GLOBAL RELATIONS FORUM YOUNG ACADEMICS PROGRAM
ANALYSIS PAPER SERIES No.11

The (Futile?) Search for Foreseeability: Constitutional Law, Subjectivity, and Its Limits

CEM TECİMER

Doctoral Candidate in Law (S.J.D.), Harvard Law School

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GRF convened the following group of distinguished members to evaluate and guide Cem Tecimer's paper:

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Cem Tecimer graduated from Koç Law School in 2016 at the top of his class. He then obtained his Master of Laws degree (LL.M.) at Harvard Law School as a Fulbright scholar. He continues his doctoral studies at Harvard Law School, where his research focuses on comparative constitutional law and democratization. Cem's publications have appeared in various national and international publications, including Constitutional Adjudication and the International Journal of Constitutional Law. He is a regular blogger at Verfassungsblog, where he comments on the recent developments in Turkish constitutional law and politics. He is a member of the New York Bar.

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Abstract

Two narratives tend to dominate our discourse on constitutional adjudication. One asserts that constitutional adjudication operates similarly to a mathematical process that uses determinate tools to yield determinate results. Another, and more skeptical, approach contends that constitutional adjudication is a black box, whose internal workings are completely arbitrary and unforeseeable. This article offers a third and more conciliatory narrative. It concedes that much is "up in the air" when it comes to how judges arrive at constitutional outcomes, but nonetheless finds sources of comfort that hint at some foreseeability in the adjudicatory process — what the article terms "predictability-providing mechanisms." These are (1) external constraints on the judiciary, somewhat crudely referring to the influence of political branches on the judiciary to predetermine the outcome of cases, and (2) internal constraints that constitute the rules of interpretation the judiciary uses to arrive at said outcomes, which refer both to the sources of interpretation and to the hierarchy among them that judges adhere to in invoking them. In other words, there are (1) institutionalist (the way in which the judiciary is set up as an institution) and (2) theoretical (the vocabulary the judges use to adjudicate cases) factors that render the adjudicatory process moderately foreseeable. The article, while noting the overlap between the two, directs its attention to the latter and, using American constitutional law and practice as a case study, examines the role of a number of sources judges draw on in adjudicating constitutional matters. The conclusion is that rules (including rules on what sources to use and when) do provide some foreseeability, not because of anything inherent in them per se, but because judges, at any given time, are more often than not already socialized in similar ways so as to interpret those rules more or less coherently.

"I was much troubled in spirit, in my first years upon the bench,to find how trackless was the ocean on which I had embarked. I sought for certainty. I was oppressed and disheartened when I found that the quest for it was futile."[1]

1. Setting the Stage: The Illusion of Separation of Powers

The classic defense of separation of powers, to put it somewhat crudely, rests on the assumption that individuals are self-interested, each seeking to advance their own interest. Because individuals are self-centered and self-interested, a higher power is needed to bring harmony to and regulate human relations. This was indeed the thinking of Thomas Hobbes, who believed in the maxim of *homo homini lupus*, and who conceived of the Leviathan as an omnipotent presence tasked with bringing peace to an otherwise chaotic state of human affairs where humans led "short, nasty, and brutish" lives. Once a Leviathan had been created to control and, when necessary, curb the self-interest of humans, the question of how to control the Leviathan arose. For Hobbes, the Leviathan's becoming an uncontrollable power was a risk worth running, as an omnipotent and unrestrained Leviathan in the form of an all-powerful monarch was still the better option when compared to a return to the state of nature, where all humans were potential prey to one another.

The idea of dealing with the problem of the overarching Leviathan was addressed by John Locke as well. Conceptually, this would take the form of limiting the Leviathan's power by constitutional government; that is, setting out limits on governmental power. Locke did not formulate an elaborate theory as to how simply telling the Leviathan to obey certain rules would be effective against the Leviathan.

The U.S. Constitution is, arguably, a practical and even somewhat enforceable elaboration of Locke's notion of restraining the Leviathan by way of constitutional government. The U.S. Constitution instantiated the notion of separation of powers as an institutional safeguard against the potential threat of an all-powerful Leviathan. It did two things.[2]

First, the Founders gave each political branch of government, the executive and the legislature, enough political support so that each would defend itself against encroachments by the other. The Founders thus established what is often referred to as horizontal separation of powers—not to mention a vertical separation of powers through a federal system wherein federal subunits, that is, states, would retain significant power vis-à-vis the federal government. The idea

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[1] Benjamin Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921), 166.

[2] I thank Professor Mark Tushnet for insightful comments on this point.

of vertical separation of powers became obsolete soon after the establishment of political parties. The lines dividing the executive and the legislature blurred quickly as well, which is why one scholar has aptly used the term "separation of parties, not powers" to describe the current state of affairs:[3] when government is divided, that is, when the executive and legislature are occupied by politicians with different political allegiances, the checks between branches operate efficiently. Conversely, when there is unified government, with both the legislature and the executive composed of members of the same political party, said checks do not operate realistically.[4]

Second, the Framers of the U.S. Constitution authored a written constitution, unlike its British counterpart, that would be enforced by courts comprising the third branch of government: the judiciary.[5] Courts would enforce the boundaries between the executive and the legislative branches, tasked with the duty of determining when and how one branch unconstitutionally exceeded its power. While many commentators suggest that the institution of judicial review was established by the Supreme Court via caselaw, a recent wave of scholarship has cast doubt on this assertion and has instead compiled evidence both from the Constitution's text and history more broadly to suggest that the Founders were well aware of the institution of judicial review and foresaw it being part of the American constitutional system as the Constitution was being drafted.

This second innovation of empowering the courts to enforce the idea of constitutional government and thereby restrain the Leviathan was not perfect either. First, when courts told any of the political branches (either the executive or the legislature) to stop, would they actually stop? In other words, what power did courts have to enforce their determinations of unconstitutional behavior by either of the other two branches? Courts did—and do—not have the power of the purse (i.e., control of the federal budget), nor did—nor do—they command troops.[6] It was merely assumed that the other branches would obey the judgments handed down by the judicial branch. In a constitutional culture where the judiciary is perceived to wield the weapon of "reason,"[7] that has indeed been the case, apart from a few notable exceptions.[8] Therefore, by

[3] Daryl J. Levinson and Richard H. Pildes, "Separation of Parties, Not Powers," *Harvard Law Review* 119, no. 8 (June 2006): 2311.

[4] Mark Tushnet, *The Constitution of the United States of America: A Contextual Analysis*, 2nd ed. (Oxford: Portland, Oregon: Hart Publishing, 2013), 4-5.

[5] While Marbury v. Madison 5 U.S. (1 Cranch) 137 (1803) is thought to have established judicial review some years after the enactment of the U.S. Constitution, historical evidence suggests that the Framers already envisioned a system where the judiciary would have the authority to review legislation's compatibility with the Constitution. Saikrishna B. Prakash and John C. Yoo, "The Origins of Judicial Review," *University of Chicago Law Review* 70, no. 3 (Summer 2003): 927; Mary Sarah Bilder, "The Corporate Origins of Judicial Review," *Yale Law Journal* 116, no. 3 (December 2006): 502 (asserting that colonial courts had invalidated corporate bylaws for "repugnancy" to law and that thus judicial review was a familiar practice for the founding generation).

