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SEMANTIC ORIGINALISM

LAWRENCE B. SOLUM

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I. INTRODUCTION: ORIGINALISM, MEANING, AND THE LAW

What does the Constitution mean? The United States Supreme Court has recently suggested that interpretations of the constitutional text are "guided by the principle that "[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and

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ordinary as distinguished from technical meaning."[1] The approach to constitutional interpretation articulated by Justice Scalia in the Opinion of the Court in *District of Columbia v. Heller* focuses on "original public meaning": in other words, *Heller's* theory of constitutional meaning is originalist. This Article offers a theory of constitutional meaning that that provides a theoretical foundation for *original public meaning originalism*. We can call that theory *Semantic Originalism*: it offers an account of the possibility of constitutional communication and explains how a written constitution can provide both fixed semantic content and a general framework that can be adapted to changing circumstances.

A. What is Semantic Originalism?

The central claim of Semantic Originalism is that constitutional law includes rules with content that are fixed by the original public meaning of the text—the conventional semantic meaning of the words and phrases in context. This central claim is developed and supported through the elaboration of four theses. First, the fixation thesis is the claim that semantic content of the Constitution (the *linguistic meaning* of the Constitution) is fixed at the time of adoption. Second, the clause meaning thesis is the assertion that the semantic content of the constitution is its original public meaning. Third, the contribution thesis argues that the semantic content of the constitution contributes to the content of the law. Fourth, the fidelity thesis maintains that because the semantic content of the constitution is the supreme law of the land, we are obligated by it, unless there is an overriding reason of morality to the contrary.[2] Each of the four theses is clarified and argued for in the remainder of the article, but at this early stage, the arguments can be previewed in order to reveal the general shape of Semantic Originalism.

1. The Fixation Thesis: The Semantic Content of Constitutional Provisions is Fixed at the Time of Framing and Ratification

The family of originalist theories of constitutional interpretation includes many variants, ranging from views that emphasize the "original intentions" of the framers or ratifiers, theories that prioritize "original understanding," and contemporary versions of the "New Originalism" that focus on "original public meaning." Despite this variation, it would be a mistake to conclude that "originalism" lacks core content. Almost all originalists agree, explicitly or implicitly, that the meaning (or "semantic content") of a given Constitutional provision was fixed at the time the provision was framed and ratified.[3] We can call this idea *the fixation thesis*.[4]

The fixation thesis is phrased in terms of "semantic content": the semantic content of any given constitutional provision is fixed at the time of ratification. The phrase "semantic content" refers to "meaning," but we need to be careful because there is an ambiguity in the meaning of the term "meaning." When we refer to the meaning of a constitutional provision, we might refer to the *linguistic meaning* or *semantic content*. Call this first sense of meaning, the *semantic sense*. But the term "meaning" can also be used to refer to *implications*, *consequences*, or

[1] District of Columbia v. Heller, ___ S.Ct.___, 2008 WL 2520816 (June 26, 2008) (citations omitted).

[2] I will not make a fifth claim, that given current circumstances, there are no overriding reasons of morality that nullify our duty of fidelity to the Constitution, but I won't deny this fifth claim either. Much turns on the truth or falsity of the fifth claim, but that is a topic for another article and perhaps another author.

[3] This period may be extended over many years. *See infra* footnote 179, p. 61.

[4] The full argument for the fixation thesis is found below. *See infra* Part III.E, "The Case for the Fixation Thesis Revisited," p. 61.

applications. Call this second sense of meaning, the *applicative sense*. We might use the term meaning to refer to the *purpose* or *function* of a given constitutional provisions: call this third sense of meaning the *teleological sense*. For the remainder of this essay, when the term "meaning" and related phrases like "constitutional meaning" are used, the term and phrases shall be used in the *semantic sense*.[5]

The first claim is that the meaning of constitutional provisions is fixed at the time of ratification.[6] Why is this the case? After all, the meanings of words and phrases change over time. Why is constitutional meaning fixed at the time of origination? One common answer to this question focuses on the fact that the constitution is *written* and the notion that the function of a writing is to fix meaning through time.[7]

But there is a more fundamental warrant for the fixation thesis. That warrant can be seen most clearly if we focus on an example that does not involve the Constitution of the United States. Suppose, for example, that we are attempting to determine the semantic content of a letter written in the twelfth century that uses the term "deer." Over time, the meaning of the term "deer" has substantially changed. Today, "Deer" refers to a ruminant mammal belonging to the family Cervidae, and a number of broadly similar animals, from related families within the order Artiodactyla, are often also called deer. But in Middle English, the word "deer" meant a beast or animal of any kind.[8] An ordinary letter written between 1066 and the fifteenth century that employed the term "deer" can only be understood reliably in light of the conventional semantic meaning at the time of writing: reading the letter to use the term deer to refer exclusively to a mammal belonging to the family Cervidae would be make a type of factual error, i.e., a linguistic mistake.[9] Although I have used an example involving a writing (a letter), this feature is not essential to fixation. The semantic content of a twelfth century oral communication using the word "deer" would also be given by usage in Middle English.[10]

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[5] The abstract distinction between different senses of meaning can be made more concrete with an example. Consider the question: "What is the meaning of the first amendment freedom of speech?" One answer to that question could be: "The first amendment means that the state can outlaw shouting fire in a crowded theater, but it cannot criminalize sincere criticisms of public officials." This answer to the question would give us a meaning in the *applicative sense*. Another answer to the question might be as "protection of political speech essential to a well-functioning democratic polity." This answer to the question would give us a meaning in the *teleological sense*. In the *semantic sense*, the meaning of the "freedom of speech" would need to spell out the semantic content of the phrase.

[6] The use of the root word "fix" to refer to the idea expressed by the fixation thesis has a long pedigree. *See* THOMAS COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWERS OF THE STATES OF THE AMERICAN UNION 124 (Carrington's 8th ed. 1927) ("The meaning of the Constitution is fixed when it is adopted and is not different at any subsequent time.").

[7] *See, e.g.,* Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 Loy. L. Rev. 611, 611-29 (1999); RANDY BARNETT, RESTORING THE LOST CONSTITUTION (2004).

[8] SOL STEINMETZ, SEMANTIC ANTICS: HOW AND WHY WORDS CHANGE MEANING 49-50 (Random House 2008).

[9] Of course, the term deer in Middle English included what we call deer in contemporary usage, and it might be clear in context that a particular letter used the Middle-English term to refer to a modern deer. Such usages were, in fact, a part of the causal chain that resulted in the contemporary usage. The mistake would be to assume that the Middle English term was limited to the modern usage. The mistake would result in a gross misunderstanding where the Middle English term was used to refer to what we call a "cow" or a "pig."

[10] Since there were no sound recordings in the twelfth century, we could only know of such an utterance through a contemporaneous written report.

Similarly the Constitution of 1789 uses the phrase "domestic violence."[11] The contemporary semantic meaning of the "domestic violence" is "'intimate partner abuse,' 'battering,' or 'wife-beating,'" and it is understood to as "physical, sexual, psychological, and economic abuse that takes place in the context of an intimate relationship, including marriage."[12] But if that meaning was unknown in the late eighteenth century, it would simply be a linguistic mistake to interpret the domestic-violence clause of Article IV of the Constitution of 1789 as referring to spouse or child abuse. The anachronistic reading of "domestic violence" would be mistaken because the semantic content is fixed at the time of "constitutional utterance," where that phrase is understood as referring to the time of origin, encompassing the period roughly contemporaneous with the framing (or drafting) and ratification (or formal legal approval) of the particular clause or amendment.[13]

The claim made by the fixation thesis is within the *core content of originalism* and the claim should be understood as neutral between most (or almost all) members of the originalist family. *Original intentions originalists* believe that the original meaning of the constitution is a function of the intentions of the framers. If this view of constitutional meaning were correct, then the semantic content of a constitutional provision would be fixed at the time of drafting; the fixation would be done by mental states (the intentions of the framers) and those states would be fixed at the time of constitutional utterance. Similarly, *original public meaning originalists* believe that the original meaning of the constitution is a function of the original public meaning (or "conventional semantic meaning") of a given constitutional provision at the time the provision was framed and ratified. Once again, meaning is fixed by the general pattern of usage at the time of constitutional utterance.

So far as I can discern all or almost all originalists agree with what I call the fixation thesis.[14] The fact of agreement alone should be enough to validate the claim that the core content of originalism includes the idea that the semantic content of constitutional provisions is fixed at the time of framing and ratification. But this claim finds additional and independent support in a second warrant: the claim that semantic content is fixed at the time of origin plays a crucial role in all (or almost all) of the normative[15] justifications for originalism. For example, fixation at the time of origin is crucial for popular sovereignty justifications for originalism, because those arguments require that the meaning of the constitution be fixed by the semantic content of the document that was ratified by democratically legitimate procedures. Likewise, fixation at the

[11] U.S. Constitution, Art. IV, Cl. 4 ("The United States shall guarantee to every state in this union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence.")

[12] Glossary, Human Rights Watch, http://www.hrw.org/reports/2003/nepal0903/3.htm (visited March 29, 2008).

[13] I owe this example to Jack Balkin. *See* Lawrence B. Solum, Blogging from APSA: The New Originalism, September 3, 2007, http://lsolum.typepad.com/legaltheory/2007/09/blogging-from-a.html (live blogging at the meeting of the American Political Science Association and describing Balkin's presentation).

[14] It is possible to imagine a form of originalism that would depart from the core content. For example, one might believe that the Constitution of 1789 has no semantic meaning: it is an empty vessel. One could then argue that contemporary interpreters should adhere to a legal fiction, treating the Constitution of 1789 as if its semantic content were determined by the reconstructed or imputed expectations of the framers regarding its application to particular issues or cases. The existence of this logical possibility, however, is not a good reason for denying the claim that the actually existing family of views that call themselves originalist is not committed to the core content as identified in the text accompanying this note.

