Constitutional Anti-Theory

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Most constitutional theorizing aims to specify the meaning or content of the Constitution. Constitutional content, in turn, is assumed to have implications for sound constitutional decisionmaking. In this Article, I argue that the search for a general theory of constitutional content rests on a mistake. Sound constitutional decisionmaking, I argue, does not rest on a prior account of constitutional content. In defending this conclusion, I argue that sound constitutional decisionmaking is pluralistic, open-ended, and context-dependent. Those features of sound constitutional decisionmaking are at odds with any attempt to specify a general theory of constitutionality that could guide constitutional decisionmakers. On the positive view defended here, constitutional decisions are constitutional not because they arise out of some independent source that makes things constitutional, be it text, structure, precedent, or some other thing. They are constitutional because they involve practical reasons that arise within the social practice of American constitutional law.

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INTRODUCTION

One of the distinctive features of American constitutional practice is its focus on getting at the *meaning* or *content* of the Constitution. The meaning or content of the Constitution is thought to have normative implications for what legal actors—judges, advocates, police officers, and citizens—ought to do. Of course, there are different theories of constitutional content. Textualism attempts to root constitutional content in the semantic properties of the words of the constitutional document. Intent-based originalism takes the content of the Constitution to be fixed by the mental states of particular constitutional actors—for example, the Framers, the Ratifiers, or the people—at the time of the Founding. Bruce Ackerman's neo-Hamiltonian view attempts to fix the content of the Constitution in terms of the will of the people at subsequent

important moments in constitutional history.[1] Though these theories offer different accounts of constitutional content, they all share two common features. First, they attempt to provide a general theory of constitutional content grounded in nonnormative constitutional facts—for example, the text of the constitutional document or the mental states of certain persons. Second, this general theory of constitutional content is supposed to constrain or guide constitutional decisionmakers by limiting the role of exercises of personal judgment. This constraining function is thought by some to be an attractive feature of constitutional theories.[2]

In this Article, I argue that the search for a theory of constitutional content or meaning is based on a mistake. The mistake manifests itself in the common thought that our Constitution has some determinate content and that the role of judges is merely to discover that content,[3] and the related idea that if we could just unearth the content or meaning of the Constitution, we would have a commonly shared basis for constitutional decisionmaking.[4] From this standpoint, constitutional theory aims at some independent, nonnormative facts—the content or meaning of the Constitution[5]—that determine the correctness or incorrectness of constitutional decisions.[6] In what follows, I refer to all views that attempt to ground sound constitutional decisionmaking in nonnormative facts that are thought to constitute the content of the Constitution as "metaphysical views." I argue that we should resist all such views by rejecting the idea that there is any role for an account of constitutional content in sound constitutional decisionmaking. In the process, however, I also argue for a positive view of constitutional decisionmaking. On the positive view presented here, constitutional decisionmaking is just a species of practical reasoning. But it is a distinctly constitutional

1. *See generally* 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991) (proposing a model of judicial interpretation that incorporates the contributions of various generations throughout American history). I borrow the term "neo-Hamiltonian" from David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 886 (1996).

2. Consider, for instance, Justice Scalia's concern that so-called living constitutionalists lack a coherent and comprehensive theory of legal interpretation. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 14, 44–45 (1997). The idea seems to be that a theory is necessary to constrain decisionmaking. *See id*.

3. Consider Chief Justice Roberts's claim during his confirmation hearing that "[j]udges are like umpires. Umpires don't make the rules; they apply them." *Roberts: 'My Job Is to Call Balls and Strikes and Not to Pitch or Bat*,' CNN (Sept. 12, 2005, 4:58 PM), http://www.cnn.com/2005/POLITICS/09/12/roberts.statement/ [https://perma.cc/D2HC-AUQN]. I must confess that I have always found this comparison odd for the obvious reason that the decisions of umpires do not have precedential effects.

4. Sanford Levinson criticizes this sort of view, calling it "weak textualis[m]." Sanford Levinson, *Law as Literature*, 60 TEX. L. REV. 373, 380 (1982).

5. Some philosophers of language might take issue with my claim that meaning or content is a nonnormative fact. For the purposes of this Article, I have no great stake in the outcome of this debate. If meaning is normative in some sense, I should recharacterize some of the claims I make here, but the general thrust of the argument will still stand. For a good discussion, see *The Normativity of Meaning and Content*, STAN. ENCYCLOPEDIA PHIL., http://plato.stanford.edu/entries/meaning-normativity/#IntNorThe [https://perma.cc/7D5V-5HLG] (last updated Jan. 12, 2018).

6. Sanford Levinson suggests that from this perspective, constitutional theorizing looks like an attempt to imitate science. *See* Levinson, *supra* note 4, at 380.

form of reasoning insofar as it is the part of practical reasoning that relates to the contingent and evolving social practice of constitutional argumentation.[7]

Fully exposing the underlying error of metaphysical views, however, will take some effort. The arguments that follow proceed in a stepwise fashion toward that end. I first describe existing views of constitutional decisionmaking. In Part I, I start with what I term "naïve" metaphysical views. Such views treat sound constitutional decisionmaking as deriving solely from some merely descriptive account of constitutional content—for example, the semantic content of the text, or original intent. All such views, I argue, fall prey to what I call the "constitutional open question argument." What the constitutional open question argument exposes is that any sound account of constitutional decisionmaking requires a normative justification. In Part II, I consider a range of views that aim to provide a normative justification for their preferred account of constitutional decisionmaking. However, these views all share a common structure that I call the "traditional model." A normative justification—what I call the "normative basis"—justifies the theorists' preferred account of constitutional content, and this account of constitutional content grounds, at least partially, the theorists' preferred account of sound constitutional decisionmaking.

Next, I delve into some of the problems inherent in many existing views. In Part III, I consider a range of problems for most extant forms of constitutional theorizing that adopt the traditional model. Specifically, I argue that such theories do not adequately account for (1) the plurality of reasons that may justify constitutional decisions, (2) the open-ended nature of reasons that could justify constitutional decisions, and (3) three different ways in which the reasons that could justify constitutional decisions are context-dependent. In Part IV, I consider Richard Primus's view that borrows features of traditional constitutional theorizing but avoids the previously mentioned pitfalls. Primus's approach makes use of a determinate set of constitutional sources or tools—original intent, text, precedent, structure, and nonoriginalist history—but holds that which sources should govern a constitutional decision should vary based on the normatively relevant features of the context. I argue, however, that even this view does not go far enough. Primus still attempts to ground sound constitutional decisionmaking in a prior (admittedly pluralist and contextual) set of constitutional sources and, thus, problematically retains a vestige of the metaphysical view.

I then set the stage to propose a positive view of constitutional decisionmaking. In particular, in Part V, I explain how the view I defend here—that constitutional decisionmaking should be guided by context-variant constitutional reasons or

7. The view offered here has some affinity with some of Mitchell Berman's claims. *See* Mitchell N. Berman, *Constitutional Theory and the Rule of Recognition: Toward a Fourth Theory of Law*, *in* THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION 269, 283–84 (Matthew D. Adler & Kenneth Einar Himma eds., 2009). Also see Gerald J. Postema, *Classical Common Law Jurisprudence (Part I)*, 2 OXFORD U. COMMONWEALTH L.J. 155, 167 (2002), and Gerald J. Postema, *Classical Common Law Jurisprudence (Part II)*, 3 OXFORD U. COMMONWEALTH L.J. 1, 5–6 (2003), from which Berman draws inspiration.

values, unmediated by any theory—is compatible with the idea that legal decisionmaking involves rules. In Part VI, I acknowledge that American constitutional practice makes use of a certain set of traditional tools or sources—for example, text, original intent, structure, and nonoriginalist history. I attempt to explain how these tools function in American constitutional law in a way that does not implicate the metaphysical view. Specifically, I argue that we should see these tools as a kind of constitutional grammar, which is no more a device for outputting constitutional decisions than English grammar is a device for outputting English thoughts.

In Part VII, I articulate a positive view of what sound constitutional decisionmaking would look like once we reject the idea that it must rest on a prior account of constitutional content. I call this positive view "constitutional anti-theory." I also propose a general argument for why theories like the one offered here, which instruct judges to be guided by normative considerations, will be superior to metaphysical theories in any pairwise comparison. Finally, I consider and respond to what I take to be the main objection to the contextualist anti-theory presented here. According to this objection, without an account of constitutional content to ground sound constitutional decisionmaking, we will have lost any sense in which there is a distinct form of constitutional authority guiding constitutional decisions; constitutional decisionmaking will be indistinguishable from a general exercise of practical reasoning. I argue that properly understood constitutional decisionmaking is just a species of practical reasoning, but one that retains a distinctly constitutional quality because it is constrained in various ways by an admittedly evolving social practice of constitutional argument and reasoning.

I. THE (CONSTITUTIONAL) OPEN QUESTION ARGUMENT

Let us start with what we might call naïve metaphysical views of constitutional decisionmaking. Naïve metaphysical views begin with a posit about the content of constitutional law: constitutional law just is φ where φ is some descriptive fact—say, the semantic content of a text, or the intent of some person or group. Naïve metaphysical views then add what they take to be an obvious truism—judges ought to follow the law.[8] They conclude by completing the syllogism and insisting that judges ought to just apply φ. It is unclear how many authors would

8. Compare with William Baude's positivist justification for originalism in William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2394 (2015). Baude does not just stipulate that judges should follow the law, he claims that they should do so because they promised to do so. *See id.* Even granting—although I am skeptical—that Baude has shown that as a matter of positive law American law is originalist, this promissory account is unconvincing. First, at most, promises can ground a defeasible reason to follow the law. Second, one should be skeptical of the assertion that by promising to follow the law judges are bound to apply originalist principles, even if originalism turns out to be correct as a positive account of law. A plausible account of promissory morality must be grounded in reasonable expectations of the recipient of the promise. No recipient of a judicial promise could reasonably expect that a judge was committing herself to uphold originalist principles where the status of originalism is well-known to be disputed. Developing these worries about Baude's promissory account, however, would take me too far afield.

endorse a naïve metaphysical view if pressed. But some authors present their views in terms that suggest a naïve metaphysical reading, at least rhetorically, even if they would reject that view on reflection.[9] Consider, for instance, Steven Calabresi and Saikrishna Prakash's claim that "[o]riginalists do not give priority to the plain dictionary meaning of the Constitution's text because they like grammar more than history. They give priority to it because they believe that it and it alone is law."[10] Amy Coney Barret claims that "[o]riginalism rests on two basic claims. First, the meaning of constitutional text is fixed at the time of its ratification. Second, the original meaning of the text controls because 'it and it alone is law.'"[11] Nelson Lund claims that he has "always had a very simple-minded view of judicial duty in constitutional cases: Supreme Court Justices should just apply the law. . . . The Constitution is a written document that means what its words, in context, would reasonably have been understood to mean at the time it was adopted."[12] So framed, each of these views takes constitutional decisionmaking to be constrained by a metaphysical posit about the content of constitutional law.[13] Although certain originalist authors may provide the best examples of

9. For instance, Saikrishna Prakash explicitly admits that "the meaning of a communication, by itself, does not necessarily provide a compelling reason to do anything." Saikrishna B. Prakash, *The Misunderstood Relationship Between Originalism and Popular Sovereignty*, 31 HARV. J.L. & PUB. POL'Y 485, 490 (2008). Hence, for Prakash, insofar as the original public meaning of the text matters, it must be for the normative reasons that favor looking to that meaning. But then one wonders about the force of insisting that the text is the law—i.e., does that claim add anything to the thought that judges ought to look to the text?

10. Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 552 (1994).

11. Amy Coney Barret, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921, 1924 (2017) (quoting Calabresi & Prakash, *supra* note 10, at 552).

12. Nelson Lund, *Stare Decisis and Originalism: Judicial Disengagement from the Supreme Court's Errors*, 19 GEO. MASON L. REV. 1029, 1029 (2012).

13. Again, in highlighting these claims, the point is to illustrate a temptation to slip into a kind of naïve metaphysical mode of reasoning and thinking about constitutionality. I suspect that this temptation plays some role in popular understandings of constitutional decisionmaking. And this temptation has been identified by others, including some originalists, as something originalists should avoid. *See, e.g.*, Lawrence Solum, *Semantic and Normative Originalism: Comments on Brian Leiter's "Justifying Originalism,"* LEGAL THEORY BLOG (Oct. 30, 2007, 1:30 AM), https://lsolum.typepad.com/legaltheory/2007/10/semantic-and-no.html [https://perma.cc/7BF3-G2UM]. Solum first distinguishes semantic originalism—a view about the meaning of the constitutional text—from normative originalism—a view about how judges or others ought to make decisions. *See id*. He notes that:

> Many originalists seem to believe that by producing arguments for semantic originalism, they have provided a prima facie normative case. By reframing the debate, I think we can see how they made this mistake. These originalists believed that it was obvious that the correct theory of constitutional meaning entailed normative conclusions. I believe that was a mistake.

Id. Solum's point is that any view of decisionmaking requires a normative argument. *See id*. One cannot simply infer from the meaning of a text what decision should be made. I also suspect (but will not argue here) that the temptation is especially acute among originalist authors insofar as originalists have often based their view on a desire to constrain the exercise of normative judgment by judges. For discussion of originalists' focus on constraint and the tendency of some "new originalists" to partially give up on constraint, see generally William Baude, *Originalism as a Constraint on Judges*, 84 U. CHI. L. REV.

naïve metaphysicalism, there could be nonoriginalist versions as well. For instance, a doctrinalist who believes that constitutional law is wholly constituted by the semantic content of Supreme Court decisions, that a judge should just follow constitutional law and therefore should just apply those decisions, would similarly endorse a naïve metaphysical view.[14]

Naïve metaphysical views are naïve in that they involve reasoning that is incomplete. We can see why the reasoning is incomplete by looking to a version of G.E. Moore's open question argument. In section thirteen of *Principia Ethica*, Moore famously argues that we should reject all forms of moral naturalism that equate the property of goodness with some nonmoral property.[15] In rough outline, the argument proceeds as follows: moral naturalists attempt to equate moral properties—for example, goodness, rightness, etcetera—with natural properties—nonnormative properties such as wealth maximization or pleasure maximization.[16] For example, a moral naturalist may claim that for something to be morally good is for it to maximize pleasure. This would be an attempt to equate moral goodness, a normative property, with increasing pleasure, a descriptive property. Moore's objection to arguments of this kind is that for any natural or descriptive property, φ, putatively identified with the moral or normative property—goodness, say—it is perfectly sensible to ask, "I know it is φ, but is it good?"[17] To use the previous example, it is perfectly sensible for a person to ask, "I know that it increases pleasure, but is it morally good?" That this question is meaningful shows us that moral goodness cannot be analytically identical with increasing pleasure, and therefore in order to convince us that increasing pleasure is in fact morally good, we need additional normative argumentation. Moore's basic insight here is that there is a lacuna in any direct move from a descriptive judgment to a normative claim that must be filled.[18] In more contemporary terms, we might reframe Moore's observation in terms of reasons for

2213 (2017). There is an obvious tension in eschewing the exercise of normative judgment and plainly admitting that normative judgment is inescapable because originalist methods of constitutional decisionmaking themselves require a normative justification. In any case, the point of this Part is to highlight the inescapability of normative argumentation in disputes about constitutional decisionmaking. As Solum suggests, theorists would do best to take on the normative debate directly without presuming a privileged status for the semantic content of the constitutional text. *See* Solum, *supra*. For more on this point, see James E. Fleming, *Are We All Originalists Now? I Hope Not!*, 91 TEX. L. REV. 1785, 1795 (2013).

