THE PLURALIST ANTICANON

Michael Zschokke[*]

Can the anticanon teach us how to interpret the Constitution? Yes, and I offer pluralism as the first test subject. A constitutional theory can both describe what we do and prescribe how we should improve, and the anticanon—four universally loathed decisions in constitutional law—can measure whether it works.

Because it considers textual, historical, structural, doctrinal, ethical, and prudential methods of interpretation, pluralism is a good starting point to test the anticanon's evaluative power. Professor Philip Bobbitt proposes a pluralist account of American constitutional law that is both descriptive and prescriptive. But it still allows for the anticanon. This, I argue, shows that the prescriptive dimension of pluralism inadequately constrains a system that should accord its decisions with the values it creates.

I identify pluralism's defects, assess potential solutions, and propose my own: When the correct constitutional interpretation is unclear, judges should defer to the elected branches if it minimizes the harm of a decision. This approach—instead of relying on a judge's conscience—better constrains judges to the values created by our constitutional system.

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INTRODUCTION

Our constitutional practice is pluralist.[1] It has also produced loathed decisions, the "anticanon" of American constitutional law.[2] If we want a constitutional theory that both describes our practice and prescribes how judges should act to improve it, I argue that the anticanon can serve as an evaluative tool to measure the degree to which a theory reflects our practice—a practice that universally rejects anticanonical decisions.

Professor Philip Bobbitt proposes a pluralist account of American constitutional law that is both descriptive and prescriptive.[3] His account develops a fundamental pluralist framework upon which many theorists have built.[4] But as I will demonstrate through an analysis of the anticanon, the prescriptive dimension of Bobbitt's pluralism inadequately constrains a system that I argue should accord its decisions with contemporary morality.[5]

Part I describes Bobbittian pluralism. Part II populates and examines the constitutional anticanon through a Bobbittian lens. In Part III, I discuss the anticanon as a tool to evaluate constitutional theories. I describe Bobbittian pluralism's defects, identified by our appraisal of the anticanon, and assess potential solutions. In Part IV, I propose my own solution: deference determination. When modalities conflict, I argue that judges should defer to the constitutional judgments of other branches only when the potential harms of a decision can be better avoided by the groups that may be harmed by ruling for the government than the groups that may be harmed by ruling against the government. This approach, I will argue, better constrains judges to values created by our constitutional system.

I. BOBBITTIAN PLURALISM

To Bobbitt, "[l]aw is something we do, not something we have as a consequence of something we do."[6] Therefore, what we do—how we make constitutional arguments—*is* the law, and the law is pluralist because what we

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* Law clerk to the Hon. Danny J. Boggs, U.S. Court of Appeals for the Sixth Circuit, 2023–24; University of Pennsylvania Law School, J.D., 2023; Boston College, B.A., 2018. The views expressed in this article are solely those of the author. They do not purport to reflect the views or opinions of any entities or individuals he is affiliated with or represents. Many thanks to Mitch Berman for helpful comments on earlier drafts.

[1] *See* PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 5 (1991) (observing that American constitutional discourse takes a pluralist form).

[2] *See* Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 380–81 (2011).

[3] *See generally* BOBBITT, *supra* note 1.

[4] *See, e.g.*, Akhil Reed Amar, *In Praise of Bobbitt*, 72 TEX. L. REV. 1704 (1994).

[5] *See infra* Part IV.

[6] BOBBITT, *supra* note 1, at 24. It is unclear whether Bobbitt means this as a constitutive claim but accepting it as such is not necessary for the argument I advance.

do is pluralist. Legitimate constitutional arguments, then, must adhere to forms that are accepted by our constitutional practice.[7]

Bobbitt categorizes the "something we do" into six forms of argument, or "modalities," each capable of producing legitimate claims about constitutional law:

> *historical* (relying on the intentions of the framers and ratifiers of the Constitution); *textual* (looking to the meaning of the words of the Constitution alone, as they would be interpreted by the average contemporary "man on the street"); *structural* (inferring rules from the relationships that the Constitution mandates among the structures it sets up); *doctrinal* (applying rules generated by precedent); *ethical* (deriving rules from those moral commitments of the American ethos that are reflected in the Constitution); and *prudential* (seeking to balance the costs and benefits of a particular rule).[8]

Modalities do not make a proposition true; they are simply the *ways* in which a constitutional proposition *can* be true.[9] They define the language of legitimate constitutional argument, allowing "one to map any constitutional proposition onto a field of legitimacy."[10] If a constitutional proposition arises from one of the modalities, it is legitimate. But because modalities do not render propositions true, a case can have multiple legitimate outcomes if the modalities point to different conclusions.[11]

This is not to say a case can also have multiple *justified* outcomes. Rather, legitimacy and justification are achieved separately: "legitimacy [is], so to speak, its own reward."[12] How do we know which legitimate outcome is the justified, true outcome? Modalities allow us to verify constitutional propositions, but verify by what standard? Bobbitt argues that we "assess the justice of a particular decision by reference to some external standard" beyond the operation of modalities.[13] These external standards are how a case is *justified* but not how it is *decided*.[14] Because legitimate constitutional decisions must rely on the modalities, external standards play a role in deciding a case "only to the extent that the modalities of argument incorporate them by reference."[15] But such incorporation is crucial, for it enables the process of *deciding* to bridge the gap between legitimacy and justification.

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[7] *Id.* at xix.
[8] *Id.* at 12–13 (emphasis added).
[9] *Id.* at 11–12.
[10] *Id.* at x.
[11] *Id.* at xi.
[12] *Id.* at xix.
[13] *Id.* at 163.
[14] *Id.*
[15] *Id.*

Thus, Bobbittian pluralism grows from a descriptive account of American constitutional argument to a prescriptive recommendation of how judges should decide constitutional cases. A Bobbittian judge first considers the available arguments within each modality. If all or most of the modal arguments point to a certain outcome, the judge's task is a simple one. But what if the modalities conflict? Perhaps historical, structural, and prudential arguments point to ruling for the plaintiff, but textual, doctrinal, and ethical arguments point to ruling for the defendant. Bobbitt's solution takes a decidedly practical flavor: Since a case must be decided, the judge must choose an outcome among legitimate contenders.[16] To guide his choice, the Constitution allows for the use of conscience, where a judge draws upon "prevailing practices of moral theory" to decide a case.[17] A legal system is just, Bobbitt argues, if it "confer[s] legitimacy on the right moral actions of its deciders."[18]

But does conscience lead to the "right moral actions"? Bobbitt distinguishes, albeit implicitly, between constitutional morality—"values of limited government, forbearance and pluralism"[19]—and the morality that governs the relationships among individuals. So, when he claims that the Constitution "does not endorse communal values," so it cannot be the moral basis of a decision,[20] Bobbitt means that the Constitution does not endorse *social* communal values—those that express value commitments among individuals and exist outside our constitutional system (and thus outside the modalities).[21] Instead, a decision's "moral basis is confirmed if the [modalities] can persuasively rationalize the decision, and the decision is not made on grounds incompatible with the conscience of the decisionmaker."[22] I do not dispute that the Constitution allows for judicial discretion beyond some quantitative tally of modal arguments, but "conscience" is not an adequate constraint. The remainder of this Article seeks to support this claim by demonstrating that, by Bobbitt's criteria, anticanonical cases are legitimate and morally permissible. As I will aim to show, modal arguments can "persuasively rationalize" the anticanon, and anticanonical cases were each compatible with "the conscience of the decisionmaker." This suggests that

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[16] *Id.* at 167.

[17] *See id.* at 167–68.

[18] *Id.* at 170.

[19] *See id.* at 169 ("The 'morality' of the American constitutional system is, broadly speaking, that of the values of limited government, forbearance and pluralism."). Democracy also comes to mind.

[20] *Id.*

[21] A notable exception is the Thirteenth Amendment, which does express values that govern the relationships among individuals. *Id.*

[22] *Id.*

Bobbitt's criteria are incomplete. A prescriptive theory of judicial review should not allow for such reviled outcomes.[23]

II. MODALITIES IN THE CONSTITUTIONAL ANTICANON

What makes a case anticanonical as opposed to just bad? A common refrain declares an anticanonical case as one "gravely wrong the day it was decided" or "overruled in the court of history."[24] But wrong by what standard? And what is "the court of history"? A more refined definition of the anticanon is required to truly understand its contents and its status as an evaluative tool to sharpen theories of constitutional decision making.

Professor Jamal Greene provides one such refined definition. Greene evaluates candidates for the anticanon on four criteria: (1) law review articles identifying the case as anticanonical; (2) successful Supreme Court nominees criticizing the case during confirmation hearings; (3) negative analysis of the case as a principal case in constitutional law casebooks; and (4) citation of the case in later Supreme Court opinions.[25] Each criterion evaluates how members of the legal community perceive the case. He determines the anticanon consists of four cases: *Dred Scott*, *Plessy*, *Lochner*, and *Korematsu*.[26]

Professor Greene's definition of the anticanon is particularly relevant to Bobbittian pluralism, where constitutional arguments are legitimate if they adhere to conventional practices. Greene's four criteria identify decisions for which there is consensus in the legal community that the cases were wrongly decided and significant enough to "help frame what the proper principles of constitutional interpretation should be."[27] Just as a baseball hitter may watch film of an embarrassing at-bat or a football quarterback may review his worst throws, the anticanon can refine our theories of constitutional decision making.[28] My goal in this Article is to do just that.

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[23] *See id.* at 170 (describing a "just" system as one that confers legitimacy on objectively right moral outcomes).

[24] Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018) (discussing Korematsu v. United States, 323 U.S. 214 (1944)); *see also* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 863 (1992) (Joint Op. of O'Connor, Kennedy, and Souter, JJ.) ("[W]e think *Plessy* was wrong the day it was decided . . . .").

[25] Greene, *supra* note 2, at 390–99.

[26] *Id.* at 383. For a discussion of near-anticanonical cases and why the anticanon is usually limited to the four identified cases, see *id.* at 385–91 & tbl. A.

[27] *Id.* at 387 (quoting J.M. Balkin & Sanford Levinson, *Interpreting Law and Music: Performance Notes on "The Banjo Serenader" and "The Lying Crowd of Jews,"* 20 CARDOZO L. REV. 1513, 1553 (1999); *accord* Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 586 (2009)).

[28] *See* J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 1017 (1998) (describing the anticanon as "cases that any theory worth its salt must show are wrongly decided.").

A. Dred Scott v. Sandford

The first of the anticanon's cases is perhaps the one most firmly in it: *Dred Scott*.[29] The case receives universal condemnation as an "aberration[], neither precedented nor destined to become [a] precedent [itself]."[30]

Dred Scott was held as a slave in Missouri by an army surgeon named John Emerson.[31] In 1834, Dr. Emerson took Mr. Scott from Missouri to Emerson's new army post in Illinois.[32] Dr. Emerson held Mr. Scott as a slave in Illinois for two years and in the Wisconsin Territory for two more.[33] Mr. Scott sued his nominal master—John Sanford, a citizen of New York[34]—for his freedom, arguing that the laws of Illinois and the Wisconsin Territory, which forbid slavery, governed the legal issues related to his status and therefore made him a free person by virtue of his residences in those locations.[35] The U.S. Supreme Court denied Mr. Scott's claim, ruling that he, by reason of being Black, was "not a citizen of Missouri, in the sense in which that word is used in the Constitution," and therefore, federal courts did not have jurisdiction to hear his claim.[36]

Chief Justice Taney, writing for the Court, found that Mr. Scott was not—and could not—be a citizen of any state for purposes of diversity jurisdiction.[37] He argued that only U.S. citizens could claim constitutional protections because the Constitution was formed to benefit only members of the political community which adopted it,[38] begging the question. From this, Taney reasoned that Black people could not be U.S. citizens because they were not citizens at the time of the Constitution's ratification.[39] Taney found his primary support for this premise[40] in Article IV's Privileges and Immunities

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[29] Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

[30] JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 16 (1980).

