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# LOGIC AND LEGITIMACY: THE USES OF CONSTITUTIONAL ARGUMENT

*Brian Winters*<sup>†</sup>

*Seule l'existence d'une argumentation, qui ne soit ni contraignante ni arbitraire, accorde un sens à la liberté humaine. . . . [E]t cela à partir d'une analyse de ces formes de raisonnement qui, quoique indispensables dans la pratique, ont été négligées, à la suite de Descartes, par les logiciens. . . .*

Chaim Perelman<sup>1</sup>

*[O]ur excuse [for embarking on these investigations] lies in the conviction that a radical re-ordering of logical theory is needed in order to bring it more nearly into line with critical practice.*

Stephen E. Toulmin<sup>2</sup>

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<sup>†</sup> Quarles & Brady, Milwaukee, WI; A.B. Economics, Cornell University; M.A. Philosophy, University of Toledo; M.A. Economics, University of Toledo; J.D., Yale Law School. The intellectual stimulus for this article came from Bruce Ackerman, David Pears, and Tom Mayberry. It is dedicated to the memory of Norman Malcolm.

<sup>1</sup> CHAIM PERELMAN & L. OLBRECHTS-TYTECA, *TRAITE DE L'ARGUMENTATION* 682 (2nd ed. 1970) [hereinafter PERELMAN & OLBRECHTS-TYTECA, *TRAITE DE L'ARGUMENTATION*]. That is, "[o]nly the existence of an argumentation that is neither compelling nor arbitrary can give meaning to human freedom . . . . And its starting point is an analysis of those forms of reasoning which, though they are indispensable in practice, have from the time of Descartes been neglected by logicians . . . ." CHAIM PERELMAN & L. OLBRECHTS-TYTECA, *THE NEW RHETORIC: A TREATISE ON ARGUMENTATION* 514 (John Wilkinson & Purcell Weaver trans., Univ. of Notre Dame Press 1969) [hereinafter PERELMAN & OLBRECHTS-TYTECA, *THE NEW RHETORIC*].

<sup>2</sup> STEPHEN TOULMIN, *THE USES OF ARGUMENT* 253 (1958).

## INTRODUCTION

The specter of Descartes haunts constitutional theory. From the commonplace observation that people can disagree about the meaning of constitutional provisions, constitutional skeptics conclude that the meaning of the Constitution is in general indeterminate. This means that when judges claim, on the basis of<sup>3</sup> the constitutional text, to overrule the democratic will of contemporary majorities, they are engaged in mystification. If the meaning of a text is indeterminate, then *any* judicial act can be said to be "on the basis of" the text. The *text* can only be a *pretext*, and the legal realist exposes judicial review as merely indulging the policy tastes and preferences of the people who wear the robes. The move from a problem in philosophy of language—whether we know what words mean—to a problem in political philosophy—the counter-majoritarian difficulty<sup>4</sup>—seems inexorable.

My thesis is that *constitutional* skepticism is a variety of *philosophical* skepticism and as such has its roots in Descartes. A standard reading of Cartesian skepticism is that it poses a deep problem in epistemology by calling into question our ability to ever *know* anything with certainty. Constitutional skepticism can easily be framed in such terms by asking how we can ever know with certainty what the Constitution requires or forbids. We may *think* the Constitution forbids jailhouse interrogations without counsel present, but we cannot *know* that it does. We can, it seems, entertain the possibility that it might—in fact—not.

In 1958 the English logician and philosopher of science Stephen E. Toulmin wrote a book<sup>5</sup> in which he argues that what appears to be a problem in epistemology actually follows from a misconception about the nature of logic. Toulmin argues that skepticism as to what we can know with certainty really boils down to skepticism as to what we can demonstrate by means of logical

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<sup>3</sup> The notion that our constitutional practice requires that our judicial review be "on the basis of" the constitutional text can be expressed in various ways. The particular locution I have chosen comes from Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1256 (1987) ("Indeed, our constitutional practice presupposes that it is only on the basis of a text produced by past political acts of framing and ratification that a judge may ever invalidate the action of a contemporary political majority.").

<sup>4</sup> See generally ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (2d ed. 1986).

<sup>5</sup> TOULMIN, *supra* note 2.

entailment. Descartes' error, according to Toulmin, and the error of those who have become ensnared in the skeptical trap, was to illegitimately privilege a model of logic that has its place in one field of discourse and to assert, or assume, that *all* arguments in *all* fields must measure up to that model. Toulmin's view is that logic is a species of argumentation, and that the primary use of argument is retrospective, to justify a claim once one has made it, not as a means of discovery or inference by which one proceeds prospectively from evidence to claim.<sup>6</sup> Toulmin's focus is on the justificatory arguments people bring forward in support of the assertions they make,<sup>7</sup> especially when such assertions are challenged by others:

Let it be supposed that we make an assertion, and commit ourselves thereby to the claim which any assertion necessarily involves. If this claim is challenged, we must be able to establish it—that is, make it good, and show that it was justifiable. How is this to be done?<sup>8</sup>

This practice of offering justifications for one's assertions is very much what goes on in constitutional adjudication. In the opinions they write, the arguments they make, the members of the Court seek to justify assertions of the form, "Legal state of affairs L is constitutional" or "Legal state of affairs L is not constitutional."

It is important to note that the practice of constitutional adjudication does not permit the Court to wait until its assertion of constitutionality is challenged before it produces arguments in justification. What Bennett has called "[t]he tradition of justification in the form of a judicial opinion"<sup>9</sup> requires that the assertion be accompanied by the argument which justifies it. In part, this is because the Court only makes assertions in the context of a case or controversy, so that a justification for its assertions is implicitly called for by the existence of briefs for the losing side. But the practice of justification plays another role, that of rendering legitimate the Court's assertion by linking it logically to the text of the Constitution.

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<sup>6</sup> See SONJA K. FOSS ET AL., *CONTEMPORARY PERSPECTIVES ON RHETORIC* 85 (1985) (describing Toulmin's approach as "a way of testing ideas critically").

<sup>7</sup> See TOULMIN, *supra* note 2, at 12.

<sup>8</sup> *Id.* at 97.

<sup>9</sup> Robert W. Bennett, *Objectivity in Constitutional Law*, 132 U. PA. L. REV. 445, 479 (1984) ("[This] is a primary mechanism of constraint, exposing judicial decisions to the discipline of reason and judicial reasoning to the judgment of the world.").

A central question is this: Given that one has made an assertion, "L is constitutional," and feels obliged to justify it, "how does he set about producing an argument in defence of the original assertion, and what are the modes [of] criticism and assessment which are appropriate when we are considering the merits of the argument he presents?"<sup>10</sup> The position of the constitutional skeptic is that *no* constitutional argument can ever be meritorious enough, and therefore no assertion of constitutionality or unconstitutionality can ever be adequately justified. But this is very much the position of the philosophical skeptic for whom *no* argument, in any field save mathematics, can ever be meritorious enough and for whom no assertion, except the analytic, can ever be properly justified.

The source of the problem, at least in philosophy, is the view that the syllogism is the only truly satisfactory way to justify an assertion.<sup>11</sup> Toulmin rejects this view. Against those who would take deductive validity<sup>12</sup> as the only acceptable criterion of an argument's strength, Toulmin argues that validity is, in practice, an "intra-field" notion, not an "inter-field" notion.<sup>13</sup> We judge the strength of arguments within a field of discourse according to standards specific to that field.<sup>14</sup> On that basis, an argument might or might not measure up. The mistake, according to Toulmin, is to judge the strength of arguments in one field according to standards characteristic of, and appropriate to, some other field: "[I]t must be expected . . . that the merits to be demanded of an argument in one field will be found to be absent (in the nature of things) from entirely meritorious arguments in another."<sup>15</sup> To judge the validity, necessity, rigor, or impossibility of arguments or conclusions in one field according to the standards of another field risks "condemning

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<sup>10</sup> TOULMIN, *supra* note 2, at 12.

<sup>11</sup> See FOSS ET AL., *supra* note 6, at 80.

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An argument is deductively valid if, and only if, there is no *possible* way for its conclusion to be false while all of its premises are true . . . . Within logic, nothing is impossible unless it is literally *self-contradictory* (that is, unless it involves the simultaneous occurrence and non-occurrence of the same state of affairs).

BANGS L. TAPSCOTT, *ELEMENTARY APPLIED SYMBOLIC LOGIC 2-3* (2d ed. 1985) (emphases in original).

<sup>13</sup> TOULMIN, *supra* note 2, at 255 (noting that in judging an argument's validity, "logic and epistemology have now to move towards one another").

<sup>14</sup> See *id.*

<sup>15</sup> *Id.*

an ape for not being a man or a pig for not being a porcupine."<sup>16</sup>

Much in the spirit of Wittgenstein, who admonished us to "look and see,"<sup>17</sup> Toulmin allows that there may be similarities between arguments in different fields,<sup>18</sup> but he warns that we should not "insist on finding such resemblances at all costs, but [rather] . . . keep an eye open quite as much for possible differences"<sup>19</sup>:

Where differences of these kinds are found, we should normally respect them; we are at liberty to try and think up new and better ways of arguing in some field which specially interests us; but we should beware of concluding that there is any field in which all arguments equally must be invalid. The temptation to draw this conclusion should be taken as a danger-sign: it indicates almost certainly that irrelevant canons of judgment have entered into our analysis, and that arguments in the field concerned are being condemned for failing to achieve something which it is no business of theirs to achieve.<sup>20</sup>

We must be quite clear about what Toulmin is claiming. It is not just that the types of arguments we employ to justify our assertions vary from field to field. It is that the standards for evaluating the logical strength of arguments are themselves field-dependent. Moreover, it will not do to privilege certain fields of discourse by claiming that the standards in those fields are particularly stringent.<sup>21</sup> Toulmin suggests that the question of comparative stringency among fields may not even be intelligible. How far does it make sense, he asks, "to compare the mathematical rigour of Gauss or Weierstrass with the judicial rigour of Lord Chief Justice Goddard . . . ?"<sup>22</sup>

My aim in this article is to apply Toulmin's insights into the nature of logic to the problem of constitutional skepticism.

In Part I, I set forth what I call the "naive" view of the Constitution and of judicial review. On this view, the one held, I be-

<sup>16</sup> *Id.* at 256.

<sup>17</sup> LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 31e (G.E.M. Anscombe trans., Macmillan Co. 3d ed. 1958) (emphasis removed). The admonition is at § 66 of the standard edition.

<sup>18</sup> See TOULMIN, *supra* note 2, at 256.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 256-57.

<sup>21</sup> See *id.* at 15.

<sup>22</sup> *Id.*

lieve, by ordinary citizens ("We the People"), the legitimacy of judicial review depends on the Court's being able to produce arguments that show how its assertions of constitutionality and unconstitutionality can be justified with reference to the text of the Constitution. The naive view is interpretivist, and in such a view, logic and legitimacy are intimately intertwined.

Part II introduces the constitutional skeptic. In this part, I rehearse a number of the well-known arguments as to why naive interpretivism, however desirable it may be, is impossible. Then in Part III, following Stephen Burton,<sup>23</sup> I argue that skepticism arises from the same conception of legitimacy as that embraced by the legal formalists. Both set up the "sound legal syllogism" as the only appropriate model for legal reasoning. In Part IV, I bring Toulmin's theory of logic to bear, arguing that both skepticism and formalism misunderstand the nature of logic. It is only if one believes that a general logic is possible, and that the canons of logical stringency appropriate to geometry should be the canons in every other field of discourse, that one finds the significant logical free play in constitutional arguments that gives rise to skepticism. Once we recognize the irrelevance of analytic criteria to what Toulmin calls "substantial" arguments, the conceptual underpinnings of both formalism and skepticism disappear.

