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## Constitutional Value Judgments and Interpretive Theory Choice

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## CONSTITUTIONAL VALUE JUDGMENTS AND INTERPRETIVE THEORY CHOICE

*Ian Bartrum*

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# CONSTITUTIONAL VALUE JUDGMENTS AND INTERPRETIVE THEORY CHOICE

IAN BARTRUM\*

*“How am I to obey a rule?” If this is not a question about causes, then it is about the justification for my following the rule the way I do. If I have exhausted the justifications I have reached bedrock, and my spade is turned. Then I am inclined to say: “This is simply what I do.”*

-Ludwig Wittgenstein<sup>1</sup>

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## I. INTRODUCTION

Near the turn of the last century, a legal reporter asked the eminent constitutional scholar Laurence Tribe to recommend the “best book on judicial review in the last twenty years.”<sup>2</sup> His response was straightforward, though perhaps unexpected to those outside of constitutional theory circles: “There are two, and they’re both by the same author.”<sup>3</sup> That author was Philip Bobbitt, and the books were

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1. LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* § 217 (G.E.M. Anscombe trans., 3d ed. 1958).

2. Dennis Patterson, *The New Leviathan*, 101 MICH. L. REV. 1715, 1731 n.64 (2003).

3. *Id.*

*Constitutional Fate* and its somewhat belated sequel, *Constitutional Interpretation*.<sup>4</sup> The central insight that distinguishes these books from the daunting mass of scholarly writing on the subject is Bobbitt's unique account of what legitimates judicial oversight of legislative enactments, both generally and in particular interpretive applications. Taking his lead from the later work of Ludwig Wittgenstein, Bobbitt argued that constitutional law—indeed, the Constitution itself—is, like all language, a *practice*: “Law is something we *do*,” he wrote in the latter book, “not something we *have* as a consequence of something we do.”<sup>5</sup> And, as with all language, what legitimates a given utterance or activity—what gives it “meaning” in the world—is how it functions within the rules of a particular communicative practice.<sup>6</sup> Thus, the Constitution can have no meaning if not embedded in a shared practice of interpretation,<sup>7</sup> and what legitimates a particular act of interpretation is the form or grammar of the argument it rests upon.<sup>8</sup> With this insight in place, Bobbitt set about describing the accepted grammar of American constitutional argument.

The account Bobbitt arrived at describes six legitimate “modalities” of argument and interpretation:

[1] The *historical* (relying on the intentions of the framers and ratifiers of the Constitution); [2] *textual* (looking to the meaning of the words of the Constitution alone, as they would be interpreted by the average contemporary “man on the street”); [3] *structural* (inferring rules from the relationships that the Constitution mandates from the structure it sets up); [4] *doctrinal* (applying rules generated by precedent); *ethical* (deriving rules from those moral commitments of the American ethos that are reflected in the Constitution); and [6] *prudential* (seeking to balance the costs and benefits of a particular rule).<sup>9</sup>

To translate the abstract into the concrete, originalist approaches to constitutional interpretation, such as those advocated by Justices Antonin Scalia and Clarence Thomas, plainly fall into the *historical* modality, while what some call “living” or “pragmatic” constitutionalism

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4. *Id.*; PHILIP BOBBITT, *CONSTITUTIONAL FATE* (1982) [hereinafter BOBBITT, *FATE*]; PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* (1991) [hereinafter BOBBITT, *INTERPRETATION*].

5. BOBBITT, *INTERPRETATION*, *supra* note 4, at 24 (emphasis added).

6. WITTGENSTEIN, *supra* note 1, § 43.

7. We might analogize this claim to Wittgenstein's assertion that language has meaning only inasmuch as it connects to a particular “form of life.” *Id.* §§ 19, 43. This claim underlies the famous remark, “If a lion could talk, we could not understand him.” *Id.* at 223.

8. In Wittgenstein's later work, the concept of “grammar” filled the place that “logic” had occupied in his earlier writing. SEAN WILSON, *THE FLEXIBLE CONSTITUTION* (forthcoming 2013) (manuscript at 9 n.1) (on file with author).

9. *Id.* at 12-13 (emphasis added).

fall more easily into the *ethical* or *prudential* modalities.<sup>10</sup> In practice, the modalities often complement each other and act in concert within a constitutional argument.<sup>11</sup> That is, in many fairly straightforward cases the most persuasive modal arguments all tend to point toward the same outcome. But Bobbitt conceded that difficult cases inevitably arise where two or more modalities conflict in a kind of constitutional impasse, and in these cases, we are likely to be most concerned about the unaccountability and potential idiosyncrasy of judicial review.<sup>12</sup> In other words, if in a particular case two equally legitimate constitutional arguments dictate opposite outcomes, what justifies a judge's decision to choose one interpretive approach over the other?

Bobbitt recognized that his practice-based account was not thick enough—nor could it be, without deriving too much of an “ought” from an “is”—to offer much prescription in these kinds of cases.<sup>13</sup> Nonetheless, he devoted much of *Constitutional Interpretation* to the issue, which he resolved by resort to a conception of judicial “conscience” and ultimate acts of “moral decision.”<sup>14</sup> Essentially, he argued that judges are the political actors we entrust—through various kinds of secondary rules—to choose between competing or contradictory modal interpretive claims in difficult cases. And just as some poets pen better verse than others, in our argumentative practices, some judges are simply better decisionmakers than others. And in the end it is these argumentative practices, taken as a whole, that make constitutional meaning possible. This is all a part of the argumentative practice that makes constitutional meaning possible.<sup>15</sup> While this resolution is ultimately correct in form, it has left many readers—including myself—feeling somewhat unsatisfied. It seems that we must be able to dig at least a little deeper into the justifications underlying these kinds of moral decisions before, to borrow Wittgenstein's phrase, we hit bedrock and our spades are turned. And that is what I propose to do in this Article. By drawing an analogy to Thomas Kuhn's work on the value judgments that underlie

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10. *E.g.*, ANTONIN SCALIA, *A MATTER OF INTERPRETATION* (1997). On “living constitutionalism,” see, for example, DAVID STRAUSS, *THE LIVING CONSTITUTION* (2010) and Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737 (2007).

11. See Ian C. Bartrum, *Metaphors and Modalities: Meditations on Bobbitt's Theory of the Constitution*, 17 WM. & MARY BILL RTS. J. 157 (2008) (describing the metaphorical overlap of modalities).

12. BOBBITT, *INTERPRETATION*, *supra* note 4, at 111-17.

13. I refer, of course, to Hume's basic distinction between normative and descriptive claims. DAVID HUME, *A TREATISE OF HUMAN NATURE* 302 (David Fate Norton & Mary J. Norton eds., 2000). Recall, however, more recent suggestions that we can draw a limited, functionalist kind of an “ought” from an “is.” See ALASDAIR MACINTYRE, *AFTER VIRTUE* 57 (2d. ed. 1984) (“[F]rom the premise ‘He is a sea-captain’, the conclusion may be validly inferred that ‘He ought to do whatever a sea-captain ought to do.’”). It is only this functionalist sort of normative claim that Bobbitt derives from his description of constitutional practice.

14. See BOBBITT, *INTERPRETATION*, *supra* note 4, at 156-62.

15. See *id.* at 178-86.

scientists' choices between competing theoretical paradigms, I hope to offer a clearer picture of the practice of judicial review as it currently exists and also to offer some modest suggestions to make that practice more transparent and accountable.

I must begin by conceding, however, that while the broad analogy I draw to Kuhn's work on scientific theory choice is reasonably apt, it does not seamlessly superimpose onto the evolving practice of constitutional interpretation. The most conspicuous and relevant incongruence between scientific practice and constitutional practice is that, at any particular point in time, no one legal interpretive paradigm is truly ascendant or dominant in the way that seems at least practically true in many fields of scientific endeavor.<sup>16</sup> This is so because law, particularly legal interpretation, is much more clearly an indeterminate practice than are the physical sciences, at least in the rational empiricist terms that we tend to conceive of those sciences.<sup>17</sup> In other words, we are generally more willing to concede that the primary focus of constitutional interpretation—the “meaning” of disputed constitutional language—is not empirically verifiable (or falsifiable) in the ways that we tend to associate with scientific inquiry.

Quite often we cannot verify textual “meaning” simply because many words refer us to imprecise linguistic rules—which are themselves subject to interpretation—rather than pointing to something objective in the world that we can all taste, touch, or see.<sup>18</sup> To make matters even more complicated, we often use words in deliberately vague ways—and this is acutely the case with the constitutional language that is most often the subject of dispute.<sup>19</sup> This lack of empirical verifiability often means that constitutional meaning cannot be something “objective” in the sense of being directly accessible and

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16. By “legal interpretive paradigm” I mean a particular modality of constitutional interpretation. One could argue that a single legal interpretive paradigm dominates our practice if the definition given that paradigm were suitably broad and had room for various incommensurable kinds of practice.

17. This is not to say that science is *not* a social practice, complete with all the epistemic—and therefore interpretive—uncertainties that characterize legal interpretation. Indeed, that science is in many ways social is precisely Kuhn's point and forms the basis of the analogy I ultimately want to draw. The salient difference here, however, is that a critical part of scientific practice seems to be a powerful normative agreement that practitioners *should* be able to agree on one true and correct theoretical paradigm—that there is, if we could discover it, one *true* way to explain relevant empirical observations. While a similar norm undoubtedly informs some types of legal interpretive practice, it is not nearly as powerful or widely accepted as is true within scientific practice.

18. For an account of language in these terms, see WITTGENSTEIN, *supra* note 1, at 1-60.

19. To be sure, in many cases constitutional language is suitably precise and determinate—for example, the President shall have “attained to the Age of thirty five Years”—and, indeed, there is such widespread agreement on the appropriate linguistic rules—how we should understand the phrase “Age of thirty five Years,” for example—that very few interpretive difficulties arise. U.S. CONST. art. II, § 1, cl. 4. For just this reason, however, such language very rarely gives rise to constitutional disputes, and very little theorizing is needed to resolve those disputes that do arise.

thus broadly agreed upon.<sup>20</sup> Indeed, because our constitutional practice has adopted the sometimes-competing conventions Bobbitt describes, a practitioner may choose between several incommensurable though equally legitimate interpretive approaches.<sup>21</sup> As a result, of course, competent practitioners may often arrive at quite different conclusions about the meaning of disputed constitutional language.

While this state of affairs would probably be untenable (at least for very long) in most fields of scientific inquiry, it is a generally accepted feature of constitutional argument and practice.<sup>22</sup> It is therefore difficult to argue that interpretive theory choices in constitutional practice bring about true Kuhnian paradigm changes, which result in the near complete and fairly long-term reimagining of a field of scientific inquiry.<sup>23</sup> Rather, constitutional interpretive theory choices are often made case-by-case or even issue-by-issue as lawyers and judges decide on which theory is most appropriate to resolve a particular problem at hand.<sup>24</sup> It is true that many, if not most, jurists have general interpretive preferences—what we might loosely call a judicial philosophy—but even the most dedicated theoretical adherents sometimes grow faint-hearted.<sup>25</sup> With this in mind, I should make it clear that I do *not* claim the different interpretive modalities are equivalent to different scientific paradigms. Nonetheless, an essential similarity between legal and scientific practices remains, which is the focus of this Article: at some relevant point both endeavors require a choice between fundamentally incommensurable theoretical approaches.<sup>26</sup>

In this regard, Kuhn's claim that underlying value judgments determine our theory choices offers a very important lesson for constitutional argument.<sup>27</sup> As applied to case specific decisions, Kuhn's insight reminds us that interpretive theory choices are, in fact, *choices* and suggests that we should be transparent and explicit about the value judgments that underlie those decisions in a given context. Indeed, this Article offers this twofold prescription: (1) constitutional

20. In this context, one might reflect on Willard Quine's influential attack on the empirical dogmas at the heart of logical positivism. See W.V. Quine, *Two Dogmas of Empiricism*, 60 PHIL. REV. 20 (1951).

21. See BOBBITT, INTERPRETATION, *supra* note 4, at 10-22 (summarizing the "modalities of constitutional argument").

22. *Id.*

23. THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 6-8 (1st ed. 1962) [hereinafter KUHN, STRUCTURE].

24. See Bartrum, *supra* note 11 (describing the metaphoric overlap of interpretive approaches within even a single opinion).

25. See Antonin Scalia, *Originalism: The Lesser Evil*, U. CIN. L. REV. 849, 864 (1989) ("I hasten to confess that in a crunch I may prove a faint-hearted originalist.").

26. See discussion *infra* Part II.

27. THOMAS S. KUHN, *Objectivity, Value Judgment, and Theory Choice*, in THE ESSENTIAL TENSION: SELECTED STUDIES IN SCIENTIFIC TRADITION AND CHANGE 320, 329-31 (1977) [hereinafter KUHN, *Objectivity*].

practitioners, particularly judges, should frankly acknowledge that nothing “objective” compels their resort to a particular interpretive theory in a particular case, and (2) they should be similarly forthright in explaining and justifying the constitutional value judgments their theory choices reflect.<sup>28</sup>

In support of this prescription, Part II presents a brief description of Kuhn’s provocative and influential claims about scientific progress and the dynamics of scientific theory choice, and argues that there are some productive grounds for analogy between Kuhn’s account and our constitutional interpretive practices. Part III offers a preliminary and nonexclusive catalogue of “constitutional values,” by which I mean the important or essential purposes we ascribe to the Constitution within our democratic structure. These shared values can provide some objective grounds to assess particular theory choices, even if the ultimate act of decision remains essentially subjective. To identify these values I look primarily to the constitutional canon—those extra-constitutional texts that have settled most deeply into our interpretive practice<sup>29</sup>—under the hypothesis that these texts are canonical precisely because they speak forcefully to widely held ideas about what the Constitution means or how it should function within our systems.<sup>30</sup>

Part IV illustrates how these constitutional values relate to our existing interpretive theories or paradigms; that is, it attempts to give some account of the ways that particular value judgments may influence particular interpretive theory choices in actual cases. Here I suggest that Kuhn’s account can inform our ideas about the choice that must occur in a case where two or more incommensurable modalities come into direct conflict.<sup>31</sup> Finally, I conclude that practitioners—especially judges—should explicitly acknowledge and justify the constitutional value judgments that ground their interpretive theory choices in particular cases. I make this claim on the consequentialist grounds that such a practice seems likely to produce clearer, more

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28. This prescription reflects Kuhn’s thoughts on how we are able to make normative assessments of particular theory choices. See Thomas S. Kuhn, *Rationality and Theory Choice*, 80 J. PHIL. 563, 563 (1983) [hereinafter Kuhn, *Rationality*] (“[T]he evaluation of criteria for theory choice requires the prior specification of the goals to be achieved by that choice.”).