[31] *Dred Scott*, 60 U.S. at 431.

[32] *Id.*

[33] *Id.*

[34] Before the suit commenced, Dr. Emerson sold Mr. Scott and his family to John Sanford. *Id.* at 431; *see also id.* at 564 (Curtis, J., dissenting) (noting Sanford's domicile). The official case caption misspelled Mr. Sanford's name. Greene, *supra* note 2, at 406 n.146.

[35] *Dred Scott*, 60 U.S. at 457–60.

[36] *Id.* at 454.

[37] *Id.* at 406.

[38] *Id.*

[39] *Id.* at 404.

[40] Professor Greene correctly identifies this as a premise, rather than a conclusion *from* premises. Greene, *supra* note 2, at 407. This is a subtle but important distinction for historical modalities because the premise identifies the constitutional theory to which Taney adhered. Modern theorists might identify Taney's premise as a use of "expectation" originalism. *See, e.g.*, Ronald Dworkin, *Comment*, *in* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 115, 119 (1997) ("'[E]xpectation' originalism . . . holds that [abstract] clauses should be understood to have the consequences that those who made them expected them to have.").

Clause,[41] which he argued could not be interpreted to yield the equal treatment of Black and white people because slaveholding states would not have ratified such a clause.[42] By consulting "the governments and institutions of the colonies" to answer the question of Mr. Scott's citizenship,[43] Taney employed a historical modality.

What if Taney wished to use a textual modality? The Privileges and Immunities Clause reads, "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."[44] The Missouri Compromise and debates on the status of slavery in new states may very well have given these words different meanings to 1857's "average contemporary 'man on the street'"[45] than the meaning Taney ascribed to the ratifiers.[46] But whether that contemporary meaning would have altered *Dred Scott*'s outcome is disputed.[47]

The case also dealt with a conflict-of-laws question: Which sovereign's law governed Mr. Scott's status as a slave? This is precisely the issue addressed by the Missouri Supreme Court in a similar action brought in state court by Mr. Scott.[48] In denying Mr. Scott's claim to freedom, the Missouri court stated that "[e]very State has the right of determining how far, in a spirit of comity, it will respect the laws of other States" and "[n]o State is bound to carry into effect enactments conceived in a spirit hostile to that which pervades her own laws."[49]

Under current Full Faith and Credit doctrine, this argument is patently wrong.[50] It does not fare better as a textual modality. Article IV provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."[51] While Missouri might have had a cognizable interest that would have allowed it to use its own law, the text of the Constitution does not support the Missouri Supreme Court's claim that a *state* determines if it respects the law of another state. Constitutional text mandates such respect.

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[41] U.S. CONST. art. IV, § 2, cl. 1.

[42] *Dred Scott*, 60 U.S. at 416–17.

[43] *Id.* at 407.

[44] U.S. CONST. art. IV, § 2, cl. 1.

[45] BOBBITT, *supra* note 1, at 12 (describing textual modalities).

[46] *See* Greene, *supra* note 2, at 407–08 (noting that *Dred Scott*'s interpretation of the Privileges and Immunities Clause rendered unconstitutional the political positions of both those who believed the territories should remain free and those who believed the territories should decide for themselves).

[47] *Id.* at 408.

[48] Scott v. Emerson, 15 Mo. 576 (1852). This case was not on appeal at the U.S. Supreme Court, but the Court largely deferred to the Missouri court's determination. *Dred Scott*, 60 U.S. at 454.

[49] *Emerson*, 15 Mo. at 583.

[50] *See* Allstate Ins. Co. v. Hague, 449 U.S 302, 313 (1981) (holding that state must have significant contacts that create interests such that the use of its law is neither arbitrary nor fundamentally unfair); Clay v. Sun Ins. Office, Ltd., 377 U.S. 179, 183 (1964) (suggesting that a state can assert an interest in after-acquired domicile).

[51] U.S. CONST. art. IV, § 1.

Under the Supremacy Clause,[52] Mr. Scott's residence in the Wisconsin Territory should have led the Missouri court to reject the argument that laws prohibiting slavery were offensive to Missouri. A federal law cannot be offensive to a state on policy grounds because federal policy *is* state policy—it preempts any contrary state interests.[53] Thus, the Missouri court could not have refused to use the Wisconsin Territory's law—based on the Missouri Compromise, which was federal law—on the grounds that it was offensive to Missouri's policy. For a Bobbittian pluralist, then, the conflict-of-laws question is simple. Textual and structural (i.e., federal supremacy) modalities pointed strongly to ruling for Mr. Scott. Arguably, Missouri precedent (and thus the doctrinal modality) was also on Mr. Scott's side.[54]

The U.S. Supreme Court did not need to address the conflict-of-laws question; Taney's argument that federal courts did not have jurisdiction was sufficient to dismiss the case. But the majority opinion seized on the question to argue that the Missouri Compromise itself was unconstitutional.[55] Taney first employed a doctrinal modality to find that Illinois law did not govern Mr. Scott's status, writing, "Our notice of this part of the case will be very brief; for the principle on which it depends was decided in this court . . . [in *Strader v. Graham*, 51 U.S. (10 How.) 82 (1851)]."[56] *Strader* held that the status of an enslaved person taken from Kentucky to Ohio and back to Kentucky was governed by the laws of Kentucky.[57]

But regarding whether federal law in the Wisconsin Territory governed, Taney concluded the law was unconstitutional: Depriving slaveholders of their property violated the Fifth Amendment's Due Process Clause.[58] Taney's argument largely forms a structural modality. Since the Constitution limited the federal government to enumerated powers, Taney wrote, the Due Process Clause must be interpreted to prevent the government from exceeding that power.[59] Thus, "an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States . . . could hardly be dignified with the name of due process of law."[60]

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[52] U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

[53] *See, e.g.*, Testa v. Katt, 330 U.S. 386, 392 (1947) (holding that states cannot have established policies against enforcement of federal law).

[54] *See* Greene, *supra* note 2, at 408.

[55] *Dred Scott*, 60 U.S. at 452. Many consider this dicta. *See* Greene, *supra* note 2, at 408.

[56] *Dred Scott*, 60 U.S. at 452.

[57] *Id.*

[58] *Id.*

[59] *Id.* at 447–49.

[60] *Id.* at 450.

So why is *Dred Scott* anticanonical? The case's errors are plenty, but three stand out. First, Taney's "originalism was . . . bad originalism."[61] Many free Black people *were* citizens at the time of ratification.[62] Further, the Privileges and Immunities Clause was not intended to protect citizens from racial discrimination,[63] so it does not logically follow that an originalist interpretation of the clause had to exclude Black people from citizenship. Taney's due-process argument is similarly condemned for its faulty historical reasoning and use of substantive due process.[64] Beyond its offensive premise that Black people were property and not people,[65] the argument would have invalidated the Northwest Ordinance, which was passed by the Continental Congress and affirmed by the First Congress.[66] Taney's own historical argument, then, suggests that his decision on the due-process issue was wrong.

But the fact that Taney decided the due-process issue at all is *Dred Scott*'s second critical error. As noted, the issue's resolution was unnecessary to resolve the case. While such activism is not an anticanonical error per se,[67] it suggests the Court has a motive beyond simply deciding the case. Since the requirement that a court decide the case provides basis for conscience and morality,[68] a Bobbittian pluralist should be skeptical of a decision that decides an unnecessary issue. But such skepticism does not strip a decision of its legitimacy, since a judge's "individual sensibility" can lead him to decide a case however he sees fit, within the constraints of modal arguments and his individual conscience.[69]

Third and finally, Taney reached morally repugnant conclusions. Some downplay the value of morality in constitutional theory,[70] but it is critical to Bobbittian pluralism. For Bobbitt, "conscience" in judicial decision making is a judge's use of contemporary moral practices (within the constraints of modal arguments) to align a decision with his *own* conscience.[71] Thus,

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[61] Greene, *supra* note 2, at 407.

[62] *Id.*

[63] *Id.*

[64] *See* SCALIA, *supra* note 40, at 143 n.23 ("[O]ne can hardly argue that the reasoning of [*Dred Scott*] was part of America's accepted understanding [of the Fifth Amendment's Due Process Clause].").

[65] Unfortunately, this is a premise which in 1857 was "unassailable." *See* Greene, *supra* note 2, at 410–11.

[66] Greene, *supra* note 2, at 410.

[67] *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (addressing case on the merits despite holding that the Court lacked jurisdiction). *Marbury* is widely considered a canonical decision. Greene, *supra* note 2, at 385; Balkin & Levinson, *supra* note 28, at 1008.

[68] *See* BOBBITT, *supra* note 1, at 167–68 ("The case must be *decided*.").

[69] *Id.* at 168.

[70] *See, e.g.*, Balkin & Levinson, *supra* note 28, at 1017 ("A constitutional theorist has to explain why *Dred Scott* or *Plessy v. Ferguson* is bad constitutional law (and not just morally appalling) or she is out of the game.")

[71] *See* BOBBITT, *supra* note 1, at 168.

Bobbittian pluralism allows for an outcome like *Dred Scott*, even if the judge's own beliefs are out of step with the objectively moral outcome.

B. Plessy v. Ferguson

In 1890, Louisiana enacted the Separate Car Act, which required railway companies operating in the state to provide "equal but separate accommodations for the white, and colored races."[72] The Supreme Court upheld the Act, holding that "separate but equal" accommodations did not violate the Fourteenth Amendment's Equal Protection Clause.[73]

Justice Henry Billings Brown's majority opinion primarily relied on historical, structural, and ethical modalities. He looked first to the ratifiers' intentions, determining that "[t]he object of the [Fourteenth] amendment was undoubtedly to enforce the absolute equality of the two races before the law . . . ."[74] This is a perfectly plausible interpretation of the Fourteenth Amendment, but Justice Brown's historical analysis went a step farther. He observed that the same Congress that passed the Fourteenth Amendment accepted certain "distinctions based upon color" such as segregated schools in the District of Columbia, and therefore, the Equal Protection Clause could not have been intended to prohibit all such distinctions.[75]

Brown buttressed this claim with an ethical modality, invoking principles of limited government to argue that since federal and state governments lacked the power to remove *social* distinctions between races and the ratifiers tolerated such distinctions, the Equal Protection Clause could not be interpreted to claim that power and prohibit distinctions per se.[76] Thus, Brown reasoned, the Equal Protection Clause could only operate as a restriction on a state's police power, requiring its use to be "reasonable" to promote the public good.[77] And if, as Brown claimed, a state's police power could not regulate social distinctions,[78] it could not "stamp[] the colored race with a badge of inferiority" that would violate the Equal Protection Clause.[79]

What went wrong? Most modalities supported the majority's interpretation of the Fourteenth Amendment. It was consistent with precedent, with the likely original understanding of the Fourteenth

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[72] 1890 La. Acts 152.

[73] Plessy v. Ferguson, 163 U.S. 537, 542, 550–51 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[74] *Id.* at 544.

[75] *Id.* at 544.

[76] *Id.* at 544–45, 551.

[77] *Id.* at 550–51.

[78] *See id.* at 551 ("Legislation is powerless to eradicate racial instincts, or to abolish distinctions based upon physical differences. . . .").

