Vanderbilt Law Review

Volume 74
Issue 7 *En Banc*

Article 14

2021

The Use of Cultural Authority in Constitutional Argument

Andrew Jensen Kerr

RESPONSE

The Use of Cultural Authority in Constitutional Argument

*Andrew Jensen Kerr**

ABSTRACT

In this paper I reconcile the need for legal validity with the aspirations of popular constitutionalism, that is that the American people should be a source of authority as to the meaning of our Constitution. The Supreme Court has long relied on cultural practices to help it discern constitutional boundaries. However, I argue that, with the erosion of our institutional gatekeepers, the use and citation to popular forms of constitutional authority is paradoxically harder to do but more necessary. Intrepid scholars like Tom Donnelly have charted some of the ways that judges can marshal popular constitutional argumentation in their decisionmaking. This paper contributes to this project of how judges and lawyers can cite to popular authority more effectively. I introduce the concept of cultural authority and distinguish

* Assistant Professor of Law, Peking University School of Transnational Law; S.J.D., Georgetown; J.D., Columbia. I thank Robin West, Madhavi Sunder, Greg Klass, Gerry Spann, Lexi Freeman, Rafi Reznik, Jomana Qaddour, and Almas Khan for their helpful feedback on this paper.

it from other forms of authority like social science. I then observe how citation to cultural authority can be used to reveal the scope of our Constitution. My synthetic approach is informed by iconic Supreme Court cases as well as recent noteworthy cases related to rap music and graffiti art.

INTRODUCTION

> "Popular constitutionalism is simple to describe in theory, but difficult to apply in practice. In theory, it is a gloss on America's rule of recognition—popular sovereignty."[1]

It is uncontroversial to write that Supreme Court doctrine tracks public opinion. This is a foundational claim for political scientists and scholars of law and society. In *Planned Parenthood of Southeastern Pennsylvania v. Casey,* the Supreme Court explicitly referred to social reliance as part of the reasoned basis for affirming *Roe v. Wade.*[2] It also acknowledged that its own legitimacy depends on public perception.[3] This makes sense. Courts publish opinions. It is up to others to enforce or obey them.[4] Judges are also human beings. They want to be liked (at least by certain audiences). And just like us, their own thinking might evolve. A ready example of this kind of "emerging"[5] or "new awareness"[6] of the broad coverage of the Constitution is the recent line of cases centered on LGBTQ rights and marriage equality. But much more often these sorts of court evolutions are left unexplained; for example, the sudden shift by the New Deal Supreme Court in its 1937 *West Coast Hotel Co. v. Parrish* opinion that constructively overruled *Lochner.*[7]

These examples of a court-society dialectic go to the descriptive claims of popular constitutionalism, that American courts do consider layperson reception when forming doctrine. But in recent decades a network of scholars has been making the stronger revisionist claim that "the people" are central to the meaning of the U.S. Constitution. Those like Larry Kramer make the normative argument that we should defer to the American people as an *authority* on constitutional meaning. At a minimum this means we should rethink our institution of judicial review and instead consider other forms of institutional settlement

---

1. Tom Donnelly, *Popular Constitutional Argument*, 73 VAND. L. REV. 73, 74 (2020).
2. 505 U.S. 833, 855–56 (1992).
3. *Id.* at 866–69.
4. *But see* Cooper v. Aaron, 358 U.S. 1, 18 (1958) (reminding state officials they are still bound by the Supreme Court's constitutional rulings).
5. Lawrence v. Texas, 539 U.S. 558, 572 (2003).
6. Obergefell v. Hodges, 576 U.S. 644, 674 (2015).
7. Lochner v. New York, 198 U.S. 45 (1905), *abrogated by* W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 392 n.1 (1937).

when resolving constitutional questions; for example, a departmentalist approach in which different branches of government negotiate constitutional meaning.[8] More vital examples of this kind of popular form of constitutional resolution include jury nullification, the Boston Tea Party, and other forms of protest.[9]

Popular constitutionalists provide sound arguments for what can feel like very provocative conclusions. The founding generation viewed so-called "ordinary law" and constitutional law in contradistinction.[10] The former was enacted by the government to restrain the people; the latter was enacted by the people to restrain the government.[11] It was up to the people to enforce it. We also have textual clues, most notably "we the people" in the preamble[12] and additional references to the rights of "the people" in the First, Second, Fourth, Fifth, Ninth, and Tenth Amendments.[13] Since *Jacobson v. Massachusetts* it has been black-letter constitutional law that the preamble is mere introduction and provides zero guidance on how to actually interpret constitutional articles or amendments.[14] But this *Jacobson* declaration has been challenged as ad hoc dicta and inconsistent with the original intent of the Constitution.[15] Perhaps "we the people" remains a guiding compass to constitutional meaning.

There are good reasons to rethink the relevance and value of the public to determining constitutional meaning. Tom Donnelly's recent article, *Popular Constitutional Argument,* provides an ambitious framework for how judges can integrate a "populist sensibility"[16] into conventional forms of decisionmaking. I use this important article as a departure point for my own analysis of how cultural practices reveal the scope of our Constitution. Coverage questions have previously been associated with marginal cases, as suggested by the passing reference in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston* to the aesthetic output of Jackson Pollock and Lewis Carroll.[17] But I

---

8. *E.g.*, Larry Kramer, *We the People*, BOS. REV. (Feb./March 2004), https://bostonreview.net/archives/BR29.1/kramer.html [https://perma.cc/3RQS-XHJZ].

9. *Id.*

10. *Id.*

11. *Id.*

12. Donnelly, *supra* note 1, at 75 (describing the preamble as central to the Constitution and its concept of popular sovereignty).

13. *See, e.g.*, Note, *The Meaning(s) of "The People" in the Constitution*, 126 HARV. L. REV. 1078 (2013).

14. Jacobson v. Massachusetts, 197 U.S. 11 (1905).

15. John W. Welch & James A. Heilpern, *Recovering our Forgotten Preamble*, 91 S. CAL. L. REV. 1021, 1023–24 (2018).

16. Donnelly, *supra* note 1, at 83.

17. 515 U.S. 557, 569 (1995).

argue that, with the Internet and the erosion of our cultural gatekeepers, these coverage debates are now a central concern for scholars and judges alike.

I. DISCERNING AUTHORITY

As observed by Tom Donnelly in the prefatory quote to this paper, while popular constitutionalism sounds good in theory, how do we actually apply it in practice?[18] It seems irresponsible to encourage people to actively ignore our justices. Donnelly instead provides the creative fix of courts themselves joining the popular constitutionalism project. He offers a pragmatic vision of how courts can "actually play a constructive role in realizing popular sovereignty today"[19] by discerning the "considered judgments of the American people," or what Donnelly identifies to be the basis of authority for popular constitutionalism.[20] His survey of constitutional argumentation can thus be reduced to the more basic question of which sources we can rely on and when.

Donnelly himself questions whether courts can discern popular meaning. He ponders: "Can courts even do this?"[21] Critics might wonder how we can identify these popular constructions, and if they are credible or worthwhile. If the American public is not sufficiently motivated to think through challenging exegetical problems, then public opinion could be superficial as well as subject to manipulation.[22] But then again, if the people (i.e., we) are indeed an *authority*, then should we not cite to our collective understandings of the Constitution independent of whether our shared ideas happen to be good or bad, or useful or not? What distinguishes authority-based thinking in the law from other forms of reasoning is the content-independence of legal justification.[23] If we feel obliged to cite to a certain source, whether a high court or the collective people, we do so for reasons separate from the "content" (i.e., the quality) of the idea. Rather we cite to these sorts of mandatory authorities in part because of their presumed institutional status.