[15] I am using "normative" in the narrow sense in which "normative reasons" are moral or ethical reasons. *See infra* Part III.A, "Semantics and Normativity," p. 29; *infra* Part III.B.4, "Semantic Meaning as a "Fact of the Matter"", p. 37; *infra* note 118.

time of origin is crucial for rule of law theories that require the fixation of content in order to ensure the predictability, certainty, and stability of constitutional rules. In other words, the agreement among originalists about the fixation thesis is not a mere coincidence or accident. The fixation thesis plays a substantial role in the articulated theoretical content of a variety of members of the family of originalist theories.

2. The Clause Meaning Thesis: The Semantic Content of the Constitution is Given by the Original Public Meaning of the Constitutional Provisions

My second claim is that the semantic content of the constitution is given by its *clause meaning*--understood as original public meaning, elaborated as (1) conventional semantic meaning,[16] (2) as modified by (a) context,[17] (b) the division of linguistic labor,[18] (c) constitutional implicature,[19] and (d) constitutional stipulations.[20] (Each of the components of clause meaning is explained in detail below.) The argument that the semantic content of the constitution is given by its clause meaning is based on ideas drawn from the philosophy of language. The central claim is that understanding the content of the constitution as focused on its conventional semantic meaning provides the only satisfactory account of the possibility of constitutional communication.

The argument for clause meaning will be elaborated at length,[21] but the intuitive idea is simple. The constitution was drafted and ratified by a multitude: many different individuals at different times and places. The intentional mental states of the multitude with respect to a given constitutional provision (their purposes, hopes, fears, expectations, and so forth) will themselves be multitudinous and inaccessible. Multitudinous, because different framers and ratifiers had different intentions, with the consequence that intentions alone cannot fix consistent (noncontradictory and not radically ambiguous) semantic content. Inaccessible, because those who were expected to engage in constitutional practice (the judges, officials, and citizens of the United States of American for an indefinite future) would have found the multitudinous intentions epistemically inaccessible.

But the fact that the original intentions of the framers and ratifiers were multitudinous and inaccessible does make constitutional communication impossible. The possibility of constitutional communication was created by the fact that the framers and ratifiers could rely on the accessibility of the public meaning (or conventional semantic meaning) of the words, phrases, and clauses that constitute the Constitution. Not only can such public meanings enable constitutional communication at the time a given constitutional provisions is drafted, approved, and first implemented, such meanings can also become stable over time or be recovered if they are lost. In other words, under normal conditions successful constitutional communication

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[16] *See infra* Part III.C.2.a), "First Approximation: Clause Meaning as the Semantic Equivalent of Original Meaning Originalism," p. 52 & Part III.C.2.b), "Second Approximation: Clause Meaning as the Constitutional Equivalent of Speakers Meaning," p. 53.

[17] *See infra* Part III.C.2.c)(1), "First Modification: The Publicly Available Constitutional Context," p. 54.

[18] *See infra* Part III.C.2.c)(2), "Second Modification: The Division of Linguistic Labor," p. 56.

[19] *See infra* Part III.C.2.c)(3), "Third Modification: Constitutional Implicature," p. 58.

[20] *See infra* Part III.C.2.c)(4), Fourth Modification: Constitutional Stipulations," p. 59.

[21] *See infra* Part III.C.2, "Clause Meaning," p. 52.

requires reliance by the drafters, ratifiers, and interpreters on the original public meaning of the words and phrases.[22]

3. The Contribution Thesis: The Semantic Content of the Constitution Contributes to Constitutional Law

My third claim is that the semantic content of the Constitution contributes to legal content.[23] As formulated, the third claim is simple and noncontroversial: once the contribution thesis is understood, it becomes apparent that that it is compatible with almost every reasonable theory of the nature of law and most normative (moral or ethical) theories of constitutional practice. The contribution thesis claims that the semantic content of the United States Constitution makes some contribution to the content of American law, and that is all that it claims. The contribution thesis itself does not answer questions about the strength or structure of that contribution.

Much of the confusion about originalism arises from the fact that there are several versions of the contribution thesis. Critics of originalism might identify originalism with an extreme position about the contribution the semantic content of the Constitution makes to constitutional law. Let us call the following view *the extreme version of the contribution thesis*: the semantic content of the constitution fully determines the content of constitutional law. If this extreme version of the contribution thesis were true, then each and every valid rule of constitutional law

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[22] Mitchell Berman has proposed an unhelpful distinction between what he calls "hard" and "soft" originalism. He writes:

> Briefly, originalism is "hard" when justified by reference to reasons that purport to render it (in some sense) necessarily true; it is soft when predicated on contingent and contestable weightings of the costs and benefits of originalism relative to other interpretive approaches.

Berman, Mitchell N., "Originalism is Bunk" (December 30, 2007). Available at SSRN: http://ssrn.com/abstract=1078933, p. 3. Berman then offers a second formulation that he believes is equivalent:

> Hard arguments contend that originalism follows logically or conceptually from premises the interlocutor can be expected already to accept; soft arguments aim to persuade readers to revise their judgments of value or their empirical or predictive assessments.

Id. at 3-4. As articulated by Berman, the distinction between Hard and Soft originalism is not coherent. First, it is not clear what the criteria for "hard" and "soft" actually are. Berman assumes that the category of the necessary and the category of the conceptual are identical, but that assumption involves metaphysical commitments that are among the most controversial in contemporary philosophy. Quine! Kripke!! Not all conceptual arguments involve necessary truths, and not all judgments of value are supported by contingent weightings. One can imagine a deontological argument for originalism grounded on "premises the interlocutor can be expected to accept" but which is sensitive to a weighing of these commitments in a process of reflective equilibrium. Is this "hard" or "soft" originalism?

Berman then suggests, "The arguments for hard originalism most commonly advanced today depend upon particular views either about what it means to interpret a text or about what it means to treat a constitution as authoritative." *Id*. at 4. But what Berman seems to be driving at here is not the distinction between conceptual necessity and persuasion, but is instead a distinction between arguments about meaning and legality, on the one hand, and normative arguments (or arguments from moral and political philosophy) on the other hand. That distinction is important, but it does not cleave the world of originalist theories into two camps, hard and soft. Arguments about semantic meaning and legal significance can be conceptual or empirical, deductive or based on reflective equilibrium, as can arguments about political morality.

[23] The full argument for the contribution thesis is found below. *See infra* Part IV.C, "The Contribution Thesis Revisited," p. 137.

would be derivable in some way from the semantic content of the constitution.[24] So far as I know, no actual proponent of originalism has endorsed this extreme position.

The implausibility of the extreme version of the contribution thesis becomes apparent once it is juxtaposed with some familiar facts about the relationship of the constitutional text and the full set of constitutional rules. One of these facts might be called *the fact of constitutional vagueness*: many provisions of the constitution are vague, including, for example, the first amendment freedom of speech, the phrases "executive power," "legislative power," and "judicial power," and the "just compensation" provisions of the Fifth Amendment. Give the fact of constitutional vagueness, the semantic content of the Constitution cannot fully determine the application of the Constitution to particular cases. Another such fact is the existence of a system of precedent, which at the very least creates doctrinal rules that are binding on lower courts. Let us call this *the fact of constitutional stare decisis*. Much of the content of what is called "constitutional law" (e.g., the doctrine of prior restraint in first amendment law) consists of implementing doctrines that are not equivalent to the semantic content of the constitutional text.[25]

Because the extreme version of the contribution is inconsistent with the facts of constitutional vagueness and constitutional stare decisis, it is an unreasonable interpretation of the contribution thesis and the principle of charity in interpretation suggests that it should not be attributed to originalists without strong textual evidence that cannot be reconciled with a reasonable interpretation.

If we set the extreme version aside, then it becomes apparent that there are several reasonable versions of the contribution thesis. For ease of discussion, we can one family of views, *moderate versions of the contribution thesis*. Moderate versions maintain that the semantic content of the constitution has the force of law, and is part of "the supreme Law of the land."[26] The Constitution itself says,

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

When the Supremacy Clause refers to "this Constitution," what does it mean? The basic intuition behind the moderate version of the contribution thesis is that it is the *meaning* (in the semantic sense) of the constitution and not its typographical or syntactic form that provides a substantial and constraining portion of its legal content. The indexical article "this" in the phrase "this Constitution . . . shall be the supreme Law of the land; and the Judges in every State shall be bound thereby" makes a contribution to the meaning of the clause. The use of "this" in "this constitution" points to the semantic content of the document itself—that is to the linguistic meaning of the Constitution of 1789.

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[24] The derivation might be deductive; that is the picture of "mechanical jurisprudence." But other methods of derivation would be compatible with the extreme version of the contribution thesis. For example, if it were the case that Rawls's method of reflective equilibrium were sufficient to generate fully specified constitutional content (that is, content that resolves all questions of constitutional interpretation and construction), then the *extreme version* would be correct, even though reflective equilibrium is not deduction.

[25] *See* RICHARD H. FALLON, IMPLEMENTING THE CONSTITUTION (Harvard University Press 2001).

[26] U.S. Const., Art. VI, Cl. 2.

There are a variety of reasons for affirming the moderate version of the contribution thesis. One reason might appeal to legal positivism: for example, it could be argued that something like the rule of recognition for the United States identifies the semantic content of the Constitution as having the force of law. Another reason might appeal directly to legal practice in the United States, which both explicitly and implicitly assumes that it is the Constitution's meaning that has the force of law. Both strategies converge on what the common sense idea that the meaning of the Constitution contributes to the meaning of American law.

The moderate version of the contribution thesis claims that the semantic content of constitutional provisions furnishes rules of constitutional law. This leaves open a further question, whether officials (paradigmatically, the Supreme Court) have the power to adopt amending constructions—supplementary rules of constitutional law that are inconsistent with the semantic content. The moderate version of the contribution thesis claims that if there is such a power, it is narrow and not wide: that is, the power to adopt supplementary rules of constitutional law that contradict the semantic content of the constitution is limited to exceptional cases of constitutional necessity. In particular, the Supreme Court does not have a general power of constitutional revision.

The moderate version of the contribution thesis is contestable. There are constitutional theorists and legal philosophers who deny the claim that the semantic content of the Constitution has the direct force of law,[27] and instead affirm that only contribution that the semantic content of legal texts can make is indirect. Such views affirm what we can call the *weak version of the contribution thesis*. Three such theories will be examined in greater depth below, but at this stage we can examine the argument that direct contributions to legal content can only be made by rules contained in judicial decisions. The semantic content of the constitution could contribute indirectly to legal content, because judges might consider or use that content when they make the law by rendering their decisions.

