; Posner, *Bork*, *supra* note 25, at 1368 (announcing the imminent demise of originalism in light of Bork's defense).

<sup>96</sup> See *infra* notes 97–100 and accompanying text.

<sup>97</sup> See *infra* notes 97–100 and accompanying text. I characterize the debate as having reached a stalemate because neither side appears capable of advancing arguments that persuade its opponents.

<sup>98</sup> Jack Balkin may appear to be an important exception to that claim; even if that were so, one convert among the scores of participants in the debate over the decades would hardly be compelling evidence against my claim. See Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291 (2007) (arguing that the original meaning of the Constitution protects a woman's right to an abortion). But even Balkin is a strange convert to originalism because he argues that an originalism committed to the original semantic or linguistic understanding of the constitutional text is compatible with living constitutionalism. See *id.* at 292–93 (tempering his commitment to the original linguistic understanding of the constitutional text with a commitment to the *principles* inherent in that text).

<sup>99</sup> See, e.g., Berman, *Originalism*, *supra* note 3 (challenging originalism's claim to endorse a single or limited number of theories); Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817 (2015); Scott Soames, *Deferentialism: A Post-Originalist Theory of Legal Interpretation*, 82 FORDHAM L. REV. 597 (2013) [hereinafter Soames, *Deferentialism*] (arguing that originalism must incorporate sources of linguistic meaning beyond the semantic); Tushnet, *New Originalism*, *supra* note 47.

<sup>100</sup> See André LeDuc, *Paradoxes of Positivism and Pragmatism in the Debate about Originalism*, 42 OHIO U. L. REV. 613, 644 (2016) [hereinafter LeDuc, *Paradoxes*] (denying that Baude's originalism will persuade originalism's critics).

<sup>101</sup> See, e.g., WHITTINGTON, *INTERPRETATION*, *supra* note 62 (emphasizing the role of



most cited, development would likely be the New Originalist move from an originalism of original private intentions (to do something or to mean something) to an originalism of original linguistic understandings.<sup>102</sup> The second development, made by Keith Whittington, is to distinguish between constitutional interpretation and constitutional construction.<sup>103</sup> Many critics of originalism would also cite these two developments as central to New Originalism.<sup>104</sup>

The New Originalists claim that the original understandings give originalism a firmer foundation than the original intentions or expectations.<sup>105</sup> This is implausible for four reasons.

First, it is not clear that originalists who claim to look only to the original linguistic understandings make good on their claim.<sup>106</sup> Dworkin made that point forcefully,<sup>107</sup> and the subsequent history has only confirmed his claim that originalists like Justice Scalia look well beyond linguistic understandings. For example, in *National Federation of Independent Business v. Sebelius*,<sup>108</sup> Justice Scalia's dissent referenced the original understanding, but it was not an original understanding of the constitutional text.<sup>109</sup> Rather, it was the original understanding of how the federal government would work.<sup>110</sup> The importance and even the correctness of this change are entirely questionable.<sup>111</sup> The reason that originalists move beyond the original understandings

construction); Baude & Sachs, *Law of Interpretation*, *supra* note 19 (defending originalism on legal positivist arguments); Solum, *Constitutional Construction*, *supra* note 14.

<sup>102</sup> See generally Barnett, *Originalism*, *supra* note 12; Thomas B. Colby, *The Sacrifice of New Originalism*, 99 GEO. L.J. 713, 720–24 (2011).

<sup>103</sup> See Lawrence B. Solum, *We Are All Originalists Now*, in CONSTITUTIONAL ORIGINALISM: A DEBATE 1, 60–61 (2011) [hereinafter Solum, *All Originalists Now*] (emphasizing the importance of the interpretation/construction distinction and arguing that originalism's critics have not offered a version of their argument that reflects that distinction); see also WHITTINGTON, CONSTRUCTION, *supra* note 62 (articulating a non-originalist account of constitutional construction to permit originalism as an exclusive account of constitutional interpretation); WHITTINGTON, INTERPRETATION, *supra* note 62, at 5–14 (emphasizing the importance of the distinction between interpretation and construction); Kay, *Constitutional Interpretation*, *supra* note 62, at 710.

<sup>104</sup> See, e.g., Berman, *Originalism*, *supra* note 3, at 3–4, 38; Tushnet, *New Originalism*, *supra* note 47, at 612.

<sup>105</sup> Colby, *supra* note 102, at 736–44.

<sup>106</sup> Dworkin, INTERPRETATION, *supra* note 61, at 115–21.

<sup>107</sup> *Id.*

<sup>108</sup> 567 U.S. 519 (2012).

<sup>109</sup> *Id.* at 649 (Scalia, J., dissenting) (arguing that the Affordable Care Act's individual insurance mandate was unconstitutional).

<sup>110</sup> *Id.* at 658 (arguing without citation to any constitutional textual provision that finding the individual mandate to be within the federal government's authority under the Commerce Clause would destroy the "Constitution's division of governmental powers").

<sup>111</sup> See generally Kay, *Constitutional Interpretation*, *supra* note 62, at 708 (noting that the original meaning intended and the original meaning understood must generally be the same



of the semantic meaning of the text is that semantic meaning is too austere to carry the necessary meaning for deciding cases.<sup>112</sup>

Second, as Mark Tushnet has pointed out, the evidence that is ordinarily adduced in support of an old originalist invocation of original intentions or expectations is largely the same evidence that is marshaled in support of New Originalism's argument from original understandings.<sup>113</sup> When the same evidence supports purportedly different claims, the significance of the distinction must be doubted.<sup>114</sup>

Third, because the purpose of writing the constitutional text is communication, what is intended to be communicated and what is understood should be the same.<sup>115</sup> Thus, the only difference between an originalism that privileges the original semantic understandings and an originalism that privileges the original intentions (at least of semantic meaning) would arise in cases of miscommunication.<sup>116</sup> In those cases, it is not clear why the New Originalists privilege the reader's understanding over the writer's.<sup>117</sup>

Fourth and finally, focusing upon semantic meaning is also questionable because of the performative role of constitutional texts.<sup>118</sup> The constitutional text is principally a doing, not a saying.<sup>119</sup> The constitutional text, along with other authoritative expressions of constitutional law, create (or recognize) rights, constitute a state, or limit powers, among other things.<sup>120</sup> This role is *performative*. Approaching the

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as a matter of the nature of language and communication: “[W]e know someone’s intended meaning by examining the typical meaning attached to the words they used.”)

<sup>112</sup> See 1 SCOTT SOAMES, *Interpreting Legal Texts: What Is, and What Is Not, Special About the Law*, in PHILOSOPHICAL ESSAYS: NATURAL LANGUAGE: WHAT IT MEANS AND HOW WE USE IT 403, 422 (2009) [hereinafter SOAMES, *Legal Texts*] (arguing that semantic meaning is too “austere” to carry all of the requisite force of legal texts).

<sup>113</sup> See Tushnet, *New Originalism*, *supra* note 47, at 612.

<sup>114</sup> See *id.*

<sup>115</sup> See Kay, *Constitutional Interpretation*, *supra* note 62, at 707–08. In characterizing the constitutional text as communicative, I want to remain agnostic for the purpose of my argument here on the debate over what Mark Greenberg has styled the “communicative theory.” See Mark Greenberg, *Legislation as Communication? Legal Interpretation and the Study of Linguistic Communication*, in PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW 217 (Andrei Marmor & Scott Soames eds., 2011) (arguing that the purpose and role of legislation is not simply a matter of communication, focusing upon what the legal texts are *doing*). That theory asserts that because law is an instance of linguistic use, we should turn to our theories of linguistic meaning and communication to understand the meaning of law. *Id.* at 256.

<sup>116</sup> Kay, *Constitutional Interpretation*, *supra* note 62, at 707–08.

<sup>117</sup> There is a tacit suggestion that reference to the auditors’ understanding may capture the public understanding better than the drafters’ understanding.

<sup>118</sup> See generally LeDuc, *Anti-Foundational Challenge*, *supra* note 43 (arguing that language does not represent the world and that, without the implicit appeal to an objective constitution-in-the-world, the originalist pursuit of the original, controlling meaning of the Constitution is problematic); LeDuc, *Constitutional Meaning*, *supra* note 75, at 150–66 (defending an account of the important performative role of the constitutional text).

<sup>119</sup> See LeDuc, *Constitutional Meaning*, *supra* note 75, at 150–66.

<sup>120</sup> See generally *id.*

constitutional text only as declarative is a mistake. Thus, the proposed shift in the New Originalism from the historical originalist focus on intentions and expectations to semantic understandings is not sufficient evidence of the growth and evolution of originalism articulated in the debate.

The second principal feature of New Originalism cited as evidence for originalism's increasing sophistication and plausibility is the distinction between interpretation and construction.<sup>121</sup> Originalism is thus a doctrine that explains how interpretation is to be done.<sup>122</sup> If there is no controlling interpretation of the constitutional text that answers a constitutional question, then the New Originalists would hold that constitutional construction is required and the original understanding is not controlling.<sup>123</sup>

The distinction between constitutional interpretation and constitutional construction has failed to move the debate forward or convince originalism's critics. There are four principal reasons for this failure. First, while seemingly intuitive, the distinction between constitutional provisions that are to be interpreted and those that are to be construed erodes under careful examination. Whittington characterizes the distinction as analytical,<sup>124</sup> meaning that interpretation and construction are "two different ways of elaborating constitutional meaning that have been . . . used."<sup>125</sup> For Whittington, the fundamental distinction is that constitutional interpretation is a legalistic process, while constitutional construction is a political process.<sup>126</sup> Construction is a political process because the choices to be made require a choice between competing claims that cannot be made on the basis of principle alone.<sup>127</sup>

Whittington offers examples of constitutional text that require interpretation or construction.<sup>128</sup> Whittington cites the Fourth Amendment protection against warrantless searches and seizures as an example of a provision requiring construction.<sup>129</sup> Whittington focuses on the response of the legislative and executive branches to early judicial decisions about the application of the Fourth Amendment to electronic surveillance.<sup>130</sup> Puzzlingly, Whittington's history does not appear to include the judicial evolution of constitutional doctrine.<sup>131</sup> Whittington does not address the judicial

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<sup>121</sup> See, e.g., WHITTINGTON, INTERPRETATION, *supra* note 62, at 5–14; Kay, *Constitutional Interpretation*, *supra* note 62; Solum, *Constitutional Construction*, *supra* note 14.

<sup>122</sup> See WHITTINGTON, INTERPRETATION, *supra* note 62, at 2–5.

<sup>123</sup> *Id.* at 5.

<sup>124</sup> *Id.* This term is not used in the classical sense of modern Anglo-American analytic philosophy. See generally WILLARD VAN ORMAN QUINE, *Two Dogmas of Empiricism*, in FROM A LOGICAL POINT OF VIEW 20 (2d ed. rev. 1980).

<sup>125</sup> See WHITTINGTON, INTERPRETATION, *supra* note 62, at 5.

<sup>126</sup> *Id.* at 7.

<sup>127</sup> *Id.* at 7–8.

<sup>128</sup> *Id.* at 9–10.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> See *id.* Whittington's account stops with *Olmstead v. United States*, 277 U.S. 438 (1928) (analyzing the scope of Fourth Amendment protections in terms of the common law

evolution of our Fourth Amendment law on warrantless searches.<sup>132</sup> His failure is consistent with his claim that the executive and legislative branches must articulate the necessary constitutional protections, thus demonstrating the political character of the action required.<sup>133</sup> But, on their faces, the Court's decisions in *Olmstead v. United States*, *Katz v. United States*, and, more recently, *Jones*, appear to be based upon legal, not political, reasoning.<sup>134</sup> Whittington assimilates construction to political decision, but does not explain how to reconcile the Court's Fourth Amendment, non-originalist legal reasoning with what we might anticipate in a traditional political process.<sup>135</sup>

One potential way to distinguish interpreted versus constructed provisions would be by reference to their specificity: specific provisions are to be interpreted; general or principled statements, whose meaning and import must be created by a project that goes beyond simply determining an inherent meaning, are to be construed.<sup>136</sup> Whittington characterizes the text as "brought into being [by the

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concept of trespass), never addressing *Katz v. United States*, 389 U.S. 347 (1967) (substituting a conceptualization of Fourth Amendment protections on the basis of the common law concept of trespass with an account grounded on defendants' reasonable expectations of privacy). That evolution proceeded as a matter of doctrine. Without an alternative political account of that evolution, Whittington's implicit claim that the evolution of the Fourth Amendment law was a matter of political choice remains unproven.

<sup>132</sup> See WHITTINGTON, INTERPRETATION, *supra* note 62, at 9–10 (describing the Court's refusal to expand the scope of the Fourth Amendment with respect to certain intrusive searches conducted in the course of a criminal investigation, which was coupled with an invitation to Congress to consider enacting non-constitutional limitations on those types of searches).

<sup>133</sup> *Id.* While *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978), may support Whittington's distinction, the evolution from *Olmstead* to *Katz* demonstrates the importance of interpretative questions in application of the Fourth Amendment.

<sup>134</sup> *United States v. Jones*, 565 U.S. 400, 404–06 (2012) (finding a warrantless search unconstitutional because the government had trespassed on the defendant's motor vehicle when it installed a GPS tracking device, without the need to reach the *Katz* test of whether the defendant had a reasonable expectation of privacy with respect to the location of a personal automobile); *Katz*, 389 U.S. at 353 (after reviewing the development of the case law after *Olmstead*, concluding that "[t]he Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth, and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment"); *Olmstead*, 277 U.S. at 466 (concluding, after a careful, extended review of the prior case law, none of the precedents "[held] the Fourth Amendment to have been violated as against a defendant unless there [was] an official search and seizure of his person, or such a seizure of his papers or his tangible material effects, or an actual physical invasion of his house 'or curtilage' for the purpose of making a seizure").

<sup>135</sup> See WHITTINGTON, INTERPRETATION, *supra* note 62, at 7–10.

<sup>136</sup> Such an approach would appear to be inconsistent with Justice Scalia's claim that all of the Constitution's provisions are to be understood as speaking in a practical, rather than aspirational, voice. See Scalia, *Response*, *supra* note 76, at 134–35. Moreover, such a constructionist methodology opens up the possibility of judicial discretion that originalism was

reader].”<sup>137</sup> In some ways this account appears to echo the natural law account of the *determinatio*, although Whittington does not himself draw this parallel.<sup>138</sup> This strategy may appear engaging because it is plausible that we can distinguish the level of generality or specificity of constitutional texts.

Nevertheless, puzzles immediately appear. For example, does the First Amendment apply to a federal law providing that flag burning is a criminal offense? The text of the First Amendment appears very clear, providing that Congress shall make no law abridging the freedom of speech.<sup>139</sup> The question of whether burning the flag is speech would appear interpretative because the question presented is the meaning or force of the term “speech.” That appears to be an interpretive question. Yet Whittington cites the First Amendment as another example of a constitutional provision requiring construction, not interpretation.<sup>140</sup> Whittington needs to reach this conclusion because his approved originalist interpretative methods are insufficient to generate the First Amendment jurisprudence that he wants to preserve. But it requires Whittington to sort constitutional provisions into interpretative and constructional texts in a non-obvious and seemingly implausible way.

The second reason that the interpretation/construction distinction has failed is that the New Originalists still assert that the original understandings are privileged and arguments from those original understandings trump all other arguments.<sup>141</sup> That privilege within the sphere of interpreted constitutional provisions is not plausible to originalism’s critics. For example, that privilege is inconsistent with Sunstein’s functionalism, which looks to constitutional law only as a social tool to mediate

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initially designed to limit. *See generally* Baude, *Originalism as a Constraint*, *supra* note 19 (exploring the shift in emphasis in originalism away from the importance of external constraint and arguing that originalism is more important as a conceptual, internal constraint); Colby, *supra* note 102 (describing the failure of the New Originalism to cabin judicial discretion); *see generally also* CROSS, *supra* note 19 (concluding that originalism has not constrained constitutional decision).

<sup>137</sup> WHITTINGTON, *INTERPRETATION*, *supra* note 62, at 5. The sense in which Whittington empowers the reader as interpreter is not the same as that endorsed by Stanley Fish, *infra* notes 225–35, because, for Whittington, the creation of the meaning or force of the text is not simply a matter of a creative, critical choice but must arise within the political constraints of our democratic Republic.

<sup>138</sup> *See, e.g.*, JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 284–90 (1980) (explaining that there are two working parts of law: the central principle of law and the determination in the application of this basic principle; the first derives from natural law); ROBERT P. GEORGE, *Natural Law and Positive Law*, in *IN DEFENSE OF NATURAL LAW* 102, 108–09 (1999).

<sup>139</sup> U.S. CONST. amend. I.

<sup>140</sup> WHITTINGTON, *INTERPRETATION*, *supra* note 62, at 10. It may be that some parts of the First Amendment, like that relating to the free exercise of religion, require construction, whereas other parts require interpretation. What is not clear is how the different parts or aspects of the constitutional provision may be distinguished.

<sup>141</sup> *See id.* at 213–15.

conflict or organize the political process,<sup>142</sup> or with his commitment to incompletely theorized agreements.<sup>143</sup> Generally, originalism's critics are not prepared to privilege textual or historical arguments over other kinds of arguments that have been made to expand citizens' rights or to limit government discretion.<sup>144</sup>

The third reason that the interpretation/construction distinction has failed is that the privilege accorded original understandings in the domain of interpretative constitutional texts leaves no room for the exercise of judgment. Charles Fried and those like him would reject this account, since they emphasize the role of judgment in constitutional decisions.<sup>145</sup> For those constitutional provisions that are interpretable, the exercise of judgment may lead a judge to follow the original semantic understandings of those provisions.<sup>146</sup> If so, the two accounts would appear consistent.

But it does not appear likely that the exercise of judgment with respect to interpretable provisions would consistently lead to the application of the original semantic understandings. It might be that where the text is clear, other arguments merely face a higher hurdle before they can be deployed. But proponents committed to the exercise of judgment would appear committed to the view that judgment is always both necessary and proper, regardless of whether a case is easy or hard.<sup>147</sup> When judgment is employed, all of the considerations that figure in the various canonical modes of constitutional argument naturally come into play. It is not clear why certain factors or claims that a judge would seek to apply, to the extent consistent with our practice of constitutional argument and decision, could be excluded. Thus, when we recognize the role of judgment in the process of adjudication, it is difficult to cabin that judgment within the confines of originalist theory.

The fourth and final reason that the interpretation/construction distinction failed to convince originalism's critics remains that New Originalism is committed, in the realm of interpretation, to the claim that there is always an answer to the constitutional questions we face in the constitutional text, properly interpreted.<sup>148</sup> That is an

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<sup>142</sup> See, e.g., SUNSTEIN, *RADICALS*, *supra* note 4, at 71 (describing the idea of judicial minimalism).

<sup>143</sup> See, e.g., *id.* at 73–74 (claiming that, in the final analysis, the Constitution is treated as binding because it is good to treat it as binding).

<sup>144</sup> See, e.g., *id.* at 71–75 (concluding that following the original understanding of the Constitution “would be terrible” because the resulting substantive constitutional law would be terrible and inconsistent with the democratic choices that the citizens would make).

<sup>145</sup> See generally Charles Fried, *On Judgment*, 15 *LEWIS & CLARK L. REV.* 1025 (2011) [hereinafter Fried, *Judgment*] (arguing that constitutional adjudication requires a judge to exercise the faculty of judgment and that such decision process cannot be reduced to an algorithm). I am grateful to Professor Fried for making available to me a pre-publication copy of this article.

<sup>146</sup> See generally *id.*

<sup>147</sup> See generally *id.*

<sup>148</sup> See LeDuc, *Constitutional Meaning*, *supra* note 75, at 115; LeDuc, *Ontological Foundations*, *supra* note 41; Lawrence B. Solum, *Semantic Originalism* 31, 36–37 (Ill. Pub. Law & Legal Theory Research Papers Series, Paper No. 07-24, 2008) [hereinafter Solum,



ontological claim that others and I have challenged.<sup>149</sup> If that challenge to the New Originalism's tacit ontology is correct, then the New Originalism has no better prospect of convincing or defeating originalism's critics than the old originalism does.

The critics demonstrate no greater progress in their efforts to discredit or rebut the originalists' arguments. If we take Dworkin, Sunstein, and Tribe as representative among the leading critics of originalism, there is no apparent progress in the evolution of their criticism of originalism.<sup>150</sup> While the arguments proffered by the critics have changed, they reflect no more meaningful engagement with the originalists.<sup>151</sup>

Dworkin began his critique of originalism with the claim that originalism cannot do what it purports to do.<sup>152</sup> Dworkin has moved on to other arguments against originalism as his own jurisprudence has evolved.<sup>153</sup> Nevertheless, he would appear to continue to embrace his impossibility claim.<sup>154</sup> Dworkin's new arguments are equally dismissive of textual and historical arguments, because Dworkin is committed to an integrated reading of the Constitution grounded in moral and political philosophy.<sup>155</sup> Although Dworkin would agree that a law's integrity requires some deference to precedent,<sup>156</sup> he is always prepared to jettison that precedent when the holistic theory, grounded in moral and political theory, is articulated.<sup>157</sup>

Sunstein's current line of criticism derives from his endorsement of judicial minimalism and his commitment to a functional account of constitutional law.<sup>158</sup>

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*Semantic Originalism*] (asserting that there is a fact of the matter about the meaning of texts and utterances).

<sup>149</sup> See generally PATTERSON, TRUTH, *supra* note 53, at 126–27; LeDuc, *Anti-Foundational Challenge*, *supra* note 43, at 142–51.

<sup>150</sup> See *infra* notes 153–88 and accompanying text.

<sup>151</sup> See *infra* notes 153–88 and accompanying text.

<sup>152</sup> See Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 482–500 (1981) [hereinafter Dworkin, *Forum*] (arguing that the originalist appeal to the original intentions with respect to the constitutional text is more complex and problematic than the originalists acknowledge, calling into question whether it is possible).

<sup>153</sup> See, e.g., Dworkin, INTERPRETATION, *supra* note 61, at 126–27 (arguing that a careful analysis of Justice Scalia's originalism reveals an overriding moral reading of the Constitution, albeit a moral reading very different from Dworkin's own).

<sup>154</sup> See *id.* at 127 (arguing that Justice Scalia tacitly invokes his philosophical reservations about majoritarianism in his defense of originalism, thus relying on extratextual contemporary values in his defense of originalism).

<sup>155</sup> *Id.* at 122–23. See generally DWORKIN, EMPIRE, *supra* note 66.

<sup>156</sup> See DWORKIN, EMPIRE, *supra* note 66, at 240–50 (acknowledging that fairness in adjudication requires that precedent be respected in many cases even if justice would support a different outcome).

<sup>157</sup> See *id.* at 245–47 (arguing that the originalists' invocation of the concept of collective intentions masks conceptual problems that may compromise the very concept).

<sup>158</sup> See SUNSTEIN, RADICALS, *supra* note 4, at xiv–xv (rejecting the originalist project to restore the Lost Constitution on minimalist arguments).



According to Sunstein, constitutional decisions should be *minimalist*.<sup>159</sup> Cases should be narrowly decided and opinions should articulate the reasons for a decision in a narrow (if not the narrowest) way.<sup>160</sup> Thus, Sunstein objects to the originalists because of their rejection of judicial minimalism, and their commitment to far-reaching, principled decision.<sup>161</sup> He also objects to originalism because it is not a functional account of our constitutional law.<sup>162</sup> Originalists are unconcerned that a constitutional interpretation or decision might lead to a result that would be rejected as a prudential matter.<sup>163</sup> Yet, it is not clear what arguments Sunstein could offer that would persuade originalists to adopt a functional account of constitutional law allowing prudential arguments to trump arguments from a provision's original semantic understanding. At the least, despite Sunstein's repeated criticisms of originalism on this point,<sup>164</sup> it is not clear that he has any new argument to make. He wants to reject originalism for its general theoretical arguments, but he never really explains whether he admits originalist arguments in his jurisprudence.

Part of the uncertainty may arise from an unacknowledged evolution in Sunstein's own views. Twenty years ago, Sunstein expressly endorsed what he termed "soft originalism" in contradistinction to "hard originalism."<sup>165</sup> It is not

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<sup>159</sup> See CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 59–61 (1996) [hereinafter SUNSTEIN, *LEGAL REASONING*].

<sup>160</sup> SUNSTEIN, *RADICALS*, *supra* note 4, at 27–30 (defending judicial minimalism). *But see* Larry Alexander, *Incomplete Theorizing: A Review Essay of Cass R. Sunstein's Legal Reasoning and Political Conflict*, 72 *NOTRE DAME L. REV.* 531 (1997) (book review) (criticizing Sunstein's rejection of highly theorized judicial decision).

<sup>161</sup> SUNSTEIN, *RADICALS*, *supra* note 4, at 25–27.

<sup>162</sup> See *id.* at 73. See generally LeDuc, *Paradoxes*, *supra* note 100.

<sup>163</sup> See, e.g., BORK, *TEMPTING*, *supra* note 7, at 258–59 (strongly criticizing the reasoning in *Griswold v. Connecticut*, 381 U.S. 479 (1965), while conceding the substantive policy objections to the Connecticut law struck down in that case); Scalia, *INTERPRETATION*, *supra* note 6, at 47 (citing the adoption of a constitutional amendment requiring the extension of the franchise to women as evidence of the limits of constitutional interpretation and application).

<sup>164</sup> See generally CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* 209–43 (1999) [hereinafter SUNSTEIN, *ONE CASE*]; SUNSTEIN, *RADICALS*, *supra* note 4.

