

# LEVELS OF GENERALITY, CONSTITUTIONAL COMEDY, AND LEGAL DESIGN

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*Many commentators write happy endings to their constitutional stories. This Article examines a few techniques for reaching preferred conclusions without falling outside the boundary of conventional constitutional argument. The investigation is oriented around the levels of generality by which sources of constitutional law are characterized. Level of generality characterizations apply to all sources of constitutional argument including constitutional clauses, originalist history, tradition, and judicial precedent. But there is more than one kind of “generality”—or at least more than one idea associated with that concept in the law literature. We can isolate three different dimensions of source characterization that recur in modern constitutional debates: (1) abstractness, (2) breadth, and (3) dynamism. Each dimension is conceptually distinct, practically important, and independently interesting. Potential manipulation of choices along these dimensions, however, may create credibility problems for constitutional advocates who promote one set of characterizations over others. The Article closes by suggesting that, happily, constitutional advocates advertise serious matters of legal design when they argue about the degree of abstractness, breadth, and dynamism in constitutional law. Regardless of how these characterization decisions are made, they help determine the character of the legal system for us all.*

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## I. INTRODUCTION

There are not many jokes in Akhil Amar’s new book, *America’s Unwritten Constitution*, and the jokes that are in there are not very funny. At least I didn’t think so. But Amar is an excellent constitutional comedian in another sense: Like Ronald Dworkin’s, William Brennan’s, Steven Calabresi’s, and Antonin Scalia’s, the endings to Amar’s constitutional expositions are usually happy from the author’s point of view.<sup>1</sup> Amar hopes for coherence and justice, and usually he finds it. With a few exceptions, the best interpretation of the Constitution of the United States coheres with the institutional practices on which he concentrates; that text and those practices largely cohere with judicial doctrine; and all three tend to cohere with, among other things, kind-spirited progressiv-

1. Some constitutional commentators are explicit about their comedic goal. See RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 38 (1996) (“It is in the nature of legal interpretation—not just but particularly constitutional interpretation—to aim at happy endings.”); James E. Fleming, *The Natural Rights-Based Justification for Judicial Review*, 69 *FORDHAM L. REV.* 2119, 2130 (2001) (“[W]e should . . . proudly aim[] at happy endings . . .”); see also William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 *S. TEX. L. REV.* 433, 438 (1986) (“For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs.”). Other commentators disclaim happy endings as their goal, other than getting the law right, but the pattern of their recommended results may indicate a commitment to happy endings, perhaps with some credibility-enhancing bullet biting thrown in. See, e.g., Steven G. Calabresi & Livia Fine, *Two Cheers for Professor Balkin’s Originalism*, 103 *NW. U. L. REV.* 663, 669–71, 678–88 (2009) (indicating that *Brown, Loving*, incorporation, and equal protection for women “are correct applying Scalia-style originalism”); *infra* Part I.B. (on bullet biting). Amar’s writings might not fit easily into either category, although he is explicitly committed to coherence and he seems to believe that coherence is part of understanding law well. See, e.g., AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* 109, 141, 283, 335, 408 (2012).

ism, the calls of individual conscience, and unwritten axioms of basic fairness. There has been dissonance in our constitutional system, but, in Amar's view, most of the mess has been eliminated.<sup>2</sup>

It is an uplifting story for many audiences, especially for those on the political left who worry that their policy commitments are inconsistent with a straightforward interpretation of the Constitution. The most uncharitable readers will wonder, though, whether such happy endings are the product of several intersecting cognitive biases. My own intellectual attention often slants toward the phenomena of tradeoffs and constitutional tragedy, of uncertainty and fundamental disagreement. A dark-side attraction can be as distracting as a bright-side bias, I freely admit, and I have been educated and influenced by Amar's work on many occasions. His attempt at an integrated and sensible understanding of the Constitution of the United States is inspiring to many of us. In this Article, I will not criticize constitutional comedians or constitutional tragedians per se. A mix of both types might be just fine for everyone.

Instead, I want to investigate methods that constitutional comedians use to write their material. Are there standard techniques for arriving at a preferred result that is appealing to otherwise undecided audiences? The techniques in which I am most interested are widely applicable. They should be useful in pursuing many different ideological commitments—left, right, statist, libertarian, and so on. And they should be useful for dealing with many different sources of constitutional argument—constitutional clauses, originalist history, subsequent tradition, judicial precedent, and so on.<sup>3</sup>

This Article is oriented around “the levels of generality” by which sources are characterized. These characterizations apply to all conventional sources of constitutional argument. Paul Brest famously tagged original intent with a level of generality question in 1980,<sup>4</sup> but he understood that “all adjudication requires making choices among the levels of generality on which to articulate principles.”<sup>5</sup> In fact, legal scholars aimed level of generality questions at judicial precedent no later than 1937. “Upon the level of generality selected for the criteria of likeness or dissimilarity,” Jerome Hall wrote, “depends the outcome.”<sup>6</sup> Laurence

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2. An arguably important exception is the exclusionary rule. See AMAR, *supra* note 1, at 222–23. But, if Amar is correct about the relevant history and tradition, recent decisions reducing the breadth of the rule are returning harmony to constitutional law.

3. Thus, these techniques should cut across different methods of constitutional interpretation, construction, and decision, and across so-called modalities of constitutional argument. See, e.g., PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 12–22 (1991) (listing historical, textual, structural, doctrinal, ethical, and prudential modalities); Adam M. Samaha, *Dead Hand Arguments and Constitutional Interpretation*, 108 COLUM. L. REV. 606, 633–35, 675–77 (2008) (discussing methods of interpretation, sources of information, and decisions).

4. See Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 216–17 (1980).

5. Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1091–92 (1981).

6. Jerome Hall, *Nulla Poena Sine Lege*, 47 YALE L.J. 165, 173 (1937); see also Edward H. Levi, *The Natural Law, Precedent, and Thurman Arnold*, 24 VA. L. REV. 587, 604 (1938) (addressing analog-

Tribe and Michael Dorf cemented the sense that everyone's favorite sources of constitutional argument are subject to level of generality questions. In 1990, they discussed generality levels as applied to the understanding of enumerated rights, to judicial opinions identifying fundamental rights, to traditions outside the courts, and to originalist history that allegedly erased value judgments from the process of specifying rights.<sup>7</sup> That generality questions can be affixed to so many sources of constitutional argument might not be very surprising, given that level of generality issues have been recognized in philosophical, historical, statistical, and other fields of inquiry for so long.<sup>8</sup> Constitutional scholars might not have been late to raise these questions but they never were alone in asking them.

Less well noted is that sources of constitutional argument can be characterized by more than one kind of "generality." Clarity is gained by breaking out three different dimensions of source characterization that recur in modern constitutional argument but are often run together: (1) abstractness, (2) breadth, and (3) dynamism.<sup>9</sup> A source thought relevant to developing a constitutional norm might best be characterized as relatively abstract or concrete, and also relatively broad or narrow, as well as relatively dynamic or static. Each of these dimensions has been associated with the notion of generality in legal commentary, even if they are not all strictly logical subdivisions of the concept.<sup>10</sup> And each should be naggingly familiar. These three dimensions along which someone might try to spin a clause or case or floor speech are well-known to savvy lawyers.

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ical reasoning from precedent and comparing the reach of various concepts therein); Julius Stone, *The Ratio of the Ratio Decidendi*, 22 MOD. L. REV. 597, 613–14 (1959) (discussing the characterization of material facts in precedent). These early scholarly references seem attuned to the dimension of breadth in the characterization of sources, but other ideas might be at work, too.

7. Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057 (1990). Tribe and Dorf concentrated on breadth, although they used the term abstraction at various points. *E.g.*, *id.* at 1058 ("The more abstractly one states the already-protected right, the more likely it becomes that the claimed right will fall within its protection."). All three concepts that I have in mind are referenced in Laurence H. Tribe, *Comment, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW: AN ESSAY BY ANTONIN SCALIA* 65, 69 (Amy Gutmann ed., 1997) [hereinafter Tribe, *Comment*].

8. *See, e.g.*, Eduard Farber, *Chemical Discoveries by Means of Analogies*, 41 ISIS 20, 20–24 (1950) (regarding philosophy and chemistry); A. M. MacIver et al., *The Character of a Historical Explanation*, 21 PROC. OF ARISTOTELIAN SOC., SUPPLEMENTARY VOLUMES 33, 34–35, 42 (1947) (regarding history); Douglas E. Scates, *The Forming of Categories in Research*, 29 J. EDUC. RES. 567, 572–73 (1936) (regarding empirical frequency studies); Norbert Wiener, *Certain Formal Invariances in Boolean Algebras*, 18 TRANSACTIONS AM. MATHEMATICAL SOC. 65, 72 (1917) (regarding mathematics); Florian Znaniecki, *The Object Matter of Sociology*, 32 AM. J. SOC. 529, 543 (1927) (regarding sociology and ethnology).

9. For references to multiple concepts that I hope to separate and elaborate, see, for example, *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003) (mingling abstractness and dynamism); *Board of Regents v. Roth*, 408 U.S. 564, 571 (1972) (mingling breadth and dynamism); *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958) (plurality opinion) (mingling abstractness, breadth, and dynamism); GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 46–48 (6th ed. 2009) (similar); Raoul Berger, *An Anatomy of False Analysis: Original Intent*, 1994 B.Y.U. L. REV. 715, 733 (mingling abstractness and breadth); Frank H. Easterbrook, *Abstraction and Authority*, 59 U. CHI. L. REV. 349, 350–51 (1992) (similar); Bruce Ackerman, *Liberating Abstraction*, 59 U. CHI. L. REV. 317, 318 (1992) (similar).

10. *See infra* note 83.

They also overlap with distinctions made in previous legal scholarship. For example, Cass Sunstein helped reorient our thinking about constitutional adjudication by charting cases along dimensions of breadth and revisibility.<sup>11</sup> My dimensions are a bit different, and I apply them to all sources of constitutional argument and regardless of institutional context. But overlap with influential scholarship and everyday advocacy is, I hope, confirmation that these characterization issues are live and pervasive.

My contribution consists of clarifying and comparing practically different and independently interesting generality-related choices—choices that cut across standard ideological categories and across all sources of constitutional argument.<sup>12</sup> Although these choices can be severely limited by the prevailing standards of good legal argument, in some cases arguments about abstractness, breadth, and dynamism can preserve hope for a dramatic rescue of the advocate's cause in the final act. At the same time, the importance and possible manipulation of certain source-characterization choices might generate credibility concerns about those taking positions on them. The closing sections of the Article wonder whether we should spend our time listening to constitutional comedians, however funny their jokes might be.

As it happens, constitutional advocates regularly fall back to matters of legal design that are potentially crucial to societal well-being. To run a healthy society, someone has to make sound choices regarding abstractness, breadth, and dynamism in constitutional law. Often educated guesses are the best we can do with such questions of legal design and, of course, good legal design is hardly the only normative concern. But the design questions remain pervasive and socially significant, or at least significant enough to warrant lots of additional investigation. Indeed, these matters should be interesting regardless of how constrained or unconstrained those choices are. Understanding these dimensions is essential to understanding the way our law works. Moreover, these dimensions of legal design are not hidden. Happily, they are advertised and the choices along them are informed by the work of constitutional advocates. We might then fairly conclude that the routines of constitutional comedians are, simultaneously, tragic and comedic.

One final warm-up note: my focus is constitutional argument, but much of my analysis extends to other legal argument. In fact, the analysis might extend to all normative argument that relies on authority. Con-

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11. See CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* 10–11, 19–23 (1999). Sunstein also graphed deep versus shallow reasoning in cases, see *id.* at 12–13, which I leave aside. For discussions that mix what I treat as separate dimensions of breadth and abstractness, as in rules versus standards, see *id.* at 209–13, 241–43 (critiquing Scalia's formalism). See also *id.* at 41–42 (emphasizing the many techniques for leaving things undecided and deemphasizing the rules/standards choice for cases that actually get decided on the merits).

12. Cf. Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1245 (1987) (explaining that coherence across sources of constitutional interpretation might be maintained partly because “historical intent may be fixed at highly varied levels of abstraction”).

stitutional argument might be special because, for instance, the stakes are higher or thought to be higher. But I need not take a position on such limiting principles. Application to other genres of argument would be a welcome extension.

## II. THE SET UP

### *A. The Constitutional Advocate's Goals*

Suppose that you want to reach answers for constitutional questions that (1) you believe best based on the nonlegal normative commitments that you happen to have, (2) might convince others who do not necessarily share your normative commitments, and (3) fit as many legally relevant sources of constitutional law as possible. Reaching this goal will not fulfill all of your dreams, of course. Winning at constitutional law, as in supreme law, will not reshape the world, nor will having a trumping legal argument shake everyone's moral or ethical views. But beating any other argument sourced in law is not so bad. How can you accomplish these objectives? Are there rules of thumb?

