

Foreword: Understanding Constitutional Reasoning

By Arthur Dyevre* & András Jakab**

A. Introduction: What is Constitutional Reasoning?

Constitutional reasoning can be defined in many different ways, thus potentially delineating many distinct research agendas. First, consider the term *reasoning*. Reasoning can refer to the justifications an agent or someone on her behalf publicly adduces for choosing a certain course of action, such as adopting a certain policy or solving a dispute in a certain way. Alternatively, though, it can refer to the motives and mental processes that drove or caused the agent to choose the course of action under discussion. It may be said that, in the first case, reasoning refers to the agent's justificatory reasons, whereas, in the second, it refers to her motivating reasons.¹ Related distinctions are those contrasting justifications and reasons for action,² justificatory and explanatory reasons,³ or context of justification and context of discovery.⁴ Justificatory and motivating reasons are independent from one another. Provided the agent's motives are noble enough, the agent may publicly offer them as justification for her course of action, but it need not always be so. Often, the agent will refrain from revealing her true motives and will instead put forth reasons that the agent believes others are more likely to regard as valid and legitimate. The distinction applies for public decision-makers—legislators, judges, bureaucrats—as well as for ordinary human beings in the most ordinary situations of every-day life—from courting a potential spouse, to reviewing a colleague's work. We do not always say what

* Senior Research Fellow, Schumpeter CONREASON Research Group, Max Planck Institute for International and Comparative Public Law, Heidelberg. Email: arthurdyevre@hotmail.com.

** Schumpeter Fellow, Principal Investigator of the Schumpeter CONREASON Research Group, Max Planck Institute for International and Comparative Public Law, Heidelberg; Tenured Research Chair and Director, Institute for Legal Studies of the Centre for Social Sciences at the Hungarian Academy of Sciences, Budapest. Email: ajakab@mpil.de.

¹ James Lenman, *Reasons for Action: Justification vs. Explanation*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY, <http://plato.stanford.edu/archives/win2011/entries/reasons-just-vs-expl/> (last visited May 23, 2013).

² Jon Elster, *Belief, Bias, and Ideology*, in RATIONALITY AND RELATIVISM 123, 123 (Martin Hollis & Steven Lukes eds., 1982).

³ Lenman, *supra* note 1.

⁴ The distinction between the context of discovery and the context of justification can be traced back to the work of Hans Reichenbach. See Clark Glymour & Frederick Eberhardt, *Hans Reichenbach*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY, <http://plato.stanford.edu/archives/win2012/entries/reichenbach/> (last visited May 23, 2013).

we think, nor do we always think what we say. More to the point, though, these two parallel dimensions of reasoning seem to call for distinct modes of inquiry. Investigating an agent's motives typically requires delving into the agent's beliefs, attitudes, and desires. A focus on motivating reasons may involve not only an examination of the cognitive and other psychological processes at work, but also, an analysis of the often complex interactions taking place among the agents involved in the same collective deliberation process when considering the situation of collegial bodies. On the one hand, these questions can be viewed as being primarily the province of the positive, empirical sciences; i.e., as questions that sociology, psychology, anthropology, and political science along with the emerging disciplines of behavioral economics, artificial intelligence, and the neurosciences are the disciplines best equipped to investigate. On the other hand, justificatory reasons and justificatory reasoning seem to speak more directly to those interested in the normative dimension of reasoning, including lawyers and political philosophers. In legal scholarship as well as in political philosophy, reasoning naturally relates to notions such as legitimacy, fairness, justice, or equality, which are given pride of place in normative political discourse. As we shall see, however, the justifications and motives distinction does not correspond to any hard and fast demarcation between normative-prescriptive and causal-empirical research. Moral philosophers may arrive at the conclusion that justice may, at least in certain circumstances, require that both our motives and our justifications be defensible, if not congruent, thus precluding hypocritical posturing. Equally, the justifications actually offered by human agents can be analyzed as part of an empirical research program seeking to identify the factors and strategic calculations leading these agents to choose these justifications over others or, once a choice has been made, to measure the effect that the justifications opted for produce on the target audience.

No less equivocal is the term constitutional. Does constitutional reasoning exist only where there is a formal, large-c constitution?⁵ Or does it denote reasoning about any issue viewed as sufficiently important to deserve the label *constitutional*, irrespective of the existence of a formal, written constitution? Is constitutional reasoning coextensive with reason-giving by constitutional judges? Or is it something constitution-makers, legislators, citizens, and academics may as well, at least from time to time, engage in?

In legal scholarship, constitutional reasoning has often been understood narrowly as referring solely to the discursive practices of judges in the context of judicial review of state action on constitutional grounds. In that narrow sense, constitutional reasoning is synonymous with judicial opinion-writing on constitutional matters. Constitutional reasoning is what constitutional judges do when they spell out the reasons for settling

⁵ On the distinction between small-c and large-c constitution (roughly equivalent to the distinction between formal and substantive constitutional law in continental European scholarship), see David S. Law, *Constitutions, in THE OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH* 376, 377 (Peter Cane & Herbert Kritzer eds., 2010).

constitutional conflicts the way they do. Constitutional courts have been described as deliberative, reason-giving institutions,⁶ and many of the contributions appearing in this special issue would seem to posit this narrow definition of constitutional reasoning, as they concentrate on the argumentative practices of constitutional judges. By “narrow” here we do not mean to imply any sort of value judgment, as in the phrase “narrow minded.” Adopting a narrow definition is often the appropriate way to go about studying a subject-matter. In the present case, a focus on reason-giving by constitutional judges is warranted by the distinct institutional setting in which it takes place as well as by the particular set of formal and informal norms that governs it.

Yet a broader definition of constitutional reasoning may also make sense. Judges are by no means the only actors who engage in reasoning over constitutional issues—whether we define *constitutional* in substantive or formal terms. Just as the judiciary, the executive, and the legislative branches must apply and specify what the values and commands enshrined in the constitutional text require in concrete fact situations, even in countries without a formal large-c constitution, checks and balances and the scope of fundamental rights norms are featured in legislative debates. One need not agree with Jeremy Waldron and Richard Bellamy on the merits to recognize that their criticism of *legal constitutionalism* has rejuvenated the normative debate on constitutional reasoning.⁷ They have rightly called the attention of legal scholars to the fact that elected officials also engage in constitutional reasoning. Meanwhile, by forcefully arguing that reason-giving by democratic legislators should be taken seriously, Waldron and Bellamy have prompted many advocates of judicial review to re-examine the normative rationale underpinning the practice.⁸ In any case, by casting a wider light on the commonalities, as well as the differences between distinct modes of constitutional argumentation, their work has triggered a discussion that clarifies the deliberative and interpretive practices of constitutional judges by challenging many prevailing conceptions about constitutional adjudication. Hence the questions that have become central to the normative debate:

⁶ See, e.g., John Ferejohn & Pasquale Pasquino, *Constitutional Adjudication: Lessons from Europe*, 82 TEX. L. REV. 1671 (2004); John Ferejohn & Pasquale Pasquino, *The Countermajoritarian Opportunity*, 13 U. PA. J. CONST. L. 353 (2010); John Ferejohn & Pasquale Pasquino, *Constitutional Courts as Deliberative Institutions: Towards an Institutional Theory of Constitutional Justice*, in CONSTITUTIONAL JUSTICE: EAST AND WEST: DEMOCRATIC LEGITIMACY AND CONSTITUTIONAL COURTS IN POST-COMMUNIST EUROPE IN A COMPARATIVE PERSPECTIVE 21, 23 (Francisco Laporta, Aleksander Peczenik & Frederick Schauer eds., 2002).

⁷ See Bellamy's contribution in the present special issue, Richard Bellamy, *Democracy as Public Law: The Case of Rights*, 14 GERMAN L.J. 1017 (2013). See also RICHARD BELLAMY, *POLITICAL CONSTITUTIONALISM* (2007); JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2005).

⁸ Matthias Kumm, *Alexy's Theory of Constitutional Rights and the Problem of Judicial Review*, INSTITUTIONAL REASON: THE JURISPRUDENCE OF ROBERT ALEXY 201 (Matthias Klatt ed., 2012); WILL WALUCHOW, *A COMMON LAW THEORY OF JUDICIAL REVIEW: THE LIVING TREE* (2007); Richard H. Fallon, Jr., *The Core of an Uneasy Case for Judicial Review*, 121 HARV. L. REV. 1693 (2007).

What makes constitutional reasoning by unelected judges different? What makes it better or worse than constitutional reasoning by other branches of government? In drawing inter-institutional comparisons, it may be useful to go beyond comparing just constitutional courts and legislative assemblies. Though not necessarily seen as addressing constitutional matters—except perhaps the ECB in the ongoing Euro-crisis—-independent central banks are also non-majoritarian, reason-giving institutions. Valuable insights could potentially emerge from a systematic comparison of the argument forms and reasoning structure deployed by constitutional judges and central bankers. Systematic comparison between constitutional judges and quangos and regulatory agencies—the other non-majoritarian institutions that have been flourishing in Western democracies over the past two decades or so, and whose legitimacy is supposed to rest on their policy-optimizing output rather than on democratic input—could prove equally instructive.⁹ An older and more familiar research question is the extent to which judicial reasoning at the constitutional level differs from judicial reasoning at infra-constitutional level. Do judges use the same arguments in the context of constitutional adjudication as in other settings, where only statutes and secondary legislation are involved? Should we expect constitutional judges to rely less on plain meaning and textual arguments given that constitutional rights norms exhibit a relatively higher level of indeterminacy?

In sum, there are several ways of understanding constitutional reasoning. As we are dealing with what appears to be a multifaceted phenomenon, it should come as no surprise that the conceptions and perspectives featured in this special issue speak to different research agendas. Looking both to the past and ahead at the research on constitutional reasoning, this Foreword contrasts four approaches to the study of constitutional reasoning: (1) the analytical-conceptual approach; (2) the decision-making approach; (3) the political communication approach; and (4) the normative approach. This quadripartite distinction will not provide an exhaustive typology of what academics studying constitutional reasoning do or even believe they do. As we shall see, there are large chunks of the literature on constitutional reasoning that do not fall neatly in one category but would appear to straddle two or more approaches. Legal scholarship and constitutional law scholarship in particular—as many contributions in this special issue illustrate—are still largely practiced as a blend of the descriptive and the normative, of the analytical and the rhetorical. There might be a good justification for this, and the purpose of this paper is not to suggest that these approaches be pursued in isolation. On the contrary, modes of constitutional reasoning should inform and cross-fertilize each other and there is a lot to be gained from keeping them conversant. Nevertheless, the distinction may help clarify what the research agenda is and identify the theories and methodological tools which best address it. In other words, the purpose is to make a broader point about the direction future research should take. As this survey shows, despite the vast literature it has fostered, constitutional reasoning remains a relatively poorly understood

⁹ See FRANK VIBERT, *THE RISE OF THE UNELECTED: DEMOCRACY AND THE NEW SEPARATION OF POWERS* (2007).

phenomenon. Yet new research designs, methodologies, and theoretical frameworks are emerging that promise both to bring greater analytical rigor to the study of constitutional discourse and to reinvigorate the normative debate on constitutional reasoning. Combining a more comprehensive and comparative theoretical framework with new empirical techniques for the analysis of legal and political texts, these new perspectives have the potential to greatly sharpen our understanding of what those engaging in constitutional reasoning do.