29. There are many important explorations of the constitutional canon and its function in our practice. See, e.g., J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963 (1998); Ian Bartrum, *The Constitutional Canon As Argumentative Metonymy*, 18 WM. & MARY BILL RTS. J. 327 (2009); Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379 (2011); Richard A. Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243 (1998).

30. Within the roughly Wittgensteinian interpretive approach I have advocated elsewhere, the Constitution’s “meaning” is, in fact, best understood as its proper use within our practice. E.g., Ian Bartrum, *Constructing the Constitutional Canon: The Metonymic Evolution of Federalist 10*, 27 CONST. COMMENT. 9, 10-12 (2010).

31. BOBBITT, INTERPRETATION, *supra* note 4, at 164-67.



focused debate and discussion about the underlying normative judgments that ultimately give rise to constitutional meanings. This is not to say, of course, that such an approach would make our constitutional disagreements any fewer or less profound, but, to borrow Charles Black's words in defense of structuralism, "at least [we] would be differing on exactly the right thing[s], and that is no small gain in law."<sup>32</sup>

## II. THOMAS KUHN AND SCIENTIFIC THEORY CHOICE

Thomas Kuhn's *The Structure of Scientific Revolutions* is often ranked among the most influential books of the latter twentieth century.<sup>33</sup> In the unsettling wake of Ludwig Wittgenstein's and Willard Quine's respective attacks on ideal language theory and logical positivism,<sup>34</sup> philosophers of science struggled to regain some reliable footing on which to ground the epistemological superiority of scientific empiricism.<sup>35</sup> Karl Popper's inspired resort to "falsifiability" seemed to save induction, at least, from the postmodern flames,<sup>36</sup> but just a few years later Kuhn's landmark intellectual history again brought us face to face with the underlying sociology of our knowledge.<sup>37</sup> Rather than depict scientific progress in familiar linear and cumulative terms—with each new discovery adding a figurative brick to an ever-growing edifice—Kuhn's book told a cyclical story of half built scientific houses abandoned on flawed foundations and of construction begun elsewhere on new, hopefully sounder bases.<sup>38</sup> He called the typical brick-laying process "normal science" and the occasional decision to start over elsewhere a "paradigm change."<sup>39</sup> Kuhn offered numerous examples, but perhaps the most illustrative is the dramatic Copernican shift to a heliocentric account of the solar system.<sup>40</sup> By the sixteenth century, astronomers had begun to find it increasingly difficult to explain observational data within the Ptolema-

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32. CHARLES L. BLACK, JR., *Some Particular Structural Considerations in Constitutional Law*, in *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 33, 48-49 (1969).

33. *E.g.*, *The Hundred Most Influential Books Since the War*, *THE TIMES LITERARY SUPP.*, Oct. 6, 1995, at 39.

34. *See* WITTGENSTEIN, *supra* note 1, at 1-3; Quine, *supra* note 20, at 20-25. These references are meant as illustrative examples of a larger 20th century attack on rational empiricism, which echoed, in more muted tones, Hume's earlier and deeper skepticism. *See* DAVID HUME, *AN ENQUIRY CONCERNING HUMAN UNDERSTANDING*, § 4 (1748) *reprinted in* *THE EMPIRICISTS: LOCKE, BERKELEY, HUME* 322-34 (1974) (outlining the problem of induction).

35. *See, e.g.*, KARL R. POPPER, *THE LOGIC OF SCIENTIFIC DISCOVERY* 27-48 (5th ed. 1968) (describing problems with verification theories of the scientific method).

36. *Id.* at 40-42, 78-92.

37. KUHN, *STRUCTURE*, *supra* note 23, at 166-69. For the reference, see KARL MANNHEIM, *IDEOLOGY AND UTOPIA: AN INTRODUCTION TO THE SOCIOLOGY OF KNOWLEDGE* (Louis Wirth & Edward Shils trans., 1955) (exploring individual experiences of meaning and truth).

38. KUHN, *STRUCTURE*, *supra* note 23, at 111-34.

39. *Id.* at 10-12, 68.

40. *Id.* at 68-69.

ic geocentric model, and then in 1543, Nicholas Copernicus presented a simple but devastating solution: move the Sun to the center of the system.<sup>41</sup> Scientists gradually tore down the Ptolemaic building and began laying bricks at the Copernican site. By Kuhn's lights, such moments of destruction and rebirth amount to "scientific revolutions."<sup>42</sup>

There was nothing startling about Kuhn's book as a historical matter—in fact, it seemed to present an almost commonsensical account of the past—but his observations posed a formidable challenge to the traditional scientific narrative. Instead of a plodding evolutionary process, wherein practitioners make incremental but ever progressive additions to human knowledge, Kuhn's science actually seemed to move in the wrong direction for long periods of time. Indeed, his theory seems to suggest that those "normal science" puzzle-solvers at work today (or at any given time) are likely building upon flawed foundations that must eventually give way. Still, none of this was too intensely controversial, given that we might nevertheless see the work of everyday science as progressive on a meta-evolutionary scale; it is, after all, the frustrated puzzle-solvers—those who continue to bump their heads against the paradigm walls—that ultimately lead us toward a corrective revolution. But Kuhn's ideas about the relationship between theoretical paradigms and about the processes by which we choose one paradigm over another were quite controversial indeed. And it is among these ideas that I think lie the most fruitful grounds for an analogy between scientific practice and constitutional interpretive practice.

Perhaps Kuhn's most radical claim about the nature of competing theoretical paradigms is that they are incommensurable.<sup>43</sup> Building on the work of Michael Polanyi,<sup>44</sup> Kuhn argued that "when paradigms change, the world itself changes with them,"<sup>45</sup> and thus proponents of competing paradigms simply lack the common referents or language with which to fully understand or evaluate one another's point of view.<sup>46</sup> This incommensurability results in part from the different ways that competing paradigms group concepts together to establish similarity relationships *prior* to naming those groupings or developing related terminology that refines them.<sup>47</sup> In a later essay, Kuhn

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41. NICHOLAS COPERNICUS, ON THE REVOLUTIONS (1543), *reprinted in* 2 NICHOLAS COPERNICUS, COMPLETE WORKS (Jerzy Dobrzycki ed., Edward Rosen trans., 1978).

42. KUHN, STRUCTURE, *supra* note 23, at 6-8.

43. *Id.* at 144-50.

44. See MICHAEL POLANYI, PERSONAL KNOWLEDGE: TOWARDS A POST-CRITICAL PHILOSOPHY 151 (1958) (arguing that scientists in competing schools "think differently, speak a different language, live in a different world").

45. KUHN, STRUCTURE, *supra* note 23, at 110.

46. *Id.* at 148-49.

47. *Id.* at 148.

illustrated such a problem in translation between Newtonian and other physical paradigms:

The Newtonian terms ‘force’ and ‘mass’ provide the simplest sort of example. One cannot learn how to use either one without simultaneously learning how to use the other. Nor can this part of the language-acquisition process go forward without resort to Newton’s Second Law of Motion. Only with its aid can one learn how to pick out Newtonian forces and masses, how to attach the corresponding terms to nature.<sup>48</sup>

Thus, the term *mass* as used within the Newtonian paradigm refers to a conceptual network that may not exist in other paradigms, and if the term does exist in those paradigms, it necessarily refers to a different set of concepts. As a consequence, language itself cannot provide neutral communicative grounds between paradigms.<sup>49</sup>

For purposes of my analogy to Bobbitt’s work, it is also important to note that Kuhn’s view of the relationship between different scientific paradigms roughly corresponds with Wittgenstein’s view of the relationship between different “language games.”<sup>50</sup> Wittgenstein famously argued that very often a word’s “meaning” is its proper use in the contexts or “forms of life” in which it naturally arises.<sup>51</sup> A form of life utilizes a corresponding language game, which may employ words used in other contexts, but—and this is critical—these words necessarily take on new meanings consonant with their use in a new language game.<sup>52</sup> Thus, while a word may bear a “family resemblance” to itself across language games, no necessary and sufficient set of definitional conditions applies in all contexts.<sup>53</sup> Wittgenstein illustrated this point using the word *game* itself as an example:

[Here] I mean board-games, card-games, ball-games, Olympic games, and so on. What is common to them all? . . . To repeat: don’t think, but look!—Look for example at board-games, with their multifarious relationships. Now pass to card-games; here you find

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48. Kuhn, *Rationality*, *supra* note 28, at 566. Newton’s Second Law holds that acceleration occurs when a force acts on a mass; the greater the mass, the greater the force required.

49. *Id.* at 566-67.

50. Kuhn explicitly acknowledges this similarity and discusses both Wittgenstein and language games in several pieces. See, e.g., KUHN, *STRUCTURE*, *supra* note 23, at 44-46; Kuhn, *Rationality*, *supra* note 28, at 570 (“[Hume’s critique of induction asks] for an explanation of the whole language game that involves ‘induction’ and underpins the form of life we live.”).

51. WITTGENSTEIN, *supra* note 1, §§ 19, 43. As an aside, it is worth noting the “form of life” qualification here is critical to Wittgenstein’s larger philosophical claims. For a word to have meaning, it must function within an actual practice of life. It is when the philosopher extracts a word from its lived context and employs it in abstract theoretical pursuits that “language goes on holiday” and philosophical problems appear. *Id.* § 38 (emphasis omitted).

52. See *id.* §§ 66-77 (discussing words’ relationships to themselves across language games).

53. *Id.* §§ 65, 67.

many correspondences with the first group, but many common features drop out, and others appear. When we pass next to ball-games, much that is common is retained, but much is lost.—Are they all ‘amusing’? Compare chess with noughts and crosses. Or is there always winning and losing, or competition between players? Think of patience.<sup>54</sup>

As with Kuhn’s competing theoretical paradigms, then, Wittgenstein’s language games are ultimately incommensurable in that no understanding of a word within one context can fully define its use (or meaning) within another, and no “neutral” language is available to make a completely literal translation possible. Indeed, Kuhn explicitly acknowledged his intellectual debt to Wittgenstein on this point in an extended discussion in *The Structure of Scientific Revolutions*.<sup>55</sup>

For Kuhn, the incommensurability of scientific paradigms was critically important because it had significant consequences regarding the rationality of theory choices, or those processes by which scientists eventually decide to give up on an old paradigm and adopt a new one. The most striking consequence of incommensurability is that it means we can never justify or explain the choice to adopt a new paradigm using the terms that exist within the old one.<sup>56</sup> Because the conceptual groupings that constitute a new paradigm occur before scientists develop the linguistic apparatus to describe them, paradigm-neutral language with which to make arguments justifying a paradigm change is simply unavailable.<sup>57</sup> The startling entailment of this position is, of course, that the decision to abandon an old paradigm and adopt a new one does not appear to be “rational,” in the sense of being objectively justifiable within the conceptual framework available to the decision-maker at the time she makes the decision.<sup>58</sup> She must, in other words, choose to adopt the new paradigm before she will have the conceptual apparatus necessary to assess it.<sup>59</sup> Given all of this, Kuhn—who never conceded that paradigm changes were actually irrational—thought it necessary to explain how we might nonetheless justify or explain the theory choices that are required to jump from one paradigm to another.<sup>60</sup>

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54. *Id.* § 66.

55. See KUHN, *STRUCTURE*, *supra* note 23, at 44-46.

56. See *id.* at 149.

57. See Kuhn, *Rationality*, *supra* note 28, at 566-67 (describing problems of “local holism”).

58. See KUHN, *STRUCTURE*, *supra* note 23, at 151 (arguing that paradigm disputes “cannot be justified by proof[s]”).

59. *Id.* at 149 (“Just because it is a transition between incommensurables, the transition between competing paradigms cannot be made a step at a time, forced by logic and neutral experience. Like the gestalt switch, it must occur all at once . . . or not at all.”).

60. See Kuhn, *Rationality*, *supra* note 28, at 563 (“[Hempel] is not one of those who suppose that I proclaim the irrationality of theory choice. But he sees why others have supposed so.”).

