UCLA School of Law

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Mitchell Berman

University of Pennsylvania

"E. Pluribus Unum"

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TO: Participants at the UCLA Legal Theory Workshop

FROM: Mitch Berman (mitchberman@law.upenn.edu)

RE: Primary materials for my workshop

DATE: November 1, 2026

For my workshop, I'm asking you to read one draft chapter from a very long book in progress with the working title, *"To Say What the Law Is": The Constitution, the Supreme Court, and the Nature of Law.* This long cover memo aims to give you a sense of the book's overall argument and structure and to summarize its main sections so that the one chapter that follows (Chapter 5) will be intelligible.

The book introduces, develops, and defends a new theory of American constitutional interpretation. I call the account "organic pluralism" and have been working it out for the better part of a decade, in articles published in student-edited law reviews and in peer-reviewed legal philosophy journals. It is both nonoriginalist and positivist. The book is under contract with Yale University Press for their trade catalogue. That last fact has a bearing on how this book ought to be written, which is not to claim that it is written as it ought to have been.

The book will comprise ten chapters grouped into three parts. Part I (Chapters 1-3) sets the table. Because a theory is a proposed answer to a general or abstract question, the task of Chapter 1 is to identify the two questions to which, I argue, we need answers. The first is the question of *constitutional content.* It asks: What makes it the case that our constitutional law is what it is, or has the content that it does? Or, almost equivalently, what makes true propositions of constitutional law true? The second question concerns *constitutional adjudication.* It asks

(some version of): How should judges undertake constitutional interpretation? How should the Supreme Court resolve constitutional disputes? The question of adjudication is the standard question addressed in the constitutional theory literature. Indeed, many or most American scholars of constitutional law will find the question of constitutional content unfamiliar—in substance, not only in nomenclature. A major purpose of this book is to put the need for a theory of content squarely on the table. A first step is terminological. I will speak of constitutional "meaning" and of what "the Constitution means" only when referring to the (or *a*) communicative content of the constitutional text, and not when referring to the legal norms (powers, prohibitions, immunities, and the like) that we believe the text, in some sense, delivers. When we're interested in "what the law is" and not (only) what the text means, "constitutional content" is more felicitous than "constitutional meaning" because it doesn't presuppose any view regarding just what is the relationship between what authoritative legal texts "say" or "mean," and what the law is. (All of this is news to many folks. It won't be to Mark Greenberg's students and colleagues.)

Chapter 2 offers a leading-landmarks tour of the first two centuries of constitutional theorists' best efforts to answer the two questions that motivate the book, through the 1980s. The tour surveys Justice Joseph Story, Frederick Douglass, James Bradley Thayer and disciples, Herbert Wechsler, Robert Bork, John Hart Ely, and Ronald Dworkin. The lessons it draws are that the most influential theories of constitutional interpretation are silent on the question of constitutional content—not only do they not explicitly provide a theory of content, but a theory of content cannot be reliably inferred from what they do say about adjudication—and that the exceptions involve commitments to one or another conception of "natural law" that run against the mainstream of legal thought for well over a century (but are now staging a comeback).

Chapter 3 turns to public meaning originalism, the version of originalism best loved by conservative legal activists and judges and the one that most people have in mind when they speak of "originalism" without qualification. As Justice Amy Coney Barrett expressed the view a decade ago, when she was still one of us: "The conventional position of modern originalists is that the original public meaning of the Constitution's text is 'the law.'" Today's originalism "is a theory about what counts as constitutional law," not only "a theory about how judges should decide cases." The argument of chapter 3 is that public meaning originalism asks the right question—what explains or determines what the law is, or makes true propositions of law true?—but supplies an implausible answer.

The upshot of Part I is that we have almost no credible answers to one of the two main theoretical questions that should occupy constitutional theorists: the question of content, or of "what the law is." Natural law accounts of content (both classical and Dworkinian) face familiar objections and difficulties; the leading positivist theory, Scalia-inspired public meaning originalism, is not credible; and positivist nonoriginalists have offered essentially nothing. Scholars and students of American constitutional law need more theories that aim to explain American constitutional content. If you and I have a routine constitutional disagreement (say, whether persons born in the United States to parents here illegally are U.S. citizens as of constitutional right?), it is an account of constitutional legal content that has the resources to resolve it, not a theory of what the constitutional text means or a theory of how courts should adjudicate constitutional cases.

To be sure, some people reject my animating assumption that there exist singular answers to contested legal questions. Some people believe, or are disposed to believe, that law is just about power, or contestation, or perspective. Law is certainly about those things. I do not myself believe

that law is *only* about those things. I believe that a full inventory of what exists capacious enough to include words and social norms includes legal norms too. Or, to put the point in less metaphysically loaded terms, I believe that some propositions of constitutional law are true and their negations false. But I don't try to argue for any of that directly and Part I does not purport to refute skeptical or nihilist positions about law. My methodological point of departure is that ordinary thought and talk about constitutional law expresses the belief that there is law, or correct legal answers, in *some* contested cases (but possibly not in all or even most), and that abandoning that belief is costly and, for most people, difficult. So we have good pragmatic reasons to try hard to vindicate the commonsensical view that constitutional prohibitions, powers, and permissions exist before fully abandoning it.

The table thus set, Part II (Chapters 4-7) introduces and argues for my theory. Chapter 4 is a dip into methodology, addressing a preliminary question that some of the arguments advanced in Chapter 3 will have invited: how are we to figure out which theory is right? The answer, in brief, is reflective equilibrium—which is essentially all I was saying in the previous paragraph.

Methodology in hand, the next two chapters collectively present the organic pluralist theory of constitutional content, Chapter 5 explaining in what sense the right theory of content is pluralist, and Chapter 6 explaining the sense in which it is organic. In brief, the fundamental determinants of constitutional rules (or of constitutional facts) are constitutional principles, which are weighted, contributory norms. These fundamental constitutional principles combine to determine constitutional rules (or facts) by aggregation, roughly as practical reasons combine to determine what you ought to do, all-things-considered. Principles : rules :: reasons : all-in oughts. And the principles are grounded in the practices by which members of the legal community (quintessentially, but not solely, judges) take them up in legally relevant acts, much as word

meanings are grounded in the practices of a linguistic community and as social norms are grounded in the practices of a social group. Because constitutional rules (such as *persons born in the United States, even to persons there illegally, are (or are not) U.S. citizens,* or *states are (or are not) constitutionally permitted to post the Ten Commandments in public school classrooms*) are determined by constitutional principles (such as *the original meaning of the ratified text has legal force,* or *states must respect the human dignity of all persons,* or *federalism*) that are grounded in human practices, they are necessarily subject to organic change over time. The figures at the end of this memo try to represent graphically the ideas conveyed by this dense stretch of prose. I hope that the text and diagrams together communicate the essence of organic pluralism better than either could do on its own.

Together, Chapters 5 and 6 explain in detail how there can be right answers to contested questions of constitutional law—how there can be constitutional content—without assuming, as the public meaning originalist folks do, that the law is reducible to, constituted or determined by, the fixed meaning of the text. I hope (and even expect) that many readers will find these claims largely familiar and congenial. Organic pluralism does not claim to be radically innovative. My aim is to sharpen and modestly precisify what I think are the core commitments of most constitutional thinkers: that our law is based on a plurality of underpinnings and changes in organic ("living") fashion.

Chapter 7 turns from an account (metaphysical or truth-making) of constitutional content—of "what the law is"—to an account (normative or prescriptive) of constitutional adjudication. I understand the view that this is where all the action is and that all that anybody really wants from me or my fellow guild members is a good normative theory of adjudication. Unfortunately, I'm also quite confident that a theory of adjudication that is both reasonably comprehensive and

plausible is not in the cards, and this chapter helps readers see why not. Fortunately, however, there's a lot to say about adjudication that's worth saying, even if it can't all be stitched together into something very theory-like. Chapter 7 tries to make good on that contention.

After Part II explains all the moving parts that make up organic pluralism and compares and contrasts it with other well-known theories (including Philip Bobbit's "multiple modalities," Dick Fallon's "constructivist coherence," David Strauss's "common law constitutionalism," and Will Baude and Steve Sachs's "original-law originalism"), Part III tests and applies it. (Testing and application go hand in hand when we're playing reflective equilibrium.) The plan calls for three chapters. Chapter 8 ("Power") addresses questions concerning the scope of congressional power, the permissibility of delegations of legislative power to administrative agencies, and the growing power of the presidency. Chapter 9 ("Rights") examines a host of disputes that implicate equality or liberty or both—segregated schools and affirmative action, same-sex marriage and same-sex sex, religious freedom, and abortion. Chapter 10 ("Democracy") explores the constitutional people and their role in self-governance, from malapportionment and partisan gerrymandering to campaign finance. Throughout, this part's jobs are to see what organic pluralism (in one scholar's hands) has to say about a diverse array of famous and important questions of constitutional law, and to elaborate and refine the theory as necessary. Put another way, and consistent with the teaching of Chapter 4, the case studies serve two functions: they show how particular disputes should be resolved, or should have been, *if* organic pluralism is the right theory of American constitutional law, and they provide grist for assessing *whether* it's the right theory.

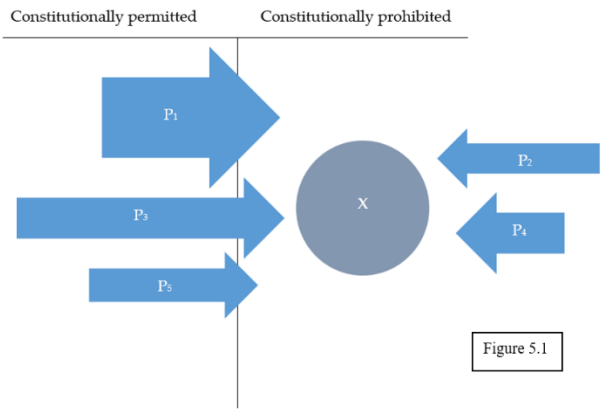


Figure 5.1

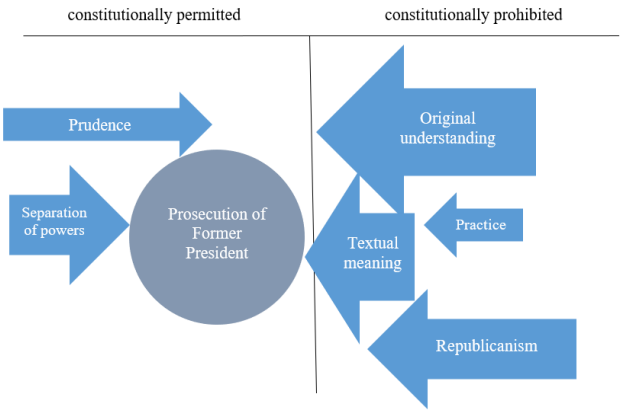
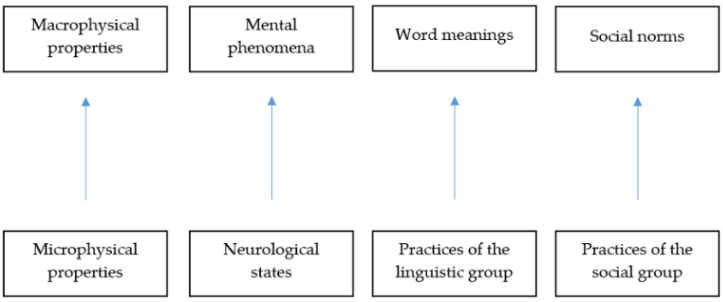
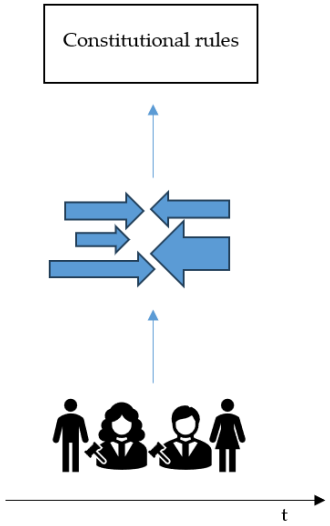


Figure 5.2



Grounding (figure 6.1)



That's an overview of the book. Chapter 5 follows. For the imagined participant who will read this long document and still hunger for more, I've prepared a separate document that consists of those sections from Chapters 6 and 7 that I think are most important and jurisprudentially interesting. If curious, please look for it wherever Legal Theory Workshop materials are usually available.

