

Someone might object to my assertion that seeking the authorially intended meaning of structural rules is the only thing that makes sense of the enterprise of asking some group to author such rules. She might claim that I have conflated the Constitution as a set of structural rules drafted and ratified by identifiable people at a specific time in history with “The Constitution” that is our fundamental law. The latter refers not to the specific instructions communicated to us by their drafters/ratifiers but to our practice of constitutional argument. Within that practice, we might invoke the intended meanings of the actual authors. But we might also invoke the plain meaning of the text, historical developments, morality, prudence, and so forth. Each argumentative modality is part of our constitutional practice. Originally intended meanings occupy no preferred position among such modalities.

There is a sense in which this claim is true, and there is a sense in which it seems deeply confused. It is true that one can find constitutional arguments framed in all of these ways, and one can find Supreme Court opinions that exhibit this modal diversity as well.

Nonetheless, each modality corresponds to a different constitution. The originally intended constitution is different from the textualist one, which is in turn different from the historical and moral ones, and so on. If rendered in Italian, each would be symbolically distinct. So different modalities entail different constitutions.

But then, when a litigant invokes one modality in an argument and her opponent invokes another, what exactly are they arguing about? To answer “the Constitution” is wrong on the modalities account, as there are different constitutions, not the Constitution. The litigants appear to be arguing past each other and thus not in fact disagreeing. They are each engaged in “the practice” of constitutional argument and cannot be said to be disagreeing about that.

What, then, is the argument about, on the modalities account? Perhaps it is not an argument over what the Constitution means but rather an argument about which constitution the Supreme Court should endorse as the Constitution. Perhaps this is true —although those endorsing the modalities approach tend not to see it as one in which litigants offer up alternative constitutions from which the Supreme Court is to choose. For one thing, if the Court does, as it must, choose one modality to resolve the case, that choice is not supposed to establish the supremacy of that modality in any other case. All of the losing constitutions are supposed to remain available for use in future cases.

Mitch Berman has recently argued that “the Constitution” is really our practice of constitutional argument. See Berman, “Constitutional Theory and the Rule of Recognition.” But this “argumentative practice” conception of the Constitution seems to me to entail a category mistake. The fact that we argue about the Constitution’s meaning does not mean that the Constitution is itself the practice of constitutional argument. To assert the latter would be to confuse the external perspective on what constitutional lawyers are doing — “they’re arguing about constitutional meaning” —with the internal perspective of the participants themselves —“we’re arguing about constitutional meaning.” If Berman’s view were correct, then when scientists argue about string theory or elementary particles, we would be justified in saying that string theory and elementary particles are argumentative practices. That would, however, be obviously absurd.

Berman has also recently argued that constitutional meaning is a matter of achieving reflective equilibrium among our various “constitutional intuitions,” intuitions that are independent of our