In Part V, I attempt to integrate Toulmin's views with a self-consciously logical treatment of judicial review, Philip Bobbitt's theory of constitutional "modalities." Though it suffers from certain shortcomings, Bobbitt's approach is a move in the right direction, toward what Toulmin called "comparative applied logic."

Finally, in Part VI, I suggest that a more self-consciously logical approach to constructing and evaluating constitutional arguments might contribute to the worthwhile program Professor Goldstein sets forth in his recent book: that of rendering Supreme Court decisions, and thereby our Constitution, intelligible to ordinary citizens.

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<sup>23</sup> See generally STEVEN J. BURTON, AN INTRODUCTION TO LAW AND LEGAL REASONING 165-215 (1985).

## I. THE NAIVE VIEW

*The work of the philosopher consists in assembling reminders for a particular purpose.*

Ludwig Wittgenstein<sup>24</sup>

*Our peculiar security is in the possession of a written Constitution.*

Thomas Jefferson<sup>25</sup>

For all the sound and fury that Alexander Bickel's "countermajoritarian difficulty" has created in the legal academy, it is somewhat remarkable how little troubled the people at large have been by the thought that "when the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now [and] exercises control, not in behalf of the prevailing majority, but against it."<sup>26</sup> While those on the losing end of a constitutional controversy, as in any legal dispute, may disagree with the outcome, sometimes vociferously, it is exceedingly rare that a Supreme Court case provokes a "legitimation crisis."<sup>27</sup>

The holdings of the Court are treated by the people as authoritative, not just in the sense that such holdings are final, but in a deeper sense. The Court's holdings exert "an ethical claim to obedience—a claim that an individual has a moral duty to obey [the Court's] interpretation . . . ."<sup>28</sup> As Fiss points out, this moral duty does not depend on the intellectual authority of a particular decision—on its correctness—but rather on a belief that the Court is part of a structure that is worth preserving.<sup>29</sup> How does the ordinary citizen understand that structure and why does she think it

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<sup>24</sup> WITTGENSTEIN, *supra* note 17, at 50e. The quotation is at § 127 of the standard edition.

<sup>25</sup> Letter from Thomas Jefferson to Wilson C. Nicholas (Sept. 7, 1803), in THOMAS JEFFERSON, *THE POLITICAL WRITINGS OF THOMAS JEFFERSON* 144, 144 (E. Dumbauld ed., 1955).

<sup>26</sup> BICKEL, *supra* note 4, at 16-17.

<sup>27</sup> For a discussion of this, see generally JURGEN HABERMAS, *LEGITIMATION CRISIS* (Thomas McCarty trans., Beacon Press 1975), but especially at 95-102.

<sup>28</sup> Owen M. Fiss, *Objectivity and Interpretation*, 34 *STAN. L. REV.* 739, 756 (1982).

<sup>29</sup> See *id.* ("[This] is the most important version of the claim of authoritativeness, because no society can heavily depend on force to secure compliance; it is also the most tenuous one.").



worth preserving?

The ordinary citizen believes in democracy. She believes that the people are sovereign, and that acts taken by the state are legitimate only to the extent they reflect the will of the majority. But there is an ambiguity lurking, a dualism,<sup>30</sup> a sense that there are majorities and then there are majorities. The will of the majority as expressed in normal legislation can be checked, *should* be checked, when it conflicts with the will of the majority as it is expressed in a privileged text, the Constitution. On the level of political phenomenology, I think it is safe to agree with Richard Fallon's characterization: "[O]ur constitutional practice presupposes that it is only on the basis of a text produced by past political acts of framing and ratification that a judge ever may invalidate the action of a contemporary political majority."<sup>31</sup>

But notice that such a practice itself presupposes a belief that there is such a thing as acting "on the basis of a text." The ordinary citizen is an interpretivist. According to John Ely, who coined the term, "interpretivism" is the view that legal acts of contemporary majorities, or their representatives, can only be overruled on the basis of "an inference whose starting point, whose underlying premise, is fairly discoverable in the Constitution."<sup>32</sup> Although he does not develop the concept of interpretivism in the explicitly logical terms I will argue for in this article, it is revealing that Ely refers to an "inference" from a "premise." Interpretivism requires that constitutional disputes be resolved only on the basis of "norms that are stated or clearly implicit in the written Constitution . . . ."<sup>33</sup>

Ely offers two reasons why interpretivism might be preferred over competing "non-interpretivist" theories of the Constitution which permit judges to roam beyond the four corners of the constitutional text.<sup>34</sup> One reason has to do with our ordinary conception of what law is.<sup>35</sup> If a judge is called upon to decide whether private behavior is consistent with a statute, our deepest intuitions tell us that the judge should look at the statute, taking the legal text as

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<sup>30</sup> See generally BRUCE ACKERMAN, *WE THE PEOPLE* (1991) (regarding the dualism in American democracy between majoritarianism and the protection of fundamental rights).

<sup>31</sup> Fallon, *supra* note 3, at 1256.

<sup>32</sup> JOHN HART ELY, *DEMOCRACY AND DISTRUST 2* (1980).

<sup>33</sup> *Id.*

<sup>34</sup> See *id.*

<sup>35</sup> See *id.* at 3.

a premise in some chain of reasoning whose conclusion is that the action is or is not permitted.<sup>36</sup> If called upon to decide whether a legislative enactment is consistent with the Constitution, it is natural to think that the Court should look at the constitutional text. The inference from the premise to the conclusion need not be immediate; indeed, an "immediate" inference is not much of an inference at all, and it is not clear why immediate inferences would ever be litigated. But the naive view, the interpretivist view, is that a conclusion that behavior is or is not legal, or that a legislative enactment is or is not constitutional, should at least be implicit in the textual premise.<sup>37</sup>

A number of writers have reminded us of what we already know. Frederick Schauer, for example, writes that "[a]n interpretation is legitimate . . . only insofar as it purports to interpret some language of the document,"<sup>38</sup> and Owen Fiss reminds us that "judges . . . must say what the Constitution requires[, that t]he issue is not [,e.g.] whether school desegregation is good or bad, desirable or undesirable, to the judge, the parties, or the public, but whether it is mandated by the Constitution."<sup>39</sup> The depth of this intuition about the way the legal language game is played is underlined by Ely's suggestion (reminiscent of Wittgenstein) that a judge who announced that he was not satisfied with the inferences that could be fairly made from the textual premises, and would therefore "enforce, in the name of the statute in question, those fundamental values he believed America had always stood for," might be committed as a lunatic.<sup>40</sup> Robert Bennett suggests that the felt impropriety of judges deciding cases on the basis of their personal value judgments touches the core of "[o]ur conception of law and the duty owed to it . . . ."<sup>41</sup>

Philip Bobbitt, whose work on the typology of constitutional argument we will look at in Part VI, makes the same point. Bobbitt recommends that anyone who believes that ordinary citizens care only about the *content* of judicial decisions, and not about the *bases* on which they are reached, reflect on the likely reaction if it were discovered that a judge reached her conclusions

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<sup>36</sup> See *id.*

<sup>37</sup> See *id.* at 2.

<sup>38</sup> Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 431 (1985).

<sup>39</sup> Fiss, *supra* note 28, at 742.

<sup>40</sup> ELY, *supra* note 32, at 449.

<sup>41</sup> Bennett, *supra* note 9, at 449.

by consulting an astrologer or was paid by one of the parties.<sup>42</sup> Bobbitt points out that our legal practice also seems to rule out arguments based on kinship, religion, the reading of entrails, and blind chance.<sup>43</sup> Bennett sounds a similar note, adding to the list of illegitimate premises for legal argument the physical characteristics of the parties, or their personalities, or the personalities of their lawyers.<sup>44</sup> It is simply a fact, Bobbitt urges, that certain kinds of arguments *are* a part of our "legal grammar," while others are *not*, that we play the legal language game the way we do and not some other way.<sup>45</sup> A legal culture that was *not* interpretivist would be quite alien to us, and I take such legal otherness to be the point of Ely's reference to lunacy.

Indeed, Ely suggests, not once but twice, that someone who fundamentally misunderstands the nature of the legal language game is well beyond our pale. "[N]o sane person could be anything else" but an interpretivist, at least in the naive sense of believing that "if your job is to enforce the Constitution then the Constitution is what you should be enforcing, not whatever may happen to strike you as a good idea at the time."<sup>46</sup> However, anticipating the siren song of the skeptic, Ely suggests that this version of interpretivism is a mere truism, a tautology.<sup>47</sup> The problem is that "interpretivism involves a further claim, that 'enforcing the Constitution' necessarily means proceeding from premises that are explicit or clearly implicit in the document itself."<sup>48</sup> What if, whispers the skeptic, there are few—or no—such premises?

The second attraction of interpretivism, according to Ely, has to do with our intuitive understanding not of law itself, but of democracy. The short answer to Bickel is this: There would indeed be a countermajoritarian difficulty if it were the politically unaccountable judges who invalidated the legislative acts of democratic majorities. But so long as the judges abide by the tenets of interpretivism, and act on the basis of the constitutional text, it is actually the Constitution that does the invalidating. And because the Constitution, including its amendments, was submitted to and ratified by the peo-

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<sup>42</sup> See PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 130 (1991).

<sup>43</sup> See *id.* at 27.

<sup>44</sup> See Bennett, *supra* note 9, at 476.

<sup>45</sup> BOBBITT, *supra* note 42, at 24 (asserting that modalities help show us *how*, without worrying about *why*, we reason this way).

<sup>46</sup> ELY, *supra* note 32, at 12.

<sup>47</sup> See *id.*

<sup>48</sup> *Id.*

ple, "the people are ultimately checking themselves."<sup>49</sup> Ely points out that this "argument from democracy" can be traced backed to the Federalist Papers<sup>50</sup> and Marshall's opinion in *Marbury v. Madison*.<sup>51</sup> It was on this basis that Jefferson, too, was a naive interpretivist. How else are we to understand his statement that "[o]ur peculiar security is in the possession of a written Constitution"?<sup>52</sup> The only way in which the constitutional text can provide security against the abuses of government is if the text can function as the premise(s) in inferences the conclusions of which take the general form "Congress/The executive/The judiciary may/may not do X." John Adams, as well, must have had the possibility of such reasoning from constitutional premises in mind when he wrote that "frequent recurrence to the fundamental principles of the constitution . . . [is] absolutely necessary to preserve the advantages of liberty and to maintain a free government," and that "[t]he people have a right to require of their law givers and magistrates an exact

<sup>49</sup> *Id.* at 8.

<sup>50</sup> Alexander Hamilton wrote:

There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this, would be to affirm, that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid.

. . . [T]he Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental.

THE FEDERALIST NO. 78 (Alexander Hamilton), at 101-02 (Robert B. Luce, Inc. ed., 1976).

<sup>51</sup> 5 U.S. 137 (1803). Marshall observed:

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature repugnant to the constitution, is void.

This theory is essentially attached to a written constitution, and is consequently to be considered, by this court, as one of the fundamental principles of our society.

