

# Michigan Law Review

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Volume 119 | Issue 4

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2021

## Anti-Modalities

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### Recommended Citation

David E. Pozen & Adam M. Samaha, *Anti-Modalities*, 119 MICH. L. REV. 729 (2021).  
Available at: <https://repository.law.umich.edu/mlr/vol119/iss4/3>

<https://doi.org/10.36644/mlr.119.4.anti-modalities>

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## ANTI-MODALITIES

David E. Pozen\* & Adam M. Samaha\*\*

*Constitutional argument runs on the rails of “modalities.” These are the accepted categories of reasoning used to make claims about the content of supreme law. Some of the modalities, such as ethical and prudential arguments, seem strikingly open ended at first sight. Their contours come into clearer view, however, when we attend to the kinds of claims that are not made by constitutional interpreters—the analytical and rhetorical moves that are familiar in debates over public policy and political morality but are considered out of bounds in debates over constitutional meaning. In this Article, we seek to identify the “anti-modalities” of constitutional law and to investigate their implications.*

*The anti-modalities both stabilize and undermine the modalities. On the one hand, they work in tandem to ensure that constitutional interpretation remains a distinctive legal enterprise. The two argument bundles are in this sense mutually reinforcing, even co-constitutive. On the other hand, by ruling out various important categories of reasoning—from general moral theory to emotional judgment to many cost-benefit calculations—the anti-modalities put continuous pressure on the modalities to accommodate such reasoning in adulterated forms, or else insist on a long distance between the inputs into supreme law and the concerns that most people care about. We call this distance constitutional law’s “resonance gap.” Such a gap arises in all areas of law, but it is especially pronounced in the constitutional realm.*

*Although the anti-modalities play a critical role in preserving the law/politics distinction, they have deleterious consequences for each side of that line. The best response, this Article suggests, is not necessarily to narrow the resonance gap but rather to narrow the domain of constitutional law. If constitutional argument must exclude (or purport to exclude) vital modes of reasoning, we might worry less about refining its grammar and more about restricting its reach.*

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## INTRODUCTION

All constitutional lawyers are familiar with the modalities of constitutional argument, whether or not by that name. These are the forms of argument that are considered legitimate within the legal profession for establishing propositions of constitutional law. They include appeals to the text of the canonical document, appeals to the understandings and intentions of its Framers and ratifiers, appeals to judicial precedent, and so on. In Philip Bobbitt's influential account, the modalities dictate "the way we de-

cide constitutional questions in the American legal culture.”<sup>1</sup> They make up “a legal grammar that we all share and that we have all mastered.”<sup>2</sup>

Yet investigations into the acceptable forms of argument tell only half the story. For even as this “legal grammar” legitimates various analytical and rhetorical moves, it repudiates others. A fuller account needs to consider the *anti-modalities* of constitutional law—the categories of reasoning that are employed in nonconstitutional debates over public policy and political morality but are considered out of bounds in debates over constitutional meaning.<sup>3</sup> What can we learn by attending to constitutional argument’s outcasts?

This Article introduces and develops the idea of constitutional anti-modalities. Because no reputable constitutional decisionmaker wishes to be associated with the anti-modalities, they tend to appear most explicitly in denials and accusations, in which the speaker insists that she is not advancing a certain kind of argument or that an opponent is.<sup>4</sup> Examining constitutional discourse with an eye toward such claims, we find that the anti-modalities include: (1) *policy arguments* that are formulated as openly instrumentalist inquiries into welfare effects; (2) *fundamentalist arguments* that depend on deep philosophical premises or comprehensive normative commitments; (3) *partisan arguments* that prefer a social or political group not said to be singled out for special treatment by the canonical document; (4) *emotional arguments* that invoke feelings without an articulable logical structure; (5) *popularity arguments* that look to the preferences of the general public; and (6) *logrolling arguments* that propose an exchange of favors, or a splitting of differences, between competing parties or positions in the interest of compromise.<sup>5</sup> Other legal fields exclude many of these types of argu-

1. PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 9 (1991).

2. PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 6 (1982); see also Jack M. Balkin, *Arguing About the Constitution: The Topics in Constitutional Interpretation*, 33 CONST. COMMENT. 145, 179 (2018) (“Since Bobbitt coined the term in his 1982 book, *Constitutional Fate*, ‘modalities’ has caught on as the standard way to describe the basic forms of argument in constitutional law.”).

3. As we explain in Section I.B and detail in Parts II and III, the anti-modalities are not opposites of the modalities in content or structure. On the contrary, the anti-modalities are closely connected to the modalities on multiple levels. We employ the label “anti-modalities” (rather than, say, “quasi-modalities”) to highlight how these forms of argument are shunned by constitutional decisionmakers, not to suggest any sort of substantive antinomy between the anti-modalities and the modalities.

4. This Article uses the term “constitutional decisionmaker” broadly—to refer paradigmatically to judges but also to anyone else advancing arguments about or determining how the Constitution should be interpreted or implemented in a professional setting. Cf. BOBBITT, *supra* note 1, at 168 (adopting the perspective of a “constitutional decider”). Arguments about the virtues or vices of the U.S. Constitution, or about how to design a new constitution, do not involve constitutional decisionmaking in this sense and therefore do not directly implicate the anti-modalities or the modalities. On the complex logical relationship between theories of the Constitution’s authority and theories of constitutional interpretation, see generally Adam M. Samaha, *Dead Hand Arguments and Constitutional Interpretation*, 108 COLUM. L. REV. 606 (2008).

5. See *infra* Section II.B.

ment as well, just as versions of the modalities can be found outside constitutional law. But the centrality and supremacy of the Constitution in our legal culture, along with its role in structuring government, lend these exclusions special significance in the constitutional context.

After identifying the anti-modalities, the Article begins to work through their implications. The most important implication is so obvious that it is easy to overlook: the anti-modalities shut out of constitutional law virtually all the arguments that drive most citizens' views on most matters of public concern. The considerations that people tend to prioritize in making normative and prescriptive judgments are banished to the realm of the political, to the subconstitutional subaltern. We call this gap, between the accepted inputs into constitutional reasoning and the standard inputs into nonconstitutional reasoning on similar subjects, constitutional law's *resonance gap*.<sup>6</sup>

This gap is under constant pressure to close. Precisely because the anti-modalities are so enticing, these lines of argument are unlikely to disappear when contentious debates take a constitutional turn. For many lawyers in many situations, the temptation to smuggle in one or more anti-modalities will prove irresistible, and the conventions of constitutional grammar can only imperfectly limit such boundary crossing.<sup>7</sup> Fundamentalist arguments, for example, surface in the area of substantive due process and in appeals to what Bobbitt calls the ethical modality,<sup>8</sup> while policy arguments surface in numerous lines of doctrine and in the modality of prudentialism.<sup>9</sup> To be seen as legitimate inputs into constitutional decisionmaking, however, these arguments must be shorn of their anti-modal aspects. Thus, substantive due process analyses and ethical arguments typically claim a grounding in tradition, while prudential arguments typically abstract away from first-order welfare effects and emphasize second-order considerations of judicial ad-

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6. See *infra* Section III.A. Constitutional argument also features some categories of reasoning that are not necessarily recognized, or given the same weight or prominence, in non-constitutional argument: for example, appeals to *stare decisis*. See Frederick Schauer, *Law's Boundaries*, 130 HARV. L. REV. 2434, 2435 n.4 (2017). This inverse gap might play an important role in keeping constitutional analysis meaningfully distinct from other fields of law and life, but it is not our focus here.

7. See *infra* Section III.B. In describing this dynamic, we concentrate on excluded modes of argument, not excluded motives. Although certain constitutional clauses have been interpreted to forbid certain purposes or intentions as the basis for state action, see generally Richard H. Fallon, Jr., *Constitutionally Forbidden Legislative Intent*, 130 HARV. L. REV. 523 (2016), the conventions of constitutional argument do not appear to require, as a general matter, that participants genuinely be motivated by a commitment to the modal propositions they assert and not by the anti-modal propositions they avoid asserting. If constitutional argument were so constrained, the resonance gap would be even more important and under even greater pressure to close. Cf. Louis Michael Seidman, *Substitute Arguments in Constitutional Law*, 31 J.L. & POL. 237, 240 (2016) (contending that "constitutional law amounts to one, giant substitute argument" in which the claims advanced are makeweights for the authentic reasons behind participants' positions).

8. See *infra* Section II.B.2; *infra* notes 234–241 and accompanying text.

9. See *infra* Section II.B.1; *infra* notes 226–233 and accompanying text.

ministrability, manageability, or the like. As these examples suggest, thinking in terms of anti-modalities helps clarify the contours of the modalities, illuminating ways in which they seek to fence off certain categories of reasoning even as they privilege adjacent categories. Constitutional law takes shape in the dialectical tension between modality and anti-modality.

Parts of our analysis should feel familiar. Our catalog of anti-modalities had better ring true to most competent constitutional lawyers once we articulate it, or else we will have failed to capture conventional practice. In addition, our account of how forbidden forms of reasoning may infiltrate constitutional argument, albeit incompletely, connects with a long line of scholarship by legal realists, legal pragmatists, and branches of the critical legal studies and empirical legal studies movements. Like these scholars, we doubt that there has been a deep or stable divide between constitutional decisionmaking and all-things-considered decisionmaking in some significant fraction of hard-fought disputes—and therefore that there has been a deep or stable divide between law and politics.<sup>10</sup> Unlike many of these scholars, however, we spotlight the resilience of our constitutional culture's prohibitions on the overt use of otherwise valued modes of reasoning. And we contend that these prohibitions have a meaningful impact on constitutional jurisprudence. What goes unsaid matters.

Some of the implications, we further contend, should trouble Americans of nearly every ideological stripe. Efforts to exclude the anti-modalities from interpretive debates can be defended on grounds of pluralism, public reason, and the rule of law, among others.<sup>11</sup> A constitutional order without any such argumentative constraints is all but unthinkable. Nevertheless, screening out the anti-modalities breeds a host of pathologies,<sup>12</sup> from pushing constitutional decisionmakers to obscure the real bases of their support for certain outcomes to inviting excessive attention to perceived inconsistencies and

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10. This skeptical tradition ranges from legal realist claims that “judges reach decisions based on what they think would be fair on the facts of the case,” Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267, 275 (1997); to critical legal studies claims that “legal reasoning is a way of simultaneously articulating and masking political and moral commitment,” Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 6 (1984); to empirical legal studies claims that ideology drives judicial outcomes, see generally JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002); to legal pragmatist claims that judging is “more results-oriented and value-laden than either judicial opinions reveal, or than legal pedagogy is willing to recognize,” Edward Cantu, *Posner's Pragmatism and the Turn Toward Fidelity*, 16 LEWIS & CLARK L. REV. 69, 70 (2012); to deconstructionist claims that jurisprudence borrows selectively from other disciplines while ignoring the “dangerous” remainder of their insights, see Peter Fitzpatrick, *The Abstracts and Brief Chronicles of the Time: Supplementing Jurisprudence*, in DANGEROUS SUPPLEMENTS: RESISTANCE AND RENEWAL IN JURISPRUDENCE 1, 1–3, 27–30 (Peter Fitzpatrick ed., 1991). Whereas many realist and neorealist works interrogate the unacknowledged preferences, motivations, and forces that lie beneath legal reasoning, this Article focuses on arguments that rise to the surface, however subtly.

11. See *infra* Section IV.A.

12. See *infra* Section IV.B.

hypocrisies of opponents. Worse still, in many scenarios the anti-modalities' taboo status conduces to analytic carelessness. For instance, even when a modality like prudentialism is in play, constitutional law does not avail itself of—indeed does not allow—rigorous consequentialist inquiry of any sort. Rigorous consequential inquiry would expose a constitutional decisionmaker to charges of making an illegitimate policy argument. To avoid such charges, decisionmakers are instead pushed to deploy tendentious analogies, slippery-slope claims, and other highly speculative or ad hoc assertions. In place of social science, constitutional law often trades on pseudoscience.<sup>13</sup>

What to do about these downsides is a difficult question. The situation might be best understood as a series of unavoidable challenges to be managed rather than overcome. Although our main goal in the final Parts of this Article is to clarify the core tradeoffs, we offer one high-level suggestion. While some might wish to adjust the norms of constitutional debate,<sup>14</sup> we suggest that a superior response is to adjust the domain of constitutional law: maintaining a resonance gap similar (though not necessarily identical) to the one we have now, but reducing its practical significance by reducing the footprint of both judicial review and supreme constitutional law.<sup>15</sup> This Article is hardly the first to propose shrinking those institutions. Yet whereas most such proposals focus on issues of democratic representation, we highlight what is missing from constitutional argument itself. If constitutional law must exclude vital categories of reasoning—granting them admission only partially, inconsistently, and through the side door—we might aspire not so much to refine its grammar as to restrict its reach.

## I. METHODS AND MODALITIES

### A. *Method Exclusivity*

Professional argumentation, like virtually any practice of collective deliberation, proceeds according to some method. Certain sorts of facts, norms, and values are adduced and assessed in a certain manner, while other sources of information and tools of investigation are marginalized or ignored. The accepted method is then used by participants to work through a set of decision problems, as opposed to presenting a sheer list of output-level results. These methods might be ad hoc and emergent, or they might be routinized and codified. But they are unavoidable. All professions need “shared notions of validity and a common way of knowing and reasoning” if they are

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13. The participants in other types of institutional decisionmaking, of course, often perform badly when judged against professional standards applied with adequate resources. The Office of Management and Budget is not perfect in its cost-benefit evaluations. But those decisionmakers have no all-purpose excuse, as it were, for a lack of social-scientific rigor. The constitutional anti-modalities provide such an excuse.

14. See *infra* Section V.A.

15. See *infra* Section V.B.

to have coherent conversations and answer questions to which they direct themselves.<sup>16</sup>

All such methods, in turn, involve analytical and rhetorical boundaries and regularities. Some forms of argument are privileged: they are understood by participants to be permissible or obligatory, and they therefore routinely recur. Other forms of argument are shut out of the decisionmaking practice to a greater or lesser degree. In a very basic sense, every method in every field relies on a distinction between (included) modalities and (excluded) anti-modalities or non-modalities.<sup>17</sup>

Both the discrete character and the overall mix of included and excluded forms of argument are part of what allows us to differentiate among disciplines. If you are engaging in the scientific method, you are not “thinking like a lawyer,” and vice versa. Although there may be overlap between methods, the discrepancies are important. A social scientist seeking to explain judicial behavior would make a kind of category error, inconsistent with the conventions of her field, were she to treat the most recent study on the subject as a “precedent” entitled to content-independent deference.<sup>18</sup> It is a general feature of professional reasoning, and perhaps of normative reasoning more broadly, that the privileging of certain forms of argument implies or presupposes that other forms are irrelevant, inferior, or illegitimate for solving particular sorts of problems.<sup>19</sup>

Participants in a decisionmaking practice face choices of whether and how to delineate the practice’s exclusions—the thoughts that cannot be expressed and the logic that cannot be followed. Explicit proscriptions might be used to clarify a method’s affirmative content, to minimize potential overlap with adjacent methods, or to define what the proponents stand against. For similar reasons, everyday instruction guides frequently include “don’ts”

16. Claudia E. Haupt, *Professional Speech*, 125 YALE L.J. 1238, 1251 (2016) (footnote omitted) (describing professionals as connected to knowledge communities); see also Adam M. Samaha, *Low Stakes and Constitutional Interpretation*, 13 U. PA. J. CONST. L. 305, 320 (2010) (noting that judges “cannot work without an interpretive method”). These observations do not imply that professional reasoning is “monolithic,” Haupt, *supra*, at 1251, just that it is structured by a set of widely shared commitments and conventions.

17. We distinguish between anti-modalities and non-modalities in the next Section.

18. For this view of precedent, see FREDERICK SCHAUER, *THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING* 62 (2009) (depicting precedents as “authoritative” in that their “force derives not from their soundness but from their status”). A related error is sometimes implied when scientists allege that political appointees have interfered with their research on non-evidence-based grounds. See, e.g., Oliver Milman, *The Silenced: Meet the Climate Whistle-Blowers Muzzled by the Trump Administration*, SCI. AM. (Sept. 17, 2019), <https://www.scientificamerican.com/article/the-silenced-meet-the-climate-whistle-blowers-muzzled-by-the-trump-administration> [<https://perma.cc/6KZP-8XWP>] (relating allegations that political appointees shaped or rejected scientific findings on climate change for ideological reasons).

19. The privileging and deprivileging of certain forms of argument provides a framework, or template, for analysis. It does not necessarily amount to a complete method of decision or generate clear answers for every problem within the method’s domain.



along with “dos.”<sup>20</sup> But exclusions might instead be left implicit because, for example, their content is already adequately clear or would be difficult to agree upon in any detail. Exactly when a list of don’ts should be spelled out is itself a complex issue.<sup>21</sup> Our modest assertion here is that forbidden forms of argument, whether expressly enumerated or unconsciously internalized, are utterly ordinary and help distinct methods of decisionmaking to survive. Anyone interested in a practice such as constitutional decisionmaking should be on the lookout for them.

### B. *Modalities, Non-Modalities, and Anti-Modalities*

Constitutional advocates may not often invoke or even be aware of the term “modalities,”<sup>22</sup> but they all know how to deploy the modalities in the exercise of their craft. Any speaker who wishes to assert a claim about the content of supreme law—about the best interpretation or construction of the Constitution—needs to establish the plausibility and relevance of her claim. She needs to render it recognizable to other lawyers as a constitutional contention. The modalities serve this need by supplying standard forms of ar-

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20. See, e.g., *United States v. Virginia*, 518 U.S. 515, 601–03 (1996) (Scalia, J., dissenting) (discussing *The Code of a Gentleman*, consisting largely of negative instructions, which had been required reading for Virginia Military Institute cadets); JOHN W. WOODY, *THE ELEMENTS OF PEDAGOGICS* 84–87 (Greensboro, Thomas Bros. 1891) (listing “musts and don’ts” for teachers managing schools, including “[d]on’t say too much about order”). At a meta level, technical writing guides sometimes say what not to do when giving instructions on how to write instructions. See, e.g., GERALD J. ALRED, CHARLES T. BRUSAW & WALTER E. OLIU, *HANDBOOK OF TECHNICAL WRITING* 256 (12th ed. 2019) (“Do not use elegant variation (two different words for the same thing).”).

21. Work along those lines is related, at arm’s length, to debates over *expressio unius* arguments in law. Compare, e.g., REED DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 234–35 (1975) (rejecting the presumption that express conferrals of privileges carry a negative implication for other privileges), with ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 107–08 (2012) (endorsing the *expressio unius* canon, if used with care, and asserting that “[t]he more specific the enumeration, the greater the force of the canon”).

22. In the legal academy, or at least in certain elite law schools, “‘modalities’ has caught on as the standard way to describe the basic forms of argument in constitutional law.” Balkin, *supra* note 2, at 179. In professional legal practice, the term is used far less frequently—it has never appeared in a Supreme Court opinion—and what Bobbitt’s followers call modalities tend to be described instead as interpretive methods or methodologies.

Bobbitt himself borrowed the term “modality” from philosophy, “where it expresses the manner in which a statement[s] or proposition’s truth holds.” Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 *FORDHAM L. REV.* 453, 480 (2013) (citing Anand Vaidya, *The Epistemology of Modality*, *STAN. ENCYCLOPEDIA PHIL.* (Dec. 5, 2007), <https://plato.stanford.edu/entries/modality-epistemology> [<https://perma.cc/Y2QH-KUUK>]). Viewing the constitutional modalities as modalities in a strict philosophical sense arguably renders Bobbitt’s theory incoherent. See *id.* at 480 n.96. Like virtually all legal scholars, we take the constitutional modalities (and anti-modalities) to be modes or types of argument, not metaphysical truthmakers.

gument or, alternatively, styles of justification.<sup>23</sup> As a set, they comprise “the ways in which legal propositions are characterized as true from a constitutional point of view.”<sup>24</sup> The modalities define what counts as sociologically legitimate constitutional reasoning and, in this sense, define constitutional law’s “rules of the game.”<sup>25</sup>

In writings now over a generation old, Bobbitt famously identified six modalities of constitutional argument:

*historical* (relying on the intentions of the framers and ratifiers of the Constitution); *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”); *structural* (inferring rules from the relationships that the Constitution mandates among the structures it sets up); *doctrinal* (applying rules generated by precedent); *ethical* (deriving rules from those moral commitments of the American ethos that are reflected in the Constitution); and *prudential* (seeking to balance the costs and benefits of a particular rule).<sup>26</sup>

This list can be questioned and refined. Bobbitt’s description of the historical modality, for example, has been criticized for focusing on original “intentions,” rather than “original public meaning,”<sup>27</sup> and for slighting postenactment practice.<sup>28</sup> Tradition-oriented arguments are standard for a range of constitutional issues and probably warrant independent recognition.<sup>29</sup> Furthermore, Bobbitt’s seemingly narrow conception of ethical argument has been called confusing,<sup>30</sup> “idiosyncratic,”<sup>31</sup> and “contrived.”<sup>32</sup> Richard Fallon, Michael McConnell, Robert Post, and other prominent scholars have offered

23. See Jack M. Balkin, *The New Originalism and the Uses of History*, 82 *FORDHAM L. REV.* 641, 658 (2013) (“I prefer to restate Bobbitt’s idea in terms of styles of justification. Each form of argument gives people reasons to accept beliefs about the Constitution-in-practice as true.”).

24. BOBBITT, *supra* note 1, at 12.

25. Dennis Patterson, *Wittgenstein and Constitutional Theory*, 72 *TEX. L. REV.* 1837, 1838 (1994).

26. BOBBITT, *supra* note 1, at 12–13 (emphasis added).

27. See, e.g., Balkin, *supra* note 2, at 152.

28. See, e.g., Curtis A. Bradley, *Doing Gloss*, 84 *U. CHI. L. REV.* 59, 63 (2017); Michael W. McConnell, *Time, Institutions, and Interpretation*, 95 *B.U. L. REV.* 1745, 1746 n.3 (2015).

29. For instance, tradition-oriented arguments play a large role in separation-of-powers disputes, see generally Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 *HARV. L. REV.* 411 (2012), and tradition is sometimes promoted as a disciplining force within ethical and fundamental-rights analysis, see *infra* notes 239–241 and accompanying text.

30. See, e.g., RICHARD S. MARKOVITS, *MATTERS OF PRINCIPLE: LEGITIMATE LEGAL ARGUMENT AND CONSTITUTIONAL INTERPRETATION* 187 (1998) (“In the end, I must admit that I do not know what Bobbitt means by ‘ethical arguments’ . . .”).

31. Mark Tushnet, *Justification in Constitutional Adjudication: A Comment on Constitutional Interpretation*, 72 *TEX. L. REV.* 1707, 1716 (1994).

32. J.M. Balkin & Sanford Levinson, *Constitutional Grammar*, 72 *TEX. L. REV.* 1771, 1785 (1994).

somewhat different lists of modalities or defined certain modalities in somewhat different terms.<sup>33</sup> Scholars also have debated at great length the relationship of the modalities to each other, including how to resolve conflicts among them, and to the authority of judicial review and constitutional law.<sup>34</sup>

For present purposes, however, the most important feature of these debates is the amount of agreement underlying them. Differences in detail seem to be just that. Bobbitt's taxonomy is "widely accepted" as a characterization of U.S. constitutional practice,<sup>35</sup> and it "has become a ubiquitous fixture in the contemporary constitutional law classroom."<sup>36</sup> Throughout the legal system, "all of the modalities of argument Bobbitt identifies are regularly utilized."<sup>37</sup> "Although disputed on the margins, mainstream legal and constitutional scholars tend to agree that reasoning outside of Bobbitt's modalities or its equivalent is not recognizable as constitutional law . . ."<sup>38</sup> The precise composition and specification of the modalities are disputed.

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33. See Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1194–209 (1987); McConnell, *supra* note 28, at 1750–85; Robert Post, *Theories of Constitutional Interpretation*, REPRESENTATIONS, Spring 1990, at 13, 19–26; see also Mitchell N. Berman & Kevin Toh, *Pluralistic Nonoriginalism and the Combinability Problem*, 91 TEX. L. REV. 1739, 1747–48 (2013) ("Similar lists [to Bobbitt's] abound in the nonoriginalist literature.").

34. Bobbitt's view is that the modalities are incommensurable and nonhierarchical, so that any conflicts among them must be resolved by recourse to the decisionmaker's conscience, see, e.g., BOBBITT, *supra* note 1, at 163–64, and that widespread use of the modalities is what maintains the legitimacy of judicial review and constitutional law, see, e.g., *id.* at 8–9. Explicit resort to individual-level conscience might now be anti-modal. See *infra* Section II.B.4 (exploring the proscription against emotional argument).