He made his clearest efforts in this regard in delivering the Machette Lecture at Furman University in 1973, later published under the title *Objectivity, Value Judgment, and Theory Choice*.<sup>61</sup> Kuhn used the lecture as an opportunity both to clarify his own position and to rebuff critics who claimed he had reduced scientific theory choice to “a matter for mob psychology.”<sup>62</sup> He adamantly denied accusations that his account denied scientists any rational grounds for selecting “better” or “worse” theoretical paradigms and claimed to have said only that those grounds could not exist within one or another of the competing paradigms.<sup>63</sup> Rather, the criteria by which scientists evaluate the merits of a particular paradigm must come at least partly from outside of science, and thus they are not entirely “scientific”—or what some might call “objective”—kinds of evaluations.<sup>64</sup> Instead, he likened these criteria of choice to what we would call “values” in other areas of human life, and he likened the choices themselves to what we might otherwise call “judgments.”<sup>65</sup> Ultimately, a scientist must assess competing theoretical paradigms against the values he judges to be most important to a particular scientific endeavor and, unavoidably, “idiosyncratic factors dependent on individual biography and personality” will inform those value judgments.<sup>66</sup> This is not to say, as Kuhn took pains to point out, that such judgments are inscrutable—scientists are often asked to justify their choices in this regard—but it *is* a refutation of the claim that some algorithmic proof formula might lead us ineluctably to a ‘true and correct’ theoretical paradigm: “[T]he criteria of choice . . . function not as rules, which *determine* choice, but as values, which *influence* it. Two men deeply committed to the same values may nevertheless, in particular situations, make different choices as, in fact, they do.”<sup>67</sup>

Kuhn’s point is in all likelihood made clearer by examples, and he provided several. He began by positing a broadly shared, though not exclusive, list of five scientific values—the criteria by which scientists generally evaluate the merits of a scientific theory. His list is as follows: (1) *accuracy* relative to observations of nature; (2) *consistency*, both internally and with other accepted theories; (3) *broad scope*, or consequences that reach “beyond the particular observations, laws, or subtheories [that the theory] was initially designed to explain”; (4) *simplicity* in ordering and explaining observed phenomena; and

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61. KUHN, *Objectivity*, *supra* note 27, at 320.

62. *Id.* at 321 (quoting Imre Lakatos, *Falsification and the Methodology of Scientific Research Programmes*, in CRITICISM AND THE GROWTH OF KNOWLEDGE 91, 178 (I. Lakatos & A. Musgrave eds., 1970)).

63. *See* KUHN, *Objectivity*, *supra* note 27, at 321.

64. *See id.* at 329.

65. *See id.* at 330-31.

66. *Id.* at 329.

67. *Id.* at 331 (emphasis added).

(5) *fruitfulness* in disclosing new phenomena or natural relationships for future study.<sup>68</sup> Kuhn claimed that these values are so widely held among scientists that we might consider them the “standard criteria for evaluating the adequacy of a theory.”<sup>69</sup> When utilized in actual scientific practice, “they provide the shared basis for theory choice,” a kind of “canon” that bestows communal and contextual legitimacy on a newly proposed paradigm.<sup>70</sup> But, again, legitimacy is not proof; there is no precise formula for weighing these values against one another, and individual practitioners may—and in fact do—judge some values to be more or less important in a given context.<sup>71</sup> The range of legitimate value judgments is thus reasonably broad, and no “objective” measure can compel one theory choice over another. This explains why some practitioners may jump immediately to a new paradigm, while others may hold out for many years.<sup>72</sup>

Kuhn illustrated this process with references to several well-known paradigm changes, but his discussion of the Copernican Revolution is probably most helpful. He began by comparing the relative *accuracy* of the geocentric and heliocentric models of the solar system and concluded—perhaps surprisingly—that this important value was not determinative in 1543.<sup>73</sup> In truth, the Copernican system “was not more accurate than Ptolemy’s until drastically revised by Kepler more than sixty years after Copernicus’s death.”<sup>74</sup> Consequently, had Kepler not judged other scientific values to be more important than accuracy in this context, he might never have labored to make the improvements necessary to bring the heliocentric model into closer alignment with the observational data.<sup>75</sup> *Consistency* also seemed to weigh against Copernicus. While both systems were internally consistent, the heliocentric model flew in the face of “a tight-knit body of doctrine which explained, among other things, how stones fall, how water pumps function, and why the clouds move slowly across the skies.”<sup>76</sup> Thus, Kepler could not have been overly concerned with the value of external consistency either. On *simplicity*, however, Copernicus came out well ahead. The heliocentric model required only a

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68. *Id.* at 321-22.

69. *Id.* at 322, 325.

70. *Id.* at 322 (emphasis omitted).

71. *See id.* at 325 (“[T]he shared canons must be fleshed out in ways that differ from one individual to another.”).

72. Kuhn famously argued that it often takes at least a generation for a new paradigm fully to take root, as those practitioners who have devoted their life’s work to puzzle-solving within the old paradigm simply refuse to cast it aside. They must, therefore, die off and be supplanted by a new crop of scientists without such personal investments. KUHN, *STRUCTURE*, *supra* note 23, at 151-52.

73. KUHN, *Objectivity*, *supra* note 27, at 323.

74. *Id.*

75. *Id.*

76. *Id.* at 323.

fraction of the complex mathematical apparatus that was necessary to explain phenomena such as planetary retrograde in Ptolemaic terms.<sup>77</sup> Kuhn pointed out that this simplicity was “vitally important to the choices made by both Kepler and Galileo and thus essential to the ultimate triumph of Copernicanism.”<sup>78</sup>

The Copernican example, then, helps illustrate the larger point that competing paradigms typically serve different criteria (or values) of theory choice in different ways and degrees.<sup>79</sup> One theory may be more *accurate* than its competitors, but may lack the *consistency* necessary to gain many practicing adherents; and more importantly, each practitioner must assess and weigh these questions individually before arriving at an independent judgment about a particular theory’s merits.<sup>80</sup> While individual practitioners may each develop a rough personal algorithm for making such judgments, no completely “objective” or universal algorithm is discoverable by rationalistic means.<sup>81</sup> Ultimately, “every individual choice between competing theories depends on a mixture of objective and subjective factors, or of shared and individual criteria.”<sup>82</sup> As a result, one theory choice cannot be compelled over another in a logically perspicuous way, and the unpersuaded scientist is never “wrong” to hold out against a changing paradigm.<sup>83</sup> Rather, there are irreducibly idiosyncratic facets of every theory choice, which make an individual’s decision to change paradigms something like “a conversion experience that cannot be forced.”<sup>84</sup> All we can say is that for some combination of shared and individual reasons, Kepler and Galileo found the Copernican model better satisfied their personal algorithms for scientific value judgment—even when most other scientists did not—and their theory choices ultimately paved the way for many others.<sup>85</sup>

Despite all of this, Kuhn never claimed that no grounds on which to evaluate the merits of a theory are shared, and he always maintained that some theory choices are demonstrably better than others.<sup>86</sup>

77. *Id.* at 324. Kuhn makes the point, however, that this is only true if one views simplicity in a particular way—with reference to planetary motion—which helps illustrate that a practitioner must sometimes pick out certain aspects of a particular value as more or less important. *Id.*

78. *Id.*

79. *Id.* (“[The Copernican] difficulties in applying standard criteria of choice are typical and . . . arise no less forcefully in twentieth-century situations . . .”).

80. *Id.*

81. *Id.* at 329 (“I continue to hold that the algorithms of individuals are all ultimately different by virtue of the subjective considerations with which each must complete the objective criteria before any computations can be done.”).

82. *Id.* at 325.

83. KUHN, *STRUCTURE*, *supra* note 23, at 151 (conceding that resistance to paradigm change is “inevitable and legitimate”).

84. *Id.* at 150.

85. *Id.* at 151-54.

86. KUHN, *Objectivity*, *supra* note 27, at 337-39.

Indeed, scientists are often called upon to justify the value judgments that have led them to adopt one theory over another, and very rarely do they say, “I just like this approach better.”<sup>87</sup> Instead, a scientist usually outlines the particular scientific values she believes a theory serves and explains why she believes those values are important in a given context. Others can then disagree about the value judgment, and it is not inscrutable or, as Kuhn says, “undiscussable,” in the way that a simple matter of taste may be.<sup>88</sup> But—and this point is critical—such a discussion is only possible where the practitioner is transparent regarding her value judgment, both in conceding that it *is* a value judgment and in justifying the factors that influenced her decision. Then the scientific community is able to clearly identify and delineate both the “objective” and “subjective” elements of a theory choice and engage in meaningful and sometimes persuasive evaluations of competing paradigms. In such circumstances it is this transparency, more than any “objectivity,” that qualifies a particular practice as “scientific.”

Constitutional practice is, of course, unlike most scientific practice in fundamental ways. Perhaps most obviously and importantly, unlike in science, a number of interpretive paradigms can coexist relatively peacefully in constitutional practice, and no one paradigm is likely to force the others out of business. As I argue above, this is a result of the essential indeterminacy of language and our communicative practices.<sup>89</sup> However, important grounds for analogy between these practices remain, particularly regarding the mutual necessity for choice between incommensurable theoretical alternatives. In constitutional interpretation, the relevant moments of choice occur in close and difficult cases in which two or more interpretive modalities come into direct conflict and the decision to adopt a particular approach is outcome-determinative. In such cases, the judge or lawyer, like the scientist, must make a choice because no wholly objective criteria can compel a particular course of action. In these circumstances, I think Kuhn offers two important lessons for constitutional practitioners: (1) even science—that practice we hold out as the most objective of our endeavors—relies to some degree on individual value judgments, and constitutional interpretation inevitably (and legitimately) should do the same; and (2) some shared or objective choice values remain, and thus there may be “better” and “worse” theory choices. With this in mind, constitutional practitioners—most particularly judges—should be as transparent as possible about the value judgments that lead them to adopt particular interpretive theories in

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87. Although, as Kuhn points out, “After 1926 Einstein said little more than that about his opposition to the quantum theory.” *Id.* at 337.

88. *Id.* at 336-37.

89. See *supra* Part I.



particular contexts. In the next two Parts, I hope to provide some resources that might make this practice more systematic and accessible to constitutional interpreters.

### III. THE CANON OF CONSTITUTIONAL VALUES

The first task in devising a systematic “Kuhnian” approach to constitutional interpretive theory choice is to establish a catalog of broadly shared constitutional values, by which I mean the purposes or functions we believe the Constitution rightly serves in our republic. This list will provide something like a “shared canon” of choice criteria that practitioners can and should refer to when making and justifying particular interpretive decisions.<sup>90</sup> This task requires some unavoidably idiosyncratic choices of my own, and I want to be absolutely clear that my account here is by no means exclusive. Other practitioners quite likely could justify additions or refinements to my catalog, and in so doing they would only enrich this discussion and approach. Most important for my purposes is that the values I do identify are broadly held and that almost all constitutional practitioners would agree they are fundamental features of American constitutionalism. After all, broad acceptance is what enables these values to function as shared or “objective” elements in our theory choices, while it is the weight and combination given to these values in a particular context that defines our individual or “subjective” value judgments.

With that said, I propose to justify my list of values by reference to what various scholars have called the “constitutional canon”—those texts apart from the Constitution itself which feature most centrally in our interpretive practice<sup>91</sup>—with the assumption that texts become canonical precisely because they embody points of broad interpretive convergence.<sup>92</sup> In what follows, I identify four constitutional values—*constraint*, *flexibility*, *representation*, and *identity*—on display in a number of widely cited and admired constitutional texts.

#### A. *Constraint*: Marbury v. Madison and Lochner v. New York

Certainly one of the most critical functions the Constitution serves in our republic is as a constraint on government institutions and actors. As Bruce Ackerman has argued, it is the “higher law[]” in a

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90. For the reference, see KUHN, *Objectivity*, *supra* note 27, at 325 (characterizing criteria of choice as “shared canons”).

91. See, e.g., Balkin & Levinson, *supra* note 29, at 975-76 (explaining the concept of a constitutional canon).

92. I have made the point elsewhere that texts become canonical for a number of reasons, and the meanings associated with that canonicity are always evolving. Bartrum, *supra* note 29, at 329-30. For the purposes of this analysis, however, I have tried to stick to the values I believe are most broadly associated with the relative texts.

system dedicated to the rule of law.<sup>93</sup> Indeed, in this capacity, it is probably the most important limit in our conception of limited government. In operation, the Constitution restrains government in a number of ways, but in terms of constitutional interpretive practice I think it is most important to focus on the ways that it functions as a constraint within the institution of judicial review. With that in mind, the focus here is on two different forms of constitutional restraint, which establish something of an interpretive dialectic for constitutional practitioners. First, the Constitution acts as a positive constraint on the branches of the federal government; it defines the limited powers allocated to each and then provides specific restrictions on their exercise. It is to enforce these positive restraints that the practice of judicial review necessarily arose.<sup>94</sup> Second, however, the Constitution acts as a negative restraint on the institution of judicial review itself. The document at least implicitly demands that the Court not step in to deny the other branches those powers they rightly enjoy. These competing constraints are well articulated in two canonical texts: John Marshall's opinion in *Marbury v. Madison*, and Oliver Wendell Holmes' celebrated dissent in *Lochner v. New York*.<sup>95</sup>

*Marbury*, of course, arose out of a dispute over several signed, sealed, but undelivered judicial commissions left on the Secretary of State's desk when John Adams' administration reluctantly yielded to the incoming Jeffersonians.<sup>96</sup> In Marshall's opinion, the case boiled down to whether the Judiciary Act of 1789—which authorized the Supreme Court to issue “writs of mandamus . . . to any . . . persons holding office, under the authority of the United States”<sup>97</sup>—exceeded Congress' constitutional authority.<sup>98</sup> After reviewing Article III, Marshall concluded that the Act impermissibly enlarged the Supreme Court's original jurisdiction and was thus “repugnant to the constitution.”<sup>99</sup> The remaining question, whether the Court could therefore declare the Act void, was in Marshall's view “deeply interesting to the United States; but happily not of an intricacy proportioned to its interest.”<sup>100</sup> The Court had a fundamental duty to enforce the constitu-

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93. 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 6-7 (1991).

94. See, e.g., Mary Sarah Bilder, *The Corporate Origins of Judicial Review*, 116 *YALE L.J.* 502, 551-55 (2006) (demonstrating that virtually all Americans, including critics of judicial review, assumed the institution would be necessary during the ratifying debates).

95. *Lochner v. New York*, 198 U.S. 45, 74 (1905) (Holmes, J., dissenting); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). For an excellent discussion of the dialectical relationship between these cases, see Miguel Schor, *The Strange Cases of Marbury and Lochner in the Constitutional Imagination*, 87 *TEX. L. REV.* 1463 (2009).

96. *Marbury*, 5 U.S. (1 Cranch) at 155. The outgoing Secretary who failed to deliver the commissions was, of course, Marshall himself.