[6] Alexander Hamilton, "The Federalist No. 78," Yale Law School, The Avalon Project, accessed October 15, 2019, https://avalon.law.yale.edu/18th_century/fed78.asp.

[7] Ibid.

[8] Ex parte Merryman, 17 F. Cas. 144 (C.C.D. Md. 1861) (holding that President Lincoln's suspension of the writ of *habeas corpus* during the Civil War violated the Constitution's express grant of that power to Congress).

and large, despite the lack of strong enforcement mechanisms, the judiciary's telling other branches to stop has indeed made those branches stop whatever unconstitutional endeavor they have undertaken. A second and equally important analytical problem, however, persists: even in a sufficiently strong constitutional culture (such as that which we observe in the U.S.) where the people come to appreciate the power of constitutional review exercised by the courts, what is to keep the courts from abusing their power? In other words, while the judiciary was initially conceived as a constitution-enforcing mechanism meant to stop the executive and/or legislature from becoming the Leviathan, what is there to stop the courts from becoming the Leviathan?

A tentative answer to this problem was provided by the Framers of the Constitution: connect judges to the political system. Through the appointment process initiated by the President and the confirmation process carried out by the upper chamber of the legislature, the Senate, it was hoped that judges would be constrained by the political process without their independence being compromised.[9] This is an imperfect solution, at best. Yet despite the evidently political nature of the appointment and confirmation processes, arguably because of the way the system of judicial appointments was set up in the Constitution, the judiciary is still thought to be, and romanticized as, the wisest branch of government, capable of arriving at neutral, consistent, and predictable legal outcomes.[10]

The main thesis advanced in this paper is as follows: using the U.S. example, this paper seeks to unsettle the understanding that the judiciary is capable of arriving at neutral, consistent, and foreseeable legal outcomes, but to distance itself all the while from the radical position that adjudication is an entirely arbitrary affair. The remainder of the Article will argue that judges are not constrained because of the existence of any document labeled as "the Constitution." Rules, given the indeterminacy of law in any complex legal system, which I will elaborate on further, cannot efficiently constrain judges. However, what I shall call the nihilist view is equally erroneous: not all is "up for grabs." There are (i) external political forces constraining judges, meaning that judges will have to factor in the political climate surrounding them when making decisions. Further, and more importantly for the purposes of this paper, (ii) judges are constrained by the internal rules of the judicial community of which they are members. Hence, the title of the paper: "constitutional law as the law of constitutional interpretive communities."

These internal rules of the judiciary manifest themselves in accepted and established ("orthodox") methods of interpretation deemed reasonable by other members of the same community. To be sure, the external and the

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[9] U.S. Const. art. II, § 2, cl. 2: "[The President] shall have Power, by and with the Advice and Consent of the Senate, to […] appoint […] Judges of the Supreme Court..."

[10] For a recent statement in the public's—now waning—confidence and belief in the Constitution and the judicial system see Sanford Levinson, *Constitutional Faith* (New Jersey: Princeton University Press, 1988) (arguing that the American Constitution since 1789 has become an object of America's "civil religion").

internal can and do intersect. For instance, external forces (in the form of, say, judicial appointments of judges of certain ideological persuasions), over time, may quite successfully alter the internal constraints generated by and for the judiciary. Notwithstanding this interrelatedness, this paper will focus on the internal constraints and, in the main, will advance two arguments. First, the fact that we can spot and label the various orthodox interpretive methods provides some predictability to the judicial process. Second, we can establish, more or less, a hierarchy among the various interpretive methods in the event that different methods lead to different outcomes, which also provides some predictability to the judicial process. These two observations serve together to qualify "the nihilist argument" by showing that there are some mechanisms (the rules of the judicial community rather than rules enshrined in a Constitution) for preventing the judiciary from becoming the Leviathan. I stress the word some, for I concede the limits of these two predictability-providing mechanisms: they do not tell us much, but they may usefully hint at what form judges' decisions will take. This, in turn, may lend some predictability to the judicial process and thereby mitigate assertions that the judicial process is emphatically arbitrary.

In sum, then, the paper pursues two theses: first, indeterminacy as a ubiquitous feature of law and adjudication—what might be termed the theoretical prong of the overall argument—and second, institutional constraints, exemplified in established ways of reading and generating meaning for those rules within the judicial community, as serving to curb said indeterminacy—what might be termed the institutionalist prong of the overall argument.

The generalizability of the claims made in this paper is a separate matter that might call into question to what extent the insights of U.S. constitutional law and practice can be brought to bear on the malleability of constitutional law generically. While not engaging with the constitutional law of other polities, the paper's assertion is that the indeterminacy that inheres in law and adjudication is generalizable to other jurisdictions.

A final introductory note is warranted on why I have chosen constitutional law in particular to illustrate the problem of legal indeterminacy. To be sure, it would have been equally reasonable and possible to illustrate the points I will be making throughout the paper by resorting to examples having to do with ordinary statutory interpretation rather than constitutional law. Constitutional law phenomena are, on balance, better known by wider audiences than statutory interpretation cases. Additionally, and more importantly, the moral choices made in constitutional law cases are usually more salient and contentious; it is therefore easier to appreciate what is really at stake.

2. Why Constitutional Rules Cannot (Entirely) Constrain Judges: The Indeterminacy Problem

Constitutional rules enshrined in the text of the Constitution rarely constrain judges. While this assertion may seem quite bold at first blush, a closer examination of the U.S. Constitution proves the point: the U.S. Constitution is a short and dated document; it rarely speaks with precision.[11] Even where it does, the issues it resolves are rather insignificant and uncontroversial, technical details.

Consider the vague stipulation on free speech: "Congress shall make no law […] abridging the freedom of speech…"[12] This appears to be the only stipulation in the text of the U.S. Constitution on the issue of free speech, and its vagueness hardly aids judges in resolving controversial issues such as whether a baker who refuses to bake a wedding cake for a same-sex couple is exercising his right to free speech,[13] whether campaign financing is a form of political speech that ought to benefit from protections afforded to free speech,[14] or whether hate speech[15] or speech amounting to genocide denial[16] ought to be abridged. The point is that free speech is a vastly complex issue that cannot be neatly regulated through lengthy legal rules, let alone through the concise and vague stipulation in the U.S. Constitution. Nevertheless, judges will almost invariably invoke the text of the First Amendment in virtually any case pertaining to free speech, although the analytical benefit of it to resolving the dispute at hand is highly questionable. The U.S. Constitution abounds in similarly vague language.

The Equal Protection Clause is another case in point: "nor shall any State […] deny to any person within its jurisdiction the equal protection of the Laws."[17] This Clause has been invoked by the U.S. Supreme Court to invalidate laws that discriminate against African-Americans in public schools by establishing a system of *de jure* segregation,[18] to invalidate laws that deny same-sex couples the right

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[11] Tushnet, *The Constitution of the United States of America*, 1 (asserting that "[t]he written United States Constitution is old, short and difficult to amend").