*Id.* at 177.

<sup>52</sup> JEFFERSON, *supra* note 25, at 144.

and constant observance of them."<sup>53</sup>

Bobbitt has offered a somewhat revisionist account of the New Deal constitutional crisis which, if plausible, lends support to the claim that the People are, deep in their hearts, interpretivists. The usual account is that the crisis was precipitated when ordinary Americans reacted against "a judicial tourniquet on effective progressive legislation . . . ."<sup>54</sup> Bobbitt urges instead that "the critical pathology must be understood as developing in the disillusion that came with the realization that law was made by the Court."<sup>55</sup> In this light, Bobbitt suggests, it was Hugo Black's naive interpretivism, and not any political sympathy Black may have had for Roosevelt's New Deal political agenda, that made him an appropriate appointment to the Court:

[According to Hugo Black, a judge] is not, as the realists charged, enforcing his own views; indeed he may sometimes be in the exquisite position of affirming legislation hostile to his own views. Moreover, he is doing so on a basis readily apprehendable by the people at large, namely, giving the common-language meanings to constitutional provisions. This allowed Black to restore to judicial review the popular perception of legitimacy which the New Deal crisis had jeopardized.<sup>56</sup>

We are on the verge of a paradox. The People seem to be interpretivists. Only interpretivism seems to do justice to our concept of law and to our belief in democracy. Indeed, only interpretivism can render intelligible an otherwise bizarre practice in which constitutional litigants, and the judges who hear their controversies, point time after time after time to the text of the Constitution. But what if, despite all this, interpretivism is not *possible*? Steven Burton has written very lucidly on the apparent relationship between the possibility of interpretivism and democratic legitimacy.<sup>57</sup> Legitimacy inheres in the acts of a democratically chosen legislature because its members are, *ex hypothesi*, elected

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<sup>53</sup> John Adams, *quoted in* PHILIP BOBBITT, CONSTITUTIONAL FATE 9-10 (1980) (footnote omitted).

<sup>54</sup> *Id.* at 28.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 31.

<sup>57</sup> See BURTON, *supra* note 23, at 176-77 (asserting that judicial decisions include a certain "degree of creativity" and that checks on judicial power do exist, though more tangentially than those on other branches of government).

by, and directly responsible to, the People, who, in a democracy, are sovereign. An unelected judiciary can partake vicariously of democratic legitimacy only to the extent the judges do not themselves make the law, but only "apply the law created by the democratic institutions . . . ."<sup>58</sup> But this solution seems to require that judges be able to "derive"—in a strong sense—their decisions from the law enacted by the legislatures.<sup>59</sup> Anything short of a "derivation" introduces a logical gap between the democratically established premises and the judicially arrived at conclusion, thereby compromising legitimacy. What the constitutional skeptic does, in a nutshell, is assert that no such strong-form derivation from textual premises to judicial conclusions is possible. Interpretivism is a fiction and legitimacy is a myth. All is politics.

## II. ENTER THE SKEPTIC

*[T]here is no such thing as deduction from a text.*

Richard Posner<sup>60</sup>

In the previous section, I advanced two claims, neither of which I consider to be terribly controversial. The first is that the ordinary citizen is an interpretivist at heart. The second is that only interpretivism seems to make sense of our constitutional practice, of the very notion of a written constitution.

But at the end of the section I raised a troubling question. What if, for all of its intuitive appeal, interpretivism turns out to be a myth? What if, as a matter of fact, judges in constitutional cases *do not* reach their decisions on the basis of the constitutional text? What if, moreover, as a matter of logic, they *cannot* reach their decisions on the basis of the text?

If we take seriously the phenomenology of reaching legal conclusions, we must admit that judges and others frequently seem to reach their conclusions in a flash, seemingly on the basis of a "hunch" or an intuition of some sort, and then construct their opinions as *post hoc* rationalizations. But if the decision was made before the text was explicitly brought into play, surely the decision cannot be said to have been on the basis of the text.

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<sup>58</sup> *Id.* at 176.

<sup>59</sup> *See id.*

<sup>60</sup> Richard Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 187 (1986).

The phenomenon of grasping a result in a "flash" and justifying it afterwards is common enough, not just in law, but in logic and mathematics as well. Indeed, Toulmin is explicit that we primarily use argumentation retrospectively, to justify conclusions after we have reached them.<sup>61</sup> A standard text on symbolic logic distinguishes between *ex ante* derivation and *ex post* proof: "[C]onstructing a derivation consists in starting out with certain given formulae (premisses) and deriving other formulae from them by using the provided rules of inference."<sup>62</sup> The text goes on to say that "[p]eople occasionally construct derivations simply for the purpose of exploration, to see what can be inferred from a given set of statements."<sup>63</sup> This is a somewhat otiose enterprise, however, because of its open-endedness: "A derivation is never *completed* in the sense of running out of possibilities for more derived lines . . . ."<sup>64</sup>

A more common practice, therefore, is to construct *proofs*, that is, to show that a particular conclusion which one already has in mind can be derived from given premises.<sup>65</sup> It is this way of proceeding that the chemist and philosopher of science Michael Polanyi was describing when he wrote that "the intuitive powers of the investigator are always dominant and decisive";<sup>66</sup> that the mathematician Gauss described when he said, "I have had my solutions for a long time but I do not yet know how I am to arrive at them";<sup>67</sup> and that the mathematician G. Polya, described when he wrote, "When you have satisfied yourself that the theorem is true, you start proving it."<sup>68</sup>

It ought therefore to be no particular impetus toward skepticism to discover that judges argue retrospectively, in order to show how the conclusions they have reached follow from appropriate legal premises.<sup>69</sup>

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<sup>61.</sup> See TOULMIN, *supra* note 2, at 17.

<sup>62.</sup> TAPSCOTT, *supra* note 12, at 98 (emphasis removed).

<sup>63.</sup> *Id.* at 102.

<sup>64.</sup> *Id.* at 99.

<sup>65.</sup> *Id.* at 102 ("Constructing a proof requires a more systematic approach than simply constructing an exploratory derivation, because we are attempting to derive a *particular* formula—the conclusion to the argument being proven.").

<sup>66.</sup> MICHAEL POLANYI, *PERSONAL KNOWLEDGE* 130 (1958).

<sup>67.</sup> *Id.* at 131.

<sup>68.</sup> *Id.* at 131 n.1.

<sup>69.</sup> One might object that there is an important difference between a mathematician who reaches a result based on some intuition, and constructs the proof afterwards, and a judge, who does not reach his conclusion as the result of a legal intuition, but rather, on the basis of his political predilections, and then writes an opinion to justify the result.

But there is a second incitement to skepticism, the problem of indeterminacy, and it is far more difficult to deal with. Bobbitt puts the problem this way: “[I]t does not take long to look around and see that authoritative statements about what the Constitution ‘directs’ are the subject of great disagreement.”<sup>70</sup> The point, according to the skeptic, is that the existence of such disagreement shows that the constitutional text does *not* “direct” us, it does not “mandate” results. It seems possible to construct inferences, which take the constitutional text, or some subset of it, as premises, and reach contradictory outcomes: L is constitutional/L is not constitutional. A text, the argument continues, which permits not just multiple inferences, but contradictory inferences, cannot be said to constrain judicial decision.

The problem of indeterminacy can be cast as a problem in logic: Given a conclusion such as “L is constitutional,” is it possible to construct in its support a suitably constraining argument from the constitutional text? The fact that in “hard” cases we can construct plausible arguments in support of contradictory conclusions would seem to show that no *deductively valid* argument can be constructed in support of either conclusion. And if only a deductively valid argument suffices to constrain judicial discretion, then judicial discretion cannot be constrained.

Burton perceptively points out that legal formalism lurks in the background of such a skeptical argument even though the legal skeptic claims to reject formalism root and branch:

Legal formalism . . . serves as an implicit standard of criticism in the legal skeptic’s argument. Once its role in skepticism is made explicit, it can be seen that formalism and skepticism are two sides of the same coin. Both operate within the same formalist world, employing the same concept of what it means for judges to decide cases in accordance with the law. A skeptic differs from a formalist only because a formalist would believe that formalism is possible while a skeptic believes that formalism is not possible.<sup>71</sup>

My goal in the next section is to unpack Burton’s claim that for-

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Perhaps, but the operative question is whether the “proof” is “valid.” Can the judge produce, for our examination, an inference that “derives” his result, whether he prefers it or not, from the constitutional text?

<sup>70</sup> BOBBITT, *supra* note 42, at 33.

<sup>71</sup> BURTON, *supra* note 23, at 190-91.



malism and skepticism are both products of the same erroneous picture, and to link this insight to the Cartesian enterprise and Toulmin's critique of it.

### III. MORE GEOMETRICO

*Those long chains of perfectly simple and easy reasonings by means of which geometers are accustomed to carry out their most difficult demonstrations have led me to fancy that everything that can fall under human knowledge forms a similar sequence; and that as long as we avoid accepting as true that which is not so, and always preserve the right order for deduction of one thing from another, there can be nothing too remote to be reached in the end, or too well hidden to be discovered.*

Rene Descartes<sup>72</sup>

Owen Fiss has eloquently described the conceptual confusion we are grappling with, though he refers to radical doubt about the legitimacy of adjudication as "nihilism" rather than skepticism.<sup>73</sup> Fiss, like essentially all other commentators today, phrases the problem not in the language of logic, but in the language of *interpretation* or *hermeneutics*. The nihilist, says Fiss, turns the law's aspiration toward objectivity (legitimacy) against it by observing that the constitutional text is capable of numerous possible meanings, all of which are "plausible."<sup>74</sup> This fact, it would seem, makes it impossible to speak of any one interpretation as the "true" interpretation, the one the constitutional "mandates." Confronted with a number of possible "meanings," all a judge can do is select the interpretation most congenial to her personal values.<sup>75</sup> "In this regard," says Fiss, "the new nihilism is reminiscent of the legal realism of the early 20th century."<sup>76</sup>

Indeed, the grip of realism is strong. One suspects that it was the realists' doubts about the role of logic in the law that account for scholars' universal tendency to speak in terms of *interpretation* of a legal text rather than *logical deduction from* a legal text. Rich-

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<sup>72</sup> RENE DESCARTES, DISCOURSE ON METHOD, Discourse 2.

<sup>73</sup> Fiss, *supra* note 28, at 740.

<sup>74</sup> *Id.* at 741-42.

<sup>75</sup> *Id.* at 741.