14. I borrow the term "doctrinalists" from Akhil Reed Amar, *The Supreme Court 1999 Term: Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 26–27 (2000). I do not mean to suggest, however, that everyone he classifies as a doctrinalist subscribes to a naïve metaphysical view.

15. *See* G.E. MOORE, PRINCIPIA ETHICA 67–68 (Thomas Baldwin ed., rev. ed. 1993) (1903).

16. *See id.*

17. *See id.*

18. *See id.*; *see also* DAVID HUME, A TREATISE OF HUMAN NATURE 469–70 (L.A. Selby-Bigge ed., Oxford Univ. Press 2d ed. 1978) (1738) (observing that an "ought" cannot be derived from an "is"). I prefer the open question way of framing the issue to the Humean way of framing it—as the principle that one cannot derive an ought from an is—because it avoids over-reliance on a sharp fact–value dichotomy. *See generally* HILARY PUTNAM, THE COLLAPSE OF THE FACT/VALUE DICHOTOMY (2002) (cautioning against drawing too sharp a distinction between judgments of fact and judgments of value and the related tendency to treat judgments of value as not rationally grounded). On the open question

associated actions.[19] We can say of any descriptive property, "I know it is φ, but is *that* a reason to perform an associated act, α?"[20] For the moral theorist who insists that conduciveness to pleasure just is a reason to perform an act, the open question argument illustrates that there are two judgments at play. On the one hand, there is a judgment that a fact obtains—here, that the act will increase pleasure. On the other hand, there is a judgment that this fact is a reason to perform an action.[21] It is the latter judgment—the judgment that increasing pleasure is a reason—that fills the gap.

There is an analogous problem for naïve metaphysical views of constitutionality. Insofar as a constitutional theory attempts to ground constitutional status in descriptive facts—for example, the semantic meaning of the text, original intent, popular will, or past judicial precedent—it faces what we might call the *constitutional* open question argument. As we have seen, for naïve metaphysical views the ultimate ground of constitutionality is some descriptive state of affairs or facts. But if that is all that it is for something to be constitutional, then it is hard to see how constitutionality can have normative relevance. That is, we can imagine granting that the semantic meaning of the words in the constitutional document suggests rule *x* and still reasonably ask why we ought to apply rule *x* in this case, or indeed at all.[22] The same holds for those who claim that the source of constitutionality is the will of the people: we can grant that *x* is the will of the people—whatever that means—and still sensibly ask why we ought to enact rule *x*. Why, we might ask, should we do as the people will? If we say that the source of constitutionality is the intent of some past persons, we can grant that those persons in fact endorsed rule *x*, but still sensibly ask why we ought to enact rule *x*. Once any one of these questions is asked, it is clear that it demands an answer. I do not mean to suggest that these questions could not be answered; my point is only that they must be answered if the theory of constitutionality is to have any purchase over what legal actors ought to do. Granting that a putative descriptive source of constitutionality obtains, for example, that the Founders had a particular intent, establishes nothing with regard to what, normatively speaking, anyone *ought* to do. This is an important point. It is not just that the descriptive fact provides only

framing, the point is just that a justification must be provided that explains the relevance of descriptive facts to what a person ought to do.

19. The tendency in contemporary moral philosophy to focus on reasons for action (rather than all-things-considered judgments) can, in large part, be traced to T.M. SCANLON, WHAT WE OWE TO EACH OTHER 17–78 (1998), though reasons talk had been around for some time before that.

20. For a discussion of this point in moral philosophy, see Jonathan Dancy, *Real Values in a Humean Context*, 9 RATIO 171, 172–74 (1996) (reviewing MICHAEL SMITH, THE MORAL PROBLEM (1994)).

21. For more on this point, see T.M. Scanlon's second Locke lecture, T.M. SCANLON, BEING REALISTIC ABOUT REASONS 16–52 (2014).

22. If it turned out that constitutional decisionmaking should not be limited to the semantic content of the Constitution, then it would turn out that *constitutionality*, as I am using the term, involved more than just the semantic content of the Constitution. The content of the Constitution (for example, the document) and *constitutionality* need not be coextensive. For instance, it is perfectly coherent to say that precedent affects constitutionality, regardless of whether that precedent is consistent with the semantic content of the constitutional document.

a defeasible reason that can be outweighed in the face of greater competing concerns. It is that without a supplemental justification sufficient to answer the open question argument, the descriptive facts identified by naïve metaphysical views provide no reason at all, constitutional or otherwise. Hence, naïve metaphysical views, standing alone, are nonstarters.

II. NORMATIVE BASES IN CONSTITUTIONAL THEORY AND THE TRADITIONAL MODEL

Still, most constitutional theorists, including many originalists, are not naïve metaphysicalists. They recognize that their preferred view of constitutionality requires some normative justification if it is to be relevant to constitutional decisionmaking.[23] So, most constitutional theorists attempt to provide some normative basis for their preferred view of constitutional content and constitutional decisionmaking sufficient to answer the constitutional open question argument.[24] Those who attempt to provide a normative basis for a preferred constitutional theory subscribe to what I call the traditional model of constitutional theory. Traditional models of constitutional theory share a three-part structure. First, they

23. As Mitchell Berman and Kevin Toh portray it, some "New Originalists" may be guilty of a kind of backtracking to a naïve metaphysical view. *See* Mitchell N. Berman & Kevin Toh, *On What Distinguishes New Originalism from Old: A Jurisprudential Take*, 82 FORDHAM L. REV. 545, 556–61 (2013). In their view, most new originalists are concerned primarily with providing theories of legal content, whereas old originalists were content to provide theories of adjudication—i.e., theories that vindicated certain norms for legal decisionmaking. *See id*. at 557–59, 560. Berman and Toh distinguish theories of adjudication from theories of interpretation and distinguish both of those from theories of legality. *See id*. at 552. Roughly speaking, a theory of adjudication is a theory of how a case ought to be decided, a theory of interpretation is a theory of how to get at the meaning of a text, and a theory of legality is a theory of the content of the law. *See id*. As Berman and Toh describe it, most new originalists assume that the theory of interpretation determines, at least partially, the theory of legality. *See id*. at 563. That is, the correct theory of how to interpret the constitutional document determines the content of constitutional law. *See id*. at 563–65. But this might be a mistake. As Berman and Toh explain, Larry Solum denies that it is ever the function of a theory of interpretation to determine the content of the law. *See id*. at 564. Put in terms of the interpretation–construction distinction, one could say that for standard new originalists, the meaning of the constitutional document is assumed to determine the content of law, except maybe in cases where the document is vague or otherwise does not yield a determinate meaning. There, judges must supplement the theory of interpretation—engage in construction—to get the legal effect. But for Solum, what the document means and what the law is are always conceptually separate questions. *See id*. at 564–66. Construction is not just what happens when one deals with a vague or otherwise unclear constitutional provision; it happens any time one moves from the semantic content of the Constitution to a determination of legal effect. *See* Lawrence B. Solum, *The Interpretation–Construction Distinction*, 27 CONST. COMMENT. 95, 103, 111–14 (2010).

24. *See* Richard A. Primus, *When Should Original Meanings Matter?*, 107 MICH. L. REV. 165, 172 (2008). Primus notes that although many scholars may not explicitly endorse the view that their preferred constitutional theory is grounded in normative considerations, they implicitly accept it as true, and this is "why the normal way of defending a given method of constitutional reasoning is to argue that it respects, or better yet promotes, values like democracy or the rule of law." *Id*. However, there have also been attempts to make conceptual, rather than normative arguments in favor of particular theories of constitutionality. For a discussion of originalist versions of conceptual arguments, see Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 37–68 (2009). The remainder of this Article is concerned with normative arguments for constitutional theories. I am skeptical that any conceptual argument could ground a substantive theory of constitutionality, but I do not argue for that conclusion here.

offer a normative basis. For example, a theorist may claim that a constitutional theory ought to preserve democratic authority or legal stability. Second, proponents use the normative basis to justify a theory of constitutional content, or constitutionality—for example, originalism or textualism. Third, the theory of constitutionality justifies certain legal actions taken on the part of judges or other legal actors because that theory purports to serve the normative basis that justifies it.[25] For example, an originalist might look to the history of a constitutional provision in order to discover its original public meaning. On such views, the normative basis serves to fill the lacuna in naïve metaphysical views by explaining why the theory of constitutional content justifies further actions taken by judges or other legal actors.

Justice Antonin Scalia's textualist originalism is a paradigm example of a traditional model of constitutional theorizing.[26] First, Justice Scalia identifies a normative basis—the value of preserving democratic authority.[27] Second, he argues that this normative basis is served by a textualist originalist theory of constitutionality because, in part, such theories limit the discretion of the judiciary, thereby shifting power from the judiciary to the will of the people, as manifest in the Constitution.[28] Third, Justice Scalia claims that judges ought to apply textualist originalist interpretation or construction rules when making constitutional decisions so as to vindicate the normative basis—democratic authority.[29]

Similarly, Bruce Ackerman's neo-originalist living constitutionalism also adopts the traditional model of constitutional theorizing. Ackerman takes the value of understanding the Constitution as responsive to the will of the people as the normative basis.[30] Ackerman claims that:

> In America today, the official canon is composed of the 1787 Constitution and its subsequent formal amendments. At present, however, there is a yawning gap between this official canon and the nation-centered self-understanding of the American people. . . . [I]t is past time for us to . . . build an official

25. Recent "positivist" arguments for originalism do not share this precise structure. *See, e.g.*, Baude, *supra* note 8, at 2349, 2351. Instead, they first look to social facts that constitute our legal practices. *See, e.g.*, *id.* at 2351 & n.5. They assert that these social facts constitute the law, and then they attempt to provide a justification for why a judge ought to follow the law. *See, e.g.*, *id.* Such theories will meaningfully differ from those that follow the traditional model insofar as they aim to provide a content-independent justification for why one ought to follow the law. That is, they attempt to provide a reason to follow the law that is not based on the merits of the particular features of the law, so conceived. For instance, Baude attempts to provide a promissory account of why judges ought to follow the law. *See id.* at 2394. A promissory justification would be content independent—for instance, a judge should adopt originalist principles if originalism happens to be the correct account of law and doctrinalist principles if doctrinalism happens to be correct. The views that follow the traditional model, in contrast, are justified based on the normative merits of a theory of law.

26. *See, e.g.*, SCALIA, *supra* note 2.

27. *See id.* at 9.

28. *See id.* at 41.

29. *See id.* at 42–43.

30. *See generally* 1 ACKERMAN, *supra* note 1 (proposing an expansion of the constitutional canon to include the views of multiple generations).

> constitutional canon that is adequate for use by lawyers and judges of the twenty-first century.[31]

From this he argues for a theory of constitutional content that treats the Constitution as evolving so as to incorporate the commitments of the people that arose at various moments of heightened political awareness.[32] Among these moments are the Reconstruction period and the New Deal.[33] As Ackerman puts the point, he is proposing a "narrative—in which both Reconstruction Republicans and New Deal Democrats appear as the equals of the Founding Federalists in creating new higher lawmaking processes and substantive solutions in the name of We the People of the United States."[34] Later, Ackerman argues that the Civil Rights era, too, could be thought of as one of the moments of heightened political awareness yielding constitutional change.[35] These moments of "higher lawmaking" should, according to Ackerman, figure into the practice of constitutional decisionmaking.[36] For instance, landmark statutes from the Civil Rights era, Ackerman claims, should be treated by decisionmakers as on par with other constitutional amendments.[37] So, Ackerman's theory also exhibits the three-part structure of the traditional model. There is a normative basis—the value of reflecting the will of the people. There is the theory—that the content of the Constitution includes subsequent legal decisions at subsequent moments of heightened political awareness. Finally, there is the claim that decisionmakers should treat certain landmark statutes as on par with constitutional amendments.

Barry Friedman and Scott Smith develop what they call a "sedimentary" theory of constitutionality that also fits the traditional model.[38] They begin with a normative view about the value of "fidelity" to the deepest values and commitments of the current generation as manifest throughout constitutional history.[39] This constitutional value forms the normative basis that is used to justify their preferred theory of constitutional content. According to Friedman and Smith, the Constitution is an evolved one consisting of accrued layers throughout our history, evidenced "in the decisions of the Supreme Court, in statutory law, in the actions of our governmental bodies, in the works of our forebearers, and the common practices of our people—in all of the sources that reveal the deeper commitments that we share."[40] Because the content of the Constitution is accumulated historically, Friedman and Smith advise a theory of constitutional

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31. Bruce Ackerman, *2006 Oliver Wendell Holmes Lectures: The Living Constitution*, 120 HARV. L. REV. 1737, 1750–51 (2007).

32. *See id.* at 1754, 1756–57.

33. *See id.* at 1761.

34. 1 ACKERMAN, *supra* note 1, at 58.

35. Ackerman, *supra* note 31, at 1761.

36. *See id.*

37. *See id.*

38. Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1, 33 (1998).

39. *Id.* at 6.

40. *Id.*

decisionmaking that looks to our history and traditions.[41] For instance, they cite favorably the principle articulated in *Washington v. Glucksberg*[42] that constitutional decisions should be made with reference to "those values 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"[43] As they put the point, "[t]he search for the 'history' and 'traditions' of the people is precisely the right one for constitutional interpreters."[44] Again, there is a three-part structure. Fidelity forms the normative basis, which justifies a view of constitutionality as accruing via Supreme Court decisions, statutory law, and other important governmental decisions. This supports a theory of legal decisionmaking that looks to history and traditions.