To make matters more interesting, assume that you are not especially popular, so your liking a result is not itself convincing to others. Also assume that you are not especially lucky, so your liking a result is not an indication that it will fit with relevant legal sources. And let's assume that you are not especially powerful, so you cannot determine which sources of argument are legally relevant to constitutional law. Furthermore, assume that you are stubborn, so that neither the prospect of being convincing nor fitting with existing sources of law will alter your normative commitments. These characteristics are shared by many participants in constitutional debate, including professors and judges. Where is the room to maneuver without losing credibility with persuadables?<sup>13</sup>

### *B. Partial Openness in Conventions*

With this set up, you will want significant yet not total flexibility in reaching the third goal—fit with legally relevant sources. If those sources are sufficiently fixed and the methods for using them are sufficiently rigid, you might have a constitutional tragedy on your hands, depending on what those sources seem to show. But, perhaps equally tragic, if you happen to gain enough power to change those sources or methods at will, you could end up sacrificing the second goal—convincing persuadables who would not follow you on nonconstitutional grounds. Even if one

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13. The term comes from political strategists. See D. SUNSHINE HILLYGUS & TODD G. SHIELDS, *THE PERSUADABLE VOTER: WEDGE ISSUES IN PRESIDENTIAL CAMPAIGNS* 24–26 (2008); Joel Achenbach, *Wisconsin, the Land of Persuadable Voters*, WASH. POST (Oct. 15, 2012), [http://articles.washingtonpost.com/2012-10-15/politics/35500602\\_1\\_undecided-voters-wisconsin-voters-persuadable](http://articles.washingtonpost.com/2012-10-15/politics/35500602_1_undecided-voters-wisconsin-voters-persuadable).

were psychologically and ethically comfortable with such power, there might not be enough distance between you simply liking a result and you choosing constitutional sources that dictate that same result. It is fortunate, then, that modern conventions of constitutional argument are not entirely fixed. Perhaps there is enough openness *and* structure to support a happy constitutional ending for you, while also persuading those who retain confidence in constitutional argument to rightly shape their thinking.

Limited room to navigate appears in at least three places. First, the *list* of relevant constitutional sources is not fully settled. Agreement is solid for many source categories (such as clauses, history, and cases<sup>14</sup>), but thoughtful people disagree over what else should be on the list (such as contemporary understandings, foreign law, and acquiescence<sup>15</sup>). Another layer of disagreement is whether the list of relevant sources should be different for different institutions, such as courts, legislatures, the Office of Legal Counsel, and the general public.<sup>16</sup> Second, a complete method of constitutional decision requires orderly *relationships* among relevant sources. Assuming that more than one source will continue to be relevant, they must be ordered or weighted by strength before they can guide decisions. Third, relevant sources are not *specified* adequately to always eliminate intelligent debate about their proper characterization. Agreeing that “history” or “precedent” is relevant does not detail how a decision maker should understand those categories or items within them. Originalism always considers ratification era history, but it has competing versions that aim at different informational targets.<sup>17</sup> Similarly, common-law constitutionalism always considers Supreme Court cases, but it is open to various levels of commitment to precedent and contemporary reason.<sup>18</sup> Even if there were only one interpretive method available, specifying the proper meaning for a relevant source within it could provoke serious disagreement. And even an agreed-upon meaning must be applied within a given dispute before a decision can be reached.

Proving just how much prevailing conventions truly constrain advocate reasoning is more difficult than proving the presence of some flexi-

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14. This overstates the agreement to the extent that many commentators have basically rejected originalism or common-law constitutionalism (or whatever). See, e.g., DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 11 (2010).

15. See, e.g., Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411 (2012) (elaborating and questioning reliance on inter-branch acquiescence); Steven G. Calabresi, “*A Shining City on a Hill*”: *American Exceptionalism and the Supreme Court’s Practice of Relying on Foreign Law*, 86 B.U. L. REV. 1335, 1340, 1398–1405 (2006); Daniel A. Farber, *The Supreme Court, the Law of Nations, and Citations of Foreign Law: The Lessons of History*, 95 CALIF. L. REV. 1335 (2007).

16. See Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 886 (2003).

17. See Adam M. Samaha, *Originalism’s Expiration Date*, 30 CARDOZO L. REV. 1295, 1328 (2008).

18. Cf. David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 897 (1996) (“[I]f, on reflection, we are sufficiently confident that we are right, and if the stakes are high enough, then we can reject even a longstanding tradition.”).

bility. But certainly we have far greater than zero constraint in any given moment. There is no chance of me persuading intelligent practitioners of constitutional argument that a clause in a foreign constitution literally trumps a conflicting clause in the U.S. Constitution, nor that Supreme Court cases have literally no weight in today's arguments. Those positions will be condemned as ridiculous. And some outcomes cannot be contested by those who want to maintain credibility. The age requirement for otherwise eligible presidents is the typical illustration of a constitutional norm on which different methods and interpreters converge. Hence, there might be sufficient constraint within the prevailing conventions of constitutional argument to help an advocate sway an undecided audience without quite being able to convince them on nonconstitutional grounds.

Moreover, our set up need not and probably should not allow advocates to claim that their nonlegal commitments are themselves a relevant source of constitutional law. We have not demanded that law include an effort at justification that puts relevant sources in their best contemporary moral light (as Dworkin does).<sup>19</sup> Nor have we added axioms of basic fairness that go without saying in the relevant sources, or a commitment against what you consider absurd or unjust results (as Amar seems to).<sup>20</sup> Without contesting the propriety of these commitments, we can make our task more difficult and more interesting if we stick to the problem of fit with legally relevant sources of constitutional law apart from the morally best outcome—about which there sometimes will be deep and persistent disagreement.

In fact, one slice of today's convention favors a touch of tragedy. This dark-side streak is akin to what Christopher Eisgruber called the "no pain, no claim" test for constitutional theorists.<sup>21</sup> He suggests that craving a little injustice was a syndrome produced by an uninformed desire to separate law from justice.<sup>22</sup> One might instead claim that embracing at least some unwelcome results is a good test of true obligation to law as an independent force in life, as opposed to acceptance of law on condition of convenience.

Another explanation is strategic: advocates may engage in conspicuous "bullet biting" in an effort to gain trust from strangers. Whether

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19. See DWORKIN, *supra* note 1, at 1–38; see also STRAUSS, *supra* note 18, at 891 ("The traditionalism underlying the practice of constitutional interpretation is a rational traditionalism that acknowledges the claims of the past but also specifies the circumstances in which traditions must be rejected because they are unjust or obsolete.").

20. See AMAR, *supra* note 1, at 5, 10 (influencing textual analysis with an unspoken maxim in order to avoid concluding that the vice president may preside at his own impeachment trial).

21. Christopher L. Eisgruber, *Justice and the Text: Rethinking the Constitutional Relation Between Principle and Prudence*, 43 DUKE L.J. 1, 7 (1993) (offering as an example Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981)). A related idea is "judicial asceticism," by which a judge reaches some results that she believes are unjust to convince herself or others that she does not use her commission to impose her personal preferences. See Larry Kramer, *Judicial Asceticism*, 12 CARDOZO L. REV. 1789, 1795 (1991).

22. See Eisgruber, *supra* note 21, at 3–9, 17–18, 27 (linking our constitutional norms to a prudent compromise between moral principle and democratic consent).



constitutional law has to hurt as a matter of principle, an advocate might lose credibility with a wary audience unless she holds out the possibility of results unwelcome to her. An audience lacking your normative commitments but willing to listen to legal argument is unlikely to believe that all of constitutional law just happens to match all of your agenda. If you concede (read: advertise) that your approach to constitutional analysis yields a few results that others think would be tragic for you, your general approach might sway the audience on a range of other matters. This might seem like cheap trickery, but imperfectly informed audiences—all audiences, that is—often rely on just such labor-saving devices. Effective signals are costly signals. And we witness advocates assuring us that there is a gap between what they want and what we all get under their version of the Constitution, to the point of Justice Kennedy in his flag-burning concurrence suggesting a “painful,” “personal toll” for following the law to an unhappy ending.<sup>23</sup>

This practice of bullet biting suggests a per capita ceiling on happy endings, as a matter of effective strategy if nothing else. It likewise suggests that an advocate’s attempt to overtly insert right reason or justice into the equation for constitutional law will contradict audience desires for advocate pain, perhaps as a signal of good faith or compromise. Regardless, we can learn something interesting about the techniques of constitutional debate by investigating opportunities for fit with legal sources when those sources do not include “happy ending.”<sup>24</sup>

### C. Adding Sources of Law?

It has been suggested that simply adding sources to constitutional analysis creates opportunities for decision makers to reach the results that they personally prefer.<sup>25</sup> Take Justice Scalia’s rejection of a multi-

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23. *Texas v. Johnson*, 491 U.S. 397, 420–21 (1989) (Kennedy, J., concurring). To the extent that constitutional advocates offer to sacrifice something truly important to them in exchange for gains elsewhere, we could think of bullet biting in constitutional argument as generating building blocks for a *modus vivendi*. This kind of compromise might be socially beneficial or morally flawed, and it might be worth another essay to decide. Here, I will leave aside this significant question. To the extent that advocates trump up insignificant matters on which they are supposedly giving in, the practice becomes more difficult to defend.

24. Cf. RONALD DWORKIN, *LAW’S EMPIRE* 228, 380 (1986) (distinguishing fit from justification in his conception of legal interpretation). In addition, I set aside a few tricks that might be effective but about which others know much more. For instance, one might borrow the credibility of others who do not share your normative commitments by pointing to their agreement with you on a given issue (a common practice in ordinary politics). Or one might infiltrate and argue from the proposed method of one’s ideological opponents, claiming that even their method of analysis yields a result friendly to you (a practice typical of many lawyers). Or one might build a coalition by joining forces across ideological lines and across issues (a common practice in legislatures but perhaps extending to some courts as well). Or one might attack the hypocrisy or inconsistency of those with different normative commitments (a common practice in perhaps all forms of debate). Or one might smile and tell amusing stories. I give this incomplete list not to denigrate these tactics, but to contrast by example the sort of logical strategies with which I am concerned.

25. See, e.g., *McDonald v. Chicago*, 130 S. Ct. 3020, 3058 (2010) (Scalia, J., concurring); Gregory C. Sisk & Michael Heise, *Ideology “All the Way Down”? An Empirical Study of Establishment Clause Decisions in the Federal Courts*, 110 MICH. L. REV. 1201, 1244–45 (2012).

factor approach to substantive due process claims that was advanced by Justice Stevens. Scalia wrote that originalism “is less subjective because it depends upon a body of evidence susceptible of reasoned analysis rather than a variety of vague ethico-political First Principles whose combined conclusion can be found to point in any direction the judges favor.”<sup>26</sup> He added that Stevens’ approach “would not eliminate, but multiply, the hard questions courts must confront, since he would not *replace* history with moral philosophy, but would have courts consider *both*.”<sup>27</sup> Interpreted broadly, this position cuts hard against today’s polycentric practice of constitutional argument, which relies on several types of sources. Opposing “source inflation” also might undercut efforts to find themes in the Constitution, as John Hart Ely attempted to do,<sup>28</sup> or to learn about one clause by referencing others, as Akhil Amar has recommended.<sup>29</sup> Even on a more modest version of the source-inflation theory, advocates hoping for flexibility might consider throwing a lot of variables at constitutional questions.

Our set up has foreclosed the tactic of increasing the number of sources. We have assumed, realistically, that no one of us has the power to decide which sources are included within conventional constitutional analysis; and, in any event, an advocate’s attempt to exercise such power might lead other people to ignore the advocate’s analysis because they consider it rigged.

But a source-inflation tactic suffers from a straightforward mathematical problem, as well. Simply adding more variables to an equation tends to increase the chances of the equation producing a decisive result. Moving from two considerations to three considerations in constitutional analysis, all else equal, should drive down the likelihood of an indeterminate result on a given question that would call for the decision maker to come up with some other consideration. To put the thought another way: a “tie” tends to be a less likely outcome when an equation has more variables, and, in the absence of a tie, a decision maker would lack discretion to ignore the equation’s outcome based on personal predilections. Elsewhere I have illustrated the usually inverse statistical relationship between the number of variables and the chance of a tie.<sup>30</sup>

Those who fear decision maker discretion must be concerned about something more than more sources. Their worry might be that a decision maker with a long menu will choose only those sources that point in the decision maker’s preferred direction, or will emphasize those sources over others, or will manipulate vague sources on the list to reach preferred results, or, perhaps, will exercise discretion to add yet another source if the existing list points in an uncomfortable direction. But such

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26. *McDonald*, 130 S. Ct. at 3058 (Scalia, J., concurring).

27. *Id.*

28. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 11 (1980) (opposing clause-bound textualism).

