

2016

## Constitutional Rhetoric

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### Recommended Citation

Jamal Greene, *Constitutional Rhetoric*, 50 VAL. U. L. REV. 519 (2016).

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# Lectures

## CONSTITUTIONAL RHETORIC

Jamal Greene\*

For close to a century, students of judicial behavior have suggested that what judges think is not altogether the same as what they say. Within the legal academy, this claim has long been associated with legal realists who have argued that the formal legal rules explicated in judicial opinions are at least partly epiphenomenal, masking the influence that the personal characteristics and dispositions of adjudicators exercise over legal outcomes.<sup>1</sup> Political scientists have argued, variously, that such outcomes are determined by ideology,<sup>2</sup> social background,<sup>3</sup> or political, professional, or other institutional constraints.<sup>4</sup>

The notion that at least some “extralegal” factors influence judicial decision making is sufficiently intuitive and well established to be

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\* Professor of Law, Columbia Law School. Much of the substance of this Essay was delivered as the 2014 Seegers Lecture on Jurisprudence at Valparaiso University Law School. I would like to thank the faculty of the Law School and other guests at the Seegers Lecture for stimulating questions and comments.

<sup>1</sup> See generally JEROME FRANK, *LAW AND THE MODERN MIND* (1936) (arguing that the law is and should be uncertain and therefore requires the exercise of judicial discretion); KARL N. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* (1930) (emphasizing the indeterminacy and contingency of law and fact).

<sup>2</sup> See generally C. HERMAN PRITCHETT, *THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES, 1937-1947* (1948) (studying the values reflected in the voting patterns of the Roosevelt Court); GLENDON SCHUBERT, *THE JUDICIAL MIND: THE ATTITUDES AND IDEOLOGIES OF SUPREME COURT JUSTICES, 1946-1963* (1965) (using statistical methods to code Justices in ideological terms); JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* (1993) (advancing on the empirical models of Schubert and other attitudinalists); see also James L. Gibson, *From Simplicity to Complexity: The Development of Theory in the Study of Judicial Behavior*, 5 *POL. BEHAVIOR* 7, 9 (1983) (summarizing the attitudinal model).

<sup>3</sup> See C. Neal Tate, *Personal Attribute Models of the Voting Behavior of U.S. Supreme Court Justices: Liberalism in Civil Liberties and Economic Decisions, 1946-1978*, 75 *AM. POL. SCI. REV.* 355, 363 (1981) (constructing a model of Supreme Court Justice behavior drawing on factors relating, among other things, to socialization).

<sup>4</sup> See LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE* (2013) (emphasizing a rational choice approach that integrates ideological considerations with professional and institutional constraints on judges); Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 *J. PUB. L.* 279, 280 (1957) (discussing coherence between views of judges and majoritarian politics); see also Barry Friedman, *The Politics of Judicial Review*, 84 *TEX. L. REV.* 257, 262-63 (2005) (urging legal academics to integrate positive political science into their work).

regarded as a fact.<sup>5</sup> It is fair to expect, moreover, that such factors wield still greater influence in close cases of constitutional law, and particularly in cases involving constitutional rights. The outcomes of such cases are tightly bound up with deep and fundamentally divergent political commitments and social values. A vast and growing literature explores these and related issues.<sup>6</sup>

The dichotomy between the factors that drive judicial decision making, on one hand, and the public justification for such decision making, on the other, obscures a different dichotomy that lies wholly within the domain of opinion-writing. This is the dichotomy between, on one hand, what judges say to *explain* or *justify* their decisions, and on the other hand, what judges say to *persuade* their audience that those decisions, and their associated reasons, are correct.

Within constitutional law, it is sometimes assumed that there are two decision nodes in the process of legal adjudication: first, the moment of decision; and second, the moment of explanation or justification.<sup>7</sup> This second node is the point at which the judge conforms his or her decision, however reached, to his or her understanding of what the law requires. There is, however a third node. Having decided what the law requires, the judge must further communicate that decision to a diverse audience of fellow judges, litigants, other legal professionals, and the broader public. This act of communication is not simply a logical transcription of the legal justification reached at the second decision node. Rather, or in addition, it requires constitutional judges to engage in forms of rhetoric. The challenge of legal persuasion bears no necessary relationship to the process of legal decision making: it arises whether a decision is reached legalistically or politically, reflectively or intuitively, in good faith or bad.

I shall refer to an opinion's explanatory moves as *demonstrative* and its persuasive moves as *rhetorical*.<sup>8</sup> This nomenclature serves a largely

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<sup>5</sup> See Donald R. Songer & Stefanie A. Lindquist, *Not the Whole Story: The Impact of Justices' Values on Supreme Court Decision Making*, 40 AM. J. POL. SCI. 1049, 1049 (1996) ("A half century of empirical scholarship has now firmly established that the ideological values and the policy preferences of Supreme Court justices have a profound impact on their decisions in many cases.").

<sup>6</sup> EPSTEIN, LANDES & POSNER, *supra* note 4, at 65-99.

<sup>7</sup> There is nothing talismanic about constitutional law. This Essay's observations surely apply to other legal domains. The discussion is confined to constitutional law because it has some distinctive (if not unique) epistemological features of particular relevance to the discussion that follows. See text accompanying notes 136-38.

<sup>8</sup> Aristotle defined "demonstration" as "a syllogism productive of scientific knowledge." ARISTOTLE, *POSTERIOR ANALYTICS* bk. I, pt. II (G.R.G. Mure trans., 1928). He defined "rhetoric" as "the faculty of observing in any given case the available means of persuasion." ARISTOTLE, *ON RHETORIC: A THEORY OF CIVIC DISCOURSE* bk. 1, ch. 2 (George A. Kennedy, trans., 2007) [hereinafter ARISTOTLE, RHETORIC].

expository purpose, for as we shall see, many judicial opinions in the United States—and nearly all Supreme Court opinions—are rhetorical devices whose content, even when logically grounded, is difficult to understand in purely demonstrative terms. Still, the distinction helps to illuminate a set of rhetorical moves that are clearly not grounded in *logos*. It also preserves the argument—which I do not fully contest here—that constitutional law has propositional content independent of who describes it and to whom.

What can we learn from recognizing the distinction between demonstration and rhetoric in constitutional cases? Are there constraints on the forms of rhetoric that characterize judicial expression? Are any constraints, such as they are, particular to constitutional adjudication? Are they particular to appellate adjudication? What role should rhetoric play in constitutional opinion-writing?

To offer some answers to these questions, I begin, in Part I, with four examples, or discourses, that anyone familiar with contemporary debates in U.S. constitutional law will recognize: the distinction between original meaning and original intent; reference to anticanonical cases such as *Dred Scott v. Sandford*<sup>9</sup> or *Lochner v. New York*;<sup>10</sup> the relationship between substantive due process and the constitutional text; and the citation of foreign law in U.S. constitutional opinions. Maintaining a notional distinction between demonstrative and rhetorical opinion-writing illuminates and better organizes what otherwise looks like a cycle of confusion and intractable disagreement that characterizes these discourses.

Part II defends judicial rhetoric in constitutional cases as not just pervasive and inevitably descriptive, but also as normatively desirable. To be interesting, the claim must be that rhetoric can be appropriate even when it obscures the logic of or misleads the audience as to the underlying legal proposition. Part II defends that claim on the ground that articulating constitutional law persuasively helps it to endure and therefore helps to constitute it over time. This Essay concludes with some observations about the degree to which this claim is contingent upon an especially “protestant” understanding of constitutional authority and the operation of judicial review.<sup>11</sup>

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<sup>9</sup> 60 U.S. 393 (1857).

<sup>10</sup> 198 U.S. 45 (1905).