97. An Act to Establish the Judicial Courts of the United States, ch.20, § 13(b)-(d), 1 Stat. 73, 81 (1789).

98. *Marbury*, 5 U.S. (1 Cranch) at 173.

99. *Id.* at 176.

100. *Id.*

tional limits on legislative power, and thus the doctrine of judicial review was established.<sup>101</sup> This announcement itself would be enough to canonize *Marbury*, but for purposes of understanding the underlying constitutional value at work, it is worth considering some of Marshall's subsequent language.

The most illustrative passage finds Marshall responding to an imagined interlocutor's suggestion that the Court lacks authority to strike the Act down:

This doctrine would subvert the very foundation of all written constitutions. It would declare that an act, which, according to the principles and theory of our government, is entirely void; is yet, in practice, completely obligatory. It would declare, that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. . . . That it thus reduces to nothing what we have deemed the greatest improvement on political institutions—a written constitution—would of itself be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the construction.<sup>102</sup>

Marshall makes it clear that the very purpose of writing out the constitution was to establish express textual limits on federal power and jurisdiction, and without judicial enforcement those limits would be meaningless. Indeed, his argument here is the fountainhead of an ongoing debate over the interpretive implications of the Constitution's "writtness."<sup>103</sup> What is significant for my purposes is not so much the nature of this debate but that it continues to take place. This is powerful evidence that Marshall's opinion still embodies a broadly felt constitutional value: the positive constraint of a transcendent rule of law.

Judicial review itself presents a significant threat to the rule of law, however, in the specter of an overreaching bench of unelected, life-tenured jurists; and thus the Constitution must also act to check the Supreme Court's substantive power. This second type of constraint forms the complement—or antithesis—of the interpretive dialectic discussed above: the Court must *prevent* the political branches from overstepping their constitutional authority, but it must likewise *permit* those branches to exercise the powers that are rightly theirs. To fulfill this latter function, the Constitution must provide a negative kind of constraint on judicial action—the Court must not impose

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101. *Id.* at 176-80. It is perhaps interesting to note that, had Congress not mooted an earlier controversy by repealing an offending law, James Wilson's opinion in *Hayburn's Case* would likely have established federal judicial review. THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 368 (Kermit Hall, ed., 2d ed. 1992); *see also* *Hayburn's Case*, 2 U.S. 408 (1792).

102. *Marbury*, 5 U.S. (1 Cranch) at 178.

103. *See, e.g.*, Andrew B. Coan, *The Irrelevance of Writtness in Constitutional Interpretation*, 158 U. PA. L. REV. 1025, 1026-28 (2010) (canvassing the debate).

limitations that are not established by the constitutional text. This facet of constitutional constraint is on display in Justice Holmes's canonical dissent in *Lochner*. There the Court confronted a New York law—the Bakeshop Act—which limited the number of hours per week a laborer could work in a bakery.<sup>104</sup> The constitutional question presented was whether the maximum hours provision impermissibly burdened a “right of contract” implicitly protected by the Fourteenth Amendment’s Due Process Clause.<sup>105</sup> Although the Court had recently upheld a similar law governing miners,<sup>106</sup> Justice Rufus Peckham argued that, unlike mining, bakery work presented none of the dangerous conditions that might justify state intervention in contractual relations.<sup>107</sup> Declaiming any intention to “substitut[e] the judgment of the court for that of the legislature,” Peckham nonetheless concluded that the New York law was unconstitutional.<sup>108</sup>

Justice Holmes opened his short, powerful dissent by cutting directly to the core of the constitutional value involved:

This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law.<sup>109</sup>

The Constitution, Holmes suggested, leaves economic (and other) policy choices up to elected representatives and majority will, and unelected judges who read their own preferences into the constitutional text effectively subvert the rule of law to individual disposition. Indeed, he argued that the Constitution is a kind of neutral framework “made for people of fundamentally differing views,” and it is only policy-neutral kinds of constraints that the Court may enforce against the Legislature.<sup>110</sup> And, as the academic literature evinces, Holmes’ expression of the counterpoint—the negative limit—of judicial review has settled into the constitutional canon just as firmly as Peckham’s majority opinion has sunk to the depths of the anti-canon.<sup>111</sup>

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104. *Lochner v. New York*, 198 U.S. 45, 45-46 (1905). For an extended discussion of the case and its place in the canon, see Bartrum, *supra* note 29, at 346-68.

105. *Lochner*, 198 U.S. at 53.

106. *Holden v. Hardy*, 169 U.S. 366 (1898).

107. *Lochner*, 198 U.S. at 57.

108. *Id.* at 56-57, 64.

109. *Id.* at 75 (Holmes, J., dissenting).

110. *Id.* at 76.

111. For several fascinating accounts of this process, see Greene, *supra* note 29, at 417-22, 446-56; Anita S. Krishnakumar, *On the Evolution of the Canonical Dissent*, 52 RUTGERS L. REV. 781, 788-90 (2000); and Richard A. Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243, 252-64 (1998).

As illustrated in Marshall's canonical opinion in *Marbury* and Holmes's canonical dissent in *Lochner*, one of the most important functions the Constitution serves in our democratic processes is as a constraint on government institutions and actors. This constitutional value—what I have labeled *constraint*—has at least two distinct aspects: the Constitution should act as both a positive check on the lawmaking power and a negative check on the exercise of judicial review. Moreover, I suggest that this value is precisely the kind of criterion of choice constitutional practitioners should and do bear in mind as they evaluate the relative merits of adopting a particular interpretive theory in the context of a given constitutional problem. Of course, both the questions of how to apply the value of constraint and of how much weight to give this value relative to other criteria remain open to individual judgment. And among the other important values a practitioner must consider is the interest of *flexibility*.

### B. *Flexibility*: *McCulloch v. Maryland*

Americans proudly lay claim to the one of the oldest written constitutions in the world.<sup>112</sup> France, our rough contemporary in constitutional time, is on at least its fifth draft since 1791—and the careful observer might count several more.<sup>113</sup> To survive in the face of rapidly changing cultural and technological development, a constitution must be *flexible*—it must bend so that it does not break.<sup>114</sup> And this kind of flexibility is among the qualities we value most in our Constitution; its critical joints have enough play that we are able to avoid catastrophic political crises and incorporate even dramatically changed circumstances into the constitutional apparatus. It is, in part, this very flexibility—and the value we place upon it—that makes constitutional interpretation necessary and controversial. It complicates, and is in many ways in tension with, the value of constraint as described above. The more flexible the Constitution is, in other words, the less rigid and effective are the constraints it applies. Nonetheless, flexibility is indeed an important constitutional value in our interpretive practices, as is evident in perhaps the most canonical case in the constitutional catalog: *McCulloch v. Maryland*.<sup>115</sup>

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112. Depending on definitions, one might count San Marino's Statutes of 1600 as an older constitution. See William Miller, *The Republic of San Marino*, 6 AM. HIST. REV. 633, 642 (1901) (reviewing San Marino's constitutional history).

113. MARTIN A. ROGOFF, FRENCH CONSTITUTIONAL LAW: CASES AND MATERIALS 3-8 (2011).

114. One could, of course, make a very compelling argument that our Constitution did, in fact, break in 1861. See, e.g., AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 283 (1998) (arguing that, in many ways, we have a new constitution after Reconstruction).

115. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). Some of the material in the remainder of this section first appeared in Ian Bartrum, *The Modalities of Constitutional*

In *McCulloch*, the Court confronted fundamental questions about the relative scope of state and federal power under the Constitution. The case arose out of a controversy over the creation of a national bank, which had begun almost as soon as the Constitution was ratified. At Alexander Hamilton's urging, the First Congress established such a bank in 1791, with the proviso that its charter would expire in twenty years.<sup>116</sup> As it turned out, James Madison—who opposed the original bank—was President in 1811, and he successfully campaigned against renewing the charter.<sup>117</sup> But after the War of 1812 left the new nation in serious financial trouble, Madison changed his mind and got behind the movement for a Second National Bank.<sup>118</sup> Unhappy with this development, the state of Maryland decided to impose an annual tax of \$15,000 on the bank's Baltimore branch.<sup>119</sup> When cashier James McCulloch refused to pay, Maryland took him to court arguing that Congress had no constitutional authority to create the bank.<sup>120</sup> Chief Justice Marshall's opinion addressed two distinct questions: (1) whether Congress had the power to create the bank; and (2) if so, whether Maryland could tax it.<sup>121</sup> His discussion of the first question is what makes the constitutional value of *flexibility* most apparent.

Marshall began by conceding that the federal government is “one of enumerated powers,” and nowhere among those explicit powers could he “find that of establishing a bank or creating a corporation.”<sup>122</sup> But he went on to conclude that nothing in the Constitution—unlike its predecessor the Articles of Confederation—“excludes incidental or implied powers.”<sup>123</sup> Indeed, he argued, the Constitution's drafters “had experienced the embarrassments” of so limiting federal power and sought “to avoid those embarrassments” the second time around.<sup>124</sup> He then wrote a passage that is among the most canonical in our constitutional law, precisely because it enunciates the fundamental value of constitutional flexibility:

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*Argument: A Primer*, in LINDA H. EDWARDS, READINGS IN PERSUASION: BRIEFS THAT CHANGED THE WORLD 203 (2012).

116. GEORGE BROWN TINDALL & DAVID E. SHI, AMERICA: A NARRATIVE HISTORY 330-32 (4th ed., 1996).

117. *Id.* at 393.

118. *Id.*

119. *McCulloch*, 17 U.S. (4 Wheat.) at 319.

120. *Id.* at 317-19.

121. *Id.* at 401, 425.

122. *Id.* at 405, 406.

123. *Id.* at 406. Article II of the earlier document reserved to the states “every power, jurisdiction, and right” not “expressly delegated to the United States, in Congress assembled.” ARTICLES OF CONFEDERATION of 1781, art. II. Marshall distinguished this language from the Tenth Amendment, in that the latter omits the word “expressly.” *McCulloch*, 17 U.S. (4 Wheat.) at 406.

124. *McCulloch*, 17 U.S. (4 Wheat.) at 406, 407.

A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. . . . In considering this question, then, we must never forget, that it is *a constitution* we are expounding.<sup>125</sup>

The final line here is rightly the most famous and often repeated. Marshall's point is that it is in the very nature of a constitution to be flexible; that this flexibility is, in fact, critical to how constitutions actually function within a political system. With this in mind, Marshall had no trouble concluding that Congress enjoyed the authority to charter a national bank.<sup>126</sup>

*McCulloch*, then, stands as a testament to the importance we ascribe to constitutional flexibility in our democratic processes. We value a constitutional architecture that is broad, sturdy, and in many ways *generic* in that it allows us to adapt the underlying structures to many new (and novel) political purposes.<sup>127</sup> This desire for flexibility necessarily exists in some tension with the value of constitutional constraint—the more flexible a constitution is, the less it constrains—and in this regard the different weight that Chief Justice Marshall assigned to these values in different constitutional contexts is informative. That constitutional values may sometimes compete with one another only adds complexity (and idiosyncrasy) to our interpretive theory choices.

### C. *Representation: Democracy and Distrust and Brown v. Board of Education*

Our Constitution establishes a republican form of government, and to that end one of the principal functions it serves is as a guarantor of our right to be *represented* in critical decisionmaking processes. The ostensible purpose of a constitution, after all, is to provide a method or form of government, and in the United States, that method undoubtedly centers on popular participation. Recall that it was not just British taxation the colonists condemned on the eve of revolution; it was taxation *without representation*.<sup>128</sup> Thus, it can be no

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125. *Id.* at 407.

126. *Id.* at 425.

127. For an excellent account of state constitutionalism in precisely these architectural terms, see Jeffrey L. Amestoy, *Foreward: State Constitutional Law Lecture: Pragmatic Constitutionalism—Reflections on State Constitutional Theory and Same-Sex Marriage Claims*, 35 RUTGERS L.J. 1249 (2004).

128. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 89 (1980).

surprise that the bulk of the original constitutional text is dedicated to matters of process, jurisdiction, and representation.<sup>129</sup> Indeed, Article IV goes so far as to “guarantee to every State in this Union a Republican Form of Government,”<sup>130</sup> and even some of the most important rights enshrined in the first ten amendments speak directly to participation and representation—most of the First Amendment, for example—reflect this value.<sup>131</sup> And it is not just political majorities whose voice the Constitution protects; minorities must also have their place in the discussion.<sup>132</sup> The central importance of this value is on clear display in two canonical texts from the latter half of the 20<sup>th</sup> century: John Hart Ely’s seminal book *Democracy and Distrust*, and the Supreme Court’s opinion in *Brown v. Board of Education*.<sup>133</sup>

John Hart Ely was teaching at Harvard Law School in 1980 when he published perhaps the most influential and widely cited book on constitutional law of the last half century.<sup>134</sup> He dedicated *Democracy and Distrust* to Chief Justice Earl Warren, for whom he clerked during the 1964-65 term, and the book is in some ways an effort to defend the Court’s work under Warren’s leadership.<sup>135</sup> Building on Justice Harlan Stone’s famous fourth footnote in *United States v. Carolene Products Co.*,<sup>136</sup> Ely pushed back against both strict constructionist and “value imposition” interpretive theories and advocated what he called a “representation-reinforcing” approach to judicial review.<sup>137</sup> Under this approach, judicial oversight and intervention is most appropriate when the representative mechanism itself breaks down:

Malfunction occurs when the *process* is undeserving of trust, when (1) the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out, or (2) though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize

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129. See, e.g., U.S. CONST. art. I, §§ 1-7; art. II § 1, cls. 1-4; art. IV, §§ 3, 4; art. V; art. VII.

130. U.S. CONST. art. IV, § 4.

131. See U.S. CONST. amend. I (protecting rights of speech, press, petition, and assembly).

132. Among the chief functions the Federalists believed the new government would serve would be to protect minority rights in the states against coalesced majority factions. See THE FEDERALIST NO. 10, at 64-65 (Alexander Hamilton) (Jacob E. Cooke, ed. 1961); THE FEDERALIST NO. 85, at 588 (Alexander Hamilton) (Jacob E. Cooke, ed. 1961).