<sup>165</sup> Cass R. Sunstein, *Five Theses on Originalism*, 19 *HARV. J.L. & PUB. POL'Y* 311, 313 (1995) [hereinafter Sunstein, *Five Theses*] (very briefly—and somewhat cryptically—asserting that soft originalism, which doesn't seek answers to particular contemporary constitutional cases but is generally attentive to the original understandings and expectations, is a stronger constitutional theory than hard originalism, the Warren Court's jurisprudence, or other leading alternatives). Hard originalism, in Sunstein's lexicon, seeks to decide particular constitutional controversies on the basis of the original understandings in a process Sunstein characterizes as "trying to do something like go back in a time machine." *Id.* at 312. Sunstein's soft originalism, to the extent that it encompasses structural arguments, may not even qualify as a traditional originalism.

entirely clear what Sunstein means by these terms.<sup>166</sup> Leaving aside that important definitional issue, the initial substantive question Sunstein's description raises is whether his soft originalism is really a form of originalism at all.<sup>167</sup> Sunstein would permit arguments from the historical understandings and expectations but caveats his endorsement of those arguments by noting that for the soft originalist "it matters very much what history shows."<sup>168</sup> It matters because the historical understanding of the Constitution is a good but not dispositive reason to interpret and apply the Constitution consistently with that understanding.<sup>169</sup> But he goes on to note that the soft originalist tempers historical reference with a judgment as to the level of generality at which to interpret historical positions.<sup>170</sup> As a result, much like Balkin's introduction of constitutional principles into his Living Originalism as authoritative sources of constitutional law, Sunstein admits non-originalist authority to support his non-originalist substantive constitutional jurisprudence.<sup>171</sup> Sunstein concludes that soft originalism is an incomplete theory of constitutional interpretation.<sup>172</sup> Sunstein would complete that theory with his functional approach.<sup>173</sup> It is not clear what is left of originalism, other than the name.

Moreover, Sunstein disregards some of the far-reaching, principled decisions that history has judged most favorably. For example, Sunstein's minimalism would appear to have doomed the Court's approach in *Brown v. Board of Education*.<sup>174</sup> It also would have blocked the series of democracy-enhancing decisions of the Warren Court like *Baker v. Carr*<sup>175</sup> and *Reynolds v. Sims*.<sup>176</sup> Sunstein, like the originalists he criticizes, is committed to a methodological position that would foreclose certain of Bobbitt's modes of argument.<sup>177</sup> Like the originalists, and despite his efforts to

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<sup>166</sup> *Id.* at 312.

<sup>167</sup> *Id.* at 313–15.

<sup>168</sup> *Id.* at 313.

<sup>169</sup> *Id.*

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

<sup>171</sup> *See id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 313–14.

<sup>174</sup> 347 U.S. 483, 493–95 (1954) (striking down state segregation in public education as violating the Equal Protection Clause without inquiry into whether any such segregated schools were equal by any other measure).

<sup>175</sup> 369 U.S. 186, 237 (1962) (repudiating the prior law that electoral districting was non-justiciable as a political question).

<sup>176</sup> 377 U.S. 533, 577 (1964) (requiring roughly equal population in state electoral districts under the republican government clause).

<sup>177</sup> It is not clear that Bobbitt's ethical argument, even understood in his limiting way, could be made on a narrow or unprincipled way, for example, under the incompletely theorized, minimalist methods that Sunstein endorses. What could a minimalist ethical argument from the essential, inherent American ethos be? Other modes of argument may be hard to constrain within Sunstein's minimalist methodology in particular contexts, as in *Brown*.

distance himself from some of the unattractive implications of hard originalism, Sunstein's own theory appears subject to some of the same normative objections.<sup>178</sup>

With Tribe, as with Sunstein, it is not entirely clear what stance he takes or which propositions he would endorse with respect to the originalist claims and their alternatives.<sup>179</sup> For example, while it is clear that Tribe rejects the claims of classical originalism, we do not know exactly what alternative account of the truth of propositions of constitutional law he would endorse.<sup>180</sup> Tribe rejects the originalist account as facing an insurmountable technical objection in the problem of generality<sup>181</sup> and for failing to give an adequate account of the richness of the constitutional text.<sup>182</sup>

Tribe's first argument, based on the problem of generality, appears wrong.<sup>183</sup> There is no general problem of generality.<sup>184</sup> Tribe next argues that the questions presented in the constitutional decision and by the constitutional text are not captured adequately by the originalist account.<sup>185</sup> But Tribe's account of the constitutional text and, in particular, his most recent account of the Invisible Constitution,<sup>186</sup> is not likely to persuade originalists. It will fail because it appears to devalue originalists' textual and historical arguments. Originalism's critics have not come to terms with what

<sup>178</sup> Sunstein's position, like that of most protagonists in the debate, would delegitimize some of the accepted forms of constitutional argument. Moreover, his claim that broader judicial holdings are always inappropriate appears implausible—as the cases of *Brown* and *Loving v. Virginia*, 388 U.S. 1 (1967), demonstrate.

<sup>179</sup> See generally LeDuc, *Ontological Foundations*, *supra* note 41, at 320–22 (arguing that Tribe is committed to the existence of an ontologically independent Constitution despite his emphasis on practice and his skepticism about systematic theories of interpretation like those defended by Justice Scalia and Ronald Dworkin).

<sup>180</sup> See *id.*

<sup>181</sup> See LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 73–80 (1991) [hereinafter TRIBE & DORF, READING] (arguing that constitutional interpretation requires determining from extraconstitutional sources the level of generality at which a constitutional provision is to be understood and applied). *But see* Brandom, *Legal Concept Determination*, *supra* note 5 (denying that there is a problem of regress because a rule does not always need an interpretation to be followed or applied).

<sup>182</sup> See generally Tribe, INTERPRETATION, *supra* note 21, at 65–75. Thus, Tribe does not appear to make a place for historical and textual arguments. For a catalog of the modes of argument, see BOBBITT, FATE, *supra* note 64, at 7–8.

<sup>183</sup> See LeDuc, *Ontological Foundations*, *supra* note 41, at 320–22.

<sup>184</sup> *Id.* (arguing that Tribe's infinite regress argument would apply equally to application of any rule, so that, paradoxically, no rule can be followed). Robert Brandom has defended a similar Wittgensteinian, Carrollian rejection of the problem of infinite regress. Brandom, *Legal Concept Determination*, *supra* note 5, at 21–22 (expressly invoking Lewis Carroll's logic fable of Achilles and the Tortoise to deny that a legal rule needs an interpretation before it can be applied).

<sup>185</sup> Tribe, INTERPRETATION, *supra* note 21, at 68–72.

<sup>186</sup> LAURENCE H. TRIBE, THE INVISIBLE CONSTITUTION 10 (2008) [hereinafter TRIBE, INVISIBLE] (introducing the concept of the “invisible” Constitution, consisting of an array of fundamental unstated assumptions that are, as Tribe puts it, within the Constitution).

makes originalism so attractive, nor with the continuing vitality of historical and textual arguments in our constitutional practice.<sup>187</sup> Without doing so, originalism's critics cannot hope to move beyond originalism's claims.

It is important to understand how the debate over originalism has failed to resolve the dispute over the role of value and scope of judicial discretion in constitutional decision. Originalism is intended to cabin judicial discretion and block the injection of personal values into judicial decision.<sup>188</sup> Originalists believe that privileging the original understandings and intentions of the constitutional text will do that.<sup>189</sup> But the critics deny those originalist claims.<sup>190</sup> They generally assert that the original intentions and understandings cannot provide the guidance necessary to resolve constitutional disputes.<sup>191</sup> To the extent the New Originalism creates a place for constitutional construction,<sup>192</sup> the goal of cabining judicial discretion is compromised. If the critics are right, then New Originalism has failed to perform its mission to provide constraint in constitutional decision.<sup>193</sup>

The final development that warrants attention relates to how the protagonists on both sides have systematically introduced modern linguistic philosophy into the debate.<sup>194</sup> I have explored those arguments in some detail in a companion

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<sup>187</sup> Thus, for example, in his review of Bork's *The Tempting of America*, Dworkin was scathing and dismissive. See Dworkin, *Bork*, *supra* note 1, at 659, 674 (characterizing Bork's argument as "generally regarded as confused and unhelpful" and asserting that *The Tempting of America* in fact highlighted [originalism's] shortcomings, concluding that "Bork's defense of the original understanding thesis is a complete failure"). Tax scholar and originalism critic Boris Bittker perhaps came closest to giving originalism its due. See Boris I. Bittker, *Interpreting the Constitution: Is the Intent of the Framers Controlling? If Not, What Is?*, 19 HARV. J.L. & PUB. POL'Y 9, 54 (1995) (concluding that "[a]ll in all, the best bet is that our judges will continue to invoke 'the American scheme of justice,' 'ordered liberty,' 'community standards,' and other noninterpretivist ideals, values and aspirations, but will not take these concepts anywhere near their logical extremes"); see also CROSS, *supra* note 19, at 1–22 (acknowledging the appeal of originalism); Boris I. Bittker, *The Bicentennial of the Jurisprudence of Original Intent: The Recent Past*, 77 CALIF. L. REV. 235 (1989).

<sup>188</sup> See Reva B. Siegel, *Heller and Originalism's Dead Hand—In Theory and Practice*, 56 UCLA L. REV. 1399, 1400–01 (2009).

<sup>189</sup> See generally BORK, *TEMPTING*, *supra* note 7; Scalia, *INTERPRETATION*, *supra* note 6.

<sup>190</sup> See, e.g., TRIBE & DORF, *READING*, *supra* note 181, at 73–80; Dworkin, *INTERPRETATION*, *supra* note 61, at 117.

<sup>191</sup> See, e.g., TRIBE & DORF, *READING*, *supra* note 181, at 73–80; Dworkin, *INTERPRETATION*, *supra* note 61, at 117.

<sup>192</sup> See, e.g., Solum, *Constitutional Construction*, *supra* note 14; Tushnet, *New Originalism*, *supra* note 47.

<sup>193</sup> I am not endorsing the critics' claims, merely pointing out that if they are right, then New Originalism has failed its mission. See generally Colby, *supra* note 102.

<sup>194</sup> See generally MARMOR, *LANGUAGE OF LAW*, *supra* note 1 (criticizing originalism); Fallon, *Meaning*, *supra* note 19 (criticizing originalism); Soames, *Deferentialism*, *supra* note 99 (criticizing originalism in part and defending originalism in part on the basis of an approach

article,<sup>195</sup> concluding that increased philosophical sophistication has yielded scant progress toward resolving the debate.<sup>196</sup>

One reply to my critical characterization of the debate over originalism might be to argue that I have set the bar to measure progress unreasonably high. For example, the reply might go, compare the debate over originalism to many ongoing philosophical debates. How does the state of the debate over originalism appear less fruitful or with less progress than the disputes over the nature of truth or the nature of moral obligation? I am simply asking too much of the debate over originalism. Instead of criticizing the debate, I should recognize the New Originalism as the jurisprudential equivalent of the causal theory of reference.

I think not. Leaving aside the obvious question of the relative significance of these two theoretical contributions, the difference between the mission of analytic philosophy and the mission of constitutional theory precludes the reply to my criticism. The different missions reflect the difference between practical and pure or theoretical reasoning. In constitutional theory, as in constitutional adjudication, questions must be answered and decisions made. In philosophy, the goal of both systematic and therapeutic projects is understanding. Discovering that we do not understand something we thought we understood counts as progress, not failure. In constitutional theory and adjudication, on the other hand, an argument or account can be refuted only by another theory or account, as Justice Scalia was fond of remarking in the context of the originalism debate.<sup>197</sup> Flawed theories do not win by default in the philosophical space of reasons.

In sum, the debate over originalism has made no significant progress over the past half century. Neither the originalists nor their critics have produced compelling new responses to the arguments made for the opposing positions, nor have they made compelling new arguments for their own positions. Even the protagonists have begun to express doubts about their ability to convince the other side.<sup>198</sup> The failure of either side to convince their opponents is simply evidence of the stalemated,

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that privileges the semantic and pragmatic meaning of the constitutional text but concedes that such meaning leaves many constitutional controversies without a determinative textual answer); Solum, *Semantic Originalism*, *supra* note 148 (defending originalism but endorsing a role for constitutional construction that goes beyond interpretation of linguistic meaning).

<sup>195</sup> See generally LeDuc, *Constitutional Meaning*, *supra* note 75. For examples of those arguments, see Soames, *Deferentialism*, *supra* note 99 (arguing that legal interpretation must incorporate all of the linguistic meaning of the relevant text, not merely the semantic meaning), and Solum, *Semantic Originalism*, *supra* note 148 (arguing that originalism must incorporate the non-semantic sources of linguistic content from texts' pragmatics).

<sup>196</sup> See LeDuc, *Constitutional Meaning*, *supra* note 75.

<sup>197</sup> See, e.g., Scalia, *Lesser Evil*, *supra* note 4, at 855.

<sup>198</sup> BREYER, *ACTIVE LIBERTY*, *supra* note 47, at 132 (acknowledging that some originalists will remain unpersuaded by his arguments); Tushnet, *New Originalism*, *supra* note 47, at 623.

pathological dimension of the debate. The purported progress in the debate, despite the protagonists' enthusiasm, collapses on careful examination.

*B. Foundations of the Pathology: The Flawed Ontology of the Debate*

After acknowledging that the originalism debate is at a dead end, the next step in my therapeutic approach plumbs the foundations that make the debate possible. The path out of the ideopolises of the debate's protagonists requires that we first understand the foundations on which those ideopolises have been built. The originalists and most of their critics take for granted that there is an objective Constitution that is to be interpreted and serve as the touchstone for deciding constitutional cases.<sup>199</sup> They assume that statements of constitutional law have non-trivial truth conditions that are determined by the correspondence of such statements to an objective Constitution.<sup>200</sup> I have defended these attributions in some depth in *The Ontological Foundations of the Debate over Originalism*<sup>201</sup> and *The Anti-Foundational Challenge to the Philosophical Premises of the Debate over Originalism*,<sup>202</sup> and will only summarize that argument here. As Bobbitt has argued,<sup>203</sup> there are a variety of modes of constitutional analysis and argument, all of them legitimate, none of them exclusive, and none of them privileged in relation to the other modes.<sup>204</sup> More importantly, Bobbitt explains how the foundational confusions arise.<sup>205</sup>

The dominant foundational picture of our constitutional law misunderstands the ontological character of that law. In Bobbitt's words: "Law is something we do, not something we have as a consequence of something we do."<sup>206</sup> This slogan is important

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<sup>199</sup> See generally LeDuc, *Ontological Foundations*, *supra* note 41.

<sup>200</sup> See *id.* at 274–79, 310–12.

<sup>201</sup> *Id.*

<sup>202</sup> LeDuc, *Anti-Foundational Challenge*, *supra* note 43.

<sup>203</sup> See BOBBITT, FATE, *supra* note 64, at 7–8; BOBBITT, INTERPRETATION, *supra* note 53, at 11–22.

<sup>204</sup> See BOBBITT, FATE, *supra* note 64, at 6–8.

<sup>205</sup> BOBBITT, INTERPRETATION, *supra* note 53, at 24.

<sup>206</sup> *Id.* Bobbitt appears to mean that there is nothing independent of the human activity of law that, as an ontological matter, can be meaningfully extracted from that activity as independent of it. The same could be said, of course, about many human activities—quantum physics, the archaeology of Minoan Crete, urban planning, and the theater of the absurd. I do not understand Bobbitt to be distinguishing law from these activities as a matter of ontology. Instead, he would appear to be emphasizing that the context and meaning of all these activities is drawn from their practice.

It is instructive to consider Bobbitt's stance in relation to Brian Leiter's recent defense of an artifact theory of law. See Brian Leiter, *Legal Positivism About the Artifact Law: A Retrospective Assessment*, in *LAW AS AN ARTIFACT* (L. Burazin, K. Himma, & C. Roversi eds., forthcoming 2017), available at <http://ssrn.com/abstract=2870877>. Leiter is focused on defeating an account of law as a natural kind, but he appears to assert the artifact claim in a way that gives law an ontological status independent of its constitutive social practices. See *id.*



in Bobbitt's theory. In place of the foundationalist, representationalist models that assert that propositions of constitutional law have truth conditions based upon the Constitution,<sup>207</sup> Bobbitt would substitute a description of practice, finding legitimacy in those practices, not in the words.<sup>208</sup> On this account, originalists object that the structuralism of Justice Black or the prudentialism of Justice Frankfurter or Alexander Bickel do not hew closely enough to the constitutional text as understood by the original drafters.<sup>209</sup> Bobbitt would reply that the originalists misunderstand how the Constitution works and what constitutional law is.<sup>210</sup> He would say that the human social activity of making constitutional arguments and deciding constitutional cases comprise our constitutional law.<sup>211</sup> For Bobbitt, constitutional law is an activity, not an abstract thing.<sup>212</sup> That is, there is no constitutional law independent of the human social activities—principally arguing constitutional cases and deciding those cases—to which we can appeal in talking about what our constitutional law is.<sup>213</sup>

The originalists want and need constitutional law to be a thing to which interpretative conclusions can be compared.<sup>214</sup> Bobbitt believes that originalism's critics make the same ontological mistake.<sup>215</sup> The constitutional law of the critics is equally reified. There is an ontologically independent Constitution that makes our claims about constitutional law true or false.<sup>216</sup> But for the critics, that constitutional law is at once richer, less static, and potentially less certain.<sup>217</sup> Originalism's critics believe that the claims of originalism are false, a belief supported by their assumption that

<sup>207</sup> See, e.g., MARMOR, *INTERPRETATION*, *supra* note 1, at 9–25 (offering a philosophically sophisticated explanation of meaning, truth, and interpretation); *THE PHILOSOPHY OF LAW 5* (Ronald Dworkin ed., 1977) [hereinafter *PHILOSOPHY OF LAW*].

<sup>208</sup> BOBBITT, *FATE*, *supra* note 64, at 5–8.

<sup>209</sup> See, e.g., Philip Bobbitt, *Reflections Inspired by My Critics*, 72 *TEX. L. REV.* 1869, 1916–17 (1994) [hereinafter Bobbitt, *Reflections*].

<sup>210</sup> *Id.* at 1873–76.

<sup>211</sup> See BOBBITT, *FATE*, *supra* note 64, at 5–8.

<sup>212</sup> *Id.*

<sup>213</sup> See *id.*

<sup>214</sup> See generally LeDuc, *Ontological Foundations*, *supra* note 41; Scalia, *INTERPRETATION*, *supra* note 6.

<sup>215</sup> BOBBITT, *FATE*, *supra* note 64, at 7–8 (describing the coequal modes of constitutional argument).

<sup>216</sup> See LeDuc, *Ontological Foundations*, *supra* note 41, at 305–23.

<sup>217</sup> See, e.g., DWORKIN, *EMPIRE*, *supra* note 66, at 355–99 (asserting that law as integrity can provide unique right answers even in constitutional cases); Powell, *supra* note 8 (asserting that the Founders had no original understanding that the Constitution would be interpreted according to their original understanding or original intentions). See generally LeDuc, *Anti-Foundational Challenge*, *supra* note 43. There is a sense in which the anti-originalists are more deferential toward the Founders than the originalists, because the anti-originalists credit the Founders with having created a constitutional machine that can provide answers through time to all constitutional controversies that may arise. See generally André LeDuc, *Originalism's Claims and Their Implications*, *ARK. L. REV.* (forthcoming 2018) [hereinafter LeDuc, *Originalism's Claims*] (describing the problem that constitutional flux poses for originalism).

the Constitution has an ontological status independent of our constitutional practices, and that the truth of propositions of constitutional law are true or false by virtue of their correspondence with the objective facts about the Constitution.<sup>218</sup>

If, following Bobbitt, we dispense with the notion of constitutional law as an objective thing independent of our practice, then the originalist, interpretative claim may be reconstructed as an endorsement of Bobbitt's first two modes of argument—the historical and the textual<sup>219</sup>—and the anti-originalist claim may be reconstructed as an endorsement of the remaining four modes—doctrinal, structural, prudential, and ethical.<sup>220</sup>

But that restatement loses a critical element of the claims made and a critical element of the entire debate. In Bobbitt's theory, depending upon the context, the claims of an originalist interpretation may be dispositive, but they will not be invariably so.<sup>221</sup> The modes of argument endorsed by originalism's critics, too, will only sometimes be dispositive; in other cases they will be trumped by the modes of argument endorsed by the originalists.<sup>222</sup> Central to Bobbitt's account of constitutional law is that none of the modes of constitutional argument is dispositive of all questions (although each will sometimes prove persuasive—and thus dispositive) and that no meta-mode exists to resolve potential conflicts among the different modes.<sup>223</sup> The debate about originalism cannot survive this re-description because the debate is based on claims of a systematic privileging of a particular mode or modes of argument—claims we now reject. While that modal account of our constitutional practice may appear to describe only a chaotic, uncertain practice, Bobbitt and I have explained the constraints that govern that sophisticated social practice.<sup>224</sup>

This modulated pluralist claim may be contrasted to the more radical skeptical claims made by Stanley Fish and the Critical Legal Studies proponents.<sup>225</sup> Fish

<sup>218</sup> See LeDuc, *Ontological Foundations*, *supra* note 41 (providing a more complete defense of the claims attributed to originalism's critics); Ronald Dworkin, *Introduction*, in *THE PHILOSOPHY OF LAW* 1, 5 (Ronald Dworkin ed., 1977); Ronald Dworkin, *Objectivity and Truth: You'd Better Believe It*, 25 *PHIL. & PUB. AFF.* 87, 95–96 (1996) [hereinafter Dworkin, *Objectivity*].

<sup>219</sup> See BOBBITT, *FATE*, *supra* note 64, at 9–38 (describing historical and textual modes of argument).

<sup>220</sup> *Id.* at 39–119 (describing doctrinal, prudential, structural, and ethical modes of argument).

<sup>221</sup> See *id.* at 246–47 (“Constitutional argument is the method by which the competition for legitimate decision is carried on.”).

<sup>222</sup> See *id.*

<sup>223</sup> See BOBBITT, *INTERPRETATION*, *supra* note 53, at xii–xv.

<sup>224</sup> See BOBBITT, *FATE*, *supra* note 64; LeDuc, *Anti-Foundational Challenge*, *supra* note 43.

<sup>225</sup> See STANLEY FISH, *Working on the Chain Gang: Interpretation in Law and Literature*, in *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* 87 (1989) [hereinafter FISH, *Working on the Chain Gang*]; STANLEY FISH, *Wrong Again*, in *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* 105 (1989); ROBERTO MANGABEIRA UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* (1986) (arguing that law is without integrity, merely serving, and reducible to, the structures of power); see, e.g.,

criticizes Dworkin for attributing far too restrictive conditions to later writers in his chain novel analogy to the interpretation of law.<sup>226</sup> The Critical Legal Studies theorists often deny that there is any objective truth in law.<sup>227</sup> They instead assert that law may be reduced to an expression of economic and political power and explained and understood by understanding those underlying power relationships.<sup>228</sup> Patterson characterizes Fish very accurately as such an anti-realist.<sup>229</sup> Fish's position may seem very similar to Bobbitt's deflationary account of the truth of propositions of law.<sup>230</sup> Both deny that constitutional law is independent of how we talk about and act with respect to it.<sup>231</sup> Patterson highlights an important difference, however, Fish goes further in his reduction.<sup>232</sup> Patterson makes an anti-realist commitment to the primacy of interpretation.<sup>233</sup> For Fish, the practice of constitutional interpretation is

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MARTHA C. NUSSBAUM, *Sophistry about Conventions*, in LOVE'S KNOWLEDGE: ESSAYS ON PHILOSOPHY AND LITERATURE 220 (1992) [hereinafter NUSSBAUM, *Sophistry*] (invoking notions of truth and objectivity in criticizing Fish's commitment to subjectivity and denial of the claims of rationality); PATTERSON, TRUTH, *supra* note 53, at 97–127; Brandom, *Legal Concept Determination*, *supra* note 5, at 21–22.

<sup>226</sup> FISH, *Working on the Chain Gang*, *supra* note 225, at 88–91 (arguing that Dworkin's chain novel metaphor—which analogizes the formation of legal doctrine by the courts to multiple authors who undertake to write a novel with each author writing a chapter after another has made her contribution—for the cumulative, precedential feature of law is fundamentally mistaken, because in such a chain novel the later authors are no more or less free than the first author in their writing). Many have rejected Fish's strong claim of legal indeterminacy. *See, e.g.*, PATTERSON, TRUTH, *supra* note 53, at 97–127 (criticizing Fish not for his subjectivism but for his construction of an interpretive community to ground claims about the truth of legal propositions); Brandom, *Legal Concept Determination*, *supra* note 5, at 21–22, 33–38 (rejecting the radically indeterminate realist account Brandom attributes to Fish as a misconception of the inferential content of legal precedents because of its failure to recognize the obligation a judge assumes in interpreting and applying legal precedent (or other legal authority)); NUSSBAUM, *Sophistry*, *supra* note 225 (arguing that Fish's subjectivism should be despised and rejected); RONALD DWORKIN, *On Interpretation and Objectivity*, in A MATTER OF PRINCIPLE 167, 175–77 (1985) (characterizing Fish's stance as invoking radical external skepticism and rejecting that position as incoherent). *See generally also* Dworkin, *Objectivity*, *supra* note 218 (making further arguments against external skepticism); Jeremy Waldron, *Did Dworkin Ever Answer the Critics?*, in EXPLORING LAW'S EMPIRE: THE JURISPRUDENCE OF RONALD DWORKIN 155 (Scott Hershovitz ed., 2006).

<sup>227</sup> *See generally* UNGER, *supra* note 225, at 5–8 (beginning the heroic epic of Critical Legal Studies with its repudiation of objectivism).

<sup>228</sup> *See id.*

<sup>229</sup> PATTERSON, TRUTH, *supra* note 53, at 126–27 (“Dworkin and Fish agree with Nietzsche that humans are ‘interpretation all the way down.’ . . . Dworkin and Fish are both committed to a picture of legal justification where each appeals to ‘something’ which makes propositions of law true.” (citation omitted)).

<sup>230</sup> *Id.*; BOBBITT, INTERPRETATION, *supra* note 53, at xix–xx.

<sup>231</sup> BOBBITT, INTERPRETATION, *supra* note 53, at xix–xx; PATTERSON, TRUTH, *supra* note 53, at 126–27.

<sup>232</sup> FISH, *Working on the Chain Gang*, *supra* note 225.