<sup>11</sup> See SANFORD LEVINSON, CONSTITUTIONAL FAITH 29 (1988) (contrasting the “protestant” position on constitutional authority as “based on the legitimacy of individualized (or at least nonhierarchical communal) interpretation [], while the catholic position is that the Supreme Court is the dispenser of ultimate interpretation”).

## I. CASE STUDIES IN CONSTITUTIONAL RHETORIC

In Aristotle's classical terms, rhetoric takes three overarching (and overlapping) forms: *logos* or appeals to logic; *ethos* or appeals to the character of the speech; and *pathos* or appeals to emotion.<sup>12</sup> As noted above, rhetoric can mislead.<sup>13</sup> It does not always do so, but when it does not, we are more apt to call it exposition.<sup>14</sup> This is especially so when, in legal discourse, rhetoric assumes the logical mode. This Part discusses four case studies in which rhetorical expression, typically outside the logical mode, masquerades as demonstrative. Recognizing the rhetorical nature of the claims helps us to understand arguments within these discourses that are otherwise mysterious.

A. *Original Meaning and Original Intent*

Originalism has been central to interpretive debates in constitutional law over the last three decades.<sup>15</sup> For perhaps the last two of those decades, the importance of the distinction between original intent and original meaning has been central to debates over originalism.<sup>16</sup> Understanding the rhetorical dimensions of constitutional opinion-writing helps us to see a compatibility between original meaning and original intent that we would otherwise overlook. It is by now a familiar story within constitutional law circles that some conservative scholars and, later, officials in the Reagan Justice Department, explicitly promoted interpretation guided by the intentions of the constitutional drafters.<sup>17</sup> Liberal legal scholars responded by quite directly attacking the theoretical underpinnings of originalism as it was then practiced.<sup>18</sup>

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<sup>12</sup> ARISTOTLE, RHETORIC, *supra* note 8, at bk. I, ch. 2.

<sup>13</sup> See *id.* at bk. I, ch. 1 (arguing that appeals to emotion have no place in legal argument).

<sup>14</sup> See John S. Dryzek, *Rhetoric in Democracy: A Systemic Appreciation*, 38 POL. THEORY 319, 322 (2010) (arguing that those who dismiss rhetoric may miss its usefulness "in stimulating reasoned reflection and interchange").

<sup>15</sup> See Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 240 (2009) (providing a brief explanation of the evolution of originalism).

<sup>16</sup> See Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 620 (1999) (identifying the shift from original intent to original meaning as the key move of the new originalism).

<sup>17</sup> See JOHNATHAN O'NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY 153-57 (2005) (describing Attorney General Edwin Meese's campaign to promote "a jurisprudence of original intention"); see also Edwin Meese, III, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 S. TEX. L. REV. 455, 464-65 (1985) (advocating for judges to interpret the Constitution using the original intent of the drafters in order to promote democracy).

<sup>18</sup> O'NEILL, *supra* note 17, at 135-37.

There were several distinct lines of attack. The notion that we can divine a single original intent from the underspecified and diverse views of multiple actors at the constitutional convention was criticized as naïve and fictitious.<sup>19</sup> Some philosophers of language and those steeped in the hermeneutic tradition argued further that the psychological gymnastics required to place ourselves in the shoes of people living within a radically different culture, two centuries distant, simply could not be accomplished without importing our own views into the project.<sup>20</sup> Legal historians such as H. Jefferson Powell argued that many of the framers themselves would have been surprised to learn that their understandings and expectations were being used as the basis for constitutional interpretation many generations after their deaths.<sup>21</sup> If we accept Professor Powell's rendering of the history, then someone who seeks the framers' guidance could expect to be told, by the framers, not to seek their guidance.<sup>22</sup>

The original meaning approach helped to respond to this academic criticism.<sup>23</sup> Under this approach, constitutional interpretation is governed not by the subjective intentions of some amorphous group of "Framers" but rather by the meaning that the words of the Constitution would have had to a reasonable person who understands the background context.<sup>24</sup> Original meaning originalism does not have the problem of determining the collective intent of a large and diverse number of people—indeed it has the opposite problem, if any, since the person whose understanding it seeks is entirely hypothetical.<sup>25</sup> Original meaning originalism also does not have the problem of being potentially foreclosed by the framers' own expectations as to constitutional method.<sup>26</sup> Professor Powell's article itself suggests that the framers would have understood the constitutional text to have an objectified meaning embodied within it, even as they

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<sup>19</sup> See Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 213–17 (1980) (discussing the complexity of determining how to identify the relevant framers and their aggregate intentions).

<sup>20</sup> See Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 793 (1983).

<sup>21</sup> See H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 887–88 (1985).

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

<sup>23</sup> See Barnett, *supra* note 16, at 620–28 (discussing generally the new originalist response to criticisms made against the old originalism).

<sup>24</sup> See Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMM. 47, 48 (2006) (explaining the reasonable person construct and its relevance to constitutional interpretation).

<sup>25</sup> See *id.*

<sup>26</sup> See Barnett, *supra* note 16, at 625–29.

disclaimed reliance on the subjective intentions of constitutional drafters.<sup>27</sup>

The broader advantage of original meaning originalism over original intent originalism is that it has a better-theorized claim to political authority. The idea is that a democratically empowered supermajority ratified a constitutional text that had a particular meaning to that polity.<sup>28</sup> As a best practice, we should seek to understand what it is that was ratified, which is determined by a best and educated guess as to the meaning of the words at the time.<sup>29</sup> The political authority of democratic, and indeed supermajoritarian, actors is leveraged to supply a reason why their understandings should be the ones that matter. The original intent practice lacks this leveraging potential because no one ratified the subjective intentions of the framers.<sup>30</sup> Indeed, since the Convention debates were not publicized, only people who were present in Constitution Hall could say with any confidence what those intentions even were.<sup>31</sup>

It is fair to say that, among constitutional theorists, original meaning has won as a theory of originalism and original intent has lost.<sup>32</sup> There is more, however, that can be said in favor of original intent than constitutional theorists tend to acknowledge. The problems that beset reliance on original intent depend on it being understood in demonstrative terms, that is, on it being used to show or explain why some constitutional proposition is true. Original intent arguments cannot serve as the legal equivalent to steps in a mathematical proof because we lack a satisfactory account of the political authority of the framers' intentions standing alone. But original intent arguments might also be used rhetorically, to persuade someone that some constitutional proposition is true, and this is an altogether different communicative exercise.<sup>33</sup>

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<sup>27</sup> See Powell, *supra* note 21, at 903–04, 914–15.

<sup>28</sup> See KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 50–61 (1999). Whittington is nominally an intentionalist, but he derives his intentionalism from his combined views that interpreters should seek the original meaning of the text and that that meaning is supplied by authorial intentions. Whittington would distinguish intentions of this sort from subjective expectations as to how the Constitution should or would be interpreted. *Id.* at 59–61.

<sup>29</sup> See Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1118 (2003).

<sup>30</sup> See *id.* at 1139 (contending that the subjective views of the framers do not themselves count as authoritative, and did not influence the decisions of the ratifiers).

<sup>31</sup> See *id.* at 1115 (describing the secret nature of the proceedings that took place at the Philadelphia Convention).

<sup>32</sup> Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 718 (2011).

<sup>33</sup> Jamal Greene, *The Case for Original Intent*, 80 GEO. WASH. L. REV. 1683, 1697 (2012).