133. ELY, *supra* note 128; *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

134. See Fred R. Shapiro, *The Most-Cited Legal Books Published Since 1978*, 29 J. LEGAL STUD. 397, 401 (2000) (ranking Ely’s book first by a wide margin).

135. See Michael C. Dorf, *The Coherentism of Democracy and Distrust*, 114 YALE L.J. 1237, 1238 (2005) (arguing that the book “remains the single most perceptive justificatory account of the work of the Warren Court and arguably of modern constitutional law more broadly”).

136. 304 U.S. 144, 152 n.4 (1938).

137. ELY, *supra* note 128, at 85-88. Ely argued that strict-constructionist theories could not adequately address the Constitution’s open-ended clauses, while value oriented—or “interpretivist”—approaches placed too much power in judicial hands. See *id.* at 11-72.



commonalities of interest, and thereby denying that minority the protection afforded other groups by a representative system.<sup>138</sup>

Ely's first point clearly applies to political efforts to manipulate or interfere with voting or political speech, but his second point is directed, more subtly, at violations of the Equal Protection Clause.

Harnessing the old political theory concept of "virtual representation"—a phrase anathema to the founding generation for its misuse by British apologists—Ely argued that representation breaks down when legislators enact laws of which they themselves do not feel the burden.<sup>139</sup> True representation occurs only by "tying the interests of those without political power to the interests of those with it," and laws that disadvantage underrepresented minorities decisively break those ties.<sup>140</sup> In this way, Ely was able to conceive of what many might see as a substantive kind of value—"equal protection"—as serving value-neutral process and representative purposes. But for my purposes, it is not so important *where* Ely saw manifestations of the representation value appear in the text, but rather *that* he recognized this as a fundamental constitutional value—and that many others have agreed with that assessment.<sup>141</sup> Indeed, the same judgment underlies one of the most canonical decisions of the last century, *Brown v. Board of Education*.<sup>142</sup>

I hope I need not do much to justify *Brown's* canonical pedigree. Perhaps it is sufficient to note that Bruce Ackerman has suggested that today "no Supreme Court nominee could be confirmed if he refused to embrace *Brown*."<sup>143</sup> The case, of course, consolidated several equal protection challenges to racially segregated public schooling and asked the Court to overturn the constitutional doctrine that allowed for "separate but equal" treatment of the races.<sup>144</sup> In reinterpreting the Fourteenth Amendment, Chief Justice Warren's opinion characterized the importance of public education in terms of the underlying constitutional value of equal participation and representation:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of

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138. *Id.* at 103.

139. *Id.* at 82-83.

140. *Id.* at 83.

141. Ely would, of course, disclaim the "value" language as attached to representation or "participation," but he does concede that others might cast it in those terms. *Id.* at 75 n.\*.

142. 347 U.S. 483 (1954).

143. Ackerman, *supra* note 10, at 1752.

144. *Plessy v. Ferguson*, 163 U.S. 537 (1896). The quoted language appears in Justice John Harlan's celebrated dissent. *Id.* at 552 (Harlan, J., dissenting).

good citizenship . . . . Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.<sup>145</sup>

The constitutional importance of public education, then, is that it facilitates meaningful participation in American civic and political life. Further, the underlying constitutional value of representation demands that such participation is available to all on at least roughly equal terms. Whether in Ely's "virtual" conception or in Warren's own words, *Brown* is in significant ways a case about the importance of equal representation in American democracy. And the Warren Court would go on to champion this constitutional value in several other important decisions, including, notably, *Reynolds v. Sims*.<sup>146</sup>

Among the Constitution's most important purposes is to establish the structures and processes of a representative democracy. Two of the Twentieth Century's most canonical constitutional texts—*Democracy and Distrust* and *Brown v. Board of Education*—illustrate the centrality of this value in American constitutionalism. Again, the value may complement or compete with the values of constraint and flexibility as described above, and some may value it more than others, but I suggest that every competent constitutional practitioner must consider *representation* as she makes interpretive theory choices in particular cases.

#### D. *Identity: The Declaration of Independence and the Gettysburg Address*

In addition to the values discussed above, the Constitution serves an important expressive function as a source and symbol of our national *identity*. To be American is, as much as anything, to endorse a national ideology made manifest in a particular form of political organization constituted by our founding document. In this regard, the Constitution not only provides us with the kind of national memory and continuity that John Locke famously theorized as at the heart of personal identity over time,<sup>147</sup> it also gives us a kind of aspirational identity as we confront new problems in an ever-changing world. Even as we remain flexible to cultural and technological evolution, the Constitution helps remind us of the core principles that make us Americans. It is in this sense that we sometimes characterize something unconstitutional as also something "un-American." The value of national identity is particularly apparent in the constitutional canon-

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145. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

146. *Reynolds v. Sims*, 377 U.S. 533 (1964).

147. JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING, Bk. II, Ch. XXVII, §§ 10-20 (Peter H. Nidditch ed., 1975) (1689).

ization of two political texts: Thomas Jefferson's *Declaration of Independence* and Abraham Lincoln's *Gettysburg Address*.<sup>148</sup>

In two of the most important and controversial decisions handed down in the last century—*Gray v. Sanders* and *Reynolds v. Sims*—the Supreme Court made conspicuous reference to Jefferson and Lincoln.<sup>149</sup> In holding that the Fourteenth Amendment requires states to roughly equalize their citizens' representative voting power, the Court concluded that “[t]he conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote.”<sup>150</sup> In truth, of course, neither of these texts has any legal authority, but the Court understood their deep relevance to the constitutional question at hand: they are profound statements of American national identity and should therefore inform our understanding of constitutional first principles. Indeed, both texts—the Declaration rather more than the Address—appear in numerous Court opinions, and most constitutional scholars would place them firmly within the constitutional canon.<sup>151</sup> These two texts speak both to our historical identity as a nation and to the identity we aspire to assume in the years ahead, and that they have become canonical parts of our constitutional practice demonstrates the value we place on the Constitution as a source of those identities.

The Declaration of Independence is, of course, more than its soaring preamble, but it is in the preamble that we find the most compelling statement of our collective political identity:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed,—That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.<sup>152</sup>

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148. Some of the material in this section originally appeared in Bartrum, *supra* note 29, at 368-90.

149. *Reynolds v. Sims*, 377 U.S. 533, 558 (1964) (quoting *Gray*, 372 U.S. at 381); *Gray v. Sanders*, 372 U.S. 368, 381 (1963).

150. *Gray*, 372 U.S. at 381.

151. A brief search of the Supreme Court database on Westlaw reveals over 200 citations to the Declaration and twelve to the Address. As for scholars, see, for example, AKHIL REED AMAR, *AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* (2012); Balkin & Levinson, *supra* note 29, at 989.

152. THE DECLARATION OF INDEPENDENCE, para. 2 (U.S. 1776).

Jefferson made three distinct claims here about the American credo. The first is an aspirational kind of claim about basic human equality and the existence of certain natural rights; the second is a theoretical claim about the just grounds of governance; and the third is a political claim about the legitimacy of revolutionary reform. The first claim was, of course, not one the original Constitution recognized in operation, but it did state a profound national aspiration—an identity we might assume, in Lincoln's words, "as fast as circumstances should permit."<sup>153</sup> The latter two claims reflect our national ideas about the organization and spirit of democratic government in ways that continue to inform our public discourse.

Lincoln's Gettysburg Address repeated these same themes, with one important difference: it made the realization or failure of the Declaration's first claim—our aspirational human equality—the stakes of the Civil War:<sup>154</sup>

Four score and seven years ago our fathers brought forth upon this continent a new Nation, conceived in Liberty, and dedicated to the proposition that all men are created equal. . . . Now we are engaged in a great civil war, testing whether that Nation or any Nation so conceived and so dedicated can long endure.<sup>155</sup>

It was, after all, eighty-seven years after the signing of the Declaration—not constitutional ratification—that Lincoln spoke in Gettysburg; and it was this Jeffersonian "Nation so conceived" that was on trial by fire.<sup>156</sup> For Lincoln, the Declaration captured the real American identity, which the Constitution must be made to embody. And in perhaps the most often repeated phrase of the address, Lincoln reiterated Jefferson's latter claims and made his own rhetorical contribution to our identity narrative: we are dedicated to a "[g]overnment[] of the people, by the people, and for the people."<sup>157</sup> The constitutional significance of the Gettysburg Address, then, is that it recommits us to Jefferson's ideals and hopes to restore our lost national soul to its better nature.<sup>158</sup>

What is most important for purposes of this discussion is that these two formative texts—neither with any binding legal authority—resound

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153. Abraham Lincoln, Speech at Springfield, Illinois (June 26, 1857), in 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 398, 405-06 (Roy P. Basler ed., 1953).

154. Bartrum, *supra* note 29, at 389.

155. Abraham Lincoln, Address Delivered at the Dedication of the Cemetery at Gettysburg (Nov. 19, 1863), in 7 THE COLLECTED WORKS OF ABRAHAM LINCOLN 19-20 (Roy P. Basler ed., 1953).

156. *Id.* at 20.

157. *Id.* at 21.

158. See Harry V. Jaffa, *Abraham Lincoln and the Universal Meaning of the Declaration of Independence*, in THE DECLARATION OF INDEPENDENCE: ORIGINS AND IMPACT 29 (Scott Douglas Gerber ed., 2002) (discussing Lincoln's effort to extend our national identity to include black Americans).

so powerfully in our constitutional imaginations. They appear and reappear in our constitutional arguments precisely because they appeal to our deepest feelings of national identity, and we believe that the Constitution should function to advance that identity in law. The value of *identity*, then, asks us to consider how well a particular interpretive theory choice works to express our national sense of self or how successfully it produces results that align with our ideas about the kind of people and nation we are or want to be. In our choice calculus, it is a source of shared conviction, but it also ultimately refines our considerations of constraint, flexibility, and representation in imprecise and individualized ways.

In Part II, I suggested Thomas Kuhn's account of the role that shared scientific values play in scientific theory choice might contain some valuable lessons for our constitutional interpretive practices. In Part III I hope I have identified within the constitutional canon a nonexclusive list of broadly accepted "constitutional values," or the functions we generally believe the Constitution should play in our republic. In Part IV below, I give a descriptive account of how these shared values might have influenced the choices that several U.S. Supreme Court justices made in two illustrative cases.

#### IV. INTERPRETIVE THEORY CHOICE

With at least a working catalogue of constitutional values now in place, we can begin to assess the various ways that underlying judgments about these values may inform our choices between Bobbitt's interpretive modalities in outcome determinative cases. To begin, however, it is important to recall that Bobbitt's account is fundamentally Wittgensteinian in that he sees the meaning of constitutional language as intelligible only in practice, as we look to the ways that we use particular terms within the forms of argument that actually exist in our constitutional forms of life.<sup>159</sup> Moreover, this conception also means that the various modalities are, like Wittgensteinian language-games, essentially incommensurable.<sup>160</sup> That is, the meaning of constitutional language as it is used within one modal framework is not fully translatable into another modality—just as Newtonian mass may not exist within a different physical paradigm.

This means that, as is true of Kuhnian theory choices, we cannot justify our decision to adopt a particular interpretive modality in a particular case within the terms of the modality we have rejected.

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159. See BOBBITT, INTERPRETATION, *supra* note 4, at 22 ("The modalities of constitutional argument are the ways in which law statements in constitutional matters are assessed; standing alone they assert nothing about the world.").

160. *Id.* at 164. Bobbitt makes this point repeatedly, but perhaps the clearest statement of Bobbitt's position comes in his arguments rejecting the possibility of a "meta-rule" that could decide modal conflicts. *Id.*

And just as with scientific choices, no apparent transcendent kind of rule can compel—rather than influence—our choice between these incommensurable modalities. Bobbitt forthrightly conceded that this leaves us in a position very similar to that of the scientist confronted with a potential paradigm change—with our spades turned on justificatory bedrock:

If there is no conclusive mode, no trans-modal standard, how do we know when the judge is right? How do we justify the result of a constitutional decision in a particular case? It would appear that the incommensurate nature of the various modalities of argument that enable legitimation makes such an assessment impossible. For if these modes lead to different outcomes, we have no rule that enables us to choose among them.<sup>161</sup>

As discussed above, Bobbitt left this kind of decision to the largely inexplicable judicial “conscience”; indeed, he argued that it is the very incommensurability of the modalities that opens the necessary space for the kind “moral decisions” that legitimate judicial review.<sup>162</sup> After all, if a “meta-rule” or “trans-modal standard” did exist, there would in theory be no place for judicial decisionmaking—only straightforward rule-obedience—and we have no reason to think that judges do this any better than others.<sup>163</sup>

Nothing in what I argue is inconsistent with Bobbitt’s resolution, with which I basically agree. My claim is simply that we can understand these acts of judicial conscience as analogous to Kuhnian value judgments, which rely on both objective choice criteria and subjective decisionmaking. Conceived this way, it becomes possible to assess the merits of a particular choice against both the shared canon of constitutional values and the normative value justifications an individual practitioner necessarily supplies. While such an approach will never reveal “true” or “correct” theory choices, it seems likely to facilitate more clear-eyed discussion of the underlying normative divergences that motivate our value judgments, and to permit more “objective” assessments of those judgments against the backdrop of our shared constitutional value structure.

Part IV.A examines, through examples, the ways underlying constitutional value judgments might lead a practitioner toward a particular theory choice in a particular context. Part IV.B argues that these often opaque judgments should be made explicit in constitutional argument, with practitioners indicating the constitutional values on which they rely and then justifying the weight or gloss given to each value in making their judgment. I begin with a description of

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161. *Id.*

162. BOBBITT, INTERPRETATION, *supra* note 4, at 156-62, 178-86.

163. *Id.*

the potential correlations between constitutional values and interpretive theories using two fairly recent decisions as illustrations.