Donnelly limns a half-accurate portrait of how notions of source-based authority and popular argument integrate with our constitutional design. His focus is necessarily on discerning the voice of

---

18. *See* Donnelly, *supra* note 1, at 74 ("In theory, it is a gloss on America's rule of recognition—popular sovereignty.").

19. *Id.* at 76.

20. *Id.* at 78.

21. *Id.* at 95.

22. *See id.* at 86 (describing the "apathy and ignorance" of the public).

23. *See, e.g.*, Frederick Schauer, *Authority and Authorities*, 94 VA. L. REV. 1931, 1935–36 (2008) ("The force of an authoritative directive comes not from its content, but from its source.").

"the people" and identifying and cataloging different proxies that reflect popular attitudes towards constitutional meaning. In doing so he suggests that the unfiltered voice of the people is itself an authority that determines constitutional meaning. Indeed, he refers to the people as an ultimate authority—as the rule of recognition in American society.[24] This is a creative reading of a "rule" that has been commonly interpreted to focus on the decisionmaking of officials. Matthew Adler questioned in *Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?* how we might bridge what seems to be an irreconcilable gap between the attitudes of officials and nonofficials (i.e., the public) as to legal validity.[25] I elide this debate by recentering this conversation around the seemingly prosaic fact that lawyers cite to things.

Scholars have been too quick to reduce Hart's reference to a "Rule of Recognition" to a sort of litmus that we can look to for binary determinations of whether an official statement—like a statute, or a judicial holding—is valid or not. In its strongest form so-called exclusive positivists like Joseph Raz require a valid decision to be derived from an identifiable source of primary law.[26] For Raz the law is the law, and it does not include the "hunches," moral principles, or references to nonlegal authority that might color an argument underlying a decision. One response is that the law is fundamentally a discursive practice and that we cannot divorce "law" from legal argumentation and the limited domain of authorities and facts that can be cited to in support of an outcome.[27] Another response is that Raz forgets the many easy cases where so-called nonlegal authorities like cultural consensus determine (the absence of) official decisionmaking.

I instead present a separate synthetic vision of how we oblige the need for legal validity, while focusing on some of the unique ways that culture functions in U.S. constitutional law. I expand on the scholarship of Richard Fallon Jr. and Frederick Schauer to situate the Hartian rule of recognition within the later Wittgensteinian tradition of ordinary language.[28] We shouldn't think of Hart's "rule" in the

---

24. *See* Donnelly, *supra* note 1, at 74–75 ("In the United States, no single government official or level of government is sovereign—not the president, Congress, the Supreme Court . . . .").

25. *See generally* Matthew D. Adler, *Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?*, 100 NW. U. L. REV. 719 (2006).

26. *See* Frederick Schauer, *The Limited Domain of the Law*, 90 VA. L. REV. 1909, 1949 (2004) ("[I]t is the goal of exclusive legal positivism to explain [law] and be relatively unconcerned with [legal reasoning].").

27. *Cf. id.* at 1931("I emphasize again my expanded idea of a rule of recognition encompassing facts as well as norms.").

28. *See, e.g.*, Schauer, *supra* note 23, at 1957 ("[T]he recognition and non-recognition of law and legal sources is better understood as a *practice* in the Wittgensteinian sense . . . .").

austere, formal sense of the word we naturally gravitate to as lawyers. Rather the more productive way to think about Hart is to consider this "rule" (or more accurately, these "*rules*"[29]) as the cluster of context-based conventions that inform whether a source provides credibility for our work in a given legal situation.[30] Robert Berring used the helpful framing of "cognitive authority" to underline the importance of trust in legal citation.[31]

I emphasize here the quality control work that goes into the social construction of cognitive authority. In brief, an authority cannot simply declare herself as such. We have external institutions that help us determine who or what may be cited to. For example, I cannot simply announce myself as a judge and comment on pending disputes (and be taken seriously). Rather our judges assume this social role after being vetted through institutional channels like the appointment process or public elections, and their opinions are further vetted by institutional norms like the bench review of briefs or other submissions from professional counsel, input from clerks, the synthetic nature of the writing process, and a public expectation that a judge provide reasons in support of her holding. Similarly, the scholar establishes a reputation within the academic community through the familiar path of writing papers or giving talks. And so citing to the most recent article of a celebrated scholar carries with it a currency informed by such measures as citation counts to her broader oeuvre, the validation of law review submissions editors, and academic title. All this reifies the authority of a scholar and endows her citation with a weight independent of the quality of a particular paper that is cited to. And all this is perfectly fine—we need shorthand heuristics of quality so our work can "go on" in line with our rule of recognition.[32]

---

29. *E.g.*, Richard H. Fallon, Jr., *Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 N.C. L. REV. 1107, 1127 (2008) (emphasis added) (footnote omitted) ("Indeed, Hart himself so recognized and occasionally used the plural formulation 'rules of recognition.' ").

30. Frederick Schauer & Virginia J. Wise, *Legal Positivism as Legal Information*, 82 CORNELL L. REV. 1080, 1089 (1997).

31. *E.g.*, Robert C. Berring, *Legal Information and the Search for Cognitive Authority*, 88 CALIF. L. REV. 1673, 1676 (2000) ("By 'cognitive authority' I mean the act by which one confers trust upon a source.").

32. *See* Richard H. Fallon, Jr., *The Many and Varied Roles of History in Constitutional Adjudication*, 90 NOTRE DAME L. REV. 1753, 1805 (2015):

> Hart used the term "rule" in the sense explicated by the philosopher Ludwig Wittgenstein, who—on a non-skeptical interpretation—identified the ability to follow a rule with the shared, often tacit, understandings of most or all participants in collective activities concerning how to "go on" in ways that others will acknowledge as appropriate or correct.

(footnote omitted).

Indeed, these paired notions of trust and quality control inform our selective use of traditional nonlegal authorities. Few of us are historians. But Justice Brandeis in *Erie* could trust that Charles Warren was a "competent scholar" to review the history of the Rules of Decision Act because of the reputation he cemented with his *The Supreme Court in United States History*.[33] Related, it is not obvious if Justice Brandeis was an able sociologist by contemporary standards, but in his iconic brief he used data with sufficient rigor to make it appear credible to a unanimous Supreme Court in *Muller v. Oregon*.[34] Justice Breyer might not himself be an expert mechanic. But in *Kumho Tire Co. v. Carmichael*[35] he could trust the integrity of his citation to *How To Buy and Care For Tires* because of its publisher affiliation (Consumer Reports) and the author's prior history of writing about cars.[36] The advent of the Internet and improved access to these sorts of nonlegal materials have arguably expanded our conventional domain of ideas or facts that can be cited to when making a legal argument.[37] But we do not necessarily need to worry about this shift so long as we remember that these so-called "legislative facts" are better read as the observations of authorities from kin fields like social science. This was the same conclusion of the authors of *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law* in their formative 1986 article in the UNIVERSITY OF PENNSYLVANIA LAW REVIEW.[38] These are not facts so much as they are the credible thoughts of reliable sources.