An example will be helpful. Consider the dissenting opinion of Justice Elena Kagan in *Town of Greece v. Galloway*.<sup>34</sup> The case concerned the constitutionality of a sectarian prayer that opened town board meetings in a town in upstate New York.<sup>35</sup> The Court upheld the practice, but Justice Kagan argued that the prayer was not neutral as between religions and that this violated the Establishment Clause of the First Amendment.<sup>36</sup> To support this point, she dropped the following footnote, which is worth quoting in full:

That principle [of neutrality] meant as much to the founders as it does today. The demand for neutrality among religions is not a product of 21st century “political correctness,” but of the 18th century view – rendered no less wise by time – that, in George Washington’s words, “[r]eligious controversies are always productive of more acrimony and irreconcilable [sic] hatreds than those which spring from any other cause.” In an age when almost no one in this country was not a Christian of one kind or another, Washington consistently declined to use language or imagery associated only with that religion. Thomas Jefferson, who followed the same practice throughout his life, explained that he omitted any reference to Jesus Christ in Virginia’s Bill for Establishing Religious Freedom (a precursor to the Establishment Clause) in order “to comprehend, within the mantle of [the law’s] protection, the Jew and the Gentile, the Christian and Mahometan, the Hindoo, and infidel of every denomination.” And James Madison, who again used only nonsectarian language in his writings and addresses, warned that religious proclamations might, “if not strictly guarded,” express only “the creed of the majority and a single sect.”<sup>37</sup>

What was Kagan doing in referring to the presidential practices of Washington, Jefferson, and Madison? One possibility is that these were steps in a logical process of justifying the claim that the Establishment Clause requires government neutrality towards religion. The views and practices of these prominent early Americans might demonstrate the

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<sup>34</sup> 134 S. Ct. 1811, 1828 (2014) (Kagan, J., dissenting).

<sup>35</sup> *Id.* at 1815–16.

<sup>36</sup> *Id.* at 1841 (Kagan, J., dissenting).

<sup>37</sup> *Id.* at 1844 n.1 (internal citations omitted).



meaning of the Establishment Clause. Since Madison wrote the clause, his intentions might be viewed as at least helping to supply its meaning.

This rendering of Justice Kagan's dissent runs directly into the criticisms of original intent discussed above. Neither Washington nor Jefferson played any formal role in the passage of the Establishment Clause. Washington was not significantly involved in the drafting of or deliberation over the Bill of Rights, and under Article V, the President plays no official part in the passage of constitutional amendments.<sup>38</sup> Jefferson famously urged the adoption of a bill of rights,<sup>39</sup> and as Justice Kagan's dissent suggests, he had mature views about church-state relations.<sup>40</sup> But there is no evidence that the Congress that considered the Bill of Rights was even aware of Jefferson's views, much less that they were especially influenced by them.<sup>41</sup> As to Madison, his authorship of the first draft of the Bill of Rights does not by itself endow his views as to the meaning of the words with political authority. Indeed, the current language of the Establishment Clause differs from Madison's initial draft, which itself tracked the language of amendments proposed in several state constitutional ratifying conventions.<sup>42</sup> The logic through which the Establishment Clause "means" what Washington, Jefferson, or Madison believed or intended it to mean is obscure at best.

A second possibility is that invocation of these three prominent framers was demonstrative in a different sense. It could be that Justice Kagan was actually employing original *meaning* originalism. That is, it could be that she took the publicly expressed views of Washington, Jefferson, and Madison to constitute evidence of how competent users of the English language who were well informed as to the constitutional context understood the words of the First Amendment. Proponents of original meaning originalism often claim that this evidentiary function is precisely the role played by frequent invocations of the subjective views

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<sup>38</sup> See U.S. CONST. art. V.

<sup>39</sup> Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), in 12 THE PAPERS OF THOMAS JEFFERSON 442 (Julian P. Boyd et al. eds., 1950).

<sup>40</sup> *Town of Greece*, 134 S. Ct. at 1844-45; THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 157-61 (William Peden ed., 1955).

<sup>41</sup> Mark D. Chadsey, *Thomas Jefferson and the Establishment Clause*, 40 AKRON L. REV. 623, 632 (2007). Jefferson did not leave Paris, where he was serving as Minister to France, until September 26, 1789, one day after Congress approved the amendments that would become the Bill of Rights. See WILLIAM HOWARD ADAMS, THE PARIS YEARS OF THOMAS JEFFERSON 22-23 (1997); NEIL H. COGAN, THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 11 (1997).

<sup>42</sup> Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 400-03 (2002).

of eighteenth century framers, including those expressed at the Philadelphia Convention and in *The Federalist*.<sup>43</sup>

The problem with this position is that taking the views of Washington, Jefferson, and Madison to carry no more than evidentiary weight as to the meaning a reasonable eighteenth century American would ascribe to the Establishment Clause places these men on the same plane as an educated citizen who did *not* happen to be a U.S. President. An account of the work performed by Justice Kagan's references to Washington, Jefferson, and Madison that does not depend on their particular status as Founding Fathers misses something central to the force of her argument. She does, after all, call them "the founders."<sup>44</sup>

And so a third possibility for understanding what Justice Kagan was doing in her *Town of Greece* dissent is that she was recruiting Washington, Jefferson, and Madison not to supply the original definition and scope of the Establishment Clause, but to "vouch" for the proposition that the Establishment Clause is neutral as between religions. Here, the choice of Washington, Jefferson, and Madison is not because—or not only because—they have special insight into constitutional meaning, but rather (or in addition) because they are recognized as great statesmen and as American heroes, and it is useful to align oneself with such people's views. This invocation of Washington, Jefferson, and Madison would fall outside the domain of demonstrative exposition and would move into the domain of rhetoric.

References to the framers are frequently made in this way, and when made in this way, provide a response to some of the criticisms of original intent. The problem of discerning collective intent from numerous, diverse, and underspecified sources disappears when the speaker privileges those framers whose imprimatur is especially valuable. Indeed, the easy way to know that the framers are invoked as much for rhetorical as for strictly interpretive purposes is to consider the situations in which judges cite Anti-Federalists such as Brutus, Cato, or the Federal Farmer. These were learned statesmen every bit as much as Madison or Hamilton and had as much access to the English language and the constitutional context, but the Anti-Federalist is hardly ever used as positive authority to support originalist interpretation.<sup>45</sup> Indeed, it is easy to find instances of the Anti-Federalist being used as *negative* authority, that is, as evidence

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<sup>43</sup> Barnett, *supra* note 16, at 622; Kesavan & Paulsen, *supra* note 29, at 1133; *see also* Greene, *supra* note 33, at 1691–92.

<sup>44</sup> *Town of Greece*, 134 S. Ct. at 1844 n.1 (Kagan, J., dissenting).

<sup>45</sup> *See* Greene, *supra* note 33, at 1692–94.

of what the Constitution does *not* mean.<sup>46</sup> This practice is difficult to explain except in rhetorical terms.

This, then, suggests a reconciliation of the original meaning and original intent positions. Much of the time, these inquiries have different objectives, and so can peaceably coexist. The possibility, raised by Powell, that the original intentions of the framers seem not to support original intent as an interpretive method ceases to be a problem for someone using the framers for rhetorical ends. The use of the framers in this way is quite independent of the interpretive method used. Justice Kagan, for example, is not an originalist, but she nonetheless uses the framers to her rhetorical benefit. Affiliating her argument with theirs helps to establish its bona fides; it bolsters her credibility as a speaker, thereby approximating the ethical form of rhetoric.<sup>47</sup>

### B. Anticanonical Cases

A second familiar discourse whose contours we may better understand by thinking carefully about rhetoric is judicial reference to certain kinds of precedent. Recall the high-profile litigation over the constitutionality of the Affordable Care Act, culminating in *National Federation of Independent Business v. Sebelius*.<sup>48</sup> The bases for the unconstitutionality of the Act claimed by challengers were entirely structural in nature. The argument was that requiring Americans to purchase health insurance exceeded the powers granted to Congress under the Commerce Clause, the Necessary and Proper Clause, and the Taxing Power, and that threatening to withdraw Medicaid funding from states that did not expand eligibility under the program exceeded Congress' power under the General Welfare Clause.<sup>49</sup> Even though challengers disclaimed any individual rights attack on the Act, the Supreme Court's notorious individual rights decision in *Lochner v. New York* made several appearances at oral argument.<sup>50</sup>

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<sup>46</sup> See *id.* at 1693.

