The Excluded Muddle

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David E. Pozen & Adam M. Samaha, *Anti-Modalities*, 119 **Mich. L. Rev.** 729 (2021).

A specter is haunting modern American legal scholarship—the specter of branding.

Whether it is a marketplace of ideas or just a marketplace, legal scholarship today overflows with neologisms, "I call this"-es, and other efforts to hawk our wares to law review editors and, perhaps, other scholars.[1] Useful at times, branding is often unnecessary or silly. It routinely announces a purportedly un-noticed phenomenon that in reality fills whole library shelves. (One awaits with resignation the inevitable article proclaiming, "I call this activity, in which two parties reach a binding and often memorialized exchange of promises, *agreementification*. It urgently deserves closer study.") Given the frequency with which legal scholars treat as "new" arguments or observations that were old before they were born but lie outside Westlaw's reach, branding often involves neither new wine nor new bottles, but old wine in old bottles with a new label slapped on. It is bad enough if these efforts are cynical, worse if they are not, and perhaps worse still when they are a bit of both. We might call this the Late Capitalism-ization of legal scholarship.

With that cheerful preface, it is a pleasure to see a new label[2] that actually performs a useful service, spotlighting something we might otherwise neglect. It is doubly pleasing because the article neither celebrates nor condemns what it labels. It walks us through the phenomenon with a proper sense of its nuances and its costs and benefits. Written by David Pozen and Adam Samaha, *Anti-Modalities* exemplifies the difference between a meaningful scholarly label and a mere marketing gambit.

Constitutional lawyers are familiar with the modalities of constitutional argument: the "forms of argument that are considered legitimate within the legal profession for establishing propositions of constitutional law." In Philip Bobbitt's words, they constitute the "legal grammar" of constitutional law. Constitutional law teachers inevitably teach these modalities, trying to instill in their students a sense of the kinds of constitutional arguments that will be legible to judges and other lawyers.

From this starting point, Pozen and Samaha ask: What sorts of recurring modes of constitutional argumentation are *illegible* and unacceptable? In particular—to distinguish them from altogether irrelevant arguments ("What does the arrangement of sculpture in the Uffizi tell us about the Seventh Amendment?")—what arguments are excluded even though they "seem relevant to the controversies that constitutional law is asked to resolve?" Are they *actually* excluded, or do they find their way in to modal argument anyway? In what form? And what are the costs and benefits of the "gap" between what is permitted and what is excluded? As they note, anti-modal constitutional law arguments are not bad in themselves. And they are common, both in general conversation and in lay public discourse on constitutional law itself. The result is that "the anti-modalities," for good and ill, "shut out of constitutional law virtually all the arguments that drive most citizens' views on most matters of public concern."

Like the Council of Elrond, Pozen and Samaha counter the six canonical constitutional modalities identified by Bobbitt with six constitutional anti-modalities, ordered by "how frequently decisionmakers

are accused of employing them." They are: 1) "Policy arguments," which are common in debates over "public policy and political morality" but "seen as out of bounds in debates over the Constitution's meaning." 2) "Fundamentalist arguments," which "draw directly on deep philosophical premises or comprehensive normative commitments." 3) "Partisan arguments," which "express a preference for a particular political or social group" for reasons not dictated by the Constitution itself. 4) "Emotional arguments," "indisputably pervasive" in life but rendered suspect in law by the norm of reasoned elaboration. 5) "Popularity arguments," which appeal directly to "the perceived popularity" or unpopularity of a proposition in arguing for a particular constitutional meaning. 6) "Logrolling arguments," which consist of various trading or compromising techniques.

A typology of common anti-modalities is valuable in itself. But Pozen and Samaha go further, noting that, like most taboos, the anti-modalities inevitably find their way back into acceptable forms of constitutional argument in "diluted and disguised incarnations." Thus, a straight fundamentalist appeal is sufficiently anti-modal to have been easily parodied by John Hart Ely ("We like Rawls, you like Nozick. We win, 6-3."). But one might "hitch [such] an arguably anti-modal argument to a modality" by insisting that the Constitution "calls for a presentist inquiry into moral norms." Typically, moreover, the return of the repressed argument calls for it to be domesticated or "modified." Rather than bring to bear all the tools of sophisticated policy analysis, for instance, courts will employ "second-order" terms like "manageability," or make broad-brush claims about consequences, ungrounded in serious data or analysis. In short, they assert, "American constitutional practice has developed an impressive array of norms to wall off the use of anti-modal reasoning"—*and* "a subtle set of gateways for letting in certain stripped-down versions of that reasoning in certain cases."

