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## The Anti-Foundational Challenge to the Philosophical Premises of the Debate over Originalism

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# The Anti-Foundational Challenge to the Philosophical Premises of the Debate over Originalism

André LeDuc\*

## ABSTRACT

The seemingly interminable tacit assumptions about the nature of language and the ontological status debate over originalism is grounded on of the Constitution. It assumes that language represents the world, that the Constitution is something that has an ontologically independent existence, and that propositions of constitutional law are true if they accurately represent the objective Constitution. This Article offers a radical critique of those apparently obvious, commonsensical premises. It presents an anti-representational, anti-foundational challenge to the premises underlying the debate over originalism.

First, building on the work of Richard Rorty and Robert Brandom in philosophy and Philip Bobbitt and Dennis Patterson in jurisprudence, it outlines how we might move beyond the notion of an ontologically independent, objective Constitution. The alternative is to understand our Constitution as constituted by our constitutional practices, particularly our practices of constitutional argument and decision. Second, this Article offers an analysis of propositions of constitutional law and their truth, that explains such statements without the notion of representing the objective Constitution and without the notion that the truth of such proposition is a matter of the accuracy of the representation by such statements. Third, this Article presents and rebuts the arguments that might be made against such an approach. It concludes by showing how, in the face of this analysis, the tacit premises of the debate over originalism collapse and with them, the debate over originalism as we know it.

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This Article thus shows the path to transcend the debate, without victory for either side. Attention to the tacit philosophical premises of the debate over originalism, and the more plausible anti-foundational, anti-representational alternative, allows us finally, after so many decades, the possibility that we may leave this fruitless debate behind

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### INTRODUCTION

Originalists and their principal critics share three fundamental philosophical premises with respect to the relationship of language to the world.<sup>1</sup> Those shared premises are seemingly so well-established that

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1. This claim is not original. Although it has been advanced before by a handful of observers of the debate over originalism, the arguments made here for the claim have not been made before. Moreover, it is a claim that has been largely rejected or ignored. Philip Bobbitt advanced the claim in *Constitutional Fate*, 58 TEX. L. REV. 695, 700–02 (1980). See, e.g., JACK BALKIN, *LIVING ORIGINALISM* 3–20 (2011) (defending the primacy of the original understanding as a matter of constitutional interpretation); JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999) (addressing the nature of legal disagreement, but ignoring Bobbitt's work). I defend this claim about the shared ontological assumptions of the debate over originalism in André LeDuc, *The Ontological*

they attract almost no notice. Both sides in the debate over originalism accept the tacit premise that the Constitution is ontologically independent of our constitutional practice.<sup>2</sup> Both sides also proceed on the premise that language represents the world. These shared premises about the nature of language and the nature of the Constitution allow both sides to take for granted that the truth of propositions of constitutional law is determined by the correspondence of those representational statements with the constitutional world. The debate over originalism is fundamentally a debate over the originalist claim to have correctly described the Constitution and correctly stated the propositions of constitutional law. The critics of originalism generally claim that the originalist description is inaccurate and that many of the propositions of originalist constitutional law are untrue because they are inconsistent with the real Constitution. The fundamental differences between the two competing views relate to the sources of constitutional law. The world of constitutional law is much more circumscribed for the originalist than for Ronald Dworkin and other leading critics of originalism, and the nature of the linguistic representation of that world simpler.<sup>3</sup> Dworkin, for example, suggests that language is much more complex than the

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*Foundations of the Debate over Originalism*, 7 WASH. U. JUR. REV. (forthcoming Mar. 2015) [hereinafter LeDuc, *Ontological Foundations*]. Dennis Goldford renewed this claim from a seemingly different stance. DENNIS J. GOLDFORD, *THE AMERICAN CONSTITUTION AND THE DEBATE OVER ORIGINALISM*, at x (2005) [hereinafter GOLDFORD, *DEBATE*] (suggesting that Hegelian methodological strategies may be fruitful in understanding the originalism debate). In fact, I think Goldford's argument, which is ultimately grounded on the social activity of reason, is very close to the argument made by Bobbitt, albeit expressed in a very different vocabulary; but our focus here does not permit exploring the parallel further.

2. See generally Ronald Dworkin, *Objectivity and Truth: You'd Better Believe It*, 25 PHIL. & PUB. AFF. 87, 88–89 (1996) [hereinafter Dworkin, *Objectivity*]; RONALD DWORIN, *JUSTICE FOR HEDGEHOGS* (2011); RONALD DWORIN, *JUSTICE IN ROBES* 37–39 (2006) [hereinafter DWORIN, *ROBES*]. For Bobbitt's identification of this shared premise, see PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION*, at xii (1991) [hereinafter BOBBITT, *INTERPRETATION*] (describing the argument of *Constitutional Fate*). This claim is not uncontroversial, however, and will be defended below. See *infra* text accompanying notes 424–427 and authorities cited there. For an analysis of the nature and limits of this argument from the philosophical premises underlying the originalism debate, see generally André LeDuc, *The Relationship of Constitutional Law to Philosophy: Five Lessons from the Originalism Debate*, 12 GEO. J.L. & PUB. POL'Y 99 (2014) [hereinafter LeDuc, *Relationship*].

3. It is simpler because the commonsensical approach of much of originalism assumes that words refer to, or represent, things in the world, and that the truth of propositions arises from such propositions correctly representing the state of the world. While Dworkin endorses some of those claims, he does so with at least a tacit acknowledgment that language is more complex than that simple account suggests. Dworkin is nevertheless committed to such a realist account.

originalists assume,<sup>4</sup> and he sometimes uses that complexity to challenge originalist claims.<sup>5</sup> Nevertheless, at bottom, Dworkin is committed to a representational account of our language and the view that it represents an objective world, including the objective Constitution.<sup>6</sup>

While a representational account of constitutional language underlies the originalism debate, some important contemporary philosophers of language have criticized that general theory.<sup>7</sup> Nevertheless, those anti-representational, anti-foundational thinkers remain a minority within modern analytic philosophy, and their critics offer important challenges to those anti-representational claims.<sup>8</sup> The anti-representational account has profound implications for the debate over originalism; indeed, it calls the entire debate into question.<sup>9</sup>

I begin this Article by introducing and defending the anti-representational, anti-foundational position. According to the anti-representationalist, language is a tool speakers use to manipulate the world, including each other, rather than a medium by which they represent the world.<sup>10</sup> As a result, propositions cannot be helpfully tested against the world to determine either meaning or truth. Such a pragmatist, functional account of language requires a theory of truth that does not rely upon correspondence. According to Philip Bobbitt and Dennis Patterson, in the case of propositions of constitutional law, that

4. See Ronald Dworkin, *Comment*, in ANTONIN SCALIA, *A MATTER OF INTERPRETATION: THE FEDERAL COURTS AND THE LAW* 115, 117 (Amy Gutmann ed., 1997) [hereinafter Dworkin, *Interpretation*] (simply noting that Justice Scalia's account of constitutional language ignores all of the important work in contemporary analytic philosophy of language).

5. *Id.* at 117 n.6 (simply citing certain important contemporary analytic philosophers of language by name).

6. Dworkin, *Objectivity*, *supra* note 2, at 95–97 (criticizing and purportedly rebutting Rorty's claim that talking about whether mountains exist in an independent reality is pointless). See generally LeDuc, *Relationship*, *supra* note 2.

7. See, e.g., ALVIN I. GOLDMAN, *KNOWLEDGE IN A SOCIAL WORLD* 10–12 (1999) [hereinafter GOLDMAN, *KNOWLEDGE*] (criticizing the argument, attributed to Rorty, against truth based upon the claim that our reality is a matter of social construction); Dworkin, *Objectivity*, *supra* note 2, at 89–96; Bernard Williams, *Auto-da-Fé*, *N. Y. REV. OF BOOKS* (Apr. 28, 1983) (reviewing RICHARD M. RORTY, *CONSEQUENCES OF PRAGMATISM* (ESSAYS 1972–1980) (1982)).

8. See, e.g., GOLDMAN, *KNOWLEDGE*, *supra* note 7, at 10–22, 26–33.

9. BOBBITT, *INTERPRETATION*, *supra* note 2, at xii–xiii.

10. See generally JOHN DEWEY, *RECONSTRUCTION IN PHILOSOPHY* 156–57 (Beacon Press definitive ed. 1957) (1920) (“The hypothesis that works is the *true* one . . .”). Dewey also writes: “[T]he interaction of organism and environment, resulting in some adaptation which secures utilization of the latter, is the primary fact, the basic category. Knowledge is relegated to a derived position, secondary in origin . . .” *Id.* at 87. For a more contemporary statement, see generally 3 RICHARD RORTY, *Antiskeptical Weapons: Michael Williams versus Donald Davidson*, in *PHILOSOPHICAL PAPERS: TRUTH AND PROGRESS* 153 (1998) [hereinafter RORTY, *Antiskeptical Weapons*]; RICHARD RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* (1979) [hereinafter RORTY, *MIRROR*].

theory is a reduction of truth to what the relevant community accepts in its constitutional practice.<sup>11</sup> According to this theory, propositions of constitutional law are not made true by a correspondence with something in the world, such as the objective Constitution. Instead, they are made true by the community accepting and endorsing them in its constitutional practice.<sup>12</sup> Although this approach draws upon, and derives from, an important thread in modern philosophy, it has been little employed in American constitutional interpretation and, despite the claims Bobbitt makes, remains at best controversial.<sup>13</sup>

The importance of this foundational, representational theory in constitutional theory is unsurprising. The history of Western philosophy is to a very large degree the story of the many efforts undertaken by philosophers to construct or otherwise establish foundations. Foundations have been offered for knowledge, faith, mathematics, the external world, our moral intuitions, language, other minds, reference, and the reliability of our sensory experience.<sup>14</sup> Another important strand

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11. See generally PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* (1982) [hereinafter BOBBITT, *FATE*]; BOBBITT, *INTERPRETATION*, *supra* note 2; DENNIS PATTERSON, *LAW AND TRUTH* (1996) [hereinafter PATTERSON, *TRUTH*]. To the extent that Bobbitt's account devalues the concept of truth, it is somewhat misleading to focus on Bobbitt's account of truth in explaining his theory. Nevertheless, that focus allows the contrast with the theory underlying the originalism debate to be highlighted more clearly.

12. PATTERSON, *TRUTH*, *supra* note 11, at 169 ("[T]he truth of our statements is not the result of the relationship between our linguistic acts and some state of affairs."); BOBBITT, *INTERPRETATION*, *supra* note 2, at xii.

13. See BOBBITT, *INTERPRETATION*, *supra* note 2, at 194 n.4 (citing only two works, both co-authored by his colleague Sanford Levinson, for this bold claim). Moreover, those adopting elements of Bobbitt's theory do not always seem to recognize the violence that they are doing to Bobbitt's more fundamental claims when they borrow from that theory. See, e.g., BALKIN, *supra* note 1, at 4 n.2 (purporting to borrow from Bobbitt's theory but claiming that the original understanding of the Constitution trumps competing modes of argument when that understanding is known). The past couple of decades have not seen Bobbitt's anti-foundational theory any more widely accepted. See, e.g., LAURENCE H. TRIBE, *THE INVISIBLE CONSTITUTION* (2008); CASS R. SUNSTEIN, *RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA* 72–73 (2005) (arguing that how well a constitutional interpretation or decision works must be the sole test of correctness); Dworkin, *Objectivity*, *supra* note 2, at 87–89, 89 ("This *auto-da-fé* of truth has compromised public and political as well as academic discussion."). But see PATTERSON, *TRUTH*, *supra* note 11, at 128–29 (seemingly concluding that Bobbitt's theory had not triumphed by 1998 when Patterson was writing: "[d]espite its aspirations, contemporary legal theory has yet to free itself from the scientific pretensions of the nineteenth century").

14. Descartes began the project of finding the foundations of our knowledge. The effort to prove our faith was a dominant theme among the scholastics, and the proofs of St. Anselm and St. Thomas are among the most celebrated. See generally SAINT THOMAS AQUINAS, *Summa Theologica Art. III*, in *INTRODUCTION TO SAINT THOMAS AQUINAS* (Anton C. Pegis ed., 1948). The proof of the existence of the external world and the refutation of solipsism also commanded the attention of Descartes, for example, as he

of that tradition, however, has been an effort to deny the need for foundations as demanded by Plato, Descartes, and others in the mainstream of our philosophical tradition or to dissolve classical philosophical problems as arising from confusion.<sup>15</sup> The strategy to deny the foundationalist project has two principal components but numerous varieties. First, an array of contemporary philosophers has attacked the notion that our language is founded on a pre-linguistic, pre-conceptual external world.<sup>16</sup> Addressing the Kantian challenge of how our concepts and experiences relate, such anti-foundationalists deny that the external world is the touchstone against which our concepts, language, and knowledge are to be tested.<sup>17</sup> Second, extending that line of attack, anti-representationalists would go further to deny that our language and concepts represent that external world.<sup>18</sup> But each would deny that

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struggled to rebut the possibility that the world was but an illusion created by an evil genius; in modern philosophy the problem has been restated in secular terms as the possibility that we are merely a brain in a vat. See, e.g., RENÉ DESCARTES, *MEDITATIONS ON FIRST PHILOSOPHY*, in 1 *THE PHILOSOPHICAL WORKS OF DESCARTES* 131 (Elizabeth S. Haldane & G.R.T. Ross trans., 1911) (1641); Hilary Putnam, *Brains in a Vat*, in *REASON, TRUTH AND HISTORY* 1 (1981). Modern philosophers from Frege and Russell to Kripke and Donnellan have explored the theory of reference. See, e.g., GOTTLIEB FREGE, *THE BASIC LAWS OF ARITHMETIC* (Montgomery Furth trans., 1967) (1893); SAUL KRIPKE, *NAMING AND NECESSITY* (1982) [hereinafter SAUL KRIPKE, *NAMING*]; Keith Donnellan, *Reference and Definite Descriptions*, 75 *PHIL. REV.* 281 (1966); SCOTT SOAMES, *BEYOND RIGIDITY: THE UNFINISHED SEMANTIC AGENDA OF NAMING AND NECESSITY* (2002) [hereinafter SOAMES, *RIGIDITY*]. For a classic account of this strand of modern analytic philosophy, see 2 SCOTT SOAMES, *PHILOSOPHICAL ANALYSIS IN THE TWENTIETH CENTURY* (2003). The reliability of our sense experience is grounded in theorists from the classical British empiricists to the modern Logical Empiricists who attempt to derive all language from such sense data. See generally JOHN LOCKE, *AN ESSAY CONCERNING HUMAN UNDERSTANDING* (Dover Publ'ns 1836) (1690); A.J. AYER, *LANGUAGE, TRUTH AND LOGIC* (Penguin Group 1971) (1936).

15. Contemporary examples include the later Wittgenstein in his assault on foundational accounts of language and Richard Rorty in his assault on traditional accounts of epistemology and the classical problems of philosophy. Earlier examples include the logical positivist effort to reduce classical philosophical problems to pseudoproblems and the pragmatists.

16. See, e.g., HUW PRICE, *One Cheer for Representationalism?*, in *NATURALISM WITHOUT MIRRORS* 304, 306 (2011) (purporting to defend a middle ground anti-representational theory between Rorty's global anti-representational theory and Brandom's modest representational commitments); DONALD DAVIDSON, *Meaning, Truth, and Evidence*, in *TRUTH, LANGUAGE, AND HISTORY* 47 (2005) [hereinafter DAVIDSON, *Meaning and Evidence*].

17. Thus, for example, Donald Davidson writes: [e]mpiricism . . . I take to involve not only the pallid claim that all knowledge of the world comes through the agency of the senses, but also the conviction that this fact is of prime epistemological significance." DAVIDSON, *Meaning and Evidence*, *supra* note 16, at 48. Davidson notes that "it is . . . an idea which, for all its attractions, I think Quine should abandon." *Id.* at 47; see also RORTY, *Antiskeptical Weapons*, *supra* note 10, at 153-63.

18. See generally Richard M. Rorty, *The World Well Lost*, 69 *J. PHIL.* 649 (1972), reprinted in *THE CONSEQUENCES OF PRAGMATISM* 3 (1982) [hereinafter Rorty, *World*].

foundations are needed for our language and knowledge. Critics of originalism, radical and otherwise, as well as critics of the entire debate have invoked and built upon this latter tradition. I will defend two claims in this Article: that the anti-representational account of constitutional propositions is more plausible than the traditional, representational account and that the rejection of the representational theory tacitly shared by the protagonists in the debate over originalism causes that debate to collapse. Without those philosophical foundations, the disagreements central to the main elements of the debate over originalism are no longer important. Although not technically meaningless, the disagreements are not meaningful in any important way.

Second, I will explore some of the criticisms that may be made of the anti-foundational position and then defend those claims against such criticisms. Within the jurisprudential community, the realist criticism of the anti-foundational claims has been most fully articulated by Dworkin and, to a much lesser degree, Brian Leiter.<sup>19</sup> That realist criticism will be the focus here, both with respect to the challenges leveled against the anti-foundational stance and for the defense of such a position. But the anti-representational account of language has also been controversial in the philosophy of language, and a brief review of the arguments made there can sharpen my focus in this Article.

Third, I examine the force of the anti-foundationalist position as a challenge both to originalism and to originalism's mainstream critics. As the anti-foundational critics have expressly argued, when the debate over

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(presenting an early statement of the claim that our linguistic claims are not accountable to the world in a philosophically important way). These challenges have, to a greater or lesser degree, been associated with Wittgenstein, Quine, Davidson, McDowell, Putnam, Brandom, and Rorty. See, e.g., LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* (G E.M. Anscombe trans., Basil Blackwell Ltd. 1953); WILLARD VAN ORMAN QUINE, *WORD AND OBJECT* (1st MIT Press paperback ed. 1964); W.V. Quine, *Main Trends in Recent Philosophy: Two Dogmas of Empiricism*, 60 *PHIL. REV.* 20 (1951), reprinted in *FROM A LOGICAL POINT OF VIEW* 20 (1953); DAVIDSON, *Meaning and Evidence*, *supra* note 16; JOHN MCDOWELL, *MIND AND WORLD* (1st Harvard Univ. Press paperback ed. 1996); HILARY PUTNAM, *REALISM WITH A HUMAN FACE* (James Conant ed., 1990) [hereinafter PUTNAM, *REALISM*]; RORTY, *MIRROR*, *supra* note 10; ROBERT B. BRANDOM, *Pragmatism, Expressivism and Anti-Representationalism: Local and Global Possibilities*, in *PERSPECTIVES ON PRAGMATISM: CLASSICAL, RECENT AND CONTEMPORARY* 190 (2011) [hereinafter Brandom, *Anti-Representationalism*]. Each would differ very significantly with the others on key points. Thus, for example, the later Wittgenstein focused his criticism on the representational account of language that had held him captive in his earlier *Tractatus Logico-Philosophicus*, while Quine attacked more traditional empirical models of language with his assault on the concept of the analytic-synthetic distinction and on empiricist models of language.

19. See generally Dworkin, *Objectivity*, *supra* note 2; BRIAN LEITER, *Why Quine Is Not a Postmodernist*, in *NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY* 137 (2007) [hereinafter LEITER, *Quine*].



originalism is stripped of appeals to an objective, ontologically independent Constitution and a representational account of propositions of constitutional law, and the theory of truth associated therewith, the debate collapses, without victory for either side. The stance defended here is equally antithetical to both sides of the originalism debate.<sup>20</sup>

Fourth, and finally, I present the arguments that may be made against the claim that the anti-representational, anti-foundational account undermines the premises of the debate about originalism and the respective opposing positions and offer response to those arguments. Some protagonists dispute the premises of the anti-representational theory; others argue that the claims do not undermine the debate in the way Bobbitt claims, and I defend here.

## I. AGAINST FOUNDATIONALISM AND REPRESENTATIONALISM IN CONSTITUTIONAL LAW

Anti-foundational, anti-representational accounts of language and the world are complex and controversial.<sup>21</sup> In introducing these arguments here, my goal is not to join into that sophisticated, professional, abstruse, and sometimes arcane philosophical debate. Rather, I want introduce the arguments before exploring how those arguments have been employed in constitutional law. Because anti-representationalism may be novel and counterintuitive, however, I defend it against some of the more apparent objections.

### A. *The Anti-Foundationalist Account*

A series of expressly anti-foundational, anti-representational thinkers have developed a radical perspective on constitutional law and the originalism debate. Although the focus here is principally on Philip Bobbitt,<sup>22</sup> Dennis Patterson<sup>23</sup> has endorsed and developed Bobbitt's

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20. It is important to note the very limited use made of philosophy in this analysis. Its role is *therapeutic*, highlighting tacit confusions in the underlying constitutional arguments. For a fuller defense of this limited role, see generally LeDuc, *Relationship*, *supra* note 2 (defending a limited, therapeutic role for philosophy in constitutional law against the claims of irrelevance by Justice Scalia and Robert Bork, on the one hand, and the claim to a foundational role by Ronald Dworkin).

21. See generally PRICE, *supra* note 16, at 304; Brandom, *Anti-Representationalism*, *supra* note 18; RORTY, *MIRROR*, *supra* note 10. For a representative robust criticism of Rorty's anti-representational attack on the importance of truth, see Dworkin, *Objectivity*, *supra* note 2, at 92–93; GOLDMAN, *KNOWLEDGE*, *supra* note 7, at 10–14.

22. See generally BOBBITT, *FATE*, *supra* note 11; BOBBITT, *INTERPRETATION*, *supra* note 2.

23. See generally PATTERSON, *TRUTH*, *supra* note 11.

views and Dennis Goldford has advanced parallel arguments.<sup>24</sup> All three theorists attribute a common error to the originalists and their critics.<sup>25</sup> They do not offer support for either side in the debate, instead offering the potential to transcend the debate in its entirety by reforming its premises. Bobbitt and Patterson adopt a Wittgensteinian, Rortian approach.<sup>26</sup> They argue that we can best understand constitutional law without an appeal to the foundations of that law or a representational theory of the truth and meaning of that law.

It is often unclear, however, how Bobbitt's various claims relate to each other.<sup>27</sup> I will articulate his claims more precisely and explain the relationships among the various claims he makes. I will restate and defend the principal claims that Bobbitt makes about truth, knowledge, and the ontological status of the Constitution corresponding to the claims made by the originalists and Dworkin. Lastly I will explore and evaluate Bobbitt's controversial claim that the originalism debate and the debate over judicial review is grounded on mistaken, shared philosophical premises among the protagonists.<sup>28</sup>

According to the anti-foundational and anti-representational account of constitutional law, originalism and its critics commit errors of theory: truth theory, theory of language, ontology, and jurisprudence. Additionally, originalists err in their semantic description of constitutional controversies. First, ontologically, the anti-foundationalists claim that constitutional law does not have an existence outside of, or independent of, our practices. Instead, those practices

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24. See generally GOLDFORD, *DEBATE*, *supra* note 1. Goldford seeks to dissolve the debate over originalism by finding an ongoing political constitutive role in our constitutional discourse. This may appear very different from Bobbitt's position because Bobbitt denies a political characterization of constitutional law. However, I think that while Goldford is less sensitive to the nature of constitutional argument than Bobbitt, Goldford's account of what goes on in constitutional discourse is not as different as its terminology might suggest.

25. See BOBBITT, *INTERPRETATION*, *supra* note 2, at xix–xx n.1; PATTERSON, *TRUTH*, *supra* note 11, at 166 n.60; GOLDFORD, *DEBATE*, *supra* note 1, at 265 n.5 (invoking Kant and Hegel to support the claim that our account of the Constitution must capture its constitutive and binding character).

26. See BOBBITT, *INTERPRETATION*, *supra* note 2, at xix–xx n.1; PATTERSON, *TRUTH*, *supra* note 11, at 166 n.60. See GOLDFORD, *DEBATE*, *supra* note 1, at 265 n.5. Goldford is avowedly Hegelian; this contrast with Bobbitt and Patterson is less stark than might appear, but exploring those themes would take us too far afield. Goldford's Hegelianism comes into play in his effort to effect a synthesis from the debate over originalism, rather than to resolve it on its own terms. See GOLDFORD, *DEBATE*, *supra* note 1, at x (suggesting that in light of the unproductiveness of the originalism debate, "we should take an analytical step back and explore whether such an opposition actually stems from a shared structure of premises"). That strategy is shared with Bobbitt and Patterson.

27. See generally BOBBITT, *FATE*, *supra* note 11, at 196–219.

28. See BOBBITT, *INTERPRETATION*, *supra* note 2, at xii; see also quotation *infra* at note 389.

constitute the American Constitution and American constitutional law. They are the reasoned, argumentative activity or practice in which we engage.

This ontological claim has an important consequence for the nature of truth for propositions of constitutional law. The truth of propositions of law cannot arise from the correspondence of those propositions with that-thing-called-constitutional-law-in-the-world. In the absence of a thing-that-is-law-in-the-world, there can be nothing for such propositions to correspond to. For anti-foundationalists like Bobbitt, truth, if a useful notion at all, turns on how our practice of law treats such constitutional or legal claims. To the extent that propositions of law are affirmed by the relevant constitutional community, they are true. The meaning of propositions of constitutional law is determined on a coherence theory of truth or by reference to the premises that support such propositions and the truth of the implications that follow from them.

Finally, the semantic account of constitutional controversies would also be denied in my argument.<sup>29</sup> Constitutional argument consists of six modes of argument, none of which can invariably trump any of the others, but each of which can sometimes itself trump all of the other modes. Bobbitt asserts that his catalogue of the modes of constitutional argument is a complete description of the permissible forms of constitutional argument. He notes that appeals to kinship, for example, are simply not made as a matter of constitutional law and would be summarily rejected if they were.<sup>30</sup>

Bobbitt claims to have captured the entire array of available modes of argument. Missing modes might appear to include moral arguments or arguments from the nature of democracy, emphasizing the will of the people. Neither form of argument would appear easily assimilated to the modes that Bobbitt identifies.<sup>31</sup> A moral argument might be an argument based upon the kinds of considerations that Dworkin asserts ought to be

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29. For the classic statement of the claim that certain jurisprudential theories are committed to the claim that legal and constitutional disputes about semantic meaning, see RONALD DWORKIN, *LAW'S EMPIRE* 31–44 (1986) [hereinafter DWORKIN, *EMPIRE*]. While many disagreements turn on the meaning to be ascribed to words and sentences, it is perhaps less clear that theories would reduce the dispute to a matter of semantics. As I use the term, I mean simply to deny that any such reduction is possible.