29. See, e.g., Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 748–49 (1999).

30. See Adam M. Samaha, *On Law’s Tiebreakers*, 77 U. CHI. L. REV. 1661, 1685–89 (2010).

concerns about decision maker manipulation should persist, to the extent that they should be taken seriously, regardless of how many variables are legally relevant at the starting point. Adding more variables in the absence of any fear of lawless manipulation actually tends to constrain decision making, in the sense of increasing the likelihood of a decisive result. We need much more argument to believe that restricting the judiciary's constitutional analysis to only originalist sources (or whatever) would increase methodological constraint. All else equal, such restrictions would have the opposite effect.

### III. LEVELS OF GENERALITY

Now we can ask targeted questions about how constitutional comedy fits within conventional constitutional analysis. Setting aside attempts to control the list of relevant sources and—to further narrow our attention along the same lines—ignoring efforts to dictate the relationship among categories of sources, what might be done in terms of *characterizing* relevant sources?<sup>31</sup> Are there standard ways of characterizing relevant sources that, if accepted by the audience, will increase the chance of a happy ending for the advocate?

Of course any advocate will want to influence substantive meaning, as in the direction in which a source points. The advocate will want the resulting conception of liberty or equality or executive power to track her preferred version. But source characterization choices, to put the point modestly, are not all open. Suppose that the direction is set for the source in question: it seems to cut against or for the advocate's preferred result and this valence cannot be interpreted away. What then?

#### A. *Three Dimensions*

My answers take off from the notion of generality levels. “The level of generality” is a stock idea in constitutional theory, but it gets used to mean different things. Discussions surrounding level of generality problems suggest three distinct dimensions of choice: abstractness, breadth, and dynamism. This three-fold partition matches up with shopworn arguments deployed by skilled constitutional comedians. Moreover, these dimensions apply across the wide variety of sources that are used to support constitutional claims, whether in or out of court. And positions along these three dimensions are urged by advocates of many ideological stripes, despite some clustering around certain combinations.

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31. Note my assumption that the source is “relevant.” Constitutional advocates expend a lot of effort attempting to control which sources are relevant and which are irrelevant. Some of the techniques described below amount to making an unfriendly source irrelevant, but part of my starting point is to accept that some sources that strike the advocate as unfriendly and relevant can be made more friendly if not entirely irrelevant. I acknowledge a weak conceptual boundary between softening the blow of unfriendly sources and making them irrelevant.

Obviously there are many other dimensions of source characterization, and some tactically helpful positions will be ruled out. When I refer to “choice” along the dimensions discussed below, I do not mean to imply that the choice is unconstrained. Advocates will look for opportunities on these dimensions, but they will not always find them. In any event, the three dimensions on which I will concentrate are often mingled together confusingly in today’s constitutional debates. As I will suggest later on, these dimensions are independently interesting and socially significant apart from their prominent role in modern constitutional argument. So there is more than one reason to pause and study abstractness, breadth, and generality.

### 1. *Abstractness*

Abstractness is perhaps the most conceptually slippery dimension that can be associated with level of generality choices. I use “abstractness” to denote the amount rather than the kind of direction that is attributed to a given source. A relevant source of constitutional argument might be characterized as providing a lot of direction to a decision maker or very little. Direction might be lacking because ideas referred to in the source are not easily associated with particular concrete examples or are otherwise not clearly defined for us. Used this loosely, abstractness includes vagueness and other hindrances to ease of understanding.<sup>32</sup> The basic thought is that a given source can be studied and then thought to yield only foggy messages that invite additional pondering or instead clear-cut directives.<sup>33</sup> A similar though not identical distinction runs between rules and standards.<sup>34</sup> In economic terms, rules are supposed to provide readily executable directions, but at the risk of repeated errors on the merits; standards are supposed to invite wider ranging all-things-considered judgments tailored to the particular problem at hand, but at the risk of excessive decision costs over time. The abstractness dimension covers all of these senses in which a source can provide more or less clear guidance.

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32. See, e.g., Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 97–98 (2010) (distinguishing vagueness, as in having borderline cases, from ambiguity, as in having different senses). In the text above, I am merging a distinction between abstract and concrete with a distinction between vague and specific. There are, of course, distinct uses of these terms. “Vague” can indicate lack of clear definition without necessarily indicating disassociation from particular examples. Furthermore, under other uses of the terms, abstract and concrete might collapse into my next distinction: broad and narrow. *But cf.* *FEC v. Akins*, 524 U.S. 11, 23–25 (1998) (distinguishing, for purposes of standing, abstract injuries from generalized grievances that are widely shared). Regardless, distinct ideas can be usefully identified.

33. Consistent with this notion is the discussion of “level of generality” and “abstractness” in LOUIS MICHAEL SEIDMAN & MARK V. TUSHNET, *REMNANTS OF BELIEF: CONTEMPORARY CONSTITUTIONAL ISSUES* 40–42 (1996), although the concept of breadth enters their discussion, as well.

34. See, e.g., Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257 (1974); see also Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 559–63, 586–96 (1992) (distinguishing the complexity/simplicity dimension).

To make this loose notion of abstractness a bit more concrete, consider examples from traffic law. Speed limits often are cast as specific rules (such as twenty-five miles per hour on Main Street), while tort law may impose a far more vague standard on drivers (such as drive reasonably under the circumstances). The tort system's demand might be meaningful to an experienced or otherwise well-informed observer, but in many applications its clarity is nothing like a posted speed limit. Of course the difference between formal rules and standards may not be stark once we account for complicating variables, such as enforcement discretion. But we can stick to comparisons within the content of formal law. Formal law and the component sources thereof can be characterized as abstract/vague, concrete/specific, or something in between.

The same design choice faces constitution writers, and a quick plain-text reading of the U.S. Constitution yields equally apparent contrasts. To make just one comparison, consider Article II, Section 1's declaration that "[b]efore he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—'I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States,'"<sup>35</sup> alongside the Fifth Amendment's declaration that no person shall "be deprived of life, liberty, or property, without due process of law."<sup>36</sup> At least on first glance and without denying some vagueness in both clauses,<sup>37</sup> we easily can characterize the first clause as a specific rule and the second clause as a vague standard.

But abstractness characterizations are not always easy to make, and the practical differences among positions on the abstractness dimension help fuel modern constitutional arguments. Competing characterizations are offered all the time by constitutional analysts. Sometimes the debate is joined at the wholesale level. In the 1980s, Ronald Dworkin maintained that many clauses in the Constitution of the United States are best understood as concepts as opposed to conceptions or abstract principles as opposed to specific rules.<sup>38</sup> A distinction of this kind has been endorsed by several constitutional scholars including Laurence Tribe<sup>39</sup> and, more recently, Jack Balkin, who looks to originalist history for relatively abstract principles and standards suggested by various clauses rather than for particular expected applications.<sup>40</sup> This movement faces opposition, of course. Some suggest that concepts are partly if not wholly composed of particular conceptions.<sup>41</sup> Others wonder whether abstract con-

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35. U.S. CONST. art. II, § 1, cl. 7.

36. U.S. CONST. amend. V.

37. For instance, neither clause specifies remedies for violations.

38. See DWORKIN, *supra* note 24, at 70–72; see also RONALD DWORKIN, JUSTICE IN ROBES 120–23 (2006); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 133–36 (1977).

39. See Tribe, *Comment, supra* note 7, at 67–68.

40. See JACK M. BALKIN, LIVING ORIGINALISM 42–44, 61–64, 263–70 (2011).

41. See Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 791 (1983).

stitutional concepts count as law at all, let alone good law, at least when in the grasp of a willful judge.<sup>42</sup> For our purposes, we only need to know that debatable choices about abstractness are made routinely within mainstream constitutional discourse.

The abstractness debate occurs at retail levels, too. A tired but still instructive example arises in Eighth Amendment debates.<sup>43</sup> One side maintains that “cruel and unusual punishment” refers to a list of particular punishments that were known at the time of the Amendment’s ratification,<sup>44</sup> while others counter that the Amendment refers to a principle that contemporary decision makers must grapple with, elaborate, and apply to contested cases.<sup>45</sup> Part of the Second Amendment debate includes a comparable choice, but with the opposite left/right ideological valence. Those skeptical of individual gun rights can suggest that “arms” refers to a list of particular weapons that were known at the time of the Amendment’s ratification, or perhaps a list of weapons with similar power,<sup>46</sup> while others counter that the term refers to a more abstract idea involving tools for self-defense or hunting or whatever.<sup>47</sup> Likewise with the Eleventh Amendment, which sovereign immunity enthusiasts take to evince a “tacit postulate” of federalism,<sup>48</sup> and skeptics treat as a specific jurisdictional code with no inspirational force.<sup>49</sup> When it comes to the Fourteenth Amendment’s guarantee of “equal protection,” both left and right seem to prefer abstractness, albeit abstractness that ends up pointing in different directions.<sup>50</sup>

We can effortlessly extend the abstractness dimension to other sources of constitutional law. It applies to histories, traditions, cases, and so on. Take originalist history: among the most famous conclusions of abstractness is Justice Jackson’s in the *Steel Seizure Case*.<sup>51</sup> On executive power, he claimed:

A judge, like an executive adviser, may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves. Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh.<sup>52</sup>

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42. See, e.g., Berger, *supra* note 9, at 733 (citing Robert Bork).

43. See *infra* text accompanying notes 101–104.

44. See *infra* text accompanying notes 101, 104.

45. See *infra* text accompanying notes 102–103.

46. See *District of Columbia v. Heller*, 554 U.S. 570, 582 (2008).

47. See *id.*

48. See, e.g., *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996); *Nevada v. Hall*, 440 U.S. 410, 433 (1979) (Rehnquist, J., dissenting).

49. See, e.g., *Seminole Tribe*, 517 U.S. at 82 (Stevens, J., dissenting).

50. See Pamela S. Karlan, *What Can Brown® Do For You?: Neutral Principles and the Struggle Over the Equal Protection Clause*, 58 DUKE L.J. 1049, 1052–53 (2009).

51. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

52. *Id.* at 634 (Jackson, J., concurring).

Jackson identified another version of enigmatic originalist history in the same concurrence. He went on to characterize the relevant historical sources as collectively conflicting their way into indeterminacy, as opposed to claiming that historical sources were individually uninformative: “A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other.”<sup>53</sup> A similar shoulder shrug appears in *Brown v. Board of Education*,<sup>54</sup> when, after reargument on the point, Chief Justice Warren characterized the relevant originalist history as “[a]t best, . . . inconclusive.”<sup>55</sup>

Such statements indicate objective views of the evidence, but other abstractness conclusions are explicitly normative. Sticking with justices’ arguments, Brennan committed to abstractness for originalist history as early as 1963. Voting to invalidate prayers orchestrated by public schools in *School District of Abington Township v. Schempp*,<sup>56</sup> Brennan contended that “our use of the history of their time *must* limit itself to broad purposes, not specific practices.”<sup>57</sup> Although he did not provide a detailed defense in that case, Brennan seemed to adopt this position *regardless* whether one could accurately ascertain what particular framers thought about the particular issue before the Court.<sup>58</sup> Brennan was emphasizing changed circumstances, such as increasing religious diversity, while fitting his conclusions to his version of founding era principles. This approach is similar to *Brown*’s announcement that “we cannot turn the clock back to 1868 when the [Fourteenth] Amendment was adopted.”<sup>59</sup> Part of this sentiment could be based on infeasibility, and part on a judgment that historical sources should gently inform today’s judgments without shackling judges who want to move within the gist of ancient principle.

The flipside to these positions are not hard to find, either—whether in the use of originalist history or other sources, and in service of more than one ideology. A nice illustration of perceived specificity involves the Second Amendment. One question has been whether various historical sources confirm or deny that the Amendment’s right to keep and bear arms is held by individuals who are not members of a state-organized militia. Several law professors think one way, several historians think another, and the justices divided five to four in *District of Columbia v. Heller*.<sup>60</sup> The amusing/horrifying part of this division was the crystal clarity that each side attributed to the historical sources. The ma-

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53. *Id.* at 634–35; *see also id.* at 635 n.1 (“A Hamilton may be matched against a Madison.”).

54. 347 U.S. 483 (1954).

55. *Id.* at 489.

56. 374 U.S. 203 (1963).

57. *Id.* at 241 (Brennan, J., concurring) (emphasis added).

58. *See id.*

59. *Brown*, 347 U.S. at 492.

60. 554 U.S. 570 (2008).

jority claimed that history obviously validated an individual rights view,<sup>61</sup> and the dissenters claimed that history specifically directed the opposite conclusion.<sup>62</sup> These two factions on the Court might have been conducting different types of originalist inquiry, but my point is that judges sometimes contend that history is an abstraction with gentle suggestions and sometimes a diktat with bracing clarity, and that either characterization can assist multiple ideologies. Now advocates of various persuasions highlight various passages in *Heller* itself to argue that the Supreme Court was clear enough on some point of law in their favor and open to argument on some less friendly proposition. This is what constitutional lawyers do.<sup>63</sup>

Ideology in some form surely influences these characterization preferences,<sup>64</sup> but the conventional left/right distinction is nowhere near perfectly correlated with abstract/concrete or vague/specific preferences. Both abstraction or vagueness and concreteness or specificity can help both left and right wingers reach happy endings. The simple point is that sources characterized as abstract are less confining than their concrete counterparts, and advocates with a wide range of normative goals will adjust their preferred characterizations accordingly. I have illustrated this diversity of users mainly with judicial opinions and constitutional theorists, but anyone could take the time to pick out lawyers' briefs, legal blogs, and political speeches making the same kind of characterization choices.