<sup>76</sup> *Id.*

ard Posner is quite emphatic: "[Interpretation is] a mental activity distinct from . . . logical reasoning";<sup>77</sup> "[T]here is no such thing as deduction from a text."<sup>78</sup> As Toulmin suggests, such claims would certainly surprise Sherlock Holmes who was always *deducing* things from texts (as well as from bits of mud, etc.).<sup>79</sup> Of course, Posner is not using "deduction" in its (everyday) Sherlockian sense; he is using it in the Cartesian sense, just as did the legal formalists (and their critics). Posner defines formalism as the "use of deductive logic to derive the outcome of a case from premises accepted as authoritative."<sup>80</sup> It is this sort of deductive logic that "enables a commentator to pronounce the outcome of the case as being correct or incorrect, in approximately the same way that the solution to a mathematical problem can be pronounced correct or incorrect."<sup>81</sup>

Posner's view of formalism is consistent with Thomas Grey's.<sup>82</sup> According to Grey, "[t]he core notion of classical [formalist] legal science can be grasped through the analogy to geometry, as that subject was understood in the late nineteenth century"<sup>83</sup> (i.e., as it had been elaborated in J.S. Mill's *System of Logic*).<sup>84</sup> The geometricization of law had been foretold by Locke, who wrote of "replacing the rhetorician and the common lawyer with the moral geometer,"<sup>85</sup> and by John Austin who "urged his followers to 'imitate the methods so successfully pursued by geometers.'"<sup>86</sup> The similarity to Euclid is obvious. The essence of legal formalism is the derivation of legal conclusions (theorems) from authoritative premises ("axioms" for Euclid, "concepts" for the formalists) by means of what Grey variously characterizes as "rationally uncontroversial reasoning,"<sup>87</sup> "demonstrative (rationally

<sup>77</sup> Posner, *supra* note 60, at 180.

<sup>78</sup> *Id.* at 187.

<sup>79</sup> See TOULMIN, *supra* note 2, at 121.

<sup>80</sup> Posner, *supra* note 60, at 181.

<sup>81</sup> *Id.*

<sup>82</sup> Thomas Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983) (discussing the rise and fall of classical orthodoxy and its view of law as a science).

<sup>83</sup> *Id.* at 16.

<sup>84</sup> *Id.* at 18.

<sup>85</sup> *Id.* at 17 (footnote omitted).

<sup>86</sup> *Id.* (footnote omitted). Grey quotes John Rawls as evidence that the geometric ideal is not dead: "We should strive for a kind of moral geometry with all the rigor which this name connotes. Unhappily the reasoning I shall give will fall short of this. . . . Yet it is essential to have in mind the idea one would like to achieve." *Id.* (footnote omitted).

<sup>87</sup> *Id.* at 9.

compelling) reasoning,"<sup>88</sup> and "sequences of indubitable deductive steps."<sup>89</sup>

The quest of the formalists to cast law in the deductive mold of geometry may be attributed in part to their scientific pretensions. Langdell apparently believed that legal scholar-scientists like himself could discover a few fundamental legal concepts from which correct legal judgments could be derived.<sup>90</sup> But, significantly for our enterprise here, the classical theorists also believed that unless the derivations were formal, "judges would have arbitrary power."<sup>91</sup> A contemporary scholar has put it this way: "Uncertainty in legal reasoning implies that there is logical room for judges and other government officials to abuse their power while offering mere rationalizations for their actions."<sup>92</sup>

We can express this notion in the language of legitimacy. The naive interpretivist holds that the Court's decision in a constitutional case is legitimate only if it is arrived at on the basis of the constitutional text, and the formalist conception of interpretation gives real bite to the locution "on the basis of." Legitimacy requires that "the decision in each case be the single decision that is logically required by authoritative rules and principles . . .";<sup>93</sup> in a constitutional case, those authoritative rules and principles are the Constitution itself. Anything short of deductive validity in the passage from the textual premise to the legal conclusion "is thought to leave logical room for judicial choice, into which the personal value preferences of the judges can intrude."<sup>94</sup> In slightly more dramatic language, "[t]he logical derivation must be tight enough to leave no room in judicial decisions for arbitrary or oppressive use of the coercive powers of the state by the individual persons who hold the reins of official power."<sup>95</sup> The paradigm case of such an adequately "tight" logical derivation is the "sound legal syllogism,"<sup>96</sup> so it is to the syllogism that we now turn our attention.

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<sup>88</sup> *Id.* at 8.

<sup>89</sup> *Id.* at 17.

<sup>90</sup> *See id.* at 5.

<sup>91</sup> *Id.* at 13.

<sup>92</sup> BURTON, *supra* note 23, at 167.

<sup>93</sup> *Id.* at 184.

<sup>94</sup> *Id.* at 185.

<sup>95</sup> *Id.* at 173.

<sup>96</sup> *Id.* at 169.

### A. *The Sound Legal Syllogism*

A syllogism is simply an argument that has two premises and a conclusion.<sup>97</sup> A representative syllogism in law might be:

(A) In any case, if goods sold by one person to another have defects unfitting them for their only proper use but not apparent on ordinary examination, then the goods sold are not of merchantable quality.

(B) In the instant case, goods sold by one person to another had defects unfitting them for their proper use but not apparent on ordinary examination.

Therefore,

(C) In the instant case, the goods sold are not of merchantable quality.<sup>98</sup>

Some basic terminology will prove useful.<sup>99</sup> The term “of merchantable quality” that appears in the predicate of the conclusion is called the *major term* of the syllogism, while the term “the goods sold” that occurs in the subject of the conclusion is called the *minor term*. The premise which contains the major term is called the *major premise*, while the premise which contains the minor term is called the *minor premise*.

The structure of the syllogism can be made more perspicuous by considering this example:

MAJ All men are mortal.

MIN Aristotle is a man.

CON Aristotle is mortal.

The major premise consigns one set of “things,” *men*, to another set, the set of *mortal beings*. The minor premise asserts that some particular “thing,” *Aristotle*, is a member of the first set. From the assertion that *Aristotle* is a member of the set, *men*, which in turn

<sup>97</sup> For a brief, but thorough, theoretical introduction to the syllogism, including its relationship to modern quantifier logic, see TAPSCOTT, *supra* note 12, at 401-16. For a more practical treatment, see DAVID KELLEY, *THE ART OF REASONING* 193-235 (1990).

<sup>98</sup> The example is from NEIL MACCORMICK, *LEGAL REASONING AND LEGAL THEORY* 25 (1978).

<sup>99</sup> See KELLEY, *supra* note 97, at 194 (describing these terms in greater detail).

is a member of the set *mortal beings*, the conclusion is drawn that *Aristotle*, too, is a member of the set of *mortal beings*.

Consider the legal syllogism appended to footnote 98 of this article. The major premise (A) says that "goods sold by one person to another, having defects unfitting them for their only proper use but not apparent on ordinary examination" belong to the category "goods of merchantable quality." The minor premise, (B), says that "the particular goods at issue in this litigation" are "goods sold by one person to another, having defects unfitting them for their proper use but not apparent on ordinary examination." From (A) and (B), the conclusion is drawn that "the particular goods at issue in this litigation" are "goods not of merchantable quality."

Two important characteristics of a syllogism are *deductive validity* (often called simply "validity") and *soundness*. A syllogism, or any other argument for that matter, is deductively valid "if and only if, there is no *possible* way for its conclusion be false while all of its premises are true."<sup>100</sup> Furthermore, "[w]ithin logic, nothing is impossible unless it is literally *self-contradictory* . . . ."<sup>101</sup> On this basis, our sample legal syllogism is *valid*. Suppose the major premise (A) is true, that it is indeed the case that goods having the specified defects are not of merchantable quality. Suppose, as well, that the minor premise is true, that the goods in the instant case did in fact have the specified defects. Given the truth of the premises, is it possible for the conclusion to be false, that is, might the goods in question turn out to be of merchantable quality after all? No, if the premises are true, the conclusion *must* be true, and therefore the argument is valid.

This characteristic of deductive validity can be expressed in various other ways, which make clearer the perceived connection between validity and legitimacy. Sometimes it is said of a valid syllogism that if its premises are true, the conclusion *must* be true, or that the truth of the conclusion follows *necessarily* from the truth of the premises, or that the premises *entail* the conclusion. Such logical necessity prevents the biases or preferences of the reasoner from carrying any weight in the passage from premises to conclusion; it "exclude[s] all personal value preferences from the judicial decision."<sup>102</sup> If the major premise is true and the minor

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<sup>100</sup> TAPSCOTT, *supra* note 12, at 2.

<sup>101</sup> *Id.* at 3.

<sup>102</sup> BURTON, *supra* note 23, at 169.

premise is true, then no matter how much the judge wants to find that the goods in question are of merchantable quality, she may not.

The deductive validity of a legal syllogism "forces" the reasoner to embrace the conclusion if she accepts the premises, but it does not establish the truth of the conclusion. Only a *sound* syllogism can do that, one which is deductively valid and whose premises are true. A moment's reflection reveals that much effort in law is devoted to establishing the truth of premises from which conclusions are to be drawn.

For example, suppose that a litigant wants to persuade the court of the proposition that the goods she bought were not of merchantable quality. We have already set out, above, a valid syllogism which has that proposition as its conclusion. So if we can persuade the court of the truth of both the major and the minor premise, then the court must, as a matter of logic, conclude that the goods are not of merchantable quality. But how do we set about showing the truth of an argument's premises? *By further arguments*, of course.

The major premise in a legal argument is a legal concept or a legal definition<sup>103</sup> or a legal rule. It does not seem to matter whether we say that the major premise in our example gives the *definition* of "goods not of merchantable quality" or sets forth the *concept* of "goods not of merchantable quality" or expresses a *rule* of law that "goods are not of merchantable quality if . . . ." The question is how we establish the truth of the major premise, how we justify it. Since our ultimate interest in this article is to say something useful about reasoning from the constitutional text, let us suppose there is some text (the Uniform Commercial Code) which states premise A *verbatim*. In that case we can justify our assertion of the major premise by merely pointing to the text. A person who does not understand the role that statutes play in our legal reasoning might be helped by a further syllogism: "If a statute contains a proposition P, then for purposes of legal reasoning we are justified in asserting P; statute XYZ contains the proposition P ('is not of merchantable quality'); therefore, proposition P (our premise A in the main argument) is true."

While the major premise in a legal syllogism is a concept, definition, or rule, the minor premise is a factual statement.<sup>104</sup> In

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<sup>103</sup> See Posner, *supra* note 60, at 182.

<sup>104</sup> See *id.*

our example, it is actually a compound factual statement, so its truth depends on the truth of its constituent claims that in the instant case: (1) the goods were sold by one person to another; (2) the goods were defective; (3) the defects made the goods unfit for their only proper use; and (4) the defects were not apparent on ordinary examination. To establish the truth of, or to justify, the minor premise, therefore, we must establish four "facts." Can we accomplish this in a way that "exclude[s] all personal value preferences from the judicial decision"?<sup>105</sup>

Consider just one of the claims: "The defects were not apparent on ordinary examination." Anyone familiar with product liability litigation will realize that for a given set of "brute" facts, some courts might find that a defect ought to have been apparent on ordinary examination, while other courts would find that the defect was not apparent on ordinary examination. What is crucial to our investigation is that neither court has necessarily committed any logical gaffe. That is because the claim, "The defects were not apparent on ordinary examination," is *not entailed by* (does not follow necessarily from, etc.) the premises.<sup>106</sup> In other words, a judge/litigant who grants the truth of the brute facts yet says, "Nonetheless, the defects were *not* apparent on ordinary examination," does not contradict herself. And neither does the judge/litigant contradict herself when she says, "I grant the truth of the same brute facts as my colleague, but I conclude that the defects *were* apparent on ordinary inspection."

Contrast this result with our paradigm case:

MAJ All men are mortal.

MIN Aristotle is a man.

CON Aristotle is mortal.

Here, the facts, if they are true, *entail* the conclusion. Anyone who accepts the facts and denies the conclusion does commit a logical gaffe: she contradicts herself.

The point is that it is a relatively trivial matter to express legal

<sup>105</sup> BURTON, *supra* note 23, at 169.

