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WHY THE DEBATE BETWEEN ORIGINALISTS
AND EVOLUTIONISTS RESTS ON A SEMANTIC MISTAKE

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ABSTRACT. I argue that the dispute between two leading theories of interpretation of legal texts, textual originalism and textual evolutionism, depends on the false presupposition that changes in the way a word is used necessarily require a change in the word's meaning. Semantic externalism goes a long way towards reconciling these views by showing how a word's semantic properties can be stable over time, even through vicissitudes of usage. I argue that temporal externalism can account for even more semantic stability, however. Temporal externalism is the theory that the content of an utterance at time *t* may be determined by developments in linguistic usage *subsequent to t*. If this semantic theory is correct, then the originalist and evolutionist positions effectively collapse. Originalism is correct in that the original meaning of the text is the meaning that is binding on jurists, but evolutionism is vindicated, as it is the current practices and standards that determine the meaning the text now has, and *has always had*. Objections to temporal externalism, and to its application to the interpretation of legal texts, are considered and addressed.

I. INTRODUCTION

Much has been done exploring the implications of philosophy of language for theories of legal interpretation. I will build on the work of

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Michael S. Moore and David Brink,¹ among others, and develop connections between contemporary semantics and disputes within legal theory as to how to interpret legal texts. Specifically, I'll explain and motivate the semantic theory of temporal externalism, and bring it to bear on a dilemma for anyone sympathetic to at least a moderate form of textualism: Should interpretation aim at capturing the original meaning of the text, which was fixed when it was originally laid down, or should we instead ask what the words of the text mean for us today? I will argue that temporal externalist semantics supports the conclusion that the dispute rests on a mistaken presupposition about how usage of a word determines its meaning, and thus that the dilemma is a false one. In the main, the original literal meaning of a legal text is the same as the meaning it has by our own lights.

What follows is a brief synopsis of this article. In section 'II', the distinction between textual originalism and textual evolutionism is briefly described. In section 'III', the theory of semantic externalism is explained, and its connection to semantic stability, in the face of changing linguistic usage, is made explicit. This is brought to bear on the matter of legal interpretation, following the work of Brink and Moore, among others. Some objections to externalism are considered and addressed. In section 'IV', I consider a thought experiment by Mark Wilson, which seems to show, at least for a range of cases, that semantic externalism cannot account for semantic stability quite as well as hoped. Section 'V' explains a somewhat recent variation on externalism called temporal externalism, and shows how it can solve the problem raised by Wilson's thought experiment. Temporal externalism is the view that the content of an utterance at time t in some cases will depend in part on linguistic developments that occur subsequent to t . Section 'VI' is devoted to considering objections and replies to this counter-intuitive thesis. In section 'VII', I apply temporal externalism to the dispute between originalists and evolutionists, and I argue that this theory secures semantic stability to an even greater degree than regular semantic externalism does. In section 'VIII', I address objections that

¹ See, in particular, Moore, Michael S., 'The Semantics of Judging', *Southern California Law Review* 54 (1981): 151–294; Moore, 'Moral Reality', *Wisconsin Law Review* (1982): 1061–1156; Moore, 'A Natural Law Theory of Interpretation', *Southern California Law Review* 58 (1985): 277–398; and Moore, 'Moral Reality Revisited', *Michigan Law Review* 90 (1992): 2424–2533; Brink, David, 'Legal Theory, Legal Interpretation, and Judicial Review', *Philosophy and Public Affairs* 17 (1988): 105–148; and Brink, 'Legal Interpretation and Morality', in B. Leiter (ed.), *Objectivity in Law and Morals* (Cambridge: Cambridge University Press, 2001), pp. 12–65.

specifically concern the application of temporal externalism to the interpretation of legal texts. In section ‘IX’, I summarize my conclusions.

II. ORIGINALIST AND EVOLUTIONIST TEXTUALISM

Paul Brest defines ‘originalism’ as ‘the familiar approach to constitutional adjudication that accords binding authority to the text of the Constitution or the intentions of its adopters’.² The textualist originalist accords this authority to the text of the Constitution, and the intentionalist, by contrast, regards as decisive (some of) the intentions of those who adopted the text. By this definition, however, any textualist is an originalist, even Justice William J. Brennan, who said that the most important interpretational question is ‘What do the words of the text mean in our time?’³ Justice Brennan is usually taken to be a critic of originalist jurisprudence, however, and as a defender of the view that the Constitution is a so-called living document. Unlike some defenders of the Living Constitution, who have embraced the notion of an unwritten constitution that contains extra-textual sources of normativity⁴; another position, Justice Brennan’s quotation suggests that it is the written text of the Constitution that lives. Thus, the meaning of the text today – the meaning that is binding on us – can differ from the text’s original meaning. We might call this view textual evolutionism. Let’s reserve the designation textual originalism for one who accords binding authority to the original meaning of the text.

An important aspect of Constitutional interpretation (or interpretation of any statute) is ascertaining the text’s meaning. But is it the original meaning of the text, as laid down by the framers, or is it the meaning that the text has for us today, which has normative force for us? A moral term like ‘cruel and unusual’ would seem to illustrate the problem. Few framers would have applied this term to capital punishment, the standard punishment of the day for felonies, and perhaps few would have applied it to other than common

² Brest, Paul, ‘The Misconceived Quest for the Original Understanding’, *Boston University Law Review* 60 (1980): 204–238, 204.

³ Justice Brennan’s 1985 Georgetown University speech, *The Great Debate: Interpreting our Written Constitution* (Washington, DC: The Federalist Society, 1987), pp. 11–25.

⁴ See Grey, Thomas C., ‘Do We Have an Unwritten Constitution?’, *Stanford Law Review* 27 (1975): 703–718, and Grey’s ‘Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought’, *Stanford Law Review* 30 (1978): 843–894. See Dworkin, Ronald, *Law’s Empire* (Cambridge: Harvard University Press, 1986).

punishments, like flogging. Today most regard flogging, if not capital punishment, as cruel and unusual. The Eighth Amendment of the Constitution prohibits cruel and unusual punishment. Is the relevant sense of 'cruel and unusual' the framers' or our own?

I argue that the very dispute rests on the mistaken presupposition that if one society uses a term one way, and a later society uses the term significantly differently, then the two societies must mean something different in their respective uses of the term. The relationship between usage and meaning is, I will argue, different from what some have supposed. This has been argued by Moore and Brink,⁵ but I will extend the argument they've begun, to better handle some problematic examples.

III. SEMANTIC EXTERNALISM AND THE STABILITY OF MEANING

One semantic puzzle regards conventionality of language and the stability of meanings over time. Language is in at least some respects conventional. Therefore, many are drawn to the idea that linguistic usage determines meaning and reference. The ways that a word has actually been applied by past and present members of the linguistic community determine the meaning and extension of the word. (The extension of a word is the set of all the things of which that word is true).

Meanings and extensions also seem to be quite stable over time. The practical judgments of speakers reflect our implicit view that speakers from the past typically meant exactly the same thing we do in our respective uses of a word. When we encounter utterances from the past, whether they involve natural kind, artifact, or moral terms, we take them typically *at face value* (as meaning just what we would mean by the same utterance).⁶ Indeed, evidence that we do so is that we often take ourselves to be in agreement or in disagreement with these utterances, rather than discoursing on a different subject. If the words 'gold' or 'cruel' meant something different as uttered by English speakers two or three centuries ago, then our utterance of 'gold is soluble' or 'flogging is cruel' could not be in agreement with their utterances of the same words, for our utterances and theirs

⁵ Moore 1981, 1985; Brink 1988, 2001, *supra* note 1.

⁶ This expression is due to Gary Ebbs, who defends these judgments of sameness of extension over time in 'The Very Idea of Sameness of Extension over Time', *American Philosophical Quarterly* 37 (2000): 245–268.

would have different truth conditions. We would not both be saying the same thing. Even our utterance of ‘gold is not soluble’ could not be in disagreement with their utterance ‘gold is soluble’, because, again, what they affirm and what we deny have different truth conditions. Literal agreement (to say the *same thing* someone else said) and disagreement (to deny the very thing someone else said) depend on our using terms with the same meanings and extensions. Of course, in some situations we recognize that we don’t use words with the same meanings and extensions as did past speakers of our language (or even present ones, as with differences between British and American English). There are some situations where we really are changing the subject, or where we use words with different meanings without realizing it. But it is a desideratum of any semantic theory that it accounts for a great deal of semantic stability, in accord with the practical judgments of speakers.

A problem looms, however. Linguistic usage is quite unstable, changing over time and differing from person to person. If usage determines the semantic properties of words, and usage is unstable, then perhaps we ought to expect semantic properties to be unstable as well.

The puzzle, then, is to reconcile the following three claims:

1. Linguistic usage determines semantic properties, like meaning and extension.
2. Semantic properties are quite stable, and do not change a great deal over time.
3. Linguistic usage is constantly changing over time.

These claims are not inconsistent. To illustrate this, consider that macro-properties of a table are determined by the table’s micro-properties. That is, properties such as the table’s size and location are determined by the locations and groupings of atoms that make up the table, although the properties of the atoms are rapidly changing, and the macro-properties are quite stable. The changes in the properties of the atoms aren’t the sort to make a difference to the table’s size or location.⁷ But if linguistic usage of a term is to determine the term’s semantic properties, *and the changes in usage seem to be of the sort that make a difference to meaning* – such as nearly

⁷ Henry Jackman makes this point, with a different example, in ‘Moderate Holism and the Instability Thesis’, *American Philosophical Quarterly* 36 (1999): 361–369, at p. 364.

everyone applying the word ‘cruel’ to flogging when previously almost nobody did – then it is hard to see how the second claim above could be true. And this is just what some have concluded. Joseph LaPorte, for example, arguing for the incommensurability of scientific theories from different ages, says:

I have argued at some length that our use of natural-kind terms has changed over time as our scientific sophistication has increased. We continually refine our use of these terms in response to scientific research. For example, earlier speakers used the word ‘fish’ differently from the way we do. So we have not simply discovered that earlier speakers erred in accepting the sentence ‘Whales are fish’. Rather, we have changed what ‘Whales are fish’ means.⁸

The culprit in the trio above, I argue, is the first claim: that linguistic usage determines meaning and extension. Semantic theories that endorse this claim are sometimes called traditional semantic theories,⁹ since most of the great philosophers of language of yesteryear, including Gottlob Frege, the logical positivists, and Ludwig Wittgenstein, defended the claim in one form or another.¹⁰ They are sometimes called conventionalist theories,¹¹ for obvious reasons, and sometimes are labeled description theories, since they identify the meaning of a name with the set of descriptions (or something along those lines) most speakers associate with it. They hold that this meaning determines the extension of the term.