Additional tactical guidance is available, however. Different choices on the abstractness dimension have different effects on the prospects for constitutional comedy. The simplest advice is to contend that apparently friendly sources provide specific and decisive guidance, while apparently unfriendly sources provide only misty abstractions. Note that the former tactic might well guarantee a happy ending, while the latter tactic can only stave off a certain defeat. It remains possible for an audience to rely on an abstract source to tip the argument against the advo-

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61. *See id.* at 595.

62. *See id.* at 637 (Stevens, J., dissenting).

63. Application of the abstractness dimension to case law and other sources is, I think, too apparent to be worth extended discussion. For a handful of stand-out illustrations, consider *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 26 (1981) (“[T]he Court’s precedents speak with one voice . . .”); *id.* at 41 n.8 (Blackmun, J., dissenting) (“[T]he Court today grants an unnecessary and burdensome new layer of analysis . . .”); *Van Orden v. Perry*, 545 U.S. 677, 683 (2005) (plurality opinion of Rehnquist, C.J.) (“Our cases, Januslike, point in two directions in applying the Establishment Clause.”); *id.* at 708 (Stevens, J., dissenting) (“[I]f there remains any meaning to the ‘wholesome “neutrality” of which this Court’s [Establishment Clause] cases speak’—a negative answer to that question is mandatory.” (citation omitted)). *Cf. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 747 (2007) (plurality opinion of Roberts, C.J.) (asserting that the plaintiffs’ position in *Brown* “could not have been clearer” and was adopted by the *Brown* Court); *id.* at 798–99 (Stevens, J., dissenting) (“There is a cruel irony in The Chief Justice’s reliance on our decision in [*Brown*].”); Karlan, *supra* note 50, at 1051–52.

64. One might have an ideological commitment to constraint in legal reasoning, in which case these choices do have ideological valence. But I don’t know anyone whose only commitment is constraint, in judiciaries or otherwise. And, regardless, I am exploring constitutional comedy in a different sense.



cate. But we can think of arguments in favor of abstract or vague characterizations as, ordinarily, fallback positions that become attractive when a source cannot be fully distinguished or reconceptualized in the advocate's favor.

## 2. *Breadth*

A more straightforward and uncontroversial dimension of generality involves how broadly to characterize a given source of constitutional law.<sup>65</sup> A source might be understood to bear on a broad range of circumstances or only a narrow corner of social life. Of course, this choice between broad and narrow characterization depends on a metric for comparison—breadth can be measured by numerous ranges of human activity, not to mention classes of people, geographic territory, temporal reach, and other matters of interest.<sup>66</sup> But the breadth choice persists regardless, and it is logically independent from the abstractness choice.

Think about traffic law again. As diagrammed in the figure below, a speed limit can be cast broadly or narrowly and, at the same time, abstractly or concretely.<sup>67</sup> Thus a city ordinance might: declare a twenty-five mile per hour speed limit for Main Street (*cell 1*, narrow and concrete); or declare a twenty-five mile per hour speed limit on all roads (*cell 2*, broad and concrete); or declare that drivers must drive reasonably on all roads (*cell 3*, broad and abstract); or declare that drivers must drive reasonably on Main Street (*cell 4*, narrow and abstract). Now, the proper characterization of a given law might not be so clear. In a way, an abstractness dimension cuts across everything, in that the degree of breadth discussed here, the degree of dynamism discussed below, and even the degree of abstractness discussed above can be clear or unclear. But many categorizations will be easy enough, and my traffic law examples can be distinguished quickly on the dimensions of abstractness and breadth.

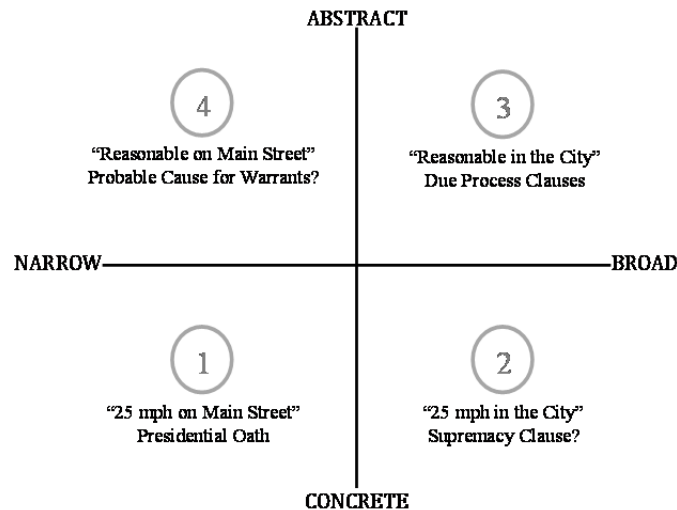
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65. See generally Frederick Schauer, *Balancing, Subsumption, and the Constraining Role of Legal Text*, 4 LAW & ETHICS HUM. RTS. 34, 38–39 (2010) (discussing the “level of generality” as the degree of case-specific particularity at which competing interests may be described in free speech cases, although emphasizing the degree of detail with which interests are described); Gerald Gunther, *In Search of Judicial Quality on a Changing Court: The Case of Justice Powell*, 24 STAN. L. REV. 1001, 1026–27 (1972) (similar, though also invoking the distinction between rules and standards); Louis Michael Seidman, *Confusion at the Border: Cruzan, “The Right to Die,” and the Public/Private Distinction*, 1991 SUP. CT. REV. 47, 68 (discussing the “level of generality” as the breadth or narrowness with which traditions may be described in substantive due process cases); Tribe & Dorf, *supra* note 7, at 1058 (using the term “abstractly” but asking, “[f]or instance, did the Court in *Griswold v Connecticut* recognize the narrow right to use contraception or the broader right to make a variety of procreative decisions?” (footnote omitted)).

66. See Tribe & Dorf, *supra* note 7, at 1067–68 (making a similar observation).

67. Cf. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1033 (2d ed. 1988) (distinguishing unconstitutionally vague laws from overbroad laws). Recall that my use of “abstractness” is loose. It includes not only the degree of association with particular examples but also the degree of vagueness or specificity and the standard-like or rule-like quality of the norm.

Figure 1



Constitutional norms are no different from traffic laws in these respects. Constitutional clauses, for example, can be characterized along the dimension of abstractness and also the dimension of breadth. As such, we can isolate a second first-glance distinction between Article II's presidential oath (*cell 1*) and the Fifth Amendment's Due Process guarantee (*cell 3*). In addition to its relative abstractness, the latter clause seems quite a bit broader, measured by the human activity covered. The former governs only those who will assume the Office of President, while the latter appears to govern any number of officials if not private parties who might deprive any person of a potentially wide range of interests. This is not to judge the relative importance of the two clauses, and additional interpretation might close the apparent gaps in abstractness if not breadth, but there is no doubt that both dimensions are in play. Indeed, all four abstractness/breadth combinations can be identified on a quick plain-text read through the U.S. Constitution. A candidate for the broad and specific combination (*cell 2*) is the Supremacy Clause of Article VI, which provides a trumping rule for any federal law over all state law, although we sometimes must struggle to discern, most notably, precisely when the latter is "to the Contrary."<sup>68</sup> An arguably narrow and abstract combination (*cell 4*) is the Fourth Amendment's Warrant Clause, which applies to a significant yet narrow slice of all official conduct and conditions it on a facially vague or highly contextual "probable cause" standard.<sup>69</sup>

68. U.S. CONST. art. VI, cl. 2 ("[T]he Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

69. U.S. CONST. amend. IV ("[N]o Warrants shall issue, but upon probable cause . . .").

Even these snap characterizations show room for controversy, and modern constitutional argument features repeated contests on the breadth dimension. It is part of every law student's education and every effective lawyer's toolkit—how to read cases broadly and narrowly. Plainly the same exercise applies to clauses, originalist history, and alleged traditions. To pick one example among countless others, consider the term “liberty” in the Due Process Clause of the Fourteenth Amendment.<sup>70</sup> Bracketing whether this clause has a so-called substantive aspect, a participant in constitutional debate might allege that this reference to liberty includes a lot or a little in terms of human affairs. Conceivably, the term is rightly understood as a reference only to freedom from physical restraint,<sup>71</sup> or, in addition, freedom to contract for wages, or to parent your biological offspring, or to drink liquor.<sup>72</sup> Indeed, the notions of physical restraint and contractual liberty can be broadly or narrowly understood. Of course, given a decision protocol, there might be one right answer to the breadth question for a particular source according to a particular metric. But that prospect will not eliminate reasonable debates.

Essentially the same struggle occurs over originalist history and tradition, which many constitutional advocates take to be relevant in ascertaining what “liberty” means. The textbook example of disagreement over breadth comes from the Supreme Court's fractured decision in *Michael H. v. Gerald D.*<sup>73</sup> One group of justices seemed willing to recognize the constitutional significance of a legal tradition protecting a unitary marital family, but they denied that the relevant tradition could be stretched to include an adulterous couple and their biological child for the purpose of the biological father's claim to parental rights against the married couple's wishes (regardless of advances in medical technology that improve third-party ability to judge the accuracy of biological paternity claims).<sup>74</sup> Another group of justices were willing to characterize the relevant tradition more broadly, and their disagreement on this point was linked to a broader disagreement over the proper way to ascertain tradition for purposes of substantive due process claims.<sup>75</sup> One small group of justices claimed to rely on the “most specific” level of generality, but their analysis was intertwined with the breadth dimension,<sup>76</sup> and a larger

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70. U.S. CONST. amend. XIV, § 1 (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .”).

71. See Charles Warren, *The New “Liberty” Under the Fourteenth Amendment*, 39 HARV. L. REV. 431, 439–45 (1926).

72. See, e.g., Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1740 (2012); James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMMENT. 315, 338–39 (1999).

73. 491 U.S. 110 (1989).

74. *Id.* at 123–24.

75. *Id.* at 137–38.

76. See *id.* at 127 n.6 (plurality opinion of Scalia, J.) (contrasting tradition regarding “the rights of the natural father of a child adulterously conceived” with “the traditions regarding natural fathers in general”).

group of justices rejected that approach to tradition in favor of something broader, more abstract, and otherwise different.<sup>77</sup>

Equally notable, the decision itself is subject to broad and narrow readings. One reason is that the Court fractured, with Justices Stevens and O'Connor signing on to the judgment but disagreeing with one or more elements of Justice Scalia's reasoning.<sup>78</sup> We need and have some rules for ascertaining constitutional doctrine in the wake of such disagreement,<sup>79</sup> and these rules are related to the breadth of judicial decisions that we prefer. But even when a multimember court is unified in both judgment and reasoning, often there is plenty of debate about how broadly to characterize the case in future disputes. Suppose, for example, that all nine justices had signed on to the plurality opinion in *Michael H.* Would it be proper to follow that opinion's preference for the most specific available tradition in all subsequent substantive due process claims? Would it be proper to follow that opinion only with respect to biological fathers seeking parenting rights beyond visitation when an objecting marital couple has reconciled and objects to anything beyond visitation? Additional variations are easy to pose, and each is conceptually akin to choosing breadth scores for constitutional clauses and post-ratification traditions.

Explaining *why* a listener should assign a broad or narrow characterization to a source can be difficult. The advocate might turn to arguments about what the author(s) of the source intended, the original meaning of the source, the contemporary understanding, the need to either preserve flexibility today or guidance for the future, the proper role of a given decision-making institution, or some other logic. Regardless, room for debate over how to choose the breadth value will open opportunities for happy endings. Any minimally competent lawyer recognizes that a potentially problematic source often can be overcome by keeping it narrow without ignoring it, and that a potentially helpful source can be especially devastating to the other side when inflated into a norm covering a broad swath of activity.

Thus, the breadth dimension has little obvious ideological valence. The substantive due process example sketched above aligned broad with left-wing and narrow with right-wing, but we can find other examples that disrupt these alignments. One is regulatory takings.<sup>80</sup> A constitu-

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77. See *id.* at 138–41, 156–57 (Brennan, J., dissenting) (relying in part on judicial precedent to defend a higher level of generality for tradition in defining liberty).

78. See *id.* at 132 (O'Connor, J., concurring); *id.* at 133 (Stevens, J., concurring).

79. See Lewis A. Kornhauser & Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 CALIF. L. REV. 1, 45–48 (1993) (elaborating and critiquing the narrowest-grounds rule).