35. Kermit Roosevelt III, *Polyphonic Stare Decisis: Listening to Non-Article III Actors*, 83 NOTRE DAME L. REV. 1303, 1312 (2008); see also Colin Starger, *Constitutional Law and Rhetoric*, 18 U. PA. J. CONST. L. 1347, 1348 (2016) ("For over thirty years, . . . Bobbitt's taxonomy of legitimate constitutional argument types has reigned as the most influential and enduring in the scholarly discourse."). The taxonomy also has been embraced as a characterization of Australian constitutional practice. See Nicholas Aroney, *Towards the 'Best Explanation' of the Constitution: Text, Structure, History and Principle in Roach v Electoral Commissioner*, 30 U. QUEENSL. L.J. 145, 145 (2011).

36. Andrew M. Siegel, *Constitutional Theory, Constitutional Culture*, 18 U. PA. J. CONST. L. 1067, 1083 (2016); see also Akhil Reed Amar, *In Praise of Bobbitt*, 72 TEX. L. REV. 1703, 1704 (1994) ("Bobbitt's modalities are key tools for me in the classroom."). Although Bobbitt's taxonomy of modalities remains the leading descriptive account of constitutional practice, arguable rivals exist, including David Strauss's common law constitutionalism, see DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010), and Ronald Dworkin's "moral reading" of the Constitution, see RONALD DWORIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* (1996); see also JAMES E. FLEMING, *FIDELITY TO OUR IMPERFECT CONSTITUTION* 73–161 (2015) (defending and developing the moral-reading approach).

37. Tabatha Abu El-Haj, *Linking the Questions: Judicial Supremacy as a Matter of Constitutional Interpretation*, 89 WASH. U. L. REV. 1309, 1330 (2012).

38. Jamal Greene, *Pathetic Argument in Constitutional Law*, 113 COLUM. L. REV. 1389, 1467 (2013).

The general outlines are not. Sparks from recent “interpretive wars”<sup>39</sup> should not obscure the degree of consensus over the generic terms on which constitutional analysis is conducted.<sup>40</sup>

If the modalities determine the rules of the game of constitutional law, what violates the rules? Roughly, we can divide the world of argument types that do not correspond to any modality into two camps: *non-modalities* and *anti-modalities*. Although it may be blurry at the edges, this simple distinction is, we believe, crucial for understanding how constitutional argument works.

Non-modalities are forms of argument that are seen as essentially unrelated to the modalities—or that would be so seen if anyone paused to evaluate the possibility of deploying them in constitutional interpretation. An endless variety of arguments are not recognized as legitimate constitutional arguments because they are not seriously considered at all by participants in those contests, and there is nothing particularly interesting about the exclusion of most of them. Appeals to family ties, say, or to the tax code or astrology or romantic poetry are so far afield from the conventions of constitutional reasoning that no constitutional decisionmaker seems tempted to consider them.<sup>41</sup> In the mine run of cases, they likely never cross anyone’s mind.<sup>42</sup> Non-modalities are nonfactors in constitutional debate.

Anti-modalities are much harder to dispel. Like non-modalities, anti-modalities are forms of argument that are considered out of bounds by most well-trained lawyers. Unlike non-modalities, however, they elicit a fair amount of attention and anxiety because they *do* seem relevant to the con-

39. Jack N. Rakove, *Fidelity Through History (or to It)*, 65 *FORDHAM L. REV.* 1587, 1593 (1997) (referring to “the interpretive wars that are the stuff of contemporary constitutional debate”).

40. Put another way, no one seems to dispute that “[c]onstitutional argument is structured in terms of recurring forms of argument,” which “provide a kind of know-how that helps lawyers analyze constitutional problems and make constitutional claims.” Balkin, *supra* note 2, at 169. Nor does anyone seem to dispute that Bobbitt’s enumeration of the recurring forms is reasonably, if not wholly, accurate as a matter of descriptive sociology.

41. In a short comment on arguments that would not make anyone’s list of modalities, Bobbitt joined arguments from religion with arguments from kinship and entrails. See BOBBITT, *supra* note 2, at 6 (“One does not see counsel argue, nor a judge purport to base his decision, on arguments of kinship . . . . Nor does one hear overt religious arguments or appeals to let the matter be decided by chance or by reading entrails.”). We break out appeals to religion as among the anti-modalities rather than a non-modality. See *infra* Section II.B.2. Judges do occasionally recite poetry in their constitutional opinions, see, e.g., *Texas v. Johnson*, 491 U.S. 397, 422 (1989) (Rehnquist, C.J., dissenting) (quoting Ralph Waldo Emerson’s *Concord Hymn*), but never as direct support for a proposition about the Constitution’s meaning. Cf. *infra* notes 54–57 and accompanying text (noting the distinction between “propositional” and “non-propositional” arguments in constitutional debate and the focus of modalities and anti-modalities on the former).

42. Cf. Adrian Vermeule, *Conventions of Agency Independence*, 113 *COLUM. L. REV.* 1163, 1190–91 (2013) (discussing in a different context the potential “cognitive hegemony of conventions,” whereby actors “so deeply internalize[] a convention or norm that it never occurs to them to breach it” (emphasis omitted)).

troveries that constitutional law is asked to resolve. Anti-modalities draw on sources of decisional guidance that are normatively or psychologically plausible but that are forbidden nonetheless. In particular, the forms of argument that fall outside the modalities but that are broadly employed in nonlegal debates over issues of public policy and political morality will become leading candidates for anti-modalities in constitutional law, if not in law generally. These common nonlegal forms will, by definition, have a significant number of adherents, and their popularity and familiarity may put pressure on any commitment to ensure that legal decisionmaking remains a distinctive enterprise.

The anti-modalities, accordingly, are not orthogonal to the modalities. Rather, they haunt the modalities. They are latent competitors with and complements to the accepted forms of constitutional argument. The anti-modalities have to be excluded from decisionmaking, or at least suppressed and sublimated in debate, for the modalities to retain their integrity and for constitutional reasoning to retain some autonomy from politics, philosophy, and other fields. Like how the “anticanon” of widely repudiated constitutional decisions can help to define and entrench the canon of respected precedent at the level of case results,<sup>43</sup> the anti-modalities help to define and entrench the modalities at a more general level of argument and analysis.<sup>44</sup>

Shifting the metaphor from grammar to geography, if the modalities mark the limits of permissible constitutional argument, the anti-modalities occupy the territory just beyond those limits—and the non-modalities are off on another continent. Both the modalities and the anti-modalities supply reasons or considerations that many people find compelling in normative-political decisionmaking. They share this conceptual and sociological com-

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43. See Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 380–81 (2011) (“Together, [the anticanonical Supreme Court decisions] map out the land mines of the American constitutional order, and thereby help to constitute that order: we are what we are not.”). The relationship between canon/anticanon and modalities/anti-modalities is complex. One might want to associate each side of those pairs with the other, such that anticanonical cases and anti-modal reasoning fit together. But that correspondence is neither clear in theory nor consistent in practice. Greene, notably, maintains that all of the most infamous cases in the anticanon employed conventional constitutional logic for their time. *Id.* at 404–34. Conversely, the single most canonical case of the postwar period, *Brown v. Board of Education*, 347 U.S. 483 (1954), arguably gave short shrift to the modalities. See Justin Driver, *Supremacies and the Southern Manifesto*, 92 TEX. L. REV. 1053, 1059 (2014) (noting that the Southern Manifesto so argued); Jordan Steiker, *American Icon: Does It Matter What the Court Said in Brown?*, 81 TEX. L. REV. 305, 330 (2002) (book review) (referring to the *Brown* opinion’s “notoriously minimal use of history, text, and doctrine”); see also *infra* notes 242–247 and accompanying text (returning to this point).

44. Modalities and anti-modalities may be connected on a still deeper level as well. Insofar as “[t]he justification for adopting any particular interpretive method depends on external reasons of normative political theory,” KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* 3 (1999), some of the reasons why we have particular modalities and anti-modalities might well be anti-modal themselves if used to support a claim about the Constitution’s meaning. See *infra* note 96 (providing an example).

mon ground. In consequence, the border between the two tends to be porous, contested, and rooted in a particular era's constitutional politics.

These features suggest that anti-modalities will be identifiable through close critical parsing of constitutional debates, as they are apt to surface episodically, if only to be condemned and denied. Especially in debates that are politically salient, participants may be at pains to insist that they are not advancing *that* sort of claim or that the other side, despite its protestations, actually is. The non-modalities are invisible in mainstream constitutional argument. The anti-modalities leave a trace.

## II. CONSTITUTIONAL ANTI-MODALITIES

If one were trained on the modalities alone, the opening paragraph of Justice Potter Stewart's dissent in *Griswold v. Connecticut*<sup>45</sup> would be arresting, perhaps even unintelligible. "I think this is an uncommonly silly law,"<sup>46</sup> Stewart wrote of a statute that banned the use of contraceptives. He then attacked the statute on a variety of grounds that have no obvious home in any of the modalities:

As a practical matter, the law is obviously unenforceable . . . . As a philosophical matter, I believe the use of contraceptives in the relationship of marriage should be left to personal and private choice . . . . As a matter of social policy, I think professional counsel about methods of birth control should be available to all . . . .<sup>47</sup>

After foregrounding these apparently devastating objections, Stewart went ahead and voted to uphold the statute anyway. The upshot was an articulation of principle and sacrifice—a sacrifice that, Stewart implied, the majority was unwilling to make. "But we are not asked in this case to say whether we think this law is unwise, or even asinine. We are asked to hold that it violates the United States Constitution. And that I cannot do."<sup>48</sup>

This writing is over fifty years old, and a dissent no less. But Justice Stewart's opinion taps a live wire of constitutional reasoning and engages in a kind of constitutional posturing that are difficult to explain solely in terms of modalities.<sup>49</sup> His sharply stated points, moreover, link up with much of what remains on the list of anti-modalities today.

45. 381 U.S. 479 (1965).

46. *Griswold*, 381 U.S. at 527 (Stewart, J., dissenting).

47. *Id.*

48. *Id.* In his opinion for the Court, Justice William Douglas sought to deflect the charge of relying on anti-modalities—of invalidating the Connecticut law based on an illegitimate assessment of its "wisdom, need, [or] propriety," *id.* at 482—by drawing on numerous pieces of constitutional text and lines of constitutional doctrine, *id.* at 482–86.

49. Justice Stewart's opinion offers an example of what might be called *constitutional virtue signaling*. Adverting to the anti-modalities, constitutional decisionmakers sometimes go out of their way to articulate normative sentiments that do not—and according to the conventions of constitutional practice may not—guide their decision, while simultaneously casting a vote that conflicts with those sentiments. This technique of expressing one's commitment to

### A. *Caveats and Complications*

Before turning to the substance of the anti-modalities, it is important to acknowledge a number of difficulties inherent in any effort to enumerate them. These difficulties confront efforts to enumerate modalities as well. The lists of modalities put forward by Bobbitt, Fallon, and others have nonetheless become central pillars of constitutional theory and pedagogy. The best that can be hoped for with a list of anti-modalities is that it strikes most readers as similarly plausible and illuminating, if no less vexed.

First, any typology of constitutional argument is bound to be at least somewhat debatable at a conceptual level, owing to the complexity of the phenomenon as well as “deep and abiding disagreement over the appropriate mix of interpretive methodologies.”<sup>50</sup> Contestable choices regarding levels of generality, cut points, and the like are inescapable. Both the modalities and anti-modalities, moreover, may tend to function less as rigid rulebooks than as flexible and fuzzy guidelines.<sup>51</sup> We should not expect any roadmap of constitutional argument to have a tidiness that the terrain itself lacks.

Second, however specified, constitutional argument types will overlap to some extent. Bobbitt cautions that the items on his list are not “wholly discrete,” that the modalities “often work in combination,” and that “[s]ome examples fit under one heading as well as another.”<sup>52</sup> Sophisticated constitutional interpreters routinely disagree not only about how best to apply a given modality but also about whether a given proposition is best understood as textual, structural, historical, prudential, or ethical or as some hybrid there-

orthodox legal reasoning is widespread even among judges not known for their methodological restraint. *See, e.g.*, *Texas v. Johnson*, 491 U.S. 397, 421 (1989) (Kennedy, J., concurring) (“With all respect to those views, I do not believe the Constitution gives us the right to [permit criminalization of flag burning], however painful this judgment is to announce.”); *Nat’l League of Cities v. Usery*, 426 U.S. 833, 881 (1976) (Stevens, J., dissenting) (“My disagreement with the wisdom of this [minimum wage] legislation may not, of course, affect my judgment with respect to its validity.”).

50. David E. Pozen, *Constitutional Bad Faith*, 129 HARV. L. REV. 885, 916 (2016).

51. The tradeoffs associated with rules and standards are implicated here. Meta-level flexibility as to the acceptable and unacceptable forms of constitutional argument generates, and perhaps exacerbates, some of the ordinary costs of vague directives in law, but with the potential benefit of allowing for gradual methodological improvements informed by democratic engagement and practical experience. *Cf.* RICHARD H. FALLON, JR., *LAW AND LEGITIMACY IN THE SUPREME COURT* 141 (2018) (warning that a fully determinate interpretive method, constructed in advance of application to concrete cases, risks unforeseen and disastrous results); 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 86–89 (3d ed. 2000) (maintaining that conflicts are bound to arise both within and across modal arguments, and doubting the feasibility and desirability of an overarching “metamode”).

52. BOBBITT, *supra* note 2, at 8. Given these blurry boundaries, the types of argument indicated by the modalities “are really archetypes.” *Id.* at 7. It is sometimes said that the most persuasive constitutional arguments involve multiple modalities working in tandem. *See, e.g.*, MICHAEL KENT CURTIS, J. WILSON PARKER, WILLIAM G. ROSS, DAVISON M. DOUGLAS & PAUL FINKELMAN, *CONSTITUTIONAL LAW IN CONTEXT* 38 (4th ed. 2018). Conversely, it might be the case that constitutional arguments implicating multiple anti-modalities will tend to be seen as especially unpersuasive or illegitimate.

of.<sup>53</sup> The same sorts of overlaps and potential disagreements should be anticipated with anti-modalities, no matter how carefully any typology of them is constructed.

Third, the domain of behavior regulated by the modalities and anti-modalities can be tricky to mark. These conventions govern only a subset of what constitutional practitioners say. As Colin Starger explains, some of the claims made in constitutional disputes do not state a proposition about what is “true from a constitutional point of view”<sup>54</sup>—and therefore are not eligible to count as modalities under Bobbitt’s definition—but instead seek to put a favorable spin on the facts, to enlist the decisionmaker’s sympathy, or to supply other grounds for resolving the dispute in favor of one party rather than another.<sup>55</sup> Likewise, claims about which cases the Supreme Court ought to accept for review or about how to remedy constitutional violations may not be governed, or governed to the same degree, by the modalities and anti-modalities.<sup>56</sup> Even if “propositional” claims about the Constitution’s substantive meaning must adhere to the modalities and steer clear of the anti-modalities to be acceptable, “non-propositional” claims are not necessarily so constrained.<sup>57</sup>

Fourth, the modalities and anti-modalities evolve. Much of Bobbitt’s discussion appears to assume a fairly constant list of modalities since the Founding,<sup>58</sup> but he warns that “there can be no ultimate list because new approaches will be developed through time.”<sup>59</sup> Even if the list does not change, mainstream views about what counts as a plausible move *within* particular modalities do change, whether by design or not.<sup>60</sup> As we write, the rise of originalism as a school of interpretive thought is arguably putting pressure

53. Doctrinal arguments are typically easier to distinguish. *But see* Martin H. Redish, *Judicial Review and Constitutional Ethics*, 82 MICH. L. REV. 665, 668 (1984) (book review) (suggesting that “there is no logical reason” why doctrinal arguments, as Bobbitt defines them, could not be recast as historical, structural, ethical, or textual arguments).

54. BOBBITT, *supra* note 1, at 12.

55. *See* Starger, *supra* note 35, at 1354–58.

56. *See* Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 857 (1999) (observing that constitutional discourse consigns questions about remedies, unlike questions about rights, “to the banausic sphere of policy, pragmatism, and politics”).

57. *See* Starger, *supra* note 35, at 1354–58; *see also infra* notes 145–149 and accompanying text (returning to this distinction); *infra* notes 321–322 and accompanying text (same).

58. Jack Balkin makes this assumption explicit, asserting that “people have employed the standard forms of argument more or less continuously from the Founding onwards.” Balkin, *supra* note 2, at 170.

59. BOBBITT, *supra* note 2, at 8.

60. *Cf.* JACK M. BALKIN, CONSTITUTIONAL REDEMPTION 12, 61, 69–70, 88, 119, 177–83 (2011) (describing how constitutional arguments can move over time from “off-the-wall” to “on-the-wall,” owing to the influence of social movements, presidential elections, judicial appointments, and more).



on the sociological legitimacy of ethical and prudential argument,<sup>61</sup> while developments in originalist theory have reoriented historical argument away from the Framers' intentions toward the original meaning of the text to a hypothetical objective observer.<sup>62</sup> Or, for a starker example, the proposition that the United States "is a Christian nation" may well have been considered a valid constitutional argument in 1892.<sup>63</sup> Today it would be considered an outrage,<sup>64</sup> at least if stated explicitly.<sup>65</sup> When naturalized conceptions of the country's character or heritage break down, one generation's ethical truism may become the next generation's anti-modal fundamentalism. More generally, any instability in the modalities suggests, if not entails, a corresponding adjustment in the anti-modalities.

Finally, within and across time periods, the best research strategy for identifying modalities and anti-modalities is not obvious. Bobbitt appears to have derived his list of modalities "exclusively from an examination of Supreme Court decisions."<sup>66</sup> Fallon indicates that he canvassed "judicial opinions, briefs, and many scholarly articles."<sup>67</sup> But of course constitutional

61. See Schauer, *supra* note 6, at 2460 n.138 (citing originalism as a "prominent example" of an attempt to delegitimize certain sources of law currently relied on by legal decisionmakers).

62. See Jeremy K. Kessler & David E. Pozen, *Working Themselves Impure: A Life Cycle Theory of Legal Theories*, 83 U. CHI. L. REV. 1819, 1844–47 & n.63 (2016) (reviewing and collecting sources on originalism's theoretical development since the 1970s).

63. *Church of the Holy Trinity v. United States*, 143 U.S. 457, 471 (1892). *Holy Trinity* concerned statutory interpretation in the end, and it did not resolve a constitutional claim. But the opinion's discussion of U.S. law's respect for religion can be translated into an argument for constitutional avoidance, *see id.* at 465–72, and there is little to suggest that its "Christian nation" logic was confined to the statutory realm. *Cf. Davis v. Beason*, 133 U.S. 333, 341–42 (1890) (characterizing bigamy and polygamy as "crimes by the laws of all civilized and Christian countries" and stating that "[t]o call their advocacy a tenet of religion is to offend the common sense of mankind"); *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring) (relating the "destiny and mission of woman" to "the law of the Creator").

64. See *infra* Section II.B.2 (discussing the place of religion in the anti-modalities); see also Anita S. Krishnakumar, *The Hidden Legacy of Holy Trinity Church: The Unique National Institution Canon*, 51 WM. & MARY L. REV. 1053, 1058–59 (2009) ("To the extent that it has been discussed at all, the Christian-nation portion of the *Holy Trinity* opinion generally has been dismissed as a nineteenth-century embarrassment beyond which we as a nation have grown . . .").

65. According to some critics, anti-modal reasoning about the United States being a Christian nation was employed by a majority of the Court just two Terms ago—covertly—in the "travel ban case." *Trump v. Hawaii*, 138 S. Ct. 2392 (2018). Portions of Justice Sonia Sotomayor's dissent arguably imply as much. See, e.g., *id.* at 2445 (Sotomayor, J., dissenting) ("What the unrebutted evidence actually shows is that a reasonable observer would conclude, quite easily, that the primary purpose and function of the Proclamation is to disfavor Islam by banning Muslims from entering our country."); see also Russell K. Robinson, *Justice Kennedy's White Nationalism*, 53 U.C. DAVIS L. REV. 1027, 1030–33 (2019) (arguing that *Trump v. Hawaii* "validated" an ideology of "white nationalism," according to which "the nation's survival hinges on resisting religious/racial diversification and hewing to white Christian dominance").

66. Tushnet, *supra* note 31, at 1709 n.9.

67. Fallon, *supra* note 33, at 1194.

argumentation takes place in other venues, albeit generally in less depth, from street protests to newspaper opinion pages to the floor of Congress.<sup>68</sup> Even if one focuses on a certain venue in a certain historical era, methodological difficulties remain. Bobbitt, Fallon, McConnell, Post, and other modality listmakers do not detail their identification strategies.<sup>69</sup> As far as we can tell, they each perused a large body of Supreme Court case law and normative scholarship on constitutional subjects, and they then used their (considerable) hermeneutic and synthetic skill to reconstruct its argumentative architecture. Conceivably, scholars could employ tools such as surveys, experiments, or digital text analysis to help make this task more systematic—although even with the aid of these tools, finding and describing modalities or anti-modalities will always require a great deal of interpretation and judgment.<sup>70</sup> Anti-modalities may be especially tricky to identify through digital methods or self-reporting on account of the subtextual work that they do.

We are left to formulate a list of anti-modalities that will be court-centric and time-bound to some degree and that will, we hope, invite further efforts at conceptualization and categorization.<sup>71</sup> If our list cannot be definitive, we can insist that anti-modalities exist and that they contribute im-

68. See, e.g., David E. Pozen, Eric L. Talley & Julian Nyarko, *A Computational Analysis of Constitutional Polarization*, 105 CORNELL L. REV. 1 (2019) (using computational methods to study constitutional discourse in Congress and newspaper editorials). It may be the case that the modalities and anti-modalities operate somewhat differently in different venues; they might, for instance, impose relatively stringent constraints on court opinions and briefs as compared to academic articles or political advocacy. Cf. Balkin & Levinson, *supra* note 32, at 1786 (suggesting that while “natural law arguments” may be rare in contemporary judicial contexts, they figure more prominently in the constitutional language of “politicians,” “lawyers,” and others); Kellen Funk, *Shall These Bones Live? Property, Pluralism, and the Constitution of Evangelical Reform*, 41 LAW & SOC. INQUIRY 742, 760 (2016) (suggesting that “popular constitutionalism,” driven by social movements, “invites unconventional or deviant voices to weigh in on constitutional meaning undisciplined by formal judicial discourse and precedent”). Bobbitt, Fallon, and other modality listmakers do not consider the possibility of “grammatical” divergence across venues. We return to this issue in Section III.A.

69. Somewhat surprisingly, in all the copious commentary on Bobbitt’s list, no one seems to have raised concerns about methodological opacity or ad hocery in the construction of the list. We suspect this is in large part because the depiction of constitutional practice rings true: it “resonates immediately with anyone who has spent time studying the twists and turns of constitutional argument in the courts, the law journals, or lawyers’ briefs.” Brian Leiter, *Why Quine Is Not a Postmodernist*, 50 SMU L. REV. 1739, 1740–41 (1997); see also MALCOLM M. FEELEY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA’S PRISONS* 7 (1998) (stating that Bobbitt’s account “certainly does describe the practice of constitutional interpretation”).

70. Cf. Pozen et al., *supra* note 68, at 22–29 (discussing unavoidable subjective judgments that must be made simply to classify any given utterance as “constitutional” or not).

71. In setting out this list, we aim to avoid taking any controversial positions on the nature of law in general or constitutional law in particular, or on the legitimacy or illegitimacy of constitutional argument in anything other than a sociological sense. We mean to describe in this Part how mainstream U.S. constitutional lawyers argue. Our normative and evaluative assessments come later.

portantly to the social practice of constitutional interpretation. A full account of any culture's "legal grammar"<sup>72</sup> must consider its prohibitive norms as well as its permissive ones.

### B. *A Typology*

Ordered roughly by how frequently decisionmakers are accused of employing them, the following appear to be the principal anti-modalities of contemporary U.S. constitutional law.

#### 1. Policy Arguments

"Policy" is the most obvious category of argument that meets our definition of an anti-modality—one that is commonly employed in nonconstitutional debates over public policy and political morality but that is seen as out of bounds in debates over the Constitution's meaning. Participants in constitutional debates routinely distinguish legitimate constitutional concerns from illegitimate considerations of policy when attacking their opponents or defending their own, ostensibly policy-free positions. Scores of articles, briefs, and court opinions take it as given that "a policy argument is not a constitutional argument."<sup>73</sup> Spotting this pattern is easy. The harder question is what exactly constitutes a forbidden policy argument in constitutional law.