<sup>106</sup> In this case it might be more natural to say "data" or "facts" instead of "premises," but the logical role of the facts is that of premises, namely, to lend support to a conclusion.

arguments (or any other argument) as valid syllogisms.<sup>107</sup> The problem is to construct sound syllogisms, syllogisms whose premises are true and, moreover, are true in the sense of themselves being entailments from more basic data. What are required are "sound legal syllogisms to support each judicial decision in every respect,"<sup>108</sup> because only such syllogisms seem to suffice to "exclude all personal value preferences from the judicial decision."<sup>109</sup>

For example, the absence of an entailment from the brute facts to the (intermediate) conclusion, "The defects were not apparent on ordinary examination," means that the judge is not adequately constrained by logic to reach that conclusion and could reach the opposite conclusion. Moreover, a judge might very well have a personal value preference for, and therefore want to reach, the opposite conclusion. Suppose that she believes that frivolous tort actions unjustifiably harm business and that consumers are generally the cheapest cost avoiders and should be more alert for "obvious" defects before using a product. Such a judge can present as cogent an argument in support of her preferred outcome as her dissenting colleague could present in support of his. What can it mean, under such circumstances, to say that the decision has been reached according to law, that is, legitimately?

What the discussion so far seems to show is that to construct a sound legal syllogism, we must justify our premises, which in turn requires more sound syllogisms. A legal argument, therefore, is almost always a chain of syllogisms, and the failure of entailment at any point in the chain deprives the argument of the only kind of logical necessity that would seem to rule out judicial discretion and thereby legitimate the result.

There are various *general* ways in which entailment can fail. One type of failure, involving the minor premise of a legal argument, implicates what has been called the "problem of importance."<sup>110</sup> As we have seen, the work that the major premise does in a syllogism is to consign particulars to some category based on a property of those particulars, e.g., to consign state action which prevents persons from acquiring property solely on the basis of their race to the category of state action which violates the Constitution. The minor premise is generally a "factual statement"<sup>111</sup>

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<sup>107.</sup> See TOULMIN, *supra* note 2, at 118.

<sup>108.</sup> BURTON, *supra* note 23, at 169.

<sup>109.</sup> *Id.*

<sup>110.</sup> *Id.* at 31-39.

<sup>111.</sup> Posner, *supra* note 60, at 182.



that asserts that some specific particular possesses the property in question, e.g., that state court enforcement of restrictive covenants belongs to the category of state action which prevents people from acquiring property on the basis of their race. The problem of importance reminds us that "the facts in a case do not come prepackaged in the language of the rule [(the major premise)]."<sup>112</sup> For example, the brute fact that a state court issued an order can be characterized (packaged) in various ways. Which of the various facts comprising a situation are used as the middle term<sup>113</sup> of the syllogism depends on how we judge the relative importance of the various available facts in light of the rules (the major premise). While we can give arguments in support of each of the various ways of formulating the minor premise, thereby justifying alternative judgments of importance, we cannot necessarily do so by means of entailments. Moreover, the inability to ground the minor premise in an entailment means there is a weak link in the chain; we are therefore unable to cast the overall argument in the form of an entailment. The problem of importance has the effect, therefore, of robbing the legal syllogism of its logical necessity, and is one way in which we can fail to produce the sort of "sound legal syllogism" that would "exclude the personal value preferences of people from the judicial decision . . . ."<sup>114</sup>

A second general problem in producing sound legal syllogisms, and perhaps the one chiefly responsible for the realist assault on legal formalism, is the "fallacy . . . of smuggling the conclusion into the premise."<sup>115</sup> Posner has proposed calling this fallacy "Langdellism," thereby "purg[ing] 'formalism' of its pejorative connotations by using it simply to mean decision by deductive logic."<sup>116</sup> When it affects the minor premise, Langdellism is related to the problem of importance. The way the conclusion is smuggled into the premise is by focusing on a certain aspect of a situation and by characterizing (packaging) it accordingly in the minor premise. Posner's example illustrates how this is done:

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<sup>112</sup> BURTON, *supra* note 23, at 50.

<sup>113</sup> The middle term of a syllogism is the term which does not appear in the conclusion but appears once in the major premise and once in the minor premise. See KELLEY, *supra* note 97, at 194.

<sup>114</sup> BURTON, *supra* note 23, at 183.

<sup>115</sup> Posner, *supra* note 60, at 184.

<sup>116</sup> *Id.*

MAJ Racial discrimination is illegal.

MIN Affirmative action discriminates against whites.

CON Affirmative action is illegal.<sup>117</sup>

The third general problem we can encounter in trying to construct sound legal syllogisms is particularly important when we engage in legal reasoning about texts. This problem has not been given a name in the literature,<sup>118</sup> so I will christen it the "problem of interpretation." It involves "adopting [the] correct major premise,"<sup>119</sup> or more specifically, adopting "the correct authoritative rule in a complex [legal text]."<sup>120</sup> The reason this is difficult, of course, is that legal texts, and particularly the Constitution, are notorious for containing vague and ambiguous rules.

Consider a real example, the controversy adjudicated in *Shelley v. Kraemer*.<sup>121</sup> The case involved a suit by a landowner in state court to enforce restrictive covenants against ownership or occupancy by African-Americans.<sup>122</sup> The Supreme Court's holding, the conclusion of its legal argument, was that "in granting judicial enforcement of the restrictive agreements in [this case], the States have denied petitioners the equal protection of the laws and that, therefore, the action of the state courts cannot stand."<sup>123</sup> Had Chief Justice Vinson been called upon to justify his conclusion in the form of a valid legal syllogism it would have been relatively easy to do so. One possibility is this:

MAJ State action which prevents persons from acquiring property solely on the basis of their race violates the Constitution, and cannot stand.

MIN Judicial enforcement of the restrictive covenants in this case was state action which pre-

<sup>117</sup> *Id.*

<sup>118</sup> This is perhaps because few people these days find it worthwhile to write about law in logical terms.

<sup>119</sup> BURTON, *supra* note 23, at 43.

<sup>120</sup> *Id.* at 57.

<sup>121</sup> 334 U.S. 1 (1948).

<sup>122</sup> *See id.*

<sup>123</sup> *Id.* at 20.

vented persons from acquiring property solely on the basis of their race.

CON Judicial enforcement of the restrictive covenants in this case violates the Constitution, and cannot stand.

This syllogism is valid; if the major and minor premises are true, the conclusion must be true. But is the syllogism sound, that is, are the premises true?

Chief Justice Vinson's opinion is devoted to constructing additional arguments to justify the premises of his main argument, but the problem of interpretation prevents him from demonstrating the major premise of his main argument by means of its own sound legal syllogism. It is not possible to construct an argument which takes the text of the Constitution as premises<sup>124</sup> and which *by entailment* justifies the claim that "state action which prevents people from acquiring property solely on the basis of their race violates the Constitution." For even if we take the text of the Constitution itself as "true" (which here simply means that each clause in the Constitution is taken as authoritative), we could conclude that "state action which prevents people from acquiring property on the basis of their race does *not* violate the Constitution" and not be guilty of a literal self-contradiction.

It might make things clearer if we contrast the conclusion in *Shelley v. Kraemer* with the conclusion in some hypothetical case: John Doe's election as President of the United States violates the Constitution and cannot stand. Here is an argument in support of that conclusion:

MAJ The election as President of any person who has not attained 35 years of age violates the Constitution.

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<sup>124</sup> The portion of the Constitutional text implicated in *Shelley* is the following:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

MIN Doe has been elected President, but he is only 29 years old.

CON Doe's election violates the Constitution and cannot stand.

Here, there is no problem of interpretation. The major premise does follow by entailment from the text of the Constitution. One literally contradicts herself if she accepts the text of the Constitution as premise, but then rejects the proposition that "the election as President of a person who has not attained 35 years of age violates the Constitution."

It is the problem of interpretation that led Richard Posner to write that "there is no such thing as deduction from a text," and that "[n]o matter how clear the text seems, it must be interpreted (or decoded) like any other communication, and interpretation is neither logical deduction nor policy analysis."<sup>125</sup> Posner's view is that interpretation of a text is a mental activity<sup>126</sup> that is *prior to* deduction.<sup>127</sup>

Let me suggest that what Posner really means is that there is no such thing as *entailment* from a text, for only entailment could enable "a commentator to pronounce the outcome of a case as being correct or incorrect, in approximately the same way that the solution to a mathematical problem can be pronounced correct or incorrect."<sup>128</sup> The following also shows clearly that when Posner says "deduction" he actually means entailment:

A conclusion obtained by deduction is already contained in the premises in the sense that the only materials used to obtain the conclusion are the premises themselves and the rules of logic. But meaning cannot be extracted from a text merely by taking the language of the text and applying the rules of logic to it.<sup>129</sup>

Posner is right: There is no such thing as Posnerian deduction/entailment from a text. But what if, as Toulmin argues, entailment turns out to be such a special case that its implications for practical reasoning are nil? What if, instead of the Posnerian view of logical deduction as logical entailment, we focus on the (Sher-

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<sup>125.</sup> Posner, *supra* note 60, at 187.

<sup>126.</sup> *See id.* at 180.

<sup>127.</sup> *See id.* at 188.

<sup>128.</sup> *Id.*

<sup>129.</sup> *Id.* at 187.

lock) Holmesian conception of deduction as simply arguing from premises to conclusions?

Posner, it turns out, is probably hoist on his own petard. While he justifiably rules out the possibility of arguing from a text by entailment, he still believes that arguing by entailment is possible from common law rules. What he actually says is that formalism, as he has defined it, is applicable only to the common law.<sup>130</sup> This means that in common law cases it is possible to use deductive logic to derive the results of the case, where deduction means drawing out conclusions "already contained in the premises"<sup>131</sup> using only the premises and the rules of logic.<sup>132</sup> Where such logical deduction can be used, "a commentator [can] pronounce the outcome of the case as being correct or incorrect, in approximately the same way that the solution to a mathematical problem can be pronounced correct or incorrect."<sup>133</sup>

But Posner tries to hedge his bet:

Logic is used to go from the premises to the conclusion, not to obtain the premises. Of course, a premise may be the result of deduction from some more basic premise, *but eventually one is forced back to a premise that cannot be obtained or proved by deduction.*<sup>134</sup>

In the emphasized clause, Posner reminds us that the analytic ideal only goes so far. Eventually we make our way back—sometimes sooner, sometimes later—to a premise which itself cannot be demonstrated by a sound legal syllogism. The same thing is true in geometry, of course. Euclid never proposes to *prove* his axioms, but the acceptability of the axioms, their "truth" if you will, is vouchsafed by other means. Exactly what those means are is still disputed, with mathematical realists offering one explanation, while antirealists offer another. The point is that a deductively sound argument can be offered in support of a theorem, and on that basis the theorem can be pronounced "correct."

So Posner, who believes it is *not* possible to reason deductively from a legal text, believes it *is* possible to reason deductively in the common law because there the ultimate premises are "con-

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<sup>130</sup> See *id.* at 181.

<sup>131</sup> *Id.* at 187.

<sup>132</sup> See *id.*

<sup>133</sup> *Id.* at 181.