A. *Argumentative Modalities and Constitutional Values*

It is perhaps not too difficult to imagine, at least in a rough sort of way, the likely correlations between particular constitutional values and particular argumentative modalities in many contexts. We might suppose, for example, that *historical* argument most often serves the values of *negative constraint* and *identity* and is less likely to facilitate *flexibility*. *Structural* argument, on the other hand, might usually well promote the values of *representation* and *flexibility* but less often serve *identity*. And perhaps *ethos* arguments generally highlight *identity*, though sometimes at the cost of *constraint*. In truth, an argumentative modality may sometimes serve all four of the constitutional values to varying degrees. But if it were true that we could all agree on a one-to-one sort of correlation between particular constitutional values and particular argumentative modalities across a broad spectrum of decisional contexts, then interpretive theory choices would be a great deal more “objective” than they actually are. Indeed, it is exactly the impossibility of this sort of “universal algorithm” that led Kuhn to his account of value judgments in the first place.<sup>164</sup> Rather, the actual weight and combination of values that underlie any theory choice are imprecise, context-specific, and most importantly, subject to individual judgment.

With this in mind, I do not attempt to provide any formulaic kind of value/theory correlation here, nor do I make any normative judgments about the “rightness” or “truth” of a particular theory choice. All I can offer are descriptions of our actual practices—indeed, I suggest this is the proper aim of constitutional scholarship—in the hope that these examples can shed some illustrative light on our processes of constitutional argument and judging.<sup>165</sup> It is ultimately true, of course, that I make a normative claim about the desirability of value transparency in judicial opinions, but nowhere do I offer any particular criteria for evaluating those value judgments once they are revealed. That assessment is left to the practice itself, which allows particular judgments to settle more or less resolutely into the constitutional landscape. What I can do, however, is present some examples of outcome-determinative interpretive theory choices made in actual constitutional decisions and offer some assessment of the value judgments those choices seem to reflect. The two examples I have chosen are of fairly recent vintage, and they involve an interpretive

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164. KUHN, *Objectivity*, *supra* note 27, at 326.

165. Bartrum, *supra* note 29, at 330-31.

problem—the scope of federal legislative authority—that continues to generate heated constitutional debate.

### 1. *Gonzales v. Raich*

In 1996, California voters passed Proposition 215 legalizing the cultivation and use of marijuana for the treatment of “seriously ill” patients.<sup>166</sup> The state law, codified as the Compassionate Use Act of 1996,<sup>167</sup> squarely conflicts with the federal Controlled Substances Act (CSA), which classifies marijuana as a Schedule I drug without an accepted medical use.<sup>168</sup> This conflict eventually came to a head in August 2002, when federal agents raided a medicinal user’s home and, after a three-hour standoff with state authorities, confiscated and destroyed six marijuana plants.<sup>169</sup> The resulting Supreme Court case turned on whether Congress has constitutional authority to regulate the wholly intrastate cultivation and personal use of marijuana and thus raised time-honored questions about the scope of federal power under the Commerce Clause.<sup>170</sup>

Between 1937 and 1995, an extraordinarily deferential Court upheld every exercise of federal commerce power that came before it, but at the close of the last century two decisions—*United States v. Lopez* and *United States v. Morrison*—seemed to put some outer limits on congressional authority.<sup>171</sup> Before *Lopez* and *Morrison*, the doctrine dating back to *Wickard v. Filburn* permitted Congress to regulate even wholly intrastate activity (in that case, wheat cultivation for personal use) so long as it had the aggregate potential to exert “a substantial economic effect on interstate commerce.”<sup>172</sup> Since 1995, however, the Court has made it clear that the regulated activity must itself be economic in nature so that the Commerce Clause does not “obliterate the distinction between what is national and what is local . . . .”<sup>173</sup> The defendants in *Raich* hoped that with *Lopez* and *Morrison* as guidance, the Court might be prepared to further revisit the extraordinary deference it had afforded Congress in *Wickard*.

It was not to be, as the Court voted 6-3 to uphold the federal act as applied to California medicinal users.<sup>174</sup> Writing for the majority,

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166. *Gonzales v. Raich*, 545 U.S. 1, 5-6 (2005).

167. Compassionate Use Act of 1996, CAL. HEALTH & SAFETY CODE ANN. § 11362.5 (West 2012).

168. 21 U.S.C. § 812 (b)(1), (c)(10) (2012).

169. *Raich*, 545 U.S. at 7.

170. *Id.* at 15.

171. *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995).

172. *Wickard v. Filburn*, 317 U.S. 111, 125 (1942).

173. *Lopez*, 514 U.S. at 557 (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)).

174. *Raich*, 545 U.S. at 33.



Justice John Paul Stevens chose to proceed primarily within the doctrinal modality, and he argued that the case called for a fairly straightforward application of the *Wickard* rule.<sup>175</sup> Although *Lopez* and *Morrison* had put some checks on federal commerce power, the personal cultivation and use of marijuana was much too close to the personal wheat farming in *Wickard* to justify a constitutional distinction.<sup>176</sup> In particular, Stevens pointed out that the *Wickard* Court had reasoned that a rise in market prices might easily draw “personal” wheat into the interstate market, and he argued that the “high demand” for marijuana presented at least as great a danger.<sup>177</sup> In either case, he argued, “the regulation is squarely within Congress’ commerce power because production of the commodity meant for home consumption, be it wheat or marijuana, has a substantial effect on supply and demand in the national market for that commodity.”<sup>178</sup> Stevens thus saw *Raich* as a straightforward doctrinal decision, and no evidence suggests that he paused long to consider any competing interpretive theoretical approaches. Justice Sandra Day O’Connor wrote the principal dissent in the case, arguing—again doctrinally—that *Lopez* and *Morrison* had carved out sufficient room for individual states to “experiment” with different kinds of drug policies.<sup>179</sup> What is of more interest to this discussion of interpretive theory choice, however, are the concurring and dissenting opinions authored by Justices Antonin Scalia and Clarence Thomas, respectively.

Justice Scalia wrote separately to make clear that his understanding of the relevant doctrine was “more nuanced” than Stevens’ opinion might suggest.<sup>180</sup> The primary nuance, it turned out, was a largely prudential interpretive approach that located congressional authority to regulate intrastate marijuana use in a combined reading of the Commerce and the Necessary and Proper Clauses.<sup>181</sup> That Scalia would choose here to utilize the doctrinal and prudential interpretive modalities is at least somewhat anomalous given his oft-repeated preference for historical and textual arguments,<sup>182</sup> but for the same reasons, his opinion provides an informative case study regarding the kinds of value judgments that might underlie particular interpretive theory choices.

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175. *See id.* at 17-20.

176. *Id.* at 19.

177. *Id.*

178. *Id.*

179. *Id.* at 57 (O’Connor, J., dissenting).

180. *Id.* at 33 (Scalia, J., concurring).

181. *Id.* at 34.

182. Dan Slater, *Scalia Justifies His Jurisprudence: ‘I Am Not a Nut’*, WALL STREET J. L. BLOG (Apr. 8, 2008, 9:17 AM) (“I am a textualist, I am an originalist. I am not a nut.”), <http://blogs.wsj.com/law/2008/04/08/scalia-justifies-his-jurisprudence-i-am-not-a-nut>.

Scalia began with the concession that “activities that substantially affect interstate commerce are not themselves part of interstate commerce, and thus the power to regulate them cannot come from the Commerce Clause alone.”<sup>183</sup> Instead, he argued that “substantial effects” analysis must be rooted in the Necessary and Proper Clause, which empowers Congress to regulate not only commerce itself but also to “*facilitate* interstate commerce by eliminating potential obstructions, [or] to *restrict* it by eliminating potential stimulants.”<sup>184</sup> Despite his efforts to locate this principle precisely in the existing doctrine, it is evident that this particular “nuance” is primarily a product of his own prudential reading of the case law.<sup>185</sup> And, in the interest of constitutional prudence, he took matters one interpretive step further. Though he acknowledged that *Lopez* had placed some limits on the necessary and proper power, he emphasized that the doctrine continued to allow Congress to regulate even noneconomic activity so long as it was “an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.”<sup>186</sup>

Having thus restated and refined the doctrine, Scalia proceeded to make a prudential case for the wisdom of his suggested constitutional policy, at least as it seemed likely to play out in the case at hand. He pointed out that “[d]rugs like marijuana are fungible commodities” and argued that “Congress need not accept on faith that state law will be effective in maintaining a strict division between a lawful market for ‘medical’ marijuana and the more general marijuana market.”<sup>187</sup> Thus, as a practical matter, the realities of the interstate drug trade convinced Scalia that California’s medicinal marijuana law would “undercut” the federal government’s larger regulatory scheme.<sup>188</sup> This likelihood distinguished the case from *Lopez*, in which no “intelligible” federal scheme appeared threatened.<sup>189</sup> Therefore, on the prudential grounds that the state law would likely prove ineffective, he concluded that Congress must enjoy constitutional authority under the Necessary and Proper Clause to regulate intrastate

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183. *Raich*, 545 U.S. at 34 (Scalia, J., concurring).

184. *Id.* at 35 (emphasis added).

185. In this effort, Scalia relies predominantly on *United States v. Coombs*, 37 U.S. 72, 78 (1838) and *The Shreveport Rate Cases*, 234 U.S. 342, 353 (1914). The first case does no more than suggest that the commerce power should be read in conjunction with the Necessary and Proper Clause, *Coombs*, 37 U.S. at 76, and the second says only that Congress may take “measures necessary or appropriate” to foster and protect commerce, without citing to the Clause at all. *Shreveport Rate Cases*, 234 U.S. at 353.

186. *Raich*, 545 U.S. at 35-36 (Scalia, J., concurring) (quoting *United States v. Lopez*, 514 U.S. 549, 561 (1995)).

187. *Raich*, 545 U.S. at 40-41 (Scalia, J., concurring).

188. *Id.* at 41 n.3. To be more precise, it is Scalia’s prudential judgment that California will be *unable to enforce* its laws that makes it likely the state’s program will undercut the federal scheme. *Id.*

189. *Id.*

marijuana grown for personal use. In *Raich*, then, Scalia made a clear choice to abandon his avowed historical and textual interpretive predilections in favor of a fairly straightforward doctrinal and prudential approach.

Not so for Justice Thomas, however, who stuck firmly to constitutional “text, structure, and history” in concluding that “neither the Commerce Clause nor the Necessary and Proper Clause grants Congress the power to regulate respondents’ conduct.”<sup>190</sup> Repeating arguments he made in *Lopez* and *Morrison*, Thomas claimed that in 1789, commerce was understood to encompass only “selling, buying, and bartering, [or] transporting for those purposes”:

Throughout founding-era dictionaries, Madison’s notes from the Constitutional Convention, The Federalist Papers, and the ratification debates, the term “commerce” is consistently used to mean trade or exchange—not all economic or gainful activity that has some attenuated connection to trade or exchange. The term “commerce” commonly meant trade or exchange (and shipping for these purposes) not simply to those involved in the drafting and ratification processes, but also to the general public.<sup>191</sup>

This, of course, is a paradigmatic historical argument, complete with references to many of the canonical sources. Given the historical evidence, Thomas had no difficulty concluding that personal, intrastate marijuana cultivation and use did not fall within the original public meaning of “commerce.”<sup>192</sup>

Thomas conceded that the Necessary and Proper Clause presented a “more difficult” question, but for largely textual and structural reasons, he concluded that it also failed to afford Congress the relevant constitutional authority.<sup>193</sup> The clearest textual reason for the clause’s inadequacy is its express limitation to laws that “carry[] into Execution the *foregoing* Powers.”<sup>194</sup> If personal medicinal marijuana use is not “commerce”—much less “*interstate* commerce”—it is very difficult to see how federal regulation is an appropriate means to a constitutionally permissible end.<sup>195</sup> For structural reasons, Thomas flatly rejected Scalia’s prudential claims about the likely inefficacy of the state law in keeping medicinal marijuana out of the marketplace: “We normally presume that States enforce their own laws . . . and there is no reason to depart from the presumption here: Nothing

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190. *Id.* at 58 (Thomas, J., dissenting).

191. *Id.* at 58-59 (citations omitted).

192. *Id.* at 59 (“In the early days of the Republic, it would have been unthinkable that Congress could prohibit the local cultivation, possession, and consumption of marijuana.”).

193. *Id.* at 59, 60.

194. U.S. CONST. art I, sec. 8, cl. 18 (emphasis added).

195. *Raich*, 545 U.S. at 60 (Thomas, J., dissenting) (citing *McCulloch*’s limits on the necessary and proper power).

suggests that California's controls are ineffective."<sup>196</sup> Moreover, even if the state law did "allow some seepage" into the interstate market, federal regulation was not a "proper" exercise of the commerce power.<sup>197</sup> As a structural matter, Thomas argued that "the Government's rationale—that it may regulate the production or possession of any commodity for which there is an interstate market—threatens to remove the remaining vestiges of States' traditional police powers."<sup>198</sup> Unlike Scalia, Thomas chose to employ historical, textual, and structural interpretive modalities, and that choice was likely outcome-determinative in *Raich*.

The relevant question here is why Scalia would choose to write a straightforward doctrinal and prudential opinion in this case, when his typical historical and textual approach—as Thomas's dissent demonstrates—would likely have produced a different outcome. As Scalia himself offers very few clues about the value judgments that informed his theory choice, we can do no more than speculate as to his motivations. With that in mind, I suggest that it is reasonable to suppose Scalia judged the constitutional value of *flexibility* to be of paramount importance in this particular case. In addition to his repeated worries about the real world consequences of too rigid or formalistic a reading of the Commerce Clause, Scalia cited to *McCulloch v. Maryland*—again, the canonical instantiation of flexibility as a constitutional value—no less than six times in his brief opinion.<sup>199</sup> Indeed, he twice quoted Marshall's opinion at length, and on the second occasion the value of constitutional flexibility shone through:

To impose on [Congress] the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments, which might disappoint its most important designs, and is incompatible with the language of the constitution.<sup>200</sup>

For Scalia, Marshall's language supported his judgment that the Constitution must not straitjacket Congress' pursuit of deeply important national policy goals—in this case the War on Drugs.