30. See, e.g., BOBBITT, *FATE*, *supra* note 11, at 6.

31. Bobbitt would clearly treat Ely's argument to read the Constitution with an overall emphasis on improving democracy as a structural argument. For the clearest statement of such an argument, see JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 74–77 (1980) [hereinafter ELY, *DEMOCRACY*] (identifying arguments and interpretations that protect the representation of minorities and generally render the democratic process more transparent and responsive as central to the mission of the Court in interpreting the Constitution).

taken into account in the most fundamental cases.<sup>32</sup> It, too, would not appear to fit into one of Bobbitt's modes. The completeness of Bobbitt's analysis requires that such arguments be excluded.<sup>33</sup>

If non-canonical arguments may be introduced, then Bobbitt's claim that his catalog of modes of argument legitimates the decisions and outcomes pursuant to those modes of argument would appear compromised. An incomplete list would not be sufficient to permit us to reject results derived from a non-canonical argument as illegitimate. Only if there were a further practice for adding or subtracting arguments could Bobbitt's argument hold.<sup>34</sup> On the other hand, if Bobbitt has simply missed modes that exist in our contemporary constitutional practice, then the omission would appear less problematic.

It is perhaps helpful to summarize the affirmative anti-foundationalist views with respect to four central philosophical issues:

1. Constitutional law is not an independent ontological entity, but is instead an ordered, evolving set of social practices composed of arguments and agreements.
2. The truth of propositions of constitutional law is given by the coherence of such propositions with our other beliefs and commitments. Propositions of constitutional law do not have truth conditions and are not rendered true by their correspondence with facts about the world. How useful the concept of truth is in this context is an open question.
3. The meaning of propositions of constitutional law is given by the premises and inferences that support them and the implications that flow from them, not from the picture of the world such propositions offer.
4. Constitutional disagreements are disagreements employing one or more of the six modes of argument to different and conflicting results. There is no metric or algorithm that resolves the conflict between the modes of argument when

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32. See, e.g., DWORKIN, *EMPIRE*, *supra* note 29, at 380.

33. As Bobbitt occasionally puts it and Balkin and Levinson emphasize, Bobbitt purports to offer a grammar of constitutional argument. Thus, Bobbitt purports to be able to test the legitimacy of constitutional arguments in much the same way that a tacit or express knowledge of a language's grammar permits the evaluation of utterances and statements in a language as proper or ungrammatical. Such a grammar must offer a classification of all principal grammatical forms of the relevant language in order to be able to make such judgments possible. Otherwise uncatalogued modes of argument could not be classified. See generally Jack Balkin & Sanford Levinson, *Constitutional Grammar*, 72 TEX. L. REV. 1771 (1994) [hereinafter Balkin & Levinson, *Grammar*].

34. It is obviously more difficult to construct an account of constitutional practice incorporating second-order practices of expanding the permissible modes of argument, if only because of the "thinness" in any such second-order practice. Such activity would be sufficiently uncommon that it might be difficult to identify as it as a practice.

they support different outcomes, only the response or consensus of constitutional judges, commentators, and other informed members of the constitutional interpretative community.

Not all of the positions summarized above are of equal import. In particular, Bobbitt is little—perhaps, as I shall endeavor to show, too little—concerned with a theory of meaning. But his ontological claims, his account of the truth of propositions of constitutional law, and his account of constitutional disagreement and argument are central to his constitutional theory.

### 1. The Ontology of the Constitution

Bobbitt would reduce constitutional law to our practices of constitutional argument, debate, and adjudication. As he puts it, constitutional law is something we do, not something that exists independent of that activity.<sup>35</sup> Moreover, such practices are not representational. They do not seek to represent a constitutional law that exists independently in the external world. There can be no account of the truth of propositions of constitutional law that relies upon the correspondence of such propositions with our Constitution-in-the-world, because there is no such thing for which correspondence may be found.<sup>36</sup>

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35. BOBBITT, INTERPRETATION, *supra* note 2, at 24.

36. It is helpful to place Bobbitt's claims in context. Although Bobbitt does not generally attempt to contextualize his constitutional theory, it falls within the mainstream of American legal pragmatism. American legal pragmatism generally extended the non-foundationalist theories of knowledge and truth to law. *See, e.g.*, BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921) (highlighting the limited role of philosophy and logic in the interpretation of law and the decision of cases). Bobbitt is within that tradition with his attempt to derive constitutional theory from constitutional practice. *See* Philip Bobbitt, *Reflections Inspired by My Critics*, 72 TEX. L. REV. 1869, 1872–73 (1994) [hereinafter Bobbitt, *Reflections*]. Bobbitt explains *Constitutional Fate*: “Thus, *Constitutional Fate* asks, ‘What legitimates judicial review?’ and proposes an antifoundationalist answer. That is, I located legitimation in a particular practice, rather than in a prior, external rationale.” *Id.* at 1872 (footnote omitted). Moreover, to the extent that Bobbitt's six modes of constitutional decision making echo similar factors articulated by Judge Cardozo, the doctrinal continuity is highlighted. *See generally* GREGORY BASSHAM, ORIGINAL INTENT AND THE CONSTITUTION: A PHILOSOPHICAL STUDY 111 (1992) (identifying five types of arguments distinguished by Justice Cardozo in constitutional adjudication including those based on: (1) text; (2) intent of the Framers; (3) structure and purpose; (4) precedent; and (5) principles of political morality or social policy). What Bobbitt adds as a fundamental and original element in this account is an explanation for why the disparate modes of argument exist together, why they cannot be ordered or harmonized, and why there cannot be a metamodel to reconcile them. That is an element in the theory missing from the original Cardozian description and, indeed, one that would not easily have been available without the later philosophical work on which Bobbitt expressly draws.

Bobbitt's project to find the Constitution in the practices of the courts and the constitutional law commentariat may appear counterintuitive, perhaps even bizarre. Any defense of Bobbitt's position must begin with an acknowledgment of its fundamental conflict with our ordinary intuitions about the nature of the Constitution and our ordinary ways of speaking about the Constitution.<sup>37</sup> We think that there is a Constitution that has an independent existence, and we think and talk as if there are truth conditions for statements we make about what the Constitution says and means.<sup>38</sup> We think constitutional disagreements are about just that—what the Constitution says and means. The originalism debate, in particular, is largely conducted in these terms.<sup>39</sup> In the face of the existing robust debate over originalism, Bobbitt has to explain what that conversation has been, what the protagonists have been asserting, and what they have been disagreeing about, on his counterintuitive anti-foundational account.

First, how can a practice—what judges do—constitute the Constitution? Bobbitt believes that it is the practice itself that constitutes the legitimacy; there is nothing more—no principle, no argument, no text—that provides further legitimacy. If our established practice derives a result, that result is legitimate. Bobbitt's claim to establish the legitimacy of the practice of judicial review by that practice, and the associated arguments, relies in part on a distinction he emphasizes between *legitimacy* and *justice*.<sup>40</sup> Legitimacy is the legal feature that marks an argument or a decision as falling within our constitutional law practice; it reflects an internal point of view. There is often manifestly no single legitimate argument or decision; any such claim follows from the different modes of constitutional argument.<sup>41</sup> Justice, by contrast, is a moral attribute. Bobbitt defines an outcome as just if it may be derived from "the most satisfactory moral theory."<sup>42</sup> Thus, Bobbitt very clearly

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37. In ordinary discourse, after all, speakers appear to talk about the Constitution as if it were a thing, not unlike other discrete things—and unlike other abstractions like truth and justice, for example. Bobbitt appears to deny that this is proper.

38. In fairness, following Wittgenstein the question might be posed as to what it would be like if we spoke as if there were no ontologically independent Constitution.

39. See generally LeDuc, *Ontological Foundations*, *supra* note 1.

40. See generally Bobbitt, *Reflections*, *supra* note 36, at 1870. For example, for Bobbitt, Nazi law would have counted as legitimate but not as just. See BOBBITT, *INTERPRETATION*, *supra* note 2, at 27–28 ("This is a solution, however, that many will find unsatisfying. It separates legitimation from justification and thus, for those who hunger for a justification of judicial review, this solution famisheth even as it is consumed.").

41. Bobbitt asserts that it follows from the requirement that each of the modes be comprehensive that each must also be indeterminate. BOBBITT, *INTERPRETATION*, *supra* note 2, at 31. He doesn't explain this claim, however, and it is hardly obvious.

42. *Id.* at 143.

separates the moral realm from the legal realm, following legal positivism.<sup>43</sup> Bobbitt claims only to establish legitimacy; he acknowledges that demonstrating the justice of an outcome or decision requires a different argument.<sup>44</sup> Bobbitt's claim to have established the legitimacy of judicial review is an argument that the search for controlling, decisive text or understanding, beyond either the Constitution or the practice of judicial review, is misguided and fruitless.

Although Bobbitt does not situate his theory in the debate over legal positivism, it is helpful to explore the theory using the metrics of that debate. His theory is not a legal positivist theory in the traditional sense.<sup>45</sup> Bobbitt's theory would not appear to permit the derivation of legal principles and rules from social practices. According to Bobbitt, the indeterminacy of constitutional duties and obligations is inherent in our constitutional law.<sup>46</sup> Nevertheless, it is precisely the social practices of making and accepting or rejecting constitutional arguments in Bobbitt's canonical six modes that ultimately determines our constitutional law.

If Bobbitt's theory is a positivist theory, it is so for two principal reasons. First, Bobbitt's theory is a positivist account because Bobbitt constitutes constitutional law as a matter of social practices and those social practices are, in the lexicon of legal positivism, social facts. Second, Bobbitt's claim to distinguish his permitted mode of constitutional argument he terms ethical argument from moral argument must be accepted. Otherwise the positivist claim to separate legal obligations from moral obligations would not be satisfied.<sup>47</sup> But Bobbitt's theory, with its assertion that the multiple modes of constitutional argument result in some measure of indeterminacy in our constitutional law, would fail to satisfy Hart's requirement that there be a rule of recognition in a legal system.<sup>48</sup> Such a failure to provide a rule of

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43. See generally JULES L. COLEMAN, *THE PRACTICE OF PRINCIPLE: IN DEFENSE OF A PRAGMATIC APPROACH TO LEGAL THEORY* 151–52 (2001) [hereinafter COLEMAN, *PRINCIPLE*] (providing a sophisticated analysis of the positivist separation of law and morality).

44. BOBBITT, *INTERPRETATION*, *supra* note 2, at xvi.

45. See JOSEPH RAZ, *Legal Positivism and the Sources of Law*, in *THE AUTHORITY OF LAW* 37, 37 (2d ed. 2002) (describing the moral thesis of legal positivism as asserting that moral value is only a contingent feature of law); COLEMAN, *PRINCIPLE*, *supra* note 43, at 75 (characterizing the social fact thesis, which holds that the content of law is a matter of social fact, as central to legal positivism); H.L.A. HART, *THE CONCEPT OF LAW* (3d ed. 2012) (introducing the concept of law as a union of primary and secondary rules and emphasizing the elements of shared practice and an internal point of view toward the legal rules for a law-bound community).

46. See generally BOBBITT, *INTERPRETATION*, *supra* note 2, at 31–47.

47. See COLEMAN, *PRINCIPLE*, *supra* note 43, at 94–95.

48. HART, *supra* note 45, at 94–95.

recognition would need to be deemed insufficient to disqualify Bobbitt's account as a legal positivist account. Nevertheless, Bobbitt's constitutional theory ought not to be construed as a legal positivist theory because although Bobbitt denies moral theory a role in constitutional argument and thus in deciding constitutional decision, his concept of ethical argument is a normative concept. As such, it introduces normative sources into constitutional law, on Bobbitt's account. Those normative sources are incompatible with a positivist account.

The form in which Bobbitt chose to present his argument has doubtless contributed to the confusion that has greeted it and may continue to surround it. In his preface to *Constitutional Fate* Bobbitt wrote: "This book presents a general theory of Constitutional decision. It is not written in a conventionally theoretical manner. *The way in which this theory is presented is naturally determined by some of the assumptions of the theory itself and, like it, differs from the standard models in this subject.*"<sup>49</sup> A reader may easily be puzzled by this preface and remain puzzled even after completing the work. I take Bobbitt to be alluding to his view that constitutional law is a practice. *Constitutional Fate* is his effort to introduce the reader to that practice rather than to present accurate representations of the world of constitutional law. The difficulty in Bobbitt's style emerged over time. In the preface to *Constitutional Interpretation*, written nearly a decade later, Bobbitt acknowledged:

I came to realize that I had, to some extent, perhaps incited the very errors that so grated on me, for in my description of the six modalities of argument as legitimating I had not addressed the issue of what to do if the forms disagreed, e.g., if textual argument led to one conclusion and historical argument to another.<sup>50</sup>

Careful reading of Bobbitt's account raises a number of fundamental questions. When he catalogs the modes of constitutional argument, Bobbitt appears to imply that they are coequal.<sup>51</sup> But when he describes the modes and their history, not only does an apparent

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49. BOBBITT, *FATE*, *supra* note 11, at ix (emphasis added).

50. BOBBITT, *INTERPRETATION*, *supra* note 2, at xi. In describing the style of *Constitutional Fate*, Bobbitt acknowledges that Powell identifies a key part of Bobbitt's argument as unstated. Bobbitt, *Reflections*, *supra* note 36, at 1880 (because that claim can only be shown, not stated, on Bobbitt's view). A good example of the problems arising from Bobbitt's style is Pat Gudridge's savage review in the *Harvard Law Review*. See Patrick O. Gudridge, *False Peace and Constitutional Tradition*, 96 HARV. L. REV. 1969, 1972 (1983) ("*Constitutional Fate* discourages close study. The difficulty lies, in several respects, in the author's manner of presentation."). In fact, *Constitutional Fate* requires and rewards close study—in part because of the style Bobbitt employs.

51. See BOBBITT, *INTERPRETATION*, *supra* note 2, at xi (describing *Constitutional Fate*'s failure to explain how conflicting modes of argument were to be reconciled).



hierarchy emerge, but the very nature of certain modes is called into question. Textual argument<sup>52</sup> is the most questionable mode.<sup>53</sup> Bobbitt never explains why the original semantic understanding of a provision should be a reason for interpreting or applying it in the same way today. Bobbitt might simply assert that the legitimacy of such a reason is inherent in the accepted status of such an argument as a permissible form of argument and that his theory does not require that he explain *why* a mode is accepted. In his theory, there can be no legitimation beyond the accepted practice.<sup>54</sup> It is no more sensible to ask why the original understanding is important than it is to ask whether the prudence of a position is relevant or whether the consistency of an interpretation with the constitutional structure matters. That appears paradoxical because the prudential argument carries its decisional implication on its face. But within our practice of constitutional argument, all of the forms carry such an implication.

Bobbitt's claims that the modalities of the Constitution are incommensurable and cannot be reconciled by a decisional algorithm or principle and that those modes of argument, without more, constitute and legitimate our constitutional doctrine, have proven highly controversial.<sup>55</sup> Bobbitt's claim of the indeterminacy of the modes of argument has been questioned.<sup>56</sup> Critics have defended purported derivations of a trumping mode. Most recently, Jack Balkin has elevated textual and historical modes of argument in *Living Originalism*.<sup>57</sup> While Balkin follows other originalists in allowing a place for constitutional construction<sup>58</sup> and, as a non-exclusive originalist, allows other modes a place in interpretation when the original understanding is uncertain or unclear,<sup>59</sup> Balkin nevertheless privileges original understandings in constitutional interpretation.<sup>60</sup>

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52. See BOBBITT, FATE, *supra* note 11, at 7.

53. *Id.* at 25–38.

54. See BOBBITT, INTERPRETATION, *supra* note 2, at xii–xiii.

55. See, e.g., *id.*; BOBBITT, FATE, *supra* note 11, at 125 (describing the prevailing view that ethical argument was “disreputable”). Bobbitt’s characterization of the prevailing view of ethical argument ought to be understood as that such argument is not properly part of constitutional argument.

56. See, e.g., Balkin & Levinson, *Grammar*, *supra* note 33, at 1794.

57. BALKIN, *supra* note 1, at 17–20.

58. See *id.* at 4–6, 341–42 n.2 (arguing that where the text of the Constitution is indeterminate, Bobbitt’s modes of argument must be employed to construe the constitutional meaning).

59. See *id.* at 14–16. For a discussion of the contrast between exclusive and non-exclusive originalism, see generally André LeDuc, *Evolving Originalism: How Are the Original Understandings, Expectations and Intentions Privileged* (Jan. 12, 2013) (unpublished manuscript) (on file with author).

60. BALKIN, *supra* note 1, at 14–16.

Some have also simply denied Bobbitt's reduction of our constitutional law to our practice of constitutional argument.<sup>61</sup> They claim an ontological status of the Constitution as an independent thing. On this account, the Constitution is whatever it may noumenally be, regardless of our understandings of it or arguments about it.<sup>62</sup> The argument against Bobbitt's reductionism may proceed at an intuitive, anti-skeptical level. Bobbitt's denial of the Constitution on this approach may be refuted by simply pointing to the constitutional artifact in the National Archives, much like Samuel Johnson's refutation of Berkeley.<sup>63</sup> Bobbitt's claim may also be challenged on the more conceptual basis that Bobbitt's ability to reduce the Constitution to the practice of constitutional argument requires defining the limits of that practice with some precision. If no such convention or accepted practice of making and accepting constitutional arguments exists, then the definitional strategy fails and the reduction dissolves. Some critics have denied Bobbitt's definitional claims with respect to the practice of constitutional argument.<sup>64</sup>

The indeterminacy of the modes of argument appears critical to Bobbitt's own account of his theory, but it is surely one of the most difficult features of that theory. Bobbitt even purports to offer a modal logic proof for his claims with respect to the necessary indeterminacy of his forms of argument.<sup>65</sup> According to that proof, taking the *Dred Scott* case as a hypothetical, Bobbitt argues that a possible worlds, metalogical analysis of the implications of the inconsistent constitutional principles—some supporting the outcome in *Dred Scott* and some supporting the contrary outcome—shows that there cannot be a decisional rule—a metalogic in Bobbitt's terms<sup>66</sup>—that yields the decision.<sup>67</sup> One imagines most readers of *Constitutional Interpretation* puzzling over this

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61. See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 163 (1989) (acknowledging that we may not always be able to discover the original understanding and force of the Constitution, but defending the claim that we will often be able to discover such meaning).

62. *Id.*

63. See generally H.F. Hallett, *Dr. Johnson's Refutation of Bishop Berkeley*, 56 *MIND* 132 (1947).

64. See, e.g., Balkin & Levinson, *Grammar*, *supra* note 33, at 1802–03.

65. BOBBITT, *INTERPRETATION*, *supra* note 2, at 160–62. Bobbitt characterizes his logic proof as “rudimentary.” *Id.* at 160. Bobbitt borrows important elements from this example from Alvin Plantinga. See *id.* at 222 n.26 (citing ALVIN PLANTINGA, *THE NATURE OF NECESSITY* 164–84 (1974) (offering a proof of free will's compatibility with the existence of an omnipotent god)).

66. Here Bobbitt relies upon Hunter's definition. See GEOFFREY HUNTER, *METALOGIC: AN INTRODUCTION TO THE METATHEORY OF STANDARD FIRST ORDER LOGIC* 3 (1973). Elsewhere Bobbitt makes it clear that he is using the term in a non-technical (and idiosyncratic) sense. BOBBITT, *INTERPRETATION*, *supra* note 2, at 216 n.8.

67. BOBBITT, *INTERPRETATION*, *supra* note 2, at 161.

purported logical argument for Bobbitt's claims.<sup>68</sup> It is a dramatic claim—a proof of Bobbitt's constitutional theory and a proof of the existence of free will.

Bobbitt's claim that our practice of constitutional argument constitutes the Constitution raises the question of the independence of the Constitution, so understood, from our other social practices. Bobbitt argues that our constitutional practice is independent; that is why it is possible to enumerate the permitted modes of constitutional argument and exclude other modes of argument employed in other contexts. Yet it would hardly appear that constitutional law, even if autonomous, is an independent domain entirely divorced from our other social practices. Unfortunately, Bobbitt is never very clear about how the line between permissible constitutional argument and other kinds of argument is to be drawn, nor is he clear about how the participants in the constitutional process learn and apply that line.

Bobbitt's game metaphors sometimes suggest a high degree of independence. The game of chess, for example, can be played almost entirely without reference to other social practices.<sup>69</sup> Yet that analogy appears rather unsatisfactory precisely because of the very different performative roles of chess and constitutional argument.<sup>70</sup> Chess is merely a game, generally a matter only of our amusement. The stakes in constitutional argument are much higher, and its role in our life, even for grand masters, is far more central and more critical. After all, the Constitution defines the limits of our personal and economic freedoms and the limits on our state and federal governments. It is therefore unlikely that constitutional argument could perform such a mission without being deeply embedded in our social and political lives. As part of being so embedded, constitutional practices would need to be more closely interwoven with our other practices in those realms. Bobbitt recognizes this when he notes that we could have different modes of

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68. His arguments invoke unstated claims of decidability, consistency, and completeness that are never expressly articulated and which cannot be accessible to his general audience. Space does not permit exploring this argument here.

69. We perhaps need conventions with respect to measuring time to ensure a pace of play, number, to count moves, and a normal environment to rule out improper distractions, but seemingly little else.

70. In constitutional practice, moreover, the moves have conceptual content; they figure in our inferences as premises and as conclusions, as the moves in chess do not. As a result, the structure of such moves is very different, and the relationship that the practice of constitutional law has with the rest of our lives, beliefs, and practices is very different, too. See generally ROBERT B. BRANDOM, *ARTICULATING REASONS: AN INTRODUCTION TO INFERENTIALISM* 165–66 (2000) [hereinafter BRANDOM, *ARTICULATING REASONS*]; 1 DAVID LEWIS, *Scorekeeping in a Language Game*, in *PHILOSOPHICAL PAPERS* 233 (1983).

constitutional argument but that then “we would be different.”<sup>71</sup> What Bobbitt means by this claim that we would be different is that our society and our political system and life would have different values and practices.<sup>72</sup> Balkin and Levinson highlight this tension between description and prescription and criticize Bobbitt for his failure to distinguish the two in his account of constitutional law.<sup>73</sup>

Bobbitt’s invocation of the distinction between constitutional practice and other social practices raises the question of the degree of precision that he must achieve in drawing that line. That question arises because it appears unlikely that such a law could be drawn very precisely. One possible strategy to articulate the distinction between the two kinds of practices would be to introduce Kuhnian concepts of normal science and revolutionary science into Bobbitt’s account of our constitutional practice.<sup>74</sup> Bobbitt may be describing our current *normal* constitutional practice. If Bobbitt is so interpreted, then constitutional change and the incorporation of practices or arguments outside our normal constitutional practice could be explained as revolutionary practice.<sup>75</sup> Two potential objections are apparent. First, how plausible is it that such porousness in the boundary between our constitutional practice and our other social and political practices appears only in paradigm shifting revolution? If we interpret the concept of revolution broadly, there is some intuitive appeal in a distinction between normal and extraordinary forms of constitutional argument. Would Bobbitt be prepared to recognize such a distinction, and, if so, what would examples of revolutionary constitutional argument be?

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71. See BOBBITT, *FATE*, *supra* note 11, at 6.

72. Bobbitt’s reference, without citation, to Orwell’s *Nineteen Eighty-Four* captures this nicely. *Id.* Orwell describes a society that purports to respect and honor individual freedom while ruthlessly eliminating any elements of individual freedom, autonomy and dignity. See generally GEORGE ORWELL, *NINETEEN EIGHTY-FOUR* (1949). The critical contrast is between what is said and what is in fact practiced.

73. See Balkin & Levinson, *Grammar*, *supra* note 33, at 1782–84 (arguing that Bobbitt conflates description with prescription in his account of constitutional law).

74. See generally THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970) (1962) [hereinafter KUHN, *REVOLUTIONS*]. Somewhat simplistically, normal science is the practice within a scientific community when shared theoretical commitments yield an accepted research agenda; revolutionary science occurs when the accepted scientific theories no longer provide a compelling explanation of the results of contemporaneous experiment. See generally *id.*

75. Such an approach recognizing the notion of revolutionary constitutional practice would appear similar to Bruce Ackerman’s re-description of the discontinuities in constitutional interpretation and practice that he would characterize as tacit constitutional amendments. See 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 49 (1993) [hereinafter ACKERMAN, *WE THE PEOPLE*] (introducing the claim that the Constitution has been transformed on occasion without formal constitutional amendment).

Second, and more fundamentally, is the underlying distinction between normal and revolutionary constitutional practice tenable?<sup>76</sup> If the normal argument cannot be distinguished from the revolutionary argument in constitutional practice, then the project of identifying normal modes of constitutional argument would appear infelicitous and the distinction empty. Each novel form of argument could be reconciled with Bobbitt's account by characterizing the new form of argument as revolutionary.<sup>77</sup> Bobbitt's concept of normal constitutional argument thus becomes important in his theoretical account of constitutional practice.

Bobbitt's normative claims as to the permissible appear to warrant additional defense. At an intuitive level, Bobbitt captures the notion that certain arguments, indeed, certain types or modes of argument, like an argument from nepotism, are impermissible.<sup>78</sup> But those are easy cases. The most plausible form of constitutional argument that Bobbitt needs to dispatch is moral argument. He has acknowledged as much and offers an argument against moral argument as an accepted form of constitutional argument.<sup>79</sup> First, Bobbitt offers an empirical argument: moral arguments are not found in constitutional briefs or in constitutional opinions.<sup>80</sup> Second, and less clearly articulated, Bobbitt appears to suggest that the nature of moral arguments is different from the kinds of argument that are permissible in constitutional adjudication.<sup>81</sup> This claim is not expressly articulated or defended, but it goes to the heart of the questions commentators have raised as to the tacit normativity of Bobbitt's typology.<sup>82</sup> Bobbitt does not think moral argument belongs in our constitutional practice. He does not want that type of argument included within the identified modalities of constitutional argument for one clear and one possible reason. The certain reason is that Bobbitt wants our constitutional practice to be largely independent. If moral arguments were permitted, then the independence of constitutional

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76. A similar challenge has been made to Kuhn's account of science, as Kuhn acknowledged. See KUHN, *REVOLUTIONS*, *supra* note 74, at 174–81, 198–207. Indeed, Kuhn apparently qualified his commitment to this distinction. See *id.*

77. Thus, it would appear necessary to describe a normal constitutional practice that is not wholly static, permitting change and the introduction of new forms of argument.