<sup>47</sup> See Jamal Greene, *Pathetic Argument in Constitutional Law*, 113 COLUM. L. REV. 1389, 1398 (2013). Aristotle's use of ethical argument differs from the usage here. For Aristotle, persuasion through *ethos* emerged from the character of the speech itself. See Colin P. Starger, *Constitutional Law and Rhetoric*, 18 U. PA. J. CONST. L. (manuscript at 19-20) (forthcoming 2016). Aristotle's understanding of *ethos* has never been the only view of the category, even classically. See Michael J. Hyde, *THE ETHOS OF RHETORIC* xvi-xvii (Michael J. Hyde ed., 2004) (discussing Isocrates' view that ethical persuasion results in part from the cultivated character of the speaker).

<sup>48</sup> 132 S. Ct. 2566 (2012).

<sup>49</sup> *Id.* at 2585, 2599, 2602.

<sup>50</sup> 198 U.S. 45 (1905).

Specifically, Solicitor General Donald Verrilli said that “to embark on the kind of analysis that [the healthcare law’s opponents] suggest the Court ought to embark on is to import *Lochner*-style substantive due process.”<sup>51</sup> Chief Justice Roberts, thinking through the implications of the government’s argument, said “it would be going back to *Lochner* if we were put in the position of saying, no, you can use your commerce power to regulate insurance, but you can’t use your commerce power to regulate this market in other ways.”<sup>52</sup> Finally, Justice Sotomayor asked Paul Clement, representing the challengers to the mandate, whether he was advancing “a *Lochner* era argument that only the States can [require the purchase of insurance] even though it affects commerce.”<sup>53</sup>

The *Lochner* Court invalidated a New York law that regulated the working hours of bakers.<sup>54</sup> It was an individual rights case, not a structural case. It was about state rather than federal power. It was about controlling working hours, not forcing individuals to purchase health insurance or anything else. It had been decided more than a century earlier and had been effectively overruled in 1937.<sup>55</sup> And yet the Solicitor General, the Chief Justice, and Justice Sotomayor each invoked *Lochner*, and each invoked it for a different substantive point. For Verrilli, *Lochner* stood for economic due process, for Chief Justice Roberts it stood for inappropriate judicial line-drawing with respect to *Congress’* powers, and for Justice Sotomayor it stood for inherent limitations on *federal* power.

Consider a second recent example. In *Obergefell v. Hodges*, the Supreme Court declared that the Fourteenth Amendment requires states to extend marriage rights to same-sex couples.<sup>56</sup> Dissenting, Chief Justice Roberts not only cited *Lochner* repeatedly, but also cited *Dred Scott v. Sandford* as an example of substantive due process gone awry.<sup>57</sup> Chief Justice Taney’s lead opinion in *Dred Scott* had declared that a law prohibiting slavery in federal territories would violate the due process rights of traveling slaveholders.<sup>58</sup> Chief Justice Roberts’ *Obergefell* dissent poignantly reminds us that “*Dred Scott’s* holding was overruled on the

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<sup>51</sup> Transcript of Oral Argument at 30, *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012) (No. 11-398).

<sup>52</sup> *Id.* at 40.

<sup>53</sup> *Id.* at 67–68.

<sup>54</sup> *See Lochner*, 198 U.S. at 52.

<sup>55</sup> *See West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937) (invalidating a minimum wage law for women); *see also United States v. Darby*, 312 U.S. 100, 125 (1941) (rejecting a substantive due process challenge to the maximum hours provisions of the Fair Labor Standards Act of 1938).

<sup>56</sup> 135 S. Ct. 2584, 2602 (2015).

<sup>57</sup> *See Dred Scott v. Sandford*, 60 U.S. 393 (1857); *see also Obergefell*, 135 S. Ct. at 2616–17 (Roberts, J. dissenting).

<sup>58</sup> *See Dred Scott*, 60 U.S. at 450.

battlefields of the Civil War and by constitutional amendment after Appomattox.”<sup>59</sup>

Citing a case for reasons unrelated to its underlying facts makes little sense if we understand invocation of precedent in purely demonstrative terms. In the common law model, precedent is cited in order to be affirmed as implicating similar application of law to fact, or in order to be distinguished as relying on different facts.<sup>60</sup> Why cite and discuss *Lochner* in a case in which there is no state law issue, no individual rights issue, and no maximum hours or labor issue? It is difficult, moreover, to construct an orthodox theory of precedent under which Chief Justice Roberts’ reference to the *Dred Scott* decision was relevant in a marriage equality case. He could not mean to say that granting marriage rights to same sex couples—which he said had “undeniable appeal”<sup>61</sup>—was akin to endorsing chattel slavery. It could be that he meant to say that judicial overreach was the common sin in both cases, and led to war in *Dred Scott*. However the relationship between *Dred Scott* and the start of the Civil War is hardly obvious, and in any event Chief Justice Roberts does not believe same-sex marriage will lead to existential armed conflict or anything like it.<sup>62</sup> Furthermore, since *Dred Scott* is conceded not to be good law, there is no institutional need to cite it, grudgingly or otherwise. So why did he cite it?

In the *National Federation of Independent Business* oral argument and in Chief Justice Roberts’ *Obergefell* dissent, *Lochner* and *Dred Scott* respectively were being used rhetorically rather than demonstratively. *Lochner* is a third rail of American constitutional law for reasons having little to do with maximum hour laws or even individual rights. The *Lochner* era was subject to a high-profile political repudiation that is perceived to have helped end the Great Depression and led to the creation of the modern administrative state. *Dred Scott*’s negative valence (these days)<sup>63</sup> is less for its invocation of substantive due process or even its support for slavery, but rather for its cold repudiation of the possibility of

<sup>59</sup> *Obergefell*, 135 S. Ct. at 2617 (Roberts, J. dissenting).

<sup>60</sup> See FREDERICK SCHAUER, THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING 103–05 (2009).

<sup>61</sup> *Obergefell*, 135 S. Ct. at 2611.

<sup>62</sup> See DON E. FEHRENBACHER, THE *DRED SCOTT* CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 561–67 (1978).

<sup>63</sup> The conventional story as to what was wrong with *Dred Scott* has undergone revision over time. For many years its error was viewed as prudential rather than moral: in light of the holding that Scott was ineligible for citizenship and therefore could not claim diversity jurisdiction in federal court, the Court had neither the need nor even the power to adjudicate his substantive claim to freedom. *United States v. UAW-CIO*, 352 U.S. 567, 590 (1957); FEHRENBACHER, *supra* note 62, at 335–36.

black citizenship.<sup>64</sup> Citation of other cases—*Brown v. Board of Education*<sup>65</sup> on the positive side and *Plessy v. Ferguson*<sup>66</sup> and *Korematsu v. United States*<sup>67</sup> on the negative side—serve a similar rhetorical function. Their negative valence is supplied by events outside of law as such, and it acts as a kind of epithet that stirs the blood, like any good *pathos*-driven (or “pathetic”) argument.<sup>68</sup> Mining citations to these cases for some narrowly doctrinal connection to the cases in which they are cited is often futile.

### C. *The Oxymoron of Substantive Due Process*

A third example, more tentative than the first two, where recognizing the role of rhetoric might illuminate constitutional practice relates indirectly to *Lochner* and relates directly to one of the many charges laid against it: its invocation of substantive due process. It is frequently said that substantive due process makes nonsense of the constitutional text, that it is oxymoronic. John Hart Ely memorably wrote that substantive due process is “a contradiction in terms, sort of like ‘green pastel redness.’”<sup>69</sup> Commentators have called the notion of “substantive” process an “atextual invention”<sup>70</sup> that is “incorrigibly self-contradictory.”<sup>71</sup> Indeed, Ely’s phrase about green pastel redness has itself been cited in well over 100 law review articles.<sup>72</sup> Modern substantive due process is a favorite target for conservatives in particular. To take one illustrative example, Robert Bork wrote in 1990 that “[i]t is

<sup>64</sup> *Dred Scott v. Sandford*, 60 U.S. 393, 407 (1857) (“[Blacks] had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit.”).