B. The Analytical-Conceptual Approach

As its name already suggests, the analytical-conceptual approach studies constitutional argumentation through conceptual analysis. It focuses on the context of justification and the justifying reasons of those who invoke constitutional discourse in support or against the exercise of public authority. While it may, in principle, serve to examine the argumentative practices of any actor appealing to constitutional norms and values, the literature overwhelmingly concentrates on adjudication and judicial review.¹⁰ This literature has predominately focused on how judges construe constitutional provisions and apply them to concrete cases. Scholars working in this line of inquiry devote their time to carefully dissecting the interpretive methods, concepts, and inferences deployed by judicial actors when adjudicating constitutional disputes, all this with a view to reconstructing the logical structure of judicial reasoning.

Going back to the Enlightenment, it was thought that legal reasoning—the application of legal rules to concrete cases—could be reconstructed as a simple syllogism, with the legal rule to be applied forming the major premise and the facts of the case the minor. In other words, it could be reduced to a simple function mapping rules and facts into decision: Legal rules + facts = decision.¹¹ Consistent with Montesquieu's characterization of the judicial branch as the mere "mouthpiece of the law," this model was supposed to accurately represent the steps a judge had to go through in order to arrive at a legally sound decision. In the meantime, legal theory has moved away from the syllogistic model, although, as we will see later,¹² it lives on in judicial rhetoric and popular culture. As it turns out, no single model has emerged to replace the old syllogistic one. Instead, scholars have developed several competing models of legal argumentation, each of which yields a distinctive picture of constitutional reasoning.

¹⁰ Legislative reasoning has received more attention from legal theorists in recent years, as attested to by the launch of a new peer-reviewed journal, *THE THEORY AND PRACTICE OF LEGISLATION* 1 (2013) (formerly known as *Legisprudence*), available at <http://www.hartjournals.co.uk/legisprudence/>.

¹¹ See Massimo La Torre, *Theories of Legal Argumentation and Concepts of Law. An Approximation*, 15 *RATIO JURIS* 377, 377 (2002).

¹² See *infra* Section D.

I. Constitutional or Not? The Ontology of Constitutional Law

A long-standing debate in the philosophy of law is what counts as *law*. This debate has implications for our understanding of constitutional reasoning inasmuch as the ontology of law we posit will in turn determine what counts as constitutional argument and what does not. In this debate, legal positivists who follow in the tradition of Kelsen and Hart tend to argue for the primacy of ontology over argumentation.¹³ What makes an argument specifically legal (constitutional) is not the fact that judges invoke it or present it as such. Instead, the only reason that can warrant the ascription of this property to an argument is the fact that its basic premises relate to normative propositions, which have already been identified as expressing valid legal (constitutional) rules. This sharply contrasts with the position of legal theorists who treat law as an output, rather than as an input of argumentation. Theories premised on the primacy-of-argumentation position effectively treat the class of constitutional reasons that can be adduced to justify the exercise of coercive power by judicial institutions as open-ended. Inspired in part by the philosophical works of Jürgen Habermas, Robert Alexy's theory of legal argumentation illustrates this perspective.¹⁴ The primacy-of-argumentation position has also inspired formal reconstructions of the exchanges of arguments in the courtroom using the tools of non-monotonic logic.¹⁵ Somewhere in between these two positions are the theories, which do not treat the domain of legal reasons as open-ended, but nonetheless as very large, encompassing any reason regarded as legitimate by members of the legal community at large. Perhaps the best illustration of this position is provided by the conception of constitutional reasoning expounded by the former Chief Justice of the Israeli Supreme Court, Aharon Barak.¹⁶

These ontological divergences have implications for the way we label the arguments put forth by judges and others. There are many things in a typical judicial opinion on constitutional matters that legal positivists will regard as non-legal and thus non-constitutional, so long as the judicial opinion is compatible with their positivist credo. The list of non-legal arguments is likely to include references to moral values, unless these are reflected in positive law, as well as references to foreign legal materials, as these do not normally constitute valid constitutional law from the viewpoint of the constitutional system

¹³ See, e.g., Otto Pfersmann, *Arguments Ontologiques et Argumentation Juridique*, 47 *AUSTRIACA* 53 (1998) (arguing that the study of legal reasoning must proceed on the basis of a pre-defined concept of law).

¹⁴ See ROBERT ALEXY, *THEORIE DER JURISTISCHEN ARGUMENTATION: DIE THEORIE DES RATIONALEN DISKURSES ALS THEORIE DER JURISTISCHEN BEGRÜNDUNG*, 134–37 (1978).

¹⁵ See Giovanni Sartor, *A Formal Model of Legal Argumentation*, 7 *RATIO JURIS* 177 (1994); Henry Prakken & Giovanni Sartor, *A Dialectical Model of Assessing Conflicting Arguments in Legal Reasoning*, 4 *ARTIFICIAL INTELLIGENCE L.* 331 (1996); Henry Prakken & Giovanni Sartor, *Argument-Based Extended Logic Programming with Defeasible Priorities*, 7 *J. APPLIED NON-CLASSICAL LOGICS* 25 (1997).

¹⁶ See AHARON BARAK, *JUDICIAL DISCRETION* (1989); AHARON BARAK, *THE JUDGE IN A DEMOCRACY* (2008).

under consideration.¹⁷ Many students of constitutional law will object, at least on normative grounds, to such a view. Yet, from a descriptive, analytical standpoint what matters, in last analysis, is whether the chosen ontology leads to an interesting research program. If we believe that constitutional courts were set up to enforce the rules spelled out in a clearly identified document adopted by the people and their representatives, we might be interested in establishing the degree to which the courts have stuck or departed from positive, written constitutional law. For such a research question, the positivist, limited-domain ontology still makes good sense. But a less restrictive ontology of constitutional reasons might be in order if—as for Christa Rautenbach and Lourens du Plessis in this special issue—the concern is how constitutional judges use foreign judicial opinions in their argumentative practice, their satisfying formal, positivistic criteria for legality notwithstanding.¹⁸

Changing realities, as manifested in the increasing influence of transnational judicial networks and the growing practice of inter-judicial citations, may well expose deficiencies in the legal positivist framework that had hitherto remained unnoticed or had been viewed as unproblematic. In his contribution on the legitimacy of constitutional comparison, Konrad Lachmayer would seem to describe the emergence of a global, common law constitutional system.¹⁹ In this horizontally integrated transnational, pluralist legal order, courts are seen as communicating freely and references to foreign precedents take on a new legitimacy. His analysis echoes the burgeoning literature on constitutional pluralism and judicial dialogue.²⁰ Other scholars, though, are more skeptical of the new pluralist paradigm.²¹ In her reply to Lachmayer, Cheryl Saunders observes that the elected branches

¹⁷ With the half-exception of South Africa where a specific reference in the Constitution explicitly permits such considerations, even though important methodological questions raised by this provision remain unanswered, as explained by Francois Venter in the present special issue. See Francois Venter, *Why Should the South African Constitutional Court Consider German Sources? Comment on Du Plessis and Rautenbach*, 14 GERMAN L.J. 1579 (2013).

¹⁸ Christa Rautenbach & Lourens du Plessis, *In the Name of Comparative Constitutional Jurisprudence: The Consideration of German Precedents by South African Constitutional Court Judges*, 14 GERMAN L.J. 1539 (2013).

¹⁹ Konrad Lachmayer, *Constitutional Reasoning as Legitimacy of Constitutional Comparison*, 14 GERMAN L.J. 1463 (2013).

²⁰ See, e.g., Armin von Bogdandy, *Pluralism, Direct Effect, and the Ultimate Say: On the Relationship Between International and Domestic Constitutional Law*, 6 INT'L J. CONST. L. 397 (2008); CONSTITUTIONAL PLURALISM IN THE EUROPEAN UNION AND BEYOND (Matej Avbelj & Jan Komárek eds., 2012); Julio Baquero Cruz, *The Legacy of the Maastricht-Urteil and the Pluralist Movement*, 14 EUR. L. J. 389 (2008); Massimo La Torre, *Legal Pluralism as Evolutionary Achievement of Community Law*, 12 RATIO JURIS 182 (1999); Michel Rosenfeld, *Rethinking Constitutional Ordering in an Era of Legal and Ideological Pluralism*, 6 INT'L J. CONST. L. 415 (2008); Neil Walker, *The Idea of Constitutional Pluralism*, 65 MOD. L. REV. 317-59 (2002); Miguel Poiáres Maduro, *Contrapunctual Law: Europe's Constitutional Pluralism in Action*, in SOVEREIGNTY IN TRANSITION 501 (Neil Walker ed., 2003).

²¹ Cheryl Saunders, *Constitutional Reasoning as Legitimacy of Constitutional Comparison*, 14 GERMAN L.J. 1493 (2013).

which “resource and appoint members of courts” are “primarily responsive to national electorates.”²² So the courts are independent, but “keep a weather eye on the climate of national opinion.” What is more, constitutional pluralists may simply be missing the forest for the trees. Legal integration, Saunders argues, seems to be an essentially European phenomenon, circumscribed to the European Union and the human rights regime that has developed under the European Convention of Human Rights. At a more abstract level, those who continue to adhere to the positivistic creed may object that constitutional pluralism lacks a coherent, well-specified concept of law. Because it treats (judicial) argumentation as having primacy over ontological considerations, it seems oblivious to the constitutive dimension of law: The fact that legal rules—as identified by positivistic criteria—do not only regulate, but also constitute human behavior. If a group of persons is seen as forming a court and its decisions are treated accordingly as the rulings of a judicial body, it is because legal rules confer such meaning on the group as well as on the statements of its members. This implies that the legal rules by which a judicial body is established can be undone, often by the same lawmakers who enacted them. When the said rules are abolished, the court’s existence is, for all intents and purposes, brought to an end. Arguably, the rules that constitute the courts—even the ones whose judges have been the most eager to embrace trans-judicial communication—still matter. When the rules in question are domestic ones, it can be argued that, despite the constitutional pluralists’ apparent claim to the contrary, the rules continue to harness judges to the domestic legal system.

To its credit, the pluralist movement seeks to make sense of the changing, increasingly globalized context of judicial reasoning. Yet as a positive account of what counts as law, it continues to lack rigorous theoretical underpinnings. In order to be more than a set of intuitions or a rhetorical slogan and become a plausible alternative to the monist accounts offered by legal positivists,²³ constitutional pluralism needs a fully-fledged theoretical articulation, which proponents of the movement have yet to offer.