The criticisms of this kind of semantic theory are legion,¹² but the problem most relevant here is that this sort of theory has a difficult time accounting for disagreement. If the set of descriptions associated with a term changes over time due to scientific discoveries, novel phenomena, or evolving moral standards, then on this view the meaning of the term, and hence its extension, changes as well. But as we have seen, speakers today take themselves typically to agree or disagree with the framers about which punishments are

⁸ Joseph LaPorte, *Natural Kinds and Conceptual Change* (Cambridge, UK: Cambridge University Press, 2004) at p. 112. LaPorte’s view will be discussed briefly in section V.

⁹ Brink 1988, 2001, *supra* note 1.

¹⁰ The attribution to Frege of this view is debatable, but see Frege, ‘Sense and Reference’ [originally 1892] in *Translations from the Philosophical Writings of Gottlob Frege*, translated by M. Black and P. Geach (Oxford: Blackwell, 1980), pp. 56–78; and Carnap, Rudolf, *Meaning and Necessity: A Study in Semantics and Modal Logic* (Chicago: University of Chicago Press, 1947). See Ludwig Wittgenstein, *Philosophical Investigations*, translated by G.E.M. Anscombe (Oxford: Basil Blackwell, 1958).

¹¹ Moore 1985, *supra* note 1, so describes them.

¹² The *locus classicus* of such criticism is Kripke, Saul, *Naming and Necessity* (Cambridge: Harvard University Press, 1972).

cruel, the nature of gold, and so forth, rather than to have changed the subject. An alternative semantic theory, which can account for the stability of meaning over time in the face of changes in linguistic usage, is needed.¹³

Semantic externalism (or anti-individualism, the causal theory of reference, or simply Kripke-Putnam semantics) is such a theory. *Semantic externalism* is the thesis that the content of an utterance does not supervene on the intrinsic features of the agent who utters the term. Molecule-for-molecule doppelgangers might differ in their utterances' contents, due to differences in their respective physical environments, or to differences in the linguistic communities to which they belong. For instance, if I have a doppelganger on Twin Earth, which exactly parallels our planet except that where we have aluminum, they have a different but superficially identical light metal that they call 'aluminum', then our respective utterances involving the word 'aluminum' have different meanings and truth-conditions. (Assume that this is before scientists discover the underlying nature of aluminum – otherwise the two planets will have additional differences.) The truth of our utterance of 'aluminum is a light metal' depends on facts about *aluminum*, and the complex causal history we have with aluminum, whereas the truth of the Twin Earth utterance depends on facts about this other metal, which, despite what they call it, is not aluminum. The utterances have different truth conditions despite the fact that there is no physical difference between the Earth and Twin Earth agents, and no difference between the set of descriptions each associates with what he calls 'aluminum'.¹⁴

Similarly, doppelgangers whose linguistic communities differ may also differ in their utterances' contents. Suppose a speaker of English, who does not know that arthritis is an ailment of the joints, claims that many people are afflicted with arthritis in the thigh bone. Consider her doppelganger on Twin Earth, who makes

¹³ This point has already been made by Moore 1985, pp. 297–298, and by Brink 1988, pp. 113–116 and Brink 2001, pp. 21–23, all *supra* note 1. See also Stavropoulos, Nicos, *Objectivity in Law* (Oxford: Clarendon Press, 1996), Chap. 2. Ronald Dworkin has dubbed as 'the semantic sting' the view that disagreement is possible only against a backdrop of (possibly implicit) shared criteria of usage, and he argues that it cannot adequately account for theoretical disagreement, such as disagreements about what *law* is. See Dworkin 1986, *supra* note 4, Chaps. 1 and 2.

¹⁴ Putnam, Hilary, 'The Meaning of 'Meaning'', in *Mind, Language and Reality: Philosophical Papers*, Vol. 2 (Cambridge: Cambridge University Press, 1975), pp. 215–271; Kripke, Saul, 1972, *supra* note 12; Burge, Tyler, 'Individualism and the Mental', *Midwest Studies in Philosophy* 4 (1979): 73–122.

the same utterance, but who lives in a linguistic community in which the term 'arthritis' is applied not only to ailments of the joints, but also to some afflictions of the thigh bone. They each associate exactly the same set of properties with what they call 'arthritis'. The Earth speaker says something false about arthritis, an ailment of the joints. The Twin Earth speaker says something true about some ailment other than arthritis. Their utterances have different contents because of differences in their linguistic communities to which they defer.¹⁵

Utterances of 'gold' one hundred years ago were causally related, via an ostensive definition, to the very same thing our utterances of 'gold' today are related to: namely, the element gold. Thus, our utterances and theirs have the same meanings and extensions, despite differences in our theories about the nature of gold. Different theories about what gold is do not make for different meanings or extensions for 'gold', so apparent disagreement can be understood to be genuine disagreement, rather than as people talking past one another.¹⁶ Our practical judgments of sameness of meaning and extension over time support the view that we implicitly accept externalist semantics, and reject conventionalist/description theories.¹⁷

An example of Michael S. Moore's nicely illustrates at least one respect in which this is relevant to the interpretation of law.¹⁸ Consider an organ transplant law that allows doctors to harvest vital organs from a person only if the person earlier gave consent, and the person is dead. Suppose that at the time the law was enacted, the concept of *death* was identified in ordinary (and expert) usage with the simultaneous cessation of heart and lung functions, together with a loss of consciousness. Suppose further that we no longer do so,

¹⁵ The anti-individualist needn't maintain that linguistic behavior is the sole determinant of content, but merely that differences in usage sometimes make for differences in content.

¹⁶ Again, this follows Moore 1981, 1985, and Brink 1988, 2001, all *supra* note 1. Moore contrasts *realist* semantics with conventionalist semantics. As he uses the term, a realist semantic theory is one that makes the meaning of a term depend on the real nature of things and not just on the conventions of ordinary language.

¹⁷ It is beyond the scope of the paper to address the arguments in favor of anti-realist positions such as Thomas Kuhn's. On his view, it is a mistake to ask for the real reference of a term, outside of any theory. All data are theory laden, and at least some rival theories are incommensurable, in that they are neither in agreement nor disagreement about the world – they live in different worlds. Kuhn, Thomas S., *The Structure of Scientific Revolutions* (Chicago: The University of Chicago Press, 1962). My position is that, everything else being equal, we should prefer a theory of semantic and scientific theory change that can accommodate our shared commitment to semantic stability. It's possible that no such theory is correct.

¹⁸ Moore 1985, *supra* note 1, pp. 297–300, 322–328.

since we have learned that people can meet those criteria, but still be revivable. On the rejected theory of meaning, we should have to either regard such revivable people as dead, and therefore allow their organs to be harvested if they consented to be organ donors, or foist upon the world an entirely new meaning of 'dead' associated with the revivability criterion, effectively applying a different law from the one enacted. Neither option seems felicitous. It would be outrageous to harvest the organs of a revivable person, and judicial legislation, rather than interpretation, is objectionable on a number of grounds. Moore points out, though, that on the externalist/causal/realist semantic theory, 'death' names a natural kind of event, and includes in its extension all events of that sort, unconstrained by conventions of ordinary usage. Such a semantic theory would encourage decisions based on the latest theories about what death is, rather than on how people have conventionally used the term 'death' or on how they previously typically identified the dead. There almost certainly is more to what death is than is captured by the ordinary linguistic conventions about the usage of 'death' at any given time. As Moore says (albeit with respect to 'polio'), 'their word meant, literally, more than they knew'.¹⁹ For theory change about a natural kind to be possible, the criteria for identification of that kind cannot be frozen as necessary conditions for membership in that natural kind. It is the perhaps unknown nature of the thing referred to that determines the extension of the natural kind term, not the identifying criteria, for those criteria must be open to revision and improvement.

Not only is this a moral argument in favor of adopting externalist semantics as a guide to legal interpretation – as it allows us to avoid choosing between absurd jurisprudence and judicial legislation – but there's reason to believe the enactors of the legislation had something like this in mind anyway. For certainly they would not have wanted the revivable but nearly drowned victim to be considered dead; neither would they have thought that evidence as to the real nature of death was somehow irrelevant to decisions about whether organs could be harvested from a person's body, or that we are entitled to change the meaning of the law by redefining 'death'. This is hard to square with their being committed to a conventionalist theory of meaning.

¹⁹ Moore 1981, p. 206, *supra* note 1.

Provided that we can apply this externalist/realist framework across the board – to other natural kind terms, artifact terms, and, importantly, moral terms – we can then ignore the fact that the framers applied key words in the Constitution differently than us. Provided that we take the framers' utterances at face value, we have *prima facie* reason to think that our utterances of a term have the same semantic properties as our ancestors' utterances of those terms. (This allows, of course, for cases in which words change their literal meaning, such as 'gay'. I don't pretend that it's easy to sort out when a term's extension has changed from when it hasn't. Doubtless there are hard cases and fuzzy boundaries.) My suggestion is that in determining whether a word has changed its meaning, we accord great weight to people's practical judgments as to whether a word has changed meaning. When people (appropriately informed) take an utterance from the past at *face value* there should be a strong presumption in favor of semantic sameness over time.

Consequently, the choice between interpreting the Constitution or a statute as meaning what it did originally or as what it means for us today is a false dilemma. Despite the evolution of linguistic usage, the original content and the content by our own lights are one and the same. The choice presupposes that the meanings must be different since the modern usage is different, and this presupposition is false, just a residue of the discredited conventionalist semantics.