<sup>65</sup> 347 U.S. 483 (1954).

<sup>66</sup> 163 U.S. 537 (1896).

<sup>67</sup> 323 U.S. 214 (1944).

<sup>68</sup> See Greene, *supra* note 33, at 1440.

<sup>69</sup> JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 18 (1980).

<sup>70</sup> Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, 103 NW. U. L. REV. 857, 897 (2009).

<sup>71</sup> CHARLES L. BLACK, JR., *A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND UNNAMED* 91 (1997).

<sup>72</sup> See, e.g., Jeffrey D. Jackson, *Be Careful What You Wish For: Why McDonald v. City of Chicago’s Rejection of the Privileges or Immunities Clause May Not Be Such a Bad Thing of Rights*, 115 PENN. ST. L. REV. 561, 579 (2011); Adam Lamparello & Charles E. MacLean, *It’s the People’s Constitution, Stupid: Two Liberals Pay Tribute to Antonin Scalia’s Legacy*, 45 U. MEM. L. REV. 281, 311 (2015); Laurence H. Tribe, *The Ones I Feel Sorry For*, 117 HARV. L. REV. 1760, 1761 (2004).

clear that the text of the due process clause will not support judicial efforts to pour substantive rather than procedural meaning into it.”<sup>73</sup>

The problem with these broadsides against substantive due process is that they are not true. While there may be a strong case against substantive due process on historical or prudential grounds, the textual case against it is remarkably weak.<sup>74</sup> As is clear from due process cases dating at least to *Goldberg v. Kelly*, the word “due” requires an adjudicator to assess the severity of the deprivation in order to specify the appropriate procedure.<sup>75</sup> The constitutional text does not limit the word “process” to judicial procedures, and so to say that some deprivations are sufficiently severe that neither ordinary majoritarian legislation nor rational basis judicial review is sufficient to affect them is consistent with the text. This is substantive due process in a nutshell: a law that restricts fundamental rights either requires the supermajority necessary for a constitutional amendment or it requires the legislature to pursue some important interest, for there to be a reasonable means-ends fit, and for the fitness of the legislation by these measures to be evaluated judicially.

Again, there might be any number of objections to this exercise of judicial review, but there is nothing in the text of the Constitution alone that makes substantive due process absurd or self-contradictory. Of course, constitutional text does not stand alone, unadorned by historical practice or doctrinal evolution. Giving “process” the liberal reading suggested above may seem to misread a term of art within legal discourse, one that tends to be associated with a specific set of adjudicatory or quasi-adjudicatory procedures and prerequisites: notice of adverse claims, an opportunity to be heard before a neutral tribunal, the availability of counsel, and so forth. But in fact the textual criticism of substantive due process is itself a strategy to arrest doctrinal evolution towards an expansive, contextual reading of the broader due process clause.<sup>76</sup> The Supreme Court has never rejected substantive due process and there is ample historical evidence to suggest that the generation that ratified the

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<sup>73</sup> ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 32 (1990); see also *Obergefell v. Hodges*, 135 S. Ct. 2584, 2640 (2015) (Thomas, J., dissenting) (referring to substantive due process as a “distort[ion of] the constitutional text”); ANTONIN SCALIA, *Common-Law Courts in a Civil-Law System*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 24–25 (Amy Gutmann ed., 1997) (arguing that to adopt substantive due process is “to abandon textualism”).

<sup>74</sup> See Jamal Greene, *The Meaning of Substantive Due Process*, 30 CONST. COMM. -- (forthcoming 2016) (manuscript on file with the author).

<sup>75</sup> See *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970) (holding that due process requires an administrative hearing prior to the withdrawal of welfare benefits).

<sup>76</sup> Cf. L.L. Fuller, *Legal Fictions*, 25 ILL. L. REV. 363, 377 (1930) (arguing that the claim that a legal term is a fiction “must be based ultimately on the notion that the word . . . has reached the legitimate end of its evolution and that it ought to be pinned down where it now is”).

Fourteenth Amendment understood the Due Process Clause as having substantive reach.<sup>77</sup> That is, the clause is indeed a legal term of art, and its meaning is contested. Claims about the inherent meaning of the text are, unremarkably, internal to trench warfare over the scope of the Fourteenth Amendment. There is nothing obvious about substantive due process, including its relationship to the text.

That said, Ely's phrase — "substantive due process is like green pastel redness" — is so felicitous because *substance* and *process* do form a standard dichotomy in legal discourse.<sup>78</sup> Substantive due process suffers from a kind of marketing or optics problem: proponents should simply leave the word "substantive" out or else perhaps start calling it legislative due process. That might put the stress on "due," which emphasizes its substantive character, rather than on "substantive," which feels like it is in tension with "process."<sup>79</sup>

What does this have to do with rhetoric? The idea that substantive due process is an oxymoron or is a contradiction in terms has significant rhetorical purchase, and the idea persists in part for that reason. Even if the best case against substantive due process is historical or prudential rather than textual, the chuckles or knowing nods one can elicit by criticizing it as oxymoronic are worth more to a judge or commentator than even the most ingenious historical argument about the original understanding of the due process clause.

This example is in some ways more interesting than our first two. As described above, original intent arguments and invocations of anticanonical cases rely, respectively, on ethical and pathetic rhetorical modes. By contrast, the fallacy of substantive due process as an oxymoron relies most substantially on a logical mode of persuasion. The underlying proposition—that substantive due process is textually invalid—is supported by syllogistic, though ultimately sophistic, reasoning. This observation should underscore that logical presentation of arguments may be entirely consistent with rhetoric and indeed there is good reason to believe that this is the dominant rhetorical form in U.S. constitutional opinions.

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<sup>77</sup> See Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 416 (2010).

<sup>78</sup> ELY, *supra* note 69, at 18.

<sup>79</sup> See Timothy Sandefur, *In Defense of Substantive Due Process, or the Promise of Lawful Rule*, 35 HARV. J.L. & PUB. POL'Y 283, 330 (2012) ("A procedure-only approach to due process cannot account for the meaning of the word 'due.'").



## D. Citation of Foreign Law

A final example that can clarify how understanding the role of rhetoric might help us to better understand judicial practices comes from the debate over citation of transnational law in constitutional opinions. One of the main criticisms of the use of such sources is that it requires selective citation — “cherry-picking” — and thus lacks integrity.<sup>80</sup> American judges and commentators engaged in foreign law citation tend either to self-limit or be limited by circumstance to English-language jurisdictions, Western or Westminster-influenced democracies, and jurisdictions whose opinions are sufficiently studied that they may meaningfully be cited and understood by the citing judge.<sup>81</sup> This is a real problem from a certain perspective and indeed from the perspective that Justice Breyer — the Supreme Court’s most vocal defender of foreign law citation — has suggested motivates his citation practices.<sup>82</sup> That perspective is what Mark Tushnet calls “functionalist.”<sup>83</sup> In constitutional interpretation we do not just care about text, structure, history, and precedent, but we also care about consequences. On this view, other jurisdictions whose constitutional judges have handled similar cases provide data points to help uncover a range of approaches that meet shared (or at least coinciding) objectives or purposes.<sup>84</sup> We can look to those other jurisdictions to give us data on the consequences of adopting a particular approach within our own jurisdictions.<sup>85</sup>

The problem is that assessing the consequences of a particular constitutional arrangement requires an empirical inquiry, and in conducting an empirical inquiry, one must be attentive to principles of case selection.<sup>86</sup> The criteria for selection should be grounded in an

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<sup>80</sup> See Norman Dorsen, *The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer*, 3 INT’L J. CONST. L. 519, 521–22 (2005) (transcribing Justice Scalia’s complaint about selective citation of foreign examples); Nelson Lund & John O. McGinnis, *Lawrence v. Texas and Judicial Hubris*, 102 MICH. L. REV. 1555, 1581 (2004) (emphasizing that in *Lawrence v. Texas*, the Court picked decisions around the world that it favored).