II. What is Constitutional Interpretation? Interpreting Interpretation

Once the question of what counts as constitutional law is settled, the next step for the primacy-of-ontology theorist is to figure out how it applies to concrete cases. This process is commonly referred to as interpretation. Both in the academic literature and in popular culture, “interpretation” used with reference to adjudication is taken to cover everything from the spoken or written utterance to be interpreted all the way down to the decision on

²² *Id.*

²³ For a criticism of legal and constitutional pluralism as mere rebranding of older theoretical positions, see Alexander Somek, *Monism: A Tale of the Undead* (University of Iowa Legal Studies Research Paper Series) (2010/22), available at <http://ssrn.com/abstract=1606909>.

the merits resolving the dispute at hand.²⁴ Some scholars see this usage as problematic. Commenting on András Jakab's attempt to provide a comprehensive typology of the argument forms encountered in constitutional court opinions in Europe, Jeffrey Goldsworthy notes in the special issue that such usage conflates two distinct dimensions at work in the application of abstract norms to concrete cases. One involves "revealing or clarifying the meaning of a legal text." The other "involves constructing the meaning of a text, by modifying it or adding to it new meanings that it did not previously possess."²⁵ In the United States, the distinction between *constitutional interpretation* and *constitutional construction* has gained some traction among constitutional scholars as a way of capturing these two dimensions.²⁶ *Interpretation* is defined as the activity of determining the linguistic meaning of a text, while *construction* is about translating the linguistic content of a legal text into legal rules. As Goldsworthy himself notes, the interpretation-construction distinction is essentially equivalent to the one he draws between *clarifying* and *creative* interpretation.²⁷ This discussion points to the broader need for a better theoretical account of how general, abstract constitutional rules are applied to concrete fact situations, whether by judges or by other public officials; an issue that continues to be obscured by the persistent influence of antiquated and wildly implausible conceptions of the separation of powers. A clearer account of the process by which general, abstract norms are implemented and concretized by public officials is needed.²⁸

Against traditional separation of power doctrines, Kelsen compellingly argued that there are not three functions in the state—making laws, executing them and applying them—but only two: Namely, the creation of rules—*Rechtssetzung*—and the application of rules—*Rechtsanwendung*.²⁹ Moreover, Kelsen conceived of these two functions as differing not in

²⁴ See, e. g., Michael S. Moore, *Interpreting Interpretation*, in LAW AND INTERPRETATION 1, 1 (Andrei Marmor ed., 1995).

²⁵ Jeffrey Goldsworthy, *Clarifying, Creating and Changing Meaning in Constitutional Interpretation. A Comment on András Jakab, "Constitutional Reasoning in Constitutional Courts—European Perspective,"* 14 GERMAN L.J. 1279 (2013).

²⁶ See Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95 (2010); Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL'Y 65 (2011); KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW (1999).

²⁷ Goldsworthy, *supra* note 25.

²⁸ For an attempt to develop a more elaborate theoretical framework, see Arthur Dyevre, *Comprendre et Analyser L'activité Décisionnelle des Cours et des Tribunaux: L'intérêt de La Distinction Entre Interprétation et Concrétisation*, 4 JUS POLITICUM 1, 4 (2010), available at http://www.juspoliticum.com/IMG/pdf/Dyevre_JP4.pdf; Otto Pfersmann, *Le Sophisme Onomastique: Changer Au Lieu de Connaître. L'interprétation de La Constitution*, in L'INTERPRETATION CONSTITUTIONNELLE 33 (Ferdinand Mélin-Soucramanien ed., 2005).

²⁹ See HANS KELSEN, GENERAL THEORY OF LAW AND STATE (1946). For a critical assessment of Kelsen's treatment of this distinction, see András Jakab, *Problems of the Stufenbaulehre: Kelsen's Failure to Derive the Validity of a Norm from Another Norm*, 20 CANADIAN J. OF L. AND JURISPRUDENCE 35, 35–68 (2007).

kind but only in degree: Just as the creation of legal rules can usually be analyzed as the application of pre-existing rules, rule-application itself involves an element of rule-creation. This view results in a radically different conception of the separation of powers, which recasts the distinction between the branches of government as an organizational one.³⁰ Kelsen not only relativized the distinction between the function carried out by ordinary courts and the function fulfilled by administrative bodies, he relativized the distinction between lawmaking by parliamentarians and constitutional adjudication by constitutional judges, famously characterizing the role of constitutional courts as that of a *negative legislator*.³¹ These insights might provide a good starting point to rethink the contribution of the various branches to the development and evolution of constitutional rule systems and determine the extent to which what the actors say accurately reflect this contribution without minimizing it as judicial rhetoric tends to.³²

III. Is There a Meaning in This Text? Methods and Canons of Constitutional Interpretation

To establish where clarifying interpretation ends and creative interpretation begins, we must be able to ascertain the linguistic content of constitutional provisions with some degree of certainty. As for virtually every question related to constitutional reasoning, legal scholars tend to approach this issue from a normative perspective. In that regard, Tamás Győrfi's contribution on constitutional interpretation provides a good illustration of how the scholarly discussion in the legal literature typically proceeds.³³ A familiar claim is that a theory of constitutional interpretation cannot but be normative.³⁴ Yet to those who subscribe to the separability thesis—the view, as John Austin put it, that “the existence of law is one thing; its merit and demerit another,”³⁵ such claims may ring hollow, at least insofar as establishing the semantic content of a constitutional provision does not seem to presuppose a normative commitment as to how judges or other public officials ought to resolve constitutional disputes. As Goldsworthy notes, though, the task of clarifying interpretation does require “a theory of the nature of the pre-existing meaning that a constitution, like any law, necessarily possesses.”³⁶ Reflecting the state of linguistic theory, textualist approaches to interpretation long assumed that the meaning of legal text was

³⁰ *Id.*

³¹ *Id.* For a critical assessment of Kelsen's treatment of this issue, see Jakab, *supra* note 29.

³² See *infra*, Section C.

³³ Tamás Győrfi, *In Search of a First-Person Plural, Second-Best Theory of Constitutional Interpretation*, 14 GERMAN L.J. 1077 (2013).

³⁴ See, e.g., RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* (1999).

³⁵ JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 157 (1995).

³⁶ Győrfi, *supra* note 33.

merely a function of words and syntax. Thus all that was needed to determine the meaning of a constitutional provision was to identify the linguistic conventions governing lexical and syntax usage of either the period when it was enacted or, for some authors, the period when it is applied.³⁷ According to Goldsworthy in this special addition, with the pragmatic turn in linguistics and the influence of post-Gricean theories,³⁸ legal theorists have been paying increasing attention to the contextual dimension of constitutional meaning.³⁹ A perusal of cutting-edge scholarship in the field reveals rich discussions of implicatures, presuppositions, and Gricean maxims.⁴⁰ The development of computer technologies able to parse natural language sentences—and thus to process legal meaning—might soon become the next frontier in the application of linguistic theory to the issue of legal—and why not?—constitutional interpretation.⁴¹

Having said this, clarifying interpretation, particularly in the context of constitutional adjudication, is not likely to give decision makers much guidance as to how the concrete issue at hand should be decided. This is because of the under-determinacy of constitutional language. To be sure, there are questions for which any given constitution will give a single right answer. The requirement in the U.S. Constitution that the person occupying the office of president be at least thirty-five years of age is quite straightforward, as is the formula by which the German Basic Law sets the number of votes for large and small *Länder* in the *Bundesrat*.⁴² Nor does the clause fixing the number of rounds in the presidential election in the French Constitution, to give another example, seem to leave much wiggle room for creative interpretation.⁴³ Generally speaking, when constitutional rules have a constitutive

³⁷ HANS-JOACHIM KOCH & HELMUT RÜßMANN, *JURISTISCHE BEGRÜNDUNGSLEHRE: EINE EINFÜHRUNG IN GRUNDPROBLEME DER RECHTSWISSENSCHAFT* (1982).

³⁸ See H. PAUL GRICE, *STUDIES IN THE WAY OF WORDS* (1989); DAN SPERBER & DEIRDRE WILSON, *RELEVANCE: COMMUNICATION AND COGNITION* (1996).

³⁹ See Györfi, *supra* note 33.

⁴⁰ LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY (Andrei Marmor ed., 1995); Pfersmann, *Le Sophisme Onomastique*, *supra* note 28; WHITTINGTON, *supra* note 26; ANDREI MARMOR, *INTERPRETATION AND LEGAL THEORY: REVISED SECOND EDITION* (2005).

⁴¹ Betsy Cooper, *Judges in Jeopardy!: Could IBM's Watson Beat Courts at Their Own Game?*, 121 YALE L.J. ONLINE 87 (2011), <http://yalelawjournal.org/the-yale-law-journal-pocket-part/legislation/judges-in-jeopardy!:-could-ibm-s-watson-beat-courts-at-their-own-game?/>.

⁴² See GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [Grundgesetz][GG] [Basic Law], May 23, 1949, BGBl. I at art. 51(2) (Ger.) (“Each Land shall have at least three votes; Länder with more than two million inhabitants shall have four, Länder with more than six million inhabitants five, and Länder with more than seven million inhabitants six votes.”).

⁴³ 2008 CONST. art. 7(1) (Fr.) (“The President of the Republic shall be elected by an absolute majority of votes cast. If such a majority is not obtained on the first ballot, a second ballot shall take place on the fourteenth day thereafter. Only the two candidates polling the greatest number of votes in the first ballot, after any withdrawal of better placed candidates, may stand in the second ballot.”).

character, as opposed to a regulatory character, they tend to be relatively clear and straightforward. For example, the rules that create the office of president, establish courts, confer upon the actions of a group of individuals the meaning of a legislative act, etc., do not and cannot leave much in an ambiguous state. The point, however, is that these questions are pointedly not the ones which litigants will want to bring before a constitutional court. In fact, the probability that a constitutional rule will be litigated appears to stand in inverse proportion to its determinacy. In France, Italy, and Austria, the equality clause tops the list of most popular constitutional provisions in constitutional adjudication. In Germany, the most frequently recurring constitutional provision in the jurisprudence of the Federal Constitutional Court turns out to be Article 2 (1) of the Basic Law, which provides for the rather indefinite right to “the free development of one’s personality.”⁴⁴ In the United States, meanwhile, the constitutional clauses most frequently considered by the Supreme Court are those guaranteeing “due process of law” and “equal protection of the laws.”⁴⁵ Evidently, in such situations clarifying interpretation does not yield a single right answer but many possible, equally right ones.

An interesting research question is how constitutional judges deal with indeterminacy and whether they acknowledge or, conversely, try to hide the vagueness and ambiguity of the text. Indeterminacy opens the domain of creative interpretation. Many of the methods and maxims identified by András Jakab’s typology of constitutional arguments effectively serve as devices to deal with indeterminacy in a way that makes judicial decision making more predictable.⁴⁶ Often, though, as both Jakab and Goldsworthy notice, they also serve to hide judges’ choices or even to override surreptitiously the plain meaning of constitutional provisions. What constitutional judges themselves say about how their constitution should be construed and how doctrines are to be derived from its provisions belongs to the research questions that might greatly benefit from comparative analysis. Looking at the practices of several European constitutional courts, Jakab points out important divergences in matters of style, notably between French and German constitutional opinion-writing.⁴⁷ More ambitious research projects, which seek to arrive at a more comprehensive and systematic picture of constitutional reasoning, are on the way. The findings of a new study conducted by Tania Groppi and Marie-Claire Ponthoreau on the use of foreign precedents

⁴⁴ GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GG] [Basic Law], May 23, 1949, BGBL. I at art. 2(1) (Ger.) (“Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law.”).

⁴⁵ See Arthur Dyevre, *Technocracy and Distrust: Revisiting the Rationale for Judicial Review*, SSRN ELIBRARY (2012), available at <http://ssrn.com/abstract=2043262>.

⁴⁶ András Jakab, *Judicial Reasoning in Constitutional Courts. A European Perspective*, 14 GERMAN L.J. 1215 (2013).