Thank you for reading this far and thanks, in advance, for what I'm sure will be your constructive engagement with this material.

CHAPTER 5. E PLURIBUS UNUM

> "The claim is often made that the authorially-intended meaning of an authoritative legal text, like a constitution or a statute, *contributes* to its legal meaning but is not identical to it. . . . But there is no sensible way one can nonlexically 'combine' precedent, original meaning, and justice, for example. That would be like combining pi, green, and the Civil War."
>
> -- Larry Alexander (2010)

Recall Steven Calabresi's influential encapsulation of public meaning originalism: "Originalists . . . give priority to the plain dictionary meaning of the Constitution's text because . . . they believe that it and it alone is law." I will call any theory of legal content that maintains that only one thing makes out "what the law is" a "monist" theory. Public meaning originalism is a monist theory. It claims that constitutional content is made out by exactly one thing: the fixed meaning of the text.

While the originalism of public meaning originalism gets all the press, it's the theory's monism that should really grab one's attention. We have seen that legal elites across all sorts of legal systems at least sometimes equate the law with something other than the meaning of an authoritative text—specific intentions or broad purposes of the text's authors, settled practices, the demands of justice. Constitutional lawyers and judges routinely appeal to other factors too—workability, practicality, and all-around good consequences, for example. But in no case is it thought that that other thing is the *only* thing. Take the theory, briefly mentioned earlier, that Marc DeGirolami calls "traditionalism." DeGirolami's view is not that tradition is all that matters; it's that original meanings and intentions aren't all that matter because traditions, even post-enactment, do too. Judge Richard Posner, the great champion of judicial pragmatism, did not believe that long-term systemic consequences furnish the sole touchstone for all constitutional decision-

making. All (positivist) theories of constitutional interpretation that reject the standard picture are pluralist.

Pluralism was orthodoxy all the way back to Thayer. He advocated judicial deference to constitutional judgments by Congress in part because constitutional questions are hard, and he thought them hard in part because the answers depend upon far more considerations than "the true meaning of" the constitutional text.[1] As Dean Larry Kramer explains, Thayer believed, like everybody else at the time, "that the Constitution could and should be interpreted using the same, open-ended process of forensic argument that was employed across legal domains—marshalling (as applicable, and in a relatively unstructured manner) arguments from text, structure, history, precedent, and consequences to reach the most persuasive overall conclusion."[2] Six decades later, Wechsler, while rejecting Thayerian deference, emphatically reaffirmed Thayerian pluralism. Deriding the monistic notion that constitutional law was determined solely by the "fixed 'historical meaning' of constitutional provisions," Wechsler described constitutional adjudication as some complex amalgam of "precedent . . . policy . . . history . . . [and] justice."[3]

Pluralism is not only for academics. Pick up a Supreme Court opinion in a random constitutional decision and you're likely to find appeals to meanings of the text, framers' intentions, historical practices, values, pragmatics, and a host of substantive principles (principles of federalism, separation of powers, human dignity, freedom of expression) that vary depending on the kind of dispute at issue. (Part III will substantiate this claim handsomely for readers uncertain.) The extent to which our practices and our theories have assumed pluralism can hardly be exaggerated. "Any theory that elevates a single modality of constitutional argumentation as its centerpiece," the originalist Keith Whittington acknowledges, "would seem to run into some

difficulty with reconciling its recommendation of argumentative monism with an accepted practice of argumentative pluralism."[4]

But a pluralistic theory of constitutional content faces one great difficulty: to explain how a plurality of inputs that, intuitively, are made of "different stuff" (meanings encoded in a text, intentions of a text's authors or ratifiers, judicial precedents, nonjudicial historical practices, prudential considerations, moral and political values, and more) collectively determine singular law, unique answers to constitutional questions. If the original meaning of the text matters, but isn't the only thing that matters, the living constitutionalist David Strauss asks, "just what role does the text play, and how can that role be harmonized with the other sources of constitutional law?"[5] The question generalizes: how can all the sources of constitutional law be harmonized with one another? Or, harmony aside, how do diverse inputs deliver singular law? I call this the *e pluribus unum* challenge: how does unique legal content—say, the rule that racially segregated public schools are unconstitutional, or that former presidents are immune from criminal prosecution—emerge from a plurality of inputs? Recall Martin Golding's contemporary criticism of Wechsler's neutral principles. Making sense of "principled judicial decision-making when more than one value is at stake, when it is impossible for a plurality of values to be fulfilled in equal measure," Golding claimed, confronts "the most complicated problems in the analysis of legal reasoning."[6] Justice Frankfurter agreed. While "any problem can be solved if only one principle is involved," he observed, "unfortunately all controversies of importance involve if not a conflict at least an interplay of principles."[7] If the existence of multiple values or inputs presents a devilish problem for a theory of principled adjudication, how much harder must it be for a theory of content?

Shockingly few constitutional theorists have squarely addressed this challenge. The two best-known efforts to theorize constitutional pluralism, by Philip Bobbitt and Richard Fallon, both date from the 1980s. This chapter will introduce and critically assess these well-known predecessor accounts en route to explaining how I think things work, how determinate legal content can emerge from a plurality of diverse grounds.

Philip Bobbitt's Inescapably Pluralist Pluralism

For those in the know—most anybody who attended an American law school in the past four decades—pluralism in American constitutional interpretation is associated with one scholar above all others: Philip Bobbitt, longtime professor at the University of Texas and, for nearly two decades, the Herbert Wechsler Professor of Federal Jurisprudence at Columbia.

Bobbitt's personal biography is rich enough to merit his inclusion (were he deceased) in Chapter 2. A nephew of President Lyndon Baines Johnson, Bobbitt was born and raised in central Texas. After graduating from high school at 15 and summering at the White House, Bobbitt attended Princeton University, from which he would graduate with a degree in Philosophy after taking time off to volunteer for VISTA, the "domestic Peace Corps." From Princeton, it was on to Yale Law and a federal clerkship, and then straight onto the UT law faculty, where he would remain for thirty years, writing on national security and war in addition to constitutional theory, and sojourning occasionally to Washington, D.C., to serve in both Democratic and Republican administrations. In 2021, Queen Elizabeth II knighted Bobbitt for distinguished service to British-American relations.

As a constitutional theorist, Sir Philip's fame derives chiefly from his 1982 book, *Constitutional Fate: Theory of the Constitution*, which presented the first careful typology of the plurality of constitutional arguments that prevailed in American constitutional discourse. In

Bobbitt's analysis, there were six, their existence due neither to timeless truths about law nor to contingent truths about late eighteenth-century America, but to having been legitimated by post-ratification American constitutional practice. Bobbitt's six constitutional arguments were: "historical" (by which he specifically meant arguments that concern intentions of the framers and ratifiers), "textual" (arguments based not on original meanings but on "the present sense of the words of the provision"), "structural" (claims drawn from governmental structures and the relationships among those structures and between them and the people), "prudential" ("argument which is actuated by the political and economic circumstances surrounding the decision"), "doctrinal" (the holdings of judicial decisions as well as "principles derived from precedent or from judicial or academic commentary on precedent"), and finally "ethical" (argument drawn from "the character or *ethos* of the American polity").[8] His typology, he emphasized, "is not a complete list, nor a list of wholly discrete items, nor the only plausible division of constitutional arguments." Not only can arguments be sliced and diced differently, "there can be no ultimate list because new approaches will be developed through time."[9]

What did Bobbitt's typology of arguments buy him? Did it undergird a theory of constitutional content or of adjudication? Or both? Or possibly neither? I'm tempted to answer: "all of the above." Bobbitt did not style his theory as one of content or of adjudication, but as a defense of the legitimacy of the institution of judicial review. His claim was not merely that continued judicial adherence to conventional and accepted methods of constitutional argument legitimate the practice of judicial review, but also, and more profoundly, that adherence to practice-legitimated legal arguments is essential to the legitimacy of a legal system and that such adherence would be impossible without judicial review. But if theories of content and adjudication weren't on his mind, that doesn't mean that his work has no implications for them. It certainly does, though

those implications became clearer in *Constitutional Fate's* 1991 sequel, *Constitutional Interpretation*.

One notable contribution of *Constitutional Interpretation* is its introduction of a new term for what *Fate* had simply called constitutional "arguments." They are now "modalities," a term bristling with significance. "[A] *modality*," Bobbitt explains, "is the *way* in which we characterize a form of expression as true."[10] If all the socks in the drawer are brown and S is a sock in the drawer, then is it true that S is brown? Yes, it is. The proposition that sock S is brown is true from a *logical* modality, for the proposition could not be otherwise given the premises and the rules of deductive logic. Is it true that one must not kill babies for fun? Yes, that is true too. It's not a logical truth but a moral one. It is true, Bobbitt would say, from a *moral* (or *deontic*) modality. His previous six constitutional arguments are now rebranded as "*constitutional modalities*—the ways in which legal propositions are characterized as true from a constitutional point of view."[11] For Bobbitt's purposes, "understanding the forms of constitutional argument as the *way* in which a constitutional proposition is true rather than the reason it is true can account for their legitimating force" while not encouraging the misconception that constitutional propositions are true the same way that true propositions about the natural sciences are.[12]

Because the constitutional arguments are "modalities," and because modalities are ways that propositions are true, Bobbitt's multiple modalities account straightforwardly explains how a proposition of constitutional law is true. A constitutional proposition is true if it is entailed or adequately supported by a valid modality. Since I have defined theories of constitutional content as theories of what makes or constitutes constitutional norms, or what makes true propositions of constitutional law true (Chapter 1), it follows that Bobbitt's account is, in a sense, a theory of constitutional content.