[12] U.S. Const.. amend. I.

[13] Adam Liptak, "In Narrow Decision, Supreme Court Sides With Baker Who Turned Away Gay Couple," *New York Times*, June 4, 2018, https://www.nytimes.com/2018/06/04/us/politics/supreme-court-sides-with-baker-who-turned-away-gay-couple.html.

[14] Citizens United v. Federal Election Commission, 558 U.S. 310 (holding that political speech is a form of protected speech under the First Amendment).

[15] Brandenburg v. Ohio, 395 U.S. 444 (1969) (holding that a Ku Klux Klan member's racially discriminatory speech was protected under the First Amendment because it had not been "directed to inciting imminent lawless action").

[16] European liberal democracies are generally more restrictive in the way in which they handle speech amounting to genocide denial, Germany being a prime example. The U.S., however, is in stark contrast with most European liberal democracies in maintaining a more absolutist view of free speech protections. See Ioanna Tourkochoriti, "Should Hate Speech Be Protected? Group Defamation, Party Bans, Holocaust Denial and the Divide Between (France) Europe and the United States," *Columbia Human Rights Law Review* 45, no. 2 (Winter 2014): 552.

[17] U.S. Const. amend. XIV.

[18] This was in perhaps the Supreme Court's most famous decision, and America's educational landmark, Brown v.

to marry,[19] but not to, for example, invalidate wealth and income inequality.[20] There is little analytical reasoning in interpreting the Equal Protection Clause and the phrase "the equal protection of the Laws" in a way that prohibits race- and gender-based discrimination, but allows wealth-based discrimination. The choice to include gender and race as protected categories under the Equal Protection Clause of the Constitution, but to exclude economic status from that same protection is arbitrary and not necessarily a dictate of the rule enshrined in the Constitution. Thus, it is not the rules themselves, but rather how the rules are translated into the legal domain by interpreters (in this case, the judiciary) that truly matters.

Apart from the vagueness, as exemplified in the First Amendment's protection of free speech and the Equal Protection Clause of the Fourteenth Amendment, the U.S. Constitution, despite its brevity, also contains rules that may be construed in different and opposing ways. The constitutionality of the death penalty is a case in point.[21] What does a detailed reading of the U.S. Constitution tell us concerning the constitutionality of capital punishment? The simple answer is that the Constitution says whatever judges want it to say. For those who think it is constitutional, the rule enshrined in the Fifth Amendment to the Constitution is an unequivocal permission: "No person shall be held to answer for a capital, or otherwise infamous crime […] nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb […] nor be deprived of life […] without due process of law…"[22] The amendment speaks of "capital crimes" and "jeopardy of life" and even more clearly of "depriv[ation] of life." These references, for proponents of the constitutionality of the death penalty, do not admit of any alternative readings that would ban the practice for being unconstitutional. However, another rule in the same document, namely the Eighth Amendment, provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[23] To the death penalty proponent, the language of the Eighth Amendment does not propose a major difficulty: the amendment does not conflict with the Fifth Amendment's clear language according constitutionality to the death penalty; all it suggests is that some practical methods of implementing the death penalty might be so shocking and immoral that they would be prohibited under the Constitution as "cruel and unusual." So, to the death penalty proponent, the language of the Fifth and Eighth Amendments are reconcilable: executions are

Board of Education of Topeka, 347 U.S. 483 (1954).

[19] Obergefell v. Hodges, 576 U.S. (2015).

[20] Harris v. McRae, 448 U.S. 297, 323 (1980) (holding that "this Court has held repeatedly that poverty, standing alone, is not a suspect classification") (citations omitted); Erwin Chemerinsky, *Constitutional Law: Principles and Policies*, 5th ed. (New York: Walters Kluwer 2015), 820 (asserting that "[i]n *San Antonio School District v. Rodriguez,* the Supreme Court expressly held that poverty is not a suspect classification").

[21] For an illustration of these debates see Furman v. Georgia, 408 U.S. 238 (1972).

[22] U.S. Const. amend. V.

[23] U.S. Const. amend. VIII.

constitutional as a general rule, but specific practices may be unconstitutional if they are "cruel and unusual." Stoning, perhaps, to the death penalty advocate may be an unconstitutional form of execution. But then the question of the constitutionality of executions through corporal punishment arises: after all, the very same Fifth Amendment that the death penalty proponent relies on to establish the constitutionality of executions speaks of "jeopardy of […] limb"—arguably a textual basis for the constitutionality of amputation as a punishment for crimes.[24] Would the death penalty proponent so keen on reading the Fifth Amendment "faithfully" be willing to approve of corporal punishment and even cutting of limbs as punishment just because there is a textual indication in the Constitution potentially endorsing that practice?

To the death penalty abolitionist, on the other hand, the language of the Eighth Amendment cannot so easily be reconciled with the Fifth Amendment's purportedly explicit authorization of executions. To some abolitionists, the deliberate vagueness of the Eighth Amendment and, as a corollary, the fact that the phrase "cruel and unusual" necessarily dictates present-day value judgments as to what qualifies as "cruel" and "unusual," are all indications that, at least contemporaneously, the constitutional rule should be that all executions are cruel and unusual per se, and therefore outlawed by the Constitution.

As can be seen from this brief discussion on the death penalty, the rules enshrined in the Constitution are far from clear. Rather, they are amenable to varying and contradictory interpretations—in the case of the Fifth and Eighth Amendments, one in favor of and one against the death penalty.

One final example worth noting comes from a rather mathematical stipulation in the Constitution. I choose this example deliberately to argue how even the seemingly most technical and uncontroversial rules in the Constitution may lend themselves to multiple interpretations. This somewhat hackneyed but very illustrative example comes from the explicit constitutional requirement that a person must be at least thirty-five years of age to become president of the U.S. The relevant part of Article II of the Constitution states: "…neither shall any Person be eligible to that Office [i.e., the Presidency] who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States."[25] At first blush, the rule seems to draw a stark line between who is and who is not eligible to be president. However, when given some thought, there are ways to unsettle the seemingly precise meaning of this provision. First, one can always depart from a mere literal reading of the rule. That is, instead of taking the age requirement of thirty-five literally, this way of argumentation would proceed from a viewpoint that considers thirty-five to be a *topos*, that is, "a literary convention or device that is meant to make a point without being

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[24] I thank Professor Carol Steiker for raising this possibility.