[79] *Id.*

Amendment, and with the text of the Equal Protection Clause.[80] And yet, no case in the anticanon better fits the "wrong-the-day-it-was-decided" maxim than *Plessy*. This is because *Plessy*'s primary error occurred not in its interpretation of the Equal Protection Clause but in its application of it. *Plessy*'s lone dissenter, Justice John Marshall Harlan, did not dispute the majority's interpretation that the Fourteenth Amendment required equality among citizens of all races.[81] But the majority's view that the Act did not produce inequality[82] ignored the social context and stigma of segregation. As John Hart Ely observed, "the Court assured the nation that if blacks were insulted by segregation, that was their choice, not a legally cognizable injury."[83]

The Court ignored the prudential modality, through which the plaintiff's counsel developed arguments[84] that should have alerted the Court to the social meaning of segregation.[85] *Plessy*'s mistake was not its interpretation that the Fourteenth Amendment required only equality[86] but its premise that segregated accommodations could still be equal.[87] Attention to prudential arguments—and recognition of their persuasiveness in contexts that require *some* assessment of the social meaning of a law's consequences—would have demonstrated that this premise was flawed.

But the prudential modality does not solve all of *Plessy*'s missteps. The claim that segregated facilities could be equal was generally accepted at the time of the Fourteenth Amendment's ratification.[88] Thus, Justice Brown's use of the historical modality (the same "expectation originalism" used by Chief Justice Taney in *Dred Scott*) conflicts with the prudential modality, triggering the use of Bobbittian conscience. The majority's use of "conscience" led it—legitimately, in the Bobbittian sense—to uphold the Act.

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[80] Greene, *supra* note 2, at 417.

[81] *See Plessy*, 163 U.S. at 559–60 (Harlan, J., dissenting) (noting the Fourteenth Amendment was intended to eradicate subordination on the basis of race).

[82] *Id.* at 550–51.

[83] ELY, *supra* note 30, at 163.

[84] *See Plessy*, 163 U.S. at 549–50 (noting plaintiff's argument that segregation implies subordination of Black people). This argument's focus on the challenged law's social context places it largely within the prudential modality. A broad definition of the ethical modality (e.g., "deriving rules from those moral commitments of the American ethos that are reflected in the Constitution," BOBBITT, *supra* note 1, at 13) could also accommodate such anti-subordination arguments because the Fourteenth Amendment likely imports into the Constitution moral commitments to social equality. However, Bobbitt more narrowly defines the American ethos as "the idea of limited government." *Id.* at 20.

[85] A contrary result in *Plessy* may have upset compromise between Democrats and Republicans in which Republicans relinquished military control of the South in exchange for political support for Rutherford Hayes. Greene, *supra* note 2, at 417. Given *Plessy*'s obliviousness to the social context of segregation, it seems unlikely the Court considered these prudential concerns.

[86] As noted, this interpretation is perfectly plausible but not one to which I commit my own views.

[87] *See* DAVID A. STRAUSS, THE LIVING CONSTITUTION 79 (2010) (discussing *Plessy*'s underlying theory).

[88] *Id.*

C. Lochner v. New York

Lochner elicits colorful condemnation from across the spectrum. Dean Ely noted that the decision is "now universally acknowledged to have been constitutionally improper."[89] Judge Robert Bork denounced it as "the symbol, indeed the quintessence, of judicial usurpation of power . . . [which] gave judges free rein to decide what were and were not proper legislative purposes."[90] Judge Richard Posner lamented *Lochner*'s majority opinion as "naked policy analysis" supported by "nothing in the Constitution, or in precedents that commanded respect."[91] And most relevant to our purpose, Professor David Strauss claimed, "You have to reject *Lochner* if you want to be in the mainstream of American constitutional law today."[92] And yet, there is no consensus on why *Lochner* was wrong.[93] Indeed, I argue that, from a Bobbittian perspective, it was not.

In *Lochner*, the Court struck down a New York law—the Bakeshop Act—that limited bakers to sixty-hour work weeks, on the grounds that it violated the Fourteenth Amendment's Due Process Clause.[94] The majority opinion, authored by Justice Rufus Peckham, determined that the Bakeshop Act exceeded the limits of New York's police power, depriving bakery employers and employees of liberty without due process of law.[95] The Court's interpretation of the Fourteenth Amendment invoked textual and structural modalities. First, the Court interpreted the word "liberty" in the Due Process Clause to include the freedom of contract.[96] While some criticism of *Lochner* claims the Court invented this right[97] (and therefore did *not* interpret "liberty" as an average contemporary "man on the street" would have understood it), evidence suggests the Court's definition reflected a plausible understanding of liberty and the Due Process Clause in the early twentieth century.[98] Professor Mary Ann Glendon notes that through its use of the textual modality, "the Court construed the Constitution . . . to harmonize with, rather than displace, a common-law background where protection of

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[89] ELY, *supra* note 30, at 14.

[90] ROBERT BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 44–45 (1990).

[91] Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CALIF. L. REV. 519, 549 (2012).

[92] David A. Strauss, *Why Was* Lochner *Wrong?*, 70 U. CHI. L. REV. 373, 373 (2003).

[93] Greene, *supra* note 2, at 418; Strauss, *supra* note 92, at 374.

[94] Lochner v. New York, 198 U.S. 45, 52 (1905), *abrogated by* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937), *overruled by* Day-Brite Lightning Inc. v. Missouri, 342 U.S. 421 (1952), *and* Ferguson v. Skrupa, 372 U.S. 726 (1963).

[95] *Id.* at 64.

[96] *Id.* at 53.

[97] *See* Strauss*, supra* note 92, at 378–79 (describing this common criticism).

[98] *See* Greene, *supra* note 2, at 419 (noting it was "far from clear" that *Lochner*'s recognition of the right of freedom of contract was detached from contemporary understandings of "liberty"); Strauss, *supra* note 92, at 381 ("[T]here are plausible historical reasons [from the early twentieth century] for viewing freedom of contract as part of the liberty protected from substantive limitation by the Due Process Clause . . . .").

property rights and freedom of contract were . . . leading principles."[99] If these protections were in fact "leading principles" in the common law, a contemporary understanding of "liberty" could easily incorporate them.

The Court's second premise, using a structural modality, was that allocation of power between the federal and state governments required the state's police power to have *some* limit; otherwise, the Fourteenth Amendment would have "no efficacy."[100] From these two modal arguments, the Court concluded that an exercise of police power infringing on freedom of contract survived constitutional challenge only if the exercise served an acceptable goal, such that it did not deprive parties of due process of law.[101]

To determine which goals a state might acceptably seek, the Court relied on the principle, derived through a structural modality, that legislation had to promote the public good, not the good of narrow groups. The Court argued that the sovereignty of each state provided police powers that "relate to the safety, health, morals, and *general welfare of the public*."[102] The Constitution gave the federal government the power to limit a state's exercise of police power beyond those conditions.[103] To the *Lochner* Court, this meant the Due Process Clause prohibited legislation that redistributed benefits to a particular group when that redistribution was not in the public interest.[104] The Bakeshop Act redistributed contract bargaining power from a neutral status quo to bakeshop employees.[105]

This is a plausible interpretation of the Fourteenth Amendment's limits on the police power. In addition to textual and structural modalities, the historical modality would likely support the anti-redistribution principle. Concerns about government favoritism pervaded American political thought and were certainly on the minds of some Framers. In Federalist Paper 10, James Madison warned of the dangers of "the violence of faction,"[106] which suggests that legislation favoring narrow interests over the public good is not a legitimate exercise of government power. Thus, several modal arguments supported *Lochner*'s interpretation of the Fourteenth Amendment.[107] Further,

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[99] Mary Ann Glendon, *Comment*, *in* SCALIA, *supra* note 40, at 108.

[100] *Lochner*, 198 U.S. at 56.

[101] *Id.* Like *Dred Scott*, this theory is often derided by critics for employing substantive due process. *See, e.g.*, ELY, *supra* note 30, at 15 (criticizing *Lochner* on the grounds that "[w]hat recorded comment there was at the time of [ratification of] the Fourteenth Amendment is devoid of any reference that gives the [Due Process Clause] more than a procedural connotation").

[102] *Lochner,* 198 U.S. at 53 (emphasis added).

[103] *Id.*

[104] *Id.* at 53–54.

[105] *See id.* at 57 (rejecting the argument that bakers required the greater contracting protections provided by the Bakeshop Act).

[106] THE FEDERALIST NO. 10, at 47–48 (Clinton Rossiter ed., 1961).

[107] The Court's discussion of the health and cleanliness of bakers, *see Lochner*, 198 U.S. at 59–63, may have been misguided but it was not illegitimate, for it relied on the prudential modality to determine

the majority's emphasis on laissez-faire capitalism[108] suggests it held a good-faith commitment to a mainstream contemporary value.[109] So while the majority opinion may have been "easily forgettable," "shallow," and "theory-free,"[110] it did not lack moral basis or legitimacy under Bobbittian pluralism.

But the *Lochner* Court erred in assuming that the status quo from which the Bakeshop Act redistributed bargaining power was, in fact, neutral. The Madisonian vision of self-sustainability and independence made little sense in the twentieth-century world where employers dominated labor markets and government intervention restricting freedom of contract could benefit a party.[111] By failing to recognize these changing labor conditions, the *Lochner* Court adopted an overly narrow conception of the public good.

D. Korematsu v. United States

A common thread through *Dred Scott*, *Plessy*, and *Lochner* was each court's mistaken premise that a constitutional principle could not yield different results in different circumstances. Bobbittian pluralism allows for such expectation originalism,[112] to which we can attribute a historical modality. But as my prior analysis demonstrates, expectation originalism is not the sole error of the anticanon, and thus its disavowal is not the simple remedy to Bobbittian pluralism's legitimacy problem. The final anticanonical case, *Korematsu v. United States*,[113] makes clear that Bobbittian pluralism requires more substantial revision.

On February 19, 1942, President Franklin Roosevelt issued Executive Order No. 9066, which authorized military commanders to "prescribe military areas . . . from which any or all persons" could be excluded.[114] After the designated military commander, General John DeWitt, prescribed the Pacific Coast as a "military area" and Congress ratified the exclusion program in the 1942 Congressional Act, making it a misdemeanor to disobey restrictions imposed under the program, DeWitt issued a curfew and several

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whether this law purporting to protect bakers was in the public interest. Its rejection of such claim (the "enact[ment of] Mr. Herbert Spencer's Social Statics," *Id.* at 75 (Holmes, J., dissenting)) may have been incorrect, but for questions of Bobbittian legitimacy and moral bases, it was likely an appropriate use of a prudential argument to "balance the costs and benefits of a particular rule." *See* BOBBITT, *supra* note 1, at 13.

[108] *See* ELY, *supra* note 30, at 229 n.94 (noting *Lochner*'s influence on eroding the persuasive value of laissez-faire capitalism).

[109] *See* Strauss, *supra* note 92, at 381 & n.37 (discussing prevalence of laissez-faire economic theory in nineteenth and early twentieth century).

[110] Posner, *supra* note 91, at 549–50.

[111] *See* Strauss, *supra* note 92, at 383–84 (describing twentieth-century labor markets).

[112] I appropriate this term from Ronald Dworkin. *See supra* note 40.

[113] 323 U.S. 214 (1944), *abrogated by* Trump v. Hawaii, 138 S. Ct. 2392 (2018).

[114] *Id.* at 226–27 (Roberts, J., dissenting) (quoting Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942)).