The contribution thesis is widely accepted. Indeed, so far as I know, no constitutional theorist rejects it. In this essay, however, I go beyond the interpretation thesis itself and rely on what I have called a *moderate version*. Although moderate versions of the contribution thesis are contestable, they are both intuitive and widely held. Making the full case for a particular moderate version of the contribution thesis would require an extended excursus into debates over the nature of law—an enterprise that is beyond the scope of this Article. Moreover, most of the claims made in this essay can be reconciled or restated without serious loss of content in ways that are compatible with plausible versions of the weak version.

Just to be sure that we have not lost sight of the forest for the trees, the point of this discussion is to provide an introductory set of warrants for the contribution thesis: the semantic content of the Constitution contributes to the content of American law.

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The first three theses share an important characteristic: they all make factual claims that do not rely on moral premises. The fixation thesis and the clause meaning thesis make claims about the semantic content of the Constitution: as a matter of fact, the meaning of a given

[27] *See* Mark Greenberg, *The Standard Picture and its Discontents*, UCLA School of Law Research Paper No. 08-07 Available at SSRN: http://ssrn.com/abstract=1103569 (suggesting that antipositivists should be understood as denying a "standard picture" that equates the linguistic content of legal provisiosn with the rules the legal provisions create).

constitutional provision is fixed at the time of origin by its original public meaning. The contribution thesis makes a claim about the legal significance of the constitutions semantic content: as a matter of fact, the semantic content makes some contribution to American law. These factual claims are not based on arguments of political morality. The semantic content of the Constitution of 1789 was fixed at that time because of the way that communication through language works, and not because it is a good idea to interpret the Constitution that way. By way of contrast, the fourth thesis is based on moral premises: it is a claim about political obligation and civic virtue.

* * *

4. The Fidelity Thesis: There Is a Defeasible Obligation of Fidelity to Law

The fourth claim is that because the semantic content of the constitution is part of the supreme law of the land, we are obligated by it, unless there is an overriding reason of morality to the contrary.[28] The warrants for the fourth claim need to include an account of fidelity to law. There are two strategies for providing such warrants: one based on comprehensive moral and political theory and the other based on public reasons.

The first strategy relies on comprehensive moral doctrines. The deontological case argues that there is a defeasible moral obligation to obey the law. The consequentialist case argues that both from the perspective of individual action and from the perspective of the ideal moral code, fidelity to law leads to better consequences than lawlessness, absent special circumstances or overriding reasons. The aretaic case argues that the virtue of justice is best understood as a virtue of lawfulness which includes a stable disposition to act in accord with and on the basis of the constitution of a well-functioning political community so long as the constitution bears the right relationship to the deeply held and widely shared social norms of that community.

While the first strategy relies on comprehensive moral doctrines, the second strategy relies on public reasons—and in particular on the public values of fidelity to law and the rule of law. The second strategy relies on the claim that there is an overlapping consensus on these public values and that they are part of the public political culture.[29] The content of that overlapping consensus

[28] For the full argument, see *infra* Part IV.D, "The Fidelity Thesis Revisited," p. 152. The discussion in text elides a deep question—whether the Constitution of the United Sates is legitimate. The position that I shall take throughout this article is that laws, including the Constitution, can provide reasons for action (which we might call obligations) even if they are not legitimate. Consider, for example, the case of traffic laws with reasonably just content in a state with an illegitimate government (a unelected dictatorship resulting from a military coup). The fact that the regime is illegitimate does not entail that citizens d not have good reasons to obey the traffic laws. The case of an illegitimate constitution is more complex, but it is not difficult to see how an illegitimate constitution can create obligations (to respect rights, to recognize official acts, and so forth). Of course, these obligations may be overridden in appropriate circumstances by reasons related to the illegitimacy of the constitution. For example, there may be overriding reasons to replace the constitution by extralegal means, such as revolution. In the case of the United States Constitution, illegitimacy is not hypothetical: at the very least, a strong case can be made the Constitution of 1789 was illegitimate because it permitted slavery. On constitutional legitimacy, see Richard Fallon, *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787 (2005); Barnett, *Restoring the Lost Constitution*, *supra* note 7.

[29] For elaboration of the ideas of public reason, overlapping consensus, and the public political culture, *see* JOHN RAWLS, POLITICAL LIBERALISM (New York: Columbia University Press, revised paperback edition 2005); *see also* Lawrence B. Solum, Public Legal Reason, 92 Virginia Law Review 1449 (2006); Pluralism and Public Legal Reason, 157 William & Mary Bill of Rights Journal 7 (2006); Pluralism and Public Legal Reason, 157 William &

includes both *general* and *special constitutional fidelity*. The obligation of *general constitutional fidelity* applies to all citizens. The obligation of *special constitutional fidelity* applies only to officials. The question whether the general and special obligations of constitutional fidelity have *identical content* is an important one, but both obligations create (at minimum) a defeasible obligation of fidelity to the semantic content of the Constitution.

Stepping back, we should observe that the question whether fidelity to law in general and the constitution in particular is virtuous or obligatory is a deep one. Even if public reason converges on such an obligation, it is possible that the public political culture of our society is simply wrong about this matter. For this reason, some readers may either reject or bracket the fidelity thesis. It is important to note, however, that rejection of the fourth thesis does not entail rejection of any of the others: that is, denial of the fidelity thesis is, *prima facie*, consistent with affirmation of the fixation thesis, the clause meaning thesis, and the contribution thesis.

* * *

The central claims of Semantic Originalism are straightforward, but they are easily misunderstood. In the end, I hope to convince you that the case for Semantic Originalism rests on arguments that are valid and sound, and that the reasons you might have for seriously doubting these arguments are rooted in widely shared but clearly erroneous assumptions about what is at stake in debates about originalism. But this is the beginning and not the end. In the beginning, I fully expect that some readers will think that I am obviously wrong, that my claims are politically motivated, or that originalism was laid to rest decades ago. We need to get these possible reactions on the table right away, because I am asking you to pay very close attention to the arguments that I shall make and to read them fairly, bracketing your instinctive reactions, your assumptions about the ideological implications of originalism, and your preconceptions of what the originalism debate is actually about.

Many of the claims made by Semantic Originalism move outside the preconceptions of some readers because they derive conclusions about constitutional meaning from nonnormative premises—that is, on the basis of premises that are not ethic or moral in nature. Most of the conclusions reached by Semantic Originalism are justified by premises about legal semantics and the nature of law. To the extent that Semantic Originalism does make a normative (moral or ethical) claim, it is simply that we have a defeasible obligation to respect the original meaning of the constitution to the extent that it is law. The normative parsimony of Semantic Originalism may strike some readers as odd or even incomprehensible. The reasons for that parsimony will be explicated in depth. My request is that you withhold judgment about my claim that Semantic Originalism rests primarily on nonnormative warrants until you have seen the full argument.

* * *

Mary Bill of Rights Journal 7 (2006); Novel Public Reasons, 29 Loyola of Los Angeles Law Review 1453 (1996); Law and Public Reason, 95 APA NEWSLETTERS No. 2, Spring 1996, at 54 (1996); Inclusive Public Reason, 75 Pacific Philosophical Quarterly 217 (1994); Constructing an Ideal of Public Reason, 30 University of San Diego Law Review 729 (1993).

B. What's in a Name, Take One: Is it "Originalism"?

One possible reaction to the argument of this Article might be called the strategy of "confession and avoidance." An opponent of originalism might *confess*—yes, the semantic content of the constitution is given by its original public meaning at the time of origin—but *avoid*—no, that theory is not originalism, it is actually "living constitutionalism" or "constitutional pluralism." A final answer to the strategy of confession and avoidance will be provided near the very end of this rather Article.[30] At this stage, however, a preliminary answer is warranted. Semantic Originalism is the view that the semantic content (or "meaning" of the constitution) is the original public meaning of the constitutional text. Even if we reserved the term "originalism" as the name for some other view—perhaps the normative theory that the original public meaning of the constitutional text should be exclusive guide to constitutional interpretation and construction—that would be no objection to using the term "originalism" in the phrase "Semantic Originalism" as the name of the view that is defended here. The phrase, "Semantic Originalism," is neither misleading nor obfuscatory when used in this way. The term "originalism" contributes to the meaning of the phrase by pointing to the role that "original public meaning" plays in "Semantic Originalism." Moreover, the use of the term "originalism" as the name of the view that "original public meaning" is "the meaning of the United States Constitution" is now standard. It is the view associated with debates over "the New Originalism" and "original meaning originalism." Given these facts, no serious objection to the use of the phrase "Semantic Originalism" as the name of the theory advanced in this Article can be sustained.

The use of the term "originalism" in the name of the theory "Semantic Originalism" is warranted by a second and more powerful argument to which we have already alluded. Originalism is best conceived as a family of theories. Members of the family may differ on the question as to *how* the "origins" (the framing and/or ratification) fix meaning, but they agree on *when* it was fixed (the period of "origination"). Originalists may disagree about *why* the original meaning is normatively significant and they may also differ on *whether* original meaning always trumps other considerations (such as historical practice or precedent), but they agree *that* the original meaning *does and should have* substantial normative and legal force. Because the fixation thesis, expresses the core content that is shared by almost all of the members of the family of originalist theories, it plays a focal role in debates about *originalism*. If the claim that the semantic content of the provisions of the Constitution were fixed at their times of origin were false, then the foundations of originalism would be shaken and all or almost all the members of the family of originalist theories would no longer be viable. As Antonin Scalia put it, "the Great Divide with regard to constitutional interpretation is not that between Framers' intent and objective meaning, but rather that between original meaning (whether derived from Framers' intent or not) and current meaning."[31] Scalia's great divide corresponds to the divide between those who affirm and those who deny the fixation thesis.[32]

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[30] *See infra* Part V.B, What's in a Name, Take F. *See also infra* Part III.D, What's In a Name, Take Two: The Sense in Which Clause Meaning is Original Meaning; Part IV.F, What's in a Name, Take Four: The Family of Normative Originalism.