72. BOBBITT, *supra* note 2, at 6.

73. Lawrence Lessig, *Constitution and Code*, 27 CUMB. L. REV. 1, 14 (1997). For a sampling of Supreme Court statements to this effect, see *Obergefell v. Hodges*, 135 S. Ct. 2584, 2617 (2015) (Roberts, C.J., dissenting) (characterizing the Court's "error" in "the *Lochner* line of cases" as "empowering judges to elevate their own policy judgments to the status of constitutionally protected 'liberty'"); *Gonzales v. Raich*, 545 U.S. 1, 26 (2005) ("The question, however, is whether Congress' contrary policy judgment . . . was constitutionally deficient."); *Reno v. Flores*, 507 U.S. 292, 305 (1993) (contrasting "policy judgment" with "constitutional imperative"); *INS v. Chadha*, 462 U.S. 919, 945 (1983) ("But policy arguments supporting even useful 'political inventions' are subject to the demands of the Constitution . . ."); *Coker v. Georgia*, 433 U.S. 584, 604 (1977) (Burger, C.J., dissenting) ("In striking down the death penalty imposed upon the petitioner in this case, the Court has overstepped the bounds of proper constitutional adjudication by substituting its policy judgment for that of the state legislature."); and *Adamson v. California*, 332 U.S. 46, 125 (1947) (Murphy, J., dissenting) ("Much can be said pro and con as to the desirability of allowing comment on the failure of the accused to testify. But policy arguments are to no avail in the face of a clear constitutional command.").

For a sampling of scholarly statements to this effect, see Karen C. Daly, *Balancing Act: Teachers' Classroom Speech and the First Amendment*, 30 J.L. & EDUC. 1, 43–44 (2001) ("Although it seems sensible that 'a responsible teacher must have freedom to use the tools of his profession as he sees fit,' the contention has the flavor of a policy argument rather than a constitutional one." (quoting *Sterzing v. Fort Bend Indep. Sch. Dist.*, 376 F. Supp. 657, 662 (S.D. Tex. 1972))); Jonathan L. Entin & Erik M. Jensen, *Taxation, Compensation, and Judicial Independence*, 56 CASE W. RES. L. REV. 965, 1009 (2006) ("But, as is always the case, we should not conflate policy arguments and the requirements of constitutional law."); Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995, 1011 n.35 (2003) (contrasting "constitutional arguments" with "policy arguments for a desired outcome"); and Carlos Manuel Vázquez, *Laughing at Treaties*, 99 COLUM. L. REV. 2154, 2216

One possibility is that this anti-modality has no independent content. A forbidden policy argument could just be the negative residual after all acceptable constitutional arguments are identified. Robert Dahl suggested something along these lines in a classic article when, at one point, he equated “policy decisions” with “going outside established ‘legal’ criteria found in precedent, statute, and constitution.”<sup>74</sup> On this understanding, the charge that a constitutional decisionmaker has made a policy argument would be nothing more or less than the charge that she has employed a form of reasoning not encompassed by the modalities. “Policy” would be synonymous with “illegitimate,” a label for an accusation premised on other grounds. “Policy argument” would amount to a kind of catchall, ur-anti-modality.

As amorphous as this anti-modality may be, most participants in constitutional debates seem to have a more specific object in mind when they invoke it. Sometimes, for instance, the proscription against policy argument is connected to the idea that constitutional interpretation should not turn on the interpreter’s personal “preferences” or “predilections,”<sup>75</sup> which is just what the attitudinal model predicts for merits votes at the Supreme Court.<sup>76</sup> But this notion of policy does not get us far on its own. Every decision with even a sliver of discretion reflects, on some level, the preferences and predilections of the decisionmaker. And as Pauline Kim has explained, constitutional interpreters may simultaneously hold and try to advance any number of preferences, including a socialized or self-interested preference for following constitutional law as best understood through conventional legal reason.<sup>77</sup>

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(1999) (“Professor Yoo makes policy arguments in favor of his constitutional interpretation that belong instead in an article urging a constitutional amendment.”).

74. Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 279–80 (1957).

75. See, e.g., *State Tax Comm’n v. Aldrich*, 316 U.S. 174, 181 (1942) (“It would violate the first principles of constitutional adjudication to strike down state legislation on the basis of our individual views or preferences as to policy . . .”); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 863 (1989) (“[T]he main danger in judicial interpretation of the Constitution . . . is that the judges will mistake their own predilections for the law.”). These passages bespeak a common intuition that if constitutional interpretation always delivers what you want, you must be cheating. Cf. Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 395 (1981) (highlighting the implausibility of the notion that a constitution established “to meet the middle distance needs of the nation at the end of the eighteenth century,” and rarely amended since, produces only optimal outcomes).

76. See SEGAL & SPAETH, *supra* note 10, at 312 (“[T]he attitudinal model holds that the justices base their decisions on the merits on the facts of the case juxtaposed against their personal policy preferences.”).

77. See Pauline T. Kim, *Lower Court Discretion*, 82 N.Y.U. L. REV. 383, 404–08 (2007). Constitutional decisionmaking based openly on “preferences” in the form of whim, caprice, or intuition is ruled out by a separate anti-modality, the proscription against what we call emotional argument. See *infra* Section II.B.4. Decisionmaking based openly on preferences for select political or social groups is ruled out by the proscription against partisan argument. See *infra* Section II.B.3.

In adjudicative settings, policy argument is further associated with “legislative” behavior and charges of “legislating from the bench.”<sup>78</sup> Alexander Hamilton’s defense of judicial review in *The Federalist No. 78* contrasts a legislature’s “pleasure” with a constitutional court’s burden of “judgment.”<sup>79</sup> Since the late 1930s, federal judges have been especially eager to disassociate themselves from the *Lochner* Court and its alleged sin of acting “as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions.”<sup>80</sup> In this discourse, a failure of role fidelity (acting like a lawmaker rather than a law interpreter) is seen to flow from an unacceptable mode of constitutional analysis, addressed to questions of socioeconomic utility. The anticanonical status of *Lochner* underwrites the anti-modal status of constitutional reasoning that too closely resembles the imagined deliberations of elected representatives seeking to promote their own vision of the public good.

Still more revealing, the proscription against policy argument is connected to the commonly voiced idea that constitutional interpretation must not be “results-oriented,” with outcomes dictated by an instrumentalist inquiry into the welfare effects or distributional implications of a disputed government action or legal rule.<sup>81</sup> Justice Neil Gorsuch, writing for the Court this past Term, associated “policy judgment” with “weigh[ing] the costs and benefits of different approaches” to assess the aggregate impact of each on “people and . . . dollars.”<sup>82</sup> In various U.S. common law fields, legal decisionmakers earnestly engage in such weighing.<sup>83</sup> Justice Gorsuch authored

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78. See Pozen, *supra* note 50, at 922 n.180 (“‘Legislating from the bench’ has become a standard trope in Supreme Court dissents . . .”).

79. THE FEDERALIST NO. 78, at 381 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

80. *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965). The *Lochner* justices themselves agreed on this principle, at least in theory. See *Lochner v. New York*, 198 U.S. 45, 56–57 (1905) (“This is not a question of substituting the judgment of the court for that of the legislature. If the act be within the power of the State it is valid, although the judgment of the court might be totally opposed to the enactment of such a law.”); *id.* at 69 (Harlan, J., dissenting) (“Under our systems of government the courts are not concerned with the wisdom or policy of legislation.”); *id.* at 75 (Holmes, J., dissenting) (“Some . . . laws embody convictions or prejudices which judges are likely to share. Some may not. But a constitution is not intended to embody a particular economic theory . . .”).

81. See Pozen, *supra* note 50, at 943–44 (observing that in constitutional law, “[e]ven more so than in other fields, . . . judges and theorists . . . disparage results-oriented reasoning as illegitimate and lawless”); cf. Dahl, *supra* note 74, at 279 (associating “policy decision” with selecting “the most preferable alternative” in light of “expected consequences and the expected probability of the consequences actually occurring”).

82. *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1816 (2019). This conception of policy judgment loosely tracks Ronald Dworkin’s conception of “arguments of political policy,” which aim “to promote . . . the general welfare or public interest,” as distinct from “arguments of political principle that appeal to the political rights of individual citizens.” RONALD DWORKIN, A MATTER OF PRINCIPLE 11 (1985).

83. See MELVIN ARON EISENBERG, THE NATURE OF THE COMMON LAW 26–32 (1988) (explaining that policy arguments that “characterize states of affairs as conducive or adverse to the general welfare” figure “pervasively” in common law reasoning); Kent Greenawalt, *Policy*,

another opinion last year, a dissent in a maritime tort case, in which he asserted that “the traditional common law rule still makes the most sense today” because, “in the language of law and economics, those who make products are generally the least-cost avoiders of their risks.”<sup>84</sup> In various statutory domains, adjudicators and administrators likewise routinely consider socioeconomic costs and benefits in construing congressional enactments.<sup>85</sup> Constitutional law is an outlier in the degree to which it denigrates, and purports to cordon off, this style of consequentialist reasoning.

Later we will explore ways in which such reasoning may seep back into constitutional law.<sup>86</sup> At a minimum, however, this anti-modality rules out anything resembling *professional-level* consequentialist analysis. In a more casual fashion, constitutional adjudicators occasionally declare that the balancing of costs and benefits has already been done for them or must be done in some other body;<sup>87</sup> constitutional opinions and briefs, especially amicus briefs, occasionally refer to empirical studies when making instrumental claims;<sup>88</sup> and constitutional interpreters of all stripes occasionally offer bold assertions about the health, functioning, and vulnerabilities of institutions and society or about the likely impact of an interpretive choice.<sup>89</sup> “Policy

*Rights, and Judicial Decision*, 11 GA. L. REV. 991, 1010 (1977) (explaining that common law courts “frequently do rely on arguments that a particular decision will serve the collective welfare in some respect”).

84. *Air & Liquid Sys. Corp. v. DeVries*, 139 S. Ct. 986, 997 (2019) (Gorsuch, J., dissenting) (citing, inter alia, STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* 17 (1987), and GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* 135 & n.1 (1970)).

85. See generally Kessler & Pozen, *supra* note 62, at 1859–68 (reviewing the increasingly central place of cost-benefit analysis in administrative law and policy since the 1980s); Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032, 1049–51 (2011) (describing scenarios in which courts and agencies will construe statutes to permit or require explicit cost-benefit analysis).

86. See *infra* Section III.B.

87. See, e.g., *United States v. Stevens*, 559 U.S. 460, 470 (2010) (“The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs.”); *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008) (stating that the Second Amendment “is the very *product* of an interest balancing by the people”).

88. Cf. Allison Orr Larsen & Neal Devins, *The Amicus Machine*, 102 VA. L. REV. 1901, 1920–21 (2016) (“The Supreme Court has embarked on ‘a widespread empirical turn,’ and its decisions are full of factual claims about the way the world works . . .” (quoting Timothy Zick, *Constitutional Empiricism: Quasi-Neutral Principles and Constitutional Truths*, 82 N.C. L. REV. 115, 118 (2003))); *id.* at 1906 (describing an “unprecedented rise” in Supreme Court amicus briefs conveying “information outside the record”).

89. Examples can be found in all areas of constitutional law. For two especially prominent ipse dixits from the educational context, see *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 746 (2007) (plurality opinion) (asserting without evidence that “race-based reasoning,” in the form of a voluntarily adopted student assignment plan that aims to increase racial integration, “contribut[es] to an escalation of racial hostility and conflict” (quoting *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 603 (1990) (O’Connor, J., dissenting))), and *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 641 (1943) (“Probably no deeper division of our people could proceed from any provocation than from finding it

judgment” in Gorsuch’s sense makes many fleeting and circumscribed appearances in constitutional debate. In recent years, moreover, the jurisprudential pragmatists Justice Stephen Breyer and Judge Richard Posner arguably have gone further and sought, in the manner of constitutional entrepreneurs, to alter this anti-modality’s boundaries or to convert it altogether into a modality.<sup>90</sup>

But at least to date, explicitly predicting, valuing, or quantifying the range of consequences associated with various interpretive options remains essentially unheard of in constitutional law. Any sustained effort to work through the practical advantages or disadvantages of a constitutional proposition—identifying key assumptions, estimating probabilities, assigning distributional weights, specifying a social-welfare function, rank-ordering alternatives, running regressions, considering counterfactuals, or the like—would immediately elicit suspicion that the anti-modality boundary had been breached. To exaggerate only slightly, the most surefire way to violate the norm against policy argument in constitutional decisionmaking is to do policy argument rigorously.

## 2. Fundamentalist Arguments

Likewise impermissible in contemporary constitutional law are what we might call fundamentalist arguments. These are arguments that draw directly on deep philosophical premises or comprehensive normative commitments, whether involving a system of religious belief, political morality, or social theory. The contest over this mode of reasoning is old and, in some respects, ongoing. Several leading constitutional theorists in the middle part of the twentieth century sought to incorporate “fundamental values” into constitutional jurisprudence.<sup>91</sup> And value arguments of various kinds are still routinely employed, with differing degrees of candor, when constitutional interpreters seek “to give meaning to constitutional provisions that expressly require value judgments” or to make “choices where other kinds of arguments are closely balanced or indeterminate.”<sup>92</sup> Even so, mainstream consti-

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necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing. . . . Those who begin coercive elimination of dissent soon find themselves exterminating dissenters.”).

90. See, e.g., RICHARD A. POSNER, *OVERCOMING LAW* 207 (1995) (“The interpretive question [in constitutional disputes] is ultimately a political, economic, or social one to which social science may have more to contribute than law.”); Cass R. Sunstein, *From Technocrat to Democrat*, 128 HARV. L. REV. 488, 489–90 (2014) (describing Justice Breyer’s “emphasis on the importance of the consequences,” exemplified by his use of fact-laden appendixes, as making “Breyer’s work distinctive, even unique”).

91. See generally John Hart Ely, *The Supreme Court, 1977 Term—Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5 (1978) (describing and critiquing this line of theory).

92. Fallon, *supra* note 33, at 1207. Value arguments, as Fallon defines them, “advance conclusions about what is morally or politically correct, desirable, or expedient as measured against some standard.” *Id.* at 1205.

tutional practice does not allow interpretive conclusions to be derived from any sort of “totalizing”<sup>93</sup> or metaethical theory about the nature of the good, the purpose of life, or the like. Explicitly moral readings of the Constitution, moreover, are “almost never openly endorsed”<sup>94</sup>—so much so that constitutional reasoning has become, in Robin West’s terms, “definitionally amoral.”<sup>95</sup>

The basic rationale for this proscription is straightforward. The Constitution, according to Justice Oliver Wendell Holmes in his *Lochner* dissent, “is made for people of fundamentally differing views.”<sup>96</sup> For people of fundamentally differing views to get along in a pluralist democracy, that democracy’s supreme law arguably must be debated and developed using only what Lawrence Solum, building on John Rawls, calls “public legal reasons,” which are accessible and acceptable in principle to all citizens.<sup>97</sup> Sectarian religious argument is perhaps the clearest example of nonpublic reason that fails this test.<sup>98</sup> Solum offers a nuanced account of public legal reason and a detailed defense of why official constitutional decisionmakers (though not necessarily academic theorists)<sup>99</sup> should refrain from invoking “the deep premises of comprehensive moral or religious doctrines in their opinions or delibera-

93. *McDonald v. City of Chicago*, 561 U.S. 742, 878 (2010) (Stevens, J., dissenting) (“[W]e have eschewed attempts to provide any all-purpose, top-down, totalizing theory of ‘liberty.’”).

94. DWORKIN, *supra* note 36, at 3; *see also id.* at 3–5 (arguing that constitutional practice “relies heavily on the moral reading of the Constitution,” even though its influence often “remains hidden” and “is almost never acknowledged”).

95. ROBIN WEST, *PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT* 191 (1994); *see also id.* (“According to the Supreme Court justices themselves, constitutional issues are by definition legal issues, as opposed to moral issues.”).

96. *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting). Justice Holmes comes close here to making a policy argument against the use of fundamentalist or partisan arguments—thus providing an illustration of how anti-modal reasoning may play a role in justifying the existence or contours of the modalities and anti-modalities themselves. *See supra* note 44. Put another way, some part of the entire structure of constitutional grammar likely rests on anti-modal foundations.

97. *See generally* Lawrence B. Solum, *Public Legal Reason*, 92 VA. L. REV. 1449 (2006). As Solum recounts, Rawls argued that public reasons include “presently accepted general beliefs and forms of reasoning found in common sense,” and he envisioned the Supreme Court as public reason’s “institutional exemplar.” *Id.* at 1468, 1473 (quoting JOHN RAWLS, *POLITICAL LIBERALISM* 224, 235 (expanded ed. 2005)).

98. One of the few examples given by Bobbitt of a type of argument never heard in constitutional law is “overt religious arguments.” BOBBITT, *supra* note 2, at 6. The trial judge in *Loving v. Virginia* notoriously violated this proscription when he opined, in upholding the state’s interracial marriage ban, that “Almighty God . . . did not intend for the races to mix.” 388 U.S. 1, 3 (1967) (quoting without citation Virginia trial judge Leon M. Bazile).

99. *See* Solum, *supra* note 97, at 1479–80 (arguing that the ideal of public legal reason that applies to legal practice “does not apply *directly* to normative legal theory,” though it does apply “*indirectly*”).



tions.”<sup>100</sup> Our point here is that decisionmakers generally do so refrain.<sup>101</sup> Although one finds many references in constitutional deliberations to widely shared, thinly specified values such as fairness or federalism, one never finds appeals to Kantianism, utilitarianism, Talmudic ethics, or any other controversial, comprehensive doctrine.

This point should not be overstated. As with the other anti-modalities, fundamentalist arguments may gain entry into constitutional law, partially and perhaps surreptitiously, if they are reformulated in modality-compatible terms.<sup>102</sup> In earlier eras, certain fundamentalist arguments were not clearly anti-modal at all. Explicit natural law reasoning, for instance, may have ceased to be “respectable” in elite constitutional circles by the mid-twentieth century,<sup>103</sup> but it was held in higher regard for much of the nineteenth century.<sup>104</sup> And as already mentioned, high-level moral reasoning played a significantly larger, though still constrained, role in constitutional scholarship during the immediate postwar period than it does today.<sup>105</sup> Even in the absence of a natural law revival, it is always possible that one or another gen-

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100. *Id.* at 1473–78; see also KENT GREENAWALT, PRIVATE CONSCIENCES AND PUBLIC REASONS 149 (1995) (arguing that judges should give priority to generally “shared premises and ways of reasoning”); Stephen Macedo, *Homosexuality and the Conservative Mind*, 84 GEO. L.J. 261, 299 (1995) (describing “insistence on public reasonableness” as “at the core of liberal constitutionalism”).

101. Consistent with this point, Solum observes in a recent blog post that it “would be unusual to see a Supreme Court justice rely on a particular religion or on a deep philosophical view about the meaning of life or the ultimate nature of the good,” and he suggests that Chief Justice Warren Burger’s explicit reliance on Judeo-Christian morality in his concurring opinion in *Bowers v. Hardwick*, 478 U.S. 186, 196–97 (1986) (Burger, C.J., concurring), helps explain why the opinion is “infamous.” Lawrence Solum, *Legal Theory Lexicon: Public Reason*, LEGAL THEORY BLOG (June 2, 2019, 9:00 AM), <https://lsolum.typepad.com/legaltheory/2019/06/legal-theory-lexicon-public-reason.html> [<https://perma.cc/M9P4-RFKK>]; see also Solum, *supra* note 97, at 1479 (“High normative legal theory—with explicit references to metaethics as well as to moral and political philosophy—is almost never an explicit part of legal practice.”). *But cf.* Gregg Strauss, *What’s Wrong with Obergefell*, 40 CARDOZO L. REV. 631, 670 (2018) (arguing that *Obergefell v. Hodges* violates the ideal of public reason by glorifying marriage as a way of life and “showing utter disregard for whether citizens in nonmarital families could accept its opinion as reasonable”).

102. See *infra* notes 234–241 and accompanying text.

103. JOHN HART ELY, DEMOCRACY AND DISTRUST 52 (1980).

104. See TRIBE, *supra* note 51, at 1335–43 (documenting assertions of natural law and natural-rights constraints on government throughout much of the 1800s, whether or not directly reflected in ratified text); *cf.* Balkin & Levinson, *supra* note 32, at 1787 (arguing that Bobbitt’s “denial of the natural law tradition” in American constitutional discourse “is seriously ahistorical”).

105. See *supra* note 91 and accompanying text; see also Kessler & Pozen, *supra* note 62, at 1828 (“The public law theories that have gained the most traction since the 1970s have retreated from the open pursuit of justice in favor of a more formalistic, institutionalist orientation.”). On the theme of diminished constitutional aspirations in courts and elsewhere, see generally MARK TUSHNET, THE NEW CONSTITUTIONAL ORDER (2003).

eral normative theory will come to be seen as an acceptable basis for constitutional decisionmaking in the future.<sup>106</sup>

A more paradoxical complication is that, in ruling out fundamentalist arguments at the retail level, this anti-modality has helped make constitutional law increasingly fundamentalist at the wholesale level. American political culture has long been marked by “constitution worship.”<sup>107</sup> Barred by this culture from “confess[ing] to a lack of faith in the Constitution or a lapse in fidelity to its commands,”<sup>108</sup> and barred by the rules of constitutional grammar from employing any deep moral principles to ground their interpretive choices, constitutional decisionmakers today inhabit a normative system in which fidelity to the Constitution is the one and only acknowledged desideratum—“not just a good thing, but the point of the practice.”<sup>109</sup> The sole comprehensive ideology to which constitutional decisionmakers may, and effectively must, swear fealty is constitutionalism itself.

### 3. Partisan Arguments

Even more plainly impermissible in constitutional decisionmaking are partisan arguments that express a preference for a particular political or social group, other than a group said to be singled out for special consideration by the canonical document itself. Chief Justice John Roberts recently channeled this proscription when he asserted that there are no “Obama judges or Trump judges, Bush judges or Clinton judges,” only “judges doing their level best to do equal right to those appearing before them.”<sup>110</sup> Bobbitt alluded to another aspect of this anti-modality when he quipped that “[o]ne does not see counsel argue, nor a judge purport to base his decision, on arguments of kinship.”<sup>111</sup>

Nor does one see constitutional interpreters advance such arguments outside of court. Scholars continue to debate whether “neutral principles” of the sort commended by Herbert Wechsler should or could guide constitu-

106. Cf. Frederick Schauer, *The Limited Domain of the Law*, 90 VA. L. REV. 1909, 1945–46 (2004) (explaining that inclusive versions of legal positivism are potentially “compatible with law being intertwined with morality, with (correct) morality being a criterion of legality, and even with the domain of law being coincident with the domain of morality or the domain of social norms”).

107. Monaghan, *supra* note 75, at 356 (“The practice of ‘constitution worship’ has been quite solidly ingrained in our political culture from the beginning of our constitutional history.”).

108. Pozen, *supra* note 50, at 941 (describing constraints on officeholders and aspirants who “wish to remain politically viable”).

109. BALKIN, *supra* note 60, at 106.

110. Adam Liptak, *Chief Justice Defends Judicial Independence After Trump Attacks ‘Obama Judge,’* N.Y. TIMES (Nov. 21, 2018), <https://www.nytimes.com/2018/11/21/us/politics/trump-chief-justice-roberts-rebuke.html> [https://perma.cc/K3N4-JET4].

111. BOBBITT, *supra* note 2, at 6. Even this particular subnorm against arguments of kinship must be specified with some care. References to “our Founding Fathers,” e.g., *Furman v. Georgia*, 408 U.S. 238, 319 (1972) (Marshall, J., concurring), are not seen to violate it.

tional decisions in any robust fashion.<sup>112</sup> But virtually no one disputes the more modest notion that constitutional decisionmaking should not be based on the decisionmaker's affinity with a potentially affected group.<sup>113</sup> Similar to how the Equal Protection Clause was understood in the late 1800s and early 1900s to forbid "[c]lass legislation, discriminating against some and favoring others" rather than serving the general good,<sup>114</sup> constitutional interpreters are themselves forbidden by their professional community from reasoning in ways that indicate favor or disfavor for specific segments of the polity. This includes segments of the polity to which the speaker herself belongs; arguments tied too closely to the interpreter's identity are likewise liable to be considered out of bounds.<sup>115</sup> Whether or not neutrality is realistic or coherent as a jurisprudential ideal, the avoidance of overt group-based partiality is an attainable—and, in mainstream constitutional practice, attained—deliberative ideal.

At the same time, group-level analysis remains embedded in parts of constitutional law. Modern equal protection doctrine, as every law student learns, devotes special scrutiny to "suspect" and "quasi-suspect" classifications based on race, sex, and other ascriptive characteristics.<sup>116</sup> First

112. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). For two of the most influential critiques, see ELY, *supra* note 103, at 55 ("An insistence on 'neutral principles' does not by itself tell us anything useful about the appropriate content of those principles or how the Court should derive the values they embody."), and Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 804–05 (1983) (arguing that the "theory of neutral principles fails" because it "requires that we develop an account of consistency of meaning" that is effectively precluded by "the atomistic premises of liberalism").

113. Cf. Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323, 1356–57 (2006) (explaining that, in American constitutional culture, advocates are required "to translate partial and partisan judgments about constitutional meaning into the language of a common tradition").

114. *Barbier v. Connolly*, 113 U.S. 27, 32 (1885). For a broad overview of this strand of equal protection doctrine, see V.F. Nourse & Sarah A. Maguire, *The Lost History of Governance and Equal Protection*, 58 DUKE L.J. 955, 962–91 (2009).