78. See BOBBITT, *FATE* *supra* note 11, at 6.

79. See Bobbitt, *Reflections*, *supra* note 36, at 1916.

80. *Id.*

81. *Id.* at 1917 (noting that the introduction of natural law arguments would be “troubling,” apparently because the introduction or acceptance of such argument would compromise the independence of our constitutional practices and leave that practice reliant upon, and perhaps derivative of, our practice of morality and moral argument).

82. See Balkin & Levinson, *Grammar*, *supra* note 33, at 1774–77.

practice would be compromised.<sup>83</sup> The second, possible reason is the uncertainty associated with moral argument in a pluralist society. If moral arguments support different conclusions, moral argument would appear to have a more fundamental indeterminacy than the other forms of argument. That indeterminacy might undermine the constraints Bobbitt wants to describe in our constitutional practice.

## 2. How and Why to Account for the Truth of Propositions of Constitutional Law

Bobbitt argues that law, like language, is a social practice.<sup>84</sup> Law has no foundation in texts or other authorities outside that practice. Thus, particular elements of practice within our constitutional law practice—such as judicial review—cannot be grounded or legitimated from outside our practice. As a corollary, Bobbitt argues that the truth of propositions of constitutional law<sup>85</sup> does not arise from a correspondence with an external world of constitutional law but rather in a coherence within other constitutional law beliefs, as well as the willingness of the constitutional law theorists and practitioners to accede to the proposition.

Bobbitt differs from most other critics of originalism's claims because he offers no alternative representational account of the truth of propositions of constitutional law.<sup>86</sup> Indeed, he also expressly disavows

83. Bobbitt's rejection of moral argument may appear to be grounded on a tacit commitment to legal positivism; he may appear to be defending the separation thesis. But elsewhere, Bobbitt expressly rejects legal positivism. BOBBITT, *INTERPRETATION*, *supra* note 2, at xix–xx n.1 (quoted *infra*, note 92). The reasons behind Bobbitt's rejection of moral argument as a permissible mode of constitutional argument are not easily ascertainable from the text of *Constitutional Fate*.

84. That practice consists, principally, in the making, rebutting, accepting, and rejecting of arguments in the courts. See BOBBITT, *FATE*, *supra* note 11, at 6–8; BOBBITT, *INTERPRETATION*, *supra* note 2, at xix n.1.

85. See BOBBITT, *INTERPRETATION*, *supra* note 2, at xix–xx n.1; BOBBITT, *FATE*, *supra* note 11, at 4–5. While Bobbitt certainly writes of the truth of propositions of constitutional law, he has rejected traditional concepts of truth for such propositions. BOBBITT, *INTERPRETATION*, *supra* note 2, at xix–xx n.1.

86. For example, Dworkin accounts for the truth value of a proposition of constitutional law by looking to whether it corresponds to an interpretation of the Constitution derived by the methods of integrity. See DWORKIN, *ROBES*, *supra* note 2, at 118. See generally Ronald M. Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 65 *FORDHAM L. REV.* 1249 (1997) [hereinafter Dworkin, *Arduous*]; DWORKIN, *EMPIRE*, *supra* note 29, at 418–19 n.29. Bobbitt also differs from most critics of originalism in that he does not seek to discredit the historical and textual arguments privileged in originalism. While he is not alone, he is clearly in the minority in such regard. All of the critics who would substitute another mode as the exclusively legitimate form of argument must reject the historical and textual methods of originalism. See, e.g., Dworkin, *Arduous*, *supra* (defending the use of moral and political theory in achieving legal integrity); DWORKIN, *EMPIRE*, *supra* note 29; Richard A. Posner, *Bork*

the anti-originalist, representationalist accounts.<sup>87</sup> According to Bobbitt, propositions of constitutional law do not have non-trivial truth conditions.<sup>88</sup> This is a striking claim; it means that we cannot aspire to identify objective conditions that, if satisfied, assure the truth of any proposition of constitutional law. Instead, in Bobbitt's view, we merely have social practices of endorsing and treating such propositions as true merely by how they are accepted.

Patterson builds on Bobbitt's passing claims with a much more formal and comprehensive analysis.<sup>89</sup> While both Bobbitt and Patterson draw heavily on Wittgenstein's analysis, Patterson expressly disavows significant components of Bobbitt's theory and amplifies that analysis with significant alternative theoretical foundations.<sup>90</sup> Patterson takes Bobbitt's claims and both contextualizes and extends them.<sup>91</sup> *Law and Truth* is an inquiry into how legal propositions are made true, and how

and Beethoven, 42 STAN. L. REV. 1365 (1990) [hereinafter Posner, *Bork*] (defending a utilitarian approach to legal decision).

87. Bobbitt does not suggest that textual or historical modes of argument are inappropriate. BOBBITT, *FATE*, *supra* note 11, at 9–24 (explaining historical argument), 25–38 (explaining textual argument). He recognizes them as among the six modes of legitimate constitutional argument. *Id.* To the extent such legitimacy is denied by critics of weak or moderate originalism, Bobbitt stands with such originalists, not their critics. Bobbitt's rejection of originalism is clearest in his analysis of the confirmation hearings on Robert H. Bork's nomination to the Supreme Court. BOBBITT, *INTERPRETATION*, *supra* note 2, at 83–108. Bobbitt's argument as to why Judge Bork's originalist views disqualified him from the Court is perhaps the most compelling indictment yet articulated. Bobbitt argues that the exclusive claims for originalism and the associated wholesale assault on the legitimacy of the Court and its constitutional jurisprudence disqualified Bork to sit on that Court. *Id.* Thus, Bobbitt's argument proceeds, not on a value-free basis, but by focusing on Bork's challenge to the legitimacy of the Court. *Id.* at 107–08, 108 (“To [the campaign against the legitimacy of the means of reasoning of the Warren Court, Bork], in part, . . . owed his public reputation, his nomination, and ultimately his defeat.”). It should therefore appeal to a broad range of citizens, without requiring a commitment to the political values of Dworkin and Tribe, for example. The argument stands without the need to construct a theory of the constitutional mainstream and its radical outliers. *See id.* at 83–108.

88. BOBBITT, *INTERPRETATION*, *supra* note 2, at xix–xx n.1; *see also* Bobbitt, *Reflections*, *supra* note 36, at 1873. Truth conditions, in the philosophy of language, are identifiable or ascertainable conditions that make statements in a natural or artificial language true or false as they apply. *See also* DWORKIN, *EMPIRE*, *supra* note 29, at 418–19 n.29 (describing accounts of law based upon the truth conditions of legal propositions approvingly as “modern”).

89. PATTERSON, *TRUTH*, *supra* note 11, at 151–79.

90. In particular, Patterson invokes Quine's holism in his account of the truth and meaning of legal propositions. *See id.* at 158–59, 172.

91. The context into which Patterson seeks to place Bobbitt is that of post-modernism. I think this contextualization was likely a misstep, if only for presentational reasons. “Postmodernism” is, in certain circles, fighting words. Bobbitt does not generally find it necessary to put his position into context in the space of reasons. Patterson seeks to extend Bobbitt's account of truth of propositions of constitutional law into a general account of the truth of all propositions of law. *See id.* at 151–79.

the leading theories of law accept legal propositions to be true. According to Bobbitt, our practice of constitutional argument, rather than representing the constitutional world correctly, establishes the truth of constitutional propositions.<sup>92</sup> Patterson's account is more complex.

Patterson offers a general theory of truth in law.<sup>93</sup> In his view, Bobbitt sketches an account of the particular types of argument employed in constitutional disputes that legitimate propositions of constitutional law and make them true. Patterson seeks both to extend that account and to render it with a little more precision. On his theory, the truth of legal propositions and the resolution of conflict among otherwise accepted types of argument is not made by recourse to conscience, but on a holistic basis.<sup>94</sup> Here Patterson invokes philosopher Willard Van Orman Quine's theory of scientific theory formation.<sup>95</sup> The resolution of such conflicts is not based upon an algorithm or rule, or even a principle, other than overall fit, simplicity, etc., much in the same way that we choose among competing theories.<sup>96</sup>

Three questions arise with respect to Patterson's theory and its relationship to the account offered by Bobbitt. First, it is hard to imagine that ethical theories—and even perhaps conscience—should not also fit into this calculation, but they are not expressly welcomed.<sup>97</sup> Second, it may not be clear whether Patterson's theory of the truth of propositions of law is consistent with Bobbitt's requirement of indeterminacy.<sup>98</sup>

92. BOBBITT, *INTERPRETATION*, *supra* note 2, at xix–xx n.1 (“I reject both of these positions [natural law and positivism], and indeed believe them to be united in an unspoken expectation that the meanings of legal propositions are given by the conditions that render them true or false.”).

93. PATTERSON, *TRUTH*, *supra* note 11, at 151–52 (“[It is not that a proposition of law is] true if it names a relation between a proposition and some state of affairs but that it is true if a competent legal actor could justify its assertion.”); *see also id.* at 169–79. Patterson does not appear to think that propositions of constitutional law are different in any ontological sense from other propositions of law.

94. *Id.* at 171–72.

95. *Id.* at 172. The import of this invocation is to suggest that something like a coherence theory of truth applies; that is the sense in which Patterson speaks of potential interpretations hanging together best with everything else we believe to be true.

96. The account appears Kuhnian in assuming that there is a best answer but not an incontrovertible answer. *See generally* KUHN, *REVOLUTIONS*, *supra* note 74. Patterson's explanation of his holistic account of the truth of propositions of law raises the question whether his account works only if Quine is right in his holistic theory of meaning and truth. Patterson's reliance on Quine's holism raises the question as to the strength of Patterson's position if Quine's holism is rejected. Patterson's account could likely be rehabilitated without substantial difficulty without Quine's holism, but space does not permit that here.

97. PATTERSON, *TRUTH*, *supra* note 11, at 175. Patterson's enumeration of backing elements includes most of Bobbitt's modes of argument but excludes his ethical argument. *Id.* Patterson's holism would appear to incorporate ethical judgments, and they are not expressly excluded.

98. *See* BOBBITT, *INTERPRETATION*, *supra* note 2, at 159–62.



Given Patterson's criticism of Bobbitt's reliance on conscience,<sup>99</sup> it is not entirely clear how much of that indeterminacy Patterson wants to incorporate. But Patterson can surely claim that he has offered an account based upon public practices, which appears important to him.<sup>100</sup>

Third, Patterson tacitly distinguishes social facts from natural facts.<sup>101</sup> Natural facts are facts about the world and are the special domain of scientific study.<sup>102</sup> Social facts are the facts about man with respect to his social, political, ethical, and constitutional life that make propositions of law true for legal positivists.<sup>103</sup> It is unclear whether his rejection of the realism/anti-realism dualism extends to natural facts, as it apparently would for Bobbitt.<sup>104</sup> It is also not clear whether Patterson's anti-representational theory extends to natural facts. It may be that Patterson endorses a representational theory of language with respect to natural facts, and to the extent that he does so, he may appear to avoid some of the more powerful objections that Dworkin and others offered to the anti-representational theory.<sup>105</sup> It is not immediately apparent whether such extension is of any moment in legal and constitutional theory, however. A jurisprudential theory would appear to need to account only for the variety of legal and constitutional language, its meaning, and its use.

To understand and assess the anti-representational claims defended by Bobbitt and Patterson with respect to propositions of constitutional law, examining the controversy over much broader, yet similar claims defended in contemporary analytic philosophy may be helpful.<sup>106</sup> Hilary Putnam makes the same or similar point when he describes the disparate

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99. See PATTERSON, TRUTH, *supra* note 11, at 143–46 (asserting that Bobbitt's recursion to the exercise of the private faculty of conscience in the event of conflict among the modes of constitutional argument cannot be reconciled with his general account of constitutional law as a matter of public practice).

100. Dennis Patterson, *Conscience and the Constitution*, 93 COLUM. L. REV. 270, 306–07 (1993).

101. See Dennis Patterson, *Law as a Social Fact: A Reply to Professor Martinez*, 29 LOY. L.A. L. REV. 579, 583–84 (1996) [hereinafter Patterson, *Social Fact*].

102. *Id.* at 580 (“Because scientific propositions assert facts, their truth or falsity depends on states of affairs in which the asserted propositions are true or false.”).

103. PATTERSON, TRUTH, *supra* note 11, at 63 (“Social facts are the truth conditions for propositions of law [for legal positivists].”).

104. Bobbitt sometimes appears to endorse Rorty's strong anti-representational claims. See BOBBITT, INTERPRETATION, *supra* note 2, at xix n.1. Elsewhere he appears equivocal on this issue, denying a representational account only for certain kinds of discourse, including constitutional law, but tacitly suggesting that such a representational account may be accurate for other types of discourse. See *id.* at xii (comparing constitutional talk with scientific discourse).

105. See generally Dworkin, *Objectivity*, *supra* note 2, at 89–96.

106. The philosophical context is helpful because the debate is carried out more directly and the arguments advanced more clearly.

ontological commitments that contemporary philosophers have made to chairs, taking Willard Quine, Saul Kripke, and David Lewis as examples.<sup>107</sup> The fundamental tension between our commonsensical description of what things, including ourselves, are, and what modern science describes has long been acknowledged.<sup>108</sup> Many philosophers have sought to reconcile, in a variety of ways, the scientific account of the world with our ordinary talk about the world and the objects we encounter in it.<sup>109</sup> One conclusion that may be drawn from Putnam's example is that even our descriptions of the most ordinary objects are not uncontroversial or simple when we endeavor to reconcile them with the description of the world offered by modern physics and chemistry. Putnam's example of the chair captures the fundamental lack of connection between representational account and reality.<sup>110</sup> Putnam cites the controversy over the relationship between the ordinary chair and a scientific description of the same thing as an example demonstrating that even our ordinary notions of things-in-the-world have conventional elements, independent of any scientific description.<sup>111</sup>

Richard Rorty anticipates and acknowledges the criticisms outlined above, but concedes no ground to his critics. Rorty expressly claims to eschew both the realist and anti-realist positions.<sup>112</sup> Rorty nowhere rejects the position that moral agents can express definitive views; indeed, he clearly believes that they can and, in appropriate contexts, should or must make just such judgments.<sup>113</sup> In committing to the possibility of such judgment, and committing himself to particular such

107. PUTNAM, REALISM, *supra* note 18, at 26–27 (rejecting the positions taken by each of Quine, Kripke, and Lewis on the basis that there is not, and cannot be, an answer to the question whether the chair of ordinary experience and discourse is identical to that object under a scientific description).

108. See generally DESCARTES, *supra* note 14; WILFRID SELLARS, *Philosophy and the Scientific Image of Man*, in SCIENCE, PERCEPTION AND REALITY 1 (1963); Putnam, *supra* note 14.

109. See generally SELLARS, *supra* note 108 (arguing that the model of the world constructed by science does not need to be reconciled with our commonsensical notions of persons and our society but only joined with such ordinary notions; Sellars tacitly takes such commonsensical notions of other as actors as primary for us).

110. The example shows the multiplicity of theoretical accounts that can be constructed of even the simplest everyday experience, and the apparent difficulty—and for Putnam, impossibility—of choosing among them.

111. PUTNAM, REALISM, *supra* note 18, at 27.

112. See 3 RICHARD RORTY, *Hilary Putnam and the Relativist Menace*, in PHILOSOPHICAL PAPERS: TRUTH AND PROGRESS 43, 47 (1998) [hereinafter RORTY, *Menace*] (suggesting that Continental philosophy had made more progress than Anglophone philosophy in transcending this debate).

113. See 1 RICHARD RORTY, *Solidarity or Objectivity?*, in PHILOSOPHICAL PAPERS: OBJECTIVITY, RELATIVISM, AND TRUTH 21, 28–9 (1991) (citing and endorsing Winston Churchill's celebrated pragmatic defense of democracy while conceding the ethnocentrism inherent in such judgments and methods of judgment).

judgments,<sup>114</sup> Rorty often does not appear to be a relativist.<sup>115</sup> Rorty's lack of equivocation in expressing his judgments, coupled with his express disavowal of relativism, has made some of his critics cautious. Even while indicting Rorty as a relativist, Putnam, unlike Dworkin, does not do so unequivocally.<sup>116</sup> In his reply to Putnam and elsewhere, Rorty is as critical of skepticism as he is of the theoretical descriptions of our knowledge as representing the world.<sup>117</sup> But if there is no such relationship between our language and beliefs and the world, how can Rorty avoid the charges of skepticism? In fairness to Dworkin, it is a charge that has been leveled with some frequency.<sup>118</sup> Rorty's clearest statement of why he believes that he has avoided skepticism is in his response to Putnam's attribution of that position.<sup>119</sup> Rorty argues that skepticism finds its potential leverage when we characterize our knowledge as relating to an external world in a representational way and characterize our language as also seeking to represent that world.<sup>120</sup> If those characterizations of our knowledge and languages are discarded, Rorty asserts, there is no relationship that the skeptic can call into question. Rorty confirms this rejection of such skeptical claims in his essay on Michael Williams's *Unnatural Doubts: Epistemological Realism and the Basis of Skepticism*.<sup>121</sup>

114. See, e.g., 3 RICHARD RORTY, *Human Rights, Rationality and Sentimentality*, in PHILOSOPHICAL PAPERS: TRUTH AND PROGRESS 167 (1998) (explaining Jefferson's ownership of enslaved persons and more contemporary cases of torture and rape in Bosnia by the actors' ability to deny humanity to their victims).

115. See *id.* His only caveat, that it may turn out to be the case that we were wrong despite our best efforts, is not intended to undermine our existential obligation to choose, only to acknowledge the contingency of our destiny. RORTY, *Menace*, *supra* note 112, at 53; 4 RICHARD RORTY, *Honest Mistakes*, in PHILOSOPHICAL PAPERS: PHILOSOPHY AS CULTURAL POLITICS 56 (2007). Rorty thus appears historicist in his characterization of value but does not appear a classical relativist. According to Rorty, history may prove us wrong, but being proved wrong does not show that we were misguided. In the present, there is no alternative to making our choices that define us. There is an existential character to Rorty's stance here. See generally JEAN-PAUL SARTRE, *BEING AND NOTHINGNESS: AN ESSAY IN PHENOMENOLOGICAL ONTOLOGY* (Hazel E. Barnes trans., 1956).

116. PUTNAM, *REALISM*, *supra* note 18, at 24 (expressing concern that Rorty is committed to relativism, but acknowledging that his position is, at the least, more "nuanced").

117. See, e.g., RORTY, *Antiskeptical Weapons*, *supra* note 10, at 153.

118. RORTY, *Menace*, *supra* note 112, at 43 (acknowledging Putnam's indictment of Rorty as a relativist, but denying its truth).

119. *Id.* Of course, Rorty is not more authoritative than Putnam in characterizing his own position. It is not a question of subjective knowledge. See generally DONALD DAVIDSON, *Three Varieties of Knowledge*, in *SUBJECTIVE, INTERSUBJECTIVE, OBJECTIVE* 205 (2001).

120. RORTY, *Menace*, *supra* note 112, at 48 (citing Donald Davidson).

121. RORTY, *Antiskeptical Weapons*, *supra* note 10, at 153. He disagrees with Williams not on the basis of Williams's claim to have offered a novel and powerful

There are two arguments against these criticisms of Rorty's claims and project. One pragmatic response is Wittgensteinian. One can use words philosophically in ways that are cut off from the linguistic practices in which they are grounded. This is the repeated lesson of the *Philosophical Investigations*. That words can be purportedly used in such nonsensical or confused ways does not establish that they necessarily have meanings in those contexts, too.<sup>122</sup> The pragmatist posits that the claims about the external world and of the correspondence with such world are examples of such distortion of language. The proof, as with Wittgenstein, is the perplexities and confusions that attend such non-canonical use. Dworkin argues that the alleged non-canonical use is not dissimilar to our ordinary usage. For Dworkin, such claims about the external, real world are thus more like "It is 5 PM in Valparaiso, Indiana," than "It is 5 PM on the sun." Rorty, however, denies that claims about the world are consistent with our ordinary practices.

Dworkin's assertion that even philosophical propositions must be understood and given meaning in the context of their philosophical usage appears questionable.<sup>123</sup> Wittgenstein would treat such non-canonical contexts as often presenting merely linguistic pathologies.<sup>124</sup> Consider the relationship of philosophy to law and to constitutional theory and interpretation. Implicit in Dworkin's claim is a recognition that our law talk is deeply embedded in a set of performatives. It may not be as simple or direct as Wittgenstein's example of the stone carrier saying "Five!", but in law in particular, we often do something when we say or write something. It is this recognition that leads Dworkin to claim that our linguistic practices, even when we talk about law, are embedded in canonical linguistic uses. For Dworkin, such usage is more like the stone carrier than the metaphysician.

Rorty would amplify the Wittgensteinian position, integrating it with American pragmatism to create the second argument in defense of his position.<sup>125</sup> Rorty would not so much deny that propositions correspond to reality as urge that notions of causal connection replace that discourse.<sup>126</sup> Instead of seeking to determine the truth of propositions and theories, Rorty would assess the usefulness of those theories and propositions. He asks us to think of ourselves not as

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response to the skeptical challenge, but on the more basic question whether the old arguments against skepticism were inadequate. *Id.*

122. WITTGENSTEIN, *supra* note 18, at § 350 (asking what it means to be five o'clock on the sun).

123. *See id.* §§ 114–20.

124. *Id.*

125. *See generally* RORTY, *Menace*, *supra* note 112, at 44–62 (articulating the areas of agreement and disagreement between Rorty and Putnam, from Rorty's perspective).

126. *Id.* at 47–48.

mirroring or picturing the world but as acting within it for our own interests and purposes, and to value and preserve and honor propositions and claims as and to the extent that they aid us.

Turning back to Bobbitt and constitutional theory, the consequences of rejecting a correspondence theory of truth in particular and the peculiar view that Bobbitt takes of the applicability of truth conditions in general are substantial. Bobbitt does not entirely deny that propositions of constitutional law have truth conditions; but, he asserts, a “grasp of [the meaning of legal propositions] cannot depend upon an ability to recognize those conditions as obtaining in cases in which they can be conclusively so recognized.”<sup>127</sup> It may not be immediately apparent what Bobbitt is asserting here. Later, in *Reflections Inspired by My Critics*, he amplifies his position: “Some may take [me] as implying that legal propositions cannot therefore be true or false. I do not deny that legal propositions have truth-conditions. I deny only that these can be satisfied in any nontrivial way—in any way external to the practice itself.”<sup>128</sup>

Bobbitt is describing a non-foundational practice of constitutional law. Without traditional truth conditions, a proposition cannot be objectively determined to be true or false even in theory. To deny propositions of constitutional law objectively recognizable truth conditions is to radically redescribe the nature of those propositions. We ordinarily accept such propositions as true or false, and we argue about the truth of contested propositions. The originalism debate, after all, is a debate about the grounds that make propositions of constitutional law true or false. The protagonists in that debate proceed as if there are such truth conditions and their opponents simply disagree about what those truth conditions are. For a proposition of constitutional law not to have traditional truth conditions entails that logical arguments constructed with such positions cannot have similar truth conditions and therefore that such arguments cannot be valid or invalid in the ordinary way. Originalism, and its critics, are fatally compromised.

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127. Bobbitt, *Reflections*, *supra* note 36, at 1908. Bobbitt’s acknowledgment of the potential for conflict between the different modes of constitutional argument and his insistence that there is not, and cannot be, a meta-mode that can reconcile such inconsistent arguments might appear to commit him to the view that Dworkin is wrong. On the other hand, his confidence that conscience can provide guidance in such cases of conflict, coupled with a rejection of moral relativism, would permit him to endorse Dworkin’s thesis.

128. *Id.* at 1914. The critical element of Bobbitt’s claim is not what constitutes truth, but the claim that such truth claims are trivial because reducible to claims about practice.

Bobbitt and Patterson's challenge to the realist theory of the truth of propositions of constitutional law has been controversial.<sup>129</sup> George Martinez rejects Patterson's theory of the truth of propositions of constitutional law because of its appeal to overall coherence when the modalities of argument conflict.<sup>130</sup> He rejects that theory because he endorses a realist theory of constitutional law.<sup>131</sup> Martinez asserts that Bobbitt's account of the truth of constitutional law is inadequate because it fails to explain the truth of propositions of constitutional law. This is because Martinez believes that there is something that makes such propositions true—or false.<sup>132</sup> For Martinez, propositions of constitutional law are made true by the world.<sup>133</sup> But there is little defense of that realist position, except to argue that earlier confidence in celebrated constitutional decisions and associated propositions of constitutional law appear erroneous in retrospect.<sup>134</sup>

### 3. The Meaning of Propositions of Constitutional Law

Bobbitt focuses less on the meaning of propositions of constitutional law than upon their use. That lack of express attention should not obscure the radical position implicit in Bobbitt's analysis. But Bobbitt's failure to analyze the nature of meaning for propositions of constitutional law more fully leads him to overlook important arguments for his claims. Moreover, once the importance of meaning is recognized, significant developments in the contemporary analytic philosophy of language suggest further arguments for Bobbitt's claims.

Classically, and for the principal protagonists in their debate over originalism, the meaning of propositions is principally a *semantic* meaning.<sup>135</sup> Semantic meaning is the import of the words and sentences,

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129. See, e.g., George A. Martinez, *Book Review: On Law and Truth*, 72 NOTRE DAME L. REV. 883, 891 (1997) [hereinafter Martinez, *Review*] (reviewing Patterson's *Law and Truth*, Martinez concluded "Patterson's project should be rejected. . . ."); see also George A. Martinez, *The New Wittgensteinians and the End of Jurisprudence*, 29 LOY. L.A. L. REV. 545 (1996); Dworkin, *Objectivity*, *supra* note 2.

130. Martinez, *Review*, *supra* note 129, at 902–03.

131. *Id.* at 903–04.

132. *Id.*

133. *Id.* at 904.

134. *Id.* at 903 (citing *Plessy v. Ferguson* as tacitly reliant on racist premises). While the argumentative force of Martinez's criticism is weak, the passion behind his resistance of any theory that may appear to apologize for, or tolerate, racist precedents is understandable. See Patterson, *Social Fact*, *supra* note 101, at 583–84 (distinguishing social facts from natural facts and defending his anti-representational account of how we make legal propositions true).