80. See, e.g., William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 782 (1995); cf. Michael B. Rappaport, *Originalism and Regulatory Takings: Why the Fifth Amendment May Not Protect Against Regulatory Takings, but the Fourteenth Amendment May*, 45 SAN DIEGO L. REV. 729, 731 (2008) (“As a friend of both economic liberty and originalism, it saddens me to acknowledge that the critics [of regulatory takings doctrine] have, so

tional decision maker who was inclined against economic-value-destroying government regulation might read clauses, scraps of originalist history, perhaps tradition thereafter, and surely certain judicial precedent to indicate that just compensation is required when a government reduces property values from some appropriate baseline, and not only when real property is physically invaded or otherwise appropriated.<sup>81</sup> This would represent a broad reading of legally relevant sources of constitutional analysis, at least along one significant dimension. And, with the opposite inclination, a constitutional decision maker might choose narrow characterizations of the Takings Clause (and the Fourteenth Amendment for state action), certain pieces of originalist history, subsequent tradition, and the judicial decisions that indicate that regulatory takings is a justiciable category.<sup>82</sup>

### 3. *Dynamism*

Finally, generality has been linked to dynamism, although the latter is not obviously included within the former as a definitional matter.<sup>83</sup> The concept of dynamism becomes elusive on careful examination, but the gist of the notion is that sources of constitutional law and their associated meanings can be characterized as relatively dynamic or relatively static. A source or an idea attributed thereto might require or forbid rethinking its proper specification or application. Toward one extreme, today's decision makers would be obligated (not just free) to reconsider the source over time with fresh eyes and open minds regarding the best understanding of that source and the best way to apply that source to any relevant situation. At another extreme, an understanding of the source's meaning and the full set of its applications would be fixed forever. Even

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far, had the better argument. . . . [But] a potentially strong case can be made that the Takings Clause had a different meaning under the Fourteenth Amendment. . . .").

81. Cf. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

82. A way in which the breadth choice does have ideological valence involves the appropriate domain for constitutional as opposed to nonconstitutional argument. "Broad" may expand the domain of constitutional argument at the expense of nonconstitutional argument, and observers may have normative positions about the proper apportionment of normative argument across these categories. "Broad," however, can operate along a different dimension—not how much territory is covered by constitutional norms, but simply how broad a lesson to draw from legally relevant sources of constitutional analysis. A lesson might broadly *add or remove* constitutional arguments from the field. I return to these thoughts in Part III.B.

83. In some ways, dynamism is conceptually separate from "generality" or derivative of it. Literally speaking, a source is not obviously more general by any metric just because it is more dynamic, and more static sources are not obviously less general in any way. Moreover, dynamism might result from abstractness: A source's meaning might be considered dynamic because it is also abstract and therefore has easily contestable content. On the other hand, a source of constitutional law could specifically order dynamic reconsideration over time while more abstract meanings might be liquidated into static ideas, so the dynamism dimension does not collapse into the abstractness dimension. And the apparent functional link between a high level of abstraction and a high level of dynamism suggests that the abstractness dimension is understandably considered in the vicinity of discussions of generality. Again, I am not as interested in getting the concept of generality straight as I am in investigating different dimensions of source characterization that hang together yet operate in practically different ways. For that mission, dynamism fits well with abstractness and breadth.

if these extreme positions cannot be implemented in the real world, the basic contrast is operable.

Return to traffic law one more time. Sticking to first-cut understandings of formal law, we can illustrate how legal sources may be static or dynamic in more than one respect. Start with a twenty-five mile per hour speed limit that is fixed until formally amended. Both the legal rule and its applications seem static. Now imagine an equally concrete rule with more dynamism: the day's speed limit is set at a specific number according to a straightforward formula, such as "twenty-five miles per hour, minus five for each inch of rain forecast by the National Weather Service at noon of the previous day." The legal rule might be called static (if not silly) but its day-to-day applications can be called dynamic. Similar remarks apply to an abstract standard of "reasonable speed" that depends on current driving conditions. Focusing on the standard's applications, the law seems dynamic. At the same time, abstract standards themselves might show either dynamic or static qualities. A reasonable-speed standard might be maintained as an abstraction to be revisited during each application; or, instead, the standard might be converted into a specific speed limit or a formula for calculating the speed limit. Another possibility is that what counts as a reasonable speed may depend on either a static or dynamic set of variables. Perhaps at some point law begins to require consideration of the current state of driving technology in addition to several driving conditions. In this example, one might think that the very idea of "reasonable speed" is (partly) unstable because influenced by a new factor. On the same logic, the concrete rule for a given situation might be dynamic to the extent that its specifics can change from one time period to the next.

With these variations in mind, we can, once again, suggest companion examples from constitutional clauses. Much of the Presidential Oath Clause is about as fixed as we can imagine, given that it actually provides a script for the oath or affirmation in question. Only the initial allocation of representatives in Article I, Section 2 is more obviously static.<sup>84</sup> In contrast, the Census Clause in that same section calls for a periodic "actual Enumeration" of people,<sup>85</sup> which might not be a dynamic concept but does produce different numerical results upon application every decade. Moving a bit further from static meaning is the Warrant Clause, which features a "probable cause" test that is conceivably dynamic in application and across time as technology and tolerance for relevant risks shift. Perhaps the concept itself is subject to dynamic reformulation in terms of relevant factors. Similar remarks are appropriate for the Due Process Clauses and their references to "liberty" deprivations. And, to the extent that any of these clauses are best read to have dynamic quali-

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84. I find the Supremacy Clause difficult to locate on the dynamism dimension on a first take. "To the Contrary" is familiar yet debatable in specification, potentially sensitive to context in application, and susceptible to conversion into rules.

85. U.S. CONST. art. I, § 2, cl. 3.

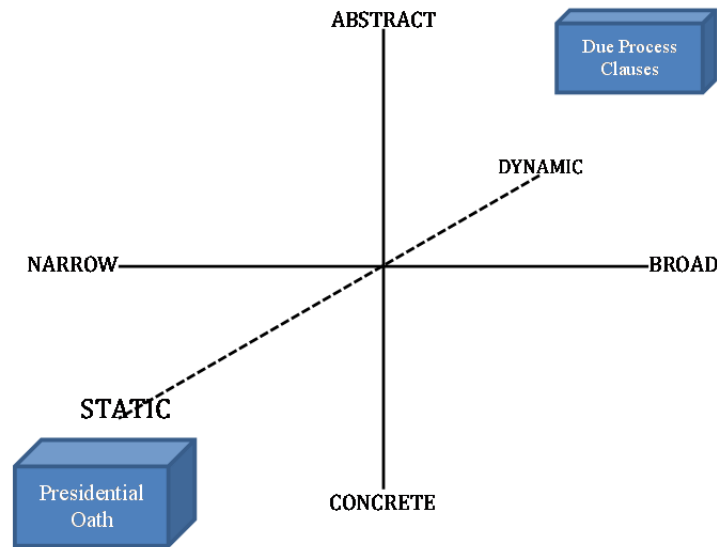
ties, they might be converted into more specific commands over time, as with garden-variety tort standards of reasonableness. (Or vice versa.) In any event, we can now suggest a third dimension of difference between the two clauses with which we began: The presidential oath seems concrete, narrow, and static while the due process guarantee seems more abstract, broader, and potentially dynamic.

Perhaps the point is already made, but the conceptual differences among abstractness, breadth, and dynamism are significant and, ultimately, practically important. Above we distinguished abstractness from breadth,<sup>86</sup> and breadth certainly is different from dynamism. Logically, a constitutional source might suggest an entirely fixed norm for proper conduct governing either a broad or narrow range of conduct; or, instead, the norm might be subject to repeated updating regardless of the norm's breadth. Dynamism also is logically distinct from abstractness, although it might feel as if these dimensions run together. First, a source's degree of abstractness might be static or dynamic. That is, a source could be understood as either abstract or concrete forever, or only for the moment as it awaits transformation into an idea that is more or less abstract. An abstract standard may turn into a specific rule or rules after repeated application, and rules may be raw material for building abstract standards. Second, a source's abstractness might stay the same while its other content changes. Thus an abstract standard governing a situation might or might not include new factors over time, just as the specifics of a concrete rule for that situation might or might not change over time. At least theoretically, then, all eight crude combinations are in play for constitutional law and traffic law alike.

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86. See *supra* Part II.A.2. A high degree of abstractness does make it difficult to tell exactly how broadly a source should be read. And, as mentioned above, abstractness cuts across all three of my dimensions in the sense that the source might not be easy to locate on one or more of those dimensions.

FIGURE 2



Thinking in three conceptual dimensions and depicting these concepts in a two-dimensional medium is difficult. We should not be surprised when even highly skilled constitutional advocates blend these ideas. Conceptual mingling might even advance their causes.

Consider first *Lawrence v. Texas*,<sup>87</sup> which mingled abstractness with dynamism. Justice Kennedy’s exit paragraph on the Due Process Clauses asserts that their authors “might have been more specific” if they had thought they knew all possible components of liberty.<sup>88</sup> The discussion then moves swiftly from abstractness to dynamism in contending that later generations were expected to see “certain truths” hidden from their predecessors and that “persons in every generation can invoke [the Constitution’s] principles in their own search for greater freedom.”<sup>89</sup> Next consider *Board of Regents v. Roth*,<sup>90</sup> which mingled breadth with dynamism. Justice Stewart’s procedural due process analysis describes liberty and property in a single breath as “broad” terms<sup>91</sup> that were “purposely left to gather meaning from experience”<sup>92</sup>—which need not be the same thing.<sup>93</sup> Finally, consider the plurality opinion in *Trop v. Dulles*,<sup>94</sup> which

87. 539 U.S. 558 (2003).

88. *Id.* at 578–79.

89. *Id.*

90. 408 U.S. 564 (1972).

91. *Id.* at 571.

92. *Id.* (quoting *Nat’l Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting)).

93. Justice Black indicated the distinction between abstractness and breadth when he criticized the substitution of words “more or less *flexible* and more or less *restricted* in meaning” for the actual constitutional text that he thought relevant. *Griswold v. Connecticut*, 381 U.S. 479, 509 (1965) (Black, J., dissenting) (emphasis added); see also *Poe v. Ullman*, 367 U.S. 497, 541 (1961) (Harlan, J., dissent-



managed to mingle all three dimensions. Chief Justice Warren's Eighth Amendment analysis concludes that "[t]he *exact scope* of the constitutional phrase 'cruel and unusual' has not been detailed by this Court," which involves matters of abstractness and breadth, and then adds dynamism by claiming that the Court had already "recognized . . . that the words of the Amendment are *not precise*, and that their *scope is not static*. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."<sup>95</sup> The author of each opinion might have understood as well as anyone the subtle distinctions and relationships among these three dimensions of source characterization, but, if they did, they did not slow down for the rest of us.

In any event, sparring over the appropriate level or kind of dynamism is another part of the ordinary routine in constitutional debate. At times the kind or degree of dynamism in a given source of constitutional law seems much less clear than my stylized traffic law illustrations, and opportunities for choice will attract the attention of advocates and decision makers alike. Specific examples of conflict on this dimension are illuminating even if frustrating. Kennedy's suggestion that "liberty" is a dynamic concept did not go unchallenged, of course. Three dissenters led by Justice Scalia pressed a different and supposedly more static view of federal constitutional law and adjudication:

Social perceptions of sexual and other morality change over time, and every group has the right to persuade its fellow citizens that its view of such matters is the best. . . . [But the state's] hand should not be stayed through the invention of a brand-new "constitutional right" by a Court that is impatient of democratic change.<sup>96</sup>

In fact, many people might believe that highly dynamic law is either horribly bad or simply not law at all. Legal concepts, one would think, must have an irreducible minimum content that lasts for anyone using them to fairly claim to be under their influence. In any event, different advocates profess different tolerance levels for dynamism in constitutional sources, and those levels can have outcome-determinative effect in a constitutional debate.

We should pause here, however, to flag a deep conceptual problem with the dynamism dimension. Judges, lawyers, and scholars fight over whether they are in fact advocating legal change or not. The simple view is that the advocate who needs legal change to win should lose the legal argument.<sup>97</sup> And so Kennedy did not characterize his opinion as inventing a new right, but rather as resorting to an original principle. In that

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ing) (making distinct references to "broader" and "more flexible" in summarizing due process precedent).

94. 356 U.S. 86 (1958).

95. *Id.* at 99–101 (plurality opinion) (emphasis added) (footnote omitted).

96. *Lawrence v. Texas*, 539 U.S. 558, 603 (2003) (Scalia, J., dissenting).