115. Consider the uproar caused by Justice Sotomayor's comment, which she walked back during her Supreme Court confirmation hearing, that "a wise Latina woman" might reach "better [legal] conclusion[s] than a white male who hasn't lived that life." See Liz Halloran, *In the Hot Seat, Sotomayor Is Model of Judicial Cool*, NPR (July 14, 2009, 2:07 PM), <https://www.npr.org/templates/story/story.php?storyId=106602696> [<https://perma.cc/H4LZ-TZUY>]. Taken together with the modalities, this episode nicely illustrates the subtlety of constitutional grammar. In cheat-sheet form:

"Americans have long valued *x* or believed *y*"—seems fine, as per the ethical and historical modalities.

"As Americans, we value *x* or believe *y*"—unusual in elite legal discourse but likely acceptable too.

"As an American, I value *x* or believe *y*"—now wait a minute . . .

"As an American of subclass *z*, I value *x* or believe *y*"—find me an anti-modality, and quickly.

116. See generally ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 683–89 (6th ed. 2020) (summarizing the "tiers" of equal protection scrutiny). But cf. Russell K. Robinson, *Unequal*

Amendment doctrine gives preferential treatment to the press in certain settings.<sup>117</sup> Only members of Congress enjoy the protections of the Speech or Debate Clause.<sup>118</sup> In various respects, then, constitutional interpreters are not just permitted but obligated under existing law to take into account the social or institutional identity of particular persons in evaluating their claims. These areas of doctrine may invite charges of undue favoritism for some classes over others.<sup>119</sup> Yet because these instances of arguable partiality are said to be grounded in constitutional text, history, or structure, they avoid running afoul of the proscription against partisan argument. Constitutional interpreters may not express their own preference for a particular group, but they may express the view that the Constitution, construed in light of the modalities, expresses such a preference.

With this anti-modality as well, suspicions run rampant that the forbidden form of argument does unacknowledged work. The Supreme Court's constitutional rulings in *Bush v. Gore*<sup>120</sup> and subsequent election law cases, for instance, are routinely assailed as the product of raw political partisanship.<sup>121</sup> An entire field of empirical study investigates the relationship between judicial behavior and proxies for extralegal ideology and party affiliation.<sup>122</sup> Again, however, our task in this Part is to identify constraints on the types of argument that may be made in constitutional law, not subterranean motivations or voting patterns. And to whatever extent partisanship

*Protection*, 68 STAN. L. REV. 151 (2016) (questioning the Court's commitment to this model of equal protection review).

117. See Sonja R. West, *Favoring the Press*, 106 CALIF. L. REV. 91, 104 (2018) (explaining that the First Amendment's Press Clause "traditionally has worked in support of differential treatment for the press").

118. U.S. CONST. art. I, § 6, cl. 1 ("[F]or any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place.").

119. See, e.g., *Craig v. Boren*, 429 U.S. 190, 211–12 (1976) (Stevens, J., concurring) ("There is only one Equal Protection Clause. It requires every State to govern impartially. It does not direct the courts to apply one standard of review in some cases and a different standard in other cases."); West, *supra* note 117, at 93 n.4 (collecting prominent works arguing against press preferentialism).

120. 531 U.S. 98 (2000).

121. For recent examples, see MARK TUSHNET, *TAKING BACK THE CONSTITUTION: ACTIVIST JUDGES AND THE NEXT AGE OF AMERICAN LAW* 110 (2020) (suggesting that the first principle of the Roberts Court's constitutional jurisprudence is that "[s]tatutes, policies, and practices. . . that strengthen the Republican Party and weaken the Democratic Party are constitutionally permissible"), and Nicholas O. Stephanopoulos, *The Anti-Carolene Court*, 2019 SUP. CT. REV. 111, 178 ("Running like a red thread through the Roberts Court's [election law] decisions is perceived, and actual, partisan advantage.").

122. For one of the most comprehensive and up-to-date contributions to this literature, see ADAM BONICA & MAYA SEN, *THE JUDICIAL TUG OF WAR: HOW LAWYERS, POLITICIANS, AND IDEOLOGICAL INCENTIVES SHAPE THE AMERICAN JUDICIARY* (2021). There are limits to the confident conclusions that can be reached through observational studies. But our ability to associate patterns of judicial behavior with extralegal commitments is likely to improve over time, which may further erode the credibility of denials that group affinities are effectively excluded from constitutional decisionmaking.

might be driving the results in politically salient disputes, partisan *reasoning* never once appears on the face of the briefs or opinions.<sup>123</sup> This anti-modality is as resilient as ever.

#### 4. Emotional Arguments

Mainstream legal practice additionally excludes certain emotional foundations for constitutional judgments. Broadly put, a decisionmaker's feelings are impermissible grounds for reaching conclusions about the content of constitutional law. More specifically, a constitutional proposition is infirm if its validity depends on the decisionmaker's affective response or state of mind, such that the proposition lacks an articulable logical structure that is accessible to other people.<sup>124</sup>

Emotions themselves are not arguments in a narrow sense, and some readers might wonder whether they belong in any account of modalities or anti-modalities.<sup>125</sup> But constitutional text is not an argument in a narrow sense either. Rather, the text furnishes source material for modal analysis, explanation, and justification. At least in principle, emotional responses can be similarly investigated and integrated into standardized forms of argument about the content of constitutional law. In social life, moreover, arguments

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123. Consider the dispassionate and rueful, if for some readers unintentionally comic, closing lines of the per curiam opinion in *Bush v. Gore*:

None are more conscious of the vital limits on judicial authority than are the Members of this Court, and none stand more in admiration of the Constitution's design to leave the selection of the President to the people, through their legislatures, and to the political sphere. When contending parties invoke the process of the courts, however, it becomes our unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront.

531 U.S. at 111.

124. Cf. BOBBITT, *supra* note 2, at 95 (stating in passing that "idiosyncratic, personal traits . . . reflect[] one feature of illegitimate judicial opinions"). Analogously, in its capital sentencing doctrine under the Eighth and Fourteenth Amendments, the Court has disapproved of jury instructions that would allow the verdict "to turn on the vagaries of particular jurors' emotional sensitivities." *Saffle v. Parks*, 494 U.S. 484, 493 (1990).

125. One position in philosophy and psychology treats emotions as essentially irrelevant or opposed to reason. See JON ELSTER, *ALCHEMIES OF THE MIND: RATIONALITY AND THE EMOTIONS* 285–301 (1999) (setting out "the traditional view" on how emotions can subvert rational information acquisition, belief formation, and action choice); Dan M. Kahan, *Two Conceptions of Emotion in Risk Regulation*, 156 U. PA. L. REV. 741, 742–43 (2008) (summarizing opposing views). That restrictive position is disputed by many. See, e.g., MARTHA C. NUSSBAUM, *LOVE'S KNOWLEDGE: ESSAYS ON PHILOSOPHY AND LITERATURE* 41 (1990) (discussing the longstanding and "very natural" view that emotions are "responsive to the workings of deliberation and essential to its completion"); Angela P. Harris & Marjorie M. Shultz, "A(nother) Critique of Pure Reason": *Toward Civic Virtue in Legal Education*, 45 STAN. L. REV. 1773, 1774 (1993) (contending that "[e]motions are part of thought, not its antithesis," and that efforts to banish them only end up "distort[ing]" intellectual exchanges). The analysis here does not depend on taking sides on these matters, although our characterization of emotional argument as anti-modal may be easiest to accept for readers who believe that reason and emotion are compatible.

based on emotion are indisputably pervasive<sup>126</sup>—which makes them prime candidates for inclusion in our list, however one conceptualizes the relationships among emotions, cognition, and rationality. Omitting emotional argument from the anti-modalities would miss an empirically plausible ground for decision in many disputes over constitutional meaning, and a ground that mainstream practitioners have long and loudly opposed.

The avowed domination of reason over emotion in constitutional law dates back to the Founding. James Madison, in *The Federalist No. 49*, contrasted “reason” with “passions” and suggested that the latter were incompatible with constitutional decisionmaking based “on the true merits of the question.”<sup>127</sup> Following Madison, not only are displays of feeling supposed to get one nowhere in constitutional interpretation, but they may also be read as signs of weakness. Injecting a statement such as “I feel passionately” into a debate about the Constitution’s meaning is apt to be deemed at best superfluous and at worst a proxy for logical error or a confession of modal desperation. Lawyers’ concerns about emotional argument are not restricted to constitutional law, of course. The suppression of emotion in the courthouse, for example, is part of a larger “script of judicial dispassion.”<sup>128</sup> Even if reason cannot be neatly segregated from emotion in legal practice,<sup>129</sup> many institutions have developed customs and rules to protect against perceived “threat[s] to the primacy of logic or reason in legal decision-making.”<sup>130</sup>

While constitutional law is not exceptional in this regard, remarkable promises of emotion exclusion appear in some of the most socially tattered areas of constitutional debate. In abortion cases, justices assure us that they have contained the surrounding “emotional uproar,”<sup>131</sup> leaving them clear

126. This observation generalizes far beyond the contemporary United States. Cf. JOHN STUART MILL, *AUTOBIOGRAPHY* 77 (Colum. Univ. Press 1924) (1873) (noting “the frequency with which, in ethical and philosophical controversy, feeling is made the ultimate reason and justification of conduct”).

127. THE FEDERALIST NO. 49, at 314 (James Madison) (Clinton Rossiter ed., 2003) (emphasis omitted). See generally Doni Gewirtzman, *Our Founding Feelings: Emotion, Commitment, and Imagination in Constitutional Culture*, 43 U. RICH. L. REV. 623, 637–40 (2009) (discussing the Framers’ “dualistic” understanding of reason versus emotion and their concern to prevent emotion from contaminating constitutional governance).

128. Terry A. Maroney, *The Persistent Cultural Script of Judicial Dispassion*, 99 CALIF. L. REV. 629, 633–42 (2011).

129. See Carlton J. Patrick, *A New Synthesis for Law and Emotions: Insights from the Behavioral Sciences*, 47 ARIZ. ST. L.J. 1239, 1248–50, 1266–68 (2015) (summarizing views of law-and-emotions scholars on the pervasiveness of emotion in law and its potential interactions with reason, variously defined).

130. Kathryn Abrams, *Empathy and Experience in the Sotomayor Hearings*, 36 OHIO N. U. L. REV. 263, 280 (2010).

131. *Stenberg v. Carhart*, 530 U.S. 914, 951 (2000) (Ginsburg, J., concurring) (“[A]midst all the emotional uproar caused by an abortion case, we should not lose sight of the character of Nebraska’s ‘partial birth abortion’ law.”); see also *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 1000–02 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part) (contrasting “deep passions” over abortion regulation with the “essentially lawyers’ work” the Court should be doing).

“to resolve the issue by constitutional measurement, free of emotion and of predilection.”<sup>132</sup> In flag-burning cases, justices associate themselves with the “special . . . feelings”<sup>133</sup> that the Stars and Stripes inspires, only to dismiss those feelings as legally irrelevant and to declare that the Constitution may compel “painful” results.<sup>134</sup> In these and countless other instances, constitutional interpreters acknowledge powerful emotional impulses and then, in the next moment, pivot to a mode of analysis that quarantines those impulses from the decisional arena.<sup>135</sup> A jarring departure from this pattern occurred when Justice Harry Blackmun not only exclaimed grief in his *DeShaney* dissent<sup>136</sup> but also, in the view of many readers, allowed that grief to inform his position on the meaning of the Due Process Clauses. Blackmun’s apparent violation of the norm against emotional argument elicited professional scorn and derision,<sup>137</sup> which in turn reinforced the norm.<sup>138</sup>

The norm extends to nonjudicial constitutional debate as well, albeit less rigidly. Personal storytelling with an emotional cast is by now a familiar, if

132. *Roe v. Wade*, 410 U.S. 113, 116 (1973) (“We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy . . . . Our task, of course, is to resolve the issue by constitutional measurement, free of emotion and of predilection.”).

133. *Texas v. Johnson*, 491 U.S. 397, 418 (1989).

134. *Id.* at 421 (Kennedy, J., concurring). The judicial rhetoric of personal pain in constitutional decisionmaking has an old pedigree. *See, e.g., McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819) (Marshall, C.J.) (describing “the painful duty” to declare federal statutes unconstitutional); 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 542, at 405 (Melville M. Bigelow ed., Boston, Little, Brown & Co. 5th ed. 1891) (1833) (describing the judiciary’s “painful duty of pronouncing judgment”).

135. *Cf. supra* note 49 (noting the phenomenon of constitutional virtue signaling).

136. *See DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 213 (1989) (Blackmun, J., dissenting) (“Poor Joshua!”); *id.* (“[C]ompassion need not be exiled from the province of judging.”).

137. *See, e.g.,* Richard A. Posner, *Judges’ Writing Styles (and Do They Matter?)*, 62 U. CHI. L. REV. 1421, 1434 (1995) (“[T]he opinions in which [Justice Blackmun] expressed his heartfelt views . . . are embarrassing performances precisely because they seem the unmediated expression of self.”); Laura Krugman Ray, *Judicial Personality: Rhetoric and Emotion in Supreme Court Opinions*, 59 WASH. & LEE L. REV. 193, 231 (2002) (charging the *DeShaney* dissent with failure to provide “legal argument”); *cf.* Mark Tushnet, *The Degradation of Constitutional Discourse*, 81 GEO. L.J. 251, 302 (1992) (criticizing a dissent by Chief Justice William Rehnquist that expressed the “author’s most heartfelt convictions” as “the Chief Justice’s ‘Poor Joshua’”).

138. *Cf.* Josh Chafetz & David E. Pozen, *How Constitutional Norms Break Down*, 65 UCLA L. REV. 1430, 1447–50 (2018) (outlining conditions under which “spectacular” flouting of a constitutional norm can end up reinforcing, rather than weakening, the flouted norm). Similarly, when Justice William Brennan disclosed in a lecture that his decision in *Goldberg v. Kelly*, 397 U.S. 254 (1970), was based in part on a belief that due process requires a “dimension of passion, of empathy,” for “the human beings affected,” William J. Brennan, Jr., *Reason, Passion, and “The Progress of the Law,”* 10 CARDOZO L. REV. 3, 21 (1988), his disclosure caused a scandal and prompted his academic supporters “to jump in and try to save Justice Brennan from himself, suggesting that he had misconstrued the grounds of his own decision.” Kathryn Abrams, *Exploring the Affective Constitution*, 59 CASE W. RES. L. REV. 571, 575 (2009).

controversial, genre of legal scholarship,<sup>139</sup> sometimes including constitutional scholarship.<sup>140</sup> Social movements seeking constitutional reform frequently give voice to their members' "most passionately held commitments."<sup>141</sup> In the impeachment proceedings against President Donald Trump, some Democratic members of Congress expressed sorrow about their constitutional conclusions, adverting to an emotional cost from discharging a nonnegotiable legal duty,<sup>142</sup> while others expressed outrage to demonstrate the intensity of their convictions and build popular support for removal.<sup>143</sup> Across such settings, however, the politicians, advocates, and academics who invoke their feelings strive to show that their constitutional conclusions do not depend on them. Today as at the inception of our constitutional order, the "dominant" view is that "emotion should have as little to do with constitutional lawmaking and interpretation as possible."<sup>144</sup>

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139. See generally Daniel A. Farber & Suzanna Sherry, *Telling Stories out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807, 808 (1993) (providing an overview of "the legal storytelling movement" and noting its "emphasis on the aesthetic and emotional dimensions" of legal experience).

140. See, e.g., KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* (2007). Personal storytelling is sometimes featured in constitutional briefs, as well. For a prominent example, see Brief of Janice Macavoy, Janie Schulman, and over 110 Other Women in the Legal Profession Who Have Exercised Their Constitutional Right to an Abortion as Amici Curiae in Support of Petitioners, *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) (No. 15-274). See also Adam Liptak, *Eyes on Kennedy, Women Tell Supreme Court Why Abortion Was Right for Them*, N.Y. TIMES (Feb. 29, 2016), <https://www.nytimes.com/2016/03/01/us/politics/abortion-supreme-court-women-explain-choices.html> [https://perma.cc/8W34-BU56] (describing such briefs as "unusual in focusing on real-life narratives").

141. Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 375 (2007); see also Kathryn Abrams, *Emotions in the Mobilization of Rights*, 46 HARV. C.R.-C.L. L. REV. 551 (2011) (exploring the role of emotions in social movement mobilization around claims of rights).

142. See, e.g., Adam Edelman, *Pelosi on Trump Impeachment Inquiry: 'We Have to Put Country Before Party'*, NBC NEWS (Sept. 27, 2019, 7:57 AM), <https://www.nbcnews.com/politics/trump-impeachment-inquiry/pelosi-trump-impeachment-inquiry-we-have-put-country-party-n1059436> [https://perma.cc/5FZX-4HXD] (quoting House Speaker Nancy Pelosi as stating, "This is a very sad time for our country"); Michael D. Shear, *Key Moments from the First Impeachment Hearing in the Judiciary Committee*, N.Y. TIMES (Dec. 5, 2019), <https://www.nytimes.com/2019/12/04/us/politics/impeachment-hearings.html> [https://perma.cc/RML9-22YJ] (quoting House Judiciary Committee Chairman Jerrold Nadler as stating, "It is not a pleasant task that we undertake today. But we have each taken an oath to protect the Constitution, and the facts before us are clear").

143. See, e.g., Zack Budryk, *Here Are the Senate Democrats Backing a Trump Impeachment Inquiry over Ukraine Call*, HILL (Sept. 25, 2019, 3:56 PM), <https://thehill.com/homenews/senate/463044-here-are-the-senate-democrats-calling-for-impeachment-over-the-trump-ukraine> [https://perma.cc/P6W6-AYF7] (quoting Senator Richard Blumenthal as stating, "I reached this decision with sadness, but also anger"); Corey Williams, *Michigan Rep. Tlaib's Campaign Pushing Impeachment T-Shirts*, AP NEWS (Sept. 27, 2019), <https://www.apnews.com/7185d1c8c1a246128d3f8f0eb2e48f2a> [https://perma.cc/5T6M-L34K] (reporting that Representative Rashida Tlaib's reelection campaign was promoting t-shirts with the slogan, "Impeach the MF").

144. Gewirtzman, *supra* note 127, at 623.



Our claim that emotional argument is anti-modal might seem to conflict with Jamal Greene's recent study of "pathetic" argument in constitutional law,<sup>145</sup> but there is room for reconciliation. Greene contends that "appeals to pathos are an important element of constitutional practice" as a tool of persuasion,<sup>146</sup> even though typologies of constitutional argument "typically ignore or dismiss emotional appeal."<sup>147</sup> With this we agree. Yet as other scholars have observed, most of the emotional statements made in constitutional debate appear to be oriented less toward establishing what is "true from a constitutional point of view"<sup>148</sup> than toward conjuring an atmosphere for successful advocacy, amplifying the significance of some factual consideration, or signaling or stimulating empathy for a favored party. Such statements might well do important work. But like practices of humor and ridicule, they are "non-propositional" in nature and so escape the framework of modalities and anti-modalities.<sup>149</sup> Following mainstream scholarship on modalities, our focus is on accepted and rejected grounds for ascertaining the content of constitutional law, not on techniques for persuading audiences within any given modal form.

The upshot is that we can understand emotional appeals as anti-modal when expressed in propositional terms, as claims about what the Constitution means, but as neither modal nor anti-modal when expressed in non-propositional terms. In the latter case, some other framework must determine whether the appeals are legitimate. That emotion-laden statements continually surface in and around constitutional debates is just another reminder that the rules of legal grammar may offer pathways of expression and influence for some version of anti-modal forces.

## 5. Popularity Arguments

On the flip side of decisionmaking based on personal feelings, offloading a constitutional judgment to popular opinion is foreclosed as well. Arguments about the Constitution's meaning that depend on the perceived popu-

145. See generally Greene, *supra* note 38.

146. *Id.* at 1393; see also *id.* at 1394–95, 1420–26 (arguing that within any given modality of constitutional argument, multiple tools of persuasion may be used, appealing to logic, to the speaker's character, or to the listener's emotions).

147. *Id.* at 1391.

148. BOBBITT, *supra* note 1, at 12.

149. See *supra* notes 54–57 and accompanying text (explaining that the modalities and anti-modalities apply to "propositional" statements about the Constitution's meaning). For examples of non-propositional expressions of emotion in constitutional cases, see *Rucho v. Common Cause*, 139 S. Ct. 2484, 2525 (2019) (Kagan, J., dissenting) ("With respect but deep sadness, I dissent."); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 110 (1873) (Field, J., dissenting) ("[I]t is to me a matter of profound regret that [the statute's] validity is recognized by a majority of this court . . ."); and *Memphis Planned Parenthood, Inc. v. Sundquist*, 175 F.3d 456, 468 (6th Cir. 1999) (Keith, J., dissenting) (dissenting "vehemently" from an "outcome-driven decision" that "does violence to the constitutional rights and liberties guaranteed to every female in this country").

larity of a proposition or the perceived unpopularity of an alternative are anti-modal, especially but not only in court.<sup>150</sup> This norm most clearly excludes attempts by constitutional decisionmakers to enhance their own popularity by appealing to the preferences of the general public. Opposition to following the crowd goes further, though. “They feel strongly” is no more accepted than “I feel strongly” as a foundation for reaching constitutional conclusions, however important popularity may be in other areas of social life and in sustaining constitutional commitments over time.<sup>151</sup> It “should go without saying,” *Brown II* accordingly pronounced, “that the vitality of . . . constitutional principles cannot be allowed to yield simply because of disagreement with them.”<sup>152</sup>

Not infrequently, constitutional propositions are promoted as decidedly unpopular—and as courageous or correct because of it.<sup>153</sup> Judges voting to uphold the constitutional claims of criminal defendants issue solemn reminders that “[e]nforcing the Constitution is neither a popularity contest nor a polling exercise.”<sup>154</sup> “The very purpose of a Bill of Rights,” the Court

150. For a representative statement of this view as it pertains to courts, see *Chisom v. Roemer*, 501 U.S. 380, 400 (1991) (“[I]deally public opinion should be irrelevant to the judge’s role because the judge is often called upon to disregard, or even to defy, popular sentiment.”); cf. Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616, 640 (1949) (depicting a fictional justice who suggests that the Court “should take account of public opinion” but acknowledges that the other justices “will be horrified by [the] suggestion”). For representative statements applicable beyond courts, see Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 13 (1979) (stating that “all seem to agree” that “a preference . . . of the body politic” cannot be a “good” constitutional reason), and John Copeland Nagle, *CERCLA’s Mistakes*, 38 WM. & MARY L. REV. 1405, 1457 (1997) (characterizing “lack of popular support” for a government action as “entirely irrelevant under the Constitution”).

151. See, e.g., THE FEDERALIST NO. 84, at 514 n.\* (Alexander Hamilton) (Clinton Rossiter ed., 2003) (contending that liberty of the press must ultimately “depend on . . . public opinion” among other nonconstitutional supports); ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* 78 (2010) (describing “[p]ublic constitutional sentiment” as “the bedrock” underlying the allocation of constitutional powers and limits on those powers).

152. *Brown v. Bd. of Educ.*, 349 U.S. 294, 300 (1955). Knowing what happened next in the battles over school desegregation does not change our point about constitutional orthodoxy.

153. Perhaps ironically, a belief about the long-run popularity of ignoring popularity seems to underwrite this anti-modality to an extent. See, e.g., *Williams v. United States*, 535 U.S. 911, 919 (2002) (Breyer, J., dissenting from denial of certiorari) (“Whenever a court considers a matter where public sentiment is strong, it risks public alienation. But the American public has understood the need and the importance of judges deciding important constitutional issues without regard to considerations of popularity.”). The idea seems to be that many people have a second-order preference that judges not follow people’s first-order preferences in deciding constitutional questions. Insofar as they credit and act upon this idea, judges would still be (partly) anchoring their position on how the constitutional system should work in popular opinion.

154. *United States v. Kincade*, 379 F.3d 813, 876 (9th Cir. 2004) (en banc) (Hawkins, J., dissenting) (opposing compulsory DNA profiling for federal offenders on supervised release); see also, e.g., *Geschwendt v. Ryan*, 967 F.2d 877, 892 (3d Cir. 1992) (en banc) (Aldisert, J., dis-

has repeatedly stated, is to place certain subjects “beyond the reach of majorities and officials.”<sup>155</sup> Even relatively popular rights claims may benefit from the proscription against popularity arguments. Asked to postpone a definitive constitutional ruling on same-sex marriage, Justice Anthony Kennedy responded in *Obergefell* that “[i]t is of no moment whether advocates of same-sex marriage now enjoy or lack momentum in the democratic process. The issue before the Court here is the legal question whether the Constitution protects the right . . . .”<sup>156</sup>

This anti-modality, too, must be specified with care. Deference doctrines of various sorts play a large role in constitutional adjudication,<sup>157</sup> and patches of constitutional law have at times enlisted measures of societal consensus. Readers familiar with Supreme Court opinions will quickly compile a mental list of examples that rely on head counting of some kind, as with incorporation of the Bill of Rights<sup>158</sup> and Eighth Amendment proportionality review.<sup>159</sup> Readers familiar with twentieth-century constitutional scholarship will recall efforts to ground unenumerated rights in conventional morality, partly to weaken the charge of anti-modal fundamentalism.<sup>160</sup> And any reader may doubt that popularity actually is blocked from influencing constitutional decisionmaking by judicial or nonjudicial actors.