135. Even the definition of the scope of semantics and pragmatics is not uncontroversial. For two very different definitions of each, see Charles Travis,

independent of what such words and sentences are inferred to mean and independent of how such words and sentences are used.<sup>136</sup> For some theorists, semantic meanings are inextricably linked with truth conditions for statements.<sup>137</sup> That definition of semantic meaning derives from the semantic meaning of the words used in the proposition, together with the application of the rules of syntax.<sup>138</sup> Bobbitt rejects this account of linguistic meaning.<sup>139</sup>

In Bobbitt's non-foundationalist world, the meaning of such propositions derives largely from their use in a variety of social practices. One such use is to perform actions—to do things, in the vernacular.<sup>140</sup> For example, certain propositions of constitutional law are used to prevent mentally impaired criminals from being executed by the state.<sup>141</sup> Propositions of constitutional law also figure as conclusions in certain inferences and as premises or grounds for other inferences.<sup>142</sup> These uses also inform the meaning of such propositions. These social practices, many of them highly articulated and elaborate linguistic practices themselves, determine the meanings of constitutional provisions in Bobbitt's anti-foundational, anti-representational account of language.<sup>143</sup>

Perhaps because Bobbitt devotes so little express attention to meaning, he misses the opportunity to reinforce his argument with a fuller account of pragmatics and inference in constitutional language.<sup>144</sup>

*Pragmatics*, in A COMPANION TO THE PHILOSOPHY OF LANGUAGE 87, 87 (Bob Hale & Crispin Wright eds., 1st paperback ed. 1999) [hereinafter PHILOSOPHY OF LANGUAGE].

136. See generally *id.*

137. Frege is the original source of this strategy. See generally FREGE, *supra* note 14. For more contemporary endorsements of this strategy, see David Lewis, *General Semantics*, in SEMANTICS OF NATURAL LANGUAGE 169, 169 (Donald Davidson & Gilbert Harman eds., 1972), cited in PHILOSOPHY OF LANGUAGE, *supra* note 135, at 87, 106 n.2; DONALD DAVIDSON, *Truth and Meaning*, in INQUIRIES INTO TRUTH AND INTERPRETATION 17 (2d ed. 2001).

138. One sometimes also identifies the semantic rules that construct the meaning of propositions from the meaning of the words that comprise the proposition. In any case, the implications drawn from the literal, semantic meaning are not generally included.

139. Bobbitt's rejection of such a traditional theory of meaning based upon truth conditions follows from his position on truth. See BOBBITT, *INTERPRETATION*, *supra* note 2, at xix–xx n.1.

140. See generally PAUL GRICE, *STUDIES IN THE WAY OF WORDS* (1989); J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* (1962).

141. See, e.g., *Ford v. Wainwright*, 477 U. S. 399, 410 (1986) (deciding as a matter of first impression that the Eighth Amendment prohibits the execution of the insane “whether . . . to protect the condemned from fear and pain without comfort of understanding, or to protect the dignity of society itself from the barbarity of exacting mindless vengeance . . .”).

142. See Bobbitt, *Reflections*, *supra* note 36, at 1908.

143. See BOBBITT, *FATE* *supra* note 11, at 6.

144. See, e.g., 1 SCOTT SOAMES, *PHILOSOPHICAL ESSAYS: NATURAL LANGUAGE: WHAT IT MEANS AND HOW WE USE IT* 403, 422 (2008) (concluding that “the meanings of legal texts are too austere to determine the content of law”). See generally BRANDOM,

Pragmatics looks to the use of language to understand the non-semantic meaning of a statement or utterance.<sup>145</sup> An inferential account of language supplements that account of the performative role of language with the role of propositions in inference.<sup>146</sup> Propositions play two roles in inference, as premises and as conclusions.<sup>147</sup>

Just as Patterson builds on Bobbitt's account of truth while offering his own theory, so, too, Patterson's account of meaning begins with Bobbitt.<sup>148</sup> Like Bobbitt,<sup>149</sup> Patterson appears to believe that jurisprudence must move beyond the opposition between realism and anti-realism in its account of meaning.<sup>150</sup> Patterson largely abandoned traditional accounts of the meaning of a proposition of law as determined by truth conditions.<sup>151</sup> Instead, meaning is determined by a proposition's use in canonical modes of legal argument.<sup>152</sup>

Two important strands in modern analytic philosophy of language support Bobbitt and Patterson's claims. The relationship between the two is complex, and they emphasize different aspects of constitutional language and its use. The first aspect is pragmatics, the analysis of how language is used, as distinguished from what it semantically means.<sup>153</sup> The second is inferentialism, which focuses upon the importance of the use of propositions as conclusions of certain inferences and as the premises in others.<sup>154</sup> The importance of pragmatics becomes apparent when we recognize that the Constitution and the courts in their judicial opinions are not simply saying something, but they are also, and more importantly, doing something.<sup>155</sup> The Constitution is in fact doing many things. It is constituting the federal government,<sup>156</sup> as well as creating

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ARTICULATING REASONS, *supra* note 70; GRICE, *supra* note 140; AUSTIN, *supra* note 140. The breadth of the recognition of the importance of non-semantic meaning, including, in particular, for propositions of law, is reflected in the authors cited here, who otherwise disagree on so much.

145. This characterization of pragmatics is not uncontroversial. *See generally* Travis, *supra* note 135.

146. *See generally* BRANDOM, ARTICULATING REASONS, *supra* note 70; ROBERT BRANDOM, MAKING IT EXPLICIT (1994) [hereinafter BRANDOM, MAKING IT EXPLICIT].

147. *See* BRANDOM, ARTICULATING REASONS, *supra* note 70, at 165–66.

148. PATTERSON, TRUTH, *supra* note 11, at 178–79 (asserting that an account of law based only on the modes of legal argument is inadequate).

149. BOBBITT, INTERPRETATION, *supra* note 2, at xix–xx n.1.

150. PATTERSON, TRUTH, *supra* note 11, at 18–21.

151. *Id.* at 18.

152. *Id.* at 21 (“[M]eaning is not to be explained as a matter of conditions.”).

153. *See generally* WHERE SEMANTICS MEETS PRAGMATICS (Klaus von Heusesinger & Ken Turner eds., 2006).

154. *See generally* BRANDOM, ARTICULATING REASONS, *supra* note 70; BRANDOM, MAKING IT EXPLICIT, *supra* note 146.

155. *See generally* AUSTIN, *supra* note 140.

156. U.S. CONST. pmbl.



and apportioning roles and functions among the three branches of that government<sup>157</sup> and between the two houses of the legislative branch.<sup>158</sup> It is also ordering the relationship between the federal government and the sovereign states.<sup>159</sup> Very importantly, it is limiting the power of the federal and state governments and creating or confirming the rights of individuals.<sup>160</sup> As a performative statement, the Constitution is quite different from Joseph Story's commentaries on the Constitution of Laurence Tribe's *American Constitutional Law*. Those works merely interpret and explain the Constitution. As a result, with respect to the Constitution and constitutional opinions, the most important element of the text is what it accomplishes, not what its semantic content is.<sup>161</sup>

An understanding of this performative role explains the doctrine of substantive due process better than conventional analysis permits. John Hart Ely has lampooned the doctrine of substantive due process as oxymoronic, embodying a contradiction in terms.<sup>162</sup> As a matter of *semantic* meaning, Ely is correct. Nevertheless, the failure of Ely's criticism to be taken seriously is puzzling. In the face of Ely's charge that the concept of substantive due process is oxymoronic, the continuing vitality of the doctrine appears paradoxical. But the doctrine of substantive due process cannot be analyzed or evaluated only in semantic terms. The doctrine must be understood in the context of the judicial decisions that created it<sup>163</sup> and that continue to apply it.<sup>164</sup> In that context, the doctrine can be understood as the means by which the nineteenth century precedents narrowly interpreting the privileges and immunities clause<sup>165</sup> have been finessed by a Supreme Court willing to

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157. U.S. CONST. art. I, II and III.

158. U.S. CONST. art. I.

159. U.S. CONST. art. I, § 10 (prohibiting the States from entering into treaties, conferring titles of nobility, generally levying duties, and keeping troops, among other things).

160. U.S. CONST. amend. I–X.

161. As explored below, however, the conceptual content of constitutional propositions is important for the inferential role such propositions play as performatives.

162. See ELY, *DEMOCRACY*, *supra* note 31, at 18.

163. By characterizing this doctrine as modern, I am contrasting it with earlier versions of substantive due process that limited state social legislation by invoking rights of economic freedom. The relationship of the two is beyond this Article's scope. For examples of the modern doctrine, see *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Roe v. Wade*, 410 U.S. 113 (1973).

164. See *Lawrence v. Texas*, 539 U.S. 558 (2003); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

165. See generally *Slaughter-House Cases*, 83 U.S. 36 (1872) (holding that the privileges and immunities clause of the Fourteenth Amendment applied only to national citizenship).

extend a variety of protections to individuals.<sup>166</sup> The doctrine is a creative way for the Court to endorse structural and ethical arguments at the expense of textual and historical arguments,<sup>167</sup> without the need to reverse long-standing precedents.<sup>168</sup>

The relevant, if difficult, question is whether the Court reached its result with the proper use of the accepted modes of argument. The critical reaction from sophisticated constitutional theorists to the Supreme Court decisions raises legitimate questions as to the results obtained.<sup>169</sup> Part of that critical reaction arose from the seemingly novel style of argument employed by the Court.<sup>170</sup> Assessing the debate over *Griswold v. Connecticut*,<sup>171</sup> *Roe v. Wade*,<sup>172</sup> and *Lawrence v. Texas*<sup>173</sup> goes beyond our scope here. But resolving that controversy requires far more than noting the infelicity of the nomenclature of substantive due process.<sup>174</sup>

Understanding the inferential role of propositions of constitutional law is also important for understanding the non-semantic meaning of the Constitution. Propositions of constitutional law, like other propositions on the inferentialist account, stand as the conclusions of certain inferences of practical reasoning and as the premises for other such inferences. For example, the proposition that “the initial clause of the Second Amendment is only prefatory” may figure as a premise in an inference to the conclusion that the Second Amendment does not protect

166. Thus, for example, the doctrine has been invoked to recognize a right to secure contraception, the right in certain circumstances to abortion, and the right to engage in consensual adult homosexual relations.

167. See generally *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (invoking the paramount rights of familial association in an ethical argument for the limits of state police powers); *Roe v. Wade*, 410 U.S. 113 (1973) (referencing the central right of corporeal autonomy and sexual choice in an ethical argument striking down a state’s general prohibition of abortion).

168. See generally *Slaughter-House Cases*, 83 U.S. 36 (1872). It may be, of course, that such an indirect doctrinal strategy has costs and consequences that a direct strategy would not.

169. See, e.g., John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973) [hereinafter Ely, *Wages*] (arguing that the overuse of highly critical rhetoric in assessing the Supreme Court’s decisions results in less credibility when really questionable decisions like *Roe* are handed down). These criticisms raise the genealogical question of the relationship of originalism to the decisions of the Warren Court. That is a topic I turn to in *Striding Out of Babel: The Promise of the American Constitution If We Leave the Unhappy Originalism Debate Behind* (July 17, 2014) (unpublished manuscript) (on file with author).

170. See, e.g., Ely, *Wages*, *supra* note 169.

171. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

172. *Roe v. Wade*, 410 U.S. 113 (1973).

173. *Lawrence v. Texas*, 539 U.S. 558 (2003).

174. I do not mean to suggest with this comment that Ely’s substantive discussion of *Roe* or of substantive due process is compromised by such a mistake.

only the rights to possess firearms of those citizens who participate in militias.<sup>175</sup> Similarly, the proposition that the Eighth Amendment prohibits lashing as a cruel and unusual punishment appears to commit anyone endorsing that proposition to the premise that there are non-historical elements to Eighth Amendment jurisprudence. That, in turn, raises questions as to whether the Eighth Amendment would or would not prohibit the death penalty today. Understanding the inferentialist account of propositions of constitutional law tempers the performative account of constitutional law and provides the explanation of the conceptual account of that law and practice.

Neither Bobbitt nor Patterson expressly articulates either a functional, performative account of constitutional provisions or an express, inferentialist account of propositions of constitutional law. But they do repeatedly and expressly indicate their endorsement of such a pragmatic, functional account in citing Wittgenstein.<sup>176</sup> Such a refinement would help to fill in the account of constitutional argument as central to truth and meaning. Thus, although such a performative account that emphasizes pragmatics rather than semantics is not express in Bobbitt's discussion, it is probably inherent there, and certainly not inconsistent therewith. Similarly, an inferentialist account is consistent with Bobbitt's emphasis on the constitutional practice of making arguments because the inferentialist theory emphasizes the role of constitutional propositions as premises and conclusions in practical reasoning.

#### 4. Constitutional Argument

Although meaning is of relatively little import for Bobbitt's account of the Constitution, constitutional argument plays a central role. Bobbitt does not focus on the structure of practical inference in constitutional argument. He is instead interested only in the premises and grounds, and the associated metrics, employed in the disparate modes of such argument.<sup>177</sup> As for Dworkin, Bobbitt's account of constitutional law begins with legal dispute and legal argument. Also, like Dworkin, Bobbitt finds the canonical accounts likely wrong, and misleading at

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175. See *District of Columbia v. Heller*, 128 S. Ct. 2783, 2789–90 (2008) (making just such an argument for the conclusion that the right to firearms protected by the Second Amendment extends to citizens without regard to service in the militia).

176. See, e.g., Patterson, *Social Fact*, *supra* note 101, at 580; BOBBITT, *INTERPRETATION*, *supra* note 2, at xi; BOBBITT, *FATE* *supra* note 11, at 123, 266 n.1.

177. Patterson, by contrast, explores the structure of such practical reasoning in some detail. PATTERSON, *TRUTH*, *supra* note 11, at 170–72 (developing a more informal account of legal reasoning, following Toulmin, that identifies the warrant, backing, and ground that support a claim).

best. But Bobbitt's use of legal argument is far more radical than Dworkin's. Dworkin uses his description of legal disputes to challenge the positivist account of law, but he accepts classical correspondence accounts of truth and a realist account of the world.<sup>178</sup> From his anti-foundational, anti-representational premises, Bobbitt argues that constitutional argument is our constitutional law.<sup>179</sup> Law is an activity, not a thing.<sup>180</sup>

Constitutional argument has a specialized meaning for Bobbitt; it is argument for particular constitutional outcomes to or by legal decision makers.<sup>181</sup> That is, it is the form of argument that determines how a legal outcome is presented, even if those forms do not determine legal outcomes.<sup>182</sup> It is distinguished from the more general concept of legal discourse, conversations about the Constitution by decision makers as well as by sociologists, historians, and philosophers.<sup>183</sup> Bobbitt catalogues six established modes of constitutional argument in his first book, *Constitutional Fate*.<sup>184</sup> The force of Bobbitt's challenge rests on the accuracy of his description of constitutional argument and his theoretical description of the legitimacy of the competing modes.

Bobbitt's analytical strategy begins with a description of how constitutional arguments have been historically made.<sup>185</sup> He asserts the existence of these modes as a contingent, historical fact.<sup>186</sup> The most striking aspect of that description is its emphasis upon the debate, the controversy, and the arguments of constitutional law. He delights in selecting brilliant but now largely discredited theorists like William Crosskey<sup>187</sup> and Felix Frankfurter.<sup>188</sup> By choosing historical figures who

178. See generally Dworkin, *Objectivity*, *supra* note 2, at 87–89.

179. Patterson would generalize this theory of the Constitution for all law. See PATTERSON, TRUTH, *supra* note 11, at 151–79, 151 (quoting HILARY PUTNAM, REPRESENTATION AND REALITY 115 (1988): “[T]o say that some proposition is true is to say that ‘a sufficiently well placed speaker who used the words in that way would be fully warranted in counting the statement as true of that situation.’” (footnote omitted)). Patterson also offers a materially different theoretical account of law when the modes of argument conflict, rejecting the notion that conscience plays a dispositive role at that stage. See *id.* at 172.

180. BOBBITT, FATE, *supra* note 11, at 24.

181. See Bobbitt, *Reflections*, *supra* note 36, at 1911–12.

182. See BOBBITT, FATE *supra* note 11, at 6–7.

183. *Id.* See also Balkin & Levinson, *Grammar*, *supra* note 33, at 1776–77 (describing the use of arguments outside Bobbitt's six modes in constitutional interpretation as “a sort of category mistake” on Bobbitt's account).

184. BOBBITT, FATE *supra* note 11, at 7–119.

185. See generally *id.* at 3–119.

186. *Id.* at 8.

187. See *id.* at 13–21 (focusing upon New Deal constitutional analysis emphasizing the strong powers of the Federal government particularly with respect to economic legislation).

espoused powerful and often dominant constitutional interpretations and modes of constitutional judicial decision making, Bobbitt constructs a thick description of our constitutional practice in which constitution argument has primacy. Bobbitt chronicles a constitutional discourse over time that does not reach definitive or final conclusions but instead reaches decisions informed by text and history, as well as by competing values, roles, virtues, and expediencies. The product of that practice is not ultimate truth but accepted and legitimate judgments and decisions. Bobbitt does not suggest that anything about this discourse is illegitimate or even in need of reform. Instead, Bobbitt endorses this discourse enthusiastically, manifestly excited by, and admiring of, its practitioners even when he clearly disagrees with their views.<sup>189</sup> The structure of these arguments is historical and contingent.<sup>190</sup> That is, the arguments are rooted in America's historical experience, not in philosophy. Our constitutional law would have been different without slavery, without the Civil War, without the Great Depression, without the New Deal, without the Second World War, or without the so-called War on Terror. The practice of constitutional interpretation responds to and reflects those events more than the abstract philosophizing of John Locke or John Rawls. While Bobbitt has defended his description of modes of argument as an accurate description of the way constitutional argument goes, he acknowledges that the existing modes may fall out of favor or new modes may be adopted.<sup>191</sup> Bobbitt's description of constitutional

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188. *Id.* at 59–73 (exploring Justice Frankfurter's prudential analysis emphasizing factors and the balancing of often competing considerations).

189. For example, Bobbitt describes William Crosskey's now discredited views of the original understanding of the Constitution with relish, savoring the legal brilliance both with which they were argued and with which they were rebutted, while enjoying the irony of the commitment to original understanding by a liberal New Dealer. *See id.* at 9–24.

190. Bobbitt stated:

Does that mean, then, that my work is necessarily bound to the present system, that it cannot account for change, such as the development of new modalities or new standards of arguments within modalities? Not at all. Because the constitutional system of establishing these forms is entirely descriptive of practice, any change that is sufficiently widespread becomes a legitimate participant.

Bobbitt, *Reflections*, *supra* note 36, at 1918–19.

191. *Id.* at 1919. It is not entirely clear how such change would occur. Presumably it would be along the lines of the efforts of the various advocates of particular modes of argument chronicled in *Constitutional Fate*. In any case, to the extent that Bobbitt is expressly and consistently committed to the contingent and historical nature of these modes, such change would surely be entirely consistent with the story Bobbitt tells, even if the story of the evolution of such modes of argument remains untold by Bobbitt himself. In his earlier work Bobbitt conceded that his litany of arguments might not be complete. *See* BOBBITT, *FATE*, *supra* note 11, at 8.

argument and decision making appears more plausible and accurate than that advocated by the originalists or by Dworkin.<sup>192</sup>

Ethical argument, as Bobbitt terms it, is not moral argument.<sup>193</sup> Rather, it is an argument based upon “the character, or *ethos*, of the American polity . . . .”<sup>194</sup> Crudely, it is the type of argument made when we appeal to what it means to be Americans, or to our higher aspirations.<sup>195</sup> Much of *Constitutional Fate* is devoted to defending the mode of ethical argument as an integral part of the culture and practice of constitutional argument. This claim is particularly important; because if open-ended ethical argument is permissible, then it is more plausible that the entire process of constitutional decision making is open-ended. If the only two modes of constitutional argument were textual and historical, then the originalist account of interpretation as an almost mechanical decision process would be far more plausible, and Bobbitt’s rich, anti-foundationalist account would be less plausible. The inclusion of ethical argument—which has little to do with what the Framers said or intended—ensures that Bobbitt must reject originalism.<sup>196</sup>

Bobbitt anticipated that his claim that ethical argument is an accepted mode of constitutional argument would be one of the most

192. Although Bobbitt identifies six modes of constitutional argument, nearly half the text of *Constitutional Fate* is devoted to exploring one of them, ethical argument, to establish it as a legitimate and legitimating mode. Part of the explanation for the emphasis on the ethical mode of argument is that the other modes are both more visible and more well established. Bobbitt recognizes that ethical argument is more controversial; it is also, for Bobbitt, an extremely important element in his description of constitutional argument. BOBBITT, *FATE*, *supra* note 11, at 93 (“I now turn to one particular sort of argument whose very status as a coherent convention would be perhaps controversial.”).

193. *Id.* at 94, 137, 140–41, 94 (“As I shall use the term, ethical arguments are not *moral* arguments.”). It might appear that such an ethical argument is an appeal to a vision of the flourishing of the American people. As such it might appear a moral argument from the good. Bobbitt does not explore these issues in much depth. *But see* Richard Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637, 1700 n.128 (1998) [hereinafter Posner, *Problematics*]. I will explore the parallels and contrasts between Bobbitt’s theory and natural law theories below.

194. BOBBITT, *FATE*, *supra* note 11, at 94.

195. Bobbitt’s formulation raises the question whether his concept of ethical argument commits him to American exceptionalism. Although I am unsure of the answer to that question, it would appear that even if Bobbitt is so committed and even if such a commitment appears indefensible, his concept of an ethical argument can be reconstructed with such commitments.

196. To the extent that the Framers helped to articulate the national ethos, those views, including their embodiment in the Constitution, are relevant, but this is a relationship to a text very different from that posited by originalism. Bobbitt’s commitment to structural and prudential argument as equal modes is also inconsistent with originalism.

novel and controversial elements in his theory of the Constitution.<sup>197</sup> It has proven so.<sup>198</sup> Although he gives examples of the use of ethical argument,<sup>199</sup> it may be helpful to define it conceptually and compare it, for example, to Dworkin's concept of the role of moral argument in constitutional law and the role of moral theory and argument in natural law. Bobbitt characterizes ethical argument as the appeal to the character of America, the core of our aspirations as Americans. It is a historical claim about who we are as citizens of the American democratic constitutional republic. Such arguments could not be made in those terms in the United Kingdom or in France, for example, despite the many common threads that these polities share with the United States in their political philosophy and political practices as advanced western democracies.

Bobbitt does not offer an account of the creation of such aspirations or self-image.<sup>200</sup> But those aspirations are evolving.<sup>201</sup> Whether the adoption of the Bill of Rights reflects such an evolution, or merely constitutes a codification of commitments in place at the adoption of the Constitution, the adoption of the Reconstruction amendments and the

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197. BOBBITT, FATE, *supra* note 11, at 125 ("[E]thical approaches are thought to be disreputable and are usually treated disparagingly . . .").

198. See, e.g., Balkin & Levinson, *Grammar*, *supra* note 33, at 1802-03; see LEITER, *Quine*, *supra* note 19, at 138-39 (addressing Patterson's interpretation of Bobbitt's account of constitutional law).

199. BOBBITT, FATE, *supra* note 11, at 96-105 (presenting *Moore v. City of East Cleveland*, *Meyer v. Nebraska*, *Pierce v. Society of Sisters*, the *Pentagon Papers Case*, and *Trop v. Dulles* as examples of ethical argument in constitutional decision making).

200. That narrative has been well established, at least in outline. Because of the strongly republican elements of a limited government, critical elements of that ethos clearly evolved out of the Western, Christian legal and political traditions and were shaped by the experiences of the English colonies up to the Revolution. See generally J.G.A. Pocock, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* (1975); BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* (1969); see also Daniel T. Rodgers, *Republicanism: The Career of a Concept*, 79 J. AM. HIST. 11 (1992). Parallel doctrinal streams of importance included the philosophy of John Locke as well as the thinking of the Scottish Enlightenment. See generally GARRY WILLS, *INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE* (First Mariner Books ed. 2002) (emphasizing the importance of Scottish enlightenment thinking).

201. This evolution implicitly figures, for example, in Bobbitt's account of the shifts in the predominant modes of constitutional argument, but without any express acknowledgment as such. The creation of the prudential argument as an express mode of constitutional argument in the twentieth century is perhaps the clearest example. See BOBBITT, FATE, *supra* note 11, at 61-65. Tribe's explanation and analysis of constitutional law by reference to evolving paradigms or frameworks has parallels with Bobbitt's account, but Tribe's description, unlike Bobbitt's, appears to have a clear temporal direction. See generally LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (2d ed. 1988) [hereinafter TRIBE, *CONSTITUTIONAL LAW*] (describing successive models of the Constitution that shaped constitutional interpretation and decision over time).

extension of the franchise to women certainly reflect such an evolution.<sup>202</sup> Bobbitt also recognizes that those aspirations evolve as constitutional doctrine evolves.<sup>203</sup> We evolve in our interpretation of the Constitution, but so, too, do we ourselves evolve as our constitutional interpretations and practices shape us.<sup>204</sup> The clearest examples in this regard may be those with respect to the rights of minorities and women. As the rights of such persons to be treated equally have been recognized within our society, the protections accorded those persons have been expanded. That expansion has conveyed an aspirational message as to how we may build a more diverse and tolerant community.<sup>205</sup>

The commitments underlying ethical arguments are not moral commitments because they may not be consistent with our moral obligations.<sup>206</sup> This distinction is grounded in both empirical and theoretical considerations. Empirically, ethical argument is rarely made expressly in constitutional argument, and when made, it is even less often asserted in an express moral theory vocabulary.<sup>207</sup> Despite the scorn poured on moral theory applied in law by judges and theorists as different as Judge Posner and Justice Scalia,<sup>208</sup> there is scant evidence of an active role for such theory in adjudication.<sup>209</sup> If Bobbitt is to rehabilitate the role of ethical theory in constitutional argument, he must distinguish it from ordinary moral argument. He does so by limiting the kind of argument that he characterizes as ethical. While he sometime speaks loosely about such an argument as appealing to the ethos of the American people, in his more measured statements, it is clear that he intends the notion to mean appeals to limits on government that preserve

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202. The adoption of the Eighteenth Amendment probably stands as one of the few manifestly failed efforts raise the bar of behavior for Americans by prohibiting the manufacture or sale of intoxicating liquors. That effort was effectively abandoned by the adoption of the Twenty-First Amendment.