[31] ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 38 (1997).

[32] Mitch Berman suggests that the "great divide" is ambiguous:

> Scalia is surely right about what does not define originalism – viz., any particular position on the dimension of interpretive object. But his remark is ambiguous regarding precisely what does define originalism. By failing

Semantic Originalism affirms the fixation thesis. The fixation thesis provides the unifying content of the family of originalist constitutional theories. Therefore, use of the term "originalism" as part of the name of "Semantic Originalism" is warranted. In the end, of course, the substance of the debate counts for more than the labels. But labels can be important for reasons of rhetorical effectiveness, persuasive force, and affective resonance. As a consequence, opponents of originalism may be tempted to argue that the label "originalism" should be reserved for views that are obviously false, that require massive disruptions in constitutional practice or even that are incoherent or internally inconsistent. It seems obvious that the temptation to make such moves should be resisted, both on grounds of the principle of charity in interpretation and civility among scholars. At the very least, attempts to deploy a stipulated definition of originalism that is contrary to usage of scholars who self-identify as originalists should be clearly articulated and identified. Beyond this minimum, if a case can be made for the fixation thesis as the core content shared by almost all originalist theories, then this case should be acknowledged or refuted when the term "originalist" is used in a nonstandard way.

C. Roadmaps

"Semantic Originalism" has a tripartite structure that can be previewed by providing two roadmaps and an explanation. The superstructure of "Semantic Originalism" has five parts, starting with Part I, this introduction. Part II is entitled "An Opinionated History of Constitutional Originalism," and it provides the context for all that follows. Part III is entitled "Semantic Originalism: A Theory of Constitutional Meaning," and it lays out the case for original public meaning as the best nonnormative theory of constitutional content. Part IV is entitled "The Normative Implications of Semantic Originalism," and it articulates a variety of normative arguments for originalism. Part V is entitled "Conclusion: Semantic Originalism and Living Constitutionalism," and it explores the broad implications of Semantic Originalism for living constitutionalism and the future of constitutional theory.

The superstructure of "Semantic Originalism" is complimented by an infrastructure—a complimentary outline of multipart arguments that unfold in stages. The first of these arguments is identified by subsections entitled, "What's in a Name?": this part of the infrastructure unfolds in five parts, building the cumulative case for careful use of the words "originalism" and "originalist."[33] The second element of the infrastructure is identified by a series of subsections

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to specify the attitudes that theorists or interpreters on either side of the Great Divide take toward original meaning and current meaning, respectively, Scalia does not identify just where that divide is located. Does it lie between those who care only about original meaning and those who care only about current meaning (in which case, everybody who cares about both resides precariously on the divide itself)? Or between those who privilege original meaning as the default and those who privilege current meaning? Or between those who attend exclusively to original meaning and those who attend to current meaning too? Or between those who attend at least partially to original meaning and those who attend exclusively to current meaning? Or someplace else entirely? Scalia's highlighting of the distinction "between original meaning . . . and current meaning" is too elliptical to supply the definition we seek.

Berman, *supra* note 22, at 15. In this passage, Berman displays a deep misunderstanding of Scalia's articulation of the line between originalism and nonoriginalism: the divide is about meaning in the semantic sense, and given the context, that is the most natural interpretation of Scalia's remark. The ambiguities that Berman identifies go to the normative force of that meaning—a topic about which originalists disagree. *See also infra* Part III.I, What's in a Name, Take Three: Strong Originalism," p. 122.

[33] *See supra* Part I.B, What's in a Name, Take One: Is it "Originalism"?," p. 12; *infra* Part V.B, What's in a Name, Take F; *infra* Part III.D, What's In a Name, Take Two: The Sense in Which Clause Meaning is Original

called "Triviality," providing three related discussions that establish that Semantic Originalism has bite and significance.[34] The third element is identified by the label "Monsters and Apparitions," and these sections discuss the parades of horribles that can be conjured as objections to Semantic Originalism.[35] The fourth element consists of two "Restatements of Semantic Originalism"—the restatements rigorously summarize the theory for ease of reference.[36]

The superstructure and infrastructure are supplemented by a series of external remarks that are identified in two ways. Each of these remarks is set off from the rest of the text by three asterisks and the use of *Roman Italic* as a typeface. In the external remarks, I speak in my own voice and comment on the argument of "Semantic Originalism" and the way it is situated in the discourse of contemporary constitutional theory. These external remarks are intended to illuminate and contextualize the more formal presentation from which they are distinguished. A different kind of context is provided in the next Part, which situates "Semantic Originalism" in the long and strange history of originalist thought in and out of the legal academy.

II. AN OPINIONATED HISTORY OF CONSTITUTIONAL ORIGINALISM

How does Semantic Originalism fit in the history of the contemporary theoretical debates about originalism? A full telling of the tale would be the subject of a longish monograph, so the story that I tell here is, of necessity, partial and selective.[37] Moreover, this history is limited to recent theoretical discourse; it ignores the pre-history of what we might call the "contemporary originalism debates," debates over original meaning amongst judges, politicians, and scholars that pre-date the 1970s.[38] This is an opinionated history of constitutional originalism: its purpose is to provide context that illuminates Semantic Originalism.

Meaning; *infra* Part IV.F, What's in a Name, Take Four: The Family of Normative Originalism; *infra* Part V.B, What's in a Name, Take Five: The Topography of Constitutional Theory," p. 170.

[34] *See infra* Part III.J, "Triviality, Take One: The Hard Wired Constitution," p. 127; Part IV.E, "Triviality, Take Two: Normative Argument and Constitutional Practice," p. 163, Part V.C, "Triviality Take Three, Truth as the Telos of Legal Scholarship," p. 171.

[35] *See infra* Part III.K, "Monsters and Apparitions, Take One: Herein of Ink Blots," p. 128; Part IV.G, "Monsters and Apparitions, Take Two: The Constitutional Big Bang," p. 165; Part V.D, "Monsters and Apparitions, Take Three: The Colonization of Law by Philosophy, p. 172.

[36] *See infra* Part III.C.2.d), "The First Restatement of Semantic Originalism: Clause Meaning is the Original Semantic Meaning of the Constitution to the Relevant Audience in Context, Plus Any Implications or Stipulated Meanings," p. 60; *infra* Part V.G, "The Second Restatement of Semantic Originalism," p. 175..

[37] For a different view from an earlier time, see Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085 (1989); Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. Penn. L. Rev. 1, 11-33 (1999).

[38] Although the first appearance of the term "originalism" in the Westlaw JLR database is in Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 Yale L. J. 1063 (1981), scholarly usage of related phrases extends at least as far back as the 1930s. The phrase "original meaning" was used in the constitutional context in Edwin Borchard, *The Supreme Court and Private Rights*, 348. 47 Yale L. J. 1051, 1063 (1938) ("There would be far greater advantage in restoring the original meaning of the "privileges and immunities" clause and by the process of inclusion and exclusion letting the country know what are now federal privileges, than in forcing the court to draw upon the fathomless depths of the "due process" clause to give effect to their personal convictions of economic and social propriety."). The phrase "original intentions" appears in Howard Jay Graham, *The "Conspiracy Theory" of the Fourteenth Amendment: 2*, 48 Yale L. J. 171, 189-90 (1938) ("Wholly apart from Bingham's personal understanding of his phraseology, his original intentions in drafting it, or the relations existing between the Cleveland and Mahoning Railroad and other members of the Joint

A. Original Intentions of the Framers

One way to start our story is with Robert Bork, William Rehnquist, Raoul Berger and Edwin Meese. In 1971, Robert Bork wrote *Neutral Principles and Some First Amendment Problems*,[39] the article that might be considered the opening move in the development or contemporary originalist theory. In 1976, then Associate Justice William Rehnquist wrote *The Notion of a Living Constitution*, which explicitly criticized living constitutionalism and implicitly endorsed originalism based on the writings of the framers.[40] In 1977, Raoul Berger wrote *Government by Judiciary*,[41] which argued that the Supreme Court's interpretations of the Fourteenth Amendment to the United States Constitution were contrary to the original intentions of its framers. In 1985, then Attorney General Edwin Meese put originalism on the political agenda in a well-publicized speech before the American Bar Association.[42] Meese's speech included the following passage:

> In reviewing a term of the Court, it is important to take a moment and reflect upon the proper role of the Supreme Court in our constitutional system. The intended role of the judiciary generally and the Supreme Court in particular was to serve as the "bulwarks of a limited constitution." The judges, the Founders believed, would not fail to regard the Constitution as "fundamental law" and would "regulate their decisions" by it. As the "faithful guardians of the Constitution," the judges were expected to resist any political effort to depart from the literal provisions of the Constitution. The text of the document and the original intention of those who framed it would be the judicial standard in giving effect to the Constitution.[43]

Bork, Rehnquist, Berger, and Meese implicitly endorsed what we now call "original intentions originalism," the view that constitutional interpretation should be guided by the original intentions of the framers. Neither Meese nor Berger explicitly considered the distinction between normative and semantic versions of originalism, and none of them seems to have been aware of the possible divergence between original intentions and original public meaning. Perhaps they assumed that it was obviously true that the semantic content of the constitution was given by the intentions of the framers. Alternatively, they might have viewed originalism as primarily a normative theory. It may be that the best explanation is that they did not grasp the

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Committee, it is possible that Reverdy Johnson, in the course of the Committee's deliberations, or perhaps even in private conversation with Conkling, mentioned Justice Grier's decision as among the most recent involving the clue process clause, and in this manner precipitated a frank discussion of the entire problem of corporate rights."). The phrase "original understanding" appears in Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 Stan. L. Rev. 5 (1949).

[39] Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

[40] William H. Rehnquist, *The Notion of a Living Constitution*, 54 Tex. L. Rev. 693 (1976).

[41] RAOUL BERGER, GOVERNMENT BY JUDICIARY (Harvard University Press 1977).