Why only "in a sense"? That qualification is demanded because what Bobbitt's theory cannot do is to explain how a proposition of constitutional law is true *and its negation false*. Normally, we take for granted that if P is true, then ¬P is not true. It usually goes without saying. But not in Bobbitt's theory, precisely because a statement is true if validated by any modality and contradictory statements will often be supported by different modalities. Bobbitt offers an example: "Some people think that a Constitution that guarantees 'the equal protection of the laws' requires race conscious affirmative action policies in order to remove the effects of past and present discrimination (a prudential argument); other people think that a state that engages in affirmative action is violating the same guarantee (a textual argument)."[13] Because both arguments are good on their own terms, both statements are *true*: our constitution requires race-conscious admissions programs and our constitution prohibits race-conscious admissions programs. That conclusion is, at a minimum, awkward. And its awkwardness is pronounced because there is nothing the least bit special about Bobbitt's example. The conclusion that a constitutional claim and its negation are both true follows whenever contradictory claims are each supported by at least one modality of argument, the state of affairs that describes every single "hard case."[14]

On Bobbitt's picture, that is, nothing is constitutionally prohibited "full stop." Acts are constitutionally prohibited from one modality, or more, and constitutionally permitted from another modality, or more. It will often be the case that a proposition of constitutional law is both true and false (from different modalities); it will often be the case that a proposition of constitutional law and its negation are both true. If you're at all like the reader I imagined in the Introduction, then you—like me—hope for an account that explains how there can be singular correct answers to at least some contested questions of constitutional law. That is something Bobbitt's modalities cannot deliver. His theory offers no path or "meta-modality" that travels from

thus-and-such is prohibited *from the perspective of one of the modalities* to thus-and-such is prohibited from *the constitutional perspective*. On Bobbitt's theory, it could be true at one and the same time both that states are constitutionally prohibited to criminalize abortion (from one modality) and that they are constitutionally permitted to criminalize it (from another modality), and that there's nothing more to say.

E pluribus pluribum is a problem for a theory of content because it doesn't do what we want from a theory of content in the first place: to help resolve intrapersonal constitutional uncertainty and interpersonal constitutional disagreements. But Bobbitt's modalities don't exhaust his theory. His typology is married to something approximating a theory of constitutional adjudication—or, better, a theory of constitutional decisionmaking for all state actors who are called upon to render constitutional judgments, legislators and executive branch officials as well as judges. "The United States Constitution," Bobbitt explains, "formalizes a role for the conscience of the individual sensibility by requiring decisions that rely on the individual moral sensibility when the modalities of argument clash."[15] Our "system is just, not because it produces just outcomes, but because it permits an opportunity for justice consistent with the freedom of the conscience to decide matters."[16]

As descriptive typology, Bobbitt's work was immensely influential. "The modalities identified by Bobbitt are now a staple of the leading casebooks on constitutional law," one scholar has fairly observed. "Every American law student learns them as the basic tools of constitutional discourse."[17] As a theory either of content or of adjudication, it has fared less well. Professor Gene Nichol summarized matters fairly when observing that, while most critics recognized "the clear power of *Constitutional Fate*," many also found "troubling" the theory's "massive" indeterminacy and the "large role" that it assigns to the "individual conscience" of the judge. "For

many Americans," Nichol surmised with some understatement, "the notion that the consciences of certain Justices will measure the powers of government would cause significant and perhaps understandable apprehension."[18] The intentionalist-originalist Larry Alexander is less understated when complaining that what he calls the "Spike Lee theory" of judging—do the right thing—is no theory at all.[19]

Richard Fallon's Lexical Pluralism

One apprehensive scholar was Richard Fallon, Jr., whom we met last chapter. Harvard's Story Professor of Law at the time of his unexpected recent death, Fallon had offered what he hoped would prove a better solution to the problem of conflict among legitimate constitutional arguments as an untenured assistant professor forty years earlier.[20]

Fallon started with what he deemed an obvious fact: American constitutional practice recognizes a variety of kinds of argument but lacks an agreed upon means of reconciling them "in a single, coherent constitutional calculus."[21] Fallon thought this a problem—he dubbed it the "commensurability problem"—and declared it "among the most important in constitutional law."[22] The importance of the problem arose from the fact that "it is impossible to reason or argue about the correct decision in hard cases—cases made hard by the actual or apparent tendency of different kinds of arguments to point to divergent results—without a theory of how different kinds of constitutional argument appropriately contribute to a single decision." The problem with the problem wasn't really that judges and scholars hadn't all agreed on the right "calculus." It was that almost nobody possesses a calculus and yet the problem had attracted "astonishingly" little scholarly and judicial attention.[23]

Fallon viewed the argumentative moves recognized in our practice not very differently from Bobbitt. Though he preferred five categories to Bobbitt's six, Fallon's main contribution was to offer a structured and much more determinate solution to argumentative conflict than bare recourse to judicial conscience. Fallon's solution—what he called "constructivist coherence theory"—had two parts.

The first part directs "a constitutional interpreter to assess and reassess the arguments in the various categories in an effort to understand each of the relevant factors as prescribing the same result."[24] That is, existing norms require constitutional interpreters—at least judges—to try to get the arguments to align even if they would not align when applied with no thumbs on the interpretive scales. Judges are supposed to attend to the various arguments not to discover what each independently and truly directs, but with the hope to bring them into concordance. "[T]he implicit norms of our constitutional practice" call for judges to make the arguments align if reasonably possible.

The second step comes in when the arguments do not all align and can't be made to align—when, despite the judge's best efforts, some arguments support one constitutional verdict and others support a contradictory verdict. If attempts to massage or strongarm the diverse constitutional arguments into "constructive coherence" fail, judges should array the arguments hierarchically and reach the judgment that accords with "the highest ranked factor clearly requiring an outcome."[25] That ranking, however, is not one each judge should choose for themselves. Rather, and again, "the implicit norms of our constitutional practice" supply the ranking. Those norms direct that judges must "accord the foremost authority to arguments from text, followed, in descending order, by arguments concerning the framers' intent, constitutional theory, precedent, and moral and policy values."[26]

Fallon's constructivist coherence theory was a theory of adjudication not a theory of content, as should not be surprising given our brief encounter with Fallon last chapter. That he was focused on adjudication while I am now focused on content might prove to be an important difference if his theory were successful on its own terms. But the communal verdict on Fallon's constructive coherence theory, as it was for Bobbitt's multiple modalities, was mixed. His observation that judges strive hard to bring the relevant factors into coherence—or at least to *present* them as cohering—is surely right and worthy of attention. However, many scholars have questioned whether our practice lays out the hierarchy he claimed to have found,[27] and Fallon himself has admitted to doubts. "In retrospect," he wrote a decade ago, "I believe that my earlier article did a better job of framing a problem that previously had been largely overlooked than of solving the problem that it framed."[28] The problem he had earlier highlighted and framed was "that our constitutional practice not only legitimates diverse kinds of arguments, but also, in doing so, generates the possibility of conflict among them." While still thinking the problem urgent, Fallon now confessed himself "uncertain that it has a categorical answer."[29]

Where does that leave us? Are there any other possible forms of constitutional pluralism—any way that discordant factors or inputs can deliver unique legal results without lexical ordering?[*] There are. Fallon identified one.

Before elaborating and defending his own lexical solution, Fallon highlighted a possible alternative: a "'balancing' theory" under which "each of the various kinds of constitutional argument would count in proportion to its quality, determinacy, or worth in individual cases."[30] Fallon was skeptical that balancing was the right theory. "[I]f balancing provided the best account

[*] A "lexical" or "lexicographic" ordering of factors places them in a strict hierarchical ranking such that if a higher-ranked factor applies, it resolves the issue without considering lower-ranked factors. The term comes from the way words are sequenced in a dictionary: *azure* comes before *baa* because if the first letters of two words are unequally ranked, the relative rankings of subsequent letters don't come into play.

of how arguments of different kinds are weighed in a single scale," he noted, then we should reasonably expect judicial opinions "to acknowledge that various kinds of arguments indicate different conclusions and to discuss the weight that different arguments merit." But, he thought, "this seldom happens. Far more common are opinions . . . that, while emphasizing one factor more than others, assert or imply that the most persuasive arguments . . . are consistent with a preferred conclusion."[31] Despite his own significant reservations, however, Fallon admitted that pluralistic balancing theories have "intuitive plausibility," and expressed surprise that "no powerfully argued balancing theory has achieved prominence in the scholarly literature."

Fallon's "Constructivist Coherence" article appeared in 1987. Remarkably, what he said then remains true four decades later. To this day, no (positivist) balancing theory has achieved prominence—neither of content nor of adjudication. Not only have scholars not developed such a theory, but the few scholars who have reflected squarely on the possibility have done so only to cast doubt upon it—especially as a theory of content. Larry Alexander presses the skeptical case with special vigor, insisting that law simply cannot emerge from an interplay of diverse inputs. Deriving unique legal content from a plurality of inputs non-lexically, Alexander maintains (in this chapter's epigram), is like trying to combine the letter pi, the color green, and the American Civil War: it can't be done.

Alexander's worry is not idiosyncratic. Professors William Baude and Stephen Sachs have similarly wondered how a large number of diverse inputs with varied weights can determine or constitute what the law is "rather than merely make soup."[32] Furthermore, doubts that multiple "determinants" can deliver single and unique "resultants" loom large in philosophical debates that arise far from American constitutional law. The single most analogous example concerns the reception accorded the pluralist ethics of the renowned early twentieth-century Scottish moral

philosopher W.D. Ross. Ross's innovation was a novel non-consequentialist moral theory that posited a plurality of fundamental moral duties (the duties of fidelity, reparation, gratitude, beneficence, and non-maleficence), each of which resists reduction to any more fundamental moral values or principles, and all of which collectively determine what you ought to do (your "absolute duty").[33] While scholars have generally acknowledged the significance and insight of Ross's moral philosophy—one contemporary deemed it "much the most important contribution to ethical theory made in England for a generation"[34]—the dominant position remains that neither Ross nor his followers provided any good account of what one's absolute duty is when their fundamental duties (what Ross called "prima facie duties") conflict. As the great American political philosopher John Rawls observed, while "[w]e must recognize the possibility that there is no way to get beyond a plurality of principles," a pluralistic conception of the right that does not explain what one ought to do when the principles conflict is "but half a conception."[35] The moral philosopher Shelly Kagan has similarly noted that "a complete normative theory" must include, not only a list of the relevant normative factors, but also "what we might call interaction principles—that is, principles specifying how the various factors interact so as to determine the moral status of particular acts."[36] Unfortunately, we do not currently have a good handle on what those interaction principles provide. To the contrary, Kagan concluded, "[t]he investigation of normative factors and their interaction is an ongoing process" that "comprises a large part of the contemporary discipline of normative ethics."[37]

Aggregative Pluralism and the Balance of Reason

The rest of this chapter puts forth an account of the sort that the indeterminacy of Bobbitt's approach calls for, that Fallon invited without endorsing, and that Alexander proclaimed hopeless—an account that makes possible uniquely right legal answers to at least some contested constitutional questions, without lexical ordering. I don't think it's impossible for a disorganized plurality of inputs to generate singular constitutional rules. I think it's actual.