<sup>233</sup> *See* PATTERSON, TRUTH, *supra* note 53, at 126, 179.

not a social practice with the social patterns and constraints that Bobbitt and Patterson describe.<sup>234</sup> Patterson wants to salvage the primacy of the argumentative community without Fish's anti-realist commitments and without Fish's commitment to the priority of interpretation in constitutional decision.<sup>235</sup>

Bobbitt's characterization of constitutional law, and his denial of foundations therefor, may seem to commit him to the same claims made by the skeptics.<sup>236</sup> Bobbitt and Patterson are at pains to distinguish their positions from that taken by Fish.<sup>237</sup> They do not argue that the absence of factual support from the world for legal propositions leaves those propositions uncertain, as the skeptics appear to do.<sup>238</sup> Rather, they argue that there cannot be any move to legitimize legal claims, and that the consensus of the relevant legal or constitutional community or, in the absence of consensus, authoritative resolution of such claims, is as good as it gets.<sup>239</sup> As I explored in *The Anti-Foundational Challenge*, this distinction resonates with the philosophical debate between realists, anti-realists, and anti-foundationalist critics.<sup>240</sup> Moreover, Bobbitt and Patterson hold themselves out as members of that community, at least implicitly—they share the internal point of view with respect to the community's rules.<sup>241</sup>

Indeed, Hart's concept of the internal point of view may capture the most important difference between Bobbitt's anti-foundational position and the positions of

<sup>234</sup> FISH, *Working on the Chain Gang*, *supra* note 225.

<sup>235</sup> PATTERSON, TRUTH, *supra* note 53, at 126–27 (defending an analysis of the truth of legal propositions derived from community practice, but denying that the relevant practices are only those of interpretation).

<sup>236</sup> See BOBBITT, INTERPRETATION, *supra* note 53, at xix–xx (asserting that his account is neither realist nor anti-realist).

<sup>237</sup> See *id.* at xix; PATTERSON, TRUTH, *supra* note 53, at 99–127 (offering a comprehensive account of, and argument against, Fish's theory).

<sup>238</sup> Critical Legal Studies theorists endeavor to reduce constitutional propositions to expressions of power or structures of power. See, e.g., Mark Tushnet, *Critical Legal Studies and Constitutional Law: An Essay in Deconstruction*, 36 STAN. L. REV. 623, 646–47 (1984) (expressly invoking Marx in an analysis of contemporary constitutional jurisprudence). See generally MARK TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW (1988) (endorsing communitarian ideals in assessing federalism and other fundamental constitutional questions).

<sup>239</sup> PATTERSON, TRUTH, *supra* note 53, at 126–27, 169–79; see BOBBITT, FATE, *supra* note 64, at 4–7.

<sup>240</sup> LeDuc, *Anti-Foundational Challenge*, *supra* note 43.

<sup>241</sup> See HART, *supra* note 3, at 88, 91 (“One of the difficulties facing any legal theory anxious to do justice to the complexity of the facts is to remember the presence of both these [internal and external] points of view and not to define one of them out of existence.”). The internal point of view with respect to a law for a member of the subject legal community is the perspective that the legal obligation is not simply a consequence of the coercive power available to the sovereign to compel compliance with the obligation (with the obligation viewed from the external point of view), but is also a consequence arising from the fact that membership in the community creates a duty to comply with the community's laws.

Fish and the Critical Legal Studies theorists.<sup>242</sup> Yet Bobbitt, despite his radical criticisms of the premises of both sides of the originalist debate, preserves the internal point of view with respect to constitutional law. That is, although he denies that true propositions about constitutional law describe the world, he nevertheless endorses, accepts, and honors that law.<sup>243</sup>

Bobbitt defends four theses<sup>244</sup>:

1. The debate between originalists and non-originalists reflects philosophical confusion, not disagreement;
2. The first philosophical confusion is ontological, reflecting the belief that law is an abstract thing— independent of our constitutional practices— rather than a human, social activity, like our social practices of courtesy and, in America, passing approaching fellow pedestrians on the right;
3. The second philosophical confusion is epistemological—the failure to recognize that we come to know law, in general, and constitutional law in particular, by participating in the social practice of constitutional interpretation, agreeing to understand within that practice certain propositions of constitutional law; and
4. If we eliminate the philosophical confusion, we are left with a concept of law in which texts acquire their meaning and force in a complex, intellectual social practice—and thus neither originalism nor its critics' position are correct.<sup>245</sup>

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<sup>242</sup> See *supra* note 241 and accompanying text.

<sup>243</sup> See BOBBITT, INTERPRETATION, *supra* note 53, at xii–xiv (implicitly acknowledging that American constitutional law is legitimate); Bobbitt, *Reflections*, *supra* note 209, at 1869 (“In my work, I have endeavored to derive legitimacy from the practices themselves . . .”). Indeed, according to Bobbitt’s account, it was Bork’s rejection of the legitimacy of certain decisions of the Warren and Burger Courts that disqualified Bork. See BOBBITT, INTERPRETATION, *supra* note 53, at 83–108. Goldford also appears to endorse such a radical strategy to resolve the controversy over originalism. GOLDFORD, DEBATE, *supra* note 2, at 17 (“My goal, therefore, is to engage and advance the literature of the originalism debate not by simply adding on to it, but, rather, by working through that literature in order to reconceptualize it in a fundamental but hitherto largely unexplored manner.”). He argues, much like Bobbitt, that the debate over originalism turns on implicit, unarticulated, shared positivist premises about language, meaning and ontology. *Id.* at 16 (“[T]he concept of Framers’ intent cannot function in the way that originalism requires, because it relies on misconceived assumptions about the nature of language, interpretation, and objectivity . . .”).

<sup>244</sup> See BOBBITT, INTERPRETATION, *supra* note 53, at xvi–xx.

<sup>245</sup> Bobbitt must explain how the practice of constitutional decision is constrained. He purports to do so by arguing that only certain modes of constitutional argument are privileged and that, as a matter of constitutional practice, there is a shared acceptance with respect to which arguments are most compelling in particular cases. See *id.* He does not establish that there is a unanimity in that practice—the presence of dissents and concurrences would put paid to that claim in any case.



In Bobbitt's view, it is necessary to reexamine the implicit ontology and epistemology underlying the originalism debate to resolve it.<sup>246</sup> Bobbitt does not claim that there is no debate; it is that through mistaken shared premises, the debate is muddle-headed.<sup>247</sup> The silence of the originalists on these questions is striking. It is less a "just say no" strategy of denial than a strategy of non-engagement, seemingly refusing to acknowledge genuine issues. Originalists owe us—and themselves—an account of these questions and their implications for originalism itself. This account presents another reason that the literature of the debate is so unsatisfying.

Before outlining what a therapeutic strategy would be, it is helpful to canvass simpler and more direct strategies that have been proposed to bring the debate over originalism to a conclusion. I will briefly describe and then reject some strategies that seek to dissolve the debate, rather than to resolve it.

First, some suggest that we are now all originalists.<sup>248</sup> The core of the originalist canon appears commonplace: who, after all, would suggest that the original meanings of the constitutional provisions ought not to be consulted in understanding how to resolve a case presenting a question of constitutional interpretation?<sup>249</sup> But that superficial formulation of originalism neither captures the originalist claim nor highlights the disagreement with originalism's critics. If caring about the original meaning of the Constitution were enough to make us all originalists, then we would indeed all be originalists.<sup>250</sup> But most versions of originalism insist on more than that principle, privileging an original intention, understanding, or expectation in derogation of other potential sources of constitutional law or interpretation.<sup>251</sup>

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<sup>246</sup> See *id.* at xvi.

<sup>247</sup> *Id.* at 16. In implicitly characterizing the debate as muddled, Goldford and Bobbitt allege that the participants are applying a representationalist and foundationalist theory of constitutional law that does not fit the facts. See BOBBITT, INTERPRETATION, *supra* note 53, at xix–xx; GOLDFORD, DEBATE, *supra* note 2, at ix–x (invoking Hegel). On this account, there are no facts about the Constitution (or about anything else in the world) that make propositions of constitutional law true. The debate over originalism can be interpreted as about whether the other side's constitutional claims are proven true by the Constitution (or otherwise). That is a debate neither side can win.

<sup>248</sup> See Solum, *All Originalists Now*, *supra* note 103 (offering an impassioned defense of the New Originalism). Dworkin also flirts with this position, perhaps ironically. See DWORKIN, ROBES, *supra* note 93, at 117–18.

<sup>249</sup> See DWORKIN, ROBES, *supra* note 93, at 117–18 (acknowledging that interpretation begins by understanding what was said). In this respect, the constitutional text would appear no different from other texts with respect to the nature of its understanding and interpretation.

<sup>250</sup> This version of the doctrine might be termed "platitudinous originalism," in terminology derived from Robert Brandom. See ROBERT B. BRANDOM, ARTICULATING REASONS: AN INTRODUCTION TO INFERENCEALISM 23–24 (2000) [hereinafter BRANDOM, INFERENCEALISM] (referring to "platitudinous empiricism").

<sup>251</sup> See generally André LeDuc, *Evolving Originalism: How Are the Original Understandings, Expectations, and Intentions Privileged?* 4–5 (Jan. 2, 2013) (unpublished manuscript) (on file with the author) [hereinafter LeDuc, *Privileged How?*] (describing the ways in which

To the extent that originalism is committed to privileging historical and textual arguments over other modes of constitutional argument,<sup>252</sup> then we are not all originalists. As Sunstein argues, many of us would not endorse the radical surgery that originalism requires upon our contemporary understanding of the Constitution and the role of the federal government.<sup>253</sup> Similarly, to the extent that originalism would disregard the consequences of certain decisions—for example, with respect to gun control<sup>254</sup>—its critics are not all originalists.<sup>255</sup> Many of those critics, like Posner and Sunstein, believe that the measure of a constitutional theory is its consequences for the decision of constitutional cases.<sup>256</sup> Similarly, to the extent that originalism calls for us to implicitly adopt the moral framework and expectations of eighteenth century or nineteenth century racist white Americans, we are not all originalists.<sup>257</sup> Finally, as a matter of substantive constitutional law rather than constitutional theory, to the extent that uncertainties cause us to abandon entire provisions of the Constitution or to reduce their protections to their lowest common denominator, we are not all originalists.<sup>258</sup>

But the disagreement between originalists and their critics goes beyond these differences. The originalists deny, or limit, the legitimacy of sources of law that non-originalists accept as authoritative—among them, the precedential, structural,

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originalism generally privileges the original understandings, expectations, and intentions in derogation of other arguments or interpretative strategies, and how its critics contest those claims).

<sup>252</sup> See BOBBITT, *INTERPRETATION*, *supra* note 53, at 83–108 (arguing that Bork’s argument in his Supreme Court confirmation hearings that the non-originalist decisions of the Warren Court were illegitimate is the feature of Bork’s jurisprudence that properly disqualified him from confirmation).

<sup>253</sup> See generally SUNSTEIN, *RADICALS*, *supra* note 4 (identifying alleged implications of originalism that would be unpalatable or unacceptable). *But see* Steven G. Calabresi, *Introduction*, in *ORIGINALISM: A QUARTER-CENTURY OF DEBATE* 32–40 (2007) (endorsing many of the constitutional implications of originalism that Sunstein characterizes as unpalatable).

<sup>254</sup> See Scalia, *INTERPRETATION*, *supra* note 6, at 43.

<sup>255</sup> See Robert Leider, *Our Non-Originalist Right to Bear Arms*, 89 *IND. L.J.* 1587, 1641 (2014).

<sup>256</sup> See generally SUNSTEIN, *RADICALS*, *supra* note 4, at 73 (characterizing the prudential defense of originalism as “an utterly implausible position”); Posner, *Bork*, *supra* note 25.

<sup>257</sup> Compare Bickel, *Original Understanding*, *supra* note 51 (arguing that the drafters and adopters of the Fourteenth Amendment did not understand it to prohibit racially segregated schools), with McConnell, *supra* note 51 (making a valiant—but what is generally viewed as an ultimately unsuccessful—effort to rebut Bickel’s claim and thus to save the original understanding of the Fourteenth Amendment from the charge of a fundamental underlying racism consistent with racially segregated public schools); see also Klarman, *supra* note 51, at 1904–05 (rebutting McConnell’s historical claims). See generally LeDuc, *Privileged How?*, *supra* note 251, at 60. *But see* BORK, *TEMPTING*, *supra* note 7, at 76 (asserting that *Brown* was rightly decided as a matter of the original understanding of the Fourteenth Amendment).

<sup>258</sup> Justice Scalia of course denies looking to expectations rather than understandings. See Scalia, *Response*, *supra* note 76, at 144. *But see* Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 65 *FORDHAM L. REV.* 1249, 1256–57 (1997) [hereinafter Dworkin, *Arduous*] (arguing that Justice Scalia proclaims himself a semantic originalist but is, in fact, an expectations originalist).

prudential, and ethical arguments.<sup>259</sup> This disagreement is as profound as the disagreement over particular constitutional interpretations.<sup>260</sup>

Second, some may question whether there is really a conflict between originalism and its critics. It would indeed be ironic if we concluded that the apparent conflict over originalism is in fact illusory. Nevertheless, that reconciliation may be entertained for two reasons. The first is trivial. On this argument, originalists and their critics merely emphasize different, independent but non-exclusive modes of argument.<sup>261</sup> From this vantage, certain forms of originalism, such as weak originalism and moderate (non-exclusive) originalism, do not conflict with other theories of interpretation because they can coexist. While there is certainly less inconsistency between such forms of originalism and their critics,<sup>262</sup> the conflict nevertheless remains because originalism asserts a priority to, or primacy for, original intentions, expectations, or understandings that critics deny.<sup>263</sup> Thus, such a strategy of reconciliation cannot harmonize even the weak or non-exclusive types of originalist theory with the critics' responses.

Finally, it is sometimes argued that the debate is illusory because originalism is not well-defined<sup>264</sup> or is incoherent.<sup>265</sup> These are disguised arguments for the anti-originalist position. The first is an argument for the anti-originalist position because

<sup>259</sup> See, e.g., Scalia, INTERPRETATION, *supra* note 6, at 139–40 (attacking the legitimacy of non-originalist precedent under originalism, but conceding a limited role for such law under the principle of *stare decisis*); Barnett, *Trumping*, *supra* note 26, at 257–59 (defending a more radical and systematic attack on the role of non-originalist precedent on the grounds that the only legitimate source of constitutional law is the constitutional text).

<sup>260</sup> Indeed, because the debate over originalism is, fundamentally, a debate over the legitimacy of various modes of argument, the stakes are perhaps even higher than with respect to any particular question that may come before the Court.

<sup>261</sup> Dworkin sometimes writes as if this were the case, but this is not his considered view. See Dworkin, *Arduous*, *supra* note 258, at 1250 (“[T]extual interpretation is nevertheless an essential part of any broader program of constitutional interpretation, because what those who made the Constitution actually said is always at least an important ingredient in any genuinely interpretive constitutional argument.”).

<sup>262</sup> See *id.* at 1249–50.

<sup>263</sup> Thus, the core of originalism is the claim to privilege arguments from original understandings, expectations, and intentions. See generally LeDuc, *Originalism's Claims*, *supra* note 217, at 1.

<sup>264</sup> See Berman, *Originalism*, *supra* note 3, at 4–6 (arguing that the various versions of originalism are inconsistent in ways at least as fundamental as the differences among its critics).

<sup>265</sup> Compare Powell, *supra* note 8 (arguing that the Founders were not committed to a jurisprudence of original intentions or understanding), with Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 273–81 (1988) (acknowledging Powell's objection and offering a series of rebuttal arguments to his claim), and Charles A. Lofgren, *The Original Understanding of Original Intent?*, 5 CONST. COMMENT. 77 (1988) (“What, Powell asks, was ‘the original understanding of original intent’? In this article, I unabashedly appropriate Powell's central question. My purpose is to offer another reading of major chunks of the evidence that Powell himself cites . . .”).

the originalists have eschewed theoretical precision. They aspire to a commonsensical, untheoretical approach to the Constitution.<sup>266</sup> In the case of the charge of incoherence, even for an often untheoretical theory like originalism, such a characterization calls into question its merits.

There is a *bona fide* dispute between originalists and their critics. Originalists privilege the original understandings, expectations, and intentions in a manner that their critics deny.<sup>267</sup> A therapeutic resolution of the debate must enter into the protagonists' respective ideopolises.

When we arrive, despite the intensity of the debate, what is most striking is not the differences, but the commonalities. Both sides of the debate believe that there is a fact to the matter as to how a constitutional case controversy ought to be decided.<sup>268</sup> They believe that there is a state of affairs—a fact of the matter—relating to the Constitution that exists in the world that determines how the Constitution applies and thus how a constitutional case should be decided.<sup>269</sup> Originalists and their critics assume that the appeal to the original understandings or expectations, for example, is an appeal to the relevant fact of the matter and that such an appeal is either correct or incorrect.<sup>270</sup> For the originalists and their critics, propositions of constitutional law, which are the building blocks of constitutional argument, assert interpretations of the constitutional text, based upon such original understandings.<sup>271</sup> Those interpretations are either true or false.<sup>272</sup>

On the other hand, in terms of the debate, originalists and their critics really do disagree about the truth of such propositions.<sup>273</sup> Originalism's critics would also assert the truth of propositions of constitutional law ungrounded on original intentions, expectations, or understandings.<sup>274</sup> Originalists would deny such propositions a place in constitutional interpretation and decision.<sup>275</sup>

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<sup>266</sup> I have elsewhere explained why that approach is flawed. See generally LeDuc, *Philosophy and Constitutional Interpretation*, *supra* note 43.

<sup>267</sup> See Farber, *Perplexed*, *supra* note 2, at 1085–90. See generally LeDuc, *Originalism's Claims*, *supra* note 217, at 1.

<sup>268</sup> See generally LeDuc, *Ontological Foundations*, *supra* note 41, at 269–74, 306–18.

<sup>269</sup> See *id.* at 304.

<sup>270</sup> *Id.* at 334.

<sup>271</sup> See *id.* at 269–74.

<sup>272</sup> See generally *id.*; LeDuc, *Anti-Foundational Challenge*, *supra* note 43.

<sup>273</sup> In characterizing the disagreement between originalists and their critics as a disagreement about the truth of their respective claims of constitutional law, I am tacitly adopting (but not endorsing) the stance of the protagonists in the debate. I am not endorsing the truth claims each makes.

<sup>274</sup> Dworkin is probably the clearest and most articulate defender of his truth claims. See generally Dworkin, *Objectivity*, *supra* note 218.

<sup>275</sup> See, e.g., Scalia, *INTERPRETATION*, *supra* note 6, at 43–44. See generally LeDuc, *Beyond Babel*, *supra* note 31, at 197–220 (exploring the originalist and non-originalist arguments in three important recent cases).

The rejection of both the alternatives offered by the protagonists sets the stage to consider a more complex therapeutic strategy to move beyond the debate. The first step is to sketch out what therapy means in this context, recapitulate why the debate about originalism appears pathological, and to flesh out how a therapeutic approach may be employed with respect to the debate.<sup>276</sup>

## II. ADMINISTERING THE CURE

### *A. Introduction*

The therapeutic project is well underway, because I have motivated us (if we need any further motivation) to want to end the debate over originalism, and I have explained why the two sides of the debate have such a powerful appeal to the protagonists in the debate. It is helpful to summarize what I have argued so far.

First, I have outlined how originalism and its critics have failed to describe our practice of constitutional argument and decision. Second, I have argued in a companion piece against the effectiveness of the strategy of using philosophy to ground radical reform strategies in our constitutional theory.<sup>277</sup> That is a strategy that figures, tacitly or expressly, in the arguments made by the protagonists in the debate. Most simply, I have argued that philosophy cannot solve our constitutional puzzles, whether substantive or theoretical. Nor can philosophy ground our constitutional arguments or decisions. At most, it can help us work through the confusions that have put our constitutional thinking—and the originalism debate—in the ditch.

Diagnosing the pathology of the originalism debate does not, however, effect the cure. A cure requires the protagonists in the debate to abandon the arguments and claims that carry on the debate. The task of therapy is first to show the protagonists how those arguments and claims may be abandoned at an acceptable cost. The second task is to show the benefits that may be captured with such progress.

### *B. Four Remaining Major Therapeutic Moves*

Four principal therapeutic insights remain to be developed with respect to curing the protagonists of their need to continue the debate. What is required is teasing out the therapeutic implications of the claims that I have already made. The therapeutic task now is to develop an alternative to the express premises and, more importantly, the tacit assumptions underlying the debate.

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<sup>276</sup> See *supra* Sections I.A–B.

<sup>277</sup> See LeDuc, *Philosophy and Constitutional Interpretation*, *supra* note 43, at 105–32 (arguing that philosophy does not ground and cannot be deployed to radically reform our constitutional law, despite Dworkin’s claims to the contrary). See generally BOBBITT, FATE, *supra* note 64; PATTERSON, TRUTH, *supra* note 53.



First, the protagonists on both sides offer an incomplete and inadequate description of our constitutional practice.<sup>278</sup> The descriptions are incomplete because they do not account for large parts of the constitutional argument authoritatively made in constitutional decisions. They are inadequate because they describe constitutional reasoning in formalistic and misleading terms.<sup>279</sup> As noted previously and in some companion articles,<sup>280</sup> the participants' descriptive failures are largely a consequence of their focus on what constitutional practice ought to be.<sup>281</sup>

If this indictment is correct, then is there a therapeutic insight that can move the protagonists toward a more fruitful stance? The protagonists may well remain steadfast in their commitment to the primacy of prescription. If they do so, they must explain the failure of either side to make advances in the debate—at least in the critical sense of convincing the other side. Without arguing against the integrity or good faith of their opponents, it is hard to understand how the protagonists can account for a half century of stalemate in the debate. The unfruitfulness of the debate seems obvious. Abandoning the dualism of the debate would allow the protagonists to recognize the complexity and richness in our constitutional argument and practice. Thus, the descriptive failure inherent in the debate provides a good reason to move beyond the opposition emphasized in the debate.

The originalists may argue that the debate is not at a stalemate. Originalists like Justice Scalia may argue that the increasing commitments to originalism on the Court and within the academy show that the originalists are winning the debate.<sup>282</sup> This may be true as a matter of political or constitutional history, but my focus is not on that aspect of the originalism debate. In the space of reasons, there is no evidence that the originalists are convincing their opponents—or successfully discrediting them. The New Originalists like Baude and Sachs believe that their new arguments will win the day.<sup>283</sup> I have argued in some depth why those arguments are not likely to be effective, even if the originalists are prepared to accept the concessions that accompany those new arguments.<sup>284</sup> Moreover, there is no evidence that any originalist critic has been persuaded by the new arguments. Originalism's critics may be

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<sup>278</sup> See *infra* notes 279–85 and accompanying text.

<sup>279</sup> LeDuc, *Practical Reasoning*, *supra* note 83, at 12–19.

<sup>280</sup> See LeDuc, *Anti-Foundational Challenge*, *supra* note 43; LeDuc, *Constitutional Meaning*, *supra* note 75.

<sup>281</sup> See generally LeDuc, *Anti-Foundational Challenge*, *supra* note 43; LeDuc, *Constitutional Meaning*, *supra* note 75.

<sup>282</sup> See, e.g., Antonin Scalia, *Foreword*, in ORIGINALISM: A QUARTER-CENTURY OF DEBATE 43, 43–44 (Steven G. Calabresi ed., 2007); Scalia, *Response*, *supra* note 76, at 149 (predicting “hard times ahead” for nonoriginalists).

<sup>283</sup> See, e.g., Baude & Sachs, *Law of Interpretation*, *supra* note 19, at 1147 (“Once we recognize the importance and ubiquity of the law of interpretation, we can be clearer with ourselves and with each other about what we’re doing in any given case . . .”).

<sup>284</sup> See generally LeDuc, *Constitutional Meaning*, *supra* note 75; LeDuc, *Practical Reasoning*, *supra* note 83.

equally optimistic, but their optimism is no more firmly grounded. The philosophical arguments that Dworkin, Marmor, Soames, and others have advanced have, again, won no originalist converts.<sup>285</sup> My claim of stalemate is hard to rebut—or ignore.

The second therapeutic insight is that, in constitutional decisional theory, description is prior to prescription; any judgments about our constitutional practice must be made from within that practice.<sup>286</sup> There is no Archimedean stance from which to criticize or reform our constitutional practice from outside that very practice.<sup>287</sup> The protagonists make prescription prior to description in their accounts of our constitutional law and practice.<sup>288</sup> This is a fatal flaw because it assumes that there is a foundational derivation of our constitutional law. On the strength of that foundational account, the existing practice of constitutional argument and decision can be assessed and, as necessary, reformed. But there is no such foundational account that legitimizes our constitutional practice. That practice is itself foundational, the bedrock of our constitutional law.<sup>289</sup> When the priority of our constitutional practice is acknowledged, the commitment of the protagonists to a foundational account of that practice emerges as the fatal flaw it is and another reason to abandon the argument.

The third therapeutic insight is that the substantive constitutional goals that the protagonists in the debate have for the theoretical stances that they take can be achieved without the theoretical commitments of the originalism debate. Originalism is not necessary for the originalists to have a basis on which to criticize the excesses of the Warren Court.<sup>290</sup> Thus, for example, the Supreme Court's decision in *Miranda*

<sup>285</sup> DWORKIN, *EMPIRE*, *supra* note 66, at 90 (“Jurisprudence is the general part of adjudication, silent prologue to any decision at law.”); MARMOR, *INTERPRETATION*, *supra* note 1; Soames, *Deferentialism*, *supra* note 99. *See generally* LeDuc, *Constitutional Meaning*, *supra* note 75.

<sup>286</sup> *See, e.g.*, LeDuc, *Practical Reasoning*, *supra* note 83, at 4 (defending an informal account of the reasoning in constitutional decision against the competing formal account of the originalists); *see also* LeDuc, *Anti-Foundational Challenge*, *supra* note 43 (arguing that there are not foundational discursive premises of our constitutional practice to which appeal may be made in criticizing or defending constitutional arguments or decisions).

<sup>287</sup> That is, I believe, the fundamental import of Justice Jackson's celebrated aphorism about the Court: “We are not final because we are infallible, but we are infallible only because we are final.” *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring). The Court's *de facto* infallibility encompasses not only the outcomes of the Court's decisions, but also the kinds of arguments it makes.