97. Cf. Robert Post, *Theorizing Disagreement: Reconceiving the Relationship Between Law and Politics*, 98 CALIF. L. REV. 1319, 1323 (2010) ("Bureaucracy and law each rest on the presumption of agreement, although not necessarily on the fact of agreement.").

respect, he was following the distinction drawn by many constitutional scholars between creating new law and using old abstract principles to generate unexpected applications.<sup>98</sup> We might reject Kennedy's preferred focus and pay attention to applications instead, just as many people pay attention to their year-to-year income tax rates instead of current-law baselines from which tax "changes" can be measured. On the other side, presumably Scalia understood that old legal norms must be applied in new circumstances and in ways that, in one sense, generate new law.<sup>99</sup>

All this is to say that the appropriate baseline for constitutional change is not entirely settled, partly because, in this field, old ordinarily beats new and advocates do not like to be beaten. What counts as static as opposed to dynamic, and the extent to which law can be either, are important topics that deserve more scholarship.<sup>100</sup> For present purposes, we can get away with observing that part of modern debates over the dynamism dimension is what counts as dynamic in the first place. Some flexibility in characterizing sources of constitutional law follows from the conceptual fragility of notions like "new," "old," "change," and "the same."

In fact, debates over dynamism pervade modern constitutional argument. Familiar illustrations come again from the Eighth Amendment context. Vocal minorities have suggested that cruel and unusual punishment means a list of particular modes of punishment that was fixed at the time of ratification,<sup>101</sup> while others interpret the Amendment to require updating by reference to "evolving standards of decency."<sup>102</sup> The latter camp holds that the Amendment's scope "is not static,"<sup>103</sup> while the former camp complains about judicial value judgments and in-

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98. See *supra* text accompanying notes 38–40. Amar uses a similar idea in his most recent book. See AMAR, *supra* note 1, at 107–08 (asserting that "the new rules" allowing testimony from criminal defendants "merely involved the application of old principles to a new context").

99. See, e.g., *Republican Party of Minn. v. White*, 536 U.S. 765, 784 n.12 (2002) (Scalia, J.) (contending that even "inferior courts often 'make law,' since the precedent of the highest court does not cover every situation, and not every case is reviewed"); *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 549 (1991) (Scalia, J., concurring) ("I am not so naive (nor do I think our forebears were) as to be unaware that judges in a real sense 'make' law. But they make it as judges make it, which is to say as though they were 'finding' it—discerning what the law is, rather than decreeing what it is today changed to, or what it will tomorrow be.").

100. For a few treatments of the concept of legal change, see Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731 (1991) (using predictability); Marc Galanter, *Conceptualizing Legal Change and Its Effects: A Comment on George Priest's "Measuring Legal Change,"* 3 J.L. ECON. & ORG. 235 (1987); George L. Priest, *Measuring Legal Change*, 3 J. L. ECON. & ORG. 193 (1987); see also Jean-Louis Halpérin, *Law in Books and Law in Action: The Problem Of Legal Change*, 64 ME. L. REV. 45, 47 (2011) (claiming that "all legal phenomena are in constant evolution"); James F. Spriggs, II & Thomas G. Hansford, *Measuring Legal Change: The Reliability and Validity of Shepard's Citations*, 53 POL. RES. Q. 327 (2000) (encouraging reliance on Shepard's coding for cases). I hope to contribute to this line of scholarship in the near future.

101. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 608–09 (2005) (Scalia, J., dissenting).

102. See, e.g., *id.* at 561 (citation omitted).

103. *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

stability in the law.<sup>104</sup> Constitutional progressives can add an assertion that they are merely following old orders to update the operative meaning of the Amendment, while their opponents can deny this and concentrate on particular results. Another notable example involves the Equal Protection Clause. Several scholars and Supreme Court Justices have indicated that the best understanding of the Clause involves not only an abstract principle, but a principle subject to revision in light of experience and contemporary judgment. That position was fairly evident in cases such as *Brown*<sup>105</sup> and *Harper*.<sup>106</sup> In the latter case, Justice Black objected that the majority was both upending precedent and overstepping its limited authority by “giving [the Equal Protection Clause] a new meaning which it believes represents a better governmental policy.”<sup>107</sup>

And again, the dynamism dimension can be applied to all sources of constitutional argument. The thought that clauses might be relatively static or dynamic is not novel, although it is controversial, and with minimal imagination we can sort judicial precedent into similar categories. Some cases suggest or are taken to suggest generative principles while others are not. *Brown* might be the leading example, given the struggle over its precise meaning that continues straight through the Court’s recent school assignment cases.<sup>108</sup>

On the other hand, there might be reason to resist thinking that originalist history or tradition can be dynamic. The relevant events or the surviving evidence thereof might be interpreted differently over time, and this is an important concession, but the events and the evidence that we have collected do not really “change.” Like the presidential oath, we could emphasize, the literal content of sources such as Madison’s *Memorial and Remonstrance*<sup>109</sup> or extended practices regarding religious symbols do not change no matter how many times we examine them. In this respect, history cannot be amended or overruled. But we can reconnect history and tradition with dynamism by remembering that, in modern constitutional argument, these sources are used to support legal propositions meant to guide human behavior now. Like clauses and cases, they are source material for legal norms that may be abstract or specific, broad or narrow, and, yes, dynamic or static. The nature of historical

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104. See, e.g., *Roper*, 543 U.S. at 629–30 (Scalia, J., dissenting).

105. *Brown v. Bd. of Educ.*, 347 U.S. 483, 492 (1954) (“In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written.”).

106. *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 669 (1966) (“Notions of what constitutes equal treatment for purposes of the Equal Protection Clause do change.”).

107. *Id.* at 672 (Black, J., dissenting); see also *id.* at 677 n.7 (indicating that *Plessy* was wrong the day it was decided).

108. See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 747 (2007) (plurality opinion of Roberts, C.J.); *id.* at 798–99 (Stevens, J., dissenting).

109. JAMES MADISON, A MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785).

and traditionalist sources is not so different from other sources in this way.

Finally, as with abstractness and breadth, dynamism preferences do not strictly follow left/right ideological divisions, although the correlation does seem notably high today. True, we might throw down examples of left-wingers decrying the destabilization of Warren Court precedent and right-wingers favoring an extremely soft force for stare decisis when the case law gets inconvenient. But right and left do seem to have different leanings when it comes to other sources of constitutional argument. Recent examples of right-wingers promoting dynamic understandings of constitutional sources have become quite scarce.<sup>110</sup> One can imagine that the older values that we can identify with confidence correlate well enough with contemporary right-wing commitments, and therefore dynamic constitutional concepts represent a threat to this faction. One can imagine the opposite being true for left-wing commitments. Moreover, there is a respectable position for at least a set of constitutional disputes that, however abstract were the concepts in the beginning, a stable meaning was liquidated by early practice. On this view, abstractness becomes detached from dynamism through a kind of path dependence that is happily enforced by contemporary decision makers. Caleb Nelson, among others, has investigated this idea of liquidation.<sup>111</sup>

But occasionally the political right associates itself with a modest form of constitutional dynamism. Consider instances in which an advocate shifts from originalist history to post-ratification tradition. More specifically, think about the use of tradition to confirm presidential power under Article II. Although he voted against presidential power on the judgment, Justice Frankfurter helped this non-originalist argument along in the *Steel Seizure Case*.<sup>112</sup> “It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them,” he wrote.<sup>113</sup> The thought was later picked up by fans of executive power. A nice example is Justice Rehnquist’s opinion in *Dames & Moore v. Regan*,<sup>114</sup> which combined a pro-executive result with a narrow holding, the

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110. Compare originalists rejecting living constitutionalism. See, e.g., Douglas H. Ginsburg, *Originalism and Economic Analysis: Two Case Studies of Consistency and Coherence in Supreme Court Decision Making*, 33 HARV. J.L. & PUB. POL’Y 217, 225 (2010) (“The proposition that the most salient feature of a written constitution is its ‘adaptability’ presents obvious difficulties for the Rule of Law.”). Here I am excluding examples, such as campaign finance debates, in which right-wing advocates might be taking advantage of dynamic constitutional concepts but do not acknowledge as much. A close call, I think, is the majority opinion in *District of Columbia v. Heller*, 554 U.S. 570 (2008), which analogized free speech claims in refusing to interpret the Second Amendment to cover only weapons available in 1791. See *id.* at 582.

111. See Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 525–29 (2003).

112. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

113. *Id.* at 610 (Frankfurter, J., concurring).

114. 453 U.S. 654 (1981).

suggestion that historical sources are hopelessly vague, and the semi-dynamism of Frankfurter's gloss of post-ratification life.<sup>115</sup>

Another candidate for overt dynamism in the service of rightward results is Justice Stewart's dissent in *Engel v. Vitale*.<sup>116</sup> He used contemporary practice in a religiously diverse country as well as tradition to defend the Regents' Prayer. Along the way he made remarks about history that today would be unorthodox even for the boldest judicial opponents of public school prayer:

The Court's historical review of the quarrels over the Book of Common Prayer in England throws no light for me on the issue before us in this case. . . . Equally unenlightening, I think, is the history of the early establishment and later rejection of an official church in our own States. . . . What is relevant to the issue here is not the history of an established church in sixteenth century England or in eighteenth century America, but the history of the religious traditions of our people, reflected in countless practices of the institutions and officials of our government.<sup>117</sup>

However later generations of advocates defended their tolerance for public school prayer,<sup>118</sup> these examples suggest that dynamic concepts can be friendly to more than one ideological camp.

### *B. Extremes and Combinations*

We are now in a position to make additional generalizations about level of generality choices (loosely defined) and the prospects for constitutional comedy. Each choice on each dimension implicates somewhat different trade-offs for the advocate. At the same time, certain combinations might hang together. Logically, the three dimensions are distinct, but, realistically, we can expect clumping around certain combinations given the goals that we have ascribed to our hypothesized constitutional advocate. Understanding modern constitutional argument calls for investigating both the differences and the connections among abstractness, breadth, and dynamism.<sup>119</sup>

The first point is that certain extreme characterizations will make a source, in effect, irrelevant. The most abstract, the least broad, or the most dynamic characterization of any source of constitutional argument deprives that source of influence over live decisions. The source be-

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115. See *id.* at 659–60, 686.

116. 370 U.S. 421 (1962).

117. *Id.* at 445–46 (Stewart, J., dissenting).

118. See, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 112–13 (1985) (Rehnquist, J., dissenting) (returning to originalist history); ROBERT L. CORD, *SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION* (1982).

119. I am fairly confident that further reflection on various level-of-generality related combinations will yield valuable additional insight. Below is an initial stab. I focus on what seemed to me the most tempting or familiar combinations.

comes totally vacuous,<sup>120</sup> automatically distinguishable,<sup>121</sup> or immediately obsolete. Because such extreme characterizations are functionally equivalent to eliminating the source, we might ignore these possibilities in the spirit of dealing with presumably relevant sources. But this would expurgate the character of modern constitutional debate. Once-popular sources of constitutional argument can be weakened through characterization to the point of disuse; later they might be explicitly repealed, overruled, or otherwise purged; and a truly infamous subset of these sources will be converted into some form of antiprecedent.<sup>122</sup> Advocates, therefore, have practical reasons to consider pitching maximally abstract, narrow, or fleeting content for sources that cannot be bent in their direction.

When a given source is instead apparently favorable, the advocate's characterization incentives will, for the most part, reverse. If possible, an apparently favorable source should be spun as maximally concrete/specific, broad, and static.<sup>123</sup> These characteristics harden a source of argument into an irreversible directive that clearly covers all of the territory needed to achieve the advocate's goal. True, pushing for a broad understanding of constitutional sources might spook modest decision makers who prize small steps. And an advocate who cares about only one case might not otherwise care about breadth. But many advocates care about a range of related circumstances, including attorneys representing governments and interest groups. And sometimes the provable facts of a single case are in doubt while constitutional debate goes on. So even an advocate hired for only one constitutional dispute could prefer a broad legal norm.

Also worth remembering is that the normative valence of a source is not always secure. If the source in question might be reinterpreted to point against the advocate's preferences, then hardening thereafter would make the advocate's position that much worse. We have, so far, held constant the favorable or unfavorable valence of the given source. But obviously advocates attempt to control this normative valence; indeed, fighting to make a source abstract is sometimes an intermediate step toward a new, positive valence on the source. At a sufficiently abstract level, a commitment to "liberty" might entail very little or a lot of government regulation, and a commitment to "property" might entail very little or a lot of government redistribution. Time might tell.

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120. Cf. Berger, *supra* note 9, at 733 ("[A]t a high enough rung on the ladder of abstraction, disparate things become the same." (quoting JACQUES BARZUN, *A STROLL WITH WILLIAM JAMES* 65 (1983))).

121. Cf. *Miller v. Am. President Lines, Ltd.*, 989 F.2d 1450, 1459 (6th Cir. 1993) (contending that a maritime case had been "condemned to a kind of legal limbo: limited to its facts, inapplicable on its facts, yet not overruled").

122. See J.M. Balkin & Sanford Levinson, *Hermeneutic: Interpreting Law and Music: Performance Notes on "The Banjo Serenader" and "The Lying Crowd of Jews,"* 20 *CARDOZO L. REV.* 1513, 1553 (1999); Jamal Greene, *The Anticanon*, 125 *HARV. L. REV.* 379 (2011).