Each view that I canvass in this Part starts with a normative basis, then derives a theory of constitutional content from that normative basis. From there, the theorist derives certain constitutional implications. Each, therefore, adopts the traditional model.[45] I have selected just three constitutional theories that illustrate a common structure, but this common structure is shared by many, if not most, constitutional theories.[46]

One key observation is that for each of these theories, the theory of legal or constitutional content has some substantial implications for any sound theory of decisionmaking or adjudication. But this is not to say that the theory of content needs to be wholly determinative of a theory of decisionmaking. A theory of content might be supplemented in some circumstances by other considerations.[47]

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41. *Id*.

42. 521 U.S. 702 (1997).

43. Friedman & Smith, *supra* note 38, at 58 (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)); *see also Glucksberg*, 521 U.S. at 721 (same).

44. Friedman & Smith, *supra* note 38, at 58.

45. Admittedly, these views allow for cases where the theory breaks down. Consider, for instance, Scalia's views on stare decisis. *See* SCALIA, *supra* note 2, at 140. But these cases are seen as exceptions to the rule, which is to apply the theory of constitutional content across the board in all constitutional decisions.

46. Berman and Toh distinguish theories that aim at the content of law from theories of legal adjudication. *See* Berman & Toh, *supra* note 23, at 546. For instance, a view that the law is just the semantic content of the text is a theory of legal content. *See id*. at 552. A view that a court should look to the semantic content of the text when it is clear, but otherwise look to precedent and other values, is a theory of adjudication. *See id*. A view that adopted both of these theories would, therefore, advise using extralegal resources where the semantic content of the text was unclear. *See id*. Views that I would categorize as fitting the traditional model take the theory of adjudication to be grounded in some important way in the theory of legal content.

47. A theory of decisionmaking might differ from a theory of legal or constitutional content in one of at least four ways. First, the theory of decisionmaking allows a judge to consider extralegal resources that normatively outweigh the reasons provided by the legal status. For instance, an originalist might think that erroneously decided precedents can create reliance interests that outweigh the requirement that one follow the original understanding of the Constitution. This seems to be Justice Scalia's view, with Scalia describing himself as a potential "faint-hearted" originalist. *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 CIN. L. REV. 849, 864 (1989). Second, the theory of decisionmaking is responsive to epistemic limitations on the direct application of the theory of content. For instance, there can be cases where the meaning of a text is unclear, and hence a judge might look to precedents that interpret that meaning. In such a case, a textualist judge does not look to precedents because they constitute legal content, but because they provide guidance regarding the meaning of a text. Third, the

The point here is that views that adopt the traditional model need not be committed to thinking that sound constitutional decisionmaking is wholly determined by the associated theory of constitutional content. But all such views are committed to thinking that the theory of content cannot be normatively inert; it must at least contribute to any account of sound decisionmaking.

What the constitutional open question argument shows is that for any given theory of constitutional content that is cashed out in wholly descriptive terms, the conditions that constitute constitutional content tell us nothing, in and of themselves, about what a judge (or anyone else) ought to do.[48] It is what I call the normative basis that bridges the gap between the theory of content and a theory of decisionmaking so as to explain why the theory of content has any normative implications at all. Traditional theories can allow additional evaluative considerations to figure into their preferred view of decisionmaking over and above those that putatively justify the theory of content. But those additional values figure merely as auxiliaries to the theory of content. The theory of content is the main determinant of sound constitutional decisionmaking.

So, theories that adopt what I call the traditional model avoid the pitfall presented by the constitutional open question argument by providing a normative principle—the normative basis—that explains why the theory of content has implications for how judges or other legal practitioners ought to act. However, once one accepts that some normative basis is required for any sound theory of constitutionality, a different set of problems arises for most extant theories of constitutional content. I address those problems in the next Part.

III. SOME ADDITIONAL PROBLEMS FOR CONSTITUTIONAL THEORIZING: THE PLURALITY AND CONTEXT-VARIANCE OF VALUES AND REASONS

In this Part, I raise several additional considerations that, I argue, any account of constitutional decisionmaking must address. Further, I argue that theories that follow the traditional model are ill-equipped to accommodate all of them. First, any sound theory of constitutionality must accommodate the plurality of values or reasons—the normative bases—that might justify a theory of constitutional

theory of decisionmaking may, in recognition of the institutional limitations of the courts, allow for decisionmaking procedures that either under- or over-enforce underlying constitutional norms. *See generally* Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1 (2004). Berman suggests, for instance, that tiers of scrutiny in the equal protection context may function as rules of this sort, especially for originalists. *See id*. at 79–82, 80 n.253. The idea here is that there is no sense in which tiers of scrutiny are part of the original understanding of the Equal Protection Clause. Rather, they are a tool for helping courts decide cases by establishing certain presumptions regarding constitutionality and unconstitutionality. Finally, the theory of decisionmaking may accommodate the fact that the theory of legal content simply does not provide an answer in some contexts. For instance, a textualist might conclude that some text is objectively ambiguous and hence resort to extralegal resources to decide a case.

48. In contrast, a view that endorses a normative theory of legal content—for example, that the law is just what a judge has most reason to do—will not face the open question argument. After all, the utterance "I know this is what I have most reason to do, but what reason is there for me to do it" (as asked by a judge under the hypothesized theory) borders on nonsensical.

content. This plurality of values will present a problem for some constitutional theories that pick a single value, or even a narrowly constrained set of values, to justify the theory. To such theorists, one wants to ask: why those values and not others? Still, this sort of worry could be accommodated by adopting a hierarchical pluralist constitutional theory that provides a lexical ordering of the normative bases and associated decision procedures. Second, both the traditional model and the hierarchical pluralist model are unable to account for the fact that the set of values that do and ought to figure into constitutional decisionmaking is not a closed one. Third, the traditional model and the hierarchical pluralist model cannot accommodate the three kinds of context dependence that bear on sound constitutional decisionmaking.[49] The three kinds of context dependence are as follows: (A) There is context dependence relating to the instrumental fit between the normative basis and the theory of content. Sometimes the theory of content will serve its putative normative basis; sometimes it won't.[50] (B) There is context dependence about the normative relevance of the putative normative basis. Sometimes a putative normative basis is reason-giving, sometimes it is not. (C) There is context dependence about who the theory of constitutionality or its associated theory of decisionmaking should apply to. A sound account of constitutional decisionmaking will exhibit a kind of agent relativity—the reasons relevant to a decision will vary based on the actor's social role. Agent relativity is hard to square with the view that constitutional decisionmaking should be driven by an account of constitutional content, whatever that looks like. These considerations form the basis of the positive view of constitutional decisionmaking that I develop in subsequent sections.

A. THE PLURALITY OF CONSTITUTIONAL VALUES AND CONSTITUTIONAL REASONS

As we have seen, different constitutional theories are justified in terms of different normative bases. But the traditional views canvassed so far tend to focus either on a single value or a narrow set of related values.[51] This may strike some as odd. After all, amongst the values that are recognized in American constitutional practice are considerations of stability and rule of law; democratic

49. By "context dependence," I mean to capture the idea that how normative considerations should contribute to an all-things-considered judgment about what ought to be done resists capture in highly abstract principles and seems to vary based on the context-specific details of the decision.

50. *See* Primus, *supra* note 24, at 175–76.

51. There is no reason, in principle, why there could not be multiple value bases that all point in the same direction so as to support a particular theory. The problem is that once one attempts to justify a theory of constitutional content in terms of multiple divergent values, it becomes unlikely that all those values will univocally support a single theory. Larry Solum argues that judges should accept originalist methods of decisionmaking because those methods best serve two clusters of closely related values that he categorizes under the headings "rule of law" and "legitimacy." *See generally* Lawrence B. Solum, The Constraint Principle: Original Meaning and Constitutional Practice (Apr. 13, 2018) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2940215 [https://perma.cc/VN4R-8HHN]. But broadening the normative bases to include multiple values leads to the result—one that Solum admits—that with regard to some of the identified values, arguably certain nonoriginalist theories do better.

authority; and a host of substantive political and moral values that are part of our constitutional tradition, including equality of citizens, principles of nondiscrimination, liberal values such as freedom of speech and religion, limits on the consolidation of power, and federalism.[52] Given that all of these values or norms form part of our constitutional system and have a legitimate role to play in sound constitutional decisionmaking, it seems odd to adopt a theory of constitutionality that focuses on just one value, or one set of related values, to the exclusion of the others. For instance, it seems odd to pick democratic authority from this list and adopt a theory of constitutional content that vindicates democratic authority to the exclusion of the other values that are equally acknowledged to be part of our constitutional system.[53] Because each version of the traditional model that we have considered thus far focuses on a single set of values or a narrow range of related values and excludes the others, each model seems ill-suited to capture our actual legal practice, which recognizes that the relevant values are plural and not always in harmony.

B. HIERARCHICAL PLURALIST THEORIES OF CONSTITUTIONALITY

The recognition that there are a plurality of norms and values that figure into our constitutional system might suggest that what we need is a pluralist constitutional theory—one that could accommodate the plurality of norms. Larry Alexander argues that any pluralist constitutional theory will be unable to accommodate a plurality of norms or values without providing some hierarchical or lexical ordering of them.[54] Similarly, in his early works, Richard Fallon argued that where different modes of legal argument—for example, text, historical intent,

52. And plausibly, this is not close to an exhaustive list.

53. For more discussion of the plurality of constitutional values and how those values figure into theories of legal content, see Mitchell N. Berman & Kevin Toh, *Pluralistic Nonoriginalism and the Combinability Problem*, 91 TEX. L. REV. 1739, 1751–52 (2013).

54. *See* Larry Alexander, *The Banality of Legal Reasoning*, 73 NOTRE DAME L. REV. 517, 521 (1998). As he sees it, the problem is that without a lexical or hierarchical ordering of the relevant constitutional norms, there is no rationally defensible way to make a decision that combines the plurality of apparently incommensurable considerations:

> No one—not even lawyers—can meaningfully "combine" fact and value, or facts of different types, except lexically in the manner I described above. Any non-lexical "combining" of text and intentions, text and justice, and so forth is just incoherent, like combining *pi*, green, and the Civil War. There is no process of reasoning that can derive meaning from such combinations.

Id. Alexander's concern may not be with the combination of different values—i.e., normative bases—but with the supposed balancing or weighing of apparently incommensurable descriptive features—semantic content or historical facts, say—with normative considerations such as the value of legal stability and the rule of law. But if that is his concern, then his focus on incommensurability is arguably misplaced. The problem is not with the weighing of merely descriptive considerations with normative ones. The problem is that the merely descriptive considerations cannot plausibly figure into any such weighing. Indeed, the point of the open question argument is that these merely descriptive features are normatively inert absent some normative basis that vindicates them. What are weighed, then, are merely the various normative considerations that putatively justify the use of some descriptive features in decisionmaking. Text is not weighed against justice, but rather considerations that justify looking to the text—rule of law, say—are weighed against justice. It is important to distinguish the normative bases

structure or theory, precedent, and value—cannot be made to cohere, legal decisionmakers should privilege some of those modes over others in accordance with a hierarchical ranking.[55] I call such lexical theories "hierarchical pluralist theories." A hierarchical pluralist theory combines two or more normative bases and their associated theories of constitutional content and then formulates a set of hierarchical rules that tell us when we should use one theory and when we should use another. Such theories attempt to specify the conditions under which one should look, say, to the text, to the history, to the purpose, to the structure, or to precedents. Such a view might seem attractive because it better accommodates a plurality of recognized constitutional values but also keeps the constraining and guiding function of what I have called traditional constitutional theories.

It is worth noting what would be required for a hierarchical pluralist theory to be up to the task of vindicating the full range of constitutional value bases. To succeed, such a theory would require that the range of values and their interactions could be manageably delineated with a clear hierarchical structure such that we could say across different broad ranges of contexts that one value was dominant. But there are two problems with this picture. First, the set of values that plausibly figure into constitutional decisionmaking is not closed and so cannot be antecedently specified. Second, the normative relevance of putative constitutional values is context-variant, so there would be no sound way to antecedently set the hierarchical ordering.[56]

C. THE OPEN-ENDED NATURE OF CONSTITUTIONAL VALUES

The first problem for both pluralistic hierarchical theories of constitutional decisionmaking and one-value traditional models is that the range of constitutionally relevant values—the values that might bear on a constitutional decision—is not a closed set.[57] Novel values can always be added to the set of values that are recognized at any given moment within our constitutional system.[58] This is a

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that might justify a theory of constitutional content with elements of different theories of constitutional content themselves. For instance, democratic authority is thought by many originalists to justify originalism. *See, e.g.*, SCALIA, *supra* note 2, at 9. But it is not strictly speaking combined with it. If one limits one's analysis to a multiplicity of values that might justify the use of a particular tool or modality of constitutional decisionmaking, then the worry seems mostly defanged. Individuals are routinely called on to make decisions in the face of a plurality of competing values where there is not an available algorithmic way to make decisions based on those values. We seem to be able to carry on. For more discussion of the so-called combinability problem, see generally Berman & Toh, *supra* note 53.

55. *See* Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1243–46 (1987).

56. I note that these are also problems for one-value views as well.

57. This observation will prove relevant in my discussion of Primus's work below.

58. Originalists might balk at this point. The whole point, such originalists might protest, is that new constitutional values *cannot* be added to the system. There are two responses to this. First, as a descriptive matter, new values are added. That response only goes so far, though, because maybe they should not be. This sort of response raises questions about the proper relationship between existing constitutional practice and future constitutional practice. I say a few things about this in the last Part of this Article. Second, we should want to know why new values should not be added to the system of constitutional decisionmaking. If the originalist says that new values cannot be added because only the original meaning is law, then that is just a metaphysical posit that falls to the open question argument.

commonplace feature of our constitutional practice. To see what I mean, consider the following three cases.