<sup>134</sup> *Id.* at 182 (emphasis added).

cepts."<sup>135</sup> But unless Posner has a method for persuading us to accept his concepts with the same equanimity with which we accept the parallel postulate in geometry, there is no way for "a commentator to pronounce the outcome of the [common law] case as being correct or incorrect, in approximately the same way that the solution to a mathematical problem can be pronounced correct or incorrect."<sup>136</sup> Of course, Posner can (trivially) construct a *valid* argument from his common law concept to his conclusion; he can persuade us that *if* we accept his concept, we are logically bound to accept the conclusion he derives from it. But how is that any different—except cosmetically—from what Chief Justice Vinson can do with his constitutional argument in *Shelley*? If we accept that the concept of equal protection encompasses the right to acquire property, then Vinson's conclusion follows. The issue, of course, is how to justify the premise.

One way, and it is a strategy Vinson adopts, is to offer arguments in its support. But isn't that all Posner can offer in support of his common law concepts? How are Posner's arguments in support of a common law premise essentially different from Vinson's arguments in support of his constitutional premise? If anything, Vinson's argument has more going for it. The authoritativeness of Vinson's ultimate premise, the constitutional text itself, is far less problematic than any proposed ultimate premise (economic efficiency) which might ground the common law. When we arrive at constitutional ground zero, and can do no more than point to a clause in the Constitution, our interlocutor's query "But why should I accept that?" meets a conclusive reply: "Because it's in the Constitution." Any further chatter (if meant seriously) risks qualifying the questioner for Ely's lunatic asylum. But when we arrive at Posner's logical ground zero, e.g., utilitarianism, the further question "Why should we accept *that*?" still seems perfectly reasonable.

### B. Logic and Legitimacy

So in the search for the formalist ideal, the sound legal syllogism, we seem to come up empty-handed, whether we want to reason from the constitutional text or from common law concepts. This failure of the formalist's logical enterprise has implications for efforts to legitimate judicial review. Steven Burton, one senses with

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<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 181.

tongue in cheek, has expressed the problem in the form of a syllogism:

- MAJ     Judicial decisions are legitimate uses of the coercive power of the state only if they are in accordance with the law as required by legal formalism, which requires that the decision be *dictated* only by authoritative rules and principles derived from legitimating foundations.
- MIN     Judicial decisions in fact are not dictated only by authoritative rules and principles derived from legitimating foundations.
- CON     [Judicial decisions are not legitimate uses of the coercive power of the state.]<sup>137</sup>

That is, the formalist model of legitimacy presupposes that the only case in which a legal conclusion can truly be said to have been reached on the basis of a text is when the text *entails* the conclusion. And since there seem to be no entailments from a text, conclusions which seem to be on the basis of a text are actually on the basis of something else, such as the personal value preferences of the judges. Only logical entailment can ensure that "the decision in each case [is] the single decision that is logically required by authoritative rules and principles that, in turn, are logically derived from a legitimating foundation. Anything less than certainty [(i.e., entailment)] in legal reasoning . . . leave[s] logical room for judicial choice."<sup>138</sup>

As Burton points out, it is the critique of legal formalism which motivates legal/constitutional skepticism.<sup>139</sup> But even as the skeptic insists that formalism is not *possible*, she implicitly embraces the view that formalism, that is, legal reasoning that proceeds by entailment, would nonetheless be *desirable*. When skepticism concludes that, because we cannot produce sound legal syllogisms, judicial decisions are perforce illegitimate, it presupposes, as does formalism itself, that only entailment could do the logical work necessary for legitimacy. Yet on the same intuitive level at which the People are naive interpretivists, "[f]ew persons, however, are

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<sup>137</sup>. BURTON, *supra* note 23, at 184 (emphasis added).

<sup>138</sup>. *Id.* at 184-85.

<sup>139</sup>. *See id.* at 187.

willing to conclude that adjudication is not legitimate and therefore should be abandoned, or that the demand for legitimacy should be abandoned."<sup>140</sup> As a consequence, "the search is on for alternative theories of legitimacy that better capture our intuitive sense that at least much adjudication *is* legitimate."<sup>141</sup>

#### IV. UNE ARGUMENTATION NI CONTRAIGNANTE NI ARBITRAIRE<sup>142</sup>

In the next section, I will outline Toulmin's critique of logical theory and try to show how it presents an alternative to both formalism and its conceptual cousin, skepticism. It does so by rejecting as irrelevant to practical reasoning the analytic ideal of the sound legal syllogism, the notion that only argument by entailment can ever fully justify the claims we make.

Let me begin building a bridge to Toulmin by examining his response to *philosophical* skepticism. Toulmin approaches philosophical skepticism via epistemology, which poses the question: "How we can ever know anything with certainty?" We may believe that a proposition is true, but is it really true? How are we to produce grounds that fully justify our knowledge claims?

Though the phraseology is a bit different, we have been dealing with a similar problem in legal reasoning. Someone advances two claims: (1) The comet will pass by at 8:35 this evening; (2) Judicial enforcement of a racially restrictive covenant violates the Constitution. What kind of argument can be advanced to justify these claims?

Descartes' "contribution" to this discussion was the idea that one can only be certain that P is the case, and that not-P is not the case, if P *cannot be doubted*. In the Cartesian context, to say that P cannot be doubted means that P is analytically true, that it follows with logical necessity (entailment) from premises that in turn cannot be doubted. To entertain any doubt about P is to fall into a literal contradiction. On that basis, for example, I cannot be certain about the truth of this proposition: "Pat Buchanan will not win the men's singles at Wimbledon this summer." While no sane person would doubt the truth of this claim, and while the man at Ladbroke's will give us any odds we want on it, the claim is not *analytically* true. One who believed that Pat Buchanan might win

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<sup>140</sup> *Id.*

<sup>141</sup> *Id.* (emphasis added).

<sup>142</sup> See PERELMAN & OLBRECHTS-TYTECA, *THE NEW RHETORIC*, *supra* note 1, at 514 (translating this statement as "an argumentation that is neither compelling nor arbitrary").



the men's singles at Wimbledon this summer would be looked at curiously and might even, if she pressed the claim with any vehemence, be carried away by the lunacy commission. But she would *not* be guilty of literal self-contradiction in the way that she would be if she doubted this proposition: "No single men are husbands." One cannot even entertain the possibility that some single men might be husbands. This proposition seems to be beyond doubt in a way that the proposition about Pat Buchanan is not.

What follows from adhering to such "rigorous" standards is clear: "If a genuine claim to knowledge must be backed by an analytic argument, then there can be no authentic claim to knowledge"<sup>143</sup> in most fields of discourse, including those in which, as a matter of our practice, we consistently behave as though doubt has quite convincingly been ruled out. Not only must we forswear the possibility that our ethical and legal beliefs could meet the highest standards of justification, but even the calculations of mathematical physics, on the basis of which we send people into space, and indeed the simple claim that the dressing gown lies on the chair, "about all these we ought, strictly speaking, to admit that we *know* nothing. Skepticism alone remains as a solution for us, and the only problem is on what terms we reconcile ourselves to the existence of these unbridgeable logical gulfs."<sup>144</sup>

The reader may not immediately see the analogy between Cartesian (or Humean) skepticism and constitutional skepticism. The reason is just that we typically don't use the epistemic language of "know," "certainty," etc. with respect to the conclusions of constitutional arguments. Sentences such as, "How do you know that racially restrictive covenants violate the Constitution?" or "Can you be certain that racially restrictive covenants violate the Constitution?" sound a bit odd. *But the core issue is the same for constitutional skepticism as for Cartesian skepticism.* Our inability to justify our claims by means of analytic guarantees seems to allow too much logical free play in the joints of our arguments. Skepticism, whether Cartesian or constitutional, is the consequence of idealizing analytic arguments.<sup>145</sup>

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<sup>143</sup> TOULMIN, *supra* note 2, at 231.

<sup>144</sup> *Id.*

<sup>145</sup> *See id.* at 218.

A. *The Layout of Arguments*<sup>146</sup>

*Toulmin's starting point . . . involves the irrelevance of the philosopher's formal logic for the assessment of rational argument in the practical world.*<sup>147</sup>

Besides idealizing the analytic, a preoccupation with the syllogism misleads us in two ways: the form of the syllogism hides from view important aspects of our actual argumentative practice and, ironically, collapses distinctions that are essential to a proper understanding of the syllogism itself.

To make the necessary distinctions, Toulmin proposes a model of argument that follows closely our actual argumentative practice in fields where we care about the merits of our conclusions, e.g., in law. Indeed, Toulmin, like Chaim Perelman,<sup>148</sup> who has proceeded in a similar vein, goes so far as to claim that logic's salvation lies in the adoption of the informal jurisprudential model of reasoning in place of the formal analytic model which has dominated philosophical discussions of logic. Toulmin's first distinction is between a *claim* or *conclusion*, some assertion the merits of which we seek to establish, and the *grounds* or *data* to which we appeal in order to support the claim.<sup>149</sup> Grounds are generally facts of some sort, what we produce when an interlocutor asks us, "What have you got to go on?"<sup>150</sup> But frequently we are confronted with a further question: "How do you get there?" That is, in what way do the grounds lend support to the claim?<sup>151</sup> There is a step to be taken in proceeding from the grounds to the claim, and the second question asks for the "nature and justification of this step."<sup>152</sup> Toulmin explains:

[W]e must bring forward not further data . . . but propositions of rather a different kind: rules, principles, inference-licenses or what you will, instead of additional items of

<sup>146.</sup> This section draws principally on TOULMIN, *supra* note 2, at 94-145.

<sup>147.</sup> FOSS ET AL., *supra* note 6, at 80.

<sup>148.</sup> See generally PERELMAN & OLBRACHTS-TYTECA, *THE NEW RHETORIC*, *supra* note 1.

<sup>149.</sup> See TOULMIN, *supra* note 2, at 97. In *THE USES OF ARGUMENT*, Toulmin uses the word "data," but in a later work, *AN INTRODUCTION TO REASONING* (1979), he substitutes the term "grounds." I will use them interchangeably, depending on which sounds more natural in the context.

<sup>150.</sup> TOULMIN, *supra* note 2, at 98.

<sup>151.</sup> See *id.*

<sup>152.</sup> *Id.*

information. . . . Propositions of this kind I shall call *warrants* . . . .<sup>153</sup>

One can easily confuse *warrants* with *grounds*. One difference is that "warrants are general, certifying the soundness of all arguments of the appropriate type, and have accordingly to be established in quite a different way from the facts we produce as data."<sup>154</sup> While their logical roles are different, warrants and grounds are indissolubly linked in the following way: In a field of discourse the grounds we offer to justify a claim depend on what we are prepared to accept as warrants. In addition, "the warrants to which we commit ourselves are implicit in the particular steps from data to claims we are prepared to take and to admit."<sup>155</sup>

Often enough, arguments progress as follows. Having been called upon to justify some claim she has made, e.g., "X is a British subject," one produces grounds, either by "pointing" to them, if they are relatively obvious, or by demonstrating them by other arguments in turn. A ground that would support the claim that X is a British subject would be the fact that X was born in Bermuda. When asked for the warrant, the step from the grounds to the claim, one could offer the rule that a man born in Bermuda will generally be a British subject. But the warrant can itself be called into question: On what basis is it claimed that a man born in Bermuda is generally a British subject? If such is not the case, then there is no way to get from the fact that X was born in Bermuda to the conclusion that he is a British subject. Toulmin explains that "[s]tanding behind our warrants . . . there will normally be other assurances, without which the warrants themselves would possess neither authority nor currency . . . ."<sup>156</sup> These other assurances Toulmin refers to as the *backing* of the warrants.<sup>157</sup>

For the warrant, "A man born in Bermuda will generally be a British subject," the backing might be a statute or some other legal provision.<sup>158</sup> Note that the backing here is factual: facts about the content of the statute. But the warrant itself does not merely repeat

<sup>153.</sup> *Id.*

<sup>154.</sup> *Id.* at 100. By "soundness" Toulmin does not mean the soundness of orthodox logical theory, deductive validity plus true premises. He merely means the logical strength of an argument, evaluated on the basis of field-dependent criteria. *See id.* at 7.