⁴⁷ *Id.*

by constitutional judges will soon appear in print.⁴⁸ Synthesizing the research of scholars from African, American, Asian, European, Latin American, and Oceania countries, the study presents both qualitative and quantitative indicators of the extent to which foreign case law is cited by constitutional judges. Another ongoing research project, the CONREASON Project, based at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg, seeks to identify patterns of convergence and divergence across a broader set of argument forms through a systematic investigation of the practices of constitutional courts in Europe specifically, but also in other parts of the world.⁴⁹

C. The Decision-Making Approach: Explaining Judicial Policy-Making Through Opinion-Writing

When public decision-makers offer an explicit justification for settling a concrete case in a certain manner, the same justification is commonly interpreted as making simultaneously a policy statement. Saying that “the outcome of case x must be y because of A and B” is thus taken to entail that A and B provide relevant, general criteria for deciding concrete cases. Suppose, for instance, that a court finds for the applicant and against law enforcement officials in a human rights case. Now suppose the court does so on the grounds that the police have violated the applicant’s constitutional rights by holding him in custody for a suspected felony more than twenty-four hours without the assistance of a lawyer. These grounds are supposed to furnish justificatory reasons for the decision on the merits. At the same time, though, they are likely to be viewed as an indication of where the court will draw the line between constitutionally acceptable and constitutionally unacceptable police behavior. This highlights two functions of judicial opinion-writing and reason-giving by public officials in general. Judicial opinions fulfill a legitimizing function; they serve to legitimize the exercise of coercive power by judges. But even in civil law systems with no explicit *stare decisis* doctrine, judicial opinions also perform a policy-making function, effectively enabling judges to make rules in the course of settling individual disputes.⁵⁰

The focus of the decision-making approach is on the latter function of reason-giving by public decision-makers. As will be shown below, the decision making approach—which is well represented in American political science but still relatively marginal in other parts of the world—is primarily concerned with judicial opinions as policy instrument. It is interested in the policy choices embedded in judicial opinions and sets itself out to

⁴⁸ Tania Groppi & Marie-Claire Ponthoreau, *The Use of Foreign Precedents by Constitutional Judges: A Limited Practice, An Uncertain Future*, in *THE USE OF FOREIGN PRECEDENTS BY CONSTITUTIONAL JUDGES* (Tania Groppi & Marie-Claire Ponthoreau eds., 2013).

⁴⁹ See *CONREASON: Constitutional Reasoning in Comparative Perspective*, CONREASONPROJECT.COM, <http://www.conreasonproject.com/> (last visited May 24, 2013).

⁵⁰ See Jan Komárek, *Judicial Lawmaking and Precedent in Supreme Courts*, (LSE Working Paper No. 4/2011), available at <http://papers.ssrn.com/abstract=1793219>.

investigate the factors such as attitudes, collegial dynamics, and external influences that modulate the content of these policies. One may see this approach as linking the context of justification to the context of discovery, because it takes the judges' explicitly proffered reasons as its *explanandum* and the judges' motivating reasons as their *explanans*. But this characterization is potentially misleading, because the decision making approach is interested in judicial opinions only inasmuch as they signal policy positions. This implies that considerations otherwise seen as central to the context of justification—including fairness and legitimacy—do not feature as relevant quantities of interest. The decision-making approach casts its subject-matter in resolutely causal terms. As such it invites the application of the whole panoply of social science methods developed for the purpose of making valid causal inferences.

I. Opinion-Writing and the Collegial Game

In the United States, where empirical research on judicial decision-making can claim a long tradition going back to the legal realist movement,⁵¹ political scientists studying judicial politics have long focused exclusively on the outcome of court cases and ignored what the judges said in the accompanying opinions. Opinions were neglected partly because of the methodological challenges involved in analyzing large samples of written documents in a systematic fashion. Classifying and coding the dispositive part of a judgment for the purpose of quantitative analysis presents itself as a relatively straightforward task, as case outcomes are generally dichotomous—constitutional or unconstitutional, affirm or reverse. A judicial opinion, by contrast, often comes in the form of a lengthy piece of writing addressing a varying number of issues in an order that is likely to differ from case to case. Another reason for neglecting opinions was more theoretical in character. To model decision-making on judicial bodies, political scientists started by transposing models and theories designed for the study of legislative politics. These models, however, overlooked key institutional characteristics that are peculiar to the judicial context, such as the distinction between case disposition and opinion.⁵²

More recent literature attempts to address this shortcoming and has begun to explore a whole set of hypotheses on opinion-writing and coalition formation in judicial settings. Lewis Kornhauser and Charles Cameron have developed a formal, game-theoretic adjudication model that fully accounts for the opinion-disposition distinction.⁵³ Their

⁵¹ See Arthur Dyevre, *Unifying the Field of Comparative Judicial Politics: Towards a General Theory of Judicial Behaviour*, 2 EUR. POL. SC. REV. 297 (2010).

⁵² Charles M. Cameron & Lewis A. Kornhauser, *Modeling Collegial Courts (3): Adjudication Equilibria (Revised)* (NYU School of Law, Public Law Research Paper No. 12-52, 2010), available at http://www.germanlawjournal.com/pdfs/Vol14-No2/PDF_Vol_14_No_02_423-433_Developments_Schanze.pdf (hereinafter Cameron *et al.*, *Modeling Collegial Courts (3)*); Jeffrey R. Lax, *The New Judicial Politics of Legal Doctrine*, 14 ANN. REV. OF POL. SCI. 131 (2011).

⁵³ Cameron *et al.*, *supra* note 52.

model assumes that individual judges have preferences over both opinion content and case disposition. Constraints for the judges, though, arise from the way in which the two dimensions of adjudication are connected, i.e., from the fact that policy making takes place within the context of and simultaneously with dispute resolution. As the authors note, it is a norm in American legal culture that a judicial opinion, even by a high court, must bear some relevance to, and be consistent with the direction of the case disposition.⁵⁴ Cameron and Kornhauser bring their model to bear on several on-going debates in U.S. Supreme Court research. An issue of central concern to American students of judicial politics relates to the ability of the median judge to control the content of the Court's opinion. Importing the median voter theorem from the legislative politics literature and applying it to the judiciary, some authors have argued that on the U.S. Supreme Court, the judge casting the swing vote on the merits effectively controls the content of the Court opinion. Of course, these scholars are aware of the fact that the formal and informal rules governing the Court's internal deliberations do not automatically assign opinion-writing to the median judge. As is the case with high courts elsewhere in the world, the power to assign opinion is wielded by the Chief Justice or, if he is in the minority or not participating, by the senior Justice in the majority. But what determines the capacity of the opinion-assigner and opinion-assignee to influence the content of the final opinion is the degree to which the other judges are able to amend the opinion-assignee's draft proposal. If the assignee can present her draft opinion as a take-it-or-leave-it proposal, then she can afford to pick the point closest to her preferred position as location of the Court's opinion. But, if the other judges can amend her proposal, then the final outcome should be somewhat closer to the median judge's ideal point on the relevant issue dimension, in line with the median voter theorem. The scholars who subscribe to the median voter theorem point to the absence of a closed rule prohibiting counter-offers in the U.S. Supreme Court deliberation protocol.⁵⁵ Yet some researchers have challenged the median voter theorem, insisting that crafting high-quality opinions has a cost—in time, intellectual energy, and leisure-time opportunities forgone—that may discourage counter-offers. Similar to other attempts at modeling the opinion-making process,⁵⁶ Cameron and Kornhauser add an opinion-writing cost to the judges' utility function to capture this assumption. They demonstrate that, under certain circumstances, the cost of writing persuasive opinions may induce a judge to join an opinion he would otherwise be inclined to challenge. This research suggests that, even in the absence of a formal gag rule, the identity of the opinion-assigner as well as that of the opinion-assignee do matter.

⁵⁴ *Id.*

⁵⁵ THOMAS H. HAMMOND ET AL., STRATEGIC BEHAVIOR AND POLICY CHOICE ON THE U.S. SUPREME COURT 161–62 (2005); Tonja Jacobi, *Competing Models of Judicial Coalition Formation and Case Outcome Determination*, 1 J. OF LEGAL ANALYSIS 411 (2009).

⁵⁶ Jeffrey R. Lax & Charles M. Cameron, *Bargaining and Opinion Assignment on the U.S. Supreme Court*, 23 J.L. ECON. & ORG. 276 (2007); Cliff Carrubba et al., *Who Controls the Content of Supreme Court Opinions?*, 56 AM. J. OF POL. SCI. 400 (2012).

For the aforementioned reasons, the empirical evidence that would permit one to conclusively adjudicate between these competing claims has proved hard to obtain. Scholars have considered various methods to measure the U.S. Supreme Court's policy output. Some have tried to infer the opinion content from the decision on the merits.⁵⁷ Others, more convincingly, have looked at patterns in concurrences and voting to construct a measure of opinion location.⁵⁸ Still others have used citations to precedent as approximation for the Court's doctrinal position.⁵⁹ Exploring the relationship between ideology and the theories of interpretation used in judicial opinions, another set of scholars has sought to elaborate coding schemes able to capture the judges' interpretive practices.⁶⁰ Political scientists tend to view the invocation of particular canons of interpretation as smokescreen for judicial preferences more along the lines of the political communication approach,⁶¹ with judges picking up whatever mode of interpretation best supports the outcome they want to reach. The literature on statutory interpretation, however, suggests that the choice of interpretive methods can also be analyzed as a form of meta-policy-making privileging certain actors of the policy-making process over others.⁶² A commitment to plain meaning and legislative history is thus conceptualized as deference towards the legislature, whereas reliance on administrative rulings is seen as signaling deference towards the executive branch. Alternatively, an emphasis on substantive canons, precedents or broad policy considerations is taken to prioritize judge-made rules and the judiciary over the other branches.⁶³ Interestingly, the two empirical studies employing this conceptual scheme, both of which involved the hand-coding of several hundred Supreme Court opinions, have found a clear prevalence of the judicial interpretive regime over the executive and legislative ones.⁶⁴ We might expect a study of interpretive regimes at constitutional level to yield similar empirical results. But it would surely be instructive to see how this conceptual framework can be adapted to the constitutional

⁵⁷ See, e.g., THOMAS G. HANSFORD & JAMES F. SPRIGGS II, *THE POLITICS OF PRECEDENT ON THE U.S. SUPREME COURT* (2006).

⁵⁸ Jacobi, *supra* note 55.

⁵⁹ Tom S. Clark & Benjamin Lauderdale, *Locating Supreme Court Opinions in Doctrine Space*, 54 AM. J. OF POL. SCI. 871 (2010).

⁶⁰ See Sara C. Benesh & Jason J. Czarnezki, *The Ideology of Legal Interpretation*, 29 WASH. U. J. L. & POL'Y 113 (2009); John B. Gates & Glenn A. Phelps, *Intentionalism in Constitutional Opinions*, 49 POL. RES. Q. 245 (1996).

⁶¹ Benesh & Czarnezki, *supra* note 60; Gates & Phelps, *supra* note 60; R. M. Howard & J. A. Segal, *An Original Look at Originalism*, 36 LAW & SOC'Y REV. 113 (2002); Pamela C. Corley et al., *The Supreme Court and Opinion Content: The Use of the Federalist Papers*, 58 POL. RES. Q. 329 (2005).

⁶² See Nancy Staudt et al., *Judging Statutes: Interpretive Regimes*, 38 LOY. L.A. L. REV. 1909 (2004); Nicholas S. Zeppos, *Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073 (1991).

⁶³ Staudt et al., *supra* note 62, at 1910.

⁶⁴ Staudt et al., *supra* note 62; Zeppos, *supra* note 62.

context. It should be possible to identify the interpretive methods that privilege the framers—textualism, originalism, records of the constitutional convention—over those that give more weight to the preferences of the current legislators—clear-mistake rule—or the sitting judges—precedent, purposive interpretation, or living constitution.