First, consider Justice O'Connor's concurrence in *Lynch v. Donnelly*.[59] *Lynch* dealt with the constitutionality of the erection of a nativity scene owned by a city.[60] In her concurrence, Justice O'Connor noted, without any apparent citation, that "[t]he Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community."[61] On her understanding, this means that the government violates the Establishment Clause when it "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."[62] The relevant standard for assessing this is not just whether the government subjectively aims to endorse religion, but whether the putatively expressive act objectively expresses that message within a community.[63] In effect,

Prima facie, if the identified new values are sound ones, then, ideally, they should figure into constitutional decisionmaking. So, the originalist needs to provide some normative account of why it is improper for a judge to incorporate novel value bases into constitutional decisionmaking, even if those values are, in some meaningful sense, sound. I can see two possible kinds of argument. First is a kind of epistemic worry that judges would better serve relevant values by hewing to originalist methods than by exercising personal judgment about what sorts of values should be incorporated into our constitutional system. I address this kind of argument in *infra* Section III.E. The other option is to argue that there is a kind of meta-norm that would preclude the expansion of the relevant value bases to include novel values not grounded in the original public understanding of the constitutional text. Such a meta-norm might take different forms. For instance, an originalist might argue against the expansion of the value base by a judge on grounds that such expansions violate norms of rule of law, democratic legitimacy, or authority. *See* Solum, *supra* note 51, at 54–78. There are two problems with this sort of argument. First, if the meta-norms are correct, it is unclear why a decisionmaker should not just incorporate the meta-norm into her decisionmaking directly rather than via the artificial mechanism of originalist decisionmaking procedures. If democratic authority requires that judges constrain the exercise of personal moral judgment, then judges should not just exercise their personal moral judgment. When a judge disagrees with congressional decisions, she could say to herself, "Well, I certainly would not have passed that sort of law, but as a judge I should constrain my exercise of personal judgment and defer to Congress. That is what living in a democracy requires." All of this, it seems to me, could be accomplished without resort to originalist decision methods. And as I argue below, originalist methods do not reliably vindicate democratic authority anyway. Second, the relationship between originalism and the putative meta-norms is likely to be contingent. That is, whether originalist methods serve the relevant meta-norm will depend on what the original meaning of the Constitution turns out to be. Consider, for instance, Larry Solum's justification of originalism on grounds that originalist methods best serve republican liberty. *Id*. at 56. Whether originalism preserves norms of republican liberty, including principles of nondomination, depends on what the original meaning is. Consider, for instance, that republican norms are plausibly served by constraining executive authority. Such constraints might include a more robust nondelegation doctrine so that Congress must play a more active role in governance, or it might include making the executive subject to criminal penalties. Whether such rules are consistent with the original meaning of the Constitution is a contingent matter. Taken together, these considerations suggest that the meta-norm response likely will not vindicate originalism. See *infra* Section VII.A for more discussion related to this point.

59. 465 U.S. 668, 687 (1984) (O'Connor, J., concurring).

60. *See id*. at 671 (majority opinion).

61. *Id*. at 687 (O'Connor, J., concurring).

62. *Id*. at 688.

63. *See id*. at 690.

Justice O'Connor announced a new constitutional value. The Establishment Clause imposes a duty on the government to maintain a certain kind of equality amongst citizens where equality of citizenship requires that the government avoid any mode of expression that would reasonably be thought to treat some citizens as second class by virtue of their religious beliefs. This conception of equality of citizenship was something new, but it has now become one of the bases for making Establishment Clause decisions.[64]

Second, consider Justice Harlan's concurrence in *Katz v. United States*.[65] The question before the *Katz* Court was whether electronic surveillance of a public phone violated the Fourth Amendment.[66] In his concurrence, Justice Harlan said that it did.[67] But in reaching that conclusion he endorsed a novel constitutional norm. The Fourth Amendment, he said, applies anywhere that a person has a reasonable expectation of privacy.[68] Justice Harlan explained:

> As the Court's opinion states, "the Fourth Amendment protects people, not places." The question, however, is what protection it affords to those people. Generally, as here, the answer to that question requires reference to a "place." My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable." Thus a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the "plain view" of outsiders are not "protected" because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable.[69]

As with *Lynch*, this represented a novel value basis for making constitutional decisions. Arguably, prior conceptions of the Fourth Amendment were concerned with the protection of property rights, as Justice Scalia argued in *United States v. Jones*.[70] There, speaking for the Court, Justice Scalia advocated for a revival of the property-based conception of the Fourth Amendment, which, he argued, predated the now more dominant privacy-based theory from *Katz*.[71]

Third, consider the evolution of protections for freedom of speech and free expression under the First Amendment. In *Schenck v. United States*, the Supreme

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64. *See. e.g.*, Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 772–73 (1995) (O'Connor, J., concurring); *id.* at 799 (Stevens, J., dissenting).

65. 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

66. *See id.* at 348–49 (majority opinion).

67. *See id.* at 360–61 (Harlan, J., concurring).

68. *See id.* at 361.

69. *Id.*

70. 565 U.S. 400, 404–05 (2012).

71. *See id.* at 405 ("[O]ur Fourth Amendment jurisprudence was tied to common-law trespass, at least until the latter half of the 20th century.").

Court upheld a conviction for the distribution of leaflets encouraging soldiers to resist the draft.[72] The Court reasoned that such speech could be restricted where its tendency and intent was to obstruct recruiting; such speech was unprotected under the Constitution.[73] In *Gitlow v. New York*, the Court considered it obvious that "a State in the exercise of its police power may punish those who abuse this freedom [of speech] by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace."[74] Over the following decades, restrictions on speech were treated with increasing suspicion, such that by the 1960s, the Supreme Court had done a complete about-face regarding protections for speech. By 1969, the Court had resoundingly rejected the idea that the government could constrain speech, even where that speech advocated violence or the overthrow of the government.[75] As the Court noted, "[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[76] This evolution represents a fundamental change in the Court's understanding of the political and moral relationships between individuals and the state with regard to the public expression of ideas.[77]

These three examples demonstrate the falsity of the idea that there is a stockpile of values or normative bases for a constitutional decision both preceding and determining the decisionmaking of courts. Many of the considerations that the Court points to in justifying its conclusions are novel and ungrounded in prior precedent, original intent, or the semantic content of the constitutional text. An honest examination of the bases of these decisions leads to the conclusion that the Justices are actually looking to the particular reasons that obtain in the particular case at hand.[78] This open-ended quality of the values that justify constitutional decisions makes both single-value traditional theories and pluralistic hierarchical accounts seem implausible. Single-value theories cannot account for new values, and correctly applying a hierarchical structure to an open-ended list of constitutional values or reasons is likely hopeless.[79]

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72. 249 U.S. 47, 52–53 (1919).

73. *See id.* at 52.

74. 268 U.S. 652, 667 (1925).

75. *See* Brandenburg v. Ohio, 395 U.S. 444, 448–49 (1969).

76. *Id.* at 447.

77. For a more detailed survey of this evolution in First Amendment doctrine, see DAVID A. STRAUSS, THE LIVING CONSTITUTION 51–76 (2010).

78. For yet another example, consider Justice Kennedy's concurrence in *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 693 (1992) (Kennedy, J., concurring), where Justice Kennedy argues for an expansion of the venues that should be treated as traditional public fora.

79. One of the editors for *The Georgetown Law Journal* astutely pointed out that one could preserve a hierarchical ordering if there was a taxonomy that could be applied to both currently recognized and later-recognized values so as to determine their place on the hierarchy. I am skeptical that such an ordering would be a reliable tool for sound decisionmaking. Consider, for instance, human rights

D. THE NORMATIVE RELEVANCE OF CONSTITUTIONAL VALUES IS CONTEXT-VARIANT

An additional problem for either traditional single-value theories or hierarchical pluralist theories is that they are unable to accommodate the context dependence of sound constitutional decisionmaking. There are three kinds of context dependence that any sound constitutional theory would have to accommodate: (1) context variance with regard to the instrumental fit between the theory and the normative bases or values that justify it, (2) context variance with regard to the normative relevance of those putative value bases, and (3) agent relativity with regard to the reasons a decisionmaker has for making a constitutional decision.

First, there is context variance with regard to the instrumental fit between a theory of constitutional content and its normative basis. As Richard Primus observes, some extant theories of constitutional content are poorly suited to serve the underlying constitutional values—the normative bases—that purport to justify them.[80] Textualism, for example, only sometimes serves the supposedly supporting value of the rule of law.[81] It fails to do so in precisely those cases where established legal practice has deviated from the text.[82] Originalism serves democratic authority shortly after a constitutional amendment is passed, but does so less reliably as time passes.[83] Primus's point is that if the justification for a constitutional theory depends on a normative basis, then one should adopt that theory—originalism, say—only to the degree that it serves that normative basis—for example, democratic authority. Although this sort of context dependence presents a problem for single-value theories, it also presents a problem for hierarchical pluralist theories. If originalism serves democratic authority less well as time passes, then originalist methods cannot take a fixed place in the lexical ordering of constitutional decisionmaking methods.[84]

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discourse, which, in the long arc of human history, is a relatively recent invention. Assume that human rights are, as an objective matter, a central or primary value that should typically win out in most cases of value conflict. There is no guarantee (and likely reasons for skepticism) that a person operating at a time prior to the establishment of human rights discourse is going to adopt a taxonomy of value types that gives human rights values their due. This is admittedly speculative, but I think it provides at least some ground for hesitation about this way of salvaging the hierarchical model. More troubling for that model is the context dependence referenced below. Context dependence presents additional problems for a hierarchical ranking, at least if that ranking is intended to be applied across various contexts.

80. *See* Primus, *supra* note 24, at 175.

81. *See id*. at 175–76.

82. *See id*. at 176. To see this point, imagine a long-established practice of adopting and following a specific legal rule. If it turns out that this legal rule deviates from the text, then for the textualist that legal rule is mistaken and should be rejected, at least prima facie. But rejecting a long-established rule destabilizes legal practice and runs counter to rule of law principles of stability and predictability.

83. The point here is that insofar as democratic authority is rooted in the idea that government should be responsive to the needs, wants, and values of the public, it does not make sense to say that adhering to a long-ago-passed law serves democratic authority, especially where the old rule runs counter to the public's current needs, wants, or values.

84. I suppose there could still be a lexical ordering of normative bases. But because the instrumental fit between the normative basis and the decisionmaking method will vary, instrumental-fit contextualism undermines the rule-like guidance that hierarchical pluralist theories promise. And without that rule-like guidance, it is hard to see why a hierarchical pluralist theory should be favored.

Second, there is context variance with regard to normative relevance. Some putative constitutional values are reason-giving—that is, normatively relevant—in some contexts but not in others, and some values can have their normative relevance or weight attenuated or amplified based on the context.[85] This presents a problem for both traditional single-value theories and hierarchical theories. Single-value theories and hierarchical theories presume that the normative bases justifying the theory of content are always reason-giving. The hierarchical model adds that one could specify a list of constitutional value bases or a list of constitutional decision procedures justified by those value bases, arrange them in a lexical order, and then derive decisions based on that hierarchical ordering.[86] For instance, one might insist that democratic authority is a lexically higher value than some other competing constitutional value, and hence insist that the constitutional theory putatively supporting democratic authority—originalism, say—should be employed wherever only democratic authority and any lexically lower ordered value are at stake. But, if democratic authority is only sometimes normatively relevant, or if its normative weight can be attenuated based on the context, such a model will not work; it would lead to the result that one should act on the basis of democratic authority even where democratic authority is not normatively relevant or where its relative weight has been diminished.[87] As I argue below, in some contexts otherwise-relevant normative bases are undercut—that is, they cease to provide reasons altogether.[88]

The idea that a normative basis can be undercut is not just a feature of a sound philosophical account of practical rationality, but has been recognized by the Supreme Court. Consider the recent decision in *Obergefell v. Hodges* upholding the right of homosexual couples to marry.[89] In two separate dissents, Justices Roberts and Scalia argued that such decisions should be left to the democratic process. According to Chief Justice Roberts:

> As a plurality of this Court explained just last year, "It is demeaning to the democratic process to presume that voters are not capable of deciding an issue of this sensitivity on decent and rational grounds."
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> . . . .

85. For an extended discussion of the context dependence of the normative weight of reasons, see JONATHAN DANCY, ETHICS WITHOUT PRINCIPLES 73–93 (2004).

86. *See* Fallon, *supra* note 55, at 1243–48.

87. To further clarify the idea here, one could imagine legal decisionmaking contexts where democratic authority is arguably not at stake at all. For instance, perhaps a private contract dispute would not implicate democratic authority at all. In such a case, a hierarchical view would then default to lower ranked values (assuming democratic authority was higher ranked). But there could be other contexts where democratic authority *is* at stake—where one wants to say that a specific outcome would better respect democratic authority—but where democratic authority is just not normatively relevant to the decision at hand. In such a case, the hierarchical model would get things wrong insofar as it would rank democratic authority (and associated theories) higher than competing values. I thank the editors of *The Georgetown Law Journal* for encouraging me to further clarify this important point.

88. Similar arguments could be made regarding attenuation.

89. 135 S. Ct. 2584, 2608 (2015).

> When decisions are reached through democratic means, some people will inevitably be disappointed with the results. But those whose views do not prevail at least know that they have had their say, and accordingly are—in the tradition of our political culture—reconciled to the result of a fair and honest debate. . . .
>
> . . . By deciding this question under the Constitution, the Court removes it from the realm of democratic decision.[90]

And Justice Scalia opined:

> I write separately to call attention to this Court's threat to American democracy. . . . This practice of constitutional revision by an unelected committee of nine, always accompanied (as it is today) by extravagant praise of liberty, robs the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves.[91]

However, in the face of a bona fide rights claim, being more democratic *is not a valid reason for a decision*. The whole point of asserting a right is to insulate a range of interests from majority will—that is, from democratic authority. In such a case, being more democratic is just not a reason to refuse acknowledgement of a right.[92] Rights claims undercut reasons that appeal to democratic authority. The *Obergefell* majority acknowledged this fact. As Justice Kennedy explained:

> This is why "fundamental rights may not be submitted to a vote; they depend on the outcome of no elections." It is of no moment whether advocates of same-sex marriage now enjoy or lack momentum in the democratic process. The issue before the Court here is the legal question whether the Constitution protects the right of same-sex couples to marry.[93]

The point here is not that certain rights claims can outweigh democratic authority. That might suggest that a highly democratic initiative could outweigh a relatively minor rights claim. Justice Kennedy is by no means weighing democratic authority against the right to marry. Rather, his concern seems to be that in the face of a competing rights claim, considerations of democratic authority are just not relevant. If someone sincerely asserts a right, pointing out that vindicating that right would be undemocratic is simply not responsive to the issue. In such a case, what would otherwise be a reason for a decision—democratic authority—is undercut.

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90. *Id*. at 2624–25 (Roberts, C.J., dissenting).

91. *Id*. at 2626–27 (Scalia, J., dissenting).

92. To invoke democracy as grounds for the denial of a claim, one must first establish that there is no constitutional right at stake. But once this is established, the constitutional claim vanishes. Therefore, being more democratic is just not relevant to a decision concerning constitutional rights. For this reason, musings on democratic authority were irrelevant to the dispute at hand.

93. *Obergefell*, 135 S. Ct. at 2606 (majority opinion) (citation omitted).