203. See BOBBITT, FATE, *supra* note 11, at 185.

204. As Bobbitt puts it pithily, "I do not believe that we are born with a taste for jury trials . . . ." *Id.* It is this sense that we are shaped by our American Constitution that leads Bobbitt to speak of "constitutional fate."

205. Jack Balkin offers the clearest statement of this aspirational role for the Constitution. See BALKIN, *supra* note 1, at 60-62.

206. Bobbitt clearly believes that our law may not reflect our highest moral obligations and may perhaps be immoral. See BOBBITT, FATE, *supra* note 11, at 141 (citing Chief Justice Marshall for the distinction between the moral and the constitutional in the context of the Cherokee cases).

207. *Id.* at 128.

208. See Posner, *Problematics*, *supra* note 193; Antonin Scalia, *Common Law Courts in a Civil-Law System: The Role of United States Courts in Interpreting the Constitution and Laws*, in ANTONIN SCALIA, A MATTER OF INTERPRETATION: THE FEDERAL COURTS AND THE LAW 45 (Amy Gutmann ed., 1997) [hereinafter SCALIA, INTERPRETATION].

209. But see Charles Fried, *Philosophy Matters*, 111 HARV. L. REV. 1739, 1743 (1998) [hereinafter Fried, *Philosophy*] (reporting, anecdotally, that as a judge he had recourse to such analysis).



important, generally shared values of the people.<sup>210</sup> As he puts it, the government is not sovereign in all ways, and, in certain domains, is not sovereign at all with respect to the people of the United States.<sup>211</sup>

At other times, however, Bobbitt seems to characterize his ethical argument as a form of moral argument.<sup>212</sup> Such ethical argument contains a normative content that goes beyond an aesthetic judgment or raw personal preference. The distinction between moral and ethical argument is also important in Bobbitt's effort to distinguish between the legitimacy of constitutional decisions and the justification for such decisions.<sup>213</sup> Ethical argument is one of the legitimating modes of constitutional argument;<sup>214</sup> moral argument is one of the means of justification. Ethical argument is deployed within constitutional law, moral argument, from outside. In *Constitutional Fate*, Bobbitt's interest is in legitimacy because in legitimacy Bobbitt claims to ground judicial review and dissolve the countermajoritarian challenge.<sup>215</sup> According to Bobbitt, the legitimacy of judicial review arises from the practice of judicial review; there is no higher, Archimedean stance from which such constitutional practices can be critiqued within law itself.<sup>216</sup> This denial of a stance from which to determine, within constitutional law, whether judicial review is legitimate, is one of Bobbitt's most important claims. With it comes a rejection of the entire structure of the historical debate over the legitimacy of judicial review.<sup>217</sup> That debate was conducted, after all, on the assumption that judicial review could be legitimated only if a principled argument justifying such a judicial role could be

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210. BOBBITT, *FATE*, *supra* note 11, at 94–95 (“Ethical constitutional arguments do not claim that the particular solution [advocated] is right or wrong in any sense larger than that the solution comports with the sort of people we are . . .”). This is not, in fairness to Bobbitt's critics, an entirely perspicuous claim.

211. *Id.* at 132.

212. *Id.* at 137. Explaining the resistance to recognizing the place of ethical argument in constitutional argument and adjudication, Bobbitt attributes the resistance to a desire to exclude “moral argument from constitutional law altogether.” *Id.* This formulation suggests a moral dimension to the concept of ethical argument.

213. For criticism of that distinction and Bobbitt's defense of it, see Balkin & Levinson, *Grammar*, *supra* note 33, at 1771–72, 1802–03; LEITER, *Quine*, *supra* note 19, at 139; Bobbitt, *Reflections*, *supra* note 36, at 1918–19 (defending the distinction by characterizing justification as an assessment that must be made from outside our system of constitutional law to with legitimation which occurs within that system by making arguments within the accepted modes of our constitutional practice).

214. See BOBBITT, *FATE*, *supra* note 11, at 93–119.

215. *Id.* at 237–38.

216. See generally LEITER, *Quine*, *supra* note 19, at 138–39.

217. Bobbitt recognizes this implication, generally parodying the prior state of the debate over judicial review. See BOBBITT, *INTERPRETATION*, *supra* note 2, at 6–10.

articulated.<sup>218</sup> Bobbitt's claim with respect to judicial review has not been generally accepted.<sup>219</sup>

Critics have leveled a variety of objections to Bobbitt's theory of legitimation and his distinction between legitimacy and justification. The first challenge is that Bobbitt conflates sociological description with normative analysis.<sup>220</sup> According to this account, Bobbitt simply confuses what is done with what ought to be done, committing, for some, a primitive category mistake.<sup>221</sup> What is done cannot be the premise for a practical inference to what ought to be done.<sup>222</sup> Bobbitt sometime speaks from within the practice when he speaks of legitimation, and sometime speaks from outside that practice, claiming a normative conclusion from such empirical practices.<sup>223</sup> In so doing, Bobbitt may appear to conflate the domain of what is with the domain of ought and obligation.

At the legal, constitutional level, Bobbitt claims a normative conclusion from his account of practice.<sup>224</sup> But that claim is limited because it is expressly not the only normative perspective from which the constitutional law may be evaluated. Moreover, it is not a moral perspective.<sup>225</sup> Bobbitt's ethical perspective is instead a shared, internal point of view with respect to certain practices, values, habits, and institutions. For example, Bobbitt offers an ethical reading of *Moore v. City of East Cleveland*,<sup>226</sup> which held that a zoning law that prohibited a grandmother from living in the same household with her minor grandchild whom she was raising violated the Due Process clause.<sup>227</sup>

218. See, e.g., *id.* (describing Bobbitt's account of the debate).

219. See, e.g., BALKIN, *supra* note 1; ROBERT W. BENNETT & LAWRENCE B. SOLUM, CONSTITUTIONAL ORIGINALISM: A DEBATE 6 (2011) (suggesting that "[t]here may be no perfect solution to the countermajoritarian difficulty").

220. See LEITER, *Quine*, *supra* note 19, at 138–39.

221. Cf. BENNETT & SOLUM, *supra* note 219, at 12 (cryptically acknowledging potential criticism of originalism as committing a similar error in deriving arguments for originalism from concerns about judicial review). For the classic statement of the concept of a category mistake, now largely discounted, see GILBERT RYLE, THE CONCEPT OF MIND 15–18 (1949).

222. The *locus classicus* for this claim is DAVID HUME, A TREATISE OF HUMAN NATURE 451–70 (L.A. Selby-Bigge ed., 1888) [hereinafter HUME, TREATISE].

223. See Balkin & Levinson, *Grammar*, *supra* note 33, at 1778–81.

224. See BOBBITT, FATE, *supra* note 11, at 94–95 (defending that decision as proper within the standards of the American ethos).

225. The claim is normative because, on Bobbitt's account, there are grammatical and ungrammatical constitutional arguments. Ungrammatical arguments made outside the accepted and proper six modes of constitutional argument are flawed as *constitutional argument*. Bobbitt acknowledges that such arguments may be powerful and persuasive morally or dramatically, for example, but denies that they have any comparable status as a matter of law.

226. *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

227. *Id.* at 505–06.

Bobbitt argues that the outcome in that case turned on the importance of family relationships and distinguishes that case from *Village of Belle Terre v. Boraas*,<sup>228</sup> which upheld a similar zoning law prohibiting multiple unrelated persons from sharing a household. In *Village of Belle Terre*, the members of the shared household shared no familial relationship, and the Court accorded their associational claims less weight, on the one hand, while according the state's exercise of its police power to regulate housing more deference than in the case when that power intruded into the freedom of a family.

*Rochin v. California*<sup>229</sup> presented the question of whether a criminal suspect in the custody of the police could be given an emetic so as to induce vomiting to recover potential evidence.<sup>230</sup> The Court held that such conduct violated the Fourteenth Amendment assurance of Due Process.<sup>231</sup> Bobbitt argues that the terms in which the Court articulated its reasoning were misleading. The Court emphasized the testimonial nature of the evidence obtained by forcibly pumping the defendant's stomach.<sup>232</sup> Instead, Bobbitt argues that the case demonstrates that "a constitutional ethic applies . . . that restrains the police from physically degrading an individual who is in custody in their efforts to enforce the law . . . ."<sup>233</sup> In each case, Bobbitt reinterprets the case to find an ethical principle of limited government and a realm of constitutionally protected individual autonomy.<sup>234</sup> Bobbitt's reading is not wholly compelling. The Court expressly invoked the requirement that the States respect "certain decencies of civilized conduct."<sup>235</sup> There is reason to believe that such concerns are heightened when the State is engaged in a criminal prosecution. Whether that rule implicates a principle of individual autonomy is not entirely clear.

Critics argue that Bobbitt does not sustain the distinction he purports to draw between describing practices and making normative commitments.<sup>236</sup> They argue that as a grammarian he must vacillate between the normative and the descriptive.<sup>237</sup> When he makes descriptive claims about our practice of constitutional argument, Bobbitt's account appears to fail to engage originalists making normative claims about what our Constitution should be understood to mean or is

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228. *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974).

229. *Rochin v. California*, 342 U.S. 165 (1952).

230. *Id.* at 166.

231. *Id.* at 174.

232. *Id.* at 172-73.

233. BOBBITT, FATE, *supra* note 11, at 105.

234. *Id.*

235. 342 U.S. at 173.

236. See Balkin & Levinson, *Grammar*, *supra* note 33, at 1780-81.

237. *Id.*

required to be understood to mean. When he makes normative claims about that practice, Bobbitt appears to violate his own claim that the practice of constitutional argument cannot be critiqued or assessed, as a matter of constitutional law, from outside that practice. Critics allege that Bobbitt invokes exactly the external perspective he denies.<sup>238</sup>

Bobbitt sometimes appears to employ ethical argument much like natural law theories employ a theory of natural rights,<sup>239</sup> but he nevertheless maintains that he is not defending a natural law theory.<sup>240</sup> He repudiates natural law theory on at least two different levels. First, he denies that moral argument has any role in our modes of constitutional argument.<sup>241</sup> Natural law asserts a fundamental nexus between law and natural rights, with a corollary role for moral argument in our law.<sup>242</sup> Even modern natural law theory, which tempers the role claimed for moral theory, nevertheless commits to such a role.<sup>243</sup> Second, and more fundamentally, Bobbitt rejects the representational, correspondence account of the truth of propositions of constitutional law that is inherent in both classical and modern natural law. Both natural law theories commit to an ontology of law in which the truth value of propositions of law derives from the correspondence of such propositions with an objective law.<sup>244</sup> Thus, Bobbitt rejects the claims natural law makes for the priority or privilege of morality and its more fundamental ontological claims about law itself.

Bobbitt also thinks that his theory differs from Dworkin's theory of law as integrity and its non-positivist emphasis of the role of moral theory in constitutional interpretation.<sup>245</sup> Most fundamentally, Bobbitt

238. *Id.* at 1782–83 (“[Bobbitt] cannot maintain the distinction between legitimacy and justification in practice.”).

239. Thus, for example, when Bobbitt explores the interpretation of the Privileges and Immunities Clause, he argues that it is a limitation on the exercise of state power and that such limitation is not restricted to the historical state law privileges and immunities of citizens. The limitation limits the states from acting, and thus limits the state from acting in derogation of such limit against anyone. *See* BOBBITT, *FATE*, *supra* note 11, at 151–53.

240. *See, e.g., id.* at 94–95 (distinguishing moral argument from ethical argument without referring to natural law theory).

241. *See id.* at 94.

242. *See generally* ROBERT P. GEORGE, *Natural Law and Positive Law*, in *IN DEFENSE OF NATURAL LAW* 102 (1999).

243. The new natural law theory recognizes that there are benefits from the specification of rights and obligations in law and that the open-ended, *de novo* analysis of those specified rights and obligations through moral deliberation by judges and citizens may be undesirable or counterproductive for the good. *See generally id.*

244. *See generally* GEORGE, *supra* note 242, at 102 (emphasizing the proper and permissible instrumental role of positive law in implementing the purposes and principles of natural law) (1999); JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980).

245. *See generally* DWORKIN, *EMPIRE*, *supra* note 29.

distinguishes his concept of ethical argument from Dworkin's account of moral reasoning in two critical respects. First, ethical arguments limit government; they do not grant or extend government powers or mandates.<sup>246</sup> Ethical argument preserves the rights of the people against governmental intrusion. For Dworkin, by contrast, moral argument is as likely to mandate action by the government as to restrict it.<sup>247</sup> Second, and more importantly, Bobbitt denies that ethical argument has a pride of place among the modes of argument because he believes that all of the modes of argument must compete among themselves in constitutional argument and interpretation.<sup>248</sup> On Bobbitt's account, not only is there no overriding mode or principle, but there must not be any such mode.<sup>249</sup> For Dworkin, by contrast,<sup>250</sup> rights are trumps, and moral argument will, generally, itself trump, albeit with important limitations.<sup>251</sup>

At an even more fundamental level, Bobbitt's anti-foundational account of law is incompatible with Dworkin's theory of value.<sup>252</sup> Dworkin believes that right answers are objectively true.<sup>253</sup> Bobbitt's account of right answers eschews appeals to the objective world to verify or confirm the truth of propositions of constitutional law and treats right answers as historically contingent.<sup>254</sup> Thus, despite the superficial

246. See, e.g., BOBBITT, FATE, *supra* note 11, at 151–53 (arguing for an interpretation of the Privileges and Immunities Clause based upon a concept of limited constitutional government as part of the fabric of ethical argument).

247. Thus, for example, Dworkin argues that the moral interpretation of the Constitution imposes limits on the death penalty and on penalizing consensual sodomy. See generally RONALD DWORIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* (1996) (defending Dworkin's law as integrity theory by offering a series of constitutional interpretations drawing on that theory's commitment to moral theory as a source of legal authority); RONALD DWORIN, *A MATTER OF PRINCIPLE* (1985) (defending Dworkin's more general claims, amplifying the arguments made in *Taking Rights Seriously*, and anticipating the comprehensive theory of *Law's Empire*).

248. See generally BOBBITT, FATE, *supra* note 11, at x.

249. See, e.g., BOBBITT, INTERPRETATION, *supra* note 2, at 31–42; BOBBITT, FATE, *supra* note 11, at 4–5 (describing the primacy of the practice of argument); see also Balkin & Levinson, *Grammar*, *supra* note 33, at 1794 (“No reader . . . can miss Bobbitt's passion in arguing for the equality of [the six modes of argument's] status.”).

250. See RONALD DWORIN, *Hard Cases*, in *TAKING RIGHTS SERIOUSLY* 81 (1977) [hereinafter DWORIN, *Hard Cases*].

251. Dworkin limits the recourse to moral argument in his theory of law as integrity because that theory balances the competing desiderata of justice with those of fairness. The latter requires settled rules of law to protect expectations and permit private ordering. See generally DWORIN, *EMPIRE*, *supra* note 29.

252. See Dworkin, *Objectivity*, *supra* note 2, at 89; BOBBITT, FATE, *supra* note 11, at 94.

253. See RONALD DWORIN, *Is There Really No Right Answer in Hard Cases?*, in *A MATTER OF PRINCIPLE* 119, 119 (1985) (arguing that there is indeed one right answer, even to hard legal questions).

254. See BOBBITT, FATE, *supra* note 11, at 94–95 (emphasizing that ethical arguments are grounded in the particular American experience and society).

similarities between Bobbitt's recognition of the place of ethical argument in our constitutional law and Dworkin's account of the role of moral theory and moral argument in his account of the Constitution, there are profound, fundamental differences between the two theories.

Bobbitt's account of constitutional argument has been criticized for failing to explain what happens when modes collide. While he acknowledges this criticism of *Constitutional Fate*, he purports to offer such an account in *Constitutional Interpretation*.<sup>255</sup> According to Bobbitt, a judge faced with conflicting modes of argument must exercise her faculty of judgment to choose an outcome.<sup>256</sup> He offers no analysis of how such a choice can or should be made.<sup>257</sup>

Bobbitt is not alone in failing to explain how normative judgments are made. The reliance on subjective preferences in classical economic theory is, after all, a means of avoiding an explanation of how choice is made by otherwise ostensibly rational actors. Hume's claim that reason is the servant of our passions is one way to articulate this stance.<sup>258</sup> While that black box model of subjective preferences has had its critics, it has also been accepted as offering a valuable contribution to our understanding of actions and choices.<sup>259</sup> Bobbitt's failure to further detail the decision process when the modes of argument conflict, ought not to be treated as an insuperable objection to his account.

Patterson's account of legal argument is more prosaic than Bobbitt's<sup>260</sup> and accords argument a non-exclusive role in constituting law.<sup>261</sup> Patterson is not committed to the indeterminacy of the modes of argument, and his account of argument itself draws on accepted accounts of informal argument.<sup>262</sup> Patterson suggests, most simply, that questions about propositions of law are resolved by an examination of the grounds for a claim, the warrant that explains how the grounds are relevant, and

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255. See BOBBITT, *INTERPRETATION*, *supra* note 2, at xv.

256. See *id.* at 178–86.

257. Bobbitt refers to exercising the faculty of conscience in such event, but does not explain any more about how this might work. See BOBBITT, *INTERPRETATION*, *supra* note 2, at 158–60 (arguing that conflict among the modes of argument creates the potential for justice).

258. See HUME, *TREATISE*, *supra* note 222.

259. Classical Humean ethics, in its distinction between reason and desire, makes desire and taste wholly a subjective matter, immune to the demands and dictates of reason. While some critics have argued against that separation, it has not generally been thought a disqualification of the theory per se.

260. See PATTERSON, *TRUTH*, *supra* note 11, at 170–79.

261. *Id.* at 178–79. Patterson suggests that the underlying agreements are as important as the forms of argument.

262. See generally PATTERSON, *TRUTH*, *supra* note 11, at 170–71 (looking to Stephen Toulmin's theoretical description of informal argument).

the nature of the claim itself.<sup>263</sup> Despite the formality with which Patterson diagrams this scheme, he never falls into the trap of suggesting that grounds and warrants can provide a formal basis for a claim. His formalization simply describes the social practice.<sup>264</sup>

##### 5. The Core Anti-Foundational, Anti-Representational Claims

In summary, the anti-foundational, anti-representational position makes four key claims with respect to the Constitution and American constitutional law. First, it asserts that the Constitution has no existence independent of our practice. To the extent that we get a constitutional question right, it is not a matter of correctly interpreting an objective Constitution to which we may look for an answer to the constitutional question or controversy at hand. Second, without an objective, independent Constitution to which judges and constitutional interpreters may turn, the classical doctrine that the truth of propositions of constitutional law arises from a correspondence with such an independent, objective Constitution must be rejected. In its place, however, we do not have the result defended by the nihilists and, often, critical legal studies<sup>265</sup>: the absence of any Constitution at all. Instead, we have a practice of constitutional law. That practice is sufficiently formal and rule-governed that we ordinarily know whether an argument is legitimate; we also often know when an argument is persuasive—although this is more often a matter on which judgments may differ. With respect to the meaning of propositions of constitutional law, the anti-representational claim must be shaped by focusing upon the performative nature of the Constitution and constitutional judicial opinions and upon the role of such propositions in practical reasoning about the Constitution and our republic. Because the Constitution does things by saying things, any interpretation or application of it must take that predominant performative role into account.<sup>266</sup> Because the Constitution and constitutional decisions are expressed by propositions, those performative statements are employed as premises and

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263. *Id.*

264. *Id.* at 174 (noting that in legal arguments “there may be dispute over what is to count as an appropriate measure for the criterion of choice among conflicting forms of argument”).

265. See, e.g., Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1 (1984); Mark Tushnet, *Truth, Justice, and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 TEX. L. REV. 1307 (1979).

266. The performative role is predominant but not exclusive. Jack Balkin’s description of the non-legal, aspirational role of the Constitution is instructive in this regard. See BALKIN, *supra* note 1, at 62–63 (arguing that constitutional aspirationalism is “Janus-faced,” both recognizing the failures and limits of our current law but also recognizing the potential for improvement).

consequences in practical reasoning about the Constitution and constitutional law as part of that practice.

The preceding analysis has focused upon the claims made by Bobbitt and Patterson and the arguments that they advance for those claims. It is helpful to explore whether other constitutional theorists ought also to be included within the anti-foundationalist, anti-representationalist camp. Laurence Tribe is sometime categorized as falling into this category.<sup>267</sup> More generally, theorists who defend a complex, pluralistic canon of interpretation, like Daniel Farber and Suzanna Sherry, have also been so characterized.<sup>268</sup> Inclusion of those theorists may obscure more than it reveals about the anti-representational position. Tribe certainly sometimes appears to endorse elements of the anti-representational account. For example, when he eschews a general theory of constitutional interpretation, he appears to endorse Bobbitt's claim that the Constitution is a matter of the arguments that we make and that we accept.<sup>269</sup> But Tribe's general structure for his account of American constitutional law emphasizes an historical evolution.<sup>270</sup> Moreover, confronting the current state of constitutional doctrine, he has asserted that there is a new absence of conceptual consistency that makes writing a treatise about constitutional law impossible.<sup>271</sup> Tribe's criticism cannot be reconciled with a model of the Constitution that reduces our law to the arguments that are made and accepted.

Finally, it may appear that the anti-representational, anti-foundational position falls within or very close to the claims that have been advanced by the criticisms of the critical legal theorists.<sup>272</sup> The enthusiasm for Rorty's anti-representational position may suggest such an assimilation.<sup>273</sup> The claims advanced here are more consonant with Bobbitt than with the critical legal theorists for at least two important

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267. See Laurence Tribe, *Comment*, in SCALIA, *INTERPRETATION*, *supra* note 208, at 72–73 [hereinafter Tribe, *Interpretation*].

268. See generally DANIEL A. FARBER & SUZANNA SHERRY, *DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS* (2002) (criticizing Bork and Justice Scalia, among others, for attempting to construct an overly conceptual and systematic constitutional theory).

269. See Tribe, *Interpretation*, *supra* note 2677, at 65; LAURENCE H. TRIBE & MICHAEL C. DORF, *ON READING THE CONSTITUTION* (1991) [hereinafter TRIBE & DORF, *READING*].

270. See generally TRIBE, *CONSTITUTIONAL LAW*, *supra* note 201.

271. See Laurence H. Tribe, *The Treatise Power*, 8 GREEN BAG 2d 291, 294–95 (2005).

272. See, e.g., Singer, *supra* note 265 (defending the claim that although law does not have foundations and cannot determine outcomes independent of political choices informed by the interests of the politically and economically powerful, legal nihilism is not entailed thereby); Tushnet, *supra* note 265.

273. See, e.g., Singer, *supra* note 265, at 7 n.13.



reasons.<sup>274</sup> First, a central claim of the critical legal studies theorists is that law may be reduced to an expression and implement of existing power relations in the law-bound society.<sup>275</sup> Bobbitt asserts expressly that no such reduction is possible.<sup>276</sup> It is the latter position that is defended here. Second, and more fundamentally, the premise of Bobbitt's theory, also defended here, is that there is a special domain of law.<sup>277</sup> Critical legal studies theorists, by virtue of their commitment to the reductionist claim described above, are committed to the view that there is no independent domain of law.<sup>278</sup> The reductive account of law is an implausible account of constitutional practice. The anti-foundational, anti-representational account defended here is not itself reducible to the theory of law defended by critical legal studies proponents.

### B. *Arguments Against the Anti-Foundationalist Claims*

The anti-foundationalist, anti-representationalist claims that Bobbitt and Patterson make are controversial.<sup>279</sup> While Bobbitt's claims received significant attention when they first appeared beginning in 1980 and 1982,<sup>280</sup> much of the response from constitutional scholars was critical,<sup>281</sup> and the jurisprudence community largely ignored his

274. Bobbitt dismisses the position adopted by critical legal studies. BOBBITT, *INTERPRETATION*, *supra* note 2, at 164–66. The critical legal studies proponents may be considered Young Rortians in comparison to the views defended by Bobbitt and me.

275. See, e.g., Singer, *supra* note 265, at 6.

276. Philip Bobbitt, *Is Law Politics?*, 41 STAN. L. REV. 1233, 1233–34 (1989).

277. See BOBBITT, *INTERPRETATION*, *supra* note 2, at 22 (characterizing constitutional arguments made outside the identified six modes as without legal import); Charles Fried, *The Artificial Reason of the Law or: What Lawyers Know*, 60 TEX. L. REV. 35, 55–56 (1981). While Bobbitt criticized Fried as falling into “philosopher envy,” I think Fried captures the notion of the independence of law, if not the source of that independence and the relationship of law to philosophy quite accurately—and not inconsistently with Bobbitt's own position. BOBBITT, *INTERPRETATION*, *supra* note 2, at 174. See also Charles Fried, *On Judgment*, 15 LEWIS & CLARK L. REV. 1025, 1043 (2011) [hereinafter Fried, *On Judgment*]. I am grateful to Professor Fried for making available to me a pre-publication copy of this article.

278. See, e.g., Singer, *supra* note 265, at 6.

279. Compare PATTERSON, TRUTH, *supra* note 11, at 165, with DWORKIN, ROBES, *supra* note 2, at 37–39. Moreover, the representational theory, despite its powerful critics, remains the dominant view in contemporary analytic philosophy. See PRICE, *supra* note 16, at 304 (acknowledging the dominant position of representationalism).

280. BOBBITT, FATE, *supra* note 11; Bobbitt, *supra* note 1. For an example of the critical response, see, e.g., *Symposium: Philip Bobbitt and Constitutional Law*, 72 TEX. L. REV. 1703 (1994) (representing a generally enthusiastic response of a variety of leading constitutional commentators to *Constitutional Fate* and *Constitutional Interpretation*).

281. See generally Gudridge, *supra* note 50, at 1969 (reviewing PHILIP BOBBITT, *CONSTITUTIONAL FATE* (1982)) (“It is easy, upon first reading, to characterize *Constitutional Fate* as simply a ‘bad’ book.”). Gudridge goes on to temper his

claims.<sup>282</sup> In particular, Bobbitt's claims have been largely ignored in the past roughly 35 years of the debate over originalism.<sup>283</sup> In the jurisprudential context, for example, Dworkin expressly rejects the anti-foundationalist, anti-representationalist account that Bobbitt endorses.<sup>284</sup> It is valuable to look closely at Dworkin's argument against an anti-representationalist account of language and knowledge and the related arguments of Hilary Putnam that Dworkin cites.<sup>285</sup> Dworkin endorses traditional concepts of truth and traditional realist ontology.<sup>286</sup>

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assessment, characterizing the work as a "provocation." *Id.* See generally Gene R. Nichol, Jr., *Giving Substance Its Due*, 93 YALE L.J. 171 (1983) (reviewing PHILIP BOBBITT, *CONSTITUTIONAL FATE* (1982)). Bobbitt complains about the response to *Constitutional Fate* in *Constitutional Interpretation*. See BOBBITT, *INTERPRETATION*, *supra* note 2, at xi.