[25] U.S. Const. art. II, § 1, cl. 5

taken literally."[26] In this case, thirty-five could be interpreted as a *topos* denoting maturity, not necessarily the literal age of thirty-five. This would, in turn, make the analysis of eligibility hinge on the question of maturity. While that would engender more uncertainty and ambiguity by requiring a judgment call as to what the criteria for being mature are, it would nevertheless potentially open the door to the presidency for those under the age of thirty-five who somehow prove that they are sufficiently mature. While the interpretive instinct is to take words literally, and therefore not read the age requirement as a *topos*, a principled attachment to this literal reading would, then, also necessitate reading the numerous references in the Constitution to the masculine pronoun "he" literally—which would, in turn, disqualify women from almost all public offices.[27] Is it not somewhat unprincipled to on the one hand read the age requirement clause with unflinching literal fidelity, but on the other not afford the numerous references to the masculine pronoun in the Constitution the same? Of course, it would be preposterous to insist on blatantly sexist constitutional arguments such as that—importantly, not because the Constitution commands us not to do it, but rather because our moral understanding, having very little to do with the text of the Constitution, dictates the conclusion that the references to "he" in the Constitution ought to be interpreted in a gender-neutral manner.

A second reading of the presidential age requirement would proceed from the acknowledgment that the text was drafted in the late Eighteenth Century, and that thirty-five was a relatively senior age back then in light of longevity statistics of the time.[28] Thus, one could argue, thirty-five in the late 1700s roughly corresponds to, say, fifty in this day and age. This interpretation, which essentially aims at "updating" the Constitution to our time, would, unlike the first interpretive move discussed above, increase the age requirement and therefore further constrain the pool of eligible candidates for office. Importantly, this interpretation too does not take the words in the Constitution literally, but attributes to them a non-textual purpose and reads them with a purposive outlook.

A third way of reading the provision connects age concerns to religious beliefs.[29] While it would be considered preposterous by many, imagine a hypothetical situation in which a sixteen-year-old guru wishes to run for the presidency and in which the followers of this guru sincerely believe in reincarnation and specifically in the guru's reincarnation. Therefore, they estimate his "actual" age to be a lot older than sixteen, and above thirty-five. Should this young, but in the eyes of his followers senior, guru be eligible to run for office? If the

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[26] Adam J. Silverstein, *Islamic History: A Very Short Introduction* (Oxford: Oxford University Press, 2010), 86.

[27] U.S. Const. art. II, § 1, cl. 1 ("He [the President] shall hold his Office...").

[28] I thank friends at the Derek Bok Center for coming up with this novel interpretation.

[29] This hypothetical is discussed by both Laurence Tribe and Mark Tushnet. See Laurence Tribe, "America's Constitutional Narrative," Daedalus: Journal of American Arts and Sciences 141, no. 1 (Winter 2012): 23; see also Mark Tushnet, *Red, White, and Blue: A Critical Analysis of Constitutional Law* (Cambridge: Harvard University Press, 1988), 61-62.

answer is negative, this could raise First Amendment and Establishment Clause concerns: denying someone the eligibility to run for public office because he is considered not to be at least thirty-five years old, while the sincere religious belief of the person running for office dictates that he is older than thirty-five, might be tantamount to the government denying the sincere religious beliefs held by the guru—a potential violation of the guru's free exercise rights[30] and perhaps even a violation of the Establishment Clause.

A fourth way of reading the provision is, yet again, a way of evading the literal age threshold.[31] Imagine a scenario where a person under the age of thirty-five wishes to run for office. Also imagine that, in full awareness of the Constitution's age requirement, this person backs a "nominal" candidate for presidency who is older than thirty-five. This "nominal" candidate, however, announces from the outset of their campaign that they are running for office as a pure technicality, and that the real person who would act as president would be the one younger than thirty-five, after the older-than-thirty-five-years-old candidate gets elected. This might, of course, raise broader questions about whether—even if "nominal"—a president is lawfully discharging his or her duties when his or her loyalties are expressly in the hands of another person—to some, no doubt, a potential case for impeachment.

A fifth and final way of unsettling the age requirement is to suggest that the text of the Constitution, while clear in its command of thirty-five, is nevertheless silent on the question of "according to which calendar?"[32] The argument would further suggest that in view of this silence, a person who is not thirty-five according to the Gregorian calendar, but has attained that age according to some other calendar, should still be able to run for office.

At the risk of having belabored the age requirement example, it becomes clear that even the most mathematical and seemingly certain rules of the Constitution can easily be complicated and interpreted in ways that produce varying results. At this point, the question might arise as to whether indeterminacy itself comes in degrees, with the possibility of speaking of, say, legal forms that are "more" indeterminate than others. Put differently, are we able to "continuumize" various legal forms based on how (in)determinate they are? Perhaps yes, but even so, I would argue that the fact that a legal form possesses a higher degree of determinacy cannot necessarily be read as evidence of more determinate legal drafting. That is, determinacy cannot be reduced to a purportedly more "objective" and/or "precise" drafting. If one legal form is perceived to be more determinate than another, then the prevailing social meaning within the

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[30] I say "potential" because invariably this case would not be deemed to violate the Free Exercise Clause. See Employment Division v Smith, 494 U.S. 872 (holding that the application of neutral laws does not violate free exercise, even if it produces disadvantageous consequences for members of a particular faith).

[31] For an iteration of this hypothetical see Mark Tushnet, "AOC and Constitutional Workarounds: A Frivolous (?) Analysis," *Balkinization Blog*, February 24, 2019, https://balkin.blogspot.com/2019/02/aoc-and-constitutional-workarounds.html.

[32] This hypothetical was raised by Professor Martha Minow in her constitutional law class.

community that engages with that legal form must have dictated so—and social meaning that has been generated for a particular legal form need not correlate with that legal form's language. More concretely put, a formulaic provision speaking in numbers (at first glance perhaps more determinate in content than others) can easily be interpreted in varied and mixed ways so as to render it wholly indeterminate, and a seemingly indeterminate legal form (for example, a long and seemingly complicated legal text that appears, again at first blush, to be more indeterminate than most other laws) can easily be read unidirectionally if the community interpreting it so desires. Communal consensus as to what a legal form means, and not *a priori* legal drafting, then, is key to generating or curbing indeterminacy. Is the First Amendment less determinate compared to, say, the Second Amendment's interpretation as granting an individual the right to bear arms, which, in turn, is arguably less determinate than the age requirement rule discussed? Again, that might indeed be the case, due not necessarily to a priori drafting, but instead to the social meaning generated for these three rules by the community tasked with generating meaning for them.

One other caveat, going back to the earlier discussion of the generalizability of the assertions made here to other jurisdictions: one plausible question is whether the examples of pervasive indeterminacy in legal texts that I present here are uniquely American. There is some data to support that conclusion when it comes to capital-C constitutional texts, by which I refer to the texts of those documents officially enacted and promulgated as constitutions. It is true that the U.S. Constitution is an exceptionally short text, when compared especially to its post-World War II counterparts that have opted to engage in more detailed drafting, partly as a strategy to "properly" constrain government power via more invasive constitutional stipulations. But as pointed our earlier, that the U.S. Constitution is, as a text, atypically short and vague in formulation does not necessarily account for a heightened degree of indeterminacy in the U.S. compared to other jurisdictions, as indeterminacy cannot be causally linked to vagueness of formulation: even the seemingly vaguest and shortest formulations can and do have stable and rather determinate meanings, due to a degree of community consensus as to what they mean.