II. CULTURAL ASSUMPTIONS ABOUT COVERAGE

My contribution is to further unpack the distinction between cultural authority and other forms of social authority, and to show how cultural authority is and should be used by courts when engaging in constitutional argument. In doing so, I rely on Donnelly's own

---

33. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 72 (1938).

34. *See* 208 U.S. 412, 419 (1908) ("In the brief filed by Mr. Louis D. Brandeis for the defendant in error is a very copious collection of all these matters, an epitome of which is found in the margin.").

35. 526 U.S. 137 (1999).

36. *See, e.g.*, Frederick Schauer & Virginia J. Wise, *Nonlegal Information and the Delegalization of Law*, 29 J. L. STUD. 495, 495–96 (2000) (discussing Justice Breyer's reliance on *How to Buy and Care For Tires* in *Kumho Tire*).

37. *See, e.g.*, Schauer & Wise, *supra* note 30, at 1106 (discussing the explosion in availability of these materials).

38. John Monahan & Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477, 488–89 (1986) ("[W]e propose that courts treat social science research as they would legal precedent under the common law.").

touchstones of Hart and Philip Bobbitt.[39] The same kinds of institutional processes that we depend on to vet the quality of our legal and social science authorities are also used to identify the cultural (i.e., the "we the people" consensus) boundaries of our Constitution. Importantly, these coverage concerns are rarely articulated because they are wired into our thinking as everyday actors in the legal community we have been acculturated to. Our assumptions about the boundaries of the Constitution have become naturalized to us—it is not worth debating something we all seem to subconsciously agree on. Frederick Schauer was the first to make this observation about the cultural boundaries of constitutional language in *Categories and the First Amendment: A Play in Three Acts*.[40] Professor Schauer encourages us to

> consider the possibility that the most logical explanation of the actual boundaries of the First Amendment might come less from an underlying theory of the First Amendment and more from the political, sociological, *cultural*, historical, psychological, and economic milieu in which the First Amendment exists and out of which it has developed.[41]

Robert Post echoes this same culture-based intuition when he writes that the boundaries of the First Amendment are "anthropologically apparent."[42]

Our settled cultural assumptions work to mask the internal discord in First Amendment doctrine. In many ways this incoherence derives from the open texture of our freedom of speech clause. "Speech" (or language more generally) is a defining feature of human life. The ubiquity of speech thus creates vagueness problems for lawyers. We know not to shout fire in a crowded theater. We also know not to trade stock tips with a pal or collude with an industry colleague about price-fixing. This kind of speech is simply assumed to be outside the boundaries of the First Amendment. Prominent attorneys like James Goodale and Floyd Abrams have questioned the underlying coherence of this regime.[43] Indeed, Goodale predicted in 1983 that securities law

---

39. Donnelly, *supra* note 1, at 79 ("Throughout, I take as my model Philip Bobbitt's influential account of conventional constitutional arguments.").

40. *See generally* Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 269–73 (1981) (discussing speech in the constitutional context).

41. Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1787 (2004) (emphasis added).

42. Robert Post, *Participatory Democracy as a Theory of Free Speech: A Reply*, 97 VA. L. REV. 617, 623 (2011).

43. *See* Amanda Shanor, *First Amendment Coverage*, 93 N.Y.U. L. REV. 318, 331 (2018) ("Floyd Abrams [ ] has argued that the constitutionality of securities regulations and the Federal Communications Act require a second look following the Supreme Court's decision in *Reed v. Town of Gilbert*.") (citations omitted); Schauer, *supra* note 41, at 1780.

and free speech were on a "collision course."[44] Of course this doctrinal collision has still yet to realize. Professor Schauer observes that "[t]he story of the First Amendment and antitrust is similar but less overt."[45] But the covert nature of this (lack of) narrative goes to my overall claim: our wired assumptions about the scope of the First Amendment explain the very *lack* of cases we encounter here.[46]

And interestingly, the First Amendment does cover many types of expression that we might not intuitively think of as speech.[47] We speak when we gift money to political campaigns,[48] wear a black armband in school,[49] record a training session for a dog fight,[50] make decisions about who may or may not march in a parade,[51] or perhaps even when we design a beautiful wedding cake.[52]

Justice Kennedy in his majority opinion in *Masterpiece Cakeshop* and Justice Thomas in concurrence[53] each suggested that the unique artfulness of these wedding cakes might trigger First Amendment coverage. This sounded strange when announced to the universe. But the core principle or intuition that supports the existence of this kind of "art speech" has long been part of our First Amendment. It is just that our prior cultural gatekeepers (i.e., "The Art World") did the threshold due diligence of determining the kind and quality of artistic media that deserved this label of "art speech." We as social actors (as jurists and scholars, as well as everyday Americans who are acculturated to our shared constitutional conventions) deferred to the vetting and quality control work of individuals like museum curators, record label executives, film producers, etc. who decided the conditional question of what is sufficiently aesthetic to count as art in society. Only in the rare case like *Hurley* did the Supreme Court bother to remark that the First Amendment "unquestionably shielded [the] painting of

---

44. Schauer, *supra* note 41, at 1780 (quoting James C. Goodale, *The First Amendment and Securities Act: A Collision Course?*, N.Y.L.J., Apr. 8, 1983, at 1).

45. Schauer, *supra* note 41, at 1781.

46. Andrew Jensen Kerr, *Art Threats and First Amendment Disruption*, 16 DUKE J. CONST. L. & PUB. POL'Y 173, 179 (2021).

47. *Id.* at 191.

48. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

49. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

50. *See* U.S. v. Stevens, 559 U.S. 460 (2010).

51. *See* Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Boston, 515 U.S. 557 (1995).

52. *See* Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Com'n, 138 S.Ct. 1719, 1723 (2018) ("The free speech aspect of this case is difficult, for few persons who have seen a beautiful wedding cake might have thought of its creation as an exercise of protected speech."); Kerr, *supra* note 46, at 191.

53. *See id.* at 1742–43 (Thomas, J., concurring in part) (discussing the artistic aspects of decorating a cake).

Jackson Pollock, music of Arnold Schoenberg, [and] Jabberwocky verse of Lewis Carroll."[54] A few scholars like Amanda Shanor have offered principled theories to explain why the First Amendment covers some things but not others.[55] This is a productive way to think about certain coverage problems. But more often our constitutional coverage seems to reflect the simple tautology that we as a people collectively *feel* a contested act or practice should be covered (or excluded from coverage) because we like it or think it is important or good.

I make the descriptive argument in my forthcoming article, *Art Threats and First Amendment Disruption*, that there is an implicit qualitative determination that separates art speech from non-art speech.[56] The word "art" connotes a threshold level of quality. This was confirmed by Judge Jones from the Fifth Circuit in *Kleinman v. City of San Marcos* when she wrote that "*Hurley* refers solely to great works of art."[57] This does not mean that art speech must be part of our cultural canon like the aesthetic output of Jackson Pollock. It is too hard to make these determinations at the initial moment of publication or distribution anyway (consider how visionary art is commonly derided by contemporary audiences). Rather Justice Souter made passing reference to Pollock to clarify that the First Amendment covers meaning-resistant/uncommunicative artwork and offer a point of comparison to the St. Patrick's Day parade at issue. And, besides, what did Justice Souter have to lose? In our pre-Internet world it was difficult to imagine a hypothetical in which art speech might be problematic. As recently as 2008 Professor Edward Eberle wrote: "It is hard to imagine art speech constituting incitement, threats or fighting words. Instances of art speech almost never involve violence or threatened violence germane to these categories of unprotected speech."[58]

I argue this changed with contemporary forms of artistic media, notably with the Internet distribution of rap music as well as the sort of transgressive performance art reflected by the work of Karen Finley[59] or in recent controversies like the Boston Marathon bombing hoax of Kevin Edson.[60] The new reality of rap threats and art threats

54. *Hurley*, 515 U.S. at 569.