282. See, e.g., WALDRON, *supra* note 1. But see LEITER, *Quine*, *supra* note 19.

283. For example, none of Bork, Justice Scalia, or Barnett address Bobbitt's claims on behalf of the originalists, nor do Dworkin, Posner, or Sunstein among the critics. Bobbitt bears some responsibility for the failure of his theory, as his style is at once dense, cryptic, and subtle. He often appears to conflate entirely independent claims, and it is very difficult to extract from his seminal *Constitutional Fate* a clear understanding of the relationship of the various theses he advances. For example, it is not easy to discern the nature of the relationship between his anti-foundational account of constitutional argument with the modes of argument that Bobbitt identifies. Similarly, it is not always clear what the relationship of his account of the so-called ethical form of argument with that account, as he sometimes asserts that ethical argument is *necessary* under his account, a claim he does not apparently make about the other forms of argument. While it is clear that such necessity is historically contingent, given the novelty and controversiality of Bobbitt's inclusion of ethical argument, it is not clear, for example, whether his entire theory must collapse if we reject ethical argument as a necessary or even possible form of constitutional argument.

Bobbitt's enterprise often has the flavor of a Kantian effort to make a place for ethical argument in constitutional law. Cf. IMMANUEL KANT, *CRITIQUE OF PURE REASON* (Norman Kemp Smith trans., St. Martin's Press unabridged ed. 1965) (1781) (defining the limits of reason and knowledge, with the consequence, if not the goal, of creating a place for God).

The failure of Bobbitt's theory to be accepted more broadly may also be attributable to Bobbitt's limited *sitzfleisch*. Since advancing his claims in *Constitutional Fate* and *Constitutional Interpretation* and a very few articles in the same period, for the past 20 years or so, Bobbitt has abandoned this field. Perhaps Bobbitt has had a change of heart. But if not, because the claims are so controversial and because they rely on philosophical claims that are themselves controversial, the defense of Bobbitt's claims probably requires further effort. It is also possible that there is a sociological dimension to Bobbitt's failure, but that is beyond the scope of this Article.

284. See DWORKIN, ROBES, *supra* note 2, at 37–39.

285. See generally DWORKIN, *EMPIRE*, *supra* note 29.

286. See, e.g., DWORKIN, ROBES, *supra* note 2, at 36–41; see also Dworkin, *Arduous*, *supra* note 86, at 1253–54. As Dworkin criticizes Rorty's anti-foundationalist rejection of correspondence with an external world, he implicitly commits to the contrary view that the concept to an external world does meaningful work for us and that just the correspondence notion of truth that Rorty rejects is also accurate. Moreover, Dworkin asserts a similar realist position with respect to morality. He believes that there are atemporal moral truths about the world, not just temporal consensus from time to time

Dworkin's more traditional position becomes clearest in his criticism of Richard Rorty,<sup>287</sup> but the criticisms themselves apply equally to anti-foundationalists like Bobbitt and Patterson.<sup>288</sup> Dworkin challenges modern pragmatism and selects Rorty as pragmatism's leading proponent. Dworkin's attention to this admittedly "abstract philosophical" debate<sup>289</sup> highlights the apparent implications of his ontological and other philosophical commitments. Dworkin makes two principal arguments. The first attacks the pragmatic, anti-representationalist position in its starkest form. The second attempts to block a potential rehabilitation of that theory. While Dworkin directs these criticisms against Rorty, they are also applicable to the anti-representational, anti-foundational account of constitutional law that Bobbitt defends.

Dworkin begins by attributing to Rorty the position that we must abandon the view that any legal, moral, or scientific inquiry is an attempt to discover what is really there.<sup>290</sup> Instead, inquiry is experimental and pragmatic; it is an effort to discover what works, and what we collectively conclude works.<sup>291</sup> Indeed, although Dworkin does not here make reference to it, this deflationist account is accompanied for Rorty by a denial of classical concepts of truth.<sup>292</sup> Acknowledging that this theory appears novel and exciting, Dworkin nevertheless asserts that it is "philosophically a dog's dinner."<sup>293</sup> Dworkin appears to believe that as a pragmatist, Rorty is simply a garden variety skeptic, no more worthy of

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about moral truth. Thus, Dworkin's Right Answer thesis appears ultimately to be a realist claim about the world, and not just about us.

287. See DWORKIN, ROBES, *supra* note 2, at 36–40. Here, I will use Dworkin's criticism of Rorty as a proxy for his likely disagreement with Bobbitt because the two have not engaged directly. This may overstate the force of the realist defense. Some who reject representational theories of the truth of propositions of law do so on the basis of a distinction between natural and social facts. See Patterson, *Social Fact*, *supra* note 101, at 583–84. This distinction creates the possibility that Dworkin's realism is true with respect to the natural world, yet false with respect to the social world.

288. See, e.g., BOBBITT, INTERPRETATION, *supra* note 2, at xix–xx n.1; PATTERSON, TRUTH, *supra* note 11, at 179. In particular, Dworkin's defense of a correspondence theory of truth and his rejection of the anti-foundational account of our discourse as incoherent would apply equally to Bobbitt and Patterson.

289. DWORKIN, ROBES, *supra* note 2, at 36.

290. *Id.* at 37 ("Rorty says that we must give up the idea that legal or moral or even scientific inquiry is an attempt to discover what is really so, what the law really is, what texts really mean, which institutions are really just, or what the universe is really like.").

291. *Id.*

292. See, e.g., RICHARD RORTY & PASCAL ENGEL, WHAT'S THE USE OF TRUTH? (2007). In one of his last statements of his views on truth, Rorty explains why and how he thinks we can and should dispense with the philosophical and foundational use of truth-talk.

293. DWORKIN, ROBES, *supra* note 2, at 37 (citing a secondhand description of a critique by Hilary Putnam).

current respect than Descartes' demon<sup>294</sup> or David Hume.<sup>295</sup> Dworkin brings this point home with his example of our discourse about the height of Mount Everest. Surely, Dworkin implies, we must recognize that the mountain is out there and is not merely a construct of how we get about or how we talk about mountain-sense-data.<sup>296</sup> Thus, Dworkin offers a linguistic variation of Samuel Johnston's kick.<sup>297</sup>

Dworkin asserts that Rorty's views are incoherent.<sup>298</sup> He attributes to Rorty the view that our claims to represent the world are mistaken, i.e. that our propositions about the world and our propositions about our propositions about the world are mistaken. In Dworkin's view, if there is no way of telling whether there is a world out there, then there is no way of denying that the goal of inquiry is to describe the world out there.<sup>299</sup> There can be no way to disavow the statements about the world because we have no "view from nowhere" from which to make the denial. In his restatement of Rorty's argument, Dworkin first appears to restate ordinary understanding: we think wars are or are not unjust and that judicial opinions are or are not correct.<sup>300</sup> These intuitions, reflected and instantiated in our language, according to Dworkin, make our language more useful to us, and we would be nearly lost were we to abandon it. According to Dworkin, Rorty would have us abandon our talk of what is out there.<sup>301</sup> Although Dworkin asserts that our commitment to these views, freighted with ontological commitments, is of critical importance

294. See DESCARTES, *supra* note 14, at 144–49 (describing radical Cartesian doubt that our entire experience and understanding of the world is mistaken, induced in us by a powerful evil demon).

295. See DAVID HUME, AN INQUIRY CONCERNING HUMAN UNDERSTANDING § 4 (Charles W. Hendel ed., Bobbs-Merrill Co. 8th prtg. 1955) (1748).

296. See DWORKIN, ROBES, *supra* note 2, at 40 ("Given how we go on, the height of the mountain is not determined by how we go on but by masses of earth and stone."). Rorty might restate this description as: "Given how we go on, we go on as if the height of the mountain is determined by masses of earth and stone." Dworkin needs to give some practical significance to the different formulations if he is to cast doubt on Rorty's claim that there is no such significance.

297. See Hallett, *supra* note 61 (exploring Johnson's purported refutation of Berkeley's idealism with a physical act).

298. See DWORKIN, ROBES, *supra* note 2, at 37.

299. *Id.* This criticism relies expressly on Williams's own critique of Rorty. Williams has himself criticized Rorty's view of truth and inquiry on just this basis. See also BERNARD A. O. WILLIAMS, TRUTH AND TRUTHFULNESS 58–59, 128–31 (2002); Williams, *supra* note 7.

300. DWORKIN, ROBES, *supra* note 2, at 37–38. Although Dworkin states these judgments in casual, vernacular terms, appealing to the moral intuitions of his moral community, he implicitly rejects a relativistic view that such judgments are local, rather than universal. Absent such implicit moral absolutism, the strong sense in which Dworkin endorses such judgments—and the contrast with the relativist Rorty—would be lost.

301. See Dworkin, *Objectivity*, *supra* note 2, at 95–97.

to us, he never explains why.<sup>302</sup> Dworkin believes that Rorty either rejects these claims or commits to them in a way that is manifestly untenable.

Dworkin offers an anticipatory rebuttal of a rehabilitation of the anti-representationalist view. In this argument, Dworkin relies heavily on a view of language that he advances only tacitly and never defends expressly.<sup>303</sup> It is necessary, therefore, to begin by articulating that theory. Dworkin anticipates that Rorty will argue that Dworkin misunderstands the levels at which we speak.<sup>304</sup> Further, Rorty implicitly distinguishes commonsense speech and philosophical speech, allowing the latter to stand and only rejecting the claims of the former in its account of representation and the ontological commitments that it makes.<sup>305</sup> Dworkin acknowledges that our practices carry realist ontological commitments, but he endorses those claims.<sup>306</sup> He argues that an attempt to employ a distinction between ordinary and philosophical discourse in order to rehabilitate Rorty's pragmatism fails because the attempt to distinguish the ontological commitments of ordinary language and those of the philosopher cannot succeed.<sup>307</sup>

Dworkin's model of language makes two critical assumptions. First, Dworkin assimilates all linguistic expressions and usages to a single model.<sup>308</sup> That is a model in which meanings exist and are given by the use, broadly defined, of the linguistic expressions.<sup>309</sup> On this account, philosophical propositions claim their legitimacy from their philosophical use. Second, Dworkin discounts the role of metaphor in our thinking and language.<sup>310</sup> Metaphor for Dworkin is largely a murky technique for masking problems and blocking analysis.<sup>311</sup> This theory of language figures prominently in Dworkin's criticism of Rorty. For example, with respect to philosophical language Dworkin asserts:

Language can only take its sense from the social events, expectations, and forms in which it figures, a fact summarized in the rough but familiar slogan that the key to meaning is use. That is true not only of

302. See DWORKIN, ROBES, *supra* note 2, at 37.

303. See DWORKIN, ROBES, *supra* note 2, at 38-40; R.M. DWORKIN, *Introduction*, in THE PHILOSOPHY OF LAW 5 (R.M. Dworkin ed., 1977); Dworkin, *Objectivity*, *supra* note 2, at 95-96.

304. See DWORKIN, ROBES, *supra* note 2, at 38-41.

305. See *id.*

306. See *id.* at 37-38 (attributing ontological commitments to realism in our science talk, ethics talk, and law talk).

307. See *id.* at 38-39.

308. See *id.* at 39.

309. See DWORKIN, ROBES, *supra* note 2, at 39.

310. See *id.* at 40-41.

311. *Id.* at 41.

the ordinary, working part of our language, but of all of it, the philosophical as well as the mundane.<sup>312</sup>

Dworkin is similarly confident about metaphor: “[I]f the pragmatist explained his heated metaphors, he would have to fall back on the mundane language of ordinary life, and then he would not, after all, have distinguished the bad philosophers from the ordinary lawyer or scientist or person of conviction.”<sup>313</sup> Dworkin appears to take this view of language as self-evident, but that confidence is misplaced.<sup>314</sup>

The grounding of meanings in practices, however, according to Dworkin, entails that there is no philosophical context in which ontological commitments arise distinct from those of ordinary language. Dworkin has thus attributed to Rorty what is ultimately a skeptical position: that we cannot speak of truth or of our representations of the world as mirroring the world because we cannot know that world. It is most natural to characterize this error as epistemological: Rorty, according to Dworkin, has succumbed to Cartesian skepticism.

Putnam frames his related criticism of Rorty a little differently. For Putnam, Rorty’s error is relativism, not skepticism.<sup>315</sup> The best argument that Rorty is a relativist or skeptic is that he is compelled into that position by his rejection of an account of the relationship between our knowledge and language and the external world.<sup>316</sup> For the realist, the only alternative is a sterile skepticism. But this move is not available to Putnam, who also eschews realism in its classic forms.<sup>317</sup> So how does Putnam tag Rorty as a relativist? He argues that Rorty’s emphasis of the claim that there is no truth but only better or worse ways of thinking and speaking, as viewed by a consensus of our historical cultural peers, commits Rorty to relativism. Rorty’s privileging of the views of our peers, Putnam suggests, must be disconnected from, and is incompatible

312. *Id.* at 39.

313. *Id.* at 41.

314. Dworkin’s theory is unnecessarily Tractarian. The Wittgenstein Dworkin looks to would be the one reflected in Wittgenstein’s early works, like the *Tractatus Logico-Philosophicus*, not the Wittgenstein of the *Philosophical Investigations*. Without express defense, Dworkin appears to reject or discount the concerns about philosophical discourse and its linguistic pathologies that the latter Wittgenstein explored so provocatively and, for many, persuasively. Dworkin claims a far more *au courant* philosophy of language grounding his jurisprudence, but his foundationalism and moral absolutism belie that claim.

315. See PUTNAM, REALISM, *supra* note 18, at 24–25 (“I think, in short, that the attempt to say that *from a God’s-Eye View there is no God’s-Eye view* is still there, under all that wrapping.”).

316. See *id.* at 21, 24–25 (appealing to the existence of a “fact of the matter” to highlight Rorty’s alleged relativism).

317. *Id.* at 26–28.

with, any non-relativist theory of what is better or worse, and thus Rorty finds himself trapped in relativism.<sup>318</sup> Rorty rejects this argument, too.<sup>319</sup>

Rorty denies that our language pictures or mirrors the world.<sup>320</sup> Rorty would likely answer Dworkin's claim that his account fails to do justice to the ontological status of the mountain by pointing out that our mountain talk cannot be imagined or understood without the context of what we are, who we are, what we value, and how we live. In a very important sense, it is not about the mountain. Rorty addressed just this objection directly:

Searle sometimes writes as if philosophers who, like myself, do not believe in "mind-independent reality" must deny that there were mountains before people had the idea of "mountain" in their minds or the word "mountain" in their language. But nobody denies that . . . . What . . . I believe is that it is pointless to ask whether there really are mountains or whether it is merely convenient for us to talk about mountains.<sup>321</sup>

Rorty amplifies this point by noting that the ways in which it is convenient to talk about mountains also commits us to the view that the mountains were there before us.<sup>322</sup> To put the matter another way, Rorty would concede that the world acts upon us as it does upon the bar-headed geese flying around Mount Everest as they migrate through the

318. Putnam writes:

[Rorty's] concept of 'coping better' is not the concept of there being *better* and *worse* norms and standards at all. Just as it is internal to our picture of warrant that warrant is logically independent of the opinion of the majority of our cultural peers, so it is internal to our picture of 'reform' that whether the outcome of a change is good (reform) or bad (the opposite) is logically independent of whether it *seems* good or bad.

*Id.* at 24.

319. RORTY, *Menace*, *supra* note 112, at 49.

320. That narrative of epistemology and discourse, after all, is so central to Rorty's philosophy, that it is how the thesis of Rorty's *Philosophy and the Mirror of Nature* might be summarized.

321. 3 RICHARD. RORTY, *John Searle on Realism and Relativism*, in PHILOSOPHICAL PAPERS: TRUTH AND PROGRESS 63, 72 (1998) [hereinafter RORTY, *Searle*]. Robert Brandom probably does the job of answering this objection. See also ROBERT B. BRANDOM, *Vocabularies of Pragmatism: Synthesizing Naturalism and Historicism*, in PERSPECTIVES ON PRAGMATISM: CLASSICAL, RECENT AND CONTEMPORARY 116, 125-27 (2011).

322. See RORTY, *Searle*, *supra* note 321, at 72. Rorty argues that our use of language assume and employ all of the usual features of mountains. All he denies is that it is helpful or fruitful to purport to ask questions about the reality that corresponds to such claims. Whether there is such a reality, or whether we have only our talk, is a distinction that Rorty thinks is without a difference. See also RORTY & ENGEL, *supra* note 292.

Himalayas.<sup>323</sup> But that causal action is not translatable into linguistic constraints through accounts of better or more accurate representation. For Rorty, our language is only another stimulus response not fundamentally dissimilar to the non-linguistic navigational techniques of the geese. This helps explain the great difference between Dworkin and Rorty on metaphor. Metaphor, for Rorty, is an important linguistic technique, precisely because it offers us the potential for redescription.<sup>324</sup> That redescription offers us new ways to construct narratives and other accounts about ourselves and others. It does not matter that the metaphor is not “literally true” because that reproach is one that Rorty disavows.<sup>325</sup>

Does such a perspective on language and the world commit Rorty to relativism as Putnam suggests and Dworkin asserts? Rorty does not claim that we can assess the utility or pragmatic value of claims or propositions *relatively*. Within a time-instantiated community there are theories and interpretations that are judged better or worse than others; in some cases, one may be best.<sup>326</sup> Moreover, such judgments are not always static; some of the community’s views on such questions evolve over time. For example, the general theory of relativity explains light, gravity, and motion better than Newtonian physics. In constitutional law there is virtual unanimity in the community that *Brown* is a better interpretation of the Fourteenth Amendment than *Plessy*. There is no implicit relativity in these judgments, although there may be a tacit acknowledgment that the community may find yet a better theory or interpretation.<sup>327</sup> That makes Rorty a relativist or an anti-realist only if one believes that there is a perspective available to us today that makes other judgments meaningful or possible. That is one of the things I understand Rorty to deny. So it appears that Dworkin largely misunderstands Rorty when he suggests that Rorty would deny that our true propositions in a given language represent the world accurately or

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323. Thus, Rorty writes: “One way of formulating the pragmatist position is to say that the pragmatist recognizes relations of *justification* holding between beliefs and desires, and relations of *causation* holding between these beliefs and desires and other items in the universe, but no relations of *representation*.” 1 RICHARD RORTY, *Inquiry as Recontextualization*, in PHILOSOPHICAL PAPERS: OBJECTIVITY, RELATIVISM, AND TRUTH 93, 97 (1991).

324. See *id.* at 94–95.

325. Rorty rejects the model of representation. See RORTY, MIRROR, *supra* note 10, at 3, 6, 9.

326. I intend agnosticism as to whether constitutional questions have a right answer as Dworkin claims. See DWORKIN, *Hard Cases*, *supra* note 250.

327. Of course, the grounds on which constitutional interpretations may evolve varies among the different positions in the debate over originalism, with originalists generally limiting the sources of flux more severely than their critics. See generally André LeDuc, Originalism’s Implications, Part II.C (Sept. 14, 2011) (unpublished manuscript) (on file with author).



truthfully.<sup>328</sup> If this defense works, then Dworkin's challenge to the anti-foundational, anti-representational narrative fails for want of its own Archimedean point from which to establish a relativist characterization.

But Dworkin is not the only critic of Rorty's anti-foundationalism and anti-representationalism.<sup>329</sup> Alvin Goldman, one of the more thoughtful, if ferocious, critics, articulates three principal arguments against Rorty's claims.<sup>330</sup> Goldman's first argument is similar to Dworkin's argument from the existence of mountains.<sup>331</sup> But Goldman makes the argument somewhat more effectively with the example of an undersea range, which he claims would exist without regard to whether anyone ever discovered it.<sup>332</sup> Moreover, Goldman makes the argument against the social construction of truth more expressly and in more variety than Dworkin. In particular, Goldman makes two additional arguments against the social construction argument for Rorty's anti-representational account.<sup>333</sup> First, he argues that a sociological account can never capture the concept of knowledge within a community.<sup>334</sup> A sociological account of human actors' behavior, without reference to physical scientific concepts, cannot provide the same level of causal explanation possible with such entities and scientific theory.<sup>335</sup> Second, Goldman argues that an account of knowledge that reduces knowledge to the practice of a community generates an infinite regress.<sup>336</sup> For each truth constituted by a community consensus there must be another truth that such consensus exists.

Second, Goldman attacks the argument against representationalism that all accounts of the world are dependent upon language.<sup>337</sup> Third,

328. See DWORKIN, ROBES, *supra* note 2, at 38–40; cf. Rorty, *Menace*, *supra* note 112, at 49 (making very clear that Rorty denies not the assumptions about the nature of mountains inherent in our ordinary mountain-talk, but the usefulness of adding a philosophical gloss that explores the essence of mountains, or the correspondence—or lack thereof—of our mountain-talk with the external world). Dworkin never engages with Rorty on why he might believe such philosophical talk is useful. DWORKIN, ROBES, *supra* note 2, at 38–40.

329. Indeed, Robert Brandom, a former student of Rorty and a pragmatist very sympathetic to Rorty's project, characterized many in analytic philosophy as finding Rorty's magnum opus, *Philosophy and the Mirror of Nature* "off-putting and even alarming." Brandom, *Anti-Representationalism*, *supra* note 18, at 190.

330. See GOLDMAN, KNOWLEDGE, *supra* note 7, at 10–22, 26–33.

331. See DWORKIN, ROBES, *supra* note 2, at 40; GOLDMAN, KNOWLEDGE, *supra* note 7, at 12.

332. GOLDMAN, KNOWLEDGE, *supra* note 7, at 12.

333. *Id.* at 10–17.

334. *Id.* at 14–15.

335. *Id.* Note that this argument from scientific knowledge would not appear applicable in the context of social facts and our practices with respect thereto.

336. *Id.* at 16–17.

337. GOLDMAN, KNOWLEDGE, *supra* note 7, at 17–22.

and finally, Goldman argues that the denial of epistemic privilege offered by Rorty misses the mark because it challenges only infallibilist theories.<sup>338</sup> Goldman notes that such theories have been abandoned and replaced with fallibilist theories that rely upon accounts of warrant and justification.<sup>339</sup> Believing that we now have an account of knowledge that represents the world, Goldman concludes that Rorty's attack fails.<sup>340</sup> At this stage, it is helpful to consider the contemporary reply offered by Robert Brandom.<sup>341</sup> Brandom acknowledges the developments in reliabilism and the brilliance of Goldman's work.<sup>342</sup> Brandom nevertheless rejects the representational account, at least in substantial measure.<sup>343</sup> Without attempting to recapitulate Brandom's argument, I offer that he rejects the account on the basis that Goldman's reliabilism doesn't deliver the naturalized epistemology and representational account of truth that Goldman promises.<sup>344</sup> That is because nothing in the world provides the conditions sufficient to permit a hypothetical observer to be recognized as reliable.

Fortunately, I do not have to score this debate here or declare a winning position. For my purpose in this Article, all that is necessary is to establish that there are grounds to doubt the traditional representational account of language, and that those grounds are particularly powerful with respect to our talk of the Constitution and the text of the Constitution. If it turns out that a representational account of the Constitution and other social facts is the best account, then the originalist debate may be revived. That is a risk I am prepared to assume in the argument that follows.

### C. *Assessing the Anti-Foundational Account of Language and Truth*

The realist attack on the anti-representational account of language and anti-foundational account of language and knowledge remains a live debate within philosophy, and it is not possible to claim that there is a

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338. *Id.* at 26–27 (suggesting that Rorty attacked a straw man because the weaknesses in such theories was “old news” in 1979, when *Philosophy and the Mirror of Nature* was published).

339. *Id.* at 27–28. Goldman's intensity is perhaps attributable, at least in part, to his own role in that evolution. See Alvin I. Goldman, *Discrimination and Perceptual Knowledge*, 73 J. PHIL. 770 (1976). The suggestion that Rorty was unaware of this work appears misplaced, however, as Rorty engaged directly with this work in his teaching at Princeton in the mid-1970's.

340. GOLDMAN, KNOWLEDGE, *supra* note 7, at 28.

341. See generally BRANDOM, ARTICULATING REASONS, *supra* note 70, at 112–17.

342. *Id.* at 113, 115 (characterizing Goldman's 1976 article as “epoch-making”).

343. See Brandom, *Anti-Representationalism*, *supra* note 18.

344. See BRANDOM, ARTICULATING REASONS, *supra* note 70, at 115–17.

manifest outcome to the ongoing philosophical debate.<sup>345</sup> For the purposes of this Article, it is enough to conclude that the anti-foundational, anti-representational account has a number of defenders and that a number of arguments can be made in its defense. The claims of such a theory are strong enough to explore its implications for the debate over originalism. Moreover, a weak version of this theory, which applies only to certain kinds of discourse relating to social facts, is sufficient to support the use of such anti-representational theory with respect to propositions of constitutional law. That version of the theory would appear immune to several of the principal arguments against the stronger, more general theory.

The anti-representational account of the language of our constitutional discourse and decision making explains why the claims of the originalists and their critics are misdirected. There is no objective Constitution to which judges may turn to find answers to the constitutional controversies with which they are confronted. The task is not a matter of being better historians so as to discover the truth of the original understanding of a constitutional provision or the original intentions or the original expectations with respect thereto. Such historical narratives are not irrelevant; they have a long standing and respected place in our constitutional arguments. It is hard to imagine that we would cease to care about such original understandings, intentions, and expectations. That might occur with the passage of time, or as the result of intervening events, however.<sup>346</sup> In some sense, we can understand the adoption of the reconstruction Amendments as reflecting just such a decisive break with the Founding Generation's views on race

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345. See, e.g., Brandom, *Anti-Representationalism*, *supra* note 18, at 190 (distinguishing local expressivism, which dispenses with representational theories of language with respect to a particular type of discourse, and global expressivism, which purports to discard a representational account with respect to all language). See generally PRICE, *supra* note 16; GOLDMAN, KNOWLEDGE, *supra* note 7, at 10–22, 26–33; McDOWELL, *supra* note 18 (characterized by Brandom as a brilliant effort to rehabilitate the concepts of experience and linguistic representation after Rorty's attack thereon); RORTY, MIRROR, *supra* note 10.