IV. MARK WILSON'S THOUGHT EXPERIMENT

In 1982 Mark Wilson performed a thought experiment about word extensions over time.²⁰ Suppose there is a community of islanders that is isolated from the modern world. They apply their word 'bird' to the various birds on the island. Then they see a B-52 bomber land on the island, and, this being the first mechanical flying device they have ever seen, they say that a silver bird has fallen from the sky. After investigating the airplane and determining that it is man-made, not alive, and so forth, they continue to call the plane a 'bird' and refer to the terns, ibises and such as 'feathered birds'. The extension of 'bird' in the islanders' idiom appears to be, approximately, the set of flying things. What was the extension of their term 'bird' before

²⁰ Wilson, Mark, 'Predicate Meets Property', *The Philosophical Review* 91 (1982): 549–589.

the arrival of the B-52? That is, what class of things was 'is a bird' *true* of before they had encountered the plane? Wilson adds a complication to the story. Suppose that the islanders had the following dispositional property. Had they first encountered the B-52 not by seeing it fly, but by finding it in the jungle after it had crashed there unseen, they would have described it as a 'great silver house'. Suppose further that after discovering that B-52 bombers were capable of flight they would persist in describing them as houses. They would draw a distinction between flying houses and earth-bound houses, and they never would call airplanes 'birds'. The extension of 'bird' in this counterfactual situation excludes airplanes, apparently. But again, we might ask what the extension of 'bird' was before the discovery of the plane in the jungle.

It seems that the extension and meaning of the islanders' 'bird' in the post-B-52 world depends on accidental, contingent, unforeseeable facts about how the B-52 was introduced to the islanders. Determining the extension and meaning of 'bird' in the pre-B-52 world, however, is a stickier issue, as can be seen from considering the alternative possible futures, both seemingly compatible with their current usage and dispositions. A number of possible verdicts come to mind. One is to maintain that the extension and meaning changed in just the scenario where 'bird' comes to refer to airplanes, as the extension swelled from the class of feathered flying things to all flying things,²¹ or that it changed in just the scenario where 'bird' ends up not referring to airplanes, as there the extension has shriveled from the set of flying things to the set of feathered flying things. Another is to say that in both possible histories the semantic properties of 'bird' changed, as before the B-52 it had been more open-textured and less determinate in its extension, whereas afterward it clearly included or excluded from the extension what previously had been neither.²²

On each of these options, one concludes that in at least one of the B-52 scenarios, the actual and the counterfactual (and perhaps both),

²¹ We will ignore any complications posed by other flying entities, such as insects and spears, or by flightless birds, which we will stipulate not to inhabit the environment.

²² As regards the last option, Harry Field has argued that in some cases of theory change, the scientific term is referentially indeterminate and refers partially to two or more different things. His example concerns Newton's word 'mass' and its reference to both relativistic mass and standard mass. See his 'Theory Change and the Indeterminacy of Reference', *The Journal of Philosophy* 70 (1973): 462–481. It is unclear what Field would say about the pre-B-52 reference of 'bird', but Wilson describes his own resolution of the puzzle as a variation on Field's strategy.

the extension of the islanders' term 'bird' changed, either by changing from one determinate extension to a different one, or by changing from an indeterminate extension to a (more) determinate one. A complication with any of these, however, is that the islanders need not feel that they have modified the meaning or extension of 'bird' in applying (or not applying) it to airplanes, and might feel that their behavior is a natural consequence of what they have always meant by the term (even if upon reflection they acknowledge that had the B-52 been introduced to them in a different way, it would've been classified as 'house' rather than 'bird'). To the extent that we trust the islanders' judgments about the sameness of this term's extension and meaning over time, we have reason to reject any of the options according to which the semantic properties of 'bird' changed with the arrival of the B-52 bomber.

Of course, we could reject as untenable their judgment of semantic sameness, but Wilson points out that we make analogous declarations about the history of our own language. For instance, consider the different paths taken by the words 'gold' and 'jade'. Although we know that platinum and gold are different elements, had platinum been discovered in 1650, rather than 1750, chemists might have applied the word 'gold' to platinum, since it dissolves in aqua regia, which chemists then thought only gold did (the so-called 'acid test'). But since by the time scientists discovered that gold and platinum were different elements there was no entrenched practice of calling platinum 'gold', platinum is not part of the extension of 'gold', and we take it never to have been part of the extension of 'gold'. We treat the 'gold' utterances from 1650 at face value; if John Locke had pointed to a South African deposit of platinum in 1650 and said 'that is gold' we would take him to have spoken falsely, and we would take ourselves to contradict him when we say 'that is not gold'. But if platinum had been discovered in 1650, and a practice of applying 'gold' to platinum was in place before the discovery that 'gold' was being applied to two elements, and this practice continued despite the discovery, would we judge that the extension of 'gold' had ever changed? This counterfactual scenario is much like what actually transpired with the word 'jade'. 'Jade' (rather, the Chinese word from which our word 'jade' is a translation) was originally applied only to nephrite, and it was not until the eighteenth century

that the Chinese encountered jadeite and called it 'jade' as well. It was not for another century that mineralogists discovered that nephrite and jadeite are different minerals, and that 'jade' had a disjunctive extension. The Chinese (and we) take eighteenth century 'jade' utterances at face value, as meaning the same as contemporary 'jade' utterances, so it seems likely that if platinum had been introduced to European society earlier than it was, we would treat the pre-platinum 'gold' utterances at face value as well. Again, the practical judgments of semantic sameness over time are defeasible – for example, the British English bird name 'robin' and the American English bird name 'robin' have different extensions – but it is desirable that a semantic theory respect and justify these powerful and universal pre-theoretic commitments about communication.²³

There are other examples of this phenomenon of current word extensions depending on 'accidental' linguistic developments, which could have transpired very differently. The extension of 'electron' does not today include positrons, but this appears to be largely a matter of phonetic convenience, as 'positive electron' never gained widespread usage. A community's linguistic conservativeness might be a factor; some societies are more receptive to neologism and borrowing from other languages when tasked with classifying unexpected objects, whereas others are more likely to make do with the linguistic taxonomies already in place. The aims that guide linguistic classification in light of novelties and scientific discoveries are motley and sometimes at cross purposes.²⁴ I do not intend this to be an anti-realist point. Sometimes the nature of reality provides a stronger guiding hand in determining the extensions of our terms. Our concepts sometime carve up reality at its seams. But sometimes our concepts cut where there are no natural dotted lines, or they cut along one seam, rather than along another equally suitable one.

²³ The gold/jade puzzle is discussed by Ebbs 2000, *supra* note 6. He draws a different conclusion about how to reconcile semantic theory with respect for the practical judgments of semantic sameness over time. Hilary Putnam deserves credit for bringing jade's disjunctive nature to the attention of philosophers of language (Putnam 1975, p. 241, *supra* note 14).

²⁴ For more examples in this vein, see Wilson 1982, *supra* note 20. Something similar may occur even with words whose meanings seem more transparent, such as 'facing'. Muslims believe that mosques must face Mecca. How must a mosque in Chicago be positioned in order to face Mecca? Must one draw an arc over the surface of the globe, and build the mosque to face in that direction, or is the line one that cuts straight through the earth, so that the mosque must face straight down into the ground in order to face Mecca? However one answers the question, speakers are unlikely to feel that 'facing' has changed its meaning. The example is due to Sorensen, Roy, *Vagueness and Contradiction* (Oxford: Oxford University Press, 2001), p. 22.

How do we settle upon an answer to the question of what the extension of 'gold' was before platinum was discovered (actually, or in the counterfactual case described above), or what the extension of 'electron' was before anyone had conceived of positrons? We might again employ the strategy of section 'III', and say that the answers to questions like these depend on extra-linguistic facts about how the world is. Just as we say that the extension of the predicate 'is dead' is all those who are dead – all those who have gone through the natural kind of event, death – whether or not the predicate is actually commonly applied this way, we say that we can all be to at least some extent mistaken about the real nature of gold or electrons, and apply the terms for those things incorrectly. But that is to suppose that there is some particular salient object out there, the real nature of which determines the semantic properties of the word in question. In Wilson's example, the question is what the extension of 'bird' is in Islandese before the arrival of the B-52. Is it the class of flying things, or is it the class of birds? The question can't be settled by investigating the relevant class of things and discovering its true underlying nature, for the question is about which class of things is the relevant one. One might think that in the case of gold or electrons things are different, but the same problem arises. Do we investigate the real nature of things that dissolve in *aqua regia*, or the real nature of element 79? A *disquotational* specification of truth conditions – one that says that x is part of the extension of 'F' if and only if x is F – is not of much help in settling whether a given x is part of F's extension or not. Neither can we necessarily look to the linguistic dispositions in the pre-B-52 island society to settle the extension of their 'bird'. As stipulated in the story, they are disposed to eventually apply the term to airplanes if they are introduced to the island society in one way, but not if they are introduced in a different way. There is nothing in their use of the word, before the arrival of the airplane, from which we may extrapolate the genuine extension/meaning of the word. In Moore's example concerning death, we can help ourselves to an antecedent understanding of what death really is, even if no lexicographer can provide the necessary and sufficient conditions

for death.²⁵ But in the Wilson example, and others like it, we have no antecedent understanding of the sort of entity their word 'bird' refers to. Whether that sort of entity is a natural kind of animal, or a non-natural kind united by some conspicuous feature, is an open question.

So here is a new puzzle. From the Wilson thought experiment (as well as the Ebbs gold/jade thought experiment, and the like) three attractive but not obviously reconcilable claims emerge.

1. The semantic facts about a given word – its extension, meaning and so forth – are determined by facts about linguistic behavior, brain states of speakers, and facts about the real nature of the mind-independent world.
2. In Wilson's 'bird' example, all of the facts about linguistic behavior, brain states of speakers, and the real nature of the mind-independent world through time *t* are insufficient to settle the extension of 'bird' after *t* (any you may substitute analogous claims for other similar cases).
3. The islanders' judgments of sameness of extension over time in the Wilson thought experiment are correct and ought to be trusted (in each alternative future).