The open-ended quality of what can count as a constitutional value or reason for a constitutional decision and the context variance of a putative value or reason's normative relevance should, taken together, lead to skepticism about the viability of constitutional theories insofar as those theories aim to specify an account of constitutional content that will guide constitutional decisionmaking. Context variance means that any theory grounded in some determinate set of values will miss the mark. Sometimes such a theory will serve values that are not contextually relevant, and sometimes it will fail to serve values that are contextually relevant. Similarly, the open-ended quality of the values that might legitimately bear on constitutional decisions means that the set of values cannot be antecedently fixed. Moral philosophers commonly acknowledge these two sets of concerns as something that any sound value theory must accommodate.[94] Because of these kinds of considerations, many philosophers reject the claim that there are general principles that adequately capture what, all things considered, we ought to do.[95] This leads some philosophers to be skeptical about the value of attempting to formulate general principles or theories that explain or guide sound moral decisionmaking.[96] Insofar as sound constitutional decisionmaking exhibits similar forms of context variance and open-endedness, there are parallel grounds for skepticism about the idea that sound constitutional decisionmaking rests on a set of antecedent principles or theories.

This brings me to the third kind of context variance that any sound theory of constitutional decisionmaking must accommodate. Any sound theory must acknowledge that different constitutional actors should act for different reasons. As Frederick Schauer convincingly argues, there are grounds for thinking that the reasons for constitutional decisions are relative to the agent making the decision.[97] Theories of constitutional content are often pitched as though they are addressed to Supreme Court Justices, or as Frederick Schauer puts it, they are framed as answers to the question: "How would *I* decide Supreme Court cases if *I* were a Justice of the Supreme Court of the United States, and if I knew that four other Justices were sure to agree with me?"[98] But as Schauer points out, this way of framing things fails to recognize that constitutional decisions are made by many different actors filling different social roles, and those social roles matter in assessing what sort of decision each actor ought to make.[99] If Schauer is right,

94. For an overview of the issues, see generally DANCY, *supra* note 85. Dancy's work is an extended defense of moral particularism, a view in contemporary ethics that emphasizes the extreme context dependency of sound moral reasoning and judgment.

95. *See, e.g.*, W.D. ROSS, THE RIGHT AND THE GOOD (Philip Stratton-Lake ed., reprt. 2007) (emphasizing the context dependency of determining what, all things considered, ought to be done).

96. *See generally* DANCY, *supra* note 85 (defending a strong form of moral particularism that emphasizes the context dependency of moral reasons).

97. *See* Frederick Schauer, *The Occasions of Constitutional Interpretation*, 72 B.U. L. REV. 729, 730 (1992).

98. Frederick Schauer, *Rules, the Rule of Law, and the Constitution*, 6 CONST. COMMENT. 69, 84 (1989).

99. *See id.* at 84–85.

and I think he is, then there are further grounds for rejecting any model of constitutional decisionmaking that aims at a theory of constitutional content, because such a theory will have difficulty accommodating this kind of agent relativity.

To see why we should think the reasons for constitutional decisions are agent-relative, let us first consider the broad range of social roles that constitutional decisionmakers might occupy. Police officers make decisions that bear on the Fourth and Sixth Amendments. Supreme Court Justices have the power to issue binding precedent that, given current practice, will at least partially constrain lower courts. Lower courts are in the position of being bound by Supreme Court precedents. Constitutional law professors are in the enviable position of being able to engage in ideal theory, which plays an important aspirational role in the evolution of constitutional decisions by other actors.[100] Citizens might wish to assert constitutional rights. Attorneys might need to make use of constitutional claims in serving the interests of their clients.

Once we see the different social roles that individuals occupy, it should be clear that what counts as a constitutional reason for action will vary based upon who is acting and what the action is. A police officer really should not engage in anything we would call constitutional interpretation at all; she should just read the *Miranda* warning.[101] But this is still a constitutional decision of a sort.[102] An attorney might need to creatively craft an argument that stretches precedent, though not too much. A Supreme Court Justice might directly take on questions of substantive justice and issue a novel constitutional rule. A mid-level appellate court might try to formulate a clarifying principle that will help resolve the matter before it justly while still being consistent with existing appellate court precedents. These examples indicate that the agent relativity of constitutional reasons cannot be squared with an attempt to provide a theory of constitutional content that will function to guide constitutional decisions. Indeed, agent relativity cuts against the idea that constitutional decisions should be premised on a prior account of constitutional content at all. If constitutional decisionmaking was just a matter of applying prior constitutional content to a set of facts, then one should expect uniformity in the reasons justifying constitutional decisions across agents. But that is precisely what we do not have.

E. A POSSIBLE DEFENSE OF TRADITIONAL CONSTITUTIONAL THEORIZING

An advocate of the traditional model could respond to the challenge raised above by acknowledging the open-ended and context-variant nature of constitutional values and reasons while insisting that the underlying values are best served indirectly by following some general decision procedure. So, for example,

100. The term "aspirational" has been suggested to me by Sherman Clark.

101. *See* Schauer, *supra* note 97, at 735–37.

102. The case of the police officer is an admittedly limiting one, and one could be tempted to say that the officer is not really engaged in constitutional decisionmaking at all but is rather merely doing what she is told. But the officer's decision does presume that the dictates of courts have authority and that her subjective judgment about what to do in the context does not. That is still a decision of a kind.

a textualist might grant that textualism will sometimes miss the mark but still insist that a judge will better serve the relevant constitutional values by following the textualist program than she would by assessing things case by case. There is certainly something sensible about this sort of approach for at least some decisionmaking. We recognize that certain sorts of biases can creep into our decisions and impair sound judgments. In those sorts of cases, one might be justified in adopting a decision procedure that will sometimes miss the mark. For instance, a rule that an employer should not get romantically involved with an employee is likely a good one to follow even though it only indirectly vindicates the normative considerations that justify it—the undesirability of power differentials and the difficulty of maintaining a good work environment when coworkers are romantically involved.[103]

A defender of traditional or even hierarchical theories might be right to claim that following a general theory will better serve the underlying normative bases than judging on a case-by-case basis. Still, it is worth noting that this sort of response has an empirical quality. Whether following a general rule or theory would better realize a relevant normative basis than aiming directly at that value by judging matters case by case depends on a set of empirical results comparing the deployment of the decision procedure with the direct approach. If we are to be convinced to follow the traditional model on these grounds, we will need some reason for thinking that following the general rule or theory would be more reliable than trying to act for the underlying reasons directly. In the cases where following the general procedure strikes us as intuitively more reliable, there is usually some plausible story as to why this is. For instance, with regard to the principle that says, "never get romantically involved with one's employees," we know that romantic relationships often involve a kind of impairment in our judgments. So, it is probably better to follow the general rule precisely because we have reason to think that the direct approach will not be reliable. That is, participants in such relationships are often not in a good epistemic position to assess power differentials within those relationships. Hence, there may be grounds for a defender of a theory to argue that, as an empirical matter, sticking to the theory gets us better results than other alternatives. Such an argument, however, has yet to be adequately empirically vindicated or made convincing in some other way.[104] Such views tend to be insisted on rather than justified. So, at best it is

103. For a discussion along these lines, see Donald H. Regan, *Authority and Value: Reflections on Raz's* Morality of Freedom, 62 S. CAL. L. REV. 995, 1004–07 (1989).

104. Richard Fallon provides a helpful extended discussion of what a sound empirical or instrumental vindication of a constitutional theory would look like. *See* Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 CALIF. L. REV. 535, 572–76 (1999). But Fallon also argues that judges are obligated to act in a consistent manner and that consistency requires at least some level of theory. *See id*. at 575–76. It is unclear, however, why consistency requires theory. After all, a judge who weighs, case by case, competing considerations of substantive justice, rule of law, and democratic values is being consistent by aiming to realize those values. It is unclear why a mediating theory that will sometimes succeed in vindicating those values and sometimes will not should count as more consistent. From the perspective of realizing those values, such theories would appear to be arbitrary.

unclear if adopting the traditional model is the best way to vindicate whatever normative basis one happens to prefer. I also think there are other reasons to be skeptical of the decision procedure approach. The rule works in the employer–romantic relationship case because we have a strong grasp of the normative issues at stake in such relationships, the issues are small in number, and there is a circumscribed story to tell about the nature of the epistemic deficiency that makes violations of the rule ill-advised. But constitutional decisions must address diverse situations with varying normatively relevant considerations at play, and there is not an analogous circumscribed story to tell about the nature of any epistemic deficiency. Having said that, I leave this empirical argument to the side for the rest of this Article.[105]

IV. RICHARD PRIMUS'S TOOLS OF CONSTITUTIONAL DECISIONMAKING

So far, I have argued that sound constitutional decisionmaking is pluralistic, open-ended, and context-variant in at least three ways. Further, I have argued that neither traditional constitutional theories—originalism or textualism, say—nor hierarchical pluralistic theories can satisfy those constraints. In this Part, I want to address Richard Primus's toolbox approach to constitutional decisionmaking because it arguably accommodates most of the objections that I have levied against other theories: it is pluralistic; it explicitly accommodates contextualism with regard to instrumental fit; and though Primus does not directly address the issue, it can plausibly accommodate contextualism with regard to normative relevance and agent relativity. Still, Primus's view appears to adopt some features of the traditional model. On his view, there are certain sources of constitutionality—for example, semantic meaning, original intent, and structure—that make a constitutional decision proper. This, I argue, is a holdover from the metaphysical view, and it should be expunged. My goal here is to examine Primus's theory and where I think it goes wrong, in order to shed light on what an adequate theory of legal decisionmaking would look like if it was wholly freed from the last vestiges of the metaphysical view.

To start, let us consider what Primus's view gets right that the traditional model and the hierarchical pluralist alternative do not. In developing his view, Primus distinguishes constitutional methods, or what he calls "tools"—for example, original intent, text, precedent, structure, and nonoriginalist history—from the constitutional values that putatively justify them—for example, democratic authority, the rule of law, and substantive justice.[106] This tracks the distinction that I drew earlier between normative bases and theories of constitutionality, though in

What Fallon appears to want is not just consistency but a particular kind of consistency—one characterized in terms of following certain interpretative or adjudicative rules. *See id*. However, he provides no argument as to why that kind of rule-based consistency should be privileged over one based in certain shared constitutional values.

105. Answering the empirical argument would require establishing criteria for what counts as better or worse results. In the context of constitutional decisionmaking, that is a highly contestable matter, which may mean that empirical arguments of this type would be unconvincing to many.

106. Primus, *supra* note 24, at 172, 175.

Primus's hands the theories—originalism, say—become methods or tools for decisionmaking.[107] Primus also accepts that "as a prescriptive matter, whether a decisionmaking method is justified today depends on its relationship to the values that now animate the constitutional system."[108] This point is related to the observation animating the open question argument: one must provide reasons that normatively justify a theory of constitutionality, lest that theory fall into the trap of being a normatively inert metaphysical posit. Primus also accepts that constitutional values are plural and that no one decisionmaking method is likely to promote every constitutional value.[109] For example, in speaking of precedent, Primus writes, "it would be odd to think that attention to precedent promotes *every* constitutional value, and it would be even odder to think that it was the best way to promote all of them."[110] Finally, Primus accepts a form of context dependence regarding the soundness of certain decisionmaking methods.[111] He notes of textualism, for instance, that it sometimes serves the rule of law and it sometimes does not.[112] He writes,

> If there is a long-settled practice of doing something other than what a natural reading of a text directs, and if that practice is blessed by judicial decisions such that people order their affairs around their expectation that the practice will continue, then altering the practice to conform to a text would compromise important rule-of-law values.[113]

So, Primus's basic contention is that there are a determinate set of constitutional decision methods or tools, and a constitutional decisionmaker should use one or another based upon the specific constitutional values implicated in the context in which the legal decision is to be made.[114] For instance, original meaning might be the relevant source of constitutional authority shortly after a formal amendment to the Constitution. At that time, the original meaning most closely tracks the democratic authority of the constitutional provision. But as time passes, the reasons for adopting an originalist methodology wane and other bases for constitutional decisionmaking become comparatively more important.[115]

I note two features of my preceding arguments that Primus does not explicitly account for, though I think his view could accommodate them. First, Primus does not address agent relativity. I think, however, that his view is fully compatible with it. Primus could simply add to his view that the appropriate constitutional tool depends not only on the context in which the tool will be used, but also on

107. *See id*. at 175.
108. *Id*. at 173.
109. *See id*. at 175.
110. *Id*.
111. *See id*. at 175–76.
112. *See id*.
113. *Id*. at 176.
114. *See id*. at 175–76.
115. *See id*. at 192–95. For instance, precedent becomes more important the longer a legal rule has been adopted and followed because such long-standing, well-established rules invite reliance.

the person deploying it.[116] Second, Primus seems to be primarily concerned with context variance as it relates to instrumental fit, rather than context variance as it relates to normative relevance.[117] That is, the kind of context variance that motivates Primus is one that arises from how the instrumental fit between the decision method and the value that putatively justifies it will vary based on the context.[118] Sometimes originalist decision methods instrumentally serve democratic authority, and sometimes they do not.[119] Context variance as it relates to normative relevance, however, derives from the inconsistent normative relevance of the putative value basis. That is, sometimes democratic authority is a reason for making a constitutional decision, and sometimes it is not. Here too Primus's view can accommodate this aspect of constitutional decisionmaking. That is, he could allow that sometimes one ought not to use originalist decision methods because originalism will not serve the value that putatively justifies it and sometimes one should not use originalist methods because the value that putatively justifies it is not normatively relevant to the decision at hand.

With a few friendly amendments to his view, therefore, we can get Primus's view closer to what I have argued an adequate account must look like. Even so, I do not think that this amended version of Primus's view goes quite far enough. This is because Primus accepts the basic form of constitutional theorizing that I reject. That is, he accepts the three-part structure of traditional theorizing: there are certain sources of *constitutional value* that bear on which theory of *constitutional content* (or in Primus's hands, which tool) to deploy, which yields a specific *constitutional decision*. As we have seen, Primus adds to the traditional picture two welcome amendments: pluralism about the constitutional values that might motivate a theory of constitutional content and contextualism about when certain theories of constitutional content should be deployed. As I have argued, his view can also take on agent relativity and contextualism regarding normative relevance. The upshot of Primus's view is that what constitutional theory—what tool—should be used will vary contextually depending on what values—which normative bases—are at play in that context and their relative normative weight. Once we take seriously the combination of pluralism and contextualism with regard to agents, normative relevance, and instrumental fit, there is no real role for constitutional theories—or on Primus's view, a determinate set of tools—to play in guiding constitutional decisions. If the driving force for constitutional

116. There is an added wrinkle here because some decisionmakers—police officers, say—arguably ought not to use any of the received tools for constitutional decisionmaking. They should just read the Miranda warning. Still, there is no reason to think that Primus's view could not accommodate this wrinkle.