One could easily imagine an article on this subject insisting that anti-modalities *should* be excluded, or conversely that such borders are artificial and must be torn down. (One need not "imagine" a scholarly article that simply accuses an adversary of anti-modal argument, or one that engages in anti-modal argument despite being ostensibly in the game. Both are common.) Pozen and Samaha avoid both poles.

They argue that the wall between modal and anti-modal argument, even if porous, has value. Blocking anti-modalities from constitutional law argument stops it "from devolving into normative argument, full stop." Law—even constitutional law—is a profession, a practice, and an institution. Like all such institutions, it needs to be bounded and disciplined if the enterprise is to be conducted with coherence and integrity.

On the other hand, the wall "move[s] constitutional decisionmaking some distance from what people usually care about." It leaves constitutional law "without the resources to reckon, seriously and explicitly, with some of the most significant dimensions of social problems." Its participants, "unable to address such matters directly, . . . endlessly accuse each other of manipulation and misdirection." And the channeling of the professional discourse of American constitutional law leaves its practitioners caught between in an interesting way. On one side, the insistence on modal reasoning encourages lawyers, who are accultured to view serious policy tools as anti-modal and are not trained to use them, to treat nonlegal expertise as "sociological gobbledygook." On the other, the gulf between modal constitutional argument and common discourse leads to its "alienation and mystification for ordinary Americans," and to constitutional lawyers' alienation *from* ordinary Americans.

That is a particular problem for constitutional law, with its customary mix of high and low politics and policy. The "between" in which constitutional lawyers reside is almost a caricature of a certain kind of cognitive and social elite. Neither part of the general populace nor possessed of reliable technical knowledge, they resemble a wealthy alchemists' guild that has somehow managed to hang on into the atomic age. "Put crudely," they write, "constitutional law cannot survive as a legal discipline without the

anti-modalities, and it cannot thrive as a political practice with them."

Pozen and Samaha argue that despite its advantages, the downsides of "the status quo regarding the anti-modalities" counsel reform. They offer two speculative options. One is to "narrow the gap" between modal and anti-modal discourse about the Constitution, "connect[ing] the forms of constitutional argument to whatever people honestly and deeply care about with regard to matters of public concern." The other—their own preference—is to "accept the resonance gap in principle, and strive to reduce its importance in practical terms," by "reducing the footprint of both judicial review and supreme constitutional law." Both proposals are thought-provoking, if secondary to the goal of "clarify[ing] the core tradeoffs" involved in the system of modal and anti-modal argument in constitutional law.

I worry about two possibilities, neither of which is fully discussed in this already full article. One has to do with the imperial reach of legalistic discourse. The "gap" that Pozen and Samaha describe arises from a view of constitutional law in which modal argument "shut[s] out . . . virtually all the arguments that drive most citizens' views on most matters of public concern." Insofar as Americans tend to see every political issue as a legal issue and every legal issue as a constitutional one, one might fear that "most citizens" themselves, in aping lawyers' argumentative forms, will themselves take on the habits of modal discourse, or at least a bastardized version of it—including its exclusion of anti-modal forms of argument. On the Internet no one knows you're not a lawyer, and a great many public arguments are conducted in a legalized form that neither mitigates sharp partisan feeling nor speaks its concerns openly. We may *all* end up alienated: severed from the capacity to engage in open talk on matters of public concern in a way that is free of the argumentative restrictions that make sense only in a narrow precinct of our society and its institutions.

Institutions themselves are the other concern, in two ways. First, as Pozen and Samaha write, "professional argumentation" unavoidably requires "some method." That professionalism or disciplinarity undergirds the maintenance of included and (more or less) excluded modes of argument. An engineer knows *when* she is talking about the structural integrity of a bridge and *how* to talk about it. She and her colleagues can easily distinguish between that discussion and an argument about critical urban theory (a phrase I made up but which, of course, exists). Constitutional law may be a profession or discipline. But it is less clearly defined and bounded than many others, making boundary maintenance more difficult.