Civilian Exclusion Orders that removed Japanese Americans from certain coastal regions to camps.[115] Mr. Korematsu, a Japanese American, was convicted of remaining at his California home in the "military area," and he challenged the 1942 Act as an unconstitutional delegation of power.[116]

The Court upheld the 1942 Act, defending its holding through arguments attributable to structural and doctrinal modalities. Doctrinally, the *Korematsu* Court relied on a companion case, *Hirabayashi v. United States*,[117] which sustained a conviction under the 1942 Act for a curfew violation.[118] In *Hirabayashi*, the Court found that the curfew order was a proper exercise of executive power necessary to protect national security.[119]

The *Korematsu* Court expanded on the principles in *Hirabayashi* through structural argument. The Court argued the Constitution's allocation of wartime powers to the executive and (to a lesser degree) Congress carried an assumption that the judicial branch trust reasonable findings upon which the other branches rested their exercise of these powers.[120] Finding no evidence that the government did not have reasonable grounds for believing the exclusion orders were necessary for national defense and public safety, the Court upheld both the executive's actions and the 1942 Act.[121]

Korematsu's path to the anticanon proves that a case does not achieve anticanonical status through mere legal error. If that were the case, *Hirabayashi* would be just as anticanonical as *Korematsu*. In addition, for decades *Korematsu* "receive[d] consistently positive citation, mainly for its early articulation of the strict scrutiny standard."[122] Under the canonical framework for evaluating executive action, put forth in Justice Robert Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*,[123] *Korematsu* falls within the category of action for which executive power is at its maximum. When the President acts with congressional authorization, the action warrants "the strongest of presumptions and widest latitude of judicial

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[115] *Id.* at 227–29 (Roberts, J., dissenting).
[116] *Id.* at 217–18.
[117] 320 U.S. 81 (1943).
[118] *Korematsu*, 323 U.S. at 217–18.
[119] *Id.* at 217.
[120] *Id.* at 217–18.
[121] *Id.* at 218–20, 223.
[122] Greene, *supra* note 2, at 456.
[123] 343 U.S. 579, 635–55 (1952) (Jackson, J., concurring). Famously, Justice Jackson argued that "[p]residential powers are not fixed but fluctuate, depending their disjunction or conjunction with those of Congress." *Id.* at 635. Jackson identified three categories of executive action. First, "[w]hen the President acts pursuant to an express of implied authorization of Congress, his authority is at its maximum." *Id.* Second, [w]hen the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers." *Id.* at 637. Third, "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb." *Id.* Scholars spill lots of ink analyzing this framework. For an excellent overview, see Patricia L. Bellia, *Executive Power in* Youngstown*'s Shadows*, 19 CONST. COMMENT. 87 (2002).

interpretation."[124] Thus, the *Korematsu* Court's deference to the executive appears defensible.

But Dean Ely argues that *Korematsu*'s fatal flaw was its focus on the "undeniable importance of [the government's] goal, without sufficient attention to [the] availability of closer-fitting alternative classifications."[125] This criticism hits the mark. Many executive actions depend on information held solely by the executive.[126] This includes *Korematsu*. In testimony and reports used by Congress, General DeWitt presented a biased and inaccurate account of the exclusion and curfew programs.[127] In such situations, courts are just as competent as Congress to police executive action because Congress's primary institutional competence over the judicial branch—a mechanism to determine net policy benefits and public preferences—is moot. *Korematsu*'s error, then, was not its interpretation of executive power but its blind trust in the executive's explanation.

III. IS CONSCIENCE ENOUGH?

What should we make of this? Is conscience an adequate constraint on a judge? Every theory has error costs and uncertainty. That a theory yields some undesirable results is not necessarily a reason to alter it. Some indeterminacy preserves a system's legitimacy by preserving a judge's "moral freedom to decide."[128] Bobbitt views his theory's agnosticism to any particular outcome as a feature, not a bug.[129] But there is a difference between indeterminacy before a case is decided and indeterminacy when justifying a decision. Only the former preserves our system's legitimacy because justification occurs after a decision is legitimated. A constitutional theory can both be indeterminate and constrain judges in a way that produces certain results.[130] Bobbitt recognizes that this is (or at least could be) true for cases that are "not deeply conflicted."[131] I argue that this is true both for cases with conflicts

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[124] *See Youngstown*, 343 U.S. at 635, 637.

[125] ELY, *supra* note 30, at 246 n.45.

[126] *See* Eric A. Posner, *Deference to the Executive in the United States After September 11: Congress, the Courts, and the Office of Legal Counsel*, 35 HARV. J. L. PUB. POL'Y 213, 216 (2012) (explaining that in emergencies the executive often keeps information secret from traditionally open bodies like courts and legislatures).

[127] *See Korematsu*, 323 U.S. at 235–36 (Murphy, J., dissenting) (noting DeWitt's "erroneous assumptions of racial guilt" in materials reviewed by Congress).

[128] BOBBITT, *supra* note 1, at 164.

[129] *See id.* at 168–69 (arguing that a theory that assures certain results sacrifices its legitimacy).

[130] *See* Michael C. Dorf, *Create Your Own Constitutional Theory*, 87 CALIF. L. REV. 593, 611 (1999) (arguing that "a lack of complete determinacy is not the same thing as indeterminacy" because our constitutional practice produces some determinacy regarding the persuasiveness of certain arguments).

[131] BOBBITT, *supra* note 1, at 168.

among modalities and cases with conflicts between modal consensus and moral values.[132]

If "[o]ur values justify our practices,"[133] we must evaluate our practices in light of our contemporary values. Otherwise, we risk legitimizing an unjustified system divorced from our values. Bobbitt correctly notes that our practices can create our values, that "[o]ur values do not necessarily precede our choices."[134] If "making decisions . . . precipitates our values,"[135] we should seek to make decisions that produce values that are consistent with the values we already have.

We should then be willing to revise a theory of constitutional interpretation that licenses decisions that are inconsistent with our current moral values. To see why, we must revisit why and how our constitutional system creates an anticanon. As several theorists have recognized, our constitutional system maintains a complex relationship between general interpretative principles and our normative intuitions about case-specific outcomes.[136] Bobbitt goes so far as rejecting the very notion that a just legal system can ensure just results because, in his view, what is just for the system—"limited government, forbearance and pluralism," perhaps[137]—is not the same as what is just for the outcome of a case.

But even Bobbitt recognizes that the Constitution—and our interpretation of it—creates moral commitments that bind decision-makers. For Bobbitt, "[t]he moral commitments of the Constitution [are] . . . a series of decisions to give abstract rules priority over substantive moral values, to pursue the ideal of the rule of law (and thus judicial neutrality), to maintain respect for individual conscience, to reject preferential status for particular communities."[138] While Bobbitt's moral commitments might not bind decision-makers to any substantive values, they do bind our system to certain methodological premises—for example, judicial neutrality, equal treatment of citizens under the law, and most importantly, recognition of the modalities as legitimate forms of constitutional argument.

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[132] I do not seek to develop any theory for what constitutes these moral values. As I explain in greater detail in this Section, I argue merely that our constitutional system gives a legitimate place for incorporating some consideration of values into constitutional argument and that those values can help us to refine our interpretative theories.

[133] *Id.* at 166.

[134] *Id.*

[135] *Id.*

[136] *See, e.g.*, RICHARD H. FALLON, JR., LAW and LEGITIMACY IN THE SUPREME COURT 143 (2018); Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1738, 1754 (2007); BOBBITT, *supra* note 1, at 168–69.

[137] BOBBITT, *supra* note 1, at 169.

[138] *Id.*

Using a form of reflective equilibrium advanced by professors Richard Fallon and Mitch Berman,[139] I contend that we can legitimately use Bobbitt's methodological commitments to produce a system that *does* bind our legal authorities to certain substantive values. Reflective equilibrium is a method of achieving knowledge or justification in which we "work[] back and forth among our considered judgments" about different propositions, continuously revising them to achieve coherence among the broadest set of beliefs.[140] In the context of constitutional reasoning, reflective equilibrium suggests that "the constitutional theory we deploy should itself be answerable to whatever strong considered judgments we may have about the correct outcomes in particular cases."[141]

Nowhere in our constitutional system are those considered judgments stronger than the anticanon. A case becomes anticanonical when consensus forms in the legal community that it was not only wrongly decided but also violates our contemporary social values "as refracted through existing legal and political institutions."[142] When our decisions create or alter our values, we should reconsider past decisions in light of these new values to produce constitutional practices that incorporate these new considered judgments and apply their lessons to future cases. Reflective equilibrium allows us, then, to bind Bobbittian pluralism to certain substantive values—but *only* at the stage of justification, not while deciding.[143] By determining whether a decision is just by our contemporary standards, we can revise constitutional theories to avoid certain undesirable outcomes without stripping the theories of the indeterminacy that provides at least some of their legitimacy. So, what we need to remedy from examining a theory through the lens of the anticanon is not necessarily that a judge applying the theory *could* have reached anticanonical outcomes but rather that in post-hoc reflection, the theory *still*

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[139] *See* FALLON, *supra* note 136, at 207 n.49 (citing Mitchell N. Berman, *Reflective Equilibrium and Constitutional Method: Lessons from John McCain and the Natural-Born Citizenship Clause*, *in* THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION 246 (Grant Huscroft & Bradley Miller eds., 2011)). Fallon writes, "There are significant differences as well as similarities between Berman's theory and mine. Among the differences, my thesis is more global and possibly more normative than Berman's . . . ." *Id.* I apply this theory globally, so any differences that may exist between the two are irrelevant for our current purposes.

[140] Norman Daniels, *Reflective Equilibrium*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Oct. 14, 2016), https://plato.stanford.edu/archives/fall2023/entries/reflective-equilibrium/ [https://perma.cc/L7QH-LVZ6].

[141] Berman, *supra* note 139, at 247. Richard Fallon has noted that, in some contexts, the refraction of claims through various conceptual lenses to achieve "mutually supportive interpretations of morally laden *concepts*" could produce different results than reflective equilibrium's back-and-forth between principles and judgments. *See* Richard H. Fallon, Jr., *Is Moral Reasoning Conceptual Interpretation?*, 90 B.U. L. REV. 535, 541 (2010). It is thus important that we carefully distinguish between what we aim to do here (achieve coherence between interpretative principles and our convictions about specific outcomes) and what we do *not* aim to do here (assess the morality of those convictions).

[142] Greene, *supra* note 2, at 464.

[143] Recall that, for Bobbitt, cases are decided and justified by separate processes. *See* BOBBITT, *supra* note 1, at 163.

accommodates the anticanon's outcomes. Thus, Bobbittian pluralism needs revision. Several candidates arise.

A. Modal Hierarchies

We could implement a hierarchy of modalities, in which arguments of certain modal forms weigh more heavily than others in the interpretative process.[144] Richard Fallon proposes the following hierarchy of "argumentative factors": arguments from text, arguments from historical intent, arguments from theory, arguments from precedent, and value arguments.[145] While Fallon's factors differ slightly from Bobbitt's modalities,[146] they serve the same purpose to define legitimate forms of constitutional argument.[147] Using this loose hierarchy—in which no factor unilaterally trumps another—a Fallonian judge would consider each factor "with all of the others in mind," seeking coherence and a uniform outcome among the legitimate forms of argument.[148]

Coherence is an improvement over conscience. It tempers the individual sensibilities that can lead judges astray, by asking them to interpret and reinterpret arguments to reach a result supportable by *each* legitimate argument form. But does correcting the anticanon require more? An optimist might argue that coherence would require the *Plessy* Court, for example, to consider the prudential arguments regarding the social costs of "separate but equal" and therefore force the Court to reinterpret its historical arguments to strike down the Separate Car Act. But I am skeptical that this is what constructivist coherence theory entails.

In my view, coherence requires the lower-ranked argumentative factors to be reinterpreted to accord with higher-ranked factors—not vice versa—if the higher-ranked factors are sufficiently determinate to maintain a conclusion. Broadly, we conceive constitutional law as a series of commitments abstracted *from* the text of the Constitution by the modalities,[149] so our practice seems to naturally prioritize clear textual meaning.[150] This conception, then, requires Fallon's hierarchy to limit the influence of lower-

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[144] *E.g.*, Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1252–68 (1987) [hereinafter Fallon, *Coherence*].