Before I sketch the view, two notes on vocabulary. The first concerns the very term that Fallon used for the kind of view that I'm offering: "balancing." Fallon's usage was utterly unremarkable. Still, I find the term unfortunate despite its familiarity. One meaning of the noun "balance" is a scale to determine relative weights. Consistent with this noun, the verb "to balance" can mean "to weigh (two things) in or as if in a balance: compare the relative weight, force, importance, or value of." But that is not the verb's primary meaning today. The more common modern meaning of "to balance" is "to bring to a state or position of equipoise."[38] When people speak of a balancing theory, or an approach to constitutional law that balances considerations, the risk is that they think interpreters should try to achieve some kind of equipoise. The term might suggest that the goal is to bring underlying factors or arguments "into balance," as when a balance scale is level or when a gymnast remains steady on the balance beam. But that is not the goal. It is to ascertain which coalition of factors or arguments outweighs the opposing coalition. It is to ascertain the existence and direction of *imbalance*. I prefer to call an approach that derives legal content from the aggregate contribution of multiple principles, rather than from their ordering, "aggregative" or "net force" pluralism, not "balancing." The full name of my theory of constitutional content, then, is "organic aggregative pluralism." I call it "organic pluralism" when

foregrounding the organic character of principles' formation, and "aggregative pluralism" when focusing on the way that principles interact to deliver or output rules—by their net force.

A second important bit of terminology concerns the inputs or factors that combine to determine the constitutional content that we're seeking. Bobbitt and Fallon both called them "arguments." I do not object to that term (as do I object to "modalities"),[*] but will usually call these inputs "principles." I do so for two interrelated reasons. First, constitutional lawyers, judges, and scholars speak of constitutional "principles" explicitly and persistently when reasoning and arguing about constitutional content. A good pluralist account should generate singular constitutional answers (or "propositions" or "rules") from what participants in the practice themselves take to be the plural inputs. Those inputs *can be* described as "arguments." But, very often, they *are* described as "principles," a term that, not incidentally, holds more intuitive promise than does "argument" for a theory of content as distinguished from adjudication. That said, lawyers do not refer to all the things that I take to be principles as "principles." I will use the word "principle" to refer both to what constitutional lawyers already *call* "principles" and to what *are* principles (I claim) even though we tend not to call them that. My usage of "principles" thus fits ordinary American constitutional discourse well, though not perfectly.

My second reason for calling the plural foundations "principles" rather than "arguments" is to latch onto a well-accepted understanding of principles in the legal philosophical literature. That literature begins with the work of Ronald Dworkin, who mounted his first challenge to legal positivism on the back of a claimed "logical distinction" between two kinds of norm: rules and principles.[39] While details of Dworkin's discussion on this point have proven slippery and

[*] Nobody who thinks that inputs combine should ever call them "modalities," a term that Bobbitt introduced precisely to convey his view that each practice-legitimated argument is an independent truthmaker of constitutional propositions rather than a contributor to be weighed up against others. I have explained why few dyed-in-the-wool pluralists likely join Bobbitt in that view. For those who do, "modalities" is perfect.

controversial, the nub of his distinction is sufficiently clear and widely accepted.[40] Briefly, principles are weighted "contributory" norms, whereas rules are "decisive" unweighted norms. "Rules," Dworkin explains, "are applicable in an all-or-nothing fashion." If the facts that the rule (complete with any exceptions) specifies are satisfied, "then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing" to the outcome or decision.[41] Principles are different. Whereas rules are like on/off switches, principles are norms with variable "weight or importance."[42] Moreover, their weightedness serves their purpose. While rules exist (by and large) to require or proscribe action, the function of principles is to "incline a decision one way, though not conclusively, and they survive intact when they do not prevail."[43] Rules and principles, in short, are distinct normative notions with distinct qualities and functions.[44]

With concepts and vocabulary in hand, the nutshell version of aggregative constitutional pluralism is simple enough to state. Constitutional content—what the law is—can be described, and often is, in terms of rules. The constitutional right of corporations not to be subjected to more restrictive limitations on campaign expenditures than natural persons face (the right announced in *Citizens United*) can be restated as this constitutional rule: Congress and the states must not subject corporations to more restrictive limitations on campaign expenditures than individuals. Constitutional rules are constituted by the aggregate net force exerted by the full set of extant constitutional principles. Constitutional principles collectively make constitutional rules by their combined force. That's the barebones account. How do principles exert force? And how do the forces they exert aggregate or net out to yield rules? I'll address all that shortly. But I'm going to back into those answers by way of an analogy. Before we engage with principles of constitutional law let's consider their cousins: ordinary reasons for action.

There are reasons for action, and then there's what you ought to do, all things considered. It's a common and plausible idea that the former determine the latter—that what you ought to do is the product of what your reasons are. Reasons are the paradigmatic contributory normative notion. Their function is to contribute to a different normative notion—what one ought to do—that is decisive. The "contributory" normative notion *a reason* helps constitute or ground the "decisive" normative notion *all-things-considered ought*. It also seems that reasons perform their function—determining what you ought to do—by adding up, weighing, or aggregating. Principles, I will argue, are to rules roughly as reasons are to all-in oughts. (For standardized test-takers: principles : rules :: reasons : all-in oughts.) Accordingly, insofar as what you ought to do is an aggregative function of what your reasons are, then constitutional rules, very possibly, are an aggregative function of constitutional principles. If reasons for action determine what you ought to do by combining (adding and subtracting), then constitutional principles might determine constitutional rules the same way.

Do reasons combine? It certainly seems so. Take a toy example. Law student Alex is deliberating between two post-graduate job offers, from Firm One and Firm Two. To Alex's eyes, the two firms are far more similar than not, differing on only three relevant dimensions: challenge and interestingness of the work, remuneration, and appeal of co-workers. Firm One, Alex determines, offers more interesting work, but Firm Two offers more pay and more appealing colleagues. The fact that Firm One offers more interesting work is a reason for Alex to select it over Firm Two. That Firm Two offers higher compensation and better colleagues are two separate reasons for selecting it over Firm One. What should Alex do?

A knee-jerk thought is that Alex should select Firm Two because it dominates Firm One two reasons to one. To be sure, Firm Two could be the right choice, but this reasoning would be

naïve. Practical reasoning does not direct that we ought to act in conformity with the balance of *reasons* (a count noun) but rather with the balance of *reason* (a mass noun).[45] You should do what you have most *reason* to do, not most *reasons.* Alex's task is not to tally up the *number* of reasons that favor each option; it's to determine which option the applicable reasons favor all told. Now, aggregating reasons is surprisingly complex at the margins,[46] but simple enough at its core. First, the force each reason individually exerts is a function of two variables: (a) the relative importance of the value or interest that grounds each reason (call this the reason's relative "weight"), and (b) the extent to which each option advances that interest or value better or less well than the other option (the degree of the reason's "activation"). Second, the force that each reason individually exerts aggregates with the force exerted by every other reason by simple addition.[47]

Possibly, each of the three reasons that bears on Alex's choice possesses equal weight and activates to equal extent. If that were so, then the fact that more reasons favor Firm Two would entail that Alex should choose it. But the three reasons might not be equal in weight and activation. Maybe Alex ranks interestingness and challenge of work as significantly more important than salary or personal appeal of colleagues. Or maybe Alex deems all three considerations to be comparably important but determines that Firm Two beats Firm One on pay and colleagues only a little whereas Firm One exceeds Firm Two on quality of work by a great deal. Under either circumstance—if the reason that favors Firm One is weightier than the reasons that favor Firm Two, or if that one reason is activated or actualized to a greater degree than are the other two—then it could well turn out that Alex has more reason to work for Firm One notwithstanding that more reasons favor Firm Two. And what Alex ought to do, all things considered, is what they have most reason to do, not most reasons.

Modeling the Battle of Principles

What are we to do with this analogy? Because principles are weighted contributory notions like reasons, because rules are decisive notions like all-in oughts, and because reasons combine to determine the all-in ought, it seems possible, perhaps even probable, that constitutional principles likewise combine to determine constitutional rules. But at this point, the analogy and the hope it might engender are all that we have. How do principles add up? On what dimension? How can principles that concern meanings of texts, intentions or purposes of historical persons, practices of communities over time, moral and political values, possibly "combine" to produce *anything* beyond the set that consists of just those motley principles? How can principles escape Alexander's combinability challenge?

The short answer is that what must combine are not the things that the principles reference—meanings, intentions, practices, and values—or even the principles themselves, but *the forces that the principles exert*. Principles, like reasons, are favorers. They weigh or press for or against things. Also like reasons, the pressure any principle exerts is a function of two factors: (a) the principle's importance relative to other principles in the system and (b) the extent to which it is implicated or activated by the facts. Finally, the contribution made by each principle individually combines with the contributions made by all the others by simple aggregation. As the legal philosopher Stephen Perry has explained, "the principles that are relevant to a particular situation are assumed to be commensurable and capable of being aggregated, along their dimension of weight, so as to produce an overall balance of principles."[48]

That is a dense and abstract little stretch of text. To sharpen the thought, what we could use now is a picture—a graphical representation of what constitutional principles are, how they exert force, how they exert more or less force depending on the variables that I have labeled *weight*

and *activation,* and how the forces that the principles individually exert combine to collectively make constitutional rules. In the picture that I introduce here (Figure 5.1) and will deploy repeatedly in Part III, principles are represented by arrows (signifying forces) that point leftward or rightward on a one-dimensional plane divided into two halves that represent the two regions of constitutional space "is constitutionally prohibited" and "is constitutionally permitted." Each arrow weighs or presses toward one of these constitutional properties or statuses. Upon what do they operate? *What* are they pressing one way or the other? Principles act upon the kinds of things that are capable of possessing the properties "constitutionally prohibited" or "constitutionally permitted"—things like statutes and arrests, but not things like Neptune and elbows. The diagram represents whatever it is that the principles are operating on as a circle.

What determines how much force each arrow exerts? The arrows vary in height and length. The height of an arrow represents the relative importance or strength of the constitutional principle that it represents compared to other constitutional principles (much like the interests in challenging work and financial compensation might vary in importance to Alex). The length represents the extent to which the factual context activates the principle, how much of the principle's potential force is unleashed by circumstances (much like a small pay differential between Firms One and Two would activate the "higher compensation" reason that favors Firm Two less than a large pay differential would). Thus, the pressure that each principle exerts *on* the act *toward* a constitutional property or status is represented by the principle's total area (length x height), and the aggregate pressure exerted by all the principles that press toward the same outcome is simply the sum of the individually exerted pressures. (The forces that the individual principles exert are aggregable precisely because they operate in a single, common dimension.) Suppose the collective force of the principles that push the legislative or executive act represented by the circle toward

"constitutionally prohibited" exceeds the collective force of the principles that push toward "constitutionally permitted." Then—lo and behold—the constitutional rule visibly emerges: the act is unconstitutional.