The first claim is meant to be so broad as to be compatible with virtually any mainstream semantic theory. All that is claimed here is that semantic facts about words are not *brute* facts. Semantic truths are made true by the way people use words, by what is going on in their heads, and by the real nature of things in the world. The second claim is that when looking at Wilson's thought experiment, and other like cases, we find that it is sometimes in principle impossible to predict, on the basis of the speakers' actual and dispositional

²⁵ Although even here we might think that the extension of the term depends on contingent, unpredictable developments. The advent of machinery that can sustain indefinitely the heart and basic brain operations, after irrevocable loss of the capacity for conscious experience, provides situations that once did not exist. It is far from clear that the facts of previous usage, combined with the natural facts about the world, could settle whether a person sustained in such a way can correctly be described as alive. Whether the person is alive might depend on how we choose between two or more plausible and available conceptions of what it is to be alive. As Moore says, "There is no conventional agreement we can reach about what death must be that can be insulated from the falsification possible from an advancing science" (1985, p. 300, *supra* note 1).

linguistic behavior, and the real nature of the world, whether those speakers will later apply the relevant term to some new phenomenon, or if they will revise their application of the term in light of new scientific discoveries. Nothing about the way Wilson's islanders behave, and the world they live in, predetermines whether they will eventually apply their word 'bird' to airplanes. Whether they will do so may depend on inherently unpredictable occurrences. The same is true of the electron/positron example, and others. The third claim is that whichever semantic path the linguistic community take, there should be a strong presumption in favor of the truth of its practical judgments of semantic sameness over time. In Wilson's thought experiment, the islanders end up applying 'bird' to the B-52, and judge that the truth conditions of the 'this is a bird' have not changed in their society. But had the B-52 been introduced in a different way, they would not have applied 'bird' to the B-52, and still they would have judged that the truth conditions of 'this is a bird' had not changed in their society. Likewise, we are not mistaken in our actual practical judgments that neither the truth conditions of 'this is gold' nor those of 'this is jade' have changed. This, despite the fact that had platinum been discovered much earlier, or jadeite much later, the truth conditions of 'this is gold' and 'this is jade' would be different – and in that scenario, *our judgments of semantic sameness over time would still be correct.*

Let t be the moment the B-52 is introduced to the islanders. In the actual case, after t airplanes are in the extension of 'bird', and since the judgments of semantic sameness over time are correct, airplanes are in the extension of 'bird' before t as well. In the counterfactual case, after t airplanes are not in the extension of 'bird', and since here again the judgments of semantic sameness are correct, airplanes are excluded from the extension of 'bird' before t as well. But how could this be? By hypothesis, there is absolutely no difference between the actual islanders' world before t and the counterfactual islanders' world before t , with respect to the islanders' linguistic behavior, intentions, or environment. The only difference between the actual and counterfactual cases concerns the introduction of the B-52 at t , and the subsequent divergence in behavior.

We can reject the judgments of sameness of extension over time, of course, and give up the third claim above. But is there any way to

avoid doing so? We could reject the first claim, that facts about linguistic behavior and the world are what make true the semantic facts about words.²⁶ While this is an option worth serious consideration, it does seem objectionable on the grounds that it posits semantic truths without facts about usage and the world *that make those truths true*. It seems a fundamental rule of metaphysics that the world constrains the practice of judgment by determining whether contingent claims are true or false. Contingent truths should not just 'hang there' but rather should be made true by the way the world is. By way of illustration of this point, consider phenomenalism, the theory that physical objects are constituted out of sense-impressions. An obvious objection to this view is that objects can exist even when unperceived, so phenomenalism was modified to accommodate this point. Phenomenalists accounted for the unobserved physical object by appealing to counterfactual truths. It is true that there is oyster dip in my refrigerator although nobody perceives it, but this must be analyzed as the claim that if someone were to open the refrigerator, in such-and-such conditions, and act in such-and-such way, they would have oyster dip sense-impressions of one sort or another. In John Stuart Mill's memorable phrase, a physical object is just a 'permanent possibility of sensation'. There are quite a few objections to this view, but an especially devastating one concerns truthmakers. What is it that makes these counterfactual truths about unperceived objects true? A realist about physical objects will of course say that it is the mind-independent unperceived reality itself that makes these counterfactuals true. Even an idealist like Berkeley can say that it is the nature of God's mind that sustains the truth of these counterfactuals. But phenomenalism cannot avail itself of either option, of course – it is the so-called 'Berkeley without God'. All that could moor true counterfactuals about unperceived physical reality is the *actual* sense-impressions, but it is hard to see how my visual and gustatory oyster dip sense-impressions from yesterday could make it true that I would have similar sense-impressions today if I acted thus-and-so; it seems we need to appeal to either the realist framework, or Berkeley's God, to explain why the sense-impressions I *would have* today are just like the ones I *did have* yesterday. The phenomenalist

²⁶ This is what Ebbs opts for, 2000, *supra* note 6. On his view, the facts about how a word is used in a community, combined with facts about the extra-linguistic world, do not determine the semantic properties of the word. Semantic facts are brute facts, and lack non-semantic truth-makers.

counterfactuals, in Roy Sorensen's fetching metaphor, 'subsist on thin wafers of reality'.²⁷ Worse yet, consider the possible world in which no sentient life ever develops – not a very distant possibility, really, considering that perhaps the universe's initial conditions had to be just right for sentience to evolve. In such a world, there would not be even the actual sense-impressions to serve as truthmakers for true counterfactuals about unobserved reality. There would not be any way the world is in virtue of which the world makes those truths true. The phenomenalist would no longer have even thin wafers for sustenance. This is a powerful objection to phenomenalism.²⁸ So, too, is it an objection to any semantic view that posits semantic truths without truthmakers. This objection is not conclusive, of course, as it may turn out that there are more powerful objections to any proposal about what those truthmakers might be. But everything else being equal, we should prefer a semantic theory that does provide truthmakers for semantic truths. Perhaps one could argue that it is the practical judgments of sameness of extension (meaning, etc.) across time themselves that are the truthmakers, but some such judgments are false, so some supplementary truthmaker would appear to be required.

As to the second claim, it is hard to see how it could be incorrect – this is practically stipulated to be true by the way the islander community is described, and there seems to be nothing impossible about such a community.

There is, however, a way to reconcile all these claims. We can maintain that semantic facts are made true by linguistic usage and facts about the world, and that in the Wilson thought experiment the (actual and counterfactual) judgments of sameness of extension across time are true. We can do this by adopting a semantic theory according to which the semantic properties of a word at a given time sometimes are determined by *later* (possibly much later) linguistic developments. Temporal externalism is such a view.

²⁷ Sorensen 2001, p. 171, *supra* note 24. Sorensen is one defender of truthmaker-gaps, on grounds relating to various paradoxes, and to his epistemicism about vagueness.

²⁸ This argument appears in Armstrong, David, *Truth and Truthmakers* (Cambridge: Cambridge University Press, 2004), pp. 1–3, though Armstrong credits the idea to C.B. Martin.

V. TEMPORAL EXTERNALISM

Temporal externalism, as I will understand it, is the semantic theory that the semantic properties (meaning, extension, truth-conditions, etc.) of an utterance or thought at time t in some cases depend in part on linguistic developments or other events *subsequent* to t . The extension of 'bird' before the arrival of the B-52 in the Wilson thought experiment includes B-52s because of the way the B-52 was introduced to their society and their subsequent application of 'bird' to such aircraft. But had the B-52 been introduced in a different way, and the term 'bird' was never applied to it, then this development would determine that the extension of 'bird' had always excluded bombers. The extension of 'gold' in 1650 excludes platinum in virtue of the fact that later, when platinum was discovered, no practice of applying 'gold' to platinum developed. But the extension of 'jade' (again, the set of things of which 'is jade' is *true*) in 1650 includes jadeite, as well as nephrite, in virtue of a century later there developing an entrenched practice of applying the term to jadeite, when it was encountered.

Thus, temporal externalism allows us to respect the near-universal commitment to practical judgments of sameness of extension over time to a greater degree than does a standard externalist/realist semantic theory. A standard, non-temporal theory allows as a determiner of content at a given time t only the real nature of the world and linguistic behaviors that occur at or before t . A non-temporal externalist theory seems to lack a principled way of maintaining that the extension of 'gold' has always been just gold, and that the extension of 'jade' has always been jadeite and nephrite (with similar consequences for countless other cases), and thus affords less semantic stability over time than temporal externalism does.

Semantic externalism allows for the possibility that two linguistic communities (or individuals) could be completely identical (non-semantically described) but differ in the contents of their utterances and thoughts in virtue of differences in their environments or in their pasts (their ancestors' baptisms causally linked to different individuals, for instance). Similarly, temporal externalism allows for the possibility that two linguistic communities (or individuals) could be completely identical (non-semantically described) but differ in the

contents of their utterances and thoughts in virtue of semantic differences between their respective sets of descendents. It is a commonplace of semantic externalism that what one's utterances mean depends in part on the conventions of one's public language, informed by expert usage, and not just on what is going on in one's own head; the temporal externalist sees the linguistic community as temporally extended, and sees semantic contents as being in some cases dependent on, and deferent to, future conventions of usage.

Joseph LaPorte has argued against the view that the language of scientific discourse remains stable through most scientific change.²⁹ On his view, the taxonomic terms of biology, such as 'mammal' and 'rodent' change their meanings over time as scientists make new stipulations, rather than discoveries, about the nature of, say, mammals and rodents. LaPorte cites examples much like Mark Wilson's. For instance, the guinea pig, long regarded as a rodent, has been reclassified by biologists, and is no longer considered a member of the order *rodentia*. Biological orders are normally systematized by historical standards of cladism. A clade, roughly, is a species and all of its evolutionary descendants. It was discovered that the narrowest clade that contains mice, rats, rabbits *and guinea pigs* turns out to be much broader than the traditional class of rodents, as it includes horses, seals and primates. Guinea pigs are not as closely historically related to mice and rabbits as had previously been supposed, so it seems that scientists have discovered that the order of rodents is more exclusive than had been supposed, and excludes guinea pigs.