<sup>155.</sup> *Id.*

<sup>156.</sup> *Id.* at 103.

<sup>157.</sup> *See id.*

<sup>158.</sup> *Id.* at 105.

its backing; it goes beyond the backing in the sense that it provides us with a general principle on the basis of which we can safely pass from grounds to conclusion.<sup>159</sup>

Toulmin makes an important claim about the backing of warrants, namely that "the sort of backing called for by our warrants varies from one field of argument to another."<sup>160</sup> Another way to express this is to say that the backing needed to establish our warrants is *field-dependent*.<sup>161</sup>

In our actual practice of giving reasons to support our claims, arguments can have two additional aspects. Often we may want to express "the degree of force which our [grounds] confer on our claim in virtue of our warrant."<sup>162</sup> We can do this by means of modal qualifiers, such as "presumably," "probably," etc. In addition, we may wish to state explicitly any conditions of rebuttal "indicating circumstances in which the general authority of the warrant would have to be set aside."<sup>163</sup>

### B. Analytic and Substantial Arguments

Toulmin uses the distinction between warrants and backing to distinguish *analytic* arguments from *substantial* arguments.<sup>164</sup> In an analytic argument, the backing for the warrant contains, explicitly or implicitly, the information contained in the conclusion.<sup>165</sup> Equivalently, we can say that an argument is analytic if and only if "checking the backing of the warrant involves *ipso facto* checking the truth or falsity of the conclusion . . ."<sup>166</sup> Toulmin offers this example:

**GROUNDS/DATA:** Anne is one of Jack's sisters.

**CONCLUSION:** Anne has red hair.

**WARRANT:** Any sister of Jack's will (i.e., may be taken to have) red hair.<sup>167</sup>

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

<sup>160.</sup> *Id.* at 103.

<sup>161.</sup> See *id.* at 104.

<sup>162.</sup> *Id.* at 101.

<sup>163.</sup> *Id.*

<sup>164.</sup> See *id.* at 125.

<sup>165.</sup> See *id.*

<sup>166.</sup> *Id.* at 133.

<sup>167.</sup> *Id.* at 124.

If we are called upon to justify the warrant we might offer:

BACKING:            Each one of Jack's sisters has  
                              (been checked individually to  
                              have) red hair.

This argument is analytic because the backing for the warrant contains the very fact expressed in the conclusion, i.e., that Anne has red hair. In a substantial argument, on the other hand, the backing for the warrant does not contain the information contained in the conclusion.<sup>168</sup>

Toulmin argues that "it has not been recognized how exceptional genuinely analytic arguments are, and how difficult it is to produce an argument which will be analytic past all question . . . ."<sup>169</sup> The reason for the oversight is that the standard form of the syllogism blurs the distinction between warrant and backing.<sup>170</sup> Consider:

MAJ     All of Jack's sisters have red hair.

MIN     Anne is one of Jack's sisters.

CON     Anne has red hair.

Is the major premise a *warrant*, entitling us to conclude from the fact that Anne is one of Jack's sisters that she has red hair? That is, is the major premise logically "permissive" along the lines of "If X is a sister of Jack's then X has red hair"? Or is the major premise *backing* for such an inference-warrant, e.g., a statistical claim that 100% of Jack's sisters have been examined and found to have red hair?

The exceptional nature of the truly analytic argument comes out if we consider that even our argument concerning the color of Anne's hair is not analytic if the inference warrant, "If X is Jack's sister then X has red hair," has as its backing the assertion that all of Jack's sisters have *in the past* been observed to have red hair.<sup>171</sup> *That* assertion does not contain the same information that is contained in the conclusion. There will be no contradiction/inconsistency if one asserts simultaneously the backing (All of

<sup>168.</sup> See *id.* at 125.

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

<sup>170.</sup> See *id.* at 107-13.

<sup>171.</sup> See *id.* at 126.

Jack's sisters have in the past been observed to have red hair) and the *negation* of the conclusion (Jack's sister Anne *does not* have red hair). Toulmin remarks:

I can defend my conclusion about Anne's hair with an unquestionably analytic argument only if at this very moment I have all of Jack's sisters in sight, and so can back my warrant with the assurance that every one of Jack's sisters has red hair at this moment. But, in such a situation, what need is there of an argument . . . ? The thing to do now is use one's eyes . . . .<sup>172</sup>

These remarks, it seems to me, apply, *mutatis mutandis*, to any effort to prove by an unquestionably analytic argument that, e.g., state court enforcement of racially restrictive covenants violates the Constitution:

I can defend (with an unquestionably analytic argument) my conclusion that state court enforcement of racially restrictive covenants violates the Constitution only if at this very moment I have before my eyes the text of the Constitution and therein I read: "No state court may enforce any racially restrictive covenant." *But, in such a situation, what need is there of an argument?* The thing to do now is use one's eyes.

The point is that "[i]f the purpose of an argument is to establish conclusions about which we are not entirely confident by relating them back to other information about which we have greater assurance, it begins to be a little doubtful whether any genuine, practical argument could *ever* be properly analytic."<sup>173</sup>

Although such arguments seem not to be found in *any* field in which our reasoning has a practical point,<sup>174</sup> logicians have singled out analytic arguments and have interpreted their "special characteristics . . . as signs of special merit; other classes of argument, they have felt, are deficient in so far as they fail to display all the characteristic merits of the paradigm class . . . ."<sup>175</sup> We

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

<sup>173</sup> *Id.* at 126-27.

<sup>174</sup> "Mathematical arguments alone seem entirely safe." *Id.* at 127. Toulmin means *pure* mathematics, not applied. He explains that arguments in applied mathematics, such as Newtonian mechanics and stellar dynamics, are beyond question *substantial*, not analytic. See *id.* at 137-38.

<sup>175</sup> *Id.* at 145.

have already identified one special characteristic of analytic arguments, the fact that verifying the backing of the warrant involves *ipso facto* verifying the conclusion.<sup>176</sup> Another characteristic of these arguments is that it is "impossible to accept the data and backing and yet deny the conclusion, without positively contradicting oneself."<sup>177</sup> *In other words, an analytic argument proceeds by entailment*, and I have suggested that entailment is central to both legal formalism and its (alleged) contrary, legal skepticism. If we privilege the analytic paradigm, and "[m]ak[e] this the universal test, we shall now think it proper to call a conclusion 'necessary', or to say that it follows 'necessarily' from our data, only if a full entailment is involved."<sup>178</sup> But if that is how we choose to define a concept like "necessarily," it is pretty obvious that it can *never* be applied to substantial arguments: "After all, in [the case of substantial arguments] the bearing of the data and backing on the conclusion can, *ex hypothesi*, [not] amount to entailment . . . ."<sup>179</sup>

What this means is that, to the extent we embrace the analytic ideal, and raise that special case as a paradigm against which all arguments are to be measured, then not only legitimating arguments in constitutional law, but "*all substantial arguments . . . [begin] to look just about irredeemable.*"<sup>180</sup>

### C. *The Irrelevance of Analytic Criteria*

If we take Toulmin's elucidations seriously, the challenge to the constitutional skeptic is this: We grant you that the conclusions of constitutional arguments are not connected to their premises by entailment. But *no* substantial argument proceeds by entailment. If the absence of entailment justifies skepticism, then one should embrace skepticism with respect to all fields of substantial argument, not merely the legal. Are you prepared to do so? Wittgenstein once remarked that philosophical confusion was the product of a one-sided diet of examples. Toulmin's position is similar. Logicians (and that includes lawyers when they are theorizing about legal reasoning) have been preoccupied with the analytic syllogism. If only they would look around, they would observe that in our logical practice we recognize *fields* of argument. Our war-

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<sup>176.</sup> See *id.*

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

<sup>178.</sup> *Id.* at 151.

<sup>179.</sup> *Id.* at 152.

<sup>180.</sup> *Id.* at 153-54 (emphasis added).

rants and the backing we offer for them, what we consider to be grounds, and our sense of logical cogency all vary as a function of the field of problems within which we are reasoning at any given time. It is worth quoting Toulmin at length:

If fields of argument are different, that is because they are addressed to different sorts of problems. A geometrical argument serves us when the problem facing us is geometrical; a moral argument when the problem is moral; an argument with a predictive conclusion when a prediction is what we need to produce; and so on. Since we are unable to prevent life from posing us problems of all these different kinds, there is one sense in which the differences between different fields of argument are of course irreducible. . . . [If] we ask the question, "Could substantial arguments come up to the standards appropriate to analytic arguments?", the answer must . . . be, "In the nature of the case, *no*." . . . In the case of substantial arguments . . . there is no question of data and backing taken together entailing the conclusion, or failing to entail it: just because the steps involved are substantial ones, it is no use either looking for entailments or being disappointed if we do not find them. Their absence does not spring from a lamentable weakness in the arguments, but from the nature of the problems with which they are designed to deal. When we have to set about assessing the real merits of any substantial argument, analytic criteria such as entailment are, accordingly, simply irrelevant.<sup>181</sup>

## V. THE NEXT MOVE: COMPARATIVE APPLIED LOGIC

It might make sense to summarize the argument so far:

1. Only interpretivism seems to make sense of deep-seated intuitions we have about how a written constitution ought to function.
2. Interpretivism requires that judicial review, to be legitimate, be on the basis of the constitutional text.
3. The skeptic responds that we can never demonstrate adequately that a constitutional conclusion is based on the text and not on some illegitimate consideration like the politics of the Court. But this alleged failure of adequate demonstration de-

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<sup>181</sup>. See *id.* at 167-68.



pend on an implicit embrace of formalism, the view that only those legal conclusions that can be derived from premises by means of a sound (analytic) legal syllogism can be said to be "on the basis of the text."

4. Toulmin's work shows that the analytic ideal, the privileging of logical entailment, is based on a fundamental confusion in logical theory, specifically the failure to distinguish analytic arguments from substantial arguments.

5. The fact that substantial arguments cannot—in the nature of things—proceed by entailment is not a defect. It is not that substantial arguments, such as arguments about the constitutional text, cannot live up to the analytic ideal. Rather, it is that the analytic criterion is simply irrelevant to evaluating substantial arguments. We must not criticize the pig because it cannot be a porcupine.

Once we are persuaded that arguments are field-dependent, it might seem appropriate to undertake what Toulmin has called "comparative applied logic."<sup>182</sup> This involves following Wittgenstein's advice that instead of theorizing we should look and see. Perhaps the most productive thing to do would be to "study the ways of arguing which have established themselves in any sphere . . . ."<sup>183</sup> Such an empirical investigation of how—in practice—we actually set about supporting the claims we make would involve "collecting for study the actual forms of argument current in any field . . . ."<sup>184</sup>

Such an investigation of how we actually argue about the Constitution has in fact been undertaken by Philip Bobbitt.<sup>185</sup> Though I have found no references to Toulmin in Bobbitt's work, it seems clear that both are working in the philosophical tradition of the ordinary language school.<sup>186</sup> In this part of the article I want to compare briefly Bobbitt's ideas with Toulmin's.