II. Expanding the Geographic Scope of Judicial Behavior Research

As Staudt's research overwhelmingly relates to the American judiciary, one may legitimately wonder whether its findings are generalizable to courts outside the United States. While there is a great deal to be learned from the American scholarship on judicial behavior, it is high time scholars worked on adapting these theoretical frameworks, models, and statistical tools to courts elsewhere in the world. This is especially important with regard to judicial opinion-making on constitutional matters. Structurally, the constitutional courts of the sort that has spread over Europe and other regions of the globe in the past few decades⁶⁵ differ significantly from the U.S. Supreme Court. First, much of what these constitutional courts do within the context of abstract and concrete review has little to do with dispute resolution in the conventional sense. An abstract review referral does not formally seek the resolution of a dispute between two parties but a judicial determination on the conformity of the challenged norm to the constitution. So both the opinion and the case disposition serve as policy-making instruments. Second, their specialized subject-matter jurisdiction means that constitutional judges cannot choose between constitutional and legislative policy-making modes.⁶⁶ This limitation may operate as an incentive to *constitutionalize* policy issues. But the lock-in effect of constitutionalization resulting from the difficulty in revising a rigid constitution may simultaneously constrain judges to write vague opinions that effectively defer other policy-makers.⁶⁷

Overall, there is an urgent need for more comparative research. Though the scholarship they have spawned does not always meet the highest standards of theoretical and methodological rigor, some areas have already received significant attention from comparativists interested in judicial behavior. One pertains to the degree of transparency

⁶⁵ See Tom Ginsburg & Mila Versteeg, *The Global Spread of Constitutional Review: An Empirical Analysis*, available at http://www.law.northwestern.edu/colloquium/law_economics/documents/Spring2012_Ginsburg_Global_Constitutional.pdf (last visited May 15, 2013).

⁶⁶ This is unlike supreme courts holding the power of constitutional review, which can decide between basing their rulings on statutory grounds and basing them on constitutional grounds. For a valuable attempt to model the conditions under which the U.S. Supreme Court will choose the statutory or the constitutional mode, see Pablo T. Spiller & Matthew L. Spitzer, *Judicial Choice of Legal Doctrines*, 8 J.L. ECON. & ORG. 8 (1992).

⁶⁷ For a formal analysis of the incentives to write vague opinions, see Jeffrey K. Staton & Georg Vanberg, *The Value of Vagueness: Delegation, Defiance, and Judicial Opinions*, 52 AM. JOURNAL OF POL. SCI. 504 (2008).

surrounding the collegial bargaining process. As Katalin Kelemen shows in her richly documented contribution,⁶⁸ there is a long-standing debate on the merits and demerits of allowing judges to publish separate opinions. While separate opinions constitute the norm in common law jurisdictions, they continue to be the exception in continental Europe. Remarkably, though, the exceptions carved out in the general prohibition regime invariably regard the constitutional courts. Kelemen also discerns a growing trend to grant European constitutional judges the right to concur and dissent publicly.⁶⁹ Broadening the scope of comparison beyond Europe and the United States, we observe an impressive gamut of institutional practices. At one end of the spectrum are the countries that not only authorize separate opinions but allow thorough public scrutiny at every stage of the judicial decision-making process. These include Brazil and Mexico, where, in addition to being public, judicial deliberations on the Supreme Court are broadcast live on television, just like plenary debates in the legislature.⁷⁰ At the other end of the spectrum are the regimes that continue to emphasize secrecy over transparency. The prime examples here are France and Italy and, at supranational level, the Court of Justice of the European Union. Strict secrecy regimes suggest that constitutional judges have no choice but to speak with one voice. As the public has only access to the end-product of the intra-court bargaining process, they effectively turn the courts into black boxes. How variations in transparency levels affect the collegial game and, in turn, the courts' policy output is a question on which comparative scholars diverge. Some have argued that secrecy gives judges an incentive to compromise and works to reinforce the deliberative dynamic of the judicial rule-making process.⁷¹ But others suggest that the right to air disagreement publicly may help soothe internal judicial tensions.⁷² An argument frequently encountered in legal writing is that the prohibition on public dissent tends to result in more complex and more convoluted opinions as judges seek to accommodate disagreements within the same piece of text.⁷³ Yet these hypotheses still await empirical validation. Indubitably, the very existence of secrecy renders systematic comparisons between secrecy and transparency

⁶⁸ See Katalin Kelemen, *Dissenting Opinions in Constitutional Courts*, 14 GERMAN L.J. 1345 (2013).

⁶⁹ *Id.*

⁷⁰ Roberto Fragale Filho, *Increasing Judicial Transparency: When Brazilian Court TV Officially Meets YouTube*, in PROCEEDINGS OF THE 10TH EUROPEAN CONFERENCE ON E-GOVERNMENT, NATIONAL CENTER FOR TAXATION STUDIES AND UNIVERSITY OF LIMERICK, IRELAND (JUNE 17–18, 2010) (David O'Donnell ed., 2010).

⁷¹ See Pasquino & Ferejohn, *supra* note 6; Ferejohn & Pasquino, *Constitutional Adjudication*, *supra* note 6.

⁷² Kelemen, *supra* note 68.

⁷³ Whether a ban on separate opinions actually results in longer court opinions is not obvious. Recent research on dissenting behavior on U.S. federal courts reveals that majority opinions are, on average, twenty percent longer when a dissent is published. See Lee Epstein et al., *Why (And When) Judges Dissent: A Theoretical And Empirical Analysis*, 3 J. OF LEGAL ANALYSIS 101 (2011).

regimes difficult, if not impossible.⁷⁴ But there is hope. In France, the year 2008 saw the adoption of a law which makes the minutes of Constitutional Council deliberations for all decisions older than twenty-five years freely accessible to the public. French law professors have just begun to explore this treasure trove of insights into the institution's decision-making process.⁷⁵ An ambitious research project might attempt to assess the impact of distinct transparency regimes on judicial opinion-making, looking at the supreme courts of Mexico and Brazil, the French Constitutional Council and the U.S. Supreme Court where scholars have managed to reconstruct the collegial, deliberative dynamic from the Justices' private papers.⁷⁶

D. The Political Communication Approach: Constitutional Reasoning as a Sword and as a Shield

In making policies and deciding individual disputes, public decision-makers are bound to make choices that will produce losers as well as winners. For this reason, especially in democratic societies, public decision-makers face the need to justify their choices in terms that the citizens in general and the addressees of public policies in particular are likely to deem acceptable. Poor, absent, or inappropriate justification may expose the decision-maker to criticism and provoke a backlash against her institution, with potentially damaging implications for its authority. In other words, there is a direct link between public justification and legitimacy in the Weberian, positive sense of social acceptance. Constitutional discourse is often invoked precisely as a means to achieve legitimacy in this sense. Political actors routinely appeal to fundamental rights or separation-of-power principles allegedly embedded in their polity's constitutional arrangement to defend or to oppose policy choices.

What makes political communication relevant when studying constitutional reasoning is that it is interested in how political actors seek to achieve political ends through the use of symbols, whether these symbols take the form of verbal messages, such as speeches, reports, and press releases, or visual representations, such as gesture, dress, or ritual.⁷⁷ In

⁷⁴ Even so, valuable insights into the judicial opinion-making process have been gained from interview data. Uwe Kranenpohl, for example, has investigated the internal decision-making dynamic and the influence of the opinion-writer on judicial outcomes on the German Federal Constitutional Court by interviewing dozens of constitutional judges. See Uwe Kranenpohl, *Herr des Verfahrens oder nur einer unter Acht? Der Einfluss des Berichterstatters in der Rechtsprechungspraxis des Bundesverfassungsgerichts*, 30 ZEITSCHRIFT FÜR RECHTSOZIOLOGIE 135; UWE KRANENPOHL, *HINTER DEM SCHLEIER DES BERATUNGSGEHEIMNISSES* (2010).

⁷⁵ See BERTRAND MATHIEU ET AL., *LES GRANDES DELIBERATIONS DU CONSEIL CONSTITUTIONNEL 1958–83* (2009).

⁷⁶ JACK KNIGHT & LEE EPSTEIN, *THE CHOICES JUSTICES MAKE* (1st ed. 1997).

⁷⁷ Both forms of communication matter in the case of constitutional discourse. This is obvious for verbal communication. But non-verbal messages have their importance, too. Consider, for example, the distinct dress-codes constitutional judges hold on to—German constitutional judges wear the distinctive velvet robe—and the

short, political communication is concerned with the rhetorical practices of political actors. In the words of Kenneth Burke, it is fundamentally about the use of symbols “as a means of inducing cooperation in beings that by nature respond to symbols.”⁷⁸ With the decision-making approach, the political communication approach shares a causal perspective. But it focuses on the persuasive effects of reason-giving by public officials, rather than on their policy content. Some may object that such an approach, though potentially useful for the purpose of analyzing the verbal behavior of politicians, cannot sensibly be applied to judicial discourse because judges are emphatically not political actors. We beg to differ. If, at all, this objection should apply equally to the decision-making approach, which also presumes that judges are political actors. When it does not result from implausible assumptions about the determinacy of legal norms and legal reasoning, the objection is likely to stem from an overly restrictive understanding of politics equating “politics” with partisan behavior. But we see politics as being more broadly about the “authoritative allocation of values,” to borrow David Easton’s classical definition. In that sense, adjudication is always political, although judges may differ widely in the amount of political discretion they enjoy. More controversially perhaps, we think that judicial opinion-writers, especially at the constitutional level, have much in common with spin-doctors and public relation advisers. The great paradox of judicial rhetoric, however, is that, while it does pursue political ends, it is at its most effective when perceived to be value-neutral. As Anne-Marie Slaughter-Burley and Walter Mattli explained regarding the European Court of Justice:

[L]aw functions as both mask and shield. It hides and promotes the protection of a particular set of political objectives against contending objectives in the purely political spheres. In specifying this dual relationship between law and politics, we uncover a striking paradox. Law can only perform this dual political function to the extent that it is accepted as law. A ‘legal’ decision that is transparently ‘political’, in the sense that it departs too far from the principles and methods of the law, will invite direct attack.⁷⁹

I. Constitutional Argumentation as Audience-Tailored Communication

carefully orchestrated choreography that typically accompanies the announcement of constitutional court rulings, which, in so many ways, mimics a church service.

⁷⁸ KENNETH BURKE, *A RHETORIC OF MOTIVES* 43 (1950).

⁷⁹ Anne-Marie Burley & Walter Mattli, *Europe before the Court: A Political Theory of Legal Integration*, 47 *INT’L ORG.* 41, 72–73 (1993).

The exercise of coercive power by public officials is legitimate to the extent that its addressees accept it as appropriate. As Max Weber himself argued, the standards or social norms defining what constitutes appropriate behavior for public decision-makers are likely to vary across space and time. Within the same political context, they may also vary across institutions. Typically, in democratic regimes, what constitutes acceptable behavior for elected officials may be regarded as unacceptable for unelected ones.