[42] *See* Edwin Meese III, Speech Before the American Bar Association, July 9, 1985, *reprinted in* The Great Debate: Interpreting Our Written Constitution (Paul G. Cassel ed. Washington DC, The Federalist Society 1986) & *available at* Attorney General Edwin Meese III, The Great Debate, Before the American Bar Association, July 9, 1985, The Federalist Society, http://www.fed-soc.org/resources/id.49/default.asp (visited April 21, 2009); Edwin Meese III, The Case for Originalism, The Heritage Foundation, http://www.heritage.org/Press/Commentary/ed060605a.cfm (June 6, 2005); Lynette Clemetson, Meese's Influence Looms in Today's Judicial Wars, New York Times, http://www.nytimes.com/2005/08/17/politics/17meese.html (April 17, 2005).

[43] See Edwin Meese III, Speech Before the American Bar Association, July 9, 1985, *supra* note 42.

distinction, and hence that their claims are ambiguous, sliding between the normative and the semantic, intentionalism and textualism.

B. The Misconceived Quest & the Original Understanding of Original Intentions

Following Berger's book, but five years before Meese's speech, Paul Brest wrote *The Misconceived Quest for the Original Understanding*[44] (one of the most cited articles on constitutional theory[45]). Brest's article advanced a variety of criticisms of original intentions originalism, including: (1) the difficulty of ascertaining *the* institutional intention of a multi-member body in general[46] and the particular problems associated with identifying *the* intention of the members of Philadelphia Convention and the various state ratifying conventions in the case of the original constitution and of Congress and the various state legislatures in the case of amendments,[47] (2) the problem of determining the level of generality or specificity of the framers' and ratifiers' intentions,[48] (3) the problem of inferring intentions from constitutional structure,[49] (4) the difficulty of translating the framers' and ratifiers' beliefs and values given changes in circumstances over time,[50] (5) the problem of the democratic legitimacy, i.e., that the Constitution of 1789 was drafted and ratified without the participation of women and slaves,[51] (6) the problem of instability, that an inflexible constitutional order cannot adapt to changing circumstances.[52] Brest had much more to say, and there were many other critics of originalism, but this list is sufficient to illustrate the reception that originalism received from constitutional theorists in the late 1970s and early 1980s.

Brest also raised the problem of the framers' and ratifiers' interpretive intentions,[53] and his remarks anticipated Jefferson Powell's 1985 article, *The Original Understanding of Original Intent*.[54] The premise for Powell's article was the assumption that that original-intentions originalists believed that the framer's themselves expected that the constitution would be interpreted to conform to their intentions. Although Powell conceded that there were references to "original intention" and "intent of the framers" in the constitutional discourse of the founding era, those phrases did not represent an early version of original-intentions originalism. Instead, "The Philadelphia framers' primary expectation regarding constitutional interpretation was that the Constitution, like any other legal document, would be interpreted in accord with its express language."[55] Both the evidence for Powell's thesis and its implications are controversial, but its effect on scholarly opinion was profound. The strongest implication would be that original-intentions originalism is a self-effacing theory: the theory requires that the framers' intentions

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[44] Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 238 (1980).

[45] A Westlaw search of the JLR database for the string corresponding to the title yielded 691 hits on April 21, 2009.

[46] *See* Brest, *supra* note 44, at 32.

[47] *See id*. at 214-15.

[48] *See id*. at 216-17.

[49] *See id*. at 217.

[50] *See id*. at 219-222.

[51] *See id*. at 230.

[52] *See id*. at 231.

[53] *See id*. at 215-216.

[54] H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 886, 903 (1985).

[55] *Id*. at 903.

regarding interpretation be respected, but those intentions require that the framers' intentions be disregarded.

Brest and Powell were hardly the only critics of original-intentions originalism, but their arguments, combined with others, helped form the scholarly consensus of the era.[56] That consensus could be summarized as the claim that *the original-intentions of the framers could not serve as the basis for a viable theory of constitutional interpretation and construction*.

C. Original Understanding of the Ratifiers

During this period, the originalism debate took a brief detour into a variant of original-intentions originalism—one that emphasized the understandings[57] or intentions of the ratifiers (either the state ratifying conventions understood as corporate bodies or of the individuals who attended the ratifying conventions and voted in favor of ratification).[58] As Charles Lofgren wrote,

> As a modern student of Madison asks, 'Why should we assume that those who merely ratified the Constitution grasped its meaning better than those who wrote it-or those who have since seen how it works in practice?' The answer from an 'intentionalist' perspective is that whether the ratifiers better grasped the instrument's meaning is beside the point; rather, how the ratifiers understood the Constitution, and what they expected from it, defines its meaning. The act of ratifying cannot be dismissed with the adverb 'merely.'[59]

We need not tarry long over this twist in the debate. The move to ratifiers understanding or intent is best understood in conjunction with popular sovereignty as a justification for originalism. The ratifiers (rather than the framers) could plausibly be viewed expressing the political will of "We the People." But all of the problems that attended the equation of constitutional meaning with framers' intent seem to attach to ratifiers' intent, but with respect to the latter type of intent, evidence may be even more difficult to obtain[60] and the problems of group intention (of multiple conventions with multiple members) even more confounding. To the extent that the ratifiers' understanding is rooted in the public meaning, the emphasis on ratifiers is merely a way station on the journey from original intentions to original public meaning.[61]

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[56] This is not an intellectual history of the originalism debates, and I am not claiming that either Brest or Powell articulated the first or best version of the claims they made. No string site can do justice to the literature. Some of the influential pieces include Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 470 (1981).

[57] *See* Richard Fallon, *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1317 (1996) (defining "originalism" as "the theory that the original understanding of those who wrote and ratified various constitutional provisions determines their current meaning").

[58] *See* CHARLES A. MILLER, THE SUPREME COURT AND THE USES OF HISTORY 150 (New York: Simon and Schuster 1969) (arguing that the originalism should look to the intent of the ratifiers as well as of the framers).

[59] Charles A. Lofgren, *The Original Understanding of Original Intent*, 5 CONST. COMMENTARY 77, 112 (1988) (omitting citation to Powell, supra note 54, at 939-42).

[60] *See* Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 375 n.130 (1981).

[61] Similar points could be made about what might be called "popular meaning," the view that the relevant intentions or understandings should be those of "We the People" or the popular sovereign—the relevant actor for popular constitutionalism. If the relevant intentions are those of each and every citizen, then popular constitutionalism suffers from compounded versions of the ills that afflict intentionalism. If popular constitutionalism points to public meaning, then it is simply another version of original meaning originalism. *See generally* LARRY KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW

D. We the People

The year before Meese gave his speech to the American Bar Association and Jefferson Powell wrote about the original understanding of original intent, Bruce Ackerman delivered his *Storrs Lectures*, entitled *Discovering the Constitution*, at Yale Law School.[62] It was in these lectures that Ackerman's theory of constitutional politics made its first wide impression on the community of constitutional scholars. Recall that Ackerman's theory distinguishes ordinary politics (what happens when state legislatures and Congress enact statutes, for example) from constitutional politics. Here is the very first statement of Ackerman's view, *dualism*, in the second lecture:

> *The Federalist* elaborates a dualistic conception of political life. One form of political action-I shall call it constitutional politics-is characterized by Publian appeals to the common good, ratified by a mobilized mass of American citizens expressing their assent through extraordinary institutional forms. Although constitutional politics is the highest kind of politics, it should be permitted to dominate the nation's life only during rare periods of heightened political consciousness. During the long periods between these constitutional moments, a second form of activity-I shall call it normal politics-prevails. Here, factions try to manipulate the constitutional forms of political life to pursue their own narrow interests. Normal politics must be tolerated in the name of individual liberty; it is, however, democratically inferior to the intermittent and irregular politics of public virtue associated with moments of constitutional creation.[63]

Ackerman's theory was intended to answer the Bickel's countermajoritarian difficulty. Judges as faithful agents of the "We the People," who legislate in rare constitutional moments (or later "periods") act more democratically than do legislators, who serve special interests and escape the people's attention during the extended periods of ordinary politics.

As told in the *Storrs Lectures*, Ackerman's theory focused on three constitutional moments, the Founding (the Constitution of 1789), Reconstruction (the 13th, 14th, and 15th Amendments), and the New Deal (institutionalized in what I shall call the "reforming constructions" (we might use "amending interpretations") of the Supreme Court). Here is the initial appearance of that idea in the lectures:

> Speaking schematically, this historical story is dominated by three peaks of high importance that tower over valleys full of more particular meanings. The first peak, of course, is the Founding itself: the framing of the original Constitution and the Bill of Rights, *Marbury v. Madison* and *McCulloch v. Maryland*. The second peak is constituted by the legal events surrounding the Civil War: the judicial failure in *Dred Scott* and the constitutional affirmations of the Civil War Amendments. The third peak centers around the legitimation of the activist welfare state: the long Progressive struggle against judicial resistance and the dramatic capitulation by the Old Court before the New Deal in 1937.

(Oxford University Press, 2004); *see also* Larry Alexander & Lawrence Solum, *Popular? Constitutionalism?*, 118 HARV. L. REV. 1459 (2005).

[62] Bruce Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984).

[63] *See id.* at 1022-23.

> Time and again, we return to these moments; the lessons we learn from them control the meanings we give to our present constitutional predicaments.[64]

Because Ackerman's theory purported to legitimize progressive New Deal constitutionalism, his view might have been construed as the polar opposite of originalism, but at a deep level, Ackerman's theory seemed to require an account of original meaning—without that judicial enforcement of the Constitution could not be legitimized by democratic constitutional politics. Or to put it differently, a theory of original meaning is required for constitutional content to be determined by "We the People."

Although Ackerman's development of popular sovereignty theory has been extraordinarily influential, important work in this vein has been done by many others,[65] prominently including Akhil Amar,[66] Ackerman's colleague at Yale Law School. Amar's position was described by Cass Sunstein in the following terms:

> [I]n the law schools the most influential originalist may be Akhil Reed Amar, an ingenious and prolific scholar at Yale Law School. Describing himself as a "textualist" who is interested in history, Amar is methodologically quite close to Scalia. He is intensely interested in the text and in the historical record, and he is generally searching for the original meaning of contested terms. Amar wishes to know what the Constitution "really means," and he puts that question as if it were largely or entirely a matter of excavation.[67]

Although Sunstein's interpretation of Amar is surely plausible, characterizing Ackerman and Amar's theoretical position in originalist terms is problematic, in no small part because they both eschew explicit theorizing about constitutional interpretation. In both cases, we might say that they "practice, but do not preach." Or to be more precise, they do not preach either semantic or normative originalism. But even if Ackerman and Amar do not describe their views as originalist, it is clear that their approaches to the constitution, which emphasize popular sovereignty and the constitutional text, have had both direct and indirect influences over contemporary theoretical debates that are explicitly concerned with originalism.[68]

E. Original Public Meaning and the New Originalism

This sets the stage for what is sometimes called "the New Originalism"[69] and is also labeled "Original Public Meaning Originalism."[70] Whatever the actual origins of this theory, the conventional story identifies Antonin Scalia as having a key role. As early as 1986, Scalia gave

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[64] *See id*. at 1051-52.