That difficulty will increase as law, like other institutions, experiences a contemporary weakening of attachment to or trust of institutions and disciplinarity as such. To the extent that what we are seeing today, in law and other disciplines, is not simply an effort to change the boundary or bring some anti-modalities into the modal space, but a rejection of boundaries *as such* and of the authority of those who collectively regulate modal space, one may worry that Pozen and Samaha's typological effort will be like trying to draw a map in the sand at high tide. Pozen and Samaha's project is descriptive and nuanced. But it may be that developments outside their endeavor—namely, a loss of faith in technē and in argument and argumentative boundaries—are pressing in ever closer on the whole enterprise.

A second point is closely related. Pozen and Samaha worry that "the anti-modalities both reflect and perpetuate the intellectual insularity of mainstream legal culture," that their subtle entry into constitutional decisionmaking "only make[s] 'the constitutional-law game' more complex and impenetrable to nonspecialists," and that this is one source of "legal estrangement" between lawyers and "nonelites." Insularity born of the exclusion of the anti-modalities is indeed one sort of problem. But code-switching is another.

All sorts of platforms, and especially social media, allow and encourage constitutional lawyers to make anti-modal arguments on public questions of a constitutional nature, or—perhaps worse—to engage in a

mix of modal and anti-modal arguments. They do not disclaim any professional status in these forums; most of them trumpet it (and would be ignored if they didn't). They do so without any necessary skill in the anti-modalities, and without making clear what role they are playing and whether particular arguments are modal or anti-modal. One might think that anti-modal engagement on public issues in public spaces would reduce the "resonance gap" that worries Pozen and Samaha. But the mixture of modal and anti-modal argument by constitutional lawyers in these spaces may, as they suggest, *add* to the impenetrability of constitutional law. The very *privilege* of code-switching at will, while still loudly asserting one's status as a professional player of the game, may exacerbate rather than narrow legal estrangement between elites and nonelites. And the lack of clarity about what role these elites are playing, personally or argumentatively, may sap institutional trust in "mainstream legal culture" and thus widen the gap further.

This observation is not meant to insist on the value of insularity or the need for stricter boundary maintenance between modal and anti-modal argument. And it may be consistent with the authors' proposal to narrow constitutional law's domain altogether. But it also suggests that, whatever the list of modal and anti-modal argument contains and whatever rules of boundary maintenance apply, the whole enterprise depends on some degree of *institutional* as well as public health. It is not clear we can count on either. Pozen and Samaha worry that the anti-modalities prevent "constitutional law" from reckoning properly with significant social problems. But we might also worry about a "constitutional law," understood as part of an institution or discipline, whose practitioners address those problems more directly, but in the process lose any capacity to maintain themselves *as* a discipline, and squander whatever remaining trust people have in the institution.

The world of argument set out in Pozen and Samaha's descriptive and analytic project may thus be beset on all sides. But it is a worthy project in itself, containing a fine mix of example, description, and speculation, positive and negative. To return to the beginning, it is an exemplar of the difference between scholarly labels that enhance our understanding of the world of social and discursive practices we inhabit—and mere branding, which simply sells us a product we already own.

1. Present company included. I find at least five relevant "call this" labels in my own work in a Westlaw search, and both of my books, published in the last flush of youth, are not exactly free of branding.
2. Semi-new, actually. The label "anti-modalit[y]" appears briefly in a 2013 article by James Grimmelman, in a different but conceptually similar fashion. To my delight, a much closer version also appeared in 2014 in *parodic* form, in one of Larry Solum's April Fool's abstracts. "Antimodalities," here, is an affectionate spoof of Suzanna Sherry's criticisms of constitutional theory, in the form of an argument that despite "the insistence of [constitutional] pluralists that constitutional argument is limited by a closed list of modalities," in reality many key Supreme Court decisions are "'antimodal' decision[s] relying on arguments from outside the modalities." That sentence could easily appear in the "real" article discussed in this jot. I see no reason to think the authors of the present-day *Anti-Modalities* were aware of or remembered this parody. But I do hope they share my delight. It is no reflection on the genuine merits of Pozen and Samaha's piece that Solum is a fine parodist or that, in legal scholarship as elsewhere, history so often repeats itself—first as farce and then as reality.

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