<sup>81</sup> See RAN HIRSCHL, *COMPARATIVE MATTERS: THE RENAISSANCE OF COMPARATIVE CONSTITUTIONAL LAW* 205–06 (2014) (describing the tendency of comparative public law scholars to hold out as representative “the constitutional experience of half a dozen (on a good day) politically stable, economically prosperous, liberal democracies”).

<sup>82</sup> See *Printz v. United States*, 521 U.S. 898, 977 (Breyer, J., dissenting) (arguing that the experiences of other jurisdictions “cast an empirical light on the consequences of different solutions to a common legal problem”).

<sup>83</sup> See Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1238 (1999).

<sup>84</sup> See *id.*

<sup>85</sup> See *Printz*, 521 U.S. at 976–77 (Breyer, J., dissenting).

<sup>86</sup> See HIRSCHL, *supra* note 81, at 22–81.

empirical strategy that controls for relevant differences between selected jurisdictions, or else uses those differences as leverage in attaching weight to an independent variable of interest.<sup>87</sup> Case selection emphatically should not be based on whether a jurisdiction writes in or translates its opinions into English<sup>88</sup> or has judges who happen to be especially effective in circulating their work to a global audience.<sup>89</sup> Once we recognize that empirical questions require attention to case selection principles, the implications for a functionalist approach are disquieting. Judges can try their best to identify appropriate bases for comparison, but they have limited time and resources. The problem of selection bias haunts the whole enterprise of constitutional comparison when the objective of that comparison is understood in functional terms.

The observations of this Essay offer a way out. Are the reasons for citation of foreign law in U.S. constitutional cases always demonstrative? Are they always, or even typically, aimed at supplying a descriptive account of constitutional practice elsewhere, as a way of filling in the meaning and requirements of a domestic constitutional norm? Consider *Roper v. Simmons*, a prominent example of foreign law citation in a U.S. constitutional case at the Supreme Court.<sup>90</sup> *Roper* concerned the constitutionality of executing convicted murderers who were juveniles at the time of the offense.<sup>91</sup> After stating his conclusion that the practice contravenes the Eighth Amendment's ban on cruel and unusual punishments, Justice Kennedy, writing for the majority, added a discussion of the prevalence of juvenile execution around the world.<sup>92</sup> He included the following sentence: "Respondent and his *amici* have submitted, and petitioner does not contest, that only seven countries other than the United States have executed juvenile offenders since 1990: Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of

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<sup>87</sup> See *id.* at 245–55 (describing what Hirschl calls the "most similar cases" and the "most different cases" principles).

<sup>88</sup> See ROSALIND DIXON & TOM GINSBURG, RESEARCH HANDBOOK ON COMPARATIVE CONSTITUTIONAL LAW 13 (Tom Ginsburg & Rosalind Dixon eds., 2011) ("It is probably the case that 90% of comparative work in the English language covers the same ten countries, for which materials are easily accessible in English.")

<sup>89</sup> See ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 65–66 (2004) (discussing interactions among judges at global seminars); Hon. Claire L'Heureux-Dube, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 TULSA L.J. 15, 26 (1998) (discussing personal contacts with other judges as a significant driver of global judicial dialogue). Cf. David S. Law & Wen-Chen Chang, *The Limits of Global Judicial Dialogue*, 86 WASH. L. REV. 523, 527 (2011) (arguing that citation patterns do not reflect judicial dialogue).

<sup>90</sup> 543 U.S. 551 (2005).

<sup>91</sup> See *id.* at 555–56.

<sup>92</sup> See *id.* at 575–78.

Congo, and China.”<sup>93</sup> These are all countries that are known to be deeply illiberal or that have committed or tolerated systematic human right abuses in the recent past. It is possible to cite these examples functionally, as a step in an argument that says that continuing to execute juvenile offenders leads to illiberal outcomes. But to complete the argument would require an empirical investigation of, for example, whether those countries that have abolished juvenile execution have done so through legislative or judicial pathways, what the effects on crime control have been, whether states are unitary or federal systems, and so forth.

Alternatively, we can understand the importance of this style of citation in rhetorical rather than demonstrative terms. What Justice Kennedy is really saying is that executing juveniles is uncivilized; citing the countries that do it communicates the message viscerally rather than demonstratively. The criticism that Justice Scalia and others have made, that like legislative history, foreign law citation involves looking out over a crowd and just picking out your friends, seems exactly appropriate if we understand the practice in rhetorical terms.<sup>94</sup> We *like* and *trust* our friends more than our enemies or mere acquaintances, and so we use our friends’ practices to vouch for our own or use association with the practices of our enemies to shame our opponents. The reason to cherry-pick Iran and the Democratic Republic of the Congo in arguments against juvenile execution aligns with the reason to cherry-pick Anti-Federalists in arguments against disfavored constitutional positions.

## II. JUDICIAL RHETORIC IN CONSTITUTIONAL LAW

These four examples all show ways in which employing a different conceptual vocabulary can help us transcend debates within constitutional theory that had seemed to be spinning their wheels. But the way the examples do so is controversial. Rhetoric has a bad reputation, and to say fallacious constitutional arguments are made in its service seems to reinforce the fallacy.<sup>95</sup> This Part shows that rhetoric, even when misleading in a narrow sense, can serve as a partner to the legitimating discourse of constitutional law.

Constitutional law has a set of familiar and overlapping taxonomies of argument forms.<sup>96</sup> These forms are an important element of

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<sup>93</sup> *Id.* at 577.

<sup>94</sup> See Dorsen, *supra* note 80, at 530.

<sup>95</sup> See STANLEY FISH, DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES 471–75 (1989).

<sup>96</sup> See, e.g., PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 3–92 (1982) (specifying constitutional argument forms); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1195–1209 (1987).

constitutional practice because constitutional law needs ways of distinguishing itself from politics. By fostering implicit limits on the kinds of arguments that “count,” constitutional law discourse cultivates a distinctive normative community. The kinds of arguments that characterize that discourse are typically said to include textual, structural, historical, precedent-based, and prudential arguments.<sup>97</sup> Most arguments that count within the community of U.S. constitutional lawyers are either about the meaning of the constitutional text; implications generated from constitutional structure or the relationships immanent within the constitutional architecture; historical intentions or the contemporaneous meaning of the Constitution’s words; judicial precedent or historical political practice; or the consequences for the institutional legitimacy of the judiciary or for the effective functioning of governmental, and especially federal governmental, institutions.<sup>98</sup> To this list we could add values-based arguments that appeal to some higher-order moral norm or ethical arguments drawing on the distinctive character of the American people, but whether these argument types are included is subject to some debate.<sup>99</sup>

Scholars of classical rhetoric have their own set of taxonomies.<sup>100</sup> The most basic one is the tripartite distinction between *logos*, *ethos*, and *pathos* discussed at the beginning of Part I. Accepting the claim that rhetorical statements have a home within constitutional discourse requires one to integrate this or some related schematic into the well-established categories of constitutional argument. One possibility is that these rhetorical forms simply supplement the traditional categories. Thus, constitutional discourse is constituted in part by, say, appeals to emotion in addition to being constituted by, say, appeals to the constitutional text. Were this the best description of the role rhetoric plays in constitutional argument, it would defeat constitutional law’s claim to distinctiveness.