[65] *See, e.g.,* Kurt Lash, *A Textual-Historical Theory of the Ninth Amendment*, Stanford Law Review (forthcoming 2007); Kurt Lash, *Originalism, Popular Sovereignty, and Reverse Stare Decisis*, Virginia Law Review (forthcoming 2007).

[66] *See* Akhil Amar, The Bill of Rights; Akhil Amar, Biography of the Constitution.

[67] *See* Cass Sunstein, Originalism for Liberals, New Republic, September 28, 1998, at 31, available at http://home.uchicago.edu/~csunstei/originalism.html.

[68] Thus it is no accident that Amar and Ackerman's students describe themselves as originalists. *See, e.g.,* Kurt T. Lash, *A Textual-Historical Theory Of The Ninth Amendment*, 60 Stan. L. Rev. 895, 900 (2008) ("I will consider the historical record and attempt to identify which of the possible textual meanings are more or less plausible, given historical evidence of original public understanding. In this way, I hope to provide an account of the Ninth Amendment satisfactory in terms of both originalism and textualism.").

[69] Keith Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599 (2004).

[70] Randy E. Barnett, *An Originalism for Nonoriginalists*, *supra* note 7.

a speech exhorting originalists to "change the label from the Doctrine of Original Intent to the Doctrine of Original Meaning."[71] The phrase "original public meaning" seems to have entered into the contemporary theoretical debates in the work of Gary Lawson[72] with Steven Calabresi as another "early adopter."[73] The core idea of the revised theory is that the original meaning of the constitution is the original public meaning of the constitutional text.

Randy Barnett[74] and Keith Whittington[75] have played prominent roles in the development of the "New Originalism." Both Barnett and Whittington build their theories on a foundation of "original public meaning," but they extend the moves made by Scalia and Lawson in a variety of interesting ways. For the purposes of this very brief survey, perhaps their most important move is to embrace the distinction between "constitutional interpretation" understood as the enterprise of discerning the semantic content of the constitution and "constitutional construction," which we might tentatively define as the activity of further specifying constitutional rules when the original public meaning of the text is vague (or underdeterminate for some other reason).[76] This distinction explicitly acknowledges what we might call *the fact of constitutional underdeterminacy*.[77] With this turn, original-meaning originalist explicitly embrace the idea that the original public meaning of the text "runs out" and hence that constitutional interpretation must be supplemented by constitutional construction, the results of which must be guided by something other than the semantic content of the constitutional text.

Once originalists had acknowledged that vague constitutional provisions required construction, the door was opened for a reconciliation between originalism and living constitutionalism. The key figure in that reconciliation has been Jack Balkin, whose influential 2006 and 2007 essays *Abortion and Original Meaning*[78] and *Original Meaning and Constitutional Redemption*[79] have argued for a reconciliation of original meaning originalism with living constitutionalism in the form of a theory that might be called "the method of text and principle."

Predating much of the American work on the New Originalism was Jeffrey Goldsworthy's work, addressed to the Australian Constitution, but developed with an explicit awareness of the

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[71] Antonin Scalia, Speech Before the Attorney General's Conference on Economic Liberties (June 14, 1986). in Office of Legal Policy, Original Meaning Jurisprudence: A Sourcebook 106 (U.S. Dept. of Justice 1987); *see also* Caleb Nelson. *Originalism and Interpretive Conventions*, 70 U. Chi. L. Rev. 519, 555 (2003).

[72] *See* Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859, 875 (1992). For extended discussions of "original public meaning," see Vasan Kesavan & Michael Paulson, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 Geo. L.J. 1113, 1127 (2003); Samuel T. Morison, *The Crooked Timber of Liberal Democracy*, 2005 MICH. ST. L. REV. 461, 465 (2005).

[73] *See* Steven G. Calabresi, *The President's Power to Execute the Laws*,104 Yale L.J. 541, 553 (1994).

[74] *See* Randy E. Barnett, *Restoring the Lost Constitution*, *supra* note 7.

[75] *See* KEITH WHITTINGTON, CONSTITUTIONAL INTERPRETATION (1999); KEITH WHITTINGTON, CONSTITUTIONAL CONSTRUCTION (1999).

[76] Another important early adopter of this distinction (in the context of constitutional theory) was Roger Clinton. *See* Robert N. Clinton, *Original Understanding, Legal Realism, and the Interpretation of 'This Constitution'*, 72 Iowa L. Rev. 1177 (1987).

[77] *See* Lawrence B. Solum, Semantic and Normative Originalism: Comments on Brian Leiter's "Justifying Originalism," Legal Theory Blog, October 30, 2007, http://lsolum.typepad.com/legaltheory/2007/10/semantic-and-no.html. *Cf.* Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462 (1987) (distinguishing determinacy, indeterminacy, and underdeterminacy)

[78] Jack Balkin, *Abortion and Original Meaning*, SSRN, http://ssrn.com/abstract=925558.

[79] *See* Jack Balkin, *Original Meaning and Constitutional Redemption*, Constitutional Commentary (forthcoming 2008), SSRN, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=987060.

theoretical debates swirling around American constitutionalism. Goldsworthy's first major statement, *Originalism in Constitutional Interpretation*,[80] was published in an Australian law review in 1997.

F. Original Applications and Original Methods

Two very recent ideas deserve particular mention: "original applications" and "original methods." The phrase "original applications" or "original expected applications" seems to originate with Jack Balkin,[81] but the role of expectations in original-intentions originalism was discussed by Ronald Dworkin, among others. Mark Greenberg and Harry Litman articulated a similar distinction between "original meaning" and "original practices" in their important 1998 article, *The Meaning of Original Meaning*.[82] Although Greenberg and Litman deserve the credit for the deepest and most thorough discussion of the issues, my account will focus on Balkin's formulation, which brings the idea of original expected applications into the New Originalism—not as a component but rather by way of exclusion.

The distinction is a simple one. The meaning of a text is one thing; expectations about the application of that meaning to future cases are a different thing. Balkin makes use of the distinction to argue that some "originalists" have conflated meaning with expected applications:

> Originalists generally assume that if we do not apply the constitutional text in the way it was originally understood at the time of its adoption we are not following what the words mean and so will not be faithful to the Constitution as law. But in focusing on the original understanding, they have tended to conflate two different ideas– the expected application of constitutional texts, which is not binding law, and the original meaning, which is. Indeed, man originalists who claim to be interested only in original meaning, like Justice Antonin Scalia, have encouraged this conflation of original meaning and original expected application.[83]

That *original expected applications* are distinct from *original meanings* does not entail that there is no relationship between the two. *Expected applications* may be evidence about *meanings*, even if they are not decisive evidence.

Of course, some originalists may contest Balkin's move and argue that *original expectations originalism* is viable. It might even be argued that reliance on original expectations is the distinctive characteristic that marks originalist theories as originalist.[84] But this view is incorrect as a matter of the history of originalist thought, and it is certainly not true of the New Originalists like Balkin, Barnett, and Whittington; as will become apparent, direct reliance on original

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[80] Jeffrey Goldsworthy, *Originalism in Constitutional Interpretation*, 1 Federal Law Review 1-50 (1997); *see also* Lawrence B. Solum, Goldsworthy on the New Originalism, Legal Theory Blog, November 2, 2007, http://lsolum.typepad.com/legaltheory/2007/11/goldsworthy-on-.html.

[81] *See* Jack Balkin, *Abortion and Original Meaning*, *supra* note 78, at 3 (SSRN pagination); Jack Balkin, *Original Meaning and Constitutional Redemption*, *supra* note 79; Jack Balkin, Clarence Thomas's Originalism, Balkinization, July 11, 2007, http://balkin.blogspot.com/2007/07/clarence-thomass-originalism.html; Jack Balkin, Alive and Kicking, http://www.law.yale.edu/news/1846.htm.

[82] Mark Greenberg & Harry Litman, *The Meaning of Original Meaning*, 86 GEO. L.J. 569 (1998).

[83] Balkin, *supra* note 78, at 3 (SSRN pagination).

[84] *Cf.* CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 25-26 (Cambridge: Harvard University Press, 2001) (characterizing originalism as relying on original expectations).

expected applications as the *criterion* for constitutional meaning is completely inconsistent with Semantic Originalism.

Another very recent development is the emergence of what might be called "original-methods originalism," the view that the original meaning of the constitution includes the methods of interpretation and construction that the framers, ratifiers, and/or public of the founding era could, would, or should have expected to guide constitutional practice. This view is strongly associated with Michael Rappaport and John McGinnis.[85] They write:

> [T]he focus of originalism should be on how a reasonable person at the time of the Constitution's adoption would have understand its words and thought they should be interpreted. The Constitution's provisions were based on commonly accepted meanings and the interpretative rules of the time. Some of the provisions had clear meanings. Others may have seemed ambiguous, but the enactors would have believed that their future application would be based the interpretive rules accepted at the time. Thus, their assessment of the meaning and the desirability of the Constitution would depend on the interpretive rules that they thought would apply.[86]

We can call this approach "original methods originalism," reflecting its commitment to the methods of interpretation and construction that characterized the founding era. Notice that McGinnis and Rappaport's formulation of their idea does not observe the distinction between *interpretation* and *construction* (in the Whittington/Barnett sense). That is, they do not make it clear whether they would use original methods to justify a departure from original public meaning (if the methods led to that result) or if they would confine original methods to construction (that is, to cases in which the original public meaning was vague, ambiguous, gappy, or contradictory).