55. *See* Shanor, *supra* note 43.

56. Kerr, *supra* note 46, at 181–82.

57. 597 F.3d 323, 326 (5th Cir. 2010).

58. Edward J. Eberle, *Art as Speech*, 11 U. PA. J. L. & SOC. CHANGE 1, 25 (2007).

59. *See* Nat'l Endowment for the Arts v. Finley, 524 U.S. 569 (1998).

60. *See, e.g.*, Joe Coscarelli, *The Weird World of Kayvon Edson, the 'Performance Artist and Mental Patient' Behind the Boston Bomber Anniversary Hoax*, N.Y. MAG. (Apr. 16, 2014), https://nymag.com/intelligencer/2014/04/kayvon-edson-performance-artist-boston-bomb-hoax.html [https://perma.cc/N4X9-DJQF]; *see also* Mark Tushnet, *Art and the First Amendment*,

repositions art speech from a marginal case to a site of core contestation in First Amendment jurisprudence. There are two connected problems here: (1) unmediated, naturalistic art forms like Internet rap can feel "real" to audiences, and (2) it is a daring analytic enterprise to make quality judgments in these sorts of gestalt art media like rap, performance art, and other forms of concept art like pop art. I draw on institutionalist approaches to the philosophy of art associated with George Dickie and Arthur Danto. Danto first posited the construct of an Art World to help explain how we as social actors discern the artfulness of a Warhol painting when it is seemingly impossible to articulate any distinction in form with the actual *Campbell's Soup* can.[61] It is similarly challenging to distinguish an artful rap song from a bad attempt at rap by reviewing lyrics alone, or a performance art piece like Marina Abramovic staring at you in the MoMA as compared to a less talented person staring at you over your Zoom screen. Rather we can only discern if an attempted rap or performance art piece is good by experiencing it. And even then, we still might prefer to rely on the judgment of Art World curators or record label executives to validate high-quality aesthetic work.

III. (THE DISAPPEARANCE OF) OUR CULTURAL GATEKEEPERS

I argue that this is what courts did, and what they were able to do, until the recent erosion of our cultural gatekeepers associated with the Internet and websites like YouTube or Facebook. An unmediated Internet is truly wonderful in how it allows the unknown artist to disseminate her music or film to a public audience without having to rely on the prior networking or luck that determined if an amateur artist was "discovered" by a talent scout or literary agent. However, at the same time this institutional imprimatur of the Art World and corollary market for the buying and selling of art created a coverage zone of art speech that courts could defer to. This helped courts avoid thorny philosophical problems of aesthetic relativism identified by both Justice Holmes in *Bleistein*[62] and Justice Scalia in *Pope v. Illinois*.[63] It also helped courts maintain the conceptual integrity of a First

35 COLUM. J.L. & ARTS 169, 184 (2012) (describing how content-neutral regulations can be applied to artwork, particularly performance artwork, without violating the First Amendment).

61. *See* Arthur Danto, *The Artworld*, 61 J. PHIL. 571, 580–581 (1964) ("It is the theory that takes [the subject of the piece] up into the world of art, and keeps it from collapsing into the real object which it is (in a sense of *is* other than that of artistic identification).").

62. *See* Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903).

63. 481 U.S. 497, 504-05 (1987) (Scalia, J., concurring) ("[I]n my view it is quite impossible to come to an objective assessment of (at least) literary or artistic value, there being many accomplished people who have found literature in Dada, and art in the replication of a soup can.").

Amendment regime that was forced to distinguish art from threat. Courts have conceptualized the "true threat" (e.g., "I will kill so-and-so at such-and-such time") as a form of violent *action* based on the physical response audiences have to a veritable threat so as to permit them to make a sort of content-based discrimination that favors nonthreatening over threatening speech.[64] In short, the threat is not a First Amendment speech act. Judges can thus hardly make balancing decisions about whether the artfulness of a work outweighs its threatening quality when artworks and threats exist in competing legal regimes.

The essential point here is that courts have tremendous difficulty in trying to unpack the constitutionality of an artwork that combines both good aesthetic intent and bad intent (see, e.g., *Elonis v. United States*).[65] And so courts have historically outsourced this fact-laden analysis to cultural gatekeepers who could vet (and likely edit) rap or film, etc. so that the aesthetic value of an artwork was understood to outweigh any unlawful element. Although there has been much recent attention on web-based attempts at rap music being prosecuted as true threats, to my knowledge no *professional* rappers have ever been prosecuted under a threats analysis.[66] Think of the non-political raps of Eminem in which he threatens his ex-wife[67] or Tupac Shakur in which he threatens Biggie Smalls and other rivals in "Hit 'Em Up."[68] Also think of the portrayal of seeming strict liability crimes like contributing to juvenile delinquency or statutory rape in Hollywood films, or even the hyperbolic statement of a comedian on stage that registers as a "joke" when a congruent statement on the nightly news could be interpreted as defamatory.[69] All of this goes to the broad point that the institutional setting of a speech act determines its constitutional coverage. This institutional layer could perhaps be quite

---

64. Kerr, *supra* note 46, at 178; *see also* Steven G. Gey, *The Nuremberg Files and the First Amendment Value of Threats*, 78 TEX. L. REV. 541, 593 (2000)

> The concept of true threats—like the concept of "fighting words" and the concept of incitement—rests on the assumption that a true threat is outside the scope of First Amendment protection because it operates more like a physical action than a verbal or symbolic communication of ideas or emotions.

65. *See, e.g.*, Elonis v. U.S., 575 U.S. 723 (2015).

66. *See, e.g.*, Charis E. Kubrin & Erik Nielson, *Rap on Trial*, 4 RACE & JUST. 185 (2014) (cataloging use of professional rap lyrics for *evidentiary* purposes by prosecutors, but not any identifying any cases where the raps themselves were criminalized as threats).

67. *See Kim (song)*, WIKIPEDIA (last visited June 20, 2020), https://en.wikipedia.org/wiki/Kim_(song) [https://perma.cc/YF8J-9UWE] ("The song reflects intense anger and hatred towards his then-wife Kim Mathers . . . .").

68. *See Hit 'Em Up (2Pac)*, GENIUS.COM (last visited June 20, 2020), https://genius.com/2pac-hit-em-up-lyrics [https://perma.cc/UBN6-AW29].

69. Kerr, *supra* note 46, at 207.

thin. This "Art World" representative might be the high-powered Hollywood executive, the local college radio jockey, or public-access television producer. There are reasons to appreciate the unique aesthetic concerns that each of these gatekeepers have. But today the amateur artist can simply share her aesthetic output with the universe via the Internet, even though the average viewer (or judge) cannot determine whether it is actually *good* or not, which is our requirement for art speech. Good art that happens to make you feel physically unsafe is covered art speech and lawful; the awful *attempt* at art that makes you feel the same way might be viewed as a threat.