LaPorte points out, though, that the exclusion of guinea pigs from the set of rodents was not forced on biologists. They could have continued to accept the claim 'guinea pigs are rodents' by broadening the set of rodents, in light of the discovery that the narrowest clade that contains all the traditional rodents also contains horses, seals and primates. That is, instead of paring down the set of rodents, they could have retained the rodent classification for guinea pigs, and also extended it to animals not traditionally regarded as rodents. They could have decided that *we* are rodents. Or they could have stuck with the traditional rodent membership, and decided that the order *rodentia* is not a historical group, but rather one whose members are united by other features, such as having large incisors,

²⁹ LaPorte 2004, pp. 63–111, *supra* note 8.

suitable for gnawing and nibbling. ('Zebra' is such a term. Zebras are recognized as a kind in virtue of their striking striped appearance, but there is no historical grouping that includes all zebras but excludes horses.) Thus, biologists did not *discover* that guinea pigs are not rodents; rather, they stipulated it, in accordance with various of their aims, which included keeping the set of rodents a scientifically respectable group (*i.e.* individuated historically), and departing as little as possible from the traditional taxonomy. Rather than the biologists of today shedding light on what 'rodent' meant all along, they give 'rodent' a new meaning and extension, according to LaPorte. Today, he says, in light of the taxonomic reassignment of the guinea pig, an utterance of 'guinea pigs are not rodents' would be true, but the same utterance a century ago would have been false, as 'rodent' meant something different then.

One can accept this anti-realism about biological kinds and other natural kinds without buying into the semantic instability and incommensurability that LaPorte infers from it. The facts, agreed upon by both LaPorte and the temporal externalist, are that guinea pigs are not now in the extension of 'rodent'; that this fact is made true by the recent decisions of biologists; and that, say, a century ago, there had transpired no linguistic or non-linguistic events that had made it the case that guinea pigs were not then in the extension of 'rodent'. All this is compatible with semantic stability and commensurability, LaPorte's contention notwithstanding, provided that temporal externalism is true. It is the decisions of contemporary biologists in virtue of which guinea pigs are not now, *nor have they ever been*, truly in the extension of 'rodent'.

Temporal externalism is not yet a widely held semantic view, but it is gaining adherents.³⁰ Before bringing the theory to bear on the matter of legal interpretation, I will consider some objections to temporal externalism, and attempt to answer them.

³⁰ The *locus classicus* of temporal externalism is Jackman, Henry, 'We Live Forwards but Understand Backwards: Linguistic Practices and Future Behavior', *Pacific Philosophical Quarterly* 80 (1999): 157–177. See also his 'Temporal Externalism, Deference and our Ordinary Linguistic Practice', *Pacific Philosophical Quarterly* 86 (2005): 365–380. Other defenses of temporal externalism, or at least of something very close to it, include Wilson, George, 'Satisfaction Through the Ages', in Kanamori (ed.), *Proceedings of the Twentieth World Congress of Philosophy, Volume 6: Analytic Philosophy and Logic* (Bowling Green: Philosophy Documentation Center, 2000), pp. 89–97; Tanesini, Alessandra, 'Bringing About the Normative Past', *American Philosophical Quarterly* 44 (2006): 191–206; and my 'Temporal Externalism, Natural Kind Terms, and Scientifically Ignorant Communities', *Philosophical Papers* 35 (2006): 55–68.

VI. TEMPORAL EXTERNALISM: OBJECTIONS AND REPLIES

I will now list some general criticisms of temporal externalism, and address them. This will not be an exhaustive list.³¹ Section 'IX' will address some objections more specifically to my application of temporal externalism to legal interpretation.

1. *Temporal externalism commits us to backward causation, and surely this is bad news.*

What is perhaps most strikingly counter-intuitive about temporal externalism is that it appears to amount to the claim that backwards causation is possible, or that what happens now can change the past, or something along those lines. As the tragic poet Agathon put it (as attributed by Aristotle in the *Nicomachean Ethics*, book 6):

For this alone is lacking even to God/To make undone things that have once been done.

The *determining* relation that holds between the linguistic behavior at time $t + n$ and the semantic property that obtains at time t should not be regarded as causal. It is a commonplace that a linguistic entity may have a semantic value at t in virtue of events that occur subsequently to t . For instance, a sentence that makes a contingent claim about the future has a truth-value at t in virtue of what occurs later on. A definite description ('my final marriage') may have a denotation, or be satisfied by such-and-such object, at t in virtue of events that occur after t . Such commonplaces do not commit us to backward causation, and neither does temporal externalism, although more needs to be said about the exact nature of this *determining* or *in virtue of* relation.

The phenomenon is already posited in other theories, as well, such as the institutional theory of art. That theory, to oversimplify a bit, says that what makes something a work of art is its position in the art world network.³² The theory is motivated in part by the

³¹ For more justification of temporal externalist semantics, and more discussion of these and other objections to it, see Jackman 1999 and 2005, *supra* note 30.

³² See Danto, Arthur, 'The Artworld', *Journal of Philosophy* 61 (1964): 571–584; Dickie, George, *Art and the Aesthetic: An Institutional Analysis* (Ithaca: Cornell University Press, 1974); and Dickie, *Art Circle: A Theory of Art* (Chicago: Spectrum Press, 1997).

apparent possibility that there are two materially identical objects, one of which is a work of art and one of which is not.³³ Marcel Duchamp's *Fountain* is simply a urinal, and materially no different from what you might find in a restroom. One puzzle for the view, though, is to explain how an artifact that preceded the existence of the art world network, such as a prehistoric cave painting, could still have been a work of art. One could say that it was not at first a work of art, and only *became* one when the art world became concerned with it. But another available reply is to say that it was a work of art from the outset, in virtue of its later gaining the relevant institutional status. Once one solves the paradox of materially identical objects, only one of which is an artwork, by defining 'artwork' in terms of an artifact's relational properties, there seems little reason to balk at including the artifact's relations to future objects.³⁴

2. *If the semantic properties of our utterances sometimes depend on future developments in linguistic usage, then since we have no way of knowing what these developments will be, we can't know the semantic properties of our own utterances (i.e. what our words refer to, the truth conditions of our utterances, and so forth). This is an implausible consequence of the view*

This is a weighty objection, and it is beyond the scope of this paper to deal with it adequately. One thing to note, however, is that this criticism is applicable to any externalist semantic theory, and not just temporal externalism. If semantic externalism – currently the dominant semantic theory in analytic philosophy – is correct, then a competent speaker of English who lacks any expert knowledge of trees, can still employ the word 'elm' to refer to elms, and 'beech' to refer to beeches, despite lacking full explicative knowledge of the correct application conditions for those terms. The semantic properties of 'elm', 'beech', and utterances containing those terms, depend on empirical facts about (at least) present and past usage by other people of those terms, such as how the term was introduced to the language, or how experts deem that the terms are correctly employed. So if externalist semantics is correct, knowledge of some of the semantic properties of one's terms is not available to introspection. But rather than being implausible, this seems quite right. I

³³ Danto 1964, *supra* note 32.

³⁴ Thanks to George Bailey for pointing out to me the parallel between temporal externalism and one variation of the institutional theory of art.

do not know the application conditions of 'elm', or the truth-conditions of 'this is an elm', except in the trivial sense that I know that 'elm' correctly applies only to elms, and so forth. A competent speaker of English in 1650 could use the word 'gold' to refer to gold, even if that speaker lacked full explicative knowledge of the application conditions of the term, and, according to temporal externalism, even if nobody contemporaneous with the speaker had such knowledge, provided that those speakers deferred to future experts who did have such knowledge. I have no novel defense of semantic externalism, and I am satisfied to argue the conditional claim that if semantic externalism is correct, then so is temporal externalism.

3. *Sometimes linguistic developments change the meaning of a word, rather than determining what the word really meant all along.*

The temporal externalist can, and of course *must*, accept this. It is not a central presupposition of the linguistic enterprise that a word never changes its meaning. We do not evaluate the truth-value of an utterance in 1900 of 'he is gay' by considering the truth-conditions of such an utterance made today. If this were a strong objection to temporal externalism, it would be equally as strong an objection to a semantic theory that allowed past events, such as baptisms, to determine current contents. 'Jupiter' now refers to a particular planet because of the way in which it was introduced as a name long ago. 'Madagascar' was first introduced as a name for part of mainland Africa, and Marco Polo mistakenly thought it to refer to the island now known as Madagascar. Now it does refer to the island. As Jackman says:

Just as we want to say that what we now mean is dependent upon our past usage, but leave room for the possibility that we occasionally break loose from it, we want to say that what we mean can depend on our future usage, but leave room for the possibility of its breaking loose from us.³⁵

It's difficult for any semantic theory to say under what conditions linguistic changes in the use of a word mark a change in the word's meaning, and when they don't. The temporal externalist should not unduly bear the burden of explaining this, but I can sketch such an account in broad strokes. The original motivation to seek a theory that is consistent with a great deal of semantic stability is that the

³⁵ Jackman 1999, p. 167, *supra* note 39.

practical judgments of most speakers presuppose such stability. People treat (non-metaphorical) uses of 'gold' utterances from centuries ago as having the same extensions, truth conditions and other semantic values as they have today; they take their own 'gold' utterances to be about the same stuff earlier 'gold' utterances were about. If people did not treat utterances from the past in this way, we would lose much of our reason to posit much semantic stability. So I submit that we should look to these practical judgments to determine which terms have changed their semantic values, and which have not. Few people would regard a pre-Polo 'Madagascar' utterance (say, using the term while demonstrating part of the mainland) as a false claim about the island, rather than as a true claim about part of the mainland (provided, of course, that they were informed of the way in which the name was then used). So we should regard 'Madagascar' as having changed its reference, while we regard 'gold' as not having done so. These judgments must be regarded as defeasible, though, and there are certain to be many borderline cases, as well.