<sup>288</sup> *See* LeDuc, *Practical Reasoning*, *supra* note 83, at 4. The claim that a jurisprudential or philosophical theory could force the fundamental revision of our constitutional law and practice reflects a misunderstanding of the nature of that constitutional law and practice—and of the nature of philosophical theory. *See* LeDuc, *Philosophy and Constitutional Interpretation*, *supra* note 43, at 113 n.92.

<sup>289</sup> *See generally* LeDuc, *Anti-Foundational Challenge*, *supra* note 43; LeDuc, *Philosophy and Constitutional Interpretation*, *supra* note 43.

<sup>290</sup> *See, e.g.*, BORK, *TEMPTING*, *supra* note 7, at 82–83, 131.

*v. Arizona*<sup>291</sup> could be criticized not simply because the Court failed to attend to the original intent regarding, or linguistic understanding of, the prohibition on self-incrimination, but on the basis that those original intentions and understanding yield a more compelling application of the Fifth Amendment or because, as a prudential matter, requiring the safeguards dictated by *Miranda* unduly hampers the police work of the State. Those arguments can be made even while acknowledging the legitimacy of the ethical and structural arguments advanced by the Court. Nor are the arguments against the legitimacy and importance of historical and textual argument necessary for originalism's critics who make structural, doctrinal, and prudential arguments.<sup>292</sup> Thus, for example, nonoriginalists like John Hart Ely can defend the voting rights decisions of the Warren Court on the structural arguments he makes, even while acknowledging that the historical and textual arguments cut against such decisions.<sup>293</sup> In the end, the Court must make a judgment as to which of the competing modes of argument is most persuasive in the case at hand. Thus, on both sides of the debate, the protagonists' claims and theories are unnecessary for the judgments the protagonists defend with respect to the Warren Court's constitutional jurisprudence. The goals motivating the protagonists can be achieved, at least in substantial part, without the sterile theories of the debate. Understanding that ought to give the protagonists another reason to move on.

The originalists seek a constitutional theory that can provide a foundation from which to criticize the Warren Court's constitutional jurisprudence, to cabin judicial discretion, and to explain the Court's power of judicial review in our democratic republic.<sup>294</sup> Moreover, by privileging varieties of historical and textual arguments, the originalists believe that they can generate a constitutional jurisprudence that delivers substantive constitutional results that can reverse much established constitutional doctrine that has allowed the growth of the modern liberal administrative state.<sup>295</sup>

The originalists are wrong both about what originalism can do and about the need for originalism to do it. The originalists want their theory to comprehensively discredit the constitutional jurisprudence of the Warren Court as illegitimate.<sup>296</sup> The critics think that their theoretical commitments generate arguments that refute the originalist claim to privilege historical and textual arguments. By privileging the arguments that generate the Living Constitution, the critics believe that they can defeat the originalist assault on the Warren Court's constitutional jurisprudence.<sup>297</sup>

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<sup>291</sup> 384 U.S. 436 (1966).

<sup>292</sup> See, e.g., ELY, DEMOCRACY, *supra* note 24 (structural arguments); Sunstein, *Five Theses*, *supra* note 165 (doctrinal arguments); Posner, *Bork*, *supra* note 25, at 1369 (prudential arguments).

<sup>293</sup> See ELY, DEMOCRACY, *supra* note 24.

<sup>294</sup> See BORK, TEMPTING, *supra* note 7, at 129–32; Scalia, INTERPRETATION, *supra* note 6, at 9. *But see* Baude, *Originalism as a Constraint*, *supra* note 19.

<sup>295</sup> See SUNSTEIN, RADICALS, *supra* note 4, at 18–19.

<sup>296</sup> See BORK, TEMPTING, *supra* note 7, at 82–83, 131.

<sup>297</sup> See, e.g., ELY, DEMOCRACY, *supra* note 24, at ch.2 (criticizing originalism and setting up the foundation for a structural argument for the Warren Court's decisions about voting

The critics are wrong about their ability to protect the constitutional legacy of the Warren Court against the attacks of the originalists on the basis of the theories they have built in the debate over originalism. They are wrong about their need for such theoretical arguments to burnish that legacy. Finally, they are wrong about their ability to ground the Living Constitution and the other alternatives to originalism on the basis of their constitutional theories. The theoretical arguments that the critics have constructed generally privilege the arguments from structure, prudence, doctrine, and ethics that support constitutional jurisprudence like that developed by the Warren Court.<sup>298</sup> But the fit is at best only rough: the most problematic elements of the Warren Court's constitutional canon were not those decisions and opinions that clearly invoked canonical structural, doctrinal, prudential, or ethical arguments.<sup>299</sup> Rather, they were those decisions and opinions that do not both expressly articulate any of those modes of argument and resonate with us as a matter of justice.

For example, in *Griswold v. Connecticut*,<sup>300</sup> the conclusion that a constitutional right of privacy extends to protect the right of a married couple to procure contraceptives was not supported by doctrinal, prudential, or structural arguments—and was supported even less by historical or textual arguments.<sup>301</sup> The only argument that may support the recognition of that right is ethical argument.<sup>302</sup> Ethical argument is not often deployed by the Court.<sup>303</sup> Historically, ethical argument has been employed to strike down overreaching by the state against its citizens.<sup>304</sup> The Connecticut statute prohibiting the sale of contraceptives is not obviously easily assimilated to the

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rights); cf. SUNSTEIN, *RADICALS*, *supra* note 4 (criticizing originalism and endorsing minimalist prudential arguments without defending the entire Warren Court's constitutional jurisprudence, but without the theoretical structure offered by Ely); Dworkin, *Forum*, *supra* note 152.

<sup>298</sup> See ELY, *DEMOCRACY*, *supra* note 24; SUNSTEIN, *RADICALS*, *supra* note 4.

<sup>299</sup> Thus, for example, while the voting rights decisions of the Court were undoubtedly politically controversial, they were not particularly controversial as a matter of constitutional law because of the strong structural arguments for the results reached.

<sup>300</sup> 381 U.S. 479 (1965).

<sup>301</sup> *Id.* at 480, 485–86. The rhetorical style of the Court's opinion, and its casual invocation of the penumbras of the express rights protected by the Constitution, undoubtedly exacerbated the controversialness of the decision.

<sup>302</sup> See BOBBITT, *FATE*, *supra* note 64, at 103–06 (describing the role of ethical argument as a tacit appeal to fundamental beliefs about the nature of individuals and their relationship to our limited government, but not invoking that mode of argument to explain the decision in *Griswold*). Ethical argument supports the result in *Griswold* because that decision protects the fundamental expectation of privacy within the intimacy of married couples' bedrooms. Thus the Court wrote: "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship." *Griswold*, 381 U.S. at 485–86.

<sup>303</sup> See BOBBITT, *FATE*, *supra* note 64, at 104–05.

<sup>304</sup> See *id.* at 103–06.

template of the kind of intrusive state action struck down in *Rochin v. California*.<sup>305</sup> In *Griswold*, while the State had criminalized the use of contraceptives by married couples, it did not actively enforce that law and never asserted that its enforcement could bring the State into the marital bedrooms that Justice Douglas invoked in striking down the statute.<sup>306</sup> By contrast, the State in *Rochin* had, in fact, entered the defendant's bedroom and ultimately forced his stomach to be pumped.<sup>307</sup>

Yet at a more general level, what was troubling in *Rochin* was also what was troubling in *Griswold*: in each case, the state had intruded into the private affairs of its citizens.<sup>308</sup> Indeed, in each case the state had implicitly asserted its right to regulate the bodies of those citizens in fundamental and intrusive ways.<sup>309</sup> Viewed with that level of generality, the decision in *Griswold* was not as much an outlier as it may initially have appeared.

Perhaps the best way to think about the perceived mistake in the Warren Court's constitutional jurisprudence is as a misunderstanding of the proper limits on the power of the Court. The Court betrayed an unrealistic arrogance in its assessment of its ability to change American society.<sup>310</sup> While the performative nature of constitutional decisional texts made the constitutional law so when pronounced by the Court,<sup>311</sup> that performative power has not extended to changing American social mores, moral beliefs, or much of American social behavior.<sup>312</sup> The failure of American political and social practices to follow the Court's leadership, while deplorable at a moral level, is not surprising as a matter of human social psychology and behavior.<sup>313</sup> The failure to anticipate that response may be grounds on which to criticize the Court.

The critics are also wrong that their theoretical stance can discredit the originalists' historical and textual arguments. All of the modes of our constitutional

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<sup>305</sup> See 342 U.S. 165, 172–73 (1952) (holding that law enforcement officials violated the Fourteenth Amendment when they obtained evidence for a drug conviction by forcing open a suspect's bedroom door, struggling to remove suspected drugs from his mouth, and ultimately forcing him to have his stomach pumped).

<sup>306</sup> 381 U.S. at 480.

<sup>307</sup> 342 U.S. at 166.

<sup>308</sup> *Griswold*, 381 U.S. at 480; *Rochin*, 342 U.S. at 165–66.

<sup>309</sup> Ironically, these two cases presented the kind of state intrusion that critics of the Affordable Care Act would analogize to a state mandate to eat broccoli—and reject. See LeDuc, *Beyond Babel*, *supra* note 31, at 204–14 (criticizing the Court's purported distinction between regulating action and inaction).

<sup>310</sup> See generally GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (2d ed. 2008).

<sup>311</sup> See *infra* note 320 and accompanying text. See generally LeDuc, *Constitutional Meaning*, *supra* note 75, at 150–68 (exploring the performative role of the constitutional text and constitutional decisions).

<sup>312</sup> See generally ROSENBERG, *supra* note 310, at 70–71 (asserting that the court's decisions had “virtually no direct effect” in ending many forms of racial discrimination).

<sup>313</sup> See generally *id.* at 72–106 (describing in some detail the political, social, and historical context for the courts' decisions regarding racial discrimination after *Brown*).



argument comprise integral parts of our constitutional practice and law.<sup>314</sup> Historical arguments have no significance in modern science; but they are nevertheless an integral part of our constitutional law and practice.<sup>315</sup>

Perhaps more importantly, the critics are wrong to believe that they need the elaborate superstructure of their constitutional theory to rebut the originalist assault on the Warren Court. The structural, doctrinal, prudential, and ethical modes of argument that the Warren Court invoked to reach its decisions are sufficient to face the originalist criticisms, except to the extent that, as a matter of our continuing judgment, the originalist criticisms made on the basis of historical and textual arguments appear persuasive.<sup>316</sup> I have previously adduced Ely's defense of the Warren Court's voting rights decisions as one example of the kinds of arguments that can be made without challenging originalism's theoretical claims.<sup>317</sup> The Warren Court's decisions on civil rights—*Brown* and its progeny—can be defended on the basis of textual arguments about the meaning of the Equal Protection Clause, even if those arguments face counter-arguments on the basis of precedent and history. As importantly, originalism's critics can generally also defend more progressive decisions protecting individual rights on the basis of canonical constitutional arguments, again, even if those arguments may admit canonical counter-arguments within that same constitutional practice.

The fourth therapeutic insight is that the debate is grounded on untenable foundations. Both the originalists and their critics are trapped by models of language and the world that fit none of the Constitution, its interpretation, or the argumentative practices of lawyers, courts, or commentators.<sup>318</sup> Most fundamentally, the Constitution, and the courts applying the Constitution, do not state propositions of constitutional law that are true or false; instead, the constitutional text and the opinions of the courts are most fundamentally performative utterances, like the statements made in entering into marriage, in wagering, and in entering into contracts.<sup>319</sup>

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<sup>314</sup> See generally LeDuc, *Anti-Foundational Challenge*, *supra* note 43; BOBBITT, FATE, *supra* note 64; PATTERSON, TRUTH, *supra* note 53.

<sup>315</sup> See BOBBITT, FATE, *supra* note 64, at 9.

<sup>316</sup> See, e.g., *id.* at 9–38.

<sup>317</sup> See *supra* note 297 and accompanying text.

<sup>318</sup> This therapeutic insight is more important because it explains why the respective claims of priority or exclusivity are unfounded. It is more fundamental because it offers a comprehensive redescription of the nature of the Constitution and constitutional argument. The protagonists in the originalism debate do not offer adequate descriptions of our constitutional practice. Their accounts are inadequate to capture the complexity of our constitutional argument and decision and generally fail to capture or even acknowledge the role of judgment.

<sup>319</sup> See J. L. AUSTIN, *HOW TO DO THINGS WITH WORDS* 4–5 (1962) (establishing the concept of “performative[s]”: sentences that comprise utterances or texts with little or no truth-value, but when uttered in the appropriate context, perform an act); see also PAUL GRICE, *STUDIES IN THE WAY OF WORDS* 14 (1989). The classic Oxford example of a performative is the utterance “I do” by the bride or groom in the traditional Anglican wedding ceremony,

These utterances are not true or false in any ordinary sense.<sup>320</sup> They do not express a claim about how things are. Instead, these statements can be felicitous and effective, or infelicitous and ineffective, in a variety of ways.<sup>321</sup> Austin thus uses the term *felicitous* in a technical, philosophical sense, indicating that a performative utterance has worked properly in the social practice in which it is imbedded.<sup>322</sup> When we recognize the performative character of the constitutional text and constitutional decision, then we can recognize that we should examine and assess such expressions not principally for their truth but for their felicity and effectiveness as performative texts. An example may help show what this performative description of constitutional texts entails. The Eighth Amendment prohibits cruel and unusual punishments.<sup>323</sup> That prohibition has proved controversial, particularly as it relates to capital punishment.<sup>324</sup> Originalists argue that the historical understanding of this clause should be understood to determine its meaning today and to control its application.<sup>325</sup> They assume that the meaning of the text corresponds to an historical linguistic understanding of the text and a state of affairs in the world.

Most of originalism's critics, who would deny the controlling role of that original historical linguistic understanding, would nevertheless look to interpret the text as if it were an assertion. They seek to identify the meaning with a state of affairs in the world. In the case of Dworkin's law as integrity, that correspondence requires first articulating a moral theory and then a complex theory of law balancing justice and fairness into which an interpretation of the constitutional text may be fit.<sup>326</sup> But fundamentally, Dworkin believes that there is a fact of the matter as to right interpretation of the constitutional text and that the meaning of the text corresponds with a state of affairs in the world.<sup>327</sup>

The shared treatment of the text by the originalists and their critics as if it were merely an assertion misses the text's more fundamental performative function. What can we say about that performative role? The constitutional text is establishing a constraint, initially on the federal government, since Reconstruction on both the state and federal governments, with respect to their criminal law. That is what the text is *doing* by what it is *saying*. How do we ascertain what that performative force

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as part of the ceremony and playing a key part in the act of marriage. See LeDuc, *Constitutional Meaning*, *supra* note 75, at Section I.B: Challenging Classical Originalism's Semantic Account. See generally LeDuc, *Anti-Foundational Challenge*, *supra* note 43.

<sup>320</sup> AUSTIN, *supra* note 319, at 14 (characterizing the nature of what happens when things go wrong with such utterances as matters of "Infelicities").

<sup>321</sup> See *id.* at 14–15.

<sup>322</sup> See *id.*

<sup>323</sup> U.S. CONST. amend. VIII.

<sup>324</sup> See, e.g., Dworkin, *Arduous*, *supra* note 258; Dworkin, INTERPRETATION, *supra* note 61, at 120–22; Scalia, *Response*, *supra* note 76, at 144–46.

<sup>325</sup> Scalia, *Response*, *supra* note 76, at 144–46.

<sup>326</sup> See DWORKIN, EMPIRE, *supra* note 66, at 176–77.

<sup>327</sup> Dworkin, *Objectivity*, *supra* note 218, at 95–96.

is? That question is not simply a matter of establishing the semantic meaning of the text.<sup>328</sup> The performative dimension of constitutional authority explains why substantive due process is not an oxymoron.<sup>329</sup> The failure to recognize the importance of that aspect of authoritative constitutional texts is the shared error of the protagonists in the debate with respect to the Cruel and Unusual Punishment Clause.

The protagonists in the originalism debate and others committed to a purely representational account of constitutional texts and decisions may challenge this performative account on the basis that we make arguments for and against readings and applications of constitutional texts and decisions and those practical inferences are assessed as to whether they are good. That may sound like a judgment about truth and what makes such inferences true. Such assessments about practical inference can instead be better understood in terms of how we make such inferences true.<sup>330</sup>

Moreover, statements of constitutional law also play an inferential role. They stand as premises and conclusions in practical reasoning.<sup>331</sup> In doing so, those performatives have conceptual content, and the nature of the truth of such conceptual content may be complex.<sup>332</sup> Constitutional case decisions and the opinions that accompany those decisions have inferential content.<sup>333</sup> They relate to other cases and other doctrine. We need a practical conceptual account of how that works. That is the sense in which constitutional performatives also have conceptual content that must be accounted for.<sup>334</sup>

I have explored these foundations in more detail in a series of related articles.<sup>335</sup> In those articles I outlined an anti-foundational, anti-representational account of our constitutional language and our constitutional practice. On that account, the language of our constitutional decisional discourse does not represent the Constitution

<sup>328</sup> See generally AUSTIN, *supra* note 319; GRICE, *supra* note 319.

<sup>329</sup> See LeDuc, *Constitutional Meaning*, *supra* note 75, at 170–71.

<sup>330</sup> See generally BRANDOM, *INFERENCEALISM*, *supra* note 250.

<sup>331</sup> LeDuc, *Constitutional Meaning*, *supra* note 75, at 168–74 (sketching an account of the complex inferential content of constitutional texts and opinions); see BRANDOM, *INFERENCEALISM*, *supra* note 250, at 63–69 (endorsing an account of the conceptual content of an expression as determined by its inferential role and arguing that the meaning of a statement is determined by how it is used in inferences).

<sup>332</sup> See LeDuc, *Anti-Foundational Challenge*, *supra* note 43, at 148 n.70; LeDuc, *Constitutional Meaning*, *supra* note 75, at 168–74.

<sup>333</sup> See generally LeDuc, *Constitutional Meaning*, *supra* note 75, at 168–74 (describing the nature of constitutional inferential content).

<sup>334</sup> See generally *id.* at 150–78; LeDuc, *Practical Reasoning*, *supra* note 83, at 11–12. For a classic inferentialist account of conceptual content, see generally BRANDOM, *INFERENCEALISM*, *supra* note 250 (offering an inferentialist account of conceptual content in contrast to a representational account of meaning).

<sup>335</sup> See generally LeDuc, *Anti-Foundational Challenge*, *supra* note 43; LeDuc, *Ontological Foundations*, *supra* note 41; LeDuc, *Philosophy and Constitutional Interpretation*, *supra* note 43.

in the world, and authoritative sentences in such discourse are not true or false in any material sense.<sup>336</sup> Those sentences are performatives, although they do have important conceptual content.<sup>337</sup> Thus, the ontologically independent Constitution to which the protagonists in the debate over originalism appeal, tacitly, to ground the truth of their claims about the Constitution, does not exist.<sup>338</sup> Moreover, as a metaphilosophical matter, philosophy does not stand as the ultimate arbiter of the claims of reason; it does not play a foundational role in grounding those claims.<sup>339</sup> In the context of our constitutional theory and constitutional argument, philosophy can play at most a therapeutic role, revealing linguistic and perhaps conceptual confusion.<sup>340</sup>

The result of this alternative account is not an end of argument, but only an account of that continuing activity, and perhaps, a little refereeing of what to expect from the arguments available to us. The aspirations of the originalists, the emphasis of Tribe on finding the new synthesis,<sup>341</sup> the claims of Bickel to the intellectually grounded coherent and consistent law,<sup>342</sup> must all be tempered, if not abandoned.

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<sup>336</sup> See generally BOBBITT, *INTERPRETATION*, *supra* note 53, at xix–xx; LeDuc, *Anti-Foundational Challenge*, *supra* note 43; LeDuc, *Constitutional Meaning*, *supra* note 75.

<sup>337</sup> See generally LeDuc, *Anti-Foundational Challenge*, *supra* note 43; LeDuc, *Constitutional Meaning*, *supra* note 75, at 150–78.

<sup>338</sup> See generally LeDuc, *Anti-Foundational Challenge*, *supra* note 43; LeDuc, *Ontological Foundations*, *supra* note 41.

<sup>339</sup> See generally LeDuc, *Philosophy and Constitutional Interpretation*, *supra* note 43, at 153–54 (arguing that our constitutional practice does not require or have legitimating foundations); NUSSBAUM, *THERAPY*, *supra* note 52, at 13–40 (describing the stoic model of philosophical inquiry as therapy intended to cure pathologies of the soul); RORTY, *MIRROR*, *supra* note 52, at 6–7 (describing a classic goal of innovative conceptual thinking as a setting aside prior problems in favor of a new vision); Richard Rorty, *Metaphysical Difficulties of Linguistic Philosophy*, in *THE LINGUISTIC TURN: RECENT ESSAYS IN PHILOSOPHICAL METHOD* 1–37 (Richard Rorty ed., 1967) (offering an account of philosophical controversy and the nature of philosophical progress and expressing caution that the linguistic turn in philosophy will result in a definitive resolution of traditional philosophical puzzles and problems); LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* § 133 (G. E. M. Anscombe trans., 3d ed. 1967) [hereinafter WITTGENSTEIN, *INVESTIGATIONS*] (“There is not a philosophical method, though there are indeed methods, like different therapies.”).

<sup>340</sup> See LeDuc, *Philosophy and Constitutional Interpretation*, *supra* note 43, at 153–54.

<sup>341</sup> See Laurence H. Tribe, *The Treatise Power*, 8 GREEN BAG 2D 291, 296 (2005) [hereinafter Tribe, *Treatise Power*] (announcing the suspension of his project of preparing a new edition of *American Constitutional Law* as the disarray in the evolving constitutional doctrine precluded the formulation of a new theoretical synthesis); see also LeDuc, *Beyond Babel*, *supra* note 31, at 221–22 (explaining why Tribe’s grounds for suspending preparation of the revised edition were insufficient).

<sup>342</sup> ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962) (proposing to solve the alleged theoretical problem of judicial review by limiting the role of the Court); see also Bork, *Neutral Principles*, *supra* note 20 (proposing to solve the problem of judicial review by requiring the Court to act on the basis of neutral principle). See generally Bickel, *Original Understanding*, *supra* note 51.

When we are all engaged in a common activity, instead of finding or recovering a text or other object bequeathed to us, the standards under which we act and to which we aspire must be different. But we would be naïve to expect this fundamental rejection of both sides of the originalism debate as fruitless, confused, and pathological to be easily embraced by the protagonists and the mainstream constitutional law community. The next section anticipates some of the principal arguments that may be made by the protagonists to preserve the status quo of the debate.

Most of the originalists decline to argue against *Brown*, for example. The voting rights decisions defended by Ely<sup>343</sup> are also often challenged as to their reasoning rather than their result.<sup>344</sup> The hard question is whether the protagonists in the debate can join in this assessment and, if they are initially unwilling to do so, if there is any further therapeutic gambit that may lead to that result. The two sides of the debate need to be treated separately. In the case of the originalists, knowing that the constitutional jurisprudence can be roundly criticized, and future cases decided, subject to the governor of *stare decisis* on the basis of historical and textual arguments, would appear to respond to much of the concerns behind the rise of originalism. Admittedly, some of those arguments against the legacy of the Warren Court are easier to make than others. On the therapeutic argument made here, the originalists are asked to concede their claim to a clean methodological strike that delegitimizes the entire Warren Court constitutional jurisprudence. That is a substantial concession. In the case of the anti-originalists, the account of our constitutional law and practice acknowledges the ability to invoke structural, prudential, doctrinal, and ethical arguments to defend the Warren Court's constitutional legacy. Some of those arguments are more plausible than others, and some of the cases that comprise the Warren Court's constitutional jurisprudence are easier to defend than others. But, just as the originalists are asked to make peace with structural, prudential, doctrinal, and ethical arguments, so, too, their critics must acknowledge the continuing place of historical and textual arguments. It is easy to imagine the protagonists on each side clinging to the hollow hope that their genius is all that is necessary for their side in the debate to prevail.

### III. RESISTANCE AND TRANSFERENCE IN THE THERAPEUTIC PROCESS

The next stage in my therapeutic strategy takes three principal further steps, addressing two forms of resistance (one as a gating, threshold response, and one later, in response to the challenge I offer). It is here that I begin unraveling the commitments of the protagonists' respective ideopolises. Resistance, perhaps through a mechanism like transference,<sup>345</sup> may play an important role in the continuation of

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<sup>343</sup> ELY, *DEMOCRACY*, *supra* note 24.

<sup>344</sup> See BORK, *TEMPTING*, *supra* note 7.

<sup>345</sup> See generally Lear, *Transference*, *supra* note 57, at 56–62.



the debate over originalism and the failure of strategies like mine and Bobbitt's to move past the debate.<sup>346</sup> Jonathan Lear suggests that Socrates's experience stands as a poignant and dramatic reminder of the power of transference with respect to public reason in the public sphere.<sup>347</sup>

*A. Early Resistance: Questioning Whether Therapy Is Possible*

The debate over originalism may be immune to therapy if the debate simply expresses in the constitutional context values or preferences that are themselves immune to reason or to argument.<sup>348</sup> If such an expressivist<sup>349</sup> account of the debate is proper, and if moral relativism is committed to such an emotivist<sup>350</sup> or subjectivist<sup>351</sup> stance, then a therapeutic strategy or, indeed, any strategy to end the debate, must fail. I do not think such an emotivist or subjectivist account of the debate is accurate, nor do I think that values or preferences are indifferent to reason and argument. Accordingly, an argument against therapy fails on two grounds. Moreover, such an emotivist characterization is not endorsed by many participants in the debate over originalism.<sup>352</sup> Indeed, the kinds of reasoned and conceptual arguments that the originalists and their critics make are largely inconsistent with such a characterization. The conceptual, inferential content of the claims made by the protagonists in the debate are not reducible to expressions of emotion. But the failure of the protagonists

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<sup>346</sup> See generally, e.g., BOBBITT, *FATE*, *supra* note 64; LeDuc, *Anti-Foundational Challenge*, *supra* note 43; LeDuc, *Beyond Babel*, *supra* note 31; LeDuc, *Constitutional Meaning*, *supra* note 75; LeDuc, *Ontological Foundations*, *supra* note 41.

<sup>347</sup> Lear, *Transference*, *supra* note 57, at 57 ("Socrates' mistake, it seems in retrospect, was to ignore transference."). I may be making the same mistake.