It was not done explicitly, and perhaps none of us realized this was happening, but I argue that judges or district attorneys effectively cited to this quality control work of our institutional actors when they made the silent, unrecorded decisions to *not* hear or prosecute these cases. The presence of a potentially threatening artwork in a museum or record store was evidence of its First Amendment coverage. And so the very existence of a marketed artwork was itself proof of its own legal validity. There is a valence of popular constitutionalism here. A functioning economic market inheres cultural consensus. After all it depends not just on a supply of artists and curators but also on the demand of art buyers, museumgoers, theater aficionados, vinyl collectors, etc. All of this is reflected in the "we the people" that popular constitutionalists defer to as providing authority on the question of what the Constitution is meant to cover. Our cultural consensus is a fulcrum of the popular delegation of powers to the national Constitution and levers the scope of certain enumerated government powers as well as that of certain rights we possess and retain. Donnelly intuits this same scope/application distinction when he suggests that we should not look to the public to resolve the sort of "constitutional niceties" that characterize doctrinal problems.[70] I explicate this distinction more fully in this paper. Cultural argument is done well when it refers to institutional proxies of what "the people" feel about the coverage or boundaries of the Constitution. However, cultural argument does not work when culture is used to make an application argument.

The recent February 2020 Second Circuit case *Castillo v. G & M Reality, L.P.* evidences how courts must now locate novel ways to resolve coverage questions.[71] In this case Judge Parker held that graffiti art at 5Pointz merited VARA moral rights against destruction by citing a select group of tastemakers and influencers. World-famous street artist Banksy does not seem to have ever contributed to the art space

70. Donnelly, *supra* note 1, at 90–91.

71. *See* 950 F.3d 155 (2d Cir. 2020).

in Queens, but he gave his signature cryptic imprimatur after completing his month-long October 2013 "residency" in New York City: "Thanks for your patience. It's been fun. Save 5pointz. Bye."[72]

Important for the constitutional law purposes of my paper, Judge Parker cited to Bansky in *Castillo v. G&M Realty L.P.* to establish the general credibility of graffiti art as a novel *medium* of art. Although for both the VARA and the First Amendment we care about whether the aesthetic output is *good*, and there might be reasons to fear that certain biases might go into this calculus, the analysis here also represents a progressive way of thinking about art in that it expands the set of valorized artistic media beyond conventional forms like novel writing or canvas painting to include ephemeral art like graffiti. Also interesting, Judge Parker puffed the reputation of Banksy by situating him "alongside President Barack Obama and Apple founder Steve Jobs on *Time* magazine's list of the world's 100 most influential people."[73] We see a network of reputation building here to make up for the easy logic of our prior universe of a *Bleistein* Art World, in which we could simply defer to the economic market of the production and distribution of individual art works.

IV. CULTURE PROBLEMS

> "Because popular constitutionalism is so oriented toward social practice, it is heavily dependent upon institutions . . . ."[74]

I argue that the institutionalization of "the people" via the work of the Art World was also essential to maintain the integrity of constitutional law doctrine. If we allow individuals to simply declare their aesthetic output as art speech, then we simultaneously create a loophole for bad actors to take advantage of certain privileges unique to First Amendment speakers, including the ability to threaten publicly. Art is a magic word in the Constitution.[75] For example, the valorized status of Eminem or Tupac as rappers permits them to say things others cannot (I will do such-and-such to my ex-wife or rap rival). This also makes for a dangerous alchemy.[76] Bad actors may parrot certain genre conventions of rap in their genuine threats, or "perform" a

---

72. Chris Boyette, *Banksy bids farewell to New York with balloons*, CNN (Nov. 1., 2013), https://www.cnn.com/2013/10/31/us/new-york-banksy-residency-ends/index.html [https://perma.cc/PG5S-2DGK].

73. *Castillo*, 950 F.3d at 168.

74. Darrell A. H. Miller, *Institutions and the Second Amendment*, 66 DUKE L.J. 69, 115 (2016).

75. Kerr, *supra* note 46, at 190.

76. *Id.*

property crime by adding a dramatic element, to create constitutional coverage for their own bad actions. This goes to our core constitutional principle that no one person can "become a law unto himself."[77] We do not allow people to decide on their own that they can avoid the law.

This interpretive modality spans the text of the First Amendment. Justice Scalia echoed the language of *Reynolds* when he wrote in *Oregon v. Smith* that "each conscience [cannot be] a law unto itself."[78] The animating logic of each of these religious liberty cases is that we cannot allow an individual to declare her own personal religion and be entitled to any privileges that might come with it. Our speech and religion freedoms are thus special in two important ways. The first way they are special is that each provides certain positive entitlements to those whom they cover. The artist may threaten. The pious may eat peyote,[79] or drink wine underage,[80] or perhaps even bring a knife to school.[81]

Second, they each inhere definitional problems that create coverage dilemmas.[82] Speech is a vague word, but we have institutions like publishers to help us determine what kind of speech is legally meaningful. Religion is a more precise word, but—despite our best efforts since time immemorial—we still lack an "institutional gatekeeper" who can confirm what is a true religion. Rather we (as a society) employ a sort of *Jacobellis v. Ohio* "I know it when I see it"[83] test to distinguish a religion from a cult or mere social club by employing heuristics such as organization, sincerity, and spirituality. The neutral design of our establishment clause encourages us (again, as a society) to distill a set of underlying traits and values that characterize religious or "religion-like" behavior, and because of this, the Supreme Court has acknowledged "[e]thical [c]ulture" and

77. Reynolds v. U.S., 98 U.S. 145, 167 (1878).

78. Emp. Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 890 (1990).

79. *E.g.*, John Horgan, *Tripping on Peyote in Navajo Nation*, SCI. AM. (July 5, 2017), https://blogs.scientificamerican.com/cross-check/tripping-on-peyote-in-navajo-nation/ [https://perma.cc/9BZ7-MVQ8].

80. *See, e.g.*, *Nebraska Bill Would Curtail Religious Freedom*, CATH. LEAGUE (Jan. 16, 2007), https://www.catholicleague.org/nebraska-bill-would-curtail-religious-freedom/ [https://perma.cc/BM9R-BZDC] (discussing rare effort to make illegal communion wine for minors).

81. *E.g.*, Eric Wilkinson, *Student allowed to bring religious knife to class*, USA TODAY (Oct. 23, 2014), https://www.usatoday.com/story/news/nation/2014/10/23/student-allowed-bring-religious-knife-school/17763379/ [https://perma.cc/MPX3-4GQQ].

82. *See, e.g.*, Shanor, *supra* note 43, at 324 ("The First Amendment prohibits the abridgement of the 'freedom of speech,' but it nowhere defines the 'speech' that falls within that protection, as opposed to the range of activity (often termed conduct) that falls outside it.").

83. Jacobellis v. State of Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

"[s]ecular [h]umanism" as religions for constitutional purposes.[84] Here courts have deferred to a cultural consensus as authoritative as to what is covered as a First Amendment religion. Only after this threshold analysis does a judge ask herself the application question of whether a specific practice of a covered religion is especially burdened by a neutral law.