The better view is that the forms of rhetoric modify rather than supplement, displace, or challenge the traditional categories.<sup>101</sup> We can think of other modes—text, structure, history, precedent, and consequences—as being domains or subjects of constitutional argument.<sup>102</sup> What makes constitutional argument a distinct form of political debate and political settlement is that it channels political dispute into these particular domains. But what makes constitutional law

<sup>97</sup> See BOBBITT, *supra* note 96, at 7; Fallon, Jr., *supra* note 96, at 1194.

<sup>98</sup> See Fallon, Jr., *supra* note 96, at 1252–68.

<sup>99</sup> See Patrick O. Gudridge, *False Peace and Constitutional Tradition*, 96 HARV. L. REV. 1952, 1969, 1975 (1983) (reviewing BOBBITT, *supra* note 96).

<sup>100</sup> Greene, *supra* note 33, at 1463–65.

<sup>101</sup> See *id.* at 1424.

<sup>102</sup> See *id.* at 1394–95.

continuous with other forms of practical reasoning is that the communicative elements of constitutional law—its opinions—employ logical, ethical, and pathetic rhetorical strategies in order to persuade their audience that the propositions they assert, with respect to text, history, structure, and so forth, are correct.<sup>103</sup>

Constitutional lawyers need to get this right. It is easy to casually dismiss rhetoric in judicial opinion writing as either pernicious and lawless or trivial and unimportant. But within the American system, the ability of a judge to persuade her audience that she is right forms part of the normative criteria for her performance. Put otherwise, the fact that a judge is unable to persuade her audience that she is correct is, without more, a reason to think she might not be correct.<sup>104</sup> Judges in the United States must constantly attend to the conditions of their own legitimacy<sup>105</sup>—Hamilton recognized that as early as Federalist 78 when he famously called the judicial branch the least dangerous branch, having “no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; . . . hav[ing] neither force nor will, but merely judgment.”<sup>106</sup> What judges have is a jealously guarded reservoir of good will that lends moral force to their pronouncements.<sup>107</sup>

One of the conditions for judicial legitimacy, therefore, is popular acceptance of what the courts are doing.<sup>108</sup> This acceptance might be more important when a judge purports to invalidate the work of the popular branches than when she validates it, but it is important either way. The case for its normative importance is strengthened to the degree scholars adopt forms of popular constitutionalism that place citizens at the table in constitutional interpretation and that privilege dialogue between judges and social and political actors.

If persuasion carries independent normative weight in American constitutional law, then at least three somewhat unsettling implications might follow. First, what a judge says in an opinion owes something to rhetoric. That is, it is not enough for a judge writing an opinion to explain his or her thinking in a demonstrative sense. He or she must also do so

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<sup>103</sup> See *id.*

<sup>104</sup> See Richard Primus, *Double-Consciousness in Constitutional Adjudication*, 13 REV. CONST. STUD. 1, 2 (2007).

<sup>105</sup> See Neil S. Siegel, *The Virtue of Judicial Statesmanship*, 86 TEX. L. REV. 959, 963 (2008).

<sup>106</sup> THE FEDERALIST NO. 78, 392 (Alexander Hamilton) (Ian Shapiro ed., 2009) (discussing the need for judges to attend to the conditions of law’s public legitimation).

<sup>107</sup> In political science this reservoir is sometimes called diffuse support. See *infra* notes 122–23 and accompanying text.

<sup>108</sup> See Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1792 (2005) (maintaining that the Constitution’s legal legitimacy depends on its present sociological acceptance).

with at least some degree of style, perhaps even at the occasional expense of clarifying the argument in a demonstrative sense or to the satisfaction of a Platonic philosopher. It is possible to overstate this tension. We expect a certain degree of legalism from our judges, and so departing from that norm in an overt way will in many cases undermine an opinion's persuasive effect. Put another way, *logos* is a powerful rhetorical mode for judges and so recognizing the rhetorical requisites of judicial opinion writing is not a call to abandon logic without due reflection.

Still, sometimes the best way to get one's point across is to show rather than tell. Thus, *pathos*—appeal to emotion—is a useful rhetorical mode even for judges. In a conventional sense, an appeal to emotion might have greater claim to legitimacy in a judicial opinion when it is in the service of persuading the reader as to a proposition within the traditional interpretive domains of constitutional law. An emotional appeal as a way of advancing a textual or historical claim seems to me entirely within the pale, whereas a similar appeal as a way of doing little more than persuading someone that a litigant should win or lose, unmediated through traditional constitutional subjects of argument, is more problematic.

An example will be helpful. In the 2014 Term, Justice Thomas chose to use the Court's capital docket as a platform for judicially crafted victim impact statements.<sup>109</sup> Thus, in *Glossip v. Gross*, he responded to Justice Breyer's dissenting opinion calling for a reconsideration of the constitutionality of capital punishment with a catalog of the acts for which petitioners who had sought stays of execution during the Term had been convicted.<sup>110</sup> The ostensible purpose was to demonstrate that capital defendants are nearly uniformly deserving of the most severe punishment, thereby undermining Justice Breyer's claim that death sentences were handed down arbitrarily.<sup>111</sup>

In *Brumfield v. Cain*, a case involving application of the Court's exemption of mentally disabled persons from execution, Justice Thomas wrote a lengthy dissenting opinion that, among other things, detailed the remarkable life and public works of the victim's son, a professional football star.<sup>112</sup> Justice Thomas appended a photograph of the victim to

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<sup>109</sup> *Glossip v. Gross*, 135 S. Ct. 2726, 2750–55 (2015) (Thomas, J., concurring); *Brumfield v. Cain*, 135 S. Ct. 2269, 2285 (2015) (Thomas, J., dissenting); *Davis v. Ayala*, 135 S. Ct. 2187, 2210 (2015) (Thomas, J., concurring).

<sup>110</sup> See *Glossip*, 135 S. Ct. at 2753 (Thomas, J., concurring).

<sup>111</sup> See *id.* at 2752 (“In my decades on the Court, I have not seen a capital crime that could not be considered sufficiently ‘blameworthy’ to merit a death sentence (even when genuine constitutional errors justified a vacatur of that sentence).”).

<sup>112</sup> See *Brumfield*, 135 S. Ct. at 2286–87 (Thomas, J., dissenting).

the end of his opinion.<sup>113</sup> Justice Thomas' discussion of the victim's son was sufficiently unusual that some of his fellow dissenting colleagues refused to join it. Justice Alito wrote (joined by Chief Justice Roberts): "The story recounted in that Part is inspiring and will serve a very beneficial purpose if widely read, but I do not want to suggest that it is essential to the legal analysis in this case."<sup>114</sup> Finally, in *Davis v. Ayala*, which considered the degree of deference owed a state court harmless error determination in federal habeas review, Justice Kennedy wrote separately to express concern over the proliferation of solitary confinement in U.S. prisons.<sup>115</sup> Justice Thomas wrote the following curt response to Justice Kennedy's opinion:

I write separately only to point out, in response to the separate opinion of Justice Kennedy that the accommodations in which Ayala is housed are a far sight more spacious than those in which his victims, Ernesto Dominguez Mendez, Marcos Antonio Zamora, and Jose Luis Rositas, now rest. And, given that his victims were all 31 years of age or under, Ayala will soon have had as much or more time to enjoy those accommodations as his victims had time to enjoy this Earth.<sup>116</sup>

Needless to say, the opinion in *Ayala* traveled some distance from technical construction of the federal habeas statute.