[145] *Id.* at 1244–46.

[146] For example, Fallon does not identify an "ethical" modality.

[147] *See id.* at 1189 (noting a "variety of kinds of argument that now are almost universally accepted as legitimate").

[148] *Id.* at 1240–41.

[149] I mean this as a descriptive claim about our constitutional practice and not a constitutive claim about the nature of law.

[150] *See id.* at 1244 (citing McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819)) ("This ranking of textual arguments follows from the settled proposition that it is a Constitution we are interpreting.").

ranked factors in achieving coherence.[151] Thus, "[w]hen the claims of arguments from text and the framers' intent are sufficiently clear, contrary moral and political arguments . . . must give way."[152] But text and framers' intent rarely exhibit the necessary clarity to require a result contrary to the other factors.[153]

Determinacy is critical. Coherence *can* run uphill—where higher-ranked factors are reinterpreted to accord with lower-ranked factors—when higher-ranked factors are indeterminate. In those cases, lower-ranked factors can help clarify arguments from indeterminate higher-ranked factors.[154] Fallon argues that when arguments from text are indeterminate, "it is desirable to give open weight" to lower-ranked factors.[155] If "open weight" means equal footing, then constructivist coherence theory gives the same weight to lower-ranked factors as indeterminate higher-ranked factors. But at the same time, "arguments from text head the hierarchy," which "promotes a conception of constitutional law as something distinct from . . . judicial visions of sound policy and moral justice."[156] Thus, constructivist coherence theory implicates a factor's rank only to the extent that factor is determinate. If higher-ranked factors are determinate, then lower-ranked factors should be reinterpreted to accord with them.

Fallon's examination of *Regents of the University of California v. Bakke*[157] demonstrates this relationship among coherence factors. *Bakke* presented the question of whether the Constitution forbids the University of California at Davis's medical school from administering an admissions system that operated as a racial quota.[158] Evaluating the Court's approach, Fallon determines that "the appropriate starting point for the Court's analysis lay in the language of the equal protection clause," which "provided no obvious resolution."[159] When Fallon then analyzes *Bakke* under constructivist coherence theory, he instead starts from the value argument "that the special historical character of racial injustice justifies extraordinary correctives."[160] These two passages make most sense as a causal chain: Fallon started with a value argument *because* the Constitution's text provided no clear answer. Consider Fallon's observation that "the historical experience, the moral and

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[151] *See id.* at 1264–65 ("The hierarchical ranking of value arguments is appropriately low because we want our constitutional law to be law in the truest sense—binding on judges as well as on the judged.").

[152] *Id.* at 1265.

[153] *See id.* at 1244, 1252–54 (discussing ambiguity in constitutional text and framers' intent).

[154] *Id.*

[155] *Id.* at 1252.

[156] *Id.*

[157] 438 U.S. 265 (1978).

[158] *Id.* at 273–75.

[159] Fallon, *Coherence*, *supra* note 144, at 1270.

[160] *Id.* at 1274 (citing Fallon & Weiler, Firefighters v. Stotts: *Conflicting Models of Racial Justice*, 1984 SUP. CT. REV._1, 33 & nn.144–45).

political values, and the precedents on which I rely provide good reasons for understanding the contestable guarantee of 'the equal protection of the laws' as embodying my preferred standard."[161] He uses arguments from history, values, and precedent to improve his understanding of arguments from text.

But if the text clearly resolves the constitutional question, constructivist coherence theory does not allow a judge to reinterpret that text to achieve coherence. Rather, when a higher-ranked factor clearly answers a constitutional question, a Fallonian judge is left either to reinterpret the lower-ranked factors to accord with the determinate, higher-ranked factor or to admit that coherence cannot be reached. The former anchors constitutional analysis to arguments from determinate text and history. In the latter case, "the implicit norms of our constitutional practice" require "a hierarchical ranking" of the factors.[162] And in either case, constructivist coherence theory asks a judge to give more weight—in both achieving coherence and deciding a case—to determinate higher-ranked factors than to equally determinate lower-ranked factors.

Bobbitt's explanation of values supports this reading of constructivist coherence theory. Bobbitt argues that decisions create values.[163] When a judge makes a constitutional decision based on arguments from text, history, theory, or precedent, she creates values that inform later decisions. These new values share principles with the arguments that produced them, so these new value arguments are grounded in the same authorities as the other forms of argument. Fallon argues that this interdependence (or something close to it) explains why value arguments can be "especially influential" in constructivist coherence theory.[164] I think it also reveals something deeper: Decisions based on higher-ranked factors precipitate new values that then create influential lower-ranked arguments. Thus, value arguments require upward coherence because the values on which they are based were created by previous interpretations of text, history, or precedent. So, value arguments simultaneously cohere and comprise arguments from text, history, theory, and precedent. This back and forth reflects Bobbitt's understanding of values as well as Fallon's understanding of coherence. From this view, a determinate, higher-ranked factor can anchor a decision within a constructivist coherence theory that still accommodates coherence in both directions on the hierarchy.

What does this mean for the anticanon and constructivist coherence theory as an improvement on Bobbittian pluralism? Fallon's hierarchy is not lexical,[165] but it reflects the "conventional understanding" of each factor's

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[161] *Id.* at 1276.
[162] *Id.* at 1243.
[163] BOBBITT, *supra* note 1, at 166.
[164] Fallon, *Coherence*, *supra* note 144, at 1247.
[165] *Id.* at 1243.

relative persuasive value.[166] To maintain this reflection of our constitutional practice and understanding, determinate higher-ranked factors must be less susceptible than lower-ranked factors to reinterpretation. Otherwise, there is no hierarchy at all, and the theory divorces itself from our "conventional understanding" of the persuasiveness of constitutional arguments. As a potential fix for Bobbittian pluralism, which derives its legitimacy from adherence to conventional constitutional practice, this is fatal.

With these limits on reinterpretation, how does constructivist coherence theory fare as a method of resolving conflicting modalities? Its main defect lies in the limits of value arguments, the weight of which I have demonstrated depends on the existence of such values *before* any decision. Since decisions create values upon which value arguments can be based, the value itself must exist before the value argument possesses any significant weight. Constructivist coherence theory cannot remedy long-standing, erroneous interpretations.

Plessy offers an example. As a value argument,[167] consideration of the social costs of segregation occupies the hierarchy's lowest rung. Perhaps certain values existed to achieve coherence with an interpretation that accommodated these social costs: for example, the general (and regrettably thin) notions of equality under the law created by the Fourteenth Amendment.[168] But *Plessy*'s separate-but-equal standard was itself a coherent reinterpretation of these values to *deny* the importance of these social facts. Since *Plessy*'s historical and textual arguments appear clear enough to anchor a Fallonian hierarchy,[169] a court seeking coherence would likely either disregard the social-context argument[170] or reinterpret it to accord with result directed by the other forms. Thus, while coherence appears better suited than conscience to properly constrain judges, it falls short to help a judge avoid the anticanon's errors.

B. Anti-Modalities

Another possibility is to clarify the boundaries of the modalities—what is and is not a legitimate modal argument. Professors David Pozen and Adam Samaha attempt to do so by identifying "anti-modalities": forms of

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[166] *Id.* at 1242–44.

[167] *See id.* at 1205 ("I shall use the term 'value argument' to refer only to claims about the moral or political significance of facts . . . .").

[168] *See* U.S. CONST. amend. XIV ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

[169] *See supra* Section II.B.

[170] *See* Fallon, *Coherence*, *supra* note 144, at 1242 (allowing a constitutional decision maker to drop a category of arguments from consideration "if, after a process of reconsideration, arguments from all the categories but one pointed to the same result" and the arguments within that category were too uncertain or indeterminate).

illegitimate argument that "draw on sources of decisional guidance that are normatively or psychologically plausible but that are forbidden nonetheless."[171] Pozen and Samaha present a compelling refinement of Bobbittian pluralism that deserves discussion but, ultimately, rejection.

Anti-modalities are certainly consistent with Bobbitt's theory. Modalities mean nothing if they don't have some exclusive effect.[172] Bobbitt himself identifies certain arguments that fall outside the bounds of legitimate constitutional argument.[173] However, I fear defining anti-modalities blurs rather than clarifies the boundaries of legitimate argument. It is better to describe what we consider the *exclusively* legitimate forms of argument than *some* forms we consider illegitimate and allow judges to color the area between. We are left with a set of modalities whose outer bounds are set by the anti-modalities but whose practical boundaries are less clear than before we defined anti-modalities.

Pozen and Samaha argue that anti-modalities violate the "rules" of constitutional law.[174] This misunderstands Bobbitt. Modalities do not "determine the rules." Rather, constitutional practice, which defines modalities, determines the rules. Modalities can change if constitutional practice changes. This distinction reveals a simple—and, I argue, better—answer to Pozen and Samaha's question of what violates the rules of constitutional law. A decision is not rendered illegitimate by the use of anti-modalities per se. Rather, it is using an argument that is *not* within the modalities that strips a decision of its legitimacy.[175] To the extent that anti-modalities clarify the boundaries of modalities, they sharpen Bobbittian pluralism's ability to reject borderline arguments. But as I demonstrated, none of the anticanon relied on borderline modal arguments.

Pozen and Samaha also run into trouble in how they identify modal arguments. Consider the opening passage of Justice Stewart's dissent in *Griswold v. Connecticut*:

> As a practical matter, the law is obviously unenforceable . . . . As a philosophical matter, I believe the use of contraceptives in the relationship of marriage should be left to personal and private choice . . . . As a matter of social policy, I think professional counsel about methods of birth control should be available to all . . . .[176]

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[171] David E. Pozen & Adam M. Samaha, *Anti-Modalities*, 119 MICH. L. REV. 729, 739–40 (2021).

[172] *See* BOBBITT, *supra* note 1, at 22 ("There is no constitutional legal argument outside these modalities.").

[173] *See id.* at 41 ("[A] political argument *per se* will never do.").

[174] Pozen & Samaha, *supra* note 171, at 739–40.

[175] This is analogous to the distinction between polar and logical opposites.

[176] 381 U.S. 479, 527 (1965) (Stewart, J., dissenting).

Pozen and Samaha criticize this passage for "attack[ing] the statute on a variety of grounds that have no obvious home in any of the modalities."[177] This can't be right. For one, the passage employs a Bobbittian ethical argument about limited government. While Justice Stewart calls it "philosophical," leaving certain decisions to "personal and private choice" invokes the American constitutional ethos of limited government.[178]

More importantly, and illuminating Pozen and Samaha's primary misunderstanding of Bobbitt, the opening passage of Justice Stewart's dissent is not part of the modality he employs.[179] It's the dissent's equivalent of dicta. As Pozen and Samaha observe, Stewart argued for upholding the statute, so his opening paragraph is "constitutional virtue signaling."[180] But the virtue signaling is not within argument that supports Justice Stewart's ultimate decision. The thrust of any legal argument is the decision. Thus, proper identification of modal arguments requires an observer to consider arguments *in light of* the decision for which the argument advocates.

An argument's modal home is not always clear from its text. The most notable example is *Brown v. Board of Education*.[181] *Brown* is a canonical case that any constitutional theory must explain.[182] At first glance, the decision appears to lack an modal argument: it was inconsistent with precedent, inconsistent with the original expected application of the Fourteenth Amendment, and not compelled by the text of the Equal Protection Clause.[183] But as we saw with *Dred Scott*, *Plessy*, and *Lochner*, social context can shape which modalities belong to an argument. The social context of school segregation placed *Brown* within a historical modality. Despite dismissing historical inquiry and lamenting "we cannot turn the clock back to 1868,"[184] the *Brown* Court nonetheless derived a principle from the original public *semantic* meaning of the text of the Fourteenth Amendment: equal treatment of racial minorities under the law.[185] It implicitly applied this principle by finding that segregation socially subordinated Black people in a way that it did not subordinate white people.[186] Thus, separate could not be equal because the mere existence of segregation in the social context of 1954 subordinated

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[177] Pozen & Samaha, *supra* note 171, at 741.