In a different vein, an important contribution to understanding of the implications of the New Originalism appeared in an important 2006 article by Richard Fallon, *Judicially Manageable Standards and Constitutional Meaning*. Fallon does not embrace originalism, but he identified the key distinction between the meaning of the constitution (its semantic content) and implementing rules of constitutional law (legal content):

> Despite large apparent differences between originalism and nonoriginalist theories, originalist and nonoriginalist judges converge in their decisions surprisingly often. Given the strident debates among constitutional theorists, one well might wonder how so much agreement could eventuate. The reason, I would suggest, is that what we call constitutional theories or theories of constitutional interpretation are often theories about constitutional meaning that implicitly accept the permissibility of a disparity between constitutional meaning and implementing doctrine. If constitutional theories fix the meaning of the Constitution, but stipulate that implementing doctrines sometimes permissibly diverge from it, then such theories are less complete and thus less practically significant than their proponents suggest.[87]

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[85] Their view is briefly stated in John O. McGinnis & Michael B. Rappaport, Original Interpretive Principles as the Core of Originalism, SSRN, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=962142.

[86] *Id*. at 2.

[87] *See* Richard Fallon, *Judicially Manageable Standards and Constitutional Meaning*, 119 Harv. L. Rev. 1274, 1317-18 (1996).

Fallon's distinction between the semantic content of the Constitution and the legal content of constitutional law put the question of contribution on the table: how does the semantic content contribute to legal content?

* * *

Many participants in academic debates about originalism assume that the fundamental questions must be normative—in the sense of normative includes ethical questions and issues of political morality. The roots of that assumption are buried deep but some excavation provides useful context for understanding the role of Semantic Originalism in contemporary theoretical debates. Post-realist academic writing about constitutional theory did not occur in a vacuum. The realist critique of legal formalism left its mark on every serious intellectual movement in the legal academy and had a shaping influence on the legal process school. Explicitly or implicitly, most theorizing about law in the American legal academy during the last half-century has assumed what might be called the instrumentalist thesis: more or less, the view that the deep answers to legal questions must be justified by arguments of policy or principle. The instrumentalist thesis had a special salience for liberal constitutional theory which took as its Herculean task the construction of a normative foundation for the jurisprudence of the Warren Court—paradigmatically the decisions in Brown v. Board of Education and Griswold v. Connecticut. Because liberal constitutionalist theorists also took it as a given that Lochner v. New York, in particular, and substantive due process, in general, could not be justified on formalist grounds, academic defenders of the Warren Court legacy believed that its normative foundations would have to come from outside the law. What was sometimes called "big think constitutional theory" fished in the deep waters of moral, political, and social philosophy: the "one that got away" was the theory that would reconcile approval for Griswold (and later Roe v. Wade) with opprobrium for Lochner while simultaneously endorsing the thesis that the counter-majoritarian difficulty was a real problem for the institution of judicial review. The assumption that theories of constitutional meaning were normative "all the way down" began to look like a truism.

In this context, early originalists looked hopelessly naïve. They seemed to be saying, "The meaning of the constitution just is the original meaning, and, therefore, we should follow the original meaning, because it is the law." The natural reactions of big think liberal constitutionalism were "there isn't even an argument there," or "that's question begging" or "you need a normative theory to justify adopting your account of constitutional interpretation." As the academic defenders of originalism became "more sophisticated" they took up the challenge, and did, in fact, produce big normative theories—"popular sovereignty," "constitutional legitimacy," "consequentialist supermajoritarianism." That is, they began to fight the anti-originalists on living constitutionalism's home turf, whose metes and bounds are marked by the instrumentalist thesis and the countermajoritarian difficulty.

Ironically, the naïve originalists were close to a theoretically powerful and normatively defensible position. The core of originalism is based on common sense about the meaning of the constitutional text and the nature of law. Once the claims of originalism are pruned of ideological excess and theoretical confusion, the common sense appeal of originalism is difficult to resist. Anti-originalists needed fancy theories to defend the counterintuitive positions to which they were driven by their attempts to reconcile deep tensions between their core commitments.

There is nothing fancy or counterintuitive in the core commitments of Semantic Originalism. At bottom, Semantic Originalism simply explains how three intuitive ideas (the fixation thesis, the clause-meaning thesis, and the contribution thesis) are grounded in both common sense and widely accepted theoretical views about meaning and the nature of law. One more idea (the fidelity thesis) finds support in an intuitive and widely shared principle of political morality.[88]

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G. New Critics of the New Originalism

And this brings us almost up to the minute—that is, up to the summer of 2008, the period during which this essay continues to be drafted and revised. The seventh and final (so far) chapter in the story of the constitutional originalism is the emergence of new critics of the new originalism. This part of the story is being played out as this essay is being written, but a variety of new criticism has begun to emerge.

The first of the new critics is Stephen Griffin, the author of *Rebooting Originalism*,[89] a powerful critique of the new originalism. Griffin's critique has thoroughly absorbed the theoretical significance of the shift from "original intentions" to "original public meaning," but it is not clear that he fully appreciates the importance of Whittington/Barnett distinction between construction and interpretation.[90] Although Griffin has a variety of important and well-argued criticisms of the new originalists, for present purposes two features of his article are especially important. First, Griffin's core argument against the new originalism is *normative*; he argues that consistent and exclusive use of originalist methodology would represent a major change in interpretive practice and *therefore* that originalists must offer a *normative justification* for their theory.[91] Second, Griffin's critique does not consider the possibility that original-meaning originalism might include a semantic thesis—a nonnormative claim about the meaning of the constitution.[92] Similar observations can be made about Trevor Morrison's review of Barnett's book,[93] *Restoring the Lost Constitution*. Morrison clearly understands the distinction between "original public meaning" and "original intentions," but his review (which is focused on other aspects of Barnett's book) does not even consider the possibility that originalist theory has a semantic component.

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[88] For reasons of clarity, the three paragraphs that proceed the call to this footnote are not interrupted by a variety of supporting notes. These paragraphs should not be read as staking out a position in the intellectual history of American legal thought. Instead, my aim is simply to assert a position as my own opinion for the purpose of elucidating and illuminating the content of the substantive claims of the article. Put another way, in these paragraphs I am testifying about my own "state of mind"—the way that I understand the intellectual history of originalism in the context of the development of legal thought in the American legal academy.

[89] Stephen Griffin, *Rebooting Originalism*, SSRN, Public Law Research Paper No. 07-05, August 2007, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1009393.

[90] The distinction is never discussed in a theoretical way. The first mention appears on page 34 of his essay. Griffin, *Rebooting Originalism*, *supra* note 89, at 39.

[91] *See* Griffin, *Rebooting Originalism*, *supra* note 89, at 14-25.

[92] No variant of the root word "semantic" appears in Griffin's article. Although the term "meaning" and its variants appear numerous time, there is no indication that Griffin appreciates the possibility that originalism might be a semantic theory.

[93] Trevor Morrison, *Lamenting Lochner's Loss*, 90 Cornell L. Rev. 839 (2005).

A second new critic is Mitch Berman whose critique of originalism is tendentiously titled, "Originalism is Bunk." [94] Berman's essay is deep and rich, raising some old objections to originalism, providing new foundations for others, and developing new positions. One of the crucial moves in his piece is his argument that the term "originalism" should be reserved for the strong claim the original meaning, whatever that might be, should trump other considerations in constitutional practice. His summarizes this claim as follows:

> [O]n one dimension of potential variability - the dimension of strength - originalists are mostly united: They believe that those who should follow some aspect of a provision's original character must give that original aspect priority over all other considerations. That is, when the original meaning (or intent, etc.) is satisfactorily discernible, the interpreter must follow it. This is the thesis that self-professed originalists maintain and that their critics (the non-originalists) deny.[95]

Berman's identification of "Originalism" with what he calls "strong originalism" is surely mistaken. So far as I can discern, originalists do agree on the fixation thesis—that the semantic content of a constitutional provision is fixed at the time of framing and ratification, but one thing on which they explicitly disagree is whether and under what circumstances original meaning trumps precedent, the long-settled practices of the political branches, and other nonoriginalist considerations. For example, in 2006, the New Originalist theorist, Randy Barnett, wrote *Scalia's Infidelity: A Critique of Faint Hearted Originalism,*[96] which explicitly disagrees with Justice Antonin Scalia on the question of force, contending that Scalia allows departure from original meaning on the basis of three factors: (1) precedent, (2) justiciability, and (3) settled historical practice. In addition to Scalia, originalists of various stripes have taken the position that original meaning can be trumped by precedent for a variety of reasons and subject to a variety of constraints as evidenced by the work by Kurt Lash, Lee Strang, and myself cited in the accompanying footnote.[97] A full statement of the reasons for rejecting Berman's claim that "Originalism" must give original meaning "priority over all other considerations" are provided below.[98]

Finally, Thomas Colby and Peter Smith have developed a very different line of criticism in *Originalism's Living Constitutionalism*. Colby and Smith claim to "demonstrat[e] that, despite

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[94] Berman, Mitchell N., "Originalism is Bunk" (December 30, 2007). Available at SSRN: http://ssrn.com/abstract=1078933.

[95] Berman, Mitchell N., "Originalism is Bunk" (December 30, 2007). Available at SSRN: http://ssrn.com/abstract=1078933.

[96] Randy Barnett, *Scalia's Infidelity: A Critique of Faint Hearted Originalism*, 75 U. CIN. L. REV. 7 (2006).

[97] *See* Lawrence B. Solum, *The Supreme Court In Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future Of Unenumerated Rights*, 9 UNIVERSITY OF PENNSYLVANIA JOURNAL OF CONSTITUTIONAL LAW 155 (2006) (arguing for originalist theory that gives trumping force to precedent); Lee J. Strang, *An Originalist Theory of Precedent: Originalism, Nonoriginalist Precedent, and the Common Good*, 36 NEW MEXICO L. REV. 419, 420 (2006) (offering originalist theory in which "limited respect is due some nonoriginalist precedent"); Kurt T. Lash, *Originalism, Popular Sovereignty, and Reverse Stare Decisis*, 93 Va. L. Rev. 1437, 1441 (2007) (stating that "popular sovereignty-based originalism" "does not require the complete abandonment of stare decisis" and "[a] theory of stare decisis that takes into account the majoritarian commitment of popular sovereignty may justify upholding an erroneous precedent").