There are two essential points to unpack here: (1) we as social actors look to cultural institutions to determine what is covered as a form of constitutional speech or as a religion or religion-like worldview under the First Amendment, and (2) we make citation to borderline cases (e.g., the abstract expressionism of Jackson Pollock, or the secular humanism of *Torcaso v. Watkins*) to mark the boundaries of constitutional coverage.

The same scope/application distinction applies to other parts of our Constitution. In *Obergefell* the Supreme Court clarified that the Constitution covers individuals who want to marry someone of the same sex.[85] To do so Justice Kennedy cited to a new collective awareness[86] of what had impliedly always been within the scope of this fundamental right or a covered class within equal protection doctrine. In *Griswold* the majority found that the right to have non-procreative sex with your spouse was covered within the boundaries of a privacy right derived from Brandeis's *Olmstead* dissent and found within the penumbras of the Bill of Rights.[87] More recently, in *Riley*, Justice Roberts channeled a collective sense that smartphones are intimately connected to our identity and thus should not be subject to a warrantless search.[88] It is a strange sort of citation when Justice Roberts notes that "nearly three-quarters of smart phone users report being within five feet of their phones most of the time, with 12% admitting that they even use their phones in the shower."[89] These are both prosaic facts in themselves about where our phones are in relation to our bodies and empirical observations that reflect deeper meaning about how we as Americans

84. Torcaso v. Watkins, 367 U.S. 488, 496 n.11 (1961) ("Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others.").

85. *See* Obergefell v. Hodges, 576 U.S. 644, 675 (2015) ("[T]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty.").

86. *Id.*

87. *See* Griswold v. Connecticut, 381 U.S. 479 (1965).

88. *See* Riley v. California, 573 U.S. 373, 385 (2014) ("These cases require us to decide how the search incident to arrest doctrine applies to modern cell phones, which are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy.").

89. *Id.* at 395.

think about the scope of Fourth Amendment privacy and the objects that become part of us. It functions as a sort of cultural authority in that the statistic itself reveals a cultural truth. It is also a credible form of authority. I doubt those surveyed expected their responses would be cited to justify the expansion of Fourth Amendment coverage. If anything, some people might have been too embarrassed to answer truthfully how much time they spend with their phone.

This blurring of fact and authority typifies this category of cultural authority and is best represented by the famous footnote 11 in *Brown v. Board of Education* to the doll experiments of social psychologists Dr. Kenneth and Mamie Clark.[90] Chief Justice Earl Warren strategically used the language of "modern authority" to emphasize the layered nature of this citation.[91] Although Chief Justice Warren doesn't draw much attention to this study, it is essential to the outcome of the case. Not only does it function as observational data about how young Black children preferred playing with white dolls to dolls of their own race, but it suggested a deeper kind of cultural meaning that is core the ethos of our constitutional culture—that we cannot tolerate a legal regime that fosters a sense of inferiority among Black schoolchildren. The use of cultural authority clarifies the scope of the equal protection clause. It does not involve a doctrinal application of law to facts. But it reminds us that that the Constitution also "covers" public segregation even if there is material equality in terms of funding or other tangible metrics.

V. ETHOS AND AUTHORITY

This paper thus expands on the framing of Donnelly and shows how popular constitutional argument can be mapped onto the Bobbitt typology of constitutional modalities. Donnelly writes: "I take as my model Philip Bobbitt's influential account of conventional constitutional arguments."[92] However, he excludes from this analysis the two modalities that I argue are most relevant to popular constitutional argument and the use and citation to cultural consensus: prudential argument and ethical argument. Each are reflected in the *Brown v. Board* litigation.

I introduce prudential argument and situate it against the use of cultural authority by courts. Prudential argument can be interpreted two ways. The more common way to think of prudential argument is

90. Brown v. Bd. of Educ., 347 U.S. 483, 494 n.11 (1954).

91. *Id.* at 494.

92. Donnelly, *supra* note 1, at 79.

the conventional policy argument in which we look at the instrumental or consequential effect of a decision, e.g. if the benefits outweigh the costs. But Bobbitt also echoes the thinking of Alexander Bickel from *The Least Dangerous Branch* in explaining why courts might choose to avoid judicial intervention altogether.[93] Justice Brandeis quipped in *New State Ice Co. v. Liebmann* to let the states be laboratories of democratic experimentation.[94]

We can also think of ways that courts feel out the cultural readiness for a transformative holding. This awareness of public reception goes to the same legitimacy concerns acknowledged in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[95] For example, it has been debated whether the Court's decision in *Brown I* to hold reargruments about the intended scope of the Fourteenth Amendment was a strategic delay tactic to wait and persuade Chief Justice Vinson to join a unanimous majority opinion so as to limit public resistance to desegregation.[96] This is "prudence" in the primary definition of patience. We can also read the signature "all deliberate speed" language of *Brown II* as reflecting a similar kind of prudential value.[97]

Although judges discern public attitudes about possible judicial interventions, this does not mean that mere popular consensus imposes meaning on our Constitution. As stated by Owen Fiss: "The judge can, of course, read another text, such as the one read by legislators—*public opinion*—but it is *not* an authoritative text for the judge."[98] Donnelly uses the language of "considered judgment" to emphasize the need that the public has thought through a constitutional problem.[99] And thus we

---

93. *See generally* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH (1986).

94. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

95. *See* 505 U.S. 833, 864–69 (1992) (discussing the necessity of preserving the judiciary's legitimacy when making serious decisions to overturn prior cases).

96. *E.g.*, Carlton F. W. Larson, *What if Chief Justice Fred Vinson Had Not Died of a Heart Attack in 1953? Implications for Brown and Beyond*, 45 IND. L. REV. 131 (2011). But see Chief Justice Vinson's reference to intangible factors in *Sweatt v. Painter,* which framed the analysis in *Brown I.* Sweatt v. Painter, 339 U.S. 629, 634 (1950) ("What is more important, the University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school.").

97. Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955).

98. Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 761 (1982) (emphases added).

99. Donnelly, *supra* note 1 at 78:

> Briefly stated, popular constitutional argument is an argument that draws on the American people's considered judgments as a form of authority for reaching a given constitutional conclusion. By "considered judgment," I mean something approaching a

should approach opinion polls with caution and look for stability across time.[100] Still, public opinion by itself lacks the layer of institutional credibility required of cultural authority. It only tells a judge if she *can* write a holding that will be dutifully observed by society. It does not instruct a judge on what she must do. This prescriptive element is what distinguishes the concept of authority.

But ethical argument reveals an additional layer of cultural significance that provides authority on what our Constitution actually means. Bobbitt describes ethical argument as reflecting our national ethos—our shared sense of self as a legal community. In his article, *Methods of Constitutional Argument,* Professor Bobbitt selects *Brown I* as a singular example of ethical argument. He writes:

> [The footnote 11 citation to the work of Dr. Kenneth and Mamie Clark] was a crucial part of the decision, however, and as is sometimes the case with extremely important decisions, the holding in *Brown* is not at all what the opinion says it is. The opinion talks about education and appears to be based on the premise that fundamental rights must be distributed equally. However, on the basis of the holding in *Brown*, the U.S. Supreme Court issued per curiams desegregating golf courses and swimming pools—things that have nothing to do with education or fundamental rights. These judgments, in my view, were based on a deeper perception and reasoning.[101]

The citation to the doll experiments inheres a deeper significance that taps into our collective vision of what we want to be as a legal community. To this extent there is an aspirational quality to ethical argument that echoes our preambular language of "we the people." Ethical argument, like each of the Bobbitt modalities, is a discernable form of argument that can be taxonomized and detailed.[102] But our ethos also reflects a sense of optimism that we all possess about the arc of constitutional coverage. Bobbitt reflects on the value of the doll experiment:

> No society such as ours, that has placed law in the very centre of the relationship among individuals, can tolerate this. These drawings are a powerful example of an appeal to the American ethos: not necessarily what we are, but perhaps what we think we are, and thus

---

popular constitutional consensus—one that unites the American people and is the product of deliberation and debate.