Defined narrowly, however, popularity-based reasoning is anti-modal nonetheless. At a minimum, one does not find constitutional decisionmakers relying on the popularity or unpopularity of a proposition as the sole basis for their decision. More than that, virtually any time a constitutional deci-

senting) (asserting, in an opinion supporting habeas relief for a defendant convicted of murder, that “[w]e must disregard public opinion on a given issue or in a given case”).

155. *W. Va. State Bd. of Ed. v. Barnette*, 319 U.S. 624, 638 (1943). A search for “beyond the reach of majorities and officials” in Westlaw’s database of U.S. Supreme Court cases indicates that this passage has been quoted in more than a dozen subsequent opinions.

156. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2606 (2015). Public-opinion polls suggest that support for same-sex marriage had been rising and surpassed opposition before *Obergefell* was handed down. See, e.g., *Attitudes on Same-Sex Marriage*, PEW RSCH. CTR. (May 14, 2019), <https://www.pewforum.org/fact-sheet/changing-attitudes-on-gay-marriage> [<https://perma.cc/Q5GM-YBSX>].

157. See generally Paul Horwitz, *Three Faces of Deference*, 83 NOTRE DAME L. REV. 1061, 1070–106 (2008) (providing a broad overview of deference as a doctrinal tool in constitutional law).

158. For a recent example, see *Timbs v. Indiana*, 139 S. Ct. 682, 689 (2019) (relying in part on the fact that “all 50 States have a constitutional provision prohibiting the imposition of excessive fines”).

159. See *Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (reviewing a series of cases in which the Court relied in part on state legislation, as well as the justices’ “own judgment,” in evaluating such claims).

160. See, e.g., Michael J. Perry, *Abortion, the Public Morals, and the Police Power: The Ethical Function of Substantive Due Process*, 23 UCLA L. REV. 689, 735 (1976) (defending “the judicial practice” in substantive due process cases “of developing and applying norms rooted not in the text but in the conventions of society”). See generally Ely, *supra* note 91, at 43–52 (cataloging and critiquing proposals to ground constitutional decisionmaking in contemporary “consensus”).

sionmaker invokes a consensus-like argument, the argument turns out to be rooted not in popular opinion per se but rather in patterns of state legislation, state constitutional law, or lower-court rulings.<sup>161</sup> Years have passed since the Court last referenced an opinion poll as a potential factor in support of a rights claim.<sup>162</sup> Public sentiment may figure in constitutional debate, then, but only indirectly, when mediated through official legal acts and institutions. Unmediated expressions of public sentiment, or speculations about possible future sentiment, are excluded as a rule. “Under current constitutional law and theory,” Tara Leigh Grove observes, “it does not appear to be legally legitimate for a Justice to vote in a way she deems legally incorrect in order to preserve the Court’s public reputation” or to please majorities or other constituencies.<sup>163</sup> *Mutatis mutandis*, the same appears to hold true for nonjudicial constitutional decisionmakers.

The precise scope of this exclusion is not well settled in contemporary practice. Judges may at one point declare that they should not “overrule under fire”<sup>164</sup> and at another point draw on criticism of old decisions as a factor in repudiating them.<sup>165</sup> But debates over precise boundaries, and accusations of illegitimate boundary crossing, are to be expected with anti-modalities as with modalities.<sup>166</sup> Those debates are source material for us, rather than unwelcome complications; they help to produce the tensions and accommodations that are central to our inquiry.

## 6. Logrolling Arguments

Finally, a set of logrolling arguments appear to be off-limits to constitutional decisionmakers. By “logrolling,” we refer to a cluster of techniques: (1) a decisionmaker supporting one proposition of constitutional law in ex-

161. See generally Aaron-Andrew P. Bruhl, *Following Lower-Court Precedent*, 81 U. CHI. L. REV. 851, 855 (2014) (discussing the Supreme Court’s inconsistent approach to “honor[ing] lower-court consensus”); Corinna Barrett Lain, *The Unexceptionalism of “Evolving Standards,”* 57 UCLA L. REV. 365, 370–400 (2009) (collecting examples from a wide range of civil liberties contexts in which the Court has engaged in “state nose-counting”—in every instance, it seems, in the form of counting state legislative or constitutional provisions).

162. See *Atkins*, 536 U.S. at 316 n.21 (citing “polling data” among other sources as “[a]dditional evidence,” beyond the state statutes discussed in the opinion’s main text, indicating a national consensus against executing “mentally retarded” individuals); see also *Miller v. Alabama*, 567 U.S. 460, 511 (2012) (Alito, J., dissenting) (stating that the Court previously “toyed with the use of public opinion polls” in Eighth Amendment cases); Tonja Jacobi, *The Subtle Unraveling of Federalism: The Illogic of Using State Legislation as Evidence of an Evolving National Consensus*, 84 N.C. L. REV. 1089, 1117–18 (2006) (reporting that, as of 2006, “the Court ha[d] never relied on public opinion polls without evidence of state legislation”).

163. Tara Leigh Grove, *The Supreme Court’s Legitimacy Dilemma*, 132 HARV. L. REV. 2240, 2269 (2019) (book review) (emphasis omitted). Notice how this formulation invites justices to incorporate considerations of public reputation into their modal legal reasoning, consciously or subconsciously, so as to dissolve any conflict.

164. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 867 (1992).

165. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 576 (2003).

166. See *supra* Section II.A.

change for another decisionmaker's support for some other proposition;<sup>167</sup> (2) decisionmakers splitting the difference between two competing propositions for the sake of achieving compromise or settlement;<sup>168</sup> and (3) decisionmakers establishing a system whereby proponents of competing constitutional propositions take turns implementing their views or are allowed to implement different views in different locations.<sup>169</sup> Each of these techniques resembles practices associated with legislatures or constituent assemblies. Such practices can facilitate compromise in environments marked by competing interests, where disagreements are bound to occur without anyone necessarily making a mistake of logic. Yet as divisive as constitutional interpretation can be, no official decisionmaker ever seems to endorse the use of these techniques to resolve the merits of a constitutional dispute or otherwise reach a conclusion of constitutional law.<sup>170</sup>

Unlike the other anti-modalities on our list, antilogrolling norms apply specifically to decisions taken within multimember groups, and the prohibited techniques have a behavioral dimension that might distinguish them from constraints on reasoning or rhetoric. Each prohibition, however, comes with a corresponding constraint on what can be said in mainstream constitutional practice. Offering to make an interpretive "deal," justifying a constitutional judgment as difference splitting, or presenting a constitutional decision as the product of turn taking would, we expect, prompt objections grounded in the modalities and the nature of constitutional interpretation (as well as professional ethics when judges are involved). Arguments to this effect never seem to be made in public, even when the "deal" at issue takes a relatively benign form and could plausibly be defended on grounds of comity, mod-

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167. See F. Andrew Hessick & Jathan P. McLaughlin, *Judicial Logrolling*, 65 FLA. L. REV. 443, 445–46 & nn.6–8 (2013) (collecting statements by judges and scholars condemning cross-case and intracase logrolling in courts and insisting that such logrolling "does not occur").

168. Cf. Schauer, *supra* note 106, at 1932 (commenting that the legal system more generally tends to "insist substantially on winner-take-all two-party decisionmaking, channeling all disputes and policy decisions into decisionmaking mechanisms in which splitting the difference is difficult [and] in which allowing one party to win because she lost the last time is frowned upon"). In the view of some, techniques (1) and (2) are especially objectionable if the exchange or the split spans unrelated matters. See Evan H. Caminker, *Sincere and Strategic Voting Norms on Multimember Courts*, 97 MICH. L. REV. 2297, 2300 (1999).

169. Cf. RONALD DWORKIN, *LAW'S EMPIRE* 178–84 (1986) (developing an integrity-based objection to "checkerboard" legal solutions); Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1747 (2005) (arguing in favor of "disaggregated" decisionmaking strategies but noting that "[o]ur intuitions about the legitimacy of majority rule lead us to resist proposals to allow would-be dissenters to 'take turns'"). Opposition to such power-sharing arrangements, if taken far enough, can implicate standard arguments in favor of federalism and decentralization.

170. Scholars are not necessarily subject to this constraint to the same degree, see, e.g., Adam M. Samaha, *Originalism's Expiration Date*, 30 CARDOZO L. REV. 1295, 1355 (2008) (suggesting that "originalism might be reworked to more closely approximate random selection" of case outcomes), although in our experience pro-logrolling arguments applicable to constitutional interpretation are exceedingly rare, and potentially scandalous, in academic debate as well.

eration, or epistemic humility. The taint of logrolling deters candid discussion of compromise in constitutional interpretation more broadly.

As with all the other anti-modalities, logrolling-like behaviors may infiltrate constitutional decisionmaking in limited or low-visibility ways.<sup>171</sup> The controversy surrounding Chief Justice Roberts's reported "switch" of his postconference vote in *National Federation of Independent Business v. Sebelius*,<sup>172</sup> for institutional legitimacy-related reasons, attests both to this reality and to the taboo.<sup>173</sup> Whatever might happen out of public view, the proscription against explicit logrolling arguments shores up the barrier between reputable constitutional decisionmaking and unacceptably outcome-oriented policymaking. It enables Supreme Court justices to insist that, when they are interpreting and applying constitutional law, they are not making "sausage" as legislators would.<sup>174</sup> Even justices who are willing to admit in interviews to engaging in strategic behavior "such as aggressive grants, defensive denials, and signaling for desired cases" will "strenuously deny logrolling behavior" that involves any clear and considered departure from their best view of the law.<sup>175</sup> The norm against logrolling is so strong, perhaps, because logrolling is understood to be attractive in many other decision settings and yet to pose a special threat to the good-faith search for constitutional meaning—and thus to the ordinary operation of the modalities.

The proscription against logrolling intersects with various other behavioral and procedural norms for decisionmakers working on constitutional problems. For instance, in addition to a norm against vote trading (subsumed by (1) above),<sup>176</sup> the justices have a norm in favor of circulating drafts of their opinions to all colleagues simultaneously while a case is pending.<sup>177</sup>

171. See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 405–08 (2010) (Stevens, J., concurring in part and dissenting in part) (cataloging "principled, narrower paths" that the majority could have taken in a manner seemingly designed to signal that these paths, while not "ideal," might have been an acceptable basis for compromise); Caminker, *supra* note 168, at 1300 (suggesting that "[c]ertain forms of strategic behavior, such as insincere voting to forge a majority or unanimous coalition, are routinely practiced" behind the scenes).

172. 567 U.S. 519 (2012).

173. See *Grove*, *supra* note 163, at 2243, 2254–55 (reviewing this controversy).

174. See *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2597 (2019) (Alito, J., concurring in part and dissenting in part) (criticizing the Court's ruling for inviting novel, policy-oriented forms of judicial inquiry that call to mind "[w]hat Bismarck is reputed to have said about laws and sausages"); *supra* notes 78–80 and accompanying text.

175. Tonja Jacobi & Matthew Sag, *Taking the Measure of Ideology: Empirically Measuring Supreme Court Cases*, 98 *GEO. L.J.* 1, 16 n.73 (2009) (citing H.W. PERRY, *DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT* 198–215 (1991)).

176. See *supra* note 167 and accompanying text; see also MAXWELL L. STEARNS, *CONSTITUTIONAL PROCESS: A SOCIAL CHOICE ANALYSIS OF SUPREME COURT DECISION MAKING* 66 (2000) (stating that "appellate courts . . . generally eschew vote trading across issues within cases and across cases").

177. See *Supreme Court Procedure*, SCOTUSBLOG, <https://www.scotusblog.com/reference/educational-resources/supreme-court-procedure> [<https://perma.cc/ZS58-B4PV>].

Private, selective conferencing does happen,<sup>178</sup> but minimizing this type of conferral could reduce opportunities for side deals of the vote-trading variety. Going too far in a hunt for norms that contribute in some way, shape, or form to the avoidance of logrolling and the preservation of reputable constitutional decisionmaking would, however, pull our inquiry into territory not easily understood as part of constitutional “grammar.”<sup>179</sup> There is a long list of rules and conventions for the conduct of judges and other constitutional interpreters that might best be assigned to the field of institutional design.<sup>180</sup> Building a coherent constitutional system depends on those institutional choices, but our inquiry is not that broad.

### C. Summary Observations

We have described a half-dozen anti-modalities that complement and complicate a similarly sized list of modalities—a countertypology of constitutional argument to round out Bobbitt’s. Neither list is unique to constitutional law. More or less standardized logics appear in various nonconstitutional fields to help shape and constrain the practice of interpretation. The foregoing typology might therefore be exported well beyond the constitutional context for which it was created.

Of all the anti-modalities, the proscription against “policy arguments” seems most distinctive to constitutional law, at least relative to common law, as well as the most frequently invoked and conceptually fuzziest boundary on constitutional reasoning.<sup>181</sup> In any event, the stakes and the subject mat-

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178. See, e.g., Charles M. Lamb & Lisa K. Parshall, *United States v. Nixon Revisited: A Case Study in Supreme Court Decision-Making*, 58 U. PITT. L. REV. 71, 107 (1996) (explaining that the papers of Justice Thurgood Marshall suggest that “certain justices were not only conferring in private but selectively circulating written memoranda among themselves as well” on *United States v. Nixon*).

179. BOBBITT, *supra* note 2, at 6.

180. Consider, for example, recusal norms, publication norms, anti-corruption laws, rules limiting ex parte contacts, rules favoring narrow rationales when a court fractures, and the practices of concurrence and dissent themselves.

181. In a development that reflects the increasing integration of constitutional law norms with subconstitutional public law norms, cf. WILLIAM N. ESKRIDGE JR. & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* (2010), the field of statutory interpretation in recent decades has arguably turned away from policy argument in the form of openly consequentialist claims about what the enacting legislature would or should have wanted. See generally Kessler & Pozen, *supra* note 62, at 1848–54 (reviewing the evolution of debates over textualism and purposivism since the 1980s). But at least to date, considerations of “policy” do not seem to have become anti-modal in that field to the degree that they have in constitutional law. See, e.g., Cass R. Sunstein, *Beyond Marbury: The Executive’s Power to Say What the Law Is*, 115 YALE L.J. 2580, 2592–93 (2006) (“[F]or hard statutory questions within the Supreme Court, policy arguments of one or another sort often play a central role, even in a period in which ‘textualism’ has seemed on the ascendancy.”). Although certain judges occasionally suggest a sharp distinction between “a question of statutory interpretation” and “a question of policy,” *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1848 (2018) (Alito, J.), those same judges may acknowledge at other times that it counts against a proposed reading of

ter of constitutional law make it special enough for its anti-modalities to warrant their own academic treatment. Scholars and jurists have devoted an enormous amount of attention to questions of methodology in constitutional interpretation. Both the prevailing methods and the accompanying debates cannot be adequately understood or assessed without consideration of the anti-modalities.

At the same time, nobody should think that the modalities and anti-modalities fully stabilize constitutional reasoning, are fully stable themselves across historical periods and locations, or exhaust the constraints on constitutional argument. Our list of anti-modalities does not include any number of generic constraints on legal decisionmaking, such as norms against logical contradiction, explicit indifference to enacted text,<sup>182</sup> or personal bias against a party to a dispute. We do not explore the constitutional practices of other countries, some of which may have substantially different or looser limits on the use of, for example, policy arguments (as in proportionality systems)<sup>183</sup> or fundamentalist arguments (as in theocratic systems).<sup>184</sup> Nor do we collect every possible second-order norm governing how the various modalities and anti-modalities may interact within our system. To the extent that U.S. constitutional decisionmakers refrain from identifying serious discordances among the modalities on any given question,<sup>185</sup> one could imagine a meta anti-modality that forbids the acknowledgement of irreducible intermodality conflict.<sup>186</sup> Indeed, reluctance to acknowledge such conflict might reflect fears about legitimating the anti-modalities. If historical, textual, structural, doctrinal, ethical, and prudential reasoning are not lexically ordered and concededly cannot be reconciled, *some* other form of reasoning must guide constitutional decision, and the anti-modalities are the obvious candidates.

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a statute if the reading “makes no sense as a policy matter,” *Home Depot U.S.A., Inc. v. Jackson*, 139 S. Ct. 1743, 1755 (2019) (Alito, J., dissenting).

182. See Cass R. Sunstein, *There Is Nothing that Interpretation Just Is*, 30 CONST. COMMENT. 193, 193 (2015) (“If judges do not show fidelity to authoritative texts, they cannot claim to be interpreting them.”).

183. See *infra* notes 298–299 and accompanying text.

184. See generally RAN HIRSCHL, *CONSTITUTIONAL THEOCRACY* (2010); see also Tarunabh Khaitan, *Constitutional Directives: Morally-Committed Political Constitutionalism*, 82 MOD. L. REV. 603, 603–10 (2019) (arguing that the U.S. Constitution is exceptional in adopting a Rawlsian antiperfectionist frame that inhibits the open pursuit of “thick moral commitments”).

185. See Fallon, *supra* note 33, at 1193 (“[W]ithin our legal culture, it is the rare judicial opinion, the anomalous brief, the unusual scholarly analysis that describes the relevant kinds of arguments as pointing in different directions.”).

186. See *id.* (asserting that “the implicit norms of our constitutional practice call for a constitutional interpreter to assess and reassess the arguments in the various categories in an effort to understand each of the relevant factors as prescribing the same result”); see also WILSON HUHN, *THE FIVE TYPES OF LEGAL ARGUMENT* 158 (3d ed. 2014) (suggesting that every apparent intermodal conflict can be resolved by “balancing the values that each of the different types of argument serve”).



The moments in which anti-modalities seem to surface in constitutional debate are fraught. Opponents are apt to accuse the speaker of breaching the barrier between constitutional and nonconstitutional logic—not just making a factual or analytical error but making a categorically impermissible move—and, when the speaker is a judge, of exercising extrajudicial power. As these moments reveal, the modalities and anti-modalities are co-constitutive yet tension inducing. If prohibited lines of argument are suspected of infiltrating a practice of legal decisionmaking, the practice's integrity and intelligibility may be reduced rather than enhanced by the prohibitions. It is this uneasy possibility that draws our attention in the pages that follow.

### III. POSITIVE IMPLICATIONS

We are now in a position to identify some general implications of the anti-modalities for how our constitutional system operates and how this system relates to the people who live within it. The first implication is the emergence of what we call the resonance gap. The second involves the consequent pressures on orthodox constitutional argument.

#### A. *The Resonance Gap*

When the entries on our list of anti-modalities are tallied, a remarkable social fact comes into focus: the list excludes from constitutional law virtually all the arguments that seem likely to shape millions of Americans' views on matters of public concern. The point is obvious once stated, yet it almost never is stated. Although our constitutional law is deeply connected to questions of partisan politics, political philosophy, and social science in substance, our constitutional grammar is deeply disconnected from each of those fields in syntax. Abstract arguments about law-following might hold intrinsic appeal for segments of the population.<sup>187</sup> But beyond lawfulness as such, what typically speaks to people in political and moral decisionmaking is typically excluded as an overt basis for constitutional decisionmaking.<sup>188</sup> This disconnect is constitutional law's resonance gap.

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187. *But cf.* Frederick Schauer, *The Political Risks (if Any) of Breaking the Law*, 4 J. LEGAL ANALYSIS 83, 90 n.9 (2012) (“Little of the empirical research on law-following focuses on what people do or would do when their substantive ideological or political or policy preferences diverge from what the law requires, but what research there is suggests that in such cases substance typically prevails.” (citation omitted)).

188. This claim relies on an assumption about how typical Americans without training in constitutional law would tend to approach questions about the allocation of public power, rights, and responsibilities: namely, that they would feel keenly the cumulative pull of policy arguments, fundamentalist arguments, partisan arguments, emotional arguments, popularity arguments, and logrolling arguments. *See, e.g.*, Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1113 (2014) (reviewing “an ever-growing body of social science work” demonstrating that partisanship “colors how we process information and what we believe about particular issues and fundamental questions alike”); Greene, *supra* note 38, at 1449 (“There is considerable evidence that emotion indeed precedes and motivates assessments of value.”); Kim, *supra* note 77, at 394 (discussing “considerable empirical evidence” that judges,

More precisely, the concept of a resonance gap is meant to capture the distance between (1) the sorts of arguments that might motivate or influence citizens in their extralegal evaluation of an issue of public import and (2) the sorts of arguments that participants in a debate about the Constitution's meaning believe they are allowed to make, if they wish to be taken seriously and to persuade relevant audiences. The resonance gap could also be thought of as a resource gap or a rhetorical gap. Nothing hangs on the label. We employ "resonance gap" to emphasize the ways in which constitutional reasoning may appear faraway from—may fail to resonate with—the values and concerns of ordinary people and policymakers.

Constitutional law's resonance gap is normatively indiscriminate. It sweeps in admirably thoughtful reasoning as well as oft-questioned human impulse. As Part II detailed, the anti-modalities exclude from the mainstream practice of constitutional interpretation not only zero-sum partisan loyalties, craven quests for popularity, and unchecked emotional reactions but also public-spirited commitments to power sharing and peaceful compromise, careful welfarist analysis backed by sophisticated empirical research, and deeply theorized systems of value. If constitutional law "has always provided us with the language . . . within which our political identities could be confronted, debated, and defined,"<sup>189</sup> an alien anthropologist might find it puzzling that this language sounds so limited and stilted.

Although every field of law likely generates a resonance gap of some kind,<sup>190</sup> the size of this particular gap is especially remarkable given core features of the U.S. legal system. In this system, federal constitutional law claims supremacy over other types of law,<sup>191</sup> life-tenured Article III judges claim supremacy over the elaboration of constitutional meaning,<sup>192</sup> and an "extraordinarily powerful"<sup>193</sup> and elite<sup>194</sup> Supreme Court claims supremacy

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who are far more deeply socialized into modal legal reasoning than ordinary citizens, "are influenced to some degree by their policy preferences"). This assumption strikes us as self-evidently correct, but it is admittedly unverified and possibly unverifiable in any systematic sense. There is no comprehensive account of human judgment. There is also a potential endogeneity complication, insofar as people's policy preferences, partisan loyalties, and so forth are themselves shaped by constitutional practices and conventions.

189. Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1072 (1984).

190. Cf. Schauer, *supra* note 106, at 1910 (arguing that "the characteristic modalities of law serve to screen out, often successfully, what would in other decisional settings be good arguments, important facts, and desirable values" and that this screening out is fundamental to "the phenomenon of law and the character of legal argument").

191. See U.S. CONST. art. VI, cl. 2 (Supremacy Clause).

192. See, e.g., *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (asserting that "the federal judiciary is supreme in the exposition of the law of the Constitution" and that this principle is "a permanent and indispensable feature of our constitutional system").

193. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 1* (Yale Univ. Press 2d ed. 1986) (1962) (describing the U.S. Supreme Court as "the most extraordinarily powerful court of law the world has ever known"); see also MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE*

over the content of constitutional doctrine,<sup>195</sup> all in the name of a centuries-old document that is almost impossible to amend under current conditions.<sup>196</sup> The Court's constitutional decisions, furthermore, are communicated to Americans through increasingly partisan media outlets and political leaders who are much more likely than the justices or litigants to evaluate the decisions in anti-modal terms.<sup>197</sup> If constitutional contestation were limited to low-stakes, low-salience questions, the resonance gap might be of limited practical significance. Many constitutional disputes are no more important than that.<sup>198</sup> But adjudicated constitutional law also extends to some of the country's most controversial issues, from abortion to affirmative action to gun control to immigration to same-sex marriage to the place of religion in public life.

Nor is the resonance gap limited to courts. As scholarship on departmentalism and popular constitutionalism has detailed, many different government bodies and civil-society groups contribute to the long-run development of constitutional law.<sup>199</sup> Within certain domains, "constitutional discourse has come to constitute the terms of political discourse."<sup>200</sup> This

RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW 21–23 (2008) (explaining that the U.S. Supreme Court exercises a paradigmatic version of "strong-form" judicial review).

194. On the justices' susceptibility to elite influence, see generally Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 GEO. L.J. 1515 (2010). On the justices' elite backgrounds, see generally Benjamin H. Barton, *An Empirical Study of Supreme Court Justice Pre-Appointment Experience*, 64 FLA. L. REV. 1137 (2012), and Denise Lu, Alicia Parlapiano & Karen Yourish, *Kavanaugh Followed the Narrow, Elite Path of Supreme Court Justices*, N.Y. TIMES (July 10, 2018), <https://www.nytimes.com/interactive/2018/07/10/us/politics/supreme-court-path-kavanaugh.html> [<https://perma.cc/87BW-HH8Y>].