<sup>348</sup> See CHARLES TAYLOR, *Explanation and Practical Reason*, in PHILOSOPHICAL ARGUMENTS 34, 34–35 (1995) [hereinafter TAYLOR, *Explanation*] (characterizing the nature of the debate over ethical questions as rarely about fundamental principles, but instead about particularized ("special") interpretations or applications of those principles—often at or beyond the limits of what others would recognize as rational).

<sup>349</sup> By expressivism, I mean a description of the debate that interprets the claims of the participants not as propositions about the world, but as *expressions* of such participants' attitudes or dispositions.

<sup>350</sup> By emotivist, I mean a theory that accounts for moral or ethical claims as expressing an emotional endorsement of an outcome or choice. See GILBERT HARMAN, *THE NATURE OF MORALITY: AN INTRODUCTION TO ETHICS* 27–40 (1977) [hereinafter HARMAN, *MORALITY*] (characterizing emotivism as claiming that ethical or moral propositions express emotional states rather than cognitive judgments).

<sup>351</sup> See, e.g., James Rachels, *Subjectivism*, in *A COMPANION TO ETHICS* 432, 432–33 (Peter Singer ed., 1993) (noting that subjectivism asserts that moral judgments are only subjective, not objective, and as such, are generally a matter of personal preference or choice).

<sup>352</sup> See generally Dworkin, *Bork*, *supra* note 1 (rejecting the substantive doctrinal claims of originalism); Scalia, *Lesser Evil*, *supra* note 4 (making and defending the methodological and doctrinal claims of originalism).

to acknowledge this possible characterization is not a sufficient reason to ignore such an objection in the context of my more expansive therapeutic project.

As we have seen, the argument against therapy begins with the claim that the positions taken with respect to constitutional decision and constitutional interpretation merely express fundamental values as to which the originalists and their critics differ.<sup>353</sup> The substantive, as well as the methodological, differences between the two sides are substantial. A brief summary cannot capture those differences fully. But originalists would appear to value democratic choice,<sup>354</sup> on the one hand, and a limited federal government<sup>355</sup> and limited individual civil liberties,<sup>356</sup> on the other hand. Their critics, by contrast, value individual civil liberties,<sup>357</sup> civil rights,<sup>358</sup> and governmental action to achieve minimal levels of equality of opportunity,<sup>359</sup> even

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<sup>353</sup> See Scalia, *Response*, *supra* note 76, at 148–49 (recognizing the difference between the political and moral values shared among the originalists and those generally shared by their critics). Whether the originalism debate merely expresses those differences is a far stronger claim that appears implausible because of the substantial conceptual content of originalism’s claims and the arguments made in the debate.

<sup>354</sup> This appears particularly true with respect to democratic choices made to preserve traditional social values. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 586, 590 (2003) (Scalia, J., dissenting). But see BORK, *TEMPTING*, *supra* note 7, at 178–85 (criticizing Ely’s classic defense of the Warren Court’s application of the Constitution to enhance the working of democratic government and the representation of all citizens).

<sup>355</sup> See, e.g., *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 558, 574 (2012) (invalidating mandatory health insurance in national health care legislation as an exercise of the federal government’s commerce power, but upholding the associated penalty tax under the exercise of the taxing power); *Bowsher v. Synar*, 478 U.S. 714, 733–34 (1986) (striking down fiscal budgetary control legislation that provided for an ongoing administrative role for a congressional officer on the basis that such a role violated the separation of powers doctrine).

<sup>356</sup> See, e.g., *Lawrence*, 539 U.S. at 586 (Scalia, J., dissenting) (dissenting from the decision striking down a Texas statute criminalizing consensual adult homosexual activity). But see, e.g., *McDonald v. Chicago*, 561 U.S. 742 (2010) (striking down a mainstream handgun ordinance of the City of Chicago); *District of Columbia v. Heller*, 554 U.S. 570 (2008) (striking down a District of Columbia firearm law).

<sup>357</sup> See, e.g., *Miranda v. Arizona*, 384 U.S. 436, 498–99 (1966) (holding that statements obtained from defendants during custodial interrogation, without full and express warning of constitutional rights, are inadmissible as having been obtained in violation of the Fifth Amendment right against self-incrimination); *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965) (holding that laws prohibiting the use of contraceptives unconstitutionally intrude upon the right to privacy); *Mapp v. Ohio*, 367 U.S. 643, 655–56 (1961) (holding that evidence obtained in violation of the Fourth Amendment must be excluded in state courts as well as in federal courts under the Fourteenth Amendment).

<sup>358</sup> See *Loving v. Virginia*, 388 U.S. 1, 2, 12 (1967) (striking down a state criminal anti-miscegenation statute on the basis of the Equal Protection and Due Process Clauses of the Fourteenth Amendment).

<sup>359</sup> See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 393–96 (2010) (Stevens, J., dissenting) (arguing to uphold federal law regulating campaign finance to limit the disproportionate role corporations and affluent individuals may play in the electoral process through campaign

at the expense of democratic majorities' exercise of their political choice. This is too simplistic an account.<sup>360</sup> But the fundamental notion that there is a political divide between the originalists and their critics has been widely recognized.<sup>361</sup> That difference in values lends some credibility to the reductionist project to explain constitutional decision in political terms.

An emotivist characterization of the debate appears far less apparent. In general, the arguments made within the debate presume that reason and argument, not value, are dispositive.<sup>362</sup> Thus, when Powell argues that there is an historical understanding that the original understanding was not to be controlling in the interpretation and application of the Constitution, he is arguing that such a historical claim argues against the originalist position.<sup>363</sup> Similarly, when Justice Scalia argues against the prohibition of capital punishment by the Eighth Amendment, he assumes that the historical fact of the matter that ought to be determinative.<sup>364</sup>

Very occasionally, the originalists and their critics suggest that the debate is about political and moral values. This reflects an ongoing concern about the Court's role.<sup>365</sup> Bork suggests that the debate over originalism may be reduced to a debate over

contributions); *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (upholding a "narrowly tailored" university admissions policy that took race into account).

<sup>360</sup> For example, Justice Scalia has both on the bench and in his commentary strongly defended a broad right of confrontation in criminal trials under the Sixth Amendment. *See, e.g., Maryland v. Craig*, 497 U.S. 836, 860–61 (1990) (Scalia, J., dissenting) (arguing that closed circuit televised testimony did not satisfy the Sixth Amendment's Confrontation Clause); Scalia, INTERPRETATION, *supra* note 6, at 43–44.

<sup>361</sup> *See* SUNSTEIN, RADICALS, *supra* note 4, at 9–14 (tracing the political sources of the constitutional originalist from the Reagan administration). *But see generally* CHARLES FRIED, SAYING WHAT THE LAW IS: THE CONSTITUTION IN THE SUPREME COURT (2004) [hereinafter FRIED, SAYING] (describing the place of precedent in articulating the conceptual content of constitutional law). It would also be possible to develop an account of the originalism debate that emphasizes the economic and sociological reasons for the continuation of the debate. The debate, after all, is a major source of tenure in the constitutional law academy. If the deflationary strategy proposed here were to be adopted in the courts and in the academy, that route would be narrowed or foreclosed. But while a sociological or economic account would perhaps be of interest to intellectual historians and advance our understanding of the debate, that analysis would not advance our legal understanding of the Constitution and the originalism debate. I am indebted to Graham Burnett for focusing my attention on the importance of this question, even as I decline to explore it further here.

<sup>362</sup> *See generally* BORK, TEMPTING, *supra* note 7, at 161–85 (offering rebuttal arguments to an array of arguments made against originalism).

<sup>363</sup> *See* Powell, *supra* note 8, at 948.

<sup>364</sup> *See* Scalia, *Response*, *supra* note 76, at 145; *supra* notes 323–25 and accompanying text.

<sup>365</sup> Thus, Justice Jackson wrote in *Brown v. Allen*:

Rightly or wrongly, the belief is widely held by the practicing profession that this Court no longer respects impersonal rules of law but is guided in these matters by personal impressions which from time to time may be shared by a majority of Justices. Whatever has been intended, this Court also has generated an impression in much of the

the continuing vitality of values embedded by the Founders in the Constitution.<sup>366</sup> Dworkin has suggested that Justice Scalia's originalist jurisprudence is informed by his moral judgments, even when those judgments lead him away from originalist theory.<sup>367</sup> From the left, the skeptics who endorse Critical Legal Studies have argued that all law, and therefore constitutional law, is reducible to politics.<sup>368</sup> In general, however, the protagonists in the debate over originalism conduct the debate as if,<sup>369</sup> and sometimes aver<sup>370</sup> that, the debate is a matter of principle. Moreover, reducing the debate over originalism to a matter of value or preference appears a difficult and unpromising task.<sup>371</sup> This is not to deny that subjective preferences may have informed individual Justice's decisions or opinions or even the decisions or opinions of the Court.<sup>372</sup> The claim is different as a matter of logical quantification: it does

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judiciary that regard for precedents and authorities is obsolete, that words no longer mean what they have always meant to the profession, that the law knows no fixed principles.

344 U.S. 443, 535 (1953) (Jackson, J., concurring).

<sup>366</sup> BORK, *TEMPTING*, *supra* note 7, at 177–78 (acknowledging Dworkin's claim that there is moral content in constitutional law, but asserting that such moral content is inherent in the constitutional text, not determined by judges).

<sup>367</sup> Dworkin, *INTERPRETATION*, *supra* note 61, at 127; *see also* Fried, *Judgment*, *supra* note 145, at 1043–44 (arguing that Justice Scalia's strongest constitutional opinions have been those in which he has broken free of the shackles of originalist modes of argument).

<sup>368</sup> *See, e.g.*, Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 *YALE L.J.* 1, 6–10 (1984) (defending the reduction of law to politics, but denying that such reduction creates a problem for the realization of our freedom or the exercise of our responsibility).

<sup>369</sup> *See, e.g.*, Dworkin, *INTERPRETATION*, *supra* note 61, at 120–22 (arguing that Justice Scalia's originalism cannot support his rejection of Eighth Amendment challenges to capital punishment); Scalia, *INTERPRETATION*, *supra* note 6, at 44–47 (arguing that alternatives to originalism are impossible to apply because indeterminate); Tribe, *INTERPRETATION*, *supra* note 21, at 76–77 (arguing that originalism leads to an infinite regress). *But see* LeDuc, *Philosophy and Constitutional Interpretation*, *supra* note 43, at 113 n.92; LeDuc, *Practical Reasoning*, *supra* note 83, at 21–22; Bandom, *Legal Concept Determination*, *supra* note 5, at 21–22.

<sup>370</sup> *See, e.g.*, BORK, *TEMPTING*, *supra* note 7, at 143 (arguing that only originalism has legitimacy as a method of constitutional interpretation in our democratic republic); Scalia, *INTERPRETATION*, *supra* note 6, at 44–45 (identifying the absence of generally accepted extratextual principles for the interpretation as the second most serious flaw in living constitutionalism). They also do so implicitly by the manner in which they argue against the claims and arguments of the opposing participants in the debate. *See, e.g.*, SUNSTEIN, *RADICALS*, *supra* note 4, at 54 (describing the harsh rhetoric of Judge Douglas Ginsburg in his argument against non-originalists).

<sup>371</sup> *See* FRIED, *SAYING*, *supra* note 361, at 241–44; Philip Bobbitt, *Is Law Politics?*, 41 *STAN. L. REV.* 1233, 1302–12 (1989) (book review) (arguing that such a reduction of law to politics misunderstands the nature of the modalities of constitutional argument and the ontology of the Constitution).

<sup>372</sup> That there exist such decisions and opinions appears hard to dispute. In the administrative law context, it seems incontrovertible that Justice Douglas's personal, subjective

not deny that decisions on the basis of subjective preference exist; it makes the much weaker claim that not all constitutional decisions are a matter of the Justices' subjective preference. Put another way, the claim asserts only that there are factors in constitutional decision and the arguments of the Court's opinions that cannot be reduced to the subjective preferences of the Justices.<sup>373</sup>

A reductive strategy would need to reduce very complex claims about constitutional law to expressions of subjective preference. Such a reductive approach could, however, incorporate at least two principal elements. First, it could interpret certain claims as *expressing* subjective values.<sup>374</sup> Second, certain claims could be characterized as consequences of such subjective values.<sup>375</sup>

But even such a complex reductive approach appears implausible for many elements in the debate. For example, the originalists' claims that the written nature of the Constitution requires fidelity to the Framers' original understandings and expectations<sup>376</sup> appear very difficult to reduce to any subjective preference or set of subjective preferences. It does not appear very plausible that we have subjective preferences for particular canons of constitutional interpretation.<sup>377</sup> Those views appear rather to be consequences of theories about the Constitution, constitutional interpretation, and constitutional adjudication, and possibly even, at the conceptual level of our beliefs, about political theory or philosophy.<sup>378</sup> When critics like Posner and Sunstein<sup>379</sup> challenge originalism's claims with a defense of a generally pragmatic,

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values shaped his decisions in federal income tax cases. *See generally* BERNARD WOLFMAN, JONATHAN L.F. SILVER, & MARJORIE A. SILVER, *DISSENT WITHOUT OPINION: THE BEHAVIOR OF JUSTICE WILLIAM O. DOUGLAS IN FEDERAL TAX CASES* (1975) (demonstrating that Justice Douglas consistently voted against the Internal Revenue Service in tax cases, without substantial argument or explanation).

<sup>373</sup> Charles Fried makes the same claim. *See* FRIED, *SAYING*, *supra* note 361, at 241–44.

<sup>374</sup> In some contexts, the notion that originalist claims may be so reducible to subjective values of the participants is not implausible. For example, with respect to the question of whether the Eighth Amendment bars the imposition of capital punishment, it is not obviously implausible that the divide between the originalists like Justice Scalia, who argue against such a prohibition, and his liberal critics, who assert such a prohibition, may be reducible to a difference in such subjective values. *See* Dworkin, *INTERPRETATION*, *supra* note 61, at 120–22. *See generally* SUNSTEIN, *RADICALS*, *supra* note 4, at 9–19 (describing potential doctrinal implications of the originalists' claims).

<sup>375</sup> *See* SUNSTEIN, *RADICALS*, *supra* note 4, at 9–19.

<sup>376</sup> *See* RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 9 (2004) [hereinafter BARNETT, *LOST CONSTITUTION*] (exploring the role of writing—and writing requirements—in private law and in public constitutional law); BORK, *TEMPTING*, *supra* note 7, at 251–53.

<sup>377</sup> *See* BOBBITT, *FATE*, *supra* note 64, at 185 (noting that we are not born with a preference for trial by jury).

<sup>378</sup> *Id.* at 182–89.

<sup>379</sup> RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 454–69 (1990) [hereinafter POSNER, *JURISPRUDENCE*] (announcing a “pragmatist manifesto”); SUNSTEIN, *RADICALS*,



utilitarian metric of constitutional interpretation and constitutional decisions, that too appears resistant to any such reduction.<sup>380</sup>

Instead, we ought to recognize and respect the debate on its own terms, at least in part. Originalism recognizes the paramount role of practical reasoning in our constitutional practice.<sup>381</sup> Occasionally, however, originalism adopts a more formalistic account of reasoning.<sup>382</sup> I have argued elsewhere against this formal account.<sup>383</sup> Constitutional argument and reasoning, in the context of constitutional decision, cannot be reduced to a syllogistic account.<sup>384</sup>

But originalism often embeds its stance in a more general, tacit account of practical reasoning.<sup>385</sup> On this account, we employ practical reasoning to make decisions and choices in our practical, all-too-ordinary lives. When confronted with a cupboard empty of a box of my favorite marshmallow-sweetened breakfast cereal, I choose an available alternative.<sup>386</sup> In the law, our faculty of practical reasoning permits us to identify the relevant evidence with respect to a question, the relevant preferences and values, and the relevant rules of law in making legal judgments.<sup>387</sup>

In Justice Scalia's view, the common law methodology is different from the proper method of statutory interpretation in a democratic republic.<sup>388</sup> According to

*supra* note 4, at 72–73 (ultimately grounding his rejection of originalism on the consequences of that theory).

<sup>380</sup> Posner and Sunstein's pragmatic, utilitarian claims about what results work best, or maximize wealth or value, appear to be based upon conceptual claims of political or moral theory, not subjective preferences, and the history of utilitarianism is the history of efforts defending utilitarian claims against our moral intuitions or subjective feelings. *See* POSNER, JURISPRUDENCE, *supra* note 379, at 454–69 (defending a pragmatist theory of law against formalist rivals, but nevertheless asserting a limited irreducible autonomy to legal practice); SUNSTEIN, RADICALS, *supra* note 4, at 72–73.

<sup>381</sup> The tacit recognition that legal and constitutional decision is a matter of practical reason underlies the originalist rejection of philosophical theory to ground constitutional argument or interpretation. *See* Scalia, INTERPRETATION, *supra* note 6, at 45.

<sup>382</sup> *See generally* BORK, TEMPTING, *supra* note 7, at 162 (describing the text of the Constitution as providing a judge “not with a conclusion but with a major premise”). Originalism thus sometimes suggests that legal reasoning follows the formal rules of logical inference.

<sup>383</sup> *See* LeDuc, *Ontological Foundations*, *supra* note 41, at 285–88 (describing the originalists' formal account); LeDuc, *Practical Reasoning*, *supra* note 83, at 27–40; *see also* PATTERSON, TRUTH, *supra* note 53, at 170–79 (offering an alternative, less formal account of legal reasoning).

<sup>384</sup> *See* LeDuc, *Practical Reasoning*, *supra* note 83, at 27–40.

<sup>385</sup> *See, e.g.,* BORK, TEMPTING, *supra* note 7, at 262; Scalia, *Response*, *supra* note 76, at 138–40.

<sup>386</sup> *See* GILBERT HARMAN, CHANGE IN VIEW: PRINCIPLES OF REASONING 1–2 (1986) [hereinafter HARMAN, CHANGE IN VIEW] (describing the process of practical reasoning).

<sup>387</sup> *See id.* at 1–2 (distinguishing practical reasoning from theoretical reasoning on the basis that the former relates to plans and intentions and the latter implicates belief).

<sup>388</sup> *See* Scalia, INTERPRETATION, *supra* note 6, at 9–13 (arguing that common law methods are inconsistent with democracy).

Justice Scalia, the judge owes a higher duty of deference to the democratic sovereign in its law making.<sup>389</sup> But both common law reasoning and statutory and constitutional interpretation are examples of practical, rather than theoretical, reasoning.<sup>390</sup> By contrast, mathematical reasoning is a classic example of theoretical reasoning; modern analytic philosophy of language also qualifies.

Even if the debate is couched in emotivist or subjectivist terms, therapeutic arguments may still be sufficient to end it. In making this argument, I want to again draw on the work of Martha Nussbaum<sup>391</sup> and Charles Taylor.<sup>392</sup> Nussbaum has made a strong case for the cognitive dimension of emotional judgments and Taylor has made a strong case for the role of reason in shaping our fundamental normative commitments.<sup>393</sup> Nussbaum argues that emotional judgments implicate other, non-normative cognitive judgments.<sup>394</sup> For example, she argues that anger can be righteous when it is based upon judgments of the wrongness or injustice of the actions taken by the object of the subject's anger.<sup>395</sup> Indeed, Nussbaum argues, when confronted with this behavior, *not* to experience anger may itself appear a questionable reaction.<sup>396</sup> Moreover, Nussbaum asserts that these emotions, freighted as they are with cognitive claims, are susceptible to modification through changes in the related beliefs.<sup>397</sup> If this account extends to an emotivist or other subjectivist account of constitutional commitments and judgments, then the kinds of argument made here have the potential to change those evaluations and constitutional commitments.

Taylor argues that moral arguments do not generally proceed from general principles.<sup>398</sup> Instead, he asserts that much, if not most, moral argument is particularized, proceeding almost *ad hominem*<sup>399</sup> against a particular moral position or stance.

<sup>389</sup> *Id.*

<sup>390</sup> See generally HARMAN, CHANGE IN VIEW, *supra* note 386, at 1–2.

<sup>391</sup> NUSSBAUM, THERAPY, *supra* note 52.

<sup>392</sup> TAYLOR, *Explanation*, *supra* note 348.

<sup>393</sup> See NUSSBAUM, THERAPY, *supra* note 52, at 38 (“[The passions] are . . . intelligent and discriminating elements of the personality that are very closely linked to beliefs, and are modified by the modification of belief.”); TAYLOR, *Explanation*, *supra* note 348, at 38–40 (describing the limits of moral nihilism and skepticism).

<sup>394</sup> See NUSSBAUM, THERAPY, *supra* note 52, at 38.

<sup>395</sup> *Id.* at 403 (describing the anger of an officer in the Allied forces upon entering a German death camp in World War II). Nussbaum's views on anger have changed over time, leading her to question whether there is any merit in anger in her later views. See generally MARTHA C. NUSSBAUM, ANGER AND FORGIVENESS: RESENTMENT, GENEROSITY, JUSTICE (2016).

<sup>396</sup> See NUSSBAUM, THERAPY, *supra* note 52, at 403.

<sup>397</sup> *Id.* at 38. This, of course, is very similar to Lear's account of how modern psychoanalytic therapy cures. See LEAR, THERAPEUTIC ACTION, *supra* note 54, at 69–73 (describing how the analyst must demonstrate an understanding and commitment to the analysand's pathological stance as a prelude to cure).

<sup>398</sup> TAYLOR, *Explanation*, *supra* note 348, at 36–41.

<sup>399</sup> See *id.* at 36, 39, 59 (emphasizing his argument as actually *ad hominem*, but without the pejorative overtones of that term in our ordinary speech). All Taylor means is that his

Taylor argues that his particularized account of moral reasoning is a better description of our moral discourse and argument.<sup>400</sup> While he doesn't expressly characterize such strategies as therapeutic, they share important features with the therapeutic approaches Nussbaum describes, as Nussbaum notes.<sup>401</sup> Taylor persuasively asserts the claim that these modes or styles of argument can be effective in cases of moral or subjective disagreements.<sup>402</sup>

If Nussbaum and Taylor are right, then even if the debate over originalism is properly cast in emotivist terms, it may well be that the kinds of therapeutic strategies offered here and in my related articles<sup>403</sup> may prove effective. Even if recast in emotivist terms, the kinds of claims that are made in the debate would appear strong candidates to fall within those judgments that carry cognitive claims and, therefore, may be changed by persuasive arguments or other therapeutic strategies.<sup>404</sup> If the protagonists in the debate recognize its fruitlessness, they ought to be open to endorsing the anti-foundational, pluralist account of constitutional law defended here, and to expressing that new preference in their judgments about the Constitution.

Two key features emerge if I place the arguments that have been made in this account of the debate in the context that Nussbaum and Taylor have developed. First, my argument has proceeded in a particular, *ad hominem* in Taylor's terms, way against each side in the debate.<sup>405</sup> Abandoning the debate gives a better account of constitutional adjudication first, constitutional discourse second, and constitutional interpretation third.<sup>406</sup>

Without claiming that my account of the ontology of the Constitution or our constitutional talk is demonstrably correct, I am claiming to offer a better account than the protagonists in the debate can provide. That account promises to be far more fruitful than the accounts that have been developed in the debate. As a novel account, it does not suffer from the same pathologies that I have articulated above.<sup>407</sup> First, as a descriptive matter, this anti-foundational account is better than the originalists' and

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argument proceeds—not unlike the therapy that Nussbaum describes—against the particular position the opponent or interlocutor endorses, rather than generally from first principles.

<sup>400</sup> *Id.* at 60.

<sup>401</sup> NUSSBAUM, *THERAPY*, *supra* note 52, at 35.

<sup>402</sup> TAYLOR, *Explanation*, *supra* note 348, at 53–60.

<sup>403</sup> See generally LeDuc, *Anti-Foundational Challenge*, *supra* note 43; LeDuc, *Ontological Foundations*, *supra* note 41.

<sup>404</sup> See TAYLOR, *Explanation*, *supra* note 348, at 34–60 (arguing that argument with respect to an array of practical reasoning can proceed on a particularized or *ad hominem* basis, and that with that recognition comes the understanding that the range of argument in practical reason is much greater than foundationalists acknowledge).

<sup>405</sup> See generally LeDuc, *Ontological Foundations*, *supra* note 41.

<sup>406</sup> Implicit in my claim is a further claim that accounting for these three elements of our social practice is ordered in importance in the order that I list them. See generally LeDuc, *Practical Reasoning*, *supra* note 83.

<sup>407</sup> See *supra* Section I.B.

their critics' accounts because our constitutional argument and decision includes several modes of argument, not just those endorsed by the originalists or their critics.<sup>408</sup> Second, there are a variety of unstated premises in the debate that make the debate possible. Those premises appear questionable.<sup>409</sup> The protagonists assume certain characterizations of legal and constitutional reasoning and the primacy of interpretation.<sup>410</sup> At a philosophical level, they also make assumptions about the ontology of the Constitution<sup>411</sup> and about language, including the nature of truth and meaning.<sup>412</sup> I have explained elsewhere why those assumptions appear mistaken.<sup>413</sup>

The second objection to a therapeutic solution to the debate argues that the debate between the originalists and their critics reveals a breakdown in the practice of normal constitutional theory.<sup>414</sup> On this account, only revolutionary constitutional theory can resolve the stalemate.<sup>415</sup> Only a constitutional paradigm shift can resolve the seeming irreconcilable conflicts.<sup>416</sup> If this account of the debate is accurate, the therapeutic strategy proposed here that treats the debate as pathological is inadequate;

<sup>408</sup> See BOBBITT, *FATE*, *supra* note 64, at 6–8.

<sup>409</sup> See generally LeDuc, *Ontological Foundations*, *supra* note 41 (arguing that the ontological and linguistic assumptions of the debate over originalism make the debate possible); LeDuc, *Anti-Foundational Challenge*, *supra* note 43 (exploring how the debate becomes impossible when we reject the tacit assumption of the existence of truth conditions for propositions of constitutional law and the existence of an objective Constitution independent in the world).

<sup>410</sup> See LeDuc, *Anti-Foundational Challenge*, *supra* note 43, at 138–89; LeDuc, *Ontological Foundations*, *supra* note 41, at 267–330.