In contrast, Thomas's dissent evinces his continuing emphasis on the constitutional value of *constraint*. Quite often, of course, Scalia shares Thomas's value preference on this score, and so—without much explanation—we are left to wonder why he chose differently here. It may be that Scalia believes that drug abuse and crime present an especially invidious threat to American culture and society,

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196. *Id.* at 63 (citation omitted).

197. *Id.* at 64-65.

198. *Id.* at 66.

199. *Id.* at 39, 41 (Scalia, J., concurring).

200. *Id.* at 41 (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 424).

and thus we should afford the federal legislature great constitutional latitude in its efforts to address these kinds of problems. He has, after all, abandoned history and text in favor of prudential arguments in other important cases involving drug law enforcement.<sup>201</sup> And this may be a perfectly legitimate constitutional value judgment—just the sort of considered decision we trust our judges to make—but without any effort to explain or justify his outcome-determinative interpretive theory choice, Scalia’s opinion leaves us no grounds on which to evaluate or challenge the merits of his judgment on this occasion. This (quite typical) kind of omission, I suggest, does our constitutional practice a disservice.

## 2. *United States v. Comstock*

A second example may help illustrate the complexity and importance of constitutional value judgments in close cases, particularly as this second case deals with a very similar interpretive problem—the limits of the Necessary and Proper Clause—in the context of a different Congressional policy goal. In *United States v. Comstock*, the Court faced a challenge to the Adam Walsh Child Protection and Safety Act (CPSA), which permits federal district courts to detain, by civil commitment, “sexually dangerous” federal prisoners, even after they have finished serving their criminal sentences.<sup>202</sup> A similar state law had survived multiple Due Process challenges,<sup>203</sup> and so it seemed that the only remaining question was “whether the Federal Government, exercising its enumerated powers, may enact such a statute as well.”<sup>204</sup> The Court concluded, by a 7-2 vote, that the Necessary and Proper Clause gave Congress the requisite constitutional authority.<sup>205</sup>

Writing for the majority, Justice Stephen Breyer adopted his customary prudential interpretive approach. He argued that five interrelated factors supported the congressional authority in question. First, though he conceded that the Constitution does not explicitly authorize the federal government to “criminalize conduct,” “imprison individuals,” or “govern[] prisons and prisoners,” he relied heavily on *McCulloch* for the proposition that “Congress nonetheless possesses broad authority to do each of those things in the course of ‘carrying into Execution’ [its] enumerated powers.”<sup>206</sup> Second, the civil commitment statute was only “a modest addition to a longstanding fed-

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201. *See, e.g.,* *Emp’t Div. v. Smith*, 494 U.S. 872, 879 (1990) (concluding that the Free Exercise Clause does not exempt religious peyote users from general, neutrally applicable drug laws, on the prudential grounds that such an exemption would permit “every citizen to become a law unto himself”).

202. 18 U.S.C. § 4248 (2006); *United States v. Comstock*, 130 S. Ct. 1949 (2010).

203. *Kansas v. Crane*, 534 U.S. 407 (2002); *Kansas v. Hendricks*, 521 U.S. 346 (1997).

204. *Comstock*, 130 S. Ct. at 1956.

205. *Id.* at 1949.

206. *Id.* at 1958.

eral statutory framework” and thus did not represent a radical departure from standard congressional practice.<sup>207</sup> Third, the civil commitment provision was a “reasonable” way for Congress to exercise its custodial duty to protect the public “from the danger federal prisoners may pose.”<sup>208</sup> Fourth, the statute actively “accommodate[ed]” state law enforcement interests, and so it did not “invade state sovereignty or otherwise improperly limit the scope of powers that remain with the States.”<sup>209</sup> Finally, the law’s sufficiently “narrow . . . scope” precluded the possibility that it might be the first step towards the realization of a “general [federal] police power.”<sup>210</sup> Taking all of these considerations together, Breyer concluded that the constitutional enumeration of federal powers was flexible enough to encompass the civil commitment of sexually dangerous persons.<sup>211</sup>

Given the latitude and flexibility Justice Scalia had read into the Necessary and Proper Clause with his prudential arguments in *Raich*, one might expect that he would have at least concurred with the majority in *Comstock*. But he made a different value judgment and theory choice this time, and instead signed on to almost all of Justice Thomas’s structural, textual, and historical and dissent.<sup>212</sup> Thomas began with the same structural concerns about the limits of enumerated federal power that informed his dissent in *Raich*.<sup>213</sup> He then found in the text a two-part limitation on the necessary and proper power: First, a law must be “necessary” inasmuch as it is “appropriate and plainly adapted to the exercise of an enumerated power.”<sup>214</sup> Second, a law must be “proper” in that it is “not otherwise prohibited by the Constitution and not [in]consistent with its letter and spirit.”<sup>215</sup> In other words, no matter how well a statute serves a stated federal objective, it is unconstitutional if that objective “is anything other than ‘carrying into Execution’ one or more of the Federal Government’s enumerated powers.”<sup>216</sup>

Thomas then moved to historical argument and located this two-step principle in the debates over constitutional ratification that occurred in the states between 1787 and 1789.<sup>217</sup> He pointed particularly to the responses that Alexander Hamilton and James Madison had made to Anti-Federalist claims that the Necessary and Proper Clause

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207. *Id.* at 1961.

208. *Id.*

209. *Id.* at 1962 (internal quotations omitted).

210. *Id.* at 1964-65.

211. *Id.* at 1965.

212. *Id.* at 1970 (Thomas, J., dissenting).

213. *Id.* at 1970-71.

214. *Id.* at 1972 (internal quotations omitted) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819)).

215. *Id.* (internal quotations omitted) (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 421).

216. *Id.* (citation omitted).

217. *Id.*

would effectively undermine any limits on federal power.<sup>218</sup> Both men, he argued, understood that the “sweeping clause . . . only extend[s] to the enumerated powers.”<sup>219</sup> And he dug up a particularly sympathetic account of the clause that George Nicholas had given during the Virginia ratification debates:

Suppose [the Necessary and Proper Clause] had been inserted, at the end of every power, that they should have power to make laws to carry that power into execution; would that have increased their powers? If, therefore, it could not have increased their powers, if placed at the end of each power, it cannot increase them at the end of all.<sup>220</sup>

With this historical understanding in mind, Thomas concluded that the Necessary and Proper Clause could not enlarge the legitimate subjects of federal authority—if Congress could not locate its legislative objective squarely within one of its enumerated powers, then the necessary and proper power simply had no application.<sup>221</sup>

Even Breyer’s majority opinion conceded that no “single specific enumerated power” could justify the federal civil commitment provision,<sup>222</sup> and so Thomas had little trouble concluding that no “readily discernable” enumerated power—not even the Commerce Clause, the “enumerated power this Court has interpreted most expansively”—authorized the CPSA.<sup>223</sup> He argued that the principal structures of federalism reserve to the states the power to police sexual predators and, moreover, local governments are well-equipped to address such problems.<sup>224</sup> Indeed, that several states had already enacted similar statutes—laws that the CPSA self-consciously mimicked—was proof enough that the states well understood their obligations as the primary source of general police power.<sup>225</sup> Thus, just as in *Raich*, Thomas judged that constitutional structure and history placed unmistakable constraints on the reach of federal legislative authority. Unlike *Raich*, however, Thomas found a willing cosigner in Justice Scalia.

Again, the relevant question for purposes of this discussion is why Scalia had a change of heart and chose to take a different interpre-

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218. *Id.*

219. *Id.* (quoting 3 J. ELLIOT, *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 455 (2d. ed. 1854)).

220. *Id.* (quoting ELLIOT, *supra* note 219, at 245-46).

221. *Id.* at 1972-73.

222. *Id.* at 1964. Breyer (and Alito in concurrence) pointed out, however, that the necessary and proper power for each individual detention is incidental to the enumerated objective underlying the particular federal statute authorizing criminal conviction. *Id.* at 1964, 1969 (Alito, J., concurring).

223. *Id.* at 1973-74 (Thomas, J., dissenting).

224. *Id.* at 1974 & n.6.

225. *Id.* at 1974.

tive approach to the constitutional question in *Comstock*—and again, we have no explicit justification to work with. The simple answer might be that in *Raich* the necessary and proper power attached directly to an enumerated power—the Commerce Clause—in a way that was not true in *Comstock*. But this answer is too simple to shed any real light on the matter. For if Scalia had chosen history and text over doctrine and prudence in *Raich*, he might easily have concluded (as Thomas did) that personal marijuana use simply is not ‘commerce,’ at which point the Necessary and Proper Clause comes just as untethered as it appeared in *Comstock*. And if he had chosen doctrine and prudence over history and text in *Comstock*, he might easily have relied on the same (voluminous) precedent that Breyer cited in support of Congress’s authority to create and punish federal crimes, which would have provided the appropriate predicate for the exercise of necessary and proper powers.<sup>226</sup> The simple answer, then, does no more than beg the question about Scalia’s determinative value judgments and interpretive theory choices in these cases.

The best guess might be that Scalia judged *constraint* as more important than *flexibility* in *Comstock*, whereas he made the opposite judgment in *Raich*. And again, these may be perfectly sound judgments of the kind we expect from a Supreme Court Justice. Perhaps Scalia believed that the national (and international) nature of the drug trade presents a problem that requires a flexible federal response, while localized state governments are better able to handle the dangers posed by individual sexual predators without interference from a monolithic federal bureaucracy. Conversely, Breyer might have judged that sex crime calls for as flexible and multifaceted a governmental response as the Constitution can afford. The difficulty is that such unexplained and unjustified interpretive theory choices obscure these underlying value judgments and so sweep potentially constructive constitutional discussions aside to preserve the ideological pretension that constitutional interpretation is as “objective” a practice as calling balls and strikes.

### B. Value Transparency in Constitutional Argument

Although many interpretive theory choices go as unexplained as those discussed above, judges do, on occasion, make their underlying value judgments explicit. In this final Part, I argue that this sort of transparency should be standard practice in constitutional argument, at least in those close cases of modal conflict where the choice of interpretive theories is likely to determine the final outcome. It may be that the general reluctance to discuss underlying value judgments is a product of jurisprudential discomfort with the appearance of judi-

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226. *Id.* at 1957-58.



cial policymaking. In truth, however, the judgments at issue, when properly made, relate not to social or economic policy but rather to constitutional values, and one of the best reasons to make this process more transparent is to make it easier to separate the former kinds of argument from the latter. It is when decisive underlying judgments remain obscure that critics can most credibly read illegitimate motivations into a decision. But even more important than maintaining appearances, value transparency promises to put the real constitutionally normative divergences that divide us more squarely in focus. And any argumentative practice that moves us closer to the actual sources of dispute is, in my estimation, an important step forward.

In the space that remains, I present an example of a Supreme Court opinion that demonstrates exactly the kind of value transparency I propose. *Planned Parenthood v. Casey* addressed the most closely contested and controversial constitutional issue of our time—elective abortion—in a context where the choice of interpretive modality was almost certainly outcome-determinative.<sup>227</sup> And *Casey* came at a particularly acute moment in political time. Just a year and a half into his presidency, George H. W. Bush had already taken advantage of the opportunity to replace two liberal stalwarts—William Brennan and Thurgood Marshall—with Supreme Court Justices of his choosing.<sup>228</sup> Many thought that Bush appointees David Souter and Clarence Thomas would swing the Court decisively against abortion rights, and so just over a year after Thomas took the bench, the nation anxiously awaited the decision in *Casey*. To most observers, it appeared that the Court's two-decade-old decision in *Roe v. Wade* was in real danger of repudiation, but when the decision was announced in late June of 1992, an unprecedented coalition delivered an unlikely opinion.<sup>229</sup>

Justices Sandra Day O'Connor, Anthony Kennedy, and David Souter authored a joint opinion, and from the opening sentences it was evident they would bring their constitutional value judgments to the surface:

Liberty finds no refuge in a jurisprudence of doubt. Yet 19 years after our holding that the Constitution protects a woman's right to terminate her pregnancy in its early stages, that definition of liberty is still questioned. Joining the respondents as *amicus curiae*, the United States, as it has done in five other cases in the last decade, again asks us to overrule *Roe*.<sup>230</sup>

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227. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

228. HENRY J. ABRAHAM, *JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT* 365-67, 411 n.72 (3d ed., 1992).

229. *Casey*, 505 U.S. at 843.

230. *Id.* (citation omitted).

Right from the outset, then, the coalition suggested that the Constitution cannot well serve its function in our republic when its meaning is subject to persistent doubt and revisitation. Thus, the Justices made no secret of their judgment that the constitutional value of *negative constraint*—which limits the Court’s role as an active constitutional actor—must substantially inform the choice of interpretive theories in this case.

Doctrinal argument, particularly the kind of doctrinal argument that emphasizes the importance of *stare decisis*, can well serve the value of negative constraint. Indeed, as retired Justice Lewis Powell observed in a celebrated lecture before the New York Bar Association, the principle of *stare decisis* preserves the Court’s legitimacy by assuring the public “that the Court is not composed of unelected judges free to write their policy views into law.”<sup>231</sup> It was exactly this kind of legitimacy-through-constraint that the *Casey* coalition judged to be of paramount importance in addressing an issue like abortion.<sup>232</sup> And the Justices made clear that it was this underlying value judgment that led them to adopt a restrictive doctrinal interpretive approach:

Our analysis would not be complete . . . without explaining why overruling *Roe*’s central holding would not only reach an unjustifiable result under principles of *stare decisis*, but would seriously weaken the Court’s capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law. . . . The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures. . . .