195. See Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 818 (1994) ("[L]ongstanding doctrine dictates that a court is *always* bound to follow a precedent established by a court 'superior' to it."); see also *id.* at 821 (noting that many legal systems around the world have rejected the U.S. approach to hierarchical precedent).

196. See Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 237, 261 (Sanford Levinson ed., 1995) (finding as of 1992 that the U.S. Constitution has the second most difficult amendment process, behind only the now-defunct Yugoslav Constitution).

197. See Baum & Devins, *supra* note 194, at 1549–50 (explaining that while "a great deal of the Court's work is essentially invisible to the public," "well-publicized criticisms by political leaders and media elites" may inform public evaluations—and listing only constitutional cases as examples of this phenomenon).

198. Cf. Frederick Schauer, *The Supreme Court, 2005 Term—Foreword: The Court's Agenda—And the Nation's*, 120 HARV. L. REV. 4, 9 (2006) (contending that only a "small proportion of the nation's agenda . . . comes directly before the Supreme Court in particular and the courts in general").

199. See generally Monica C. Bell, *Safety, Friendship, and Dreams*, 54 HARV. C.R.-C.L. L. REV. 703, 718 n.50 (2019) (collecting sources); Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 CALIF. L. REV. 959, 967–73 (2004) (canvassing scholarship on constitutional law outside the courts).

200. Michael J. Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 CALIF. L. REV. 521, 538 (1989).

phenomenon is most apparent during exceptional moments of legal conflict, such as when impeachment proceedings are threatened or when proposed legislation is criticized as beyond Congress's authority. Explicit constitutional argument might be a small part of democratic deliberation. But whatever the exact ratio, nonjudicial actors routinely make claims about what the Constitution means.<sup>201</sup> And as in a court brief or judicial opinion, these claims must as a rule adhere to the modalities and avoid the anti-modalities to be recognized as valid.<sup>202</sup>

This is not to say that the resonance gap looks exactly the same inside and outside the judiciary—or even within the judiciary, insofar as lower-court judges are, for example, more likely than higher-court judges to fear reversal or reputational harm from pushing anti-modal boundaries. The conventions of constitutional discourse might well vary some for federal jurists, executive branch lawyers, members of Congress, media commentators, merits-brief authors, amicus-brief authors, and other actors.<sup>203</sup> Among elites, normative constitutional theorists may feel most free to advance arguments that challenge prevailing modalities and anti-modalities, on account of the academic commitment to critical inquiry and the potential rewards from work that is seen as especially creative, provocative, or interdisciplinary.<sup>204</sup> The nature and determinants of such discursive variation are empirical questions worthy of future study.<sup>205</sup> But in general, the more a given constitutional culture orients itself around courts, the smaller will be the discrepancy

201. See generally Pozen et al., *supra* note 68, at 2 n.2, 13–15 (collecting works on extra-judicial constitutional discourse).

202. Although Bobbitt does not expressly consider the possibility that the modalities do not apply, or apply differently, outside the courts, he illustrates their nonjudicial use through case studies of Congress, the executive branch, and the academy. See, e.g., BOBBITT, *supra* note 1, at 64–108 (discussing Robert Bork's confirmation hearing and the Iran-Contra affair); see also Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers*, 105 GEO. L.J. 255, 279 n.137 (2017) (noting that “government officials, like judges, often reason from precedent and other interpretive modalities” when construing the Constitution); L.H. LaRue, *Speaking Outdoors*, 19 GA. ST. U. L. REV. 1135, 1144–48 (2003) (observing that “[o]rdinary citizens” rely on the modalities when debating the Constitution “out of doors,” but with special emphasis on prudential and ethical arguments and special concern for the demands of good storytelling); cf. Tara Leigh Grove, *Article III in the Political Branches*, 90 NOTRE DAME L. REV. 1835, 1855–60 (2015) (suggesting that the political branches are more likely than courts to rely on nonjudicial precedents and to develop standards that might not be “judicially manageable,” while otherwise sketching a portrait of legislative and executive constitutional decisionmaking that appears to track Bobbitt's). Section II.B's typology of anti-modalities similarly incorporates nonjudicial examples throughout.

203. See *supra* note 68 and accompanying text.

204. Cf. Solum, *supra* note 97, at 1479 (arguing that the principles of public reason that apply “to legal practice should not apply directly to legal scholars when they debate and discuss legal policies or normative legal theories”).

205. Related subjects for comparative study include whether other countries have different or smaller constitutional resonance gaps than the United States', whether “written” constitutions are associated with larger gaps than “unwritten” constitutions, and whether relatively old constitutions are associated with relatively large gaps.

between its judicial and extrajudicial conventions of constitutional argument. The common observation that our constitutional culture is “juricentric”<sup>206</sup> accordingly suggests that our rules of constitutional grammar will tend to be more similar than dissimilar across interpretive communities. The anti-modalities, and the resonance gap that they help create, are ubiquitous if not uniform features of American constitutionalism.

B. *The Return of the Repressed: Modalization, Modification, Marginalization*

The fact that certain categories of reasoning are taboo in constitutional debate could lead them to be shunted off to nonconstitutional realms or even crowded out of public discourse altogether.<sup>207</sup> This is not what happens in practice, however. Constitutional decisionmakers often find ways to enlist anti-modal reasoning indirectly and to skirt the anti-modal line without quite crossing it. We called attention to numerous examples as we built our list of anti-modalities. This Section explores in more detail constitutional law’s techniques for refashioning and rehabilitating otherwise forbidden forms of argument. Our account carries a faint Freudian echo. Even as all sides in constitutional debates disavow the anti-modalities, arguments that appear anti-modal in some respects crop up constantly. The repressed reasoning does not vanish from constitutional law; it returns in diluted and disguised incarnations and thereby “evad[es] censorship.”<sup>208</sup>

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206. See generally David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2055–56 (2010) (reviewing popular constitutionalists’ arguments to this effect).

207. Cf. Michael C. Dorf, *How the Written Constitution Crowds Out the Extraconstitutional Rule of Recognition*, in *THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION* 69, 76 (Matthew D. Adler & Kenneth Einar Himma eds., 2009) (contending that “the existence of the written Constitution crowds out arguments rooted in the customs of nonjudicial government officials”).

208. SIGMUND FREUD, *THE INTERPRETATION OF DREAMS: THE COMPLETE AND DEFINITIVE TEXT* 284 (James Strachey ed. & trans., 2010) (1900) (analyzing the emergence of repressed emotions in dreams). Within the jurisprudential literature, our account bears most directly on the debate over whether and to what extent law is, as an empirical matter, a “limited” or “differentiated” domain in terms of the sources of information and guidance that it recognizes. See generally FREDERICK SCHAUER, *THE FORCE OF LAW* 154–68 (2015); Schauer, *supra* note 106, at 1914–54. Very roughly, our position lies somewhere in between the two poles in this debate: that American legal practice accepts as valid only a small set of pedigreed materials and methods, and that American legal practice effectively collapses into all-things-considered decisionmaking. Constitutional argument, as we explain, does not entirely banish the categories of reasoning that lawyers most fear and denigrate. But even imperfect exclusions can have large effects, and we further suggest that the anti-modalities meaningfully, if unevenly, constrain constitutional practitioners and the development of constitutional law.

There are several basic techniques for facilitating such returns.<sup>209</sup> The principal strategy involves hitching an arguably anti-modal argument to a modality—employing the argument not as an independent basis for constitutional decision, but rather “with a view of carrying out the purposes and values that the [modality] serves.”<sup>210</sup> That is to say, arguments that look a lot like anti-modalities may be able to gain entry into constitutional law, at least in part, if framed as facilitative of a conventional category of legal reasoning. Let us call this strategy *modalization*.

Examples cut across the various modalities and anti-modalities. Consider, for instance, how participants in constitutional debates may contend that the ordinary or original meaning of the document’s language calls for a presentist inquiry into moral norms, social expectations, or practical consequences;<sup>211</sup> or that the constitutional text embodies a broad normative ideal that ought to guide its interpretation;<sup>212</sup> or that structural reasoning requires the interpreter to put away the dictionary and “deal with policy and not with grammar”;<sup>213</sup> or that prudential reasoning may be refined in the “empirical

209. These techniques are separate from efforts to transform an existing modality or to force the recognition of a new modality. Cf. *supra* note 90 and accompanying text (noting that Justice Breyer and Judge Posner might be seen as constitutional entrepreneurs in this sense).

210. Howard J. Vogel, *The “Ordered Liberty” of Substantive Due Process and the Future of Constitutional Law as a Rhetorical Art: Variations on a Theme from Justice Cardozo in the United States Supreme Court*, 70 ALB. L. REV. 1473, 1551 (2007). As Donald Dripps puts the point with regard to the first anti-modality on our list, “[p]olicy arguments have a role in constitutional interpretation, but the policies on which constitutional adjudication turns ought to have some basis in the document itself.” Donald A. Dripps, *Delegation and Due Process*, 1988 DUKE L.J. 657, 673; see also HUHNS, *supra* note 186, at 156 (remarking that legitimate appeals to policy in legal debate “ensure that the consequences of the legal determination will be consistent with the underlying purposes of the law”).

211. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003) (“Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight.”); Fallon, *supra* note 33, at 1205 (discussing “constitutional language whose meaning has a normative or evaluative component,” including “the due process clauses, the equal protection clause, the fourth amendment’s prohibition of ‘unreasonable’ searches and seizures, and the eighth amendment’s guarantee against ‘cruel and unusual punishments’” (footnotes omitted)).

212. See, e.g., DWORKIN, *supra* note 36, at 9–10 (arguing that the Framers of the Equal Protection Clause meant “to enact a general principle . . . of political morality” with “quite breathtaking scope and power”); Michael S. Moore, *Four Reflections on Law and Morality*, 48 WM. & MARY L. REV. 1523, 1565–66 (2007) (listing “substantively moral theories of constitutional law that discover the theorist’s preferred value scheme in the text of the United States Constitution,” such as Richard Epstein’s “Nozickian libertarian[]” reading, David Richard’s “liberal tolerance” reading, and John Hart Ely’s “democracy” reading).

213. CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 23 (1969); see also Steven G. Calabresi, *The Vesting Clauses as Power Grants*, 88 NW. U. L. REV. 1377, 1402 (1994) (lamenting that prominent approaches to structuralism “raise[] the level of generality of the constitutional text to too high a level, . . . thus making unavoidable the importation of one’s own personal policy views”).

light” of foreign or international practice;<sup>214</sup> or that the Court’s constitutional precedents enshrine “fundamental principles of liberty and justice,”<sup>215</sup> special solicitude for vulnerable groups,<sup>216</sup> special revulsion at “conduct that shocks the conscience,”<sup>217</sup> or welfarist balancing of one sort or another.<sup>218</sup> Each of these contentions might be anti-modal if advanced on its own. Yoked to a modality, however, they play a part in mainstream constitutional debate, even if doubts about their legitimacy linger in some quarters. Doctrinal argument is a particularly powerful engine of modalization. Once an authoritative ruling establishes a principle of law, that principle can be invoked and elaborated indefinitely without leaving modal territory, notwithstanding that the initial ruling’s logic might seem anti-modal by contemporary standards.<sup>219</sup>

For modalization to succeed, however, *modification* of the most clearly anti-modal version of an argument is almost always necessary. The admitted argument must be formulated in a manner that distinguishes it from the anti-modality’s archetype, typically through simplification, truncation, adulteration, or a combination thereof. Section II.B repeatedly adverted to this sail-trimming strategy, noting that appeals to utilitarian considerations may avoid being seen as policy arguments if sufficiently superficial;<sup>220</sup> that appeals to moral values may avoid being seen as fundamentalist arguments if sufficiently shallow;<sup>221</sup> that appeals to the interests of particular groups may avoid being seen as partisan arguments if framed as serving a neutral princi-

214. *Printz v. United States*, 521 U.S. 898, 977 (1997) (Breyer, J., dissenting).

215. *E.g.*, *Duncan v. Louisiana*, 391 U.S. 145, 148 (1968) (quoting *Powell v. Alabama*, 287 U.S. 45, 67 (1932)).

216. *See, e.g.*, *Ind. State Tchrs. Ass’n v. Indianapolis Bd. of Sch. Comm’rs*, 101 F.3d 1179, 1181 (7th Cir. 1996) (“[T]he principal target of the equal protection clause is discrimination against members of vulnerable groups . . . .”); Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFFS. 107, 147–70 (1976) (providing a foundational statement of what has come to be known as the anti-subordination approach to equal protection analysis).

217. *E.g.*, *Rochin v. California*, 342 U.S. 165, 172 (1952).

218. Arguable examples range widely, from *Mathews v. Eldridge*’s three-part test for determining levels of procedural protection, 424 U.S. 319, 334–35 (1976); to the “essentially ad hoc, factual inquiries” as to what constitutes a “taking,” *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978); to substantial-burden and compelling-interest determinations for various rights claims. *See generally* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987) (charting the rise of “balancing” in postwar constitutional interpretation); Jamal Greene, *The Supreme Court, 2017 Term—Foreword: Rights as Trumps?*, 132 HARV. L. REV. 28, 54 (2018) (discussing the “myth that interest balancing is never conducted” by the U.S. Supreme Court in constitutional-rights adjudication).

219. As Fallon has detailed, a large part of constitutional doctrine takes the form of “tests” through which judges implement constitutional norms. *See* Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 61–75 (1997). Although the formulation of these tests often involves contentious practical judgments, once in place they tend to constrain future debates by serving as a “focal point for reasonable agreement” and “block[ing] appeals to first principles.” *Id.* at 150–51.

220. *See supra* notes 86–90 and accompanying text.

221. *See supra* notes 91–95 and accompanying text.

ple;<sup>222</sup> that appeals to pathos may avoid being seen as emotional arguments if framed in non-propositional terms;<sup>223</sup> that appeals to societal consensus may avoid being seen as popularity arguments if restricted to trends in state law;<sup>224</sup> and that appeals to compromise may avoid being seen as logrolling arguments if no deviation from anyone's best understanding of the Constitution is conceded.<sup>225</sup> A common thread among many of these examples is that the speaker limits the depth or breadth of a controversial style of reasoning to preserve its compatibility with a modal form.

The prudential and ethical modalities rely heavily on modification. Prudentialism, as Bobbitt describes it, "seek[s] to balance the costs and benefits of a particular rule"<sup>226</sup> and can "remedy" the "austere detachment . . . of the doctrinal approach . . . by admitting into the arena of argument those preferences of policy which arise in the political world."<sup>227</sup> So defined, the potential overlap with forbidden policy argument is plain. To avoid triggering that anti-modality, constitutional decisionmakers who advance prudential claims tend to abstract away from quantified, or even seriously concretized, consequences. Instead of investigating the first-order welfare implications of competing constitutional propositions, they limit their field of vision to second-order issues of "workability,"<sup>228</sup> "administrability,"<sup>229</sup> and "manageability"<sup>230</sup> or to thinly substantiated speculations about other impacts.<sup>231</sup> Certain forms of rule-utilitarian analysis are thus admitted directly into constitutional law, especially when connected to the process of adjudication itself, even though straightforward utilitarian analysis remains forbidden.<sup>232</sup> By the same token, constitutional decisionmakers almost never seriously consider the social

222. See *supra* notes 112–115 and accompanying text.

223. See *supra* notes 139–149 and accompanying text.

224. See *supra* notes 157–162 and accompanying text.

225. See *supra* notes 171–175 and accompanying text. As this list reflects, while certain anti-modalities (and in particular policy arguments) may be assimilated into constitutional argument more often than others, *all* of the anti-modalities are potentially redeemable through modalization and modification.

226. BOBBITT, *supra* note 1, at 13.

227. BOBBITT, *supra* note 2, at 71.

228. See David E. Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257, 303 n.148 (2010) (collecting justices' invocations of "workability" in constitutional contexts).

229. See, e.g., *Lehnert v. Ferris Fac. Ass'n*, 500 U.S. 507, 551 (1991) (Scalia, J., concurring in the judgment in part and dissenting in part) (arguing in favor of "a much more administrable" test for when a union may constitutionally compel contributions from nonmembers).

230. See, e.g., *Rucho v. Common Cause*, 139 S. Ct. 2484, 2498 (2019) (stating that "[a]ny standard for resolving" claims of unconstitutional partisan gerrymandering must be "manageable"). Chief Justice Roberts's opinion for the Court in *Rucho* includes more than a dozen references to manageability. *Id.* at 2491–505.

231. See *supra* note 89 and accompanying text.

232. As the most celebrated policy-oriented judge of the modern era has acknowledged, the "pragmatic judge must play by the rules of the judicial game, just like other judges. The rules permit the consideration of certain types of consequence but forbid the consideration of other types." RICHARD A. POSNER, *HOW JUDGES THINK* 253–54 (2008).



costs and benefits of upstream choices about the design of constitutional doctrine—whether rulings should be broad or narrow, rule-like or standard-like, simple or complex, easy to overturn or hard to overturn, and so forth—even though these design choices are amenable to institutional analysis informed by economics and political science.<sup>233</sup>

If the proscription against policy argument haunts the prudential modality, the proscription against fundamentalist argument haunts the ethical modality.<sup>234</sup> Bobbitt describes ethical argumentation as “deriving rules from those moral commitments of the American ethos that are reflected in the Constitution.”<sup>235</sup> Ethical argument, he writes elsewhere, is “constitutional argument whose force relies on a characterization of American institutions and the role within them of the American people.”<sup>236</sup> Critics charge that this modality is “a dangerous enterprise,”<sup>237</sup> capable of legitimating “a remarkable list of contentions.”<sup>238</sup> Bobbitt takes pains, however, to prevent a slide into natural law or religious or moral philosophy. Ethical argument, as he elaborates it, consists only of claims that are derived from principles immanent in our constitutional practices—in particular, from the principle that ours is a limited government.<sup>239</sup> In much the same vein, substantive due process claims about fundamental rights often purport to be “rooted in the traditions and conscience of our people.”<sup>240</sup> By eschewing fundamentalism and demanding a basis in the shared commitments of We the People, ethical argument enables the transvaluation of otherwise impermissible values. Invok-

233. See e.g., CASS R. SUNSTEIN, ONE CASE AT A TIME 3–23 (1999); ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION (2006); Louis Kaplow, *A Model of the Optimal Complexity of Legal Rules*, 11 J.L. ECON. & ORG. 150 (1995).

234. It is not the case, in general, that particular anti-modalities function as foils or dop-pelgangers for particular modalities. As the discussion in this Section and Part II explains, the modalities and anti-modalities interact in more complex ways. But across the modal/anti-modal boundary, policy arguments and fundamentalist arguments have an especially close connection with prudential arguments and ethical arguments, respectively.

235. BOBBITT, *supra* note 1, at 13.

236. BOBBITT, *supra* note 2, at 94.

237. Redish, *supra* note 53, at 670.

238. Gene R. Nichol, *Constitutional Judgment*, 91 MICH. L. REV. 1107, 1113 (1993) (book review).

239. BOBBITT, *supra* note 2, at 230; see also Philip Bobbitt, *Is Law Politics?*, 41 STAN. L. REV. 1233, 1284 (1989) (book review) (“The fundamental American Constitutional ethos is the idea of limited government . . .”).

240. *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934); see also, e.g., Michael H. v. Gerald D., 491 U.S. 110, 122 (1989) (plurality opinion) (“In an attempt to limit and guide interpretation of the [Due Process] Clause, we have insisted not merely that the interest denominated as a ‘liberty’ be ‘fundamental’ . . . but also that it be an interest traditionally protected by our society.”); *Moore v. City of East Cleveland*, 431 U.S. 494, 504 (1977) (plurality opinion) (relying on a “venerable” tradition of certain family forms in identifying a substantive due process violation). Even the most innovative substantive due process rulings claim the mantle of tradition. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 562, 571–72, 574 (2003) (invoking “tradition” multiple times in support of a conclusion that criminal sodomy statutes are unconstitutional).

ing Catholic social thought's conception of dignity would clearly be anti-modal in mainstream constitutional practice; yet Justice Kennedy's scattered references to the dignity of free persons are sufficiently generic and unsystematic, and sufficiently compatible with the American constitutional imaginary, to enter through the ethical door.<sup>241</sup>

An additional strategy for bringing anti-modalities back into constitutional practice is *marginalization*: confining their usage to situations “when the law runs out” or risks generating results that seem exceedingly bad.<sup>242</sup> Pursuant to this strategy, the decisionmaker first establishes that the modalities underdetermine the answer to a constitutional question—not necessarily that the modalities offer no guidance, just that they supply insufficient guidance to confirm the superiority of one answer—and then enlists what might otherwise be anti-modal reasoning to inform her exercise of discretion or as a kind of external check on her preliminary conclusion. The notion that the Constitution is not a “suicide pact,” for instance, may legitimate certain policy arguments in extremis.<sup>243</sup> The *Brown* Court employed a softer version of this strategy when it declared that the history of the Fourteenth Amendment's adoption was “inconclusive” as to the status of racially segregated schools<sup>244</sup> and that the leading case on the separate-but-equal principle was too old to be relevant.<sup>245</sup> Having thus discarded virtually all the modalities, the Court proceeded to “consider public education in the light of its full development and its present place in American life throughout the Nation,”<sup>246</sup> as well as contemporary “psychological knowledge.”<sup>247</sup>

241. See FRANK J. COLUCCI, JUSTICE KENNEDY'S JURISPRUDENCE: THE FULL AND NECESSARY MEANING OF LIBERTY 31 (2009) (“Theological fidelity aside, Kennedy's rhetoric of liberty and human dignity appears to be profoundly shaped by his Catholicism.”); Anne Jelliff, Comment, *Catholic Values, Human Dignity, and the Moral Law in the United States Supreme Court: Justice Anthony Kennedy's Approach to the Constitution*, 76 ALB. L. REV. 335, 349 (2013) (“Perhaps the primary area in which Anthony Kennedy's jurisprudence mirrors the teachings and even the language of the Catholic Church is in his opinions dealing with human dignity and personal liberty, two values that the Catholic Church views as firmly intertwined.”).

242. Schauer, *supra* note 106, at 1942 (discussing circumstances in which “policy and principle” play an explicit role in legal practice); see also Fallon, *supra* note 33, at 1262–63 (explaining that “[s]elf-conscious attention to moral and policy arguments” may be viewed as legitimate if used as a means of confirming results generated by other categories of constitutional reasoning); Adam M. Samaha, *On Law's Tiebreakers*, 77 U. CHI. L. REV. 1661, 1708–10 (2010) (depicting interpretive methods as lexically ordered decision structures that may involve more controversial sources or rationales in the lower tier).

243. *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting); see also BOBBITT, *supra* note 1, at 17 (suggesting that cost-benefit considerations are “likeliest to be decisive” in emergencies).

244. *Brown v. Bd. of Educ.*, 347 U.S. 483, 489 (1954).

245. *Id.* at 492 (“In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written.”).

246. *Id.* at 492–93.

247. *Id.* at 494 & n.11; see also *supra* note 43 (noting *Brown's* attenuated relationship to the modalities and the difficulty this poses for anyone wishing to associate the anti-modalities with the anticanon).

At this writing, the most prominent variant of this strategy involves what some originalists call the “construction zone.” This label refers to situations where the communicative content of the constitutional text cannot fully determine a legal result because the text is “vague, open textured, or irreducibly ambiguous.”<sup>248</sup> To resolve disputes in this zone, many originalists acknowledge that decisionmakers have no choice but to rely on normative judgments—potentially sounding in anti-modal considerations—of the sort that “originalists have often disdained.”<sup>249</sup> Keith Whittington, for instance, characterizes the practice of constitutional construction as “essentially political,”<sup>250</sup> and often beyond the remit of judges, while Randy Barnett has proposed that textual vagueness be resolved by courts in part by applying a “Presumption of Liberty” that generally supports libertarian rights.<sup>251</sup>

Modalization, modification, and marginalization may travel together, but they reflect distinct orientations toward the problem of how to create an opening for arguments that the speaker sees as valuable but that come uncomfortably close to being anti-modal. Modalization is a strategy of conversion: practitioners take an impermissible form of reasoning and, by tying that form to a modality, transform it into a permissible one. In this alchemy, modalization resembles the classic rhetorical device of *paradiastole*, by which a vice (say, rashness or cheapness) may be “re-described” as a virtue (say, bravery or frugality).<sup>252</sup> But modalization typically depends on modification, which is a strategy of resignation. By limiting the depth or breadth of analysis, modification acknowledges that the anti-modality is an intractable difficulty and cannot be fully integrated. Short of creating a new modality, the

248. Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269, 294 (2017).

249. Richard H. Fallon Jr., *The Meaning of Legal “Meaning” and Its Implications for Theories of Legal Interpretation*, 82 U. CHI. L. REV. 1235, 1293 (2015).

250. WHITTINGTON, *supra* note 44, at 7.

251. RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION 120–30, 261–66 (rev. ed. 2014). In more recent work, Barnett proposes that decisionmaking in the construction zone should be guided by a good-faith inquiry into “the Constitution’s original spirit.” Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1, 34 (2018).