117. As a reminder, context variance relating to instrumental fit is the idea that how well some act—following precedent, say—serves some value—reliance interests, perhaps—varies based on the context. Context variance regarding normative relevance, in contrast, is the idea that the relevance of a value or norm itself can vary based on context. Sometimes a value is weightier. Sometimes it is less weighty. Sometimes it is irrelevant.

118. *See* Primus, *supra* note 24, at 174.

119. *Id.* at 191–95.

decisionmaking is certain constitutional values, then it is not clear why we should not just try to vindicate those values directly rather than try to do so in a mediated manner via a constitutional theory or a determinate set of constitutional tools. If what we care about is rule of law, democratic authority, equality of citizens, principles of nondiscrimination, certain liberal values such as freedom of speech and religion, limits on the consolidation of power, federalism, and so forth, then why not simply ask what sort of decisions serve those values?

To clarify, consider a decision about what view to take of the Free Speech Clause of the First Amendment. One might ask what the relevant constitutional values are in the context of making this decision and then ask what theory of interpretation one should use. For example, should one look to original intent, or look to semantic meaning? Alternately, one might just ask "what decision and what reasoning best serves the relevant values that are in play?" In many court decisions, this more direct approach is exactly what judges appear to take. Consider, for example, Justice Scalia's concurrence in *National Endowment for the Arts v. Finley*.[120] That case dealt with a constitutional challenge to provisions in a law requiring the National Endowment for the Arts to take into account "general standards of decency and respect for the diverse beliefs and values of the American public" in issuing grants.[121] In his concurrence, Justice Scalia claimed that in the context of subsidies, the government can engage in content discrimination: "By its terms, [the law] establishes content- and viewpoint-based criteria upon which grant applications are to be evaluated. And that is perfectly constitutional."[122] Why did Justice Scalia reach that conclusion? Because he thought the proper framework for thinking about subsidies is in terms of government programs and government speech. Surely, he reasons, the government can engage in content discrimination with regard to its own speech.[123] In Justice Scalia's words:

> It is the very business of government to favor and disfavor points of view on (in modern times, at least) innumerable subjects. . . . And it makes not a bit of difference, insofar as either common sense or the Constitution is concerned, whether these officials further their (and, in a democracy, our) favored point of view by achieving it directly (having government-employed artists paint pictures, for example, or government-employed doctors perform abortions); or by advocating it officially (establishing an Office of Art Appreciation, for example, or an Office of Voluntary Population Control); or by giving money to others who achieve or advocate it (funding private art classes, for example, or Planned Parenthood). None of this has anything to do with abridging anyone's speech.[124]

120. 524 U.S. 569, 590 (1998) (Scalia, J., concurring).
121. *Id*. at 572 (majority opinion) (quoting 20 U.S.C. § 954(d)(1) (2012)).
122. *Id*. at 590 (Scalia, J., concurring).
123. *See id*. at 597–98.
124. *Id*. at 598 (footnote omitted).

There is no meaningful sense in which Scalia arrived at his opinion in *Finley* by settling on a standard "tool" for constitutional decisionmaking. Rather, Scalia reached his conclusions by referencing intuitive ideas about the proper function of a government and his judgment about how best to frame the issues at stake. Justice Scalia starts the substance of his argument with what looks like a textualist move:

> The First Amendment reads: "Congress shall make no law . . . *abridging* the freedom of speech." To abridge is "to contract, to diminish; to deprive of." With the enactment of § 954(d)(1), Congress did not *abridge* the speech of those who disdain the beliefs and values of the American public, nor did it *abridge* indecent speech.[125]

But this textualist move does nothing to move the argument forward; it functions merely as a framing device. To see why, consider first that what it means to abridge speech is hardly obvious. One could have plausibly argued that the government's action was an abridgment of speech. Whether one adopts that view or not would depend on what one took to be the relevant baseline with regard to access to the available funding. That in itself is a moral or political question. But second, and more importantly, consider that Justice Scalia could have written an opinion with exactly the same argumentative force had he left out the putative reliance on the text of the constitution. The argument would have been equally persuasive had he instead pointed to decisions that upheld the government's right to take a stand on normative issues or simply pointed out that the government routinely does so—which, of course, is the main argumentative thrust of the larger section quoted above. The real argumentative move is the endorsement of a political principle according to which the government can engage in content discrimination with regard to its own speech. Wrangling over the semantic content of the word "abridging" plays no serious role in Scalia's argument, which is contrary to what we would expect if he were using, rather than merely mentioning, the text of the Constitution.

Primus's account invites the idea of a three-part constitutional decisionmaking process: First, we ask what constitutional values are at stake. Second, we decide what constitutional tool best serves those values. Third, we apply that tool to determine the outcome of the case. In some cases, the tool is prior precedent. In others, the tool is the original meaning, and in still others, it is the semantic content of the text. Any output—an opinion or brief, say—should be the product of the application of a tool, which plays the role of a constitutional theory in the three-part structure noted above. But as we have seen, a great deal of sound constitutional reasoning does not and need not fit this model. This is the point that emerges by looking at Justice O'Connor's concurrence in *Lynch*, Justice Harlan's concurrence in *Katz*, and at the evolution of First Amendment doctrine over time, including Justice Scalia's concurrence in *Finley*. The decision that a court comes

125. *Id.* at 595 (citations omitted).

to is often not grounded in any tool—text structure, original intent, precedent, or nonoriginalist history—at all. Instead, it appeals directly to a contextually relevant normative basis and determines what reasons that particular normative basis provides for particular legal decisions.[126] This should give us pause in assuming that any view that relies on the traditional model, including Primus's toolbox theory, is a required feature of current constitutional practice or required for decisionmaking to be sound.

V. HOW CONTEXTUALISM REGARDING CONSTITUTIONAL DECISIONMAKING IS COMPATIBLE WITH THE IDEA THAT LAW INVOLVES RULES

So far, I have argued that constitutional decisionmakers should make constitutional decisions based on the relevant constitutional values or reasons that obtain case by case. Such decisionmaking, I have argued, should not be guided by any constitutional theory because the reasons that bear on sound decisions are open-ended, pluralistic, and context-dependent. This picture of decisionmaking might be thought to be at odds with the idea that anything recognizable as law requires rules that apply across diverse contexts. According to this objection, it is constitutional theories that provide those cross-contextual rules.

The problem with this objection is that it fails to recognize that a context-dependent, open-ended theory about the bases of sound constitutional decisionmaking is wholly compatible with a rule-based conception of law.[127] In discussing the role of rules in legal decisionmaking, it is important to differentiate the inputs and outputs of that deliberation. The inputs are just the reasons for performing some legal act. Such reasons might include, for example, that the legal act would further justice, serve reasonable expectations, or prevent cruelty. The outputs are the legal acts that are done on the basis of those reasons. The outputs might include drafting a precedential published opinion, drafting a nonprecedential unpublished opinion, writing a brief, or making an appeal. When discussing the role of rules in decisionmaking, it can often be unclear whether the rule is an input or an output. Consider the following as a legal rule: officers should not enter a residence without a warrant, consent, or certain exigency conditions.[128]

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126. Of course, I do not mean to suggest that constitutional decisions are wholly untethered. In each case, there is at least some loose conceptual connection between the novel constitutional value and prior decisions or values that might arguably be referenced textually. How this works is explained in more detail in *infra* Part VII.

127. Consider Schauer's argument that a person with humility would follow legal rules, rather than make case-by-case decisions. *See* Frederick Schauer, *Must Virtue Be Particular?*, *in* LAW, VIRTUE AND JUSTICE 265, 274 (Amalia Amaya & Ho Hock Lai eds., 2013). But this observation relates only to the outputs of legal deliberation—the output being the decision to decide a case in the manner prescribed by a rule. The reasons for making that decision could still be context-dependent and open-ended in the way that I have described. As I argue below, if the context dependence advocated above is properly understood as a thesis about the reasons for making a decision and a decision to follow a rule is properly understood as an output of deliberation, then Schauer's observations about humility are wholly compatible with the context dependence of reasons or values, even in the context of legal decisionmaking.

128. *See, e.g.*, Michigan v. Clifford, 464 U.S. 287, 297 (1984).

Suppose that there is a person who violates this legal rule by entering without satisfying one or more of those conditions. That person goes before a legal decisionmaker. That legal decisionmaker might be an advocate considering how to argue a case, a judge, or a member of the jury. As noted above, that difference matters. Consider judges—judges, especially lower court judges, often follow rules. In fact, it is natural to think that this is what they should do in cases where such rules—usually in the form of prior precedents—are available. In some sense, the rule is an input to a decision that results in a concrete legal output—say, granting a motion for summary judgment. But the decision to follow it is an output of a prior deliberation—here, a decision about whether to follow the rule or what rules, if any, might be relevant to a case.

The open-ended, context-dependent view of constitutional decisionmaking that I am arguing for is intended to be a theory about what reasons there are for performing a legal act: it is a theory about the nature of the inputs that go into deliberation. This theory is fully compatible with a view of legal decisionmaking as privileging rules, insofar as we conceive of the rules as outputs of deliberation. Following a rule or announcing a new rule can be the result of a prior deliberation, which is itself context-dependent and open-ended as I have described. When an appellate panel announces a new rule, what they are doing is creating a new social fact—a precedential decision—which may have a rule-like form. That social fact then changes the world in such a way as to change what reasons there are for certain other actors. A subsequent panel, for instance, must either follow the rule, or differentiate the case. The point here is that the decision to follow the rule is the output of their deliberations, not an input into it. The inputs will be a host of considerations like the following: Would differentiating this case make the law overly complicated? Would doing so strike others as arbitrary? If it seems somewhat arbitrary, would it be so in a way that undermined confidence in the judiciary? Would not following the rule violate people's reasonable expectations? These considerations—these inputs—are just reasons for action that have the open-ended and contextual features noted above. So, the point here is that often judges ought to follow rules, but when they should, it is because of the reasons to follow the rule. And it would be a mistake to think that the content of the rule determines the content of those reasons. To illustrate, I take it as given that in the face of a well-known and clear regulation a judge ought to follow the rule. But the reason why is not that it is a rule, or that the rule has a particular content; it is that people reasonably rely on what the rule says. Legal decisionmaking can deal in rules—indeed plausibly it should—without being rule-governed.

VI. TEXT, STRUCTURE, ORIGINAL INTENT, PRECEDENT, AND HISTORY AS VEHICLES FOR CONSTITUTIONAL ARGUMENT, NOT SOURCES OF CONSTITUTIONAL CONTENT OR DECISIONS

So far, I have argued that given the nature of the underlying normative bases—they are context-dependent, agent relative, open-ended, and pluralistic—constitutional decisionmakers would do best to vindicate constitutional

values in a manner that is unmediated by either theories of constitutional content or tools for constitutional decisionmaking. Still, it cannot be denied that text, structure, original intent, precedent, and history—the tools of constitutional decisionmaking—are part of our constitutional practice. Most constitutional decisions will at least *point* at some bit of text, and nearly every opinion will discuss some precedents.[129] This is an uncontroversial fact about our legal practice, and any story that one tells about American constitutional decisionmaking must account for it. A person who does not at least occasionally point at the constitutional text or who does not cite precedents is simply not acting as a well-acculturated legal practitioner. So, the question is how to understand the role of these features of our constitutional practice.

On my view, we should not think of the tools of constitutional decisionmaking as intermediaries between some set of values and a legal output, functioning to determine the correct legal output. Rather, we should think of text, structure, precedent, and original intent as something like a grammar—a vehicle for talking about constitutional decisions—with which any well-acculturated legal practitioner will have some familiarity.[130] As I conceive it, however, constitutional grammar is not a device for yielding a legal output or legal legitimacy any more than English grammar is a device for determining the content of English thoughts or determining what English thoughts are sound.[131] Rather, it is a set of constraints that set parameters for how other ideas—here, legal ones—get expressed.[132]

A. THE TOOLS OF CONSTITUTIONAL DECISIONMAKING HAVE LOCALIZED APPLICATION

To help us see why we should not think of the tools of constitutional decisionmaking as devices for yielding constitutional outputs, consider the following three observations. First, not all of the tools are part of our constitutional practice for all constitutional decisions; they have localized applications. It would be a highly unusual First Amendment argument that attempted to seriously get at the

129. History and structure seem more optional.

130. The idea of a constitutional grammar comes from PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 6 (1982). For an extended discussion of Bobbitt's views and the normative implications, if any, of constitutional grammar for making constitutional decisions, see J.M. Balkin & Sanford Levinson, *Constitutional Grammar*, 72 TEX. L. REV. 1771, 1778–92 (1994).

131. Primus considers and rejects a view that treats constitutional legitimacy as arising from using a specific constitutional grammar—rather than from underlying values that might justify the tools that constitute that grammar. *See* Primus, *supra* note 24, at 183–84. I note that such a view would also fall prey to the open question argument. We could grant that constitutional practitioners use a certain grammar but sensibly ask what reason that gives us. Indeed, such a view does not take the grammar analogy seriously enough. A constitutional grammar is a vehicle for talking about certain underlying values. It is not a device that on its own yields a particular content—here, a legal content—nor a device that grants legitimacy to what is expressed through it.

132. I do not mean to suggest that text, original meaning, precedent, and history function in legal discourse exactly like grammatical rules function in natural language. The idea here is somewhat metaphorical. The point is only to emphasize the distinction between the content of a legal idea and the vehicle through which it is argued or expressed. Text, original meaning, precedent, and history are the vehicles of expression.

original public meaning of "Congress shall make no law . . . abridging the freedom of speech."[133] A focus on that sort of consideration would be out of step with the practice of First Amendment law. In part, this is because the current understanding of First Amendment speech protections is likely not at all like the original understanding of those protections.[134] Well-acculturated First Amendment practitioners know that original intent is probably not a good way to start a First Amendment free speech argument. Proper constitutional reasoning is, therefore, localized. Similarly, serious arguments about the semantic content of the First Amendment text would be out of step with First Amendment practice. For instance, by its plain text, the First Amendment applies only to Congress, not the President.[135] But no serious legal practitioner would advance this sort of argument. This localization appears to be a historically contingent feature of a practice and does not appear to be the product of arguments about the shifting normative purchase of democratic authority, rule of law, originalism, or textualism. In other constitutional contexts, practitioners do talk about the underlying constitutional values in terms of original understandings.[136] Localization, and its apparent historical contingency, suggests that we do not treat the tools of constitutional decisionmaking as sources of constitutionality. Rather, depending on the constitutional question at issue, there will be different ways of talking or thinking that are either in step or out of step with received constitutional practice.