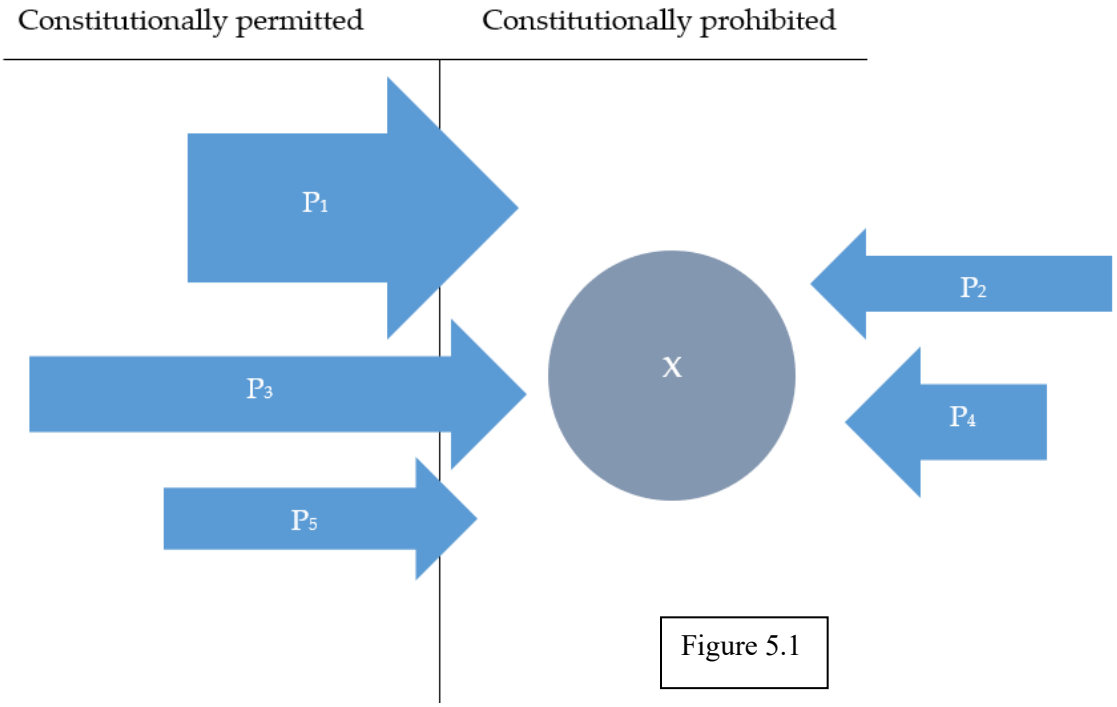


Figure 5.1

That's the graphical model, generically.[49] Let's now see our representational schema in action, replacing the placeholder, *X,* with one recent hard constitutional question: whether former presidents are immune from criminal prosecution for acts committed while in office. The Supreme Court confronted and purported to answer this question in 2024, in *Trump v. United States.*[50] The goal now is not to resolve that dispute confidently; it's still only to familiarize ourselves with the machinery and underlying reasoning. We'll move in three quick steps: first, to identify the constitutional principles that bear on the question; second, to figure out which direction each principle weighed and how forcefully; and third, to ascertain how the principles varied, if at all, in their relative importance.

Not every constitutional principle bears on every constitutional case or question, any more than every moral principle bears on every moral case or question. (Principles regarding promise-keeping, for example, are simply not relevant to moral quandaries that don't involve promises.) Call the set of principles that activate on a given constitutional question that issue's "prickle," after the collective noun for porcupines and hedgehogs. What principles comprise the prickle for *Trump v. United States*? It is widely accepted that principles lack canonical formulations; any principle can be stated in a variety of ways.[51] That acknowledged, before the Court issued its decision, a reasonable constitutional lawyer might have identified six relevant constitutional principles—principles of *separation of powers* (that functions are assigned where they belong, and that powers should be effectively checked and balanced) and of *republicanism* (that government remains of, and by, the people), principles that confer legal force on the ordinary *meaning of the text*, on the *intentions of the founders,* on stable and widely accepted *historical practices*, and on *practical need*.

Assuming that these are the principles in the prickle (and we'll say more about them in Part III), which way and how far does each lean? Here's a plausible set of judgments. Although I'm confident about some, uncertain about one or two, I offer them here only for illustration, not for truth. To start, *republicanism* and *founding intent* both weigh against immunity (that is, in favor of the constitutional permissibility of prosecuting former presidents), and with substantial force. As a distinguished group of historians of the American founding argued in an amicus brief filed in the *Trump* case, "[s]ometimes history speaks ambiguously. But here, it speaks with surpassing clarity." The notion that former presidents would be immune from criminal prosecution for crimes committed in office "violates common understandings of executive power in the new republic and contradicts basic values that have defined American democracy."[52] *Textual meaning* also weighs

against immunity, though perhaps less fully than *republicanism* and *founding intent* do. No constitutional text speaks expressly to the immunity of former presidents, either to affirm or to deny it. But the fact that the text does explicitly grant immunity to members of Congress and not to the president pragmatically implies that presidents are not immune,[53] and the Impeachment Clause ("the Party convicted [of Impeachment] shall nevertheless be liable and subject to Indictment, Trial, Judgment, and Punishment, according to Law")[54] implies the same, pretty strongly. *Historical practice* is similar. No administration has tried to prosecute a former president, so the courts have had no occasion to opine on its constitutionality. But the question had arisen in circumstances where the answer was of more than academic interest—as during the impeachment and subsequent pardoning of President Nixon and President Trump's own second impeachment—and relevant parties made clear their assumption that presidents were liable to prosecution.[55] Against all this, the final two principles possibly support presidential immunity, though modestly. Conceivably, the threat of future criminal prosecution could make it harder for sitting presidents to exercise their core functions—a *separation of powers* concern. Where *practical need* leans is uncertain. On one hand, immunity might encourage lawbreaking at the margins; on the other, it protects against a potentially destructive cycle of tit-for-tat prosecutions. Let's say, for sake of argument, that *practical need* favors immunity, on net.

Lastly, we need to know how important or weighty these principles are relative to one another. Are they all comparably important, or are some weightier than others? In truth, we are in no position even to speculate until we get a grasp on what makes the principles what they are, the topic for next chapter. Still, for this example to fully serve its purpose, it would be helpful to introduce varied weights, even if they are entirely made up. So let's assume that principles come in three levels of importance and, just for the heck of it, that the structural principles *republicanism*

and *separation of powers* are of ordinary weight, that principles of *text* and *founding intent* are weightier, and that *practical need* and *historical practice* are least weighty. Again, at this point, these are just stipulations.

That's a large number of judgments. Figure 5.2 conveys them all. It gives clear visual content to what one early twentieth-century state court observed is "[t]he theory of our system"—namely, "that the law consists, not in the actual rules enforced by the decisions of the courts at any one time, but in the principles from which those rules flow."[56] It also displays that, on these assumptions (which I have laid on the table but done little to defend), it is constitutionally permissible for the national government to criminally prosecute a former president for crimes committed while in office.

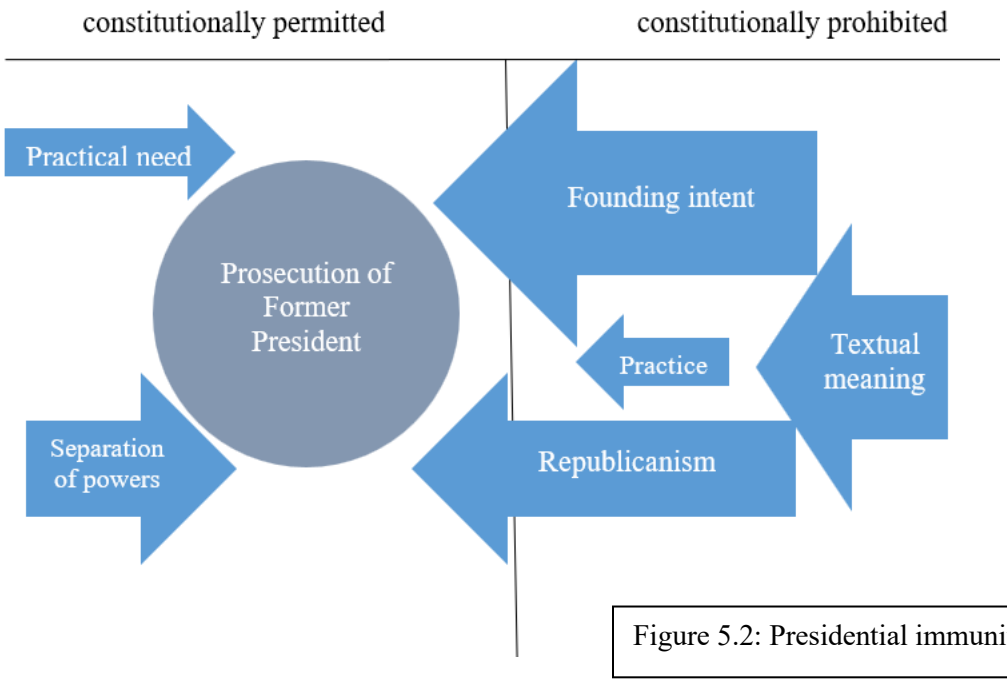


Figure 5.2: Presidential immunity?

That's an illustration of the model in one recent hard case. Importantly, this is not a theory limited to how rules emerge in hard or contested cases. It explains easy cases too.[57] Is it a rule of

constitutional law that each state is entitled to an equal number of Senators? It certainly is, as Figure 5.3 makes plain.