Borrowing from the terminology of the Critical Legal Studies Movement, constitutional law, like any other complex body of law, is not immune to "the indeterminacy problem," that is, the problem that even the most seemingly stable rules can be interpreted in different ways, as discussed in many examples above. If even the most mathematical of rules can be interpreted in creative ways as to produce different and sometimes contradictory outcomes, then rules themselves cannot provide stability and predictability to the judicial process. The answer must lie somewhere else. And that is where (i) politics and (ii) internal rules of the interpretive community come into play. This Article, as explained earlier, focuses on the latter—and argues that it is not the rules or the legal texts, but rather the rules guiding the orthodox practices of the community that interprets those rules and texts, that impose some limitations on the adjudicatory process.

3. The Interpretive Community and Its Rules

There are two levels on which I argue that there is some certainty to the judicial process. The first is that the methods of constitutional interpretation are more or less known and the list of methods, more or less, finite. The second is that there are indications of a hierarchical relationship among said methods in the event that two or more methods of interpretation produce contradictory outcomes. This hierarchy might help us predict with some accuracy which path judges will take if two or more interpretive methods point in different directions. I will elaborate on both points in turn.

3.1. The universe of methods of interpretation can easily be documented

The first characteristic of the adjudicatory process that provides us with some relief that the process itself is not entirely arbitrary is that interpreters tend to rely on a closed set of interpretive methods in arriving at their desired constitutional outcomes. The fact that they make use of a familiar and closed set of interpretive "moves" might comfort us: after all, if we can predictably map out the different types of methods employed to decide cases, we might, on some general level, predict the outcome—although not always, perhaps not even in most cases, accurately. Here, I sketch a brief summary of these familiar interpretive methods that the Supreme Court draws on to decide cases:[33] textualism, history, constitutional structure, precedents, and ethical/moral arguments.

a. Textualism

As I intimated earlier, the U.S. Constitution's text is hardly ever precise enough to decisively determine constitutional outcomes without much disagreement. Most textual stipulations in the Constitution are "open-textured"[34]—so general and abstract that they allow for competing considerations to be advanced by reference to the same text. Despite these objections, textualism cannot be sidelined from the practice of constitutional interpretation. For one, for better or worse, the Supreme Court is tasked with interpreting a Constitution whose many features are written. Thus, even if not very helpful to the resolution of the case at bar, the Court will nevertheless begin its analysis by reference to the text, even if only to symbolically honor the document.

Although in most instances unable to provide interpreters with much guidance, the text surely provides some. For instance, we know that the

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[33] For similar works on typologies of constitutional argument, which I partly draw on for this part, see Philip Bobbitt, *Constitutional Fate* (New York: Oxford University Press, 1982); Richard H. Fallon, Jr., "A Constructivist Coherence Theory of Constitutional Interpretation," *Harvard Law* Review 100, no. 6 (April 1987): 1189. Apart from these references, the thinking of Ronal Dworkin, and his cautious optimism that interpretation is more than a purely subjective endeavor needs to be mentioned. See representatively, Ronald Dworkin, "The Moral Reading of the Constitution," *The New York Review of Books*, March 21, 1996, https://www.nybooks.com/articles/1996/03/21/the-moral-reading-of-the-constitution/.

[34] John Hart Ely, *Democracy and Distrust*: A Theory of Judicial Review (Cambridge: Harvard University Press, 1980), 13-14.

Eighth Amendment, which I alluded to above in briefly discussing the debates around the constitutionality of the death penalty, deals with "cruel and unusual *punishment*[s]." The Amendment, therefore, can confidently be said not to deal with civil offenses. Even the vaguest of provisions, such as the Equal Protection Clause also alluded to earlier, guaranteeing citizens the "equal protection of the Laws," says something to the interpreter: in essence, it is an anti-discrimination norm. Again, it provides almost no guidance on more complex questions of, for example, whether a state school for rigorous military training open to only males without any equivalent school for women violates the Constitution.[35] But we can, at least, assert that the Constitution dictates a general rule about situations precisely like that. In other words, despite its vagueness, the text of the Equal Protection Clause signals to the interpreters of the Constitutionthat they ought to be engaged—in the case of the Supreme Court members, judicially engaged—in cases that classify people based on a multitude of factors, including race, gender, and many others.[36]

b. History

Another method of interpretation the Court often relies on is history, in particular, the intentions of the drafters of the Constitution—a variant of historical interpretation often dubbed "originalism."[37] The appeal of originalism is clear: those who ratified the Constitution wanted to effectuate their intentions and purposes through the specific language that they adopted in the document, and if the document is to bind us at all, the intentions of the Framers ought to bind us too.[38] Further, fixing constitutional meaning at one point in time arguably curbs judicial discretion and enhances the predictability of the adjudicatory process. After all, in an originalist interpretation, what is required of the judge is, simply put, to go back to the time of ratification and discern the intentions of the Framers—what they meant when they adopted a particular word or phrase in the Constitution. This, in turn, conceives of the judge as almost a technician, rather than an agent with discretion who can adjudicate based on his or her own moral judgments.

A notorious, but well-known, application of originalism can be seen in the Court's decision in *Dred Scott v. Sandford*.[39] In that decision, at bar was, among others, the question of whether African-Americans, enslaved or free,

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[35] The Court held that it did. See United States v. Virginia, 518 U.S. 515 (1996).

[36] However, of course, non-textual considerations will play a very large role in determining whether a particular classification (e.g., based on race, or based on economic status) violates the Constitution. See similarly Richard H. Fallon, Jr., *The Dynamic Constitution: An Introduction to American Constitutional Law and Practice*, 2nd ed. (Cambridge: Cambridge University Press, 2013), 152 (arguing that "[w]hether or not the Supreme Court admits it, it inevitably makes lots of moral judgments in applying the Equal Protection Clause) (emphasis omitted).

[37] For purposes of brevity, I omit a discussion of the various schools of originalism.

[38] For a general statement of this argument see Keith E. Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* (Lawrence: University Press of Kansas, 1999).

[39] 60 U.S. (19 How.) 393 (1857).

were citizens of the United States. Chief Justice Taney, writing for the majority, concluded that the Constitution emphatically excluded blacks from citizenship. In arriving at this morally reprehensible conclusion—which made the case part of what is sometimes termed the "anti-canon" of American constitutional law, cases that are emphatically rejected by scholars, politicians, and judges alike[40] —Taney relied on what he perceived to be the *intent* of the people who drafted the U.S. Constitution:

> We think they [African Americans] are not, and that they are not included, and *were not intended to be included*, under the word "citizens" in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States.[41]

Note Taney's resort to "inten[tions]" in discussing whether blacks were meant to be included as citizens of the United States by the Framers. Of course, not all instances of reliance on history, and more specifically on the intentions of the Constitution's drafters, can be associated with consequences of moral depravity. In fact, originalism is among the most prominent interpretive methodologies currently at use in the Supreme Court.[42] Its strong appeal suggests that originalism will more likely than not be employed as an interpretive method to decide cases.