[178] *See* Philip Bobbitt, *Is Law Politics?*, 41 STAN. L. REV. 1233, 1284 (1989) ("The fundamental American Constitutional ethos is the idea of limited government.").

[179] Justice Stewart's dissent primarily used a textual modality. *See Griswold*, 381 U.S. at 528–30 (Stewart, J., dissenting) (considering the contemporary textual understanding of the First, Third, Fourth, Fifth, Ninth, Tenth and Fourteenth Amendments).

[180] Pozen & Samaha, *supra* note 171, at 741–42 n.49.

[181] 347 U.S. 483 (1954).

[182] *See, e.g.*, Greene, *supra* note 2, at 381–82 ("[A]ll credible theories of constitutional interpretation must accommodate [*Brown*].").

[183] *Id*.

[184] *Brown*, 347 U.S. at 492.

[185] *Id.* at 489–90. The *Brown* Court's purported disavowal of historical inquiry appears to be another victim of conflating expectation and semantic historical inquiry.

[186] *Id.* at 493.

Black people in violation of the original semantic meaning of the Fourteenth Amendment.

If an argument may implicitly belong to a modality, depending on social context, the scope of modal arguments encompasses more than what Pozen and Samaha use to define anti-modalities. *Lochner* demonstrates this broadened scope. Pozen and Samaha criticize *Lochner*'s modal soundness by claiming "the anticanonical status of *Lochner* underwrites the anti-modal status of constitutional reasoning that too closely resembles the imagined deliberations of elected representatives seeking to promote their own vision of the public good."[187] While I mostly agree with this characterization of *Lochner*, I disagree that such reasoning is anti-modal. This reasoning could easily fall within a prudential modality, which allows courts to consider the benefits and costs of a decision. Prudential arguments may resemble the hated (and often illusory) "policy" arguments, but *Lochner*'s error was not in the form of its argument but the facts with which it populated the argument.[188] As the previous section demonstrates, the worst constitutional errors (i.e., the anticanon) occur when the Court fails to account for social facts and context in application of its interpretative arguments, not necessarily in the form those arguments take. Thus, we should be more concerned with identifying the social facts that a court should consider than identifying anti-modalities.

C. Two-Moments Model

A more promising revision is to alter Bobbittian pluralism at the ground floor. Many academics ascribe to the claim that constitutional decision making occurs in two steps: law discovery and implementation.[189] Professor Lawrence Solum argues that Bobbitt's failure to separate these concepts renders Bobbittian pluralism incoherent.[190] Solum claims that only three modalities—historical, textual, and structural—are relevant to the first step

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[187] Pozen & Samaha, *supra* note 171, at 748.

[188] *See supra* Section II.C (discussing *Lochner*).

[189] *See, e.g.,* Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1 (2004) [hereinafter Berman, *Decision Rules*]; Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453 (2013); Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649 (2005) [hereinafter Roosevelt, *Constitutional Calcification*]; Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54 (1997) [hereinafter Fallon, *Implementing*]. Terminology gets tangled. For Professor Berman (and Professor Roosevelt, who adopts Berman's model), a judge's first step is to determine the "constitutional operational proposition." Berman, *Decision Rules*, *supra*, at 9; Roosevelt, *Constitutional Calcification*, *supra*, at 1653. For Professor Solum, the first step is simply "interpretation." Solum, *supra*, at 495. Nomenclature aside, these scholars—and others—believe in some distinction between the tasks of determining the law and crafting doctrine to implement the law. *See also* KERMIT ROOSEVELT III, THE MYTH OF JUDICIAL ACTIVISM: MAKING SENSE OF SUPREME COURT DECISIONS 36 (2006) [hereinafter ROOSEVELT, JUDICIAL ACTIVISM] ("The basic idea that there is a significant difference between doctrine and meaning is fairly widely accepted among legal scholars.").

[190] *See* Solum, *supra* note 189, at 481.

and the remaining modalities should be relegated to the "Construction Zone."[191] He proposes that a Bobbittian pluralist alter the multiple-modalities model to one in which interpretation (consisting of historical, textual, and structural modalities) is augmented by the doctrinal, ethical, and prudential modalities, which all feed into implementation.[192]

Does this correct the anticanonical errors? Again, I think not. It suffers from the same fate as the hierarchical model, tethering a judge too tightly to the Constitution's communicative content. If the textual meaning of the Constitution is clear, a judge does not need to enter the Construction Zone. But the anticanon demonstrates that even clear communicative content can lead a judge astray if she fails to account for social facts.

IV. RESOLVING CONFLICTING MODALITIES WITH DEFERENCE

But let's recast "interpretation" as "law discovery." With this rebrand comes the premise that constitutional law comes from more sources than the Constitution's communicative content—a hefty claim but not one too far afield.[193] If a judge's first decision-making step is not only to determine the Constitution's communicative content but also the *law*, all modalities are available for law discovery. The second step becomes the implementation of the discovered law. Rather than merely "constructing" the legal effect of text,[194] "implementation" makes explicit that the discovered law causes its legal effect.[195] At this step, conscience inadequately constrains judges, and Bobbittian pluralism needs an alternative method of justified decision making. I propose one of deference.

An effective constitutive vehicle for this view of pluralistic deference is Professor Berman's "organic pluralism," which posits that principles grounded in social practices derive the law through "a multiplicity of fundamental norms that vary in their weight or importance and determine

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[191] *Id.* Professor Solum's two steps are "interpretation" and "construction." I prefer the terms "law discovery" and "implementation." In so far as Solum believes a judge discovers law by interpreting the Constitution's communicative content, "law discovery" refers to the same activity but with different inputs. I, like most pluralists, believe the law is discovered by examining more sources than simply the Constitution's communicative content. *See, e.g.*, Mitchell N. Berman, *Our Principled Constitution*, 166 U. PA. L. REV. 1325, 1377–78 (2018) [hereinafter Berman, *Principled*]. Likewise, "implementation" and Solum's "construction" refer to the same activity of giving legal effect to the discovered law, but as I will explain, I believe "implementation" is a more accurate description of this activity when the law is not simply "constitutional meaning."

[192] *See* Solum, *supra* note 189, at 482 fig. 4.

[193] I do not have the space to wade into jurisprudence. For support for this claim, *see generally* Berman, *Principled*, *supra* note 191 (arguing that actual practices create law); RONALD DWORKIN, FREEDOM'S LAW intro. (1996) (arguing for moral readings of the Constitution to supplement or supplant the Constitution's communicative content).

[194] *See* Solum, *supra* note 189, at 468.

[195] *Cf.* Fallon, *Implementing*, *supra* note 189, at 57 (arguing the Court crafts doctrine driven by the Constitution but not necessarily reflecting its communicative content).

derivative norms by aggregation."[196] If these fundamental constitutional norms fit more or less into the Bobbittian modalities,[197] organic pluralism explains why arguments from all modalities—not just, as Professor Solum claims, the ones directly linked to the Constitution's communicative content—create law at the law-discovery stage.

The anticanon lends support to Berman's theory. Anticanonical cases stand for various negative authority depending on the contexts in which they are invoked.[198] These principles for which anticanonical cases are invoked—and that make them anticanonical—are grounded in social practices.[199] Thus, the anticanon's modern function through an organic-pluralism lens is to define and support principles that, through modal argument, create constitutional law. In this sense, the anticanon itself constrains judges more than mere conscience.

But organic pluralism is a constitutive theory of law and not directly concerned with how judges should act.[200] Of course, a simple way to convert any constitutive account of what the law is to a prescriptive recommendation for judicial behavior is to claim that courts should enforce the law.[201] This is intuitively appealing, but I believe it is incomplete. It relies on the premise that judges have correctly discovered the law. The anticanon shows us that judges can be wrong about what the law is or requires when they fail to account for social practices; disaster can occur when a court enforces something that it *incorrectly* thinks is the law.

Thus, we must return to the problem Bobbitt identified in *Constitutional Interpretation*: What should judges do when modalities conflict? Or put another way, what should judges do when their process of law discovery does not yield a clear answer? If the discovered law is simply vague but all modalities point to the same result, the court will craft a doctrinal

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[196] *See* Berman, *Principled*, *supra* note 191, at 1366.

[197] I claim so. Berman argues principles are defined by social practices. Berman, *Principled*, *supra* note 191, at 1331. Bobbitt argues the modalities are defined by our constitutional practice. BOBBITT, *supra* note 1, at xix. Actual practice provides a common denominator. *See also* Berman, *Principled*, *supra* note 191, at 1377 ("[T]he plural principles [my account] identifies may approximate (and may not) the considerations or factors emphasized in previous accounts.").

[198] *See, e.g.*, Greene, *supra* note 2, at 441 (noting that *Dred Scott* was not "called to service as a race case" until the Civil Rights Movement); *id.* at 454–55 (noting that *Lochner* did not become anticanonical until partisans on both sides of the debate invoked it to denounce opposing views of substantive due process).

[199] *See supra* Part II (identifying failure to account for social context as a primary error throughout the anticanon).

[200] *See* Berman, *Principled*, *supra* note 191, at 1377.

[201] Many originalists stress this point, claiming that judges who draw on sources beyond the communicative content of the Constitution are not enforcing the law. *See* Mitchell N. Berman, *The Tragedy of Justice Scalia*, 115 MICH. L. REV. 783, 790–91 nn.24–25 (2017) (listing examples). But pluralism is not inconsistent with this claim; the duty of a pluralist judge is still to enforce the law, but sources beyond the Constitution's communicative content can create the law. *See* Berman, *Principled*, *supra* note 191, at 1377–78.

implementing rule.[202] But when the discovered law is uncertain because modalities conflict, the court's implementing rule should govern whether the court defers to the constitutional judgment of the government entity whose action is challenged. If we assume that members of the legislative and executive branches do not intend to violate the Constitution, we can assume that they believe that their actions are constitutional.[203] When modalities conflict, legitimate arguments can persuasively rationalize rulings for and against the government and the risk of error accompanies either outcome. Thus, a judge may be inclined to defer to another branch's implicit constitutional judgment—a second opinion of sorts.

James Bradley Thayer's clear-error rule, which argues that a legislative act should be struck down only when the legislature "made a very clear" mistake,[204] is the touchstone for judicial deference but, somewhat ironically, suffers from uncertainty, the same problem that I argue requires deference determination. How should a court resolve this uncertainty? One possible method is to identify specific factors—"deference doctrine" to implement Thayer's clear-error rule—that aid a court in determining whether the legislature made a "very clear" error.

Professor Kermit Roosevelt describes several such factors, including institutional competence, historical context, democratic defects, and differential error costs.[205] First, a court may assess the relative institutional competencies of each branch to resolve the dispute.[206] A court may also consider any historical lessons that inform whether it should (or should not) trust another government actor.[207] A related, third factor is the consideration of any defects in the democratic process which cause the legislature to fail to account for the interests of certain groups.[208] Finally, courts can assess the

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[202] *See* Fallon, *Implementing*, *supra* note 189, at 57 (explaining that the "effective implementation" of purposes that are "too vague to serve as rules of law" requires doctrinal rules); Berman, *Decision Rules*, *supra* note 189, at 89 n.301 ("That courts find it useful to concretize often vague constitutional standards into doctrine cannot be doubted.").