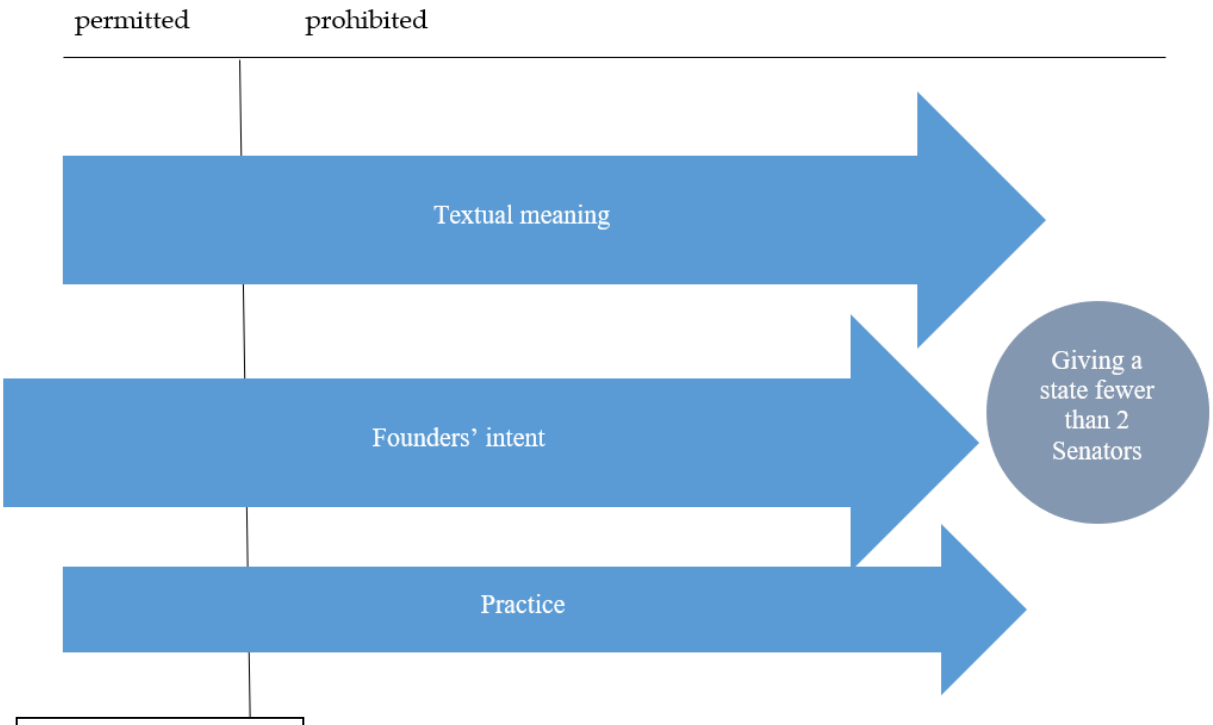


Figure 5.3: Easy case

Not only does aggregative pluralism deliver the right answer, but it also shows why the question is overwhelmingly easy, thus why pluralism will often appear indistinguishable from the standard picture in easy cases.

Do these graphics present an accurate rendering of how principles and rules really work? Of course not. They abstract and simplify complex normative phenomena and the relationships among them into a visual form designed to aid understanding, not to transmit full knowledge. The model sacrifices detail to better convey the central and important features through what I hope are accessible and intuitive images. This is how visual representations of complex phenomena often work. Famous examples include the London Tube and NYC Subway maps, the planetary (Bohr)

model of the atom, the double-helix model of DNA, even standard supply and demand curves. The successful representational schemas succeed not because they accurately convey all details of the reality that they signify but because they strike a good compromise between detail and accuracy on the one hand and visual clarity and intelligibility on the other. My hope is that my images of how principles make rules do the same.

Consistent with that ambition, I should emphasize that the net forces account is not sold as a sure-fire way to eliminate disagreements. Nothing about this picture is remotely algorithmic, mechanical, or demonstrable. Nonetheless, the picture should facilitate more productive disagreement by clearly isolating four chief loci of uncertainty and dispute. Supreme Court Justices, and all the rest of us, can reasonably disagree about: (1) what our principles are, (2) the relative weight or importance of varied principles, (3) which direction a principle leans on a given constitutional question, and (4) the extent to which the facts activate the principle in the direction that it presses. If you and I are both aggregative pluralists but disagree about some constitutional bottom-line—in this example, the existence and scope of presidential immunity from prosecution—that disagreement should flow from disagreement about one or more of these four issues.[*] The diagram should facilitate our ability to see that quickly and distinctly, allowing our arguments to become more focused and constructive.

A second virtue of the net-forces account is that it makes obvious why a principle that prevails in one case will lose out in another. Sometimes the legally correct judicial decision will be in accord with what the text means (or what the framers intended or what our settled practices have been, etc.), while other times the correct decision will be correct despite not according with what the text means (or what the framers intended or what our settled practices have been, etc.).

[*] There's a fifth possibility: we might disagree about whether the function that generates rules from principles is entirely aggregative or includes lexical features. We'll return to this possibility in Chapter 6, "Living Originalism?"

Some critics of pluralism have been perplexed and troubled by just this quality—that a factor that carries the day on one occasion will be defeated on another. "[W]hat persuasive explanation is there for the living constitutionalists' suggestion that we should *only sometimes* adhere to the original public meaning of the Constitution's written text?" Justice Gorsuch asks, speedily declaring that he "can think of none."[58]

But the close connection between principles and reasons supplies the explanation that Gorsuch sought: when principles point in different directions, we should adhere to the original public meaning of the Constitution's written text when that original public meaning *is part of the winning coalition of principles*, and not otherwise. The diagrams make this plain. Consistency in application of a principle does not require that if it carries the day in one case it must also prevail in another case in which it applies any more than such consistency is required of reasons. Suppose Ernie joins his roommate Bert for dinner at Taste of Colombo, a new Sri Lankan restaurant in town. When deliberating whether to accept Bert's invitation, Ernie was influenced by the fact that he had never tried Sri Lankan food. "That this cuisine is new to me is a reason to go," Ernie thought. But that decision, even if based in part on that reason, doesn't commit Ernie on pain of inconsistency or irrationality to join Bert the following week at Taste of Tashkent even if Ernie had never eaten Uzbek food either. Maybe the reasons that weigh against the trip to Taste of Tashkent press more heavily than they did against Taste of Colombo (it's more expensive or a longer drive). Maybe other reasons in addition to "try new cuisine" had favored last week's outing (it's near a duck pond that would invite a postprandial visit) but exerts little or no force in favor of Tashkent. Recall the central difference between rules and principles that Dworkin emphasized: if a rule applies, then "the answer it supplies must be accepted," whereas the principles "incline a decision one way, though not conclusively, and they survive intact when they do not prevail."[59]

While the explanation Gorsuch seeks is readily supplied, he had good reason to ask for one. The *e pluribus unum* challenge is hard, for content or adjudication. But it's still true, as Fallon complained long ago, that pluralists haven't given it the attention it warrants and that the pattern of constitutional judgments pluralists tend to reach—not each one of us, but overall—doesn't look calculated to assuage critics' worries. One concrete thing pluralists could do to help themselves see things more clearly (if organic pluralism is on the right track), and to invite less misunderstanding by others, is to retire a popular self-description. (Yes, we've come full circle: back to my preferred lexicon.) Some scholars who endorse versions of pluralism prefer a different label: "eclecticism."[60] To my ear, that is an unhappy name for a theory of adjudication and an inapt one for a theory of content. Eclecticism is "the selection of doctrines or elements from varied and diverse sources according to their presumed utility or validity usu. for the purpose of combining them into a satisfying or acceptable style, system of ideas, or set of practices."[61] The term refers to human activity, not to existent social phenomena that needs to be explained and also suggests highly personal choice. A theory of *content* is not eclectic; it is pluralist. And a theory of *adjudication* that *is* eclectic is undisciplined. Say no to eclecticism. Say yes to aggregative pluralism.

Of Snipes and Cougars

Let's take stock. We are seeking an explanation of what makes it the case that the constitutional law has the content that it has. We're not asking why some historical persons decided to write a portion of the constitutional text one way rather than another or decided to vote for ratification of the text rather than against. We're asking why, given the text we have, along with anything else that might matter—intentions of those who brought it into effect, our nation's

practices under it, the values and commitments with which the nation's people have invested it, the polity's practical needs, whatever—the *law* is what it is. What determines the shapes and contents of our constitutional rights, powers, prohibitions, and immunities? Public meaning originalism offers a singular or "monist" answer: the text's original communicative content does. But our constitutional practice, like legal practice most places, is pluralist in its foundations. As a descriptive or sociological matter, judges and other experts in American constitutional law invoke many and diverse considerations as the grounds of their constitutional judgments, not only the text's original meaning. To the extent the practice of judges makes the law what it is, the pressure in favor of a pluralist theory of content is great. Yet the challenge that a pluralist theory of constitutional content confronts is also great: to explain how these diverse considerations or inputs can ever supply determinate answers to disputed constitutional questions on their own, answers that judges are able (at least sometimes) to discover, not only to create.

The preeminent theory of constitutional pluralism, Philip Bobbitt's multiple modalities, rejects the challenge rather than meeting it. For Bobbitt, seeking singularly correct answers in hard constitutional cases is wasted labor, for all we have are distinct arguments and the answers that they individually support. "Law is something we do, not something we have as a consequence of something we do."[62] Bobbitt could be right. I've said nothing to disprove it.[63] But his conclusion comes at considerable coherentist cost if you start believing (as I am sure many students and practitioners of constitutional law do) that there are legally right and wrong answers to at least some hard constitutional questions, that at least some constitutional rights, powers, and duties exist despite disagreement about them and prior to their being pronounced by an authoritative tribunal. Richard Fallon offered an alternative theory designed to vindicate this widespread belief. But Fallon's "constructivist coherence" theory delivers the goods only by assuming that our practices

array the plurality of legitimate constitutional arguments in a strict hierarchy, like a decision tree. If our practices were hierarchical or lexical, that would solve the *e pluribus unum* challenge. But few scholars have agreed with Fallon that they are, and Fallon confessed frankly to his own uncertainty.

The obvious alternative to lexicality is aggregation. The fundamental inputs ("principles," as courts and I call them) exert force—not gravitational force or mechanical force, but legal force. Principles exert their force upon the kinds of things that can have legal properties—not atoms, sailboats, or radio waves, but acts and practices of governments and individuals. The force the principles exert is directional—not up or down, east or west, but toward the act's either possessing or lacking a relevant legal property, such as being unconstitutional. The magnitude of the force that a single principle directionally exerts is contextual—not fixed and uniform, but a function of its relative importance compared to other activated constitutional principles and of how much of its weight is brought to bear on this disputed question given the actual facts. The forces that individual principles exert combine with one another such that the net force exerted by the whole collection of activated principles determines whether the act or practice possesses or lacks the constitutional property at issue. All that sounds complicated, but it's just a moderately careful description of an entirely familiar dynamic. A collection of constitutional principles collectively determines a singular constitutional rule in much the same way that a collection of reasons collectively determines a singular all-things-considered ought. And trying to ascertain what we ought to do from what our reasons are is standard fare for practical deliberators such as us. We've been doing it for most of lives.

I will not say more now in defense of this account, or in response to objections. Much better to first fill out the picture by explaining where the principles come from (Chapter 6), by

showing how an organic aggregative account of constitutional content fits with a plausible and attractive companion account of constitutional adjudication (Chapter 7), and by drawing forth particular constitutional judgments the account supports (Chapters 8-10). But the work of this chapter would remain incomplete if it didn't address one major worry that will loom large even to many readers who are sympathetic to pluralist aggregation, let alone to those more doubtful.

On the net-force account of how constitutional principles operate, "what the law is" is determined by what the principles are (their contents and contours), how weighty they are relative to other principles, which direction they lean with respect to the challenged state action, and how fully activated they are by the facts that they make legally relevant. Those are a lot of moving parts. That we will never all agree about all these variables is no embarrassment to this account or to any theory of legal content. What might be some embarrassment is if we can rarely gain much epistemic access to many of these issues, if we are doomed always to be highly uncertain about them. Yet more worrisome is the intuition that, in hard cases, many of these variables are themselves undetermined, that there might be no facts of the matter.