<sup>411</sup> See LeDuc, *Ontological Foundations*, *supra* note 41, at 267–330; LeDuc, *Anti-Foundational Challenge*, *supra* note 43, at 138–89.

<sup>412</sup> See LeDuc, *Anti-Foundational Challenge*, *supra* note 43, at 138–89; LeDuc, *Constitutional Meaning*, *supra* note 75, at 225–32; LeDuc, *Ontological Foundations*, *supra* note 41, at 267–330.

<sup>413</sup> LeDuc, *Anti-Foundational Challenge*, *supra* note 43, at 206–09; LeDuc, *Constitutional Meaning*, *supra* note 75, at 225–32.

<sup>414</sup> I am here defending an account of the debate that draws on Kuhn's classic analysis of scientific revolutions. See generally THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 43–76 (2d ed. 1970) (1962) [hereinafter KUHN, *SCIENTIFIC REVOLUTIONS*] (arguing that revolutionary scientific theories do not replace their predecessor theories on the basis of experimental proof, but on the basis of the adoption of what Kuhn termed a “paradigm shift”). The stalemate of the current debate over originalism on this analogy is comparable, for example, to the state of Ptolemaic astronomical theory on the eve of the Copernican Revolution. See generally THOMAS S. KUHN, *THE COPERNICAN REVOLUTION: PLANETARY ASTRONOMY IN THE DEVELOPMENT OF WESTERN THOUGHT* (1957). The methods available within the debate are insufficient to resolve the puzzles and disagreements about constitutional decision.

<sup>415</sup> See KUHN, *SCIENTIFIC REVOLUTIONS*, *supra* note 414. The needed breakthrough is revolutionary not in the substantive sense that Kuhn describes revolutionary scientific theory making but in the more limited therapeutic sense that I have described. But both transcend the constraints of the existing discourse.

<sup>416</sup> See *id.*

instead, the debate about originalism reflects the healthy, if difficult, path of progress in our constitutional theory. Resolving the debate requires, on this account, revolutionary constitutional theory and a paradigm shift in our constitutional theory.

Nevertheless, I doubt that the debate reflects the birth throes of a revolution in constitutional theory. First, neither originalism nor its critics offer a better or fuller account of our constitutional practice; each would instead exorcise a portion of that practice in their respective prescriptions for our constitutional practice.<sup>417</sup> Second, the implications of those respective prescriptions are implausible or unacceptable to significant communities within our constitutional practice.<sup>418</sup> In short, the respective positions advanced in the debate do not have the profile of revolutionary theory.

The third objection to the possibility of successful therapy questions the apparently meta-theoretic stance of a therapeutic approach. My approach to ending the debate may appear to replicate, at another level of theory, the originalist and anti-originalist strategies against the kinds of arguments that the originalists and their critics offer for substantive constitutional claims. If I am rejecting those kinds of meta-arguments of the originalist debate, why should the theoretical arguments against the underlying premises of the debate be more persuasive?

There is a difference. In challenging the premises and arguments of the debate, I am emphasizing the richness and complexity of our constitutional practice and discourse. By contrast, the arguments of the debate about originalism, on both sides, seek to foreclose arguments and discourse.<sup>419</sup> My account of constitutional theory, like that articulated by Bobbitt and Patterson, leaves constitutional *practice* intact, except insofar as it has incorporated elements of the originalism debate, which should be abandoned.<sup>420</sup> Its target is constitutional *theory*, seeking to reject constitutional theories that would reject or devalue established modes of constitutional argument. This anti-theoretical method preserves our constitutional practice, but leaves it more self-conscious. It is thus to be distinguished from the participants in the debate who would generally claim to offer constitutional theories to change our fundamental constitutional practice, and thus, to change our Constitution itself.

### *B. Acknowledging the Failure of the Debate*

Four elements of the debate ought to give particular concern to protagonists who may be tempted to reject therapy in favor of continuing a failed debate.<sup>421</sup> First,

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<sup>417</sup> See generally LeDuc, *Constitutional Meaning*, *supra* note 75; LeDuc, *Ontological Foundations*, *supra* note 41.

<sup>418</sup> LeDuc, *Ontological Foundations*, *supra* note 41, at 284–85.

<sup>419</sup> *Id.*; André LeDuc, *Political Philosophy and the Fruitless Quest for an Archimedean Stance in the Debate over Originalism*, 85 UMKC L. REV. 1 (2016) (exploring the use of political philosophical arguments to resolve the originalism debate).

<sup>420</sup> See LeDuc, *Anti-Foundational Challenge*, *supra* note 43, at 152–54; LeDuc, *Beyond Babel*, *supra* note 31; see also *supra* text accompanying note 52.

<sup>421</sup> See generally LeDuc, *Anti-Foundational Challenge*, *supra* note 43; LeDuc, *Ontological Foundations*, *supra* note 41.



neither the originalists nor their critics offer a persuasive description of the practice of constitutional argument in the courts.<sup>422</sup> That *descriptive* failure compromises the prescriptive theories defended in the debate.<sup>423</sup> The protagonists, particularly on the originalist side, acknowledge that failure.<sup>424</sup> They are not troubled by originalism's failure to offer an accurate description of the current practice of constitutional argument.<sup>425</sup> They acknowledge that failure.<sup>426</sup> Originalism, after all, begins with the premise that our non-originalist constitutional practice—as epitomized by the Warren Court—is mistaken, if not illegitimate.<sup>427</sup> Originalism's goal is to repudiate the current practice and replace it with new, originalist argument and results.<sup>428</sup> That is not a change that can be effected by means of extra-constitutional, theoretical argument. It can only happen over time—admittedly sometimes discontinuously as precedents are effectively, if not literally, reversed, as in *Brown* or reinterpreted, as in *Griswold*—within our practice of constitutional law as canonical arguments are made to justify and expand decisions.

The originalists' failure to describe current constitutional practice is a consequence of the primacy of prescription in originalism. The failure to describe that practice and to acknowledge the force of centuries of constitutional argument is a

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<sup>422</sup> Originalists vary in their dating of the Court's departure from the original understanding of the Constitution. Bork appears to identify the origins of the departure in Chief Justice Marshall's jurisprudence. See BORK, TEMPTING, *supra* note 7, at 25. But the turn from the original understandings only became acute much later.

<sup>423</sup> The failure of an account of the Constitution to explain the arguments made and the results obtained from an internal point of view discredits such an account, because there is no Archimedean stance from which to discredit entire modes of argument as the originalists (and their critics) would do.

<sup>424</sup> See, e.g., BARNETT, LOST CONSTITUTION, *supra* note 376, at 354–57; Soames, *Deferentialism*, *supra* note 99; Solum, *Semantic Originalism*, *supra* note 148, at 32–40 (acknowledging the need for a more complex and inclusive account of the sources of linguistic meaning for originalism).

<sup>425</sup> See, e.g., BARNETT, LOST CONSTITUTION, *supra* note 376, at 354–57; BORK, TEMPTING, *supra* note 7, at 69–100 (criticizing the Warren Court for departing from the original understanding of the Constitution); SUNSTEIN, RADICALS, *supra* note 4; Scalia, INTERPRETATION, *supra* note 6.

<sup>426</sup> See, e.g., BARNETT, LOST CONSTITUTION, *supra* note 376, at 354–57; BENNETT & SOLUM, ORIGINALISM, *supra* note 51, at 32–40 (acknowledging and endorsing some departures originalism makes from current law and disavowing others).

<sup>427</sup> See BORK, TEMPTING, *supra* note 7, at 143 (“[O]nly the approach of original understanding meets the criteria that any theory of constitutional adjudication must meet in order to possess democratic legitimacy.”); Bork, *Neutral Principles*, *supra* note 20, at 5–8; Whittington, *New Originalism*, *supra* note 86, at 599–600; see also SUNSTEIN, RADICALS, *supra* note 4, at 54.

<sup>428</sup> See, e.g., BERGER, GOVERNMENT BY JUDICIARY, *supra* note 76, at 407–18 (concluding that the Fourteenth Amendment was not originally intended or understood to extend to the protection of political rights or to protection from segregation, and that the decisions so interpreting it should be overturned); BORK, TEMPTING, *supra* note 7, at 155–59 (exploring the extent to which the doctrine of *stare decisis* limits originalism from reaching correct results).

fundamental failure in the originalist argument.<sup>429</sup> Originalism mistakenly assumes that there is a stance, outside our current constitutional practice, from which that practice may be criticized.<sup>430</sup> In the case of Robert Bork, that assumption was coupled with the claim that constitutional decisions were illegitimate if they could not be legitimized under such a radical, Archimedean criticism.<sup>431</sup> As Bobbitt has argued, the Senate's rejection of Bork's nomination to the Supreme Court can be best understood as a rejection of Bork's originalist claim to delegitimize the non-originalist corpus of our constitutional law.<sup>432</sup> That law cannot be delegitimized by an originalist assault; for good or for ill, the accepted modes of constitutional argument constitute our constitutional law.<sup>433</sup> As Bobbitt has argued, its legitimacy consists simply of its contextualization within our practice of constitutional argument and decision.<sup>434</sup> The only criticism that may be made of such practice is the same as that made at the founding of the Articles of Confederation: it is the repudiation of such practice by action.

There is also no Archimedean stance from which the originalist criticisms of such decisions can be rejected.<sup>435</sup> Nor can the sweeping decisions of the Warren Court

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<sup>429</sup> The failure to reconcile the claims of originalism that privilege the original understandings, expectations, or intentions over other modes of argument in our constitutional practice reveals the flaw in originalism, because it presumes to have articulated the critical stance from which a radical critique of our constitutional law may be made. Some originalists might challenge my claim that their theory is inconsistent with centuries of our constitutional decisional practice because of their focus on the excesses of the Warren Court. Others, like Robert Bork, acknowledge that their revolutionary claims challenge our constitutional practice at least as far back as Chief Justice Marshall. *See* BORK, TEMPTING, *supra* note 7, at 20–28 (deploring Justice Marshall's judicial activism, first, in holding that the Court had the power to hold statutes that violate the constitution invalid and second, in looking to extra-constitutional natural law as a source of constitutional law).

<sup>430</sup> *See, e.g.*, BOBBITT, INTERPRETATION, *supra* note 53, at 83–108 (criticizing Bork's constitutional jurisprudence for its claim to delegitimize non-originalist decisions of the Warren and Burger Courts).

<sup>431</sup> *Id.*

<sup>432</sup> *Id.* (arguing that the Senate's rejection of Robert Bork's nomination to the Supreme Court was proper and, indeed, required because of Bork's attack on the legitimacy of the Court's decisions).

<sup>433</sup> BOBBITT, FATE, *supra* note 64, at 3–8 (describing the accepted modes of argument); BOBBITT, INTERPRETATION, *supra* note 53, at 88–99 (describing Bork's constitutional theory and his criticism of the Warren Court's constitutional jurisprudence); *see* BORK, TEMPTING, *supra* note 7, at 139–41.

<sup>434</sup> BOBBITT, INTERPRETATION, *supra* note 53, at xii–xv (rejecting the search for the foundations of the legitimacy of constitutional decision). *See generally* LeDuc, *Anti-Foundational Challenge*, *supra* note 43.

<sup>435</sup> *See generally* BOBBITT, FATE, *supra* note 64, at 5 (arguing against such an Archimedean stance to justify or challenge the legitimacy of constitutional decision); LeDuc, *Anti-Foundational Challenge*, *supra* note 43. *But see* SUNSTEIN, LEGAL REASONING, *supra* note 159, at 59–61, 176 (offering a global challenge to originalism on the basis of a theory of judicial minimalism).

be delegitimized by Sunstein's minimalism,<sup>436</sup> nor the concept of substantive due process discredited by Ely's mockery of the concept as an oxymoron.<sup>437</sup> Whether or not dispositive in any particular case, the acceptance of such forms of argument precludes the rejection of such arguments as a practical matter.

Practice must trump theory in the context of constitutional argument. That is because our practice of constitutional law is not simply a conceptual or analytical practice. It is also an exercise in political organization and the deployment of political power. As such, our constitutional law and its practices of argument and decision implicate both conceptual commitments and power.

It implicates our conceptual commitments because the propositions of constitutional law that are stated in the text and in precedential opinions have inferential content.<sup>438</sup> Those opinions follow as a matter of practical inference from other statements of constitutional law and support inferences to other statements of constitutional law.<sup>439</sup> Constitutional doctrine is stated in conceptual terms; that doctrine carries inferential content as the consequence of certain other doctrinal claims and in its commitments to other doctrines derived from practical inference.<sup>440</sup> What opinions *say* implicates what the decisions and opinions *do*. The statement of the principles or terms on which the Court makes its decision helps to determine the breadth of the decision and the scope that it is to be given.<sup>441</sup>

But unstated elements of the decision may also provide an important foundation for the subsequent understanding of the force and implications of the Court's decision. These contextual factors explain the limited force of *Bush v. Gore*<sup>442</sup> and help explain why that case has never been cited.<sup>443</sup> We understand the force of an opinion and decision only as our ongoing practice of constitutional argument and decision give them effect.

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<sup>436</sup> SUNSTEIN, *LEGAL REASONING*, *supra* note 159, at 38–41; SUNSTEIN, *ONE CASE*, *supra* note 164, at xiii–xiv. While Sunstein wants to criticize the sweeping, principled decisions of the Warren Court, it is less clear that he wants to deny them legitimacy. They appear more mistaken than lawless. SUNSTEIN, *LEGAL REASONING*, *supra* note 159, at 176.

<sup>437</sup> ELY, *DEMOCRACY*, *supra* note 24, at 18.

<sup>438</sup> *See generally* BRANDOM, *INFERENTIALISM*, *supra* note 250, at 11–12.

<sup>439</sup> *See id.*

<sup>440</sup> *See* FRIED, *SAYING*, *supra* note 361, at 4–10 (describing the place of precedent in law, generally, and asserting that precedent and its associated doctrine have a particularly important role in articulating the conceptual content of constitutional law); SOAMES, *Legal Texts*, *supra* note 112, at 422 (emphasizing that semantic meaning alone is too “austere” to carry the full meaning and import of legal texts, including constitutional texts).

<sup>441</sup> *See* FRIED, *SAYING*, *supra* note 361, at 4–10.

<sup>442</sup> 531 U.S. 98 (2000).

<sup>443</sup> Insensitivity to this dimension led Bruce Ackerman and others (not including Charles Fried) to breathlessly exaggerate the importance of the decision shortly after the case was decided. *See generally* BUSH V. GORE: THE QUESTION OF LEGITIMACY (Bruce Ackerman ed., 2002).

The performative dimension of constitutional decisions also exercises *power*, as rights and obligations are determined in real-life cases. In so doing, constitutional decisions stand beyond the realm of mere reason. By contrast, constitutional theory operates exclusively within the realm of reason.<sup>444</sup> Thus, the treatise power is weaker, however important it may be in the space of reason.<sup>445</sup> It is weaker because, in contrast to the interpretations made part of judicial decisions, treatises do not do anything directly in the constitutional space.<sup>446</sup> Judges and Justices, by contrast, cause things to happen—or not to happen—in the lives of the parties to cases, and to others through the force of doctrine and precedent.<sup>447</sup>

The second element that should trouble persistent protagonists is that they encounter substantial difficulty explaining the role of judgment in the process and practice of constitutional adjudication.<sup>448</sup> The leading originalists describe their decisional algorithm in some detail,<sup>449</sup> but gloss over the role of judgment in the decision of cases quite quickly.<sup>450</sup> The originalists sometimes seem to suggest that the role of judgment is severely circumscribed, and other times seem to suggest that even after the original understandings are determined, the role to be played by judgment is significant.<sup>451</sup> Their critics generally do no better.<sup>452</sup>

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<sup>444</sup> This is different than the claim Posner made in his Holmes lectures. Richard A. Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637, 1639–40 (1998) (denying that academic moral theory can provide valuable insights and answers to important questions). I am not denying that theories and narratives play causal roles, only that those roles are mediated through mechanisms like judicial decision. Posner appears to deny even that indirect causal role.

<sup>445</sup> See generally Tribe, *Treatise Power*, *supra* note 341 (tacitly assuming that the future of a revised edition of a leading constitutional treatise was of such import that it should be announced by the publication of a letter to a sitting Justice).

<sup>446</sup> See generally *id.*

<sup>447</sup> See FRIED, SAYING, *supra* note 361, at 4–10.

<sup>448</sup> See generally Fried, *Judgment*, *supra* note 145 (describing the nature and place of *judgment* in constitutional adjudication and the futility of efforts to articulate theories of constitutional interpretation, like originalism, that can determine the outcome of constitutional cases). *But see* BORK, TEMPTING, *supra* note 7, at 158 (acknowledging that “[j]udging is not mechanical” under originalist theory).

<sup>449</sup> See, e.g., BORK, TEMPTING, *supra* note 7, at 149 (explaining that, for most constitutional provisions, the level of generality at which they are to be applied “is readily apparent”).

<sup>450</sup> See Scalia, INTERPRETATION, *supra* note 6, at 45 (“Often—indeed, I dare say usually—[the original meaning of the constitutional text] is easy to discern and simple to apply.”).

<sup>451</sup> See, e.g., BORK, TEMPTING, *supra* note 7, at 149–51; Scalia, INTERPRETATION, *supra* note 6, at 45.

<sup>452</sup> See SUNSTEIN, LEGAL REASONING, *supra* note 159, at 49 (mocking Judge Hercules’s methods as a member of an appellate judicial panel). *But see* DWORKIN, EMPIRE, *supra* note 66, at 379–99 (offering an elaborate, but patently implausible, account of how his model Judge Hercules makes constitutional decisions).

Both sides of the debate generally leave the impression (even if it is not asserted expressly) that the judgment required is rather modest.<sup>453</sup> They fail to account for the nature and role of judgment. That absence has been widely noted.<sup>454</sup> Such an omission is glaring, not only because we call the decision makers “judges,” but, more fundamentally, because we experience many of the questions presented as lacking an answer from the authorities, or from the mere application of reason or analysis.<sup>455</sup> This part of Dworkin’s account, before he turns to the defense of his “right answer” thesis, rings true.<sup>456</sup> The decision of such questions and the resolution of such cases require the exercise of judgment.<sup>457</sup>

The third element that should trouble persistent protagonists is the confusion generated by the premise of the originalism debate as to the primacy of interpretation in constitutional decisions.<sup>458</sup> Both the originalists and their critics generally assume that constitutional decision requires, first, constitutional interpretation.<sup>459</sup>

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<sup>453</sup> In the case of the originalists, the tacit derogation of the role of judgment may be explained by their goal of cabining judicial discretion and repudiating the decisions of the Warren Court. *See generally* BERGER, *GOVERNMENT BY JUDICIARY*, *supra* note 76; Bork, *Neutral Principles*, *supra* note 20. Mistakenly conflating judgment with discretion, the originalists exclude any meaningful role for the former as they strive to limit the latter.

<sup>454</sup> *See generally* Fried, *Judgment*, *supra* note 145; BOBBITT, *INTERPRETATION*, *supra* note 53, at xvi–xvii (arguing that judgment is the faculty necessary to choose among the incommensurable canonical modes of constitutional argument when those arguments support inconsistent outcomes).

<sup>455</sup> *See* Tribe, *INTERPRETATION*, *supra* note 21, at 65, 68–73. *See generally* TRIBE & DORF, *READING*, *supra* note 181.

<sup>456</sup> *See* DWORKIN, *EMPIRE*, *supra* note 66, at 43–44; RONALD DWORKIN, *Is There Really No Right Answer in Hard Cases?*, in *A MATTER OF PRINCIPLE* 119 (1985) [hereinafter DWORKIN, *No Right Answer?*] (arguing that there is indeed one right answer, even to hard legal questions).

<sup>457</sup> *See* BOBBITT, *FATE*, *supra* note 64, at 234–35 (acknowledging that the nature of the arguments and judgments employed in constitutional law may appear anomalous to lawyers familiar with more doctrinal areas of the law, like trusts and estates); Fried, *Judgment*, *supra* note 145, at 1043–46.

<sup>458</sup> For a more extended analysis of interpretation and the role of interpretation asserted by originalism and its critics, see LeDuc, *Constitutional Meaning*, *supra* note 75; LeDuc, *Ontological Foundations*, *supra* note 41, at 264. The nature and place of interpretation in legal theory and adjudication has long been controversial. Ronald Dworkin is one of the strongest defenders of the primacy of interpretation in legal theory and in legal decision. *See* DWORKIN, *EMPIRE*, *supra* note 66, at 225–27. For an extended criticism of theories that accord primacy to interpretation, see Michael S. Moore, *The Interpretive Turn in Modern Theory: A Turn for the Worse?*, 41 *STAN. L. REV.* 871 (1989). *See generally* LAW AND INTERPRETATION: *ESSAYS IN LEGAL PHILOSOPHY* (Andrei Marmor ed., 1995) (collection of a variety of philosophical essays on interpretation in law).

<sup>459</sup> *See* BORK, *TEMPTING*, *supra* note 7, at 143–46; Frank H. Easterbrook, *Alternatives to Originalism?*, 19 *HARV. J.L. & PUB. POL’Y* 479, 486 (1996) (arguing that the primacy of the theory of meaning embedded in judicial review requires that constitutional adjudication begin with interpretation on an originalist, textualist basis: “Judicial review came from a



That claim is not only descriptively mistaken, but more importantly, conceptually flawed.<sup>460</sup> Interpretation is not, and cannot be, prior to decision or prior to following the constitutional rule.<sup>461</sup> If it were, there would be an infinite regress. No interpretation of a rule is self-interpreting.<sup>462</sup> Each interpretation of a rule would need an interpretation before it could be applied to the preceding rule or interpretation.<sup>463</sup> Thus, there would be an infinite regress as each interpretation requires yet another interpretation before it can be applied in constitutional decision.<sup>464</sup>

Making a constitutional decision is not primarily interpretation, and interpreting the relevant constitutional provisions is not, in that sense, logically prior to the decision.<sup>465</sup> Interpretations do not, in our practice of constitutional law, determine constitutional decisions.<sup>466</sup> To the extent originalism and many of its critics are committed to an account of constitutional decision that assimilates our practice to that model, that account is implausible. Rather, constitutional argument and decision is a complex practice of making choices and other judgments within a pattern of performative and inferential claims.<sup>467</sup>

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theory of meaning that supposed the possibility of right answers—from an originalist theory rooted in text.”); Scalia, *INTERPRETATION*, *supra* note 6, at 37.

<sup>460</sup> See generally LeDuc, *Constitutional Meaning*, *supra* note 75; LeDuc, *Ontological Foundations*, *supra* note 41, at 279–85; LeDuc, *Practical Reasoning*, *supra* note 83.

<sup>461</sup> See WITTGENSTEIN, *INVESTIGATIONS*, *supra* note 339, at §§ 201–40 (classical but controversial account of the nature of following a rule, conventionally understood to deny that following a rule first requires that there be an interpretation of the rule); SAUL A. KRIPKE, *WITTGENSTEIN ON RULES AND PRIVATE LANGUAGE: AN ELEMENTARY EXPOSITION* 7–15 (1982) (interpreting Wittgenstein as expressing, or constructing, a novel, skeptical account of the problem of following a rule). *But see generally* G.P. BAKER & P.M.S. HACKER, *SCEPTICISM, RULES AND LANGUAGE* (1984) [hereinafter BAKER & HACKER, *SCEPTICISM*] (rejecting Kripke’s skeptical account).

<sup>462</sup> See TRIBE & DORF, *READING*, *supra* note 181, at 73–80 (arguing that the determination of the level of generality at which to interpret a constitutional judgment requires the application of extraconstitutional judgment).

<sup>463</sup> See Lewis Carroll, *What the Tortoise Said to Achilles*, 4 *MIND* 278 (1895) (demonstrating that even the rules of logical inference cannot be self-applying).

<sup>464</sup> See WITTGENSTEIN, *INVESTIGATIONS*, *supra* note 339, at §§ 201–40; *see also* KRIPKE, *supra* note 461, at 7–15. *See generally* BAKER & HACKER, *SCEPTICISM*, *supra* note 461 (rejecting Kripke’s interpretation of Wittgenstein as raising a skeptical challenge to our commonsense understanding of language and meaning).

<sup>465</sup> Constitutional decision is a mixture of following rules and making choices. *See generally* BOBBITT, *FATE*, *supra* note 64; TRIBE, *INVISIBLE*, *supra* note 186 (suggesting that constitutional decision is principally a matter of choice; however, Tribe is inconsistent, often also asserting that constitutional decision is a matter of discovering the meaning of the visible or invisible constitutions).

<sup>466</sup> Those like Justice Scalia and Ronald Dworkin who are committed to an interpretative account of our constitutional law endorse just such a determinative role for interpretations, of course. *See generally* LeDuc, *Constitutional Meaning*, *supra* note 75.

<sup>467</sup> *See* BOBBITT, *FATE*, *supra* note 64, at 4–8; BOBBITT, *INTERPRETATION*, *supra* note 53, at xi–xvii; PATTERSON, *TRUTH*, *supra* note 53, at 181–82.

Both the performative and the conceptual elements in constitutional argument and decision, as well as in the constitutional text itself, are central to the practice that is constitutional law.<sup>468</sup> The performative role of the constitutional text, the past constitutional decisions, and the doctrine of *stare decisis* determine how certain decisions come out—whether it is the way public schools are organized with respect to the race of their students in Topeka, Kansas,<sup>469</sup> or whether the State may take the lives of convicted criminals.<sup>470</sup> But the performatives of our Constitution and our constitutional law are freighted with conceptual and inferential content.<sup>471</sup> The propositions of constitutional law stand as the consequences of certain propositions and as the grounds for others.<sup>472</sup> Those inferential commitments are an integral part of our practice of constitutional law.<sup>473</sup> Any failure to make and to acknowledge those commitments would require a substantial departure from that practice.<sup>474</sup> In our practice of judicial decision, it is customary and expected that judges provide reasons for their decisions.<sup>475</sup> That articulation permits the parties to assess the persuasiveness of lower court decisions, and allows the parties and other non-parties subject to the legal rule at issue in the decided case to better understand the law.

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<sup>468</sup> See generally LeDuc, *Anti-Foundational Challenge*, *supra* note 43.