[203] *See* David A. Strauss, *Presidential Interpretation of the Constitution*, 15 CARDOZO L. REV. 113, 114–15 (1993) (arguing that executive disputes with the judiciary are almost always disagreements about the meaning of the Constitution and not attempts to violate the Constitution); Mark Tushnet, *Evaluating Congressional Constitutional Interpretation: Some Criteria and Two Informal Case Studies*, 50 DUKE L.J. 1395, 1404 (2001) ("Congress may be wrong . . . [but its] 'errors' show that Congress disagrees with me, or the Supreme Court, about what the Constitution means."). The question of whether this point extends to the relationship between branches of state governments and the federal Constitution warrants more thorough examination than this Article can provide. For our purposes, I think a tentative answer in the affirmative suffices because state actors can violate the federal Constitution and state interests are subordinate to contrary federal interests. *See* U.S. CONST. art. VI, cl. 2.

[204] *See* James Bradley Thayer, *The Origins and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893).

[205] ROOSEVELT, JUDICIAL ACTIVISM, *supra* note 189, ch. 2; *see also* ELY, *supra* note 30 (discussing similar considerations).

[206] ROOSEVELT, JUDICIAL ACTIVISM, *supra* note 189, at 24.

[207] *Id.* at 26.

[208] *Id.* at 27.

relative error costs of ruling for and against a certain party. A court errs by either upholding an unconstitutional law or invalidating a constitutional one.[209]

These factors appear to be consistent with the anticanon's lessons. *Korematsu* revealed the risks of misunderstanding institutional competencies and blindly deferring to another branch. In *Plessy*, the Court should have been skeptical of the Louisiana legislature's motive for enacting the Separate Car Act, due to an extensive history of racism. This would have led the Court to *not* defer to the Louisiana legislature's stated rationale or its implicit judgment that the Act was within its police power. Moreover, *Dred Scott* shows the importance of considering democratic defects. In 1857, many Black people did not have political rights.[210] Thus, their interests were drastically underrepresented in the elected branches. This should have led the Court to be skeptical of laws, like Missouri's, whose burdens fell solely on a group unable to participate in the political process.[211]

To understand differential error costs, consider *Lochner*'s Bakeshop Act. The New York legislature determined that the law benefited public health and the health of bakers.[212] Invalidating the maximum-hour provision risked denying the public these benefits without preventing any unconstitutional behavior. If the Court upheld the Act, it risked unconstitutionally burdening bakers' freedom of contract. But if this burden became unacceptably high, the largely unionized bakers could lobby the legislature to repeal the Act.[213] Thus, the error costs of invalidating the provision (permanent denial of constitutional public benefits) were likely greater than those incurred by mistakenly upholding it (temporary imposition of unconstitutional burdens on a politically powerful group), which supports the Court adopting a deferential posture.

But like the modalities, a factor-based approach to deference provides no guidance on what to do when the factors conflict. For example, *Korematsu* showed that the judiciary was no less competent than Congress to assess the executive branch's trustworthiness, but the *Korematsu* Court faced a long history of the judiciary failing to reign in the executive's wartime activities.[214]

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[209] *Id.* at 29.

[210] Greene, *supra* note 2, at 409.

[211] *Dred Scott* provides an extreme example of democratic defects, but the same analysis applies to *Plessy*. The Court should not have deferred to the judgment of the Louisiana legislature because the white population oppressed the political rights of many Black people.

[212] Greene, *supra* note 2, at 421–22.

[213] *But see* Greene, *supra* note 2, at 422 (observing the Act was largely the result of bakers' unions seeking to limit competition with non-unionized bakers who were often willing to work longer hours).

[214] *See, e.g.*, *Ex parte* Vallandigham, 68 U.S. (1 Wall.) 243, 250–51 (1864) (holding that the Supreme Court lacked jurisdiction to hear appeals from military tribunals); The Prize Cases, 67 U.S. (2 Black) 635, 671 (1863) (upholding President Lincoln's authority to blockade Confederate ports); *Ex parte* Merryman, 17 F. Cas. 144, 148 (C.C.D. Md. 1861) (Taney, C.J.) (holding that only Congress can suspend the writ of

Historical lessons, then, likely supported the Court's apprehension to review executive wartime action. Thus, a court making a factor-based deference determination must confront many of the same problems that plague Bobbittian modalities, including selecting a method to resolve uncertainty. Attempts to rank deference factors should be rejected on the same grounds I rejected attempts to rank modalities.[215]

More concerning, factor-based deference may not be consistent with Bobbittian pluralism. For Bobbitt, the modalities "maintain[] the legitimacy of judicial review."[216] Bobbittian pluralism confers legitimacy only on decisions based on modal arguments. And recall that modal arguments are legitimate because they reflect our constitutional practice.[217] For a deference determination to be legitimate, then, it must reflect our constitutional practice. I fear that factor-based deference does not meet this requirement.

Throughout this Article, I have taken a fairly inclusive view of what counts as a modal form of argument. Likewise, I believe one could persuasively argue that many potential deference factors—including the four I identified from Professor Roosevelt's work—are, in fact, consistent with the modalities. For example, structural arguments animate institutional competence. But while the factors may be consistent with modalities, a factor-based *approach* is not. Recall: Constitutional modalities are "the ways in which legal propositions are characterized as true from a constitutional point of view."[218] A deference determination does not characterize a constitutional claim as true. Instead, it assesses whether a court should defer to another actor's understanding of the Constitution. A court may consider various factors to make that determination, but those factors cannot render a legal proposition true. So, they cannot be modal arguments. And if they are not modal arguments, any attempt to rank deference factors will necessarily rely on criteria that is external to both modal interpretation and the process of deciding, rendering it illegitimate.[219]

But if a court bases its deference determination on a single principle derived from the modalities, the determination remains internal to the modalities, deriving its legitimacy from the legitimacy of modal arguments

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habeas corpus); *accord* Michael Stokes Paulsen, *The* Merryman *Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 CARDOZO L. REV. 81, 89–95 (1993) (explaining that President Lincoln refused to comply with *Merryman*). *But see* Seth Barrett Tillman, *Ex parte* Merryman*: Myth, History, and Scholarship*, 224 MIL. L. REV. 481, 495–506 (2016) (arguing that Lincoln did not defy or ignore the *Merryman* order or opinion).

[215] *See supra* Part III.

[216] BOBBITT, *supra* note 1, at 8–9.

[217] *See supra* notes 7–12 and accompanying text.

[218] BOBBITT, *supra* note 1, at 12.

[219] As the only legitimate forms of argument, modalities are the only legitimate bases on which a court can determine constitutional law. Because deference factors do not interpret the Constitution, they occupy space at the decision-making step, for which Bobbitt derives legitimacy from the fact that deciding a conflicted case requires some choice—a process that, while not modal, is simply inherent to a functioning legal system and thus universally accepted in our constitutional practice. *See id.* at 167–68 (explaining legitimate decision making).

and excising the need to rank factors by some external criterion. To derive from the modalities, this principle must be consistent with constitutional practice and the modalities' underlying values.

In my view, the better candidate is what Professor Aaron Tang calls "harm-avoider constitutionalism," where a court "decides hard constitutional questions . . . based on a raw, second-order consideration: which group, if the Court rules against it, would be better able to avoid the harm it would suffer?"[220] Professor Tang's mostly descriptive account of harm-avoider constitutionalism[221] treats harm avoidance as a way to minimize error costs. Rephrased as a method of deference determination, harm-avoider constitutionalism would ask a court facing conflicting modalities to defer to the constitutional judgments of other branches of government only when the harm created by ruling for the government is more easily avoidable than the harm created by ruling against the government.[222]

For judges facing conflicting modalities, harm-avoidance reasoning can be particularly useful because it offers a legitimate escape from the impossible task of quantifying and weighing modal arguments. Instead of forcing a judge to compare incommensurate interests, harm-avoidance reasoning "attend[s] to the asymmetry of groups' relative abilities to avoid their harms."[223] While quantifying potential harms can devolve into subjective balancing, measuring a group's ability to avoid harm is a "more objective" inquiry.[224]

Harm avoidance can guide judges in their deference determinations, but it should be calculated slightly differently than Professor Tang suggests. Tang connects his view of harm avoidance to philosopher Karl Popper's negative utilitarianism,[225] which argues that a system should minimize harm, rather than maximize benefits, for the greatest number of people.[226] As a

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[220] Aaron Tang, *Harm-Avoider Constitutionalism*, 109 CALIF. L. REV. 1847, 1849 (2021) (footnote omitted).

[221] *See id.* at 1853 ("This Article's foundational objective is to provide a descriptive account of [harm-avoider constitutionalism] . . . .").

[222] I recognize that this formulation is not the same as Tang's. One could distinguish between harm avoidance that focuses on the nature of harm (i.e., whether the harm is avoidable by some objective standard) and harm avoidance that assesses parties' abilities to avoid the harm (i.e., whether particular parties can avoid the harm). To borrow nomenclature from administrative law, we could term these polycentric and adversarial harm avoidance, respectively. But for our present purposes, this distinction is unnecessary. Because constitutional cases implicate the interests of groups that are not parties to the litigation, any assessment of parties' abilities to avoid harm must include non-parties who have no opportunity to describe their potential harms to the court. Thus, the court will have to engage in an objective inquiry into the nature of the harm to account for these interests, to the extent that named parties do not represent them.

[223] Tang, *supra* note 220, at 1879.

[224] *Id.* at 1892.

[225] *Id.* at 1894.

[226] *See* KARL R. POPPER, THE OPEN SOCIETY AND ITS ENEMIES 548 n.6 (Princeton Univ. Press 2020)

normative theory, this formulation of hard avoidance likely supports a just legal system (in the Bobbittian sense) because it imposes on a court an affirmative duty to minimize its citizens' suffering and, in turn, raises the bar necessary to justify restrictions on a citizen's liberty.[227] Without clear constitutional meaning, then, a court guided by Tang's negative-utilitarian harm avoidance would be less likely to run afoul of contemporary moral theory than one constrained only by individual conscience.

But for hard constitutional cases, I propose a different analogue from which to calculate the harm that must be avoided: what I will call "negative prioritarianism."[228] Prioritarianism is the moral commitment that "a benefit morally matters more the worse off the individual is to whom it accrues."[229] Negative prioritarianism, then, is the view that the value of avoiding harm increases as the well-being of the party avoiding the harm decreases. A harm-avoidance principle that adopts negative prioritarianism seeks to minimize suffering but, unlike negative utilitarianism, gives additional import to harm avoided by those who suffer the most.

I argue that this approach solves a primary difficulty with harm-avoider constitutionalism: The value of avoiding harm is subjective, so ruling in ways that create better-avoidable harms may not actually minimize error costs. One party might be less able to avoid the harm but better able to incur it. For example, a group that possesses two widgets likely places significant value on avoiding losing one widget. A group that possesses a thousand widgets likely places less value on avoiding losing one widget. The value that our *society* places on avoiding a harm must be defined by some moral value. Our reflective approach to the anticanon suggests that, to promote equality, our society places at least some weight on harm avoidance by worse-off parties.

Before we probe that claim, it may be useful to address a common objection to prioritarianism and examine whether it applies to negative prioritarianism in the constitutional space. As Larry Temkin has argued, prioritarians are most concerned with the well-being of the worst-off but not

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(1945) ("I suggest . . . to replace the utilitarian formula 'Aim at the greatest amount of happiness for the greatest number', or briefly, 'Maximize happiness', by the formula 'The least amount of avoidable suffering for all', or briefly, 'Minimize suffering'."). R.N. Smart coined the term "negative utilitarianism" to describe Popper's theory. *See* Roderick Ninian Smart, *Negative Utilitarianism*, 67 MIND 542, 542 (1958) (describing Popper's "negative formulation of the utilitarian principle").