4. *Temporal externalism looks to be an example of the worst sort of "Whig" interpretation of history, as it "goes hunting for the present in the past."*

The historian and philosopher Herbert Butterfield critiqued a certain style of historical interpretation, called 'Whig' interpretation, that is quite eager to find likenesses between the past and present and thus to find in the past 'anticipations' of what is occurring today.³⁶ While there is nothing wrong with finding such likenesses and anticipations where they exist, Butterfield thought that study of the past with perpetual reference to the present, with its attendant principles of selection, inevitably involved the historian in oversimplification and misunderstanding. It took events out of historical context, and sometimes resulted in self-serving analysis that squishes all of history into a triumphalist narrative. Such a historian would 'produce a story which is the ratification if not the glorification of the present', and 'elicit more from history than history can really give'.³⁷ Perhaps temporal externalism Whiggishly discovers the semantic

³⁶ Butterfield, Herbert, *The Whig Interpretation of History* (London: G. Bell and Sons, Ltd., 1931).

³⁷ Butterfield 1931, p. 64, *supra* note 36.

facts of the past in present day (or future) usage, thus distorting the semantic past.

I don't think the temporal externalist takes the semantic past out of context, foisting upon it our own semantics. Externalist semantic theories in general, and most particularly temporal externalism, are committed to the view that when considering the semantic properties of an utterance, the relevant context is one that extends across persons and time. To look at an individual's (or even a society's) linguistic actions and dispositions at a moment – a freeze-frame – is to ignore many of the elements determinative of content. All externalists see past linguistic behavior (baptisms, for instance) as relevant to content, and more controversially, the temporal externalist sees subsequent developments as also being relevant as well. A theorist who sees semantic content at one particular time t as inextricably linked to the contents at other moments in the history of the linguistic community cannot very well draw conclusions about the semantics at t while ignoring all those other times.

Neither does the charge of oversimplification stick. The temporal externalist can happily agree that the linguistic usage of a term like 'gold' has changed over time, and differs from person to person, in ways too complex to sort out. We can also admit that the externalist conception of content may omit certain individualistic or idiosyncratic elements of speaker meaning (or of what a speaker intends to convey in making an utterance). An externalist semantic theory, especially the temporal externalist theory, gives an account of how, out of all those vicissitudes of linguistic history, people of different eras can still mean the same thing by their words.³⁸

5. *While realist/externalist semantics, and particularly temporal externalist semantics, might be the best semantic account of natural kind terms, like "gold", and perhaps for artifact terms, such as "firearm", the externalist framework seems ill-suited to moral terms (which are of particular interest in legal interpretation)*

In giving a semantic account of a natural kind term like 'gold', an externalist will cite causal relations between speakers and the natural kind gold, as instanced in baptisms or demonstrated stereotypes of the kind. The typical externalist accepts scientific realism: the

³⁸ The relevance here of Whiggish norms was brought to my attention by Tanesini 2006, p. 196, *supra* note 30.

doctrine that the reality described by empirical theories is largely independent of our theorizing, and that our ordinary methods of studying this reality are generally reliable ways of gaining knowledge about this reality. An analogous realism about morality is thought by many to be on considerably weaker ground. When we consider a moral term like 'cruelty', it is controversial whether there is any such external thing – be it a natural or non-natural entity – as cruelty, to which speakers could bear any causal relation. Furthermore, externalists often argue that speakers ignorant of the extension of a kind term can typically use it with the same truth conditions as do experts, in virtue of their deference to expert usage. It's unclear, however, that there's anything resembling expertise of the right sort about the extensions of moral terms, or that there is a willingness to defer to those experts about said moral extensions. So one might argue that temporal externalism is at best a suitable semantic theory only for texts that do not include moral, or other similarly evaluative or normative, language. Perhaps the traditional, conventional semantic theory ought to be adopted when interpreting moral language.³⁹

It is, of course, far beyond the scope of this article to settle the question whether some version of moral realism (or even scientific realism) is correct. Nonetheless, there are a few things that may be said in response to this objection. First of all, one primary motivation for realist semantics, as applied to natural kind terms, is equally a motivation for realism about moral properties. When a society's moral beliefs change over time, we are strongly inclined to see ourselves as disagreeing with our ancestors about such things as cruelty and justice, and not as merely changing the subject. If the meaning of a moral term is completely determined by the conventions of its usage at a given time, and those conventions change, then when people of different eras use the term, they discourse on different subject matters. But we take ourselves to disagree with our ancestors about the cruelty of flogging and branding, and about the injustice of slavery. One main motivation for externalist semantic theories generally, and temporal externalism particularly, is the respect they accord to our judgments of semantic sameness over time. Our treatment of moral language, including moral language

³⁹ An objection along these lines is made by H.L.A. Hart, in 'Definition and Theory in Jurisprudence', in *Essays in Jurisprudence and Philosophy* (Oxford: Oxford University Press, 1983), p. 23.

from the past, reveals our realist presuppositions about morality.⁴⁰ Other features of our moral practice, such as a commitment to moral argumentation, deliberation, and moral fallibilism, are evidence of a commitment to moral realism. When faced with a moral dilemma, we do not seek greater knowledge of the prevalent conventions governing usage of moral terms. Neither do we typically seek to convince others of our own moral view by adducing such facts about the usage of moral terms. And most suppose that an entire society can be wrong in its collective usage of a moral term, such as a slave-holding society describing that practice as just. If the conventions governing the usage of 'justice' at a given time determine its reference at that time, it's difficult to make sense of the possibility that a society's moral judgments could be fallible.⁴¹

Second of all, a modestly formulated moral realist position can avoid many of the criticisms of the view that once were thought devastating. The moral realist who identifies moral properties with a cluster of natural properties (or reduces moral properties to natural ones, or posits some sort of correlation between them) will avoid the objection from philosophers like J.L. Mackie who say that moral entities must be rather 'queer'. Mackie thought that the positing of an abstract realm of moral things, like justice and the Good, is contraindicated on empiricist/naturalist grounds, as such things would be resistant to empirical investigation. Such entities could not, apparently, enter into causal relations with natural phenomena, and would be unknowable by us.⁴² Naturalistic moral theories, which identify moral properties with (or reduce them to) natural properties, such as conduciveness to pleasure or other properties countenanced by science, once were thought to commit the naturalist fallacy of confusing the property of goodness (or some other moral property) with other natural properties that good things have. G.E. Moore's famous 'Open Question' argument against naturalistic moral theo-

⁴⁰ This point has been pressed by Moore 1981, 1982, 1985, all *supra* note 1.

⁴¹ It's not impossible to reconcile moral conventionalism and some sort of societal moral fallibilism, though. We might try to assimilate the misapplication of 'just' to slavery to other situations in which the misapplication of a word is clearly not due to a defective understanding of the term in question. Consider the mistake of applying the term 'flat' to our planet. This mistake was due to ignorance of the actual shape of the planet, rather than to any misunderstanding of the nature of flatness. Perhaps those who described slavery as just had the same understanding of justice as ours, but simply were ignorant of the true nature of slavery. I think, however, it would be difficult to account for all past misapplications of moral terms in this manner.

⁴² See Mackie's *Ethics: Inventing Right and Wrong* (Harmondsworth: Penguin, 1977), Chap. 1.

ries was that any naturalistic definition of a moral property, such as defining 'good' as 'pleasure-maximizing', must fail, because one can always say that it is an open question whether pleasure-maximization is good (and so on for other attempted definitions). Thus, moral properties must be *sui generis*, irreducible to any natural complex of properties.⁴³ Moore's argument fails, though, as there is no reason whatever to suppose that correct theoretical identifications should be obvious to any competent speaker. Water was correctly identified as H₂O, although one could sensibly ask of water 'but is this water really H₂O?'

Many moral anti-realists have thought that the plausibility of moral *internalism* is a stumbling block for the moral realist. The moral internalist says that moral judgments necessarily motivate, or provide reasons for, action. But most regard judgments of objective fact as not in themselves motivating. Thus, moral judgments cannot be judgments of objective fact.⁴⁴ But the contemporary moral realist may reject moral internalism, and explain the apparently motivational properties of moral judgments in a different way.⁴⁵ So, moral realism that is broadly naturalistic and that rejects moral internalism is an attractive and plausible position.

And third, there is some evidence that those who wrote the Constitution and other statutes did not intend their moral language to be understood as legislating their own time-bound moral notions. When writing the Eighth Amendment prohibition on cruel and unusual punishment, the framers intended a number of things. They intended certain specific forms of punishment, which they regarded as morally unjustifiable, such as the rack, to be prohibited. They also intended that *whichever* punishments in fact are morally unjustifiable, because of their cruelty and unusualness, be prohibited. Intending the former is not at odds with intending the latter, provided that one believes that certain forms of punishment, like the rack, are in fact cruel and unusual. But if we disagree with our ancestors about which punishments are in fact cruel and unusual, then we see these

⁴³ See Moore, G.E., *Principia Ethica* (Cambridge: Cambridge University Press, 1903), Chap. II.

⁴⁴ This argument is due to Hume, David, *A Treatise of Human Nature* (originally published in 1738), Book III, Part I, Section I, 'Moral Distinctions Not Deriv'd from Reason'.

⁴⁵ This is the approach of Brink, David, in 'Moral Realism and the Sceptical Arguments from Disagreement and Queerness', *Australasian Journal of Philosophy* 62 (1984): 111–125, and by Boyd, Richard N., 'How to be a Moral Realist', in Sayre-McCord, Geoffrey (ed.), *Essays on Moral Realism* (Ithaca: Cornell University Press, 1988), pp. 181–228.

intentions as in conflict. Which is the dominant intention, however? Had their primary intention been to prohibit a specific list of punishments that they happened to believe were morally unjustified in virtue of being cruel and unusual, it would have behooved them to draw up such a list, explicitly exclude others, and spell out as much as possible the criteria for cruelty and unusualness. This they did not do. If their dominant intention was to prohibit cruel and unusual punishments, their own views on what was cruel and unusual notwithstanding, then it would have behooved them simply to prohibit cruel and unusual punishment, and this is what they did. Thus, it is reasonable to construe them as principally intending to prohibit cruel and unusual punishments, whichever punishments in fact meet those criteria.⁴⁶

Much has been said in defense of the application of externalist semantics to moral and legal terms.⁴⁷ I have nothing substantive to add to that defense, except to note that what has been said in defense of this applicability of externalism should also serve as argument for the applicability to moral and legal language of temporal externalist semantics.⁴⁸

VII. TEMPORAL EXTERNALISM AND LEGAL INTERPRETATION

Temporal externalism may be brought to bear on the disagreement between the textual originalist and the textual evolutionist in much the same way that regular semantic externalism was in section 'III', while achieving different results in a range of cases. Is the literal meaning that the Constitution (or any other legal text) now has the same as its original meaning, or has the literal meaning evolved, and

⁴⁶ Brink makes a similar point in 1988, pp. 121–129, and in 2001, pp. 26–30, both *supra* note 1, describing the two sorts of intentions as *specific intent* and *abstract intent*. Moore draws a similar distinction between what he calls *rich semantic intentions* and *spare semantic intentions* (1985, pp. 340–344, *supra* note 1), and argues that even if a legislative body has a rich semantic intention – it spells out its understanding of the relevant class by linguistic definition or by paradigms, and expects its understanding to be given absolute weight – interpreters ought to be concerned with the genuine extensions of the words in the legal text, and not with legislators' provisional and amateurish attempts to fix terms' meanings. Ronald Dworkin's distinction between appealing to a *concept* (of, say cruelty) and laying down a *conception* shares something with the distinction addressed above. See Dworkin 1986, pp. 71–74, *supra* note 4, and *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1976), pp. 134–136.