Based on an empirical examination of how we actually reason about the Constitution, Bobbitt identifies six forms of constitutional argument, which he refers to as "modalities."<sup>187</sup> These modalities

<sup>182.</sup> *Id.* at 218.

<sup>183.</sup> *Id.* at 257.

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

<sup>185.</sup> See generally BOBBITT, *supra* note 42; BOBBITT, *supra* note 53.

<sup>186.</sup> Toulmin acknowledges particularly the influence of John Wisdom and Gilbert Ryle. See TOULMIN, *supra* note 2, at vii. Bobbitt's debt to Wittgenstein is acknowledged more obliquely. See BOBBITT, *supra* note 53, at xi.

<sup>187.</sup> BOBBITT, *supra* note 42, at 11-22.

are “the ways in which law statements in constitutional matters are assessed.”<sup>188</sup> That is, when called upon to assess Chief Justice Vinson’s legal statement in *Shelley*, that state court enforcement of racially restrictive covenants violates the Constitution, we would turn to the modalities. Indeed, in constructing the arguments by which he justifies his legal statements, Chief Justice Vinson employed the modalities. The six modalities Bobbitt identifies are the following:

- (1) the historical modality, which argues from the intentions of the Constitution’s framers and ratifiers;
- (2) the textual modality, which argues from the words of the Constitution alone, as they would be understood by contemporary readers;
- (3) the structural modality, which argues from the relationships the Constitution seems to mandate, for example, the relationship among the three branches of government;
- (4) the doctrinal modality, which argues from judicial precedent concerning constitutional questions;
- (5) the ethical modality, which argues from moral principles that seem immanent in the Constitution, e.g., the value of individual liberty; and
- (6) the prudential modality, which argues from the relative costs and benefits of reaching a particular constitutional conclusion.

Fresh from our study of Toulmin, we should ask how these modalities might be assimilated to Toulmin’s grounds, warrants, backing, etc. It seems clear that the modalities do not play the role of grounds or data, “the facts we appeal to as a foundation for [our] claim”;<sup>189</sup> that is, what we produce in response to the challenge “What have you got to go on?”<sup>190</sup> The grounds in a constitutional argument might consist of such “facts” as the constitutional text itself, reports of ratification debates, reports of decided cases, etc.

Are the modalities warrants? Recall that a warrant takes the form, “Data such as D entitle one to draw conclusions or make claims such as C,” or “Given data D, one may take it that C.”<sup>191</sup> Because a modality does not express such an inference-license, it does not seem to function as a warrant.

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<sup>188.</sup> *Id.* at 22.

<sup>189.</sup> TOULMIN, *supra* note 2, at 97.

<sup>190.</sup> *Id.*

<sup>191.</sup> *Id.* at 98.

Recall Toulmin's example of X who was born in Bermuda and therefore was a British subject.<sup>192</sup> The warrant was "Persons born in the commonwealth are British subjects." The backing for the warrant was the statute in which the warrant was found. By analogy, in a constitutional argument the backing is some statement found, explicitly or implicitly, in the Constitution, e.g., the text of the Fourteenth Amendment. Thus a modality does not seem to be data, warrant, or backing.

Toulmin's full schema included modal qualifiers, words like "necessarily," "probably," "presumably," etc., which express the degree of force conferred on the conclusion by the warrant.<sup>193</sup> In other words, a modal qualifier tells us the way in which a claim is true. Despite a similarity in phraseology,<sup>194</sup> it does not seem to me that Bobbitt's modalities function as modal qualifiers. For one thing, we almost never see them used to qualify the force of a constitutional claim. Courts find that an action L violates the Constitution, not that "textually (or doctrinally, etc.), L violates the Constitution."

I am inclined to say that Bobbitt's modalities find their place in Toulmin's scheme implicitly: They delineate categories of backing. In the argument above, if I am called upon to justify the warrant, "If any L prevents persons from acquiring property . . .," I am bound to cite the fact of the constitutional text. But the other facts I adduce depend on which modality, which form of argument, I employ. If I use the textual modality, I will adduce facts about the contemporary meaning of the words in the text. If I use the historical modality, I will cite (ultimately, at least—remember that *chains* of arguments are often necessary) facts about certain documents or other pieces of evidence as to the intentions of the framers/ratifiers. If I use the doctrinal modality, I will cite as my facts the reports of court opinions on constitutional questions, and so forth. The materials I use as backing for any constitutional inference-warrant depend then on the *type* of argument I mount, the modality I employ.

On Bobbitt's account, "[l]egitimacy is maintained by following the forms of argument . . .,"<sup>195</sup> or, as one sympathetic commen-

<sup>192</sup> See *supra* notes 156-59 and accompanying text.

<sup>193</sup> TOULMIN, *supra* note 2, at 100.

<sup>194</sup> Bobbitt says that his modalities are "the ways in which [constitutional] statements are true." BOBBITT, *supra* note 42, at 41-42.

<sup>195</sup> Phillip Bobbitt, *Is Law Politics?*, 41 STAN. L. REV. 1233, 1266 (1989).

tator expressed it, "[t]he judicial decision is justified to the extent that it is rendered according to law [and a] decision is made 'according to law' when one or more of the six modalities is employed to reach the decision . . . ."<sup>196</sup> This is quite misleading, it seems to me. It certainly does not come to the same thing as the naive interpretivist's intuition that a legislative act may only be legitimately overruled on the basis of the constitutional text. Bobbitt seems preoccupied with constitutional *argument* to the exclusion of what that argument is *about*, namely, the meaning of the Constitution, what it mandates, what it prohibits, what it permits. A judicial decision is a claim, a claim about the law (in this case a claim about the Constitution), and the various forms of argument play a role, not for their own sake, but only because they seem to be appropriate ways to set about justifying that kind of claim.

Bobbitt is content to *describe*: "Here is how we do in fact argue about the Constitution." He does not want to construct a theory about *why* we argue in those particular ways. Nevertheless, it is worthwhile noticing that the modalities, the forms our arguments take, only make sense because of the sorts of things we are arguing about: legal texts, sets of instructions, as it were. On one occasion, Bobbitt compares the Constitution to another set of instructions, a trust agreement by which the settlor instructs the trustee as to how she should behave with respect to the trust property.<sup>197</sup> An action taken by the trustee is justifiable (legitimate) only if it is taken on the basis of the trust agreement. And when called upon to justify a claim such as "Under the agreement I am to do U," the trustee will offer arguments remarkably similar to the modalities of constitutional argument. Moreover, it will frequently be the case that the trustee will not be able to support her claim by means of entailment from the text of the trust agreement.

The idea that a legal text is a set of instructions is advanced explicitly by Posner: "In our system of government the framers of statutes and constitutions are the superiors of the judges. The framers communicate orders to the judges through legislative texts (including, of course, the Constitution)."<sup>198</sup> Common law doctrines can certainly be seen as communications with, or instructions to, judges, but there is an important difference, as Posner points out:

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<sup>196</sup>. Dennis Patterson, *Conscience and the Constitution*, 93 COLUM. L. REV. 270, 295 (1993).

<sup>197</sup>. See BOBBITT, *supra* note 42, at 4.

<sup>198</sup>. Posner, *supra* note 60, at 189.

"If we are puzzled about the formulation of the doctrine of consideration in some opinion *we are not likely to feel an urge to ask the author of the opinion what he meant.*"<sup>199</sup> This urge to ask the author what the legal text means, what the instructions are, which we are likely to feel when confronted by a legislative text, is precisely the urge toward interpretivism that has motivated my discussion throughout. The authority (legitimacy) of a legal text seems to be quite explicitly a function of authorship, so it is a natural response to uncertainty about what a text instructs us to do to frame the inquiry in terms of the author's intentions.

But such an inquiry implicates, as Bobbitt and Fallon remind us, a number of argumentative forms. My point, and I take it from Wittgenstein, is that all of the forms are natural responses when we are called upon to justify a claim about what a legal text (or any authoritative<sup>200</sup> set of instructions) commands us to do. Anyone who failed to acknowledge the relevance of the various argument forms to the enterprise of justifying claims based on a legal text would, quite frankly, lack a rational capacity, in the same way as would a person who did not admit the relevance of visual observation to justifying claims about the natural world. What we argue *about*—in the nature of the case—determines the kinds of arguments we make and accept.

## VI. CONCLUSION

I will conclude in a somewhat normative vein, inspired by Professor Goldstein's recent book.<sup>201</sup> Constitutionalism really does not make any sense—logically, legally, or politically—unless the urge toward interpretivism is taken seriously, unless we expect the Court to reach its decisions on the basis of the constitutional text. While skepticism might seem to call into doubt the possibility of interpretivism, the argument of this article has been that it does so only by illegitimately privileging the formalist model. Once we see that the search for logical entailments in substantial arguments is misguided—not just in constitutional arguments, but in all substan-

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<sup>199.</sup> *Id.* at 188 (emphasis added).

<sup>200.</sup> As opposed to purely prudential instructions. "Authoritative" means we take the instructions seriously out of respect for the authors.

<sup>201.</sup> JOSEPH GOLDSTEIN, *THE INTELLIGIBLE CONSTITUTION: THE SUPREME COURT'S OBLIGATION TO MAKE THE CONSTITUTION SOMETHING WE THE PEOPLE CAN UNDERSTAND* (1992) (suggesting guidelines for judges to follow to keep the constitutional bases of their decisions understandable to the general public).

tial arguments—the allure of skepticism ought to fade.<sup>202</sup>

But, concluding that it is fundamentally confused to look for entailments in constitutional arguments does not mean that we cannot ask questions about an argument's logical strength. Indeed, that is one of Toulmin's main points, that we ought to assess and criticize arguments, provided we recognize that the criteria we appeal to must be field-dependent.

So this is an appeal for a more explicitly logical assessment of constitutional arguments. It is of a piece with Professor Goldstein's plea for an "intelligible" constitution:

[A] necessary justification for judicial review—for the Court's power to say that government cannot do what the people acting through their elected representatives want it to do—is the Court's ability to explain in each case in a way that the people as the sovereign can understand *what it is in the Constitution* that forbids (or, in the opposite case, permits) government to take the contested action.<sup>203</sup>

The reader is recommended to Goldstein's book for his proposals as to how to achieve such legitimating intelligibility. I would only point out that *explaining* "what it is in the Constitution that forbids . . . government to take the contested action"<sup>204</sup> is identical to *arguing* from textual grounds (what is in the Constitution) to a conclusion (that the contested act is or is not forbidden), and therefore implicates *logic*. I propose, therefore, that we consciously conceptualize constitutional "interpretation" as a *logical* enterprise—*contra* Posner, and much contemporary scholarship—and mount our assessments of Supreme Court opinions in explicitly logical terms. I believe that such an approach would do much to advance the cause of intelligibility—and of legitimacy.

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<sup>202</sup> Of course, it may not fade, but at least one is aware of the consequences of embracing it, namely, that one may very well be committed to full-blown philosophical skepticism.

<sup>203</sup> Burke Marshall, *Foreword* to GOLDSTEIN, *supra* note 201, at xvii (emphasis added).

<sup>204</sup> *Id.*