However, originalism's attractiveness as a method of purportedly curbing judicial discretion should not be overstated and needs to be qualified. Ultimately, an inquiry into history, especially when conducted by judges who are not trained in history, will inevitably entail non-neutral historical reconstruction.[43] Capturing original intent cannot be said to be wholly insulated from judicial choices—for example, from choices about which source to cite or which historical narratives to selectively use.

Originalism, most comparative observers will correctly assert, is a particularly influential and dominant form of constitutional interpretation in the U.S., which is perhaps understandable given the endurance of the written U.S. Constitution compared to, for instance, its much younger European counterparts. In the jurisdictions of those counterparts, originalism, though a viable and established modality of generating constitutional meaning, is not the only, even the most preferred, way of "doing" constitutional law. It might therefore be argued that

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[40] See generally Jamal Greene, "The Anticanon," Harvard Law Review 125, no. 2 (December 2011): 379. See also Richard H. Fallon, Jr., *The Dynamic Constitution*, 163 (describing Dred Scott as "part of the constitutional 'anti-canon' of cases that illustrate egregiously misguided constitutional analysis from which lessons now have been learned and that the Supreme Court should never repeat").

[41] Dred Scott v. Sandford, 403 (emphasis added).

[42] Why that is so is a separate, and no doubt very interesting, question. For a study suggesting some hypotheses as to why originalism has such a robust appeal in American constitutional law and practice see Jamal Greene, "On the Origins of Originalism," *Texas Law Review* 88, no. 1 (November 2009): 62-88.

[43] For a statement of this problem see, e.g., Charles A. Miller, *The Supreme Court and the Uses of History* (Cambridge: Harvard University Press, 1969), 157 (arguing that "historian as scholars can generally state the matter more objectively than can advocates as historians").

the lack of stringent adherence to originalism outside the U.S. helps to curb indeterminacy, as any indeterminacy resulting from originalism will be less visible in those other jurisdictions. This might or might not be the case, and it is hard to generalize because, among other things, we do not know how much originalism contributes to generating (or curbing) indeterminacy.

c. Constitutional structure

A third recurring interpretive method in the Court's jurisprudence is structuralism, defined somewhat tautologically as "inferences from the existence of constitutional structures and the relationships which the Constitution ordains among these structures."[44] More concretely put, structuralism looks at how the resolution of a particular case would shape the overall checks and balances arrangements of the Constitution, be it among the three branches of government, or between the federal government and the states. The latter is sometimes called "vertical separation of powers," as opposed to the "horizontal separation of powers" among the three co-equal branches of government: Congress, the President, and the courts.

One of the earliest and most celebrated cases of American constitutional law, *McCulloch v. Maryland*,[45] provides a perfect illustration of this interpretive method. In that case, the issue at bar was whether Congress had the right to incorporate a federal bank, and further, if the State of Maryland could levy a state tax on that federal bank. Answering the first question in the affirmative, the Court proceeded to rule that Maryland could not tax the federal bank. In arriving at this conclusion, Chief Justice Marshall famously reasoned that "[t]he power to tax [was] the power to destroy."[46] In reasoning thus, Marshall primarily relied on the notion that the structural relationship between the federal and state governments would be significantly altered in favor of the states, if states were allowed to tax federal government property.[47]

To be sure, structural arguments presuppose a clearly defined national balance among the relationship between different branches of government, or between the federal government and the states—but it is debatable, to put it mildly, that such a predefined balance exists. Preventing the taxing of federal property by state governments surely does preserve the structure of the Constitution, but only if one believes that the structure is such that states ought not to tax federal property because doing so would totally debilitate the federal government in its ability to act on behalf of the nation by, for example, instituting federal

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[44] Bobbitt, *Constitutional Fate*, 74.

[45] 17 U.S. (4 Wheat.) 316 (1819).

[46] Ibid., 427.

[47] Bobbitt, *Constitutional Fate*, 79 (summarizing Marshall's decision as "a structural one" and arguing that "if a state could tax federal activities, i.e., make certain Congressional allocative choices more expensive than others, it could manipulate which choices are ultimately made, and to some extent exercise influence over all choices, a power clearly inconsistent with national supremacy").

welfare programs, or even maintaining a robust federal bureaucracy. But that assertion, in and of itself, assumes that the Constitution should be understood as creating a powerful national government free from state taxation. This may very well be the case, but might be contested, especially by those interpreters who fear that an over-powerful central government encroaches upon the separate sovereignty of the states.

d. Precedents

All legal systems with courts rely, in some part, on past decisions handed down by courts, and the U.S. is no exception. In fact, one could argue that by virtue of being a common law jurisdiction, the judicial deference to precedents enjoys a heightened status of legitimacy and legal acceptance in the U.S. The principle of *stare decisis*, invoked often by scholars and judges alike, dictates literally, "to stand by that which is decided." Precedential methods of interpretation therefore focus on how similar cases have been dealt with in the prior caselaw of the Court.[48] The deference owed to past decisions of the Court arises out of a deference to history but also out of a deference owed to past Justices who have inhabited the Court, and to the institutional role of the Supreme Court as a predictable and non-partisan arbiter of constitutional disputes.

The prime example of precedential methods of interpretation can be found in the abortion saga the Court has endured and, arguably, is still going through. *Roe v. Wade*,[49] which recognized a woman's right to an abortion, encountered a fierce backlash from the right, and especially from the religious pro-life right in the country. Conservative presidents to this day, Donald Trump being no exception,[50] have generally vowed, if elected, to appoint Justices to the Court who would be pro-life and overrule *Roe*. A chance for the Court to actually overturn *Roe* came in 1992. Between 1973—the year in which Roe was decided—and 1992, Republican presidents had appointed "five new Justices to the Supreme Court (and Democrats none), and *Roe* appeared ripe for overruling."[51] But the Court, shocking most pundits, declined to overrule *Roe* in *Planned Parenthood v. Casey*.[52] The Court affirmed "*Roe*'s essential holding," and in so doing, reasoned that precedents ought to be respected, especially in light of the fact that in the intervening years between *Roe* and *Casey*, many women had relied on their Supreme Court-granted right to abortion in planning and living out their lives, which would all be frustrated if the Court suddenly

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[48] This method of interpretation has also been labeled as "doctrinal." See, e.g., ibid., 39-58.

[49] 410 U.S. 113 (1973).

[50] See, e.g., Andrew M. Cuomo, "Trump's Assault on Abortion Rights Must Be Rejected," *New York Times*, February 6, 2019, https://www.nytimes.com/2019/02/06/opinion/cuomo-roe-abortion-trump.html (claiming that President Trump's recent two appointments to the Court increased fears that Roe would be overturned).

[51] Fallon, *The Dynamic Constitution*, 211.

[52] 505 U.S. 833 (1992).

overruled its prior decision.[53] Thus, the ruling in *Roe* was a reliable predictor of the decision reached by the Court years later in *Casey*, affirming its prior caselaw. It is in this respect that prior decisions constrain adjudication and infuse the process with some predictability, rendering it less arbitrary than the nihilist perspective I alluded to earlier would suggest.