⁴⁷ Besides the aforementioned papers by Michael Moore and David Brink, see also Stavropoulos 1996, *supra* note 13, chapters three and four.

⁴⁸ The foregoing section is heavily indebted to Jackman 1999, *supra* note 3, especially the first three objections and replies.

now differs from its original meaning? One of the ostensible virtues of temporal externalism is that it reconciles stability or constancy of meaning (and other semantic properties), with the constant developments in linguistic usage that partly determine that meaning (and it does so to an even greater extent than semantic externalism does). So a temporal externalist will not be very inclined to see evolving standards of decency, or linguistic developments, as necessitating that the words of a piece of legislation, if written today, would have a different content than they did originally, or that the original meaning has changed. Since the existence of these evolving standards and linguistic changes constitutes the principal evidence in favor of the view that the literal meaning of the written Constitution has changed, the temporal externalist will see little reason to suppose that the current literal meaning is different from the original literal meaning. The literal content that binds us, or that at least makes some important contribution to the norms that bind us, is the original content. Score one point for the originalist, who seems to be on firm ground in insisting, along with Chief Justice Roger Taney:

[The Constitution] speaks not only with the same words, but with the same meaning and intent with which it spoke when it came from the hands of the framers... Any other rule of construction would abrogate the judicial character of this court and make it the mere reflex of popular opinion or passion of the day.⁴⁹

But temporal externalism does not validate textual originalism in quite the way that originalists likely hope. The originalist typically holds that the literal meaning of the written Constitution was determined at the time it was written, by the conventions of English that then were current, along with other semantic intentions of the framers, and possibly facts about the way the world was. The temporal externalist denies this, and maintains that in at least some cases the content of an utterance is not determined by any events that had occurred simultaneous with or previous to the occurrence of the utterance. Rather, it is subsequent events that frequently determine the content of the utterance. Therefore, the literal meaning of the Constitution, although it has not changed, is sensitive to evolving standards and novel, unpredictable, and sometimes accidental linguistic developments. The content that reflects these recent developments is the current literal meaning – the content ‘by

⁴⁹ The quotation is from *Dred Scott v. Sandford* (19 Howard at 426 [1857]).

our own lights' – and the meaning the document has always had. Once again, this will be equally true of the interpretation of any binding document, such as a statute or a contract (or, indeed, of any document at all).

The distinction between textual originalism and textual evolutionism then effectively collapses. It is based on a false presupposition, a holdover from the failed traditional conventionalist theory of semantics: *viz.* that the linguistic and moral differences between us and the framers entail that many of our words have different meanings. The choice whether to interpret a legal text by its original meaning, as Chief Justice Taney would have it, or to interpret it as those words would mean for us today, as Justice Brennan would have it, is a false dilemma. It is not a false dilemma in virtue of there being a third option, but rather because the two options are essentially the same. If temporal externalism is correct and semantic properties are as stable as I am supposing, then the original content, and the content that is sensitive to our usage and moral standards today, are one and the same.

An example will be helpful for illustration. I will consider an actual US Supreme Court case, albeit one that dealt with the interpretation of a tariff act, rather than the Constitution. *Nix v. Hedden*, 149 U.S. 304 (1893) concerned a suit by a fruit importer against the New York customs collector, to recover duties paid on the import of tomatoes from the West Indies. Under the terms of the statute then in effect, vegetables required a ten percent tariff, but fruits were imported duty free. New York customs regarded tomatoes as vegetables (although the tariff act did not list the produce the legislators considered to be vegetables) and required the plaintiff to pay a duty, which he paid under protest. Since botanists classify tomatoes as fruit, as they contain the seeds of the plant, the plaintiff argued that he should not have to pay a duty on tomato imports.

Let us suppose, as is surely the case, that the legislators who passed the tariff act understood 'vegetable' to include in its extension tomatoes, even though tomatoes were not mentioned in the statute. Although the act was only a decade old, we can easily imagine a case in which the legislation was a century old and had preceded the event of botanists' classifying tomatoes as fruit, so that when the statute was enacted, there was *nobody* who classified tomatoes as

fruit. Let us suppose, for the sake of illustrating the view, that this is what happened. One might suppose, however, that the linguistic behavior in the community at that time determined that tomatoes were not in the extension of 'vegetable' either, since most things that people called 'vegetable' had an underlying structure relevantly different from the underlying structure of tomatoes. But it seems quite plausible that nothing that had occurred by the time the statute was enacted determined what sort of taxonomy botanists would eventually settle on, or determined that the botanists' taxonomical choice would become meaning determinative. Botanists might have drawn up a different taxonomy (perhaps using neologisms in place of the familiar terms 'fruit' and 'vegetable'), or their taxonomy might simply not have had any impact on word meanings. (This is what might have been the case if, following Sir Arthur Eddington, physicists had classified tables and other such objects as *not solid*, since they are mostly empty space. The consensus of physicists notwithstanding, the extension of 'is solid' might well have continued to include things like tables).⁵⁰ Let us also suppose, very possibly contrary to fact, that terms like 'vegetable' and 'fruit' are not literally ambiguous (putting aside slang usage), and that the only extensions those terms have are those that botany has settled upon. That is, we suppose that there is no common parlance, or cook's taxonomy, meaning of 'vegetable' such that the term may correctly and literally be applied to tomatoes. (The court sided, as a matter of fact, with the defendant, saying that 'vegetable' has, distinct from the meaning assigned to it by the botanist, a meaning in the common language of the people, and that it was this common parlance meaning of the term which was its meaning in the tariff act. They may well have been right, but for sake of argument, I put aside the possibility that 'vegetable' is literally ambiguous in this way).

With all these suppositions in place, I submit that the content the law had when it became legislation is the same as it had at any later date, and that it never mandated a duty on tomatoes, since tomatoes are not, and have never been, vegetables. Mr. Nix should have gotten his money back. Nevertheless, the human behavior in virtue of which 'vegetable' applies to tomatoes had not yet occurred when the legislation was enacted; it was the later behavior of the botanists

⁵⁰ See Sir Arthur Eddington's *The Nature of the Physical World* (London: J.M. Dent & Sons, 1935).

settling on an understanding of vegetables that determined what the extension of 'vegetable' has always been. Neither can we say that the real natures of the natural kinds *vegetable* and *tomato* settled the extension of those terms, because again, we have no *antecedent* way of identifying whether the relevant kind is the natural kind identified by botanists, or the less unitary kind of interest to cooks. Either taxonomic classification *could* have become determinative of meaning, and in either case, ordinary speakers would have continued to take past 'fruit' and 'vegetable' utterances at face value. Thus, temporal externalism allows us to plausibly claim that the meaning or extension of 'vegetable' did not change, even though nothing that had occurred by the time the tariff was passed determined what that meaning and extension would be. But we are not required to say that nothing about the world or linguistic usage made these semantic facts true. The tariff, at the time it passed, did not mandate a duty on tomatoes, but only because much later botanists arrived at one classificatory scheme, rather than another.

Interpretation of legal texts including moral language will be handled in a similar manner. Rather than reviewing the timeworn example of the Eighth Amendment to the Constitution prohibition on punishment that is cruel and unusual, let us consider the law that allows an alien to be deported if he meets any of several conditions, one of which is that he be convicted of a crime involving 'moral turpitude' (and sentenced to at least a year of confinement for the crime).⁵¹ The notion of moral turpitude is a loose one, with no clear statutory definition. Crime involving moral turpitude has been alternatively defined as crime that is inherently base, depraved, shocking to the public conscience, and *malum in se* (wrong in itself), rather than *malum prohibitum* (wrong by statute). Crimes that have been held to involve moral turpitude include murder, rape, aggravated assault, and armed robbery, but also student loan fraud, perjury, and income tax evasion. Engaging in unlicensed trade has been excluded, however, as has driving under the influence of drugs or alcohol (although in some cases repeated drunk driving has been judged to involve moral turpitude).

Let us suppose, with the moral realist, that there is a fact of the matter about what is morally right or wrong (though with any vague

⁵¹ 8 U.S.C. § 1251(a)(2)(A)(i).

term, there will be borderline cases), and that this is independent of how we (think we should) apply our moral terms. But which crimes are within the extension of 'acts involving moral turpitude'? The question here is how we carve up the set of morally wrong actions into those that involve moral turpitude, and those that do not. A vague working definition might not be sufficient to give a verdict about novel crimes, such as the production, contrary to law, of extremely violent video games, or virtual snuff films (in which all the actors are computer generated). One can imagine these sorts of cases being decided either way. On the view offered here, although conventions of usage do not determine what actions are morally right or wrong, some moral terms are like the term 'bird' from Mark Wilson's thought experiment. There, neither the pre-B-52 usage nor the extra-linguistic reality settled whether their term was a natural kind term, or a term for some less unitary kind. Similarly, the usage of a term like 'moral turpitude', combined with the nature of moral reality, might not settle which of the notions connected with moral turpitude – wrongness in itself, depravity, scandal, or something else – is the dominant one. But whatever direction usage takes (or will take), presumably we will still take the extension of 'moral turpitude' not to have changed, allowing us to disagree with our forebears as to whether sodomy, for instance, involves moral turpitude.