To make this concern more concrete, look no further than the case I used to introduce the account: *Trump v. United States*. None of the justices viewed the constitutional dynamic just the way that I suggested is most plausible. To start, the majority came out the other way on the constitutional bottom line. Where figure 5.2 shows the principles collectively weighing in favor of the permissibility of prosecution (against immunity), the *Trump* majority concluded against prosecutability (in favor of immunity). And in reaching the opposite constitutional rule from what my tentative analysis supports, Chief Justice Roberts's opinion for that majority reasoned differently about the direction and activation of several of the principles (or arguments or factors) that I have claimed to be relevant. Justice Sotomayor's opinion for the dissenting justices reasoned

more in line with the snapshot I've offered but concluded—as readers of Fallon might have anticipated—that all the principles or considerations pointed in the same direction: toward the permissibility of prosecution. Arguably, then, *Trump* bolsters suspicion that even if any aggregative pluralistic account can provide constitutional content in some small number of hard cases, it will prove underdeterminate on the vast majority of disputed constitutional questions and therefore advances the ball trivially if at all.

The line of response most obviously available to me would be to contend that aggregative pluralism delivers significantly more determinacy than critics assume or assert. Perhaps our existing principles are sufficiently determinate to yield determinate legal content in a sizeable proportion of hard cases—not in a tiny sliver of cases, say, but in a quarter, or even more. That response, if true, would make this theory of content important on any reasonable standard. In truth, I think there is at least something to this response. Indeed, I suspect that some readers familiar with the case will believe that *Trump v. United States* cuts more in favor of my account than against, as commentators from across the political spectrum eviscerated the decision as "an affront to democracy and the rule of law,"[64] "astonishingly lawless,"[65] and "a constitutional abomination."[66] But that is not my response.

I really have little idea what percentage of hard constitutional cases that reach the Supreme Court have reasonably determinate, reasonably discoverable answers. Ten percent? Two?[67] I pull these numbers from the air both to reassure sophisticates that my theory does not depend on wildly optimistic assumptions about its determinacy and to highlight that the answer matters little. That second part is the heart of my response: the importance of a sound account of constitutional content does not depend upon the percentage of contested cases that the theory would "resolve." Certainly the *utility* of the theory might depend on its determinacy. But not its importance or

significance. An account of constitutional content gives us what we need even if it turns out to suggest that determinate content is rare. It's not, in short, that the aggregate or "balancing" account delivers substantially more determinacy than critics think that it does (though it might), but that a theory of content needs to deliver substantially less determinacy to matter than critics think that it must.

That's the claim. I'll try to help you see it as I do by once again directing your attention away from law and toward something very different: this time, hunting. Not just any hunting, but the hunting of snipe and of cougar. And not just anywhere, but in scenic Scappoose, Oregon.

You know what cougar are. Called by many names—including mountain lion, puma, catamount, and panther—they are the largest wildcat in North America. What about snipe? In point of fact, snipe are a diverse group of wading birds, related to the sandpiper. But, for our purposes, that's incidental and distracting. Forget that I mentioned them. Snipe hunters are not after wading birds. A snipe hunt, one authority explains, "is a type of practical joke or fool's errand, in existence in North America as early as the 1840s, in which an unsuspecting newcomer is duped into trying to catch an elusive, nonexistent animal called a *snipe*." Although descriptions of the snipe vary, as do recommended hunting techniques, the standard approach is to lead the prank's unsuspecting target to a secluded spot, usually at night, furnished with hunting tools and instructions. Those in on the prank then skedaddle and hilarity ensues. "As an American rite of passage, snipe hunting is often associated with summer camps and groups such as the Boy Scouts."[68]

Compare snipe hunts to cougar hunts. Cougars are among the most difficult game animals to kill. They are solitary, well camouflaged, quick and strong. Oregon boasts one of the largest populations of cougar in the United States. But even there, success rates on hunts are strikingly

low. Most years, statewide success rates for cougar hunting hover around 2%, higher in some areas, lower in others. Scappoose, in the state's northwest corner, is not a cougar mecca. For the three years 2020-2022, 821 Scappoose cougar hunters collectively spent over 16,000 person-days hunting their quarry. They bagged two. That's an overall success rate of .24% per hunter, .0125% per hunt day.[69] I don't know how many young Scappooseans hunted snipe over this period, but we can be confident that no snipe were captured or harmed in the endeavors. Success for snipe hunting in Scappoose: 0.0%; for cougar: 0.24%. This is a very small difference in absolute terms. And yet the two practices belong to different worlds of meaning and intelligibility. Compare cougar and snipe with other game animals. Buck deer hunts succeed in Scappoose 30% of the time. Although you're more than 100 times likelier to bag a buck than a puma, the rationality of the activities is, if not exactly the same, then nearly so. The difference between buck hunting and cougar hunting in Scappoose is as nothing compared to the difference between cougar hunting and snipe hunting. What makes the difference is that cougar exist in the Scappoose area and snipe do not.

It's the same for law. Whenever we find ourselves searching for what we imagine to be already existing constitutional law—for legally correct answers to hard constitutional questions—we must presuppose that the object of our investigation could exist. We don't need to know that it does exist, let alone that we're likely to discover it. But we need grounds to believe that our search could succeed. Otherwise we're just hunting snipe—fun enough if you're pranking or being pranked, ridiculous if you're all in on the gag. That's why we need a theory of content. You need to possess a theory of content, or at least presuppose that a sound one exists, to render rational the activity of ever trying to find what the law is. That's also why it matters little, however, whether the theory you have or presuppose delivers lots of law or not very much. So long as you believe

there could be a legally right answer to a hard question that you are motivated to solve, you keep doggedly at it, striving to reason yourself to the answer that might be out there, even if you also believe there's a good chance—even a very good chance—that it isn't. "Judges do not decide hard cases in two stages," Dworkin observed decades ago, "first checking to see where the institutional constraints end, and then setting the books aside to stride off on their own."[70] No, they ordinarily move from law-seeking to law-developing seamlessly, without experiencing an abrupt shift from one to the other. That's a desirable phenomenology and mindset for judges if we don't want them to see themselves as legislators or social engineers, and a theory of content that allows for substantial indeterminacy is sufficient to sustain it. To pay diligent attention, and to keep trying hard to find your quarry, you need only to know that there might be a cougar out there; that's enough to foster the right attitudes and habits of care and diligence, even if you also believe that, in this case, there probably isn't.

ENDNOTES

[1] James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 138 (1893).

[2] Larry D. Kramer, *Judicial Supremacy and the End of Judicial Restraint*, 100 CAL. L. REV. 621, 624 (2012).

[3] Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 16 (1959).

[4] Keith E. Whittington, *Originalism: A Critical Introduction,* 82 FORDHAM. L. REV. 375, 388 (2013).

[5] David A. Strauss, *The Supreme Court, 2014 Term—Foreword: Does the Constitution Mean What it Says?,* 129 HARV. L. REV. 1, 4 (2015).

[6] Martin P. Golding, *Principled Decision-Making and the Supreme Court*, 63 COLUM. L. REV. 35, 48 (1963).

[7] Felix Frankfurter, The Supreme Court in the Mirror of Justices, in OF LAW AND LIFE & OTHER THINGS THAT MATTER 94 (Philip B. Kurland ed., 1965), quoted in STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 19 (2005). [confirm cite]

[8] PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 7, 61, 94 (1982).

[9] BOBBITT, CONSTITUTIONAL FATE, at 8.

[10] PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 11 (1991).

[11] BOBBITT, CONSTITUTIONAL INTERPRETATION, at 12.

[12] BOBBITT, CONSTITUTIONAL INTERPRETATION, at xiv.

[13] BOBBITT, CONSTITUTIONAL INTERPRETATION, at xiv.

[14] *See* BOBBITT, CONSTITUTIONAL INTERPRETATION, at xiv ("In hard cases, two or more legitimate modalities will conflict.").

[15] BOBBITT, CONSTITUTIONAL INTERPRETATION, at 168.

[16] BOBBITT, CONSTITUTIONAL INTERPRETATION, at 163.

[17] Dennis Patterson, "Wittgenstein, Ludwig". In Sellers, M.N.S.; Kirste, Stephan (eds.). *Encyclopedia of the Philosophy of Law and Social Philosophy* (2020).

[18] Gene R. Nichol, *Constitutional Judgment,* 91 MICH. L. REV. 1107, 1111 (1993). *See also, e.g.,* Michael C. Dorf (1997), at 1794.

[19] Larry Alexander, *Law and Politics: What Is Their Relation*, 41 HARV. J. L. & PUB. POL'Y 355, 356 (Winter 2018) ("But why have rules at all? In other words, why not decide everything by means of first-order practical reasoning? Put differently, why is not our only law what I call the Spike Lee law: 'Do the right thing.'?)

[20] Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1229 (1987).

[21] Fallon, *Constructivist Coherence*, at 1190.

[22] Fallon, *Constructivist Coherence,* at 1191.

[23] Fallon, *Constructivist Coherence,* at 1191-92

[24] Fallon, *Constructivist Coherence,* at 1193.

[25] Fallon, *Constructivist Coherence,* at 1193.

[26] Fallon, *Constructivist Coherence,* at 1193-94.

[27] *See, e.g.,* Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent,* 22 Const. Commentary 289, 295 (2005) (contending that "what Fallon so charitably (if jargonistically) denominates 'constructivist coherence' is,

in the reality of judicial practices, 'anything goes'—something closer to (if Professor Fallon will forgive me) 'deconstructionist incoherence'").

[28] Richard H. Fallon Jr., *The Many and Varied Roles of History in Constitutional Adjudication*, 90 NOTRE DAME L. REV. 1753, 1812 n.300 (2015).

[29] Fallon, *The Many and Varied Roles*, at 1812 n.300.

[30] Fallon, *Constructivist Coherence,* at 1228.

[31] Fallon, *Constructivist Coherence,* at 1229.

[32] Baude and Sachs, *Grounding Originalism*, at 1489 (criticizing Berman, "Our Principled Constitution"); *see also* Alexander, *The Banality of Legal Reasoning*, at 521.

[33] W.D. ROSS, THE RIGHT AND THE GOOD (1930).

[34] C.D. Broad, 940, Review of *Foundations of Ethics* by W. D. Ross, 49 MIND 228, 228 (1940), quoted in William David Ross (Stanford Encyclopedia of Philosophy).

[35] JOHN RAWLS, A THEORY OF JUSTICE 41 (1971).

[36] SHELLY KAGAN, NORMATIVE ETHICS 183 (1998).

[37] KAGAN, NORMATIVE ETHICS, at 186. For a more superficially distant example of commensurability-style worries, philosophers of concepts have questioned the coherence of "non-classical" accounts of concept structure—Wittgenstein's "family resemblance" account, and broadly similar "cluster" accounts—that demarcate a concept by a set of factors that bear on it or contribute to its instantiation, without forming a set of necessary and sufficient conditions. *See* Stephen Davies, *The Cluster Theory of Art*, BRITISH JOURNAL OF AESTHETICS 44, no. 3 (July 2004) 297-300; Eric Margolis and Stephen Laurence, *Concepts*, Stanford Encyclopedia of Philosophy (Winter 2019). https://plato.stanford.edu/archives/sum2o19/ entries/concepts/.