346. To see this possibility, consider the import of the Civil War with respect to the pre-Reconstruction-Amendment perspective on States' rights. As a result of the Civil War and the decisive refutation of the claim that States, having given their consent—or, more precisely, whose citizens gave consent through ratifying conventions—to join and thereby constitute the United States of America, could withdraw without the consent of the United States, the role of States' rights was forever changed, and the original understandings, expectations and intentions with respect thereto—whatever they may have been—have been eclipsed.

and slavery. Such a break might also occur as a matter of constitutional adjudication.<sup>347</sup>

On the anti-representational account of propositions of constitutional law, there is no non-trivial truth—or falsity—with respect to propositions of constitutional law. There are better and worse interpretations, and better and worse propositions of constitutional law. But the dimension on which such value is to be determined is as performative statements and as conceptual statements that figure in the space of practical reasons. That is, such propositions are to be judged on the basis of what they do, on the one hand, and on the basis of what practical reasoning supports them and what practical inferences follow from them.<sup>348</sup> Moreover, those judgments are to be made within the partially formalized practices of constitutional interpretation, application, and adjudication.

## II. THE ANTI-FOUNDATIONAL CHALLENGE AND THE END OF THE ORIGINALISM DEBATE

In this section, I will first defend the claim that when the error underlying the originalism debate is identified and abjured, the debate over originalism effectively collapses.<sup>349</sup> Second, I present and reject the potential rebuttal arguments that may be made from originalist and non-originalist positions against the end of the originalism debate.

### A. *Why the Debate Collapses*

The argument that the debate over originalism collapses in the face of the anti-foundational, anti-representational challenge makes a prescriptive, not a descriptive claim; the originalism debate, judging only by the number of participants and the volume of the contributions, is robust.<sup>350</sup> Nevertheless, once the implications of the anti-foundational, anti-representational stance are understood, the debate ought to be

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347. Bruce Ackerman famously argues that such breaks are more common than generally recognized and are not confined to constitutional amendment. See ACKERMAN, *WE THE PEOPLE*, *supra* note 75, at 49.

348. For a defense of the primacy of judgment, within the parameters of constitutional doctrine, see Fried, *On Judgment*, *supra* note 277.

349. Although Bobbitt asserts that the two sides share a fundamental, erroneous premise, he never expressly explores the implications of that claim for the originalism debate.

350. See generally, e.g., JOHN O. MCGINNIS & MICHAEL B. RAPPOPORT, *ORIGINALISM AND THE GOOD CONSTITUTION* (2013); BALKIN, *supra* note 1, at 17–20; BENNETT & SOLUM, *supra* note 219; Mitchell Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1 (2009); Lawrence B. Solum, *Semantic Originalism* (Ill. Pub. Law, Research Paper No. 07-24, 2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1120244##](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244##).

abandoned. It ought to be abandoned because defending the claims of the respective sides to privilege particular modes of constitutional argument and to delegitimize other modes of argument is a fool's errand.

The anti-foundational challenge directed against the originalism debate unfolds in two stages. First, both substantive positions are undermined by the anti-foundational stance. Second, Bobbitt and Patterson reject the model of an objective Constitution that is to be properly represented by our constitutional discourse in favor of their respective models of social practice. I will examine each line of argument in turn.

### 1. Challenging the Competing Claims of the Debate

At least four of the principal arguments offered for originalism fail without the benefit of foundational, representational premises. First, fidelity to original meanings is unnecessary to legitimate or justify judicial review because no such independent legitimization is required or possible.<sup>351</sup> According to Bobbitt, there is no problem with the legitimacy of judicial review and no need, or even any ability, to legitimate judicial review outside of our constitutional practice. Second, appeals to the original understandings are not any more neutral or otherwise properly entitled to be privileged such that they are prior to, or preferred to, the other forms of constitutional argument.<sup>352</sup> For Bobbitt, such modes of argument stand as equals in the practice of constitutional argument and decision.<sup>353</sup> Third, the semantic meaning claims made for originalism are overstated and untenable.<sup>354</sup> Bobbitt denies that semantic meanings capture the import of the constitutional text.<sup>355</sup> Fourth, the formal account of constitutional argument offered by originalism is untenable.<sup>356</sup> Bobbitt's account of the nature of constitutional argument, as we have seen, cannot be reduced to a matter of syllogism.<sup>357</sup> Thus,

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351. See BOBBITT, *INTERPRETATION*, *supra* note 2, at 33–34 (citing Bork's claim that originalism is necessary to cabin judicial discretion in constitutional decision).

352. See BOBBITT, *FATE*, *supra* note 11, at 5–8.

353. See *id.*; BOBBITT, *INTERPRETATION*, *supra* note 2, at xiv–xv.

354. See *Solum*, *supra* note 350.

355. Bobbitt should be understood to deny the exclusive import of semantic meanings precisely because his typology of constitutional arguments permits recourse to nonsemantic elements and the use of those nonsemantic terms in the application of the constitutional provision in decision. That methodology is inconsistent with a semantic project; indeed, it goes beyond ordinary pragmatics as well.

356. See BORK, *supra* note 61, at 162–63 (describing constitutional argument as taking the form of a formal syllogism, with the major premise furnished from the constitutional text).

357. See BOBBITT, *FATE*, *supra* note 11, at 3–8.

Bobbitt denies the principal arguments made for originalism by its proponents.

The anti-foundational, anti-representational stance also undermines the positions taken by the principal critics of originalism. The account of a pluralistic practice of constitutional argument rebuts the position of all of the critics of originalism who would replace the original understandings, expectations, and intentions with another privileged form of argument. For example, Bobbitt rejects the argument Ely makes for the primacy of democracy enhancement.<sup>358</sup> He does not deny such a mode of structural and ethical argument a place; he denies it a privileged place in our constitutional discourse.<sup>359</sup> Similarly, he rejects the position taken by Cass Sunstein that the test of what works is the final test of constitutional argument.<sup>360</sup> Again, he does not deny such prudential argument a place; he only denies prudential argument a privileged place.<sup>361</sup> Bobbitt also rejects modes of argument excluded by his catalog of the permissible modes of constitutional argument. Thus, for example, he rejects Dworkin's argument that hard cases require recourse to moral arguments.<sup>362</sup> Bobbitt denies that moral arguments have a place in constitutional argument.<sup>363</sup> Bobbitt also rejects the argument made by Jefferson Powell: that appeals to the original understanding are historically flawed.<sup>364</sup> In the context of Bobbitt's modes of constitutional argument, the practice of appealing to the original understandings is accepted; it is irrelevant whether, as a historical fact, the original actors contemplated such appeals.<sup>365</sup>

But the anti-foundational, anti-representational account of the Constitution does not simply discredit the substantive positions of originalism and its critics; the effect is more fundamental. The anti-foundational position challenges the account of law and of the truth of

358. See ELY, *DEMOCRACY*, *supra* note 31, at 74–77.

359. See BOBBITT, *FATE*, *supra* note 11, at 74–92.

360. See *generally* SUNSTEIN, *supra* note 13.

361. See BOBBITT, *FATE*, *supra* note 11, at 59–73.

362. See DWORKIN, *EMPIRE*, *supra* note 29, at 254–58.

363. See BOBBITT, *FATE*, *supra* note 11, at 94–96 (distinguishing his concept of ethical argument and implicitly rejecting a place for moral argument in constitutional argument).

364. See H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 948 (1985).

365. This claim perhaps merits a precise statement in light of Bobbitt's example of Crosskey. The ultimate rejection of Crosskey's claims as to the scope of the Commerce Power would appear to reflect some importance as to the validity of the historical claims. See WILLIAM W. CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* (1953). Thus, while it does not matter whether the project of looking to original meanings was endorsed by the originalists, it does matter what the substantive original understandings, expectations, and intentions were.

propositions of constitutional law that underlies both sides of the originalist debate. It is this second step that reveals the entire originalism debate as grounded on a shared error.<sup>366</sup> That error is a representationalist account of law, in which propositions of law are true insofar as they correctly represent states of affairs in the world.<sup>367</sup> The principal debate between originalists and their critics, such as Dworkin and Tribe, is what states of affairs in the world are mirrored by true statements of constitutional law.<sup>368</sup> Bobbitt's challenge is more fundamental, suggesting that there is no such representation or correspondence and that statements of constitutional law are true only insofar as they are accepted in the practice of constitutional interpretation.<sup>369</sup>

Although it is easy enough to understand Bobbitt's claim that there are no truth conditions in the world for propositions of constitutional law, it is more difficult to understand its implications. Ordinarily, we think we know what propositions are true, and what makes such propositions true: facts about the Constitution. Anti-representationalists would deny these propositions.<sup>370</sup> But given the ongoing, intense controversy surrounding these philosophical questions, I will not attempt a resolution

366. Bobbitt asserts:

It was my conviction, expressed in *Constitutional Fate*, that what the left and the right share in this debate is a fundamental epistemological mistake. Each of these perspectives assumes that law-statements are statements about the world (like the statements of science) and thus must be verified by a correspondence with facts about the world.

BOBBITT, INTERPRETATION, *supra* note 2, at xii. It is unclear whether Bobbitt is implicitly endorsing the claim that science-statements correspond to facts about the world, or whether that view is instead within the quotational mode. Bobbitt's position on that question is likely irrelevant to my current inquiry. Bobbitt, however, explores the support for this view only very briefly with a reference to the work of Richard Rorty. *Id.* at xix–xx n.1.

367. See *id.* at xix–xx n.1. Bobbitt is not the only observer to characterize the debate over originalism as grounded on a shared error. See also PATTERSON, TRUTH, *supra* note 11, at 129, 149–50 (endorsing Bobbitt's claim that the debate over the legitimacy of judicial review is grounded on a shared philosophical error).

368. See *supra* Part I.

369. BOBBITT, INTERPRETATION, *supra* note 2, at xii, xix–xx n.1.

370. See, e.g., P.F. Strawson, *Truth*, 24 ARISTOTELIAN SOC. 129 (1950) ("Mr. Austin offers us a purified version of the correspondence version of truth . . . . The correspondence theory requires not purification but elimination."); Donald Davidson, *True to the Facts*, 66 J. PHIL. 748 (1969); DONALD DAVIDSON, *A Coherence Theory of Truth and Knowledge*, in SUBJECTIVE, INTERSUBJECTIVE, OBJECTIVE 137 (2001); Donald Davidson, *A Coherence Theory of Truth and Knowledge, Afterthoughts*, 1987, in READING RORTY 134, 134–37 (Alan R. Malachowski ed., 1990); RICHARD RORTY, *Pragmatism, Davidson and Truth*, in TRUTH AND INTERPRETATION 333, 333 (Ernest LePore ed., 1986) ("Davidson does not want to see truth identified with anything. He also does not want to view sentences as 'made true' by anything—neither knowers or speakers on the one hand nor 'the world' on the other.").

here.<sup>371</sup> Nor need we do so; it is sufficient for our purposes to acknowledge the ongoing debate and the claims made for the anti-representationalist stance. Put more expressly, propositions of constitutional law are true or false (or the equivalent of true or false) by virtue of their place in the practice of constitutional discourse. Although Bobbitt is not express on this point, there is a historicity in this definition, too.<sup>372</sup> Put somewhat formally, propositions of constitutional law are true for a community *C* at a time *T*.

Bobbitt argues that law is an activity of argument and endorsement and that the truth of propositions of constitutional law inheres only in their acceptance by the relevant constitutional communities. Bobbitt is right that originalists and their critics share a common, fundamental view of what makes these law-statements true or false: the world.<sup>373</sup> So if Bobbitt can undermine the foundation on which the disagreement is based, he can perhaps transcend the debate. Thus, Bobbitt seeks not only to discredit the originalist position but also to rebut the traditional challenges to originalism. In so doing, he sets the stage for us to move beyond the originalism debate.

Bobbitt rejects the originalist claims for the relative privilege of the originalist enterprise without rejecting the originalist forms of argument.<sup>374</sup> He believes that attention to the linguistic analysis of the constitutional text and to the historical understanding of that text are both valid and legitimate methods of constitutional argument.<sup>375</sup> He denies only that those methods stand on higher ground than the other four

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371. See generally TRUTH (Simon Blackburn & Keith Simmons eds., 1999) (collecting recent leading articles in the ongoing debate about truth within analytic philosophy).

372. Bobbitt's account must be historical because his characterization of the modes of constitutional argument is as contingent, historical modes. Thus, he believes that he is describing how constitutional arguments are made and the Constitution is applied and interpreted at a particular time. He acknowledges that those modes could change, although his account of how that might happen is not very clear. Thus he writes: "[T]here have been and I expect that there will be changes in the number and composition of the modalities." Bobbitt, *Reflections*, *supra* note 36, at 1919. Ultimately, Bobbitt's account is a post-Hegelian account of our social practices, and as such, rejects the notion of ahistorical truth or knowledge.

373. *Id.* at xix–xx n.1 ("I reject both of these positions, and indeed believe them to be unified in an unspoken expectation that meanings of legal propositions are given by the conditions that render them true or false."). Bobbitt also believes that we commit an ontological error when we reify law rather than recognizing it simply as an important human activity. *Id.* at 24.

374. Exclusive originalism argues that only the original intentions, expectations, and understandings with respect to the constitutional text are privileged as authority. Weaker forms of originalism privilege those same original intentions, expectations and understandings in weaker and more limited ways.

375. See BOBBITT, FATE, *supra* note 11, at 5–8.



methods of constitutional argument that he also identifies.<sup>376</sup> Bobbitt's account of constitutional argument trumps the originalist account as a matter of description. Constitutional argument has the complexity and richness that Bobbitt describes. Moreover, Bobbitt's account captures the not uncommon feature that the kinds of arguments that are made in constitutional cases often do not speak directly to each other. A prudential argument, for example, does not rebut a textual argument to a different conclusion or outcome. The originalists, by contrast, concede the descriptive failure of their theory on the basis that much of what passes for constitutional argument is simply illegitimate.

The originalist is committed to the view that the truth of propositions of constitutional law is determined by the correspondence of those propositions with the original understanding of one or more provisions of the Constitution. The originalist's critic, by contrast, generally believes that the truth of such propositions is determined by the correspondence of such propositions with various facts in the world.<sup>377</sup> For Tribe, the correspondence would appear to be with certain just states of the world as understood from a twentieth or twenty-first century legal liberalist perspective.<sup>378</sup> For Dworkin, the correspondence is with certain Rawls-theoretic states of justice.<sup>379</sup>

It may yet be unclear how the anti-foundational, anti-representational claims defended above relate to the debate about originalism. How do the answers to the questions whether truth exists, and whether truth consists of correspondence with the external world, relate to the resolution of the various seemingly unrelated issues joined in the debate over originalism? If the originalists are wrong about the truth conditions for propositions of constitutional law, what import will that have for the controversy? Put another way, the originalists and their

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376. *See id.*

377. The relevant facts in the world vary with the critic's theoretical stance. For Posner, for example, the correspondence would appear to be with various wealth-maximized economic descriptions of the world. *See generally* RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* (1981). More recently Posner has been taken to back off from this claim. *See* Richard Posner, *Problematics*, *supra* note 193, at 1670 (acknowledging Dworkin's criticism and characterizing his effort as doomed). *But see* GILBERT HARMAN, *Explaining Value*, in *EXPLAINING VALUE AND OTHER ESSAYS IN MORAL PHILOSOPHY* 196, 209–10 (2000) (questioning why Dworkin's argument ought to be persuasive because some moral theory explanations, like that of the double effect, are viewed as important even though they do not explain why the theory holds).

378. LAURENCE H. TRIBE, *CONSTITUTIONAL CHOICES*, at vii–ix (1985) (describing his *Constitutional Choices* as a work defending choices in substantive, value-laden constitutional commitments). Of course, if the alternative, anti-foundationalist interpretation of Tribe's position is correct, then perhaps this representationalist account is mistaken along with the foundationalist account.

379. DWORKIN, *EMPIRE*, *supra* note 29, at 405–07.

critics disagree about what the Constitution means, and they disagree about what arguments count for the meaning of a constitutional provision. So long as they continue to disagree about that, whether or not those disagreements also entail that they disagree about truth conditions, the debate would appear likely to persist. Perhaps the originalists and their critics are mistaken about the nature of truth, or the world, or the existence of leprechauns; how would correcting any of those errors eliminate the debate? Bobbitt never explains his claim that it would.<sup>380</sup>

Bobbitt's implicit argument may be that his model of multiple, unordered modes of constitutional argument obviates the implicit competing truth claims of the debate's participants. If it is neither the case that a proposition of constitutional law is true if and only if it is consistent with the original understanding, nor the case that such a proposition is true if established by Dworkin's law-as-integrity theory, for example, then the debate is radically reoriented. It has been replaced, under Bobbitt's theory, with a practice of constitutional argument that results in outcomes of varying degrees of scope and confidence and evolves over time. Debates about conformity with prior linguistic practices or understanding thus become beside the point.

Bobbitt denies the claims of originalism without endorsing the claims of its critics by disavowing the foundations of the dispute. Originalism's critics believe that the truth of propositions of constitutional law consists in those propositions corresponding to certain states of affairs in the world.<sup>381</sup> For originalists, a proposition of constitutional law is true if the expectations or semantic understandings of the Founders would have been consistent with that proposition of law or would have entailed its truth. For example, consider the following Originalist Proposition ("OP"):

The Eighth Amendment does not prohibit all capital punishment.

This statement is true if and only if the text of the Eighth Amendment, prohibiting the infliction of cruel and unusual punishments, were understood by the relevant linguistic community not to prohibit capital punishment. OP is true if and only if "cruel and unusual punishments" as used in the Eighth Amendment did not include capital punishment. This account is thus fundamentally a semantic account. It

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380. See BOBBITT, *INTERPRETATION*, *supra* note 2, at xii-xiii.

381. See, e.g., Dworkin, *Objectivity*, *supra* note 2, at 92-93, 92 ("[I]t is an objective matter—a matter of how things really are—that genocide is wrong."); DWORKIN, *ROBES*, *supra* note 2, at 37-38; see TRIBE & DORF, *READING*, *supra* note 269, at 17 (criticizing Dworkin as untrue to the Constitution).

does not ask what something is, only how the linguistic community uses the words comprising the constitutional text. Thus, the facts about the world to which the truth of the proposition of constitutional law corresponds are linguistic facts. They are therefore facts about the original actors' social practices.

Dworkin asserts that the truth value of OP is determined not by its correspondence with certain facts relating the linguistic usage and understanding of the Founders but by the nature of capital punishment. If capital punishment is not cruel and unusual, that is, if on a correct moral theory that defines what it is to be cruel, capital punishment is not cruel, then the proposition is true. The linguistic practices of the Founders are relevant, but do not stand, from Dworkin's perspective, in a position of priority to other linguistic communities. Fundamentally Dworkin's is a realist theory, and he would contrast it expressly with relativist theories.<sup>382</sup> Dworkin's theory of law as integrity is committed to the claim that there is a right answer, legally as well as morally.<sup>383</sup> But both originalism and Dworkin are committed to the view that there are facts in the world that make propositions of constitutional law true.

Dworkin is hardly alone among originalism's critics in his realism. Powell's criticism of originalism's commitment to the original understandings takes a tacit realist stance in its reliance on historical fact to rebut the originalist project.<sup>384</sup> The historical fact is adduced to rebut the originalist claim.<sup>385</sup> Similarly, Posner's criticism of originalism is predicated on the premise that there is an answer to the constitutional question being confronted, and that such an answer exists not as a matter of social practice but as a matter of reality.<sup>386</sup> For Posner, the relevant reality is not in the constitutional text as originally understood. Rather the answer arises through the application of a complex algorithm that is,

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382. See Dworkin, *Objectivity*, *supra* note 2, at 95–96 (giving the example of the existence of mountains to support his realist claims).

383. See RONALD DWORKIN, *Is There Really No Right Answer in Hard Cases?*, in *A MATTER OF PRINCIPLE* 119 (1985). Dworkin's moral realism has been criticized from a variety of perspectives. See, e.g., Brian Leiter, *The End of Empire: Dworkin and Jurisprudence in the 21<sup>st</sup> Century*, 36 *RUTGERS L.J.* 165, 175 (2004) (arguing that Dworkin's moral realism is naïve and fails to take into account metaethical thinking about moral relativism). Many might be surprised by Leiter's invocation of the importance of metaethical analysis.

384. See Powell, *supra* note 364, at 886. An alternative interpretation would be that Powell is simply demonstrating the inherent self-contradiction in the originalist project.

385. *Id.* at 886–87.

386. Posner, *Bork*, *supra* note 86, at 1380. I analyze Posner's philosophical commitments in LeDuc, *Ontological Foundations*, *supra* note 1, at notes 322–27 and accompanying text.

broadly speaking, utilitarian.<sup>387</sup> A proposition of constitutional law is true if it corresponds to social, economic, and political behavior that maximizes wealth (or optimizes some other set of social goods).<sup>388</sup>

Bobbitt, by contrast, denies that facts about the matter make propositions of constitutional law true.<sup>389</sup> Instead, assuming Bobbitt would employ truth talk, OP is true if the courts employ legitimate arguments to that conclusion and, perhaps, other constitutional commentators endorse those arguments and conclusions. Neither the originalists' original understanding nor Dworkin's moral theory is controlling. Indeed, except to the extent that a moral theory has been incorporated into a national *ethos*, it would appear not to support any constitutional legal argument in Bobbitt's world.<sup>390</sup> If the complex, linguistic claims of Bobbitt can be sustained, he has offered a novel reconstruction of the interpretive project and largely eliminated the controversy over originalism. To be right, however, it would appear that the anti-representationalist account of language and meaning would need to prevail.

## 2. The Alternative Model of the Constitution

Turning to the second line of argument against the debate, Bobbitt denies originalist arguments and methods preeminence for two principal reasons. First, Bobbitt believes that all of the identified modes of argument are equally legitimate. As a matter again of contingent, historical fact, he believes that each of the modes is reflected in established constitutional argument.<sup>391</sup> Each mode can provide the determinative argument in a particular case. None is paramount, however.<sup>392</sup> Bobbitt's description of our constitutional practice appears

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387. It is not precisely utilitarian, at least in Posner's early work, as it maximizes *wealth* rather than *utility*.

388. Posner, *Bork*, *supra* note 86, at 1380.

389. See BOBBITT, *INTERPRETATION*, *supra* note 2, at xii ("[W]hat the left and right share in this debate [over originalism] is a fundamental epistemological mistake. Each of these perspectives assumes that law-statements are statements about the world (like statements of science) and thus must be verified by a correspondence with facts about the world.").

390. That conclusion follows from Bobbitt's claim that, at present, these six modalities are exclusive and no constitutional argument may be made except within these modes. Even if moral argument is embedded in the American ethos, however, Bobbitt's ethical argument looks only to that ethos itself, not the embedded moral theory.

391. BOBBITT, *FATE*, *supra* note 11, at 6 ("This suggests that arguments are conventions, that they could be different, but that then we would be different."). It is not clear that Bobbitt intends to commit to a view of convention here that is to do any philosophical work.

392. Bobbitt links preference of particular modes to *style*. *Id.* at 8 ("It will become apparent that what is usually called the *style* of a particular judge, as well as different

accurate. Second, Bobbitt believes as a matter of the nature of the practice, there cannot be a dominant mode. The practice is the only means by which constitutional meanings are articulated and formed; those meanings have no prior or independent existence.<sup>393</sup> Thus, on Bobbitt's view, it would apparently be misguided to look for a foundation to our constitutional practices.

It follows from the claim that our constitutional law inheres in the argumentative practices of the Court with respect to the interpretation, construction, and application of the Constitution that we cannot ground those practices—which include the practice of judicial review, a central element in the process of constitutional argument—in a necessary recourse to the original understanding of the Constitution. The practice of judicial review is an element in our social practices that constitute our Constitution. It cannot, and need not, be grounded in the interpretative understanding on adoption of the Constitution or a relevant Amendment.

Skeptical critics may question Bobbitt's account. For example, if the adoption of a constitutional amendment is not controlling as to the relevant constitutional subject matter, then how does Bobbitt account for how the democratic adoption of a constitutional amendment works? More fundamentally, what is the significance of having a written Constitution? That question calls up Justice Scalia's plaintive question of why, if we are to employ such open-ended methods of constitutional interpretation and construction as the non-originalists defend, did we not just choose to write constitutional poetry?<sup>394</sup> Bobbitt would surely reply that his account of our constitutional practice presumes a written Constitution.<sup>395</sup> Thus, Bobbitt notes, perhaps somewhat cryptically:

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notions of style in particular eras, can be explained as a preference for one type of argument over others.”).

393. For Bobbitt, constitutional law is no different in this respect from the arcane statutory law of tax-free corporate reorganizations. Cf. Joseph Isenbergh, *Musings on Form and Substance in Taxation*, 49 U. CHI. L. REV. 859, 879 (1982) (“[T]here is no natural law of reverse triangular mergers.”). Notwithstanding Isenbergh, the entire corpus of the classical law of tax-free corporate reorganizations is premised on the existence of a fundamental distinction between sales of businesses and mere readjustments of a continuing corporate enterprise. See generally AMERICAN LAW INSTITUTE, FEDERAL INCOME TAX PROJECT: SUBCHAPTER C (William D. Andrews, reporter 1982). Isenbergh may be best understood as endorsing the American Law Institute's law reform challenge to that distinction between corporate sales and corporate reorganizations.

394. See SCALIA, INTERPRETATION, *supra* note 208. The written Constitution creates the basis for the textual mode of argument. And poetry is rarely performative.

395. Constitutional practice in the United Kingdom, which has no written constitution, is very different. Bobbitt's account is very much a description of the American Constitution and of our constitutional practice. This is clearest when Bobbitt discusses ethical argument, which is built upon a peculiarly and particularly American ethos.