[227] *Cf.* Jonathan Cantarero, *The Ethics of Civil Commitment*, 16 J. HEALTH & BIOMEDICAL L. 105, 116 (2020) (arguing that negative utilitarianism requires the state to use its police power to minimize unhappiness).

[228] This appears to be a novel term. A search of the University of Pennsylvania Libraries database for "negative prioritarianism" yields zero results. *See Franklin Database*, UNIV. OF PA. LIBRS., https://franklin.library.upenn.edu/bento?utf8=✓&q=%22negative+Prioritarianism%22 [https://perma.cc/KS9C-L75G]. Whether this is a confusion of nomenclature or concept, I simply wish to express the idea that prioritarianism can be used equitably to avoid harms and equitably to accrue benefits.

[229] NILS HOLTUG, PERSONS, INTERESTS, AND JUSTICE 204 (2010).

with how worse off those people are relative to others.[230] So, prioritarianism allows for large increases in inequality if they are "necessary for improving—however slightly—the worse-off."[231] The negative equivalent to this objection, then, would be that negative prioritarianism licenses large increases in inequality if necessary for avoiding—however little—harm to the worse-off.

I do not think that this objection applies in the context of constitutional decision making. A case must be decided. In some sense, one party must "win" and the other must "lose." This is true even when a dispute implicates the interests of non-parties. When a court asks whether the beneficiaries of a government action will be better able than the groups burdened by it to avoid the harm of an adverse ruling, it necessarily weighs the harms and capabilities of interested groups *relative to each other*. This is the nature of an adversarial legal system. So, while traditional prioritarianism as an ethical view does not concern itself with how people fare relative to other members of their society,[232] negative prioritarianism as a constitutional decision rule must.

In the context of constitutional decision making, Temkin's objection can be further rebutted by examining equality as a value precipitated by our culture's repudiation of the anticanon. If anything, the anticanonical cases and the events that rejected them strengthened equality as a constitutional value.[233] *Dred Scott* and *Plessy*, in particular, entered the anticanon only after various events—including the decisions themselves—precipitated a deeper understanding of equality that became "an ethical commitment of the American political culture."[234] With equality firmly cemented as a value of our constitutional practice, we can give weight in our harm-avoidance calculation to equality itself. As long as that weight does not exceed the weight we give to the worse-off group's absolute well-being, negative prioritarianism can maintain a deference rule that prioritizes avoiding harm for the worse-off without sanctioning increases in inequality.[235] So, negative

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[230] Larry Temkin, *Equality, Priority, and the Levelling-Down Objection*, *in* THE IDEAL OF EQUALITY 128–30 (Matthew Clayton & Andrew Williams eds., 2000).

[231] *Id.* at 130.

[232] *Id.* at 129.

[233] *See* Greene, *supra* note 2, at 435–36 (noting that "it is easy to identify the moment at which [the] central holding[s]" of *Dred Scott*, *Plessy*, and *Lochner* were "decisively repudiated"). The same can now be said for *Korematsu*. *See* Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018) (stating that *Korematsu* was "gravely wrong the day it was decided" and "overruled in the court of history").

[234] *See* Greene, *supra* note 2, at 441, 444 (arguing that *Dred Scott* and *Plessy* entered the anticanon only after our culture deepened its understanding of racial equality).

[235] The contrary case—where the value we attach to equality for equality's sake exceeds that which we give to absolute well-being—forces us to address the Leveling Down Objection, which points out that such a view allows a system to reduce, or "level down," every person's well-being if it improves equality. *See* Temkin, *supra* note 230, at 131. For a recent discussion of the Leveling Down Objection, see Michael Weber, *The Persistence of the Leveling Down Objection*, 12 ERASMUS J. FOR PHIL. & ECON. 1 (2019).

prioritarianism can ground a conception of harm avoidance that closely tracks our constitutional values. But is negative-prioritarian harm avoidance consistent with Bobbittian pluralism? I believe so. Bobbitt focuses the legitimacy of judicial review on how judges reach decisions, not the utility of outcomes. Consider the following passage: "[J]udicial review that is wicked, but follows the [modal] forms of argument, is legitimately done; and review that is benign in its design and ameliorative in its result but which proceeds arbitrarily or according to forms unrecognized within our legal culture, is illegitimate."[236] So, negative-prioritarian harm avoidance is a legitimate method of deference only in so far as it derives its guiding principles from the modalities.

It is tempting to argue that at least the prudential modality accommodates any harm-avoider calculation because it "balances the costs and benefits of a particular" decision.[237] But this argument would be misguided. Like factor-based deference, harm avoidance does not interpret the Constitution. As a method of determining when to defer to other constitutional judgments, it is not a modal argument. Since "harm-avoider arguments do not reveal anything about what the Constitution *means* or *requires*,"[238] deference to other constitutional judgments does not require the court to accept them as true. Thus, harm-avoider constitutionalism can function as a legitimate constraint on judges if it is consistent, not with any particular modality, but with our constitutional practice as a whole. I think it is.

Constitutional decisions often resolve, or at least implicate, disputes between the weak (e.g., unduly burdened groups) and the powerful (e.g., the government).[239] As I showed in Part II, a common error by courts in the anticanon was a failure to recognize the social facts that identified, among other things, these power disparities. The *Plessy* Court, for example, should have recognized that the Separate Car Act—an action by a politically powerful group—unduly burdened Black passengers, a politically weaker group.[240] When we revisit the anticanon through our process of reflective equilibrium, we revisit it in light of newly refined values of equality and protection of less powerful groups—values precipitated by anticanonical cases and our legal and social backlash to their outcomes. In the context of deference and conflicting constitutional modalities, then, harm avoidance

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[236] BOBBITT, *supra* note 1, at 28.

[237] *See id.* at 13.

[238] Tang, *supra* note 220, at 1879 (emphasis in original).

[239] Famously, John Hart Ely argues that the Constitution requires heightened judicial scrutiny of laws that burden politically weak groups. *See* ELY, *supra* note 30, at 73–104 (developing a "representation-reinforcing approach to judicial review"). Ely recognizes that constitutional disputes involve imbalances of political power, and he claims that the Constitution requires judges to police the democratic process to ensure politically weak groups are appropriately represented. *See id.* at 77–79, 103.

[240] *See supra* Section II.B.

should consider not only error costs but which parties possess the political and economic power to avoid the harms of unfavorable decisions.

Tang argues that harm-avoider constitutionalism need not concern itself with these power imbalances because "political power is far from absolute" and the weaker group could be the better harm avoider in certain circumstances.[241] But his argument responds to the critique that harm-avoider constitutionalism favors weaker groups.[242] I think the opposite claim—that harm avoidance favors more powerful groups—is more concerning. Weaker groups, by virtue of their political or economic positions, may face harms of a substantially different character than those faced by more powerful communities whose interests are more salient in popular discourse and better represented in our legal and political cultures. Thus, harm avoidance may favor more powerful groups who are better able—through nothing more than the fact that their lived experiences are closer to those of most constitutional decision makers—to describe their harms and avoidance strategies in ways that the mainstream legal community finds compelling. Attention to this inequity requires courts to consider the social facts that define parties' power. Because it prioritizes harm avoided by weaker groups, negative prioritarianism is better equipped than negative utilitarianism to ground a conception of harm-avoider constitutionalism that weighs parties' power.

The biggest hurdle to implementing any harm-avoidance principle is likely the inherent difficulty in quantifying the harms that might result from an adverse ruling. Tang, citing the Supreme Court's approach to harm avoidance, suggests that courts could "defer to the parties' descriptions of their own harms" because judges "do not have any particular wisdom in defining the nature of harms the groups would suffer" and "paternalistic attempts by the Court to declare what a group's harm *really* is would risk backlash."[243] The latter is particularly compelling because *Dred Scott*, *Plessy*, and *Lochner* committed the same error.

But Tang highlights a worthy concern with this deferential approach: "Might a group frame its harms in a way that leads to artificially difficult (or even impossible) avoidance options, thereby enhancing its ability to prevail?"[244] He fears that groups may characterize their harms in ways that make them impossible to avoid without a ruling in their favor.

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[241] *See* Tang, *supra* note 220, at 1907. Tang criticizes a conception of "powerlessness as an on/off switch." *Id.* at 1908. I am not sure that I fully understand this criticism. If Tang means that the same groups are not always less powerful, I do not see how that is an issue in a system that requires courts to determine the *relative* power of parties on a case-by-case basis. If he instead means that political powerlessness is not a proxy for the difficulty of avoidance, we can simply narrow our definition of power to that which influences parties' abilities to avoid harm. In either case, a negative-prioritarian approach licenses courts to adjust their conceptions of power to ensure equitable voice to worse-off groups.

[242] *Id.* at 1906.

[243] Tang, *supra* note 220, at 1890–91 (emphasis in original).

[244] *Id.* at 1891.

> Groups that seek to defend a law as it exists might attempt to game the doctrine by characterizing their harm in a circular fashion, as the inability to have the law say what they want it to say. Groups in the converse position, who wish to have a law invalidated, may make a similar move by defining their harm as the loss of a constitutional right.[245]

In other words, why trust a party's description of its harm when that description determines whether it wins? Tang's answer is simple: "judges should not consider the inability to have the law say what a group wants it to say as a credible harm."[246]

This is a sensible solution, but I see another problem with this deferential approach—a problem that negative prioritarianism solves. As I discussed earlier, weaker parties may articulate their harms in ways that judges do not recognize or do not find compelling. Left unchecked, this communication gap could distort harm-avoidance calculations in favor of stronger parties. Unfortunately, I see little recourse at the articulation stage other than the near-complete deference that Tang describes. The judiciary is no better at articulating harms than the parties themselves.

Here again, though, we must answer Temkin's inequality objection. Deference helps weaker parties communicate their harms, but it might also enable more powerful parties to successfully claim harms that they do not expect to incur. If this is true, deference could help stronger parties *more* than it helps weaker parties, and it would still be acceptable for negative prioritarianism because it helps weaker parties in some marginal way. And this inequity too, then, would distort harm avoidance in favor of stronger parties.

A negative-utilitarian approach would end the inquiry at this stage, admitting defeat to the inevitability of indeterminate harms. But a negative-prioritarian approach allows a court to weigh its harm-avoidance determination with a determination of which parties are worse off. While judges lack expertise in defining harms, they do not lack expertise in identifying which parties are politically or economically less powerful.[247] These determinations do not require judgments about policy or complex factual inquiries. Instead, courts rely on parties' descriptions of their harms and avoidance strategies, augmenting where necessary to incorporate the interests of unnamed parties. Identifying the less powerful parties are adjudicative determinations well within the competence of the judiciary.

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[245] *Id.*

[246] *Id.*

[247] *Cf.* Tang, *supra* note 220, at 1892–93 (explaining that the Court has successfully evaluated parties' *actual* abilities to avoid harms, with an eye to their relative statuses as affluent or disadvantaged).

V. CONCLUSION

Bobbittian pluralism calls for judges to use their conscience to decide cases where modalities conflict. If they do, Bobbitt argues, the decision is morally permissible. But as the anticanon shows, this method of decision making can produce reviled decisions. Anticanonical decisions and the events that repudiated them precipitated values against which we can and should measure our constitutional theories.

Instead of conscience, judges should determine whether to defer to the constitutional judgments of the government entity whose action is challenged. They should make this determination by identifying the groups who are better able to avoid the harm of an adverse decision. If the harms created by ruling for the government can be better avoided than the harms created by ruling against the government, the other branch's constitutional judgment warrants deference. Judges should make this calculation by accepting parties' descriptions of their harms and prioritizing the unavoidable harms expected by weaker parties. Unlike Bobbittian conscience, which only constrains judges to their individual moral beliefs, deference determinations constrain judges facing uncertain law to outcomes that are reflectively consistent with our constitutional system's moral values.