Each of the three Justice Thomas opinions referenced above seeks to persuade in the pathetic mode—they appeal directly to the emotions of the reader. But they also differ from one another in a respect that lends some criteria to our evaluation of constitutional rhetoric. The *Glossip* opinion appeals to emotion in the service of a claim about the consequences of capital punishment. Justice Breyer's opinion argues that, within our federal system, capital punishment must be either unreliable or arbitrary.<sup>117</sup> Justice Thomas' rebuttal consists in arguing that, because all capital defendants are deserving of death, capital punishment is not arbitrary in a way that should raise moral concern.<sup>118</sup>

By contrast, Justice Thomas' emotional appeals in his *Brumfield* and *Ayala* opinions do not modify any recognizable constitutional claim. They appear to serve no purpose other than to arouse enmity and,

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<sup>113</sup> *Id.* at 2297.

<sup>114</sup> *Id.* at 2298 (Alito, J., dissenting).

<sup>115</sup> See *Davis v. Ayala*, 135 S. Ct. 2187, 2208–10 (2015) (Kennedy, J., concurring).

<sup>116</sup> *Id.* at 2210 (Thomas, J., concurring).

<sup>117</sup> See *id.* at 2772 (Breyer, J., dissenting).

<sup>118</sup> See *id.* at 2754–55 (Thomas, J., concurring).

consequently, disgust: in *Brumfield*, disgust that someone who committed a horrific act may be spared death, and in *Ayala*, disgust at the prospect that the state might be made to attend to a convicted murderer's conditions of confinement. An emotional appeal directed solely at the ultimate disposition in the case feels off-key in a way in which a similar appeal that amplifies a recognized legal argument does not. This is not to say that Justice Thomas' *Glossip* opinion was not over-the-top or ham-handed, but it is to say that it fits our constitutional tradition in a way that the other two opinions categorically do not. It is no wonder that commentators have compared those opinions to Justice Blackmun's memorable and oft-criticized "Poor Joshua" dissent, which openly sympathized with a child abuse victim whom the majority declared not to have a constitutional remedy.<sup>119</sup>

Even if one measure of the legitimacy of constitutional rhetoric is its relationship to traditional forms of constitutional argument, we must ask whether it is the only measure. Beyond that relationship, do we measure rhetoric solely by its power to persuade? Would it be appropriate, for example, for a judge to make even a logical case for a proposition of constitutional law if she thinks the logical case will persuade others but it does not persuade the judge herself or adequately explain her analytic process? This question raises the second unsettling implication of understanding rhetoric as having independent normative significance: there may be times when rhetorical demands make it appropriate for a judicial opinion to take a certain form, or even reach a certain outcome, that is at odds with the judge's own thinking. Put otherwise, the significance of persuasion as a part of the judicial function might well compete with the significance of candor or transparency. In some sense, many of us intuit this to be true. Consider, for example, the role of religious conviction in judicial decision making. We might or might not think it is appropriate for religion to influence how a judge approaches a constitutional issue. A committed legal realist or attitudinalist might assume the judge in fact has no control over this. But most of us agree that the judge's personal religious convictions should play no role in the opinion the judge writes, and we would find the opinion less persuasive as constitutional law if it included religious elements in its written

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<sup>119</sup> *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 213 (1989) (Blackmun, J., dissenting); compare Mark Joseph Stern, *Has Clarence Thomas Forgotten What His Job Is?*, SLATE (June 18, 2015), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2015/06/clarence\\_thomas\\_opinion\\_in\\_brumfield\\_v\\_cain\\_has\\_he\\_forgotten\\_he\\_s\\_a\\_supreme.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2015/06/clarence_thomas_opinion_in_brumfield_v_cain_has_he_forgotten_he_s_a_supreme.html) [<http://perma.cc/2FUG-B9KV>], with Jeffrey Rosen, *Sentimental Journey: The Emotional Jurisprudence of Harry Blackmun*, NEW REPUBLIC 13 (May 2, 1994).



presentation. Justice would not, in that case, “be seen to be done.”<sup>120</sup> And as noted, constitutional law must satisfy this condition.

At this point one must pause to consider the nature of the judicial audience. I say “we” would find an appeal to religion in constitutional argument less convincing, but what I mean by “we” is the professional legal elite. Thus, a third possible and, if true, unsettling implication of the argument: If we believe that persuasion carries independent normative weight in constitutional opinion-writing, we must consider the possibility that those who ultimately need to be persuaded are not just legally unsophisticated but have illiberal ends. Parochialism and chauvinism might be necessary features of a conventionally accepted constitutional order. In fact, the choices are unlikely to be so stark. I suspect that if the American people were in fact illiberal in a higher law sense – that is, were not committed in some deep sense to a culture of rights – then we would find judicial review intolerable.<sup>121</sup> And so when we speak of rhetoric and of the demands that the need to persuade places on the judicial role, we must understand the object of persuasion to bear not necessarily upon the individual outcome in any particular case, but rather upon the consistency of the opinion with conventional understandings of the judicial role. Political scientists distinguish the “specific support” for decisions of the courts from “diffuse support” for courts in an institutional sense.<sup>122</sup> Diffuse support is less sensitive to particular decisions; there is an inelasticity to it that suggests a reasonable margin of appreciation for courts to reach decisions that members of the polity may disagree with or find unpersuasive in their particulars.<sup>123</sup>

### III. CONCLUSION

It is appropriate to close, then, with an observation about the degree to which this Essay’s claims are contingent upon a particular judicial culture and a particular kind of Constitution. The case for persuasion carrying independent normative weight depends on understanding constitutional lawmaking by judges as being in dialogue with the polity. Many civil law jurisdictions distinguish sharply between ordinary legislative power and what is sometimes called constituent power or

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<sup>120</sup> R v. Sussex Justices Ex parte McCarthy, [1924] 1 K.B. 256, 259 (1923).

<sup>121</sup> But see Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1353 (2006) (arguing that a society with a culture of rights, among other conditions, should find judicial review intolerable).

<sup>122</sup> See Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635, 637 (1992).

<sup>123</sup> See *id.*

*pouvoir constituant*.<sup>124</sup> Constitutional revision requires activation of that constituting power and the role of a constitutional judge is to keep faith with constitutional law as codified by those authorized to exercise that constituting power. Jurisdictions in which this view is prominent tend to have more accessible modes of constitutional amendment than Article V of the U.S. Constitution.<sup>125</sup> A constitution that is viewed in different terms than the American one, and in particular a constitution that is viewed either in large measure as a technical document or one that, even if not purely technical, is not associated pervasively with national political identity seems likely to place relatively weak demands of persuasion on courts. A constitutional order of that sort seems less likely to give rise to a judicial culture that gives rhetoric a long leash. One's Frenchness does not depend on acceptance of or affiliation with the 1958 Constitution, in the way that one's Americanness might depend on one's affiliation with particular political commitments embodied in the U.S. Constitution.<sup>126</sup> Under the circumstances, the dry syllogistic reasoning one observes in French courts, even in constitutional cases, may be good enough. Notice, though, that this might be characterized simply as different weight that other jurisdictions might attach to *logos* as against *pathos* or *ethos* in assessing what counts as persuasive for judges. Maintaining consistency with the conventional judicial role might well make normative demands on opinion writing quite apart from one's theory of the relationship between "the people" and constitutional elaboration. In that case, the application of these observations to U.S. constitutional law simply makes a stronger case for attention to rhetoric than would exist under a different kind of constitution.

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<sup>124</sup> See Richard S. Kay, *Constituent Authority*, 59 AM J. COMP. L. 715, 717-19 (2011); Emmanuel Joseph Sièyes, *What Is the Third Estate?*, in POLITICAL WRITINGS 92, 134-37 (Michael Sonenscher ed., 2003).

<sup>125</sup> See Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, in RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 237, 260-62 (Sanford Levinson ed., 1995) (suggesting empirically that the U.S. Constitution is among the most difficult in the world to amend).

<sup>126</sup> See Aziz Rana, *Constitutionalism and the Foundations of the Security State*, 103 CALIF. L. REV. 335, 341 (2015).