To be sure, however, there are many cases which have explicitly overruled prior cases, and disregard for the principle of *stare decisis* is not entirely uncommon. This is especially evident when Justices agreeing to overrule a previous decision strongly believe that that decision was erroneously decided and cannot be tolerated as a constitutional ruling, even when its overruling comes at the expense of portraying the Court as an unpredictable institution.[54] A second problem with precedential arguments is that precedents are complex enough to be twisted, and "creatively" interpreted—just like the text of the Constitution. Nevertheless, precedents do somewhat constrain Justices, at least to the extent that overruling or more generally departing from precedent requires judicial justification.

e. Ethical/moral interpretation

At the end of the list are ethical methods of interpretation, which diverge from the rest in that they are more transparent about invoking what interpreters believe to be guiding moral principles that ought to be used in interpreting the Constitution.[55] A paradigmatic example comes from the Court's death penalty jurisprudence. In *Roper v. Simmons*,[56] the majority held that the death penalty as applied to juvenile offenders was violative of the Constitution's Eighth Amendment forbidding "cruel and unusual" punishments. That decision was based partly on "evolving standards of decency"—an explicit recognition that moral judgments as to what constituted "decent," and as a corollary, proportionate punishment, factored in the judicial decision-making process. Consider too the now overruled case of *Bowers v. Hardwick*,[57] where the Court upheld the constitutionality of a Georgian anti-sodomy statute. In his concurring opinion siding with the majority, Chief Justice Burger wrote: "I cannot say that conduct condemned for hundreds of years has now become a fundamental right."[58] His concurrence thus can be read as an explicit condemnation of sodomy—a moral conviction that inevitably influenced the Chief Justice's reasoning in that case.

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[53] Fallon, *The Dynamic Constitution*, 212.

[54] One famous example includes the Court's overruling of Plessy v. Ferguson, 163 U.S. 537 (1896) by Brown, *supra* note 18. See generally, Jack M. Balkin,"' Wrong the Day It Was Decided:' Lochner and Constitutional Historicism" *Boston Law Review* 85, no. 3 (June 2005): 677.

[55] See, e.g., Fallon, *The Dynamic Constitution*, 293-294; Bobbitt, *Constitutional Fate*, 125-136.

[56] 543 U.S. 551 (2005).

[57] 478 U.S. 186 (1986).

[58] Ibid., 198 n.2 (Burger, C.J., concurring).

Can ethical arguments, so explicitly tied to one's personal moral beliefs, constrain judges at all? Surprisingly, they might, and primarily because the moral beliefs of the interpreters sitting on the Supreme Court seldom diverge from those of the public at large, or from the political forces that they are thought to be loosely aligned with—aligned not in a partisan sense, but more in a sense of constitutional vision.[59] An obvious example comes from the abortion "culture wars." As I noted earlier, anti-*Roe* presidents have constantly made it clear to the public during their presidential campaigns, especially in an effort to court the votes of the Christian right, that if elected, they would appoint Justices who would overrule *Roe*. While that has not happened, at least not yet, we can be reasonably certain that presidents will in the end try to deliver on that promise by indeed appointing Justices who maintain a decided aversion toward *Roe* and the way in which it was decided. While that may not result in the decision's outright rejection, as evidenced by the Court's affirmation of the central holding of *Roe* in *Casey*, it may still reasonably indicate to outside observers that those Justices will not be in favor of expanding the contours of the right recognized in *Roe*, and will seek to gloss the decision in a way that construes it narrowly and more restrictively. This, in and of itself, provides us outsiders with *some* sense of how the future of the abortion saga will play out in the Court, which in turn provides the adjudicatory process with some—ultimately not-to-be-overstated—predictability.

What we know is indeed quite revealing. First, we know the foregoing methods of interpretation. Second, and equally importantly, we know that these methods constitute more or less the universe of possible interpretive "moves" that Justices will make in interpreting the Constitution. We outsiders to the adjudicatory process know *in advance* what methods the Court will be relying on in arriving at a constitutional outcome. This provides *some* stability to the process. But admittedly, not much, chiefly because all five methods of interpretation briefly sketched here are sufficiently elastic to enable the interpreter to arrive at his or her desired outcome.

I now turn to the second and final, but also not-to-be-overstated, predictability-providing attribute of the adjudicatory process. And that is the phenomenon of hierarchy among various interpretive methods.

3.2. There exists a hierarchy among some methods of interpretation that we can document

Justices usually tend not to present the various interpretive methods at their disposal as signaling contradictory constitutional outcomes. Instead, they try to align interpretive methods with one another and interpret them agreeably

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[59] The best statement on this point comes from political scientist Robert Dahl. See Robert A. Dahl, *A Preface to Democratic Theory* (Chicago: University of Chicago Press, 1956) (asserting that the Supreme Court seldom if ever diverges from the values held by the political majority).

and coherently,[60] at least in part because a constitutional outcome sanctioned by all or nearly all interpretive methods—rather than just one—is perceived to be more unshakable and overall more convincing. But coherence cannot always be achieved. However, our knowledge that these interpretive sources will usually be employed by the Justices in a manner such that they will come across as mandating the same constitutional outcome is, in and of itself, somewhat comforting in terms of predicting the outcome of a case. After all, if we are certain that one of the interpretive methods almost always points in one direction, and the rest are ambiguous, then we can predict with some accuracy that the interpreter will also use those ambiguous interpretive methods to arrive at the conclusion mandated by the one interpretive method that undeniably points toward an incontestable constitutional outcome.[61]

Sometimes interpreters encounter different interpretive methods that favor outcomes at variance with each other, and they consider it impossible or extremely difficult to make use of all interpretive methods unidirectionally. Constructivist coherence, that is, may not always be achieved, especially if two or more interpretive methods are in tension with one another. In those cases, the Supreme Court typically favors one interpretive method over another, effectively establishing a hierarchy between two methods at variance with each other, with one method yielding to the other. This hierarchical relationship among the methods of constitutional interpretation outlined above may provide the adjudicatory process with, again, *some* added certainty: if we can ascertain, for example, that textual and moral arguments in a given case are surely in tension, and if we know for a fact that the Court, in such cases of tension, prefers textual over ethical arguments, then we may be able to predict the outcome with some precision.

Before I turn to more concrete examples of this interpretive hierarchy, I will caveat a few other points. First, as mentioned earlier, the cases that give rise to tension between two or more interpretive methods may be fewer than assumed. Constructivist coherence persists: the tendency among interpreters to arrive at similar, even identical, constitutional outcomes via different interpretive methods is real and recurs frequently in the Court's caselaw. Second, we do not have a perfectly delineated, unchanging, and fully mapped out hierarchical relationship among various interpretive methods. To put it concretely, for instance, an assertion such as "originalism and more generally historical methods of interpretation trump ethical arguments," although probably true in most cases, may not *always* be true. That is to say, hierarchical relationships among interpretive methods, if they exist, may change. Third, and relatedly, I say "if they exist," because while we do have a general sense of some preferred interpretive methods, we do not know how each interpretive method fares

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[60] Professor Richard Fallon terms this the Court's practice of "constructivist coherence." For a detailed exposition see Fallon, "A Constructivist Coherence Theory of Constitutional Interpretation,"1237-1243.