But in those cases where ordinary speakers do not make practical judgments of the sameness of extension over time, and we have reason to believe that the change in usage is so dramatic that the word no longer has its old meanings, it is hard to deny that it is the original meaning that must hold sway. Much has been written about the meaning of the phrase 'high Crimes and Misdemeanors' from Article II, section 4, of the United States Constitution. I have nothing to add to that body of research. But let us suppose, possibly contrary to fact, that at the time the Constitution was drafted, the term 'misdemeanor' was used the same way we use 'felony' today, whereas today we use 'misdemeanor' to designate a class of crime less serious than felonies. Suppose also that we do not take ourselves to be disagreeing with the framers as to whether petty larceny and public intoxication are really misdemeanors. That is, let's suppose that 'the president is guilty of a misdemeanor' no longer has the same truth-conditions and meaning it did two centuries ago. If this is

the case, should we understand ‘misdemeanor’ in Article II, section 4, to have the extension it had when the language was drafted, or what someone would refer to today with that term? It is hard to see how a judge could be exonerated of judicial legislation were she to interpret ‘misdemeanor’ as having its current extension. When the original meaning and the contemporary meaning in fact genuinely diverge, I can see no grounds for attaching to the text anything but its original meaning. Otherwise, all that it would take to radically revise the Constitution and to drastically alter the protections it provides is a simple linguistic shift. The First Amendment to the US Constitution guarantees the right of the people ‘peaceably to assemble’. Suppose that the relevant meaning of ‘assemble’ were to become obsolete, such that nobody speaking English today could use ‘assemble’ to mean ‘gather’, but only to mean ‘construct’. Would a right guaranteed by the Constitution disappear, or become the right to *construct*? To consider an even more absurd possibility, if at some time in the future the word ‘four’ were to change meaning, and come to mean what ‘forty’ now means, would Article Two, section one of the US Constitution mandate that presidents be elected to a term of 40 years?

Constitutional textual non-originalism, construed as the view that the meaning of the text that is accorded binding authority is the meaning that the words have today by the conventions of contemporary English, *rather than* any antiquated meanings they once had, is self-evidently absurd. Non-originalism’s principal insight – that for the wide range of cases in which we take the sentences in laws at face value, we ought to privilege our own conceptions about the truth conditions of those sentences, rather than the conceptions of the laws’ enactors – must, if it is to be part of a coherent approach to constitutional adjudication, be made compatible with the seemingly undeniable originalist claim that the content of a law does not change simply because a word in the text of the law changes its meaning. Temporal externalism, and indeed any semantic theory that accounts for the truth of most of the practical judgments of sameness of extension over time, allows us to reconcile the evolutionist insight with what is plainly correct about originalism.

VIII. OBJECTIONS TO THIS APPLICATION OF TEMPORAL
EXTERNALISM TO LEGAL TEXT INTERPRETATION

In section ‘VI’ I considered some general objections to temporal externalist semantics. In this section, I want to consider some objections that target specifically temporal externalism’s application to questions of legal interpretation.

1. *If the contents of our laws ought to be understood as the temporal externalist would have it, then what those laws mean will in some cases be unknowable to us, leaving citizens unsure of what is required of them. Perhaps a semantic theory without this counterintuitive consequence would be preferable.*

The temporal externalist should bite the bullet here, and concede that, in some cases, we simply will not know exactly what a law requires. It’s a consequence of temporal externalism that sometimes it may be the case that a term has an extension at *t*, although nobody at *t* can know what this extension is, or how the extension is determined. If we don’t know exactly what the extension of ‘cruel and unusual’ is, or we don’t know exactly what it is for something to be cruel and unusual, but we’re convinced that there is a fact of the matter about both, then we won’t know exactly how the Eighth Amendment constrains us. This is a consequence we should accept. If we intend to refer to things whose nature is only partially known to us, then we will lack full explicative knowledge of our terms’ correct application conditions. Note, however, that the alternative theories cannot easily avoid this problem, either. If we’re to be textual originalists, and adopt conventionalist semantics as well, then we need to ascertain whether the framers would have deemed novel punishments as cruel and unusual, or whether they would have so deemed the old ones in light of new factual information (about deterrence, maldistribution of punishments along racial lines, and so forth). The contents of natural kind, artifact, and moral terms, as determined by the linguistic conventions in place two centuries ago, might be even less accessible to the ordinary speaker.

Furthermore, this needn’t result in unfair punishments. As Michael S. Moore noted in connection with his death example, if a doctor removed organs from someone who met the then conventional criteria for being dead, but who was in fact not dead, the doctor’s action would be prohibited by the law, but the doctor

would not be guilty of murder, in light of lacking the requisite mental state.⁵² Ignorance of the law, contrary to the popular proverb, can be a mitigating factor in considering a person's guilt for violating that law, especially if at the time nobody had any way of knowing that the act was a transgression of the law. The same can be said about *Nix v. Hedden* (involving the duty on vegetables), although there is nothing unfair about requiring the return of funds collected in error. Policies about strict liability are not entailed by any of the above, either. It's a separate question of tort law how to handle damages due to violations of the law that nobody at the time could've known were violations, and which involved no negligence.

We must reach conclusions about the literal meanings of the Constitution and the laws, even without knowing these facts. We must assign terms the extensions that we suppose they have, while realizing that we'll sometimes assign the wrong extensions, and thus that sometimes we'll be mistaken as to how the Constitution, or another legal text, binds us. Better that we accept this than to decide upon a clearly sub-optimal decision procedure for legal interpretation.

2. *Temporal externalist semantic theory creates ex post facto laws, since it makes the legal status of an action at a given time depend on developments that occur much later. Such laws are widely regarded as unfair, so it would be preferable to find a semantic theory without this untoward consequence.*

To avoid *ex post facto* legislation, a government's executive decisions with respect to an action's legal status must be guided and justified by legal standards already in place at the time of that action. That isn't at odds with the picture drawn here, according to which the legal standard originally adopted is also the one informed by later discoveries or developments. On this view, if tomatoes are part of the extension of 'fruit' and not of 'vegetable', although this fact is determined by events transpiring after the legislation, a tariff on vegetables would never have been a tariff on tomatoes. Odd as it admittedly sounds, the later events determine what law had always been in place. This sounds like an Orwellian spin on the *ex post facto* from the Ministry of Truth – 'Oceania has always been at war with

⁵² Moore 1985, pp. 324–325, *supra* note 1.

Eastasia' – but really it is just a consequence of a central tenet of semantic externalism. I quote Gareth Evans:

If a speaker uses a word with the manifest intention to participate in such-and-such a practice, in which the word is used with such-and-such semantic properties, then the word, as used by him, will possess just those semantic properties.⁵³

This, conjoined with the unobjectionable claim that the linguistic practices in which one intends to participate are temporally extended, and include not just past parts but also future ones, then what one means now, or what a law adopted today means now, may depend in part of how one's own linguistic community behaves in the future. We are committed to our moral terms like 'justice' referring to whatever the (eventual) best theory about justice we will be able to articulate says that justice is.

3. *Semantic theories like temporal externalism tell us about the literal content of a text, but interpretation goes beyond that. When interpreting an utterance we care about other pragmatic factors, as well.*

When interpreting a comment by one's spouse, or instructions made by one's boss, one must consider more than the literal content of the words. Sarcasm, irony, metaphor, spoonerisms and background knowledge of the speaker and the context must be taken into consideration. Still, there are obvious reasons why a legislature would not draft a law and rely on such devices for non-literal communication. We need only worry about the 'ordinary meanings' of the law's text, although adopting this policy when following orders from the boss, or talking to one's spouse, would be obtuse. Still, the dividing line between pragmatics and semantics is unclear, and different philosophers draw it in different places. Some argue that, even putting aside such obviously non-literal aspects of meaning as sarcasm, there is a distinction between the ordinary, natural meaning of an utterance – how someone would interpret it if she took it to be an anonymous letter – and the literal meaning of the utterance, in a very strict sense. That is, it might turn out that the strict literal meaning of an utterance is different from how ordinary speakers would construe it, even if they were intending to take it literally.⁵⁴

⁵³ *The Varieties of Reference* (New York: Oxford University Press, 1982), p. 387.

⁵⁴ For a discussion of this issue, see Booher, Troy, 'Putting Meaning in its Place: Originalism and the Philosophy of Language', *Law and Philosophy* 25 (2006): 387–416.

But there's nothing in the view argued for here that's at odds with this point. We might agree that there are pragmatic components to the ordinary natural meanings of our words, and still maintain that the facts about the world and future usage are in part determinative of this ordinary natural meaning.

There's also no inconsistency between my view and the claim that *legal contents* might not be exactly the same as *semantic contents*. The law might require or forbid things not articulated by the text. I take it to be an open question whether this is the case.⁵⁵ But I take the semantic content of the sentences in a legal text to be at least an important factor in determining the legal content of the law. As such, a theory of that semantic content is necessary, even if it is not sufficient, for a theory of legal content.

IX. CONCLUSION

The dispute between textual originalists and textual evolutionists is whether the meaning of a legal text that is binding on us is the one that the text originally had when it was first adopted, or the meaning that those words have for us today. The distinction between these two theories presupposes that the original meaning and the meaning by our own lights are different, but I argue that in the main, they are not different. Temporal externalist semantics (even more than standard externalist/realist semantics) allows us to maintain sameness of meaning over time despite changes in usage. Originalism and evolutionism thus effectively collapse into one view, for the meanings that are sensitive to contemporary linguistic developments and theories are the meanings the words have always had. Both the originalist and the evolutionist are technically correct – the meaning that binds us is the original meaning, and it is the meaning that is sensitive to more recent developments – but in effect this is a victory for the evolutionist, since on this view we are not bound by textual meanings determined by the linguistic behavior or theories of the framers of the law.

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⁵⁵ For a discussion of this point, see Greenberg, Mark, 'How Facts Make Law', *Legal Theory* 10 (2004): 157–198.