123. It might not be possible for sources to be characterized as infinitely broad, covering every situation imaginable, but otherwise sources retain their relevance when characterized as maximally broad, concrete, or static.

At least occasionally, the normative valence of a source will be frustratingly unclear or unpredictable, such that prudence will suggest hedging. If an advocate is unsure whether his audience will point a given source in his direction or not, what should the advocate recommend regarding our three dimensions of choice? Well, certain combinations of positions will minimize variance in expected outcomes. Abstract, narrow, and dynamic characterizations each put a floor on the depth of tragedy that the advocate might experience, while also placing a low ceiling on the height of comedy that can be achieved. As suggested above, combining these characterizations reduces the significance of a given source and shifts constitutional decision making to other grounds. Sufficiently risk-averse advocates might argue for this combination whether the source is apparently unfavorable or simply unclear in its normative valence.

Advocates who are more optimistic might move toward a different combination. Slightly more hope for the comedic potential of a given source, or slightly greater confidence in the process of constitutional decision-making, should make an advocate more open to continued argument based on the contested source. Such openness to repeat play with a source aligns with characterizations that are relatively dynamic, if not abstract. But such optimism seems to militate against extremely narrow characterizations. A relatively broad understanding will keep the source in play for this and similar controversies.

Support for abstract, dynamic, yet relatively broad understandings can be found on today's left wing with regard to certain constitutional clauses and, for some, the Constitution as a whole. Some liberals or progressives seem untroubled by or resigned to supreme law covering a large part of social life, while harboring concern that the conventional sources of constitutional analysis might hinder or not help their causes. On a different end of the ideological spectrum, those on the political right often characterize particular constitutional sources or the Constitution itself as a set of specific and static rules that dictate outcomes in non-ideological fashion. Although this commitment against abstract and dynamic ideas in constitutional law is not without exception on the political right, it is a tendency.

But note that this twofold combination does not commit right-wing advocates on the dimension of breadth. One can easily believe that the Constitution covers either a lot or only a little territory while also believing, as a matter of legal philosophy, that constitutional law just is not "law" unless rule-like and unchanging absent Article V amendment. The same observation applies to categories of sources in constitutional argument, such as constitutional clauses and originalist history.<sup>124</sup> Even if le-

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124. We do find originalists telling us that "the" level of generality question should be answered with originalist history. *See, e.g.*, RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 119–20 (2004); ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 149 (1990); KEITH E. WHITTINGTON, *CONSTITUTIONAL*

gal philosophy has nothing to do with it and right-wing advocates simply prefer static rules because they happen to believe that the rules will come out well for them, this group might, nevertheless, hedge on breadth for strategic reasons. They might be confident about scoring favorable results in nonconstitutional politics and about the ability of such victories to sustain an energized political movement. These beliefs could underwrite a preference for specific, static, yet narrow constitutional law.

Plainly there is guesswork and overstatement in these remarks, and they need not forecast the commitments of right and left over time. In recent years, a few on the political left have raised a measure of concern over lawyers litigating the way to same-sex marriage,<sup>125</sup> while many on the political right have embraced lawyers litigating the way to weaker gun regulation, campaign finance laws, and race-based affirmative action programs. In addition, certain positions on my three dimensions might be tactically risky to pursue. As I intimated above, some audiences are repelled by overstatement or by sweeping conclusions that box people in and threaten to disrupt existing systems. These conservatives might stop listening to the advocate who talks tall, or they might thwart the advocate in another way, such as by decreasing the strength of any source that must be characterized as concretely, broadly, and statically favoring the advocate's cause. Effective advocates might have to placate such audiences. But the above comments do sketch plausible reasons for different factions to adopt various combinations of characterizations for constitutional sources.

#### IV. ADVOCACY AND LEGAL DESIGN

##### *A. Why Pay Attention?*

Combining these source characterization dimensions—abstractness, breadth, dynamism—might produce enough analytical freedom to increase greatly the chances of constitutional comedy, if that is what you want. This is true whether “source” refers to large categories under headings such as history and precedent, or instead is split into smaller components such as a framer's remark during a drafting process or a block quote in a fractured Supreme Court decision. Relevant sources might be minimized into a hazy insignificance when they seem unfriendly to the advocate's cause, or magnified into sweeping and irreversible directives when they seem to support the advocate's preferred result. If the audience cannot be convinced of these characterizations, the advocate might resort to pitching abstract or dynamic understandings when uncertainty beats a certainly bad outcome.

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INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 186–87 (1999). To the extent this is a noncircular response to the challenge, we might interpret it as deferring on the breadth question and perhaps the dynamism question, but not necessarily the abstractness question.

125. See William N. Eskridge, Jr., *A Pluralist Theory of the Equal Protection Clause*, 11 U. PA. J. CONST. L. 1239, 1262 (2009).



Pushing these choices cannot guarantee laughter in the final scene of any constitutional debate, of course. Normally the advocate is not the sole decision maker, and therefore his or her happy ending depends on others falling into line. A single advocate can only hope to increase chances of comedy and decrease chances of tragedy by peddling characterizations of sources that become relevant to a constitutional question. In addition, some participants in these debates are independently committed to abstract or concrete, broad or narrow, dynamic or static qualities for constitutional law. We expect academics to be among them, and one might say that such jurisprudential differences are themselves ideological.

But surely a number of people taking positions on constitutional questions do so instrumentally, for the primary purpose of reaching a specific answer to which they are committed for other reasons. My sense is that most nonlawyers care more about what the norm will be for abortion or marriage or punishment than how that norm is achieved, let alone how supposedly relevant sources of information are characterized along the way to reaching the norm. Ordinary people might not even care much whether the norms are generated by law and legal institutions or instead by private ordering. In any event, there is no doubt that people do and should care about these particular outcomes.

The above should prompt us to ask whether we should ever listen to constitutional advocates. Using the tools of the trade and abiding by the conventional demands of their profession, the best of them spin sources of law this way and that without losing sight of their bottom line and without crossing over into overt nonlegal moralizing. But why should even the most spectacular performance matter to any thoughtful person who wants good answers to important social questions?

A strong reason is especially hard to come up with when the advocates in question crisscross lines between abstract/concrete, broad/narrow, and dynamic/static in opportunistic fashion. In a first-best world, perhaps a long distance would separate eager advocates making these moves from attentive audiences with even a dash of doubt about the right conclusion. Source characterization issues are unavoidable, but answers often are suggested in service of a conclusion that is preferred on other grounds. The rational response might be to turn our backs and do something else. If we did, there probably would be much less constitutional advocacy contending for our attention in the first place. And perhaps more peace, or at least more unadulterated normative discussion.

Credibility problems need not be as great as those facing hired-gun advocates with a case-specific job. People might aggregate their approach to lumps of sources, announcing that entire categories should be treated in a particular way. This is a step toward a broadly applicable method of constitutional interpretation, construction, or decision, as opposed to an ad hoc approach that comes from a narrow tactical necessity. To the extent that a commentator cannot utterly dismiss a source catego-

ry, the commentator might instead argue for a systematic characterization of such sources to enhance or diminish their significance. Originalist history or judicial precedent might always be treated as if it can deliver only narrow messages not subject to dynamic reconsideration that might inflate their significance over time, or instead concrete and broad messages that are equally stable to reinforce their significance over time. Once again, a fallback strategy might be to call for abstract or dynamic characterizations within a disfavored category. These possibilities roughly map onto Federalist Society and American Constitution Society leanings regarding the use of originalist sources and judicial precedent.

But it is difficult to grant much respect to these wholesale approaches, either. Insofar as they are motivated by the desire to achieve a pattern of constitutional results preferred on other grounds, a similar foundation for disregard persists. The ideological valence of supposedly broader constitutional methodologies might be less acute, but not obviously better justified.<sup>126</sup> This skeptical conclusion is not much changed by the fact (and it is a fact) that many commentators are indeed independently interested in how best to treat categories of sources. This cohort might be striving for the best interpretation of constitutional law that they can achieve, and they might be honestly ignoring wins and losses for various ideological camps. But consumers of constitutional commentary lack effective means for sorting between clever strategy and attempts at sound constitutional method from a motive of good governance. Both efforts look the same. And this is particularly true because truly sophisticated strategists will pick out some bullets to bite simply to build credibility.

As Mike Seidman and Mark Tushnet put it in the mid-1990s, “If great and transcendent principles are not really at stake—if constitutional argument amounts to no more than a series of tendentious rhetorical moves—then it is hard to know why one should bother.”<sup>127</sup> Yet constitutional argument persists.<sup>128</sup> It persists despite the obvious significance of source characterization choices and the equally obvious incentives to slant these choices in one ideological direction or another. Why? What is the point?

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126. Cf. Alexander Volokh, *Choosing Interpretive Methods: A Positive Theory of Judges and Everyone Else*, 83 N.Y.U. L. REV. 769 (2008) (supposing that interpretive methods constrain judges' decisions, contending that strategic judges will choose methods that yield results closest to their policy preferences, and suggesting that this selection bias will yield a skewed portrayal of how the method would operate if all judges subscribed). To be clear, reviewing a pattern of results can be a perfectly appropriate element of normative analysis, see JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* 29–32 (Erin Kelly ed., 2001) (discussing reflective equilibrium), and below I will suggest that the motive of an advocate does not fully determine the intellectual value of the advocate's claims. In the text above, I am voicing a complaint and a frustration that are at least plausible.

127. SEIDMAN & TUSHNET, *supra* note 33, at 194.

128. See *id.* at 193–94, 200 (suggesting that constitutional arguments, although usually made by energized extremists, might nonetheless promote some social cohesion and beat the alternative of polarized non-constitutional argument).

*B. Tragic and Comic Takes*

A tragic account of the status quo is that we are trapped in a bad equilibrium, with people drawn unduly to the prestige of constitutional debate without those debates producing meaningful social benefits. Advocates operate against the backdrop of loud and widespread respect for the Constitution without enough agreement on what this means to tie one's hands in truly big decisions. At other times, the hotly debated constitutional issues might not make a major difference in our lives anyway, aside from case-specific outcomes. Those who still listen to constitutional arguments might be arms-racing partisans trying not to fall behind on stocks of rhetorical ammunition, or they might be relatively unsophisticated audiences who are overly impressed by the firepower on one side or another. To be fair, one might suppose that the interpretive freedom provided by some level of generality choices creates a unifying discourse for people who fundamentally disagree. But this position is, at best, not yet proved. Resorting to constitutional argument easily can increase the perceived stakes of a dispute in ways that escalate conflict, protract disagreement, and slacken efforts at creative settlement, as people dig in for what they take to be the final showdown.<sup>129</sup> This is a dark but not unrealistic view.

There is a brighter account of persistent constitutional debate, however, if we search for it. The pages above actually provide the foundation for it. As we reviewed source characterizations along the dimensions of abstractness, breadth, and dynamism, we examined not only spirited debates but also different ways in which constitutional law is understood and designed. Illuminating these elements of constitutional design might help us find constitutional comedy on a large scale.

First, choices about the appropriate degree of abstractness, breadth, and dynamism are necessary to perform modern constitutional analysis. Our conventions demand consideration of certain sources which must be examined for meanings that can be plugged into a larger decision procedure. At minimum, this source-by-source meaning will include levels of abstractness, breadth, and dynamism. These characterizations are unavoidable. They are part of legal meaning as we know it. To be sure, this necessity actually is bad news for some people. For those who suspect that modern constitutional argument is a distraction because orchestrated by independent ideological commitments, the complication of sorting through source-characterization choices only adds mental labor to an unworthy exercise.<sup>130</sup> If, however, you believe that translating disagreements into constitutional form is even slightly beneficial on net, at least for some issues, then somebody should be evaluating the generality-

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129. See Adam M. Samaha, *Talk About Talking About Constitutional Law*, 2012 U. ILL. L. REV. 783 [hereinafter Samaha, *Talk*]; see also Adam M. Samaha, *Low Stakes and Constitutional Interpretation*, 13 U. PA. J. CONST. L. 305 (2010).

130. For a classic exposition of this kind of concern, see SEIDMAN & TUSHNET, *supra* note 33, at vii, 193–94.

related choices entailed by the exercise. That some advocates try to take advantage of uncommitted audiences does not mean that their motivated arguments about abstractness, breadth, and dynamism are uninformative. People can be both strategic and insightful. Consider the numerous examples in Part II. We can think of each of the participating judges, lawyers, and scholars as “advocates” and nevertheless use their articulated positions as occasions for reflection on how modern constitutional argument must proceed.

But we need not have even subsistence-level faith in modern constitutional argument to find significant value in examining generality-related choices. These choices would retain connections to the quality of our law even if they were not necessary to make constitutional arguments. Indeed, if it were somehow possible to eliminate the entire category of constitutional law, we still could not avoid socially significant decisions related to levels of generality in law. Degrees of abstractness, breadth, and dynamism in law and its sources may or may not link up with “great and transcendent principles,” but they do affect how life goes in our society and not only how one side of any issue-specific debate fares against the others.