[38] WEBSTERS THIRD NEW INTERNATIONAL DICTIONARY 165 (1991).

[39] Ronald Dworkin, *The Model of Rules*, 35 U. Chi. L. Rev. 14 (1967), *reprinted and revised as The Model of Rules I*, *in* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY ch. 2 (1977). Dworkin's challenge from principles is often misunderstood. I clarify its logic in Mitchell N. Berman, *Dworkin vs. Hart Revisited: The Challenge of Non-Lexical Determination*, 42 OXFORD J. LEG. STUD. 548 (2022).

[40] *See, e.g.*, Dale Smith, *Dworkin's Theory of Law*, PHIL. COMPASS 267, 268 (2007) ("While many positivists thought that [Dworkin] over-stated or misunderstood the difference between rules and principles, most accepted that there *is* a difference between these two types of norm."); Larry Alexander & Ken Kress, *Against Legal Principles*, 82 IOWA L. REV. 739, 745 (1997) (observing that the Dworkinian distinction between rules and principles reflects "an entire jurisprudential tradition, a tradition that has shaped not only academic thought on these matters but also how lawyers and judges think and operate"). Principles are especially important to European and Latin American constitutional thought, in large measure thanks to the work of the German legal theorist Robert Alexy. *See especially* ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS (Julian Rivers trans. 2002). Alexy's system is elaborate. I could not explain our points of agreement and divergence in the space I could afford it. For our purposes, it should be enough to say that Alexy's is a natural law-inspired theory about the adjudication of constitutional rights, whereas organic pluralism is a positivist account of all constitutional content, rights and powers.

[41] DWORKIN, TAKING RIGHTS SERIOUSLY, at 24.

[42] DWORKIN, TAKING RIGHTS SERIOUSLY, at 26.

[43] DWORKIN, TAKING RIGHTS SERIOUSLY, at 35.

[44] All references here and throughout to "normativity," "normative theory," "normative domains," and the like, are noncommittal between what has been called "robust" and "thin" normativity. Robust (or "authoritative") normativity is the grade of normativity routinely associated with morality. If you $\text{ought}_{\text{morality}}$ to φ, then you *really* ought to φ, unconditional on your own desires or commitments. Thin (or "formal") normativity is associated with manners, prescriptive grammar, and the rules of games and organizations. Even if you $\text{ought}_{\text{grammar}}$ not to split an infinitive, it is an open question whether you *really* (robustly) ought not to. The same is true, most positivists believe, about law: that you $\text{ought}_{\text{law}}$ not to φ does not entail that you *really* ought not to φ. The literature on the robust/thin distinction

(often under different labels) is burgeoning. For an introduction, see David Plunkett, *Robust Normativity, Morality, and Legal Positivism*, *in* DIMENSIONS OF NORMATIVITY: NEW ESSAYS ON METAETHICS AND JURISPRUDENCE 105 (David Plunkett, Scott J. Shapiro, & Kevin Toh eds. 2019). When I say that principles and rules pack normative force, I don't presuppose that they bear on what anyone really or truly ought to do, or what citizens or subjects have "real reason" to do.

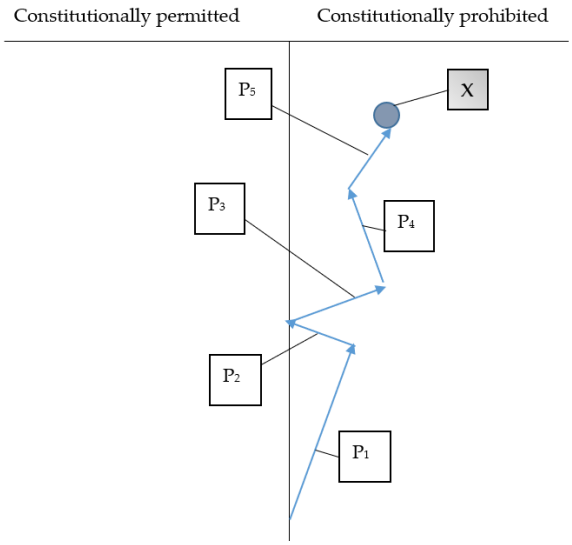
[45] *See* Daniel Fogal, *Reasons, Reason, and Context*, *in* WEIGHING REASONS, at 74 (defending this claim at length); *see also* JONATHAN DANCY, ETHICS WITHOUT PRINCIPLES 16 (2004) (asserting it in passing).

[46] See the essays in ERROL LORD & BARRY MAGUIRE, EDS. WEIGHING REASONS (2016).

[47] This analysis simplifies. Current analyses of how reasons accrue involve not only reasons but auxiliaries to reasons such as attenuators, enhancers, enablers and cancelers, all descendants of Joseph Raz's famous distinction between first- and second-order reasons. *See* JOSEPH RAZ, PRACTICAL REASONS AND NORMS (2d ed. 1999).

[48] Perry, *Two Models of Legal Principles*, 788. *See also* Perry, *Second-Order Reasons*.

[49] All the same information could be represented by a very different representational schema—the vector force addition diagrams in which individual forces, represented by arrows, are placed tip to tail to display the resultant force. Readers might remember this kind of problem from tenth grade math or physics: Dori is rowing a dinghy across the river at 4 mph, heading 20° west of due north. The river current flows 30° north of due east at 3 mph. After one hour of rowing, where is Dori relative to their launch point? That problem involves applied forces in two-dimensional physical space. To model normative forces operating in one-dimensional legal space, we can represent a principle's relative importance by the arrow's length, and the degree of its activation by the arrow's angle relative to neutrality, represented by the y-axis. As in the two-dimensional situation, the force that the principles exert collectively is determined by linking the arrows head to tail. If the chain of vector arrows starts at neutral, then the act or event *X* has the legal property or status that corresponds to the area of the plane where the chain ends. (Distance that the chain travels along the y-axis has no significance; distance from the y-axis, as in my preferred model, displays how legally close the case is.)



The above diagram and Figure 5.1 are informationally equivalent. While this alternative schema will be more familiar to some readers, it is a less intuitive way to symbolize aggregation of forces in one-dimensional normative space, and I won't be using it further in this book.

[50] 603 U.S. 593 (2024).

[51] *See, e.g.,* Larry Alexander & Ken Kress, *Against Legal Principles,* 82 IOWA L. REV. 739, 740-41 (1997).

[52] Cite Brief of Scholars of the American founding.

[53] U.S. CONST. Art. I, § 6, cl. 1 (providing that "for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place").

[54] U.S. CONST. Art. I, § 3, cl. 7.

[55] *See* Trump v. United States, 603 U.S. at 664-66 (Sotomayor, J., dissenting) (describing the precedents).

[56] Williams v. Miles, 68 Neb. 463, 94 N. W. 705, 96 N. W. 151 (1903), *quoted in* Dickinson, *The Law Behind the Law* (1929), at 120.

[57] On the importance of explaining legal agreement as well as disagreement see Bill Watson, *Explaining Legal Agreement,* 14 JURISPRUDENCE 221 (2023).

[58] GORSUCH, at 119. For an extended criticism of a similar argument by Justice Scalia, see my *Religious Liberty and the Constitution*, at 892-93.

[59] DWORKIN, TAKING RIGHTS SERIOUSLY, at 35.

[60] Kent Greenawalt, Columbia colleague to Herbert Wechsler and then to Philip Bobbitt, is an especially noteworthy example. Kent Greenawalt, *Fundamental Questions About the Religion Clauses: Reflections on Some Critiques*, 47 SAN DIEGO L. REV. 1131, 1142 (2010). "I believe a range of considerations are relevant besides original understanding," Greenawalt once explained, "and that no neat ordering or precise method of weighing can be assigned." Exactly: the various "considerations" that matter are not arrayed lexically. "Indeed," he continued, "the power of any one factor depends on the particular context and the decisiveness with which it points in one direction in a particular case." Yes, again: the distinction between weight and activation captures just this insight. "My own position about constitutional interpretation," he summarized, "is fairly labeled 'eclectic.'" Ouch. The views are the same regardless of the label, and smell just as sweet. Still, I think "eclecticism" is a modest unforced error for a pluralist. *But see* Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning,* 85 GEO. L.J. 1765, 1768 n.14 (1997) (explaining that he prefers "eclecticism" to "pluralism" in part to distance himself from the most famous constitutional pluralism—Bobbitt's—which holds "that there may be more than one right answer to a constitutional question").

[61] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 720 (1993).

[62] BOBBITT, CONSTITUTIONAL INTERPRETATION, at 24.

[63] One sophisticated constitutional theorist who accepts more of the Bobbittian picture than I am inclined to is Jack Balkin, Knight Professor of Constitutional Law and the First Amendment at Yale Law School and Bobbitt's erstwhile colleague at the University of Texas. Like Bobbitt and unlike Fallon, Balkin views constitutional law as, first and foremost, a rhetorical practice. But he thinks that the rhetorical norms of our practice are far more constraining than Bobbitt does and he rejects Bobbitt's recourse to judicial conscience as the way to resolve cases of intractable disagreement. *See* Jack M. Balkin, *Arguing About the Constitution: The Topics in Constitutional Interpretation*, 33 CONST. COMMENT. 145 (2018).

[64] Samuel Breidbart, *The Supreme Court's Presidential Immunity Ruling Undermines Democracy*, Brennan Ctr. for Justice (Oct. 1, 2024), https://www.brennancenter.org/our-work/analysis-opinion/supreme-courts-presidential-immunity-ruling-undermines-democracy.

[65] Michael Stokes Paulson, *A Lawless Court Gives Us a Lawless Presidency*, Public Discourse, https://www.thepublicdiscourse.com/2024/07/95374/.

[66] Brad Rourke, *Katyal and Luttig: Presidential Immunity Unconstitutional?* (Kettering Foundation, July 8, 2024), https://kettering.org/katyal-and-luttig-presidential-immunity-unconstitutional/ (comment of J. Michael Luttig).

[67] Harry T. Edwards, a long-serving and respected judge on the D.C. Circuit Court of Appeals, once estimated that half of the disputes that reached him were easy, most of the rest were hard but answerable after sufficient thought and research, and that only five to fifteen percent lacked reasonably discoverable answers, and thus required the exercise of judicial discretion. Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies that Attempt to Understand the Factors Affecting Appellate Decisionmaking,* 58 DUKE L.J. 1896, 1898 (2009). For what it's worth.

[68] Snipe hunt - Wikipedia

[69] 319 hunters spent a total of 6184 person-days hunting cougar, ultimately killing 1 animal, for a success rate of under 1%. 2022 Expanded Harvest Estimates Website.xlsx (state.or.us). In 2021: 0 kills for 261 persons and 4638 person-days. 2020: 1 kill for 241 persons and 5194 person days. Big game hunting harvest statistics | Oregon Department of Fish & Wildlife (myodfw.com).

[70] DWORKIN, TAKING RIGHTS SERIOUSLY, at 86.