<sup>469</sup> See *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (striking down segregated public schools in Topeka, Kansas, as violating the Equal Protection Clause of the Fourteenth Amendment without overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

<sup>470</sup> See *Gregg v. Georgia*, 428 U.S. 153, 207 (1976) (upholding a Georgia criminal statute imposing the death penalty as satisfying the Eighth Amendment prohibition on cruel and unusual punishment); see also Scalia, INTERPRETATION, *supra* note 6, at 46 (deriding the suggestion that the Eighth Amendment could prohibit capital punishment, since it was imposed at the time that the Bill of Rights was adopted).

<sup>471</sup> See generally LeDuc, *Anti-Foundational Challenge*, *supra* note 43, at 162–64.

<sup>472</sup> For an account of the inferential role of propositions, see BRANDOM, INFERENTIALISM, *supra* note 250, at 45–77 (introducing an inferentialist account of language to replace the more traditional representationalist account).

<sup>473</sup> See *id.*; LeDuc, *Anti-Foundational Challenge*, *supra* note 43, at 163–64; LeDuc, *Constitutional Meaning*, *supra* note 75, at 168–74 (sketching how a Brandomian inferentialist account might be extended to authoritative constitutional language).

<sup>474</sup> Such a rejection could take the form of a court turning its back without explanation on its own relevant precedent, or, in the case of an advocate presenting an argument to a court, could take the form of ignoring precedent or the force of precedent relevant to the case being argued. Such recognition would not preclude customary argumentative moves, like an advocate's urging the narrow interpretation of a precedent or a court's distinguishing—or even overruling—a precedent in an express manner.

<sup>475</sup> This is one of the principal reasons why Chief Justice Roberts's celebrated metaphor of the judge as umpire is fundamentally inadequate and misleading. See *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of John G. Roberts, Jr.); see also MARK TUSHNET, IN THE BALANCE: LAW AND POLITICS ON THE ROBERTS COURT 70–72 (2013) (discussing the academic reaction to this testimony).

Originalism's critics fare no better in seeking to describe and explain constitutional law. Their failure results from a misunderstanding, shared with the originalists, of the relationship between constitutional decision and constitutional interpretation.<sup>476</sup> Tribe assumes interpretation is prior to application of a constitutional provision and decision.<sup>477</sup> He invokes the concept of an Invisible Constitution to explain how interpretation and decision are possible.<sup>478</sup> Akhil Reed Amar,<sup>479</sup> among others,<sup>480</sup> endorses the concept of an Unwritten Constitution. These spectral constitutional penumbras are called forth because of interpretative puzzles that Tribe, Amar, and others conjure up.<sup>481</sup> As a matter of interpretation, they find themselves unable to find answers to their puzzles in the text of the Constitution, just as before them Nelson Goodman purported to be unable to determine whether he saw the color green or "grue"<sup>482</sup> and Kripke questioned whether and how we are able to distinguish addition from "quaddition."<sup>483</sup>

The introduction of the concepts of the Invisible or Unwritten Constitution is a wrong turn for three principal reasons. First, the concepts are wrong because they are grounded on a model of language—including a model of constitutional language—that

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<sup>476</sup> See LeDuc, *Constitutional Meaning*, *supra* note 75 (arguing that the assumption of the originalism debate, generally tacit but occasionally express, that appellate adjudication begins with interpretation, is mistaken); LeDuc, *Ontological Foundations*, *supra* note 41, at 335 (noting that originalism's critics have generally not been able to persuade originalists because both sides take for granted that there are right answers to constitutional questions).

<sup>477</sup> See *TRIBE, INVISIBLE*, *supra* note 186, at 5–6; *TRIBE & DORF, READING*, *supra* note 181, at 73–80.

<sup>478</sup> See *TRIBE, INVISIBLE*, *supra* note 186, at 2, 10 (introducing the "Invisible" Constitution).

<sup>479</sup> AKHIL REED AMAR, *AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY IX–X* (2012) [hereinafter *AMAR, UNWRITTEN*] (endorsing the concept of an Unwritten Constitution that, among other things, permits the identification of the authoritative written Constitution, as well as providing substantive constitutional content).

<sup>480</sup> See, e.g., Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 *STAN. L. REV.* 703, 717 (1975) (defending an early account of the authoritative force of the Unwritten Constitution, derived from natural law: "[T]here was an original understanding, both implicit and textually expressed, that unwritten higher law principles had constitutional status."); Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 *U. CHI. L. REV.* 1127, 1127–28 (1987) (arguing that the democratic enactment of higher law in the Constitution was not intended by the Founders to displace all other authoritative higher law).

<sup>481</sup> See, e.g., *AMAR, UNWRITTEN*, *supra* note 479, at 6–16 (exploring whether the Constitution would permit the Vice President to preside over her own impeachment trial); *ELY, DEMOCRACY*, *supra* note 24, at 13 (inquiring whether an individual born by Caesarian section would be eligible to be elected president under the Natural Born Person Clause).

<sup>482</sup> NELSON GOODMAN, *FACT, FICTION AND FORECAST 72–81* (4th ed. 1983) (describing grue—which is defined as a color with a temporal dimension, varying over time—and exploring how we can distinguish green from grue).

<sup>483</sup> KRIPKE, *supra* note 461, at 7–15 (noting that quaddition is indistinguishable from addition up to sums less than a certain number, at which point it is a completely different binary operator).

is implausible.<sup>484</sup> The hypothesis of the Invisible or Unwritten Constitution suggests a pervasive gap in the written Constitution that is unusual or anomalous as a matter of the written text.<sup>485</sup> It is a mistake in quantification: it is not the case that all of the constitutional provisions require interpretation or an unwritten constitution to know how they apply.<sup>486</sup> There is no such pervasive gap or anomaly; richer and more complete accounts of the nature of language and texts acknowledge the austerity of semantic meaning—in particular, pragmatics; other sources of communicative content recognize that language, generally, and texts, in particular, have more than only semantic sources of linguistic and inferential content.<sup>487</sup> That is not to assert that the constitutional text anticipates or answers all of our contemporary constitutional questions; there are some constitutional provisions that do require such extratextual exegesis.<sup>488</sup> Moreover, the model of the Invisible or Unwritten Constitution is not the best account of the extratextual material we need. We do not need an Unwritten or Invisible Constitution once we understand each of the provisions of the written Constitution we have. This does not imply that the linguistic meaning of the constitutional text answers all of the constitutional controversies we face, only that the limitations on that linguistic meaning are not peculiar to the Constitution. The linguistic meaning of the constitutional text is like that of other performative texts; once we recognize that performative character, the task of applying the Constitution becomes easier, because we can recognize that the meaning of propositions of constitutional law is not determined by their correspondence with matters of constitutional fact.<sup>489</sup>

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<sup>484</sup> See generally BRANDOM, *INFERENCEALISM*, *supra* note 250; LeDuc, *Anti-Foundational Challenge*, *supra* note 43.

<sup>485</sup> See AMAR, *UNWRITTEN*, *supra* note 479, at ix–x; TRIBE, *INVISIBLE*, *supra* note 186, at 1–8.

<sup>486</sup> This is a mistake of the type explored by, among others, Wittgenstein in considering how we follow rules. See generally WITTGENSTEIN, *INVESTIGATIONS*, *supra* note 339, at §§ 198–240. Wittgenstein’s remarks on following a rule are far from straightforward (and have been, as noted below, controversial). Wittgenstein appears to be challenging the paired positions that (1) the application of a rule is premised upon the prior interpretation of that rule and (2) when a rule is unclear in its application, that uncertainty can be removed by articulating a fuller or more precise interpretation of that rule. See *id.* For my fuller discussion of some of these issues, see LeDuc, *Originalism’s Claims*, *supra* note 217, at 13–14. For my argument that this analysis reveals the originalist critics’ problem of generality as a confusion about the nature of legal rules, see LeDuc, *Philosophy and Constitutional Interpretation*, *supra* note 43, at 113 n.92; LeDuc, *Practical Reasoning*, *supra* note 83, at Section II.B.

<sup>487</sup> See SOAMES, *Legal Texts*, *supra* note 112, at 422 (arguing that semantic meaning is too “austere” to carry all of the requisite force of legal texts). See generally BRANDOM, *INFERENCEALISM*, *supra* note 250, at 89–90 (describing the inferential commitments carried with the expressive dimension of normative language).

<sup>488</sup> See AMAR, *UNWRITTEN*, *supra* note 479, at ix (offering examples of principles of the Unwritten Constitution like that of “One Man, One Vote”). These are largely congruent with what Bobbitt has styled structural arguments. See generally BOBBITT, *FATE*, *supra* note 64, at 74–92.

<sup>489</sup> See *supra* notes 335–39 and accompanying text. See generally LeDuc, *Anti-Foundational Challenge*, *supra* note 43.

The accounts Tribe and Amar offer might be defended on the basis that their notion of an Unwritten or Invisible Constitution is merely a metaphorical gambit to highlight the complexity of meaning and use in our written Constitution for a philosophically unsophisticated *hoi polloi*.<sup>490</sup> While describing an Invisible or Unwritten Constitution, on this defense, Tribe and Amar do not mean to make an ontological claim for the existence of such constitutions.<sup>491</sup> They are merely expositional or explanatory devices. Such an account of the use of the notions of an Invisible or Unwritten Constitution fails to recognize the doe-eyed ingénue in Amar and Tribe as they announce that the force of the constitutional provisions is not captured by the semantic meaning of the text.<sup>492</sup> They believe that they have made an important discovery. It is not entirely clear whether Tribe and Amar believe that they have discovered something unusual or unique about the constitutional text, or about legal texts generally. Certainly there appears to be no acknowledgment that the kinds of methods that they introduce with the Invisible and Unwritten Constitutions are generally equally appropriate and necessary for other kinds of texts: the invisible parking ticket, the unwritten shopping list, the unwritten and invisible recipe, etc.

Second, introducing an Invisible or Unwritten Constitution is a wrong turn because it suggests that the nature of the constitutional communicative acts and techniques are somehow different. We cannot be expected to read an Invisible or Unwritten Constitution in the same way that we read a visible or written Constitution. For example, could the Ninth Amendment of the Invisible Constitution be disregarded in the same manner as a provision of such Constitution that had been obscured by a blot of invisible ink?<sup>493</sup> While Tribe intends his book to be an introduction to the methods of invisible constitutional interpretation and analysis, the strategy raises more questions than it resolves.<sup>494</sup> For example, Tribe's Invisible Constitution presents novel and difficult questions about how such a constitution can be amended<sup>495</sup> and how it can be reconciled with the benefits of a written constitution that had been

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<sup>490</sup> See AMAR, UNWRITTEN, *supra* note 479, at xiii (promising that non-lawyers should not feel daunted by the book, despite its length and the sophistication of its arguments).

<sup>491</sup> See TRIBE, INVISIBLE, *supra* note 186, at 211 (suggesting an analogy of Plato's cave metaphor for understanding the constitutional text).

<sup>492</sup> See *id.* (concluding that "the quest for the [I]nvisible Constitution is surely central to any study of the Constitution we are able to see and to read").

<sup>493</sup> See BORK, TEMPTING, *supra* note 7, at 166 (arguing that the Privileges and Immunities Clause should be disregarded as if obscured by an ink blot because we cannot fathom its meaning); see also *id.* at 183–85 (arguing that there is no guidance as to what the Ninth Amendment means).

<sup>494</sup> See TRIBE, INVISIBLE, *supra* note 186, at 12–13.

<sup>495</sup> This question might be put as to whether the Invisible Constitution has a provision corresponding to Article V of the Constitution. This question becomes less pressing if one adopts Bruce Ackerman's account of constitutional amendment. See 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 49 (1991) (introducing the claim that the Constitution has been transformed on occasion without formal constitutional amendment).



sought in the founding.<sup>496</sup> Most obviously, an Unwritten Constitution does not deliver the confidence of having reached shared agreement and understanding that a writing provides.<sup>497</sup> As much difficulty as we have reaching agreement on what the *written* Constitution provides, an *unwritten* constitution would present even more serious challenges of interpretation and application.<sup>498</sup>

On Amar's account, a judge facing a constitutional question must interpret both the written and unwritten Constitutions.<sup>499</sup> Moreover, there cannot be an unresolved conflict between the two;<sup>500</sup> in the event of conflict, the written Constitution trumps.<sup>501</sup>

Third, introducing the concept of an Invisible or Unwritten Constitution is a wrong turn because it plays into the existing dialectic of the debate over originalism, inviting originalists to reject such concepts on the basis that they do violence to the text in the same way that the Living Constitution did before.<sup>502</sup> The Invisible and Unwritten Constitutions are needless provocations to originalism because they are manifestly inconsistent with the originalist project of deciding constitutional cases on the basis of the historical public linguistic understanding of the written constitutional text. Moreover, the introduction of the Invisible and Unwritten Constitutions fails to take into account and respect the choice of the Founders and other relevant agents to adopt a written Constitution.<sup>503</sup> If, by contrast, we plumb the sources of meaning and use of the constitutional text as an example of written language generally, with features common to other texts and features that are specific to performative texts and to legal texts, the originalist alternative is not called up. While our inquiry largely explores the meaning of the constitutional text, using tools that

<sup>496</sup> AMAR, UNWRITTEN, *supra* note 479, at xii–xiii (introducing, without argument, the claim that the adoption of a written Constitution did not reflect a complete break with the British tradition of an unwritten constitution and that from its adoption the Constitution has always encompassed unwritten law).

<sup>497</sup> *See id.* at xii.

<sup>498</sup> I am indebted to Jeff Greenblatt for highlighting this point.

<sup>499</sup> AMAR, UNWRITTEN, *supra* note 479, at xiv–xv (describing the task as that of “faithful interpret[ation]”).

<sup>500</sup> *Id.* at xi (characterizing the Unwritten Constitution as supplementing the written Constitution, not supplanting it). I have sketched how abandoning the debate would enable us to enrich our constitutional decisional discourse. *See* LeDuc, *Beyond Babel*, *supra* note 31, at 197–220.

<sup>501</sup> AMAR, UNWRITTEN, *supra* note 479, at xi (“America’s unwritten Constitution could never properly ignore the written Constitution . . .”).

<sup>502</sup> *See, e.g.,* BERGER, GOVERNMENT BY JUDICIARY, *supra* note 76, at 407–18; BORK, TEMPTING, *supra* note 7, at 167–70; Rehnquist, *Living*, *supra* note 4, at 705 (arguing against judicial decision pursuant to the doctrine of a Living Constitution, and arguing that democratic political action is the only process “compatible with political theory basic to democratic society by which one’s own conscientious belief may be translated into positive law and thereby obtain the only general moral imprimatur permissible in a pluralistic, democratic society”); Scalia, INTERPRETATION, *supra* note 6, at 38–47.

<sup>503</sup> *Compare* AMAR, UNWRITTEN, *supra* note 479, at ix–x, with Scalia, INTERPRETATION, *supra* note 6, at 38–47. *See generally* BARNETT, LOST CONSTITUTION, *supra* note 376.

we may not have recognized are available to us, in some instances our inquiry into the performative element and use of the constitutional text may take us beyond the meaning of the text. But none of the techniques defended here would appear to their proponents to be unfaithful to the Constitution. Their proponents also seek and proclaim their fidelity to the Constitution.<sup>504</sup> They do so, however, in such a different way that the originalists would not agree that their critics maintain the requisite fidelity.

The introduction of the concepts of the Invisible and Unwritten Constitutions would also create extraneous sources of authority for constitutional interpretation and constitutional decision.<sup>505</sup> While that strategy might appear attractive to some of originalism's critics, it is not likely to persuade originalists.<sup>506</sup> It is not likely to persuade originalists for a number of reasons. Most importantly, of course, they are not written to persuade the originalists: Amar's ideopolis is distinct from that of the originalists and he appears to have no desire to visit. Indeed, Amar's work is likely to be rhetorically unsuccessful even with many critics of originalism.<sup>507</sup> More fundamentally, our canonical constitutional argument does not incorporate appeals to the Invisible or Unwritten Constitutions.<sup>508</sup> The anti-foundational account of our constitutional practice I have defended cannot endorse such foundational, theoretical arguments for a departure from our constitutional decisional practice.

Those extraneous sources Tribe and Amar would look to are not part of the written Constitution itself.<sup>509</sup> Amar characterizes the written and unwritten constitutions as the yin and yang of our constitutional law.<sup>510</sup> My rejection of Amar's strategy turns on the relationship between the written and unwritten constitutions that he propounds. His strategy is implausible as a matter of constitutional language and paradoxical as a matter of constitutional practice. We do not need an Unwritten Constitution to understand the language of the Constitution, and we do not need the Unwritten Constitution to decide constitutional cases. Amar pursues a subtle strategy to ground our constitutional practice and decisions on a foundation of the synthesized written and unwritten constitutions. As a foundationalist account, it must fail.<sup>511</sup>

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<sup>504</sup> See, e.g., AMAR, UNWRITTEN, *supra* note 479, at xi; Dworkin, *Arduous*, *supra* note 258 (asserting that his moral reading of the Constitution maintains fidelity, not the mechanical reading defended by the originalists).

<sup>505</sup> AMAR, UNWRITTEN, *supra* note 479, at xi.

<sup>506</sup> See Scalia, INTERPRETATION, *supra* note 6, at 38–47.

<sup>507</sup> See, e.g., RICHARD A. POSNER, DIVERGENT PATHS: THE ACADEMY AND THE JUDICIARY 320 (2016) (implicitly characterizing Amar's *Unwritten Constitution* and Tribe's *Invisible Constitution* as works of provocation without practical utility to the judiciary).

<sup>508</sup> See generally BOBBITT, FATE, *supra* note 64, at 7–8. Bobbitt's structural argument may incorporate much of Amar's concept of the Unwritten Constitution, but I cannot explore this potential line of harmonization further here.

<sup>509</sup> See AMAR, UNWRITTEN, *supra* note 479, at xii–xiii; TRIBE, INVISIBLE, *supra* note 186, at 6–8.

<sup>510</sup> AMAR, UNWRITTEN, *supra* note 479, at xiii.

<sup>511</sup> See BOBBITT, FATE, *supra* note 64, at 6–8; LeDuc, *Anti-Foundational Challenge*, *supra* note 43.

The fourth element that should deter persistent protagonists from seeking to continue the debate is that none of the differing accounts of constitutional reasoning underlying the debate is satisfactory, and they share common flaws.<sup>512</sup> The most obviously unsatisfactory is the formalism of Robert Bork's originalism.<sup>513</sup> He attempts to assimilate constitutional arguments to the syllogisms of formal logic.<sup>514</sup> But constitutional argument cannot be reduced to such syllogistic form.<sup>515</sup> Attempts to reduce real life constitutional arguments to those simple structures may reveal important elements in those arguments, but those attempts also lose critical elements in the arguments. In particular, given the alternative modes of argument, no formal syllogism is adequate to derive a decision, because it cannot explain the rejection of alternative arguments made in other modes. The arguments made under any mode, on Bobbitt's account, are effectively incommensurable with the arguments under the other modes.<sup>516</sup> While other originalists do not go as far as Bork, they share his strategy for formalization.<sup>517</sup> Such formality is not incidental to originalism. The formalism of originalism is an essential element in the originalist strategy to limit judicial discretion and the kinds of prudential and, perhaps, ethical argument that may provide sources of change in our constitutional law.

Originalism's critics generally offer equally implausible accounts of constitutional reasoning. While Dworkin claims that his account of law outperforms competing theories because of its account of legal argument and reasoning,<sup>518</sup> Dworkin's account is fundamentally implausible.<sup>519</sup> Nor do other critics of originalism offer

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<sup>512</sup> One of the starkest contrasts in these accounts is between Robert Bork's formalistic syllogistic reasoning and Ronald Dworkin's comprehensive theory, posited in his law as integrity theory; neither account captures our actual practice of constitutional reasoning and argument very well. *See infra* notes 528–33 and accompanying text.

<sup>513</sup> BORK, TEMPTING, *supra* note 7, at 162.

<sup>514</sup> *Id.* at 162–63 (describing the constitutional text as providing a “major premise” in constitutional argument).

<sup>515</sup> For an alternative description, see PATTERSON, TRUTH, *supra* note 53, at 169–79 (describing a complex structure for legal argument that cannot be reduced to the classical models of formal logic). *See also* LeDuc, *Practical Reasoning*, *supra* note 83, at 27–40 (endorsing an informal description of constitutional reasoning and argument).

<sup>516</sup> *See, e.g.*, BOBBITT, FATE, *supra* note 64, at 5–8.

<sup>517</sup> *See, e.g.*, Scalia, INTERPRETATION, *supra* note 6, at 45. *See generally* LeDuc, *Practical Reasoning*, *supra* note 83, at 27–40.

<sup>518</sup> *See* DWORKIN, EMPIRE, *supra* note 66, at 43–44.

<sup>519</sup> First, I am unpersuaded by Dworkin's realism and his claim that constitutional values are found rather than made. *See* DWORKIN, ROBES, *supra* note 93, at 36–41. Second, Dworkin's rejection of many of the established modes of constitutional argument (including the textual and the historical), to the extent that he is committed to his claim of a complete ethico-legal synthesis in his theory of law as integrity, appears implausible. While Sunstein appears equally wrong in his opposite claim that constitutional decision should never be made on the basis of general principles, Dworkin appears equally mistaken in his claim that decisions must be grounded on a unique, complete principle ultimately grounded on moral and political

more satisfactory accounts. Sunstein offers perhaps the most radical strategy as he rejects principled argument almost entirely.<sup>520</sup> Principled reasoning and sweeping opinions and decisions have their place in constitutional decision. They have a place, notwithstanding Sunstein's important and accurate reminders of the limits of the place of the courts in our political, constitutional democratic republic and as engines of social change.<sup>521</sup> Just as *Brown* is the cliff over which the originalists may be thrown by their critics,<sup>522</sup> so, too, is it the cliff over which the Sunsteinian minimalists may be thrown. While *Brown* could have been more principled than it was, the rejection of the separate but equal doctrine was fundamental, principled, and far-reaching. Once *Brown* was decided, it was unlikely that the Supreme Court would reverse direction. As a result, the federal government became committed in new and important ways to the goal of racial equality in America.<sup>523</sup> That scope and implication could not have been achieved with an unprincipled, minimalist decision.

These four failures inherent in the positions and arguments of both sides in the debate do not conclusively rebut either position in the debate or preclude the continuation of the debate. But taken together, when coupled with the stalemate in the debate and the other symptoms of pathology, these weaknesses strongly suggest that the debate should be abandoned.

The rejection of the originalism debate argued for here cannot be more definitive. To some extent, the characterization of the debate is as a matter of mistaken modalities. The kinds of arguments from the constitutional text, and the original

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philosophy. See DWORKIN, *EMPIRE*, *supra* note 66, at 225 (“According to law as integrity, propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community’s legal practice.”); SUNSTEIN, *LEGAL REASONING*, *supra* note 159, at 49 (describing Dworkin’s Hercules as an “oddball,” because his elaborate, comprehensive, and principled theory of decision-making will make it very difficult, if not impossible, for him to find common ground with other judges). For my criticisms, see generally LeDuc, *Anti-Foundational Challenge*, *supra* note 43.

<sup>520</sup> See SUNSTEIN, *LEGAL REASONING*, *supra* note 159, at 38–41; SUNSTEIN, *ONE CASE*, *supra* note 164, at 41.

<sup>521</sup> See SUNSTEIN, *LEGAL REASONING*, *supra* note 159, at 176 (characterizing *Brown* as ineffective in securing the desegregation of public schools and claiming that effective steps toward such desegregation required political, legislative action); see also ROSENBERG, *supra* note 310, at 70–71 (expressing substantial reservations about the role of the courts as agents for change with respect to fundamental social practice and concluding, with respect to the impact of the federal courts on racial discrimination, that “*Brown* and its progeny stand for the proposition that courts are impotent to produce significant social reform”).

<sup>522</sup> See BASSHAM, *PHILOSOPHICAL STUDY*, *supra* note 2, at 106 (arguing that originalism cannot give an account of the decision in *Brown* and that that failure discredits originalism as a plausible constitutional theory).

<sup>523</sup> Sometimes a hollow hope is better than no hope at all. Balkin, as noted before, captures this aspirational ability of the Constitution to keep citizens’ hopes for justice alive. See BALKIN, *LIVING ORIGINALISM*, *supra* note 51, at 60–62.

intentions and understandings, are good modes of argument. Similarly, the modes emphasized in their place by the critics—precedential, doctrinal, prudential, and structural among them—are also established and permissible kinds of argument made in our constitutional practice.<sup>524</sup> The error—for the originalists and for their critics—lies in privileging one or more modes of argument in derogation of the others.

*C. Later Resistance: Can the Protagonists Rehabilitate the Debate?*

It is valuable to consider the replies that the protagonists in the debate may offer to support their positions and thereby, implicitly, the debate itself. None of what has been advanced here can offer a definitive rebuttal of the claims that have been made in the debate. The protagonists can continue the debate without standing convicted of an error in logic, a category mistake, or otherwise of a mistake that could properly be characterized as calling into question their rationality. I do not purport to have offered a call to end the debate that all rational persons must hear and accept. I hope some of what I have argued suggests why practical reasoning does not operate at the level that could deliver conclusions of that force.

The arguments made here are directed, first, to persuade judges responsible for deciding constitutional cases. They are also meant to persuade originalist judges to support their originalist arguments and results on the merits of those arguments and the weaknesses inherent in the countervailing arguments from other modes. My arguments are meant to persuade originalist judges to eschew the strategy of suggesting that alternative modes of argument are impermissible.<sup>525</sup>

The arguments here are also designed to persuade proponents of the Living Constitution or the Unwritten Constitution, along with other critics of originalism, to defend their proposed decisional outcomes on the strength of the established, canonical modes of constitutional argument that support those outcomes, and on basis of their assessment of the inherent weaknesses in the countervailing textual and historical arguments. For such critics of originalism, the claim here is that the systematic rejection of the modes of argument that the originalists make is not a strategy that may fruitfully be pursued.