[61] In many cases, however, the Justices will succeed in presenting a multitude of interpretive methods as mandating the same constitutional outcome. For notable examples see ibid. 1268-1285.

against every other. For example, as I will discuss shortly, we do have a general sense of how the textual method compares to other methods, but we do not have an equally solid sense of how, for instance, structural arguments fare against precedential ones.

Caveats notwithstanding, we can first and foremost, with reasonable confidence, assert that textual arguments are at the very top of the hierarchy. While this does not mean much, it does mean that "[w]here compelling arguments from text unambiguously require a conclusion, the text must be held dispositive."[62] Although it may be seldom that constitutional text—at least in the case of the U.S. Constitution—"unambiguously" requires a certain conclusion, when it does, the text controls the outcome in that case, regardless of what other interpretive methods might have to say on the matter. Despite the hypotheticals that I posed about the Constitution's presidential age requirement, the rule that the President must have reached the age of thirty-five before assuming office is virtually a settled question in American constitutional law and practice. Consequently, if there were ever moral arguments against the age requirement—for instance, for being "ageist" and therefore discriminatory, or generally for being arbitrary—those arguments would yield to the clear mandate of the Constitution's text.

Second, if and when text does not clearly guide the interpreters in a particular direction, originalism, given its robust appeal in American constitutional law,[63] occupies the second rank in the hierarchy.[64] This would mean, for example, that if originalist and ethical inquiries produced contradictory constitutional outcomes, the former would trump the latter. That is indeed the case most of the time. As stated earlier, however, the hierarchical relationships offered here do not always apply: they are in flux. The Court's opinion in *Brown*, declaring race-based segregation in public schools violative of the Constitution, is a case in point: that decision was undoubtedly influenced by ethical considerations, and those considerations seem to have trumped precedential and originalist interpretive arguments, although ethical arguments are supposed to enjoy a relatively low hierarchical status among all interpretive methods. If they had scrupulously followed precedent, the Justices would likely have concluded that segregated public schools were constitutional, given the clear holding of *Plessy v. Ferguson* that upheld the constitutionality of the "separate and equal" doctrine, which the Court ultimately saw as irreconcilable with *Brown* and thus overruled. What is more, the Court consciously chose not to look to history to inform its deliberations. Historical arguments inquiring into the intentions of the Framers who had adopted the Fourteenth Amendment guaranteeing the "equal protection of the Laws," the Court ruled, were "at best […] inconclusive."[65] To

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[62] Ibid. 1244.

[63] See note 42 and accompanying text.

[64] Fallon, "A Constructivist Coherence Theory of Constitutional Interpretation," 1244.

[65] Brown v. Board of Education, 489; see also *The Dynamic Constitution*,164 (arguing that "at best, the history revealed no clear intent to abolish discrimination in public education"); but see Michael W. McConnell, "The Originalist Justification for Brown: A Reply to Professor Klarman," *Virginia Law Review* 81, no. 7 (October 1995):

many, the decision not to engage the Amendment's history was a deliberate strategy of the Court to avoid facing embarrassing originalist interpretive outcomes that more likely than not would have upheld the constitutionality of race-based school segregation. Put differently, Justices knew that a historical inquiry into the intent of the drafters of the Fourteenth Amendment would have shown that they were comfortable with social segregation and did not author the Amendment to put an end to that. In an attempt to avoid making it explicit that history would have required the conclusion that race-based segregation be deemed constitutional, the Justices decided not to engage history at all. Instead, they chose to base their reasoning largely on ethical argumentation.

With the important caveat that the Court will not always remain faithful to the hierarchical relationship among the interpretive methods where textualism ranks first and is immediately followed by originalism, knowing that this hierarchy holds true in most cases may still provide some certainty to the judicial process.

4. Conclusion

When confronted with the two certainty-providing mechanisms that are embedded in the judicial practice of the Supreme Court and lower courts more generally, it seems not entirely accurate to suggest that the quest for certainty or even foreseeability in the judicial process is an utterly futile one. To be sure, most things remain uncertain. However, we know the tools interpreters make use of to arrive at constitutional outcomes, and further, we have a vague idea about which methods take precedence over others in the case of a conflict. These two observations ought to offer some comfort to even the most nihilistic among us, who hold that the judicial process is simply politics in disguise—an arena for partisan ideologies to battle with each other using the vocabulary of the law. This brief survey does not aim to wholly counter that assertion. At best, it aims to qualify it by suggesting possible ways in which interpreters feel constrained not by expressly political considerations, but by considerations stemming from the rules of interpretation widely shared and practiced by the community that they inhabit. Not the rules themselves, then, but the rules of the interpretive community, might provide us with some assurance that the judicial process has some certainty embedded in it.

1937 (an idiosyncratic study asserting that Brown can be justified from an originalist perspective).

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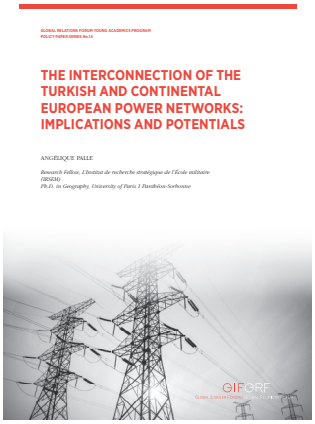

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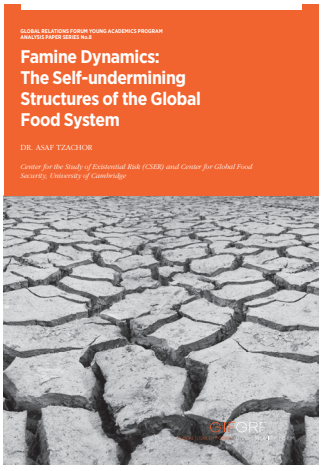

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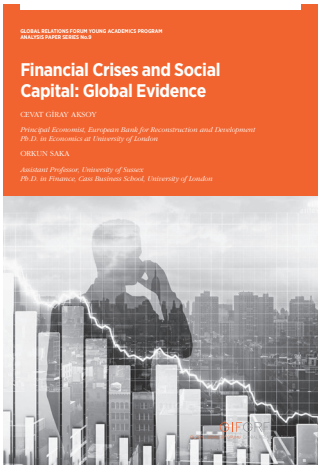

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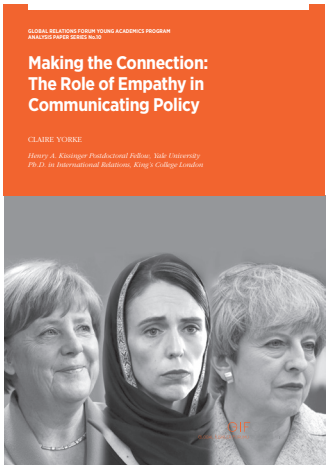

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