As regards constitutional judges, we think there are two socially dominant, partly overlapping, normative representations of the judicial function in Western-style democracies. One casts the judges as the neutral, impartial guardians of constitutional law, in keeping with the legalistic model of adjudication.⁸⁰ Accordingly, judicial review is seen as a necessary mechanism to ensure that constitutions are not merely parchment barriers but effective rules. Constitutional judges are supposed to be a mainstay of the rule of law. But this role is viewed as entirely consistent with the doctrine of the separation of powers. So when done correctly and competently, their job should entail neither making nor executing but merely *applying* law. The other representation depicts constitutional judges in more militant terms as champions of rights and democratic values. Courts are portrayed as bulwarks of liberty where the weaker members of society can seek protection against oppressive majorities and opportunistic politicians. In his comparative analysis of the political battles surrounding judicial appointments in Chile and the United States, Fernando Muñoz makes a similar point. He sees the two sides in the appointment controversy as appealing to two distinct conceptions of the office of constitutional judge: One emphasizing the *autonomy* of law and adjudication; the other its *responsiveness* to social needs, expectations and priorities.⁸¹ As Aida Torres Pérez points out, these conceptions correspond to distinct approaches to judicial legitimacy.⁸²

We take the legalistic—or, in Muñoz's words, *autonomy*—model to reflect a more defensive communication strategy. As such, it is more aptly described as a shield than as a sword. Judges are especially likely to resort to legalistic arguments when their decisions come under attack. To their critics, the judges can retort that those who don't like the decisions should go and complain to the constitution-makers. As indicated above, the legalistic model is largely discredited in legal theory but remains deeply ingrained in the popular culture. Opinion surveys show that people who are more favorably oriented towards the judiciary are also more likely to subscribe to the mythology of judicial neutrality and objectivity in decision-making.⁸³ Against this backdrop, the fact that

⁸⁰ See Section B, *supra*.

⁸¹ Fernando Muñoz, *Not Only "Who Decides": The Rhetoric of Conflicts over Judicial Appointments*, 14 GERMAN L.J. 1195 (2013).

⁸² Aida Torres Pérez, *On Judicial Appointments and Constitutional Adjudication. A Reply to Fernando Muñoz*, 14 GERMAN L.J. 1209 (2013).

⁸³ James L. Gibson et al., *On the Legitimacy of National High Courts*, 92 AM. POL. SCI. REV. 343, 345 (1998).

legalistic patterns of argumentation continue to be so pervasive in judicial rhetoric appears far less puzzling. After all, “the way an institution advertises tells you what it thinks its customers demand.”⁸⁴ Constitutional judges regularly profess a commitment to the legalistic model. In his confirmation hearing before the Senate Judiciary Committee, Chief Justice Roberts famously compared the role of a judge to that of an umpire in a ball game:

Judges and justices are servants of the law, not the other way around. Judges are like umpires. Umpires don't make the rules; they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules. But it is a limited role. Nobody ever went to a ball game to see the umpire.⁸⁵

In a similar vein, the following statement can be read on the official homepage of the German Federal Constitutional Court:

The decisions of the Court do have political consequences. This is most evidently the case when the Court declares a statute unconstitutional. However, the Court is not a political body. Its sole standard of review is the Basic Law. Considerations of political expediency do not play any role for the Court.⁸⁶

But one of the most arresting invocations of the legalistic conception of constitutional adjudication can be found in a U.S. Supreme Court opinion from the New Deal era:

When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the Government has only one duty—to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question. The only

⁸⁴ Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 4 (1971).

⁸⁵ John G. Roberts, Chief Justice of the Supreme Court of the United States, Confirmation Hearing on the nomination to be Chief Justice of the United States (Sept. 12, 2005), <http://www.gpoaccess.gov/congress/senate/judiciary/sh109-158/55-56.pdf>.

⁸⁶ See the Federal Constitutional Court website, <http://www.bundesverfassungsgericht.de/organisation/aufgaben.html> (last visited May 25, 2013).

power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends.⁸⁷

In contrast to the legalistic model, communication strategies emphasizing rights and values seem to correlate with a position of judicial assertiveness. There undoubtedly exists a connection between the spread of rights discourse and the global rise of judicial power.⁸⁸ The emergence of powerful constitutional courts in Germany, Italy and France has coincided with the development of broad rights jurisprudences. So too has the activism of the Warren and Burger Courts in the United States. Discussing the interpretive practices of the Hungarian Constitutional Court between 1990 and 2010, Zoltán Szente and Gábor Attila Tóth recount how the Hungarian institution imported entire foreign rights doctrines—most notably from the jurisprudence of the German Federal Constitutional Court—to carve for itself a role as central actor in the Hungarian political system.⁸⁹ But both scholars anticipate that the political backlash against constitutional judges following the landslide victory of Fidesz in the 2010 elections will put the Court on a defensive foot and incite it to play down its emphasis on fundamental rights and un-enumerated principles.⁹⁰

Strictly speaking, the rights model and the legalistic model are not incompatible communication strategies. They may, to some extent, simultaneously coexist in the discursive practices of the same tribunal. A question worth considering for future research, though, is what the exact balance between the two is and how it changes over time and across constitutional systems depending on the evolution of the courts' environment.

II. Constitutional Spin: The Style and Structure of Constitutional Rhetoric

Stressing the rhetorical dimension of constitutional discourse implies that its ultimate aim is not to explain but to persuade—that its concern is not truth, but persuasion. Assuredly,

⁸⁷ United States v. Butler, 297 U.S. 1, 63–64 (1936).

⁸⁸ NEAL TATE & TORBJORN VALLINDER, *THE GLOBAL EXPANSION OF JUDICIAL POWER* (1995).

⁸⁹ Zoltán Szente, *The Interpretive Practice of the Hungarian Constitutional Court—A Critical View*, 14 GERMAN L.J. 1591 (2013); Gábor Attila Tóth, *Historicism or Art Nouveau in Constitutional Interpretation? A Comment on "The Interpretive Practice of the Hungarian Constitutional Court—A Critical View" by Zoltán Szente*, 14 GERMAN L.J. 1615 (2013).

⁹⁰ Szente, *supra* note 89; Tóth, *supra* note 89.

the distinction between rhetorical and analytical language should not be seen as absolute. Indeed, there is a sense in which every discourse aims to achieve persuasion. All scientists—whether in physics or economics—hope to persuade their peers and the broader public that their hypotheses and theories are true. Rhetorical effectiveness is not necessarily incompatible with analytical rigor. In some situations (e.g., in defending a thesis before a group of mathematicians), an analytical, formal argument is likely to be the most, or even the only, effective rhetoric—that is, the only realistic way to achieve persuasion. There might also be instances where constitutional discourse may have to espouse more analytical forms of argumentation in order to elicit acceptance. But what characterizes fields such as law and politics is that the constraint to do so is much less stringent. Much like partisan discourse, which in democratic regimes mostly aims at persuading voters, legal reasoning—both in judicial reasoning and legal scholarship—is relatively more tolerant of non-analytical argument forms that are normally rejected in scientific contexts. Judges and politicians have more room, as well as greater incentives, to exploit the ignorance and cognitive biases of their audiences.

As with political communication in general, much in constitutional reasoning is about framing.⁹¹ To say that an issue possesses a “constitutional” character is already a way of signaling its importance, making it more difficult for opponents to ignore it. Scholars have documented the growing “judicialization” and “constitutionalization” of legislative politics, with legislators invoking arguments from constitutional law with increased frequency.⁹² But framing techniques are just as prevalent in judicial argumentation as they are in other political areas. Framing often proceeds through the use of positively-connoted language. This point is well illustrated by the use of expressions such as *freedom*, *fundamental right*, *human dignity* and *rule of law* in judicial opinions. To state that a case is about some fundamental right or to call freedom the interest a given litigant is seeking to vindicate before the court is a way of suggesting what the measure of a fair outcome should be, as much as a way of immunizing the judges against potential attacks. When judges manage to portray themselves as champions of rights, their detractors are at a much higher risk of being dismissed as enemies of freedom. Just as no one wants to be seen as opposing freedom or supporting the curtailment of fundamental rights, no one wants to be seen as opposing the rule of law or human dignity. Since the rule of law must surely be better than what seems to be its implied opposite, the rule of un-law, and human dignity preferable to human *indignity*, it should not be surprising to find these expressions are given pride of place in constitutional court opinions, as András Jakab and Zoltán Sente highlight human

⁹¹ For an introduction to the concept and literature on framing techniques, see Robert D. Benford & David A. Snow, *Framing Processes and Social Movements: An Overview and Assessment*, 26 ANN. REV. OF SOCIOLOGY 611 (2000); Robert M. Entman, *Framing: Toward Clarification of a Fractured Paradigm*, 43 J. OF COMMUNICATION 51 (1993).

⁹² See ALEC STONE, *THE BIRTH OF JUDICIAL POLITICS IN FRANCE: THE CONSTITUTIONAL COUNCIL IN COMPARATIVE PERSPECTIVE* (1992); CHRISTINE LANDFRIED, *BUNDESVERFASSUNGSGERICHT UND GESETZGEBER: WIRKUNGEN DER VERFASSUNGSRECHTSPRECHUNG AUF PARLAMENTARISCHE WILLENSBILDUNG UND SOZIALE REALITÄT* (1984).

dignity has been in the jurisprudence of the Hungarian Constitutional Court.⁹³ There are many more expressions popular in judicial writing that could be added to this list of legal frames, all of which share the characteristic of carrying strong emotional significance. Some courts present their case law as embodying a conception of their constitution as *living law* or *living instrument*. Prime examples are the Supreme Court of Canada⁹⁴ and the European Court of Human Rights.⁹⁵ This is yet another clever judicial stratagem designed to make the task of critics, who will fear being cast as necrophiles advocating a *dead* constitution, more difficult.

For those who oppose the policies behind these communication tactics, a careful, analytical refutation is unlikely to prove rhetorically effective. Instead, the best answer to framing is counter-framing. Like the framing act it responds to, counter-framing exists in both the positive and the negative variety. Positive counter-framing seeks to recast the opponents' own position in positive terms. So the opponents of abortion in the United States are not *anti-choice*, but *pro-life*.⁹⁶ Likewise, parties on the left typically respond to the right's emphasis on *freedom* by stressing their commitment to *equality*. Judges, meanwhile, are inclined to counter the legislators' emphasis on *democracy* and the *will of the people* by putting the accent on the *rule of law*. Negative counter-framing, on the other hand, attempts to cast the opponents' policy position in an unfavorable light. To give a familiar example, judicial rulings on polarizing issues often trigger accusations of *judicial activism*, *gouvernement des juges*, or *judges legislating from the bench*, as the losing side attempts to mobilize the public against the judges.⁹⁷

This observed feature of constitutional discourse—the fact that it does not proceed through analytical formulations and refutations but through symbolic and emotionally-laden language—makes it eminently suitable for automated content analysis. Automated content analysis is a set of computerized methods that allow researchers to extract information from texts by basically treating frequencies in word usage as statistical data.⁹⁸

⁹³ Jakab, *supra* note 46; Szente, *supra* note 89.

⁹⁴ For the Supreme Court of Canada's same-sex marriage opinion, see *Re Same-Sex Marriage*, [2004] 3 S.C.R. 698 (Can.) ("The "frozen concepts" reasoning runs contrary to one of the most fundamental principles of Canadian constitutional interpretation: [T]hat our Constitution is a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life.").

⁹⁵ See Alastair Mowbray, *The Creativity of the European Court of Human Rights*, 5 HUM. RTS. L. REV. 57 (2005).

⁹⁶ Anne W. Esacove, *Dialogic Framing: The Framing/Counterframing of "Partial-Birth" Abortion*, 74 SOC. INQUIRY 70 (2004).

⁹⁷ The frequency with which these negative frames are used suggests the intriguing paradox that the judges' critics are often precisely those who contribute most to perpetuate a legalistic picture of adjudication.

⁹⁸ For an introduction to content analysis, see KLAUS H. KRIPPENDORFF, *CONTENT ANALYSIS: AN INTRODUCTION TO ITS METHODOLOGY* (3rd ed., 2012).