B. CONSTITUTIONAL DECISIONMAKING AS EMBEDDED IN A CONTINGENT SOCIAL PRACTICE

Second, how we talk and think about constitutional decisionmaking depends, in part, on other contingent features of the social practice—the discourse is embedded within a social practice. The relevance of a certain way of talking or thinking about the Constitution is best explained in terms of other contingent features of the practice. Consider precedents. Well-acculturated American legal practitioners know that a lower court is "bound" by any precedent issued by a

133. U.S. CONST. amend. I.

134. For a discussion of the original understanding of the First Amendment, see Lawrence Rosenthal, *First Amendment Investigations and the Inescapable Pragmatism of the Common Law of Free Speech*, 86 IND. L.J. 1, 9–26 (2011). As Rosenthal explains, the most prominent—though not wholly uncontested—Founding-era understanding of the First Amendment was the Blackstonian one, according to which "the freedom of the press consisted only of a prohibition against prior restraint without limitation on the ability of the law to impose after-the-fact punishment on any expression thought to be 'of a pernicious tendency.'" *Id.* at 13; *see also* STRAUSS, *supra* note 77, at 51–76 (discussing the evolution of freedom-of-speech doctrine through the living Constitution). Under the current understanding of the First Amendment, after-the-fact punishment is equally proscribed. *See* Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 101 (1979) (noting that "First Amendment protection reaches beyond prior restraints"). Moreover, as discussed in *supra* Section III.C, the judicial understanding of the scope of the speech right expanded greatly in the twentieth century.

135. I owe this example to Richard Primus.

136. Consider Justice Scalia's opinion in *United States v. Jones*, which emphasizes the historical understanding of constitutional protections against unlawful search and seizure as rooted in property interests. 565 U.S. 400, 404–05 (2012).

higher court.[137] The Supreme Court is not, strictly speaking, bound at all. That in our legal system we treat higher court decisions (and at the circuit level, prior circuit court decisions) as binding partially explains why talking about precedents is part of our practice. This feature of our practice also affects other ways that we talk about legal decisions.[138] For instance, it is commonplace that cases can be differentiated. That is, a court or attorney may resist applying a prior precedent to the facts of a case even though the case bears some resemblance to the precedent-setting case. In practice, this requires using certain terminology in issuing a decision or writing a brief. One cannot simply disregard a prior precedent—that would be to treat the precedent as nonbinding. Rather, one must explain why that precedent should not apply to a given case. But so long as a legal practitioner acknowledges the precedent and attempts to explain whether the current case falls under that precedent or can be differentiated, the legal practitioner is playing the game of legal decisionmaking appropriately.

Consider, for instance, the dueling opinions in *Pennhurst State School & Hospital v. Halderman*.[139] As Richard Fallon describes, "Justice Stevens, in his dissenting opinion, accused the majority of 'repudiat[ing] at least 28 cases.' Answering for the majority, Justice Powell asserted that nearly all of the cases that were relied on by the dissenting Justices could be distinguished and that many of the decisions were 'simply miscited.'"[140] As Fallon notes, "[b]ad faith need not have obtained on either side."[141] One lesson that we might draw from this case is that precedents are not binding because judges create law and courts should follow that law. Rather, they are binding because custom treats certain modes of reasoning and thinking about cases as acceptable. In *Pennhurst*, all parties could be understood as practicing law in good faith even though they came to different conclusions. This is so because all partook in the custom of looking to past cases and considering those cases in the decision at hand. This is not to suggest that the received modes of constitutional discourse and argument do not impose a constraint on constitutional decisionmaking. They do. There are many ideas that simply cannot find expression using the modes of discourse that are

137. What exactly this comes to is a matter of some dispute. For a good discussion of different models of the binding role of precedent, see generally Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1 (1989).

138. It is important to emphasize how contingent this feature is. One could have a different sort of legal system where precedents were only persuasive. In such a system, legal practitioners would make different sorts of arguments regarding those precedents. Consider, for instance, Mary Garvey Algero's discussion of the different role of precedents in civil law and common law systems. *See generally* Mary Garvey Algero, *The Sources of Law and the Value of Precedent: A Comparative and Empirical Study of a Civil Law State in a Common Law Nation*, 65 LA. L. REV. 775 (2005) (noting that precedent is relied upon in both civil and common law systems alike to ensure stability and predictability). I do not, however, mean to suggest that the practice of treating precedents as binding is wholly arbitrary. It serves an important political value of providing stability and predictability to the law.

139. 465 U.S. 89 (1984).

140. Fallon, *supra* note 55, at 1203 (alteration in original) (footnote omitted) (quoting *Pennhurst*, 465 U.S. at 109; *id*. at 165 (Stevens, J., dissenting)).

141. *Id*.

part of legal custom. Certain attempts to differentiate a case, say, will just not be persuasive to any legal practitioner.

C. POLITICAL VALUES EXPLICITLY INFORM THE DEPLOYMENT OF CONSTITUTIONAL TOOLS

Third, the way that the tools are used is also informed by an antecedent set of political values. Occasionally, the Supreme Court or an en banc panel will overturn a precedent. Courts have adopted a set of principles for thinking about when stare decisis ought to apply and when a precedent should be rejected. The Supreme Court has noted that: (1) stare decisis has a point—it "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process";[142] (2) the requirements of stare decisis are less weighty in constitutional cases because legislative correction is extremely difficult;[143] and (3) reasons for adhering to past precedent are at their apex in property and contract cases where issues of reliance are more pressing.[144]

Taken together, these three considerations—the localization of the tool, that the tool's relevance is embedded in a related set of social practices, and the explicit role of political values in deciding whether to use a tool—suggest a view of constitutional decisionmaking that does not rest on a set of intermediary tools that stand between constitutional values and constitutional outputs so as to determine those outputs. Rather, the tools are better conceived as the mode or vehicle of constitutional discourse.

VII. CONSTITUTIONAL REASONING AS PRACTICAL REASONING IN LIGHT OF A SOCIAL PRACTICE

In this Article, I have argued in a stepwise manner that we should reject any account of constitutional decisionmaking that rests on a prior account of constitutional content. I first argued that we should reject naïve metaphysical views on grounds that any sound theory of constitutional decisionmaking required a normative justification—something that answered the question: "Why should we adopt that theory of constitutionality?"[145] I then argued that we should reject most extant constitutional theories on grounds that such theories focus on a single value or narrow range of related values although constitutional values are plural.[146] I further argued that any sound theory of constitutionality admitting that constitutional decisionmaking should be grounded in constitutional values or reasons would need to accommodate, first, the pluralistic and open-ended quality of reasons for making constitutional decisions and, second, several forms of context dependence regarding the ways in which values or reasons support constitutional

142. Payne v. Tennessee, 501 U.S. 808, 827 (1991).
143. *Id.* at 827–28.
144. *Id.* at 828.
145. *See supra* Part I.
146. *See supra* Sections III.A–C.

decisions.[147] Those considerations, I argued, should lead to skepticism about the viability of any account of sound constitutional decisionmaking grounded in a prior account of constitutional content.[148] Finally, I argued that even Richard Primus's tool-based theory does not go far enough, because it still maintains the traditional model of constitutional decisionmaking: start with a constitutional value (or values), adopt a theory or tool that serves those values, and then derive constitutional outputs from that theory or tool.[149] Instead, I argued that sound constitutional decisionmaking does not require any intermediary standing between constitutional values and constitutional outputs.[150]

The view that we are left with eliminates the intermediary theory of constitutional content. We might call such a view a kind of constitutional anti-theory. Still, my arguments have been as much positive as negative throughout this Article. As a result, we can say a lot about what sound constitutional decisionmaking should look like within an anti-theoretic framework. Specifically, a person confronted with a constitutional decision should make that decision based on the following four kinds of considerations: (1) the normative dimensions of the decision the legal actor confronts; (2) the social role of that legal actor—for example, whether they are a litigator, judge, or academic; (3) the social facts relating to the conditions under which the judgment is being made, including facts about the legal tradition and legal expectations; and (4) the range of possible legal acts that person could realize.

To help understand this sort of anti-theoretic view, let us begin by considering the position of a Supreme Court Justice making a legal decision. That Justice will be confronted with a range of normative considerations, among them considerations of stability in the law, facts about the legal status of her decision—as part of a practice that treats it as final and binding on lower courts, say—and, of course, considerations of substantive justice. In light of these considerations, that Justice must decide what sort of legal act to take. She might, for instance, find grounds to avoid making a substantive legal decision at all,[151] decide on nonconstitutional grounds, or announce a new constitutional rule. Each of these is an available legal act that a Justice could perform, and each of them, in the right context, might be sound. The question our Justice should ask is, given the relevant background conditions, which of the available legal actions—which legal output—she ought to perform. If the Justice decides to render a constitutional decision, this should be ultimately grounded in reasons—the inputs—for rendering a decision of that type. But this is just a matter of there being particular reasons for performing a particular legal act. It is not a matter of vindicating a prior concept of

147. *See supra* Sections III.C–D.

148. *See supra* Section III.D.

149. *See supra* Part IV.

150. *See supra* Part VI.

151. She may do this by denying standing or finding the matter to be moot, for instance. Consider also that at the circuit level, unpublished, nonprecedential circuit court decisions provide a way to resolve a case without binding future courts. *Cf.* 9TH CIR. R. 36-3(a) (noting that "[u]npublished dispositions and orders of [the 9th Circuit] are not precedent").

constitutionality. Stated another way, although there are reasons for making a constitutional decision, these reasons are not *constitutional reasons* in the sense of having a distinct form of constitutional normativity arising out of putative constitutional requirements.

A. ON NORMATIVE AND METAPHYSICAL THEORIES

It is worth pausing a moment to take a broader view of how the theory on offer here sits in relation to what I have called metaphysical constitutional theories. This theory is a normative theory of constitutional decisionmaking. That is, it is a theory that says that sound legal decisionmaking should be based in exercises of normative judgment, unmediated by any theory of constitutional content cast in nonnormative or descriptive terms. The theory endorsed here happens to emphasize the context dependence of normative considerations. I think that is the correct view of how normativity works.[152] And as I have argued, the context dependence of normativity creates a special problem for descriptive theories of constitutionality that hold that sound constitutional decisionmaking should be mediated through some descriptive account of constitutional content. However, even if I am incorrect about the context dependence of normativity, there are reasons to suspect that a normative theory will generally be superior to a descriptive theory. In other words, even if normativity is not context-dependent or, at least, if the normativity relevant to judicial decisionmaking is not context-dependent, we should still prefer a normative theory to a descriptive one.

To help frame the argument, consider Solum's challenge to nonoriginalist theories of constitutional decisionmaking in *The Constraint Principle: Original Meaning and Constitutional Practice*.[153] Solum proposes to defend originalism by showing that in a pairwise comparison, it is superior to all competing theories in serving two related clusters of value—rule of law and legitimacy.[154] Let us grant for the sake of argument that these two clusters of value are all that matters—or at least all that matters for the purposes of judicial decisionmaking. Now, let us compare a mediated theory that putatively serves these values—originalism—to an unmediated theory that aims at these values directly. There is good reason to think that the unmediated theory will be superior to the mediated one. The argument for this conclusion has two premises. First, a theory of constitutional decisionmaking is, at most, as good as the normative considerations that justify it. Second, one typically hits a normative target best by aiming at that normative target rather than by aiming at something else. That is, one who cares about some value or norm typically does best by aiming at that value or norm. The combination of these two principles, however, seems to suggest that the best theory of constitutional decisionmaking will likely be a normative theory. According to the first principle, a theory of constitutional decisionmaking is no

152. For an extended argument in defense of the context dependence of normativity, see generally DANCY, *supra* note 85.

153. *See* Solum, *supra* note 51, at 52–53.

154. *Id.*

better than the normative considerations that justify it. So, a theory like originalism is no better than the normative considerations that favor it as compared to some alternative theory. But for any descriptive theory like originalism, there will be an associated normative theory that aims directly at the values that putatively justify the descriptive theory. According to the second principle, that normative theory will likely be better than the descriptive theory at hitting those normative targets.[155] Hence, it will turn out that originalism—which says, "aim at the original public meaning"—likely loses to the theory that says, "aim directly at the values that putatively justify originalism and issue decisions and adopt procedures and legal doctrines that best serve those values."

But if this argument is right, then for any descriptive theory there is an analogous normative theory that simply incorporates the normative arguments in favor of the descriptive theory. For instance, consider the objection to judicial exercise of unconstrained personal normative judgment in reaching a decision: that doing so is at odds with principles of republican freedom or democratic authority.[156] The defenders of the normative theory could say that they are convinced that principles of republican freedom and democratic authority have pride of place in sound judicial decisionmaking and hence conclude that the moral judgment exercised by judges in crafting legal norms and decisions should be constrained by those normative considerations. In other words, a judge who exercises unconstrained judgment isn't acting properly—judges should bracket some of their moral judgments in the face of competing legislative directives, say.[157]

As a general matter, whether a descriptive theory best serves some normative basis will be contingent on the actual content of the descriptive theory, among other things. Originalism may or may not serve norms of republican liberty or democratic authority. Whether it does so would depend on the specifics of the original meaning. If it turned out that the original public meaning of the Constitution allows for broad executive authority, unconstrained by either courts or the legislature, then originalism would not serve norms of republican liberty. A theory that instead said that judges ought to be guided by principles of republican liberty would, therefore, more reliably serve the norm of republican liberty than originalism. Expanding from this line of argument, there is at least a prima facie reason to think that normative theories will win out in a pairwise comparison with any descriptive theories. And if the views presented here concerning the context dependence of the normative considerations that properly figure into legal decisionmaking are sound, it will also turn out that this anti-theoretical view will best serve the relevant norms.

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155. For more discussion related to this point, see *supra* Section III.E.

156. *See* Solum, *supra* note 51, at 56. Also see *supra* note 58 for related analysis. Republican freedom is understood in terms of norms of nondomination—one is free insofar as one is not subject to the arbitrary or uncontrolled power of another. *See* Solum, *supra* note 51, at 56.

157. The idea that judges should bracket some of their personal judgments is a corollary of the agent relativity argument discussed in *supra* Section III.D.