. . . .

Thus, the Court’s legitimacy depends on making principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation.<sup>233</sup>

In this instance, the need for restraint and legitimacy called for application of the “neutral principles” that characterize the doctrinal modality.<sup>234</sup>

It is of course true, however, that there will often be disputes within an interpretive modality about the proper way forward, and the coalition frankly acknowledged “the rule of *stare decisis* is not an inexorable command.”<sup>235</sup> And so the justices went on to explain the principles underlying their judgment that *Casey* called for a rigid,

231. Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, 47 WASH. & LEE L. REV. 281, 286-87 (1990).

232. *Casey*, 505 U.S. at 866-67.

233. *Id.* at 865-66.

234. The quoted language is taken from Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

235. *Casey*, 505 U.S. at 854 (internal quotations omitted).

constrained reading of precedent.<sup>236</sup> They suggested four considerations should inform the decision of whether to overturn a weighty precedent: (1) whether the previous rule has proved “unworkable”; (2) whether significant reliance interests are at stake; (3) whether the law has evolved so as to make the precedent a “doctrinal anachronism”; and (4) whether the factual premises underlying the older opinion have changed so as render the decision “irrelevant” or “unjustifiable.”<sup>237</sup> None of these considerations, the coalition concluded, could in this case justify a departure from *Roe*’s “essential holding.”<sup>238</sup> And it is worth noting here that intramodal disputes, like the doctrinal question of when to abandon precedent, *can* be contested in commensurable terms, with doctrinal terms brought into direct competition with other doctrinal terms; and that is precisely what the joint opinion did in *Casey*. It created a four-part doctrinal test for overruling precedent, and in this case, *Roe* survived.

Normally, such an intradoctrinal resolution might be enough to close out an opinion, but “the sustained and widespread debate”<sup>239</sup> *Roe* had engendered inspired the justices to reemphasize—a second time—their judgment that, in this circumstance, the constitutional value of negative constraint counseled the rigid doctrinal approach they had taken. The coalition argued there were “two circumstances” in which a decision to overturn precedent could dangerously undermine the Court’s credibility as a constitutional actor.<sup>240</sup> The first is when “frequent overruling” or “vacillation” suggests the Court is not operating in “good faith”; after all, the justices pointed out “[t]here is a limit to the amount of error that can plausibly be imputed to prior Courts.”<sup>241</sup> The second circumstance arises in contexts such as that presented in *Casey*, where “the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe*.”<sup>242</sup> In this regard, the justices compared the decision in *Roe* to the similarly divisive issue the Court confronted in *Brown v. Board of Education*.<sup>243</sup> In both cases, the Court had called on “the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.”<sup>244</sup> Such momentous decisions, the coalition argued, must carry “rare precedential force,” as the losing side is sure to keep working to undermine

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236. *Id.* at 855-61.

237. *Id.* at 855.

238. *Id.* at 846.

239. *Id.* at 861.

240. *Id.* at 866.

241. *Id.* at 866.

242. *Id.*

243. *Id.* at 861-63.

244. *Id.* at 867.

the holding—and the Court should not allow itself to become a manipulable part of the political process.<sup>245</sup>

Thus, it is when the political pressures are at their most intense that we should place the greatest weight on the value of negative constraint. For it is at these times that the Court is most vulnerable to the appearance of ideologically motivated activism, and steadfast adherence to doctrinal principle is concomitantly most important. In such circumstances:

[O]nly the most convincing justification under accepted standards of precedent could suffice to demonstrate that a later decision overruling the first was anything but a surrender to political pressure, and an unjustified repudiation of the principle on which the Court staked its authority in the first instance. So to overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question. . . . The promise of constancy, once given, binds its maker for as long as the power to stand by the decision survives and the understanding of the issue has not changed so fundamentally as to render the commitment obsolete. From the obligation of this promise this Court cannot and should not assume any exemption when duty requires it to decide a case in conformance with the Constitution. A willing breach of it would be nothing less than a breach of faith, and no Court that broke its faith with the people could sensibly expect credit for principle in the decision by which it did that.<sup>246</sup>

Lofty rhetoric indeed; but at least it is rhetoric directed to answering what are, in my opinion, the most fundamental questions in cases of modal conflict: what constitutional values are most important in a particular context, and which interpretive theory best serves those values? When these underlying judgments are laid bare, as the coalition frankly accomplished in *Casey*, it allows those who would have made a different interpretive theory choice to challenge the decision on its stated merits and then to provide their own competing account of the constitutional values at stake.

Indeed, Chief Justice William Rehnquist mounted just such a challenge in his dissent in *Casey*.<sup>247</sup> Perhaps unaccustomed to such a candid discussion of value judgments and theory choice, Rehnquist admittedly confined his response to a criticism of the coalition's judgment without forwarding much of an alternative account as to why a historical, structural, or textual interpretation might be more appropriate. Nonetheless, the give and take on these questions is something of a welcome anomaly in constitutional argumentative

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245. *Id.*

246. *Id.* at 867-68.

247. *Id.* at 944 (Rehnquist, C.J., concurring in part and dissenting in part).

practice. He began his criticism by taking aim at the coalition's judgment about the need for constraint in politically divisive cases:

This is a truly novel principle, one which is contrary to both the Court's historical practice and to the Court's traditional willingness to tolerate criticism of its opinions. Under this principle, when the Court has ruled on a divisive issue, it is apparently prevented from overruling that decision for the sole reason that it was incorrect, *unless opposition to the original decision has died away*.<sup>248</sup>

Instead of explaining the grounds of his own interpretive theory choice, however, Rehnquist devoted the bulk of his discussion to criticizing the coalition's approach on the prudential grounds that no clear criteria separates such "intensely divisive" cases from more typical precedent.<sup>249</sup> Indeed, Rehnquist ultimately made the unfortunate claim that in revealing the grounds of its interpretive theory choice, the Court had actually undermined its own legitimacy:

The sum of the joint opinion's labors in the name of *stare decisis* and "legitimacy" is this: *Roe v. Wade* stands as a sort of judicial Potemkin Village, which may be pointed out to passers-by as a monument to the importance of adhering to precedent. But behind the facade, an entirely new method of analysis, without any roots in constitutional law, is imported to decide the constitutionality of state laws regulating abortion. Neither *stare decisis* nor "legitimacy" are truly served by such an effort.<sup>250</sup>

Of course, I entirely disagree with the Chief Justice's suggestion that the joint opinion's interpretive transparency threatens the Court's legitimacy. Rehnquist's pretensions notwithstanding, it is not as though omitting all discussion of the (necessarily) "novel" value judgments that inform interpretive theory choices in difficult cases will convince any reasonable observer that those judgments do not actually occur. Better, I suggest, to be forthright and candid and, in so doing, allow practitioners the opportunity to evaluate the underlying judgments and choices as they are presented and justified. After all, it is not the *Casey* coalition's *policy* judgments about abortion that are on display,<sup>251</sup> but rather its *value* judgment about the constitutional importance of judicial restraint in politically divisive cases. This latter kind of judgment is of exactly the sort we expect constitutional judges to make, and no credibility is lost by offering the public a reasoned explanation.

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248. *Id.* at 958.

249. *Id.* at 959.

250. *Id.* at 966.

251. Indeed, the coalition Justices make clear early on that, "[s]ome of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision." *Id.* at 850 (plurality opinion).

Even if Rehnquist's response to the Court's theory justification in *Casey* ultimately falls a little flat, that he was able to challenge the coalition's theory choice justifications on their express terms makes the decision an excellent example of the kind of value transparency I propose. Indeed, Justice Scalia took up Rehnquist's flag—with perhaps a little more success—a decade later with his dissent in *Lawrence v. Texas*.<sup>252</sup> Just as the competent scientist must justify his choice between incommensurable scientific paradigms in terms of the shared sorts of criteria Thomas Kuhn described, the competent constitutional practitioner should be prepared to justify her interpretive theory choices in terms of our shared constitutional values. Bringing this discussion to the forefront, as the Court does in *Casey*, can only make our arguments clearer, more rational, and more closely focused on the real sources of constitutional dispute.

## V. CONCLUSION

Philip Bobbitt has done constitutional law an immense service with his practice-based account of the interpretive “modalities” at work in constitutional argument. By tying the “legitimacy” of a particular constitutional assertion to its form—that is, to its consonance with the accepted grammar of constitutional practice—Bobbitt frees us from the regressions and circularity that persist in attempts to justify a “correct” interpretive methodology by reference to some external foundation of constitutional “truth.” Law, for Bobbitt, is a practice—an activity—not an artifact. To understand the law is thus to know how to practice it, and so to understand the Constitution is to be able to make legitimate assertions about its meanings within the existing grammatical forms. The academic's role, then, is to describe that practice rather than try to justify or discredit it in terms of some external normative theory. Just as the Wittgensteinian philosopher's task is to reveal the misuses of language that create philosophical puzzles—to thus “shew the fly the way out of the fly-bottle”<sup>253</sup>—the constitutional theorist's job is to better understand and explain the grammar of constitutional practice *as it exists*.

The descriptive explanation Bobbitt offers recounts the six modalities of argument outlined above. For Bobbitt, these modalities are roughly analogous to Wittgensteinian language games in that the “meaning” of a term derives from its proper use within a particular argumentative modality. Thus, like different language games, differ-

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252. *Lawrence v. Texas*, 539 U.S. 558, 586 (2003) (Scalia, J., dissenting) (“‘Liberty finds no refuge in a jurisprudence of doubt.’ That was the Court's sententious response, barely more than a decade ago, to those seeking to overrule *Roe v. Wade*. The Court's response today, to those who have engaged in a 17-year crusade to overrule *Bowers v. Hardwick*, is very different. The need for stability and certainty presents no barrier.” (citations omitted)).

253. WITTGENSTEIN, *supra* note 1, § 309.

ent argumentative modalities are *incommensurable*: a term's meaning within one modality may not be fully translatable into the terms used in another modality. As a consequence, there is simply no way to fully justify one type of constitutional assertion—say a “doctrinal” assertion—in terms of another modality; and thus a conflict between two or more modalities cannot be resolved in a practically justifiable way. This lack of a “trans-modal” algorithm has bothered many theoreticians (and perhaps limited Bobbitt's own influence) because scholars and advocates tend to want to speak normatively and generally try to provide “right” answers. I agree with Bobbitt that no such algorithm exists, but I hope that—in drawing attention to Thomas Kuhn's account of value judgments and theory choices—this Article has shed some new light on the processes by which we choose between incommensurable interpretive approaches in close and difficult cases.

Kuhn, like Wittgenstein in language and Bobbitt in law, understood that competing scientific paradigms are ultimately incommensurable. The very terms used in one paradigm refer to a different network of concepts in another, and so the decision to adopt a new paradigm in terms that exist in an older one cannot be justified. Kuhn's critics responded with fears that his account undermined the basic “rationality” of science: If a scientist must choose to adopt a new paradigm before she has the conceptual apparatus necessary to justify that choice, it appears the choice itself cannot arise from the application of neutral or “objective” principles. There is, in other words, no algorithmic way to claim that a paradigm choice is ultimately “right” or “wrong”—and science appears ultimately to be a subjective kind of pursuit. Kuhn pushed back, however, and argued objective choice “criteria” do inform—if not determine—scientific theory choices. These criteria are objective in that they are broadly shared and form something like a “shared canon” that scientists must refer to in justifying their theory choices. The lack of a universal choice algorithm means only that some element of the final decision remains personal and subjective. Thus, for Kuhn, the emphasis given a particular criterion in a particular context is open to individual value judgment, and importantly, it is incumbent on the individual scientist to explain this judgment when justifying her final theory choice.

I suggest that Kuhn's account has important lessons for the practice of constitutional law. It is a useful way to conceive of the choices that constitutional practitioners must make between incommensurable interpretive modalities in cases where this theory choice is likely outcome-determinative. To facilitate this kind of approach, I derive an incomplete and—admittedly—somewhat idiosyncratic list of “constitutional values” from the constitutional canon. I refer to the canon because it is critically important that the values I identify are broadly shared, as this is what allows them to be the “objective” elements

at work in our interpretive theory choices. The four overlapping and competing values I identify are *constraint*, *flexibility*, *representation*, and *identity*. I suggest these are among the important purposes or functions we believe the Constitution serves in our democratic system, and that they should inform our interpretive theory choices in close and difficult cases.

I then examine the ways particular constitutional value judgments may have influenced particular interpretive theory judgments in two concrete cases. I conclude that like the competent scientist, the competent constitutional practitioner should forthrightly acknowledge and justify the constitutional value judgments that led her to choose an interpretive theory in a given case, and I offer the joint opinion in *Planned Parenthood v. Casey* as an example of an argument so constructed. Such explanations move us closer to the real sources of our constitutional disagreements by shifting focus towards the underlying judgments that we all make about the purposes the Constitution serves in our legal practice. It is then in terms of these purposes that we should make and justify our interpretive theory choices, most particularly when those choices seem likely to determine the outcome of an important case.

Ultimately, of course, revealing and assessing the value judgments that influence interpretive theory choices is unlikely to reduce either the number or the intensity of our constitutional disputes. Indeed, as Bobbitt persuasively argues, it is only through these disputes—through actual constitutional argument—that we legitimate constitutional assertions and the institution of judicial review itself. A practice of value transparency promises, however, to move our arguments closer to the questions that really should concern us in constitutional law. How does constitutional practice work? What purposes does the Constitution itself serve in that practice? How do we make interpretive theory choices that reinforce—rather than undermine—those purposes? Understanding and justifying the judgments we make on these questions in particular cases can only strengthen our practice and clarify its nature. And after all it is clarity, not truth, that helps the fly to find his way out of the bottle—and it is clarity—not truth—that the constitutional theorist can offer constitutional practice.