The construction zone is itself a work in progress. An imaginable version would allow constitutional decisionmakers to engage in deep, unadulterated normative analysis whenever the top-tier sources of interpretation are arguably in conflict. See Solum, *supra* note 22, at 473 (noting that judicial resolution of issues in the construction zone could “be guided directly by considerations of political morality”). Or perhaps academic theorists would perform the sophisticated moral and institutional analysis, and then prescribe simple rules for adjudicators to adopt. Under these approaches, the marginalization strategy does all the work of legitimating otherwise illegitimate arguments. More realistic versions, however, probably will also resort to the modification strategy that we have described, thereby taming arguments in the construction zone to better resemble the standard forms of constitutional reasoning. See, e.g., *id.* (suggesting that any originalist approach to the construction zone must be consistent with commitments to “fixation and constraint”); see also *id.* at 479–83 (discussing the relationship between originalism and the modalities more broadly).

252. See generally QUENTIN SKINNER, REASON AND RHETORIC IN THE PHILOSOPHY OF HOBBS 138–80 (1996). We thank Ashraf Ahmed for this point.

only response is to amputate part of the analysis. Marginalization, in contrast, is a strategy of containment. Recognizing that potentially destabilizing arguments are going to enter constitutional decisionmaking, it tries to confine their role to certain red-light districts.

As this portrait suggests, the freedom to run anti-modal arguments on or between modal rails is limited. A shed-full of analytical tools that are used regularly in nonconstitutional settings continue to be excluded from mainstream constitutional practice, from detailed cost-benefit assessments to explicit moral and political philosophy to empirical demonstrations supported by regression tables with coefficients and *p*-values.<sup>253</sup> Sources that use these tools are rarely even cited in constitutional decisions, let alone explained to the point that a firm understanding is demonstrated by the decisionmaker. A newcomer to constitutional law might suppose that modalities such as prudential and ethical argument warehouse unrestrained policy calculations and comprehensive normative frameworks. In practice, they do not. The most sophisticated components of such analyses are excised and the remainder harnessed to familiar legal categories. Modalization, modification, and marginalization allow anti-modal-like arguments to be rerouted into constitutional law, but there is significant loss on the journey.

Thus, even though constitutional law's resonance gap puts pressure on the conventions of constitutional reasoning, the conventions do not fully collapse, and the gap does not fully close. The anti-modalities continue to constrain arguments over what the Constitution means. American constitutional practice has developed an impressive array of norms to wall off the use of anti-modal reasoning in general, along with a subtle set of gateways for letting in certain stripped-down versions of that reasoning in certain cases.

#### IV. NORMATIVE IMPLICATIONS

The anti-modalities generate recurring dilemmas. They help prevent constitutional argument from devolving into normative argument, full stop, yet in so doing they move constitutional decisionmaking some distance from what people usually care about. That distance serves important rule of law values, yet it also contributes to a number of pathologies in our constitutional culture. Put crudely, constitutional law cannot survive as a legal discipline without the anti-modalities, and it cannot thrive as a political practice with them.

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253. Effort is required to locate even the word "coefficient" in a Supreme Court opinion. For examples in nonconstitutional cases, see *Kansas v. Colorado*, 514 U.S. 673, 685 (1995) (involving water rights), and *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 430 (1975) (involving Title VII employment discrimination). For the most recent reference to *p*-values, and the rejection thereof as a requirement for a disclosure duty in the securities field, see *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 39 & n.6 (2011). Among the best-known examples of the Court refusing to rely on expert statistical analysis to vindicate a constitutional claim is *McCleskey v. Kemp*, 481 U.S. 279 (1987) (declining to hold that Georgia's capital sentencing process was administered in a racially discriminatory manner in violation of the Equal Protection Clause or the Cruel and Unusual Punishment Clause).

Or so we will suggest. In this Part, we outline several advantages and disadvantages associated with current practice, while the next Part considers some possible ways forward. Both Parts aim for brevity. The main focus of this Article is the conceptualization and elaboration of the anti-modalities; the thoughts below must be more provisional.

#### A. *Status Quo Advantages*

Cast in a sympathetic light, the existence and function of the anti-modalities might be defended on a number of overlapping grounds. To begin, not every aspect of every argument type excluded by the anti-modalities is reputable. Some anti-modalities are in obvious tension with standard goals of constitutional government, ranging from impartiality (threatened by certain partisan arguments) to rationality (threatened by certain emotional arguments) to protection of minority rights (threatened by certain popularity arguments). In addition, the exclusions are moderated by partial openings for generally valued reasoning, such as intuitive consequentialist and fairness-based claims, as well as by the potential for changes in content over time.<sup>254</sup> The “artificial reason” of the anti-modalities, as Sir Edward Coke might have put it,<sup>255</sup> arguably allows constitutional law to maintain a base level of autonomy without blocking too many outcomes that seem sensible on an all-things-considered basis. Every legal institution, Philippe Nonet and Philip Selznick have argued, must establish practices that limit discretion and ensure the integrity of decisionmaking, while also finding ways to remain responsive to new contingencies.<sup>256</sup> Perhaps the anti-modalities thread this needle—or come as close to success as can reasonably be expected of an institution as old, broad, and politically contentious as constitutional law.

That the precise boundaries of the anti-modalities are hard to determine is a feature, not a bug, on this account. Rigid exclusions could destroy constitutional law’s “openness”<sup>257</sup> and invite ossification. To negotiate the dilemma laid out by Nonet and Selznick, legal institutions may find it necessary to repudiate practices of argument and analysis that are troubling in certain respects, understanding that some benefits will be sacrificed, yet maintain flexibility to engage in limited variants on those practices if done artfully or in low-visibility ways.<sup>258</sup> Vagueness in the border between modalities and an-

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254. See *supra* notes 58–65 and accompanying text (discussing ways in which modalities and anti-modalities may evolve over time).

255. See *Prohibitions del Roy* (1607) 77 Eng. Rep. 1342, 1343 (K.B.).

256. PHILIPPE NONET & PHILIP SELZNICK, *LAW AND SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW* 76–79 (Transaction Publishers 2001) (1978).

257. *Id.*

258. Cf. Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 665–77 (1984) (exploring implications of maintaining different legal rules for the public and for the officials who apply the rules). For another example, suggested to us by Eric Posner, consider how corporate norms may require officers and

ti-modalities not only preserves this flexibility but also allows individuals who excel at forbidden-yet-valuable forms of reasoning to participate in constitutional debates, rather than disengage. A hard line against sources of knowledge, perspective, and creativity outside the modalities would disable constitutional decisionmakers from consulting those contributions even casually. As Parts II and III discussed, there is no such hard line. Constitutional argument in the United States is organized to allow indirect inputs from empiricists, historians, philosophers, organized interests, and others, even if those inputs will not receive much recognition or extended treatment in official outputs.

Still more optimistically, the anti-modalities can support a division of analytic labor across institutions. Given the juricentrism of American constitutional culture,<sup>259</sup> the anti-modalities have special bite in the courts. Insofar as they push sophisticated policy evaluation, deep normative theorizing, and coalition-building compromise toward the political branches, they may have the effect of matching those methods to decisionmakers with the requisite competencies.<sup>260</sup> It is a systems fallacy to assume that just because it is desirable for legislators or administrators to rely on certain anti-modalities in certain contexts, such as rigorous cost-benefit analysis when evaluating a proposed regulation, it is desirable for every other set of officials to do so in other contexts.<sup>261</sup>

That said, not every division of labor is benign. The degree to which the anti-modalities promote a socially beneficial distribution of argument types is hardly clear in a system where constitutional reasoning trumps nonconstitutional reasoning and constitutional reasoning by judges trumps constitutional reasoning by nonjudges.<sup>262</sup> By excluding the most politically salient modes of reasoning from constitutional decisionmaking, the anti-modalities may help the judiciary safeguard its own legitimacy without necessarily promoting the public good. Moreover, whatever deficiencies judges now have in anti-modal categories of reasoning are partly endogenous to legal pedagogy and practice, as the emphasis on modal reasoning in law schools and courthouses trains many lawyers to see statistical evidence as “sociological gobbledygook”<sup>263</sup> and law as an autonomous discipline. For better and

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directors to focus explicitly on shareholder wealth maximization yet also allow them, in limited respects, to take into account other goals and constituencies.

259. See *supra* note 206 and accompanying text.

260. Cf. Charles Fried, Observation, *The Artificial Reason of the Law or: What Lawyers Know*, 60 TEX. L. REV. 35, 37 (1981) (stating that “it would be peculiar to found the activity of judges on a subject,” such as philosophy, “with which those judges are, roughly speaking, incompetent to deal”).

261. Cf. Adrian Vermeule, *The Supreme Court, 2008 Term—Foreword: System Effects and the Constitution*, 123 HARV. L. REV. 4, 8–9 (2009) (discussing fallacies of division and composition within systems, with applications to legal institutions).

262. See *supra* notes 191–200 and accompanying text.

263. Adam Liptak, *A Case for Math, Not “Gobbledygook,” in Judging Partisan Voting Maps*, N.Y. TIMES (Jan. 15, 2018), <https://www.nytimes.com/2018/01/15/us/politics/gerry>

worse, the anti-modalities both reflect and perpetuate the intellectual insularity of mainstream legal culture.

To bolster their case, status quo proponents might enlist a version of Rawlsian public reason. As previewed in Part II, some prominent theorists contend that to accommodate social pluralism and secure liberal legitimacy, law's officials should rely only on claims that can appeal to the public at large.<sup>264</sup> By ruling out fundamentalist and partisan arguments, the anti-modalities generally ensure that constitutional decisionmakers do just this. The anti-modalities are overinclusive in this regard: they rule out additional arguments that are not clearly inconsistent with public reason, while requiring modifications to otherwise excluded forms of reasoning that can degrade the quality of that reasoning on its own terms. Moreover, the extent to which U.S. constitutional argument fosters social cohesion in any empirically verifiable sense is an open question.<sup>265</sup> The anti-modalities may invite more "trickery and mystification"<sup>266</sup> than intellectually honest, publicly accessible, and mutually respectful debate. Still, if the anti-modalities leave constitutional deliberations unsatisfyingly shallow by the standards of professionals in other fields, this could be the price for realizing some of the benefits associated with public reason.

In a similar spirit, status quo proponents might draw on Cass Sunstein's notion of incompletely theorized agreements.<sup>267</sup> Sunstein highlights possibilities for agreement on discrete outcomes despite intractable divisions over fundamental commitments, and he suggests that "relatively narrow or low-level" legal argumentation facilitates such agreement.<sup>268</sup> Going further, we might characterize the entire structure of the anti-modalities as a giant incomplete-theorization machine. Together, they ensure that the only kinds of arguments that count in constitutional law are relatively "low-level" in their moral and empirical reasoning and relatively detached from the first-order concerns that most people care about. The combination of judicial suprema-

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mandering-math.html [https://perma.cc/R6CP-BFZH] (quoting a remark by Chief Justice Roberts about a standard political-science measure of partisan gerrymandering).

264. See *supra* notes 96–101 and accompanying text.

265. Compare, e.g., JACK M. BALKIN, *LIVING ORIGINALISM* 64–73, 320–29 (2011) (suggesting that prevailing practices of constitutional deliberation and contestation promote democratic legitimacy), with Adam M. Samaha, *Talk About Talking About Constitutional Law*, 2012 U. ILL. L. REV. 783, 789–800 (emphasizing difficulties surrounding empirical claims about social cohesion from constitutional dialogue).

266. LOUIS MICHAEL SEIDMAN, *ON CONSTITUTIONAL DISOBEDIENCE* 136 (2012). We elaborate this point in the next Section.

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

268. *Id.* at 1735–36. As Kenji Yoshino has suggested to us, the fact that our society is deeply divided on anti-modal grounds may help account for the development and persistence of the modalities. Even so, alternative grounds for debate cannot ensure the softening of original disagreements. See *infra* notes 276–287 and accompanying text. Consider, for example, the (lack of) effect on disagreement when a president's opponents shift from unapologetically ideological arguments to formal constitutional arguments for impeachment.

cy (over nonjudges) and constitutional supremacy (over nonconstitutional law) supports this feature, insofar as it prevents any completely theorized—and therefore anti-modal—legal claim from decisively carrying the day. There is a hint of paradox here, as judicial pronouncements on constitutional law end up serving as a kind of authoritarian guarantor of philosophical modesty and concern for pluralism.

Finally, old and contested claims about the “practical wisdom” of lawyers and legal craft might be pitched in.<sup>269</sup> Accomplished lawyers probably develop a special combination of skills.<sup>270</sup> With adequate time and license, these may include conceptual precision, attention to institutional details and factual particulars, the ability to articulate competing views in their strongest forms, and sensitivity to potential negative consequences of new rules.<sup>271</sup> Practitioners in other disciplines share these skills but not necessarily in the attorney’s combination and depth. By preventing constitutional law from straying too far from classic legal modes of analogical, precedential, and text-based reasoning, the anti-modalities may play to lawyers’ strengths while helping to secure the conditions under which such reasoning can flourish.

#### B. *Status Quo Syndromes*

Although the foregoing advantages are partly speculative, their cumulative force is considerable. This should come as no surprise: the anti-modalities would not have been so stable for so long if they were not at least minimally functional for official decisionmakers and minimally acceptable to the general public.<sup>272</sup> From other perspectives, however, this Article’s portrait of constitutional culture looks far bleaker. We have already previewed

269. *E.g.*, ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 21 (1993). Kronman saw large differences between actual contemporary practice and his ideal of the lawyer-statesperson. *See id.* at 13.

270. *Cf.* Frederick Schauer & Barbara A. Spellman, *Analogy, Expertise, and Experience*, 84 U. CHI. L. REV. 249, 265 (2017) (suggesting that “legal experts are, by virtue of that expertise, more likely to see connections of a certain type” and to employ analogical reasoning in distinctive ways). Schauer and Spellman expressly withhold judgment on the desirability of lawyers’ reason. *See id.* at 267.

271. *See, e.g.*, KRONMAN, *supra* note 269, at 113–14, 158–62; Jerome E. Bickenbach, *The ‘Artificial Reason’ of the Law*, 12 INFORMAL LOGIC 23, 30–32 (1990); Fried, *supra* note 260, at 54–57.

272. This observation, which holds true for enduring constitutional norms generally, does not imply that the anti-modalities promote social welfare. *Cf.* Eric A. Posner & Adrian Vermeule, *Constitutional Showdowns*, 156 U. PA. L. REV. 991, 1033 (2008) (arguing that “there is no reason to expect that interaction between national lawmaking institutions will tend to produce anything like efficient customs or norms,” given the lack of a mechanism that could ensure efficient results as well as “enduring divergences between private and social costs and benefits”); David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2, 80–81 (2014) (“Longstanding interbranch norms . . . may be workable [for the actors subject to the norms] and attractive to a Burkean traditionalist, yet suboptimal from any number of perspectives.”).



many of these points, too—some of which are the flip side of the advantages sketched above.

Most obviously, the anti-modalities leave constitutional law without the resources to reckon, seriously and explicitly, with some of the most significant dimensions of social problems. Consider Jeremy Waldron's comparison of debates over reproductive rights and the death penalty in the United States with debates on the same subjects in countries like the United Kingdom and New Zealand, "where they are not constitutionalized":

It is sometimes liberating to be able to discuss issues like abortion directly, on the principles that ought to be engaged, rather than having to scramble around constructing those principles out of the scraps of some sacred text, in a tendentious exercise of constitutional calligraphy. Think of how much more wisely capital punishment has been discussed (and disposed of) in countries where the debate has not had to centre around the moral reading of the phrase "cruel and unusual punishment," but could focus instead on broader aims of penal policy and on dangers more morally pressing than "unusualness," such as the execution of the innocent.<sup>273</sup>

Waldron links the tendentiousness of American constitutional debates to the centrality of a canonical text. But the anti-modalities ensure that these debates remain relatively impoverished even when the conversation turns away from the text toward other forms of reasoning. Because of the difficulty of amending the Constitution through Article V,<sup>274</sup> interpretation is the name of the game in U.S. constitutional politics. Because of the anti-modalities, Americans are stuck with a limited language game in which most "broader aims" of policy and "morally pressing" considerations are excluded in whole or in part.

Unable to address such matters directly, participants in the practice endlessly accuse each other of manipulation and misdirection—of reaching constitutional judgments in an opportunistic rather than a principled manner and of obscuring the real bases of their constitutional commitments.<sup>275</sup> "Everyone pretends to be making authentic arguments," Louis Michael Seidman observes, while "everyone accuses everyone else of using unprincipled substitutes."<sup>276</sup> Advocates charge that their opponents are using constitutional "code words" to convey forbidden sentiments;<sup>277</sup> nominally nonpartisan

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273. JEREMY WALDRON, *LAW AND DISAGREEMENT* 290 (1999).

274. See *supra* note 196 and accompanying text.

275. See Pozen, *supra* note 50, at 887 (observing that "insinuations of others' bad faith suffuse constitutional debates" in the United States); *id.* at 918–39 (cataloging such insinuations).

276. Seidman, *supra* note 7, at 289.

277. See, e.g., Linda Greenhouse, Opinion, *Actively Engaged*, N.Y. TIMES: OPINIONATOR (Oct. 19, 2011, 9:30 PM), <https://opinionator.blogs.nytimes.com/2011/10/19/engagement-as-the-new-activism> [<https://perma.cc/F5N4-756F>] (describing "judicial engagement" as an emerging libertarian code word for urging the Court to apply more exacting scrutiny to economic regulation); Karl Rove, Opinion, *'Empathy' Is Code for Judicial Activism*, WALL ST. J. (May 28, 2009, 12:01 AM), <https://www.wsj.com/articles/SB124347199490860831> (on file with

judges vote in ways that are strongly predicted by unacknowledged ideological commitments;<sup>278</sup> and participants in constitutional disputes obsess over arguable inconsistencies, contradictions, and methodological missteps by the other side while studiously avoiding “what actually matters to the disputants.”<sup>279</sup> Many of the most worrisome pathologies of American constitutional culture turn out to be inseparable from—and inexplicable without reference to—the rhetorical and analytical constraints imposed by the anti-modalities, alongside the efforts by constitutional decisionmakers to maneuver around those constraints.

These pathologies go a long way toward undermining any compromise-oriented case for the anti-modalities. We noted above that there is little empirical evidence to support the notion that constitutional argument fosters social cohesion.<sup>280</sup> There is, however, new computational research indicating that when members of Congress invoke the Constitution on the House or Senate floor, their remarks tend to be even more polarized on partisan and ideological lines than when they refrain from invoking the Constitution.<sup>281</sup> And there is no shortage of qualitative accounts that highlight the “tribalism,”<sup>282</sup> “bitterness,”<sup>283</sup> “acrimony,”<sup>284</sup> and “profound constitutional dis-

the *Michigan Law Review*) (“Empathy” is the latest code word for liberal activism, for treating the Constitution as malleable clay to be kneaded and molded in whatever form justices want.”); see also Suzanna Sherry, *Outlaw Blues*, 87 MICH. L. REV. 1418, 1422 (1989) (book review) (discussing Mark Tushnet’s claim “that all grand [constitutional] theories betray their political agendas by code words”).

278. See, e.g., Christopher Sundby & Suzanna Sherry, *Term Limits and Turmoil: Roe v. Wade’s Whiplash*, 98 TEX. L. REV. 121, 133–34 & nn.55–60 (2019) (summarizing evidence that “the Court increasingly votes along ideological lines that are predictable and closely aligned with the views and preferences of political parties”).

279. Seidman, *supra* note 7, at 265, 289.

280. See *supra* note 266 and accompanying text. As explained in Samaha, *supra* note 265, at 789–98, there are numerous reasons to doubt this hypothesis in a legal system such as ours. In a nutshell: the Constitution is a commonly available reference, and its abstract terms might help create a kind of shared language for discussing important issues. But people are quite able to divide and polarize while speaking the same language. Shared references might even escalate conflict by connecting antagonists. Either way, channeling disagreement into a constitutional frame raises the stakes. At a minimum, legal supremacy becomes implicated; on some versions of constitutional dialogue, so do issues of national identity and fundamental values. The losing positions in these debates therefore become deeply tarnished, even un-American, and the prospects for a reversal of fortune might be too distant to promote acceptance. In some settings, raising the stakes of decision also tends to depress creativity, trust, and compromise. Although it is possible that our constitutional debates are insulated from all these effects, these points make it rash to place any great faith in constitutional argument’s cohesive benefits absent empirical support.

281. See Pozen et al., *supra* note 68, at 37–47.

282. Amy Chua & Jed Rubenfeld, *The Threat of Tribalism*, ATLANTIC (Oct. 2018), <https://www.theatlantic.com/magazine/archive/2018/10/the-threat-of-tribalism/568342> [<https://perma.cc/S427-ERJG>].

283. Sanford Levinson, *The Audience for Constitutional Meta-Theory (or, Why, and to Whom, Do I Write the Things I Do?)*, 63 U. COLO. L. REV. 389, 396–97 (1992) (discussing exchanges among academic constitutional theorists).

trust”<sup>285</sup> that characterize contemporary American debates over the content of supreme law. The anti-modalities may rule out certain forms of especially divisive argument, but in so doing they underwrite formulaic constitutional scripts<sup>286</sup> and suspicions of bad faith that recreate or exacerbate those same divisions.

Compounding these risks, the resonance gap may contribute not only to manipulation and misdirection by legal practitioners but also to alienation and mystification for ordinary Americans. We have emphasized how the anti-modalities foster a kind of anti-politics, detaching mainstream constitutional debates from the central concerns of most people.<sup>287</sup> One effect is to sanitize these debates. Another is to professionalize them. If the modalities mesh with the skill set of lawyers, the anti-modalities delegitimize forms of reasoning that might expose lawyers’ lack of special normative competencies and invite uncomfortable questions about their dominant role in the elaboration of supreme law.<sup>288</sup> Attention remains riveted, instead, on judicial opinions, textual provisions, and other historical materials that are quite distant from the familiar source material for decision in other fields.

The subtle strategies through which modified versions of the anti-modalities reenter constitutional decisionmaking,<sup>289</sup> meanwhile, only make “the constitutional-law game”<sup>290</sup> more complex and impenetrable to nonspecialists. There are many other sources of legal estrangement, and we do not want to overestimate the influence of constitutional grammar. But we can fairly ask whether this grammar’s peculiar mix of inclusions and exclusions elevates the political power and prestige of lawyers—not to mention constitutional law professors—at the expense of nonelites and more democratic visions of constitutionalism.

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284. Robert R. Gasaway & Ashley C. Parrish, *Administrative Law in Flux: An Opportunity for Constitutional Reassessment*, 24 GEO. MASON L. REV. 361, 396 (2017).

285. Pozen, *supra* note 50, at 954.

286. See David Pozen, Eric Talley & Julian Nyarko, *Republicans and Democrats Are Describing Two Different Constitutions*, ATLANTIC (June 2, 2019), <https://www.theatlantic.com/ideas/archive/2019/06/democrats-and-republicans-have-different-constitutions/590005> [<https://perma.cc/6MTH-XKKN>] (“[M]embers of each party follow a certain constitutional script. The details change, depending on the issue. The broad interpretative themes, and ideological fault lines, stay the same.”).

287. See *supra* Section III.A.

288. Cf. Kessler & Pozen, *supra* note 62, at 1891 (explaining that theories of constitutional interpretation “exert disciplinary effects” by privileging particular “styles of research, rhetoric, and justification”). Improved empirical methods now make it easier to measure the influence of certain extralegal factors on constitutional decisions. This improvement might come to undercut the effectiveness of prevailing analytical and rhetorical techniques that obscure those influences, thereby reducing mystification, but it will not close the resonance gap or solve the gap’s other problems on its own.

289. See *supra* Section III.B.

290. H. JEFFERSON POWELL, CONSTITUTIONAL CONSCIENCE: THE MORAL DIMENSION OF JUDICIAL DECISION 53 (2008).

Even this depiction of the anti-modalities may be too generous, insofar as it suggests that they in fact limit constitutional argument to the forms of reasoning that lawyers do best. What the anti-modalities truly ensure, as Parts II and III showed, is not that constitutional decisionmakers refrain from considering matters of policy, morality, partisanship, emotion, popularity, or compromise, but rather that they refrain from considering them *in any rigorous fashion*. Analogies, slippery slopes, ipse dixits, and casual speculations are allowed to substitute for the forbidden modes of analysis, with the result that successful constitutional claims can amount to a kind of ersatz, superficial hybrid of social science and philosophy. Put polemically, the anti-modalities may be distractions in every bad sense, wasteful and misleading, as they encourage constitutional interpreters to render poorly justified decisions based on incomplete information and insufficient study. Put more modestly but still alarmingly, the anti-modalities contribute to a culture of analytic carelessness whenever constitutional decisionmakers stray beyond the most formalistic styles of reasoning.