Contemporary constitutional debates contribute something valuable to our understanding of those choices. They habitually address core questions of legal design that implicate socially significant trade-offs that cut across the typical sorting of constitutional issues into subject-matter controversies, such as abortion or affirmative action or gun control or presidential power.<sup>131</sup> We can affirm the importance of each of those topics without denying the importance of other dimensions of choice. Sometimes these design choices will indeed distract people from their justifiably deep commitments, but somebody ought to carefully examine the feasibility and effects of running a legal system at various levels of abstractness, breadth, and dynamism. If constitutional law were just about speed limits, these dimensions of choice would stand out even more clearly. But even now, these dimensions routinely attract attention from constitutional advocates. This practice is not only a matter of appealing

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131. This is just the kind of evaluation that Sunstein pressed with respect to judicial decisions and opinion writing on the dimensions of breadth, theoretical depth, and reversibility. See SUNSTEIN, *supra* note 11, at 261–63 (discussing, for instance, needs for flexibility as opposed to predictability); see also Cass R. Sunstein & Edna Ullmann-Margalit, *Second-Order Decisions*, 110 ETHICS 5, 7 (1999). He went on to apply general design recommendations to subject-matter controversies, but his contribution was no less valuable for that. By singling out Sunstein’s work I do not mean to ignore the efforts of countless other scholars in law schools and elsewhere who are interested in similar legal design questions.

On that note, I want to reemphasize the lasting importance of subject-matter controversies as they are typically categorized. Indeed, the legal norms for abortion and presidential power and so on are also legal design questions, in a sense. And one could observe that those questions “cut across” the design questions that I highlight here. My point is that both categories of questions should be understood as significant and crosscutting in different ways. Constitutional advocates sometimes are narrowly concerned about the results in standard subject-matter terms, but, even when they are so focused, they often end up speaking to my legal design questions, too. This helps the rest of us pay some attention to questions that, in my opinion, are also socially significant.

to *any* supposedly neutral ground for deciding a contested issue, but also a matter of appealing to what many people reasonably believe is important to the proper design of a legal system.

As we have seen, the abstractness choice is connected to the rules/standards distinction, which is easy to oversimplify but undeniably noteworthy. Abstractness choices implicate trade-offs involving decision costs, error costs, and the mix of clarity, predictability, and flexibility that law provides.<sup>132</sup> The location of sources along the dimension of abstractness generates various advantages and disadvantages across time. To characterize sources of law as relatively abstract or vague is (ordinarily) to establish flexibility for dealing sensibly with details in case-specific applications that might not be foreseen. To characterize sources of law as more concrete or specific is (ordinarily) to sacrifice these upsides in exchange for ease of application and potentially healthy constraints on official discretion. On the other hand, this tends to raise the stakes and the costs of reaching a correct conclusion on the normative direction of the rule in the first place, whereas higher levels of abstraction defer decision costs to future decision makers. To be sure, those who influence the shape of legal systems ought to be aware of other design dimensions, including complexity. But the rules/standards distinction has captured sustained attention for good reasons. Equally important for present purposes, there remain fairly debatable questions regarding how abstract our constitutional law is or should be. Those questions do not get less important just because result-driven advocates offer convenient answers.

The breadth dimension is linked to a similarly important design choice. A decision about how broadly to understand a source of constitutional law is simultaneously a decision about how much policy space will be governed by that piece of supreme law. Jamming numerous social choices into the supreme law category withdraws them from ordinary policy debate and private ordering. Such breadth for supreme law makes it easy for people to assert their normative positions in such forms and not merely as moral, ethical, or other normative claims. In earlier work of mine and others, the syndromes of constitutionalizing arguments have been suggested,<sup>133</sup> but it is also theoretically possible for constitutionalization to have a net beneficial impact.<sup>134</sup> In addition to a potentially cohesive dialogue, a lot of supreme law might stabilize the legal system. And

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132. See, e.g., Adam M. Samaha, *Undue Process*, 59 STAN. L. REV. 601, 619 (2006) (noting different cost profiles over time).

133. See Samaha, *Talk*, *supra* note 129, at 789–800.

134. See SEIDMAN & TUSHNET, *supra* note 33, at 200 (suggesting with mixed emotions that “constitutional rhetoric provides the only vocabulary we have for reaching beyond ourselves and appealing to universal values”); BALKIN, *supra* note 40, at 70 (suggesting with unmixed emotion a similar thought regarding legitimacy through constitutional debate); see also LOUIS MICHAEL SEIDMAN, *OUR UNSETTLED CONSTITUTION: A NEW DEFENSE OF CONSTITUTIONALISM AND JUDICIAL REVIEW* 55, 210–16 (2001); LOUIS MICHAEL SEIDMAN, *ON CONSTITUTIONAL DISOBEDIENCE* 7–9, 25–26, 142 (2012) (suggesting that the Constitution might be used as a source of common vocabulary regarding shared abstract values, instead of supreme law that must be obeyed regardless of any other moral and political considerations).

stabilization might be useful or destructive. That the social value of a given degree of breadth is honestly debatable makes more debate potentially quite helpful. The challenge in delivering reliable answers on the effects and desirability of various breadth choices makes the topic amenable to contributions from many sources, including hired-gun advocates. Note, too, that I am using a relatively thin understanding of constitutional law. We could raise the social stakes by packing more into the concept, but supremacy within law is all we need to make the design choice socially significant. Even if the notion of constitutional law is drained of cultural resonance and any supposed relationship to fundamental values or the foundational elements of our government's structure, the scope of supreme law almost certainly matters to the character and health of our society.

Finally, the dynamism choice is at least equally connected to crucial legal design trade-offs. It implicates our feelings about legal stability, the value of rethinking the status quo, and the prospects for human-engineered progress. Many people want to hold on to what we have in law and its component sources, and many others are willing to destabilize the system and question old premises with the hope of achieving social improvement.<sup>135</sup> The depth of disagreement on such questions is illustrated by advocates doubting whether the other side has an adequate understanding of what counts as law in the first place. Now, it might not be sensible to make sweeping judgments about whether our law or even just our constitutional law ought to be more or less dynamic. Perhaps a sensible judgment on dynamism is actually a series of localized judgments regarding particular fields of law. But once again the challenge of making either global or localized judgments on this dimension suggests that many voices can contribute to some resolution of the challenges, however provisional. Advocates who otherwise might be ignored on fears of manipulation might well contribute useful information and helpful suggestions for those who care about legal design writ large.

If these dimensions of choice are at least arguably significant to society, and if we can consider these choices with adequate detachment from distracting spin, then we might be inspired to consider offbeat combinations. Above I contrasted the presidential oath with the due process clauses by locating them at two opposite corners in our three-dimensional design space. Perhaps it is intuitive to characterize sources as either concrete, narrow, and specific or abstract, broad, and dynamic. Furthermore, there are tensions or salient risks within certain combinations: concrete, broad, and specific constitutional norms risk many costly errors in application if the norm designer is not fully informed and care-

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135. These pulling and pushing considerations overlap with the abstractness choice and the rules/standards distinction with which it is associated, but dynamism can be understood to include distinctive features. As discussed in Part II.A.3, rules might be fixed or else changed into standards or rules with different content, and standards can be fixed or else changed into rules or standards with different content.

ful, while equally broad but abstract and dynamic norms foretell high decision costs. Narrowing up constitutional norms can alleviate some of these problems, but the downside is less guidance from supreme law or equally broad coverage but with increasing complexity due to the multiplicity of norms. Just because the possible combinations are numerous and the trade-offs often difficult, however, we should anticipate counter-intuitive combinations working best for many situations. These offbeat outcomes should become more attractive given plausible combinations of design preferences.

For instance, within some domain a thoughtful observer might conclude that supreme law should be concrete and narrow but also dynamic, yielding clear but only episodic guidance. This observer must highly value clarity and targeting in supreme law to avoid overbroad constraints on individual judgment, but also must believe that the rules will need updating in situations of rapid change. This is not a foolish combination of conclusions. It might well make sense for some law enforcement decisions that must be made on the fly and that can be influenced only with specific dictates, but that cannot be sensibly influenced without intermittently reviewing the content of those rules. Search-and-seizure doctrine could be the right place for this combination.

In contrast, the observer might conclude that that the best combination for a different domain involves relatively abstract and broad but static norms. Here the observer must believe that a supreme-law norm should be locked in because an enduring value with widespread applicability has been identified confidently, but that the value should remain pitched at a fairly high level of abstraction to avoid unjustifiable results in the many foreseen and unforeseen situations for application. Perhaps this fits with a version of our due process norm. Procedure is valued in a large array of settings and often takes similar forms across time, but constitutionally required procedure can be customized according to efficiency and other needs across different government operations, or even across different proceedings within the same operation. Obviously I am only gesturing at intriguing combinations, but much standard constitutional debate is not far removed from this analysis.

One key challenge for salvaging social value from contemporary constitutional argument, however, relates to a simplifying feature of my setup that I have not defended: the separation of people into sophisticated advocates and thoughtful audiences. Audiences who are not themselves interested in the tools of advocacy may find themselves picking them up when their normative intuitions are challenged. If nothing else, they might worry that abstaining from the constitutional advocate's techniques will place their normative commitments at a competitive disadvantage. Furthermore, the proportions of strategic advocates and thoughtful audiences, along with the comparative mental effort they are willing to exert, might not be sufficiently favorable to "the rest of us" picking out the socially beneficial asides within the advocate's larger

message. Thoughtful need not go along with engaged, and care sometimes follows intense nonconstitutional preferences.

Indeed, organizations and resources seem to track the typical subject-matter categories for constitutional issues rather than the legal design choices that I have underscored. There are well-organized groups with research, lobbying, public outreach, and litigation arms to influence, for instance, abortion practices but not, say, the degree of abstractness in constitutional law. The existing pattern of concerted effort might be easily explained and justified in the end; they do reflect some pressing human interests. Unfortunately, these patterns also might crowd out attention to interesting issues of legal design that will influence any number of subject-matter disputes.

But should the crowding-out concern run the other way? Perhaps legal design questions improperly crowd out valuable attention to typical subject-matter disputes, which are what real people really and rightly care about.<sup>136</sup> To this risk I can offer only a preliminary response. First, people who have come to rest on typical subject-matter disputes such as gun control and executive power should want to make sensible legal design choices of the kind I have in mind. Otherwise their commitments cannot be operationalized. Second, some of us are committed to designing law to accommodate ongoing disagreement, to moderate it, or even to energize it in productive ways. Legal design can be about dealing sensibly with diversity in values. Third, some people are or should be uncertain about their goals and priorities. Legal design choices then become more significant, at least in the interim while normative uncertainty persists. And fourth, we might ask whether people truly know what they want to accomplish until they grapple with the design choices involved. Aside from the possibility that attending to my three dimensions of “choice” will reveal feasibility constraints on how law can be designed, positions on these dimensions fill in the picture of what the world is supposed to be like according to somebody’s normative vision. Paying attention to various dimensions of legal design need not cover up other normative commitments or disagreements. In a way, those commitments and disagreements are not fully intelligible without adding generality-related design questions.

I am sure that I have not written the case for continued constitutional advocacy in its most persuasive form. The most skilled constitutional comedians, in the most public spirited sense of that playful label, probably can better establish that (1) all three generality-related choices are socially significant and (2) the debatable quality of these choices ought to keep thoughtful audiences listening instead of turning the channel on constitutional advocates. I admit to doubting that constitutional argument today can be confirmed with confidence as a net social benefit. But I am open to persuasion. Much good work remains to be done on

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136. See, e.g., Louis Michael Seidman, *Depoliticizing Federalism*, 35 HARV. J.L. & PUB. POL’Y 121, 122 (2012).



the question. And I am tempted to say that an oddly familiar curiosity about tragedy, taken at a certain level of generality, makes me hope that my darker inklings will turn out to be terribly mistaken.

#### V. CONCLUSION

Debates surrounding “the” level of generality in constitutional law are, in my view, both necessities and distractions. Modern constitutional analysis cannot operate without making such choices, even if those choices are tightly constrained. At the same time, trying to work these angles is part of the dark art of constitutional advocacy. Many advocates attempt to leverage these interpretive imperatives into opportunities for trumping thoughtful normative disagreement. On the bright side, however, the routine resort to cross-cutting questions of legal design by so many advocates happily advertises those questions and it suggests that the questions resonate with persuadable audiences. We would not hear these arguments otherwise. Moreover, we have good reason to believe that these legal design choices influence how life goes in our society, or at least enough reason to sustain interest in them. The social significance of and fascinating interaction among abstractness, breadth, and dynamism in the design of constitutional law—indeed all law—will persist regardless of how many constitutional comedians compete for our attention. In fact, serious debate about these design choices happens partly because constitutional comedians continue to take the stage. And that is no joke.