Evidently, we have not reached the point where computers can match the precision and accuracy of human readers.⁹⁹ Yet we see great potential for the application of automated content analysis techniques to constitutional reasoning as a way to amplify and augment human reading, especially as the Internet facilitates public availability of large collections of constitutionally relevant texts. The last decade saw a surge of interest in automated content analysis from political scientists studying party manifestos and political speeches.¹⁰⁰ But the text-as-data movement has also caught the attention of judicial politics and empirical legal scholars. Kevin McGuire and Georg Vanberg have sought to measure the content of Supreme Court opinions using Wordscores.¹⁰¹ Michael Evans and his team, meanwhile, apply Wordscores along with various models relying on a Naïve Bayes classifier, to the analysis of amicus curiae briefs. They find that all the methods accurately classify the ideological direction of amicus curiae briefs submitted in the two affirmative action cases, *Bakke* (1978) and *Bollinger* (2003), considered in their study. They also find that automated feature selection techniques can enable the detection of disparate issue conceptualizations by opposing sides in a single case.¹⁰² On the other side of the Atlantic, Arthur Dyeve is applying the Wordscores and Wordfish approaches to German constitutional rulings on European integration.¹⁰³ His early findings suggest the

⁹⁹ Because they focus on the lexical dimension of language and model the occurrence of words as independent events (the occurrence of “rancid” does not make the occurrence of “butter” any more likely), automated content analysis techniques cannot directly capture the propositional content of texts. Indeed, they will usually fail to differentiate between the statement “democracy matters” and the contrary statement “democracy doesn’t matter.” Yet we can plausibly assume that political actors, including judges, will refrain from making statement such as “democracy doesn’t matter” when seeking to distinguish their position from those who go by the slogan “democracy matters.”

¹⁰⁰ See, e.g., Michael Laver et al., *Extracting Policy Positions from Political Texts Using Words as Data*, 97 AM. POL. SCI. REV. 311 (2003); Jonathan B. Slapin & Sven-Oliver Proksch, *A Scaling Model for Estimating Time-Series Party Positions from Texts*, 52 AM. J. OF POL. SCI. 705 (2008); Burt L. Monroe et al., *Fightin’ Words: Lexical Feature Selection and Evaluation for Identifying the Content of Political Conflict*, 16 POL. ANALYSIS 372 (2008); Kevin M. Quinn et al., *How to Analyze Political Attention with Minimal Assumptions and Costs*, 54 AM. J. OF POL. SCI. 209 (2010); Sven-Oliver Proksch & Jonathan B. Slapin, *Position Taking in European Parliament Speeches*, 40 BRIT. J. OF POL. SCI. 587 (2010); Sven-Oliver Proksch & Jonathan B. Slapin, *How to Avoid Pitfalls in Statistical Analysis of Political Texts: The Case of Germany*, 18 GERMAN POL. 323 (2009); Sven-Oliver Proksch et al., *Party System Dynamics in Post-War Japan: A Quantitative Content Analysis of Electoral Pledges*, 30 ELECTORAL STUD. 114 (2011); Gary King & Will Lowe, *An Automated Information Extraction Tool for International Conflict Data with Performance as Good as Human Coders: A Rare Events Evaluation Design*, 57 INT’L ORG. 617 (2003); Daniel J. Hopkins & Gary King, *A Method of Automated Nonparametric Content Analysis for Social Science*, 54 AM. J. OF POL. SCI. 229 (2010).

¹⁰¹ Kevin T. McGuire & Georg Vanberg, *Mapping the Policies of the U.S. Supreme Court: Data, Opinions, and Constitutional Law*, in ANNUAL MEETING OF THE AMERICAN POLITICAL SCIENCE ASSOCIATION (2005).

¹⁰² Michael Evans et al., *Recounting the Courts? Applying Automated Content Analysis to Enhance Empirical Legal Research*, 4 J. OF EMPIRICAL LEGAL STUD. 1007 (2007).

¹⁰³ See Arthur Dyeve, *Domestic Judicial Defiance in the European Union: A Political Economic Approach*, SSRN ELIBRARY (2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2295034 (last accessed July 17, 2013).

method can locate the sixteen opinions on European integration issued by the German Federal Constitutional Court between 1967 and 2010 on a Eurosceptic scale with impressive accuracy. The *Maastricht* and *Lisbon* rulings, for instance, are correctly identified as more Eurosceptic than, say, *Kloppenburg* or *Honeywell*.¹⁰⁴

Another strategy commonly employed by public relations gurus but also familiar to jurists across legal cultures is cherry-picking—the selective presentation of facts and authorities that support one’s position. When arguing a case before a court, a lawyer typically concentrates on the evidence supporting her client while ignoring the evidence supporting the other side. Judges frequently do the same. If the findings of the few existing studies are any guide, courts evince as little consistency in their use of interpretive canons¹⁰⁵ as in the way they cite precedents.¹⁰⁶ As shown by patterns of reference to the Federalist Papers in U.S. Supreme Court opinions,¹⁰⁷ or the use of foreign materials by constitutional judges the world over, it seems that constitutional judges mostly invoke methods and authorities in ad hoc fashion, picking and choosing those which best suit the outcome they want to reach. Why canons of interpretation used in other cases are not considered and why some precedents are cited and others are not is a question that is typically glossed over.

A more thorough empirical analysis of judicial communication strategies would involve the development of a comprehensive typology of argument forms encountered in judicial discourse. Though not explicitly intended as a political communication approach to the study of judicial opinions, András Jakab’s contribution in this special issue suggests what such a typology might look like.¹⁰⁸ Valuable insights for future research may also be found in the work of such diverse scholars as Stephen Toulmin,¹⁰⁹ Chaïm Perelman,¹¹⁰ and Douglas Walton.¹¹¹

¹⁰⁴ See the graph on the CONREASON website for a foretaste of the results: <http://www.conreasonproject.com/automated-content-analysis-of-legal-texts.html> (last visited May 25, 2013).

¹⁰⁵ See Matthias Jestaedt, *Und er bewegt sie doch!: Der Wille des Verfassungsgesetzgebers in der verfassungsgerichtlichen Auslegung des Grundgesetzes*, in RECHT IM PLURALISMUS 267 (Hans-Detlef Horn ed., 2003); Benesh & Czarneski, *supra* note 60; Gates & Phelps, *supra* note 60; Howard & Segal, *supra* note 61.

¹⁰⁶ HAROLD J. SPAETH & JEFFREY A. SEGAL, MAJORITY RULE OR MINORITY WILL: ADHERENCE TO PRECEDENT ON THE U.S. SUPREME COURT (2001).

¹⁰⁷ Corley et al., *supra* note 61.

¹⁰⁸ Jakab, *supra* note 46.

¹⁰⁹ STEPHEN EDELSTON TOULMIN, THE USES OF ARGUMENT (1958).

¹¹⁰ CHAIM PERELMAN & L OLBRECHTS-TYTECA, THE NEW RHETORIC: A TREATISE ON ARGUMENTATION (1969).

¹¹¹ DOUGLAS WALTON, A PRAGMATIC THEORY OF FALLACY (1st ed. 2003).

E. The Normative Approach

Much of what is written about constitutional reasoning is normative. Scholars—not least law scholars—are not content with simply describing and analyzing the practices of courts and other actors, but go to great length to evaluate, justify and prescribe what these practices ought to be. The contributions featured in this special issue are no exception. Their authors consider a range of institutional as well as strictly argumentative issues from varying normative perspectives.

I. Constitutional Reasoning and Institutional Arrangements

A raging debate in normative constitutional theory concerns the respective role of courts and legislatures in specifying constitutional commands and, chief among them, rights norms. A leading proponent of *political constitutionalism*, Richard Bellamy challenges the primacy that mainstream contemporary constitutional thinking ascribes to judges and judicial review in reasoning about individual rights. Because rights entail reciprocal duties on the part of society, he argues, their definition involves “an implicit appeal to democratic values.”¹¹² Accordingly, the task of specifying the content of rights should primarily fall on the people’s elected representatives. Constitutional *authorship*, in other words, should be firmly in the hands of the democratic legislature. This does not rule out judicial review entirely, but implies judicial review being restricted to a strictly editorial function. Responding to Bellamy, Will Waluchow and Marco Goldoni advocate a stronger role for constitutional judges. Waluchow does so from a perspective more commonly associated with political liberalism and the pathologies and dysfunctions that this tradition sees as potentially arising from unfettered majority rule.¹¹³ Goldoni, meanwhile, presents his position as furthering and complementing the political constitutionalist project rather than as articulating a rival approach. He takes it that rights-reasoning may be best advanced by a mixture of weak and strong judicial review.¹¹⁴ Cesare Pinelli, on the other hand, squarely rejects the argument made by political constitutionalism. Pointing to the distinct role orientations of judges and legislators, he maintains that courts outperform legislators when it comes to reasoning about fundamental rights.¹¹⁵

¹¹² Bellamy, *Democracy as Public Law: The Case of Rights*, *supra* note 7 .

¹¹³ Will Waluchow, *Constitutional Rights and Democracy: A Reply to Professor Bellamy*, 14 GERMAN L.J. 1039 (2013).

¹¹⁴ Marco Goldoni, *Constitutional Reasoning According to Political Constitutionalism. A Comment on Bellamy*, 14 GERMAN L.J. 1053 (2013).

¹¹⁵ Cesare Pinelli, *Constitutional Reasoning and Political Deliberation*, 14 GERMAN L.J. 1171 (2013).

Which institutional arrangements are likely to ameliorate the quality of constitutional reasoning and which are not is also a question that comes to the fore in discussions over whether to allow separate opinions. While commenting on Kelemen's exposition of opinion-publication regimes across Europe, Hjalte and Louise Nan Rasmussen plead for the introduction of separate opinions on the Court of Justice of the European Union. They argue that a ban on separate opinions is incompatible with twenty-first century democratic and rule of law standards, which demand greater transparency from public institutions. But they also claim that separate opinions would force the Court to mend its ways and write opinions that are more enlightened, more informative and more responsive to the issues it is called on to adjudicate.¹¹⁶

II. What Should Guide Judicial Decision-Making? Morality vs. Rules

Another issue that continues to loom large in scholarly debates pertains to the role of moral considerations in constitutional adjudication. As we have seen above, the kind of crude legalism propounded by Enlightenment thinkers and early positivists is no longer seen as a plausible theoretical proposition. Yet some constitutional lawyers still emphasize fidelity to the text as cardinal principle of constitutional adjudication. Out of respect for "legal certainty" and the "democratic choices embodied in constitutional provisions," says Jeffrey Goldworthy, judges ought to stay within the limits marked off by clarifying interpretation.¹¹⁷ This view contrasts with the perspective espoused by Ronald Dworkin, whose work stresses the role of judges as moral reasoners.¹¹⁸ In this special issue, Thomas Bustamante makes the case for the Dworkinian position and the idea of law as integrity.¹¹⁹ Marcos Chein, for his part, attempts to bring the Dworkinian project along with Charles Taylor's identity politics and Zenon Bankowski's precept of living lawfully within the same framework,¹²⁰ although Giovanni Tuzet, in his reply, casts doubts on the need for such a complex theoretical reconstruction in assessing the legitimacy of state action.¹²¹

¹¹⁶ Hjalte Rasmussen & Louise Nan Rasmussen, *Activist EU-Court "Feeds" on the Existing Ban on Dissenting Opinions and Lifting it is Likely to Improve the Quality of EU Judgments. Comment on Katalin Kelemen*, 14 GERMAN L.J. 1373 (2013).

¹¹⁷ Goldworthy, *supra* note 25.

¹¹⁸ DWORKIN, *supra* note 34.