100. *See id.* at 131–33 (discussing the potential benefits of opinion polls in measuring the "constitutional views" of American citizens while also recognizing the need to "approach them with the requisite level of humility and caution").

101. Philip Bobbitt, *Methods of Constitutional Argument*, 23 U.B.C. L. REV. 449, 455 (1989). *But see* Michael L. Wells, *"Sociological Legitimacy" in Supreme Court Opinions*, 64 WASH. & LEE L. REV. 1011, 1033 (2007) ("[T]he social science evidence the Court relied on [in *Brown*] seems better understood as an effort to maximize public acceptance than as a forthright account of the constitutional principles . . . .").

102. *Cf.* Edward L. Rubin, *Law and the Methodology of Law*, 1997 WIS. L. REV. 521, 559 (1997) ("According to Bobbitt, judicial review in constitutional law is a practice, not a theory. It consists of six forms, or modalities, of argument . . . .").

> how we think about ourselves and our society; that is, what we would like to be, or in some cases what we know we are and what we are no longer willing to abide.[103]

I conclude this section by emphasizing the organic way that trust works in the cultural authority we cite to for our ethos. The subjects of the doll experiment, just like the survey participants cited to in *Riley*, were not conscious of how their responses might be employed by courts to form popular constitutional argument. In the logic of law and economics, this kind of authority indicates a "revealed" sense of constitutional coverage that we had previously not articulated or foreseen. These questions about smartphone use were not posed in a way that prompted subjects to make claims about the constitutional scope of privacy. This is distinguished from a targeted snapshot opinion poll that queries survey participants to respond to precise questions about constitutional meaning ("Who do you think should be permitted to marry?"). In this context the poll only helps us to make superficial group observations about declared preferences. The instrumental posture of a law-centric poll negates the kind of candor needed to verify the trust and credibility associated with sources that comport with our working sense of a rule of recognition.

The same self-awareness of the opinion poll also militates against the use and citation of cultural movements as a source of authority as to constitutional meaning. Changes in opinion track public reception, but they do not tell us what has *always* been part of our Constitution. This oblique distinction informs Justice Kennedy's framing choice in *Obergefell* to use the language of a "new awareness" to emphasize what has been a perennial truth about the scope of an unenumerated fundamental right to marry or the classes of people covered by the equal protection clause.[104] This also explains the adjunct tests of reliability constructed by Bruce Ackerman in his formulation of the "constitutional moment." Ackerman argued for a kin sort of cultural authority, the constitutional moment, in which American society has undergone a studied transformational shift in how it reads the Constitution. Importantly, Ackerman imposed tough deliberation requirements to ensure the integrity of this theorizing.[105] That there have been only *four* such moments for Ackerman over our 230-plus year history (the Founding, Reconstruction, the New Deal, and the Civil Rights Movement) would seem to cut against the facile citation to history as authoritative.[106] Donnelly observes that there might be space

---

103. Bobbitt, *supra* note 101, at 455.

104. Obergefell v. Hodges, 576 U.S. 644, 674 (2015).

105. *See* Donnelly, *supra* note 1, at 104–08.

106. *See id.* at 105. A related historiographical question: how do we decide what counts as History? *See generally* E.H. CARR, WHAT IS HISTORY? (1961). For a more contemporary treatment

outside of these strict Ackermanian limits in which cultural movements might inform constitutional meaning.[107] But today we might wonder if the echo chamber and viral moment of the Internet has only made it more difficult to identify genuine consensus. In the same way that no one person can announce themselves as a judge, an expert, a prophet, or an artist, here there is the same problem that no one group of people can announce themselves as "we the people." We need an institutional layer to help us reveal the mystic integrity of our cultural consensus.

VI. THE USE (AND MISUSE) OF CULTURAL AUTHORITY

I observe how the recent treatment of rap lyrics by the legal community reflects these integrity concerns. My analysis suggests the hidden nature of the scope/application distinction in popular constitutional argument and how it can manifest in advocacy work.

I first point to an example of legal scholarship that wisely cites to rap as a cultural authority, Paul Butler's formative article, *Much Respect: Toward a Hip-Hop Theory of Punishment.*[108] In this article Butler suggests how rap lyrics can be regarded as an index of community views on criminal justice. He catalogs a range of lyrics from different genres of rap to evidence certain consensus positions around how both rappers and rap *fans* view the nature of punishment in society. The implied logic of his argument is that the jurisprudence of professional rappers reflects that of rap fans, many of whom come from the same communities. There is a dialectic here. The rapper's lyrical references reflect the lived experiences of fans. And perhaps rap fans also gravitate to rap lyrics that they identity and agree with. The idea embodied in the lyric must resonate with the fan at some level if they purchase or stream it repeatedly. And this suggests the representative truth of the rapper's attitudes toward the law.

In this way Butler employs rap as a form of cultural authority to help the reader rethink the purpose and design of our criminal law. There is not a strong constitutional valence to the article (perhaps it shapes our understanding of an Eighth Amendment dignity value).[109]

---

of this question, see also MICHEL-ROLPH TROUILLOT, SILENCING THE PAST: POWER AND THE PRODUCTION OF HISTORY (1995).

107. *E.g.*, Donnelly, *supra* note 1, at 104 ("The popular constitutionalist seeks to offer a more flexible approach—one that shares Ackerman's central goal and borrows from many of his core insights but also allows interpreters to identify popular constitutional consensus outside of what Ackerman has famously labeled 'constitutional moments.' ").

108. Paul Butler, *Much Respect: Toward a Hip-Hop Theory of Punishment*, 56 STAN. L. REV. 983 (2004).

109. *See id.* at 1003 ("The Eighth Amendment prohibits the state from punishing criminals in a manner that is inconsistent with their dignity.").

But it suggests how we can cite to a cultural index with integrity.[110] Still, there is an important distinction between the *idea* embodied in a rap lyric and the *quality* of a song. Broad trends in professional rap do not tell us much about whether the aesthetic output of an individual amateur rapper is good or not, which is of course requisite for art speech.