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<sup>524</sup> Certainly many originalists sometimes employ structural argument, too. But to the extent that they do so, they are employing a mode of argument that is not entirely consistent with their claim to look only to the historical semantic understanding of the constitutional text in constitutional interpretation and decision. Because we naturally rely on pragmatic import in determining meaning, context often supplies important linguistic content. It may be that the originalists ought to be understood as looking to linguistic meaning, not only to the austere semantic meaning of the text.

<sup>525</sup> For a fuller statement of these arguments, see generally LeDuc, *Anti-Foundational Challenge*, *supra* note 43. I have sketched how abandoning the debate would enable us to enrich our constitutional decisional discourse. See LeDuc, *Beyond Babel*, *supra* note 31, at 197–220.



Whom can these therapeutic strategies reasonably be expected to cure? In theory, both camps. But the manner in which the theoretical commitments of judges are to be changed by the therapeutic elements incorporated here is different. Part of the therapeutic strategy is designed to make the protagonists want to abandon the debate, convincing them that the costs of abandoning their respective claims of privilege and giving up the debate is an acceptable cost to incur. In Kuhnian terms, the therapeutic strategy is to propose and defend a paradigm shift.<sup>526</sup> That shift replaces the representational, foundational account of constitutional law and acknowledges the priority of our constitutional practice.

When my strategy is characterized in these terms, the failure of the prior efforts along these lines by Bobbitt and Patterson may make more sense. Because of the intensity with which they advocated their then-radical views, it is not surprising that they encountered equally intense resistance.<sup>527</sup>

The second class intended as an audience for the arguments and as patients for the therapy are American constitutional scholars. The challenge faced to persuade or cure this class is perhaps even more daunting. That is because they are even more conceptually invested in their claims. For them to be persuaded by my arguments or persuaded to make a paradigm shift in their thinking about the nature of the Constitution, the truth of propositions of constitutional law and the associated implications for originalism and its critics requires an intellectual tectonic shift. It is hard to be optimistic that this will happen.

The originalists may attempt to rehabilitate their claims and to restart the debate by recharacterizing my arguments and my nonargumentative therapeutic strategies. They may argue that I have conceded that historical and textual arguments are recognized forms of constitutional argument.<sup>528</sup> In order to reassert the core originalist claim and restart the debate, originalism need only privilege those modes of argument *vis à vis* the other modes of constitutional argument.<sup>529</sup>

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<sup>526</sup> See generally KUHN, *SCIENTIFIC REVOLUTIONS*, *supra* note 414, at 43–76 (arguing that the results of scientific evidence are insufficient to determine the choice between radically different scientific theories and that scientific revolutions require paradigm shifts in scientific thinking).

<sup>527</sup> See, e.g., Patrick O. Gudridge, *False Peace and Constitutional Tradition*, 96 HARV. L. REV. 1969, 1969 (1983) (reviewing PHILIP BOBBITT, *CONSTITUTIONAL FATE* (1982)) (rejecting the temptation to judge *Constitutional Fate* simply as bad—“[i]t is easy, upon first reading, to characterize *Constitutional Fate* as simply a ‘bad’ book”—instead characterizing *Constitutional Fate* as a “provocation”).

<sup>528</sup> See generally LeDuc, *Anti-Foundational Challenge*, *supra* note 43. But I deny that such historical or textual arguments are privileged when they conflict with other modes of argument, thus denying the core originalist claim. See LeDuc, *Privileged How?*, *supra* note 251 (asserting that the claim that such authorities generate privileged arguments, to a greater or lesser degree, is the core tenet of originalism).

<sup>529</sup> See LeDuc, *Privileged How?*, *supra* note 251, at 6–62 (cataloging the principal ways that the force of the privilege accorded the original understandings, expectations, and intentions varies with the particular form of originalism).

Establishing that claim of privilege, once the force of these modes of argument has been acknowledged, may appear a modest task. But originalism has been trying unsuccessfully to move from the existence of such arguments as accepted forms of constitutional argument to a claim of privilege for those modes for the past several decades. To redirect a practically powerful argument made by Robert Bork against originalism's critics,<sup>530</sup> if the originalists were going to establish the claim of privilege, they would have done so long ago. Conceptually, the originalists cannot establish the claim of privilege because the other modes of constitutional argument are a constitutive part of our constitutional law.<sup>531</sup> When I characterize those arguments as constitutive, I mean those arguments are, as descriptive matter, how our constitutional law is made, beginning with advocates, who endorse or criticize one or more modes of argument to support a decision in cases of constitutional controversy.<sup>532</sup> The arguments and decisions are what our constitutional law is; it is not a parchment or printed copy of the Constitution in the National Archives.<sup>533</sup> By characterizing the canonical modes of constitutional decisional argument as constitutive, I mean that they constitute the social practice that is our constitutional law.

Thus, even if the task of privileging the original understandings and intentions appears relatively modest to originalists, that project is nevertheless fundamentally inconsistent with the pluralist, modal account of constitutional argument and decision defended here. The arguments made here are inconsistent with privileging those kinds of arguments in a constitutional decisional discourse. Such a privilege is at once inconsistent with our constitutional practice and its demand for the exercise of judgment in constitutional decision.

Charles Barzun has begun to sketch an inclusive, non-positivist approach that offers one of the latest contributions to the debate.<sup>534</sup> His focus has been on criticizing the arguments William Baude makes for providing a new, uncontroversial, positivist foundation for originalism,<sup>535</sup> but he does not reject the originalist position. Barzun characterized the positivist strategy to rehabilitate the originalist arguments as project to find a middle ground between the originalists and their critics.<sup>536</sup> In particular, it is a means to find a middle ground between opposing positions in the debate over how to interpret the Constitution.<sup>537</sup> Thus, there are similarities between

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<sup>530</sup> BORK, TEMPTING, *supra* note 7, at 255.

<sup>531</sup> See BOBBITT, INTERPRETATION, *supra* note 53, at xi–xvii.

<sup>532</sup> See BOBBITT, FATE, *supra* note 64, at 4–6.

<sup>533</sup> AMAR, UNWRITTEN, *supra* note 479, at 64–69 (describing the discrepancy between the parchment copy of the Constitution in the National Archives and the printed copies presented to the ratifying conventions).

<sup>534</sup> Charles L. Barzun, *The Positive U-Turn*, 69 STAN. L. REV. 1323 (2017) [hereinafter Barzun, *Positive U-Turn*].

<sup>535</sup> See William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349 (2015).

<sup>536</sup> Barzun, *Positive U-Turn*, *supra* note 534, at 1328.

<sup>537</sup> *Id.* (characterizing the new positivist originalism as claiming to “help resolve, or at least reorient, our scholarly debates about how to interpret our Constitution”).

his project and mine. Barzun is critical of the claims that Baude and Sachs make, because what Barzun characterizes as a fundamental tension between the legal academy and legal practice cannot be bridged so easily.<sup>538</sup> Barzun thinks that something like Baude's and Sachs's project can bridge the gap if the fundamental, positivist distinction often drawn between the internal and external perspective is discarded.<sup>539</sup> He briefly argues that without such a distinction our legal discourse can be broadened to incorporate contributions from theoretical disciplines now thought to offer an external perspective.<sup>540</sup> If we end up making that choice in our constitutional law—and I am skeptical that we will—it will not be on the basis of jurisprudential argument.

I want to distance myself from Barzun's objections on at least three levels. More importantly, I want to discount the prospect that his inclusive approach offers the path forward in the debate. First, I do not think the internal/external distinction should be rejected. That distinction, at least in constitutional law, is grounded in the particular practices that constitute our constitutional law in general and the particular canonical forms of constitutional argument.<sup>541</sup> Arguments against characterizing our constitutional discourse as a practice do not seem descriptively apt. Second, Barzun argues that Baude and Sachs do not understand the philosophical and theoretical complexity underlying the originalism debate.<sup>542</sup> As a result, they gloss over the fundamental questions that demand answers if we are to choose among theories of constitutional law. My objections to Baude and Sachs come from the opposite direction: they accord too much authority to theoretical argument in their approach to the originalism debate.<sup>543</sup> Third, at a meta-philosophical level, Barzun, like Baude and Sachs, misunderstands what philosophy should aspire to do and, more importantly, what philosophy can do.<sup>544</sup> He envisions a robust role for philosophy and thinks that philosophy can and should be enlisted to tell us how constitutional argument can be made.<sup>545</sup> Barzun has not acknowledged or engaged my claims in *The Relationship of Constitutional Law to Philosophy* and he does not otherwise engage the

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<sup>538</sup> *Id.* at 1330.

<sup>539</sup> *Id.*; see Charles L. Barzun, *Inside-Out: Beyond the Internal/External Distinction in Legal Scholarship*, 101 VA. L. REV. 1203, 1212–24 (2015).

<sup>540</sup> Barzun, *Positive U-Turn*, *supra* note 534, at 1386–87.

<sup>541</sup> See BOBBITT, FATE, *supra* note 64, at 3–8 (describing the practice of argument that constitutes our constitutional law); Brian Z. Tamanaha, *The Internal/External Distinction and the Notion of a "Practice" in Legal Theory and Sociolegal Studies*, 30 LAW & SOC'Y REV. 163 (1996) (endorsing the internal/external distinction and exploring its relationship to concepts of shared practices).

<sup>542</sup> See Barzun, *Positive U-Turn*, *supra* note 534, at 1330.

<sup>543</sup> See LeDuc, *Paradoxes*, *supra* note 100, at 635–45.

<sup>544</sup> See Barzun, *Positive U-Turn*, *supra* note 534, at 1328 (“[The new legal positivism] suggests that deep questions of legal theory or philosophy may shed light on what legal practice requires.”); LeDuc, *Philosophy and Constitutional Interpretation*, *supra* note 43, at 153–54.

<sup>545</sup> Barzun, *Positive U-Turn*, *supra* note 534, at 1386–87.

arguments that ascribe a therapeutic role to philosophy. Had he done so, he might have been more cautious in tacitly defending a foundational role for such philosophical argument. He is not necessarily wrong, but he is not entitled to his claim as a matter of argument—the same criticism he makes of Baude.<sup>546</sup>

Finally, it is for these reasons that Barzun does not offer us new hope that the originalism debate may be resolved on its own terms. The therapeutic arguments I have offered against earlier iterations in the debate are thus also applicable against Barzun's stance.

Originalism's critics also have a variety of strategies by which they might seek to salvage their claims from the criticisms here. To do so they might interpret or restate my criticism of originalism's account of constitutional language and the truth of propositions of constitutional law as showing that textual and historical modes of argument are confused or otherwise untenable. If that were so, my account would also fail as a description of our constitutional practice and thus would be inconsistent with my own account of what a constitutional theory must do. Nothing in my account discredits the historical or textual modes of argument made by originalists; those are good modes of argument, even if they are not privileged modes of argument.<sup>547</sup> They are coequal with other modes of constitutional argument.<sup>548</sup> All are part of our constitutional practice and, as such, constitutive of our constitutional law. While originalism's critics rightly point out my claim that tacit philosophical premises underlie originalism, I made a parallel claim with respect to originalism's critics.<sup>549</sup> So a strategy to endorse my claims against originalism requires a defense against the parallel claims against the Living Constitution and the related strands of originalism's critics.

The originalists and their critics might each begin to defend their respective positions and the continuing need for the debate on the basis that my challenge to the underlying philosophical premises of the debate is unpersuasive.<sup>550</sup> The philosophical arguments against the premises of the originalism debate, particularly in the stronger form I have outlined, admittedly do not reflect a consensus in contemporary analytic philosophy.<sup>551</sup> In the weaker form, it appears a more plausible stance, simply asserting the absence of an objective world to which statements of constitutional law correspond.<sup>552</sup> If the premises that there is an objective, ontologically

<sup>546</sup> *Id.* at 1330.

<sup>547</sup> See generally LeDuc, *Anti-Foundational Challenge*, *supra* note 43, at 197–202 (endorsing a pluralist account that recognizes multiple modes of constitutional argument).

<sup>548</sup> See BOBBITT, INTERPRETATION, *supra* note 53, at x–xiii.

<sup>549</sup> See LeDuc, *Ontological Foundations*, *supra* note 41, at 305–22.

<sup>550</sup> For the more complete statement of these arguments, and possible replies, see LeDuc, *Anti-Foundational Challenge*, *supra* note 43, at 202–06.

<sup>551</sup> See generally *id.*

<sup>552</sup> See also PATTERSON, TRUTH, *supra* note 53, at 154–63 (arguing that the of propositions of law is not a matter of correspondence but a matter of our legal practice); *cf.* HARMAN,

independent Constitution and that the truth of propositions of constitutional law is determined by their correspondence *vel non* with such independent Constitution can be defended, then there would appear to be ground on which to carry forward the debate over originalism without interruption.

One response to such a strategy should be to note the cost that such a strategy would exact—most tellingly for the originalists, but for most of their critics, too.<sup>553</sup> Once originalism acknowledges its philosophical premises, some of its claims to the simplicity and transparency would appear compromised.<sup>554</sup> Its sneers at highfalutin philosophy would also appear unfair. The truth of originalism's claims would appear hostage to originalism's own tacit philosophical premises.<sup>555</sup>

It might be argued that conceding that originalism relies on certain premises, whether ontological, epistemological, or drawn from the philosophy of language, is no more damaging than Bork's acknowledgment that originalism relies on the moral premises of the Founders.<sup>556</sup> The Founders and the adopters of the Reconstruction Amendments relied upon these foundational, representational premises.<sup>557</sup> But there are two important differences. First, it is unclear whether or how these premises are embedded in the constitutional text. Second, it is unclear whether rejecting these premises is more properly analogized to making value judgments or to changing our views about the nature of things. To an extent, this shift in philosophical view is characterized as an advance in our knowledge, rather than a change in our moral stance. But to so characterize the original understanding is not unlike the way Dworkin would approach the Constitution. Accordingly, if originalism concedes its reliance on such philosophical premises, the cost of that concession would be high. Not surprisingly, therefore, mainstream originalism does not interpret the relevant original understanding that way.

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MORALITY, *supra* note 350, at 3–10 (exploring the seemingly limited relationship between normative ethical statements and evidence from the observed world).

<sup>553</sup> To the extent that Dworkin has already made this claim expressly, such a strategy has already been deployed. See DWORKIN, ROBES, *supra* note 93, at 40 (“Given how we go on, the height of the mountain is not determined by how we go on but by masses of earth and stone.”). For my defense of an anti-representational, anti-foundational constitutional theory, see LeDuc, *Anti-Foundational Challenge*, *supra* note 43; LeDuc, *Constitutional Meaning*, *supra* note 75.

<sup>554</sup> See generally LeDuc, *Ontological Foundations*, *supra* note 41.

<sup>555</sup> Brandom's account of the error of the originalists and their radical critics is not stated expressly in terms of their ontological commitments with respect to the Constitution. Brandom instead states the error as misunderstanding the paired elements of authority and responsibility for judges in their decisional practice. Brandom, *Legal Concept Determination*, *supra* note 5, at 37–38. According to Brandom, the duty to interpret and apply the law by reference to its historical understanding is accompanied by an authority to interpret that law as a judge determines proper. *Id.* But Brandom does not explore the source of the duty that binds judges or the parameters within which judges' authority operates. The originalists, and many of their critics, attribute that constraint to the objective Constitution. Brandom's account is not inconsistent with my argument.

<sup>556</sup> See BORK, TEMPTING, *supra* note 7, at 177.

<sup>557</sup> There were no alternatives to such accounts at those times.



## IV. BEYOND THE ORIGINALISM DEBATE

Thus, even if the task of privileging the original understandings and intentions appears relatively modest to originalists, that project is nevertheless fundamentally inconsistent with the pluralist, modal account of constitutional argument and decision defended here. The arguments made here are inconsistent with privileging those kinds of arguments in a constitutional decisional discourse. Such a privilege is at once inconsistent with our constitutional practice and its demand for the exercise of judgment in constitutional decision.

My therapeutic strategy has had four steps. First, I argued that the debate over originalism long ago reached a stalemate—even with the celebrated introduction of New Originalism.<sup>558</sup> The debate fails to generate new ideas, arguments, or conclusions of any practical or theoretical import to our constitutional practice. There is admittedly the appearance of progress, most notably in the arguments of New Originalism, through the introduction of increasingly sophisticated analytic philosophy of language into the debate.<sup>559</sup> But that appearance is illusory. Those new strategies have not convinced the protagonists' opponents and they do not yield a better description of our constitutional practice. The debate is *pathological*.

Second, drawing heavily on the argument made in earlier articles,<sup>560</sup> I defended an account of the conceptual confusions that underlie both sides of the debate, making the debate possible.<sup>561</sup> I highlighted the shared ontological assumption that an objective Constitution makes our constitutional statements true or false and that the decision of constitutional cases begins with the interpretation of the constitutional text. Those premises make the debate, as it has been carried out, possible.

Third, and finally, I parried potential rebuttal arguments against my therapeutic strategy and defended the claim that the debate cannot be reconstructed or revived, criticizing the principal advances claimed by the originalists and their critics as without promise.<sup>562</sup> Progress in this part of the space of reasons will come from moving beyond the terms of the debate and beyond the foundational premises that make the debate possible.

The ongoing debate over originalism should be forsaken because it is pointless. Neither side can prevail because the implicit ontological premise of the debate—the existence of an original understanding in the requisite sense that the originalists privilege and their critics reject—does not exist.<sup>563</sup> It does not exist because our

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<sup>558</sup> See *supra* Section I.A.

<sup>559</sup> See *supra* Section I.A.

<sup>560</sup> See generally LeDuc, *Anti-Foundational Challenge*, *supra* note 43; LeDuc, *Ontological Foundations*, *supra* note 41.

<sup>561</sup> See LeDuc, *Anti-Foundational Challenge*, *supra* note 43; LeDuc, *Ontological Foundations*, *supra* note 41; *supra* Section I.B.

<sup>562</sup> See *supra* Part III.

<sup>563</sup> For a statement of this claim and my defense of it, see LeDuc, *Anti-Foundational Challenge*, *supra* note 43, at 142–51.

constitutional law consists of a practice of resolving constitutional case controversies on the basis of accepted modes of argument. Some of those modes look to the original historical understanding of the text; some do not. It might appear that I am endorsing the anti-originalist side of debate. The sense in which there is no original understanding is as damaging to the traditional anti-originalist position as it is to the originalist claims.<sup>564</sup> If the account of constitutional law as a matter of social practice is correct, then the originalist project of identifying the original understanding of the Constitution *and employing that understanding to decide cases, without more*, is impossible.

Similarly, the anti-originalists' project to demonstrate that the originalists are wrong about the facts of the matter with respect to constitutional law is misguided. The anti-originalists argue that the original understanding of the original understanding was inconsistent with the originalist project<sup>565</sup> or, as Tribe, Brest, and Dworkin have all argued,<sup>566</sup> that the original understanding was necessarily incomplete or uncertain. Tribe and Dworkin assume that there is a constitutional fact of the matter that is relevant in some controlling way to the controversy presented in a constitutional case.<sup>567</sup> The critics also adopt two fundamental erroneous concepts: first, of language—that propositions of constitutional law correspond to constitutional facts, if true, and second, of rules—that we need an interpretation of a rule before we may apply that rule.

I have defended the thesis that there are no facts outside of our social practices to which we may appeal in determining the truth of our propositions of constitutional law. As a result, the disagreement over the original understanding, the original expectations, or the original intentions with respect to constitutional provisions cannot either be sustained or refuted in the manner assumed by the protagonists in the

<sup>564</sup> *See id.*

<sup>565</sup> *See* Powell, *supra* note 8, at 948 (“[The originalism debate] cannot be resolved, however, and should not be affected, by the claim or assumption that modern intentionalism was the original presupposition of American constitutional discourse. Such a claim is historically mistaken.”).

<sup>566</sup> *See generally* Tribe, INTERPRETATION, *supra* note 21, at 65–66 (arguing that Justice Scalia’s originalism conflates a semantic or linguistic originalism with an approach that looks to the original expectations with respect to constitutional provisions); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980) (arguing that the constitutional text is underdetermined); Dworkin, *Forum*, *supra* note 152, at 476–79 (arguing that the concept of collective original intentions is not well-defined).

<sup>567</sup> *See* DWORKIN, *No Right Answer?*, *supra* note 456, at 119 (arguing that there is indeed one right answer to legal questions, as a matter of fact); LeDuc, *Ontological Foundations*, *supra* note 41, at 320–22 (arguing that Tribe is committed to the existence of an ontologically independent Constitution despite his emphasis on practice and his skepticism about systematic theories of interpretation like those defended by Justice Scalia and Ronald Dworkin). *But see* TRIBE, INVISIBLE, *supra* note 186 (raising doubts about whether there is a fact of the matter with respect to constitutional propositions through the hypothesization of an Invisible Constitution). Dworkin does not believe that the originalists are right about their claim that there is a fact of the matter about the original intentions. *See* Dworkin, *Forum*, *supra* note 152, at 476–77. *See generally* LeDuc, *Ontological Foundations*, *supra* note 41.

debate. Originalists and their critics each tacitly appeal in their arguments about the content of our constitutional law to an ontologically independent constitution that does not exist. That ontological deficit undermines the arguments each side makes. In the case of the originalist critics, the appeal to other facts to prove the truth of anti-originalist propositions of constitutional law is no more compelling. The originalists' modes of historical and textual argument cannot be delegitimized by historical or philosophical arguments. Further, to the extent that the Living Constitution derives its force by contrast with the originalist account, the anti-realist Living Constitution is no more plausible than the realist account of original understanding or intentions.

The debate over originalism should be abandoned because it is fruitless. Originalism offers the siren call of a decision process that reestablishes constitutional consensus and eliminates the apparent judicial discretion run amok of the Warren Court. Anti-originalism offers the promise of a competing methodology that delivers justice and freedom through the Constitution and the Court, unfettered by historical understandings or expectations and untainted by the racist and sexist beliefs and assumptions of the Founders.<sup>568</sup> Both assume that there is an objective Constitution to which such appeals may be made. Both projects are thus similarly misguided; we must abandon the chimera of a Constitution against which we can test the truth of our propositions of constitutional law, creating a decision process that can give us certainty and consensus. Instead, we must eke out our constitutional decisions, and our progress, if any, in the hard, particularized field of constitutional argument. The alternative of invoking global arguments to discredit the opposing stance, however seductive they may be to the protagonists in the debate, is illusory. It is illusory because there is no Archimedean stance from which to delegitimize accepted, canonical forms of constitutional argument from outside our practice of constitutional argument and decision.<sup>569</sup>

It may be that, like the prior approaches to win or otherwise resolve the debate, a therapeutic approach to the debate is doomed to fail. None of the participants themselves have given much indication that they are open to therapy or even recognize the need for it. Therapy may cure, but only if the patients are open to help. If the participants must experience deep frustration and despair over the debate before

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<sup>568</sup> The anti-originalists must acknowledge the constraints of precedent and *stare decisis*, but as *Brown* demonstrated, the anti-originalists are prepared to limit or overturn such precedent as may be necessary. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 493–95 (1954) (fundamentally limiting *Plessy v. Ferguson* as a controlling interpretation of the Equal Protection Clause).

<sup>569</sup> Further support for this pluralist, anti-foundational account comes from Noah Feldman's recent account of the mid-twentieth-century Supreme Court. See NOAH FELDMAN, SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR'S GREAT SUPREME COURT JUSTICES (2010). While that work is largely insensitive to the constitutional-theoretic issues underlying some of the conflict, it richly captures the decisional practices that instantiate the modal, pluralist account of constitutional argument and law.

making the kinds of fundamental changes sketched by this Article, we must question whether the participants have yet reached that stage. After all, scholastic philosophy survived, increasingly arcane and academic, for centuries before it was replaced.

Despite all of the evidence, most of the debate's protagonists appear to believe that their triumph is at hand.<sup>570</sup> My critical account of the debate from each side's perspective may lead even the hardened participants to step back and assess how fruitless their project has proven.

Perhaps the originalists and their critics cannot imagine a world in which the Constitution is a matter of practice, rather than an objective artifact that can provide us with answers when we face constitutional controversies in cases. The therapeutic strategy pursued here requires abandoning the notion that there is a Constitution that can give currency to our constitutional claims independent of our hurly-burly practice of constitutional argument and decision. Without being able to imagine that alternative, the therapeutic project pursued in this Article must fail, and the debate must continue. Thus, the final therapeutic step remaining is to begin to imagine and contemplate the world of constitutional decision and interpretation without the dualisms of the originalism debate.

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 abandon the strategy of delegitimizing other modes of argument.<sup>571</sup> The originalists must concede that prudential, structural, doctrinal, and ethical arguments are legitimate modes of argument. When those arguments are made in constitutional decision, they legitimize the decisions made—even if contrary arguments may also be made that such arguments are noncompelling or the decision itself is erroneous.

The corresponding strategy by originalism's critics to delegitimize the historical and textual arguments of the originalists also fails. Originalism's critics must acknowledge the place of historical and textual arguments. No constitutional theory can delegitimize those forms of argument. In the place of wholesale, methodological challenges to various modes of argument, we must return to a retail method of constitutional argument. Each constitutional question must be addressed on its own even while attending to the overall constitutional fabric. That does not mean that we must abandon *stare decisis*. We can both address each case and controversy on its particular terms and recognize the importance of consistency and general rules by continuing our constitutional decision practices. *Beyond Babel* sketches the public

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<sup>570</sup> See, e.g., Scalia, *Response*, *supra* note 76, at 149 (announcing the beginning of hard times for originalism's critics); Dworkin, *Bork*, *supra* note 1, at 674; Posner, *Bork*, *supra* note 25, at 1369–70 (announcing the demise of originalism).

<sup>571</sup> The anti-foundational arguments made here would foreclose other delegitimization strategies, too, because if our constitutional arguments comprise our constitutional law, then no mode of those arguments may be excised from our decisional process on the basis of theoretical argument.

space of reasons in an alternative constitutional world that we can now recognize as possible, where arguments are made and cases decided without the pervasive metrics and informing concepts of an ongoing debate over originalism.<sup>572</sup>

In conclusion, the pathology of the debate is apparent. Traditional arguments made over many decades by each side have failed to persuade their intended audiences. A novel, therapeutic stance toward the debate over originalism offers a promise for relief.

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<sup>572</sup> See generally LeDuc, *Beyond Babel*, *supra* note 31.