¹¹⁹ Thomas Bustamante, *Comment on Györfi—Dworkin, Vermeule and Györfi on Constitutional Interpretation: Remarks on a Meta-Interpretive Disagreement*, 14 GERMAN L.J. 1109 (2013).

¹²⁰ Marcos Chein, *Law as Integrity and Law as Identity: Legal Reasoning, State Intervention and Public Policies*, 14 GERMAN L.J. 1147 (2013).

¹²¹ Giovanni Tuzet, *Does Economic Analysis of Law Need Moral Foundations?*, 14 GERMAN L.J. 1163 (2013).

III. Judicial Candor vs. Judicial Concealment

Even if cases are not controlled by the wording of constitutional provisions and judges have no choice but to rely on non-legal considerations to decide them, the question remains as to the extent to which judges should be candid about their motivating reasons.¹²² The conventional moral wisdom implies that judges should always tell the truth. The case for judicial sincerity, however, is by no means as straightforward as it might seem at first glance. Indeed, it may be argued that explicit mention of non-legal considerations may undermine the function that constitutional judges have come to assume in many political systems. Judges, according to this line of argument, contribute to taming ideological and political conflicts by transforming them into technical-legal questions.¹²³ When publicly discussing the solution of a case, lawyers normally do and should refrain from designating the litigants and policy stakeholders as good or bad; smart or stupid; democrat, or fascist, or communist; as nice or ugly; or as honest or corrupt, etc. Instead, lawyers, as they should, typically reframe the controversy as one of legal meaning and justify their decisions by reference to an agreed upon textual reference point, here the constitution. In this view, constitutional judges are not functionally outside politics. But their effectiveness as dispute-solvers crucially depends on their ability to maintain the appearance that they are above politics and especially above party politics.¹²⁴ This entails that judges should, to the utmost possible extent, steer clear of overtly partisan language and stick to doctrines and legalese.

IV. Constitutional Reasoning in the Age of Balancing: The Rational Basis of Proportionality and Other Means-End Tests

Embracing the agenda of global constitutionalism, courts around the world have moved away from rigid rule frameworks and core rights doctrines, which they have replaced with balancing, proportionality, reasonableness, and similar means-ends tests.¹²⁵ While

¹²² See Scott C. Idleman, *Prudential Theory of Judicial Candor*, 73 TEX. L. REV. 1307 (1994); David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731 (1986); Yane Svetiev, *On Nagel and the Strategies for Judicial Candor*, AUSTL. REV. PUB. AFF. (2006).

¹²³ See ANDRÁS JAKAB, A LANGUAGE FOR THE EUROPEAN CONSTITUTIONAL DISCOURSE (forthcoming 2014); András Jakab, *What Makes a Good Lawyer?*, 62 ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT 275-87 (2007). See also Martin Shapiro, *Judges As Liars*, 17 HARV. J. L. & PUB. POL'Y 155 (1994) (arguing that courts, unlike the other branches, face a powerful incentive to conceal their value judgments so as to make their decisions acceptable).

¹²⁴ Inasmuch as legal academics see themselves as purveyors of doctrinal arguments for the courts, this means they, too, should avoid overt politicization. See Andreas Voßkuhle, *Die politischen Dimensionen der Staatsrechtslehre*, in STAATSRECHTSLEHRE ALS WISSENSCHAFT 138 (Helmuth Schulze-Fielitz ed., 2007); MICHAEL STOLLEIS, STAATSRECHTSLEHRE UND POLITIK 26–27 (1996).

¹²⁵ Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. 73 (2008).

affording judges even greater flexibility in their decision-making practices, these doctrines also raise new legitimacy issues. Whether balancing is amenable to rational reconstruction and justification is disputed. As Niels Petersen and Martin Borowski point out in their defense of the practice, the argument from value incommensurability might suggest that balancing constitutional requirements is akin to comparing the length of lines to the weight of stones (to borrow Justice Antonin Scalia's famous quote, used by Petersen in the title of his contribution). Some legal philosophers—most prominently Ronald Dworkin and Robert Alexy—have worked hard to try and refute this objection. In short, their approach rests on the distinction between rules and principles, which are presumed to possess differing logical structures.¹²⁶ Dworkin characterizes rules as applying in all-or-nothing fashion and principles as having a “dimension of weight.”¹²⁷ Alexy, meanwhile, defines principles as optimization imperatives—*Optimierungsgebote*¹²⁸—which leads him in turn to formulate his “law of balancing” as requiring that constitutional adjudicators balance principles so that greater degrees of non-fulfillment for one principle be offset by greater fulfillment for the conflicting principle.¹²⁹ The distinction has met considerable criticism. Objections pertain to the implications of the distinction for the notion of rights as trump,¹³⁰ the possibility to redefine principles as all-or-nothing commands,¹³¹ or to retranslate them into rules¹³² along with the overall consistency of the theory of principles.¹³³ The precept of

¹²⁶ RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1978); Robert Alexy, *Zum Begriff des Rechtsprinzips*, 1 RECHTSTHEORIE: BEIHEFT 59–87 (1979); ROBERT ALEXY, *THEORIE DER GRUNDRECHTE* (1985); Robert Alexy, *Zur Struktur der Rechtsprinzipien*, in *REGELN, PRINZIPIEN UND ELEMENTE IM SYSTEM DES RECHTS* 31–52 (Bernd Schilcher et al., eds., 2000).

¹²⁷ *Id.* at 26.

¹²⁸ Alexy speaks of “ideal” and “real” obligations (referring to the German word *sollen*). See Alexy, *Zum Begriff*, *supra* note 91, at 79. In this sense, an ideal obligation is any obligation that does not require that its content be both factually and legally possible in its entirety, but requires that its fulfillment be as extensive as possible. *Id.* at 81.

¹²⁹ ROBERT ALEXY, *THEORIE*, *supra* note 126, at 146.

¹³⁰ Pointing to the danger that fundamental rights may lose their trump function as a result. See JÜRGEN HABERMAS, *DIE EINBEZIEHUNG DES ANDEREN* 368 (1996).

¹³¹ Ota Weinberger, *Revision des traditionellen Rechtssatzkonzepte*, in *REGELN, PRINZIPIEN UND ELEMENTE IM SYSTEM DES RECHTS*, *supra* note 126, at 64 (referring to the *ne bis idem* principle).

¹³² Every principle (generally, a fundamental right) could then be qualified with a conditional clause, such as “and so long as no contrary principle of greater weight requires something else.” Thereby principles become all-or-nothing rules. See MANUEL ATIENZA & JUAN RUIZ MANERO, *A THEORY OF LEGAL SENTENCES* 9 (1998).

¹³³ ‘Either one does or does not optimize,’ optimization imperatives, therefore, have the structure of rules. See Aulis Aarnio & Jan-Reinard Sieckmann, *Taking Rules Seriously*, in 42 *ARSP BEIHEFT* 187 (1990).

ontological parsimony—or Ockham’s razor—would seem to imply that the distinction between rules and principles is simply superfluous.¹³⁴

Sophisticated as it may be, Alexy’s treatment of proportionality faces objections that appear no less severe. This does not concern so much the suitability and necessity stages of proportionality analysis. Indeed, the suitability requirement naturally follows from common conceptions of practical rationality, while the necessity criterion can be convincingly treated as an application of the principle of Pareto optimality. Instead, the main problem relates to the balancing stage. Alexy’s theory assumes that principles can be assigned values and that we can compare balancing outcomes on this basis. In the present special issue, Giovanni Sartor seeks to demonstrate that we can assess the impact of our actions on given values without actually ascribing numerical values but by reasoning in terms of magnitudes.¹³⁵ Though his rich theoretical argument does lend support to Alexy’s position, it leaves the main point unanswered. As he himself concedes, he cannot offer an inter-subjective metric on which to measure constitutional principles.¹³⁶ Niels Petersen, in his equally sharp contribution, points to the same problem.¹³⁷

V. Bringing the Normative and the Empirical Together

A major weakness of the normative literature on constitutional reasoning lies in its being poorly informed by empirical research. As a prominent political economist has observed “it seems impossible to engage in meaningful normative discourse—to criticize a practice or give advice—without some conception of how political institutions either do or could be made to work. Without some conception of the politically possible, normative advice is inherently vulnerable to utopian impulses.”¹³⁸

In our opinion, constitutional scholars have not paid sufficient heed to this observation. Normative theories of interpretation abound. Long lists of do’s and don’ts for judges to follow have been put together while lofty claims have been made about the benefits of judicial review or about its alleged pathologies. Yet much of this discourse rests on

¹³⁴ For an argument in that sense, see András Jakab, *Re-Defining Principles as ‘Important Rules’—A Critique of Robert Alexy*, in *ON THE NATURE OF LEGAL PRINCIPLES*, 145–59 (Martin Borowski ed., 2009) (viewing the concept as a rhetorical emphasis on certain norms).

¹³⁵ Giovanni Sartor, *The Logic of Proportionality: Reasoning With Non-Numerical Magnitudes*, 14 *GERMAN L.J.* 1419 (2013).

¹³⁶ *Id.*

¹³⁷ Niels Petersen, *How to Compare the Length of Lines to the Weight of Stones: Balancing and the Resolution of Value Conflicts in Constitutional Law*, 14 *GERMAN L.J.* 1387 (2013).

¹³⁸ John Ferejohn, *Law, Legislation and Positive Political Theory*, *MODERN POL. ECON.* 191, 192 (Eric Hanushek & James Banks eds., 1995).

unwarranted empirical assumptions about the factors and institutional constraints that shape public decision-making, whether by judges or by legislators. Generalizations over the pros and cons of particular arrangements are frequently made on the basis of a handful of cherry-picked cases. What is more, scholars often write about interpretation and judicial restraint as if they believed that judges will mend their ways just because some academics urge them to.¹³⁹

Guillaume Tusseau¹⁴⁰ makes the same point in his reply to Cesare Pinelli. And we believe the scholarly community is increasingly aware of the need to ground normative claims in sound empirical assumptions. The discussion between Richard Bellamy, Will Waluchow, and Marco Goldoni in this Special Issue is refreshing for the manner in which it relates normative concerns with questions of institutional engineering. Still, there is plenty to be done to bring normative and empirical perspectives together.

F. Conclusion: The Multifaceted Character of Constitutional Reasoning

This overview shows how multifaceted a phenomenon constitutional reasoning is. As such, it cannot be captured by a single approach. Instead, its proper study must bring together the perspectives of multiple disciplines. Overall, constitutional reasoning remains a both under-theorized and under-researched topic. This opens a vast field for future research, particularly of the more empirical and quantitative kind. For now, we believe that, although this Special Issue can only address a tiny set of all the possible research questions, the interested reader will find food for thought as well as new insights to pursue her reflections on constitutional reasoning.

¹³⁹ On that score we cannot but agree with Judge Richard Posner when he says that:

Academics who are not seriously engaged with the judiciary urge judges to change by adopting this or that approach, and usually it is an approach designed to clip judges' wings. Judges are not interested in having their wings clipped, but will happily adopt restraintist approaches as rhetorical tools to persuade others that what looks judicial assertiveness is obedience. Academics who are serious about wanting judges to change have to appeal to their self-interest.

See RICHARD A. POSNER, *HOW JUDGES THINK* 215–16 (2009).

¹⁴⁰ Guillaume Tusseau, *A Plea for a Hint of Empiricism in Constitutional Theory: A Comment on Cesare Pinelli's "Constitutional Reasoning and Political Deliberation,"* 14 *GERMAN L.J.* 1183 (2013).