I thus turn to the advocacy network of law and rap scholars who have submitted amicus briefs in the recent cases of *Elonis v. United States*,[111] *Bell v. Itawamba County School Board*,[112] and *Knox v. Pennsylvania*.[113] In each of these cases the defendant wrote or vocalized a threatening rap of uncertain quality and disseminated it over the Internet. And in each case the law and rap scholarly network submitted an amicus brief to the Supreme Court that contextualized these amateur efforts within a genealogy of published rap songs that happened to detail violence as a form of social commentary or aesthetic release. These briefs convey a logic that these amateur attempts are sufficiently like the celebrated raps that they too merit First Amendment protection. To use my scope/application distinction, these authors "apply" these published rap songs as a kind of authoritative precedent or model for the contested raps at issue in order to construct a legal syllogism. But this is an enthymematic argument in that it assumes that those prior published raps were covered by the First Amendment because of their violent element. Rather they were covered because they were art speech.[114] The rap scholar-advocates—like most all of us—forget that those raps were covered by the First Amendment simply because they were produced and marketed by record labels and

110. *Cf.* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 355–81 (1987) (analyzing how the "cultural meaning" of a government action can be used to determine constitutionality).

111. Brief of the Marion B. Brechner First Amendment Project and Rap Music Scholars as Amici Curiae Supporting Petitioner, Elonis v. United States, 575 U.S. 723 (2015) (No. 13-983).

112. Brief of Erik Nielson et al. as Amici Curiae Supporting Petitioner, Bell v. Itawamba Cnty. Sch. Bd., *cert. denied*, 136 S. Ct. 1166 (2016) (No. 15-666), 2016 WL 763687.

113. Brief of Michael Render ("Killer Mike") et al. as Amici Curiae Supporting Petitioner, Knox v. Pennsylvania, 139 S. Ct. 1547 (2019) (No. 18-949).

114. Many raps are separately covered by the Constitution as political speech; for example, raps that comment on systemic issues related to policing. But this does not mean that *all* raps are political. All successful attempts at rap are art speech; many such raps are also political speech, and thus many raps are situated in these overlapping coverage zones. Some attempts at rap might still be political speech even if they are not artful. But some attempted raps are neither political nor art speech. Maybe they are covered for other reasons, e.g., as religious or profane speech etc. However, there must exist some number of attempted raps that do not enjoy any constitutional coverage. This does not mean we should criminalize these would-be speakers or artists even if their attempts do have some quantum of bad intent. There are more constructive ways to resolve these aesthetic misfires. But neither does this mean we should try to shoehorn these attempted raps as covered speech acts and reify them in our constitutional law doctrine as something *good*.

received as quality raps by fans. We might challenge the normative basis for such a regime, but this is how our cultural consensus worked to manage the boundaries of our free speech clause. It is an easy point to miss because prior to the Internet most of the rap we listened to was good rap.

There are two different axes that mark art speech coverage—the form or media of art and its quality. It is true that we as viewers and consumers of art have helped to create constitutional status for novel media like rap, performance art, and graffiti. This is the same insight made by Donnelly of how the "everyday practice" of millions of Americans going to the cinema informed the Supreme Court's decision in *Joseph Burstyn, Inc. v. Wilson*[115] to expand First Amendment coverage to include film.[116] The cultural significance of film to the American people made it something beyond a mere "spectacle" (*Mutual Film Corp. v. Industrial Commission*[117]) and instead worthy as art speech. But this does not mean that all *attempts* at filmmaking are covered by the First Amendment.

Like film after *Burstyn v. Wilson*, the amateur rapper who produces provocative rap music today has the *potential* to be covered as art speech. But her raps must still be good. In our prior world we could simply defer to the decisions of Art World marketing executives and effectively conclude our art speech analysis, without having to verify if an individual artwork was actually good or not.

But in our new Internet landscape it is not always obvious how we can make these same quality determinations, especially in "gestalt" genres like pop art or contemporary forms of rap music in which sonic atmosphere and vocal delivery seem to be prioritized over prior benchmarks like lyrical meaning and intelligibility. This problem is compounded by the fact that many of these uncertain attempts at art speech reflect the growing pains of young people trying out new ways of thinking or acting. We should thus relax these coverage boundaries and think of constructive ways that such issues can be managed within non-legal institutions like our schools. This is likely what we have already been doing.

Citation to a seemingly threatening Eminem or Tupac Shakur track can certainly still mark the boundaries of the First Amendment for legal readers. But the fact that Tupac happened to be a great rapper has little to do with the quality of a contested amateur track like those in the recent noteworthy cases of *Elonis*, *Bell*, or *Knox v. Pennsylvania*.

115. 343 U.S. 495 (1952).

116. Donnelly, *supra* note 1, at 118–19.

117. 236 U.S. 230 (1915).

Griswold tells us the bedroom is an important place, but it does not tell us that everything that happens to take place there is legally protected. Just as we ask the additional question of whether a certain happening in our bedroom is integral to our private life, so we ask the additional question of whether an amateur artwork meets our quality threshold for art speech.

VII. CULTURAL AUTHORITY OUTSIDE THE CONSTITUTION

I conclude by positing how my analysis might manifest outside of formal channels of constitutional law argument. The "canon of constitutional avoidance" likely informs how officials treat the borderline cases of where religion blurs with tradition, or religious practice with secular ritual. Consider the well-known exception of our "American pastime" of baseball to antitrust regulation.[118] Or how sports violence like brawls or hockey sticking are hardly ever investigated by police.[119] Or agency exceptions that allow the Makah tribe to renew their traditional whale hunt.[120] In each of these examples there might be at work the same underlying constitutional principles that go to our cultural intuition of which kinds of things ought to be covered as First Amendment performances or religions, even if they do not fit neatly into these categories. The many hidden decisions *not* to regulate or prosecute shed light on the broad space where considerations of cultural authority work *outside* of constitutional coverage. We might ask if these hidden decisions still count as "official decisions" for positivists like H.L.A. Hart or Joseph Raz. How conscious do we have to be of those legal questions we do not necessarily want to answer?

Sometimes cultural authority functions to clarify the scope of things we like about the law, like how the First Amendment protects provocative art speech or the equal protection clause thinks about underlying social facts. But sometimes there are things we do not like as much about the law, like the notion of prosecuting the "enforcer" of an ice hockey team, someone who participates in a traditional whaling

---

118. *See, e.g.*, Naomi Mezey, *Law as Culture*, 13 YALE J.L. & HUMAN. 35, 35 (2001) (arguing that the assumption "that a lawsuit challenging baseball's exemption from antitrust laws is a legal act with few cultural implications" is "profoundly wrong").

119. *Sports Violence*, USLEGAL (last visited June 20, 2020), https://sportslaw.uslegal.com/sports-violence/ [https://perma.cc/5JJX-5Q6G].

120. *E.g.*, Hal Bernton & Evan Bush, *NOAA Argues to Allow Makah Tribe to Hunt Gray Whales off Washington Again*, SEATTLE TIMES (Nov. 16, 2019), http://www.chronline.com/northwest_regional_news/noaa-argues-to-allow-makah-tribe-to-hunt-gray-whales-off-washington-again/article_131f13c6-08aa-11ea-a368-c7fb2a455a4c.html [https://perma.cc/4W74-9VYY]; *see generally* Andrew Jensen Kerr, *Defining Meat and Contesting Tradition*, 52 U.C. DAVIS L. REV. 1999 (2019).

rite, or the young artist who makes an unfortunate aesthetic misfire. A law and culture framing helps to surface the ways that officials dispose of legal conflicts outside of formal mechanisms or avoid reifying these kinds of tough cases into our constitutional law doctrine. Donnelly's article is a formidable contribution that does important work in charting how constitutional argument can be done within our constitutional regime. The next frontier is to explore the ways that popular constitutionalism works outside of these settled boundaries.