B. BUT WHAT OF LEGAL AUTHORITY?

According to the view I have defended here, constitutional reasoning is just a species of practical reasoning. But thinking of things in those terms might give one pause. If legal actors should just act on the basis of whatever practical reasons bear on the decision that confronts them, then one might worry that we have lost anything distinctly constitutional, or indeed legal, about constitutional reasoning. One manifestation of this worry is the thought that we need constitutional theory because, unmoored from *some* intervening theory of constitutionality or at least a recognized set of constitutional decisionmaking tools, all we have is a cacophony of moral or political reasons for making certain kinds of decisions. Per this line of thought, it is the intervening theory, or the determinate set of tools, that constrains decisionmaking and makes those decisions distinctly constitutional or, indeed, legal. The challenge for the anti-theorist is to articulate a picture of constitutional decisionmaking that preserves the intuitive idea that there is something to legal decisionmaking beyond *just* a general exercise of moral or political judgment. In this closing Part, I aim to respond to this worry. On the view I put forth here, there is one sense in which all legal decisionmaking, including constitutional decisionmaking, is just an exercise of practical rationality. But there is still another sense in which we can distinguish constitutional reasoning from other general exercises of practical rationality.[158]

To get at the sort of picture I have in mind, let us start with the following passage from "The Model of Rules II" from Dworkin's "Taking Rights Seriously," where he draws an analogy between law and other contingent social practices.[159] In doing so, he asks us to consider the practice of removing a hat in church:

> The fact that a practice of removing hats in church exists justifies asserting a normative rule to that effect – not because the practice constitutes a rule which the normative judgment describes and endorses, but because the practice creates ways of giving offense and gives rise to expectations of the sort that are good grounds for asserting a duty to take off one's hat in church or for asserting a normative rule that one must.[160]

158. The view I defend here is inspired in large part by Scott Hershovitz's account of legality. *See generally* Scott Hershovitz, *The End of Jurisprudence*, 124 YALE L.J. 1160 (2015). Hershovitz's main focus is the Hart–Dworkin debate. *See id.* at 1162, 1165–67. He argues that the mistaken common assumption in that debate is that there is a distinct form of legal normativity that arises from our legal practices. *See id.* at 1192. As Hershovitz puts it, "we could abandon the thought that, in addition to their moral and prudential upshots, legal practices have distinctively legal upshots." *Id.* at 1173. Similarly, I argue here that the common assumption of constitutional theorizing is that there is some fact about constitutional content that grounds constitutional normativity—in other words, such content has distinctly constitutional upshots—and that this is an assumption that we ought to reject.

159. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 57 (1977).

160. *Id.*; *see also* Hershovitz, *supra* note 158, at 1195–98 (discussing what Dworkin's example shows).

Dworkin's basic point is that contingent social practices, including legal practices, do not consist of a set of rules that constitute the practice.[161] Rather, the practice has normative relevance by changing the conditions of the world, including the expectations of participants and the meaning and significance of practices.[162] There is nothing intrinsically wrong with failing to remove one's hat, apart from its connection to a social practice. Once the social practice is in play, however, failure to remove a hat becomes a way of triggering a related norm regarding offense.

An analogous point could be made about constitutional law. A court's constitutional decision does not constitute a constitutional legal norm, but rather triggers related norms dealing with expectations of citizens and legal practitioners. When the Supreme Court issues a constitutional ruling, part of our social practice is that legal practitioners can rely on that ruling. Lower courts will use that ruling in thinking about future cases, attorneys will advise clients about what that ruling means for them, and citizens and institutions will rely on that ruling in adopting future policies. These are welcome features of our social practice. Given this practice, there are strong reasons for a lower court to conform to that prior decision. After all, other actors will have reasonably relied on the Supreme Court decision. Ignoring the precedent, or indeed, being too creative in the ways one differentiates a case upsets this sort of reliance. But the reason that a lower court should not ignore the Supreme Court decision is not that the Supreme Court creates law and lower courts ought to follow the law. Rather, it is that the Supreme Court creates reasonable expectations and lower courts should not unnecessarily upset those expectations. This is one way in which constitutional decisionmaking is constrained by legal practice in ways that other exercises of practical reasoning are not.

Of course, other exercises of practical reasoning are constrained in other ways. For instance, sound marital decisionmaking is constrained by contingent features of the practice of marriage. But it is not as though there are *marital* reasons. There are, rather, just reasons that arise in light of the contingent features of marriage.[163] So, there is one sense in which sound marital decisionmaking is just an exercise of practical reasoning. Like all exercises of practical reasoning, one must look to the specific features of the context in which one is called to make a decision. But there is another sense in which those reasons are rooted in what is

161. *See* DWORKIN, *supra* note 159, at 57.

162. *See id*.

163. For instance, the social practice of marriage allows married couples to make certain assumptions about joint activity and planning. This practice grounds reasonable expectations, which place moral constraints on what married persons ought or ought not to do. I do not mean to suggest here that individual married couples do not have some flexibility in setting expectations. I mean only to suggest that the practice of marriage at least grounds some default expectations, which could become a legitimate basis for married persons to make claims on one another. Barring highly unusual circumstances, if a married person simply left town for days without notice, his or her spouse would have grounds to object. See Hershovitz, *supra* note 158, at 1174–81, for similar points about "house rules" and promises, and *id*. at 1186–92, for a discussion extending this point to the law.

distinctive about marriage—they arise precisely because of the contingent social features of the practice of marriage.

The social practice of taking off a hat is a relatively simple one as compared to legal practice. If one attempted to describe the practice of taking off hats, there is not much to say other than that doing so is a way of showing respect in certain contexts and that in those contexts failure to take off a hat can yield offense. Other kinds of social practices are more complicated. Marriage is a social practice that involves public expression of commitment, which in turn alters the reasonable expectations of third parties. This, in turn, alters the reasonable expectations of the married couple. It usually involves a host of normative commitments as well—a kind of fidelity, a commitment to making time for one's spouse, a commitment to a kind of joint decisionmaking and planning, among other things. Complex social practices like marriage and law take on a life of their own.

This leads me to the second way that constitutional decisionmaking retains a distinctly legal status. We can add to Dworkin's observation and, indeed, to Hershovitz's account a recognition of the ways in which complex well-established social practices can create their own norms—what we might call internal norms. A practice's internal norms help to determine what does or does not make sense as an alteration of that practice and what is or is not in step with that practice. The best way to illustrate this is to look at other well-established social practices in which substantial numbers of individuals are invested. The best example of this kind may be found in sports, which routinely undergo rule changes. World Rugby officials recently instituted a new set of rules related to the scrum.[164] The National Basketball Association (NBA) instituted the shot clock in 1954, revolutionizing the game.[165] The National Hockey League (NHL), during the 2004–2005 lockout, changed the rules to permit the "two line pass."[166] These rule changes were all made with an eye toward preserving the core integrity of the game. In rugby, there were concerns about player safety and scrum collapses, so league officials adopted new engagement rules that would lessen the force of impact at the scrum and hence reduce the incidence of injury.[167] In the NBA, teams would try to get a lead and then engage in an elaborate game of keep-away.[168] In the NHL, the neutral-zone trap was a defense that effectively stymied free-flowing offensive hockey, and the legalization of the two-line pass was an attempt to revitalize that sort of free-flowing game.[169]

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164. *See* Jamie Doward, *Rugby World Cup Organisers Hope New Safety Rules Will Broaden Sport's Appeal*, GUARDIAN (Sept. 12, 2015, 7:04 PM), http://www.theguardian.com/sport/2015/sep/13/rugby-world-cup-new-rules-braoden-appeal-scrum-changes [https://perma.cc/Z8TV-YM55].

165. *See* Alex Sachare, *24-Second Clock Revived the Game*, NBA ENCYCLOPEDIA, http://www.nba.com/history/24secondclock.html [https://perma.cc/5G42-LUVG] (last visited Feb. 14, 2019).

166. *NHL Enacts Rule Changes, Creates Competition Committee*, NHL (July 22, 2005), http://www.nhl.com/ice/page.htm?id=26394 [https://perma.cc/9LSG-EBBL] [hereinafter *NHL Enacts Rule Changes*].

167. *See* Doward, *supra* note 164.

168. *See* Sachare, *supra* note 165.

169. *See NHL Enacts Rule Changes*, *supra* note 166.

In all of these cases, the changes were made with an eye toward the existing social practice, what sorts of changes would best maintain that practice, and the practice's distinctive qualities and value. In the case of rugby, the officials were responding to an external norm: player safety. Apparently, as rugby became professionalized in the mid-1990s, the players got bigger and stronger, and the risk of harm to the spinal column in the event of a collapse of the scrum got to be great enough that governing bodies thought it advisable to lower the force of impact as a scrum engages.[170] This is an example of a norm external to the practice—player safety—encroaching on and precipitating a change in the practice. But the governing body did not simply get rid of contested scrums, which would have done far more to accommodate the external norm of player safety.[171] Instead, contested scrums were seen as an essential part of the practice of playing rugby.[172] Hence, a compromise was reached that attempted to preserve the character of the practice. Eliminating the scrum would change the sport in such a way that it would no longer be recognizable as the kind of social practice that it is.

Something similar to rule changes in well-established sports goes on in constitutional decisionmaking. There are norms internal to a constitutional system, much like there are norms internal to a sport. And much like with a sport, there could be a change to those norms that would make it hard to recognize that practice. I previously referenced a series of cases where the Supreme Court adopted wholly novel rules based on novel values. In *Katz*, we saw the emergence of an understanding of the Fourth Amendment as protecting a privacy interest.[173] In Justice O'Connor's expressive understanding of the Establishment Clause, we saw a novel view about the ways in which state action can treat persons as second class, even if that is not the state's purpose.[174] In the evolution of American free speech norms during the middle part of the twentieth century, we saw a substantial reorientation of the understanding of the relationship between individuals and the state regarding the expression of ideas.[175] But these new values did not emerge out of nowhere. Rather, they can be seen as incremental extensions of the existing practice that left the core of that practice in play.[176] *Obergefell*, too, can

170. *See* Doward, *supra* note 164; *see also* James B. Bourke, *Rugby Union Should Ban Contested Scrums*, 332 BRIT. MED. J. 1281, 1281 (2006); Jonathan Wynne-Jones, *Ban the Scrum, Says Top Rugby Coach*, INDEPENDENT (Feb. 12, 2006, 1:00 AM), https://www.independent.co.uk/sport/rugby/rugby-union/ban-the-scrum-says-top-rugby-coach-6109309.html [https://perma.cc/4ZQN-SMNC] (noting concerns that changes, including "the introduction of professionalism" and "a new breed of bigger players," have made the scrum more dangerous).

171. *See, e.g.*, Bourke, *supra* note 170, at 1281.

172. *See* Chris Hewett, *The Collapse of the Scrum as We Know It*, INDEPENDENT (Aug. 30, 2013, 10:09 PM), https://www.independent.co.uk/sport/rugby/rugby-union/news-comment/the-collapse-of-the-scrum-as-we-know-it-8792441.html [https://perma.cc/E85M-DDES] (describing the scrum as "a sacred element of the union code").

173. *See supra* notes 65–69 and accompanying text.

174. *See supra* notes 59–64 and accompanying text.

175. For an extended discussion of this point, see STRAUSS, *supra* note 77, at 51–76.

176. *See id*. at 76.

be seen in this way.[177] In some sense, that decision did something novel—it introduced a constitutional right of same-sex couples to marry. But in another sense, it is a decision that can be seen as a natural extension of existing equal protection law, once one concludes that sexual orientation is analogous to sex or race.

Over a long enough period of time, a legal practice may evolve so that it would not be recognizable to persons in the past as part of the same legal practice. This may be what has happened to free speech protections under the First Amendment during the twentieth century.[178] But at any given time there are substantial limits to what sorts of changes in the practice would be deemed acceptable, even if in some abstract sense there may be good reasons for those changes. There may be good reasons for providing every American with a basic minimum income. But one cannot now plausibly argue that there is a constitutional right to a basic minimum income. This is because it is hard to tell a story within our current constitutional practice that gets us to that result. A court that simply announced a substantive due process right to a basic minimum income would be acting in a manner that is out of step with our current practice.

The practice of constitutional decisionmaking, including its emphasis on the text of the Constitution as a common focal point, constitutes a core framework of our constitutional system, without which we would not be able to recognize the practice as American constitutional law. But the framework operates at a general level of specificity. We have a federal system, and certain values are essential to the American political system, including equality, separation of church and state, freedom of speech, freedom to exercise one's religious beliefs, and a (mostly) negative conception of constitutional rights. We have a case and controversy requirement that invites judges to make decisions based on the particulars of a case rather than broad general principles.[179] We have an emphasis on the separation of powers. We have judicial review. The details of all of these things, however, are contestable. And much of constitutional decisionmaking about those details proceeds in an otherwise open-ended manner by asking what reasons there are for making one decision rather than another. Some of those reasons, of course, have their salience because of the practice's internal features—the practice of treating higher court precedents as binding invites reliance on those court decisions. Others are reasons that would bear on anything that might be recognizable as a sound legal system—stability, predictability, fairness. And some arise because of external considerations that the system of law has to address—America's history of racial oppression is one example.[180]

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177. *See supra* notes 89–93 and accompanying text.

178. *See supra* notes 72–77 and accompanying text.

179. *See* Richard A. Posner, *Conceptions of Legal "Theory": A Response to Ronald Dworkin*, 29 ARIZ. ST. L.J. 377, 387 (1997).

180. External norms can encroach on a practice, so as to change it in fundamental ways. This may be what will happen with American football in light of recent worries over brain injuries. *See* Tom Goldman, *Repeated Head Hits, Not Just Concussions, May Lead to a Type of Chronic Brain Damage*, NPR (Jan. 18, 2018, 10:01 AM), https://www.npr.org/sections/health-shots/2018/01/18/578355877/repeated-head-hits-not-concussions-may-be-behind-a-type-of-chronic-brain-damage [https://perma.cc/L6LW-XAL2]. And

CONCLUSION

In this Article, I have defended an account of constitutional decisionmaking that rejects any role for a prior descriptive account of constitutional content that guides those decisions. Constitutional decisionmaking, properly understood, is just an exercise of practical rationality, albeit one informed by a rich and complex social practice. Constitutional decisions are constitutional not because they arise out of some independent source that makes things constitutional, be it text, structure, precedent, or some other proposed basis. They are constitutional because we can see them as relevantly related to a contingent social practice of American constitutional law. But within that practice, all that there is are legal acts of various kinds, taken by certain legal actors for whatever particular reasons are salient to the decision that those actors confront. On the view defended here, a legal system sustains itself on the basis of a set of internal norms, and those norms both are grounded in and ground the expectations of participants in that legal system. This, in turn, affects what reasons actors have within the system and what sorts of arguments and decisions are in sync or out of step with the practice.

The idea that what gives a constitutional system its identity is just that certain moves in the game of constitutional decisionmaking will strike practitioners as in or out of step might lead to a sense of vertigo. But it might also lead to a greater appreciation for the social and legal institutions that hold a constitutional system together. And it might lead to greater care in protecting the norms and institutions that sustain that system. Those norms and institutions and the expectations they invite are all that ground a system of constitutionality, but for those lucky enough to live in states with rule of law and entrenched social norms that guide legal practice, that should be enough.

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arguably, it is what happened in American constitutional law in *Brown v. Board of Education*, 347 U.S. 483 (1954).