#### V. CONFRONTING THE ANTI-MODALITIES

For readers who are convinced that current practice is optimal or unalterable, nothing needs to be done. Some may find compelling Section IV.A's qualified defense of the anti-modalities' exclusion from constitutional debate on grounds of liberal legitimacy, social cohesion, institutional competence, or analytic integrity. Others may believe that something like the current configuration of modalities and anti-modalities is an entailment of the hermeneutic enterprise, rather than an option set that can be revised by design. At most, such readers might strive to enhance appreciation for workaday legal reason and the filtering effect of the anti-modalities.

For those less sure about current practice, we can mark alternatives. Our own view is that while the status quo regarding the anti-modalities has significant upsides, its potential downsides are at least as plausible and seriously disconcerting. That much is enough to recommend a preliminary investigation of reform options, only some of which may prove attractive and feasible.<sup>291</sup> Given our focus on the normative concerns raised by the resonance gap, we bracket reforms that would enlarge or exacerbate the gap, such as dragging nonconstitutional argument toward its constitutional partner<sup>292</sup> or

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291. Cf. Jeremy Waldron, *Never Mind the Constitution*, 127 HARV. L. REV. 1147, 1149 (2014) (book review) (highlighting the value of constitutional critiques that “succeed in making us uneasy with various practices we have been wedded to even though, at this stage, there is nothing much to be done about them”).

292. Even if one wished to promote such constitutional colonization, the domain of non-constitutional argument is almost certainly too large and embedded to make a great deal of headway. Cf. Samaha, *supra* note 265, at 790 (characterizing constitutional argument as “an outlier practice for normal human beings—even law professors”).

slashing the list of modalities without making other changes to the constitutional system.<sup>293</sup>

This leaves two main responses for those troubled by the status quo: minimize the resonance gap by expanding the modalities and contracting the anti-modalities, thereby *reducing the distance* between constitutional and nonconstitutional argument; or leave the resonance gap intact but moderate its effects by *reducing the area* of active constitutional decisionmaking. Rationally choosing an aspiration depends on educated predictions and a thorough normative framework, which we do not pretend to supply here.<sup>294</sup> These closing remarks are merely suggestive, intended to facilitate serious thinking about how we might better confront, not thoughtlessly accept, our constitutional grammar.

#### A. *Narrowing the Gap*

Assume for the moment that constitutional officials, advocates, and scholars can jointly select which types of arguments to make modal and anti-modal. Those lists of arguments will impose constraints once constructed, but we are free to choose, by some responsive mechanisms, the items on the lists.<sup>295</sup> One option available to us, then, is to connect the forms of constitutional argument to whatever people honestly and deeply care about with regard to matters of public concern. Whereupon the resonance gap would collapse, “constitutional argument” would become argument, and constitutional decisionmaking would be animated by any and all claims that Americans care to press in debates over supreme law. The category of supreme law would not have to be abandoned, insofar as it remains useful in marking su-

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293. Scholars working along these lines include those who support “exclusive originalism,” see Stephen M. Griffin, *Rebooting Originalism*, 2008 U. ILL. L. REV. 1185, 1187 (introducing the term to refer to the idea that “other methods of interpretation are wrong or illegitimate”), as well as those who reject originalism altogether, see, e.g., STRAUSS, *supra* note 36, at 11 (suggesting that all versions of originalism are “vulnerable to decisive objections”); see also *supra* note 61 and accompanying text (noting that the originalist movement poses a potential threat to the ethical and prudential modalities).

294. Instead, we supply a very preliminary and somewhat speculative analysis that reproduces, perhaps ironically, some of the deficits that the Article identifies in modal constitutional reasoning. The issues considered in this Part are so large and systemic, and the existing literature so thin, that it is all but impossible to do much more in a few closing pages.

295. How modalities and anti-modalities develop is a difficult question, given that their construction involves ongoing decentralized exchanges, without up-or-down votes in a governing body, throughout what some sociologists call the “legal complex.” See Lucien Karpik & Terence C. Halliday, *The Legal Complex*, 7 ANN. REV. L. & SOC. SCI. 217, 220–23 (2011) (describing “a cluster of legal actors”—including the bar, courts, legal academics, civil servants, and prosecutors—“related to each other in dynamic structures and constituted and reconstituted through a variety of processes”). But their content over time probably must be determined by extramodal reasoning and forces, at least within a wide range of plausible conceptions of interpretation and construction, see Sunstein, *supra* note 182, at 193–94, 211–12, and we pause to concentrate on aspirations more than implementation barriers.

perseding norms in cases of conflict. But the resources for determining its substance would be open.<sup>296</sup>

Less radical versions of this option are easier to imagine. For instance, structural, prudential, and ethical arguments could be reconfigured to permit more explicit use of political philosophy or sophisticated institutional and sociological analysis, and judicial doctrine could reinforce those themes. The experiences of many other countries with proportionality review, in which courts openly weigh competing interests and second-guess “policy judgments on the ground that those judgments were qualitatively inadequate in light of facts about the world,”<sup>297</sup> give hints of what it might look like to incorporate a broader range of empirical inputs directly into constitutional decisionmaking.<sup>298</sup> Existing inlets for proportionality-style analysis might be widened while holding constant other constraints on constitutional grammar.

However specified, this less radical option is still an obvious target for standard concerns about legal change and judicial capacity. Uncertainty, transition, and adaptation are not cost-free even if their burdens often are overstated. And as currently configured, U.S. courts are poorly suited to produce high-quality welfarist evaluation, moral inquiry, or multiparty negotiation across issue domains.<sup>299</sup> Redesigning the judicial system or reallocating constitutional authority to other bodies could in principle address this concern, but only by generating significant additional forms of uncertainty and transition costs.

Another variant would relax the rules of constitutional grammar for nonjudicial actors, but not for judges. Although American constitutional culture may be court-centric overall, nonjudicial participants in constitu-

296. Some of the legal realists endorsed such an opening up of legal reasoning, in general, and sought to create space for new modes of analysis by demonstrating how received legal categories were neither natural nor neutral nor determinate. *See, e.g.,* Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 14 (1927) (arguing for the necessity of applying to property law “all those considerations of social ethics and enlightened public policy which ought to be brought to the discussion of any just form of government”). For a more recent call for reshaping legal practice to facilitate broader consideration of alternative futures, including radical reform, see ROBERTO MANGABEIRA UNGER, *WHAT SHOULD LEGAL ANALYSIS BECOME?* (1996).

297. Greene, *supra* note 218, at 63.

298. *See, e.g.,* DAVID M. BEATTY, *THE ULTIMATE RULE OF LAW* 170 (2004) (describing proportionality as “a particularly powerful example of a method of analysis known as ‘casuistry’, which involves the application of ethical rules to cases of conflicting obligations by emphasizing the factual distinctions of each”); *see also* Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094, 3142 (2015) (arguing that proportionality review can enhance the transparency and persuasiveness of constitutional-rights determinations and “help bring law closer to the community’s sense of justice”).

299. *See supra* notes 259–261 and accompanying text; *see also* NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES* 123–52 (1994) (discussing comparative disadvantages and advantages of the adjudicative process relative to other institutions); Jamal Greene, *A Private Law Court in a Public Law System*, 12 LAW & ETHICS HUM. RTS. 37, 58–72 (2018) (explaining that U.S. appellate courts are not well structured to ascertain social facts or fashion flexible remedies in the manner that proportionality review often requires).

tional debates already appear to enjoy somewhat more rhetorical and analytical leeway than judges do, depending on the institutional setting.<sup>300</sup> Reformers could build on these nascent discrepancies and further liberalize the terms of constitutional deliberation outside the courts. An enlarged set of conflicts would arise, not dissimilar to the old problem of departmentalism.<sup>301</sup> Competing constitutional argument structures would have to be reconciled, such as by partitioning subject matter carefully across institutions, or else the division and fragmentation would have to be tolerated. The current system already bears some of these tensions, however, and we remain provisionally sympathetic to this model of popular constitutionalism.

Yet if the goal is to reduce the influence of courts and their characteristic modes of analysis, it is hardly apparent that nonjudicial actors should be labeling more arguments “constitutional.” Those concerned about the resonance gap could just as well prefer to see more flexible and open-ended practices of *nonconstitutional* argument govern a larger area of social life—the option that we present in the next Section. Moreover, constitutional argument might lose whatever value it now offers if its accepted channels were opened much wider. Past some point, reconfiguring the modalities and antimodalities to allow in more argument types, inside or outside the courts, would vitiate the traditions and benefits of professional legal reason.<sup>302</sup> Without distinctive, widely shared norms about which sorts of claims will be recognized as valid, the discipline of constitutional interpretation would lose coherence.<sup>303</sup> If closing the resonance gap means transforming the practice of constitutional law beyond recognition, the aspiration becomes unrealistic for our lifetimes.<sup>304</sup>

Furthermore, if one is willing to bracket feasibility constraints, liberalizing the rules of constitutional amendment may well be a superior option to liberalizing the rules of constitutional grammar. The modalities and antimodalities, recall, apply to claims about the meaning of the Constitution.<sup>305</sup> They have no direct bearing on questions of whether or how the document

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300. See *supra* notes 203–206 and accompanying text.

301. Compare, e.g., Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1379–81 (1997) (arguing for settlement by and coordination around judicial review despite its drawbacks), with Neal Devins & Louis Fisher, Essay, *Judicial Exclusivity and Political Instability*, 84 VA. L. REV. 83, 84–85, 103–06 (1998) (doubting that concentration of the settlement function in the Supreme Court is a proven or stable response to disagreement, compared to more interactive approaches).

302. See *supra* notes 270–272 and accompanying text.

303. See *supra* Section I.A (discussing the boundaries of disciplines).

304. Even a complete merger of constitutional and nonconstitutional argument, it is worth observing, would not cure popular estrangement from official decisionmaking. No reform can close every resonance gap. Although we have suggested that constitutional law’s current resonance gap is especially pronounced, government decisions about an endless variety of matters may be made for reasons that some parties find unintelligible, unacceptable, or less significant than other reasons that were not considered.

305. See *supra* note 4; *supra* notes 54–57 and accompanying text.

ought to be revised. Once an official amendment process is underway, any number of new argument types are welcome;<sup>306</sup> the anti-modalities fade and the resonance gap closes. Those who would prefer to have a greater amount of all-things-considered analysis inform constitutional outcomes could thus focus their efforts on repeated Article V amendments—then turn around and embrace highly constrained, lawyerly modes of reasoning for the interpretation of that oft-updated text. This option ought to appeal to legal formalists and popular constitutionalists alike. Indeed, the downsides of the anti-modalities identified in this Article provide additional support for the standard democratic complaint that the U.S. Constitution is too difficult to amend.<sup>307</sup>

The obvious barriers to the idea are practical. Short of holding a Philadelphia-style convention to reconsider the entire Constitution, there is no evident way to overcome all the factors that may be depressing amendment rates.<sup>308</sup> And although we are not prescribing implementation strategies in this project, there is another reply to the resonance gap that may be pursued in more conventional terms.

#### B. *Narrowing Constitutional Law*

The final option is both reformist and relatively conservative. We might leave alone the modalities and anti-modalities, accept the resonance gap in principle, and strive to reduce its importance in practical terms. The discipline of constitutional argument, as we have seen, generally excludes a number of valuable forms of analysis while granting them admission selectively and superficially; yet a bid to integrate these forms more fully and transparently risks undermining the discipline's virtues and even unraveling it altogether. If this diagnosis is sound, limiting the external reach of constitutional argument may be a more promising strategy than tinkering with its internal norms.

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306. See, e.g., Vázquez, *supra* note 73, at 2216 (remarking that while “policy arguments” have no place in constitutional interpretation, they “belong instead in an article urging a constitutional amendment”).

307. For leading statements of this position, see SANFORD LEVINSON, *FRAMED: AMERICA'S FIFTY-ONE CONSTITUTIONS AND THE CRISIS OF GOVERNANCE* 331–45 (2012), and SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* 159–66 (2006). Cf. David Singh Grewal & Jedediah Purdy, *The Original Theory of Constitutionalism*, 127 *YALE L.J.* 664, 668, 679 (2018) (book review) (arguing that “the Article V amendment procedure came perilously close to choking off further sovereign action by the people,” producing “a political community that is at once committed to ruling itself and unable to do so”).

308. The plausible factors range well beyond the formal amendment rules and the prevailing interpretive methods used by courts. See Tom Ginsburg & James Melton, *Does the Constitutional Amendment Rule Matter at All? Amendment Cultures and the Challenges of Measuring Amendment Difficulty*, 13 *INT'L J. CONST. L.* 686, 711–12 (2015) (suggesting that “constitutional designers have little influence over the observed flexibility of their product”).



The resonance gap's significance is a function of both distance and area. That is, the severity of its syndromes depends not only on the difference in content between modal and anti-modal reasoning but also on the overall domain of social life subject to constitutional resolution. A small domain might be tolerated despite major discrepancies in constitutional and non-constitutional reasoning. Conversely, even modest discrepancies might become unsustainable as the area under constitutional control grows and, with it, the pressure to reach conclusions that are acceptable to adjudicators and policymakers on extralegal grounds. Just as the modalities and anti-modalities can evolve and certain claims can move from off-the-wall to on-the-wall or back,<sup>309</sup> the range of issues subject to constitutional resolution can drift over time owing to an enigmatic combination of forces.<sup>310</sup> But in any given legal system at any given moment, some large set of issues cannot plausibly be "constitutionalized" by competent interpreters.

Reformers therefore need not focus on constitutional grammar when they can focus on constitutional hegemony—and work to reduce the disappointments of constitutional argument by reducing the space in which it is expected to provide authoritative answers. With every issue taken out of the constitutional domain and assigned elsewhere, we can moderate the impact of truncated analyses, misdirection, mystification, and other pathologies associated with the resonance gap. Analogous problems may arise in other decision settings, of course, but fewer such problems will be embedded in contests over supreme law. At the same time, pressures on the resonance gap will likely fall along with the stakes of constitutional argument. The impulse to smuggle in anti-modal reasoning should wane for many constitutional decisionmakers as one politically salient issue after another is removed from their field of decision. Shrink this field enough, and the modalities probably could be trimmed and the anti-modalities expanded and hardened without destabilizing the system.

In a phrase, the suggestion is to pursue not merely judicial minimalism in constitutional cases but *constitutional minimalism* across the board, in recognition of the limited affordances of orthodox constitutional logic. To begin to operationalize the suggestion, constitutional officials, advocates, and scholars could establish a presumption against constitutionalizing contested issues. A quasi-Thayerian version of the idea might reject any claim about what the Constitution commands unless the claim seems "clearly"

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309. See *supra* notes 58–65 and accompanying text.

310. We are unaware of any reliable models for these movements. Complicating matters, the very question whether an issue may be debated in constitutional terms is itself a constitutional issue, at least in part, and thus a boundary question that implicates both sides of a line. The problem is roughly analogous to situations where one decisionmaker attempts to steer clear of another decisionmaker's exclusive domain and ends up issuing a decision on the boundaries of that domain. See Louis Michael Seidman, *The Secret Life of the Political Question Doctrine*, 37 J. MARSHALL L. REV. 441, 454–57 (2004).

supported by all the modalities or some privileged subset thereof.<sup>311</sup> This approach would deny a wide range of constitutional-level demands or at least leave many constitutional questions unresolved on the merits, thereby preserving those matters for nonconstitutional decision. The shift would not necessarily dictate fewer successful claims of right, a weaker attachment to familiar government structures, or even a smaller role for courts in society. But the shift would mean that more bitterly contested questions would be resolved as matters of ordinary law and policy, not as matters of supreme law.

This suggestion will be unpopular with some of the constitutional actors whose agreement would be needed to implement it and whose power it might threaten. But the idea of constitutional minimalism is hardly outlandish. In addition to contemporary calls for judicial minimalism<sup>312</sup> and generations-old calls for Thayerian deference to nonjudicial actors, it dovetails with coordination theories that envision constitutions as self-enforcing arrangements for mutual benefit among influential constituencies.<sup>313</sup> In these models, “constitutionalism . . . works at all only if there is relatively wide agreement on core issues.”<sup>314</sup> The upshot is a small constitution, legally as well as culturally: a source of specific reminders, details, and unobnoxious collaborative frameworks within which collective gains are made and distributed—not a platform for staging, let alone resolving, a mounting list of fundamental conflicts debated and defined in lawyers’ terms.

None of this identifies which substantive issues should be constitutionalized. “Few” is nonresponsive, and we cannot deny that the question is hard. But a quasi-Thayerian approach supplies one part of a complete answer through the modalities themselves: whenever the modalities are seen to establish a relatively determinate proposition of law, that proposition is eligible to stay in the constitutional box; everything else comes out. Because doctrinal argument is one of the modalities, this approach would not directly dis-

311. This approach is a modification of James Bradley Thayer’s proposal that judges should defer to a coordinate legislative branch except when the latter has made a “very clear” mistake, James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144, 154–55 (1893), and of Adrian Vermeule’s defense of that position in light of modern decision theory, see generally VERMEULE, *supra* note 233, at 230–88 (considering how to restrain judicial review under conditions of uncertainty that prevent confident choices among high-level interpretive theories).

312. See generally SUNSTEIN, *supra* note 233.

313. See, e.g., RUSSELL HARDIN, LIBERALISM, CONSTITUTIONALISM, AND DEMOCRACY 16, 26–28, 87–88 (1999); Barry R. Weingast, *Designing Constitutional Stability*, in DEMOCRATIC CONSTITUTIONAL DESIGN AND PUBLIC POLICY: ANALYSIS AND EVIDENCE 343, 348–53 (Roger D. Congleton & Birgitta Swedenborg eds., 2006); see also RICHARD H. MCADAMS, THE EXPRESSIVE POWERS OF LAW: THEORIES AND LIMITS 71–76 (2015) (depicting constitutions as, among other things, focal points that coordinate expectations as part of an assurance game where interests diverge somewhat on government structure).

314. HARDIN, *supra* note 313, at 84.

turb existing case law,<sup>315</sup> although it might make it harder to extrapolate from marginal precedents.

Some may wish to continue to resolve individual-rights disputes on constitutional grounds even when the modal result is less clear, for fear that these rights would suffer if exposed to more open-ended inquiry or to less judicial supervision. Our instincts run in the other direction. The anti-modalities, this Article has suggested, wall off constitutional decisionmaking from the better parts of policy analysis, comprehensive normative theory, emotional empathy in context, and complex arrangements for multiparty compromise. Many people's first-order commitments are sacrificed or obscured to the dictates of constitutional grammar.<sup>316</sup> Given this deeply entrenched feature of American constitutional law, we might find that second-order arguments of the sort privileged by the modalities are best suited to second-order decisions—to issues that are relatively less important, less divisive, and less in need of creativity and updating. The limited resources available for constitutional argument, in other words, point toward a limited role for constitutional law in resolving complex social controversies, at least under conditions of practical unamendability.

Following this reorientation, constitutional practice would lend itself to "lawyers' law," not in the sense of method-free intuition<sup>317</sup> but of small-bore craft and precision honed through technical legal reasoning. These argumentative and analytical traits may be especially useful when aimed at issues of institutional detail, opportunities for collaboration rather than zero-sum conflicts, and other matters on which a conclusive answer is important and the optimal answer elusive. These traits have less purchase when applied to normatively fraught questions involving the limits on regulatory power, the scope of private ordering, the relationship between liberty and equality, or the like. By rolling back the domain in which constitutional law and its limited menu of argument types are expected to provide definitive answers, we might open those contested first-order issues to a more diverse spectrum of value structures and knowledge bases. At the same time, we might orient modal constitutional claims toward the issues that best match their analytical forms, instead of committing to their forms and letting the analysis run wherever it can possibly lead.

Any such reorientation would be difficult to achieve and to sustain. Societies may coordinate around and struggle over texts and norms that lack the status of supreme law.<sup>318</sup> Constitutionalism is not the only institution

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315. To further minimize disruptiveness, this approach could be combined with a strengthened stare decisis norm.

316. The same is true for other legal grammars with similar modalities and anti-modalities. Cf. Alexander & Schauer, *supra* note 301, at 1380–81 (distinguishing first-order moral commands, second-order positive law commands, and third-order judicial commands).

317. See Underhill Moore & Gilbert Sussmann, *The Lawyer's Law*, 41 YALE L.J. 566, 569 (1932).

318. See Samaha, *supra* note 4, at 666 ("[The Constitution] is at most one point in a constellation of provisional social settlements."); Barry R. Weingast, *The Constitutional Dilemma*

made fragile by societal division; in democracy generally, “[b]ig disagreements bring us down.”<sup>319</sup> Moreover, even if constitutional law’s domain is narrowed, those who lose on nonconstitutional grounds may still be motivated to translate their positions into constitutional claims. As long as the modal/anti-modal border remains somewhat porous, they often will be able to do so in nonfrivolous ways. Their opponents may respond with counterarguments in kind, thereby refueling constitutional debate. More broadly, those who seek to hold the line on the nonconstitutional status of certain issues may refuse to unilaterally disarm themselves from trying to (re)constitutionalize other issues.

All that said, if enough people find good sense in restricting the field of constitutional contestation, which is a project for any social order at any stage, then this response to the resonance gap may have orthodox advantages. A difficulty for changing constitutional practices is that, in our legal culture, influential voices are apt to demand that the proposal be tied to the Constitution itself, understood in modal terms. Yet the very problem we are trying to address is that the modalities and anti-modalities leave constitutional law unable to confront the costs of its grammar. Our constitutional system does not entirely trap us in this vicious circle, however.

In the first place, the ordinary rules of constitutional grammar are directed to debates over the substantive content of the Constitution.<sup>320</sup> The degree to which they govern debates over the scope of its application is less clear. Consider how proponents of judicial minimalism and Thayerianism routinely ground their analyses in policy considerations rather than in the modalities themselves.<sup>321</sup> Whereas efforts to alter the interpreted meaning of the Constitution run straight into modal barriers, efforts to alter the boundaries or institutional locations of constitutional disputes may remain relatively free to draw on anti-modal logic, including insights from other disciplines. Meta-level arguments about how the modal forms of argument work and

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of *Economic Liberty*, J. ECON. PERSPS., Summer 2005, at 89, 97–98 (using the Missouri Compromise of 1820, the Compromise of 1833, and the Compromise of 1850 to illustrate the possibility of a self-enforcing “constitution”).

319. HARDIN, *supra* note 313, at 277.

320. See *supra* note 4; *supra* notes 54–57 and accompanying text.

321. Thayer himself defended his rule of clear mistake partly on grounds of comparative institutional competence. See Thayer, *supra* note 311, at 135; see also John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 775 n.81 (2009) (noting that Thayer based his proposal on both “history” and “policy”). For more recent considerations of Thayerian ideas in openly anti-modal terms, see RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 148 (1999) (suggesting that the desirability or undesirability of Thayer’s proposal depends on whether it would do “more harm than good”); VERMEULE, *supra* note 233, at 254–64 (analyzing the “neo-Thayerian” strand in constitutional theory in terms of agency costs, error costs, institutional capacities, and system effects, among other variables); and Sunstein, *supra* note 182, at 209–12 (arguing that Thayerianism and minimalism must be defended on grounds external to the Constitution itself).

should work—such as those offered in this Article—are always available, and they can be used to challenge prevailing assumptions and practices.

Even when the ordinary rules of constitutional grammar are understood by relevant decisionmakers to govern a dispute, those opposed to constitutionalizing issues need not surrender their positions. The anti-modalities do not rule out invoking modal argument forms, repeatedly, with the objective of restricting the domain of constitutional law in the long run. The pursuit of that large-scale goal is no more forbidden by the conventions of constitutional debate than the pursuit of narrowly self-interested ends is forbidden by the conventions of constitutional litigation. Otherwise anti-modal arguments in favor of a limited footprint for constitutional law might be modified and deployed in narrowly case-specific terms, promoted as a resource for resolving close calls in a “construction zone,” and enlisted to steer modalities such as prudentialism and structuralism toward constitutional minimalism.<sup>322</sup>

None of this is to suggest that progress will be easy. Throughout our analysis, we have tried to recognize complications and tensions. If attempts at constitutional minimalism ultimately fail to make meaningful headway because they lack sufficient depth, breadth, or sophistication, there could be no more poignant illustration of the problem this Article has highlighted.

#### CONCLUSION

Our aims in this Article are primarily descriptive and analytic. Readers need not agree with our normative assessments or prescriptive suggestions to agree that the anti-modalities are an underappreciated aspect of constitutional practice—or that the boundary between modalities and anti-modalities in any given system reveals a great deal about its legal culture. Nor do readers need to accept all the details of our typology to accept that anti-modalities exist and warrant careful study at the intersection of legal sociology, constitutional theory, and general jurisprudence. Because anti-modalities evolve over time, such study must be always ongoing.

The modalities have been a central focus of the constitutional literature for over thirty years. To make meaningful progress on the subject now, scholars need to start talking about the ideas that constitutional decisionmakers feel they cannot talk about. Only by setting the spoken alongside the unspeakable, and exploring their interactions, can we hope to achieve a deeper understanding of constitutional argument.

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322. See *supra* Section III.B (explaining how otherwise anti-modal arguments may be able to enter constitutional decisionmaking in the construction zone or through modalization paired with modification).