There is no constitutional legal argument outside these modalities. Outside these forms, a proposition about the US Constitution can be a fact, or be elegant, or be amusing or even poetic, and although such assessments exist as legal statements in some possible legal world, they are not actualized in our legal world.<sup>396</sup>

Bobbitt's description of constitutional discourse, focusing on its richness, complexity, and even the inconsistent results that may be derived from the disparate modes of argument, stands as an implicit rebuke of the originalist position.<sup>397</sup> Originalists expressly deny legitimacy to a majority of the modes of constitutional argument described in *Constitutional Fate*.<sup>398</sup> Thus, the first, fundamental conflict is over the validity and legitimacy of the modes of argument other than the textual and historical. Second, even if a weaker form of originalism would permit a role for such arguments, that role is secondary to the overriding original meaning analysis. Bobbitt insists not only that there is no such hierarchy among the arguments but also that there cannot be an algorithm or principle to harmonize the theories when they conflict.<sup>399</sup>

Originalists do not dispute that alternative types of argument are made.<sup>400</sup> Precedential or doctrinal arguments are often acknowledged by certain originalists.<sup>401</sup> But to a large extent, the use of such arguments is effectively, or even expressly, characterized as illegitimate.<sup>402</sup>

396. BOBBITT, INTERPRETATION, *supra* note 2, at 22. Bobbitt claims that our modes of constitutional argument are historical and local, shaped by the history of our relevant practices within our constitutional republic. BOBBITT, FATE, *supra* note 11, at 6 (“[Constitutional] arguments are conventions . . . they could be different, but. . . then we would be different.”).

397. Equally, it rejects originalism's critics because Bobbitt's model includes historical and textual argument as dispositive modes of constitutional argument.

398. Originalists would accept the historical and textual arguments, and reject structural, prudential, doctrinal, and ethical modes of argument.

399. See BOBBITT, INTERPRETATION, *supra* note 2, at 155–62. In Bobbitt's theory such modes exist independently, without a meta-theory or meta-mode that harmonizes them, because of Bobbitt's anti-foundationalism. If such a theory existed, it would fundamentally change the practice. Instead of being an open-ended process, constitutional interpretation and decision making would be itself reduced to a foundational algorithm. That is, there would be a decision process that could provide outcomes. *Id.* at 160–62; see also *supra* notes 65–68 and accompanying text. Bobbitt rejects that possibility because of his model of constitutional law and his insistence on the role of judgment. BOBBITT, INTERPRETATION, *supra* note 2, at 161–62.

400. See generally Frank Easterbrook, *Alternatives to Originalism*, 19 HARV. J.L. & PUB. POL'Y 479, 485 (1995) (denying that such other positions offer a plausible alternative to originalism because nonoriginalist theories arrogate power to the judiciary in a manner inconsistent with the Constitution and the principles of our democratic republic).

401. See, e.g., SCALIA, INTERPRETATION, *supra* note 208, at 139–40. That argument for precedent appears grudging and prudential rather than principled.

402. See *id.*

Originalists have never responded directly to Bobbitt's argument, so it is unclear how their argument would go. One of the sources of uncertainty is the apparent willingness of originalists to employ alternative modes themselves. Justice Scalia is willing to strike down a contemporary criminal statute prescribing whipping as a punishment, even if contrary to the original understanding of the Eighth Amendment.<sup>403</sup> What type of argument would Scalia find compelling? The candidates would, in Bobbitt's universe, appear to be doctrinal or ethical; the prudential and textual would appear ineffectual and the structural argument irrelevant. Justice Scalia repeatedly asserts that a law providing for whipping would be struck down—hardly a controversial claim. Implicitly, Justice Scalia endorses that result. But he never explains how or why it would be struck down. It would appear that one or both of the ethical or doctrinal arguments are what Justice Scalia finds persuasive and authoritative. The reader is necessarily left perplexed by the unstated contrast between lashing and the death penalty for Justice Scalia. Both punishments were not infrequently imposed in colonial America—both were clearly contemplated as permissible punishments under the Bill of Rights. Yet Justice Scalia regards it as clear that one is prohibited today and equally clear that the other is not.<sup>404</sup> The death penalty's significant contemporary public support would appear to have no significance as a legal, constitutional matter for Justice Scalia.

Nevertheless, originalism responds to Bobbitt's fundamental claim that the multiple modes of constitutional argument stand without an ordering by arguing that such an approach is undemocratic and inconsistent with the supremacy of the democratic will expressed through the legislature. Bobbitt's answer is that the originalist's implicit appeal to the facts of the Constitution in the world has no currency. It is

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403. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 861 (1989). That acceptance is merely reported rather than defended or explained. Two defenses obviously unavailable to Justice Scalia are the public consensus that has evolved on the question or the moral theories that would reject such forms of punishment, because both are expressly illegitimate sources of constitutional law.

404. Originalist critics of Justice Scalia's "faint-hearted" originalism would suggest perhaps that the reconciliation lies in affirming the constitutionality of lashing and that Scalia's error consists in not maintaining the courage of his convictions. For such an approach (without, I should hasten to add, expressly endorsing lashing), see Randy Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7 (2006). It is possible the Justice Scalia would focus on the express mention of capital punishment in the Constitution (as lashing is not) to explain the difference in treatment. But it is not easy to see how that distinction should be accorded such significance in a semantic intention originalism. The mention of capital motion or the silence with respect to lashing and the stocks in a text would appear of little moment for an interpretative method looking to semantic meanings.

not that the Constitution is only what we say it is, but that the Constitution is what the legitimating practice makes it.

To defend his claims about the primacy of constitutional practice, Bobbitt compares the U.S. Constitution with the former Soviet Constitution.<sup>405</sup> He does so to emphasize the contrast between constitutional semantics and constitutional practice. It is the latter that counts, for Bobbitt. The U.S. Constitution is not more sweeping or promising in its language guaranteeing individual rights; the Soviet Constitution was bolder and broader on paper.<sup>406</sup> Rather, the U.S. Constitution is more sweeping and powerful in its practice and in the role it is accorded in the community's legal and political practice. Thus, for example, when the U.S. Supreme Court said that the taking of the Steel Mills during the Korean War was unconstitutional,<sup>407</sup> the control of the mills reverted to their rightful managers and owners.<sup>408</sup> When the Supreme Court intervened in the 2000 presidential election,<sup>409</sup> the outcome stood—without street rallies or violence, if not without objection.<sup>410</sup> It is this dimension of practice that Bobbitt finds paramount—the ability of our legitimating constitutional practice to channel and resolve fundamental disagreements.<sup>411</sup> The originalists want

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405. See also BOBBITT, *INTERPRETATION*, *supra* note 2, at xvii (referring to the Stalinist invocation of objective truth with respect to the regime's "monstrous lies").

406. See, e.g., *Constitution (Fundamental Law) of the Union of Soviet Socialist Republics, Chapter 7: The Basic Rights, Freedoms, and Duties of Citizens of the USSR*, BUCKNELL.EDU, <http://www.departments.bucknell.edu/russian/const/77cons02.html#chap07> (last visited June 24, 2014) (including Art. 41, right to rest and leisure; Art. 42, right to health care; Art. 46, right to cultural activities; Art. 47, right to artistic expression; all such rights were ostensibly guaranteed at a time of totalitarian suppression of individual freedoms well-established in the West).

407. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 589 (1952) (holding no constitutional authority existed for the President to take control of the privately-owned United States steel mills to insure continuing steel production in the face of strikes).

408. See generally DAVID MCCULLOUGH, *TRUMAN* 900–02 (1992); see also GARRY WILLS, *BOMB POWER: THE MODERN PRESIDENCY AND THE NATIONAL SECURITY STATE* 126–27 (2010) (analyzing Truman's seizure of the steel mills as a development in, and symptom of, the evolution of the Executive Branch's arrogation of unconstitutional powers in a nuclear bomb era). Wills captures the importance of this decision in highlighting the tensions incident to the rise of the national security state.

409. See generally *Bush v. Gore*, 531 U.S. 98 (2000) (reversing a state-ordered recount of ballots and finding that no recount could be constitutionally sufficient, effectively determining the outcome of the 2000 presidential election).

410. For a sample of the controversy, see generally BRUCE ACKERMAN, *BUSH V. GORE: THE QUESTION OF LEGITIMACY* (2002) (passionate, if not intemperate, discussions of the Supreme Court's role in the contested U.S. presidential election); DWORKIN, ROBES, *supra* note 2, at 94–104.

411. See generally BOBBITT, *FATE*, *supra* note 11.



to replace this practice of argument with deference to an historical text.<sup>412</sup>

It may be that the originalists were almost right. That is, the sweeping decisions of the Warren Court may have tested the limits of our constitutional fabric. Certainly, there was great stress in the South over the assault on segregation and criticism more generally of the expansion of protected speech and defendants' rights. But we do not know the answer to the implicit counterfactual conditional questions; what we do know is that the practice remains intact. We have no accepted touchstone beyond our practice to which we may turn in interpreting the Constitution and deciding constitutional cases.

To recapitulate, to the extent that the proponents of originalism believe themselves to be arguing for its exclusive role—and against a valid role for the other modes of argument—Bobbitt believes they are wrong. Although Bobbitt does not make his argument expressly, it would appear that he believes that the error in the originalist argument for exclusivity is to believe that a document can carry its own interpretive instructions and that it can be self-interpreting.<sup>413</sup> Can the originalist argument for exclusivity be rehabilitated with an interpretive canon from outside the text? Bobbitt's response is that no such interpretive canon can be any more authoritative than the existing practice of constitutional argument and interpretation. It is that existing practice of constitutional interpretational adjudication that originalism seeks to discredit and overthrow with its claims to priority and exclusivity. That argument appears to fail, to the extent Bobbitt's reduction of legitimacy to practice stands. The proponents of originalism need to explain why they are not standing in Achilles's shoes in Lewis Carroll's delightful logic fable.<sup>414</sup>

### *B. The Protagonists' Defense of the Debate*

Protagonists on both sides of the originalism debate have defended or would defend the vitality of that debate<sup>415</sup> in the face of the anti-foundational, anti-representational challenge. But that defense has been

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412. For a related criticism of the impossibility of such deference, see GOLDFORD, DEBATE, *supra* note 1, at 15 (“We—always and necessarily we—decide . . .”).

413. I have explored that originalist argument, and the reasons to doubt it, in another article. See LeDuc, *Ontological Foundations*, *supra* note 1.

414. See Lewis Carroll, *What the Tortoise Said to Achilles*, 4 MIND 278 (1895) (whimsically demonstrating that even the rules of logic cannot easily be demonstrated logically to be true); see also André LeDuc, *What Were They Thinking? Reconceptualizing the Originalism Debate*, Part II.B.1 (July 15, 2014) (unpublished manuscript) (on file with author).

415. See, e.g., BENNETT & SOLUM, *supra* note 219.

largely tacit and performative: they have simply continued the debate, without much attention to the anti-foundational, anti-representational challenge.<sup>416</sup> I will suggest the arguments that might be made to continue the debate. The most fundamental challenge comes from Dworkin, who disputes the anti-representational premise.<sup>417</sup> I have explored those arguments in the preceding sections and will not develop them further here.<sup>418</sup>

Reconstructing the various originalist responses to the anti-foundational challenge is difficult because key originalists nowhere address the anti-representational challenge.<sup>419</sup> Nevertheless, confronted with the radical anti-representational, anti-foundational challenge outlined above, the originalists must deny those claims and assert the validity of their tacit foundational and representational account. Natural law originalism offers the first response that should be considered. That response is similar to natural law's response to legal positivism. Natural law is ahistorical and noncontingent, independent of the human societies that it governs. If such a law exists, then it exists apart from our human practices and beliefs. The anti-foundationalist account of constitutional law in terms of our practices cannot describe such natural law. Natural law originalists argue that in denying the existence of such a law the anti-foundationalists are implicitly stripping much of our constitutional law talk of meaning because when we talk about such law, either to endorse a claim or to deny it, we are implicitly relying upon natural law as our touchstone. The anti-foundationalists deny that any such foundation is needed to make sense of our law talk. The natural law originalists simply reply that the only alternative to reliance upon such a foundation of natural law is an arbitrary, relativist theory that fails to capture the absolute majesty of law in its timelessness, universality, and justice. To the extent that the anti-foundational account is persuasive, natural law is only another foundational account that must be rejected.

Positive law originalism might initially appear more receptive to the anti-representational challenge. This approach argues that the

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416. *Id.* at 59.

417. See Dworkin, *Objectivity*, *supra* note 2, at 94–96. The originalists would appear to endorse a similar strategy on different, intuitive grounds. It may appear obvious that language represents the world. See, e.g., SIMON BLACKBURN, *TRUTH: A GUIDE FOR THE PERPLEXED* 153 (2005) *quoted in* Price, *supra* note 16, at 304 n.2. The model of language as representer and the mind as mirror is so well-established and dominant that its grip goes almost unremarked. *But see* RORTY, *MIRROR*, *supra* note 10. From its commonsensical stance, this is a natural first response of originalism to the anti-foundational challenge, but I am not sure that it has been previously made.

418. See discussion, *supra* Part I.B.

419. Bobbitt's works are not addressed, for example, by any of the leading originalists such as Bork, Justice Scalia, and Randy Barnett. *But see* BENNETT & SOLUM, *supra* note 219, at 58–59.

constitutional law is a matter of facts in the world, constituted by social practices, including linguistic practices, and by the attitudes toward those practices and expectations about them. So it might appear that the disagreement between the positive law originalists and the anti-representationalists is, as a matter of ontology, modest. In fact, the disagreement is fundamental. Although the originalist constitutional law is derived from social practices, originalists assert the objective nature of our resulting constitutional law; that law cannot be reduced to social practice and most certainly does not have the somewhat tentative nature of Bobbitt's argument-based practice. The error of the anti-foundationalists is in the failure to recognize, in the end, that our Constitution has an existence independent of our practices. Put another way, Bobbitt's error is in denying that law is something that we have as a result of something we do.<sup>420</sup>

For the originalists, law is something we have as a result of something that the relevant founding actors did a long time ago. The argument against Bobbitt's reductionism is never made express, unfortunately. Originalists like Judge Bork and Justice Scalia appear only to rely on common sense. The Constitution and our constitutional law are manifest and real; those in doubt about the objective and independent existence of Constitution can visit the National Archives.

Third, and finally, Larry Solum offers one of the most philosophically sophisticated defenses of the originalist position and expressly rejects the anti-foundational position.<sup>421</sup> He does so, however, by interpreting the anti-foundational account as asserting only that the existence of the status quo, which employs various forms of constitutional argument, imposes a burden of persuasion on originalism to change that status quo.<sup>422</sup> That is a profound misreading of the anti-foundational, anti-representational argument. Solum's brief discussion leaves open the question whether he has misread that argument, or whether he disagrees with it for reasons he never presents.<sup>423</sup>

Originalism's critics are equally keen to continue the debate but also offer few express arguments against the anti-foundational challenge. One exception, Brian Leiter, has challenged Bobbitt and Patterson's claim that the debate over originalism turns on flawed, shared premises

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420. See BOBBITT, *INTERPRETATION*, *supra* note 2, at 24.

421. BENNETT & SOLUM, *supra* note 219, at 58–59.

422. *Id.* at 59.

423. Solum asserts only that Bobbitt has either fallen into conceptual confusion or linguistic misunderstanding. See *id.* By that he means that Bobbitt has confused the originalist 'is' with 'should.' Although Solum does so unselfconsciously, that claim highlights the tenor of the debate over originalism that the arguments never engage. But Bobbitt understands full well that the argument from original understanding cannot be met, on its own terms, by a prudential or structural argument.

about the nature of language and truth.<sup>424</sup> It is not clear what Leiter rejects in Bobbitt's account.<sup>425</sup> Certainly one could imagine a constitutional debate about the role and legitimacy of judicial review without commitments to a representational account of language and the meaning of the Constitution. But Bobbitt is not denying that such a debate would be possible; he is only claiming that the current debate is grounded on a representational account.<sup>426</sup> I have elsewhere argued why Bobbitt is right that the protagonists in the debate are committed to a representationalist account.<sup>427</sup>

Leiter ought perhaps to be read charitably as claiming that the debate over originalism could be rehabilitated without representationalist foundations. That is a potentially important claim, because if the debate could be restated without the benefit of a foundational, representational account, much of the force of Bobbitt's claim would be lost. It would be possible to attempt to recast the debate about the role of the original understandings and expectations not as a matter of the truth of propositions about the Constitution expressed by reference to the historical fact, *vel non*, of such historical understandings or expectations, but as matter of the overall merits of an interpretation or, indeed, a particular constitutional decision.

But recasting the originalist claim in a particular case as a substantive claim as to the best outcome appears fundamentally inconsistent with originalism's claim. Thus, such a recharacterization of the originalist claim would not be a rehabilitation of our debate; it would be the construction of a very different debate and one, moreover, in which the originalists could participate only in a very different capacity. It is fundamental to our debate over originalism that it purports to be conducted within our constitutional practice, but relies upon a reified, objective Constitution.<sup>428</sup> Originalism, after all, does not propose a

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424. LEITER, *Quine*, *supra* note 19, at 139 (denying that the debate over the legitimacy of judicial review is driven by a mistaken theory of truth or that propositions of constitutional law are statements about the world).

425. See LeDuc, *Ontological Foundations*, *supra* note 1 (defending the claim that both sides in the debate over originalism share the premises that propositions of constitutional law describe the world and that such propositions of law are true if they describe that world accurately).

426. See BOBBITT, *INTERPRETATION*, *supra* note 2, at xii.

427. I have argued this claim at some length, in the absence of much defense by Bobbitt, in LeDuc, *Ontological Foundations*, *supra* note 1. The discussion here draws on that analysis.

428. See BORK, *supra* note 61, at 164 (comparing the Constitution to the Ten Commandments on a stone tablet to emphasize the unchanging nature of constitutional law).

revolution; it purports a restoration of the original Constitution.<sup>429</sup> Therein lies the fundamental tension or incoherence that Bobbitt has called out.<sup>430</sup> To the extent that our Constitution inheres in our constitutional practices, that strategy is incoherent, despite the pretense to the restoration of the Constitution.

If recasting the originalism debate in general normative terms will not work, is there another way the re-characterization might proceed? What would a non-realist originalism look like? It is difficult to construct that counterfactual world. The originalists do not want to debate outcomes with their critics.<sup>431</sup> They recognize that outcomes under originalism may be unhappy, but believe such results are not germane to the constitutional judicial decision making process.<sup>432</sup>

## CONCLUSION

Four conclusions warrant recapitulation. First, there is a compelling alternative, anti-foundational, anti-representational account of constitutional law and constitutional argument that disputes the ontology and theory of truth underlying the originalism debate—premises generally shared by originalism and by its critics. That theory denies the claim that there is a fact of the matter when we disagree about our claims about the Constitution and what it says or requires. That does not entail that there are not better and worse interpretations, better and worse decisions, better and worse applications of the Constitution and accounts thereof. There are. But the measure of excellence of a constitutional decision or a constitutional interpretation is not a matter of its truth.

Second, such an anti-foundational account of our language, world, and Constitution is controversial and, for those raised in a Cartesian, representational world, counterintuitive.<sup>433</sup> Nevertheless, for the reasons

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429. See RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2004).

430. See BOBBITT, *FATE*, *supra* note 11, at 6 (asserting that mastery of the grammar of constitutional argument must be prior to invocation of those arguments).

431. See, e.g., SCALIA, *INTERPRETATION*, *supra* note 208, at 44 (criticizing the apparent dilution of the protection of the Confrontation Clause of the Sixth Amendment in child abuse cases).

432. *But see* *Boumediene v. Bush*, 128 S. Ct. 2229, 2307 (2008) (Scalia, J., dissenting) (citing the threat to national security that the Court's decision creates as another factor arguing against that decisions).

433. The grip of the Cartesian premises has been made clear in the past several centuries. See, e.g., RORTY, *MIRROR*, *supra* note 10 (articulating and then repudiating the classical Cartesian philosophical project of understanding how our minds and our language mirror the world); RYLE, *supra* note 221 (1949) (modern challenge to the Cartesian mind-body dualism); G.W.F. HEGEL, *PHENOMENOLOGY OF SPIRIT* (A.V. Miller trans., 1977) (1807) (classical groundbreaking historicist analysis of the social nature of our knowledge); see Dworkin, *Objectivity*, *supra* note 2, at 95–97 (criticizing Rorty's

canvassed above, I think the anti-foundational, anti-representational account is more plausible than the account offered by its critics for two principal reasons. First, it better captures the nature of constitutional argument and constitutional decision. It also explains the nature of learning how to be a constitutional lawyer, which is as important as learning the that of constitutional doctrine. Second, and more importantly, the anti-representational account captures the performative element of the Constitution and constitutional argument and decision. While that performative dimension of the anti-representationalist account is not articulated expressly by Bobbitt or Patterson, it is a helpful way of restating the anti-representational account. It highlights the manifest feature of the Constitution and of judicial decisions interpreting and applying the Constitution; they are *doing* something as much as they are *saying* something. That description must include the recognition that the performatives of the Constitution also figure fundamentally in inferences about the Constitution and constitutional questions. Thus, the theory must also account for such inferential role for our Constitution talk.

The critics' arguments against this anti-representationalist account are unpersuasive. Dworkin and Goldman, among others, offer sophisticated arguments against that philosophical position, particularly as it would apply to the natural world.<sup>434</sup> But in relying on a traditional realist notion that mountains and other subjects of our talk pre-exist, and would have existed regardless of whether we had ever existed—a *fortiori* whether we had ever spoken of them<sup>435</sup>—Dworkin is vulnerable to the reply that the anti-representationalists need not deny that the physical phenomena would have occurred, only that such phenomena would not have been recognizable as what we conceptualize as such things.<sup>436</sup> Without us, there would not have been a vocabulary by which we could express the truths about such facts.<sup>437</sup> It is not enough for Dworkin to salvage the existence of facts if there are no true propositions that exist independent of us and our vocabularies expressing those truths. The realist claim must extend not just to the underlying facts but also to the

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claim that talking about whether mountains exist in an independent reality is pointless); see also *supra* Part I.B.

434. See *supra* Part I.B.

435. For a fair and pithy statement of this argument see ROBERT B. BRANDOM, *Vocabularies of Pragmatism: Synthesizing Naturalism and Historicism*, in PERSPECTIVES ON PRAGMATISM: CLASSICAL, RECENT AND CONTEMPORARY 116, 125–27 (2011) (walking back some of Rorty's more sweeping claims about the relationship of true statements and the world).

436. *Id.*; see also BRANDOM, *ARTICULATING REASONS*, *supra* note 70, at 115–17.

437. For such a recharacterization of the anti-representationalist claim, see *id.*

sentences that express truths about those facts.<sup>438</sup> Without sentences that can be true or false, the import of a realist claim about the world is of little moment.<sup>439</sup>

Third, this anti-foundational challenge has not yet figured significantly in the debate over originalism, either for the originalists or for their critics. The silence is not easy to explain. For Dworkin, a commitment to philosophical realism stands as a fundamental objection to the anti-foundational challenge.<sup>440</sup> But most of the critics expressly endorse no such realist position and their indifference to the anti-foundational arguments is pervasive.<sup>441</sup> In the case of the originalists, the even more complete indifference to the anti-foundational challenge is apparently attributable to two sources. First is the originalist hostility to modern philosophy.<sup>442</sup> That hostility may lead originalists to reject the anti-foundational challenge as freighted with a commitment to the anti-representational ontology. Second, much originalism is untheoretical and so does not easily engage directly with the more theoretical articulation of the anti-foundational challenge.<sup>443</sup> Nevertheless, it does not follow that the originalist position is neutral or unphilosophical. The originalists are also committed to a realist position,<sup>444</sup> and that realism and accompanying representational account of constitutional language and the truth of propositions of constitutional law makes the debate over originalism possible.

Fourth, and finally, this alternative, anti-foundational approach to our constitutional ontology and our theory of the truth of propositions of constitutional law offers the potential to dissolve the debate over originalism by sapping the foundations on which it is built. The anti-foundationalist challenge reveals the debate over originalism as not unlike the effort to peel an onion to find its true essence. The originalists would strip away all of the layers of non-originalist interpretation and

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438. Without such true or false sentences, the place of the world in our discourse and in our knowledge would appear problematic.

439. Leiter has also defended a realist account of constitutional laws. See BRIAN LEITER, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, in NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY 15 (2007); LEITER, *Quine*, *supra* note 19, at 137.

440. See Dworkin, *Objectivity*, *supra* note 2, at 95–97.

441. See TRIBE & DORF, *READING*, *supra* note 269. The commitment of such critics to a realist account of the Constitution is often only implicit. See generally LeDuc, *Ontological Foundations*, *supra* note 1.

442. See SCALIA, *INTERPRETATION*, *supra* note 208, at 45; BORK, *supra* note 61, at 251–59.

443. See Randy Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 613 (“[Originalism] . . . has prevailed without ever having a definitive formulation . . . or a definitive refutation of its critics.”).

444. See LeDuc, *Ontological Foundations*, *supra* note 1.

argument; the critics would, generally, discount or deprivilege the powerful and intuitive originalist claims. In each case, as the layers are removed, no true constitutional essence is found; indeed, no constitutional law remains when the disparate modes of argument catalogued by Bobbitt are harmonized in a purified theory.

Arguments may be made that the debate over originalism can properly continue, of course, and in all likelihood it will surely do so. Some protagonists, like Dworkin, have challenged the anti-representational account itself.<sup>445</sup> Leaving aside that frontal assault, other protagonists have argued that the originalism debate makes no commitment to a foundational, representational account, and thus the challenge by Bobbitt and Patterson misses its mark.<sup>446</sup> While it might be possible to rehabilitate the debate over originalism without the representational claims and commitment to an ontologically independent Constitution on which it rests, the result would be a debate in which the two sides must address the arguments each advance on their substantive merits. Whether that is a radical restatement of our historic debate about originalism or a new debate about how to apply the Constitution may be a distinction that makes little difference.

If we transcend the methodological dispute of the debate over originalism, we do not come to an end of constitutional discourse. Rather, the constitutional discourse and debate returns to the underlying disputes about the best judicial outcomes under our constitutional practice. The protagonists in the debate over originalism disagree most fundamentally about those substantive constitutional law outcomes. Debating those substantive issues directly, rather than through the medium of originalism and the opposing theories, is both more straightforward and more likely to resolve the substantive constitutional questions on the most plausible and persuasive grounds. Finally, this seemingly philosophical approach to transcend the originalism debate may appear to privilege philosophy and philosophical argument in a manner inconsistent with a therapeutic model of philosophical analysis. While that is not so, it is a topic for another day.<sup>447</sup>

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445. See Dworkin, *Objectivity*, *supra* note 2.

446. See generally LEITER, *Quine*, *supra* note 19.

447. See LeDuc, *Relationship*, *supra* note 2.



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