[98] *See infra* Part III.I, "What's in a Name, Take Three: Strong Originalism and Moral Originalism," p. 122.

the suggestion of originalist rhetoric, originalism is . . . a disparate collection of distinct constitutional theories that share little more than a misleading reliance on a common label."[99]

Although the New Critics of the New Originalism advance a variety of arguments, they share a common characteristic; their criticisms premised on the notion that the debates about the New Originalism are fundamentally *normative* (ethical or moral) and not *semantic* (linguistic or meaning-focused). That is, the focus of the New Criticism is on *normative originalism*—the thesis that the original meaning of the constitution should be given substantial normative force in constitutional practice.

One last point about recent debates about originalism. Lurking in the background of recent discussions is the impact of *Bush v. Gore* on constitutional theory. Although the indeterminacy thesis—that judicial decisions are unconstrained by legal rules—might have been rejected by a consensus of legal scholars in the 1980s, *Bush v. Gore* was read by many to suggest that the Supreme Court is unconstrained by law or high principle.[100]

H. District of Columbia v. Heller

Supreme Court decisions that squarely address the fundamental issues of constitutional theory are rare, but *District of Columbia v. Heller*[101] is such a decision. *Heller* held that a District of Columbia ordinance that prohibited the possession of handguns violated the Second Amendment's "right to keep and bear arms".[102] Justice Scalia's opinion for the Court begins with a general statement of interpretive methodology:

> The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." In interpreting this text, we are guided by the principle that "[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." United States v. Sprague, 282 U.S. 716, 731, 51 S.Ct. 220, 75 L.Ed. 640 (1931); see also Gibbons v. Ogden, 9 Wheat. 1, 188, 6 L.Ed. 23 (1824). Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation.[103]

The implications of the majority's conclusion that the Second Amendment protects an individual right to possess and carry weapons were disputed by dissents from Justice Stevens and Justice Breyer; in particular, Justice Stevens offered a lengthy dissent that focused in part on the

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[99] Colby, Thomas and Smith, Peter J., "Originalism's Living Constitutionalism" (February 2008). GWU Legal Studies Research Paper No. 393 Available at SSRN: http://ssrn.com/abstract=1090282.

[100] *But see* Ronald J. Krotoszynski, Jr. , *An Epitaphios for Neutral Principles in Constitutional Law: Bush v. Gore and the Emerging Jurisprudence of Oprah!*, 90 Geo. L.J. 2087, 2091-92 (2002) ("The idea that judges act in partisan-as opposed to merely ideological-ways when discharging their professional duties is hardly a new idea. Legal realists have recognized that, at some level, the law consists of what judges make it out to be on a ongoing basis. More recently, members of the critical legal studies movement have advanced legal realist claims more aggressively, suggesting that *2092 judges recognize their own status as political actors and exercise discretion to advance their personal policy preferences. Casting Bush v. Gore as proof that adherents of the critical legal studies movement have a vision may be entertaining, but it would not be very enlightening.").

[101] District of Columbia v. Heller, ___ S.Ct.___, 2008 WL 2520816 (June 26, 2008) (citations omitted).

[102] U.S. Const. amend. 2.

[103] *Heller*, ___ S.Ct. at ___.

purposes that animated the Second Amendment and raised a number of arguments relevant to the original intentions of the framers.[104]

The Opinion of the Court in *Heller* covers a good deal of territory, much of it contested by the dissents, but, for the purpose of this brief survey of the contemporary development of originalist theory, the important feature of *Heller* is methodological. The court examined each of the operative words and phrases in the Second Amendment, examining the semantic content of "the people," "keep," "bear," "arms," and then concluding, "Putting all of these textual elements together, we find that they guarantee the individual right to possess and carry weapons in case of confrontation."[105] In examining each of the operative words and phrases, the court examined evidence of usage from the period the Second Amendment was proposed and ratified. For example:

- "Before addressing the verbs "keep" and "bear," we interpret their object: "Arms." The 18th-century meaning is no different from the meaning today. The 1773 edition of Samuel Johnson's dictionary defined "arms" as "weapons of offence, or armour of defence." 1 Dictionary of the English Language 107 (4th ed.) (hereinafter Johnson). Timothy Cunningham's important 1771 legal dictionary defined "arms" as "any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another." 1 A New and Complete Law Dictionary (1771); see also N. Webster, American Dictionary of the English Language (1828) (reprinted 1989) (hereinafter Webster) (similar)."[106]
- "The phrase "keep arms" was not prevalent in the written documents of the founding period that we have found, but there are a few examples, all of which favor viewing the right to "keep Arms" as an individual right unconnected with militia service. William Blackstone, for example, wrote that Catholics convicted of not attending service in the Church of England suffered certain penalties, one of which was that they were not permitted to "keep arms in their houses." 4 Commentaries on the Laws of England 55 (1769) (hereinafter Blackstone); see also 1 W. & M., c. 15, § 4, in 3 Eng. Stat. at Large 422 (1689) ("[N]o Papist ... shall or may have or keep in his House ... any Arms ..."); 1 Hawkins, Treatise on the Pleas of the Crown 26 (1771) (similar)."[107]
- "At the time of the founding, as now, to "bear" meant to "carry." See Johnson 161; Webster; T. Sheridan, A Complete Dictionary of the English Language (1796); 2 Oxford English Dictionary 20 (2d ed.1989) (hereinafter Oxford)."[108]

Bracketing the question whether *Heller's* analysis of the linguistic evidence was correct, the methodology of Justice Scalia's majority opinion was clear: the Court focused on the evidence of the original public meaning of the text. Given the inevitable differences between judicial practice and constitutional theory, it is hard to imagine finding a clearer example of "original public meaning originalism" in an actual judicial decision.

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[104] *See, e.g., Heller*, ___ S.Ct. at ___ n. 28 (Stevens, J., dissenting).
[105] *Heller*, ___ S.Ct. at ___.
[106] *Id*. at ___.
[107] *Id*. at ___.
[108] *Id*. at ___.

I. Situating Semantic Originalism in the Historical Narrative

How does *Semantic Originalism* fit in the historical narrative of originalist theory and practice? Of course the full answer to that question depends on the content of the theory, and that content is about to unfold. But as a preliminary matter we can make a few observations about the relationship:

- Semantic Originalism is a development within what is called the "New Originalism" and bears a close affinity to approach articulated by Justice Scalia, extended by Gary Lawson and Steve Calabresi and then modfied by Jack Balkin, Randy Barnett, and Keith Whittington.
- Semantic Originalism can be understood as providing theoretical foundations for moves made by New Originalists, and in particular as doing groundwork in the philosophy of language for original public meaning originalism.
- Semantic Originalism thematizes and makes explicit the linguistic turn in originalist constitutional theory. Even careful originalists sometimes elide the distinction between normative claims and claims about semantic content. Semantic Originalism untangles these claims.
- Semantic Originalism disentangles claims about the conventions of legal practice that determine legal content from claims about semantic meaning and claims of political morality that can be used to justify or criticize these conventions.
- Semantic Originalism extends and develops the substantive content of original public meaning originalism by offering a theory of the relationship of conventional semantic meaning to the publicly available context of constitutional utterance, the role of the division of linguistic labor, the possibility of constitutional implicature, and the special case of constitutional stipulation.
- Semantic Originalism is broadly consistent with the core approach of the Supreme Court in *District of Columbia v. Heller*—which emphasizes "original public meaning" and relies on linguistic evidence to establish the conventional semantic meaning of the Second Amendment.

In sum and substance, *Semantic Originalism* is both a move within the development of originalist constitutional theory and a move outside that theory. Within originalism, the point of Semantic Originalism is to provide supporting arguments and modifications. Outside of originalism, the upshot of Semantic Originalism is to reinterpret the debate from the perspective of the philosophy of language and the philosophy of law.

III. SEMANTIC ORIGINALISM: A THEORY OF CONSTITUTIONAL MEANING

What does the constitution mean? To be more specific, what is the fact of the matter with respect to the linguistic meaning of the constitutional text?[109] And to restate the question in

[109] Our current task is to develop a theory of constitutional meaning, but this task presupposes that we have a view about what the constitution is—that is, a theory as to what "constitutes" the "constitution." Simplifying vastly, there are at least two answers (or families of answers) to this question. The first answer is that the constitution is the United States Constitution—the content of the document that appears in various official compilations of the federal law. It begins with the words, "We the People" and ends with 27th Amendment, "No law, varying the compensation

language that is even more precise: what theory provides the best account of the semantic content of the United States Constitution?

A. Semantics and Normativity

Let's begin with the distinction between semantics and normativity. Semantics is about meaning.[110] "Normativity," in the sense in which I use it here,[111] is about the moral or ethical status of reasons for action, evaluations of states of affairs, and judgments about human character. The distinction between semantic and normative originalism is a fundamental building block of the argument of this Article. Before going any further, let's try to get that distinction clear.

The domain of semantics is the domain of meaning. A semantic theory is the theory of the meaning of utterances, usually in a natural language such as English. The semantic content of an utterance is its *linguistic meaning* (or meaning in the semantic sense[112]). When we make assertions about what an utterance means, we are making factual assertions about the world (and

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for the services of the Senators and Representatives, shall take effect, until an election of representatives shall have intervened." Let us call this first view of the constitution, "the textualist theory of constitutional content," and for short let us use the phrase "constitution as text." The second answer (or family of answers) might be expressed via the idea of a constitutional regime—a set of fundamental practices that constitutes (defines and establishes) the mode of governance for a particular political community. The second answer can (and does) encompass the first, but typically would include practices that go beyond the constitutional text. For example, the constitutional regime in the United States might include the party system—a complex array of institutions and practices that are presupposed (implicitly or explicitly) by the positive law, but which is not the subject of any provision of the text of the United States Constitution. Let us call the second view of the constitution, "the regime theory of constitutional content," and for short use the phrase "constitution as regime."

For the purposes of this article, I want to assume a stance of strict neutrality as between constitution as text and constitution as regime—except for the assumptions explicitly stated in the remainder of this paragraph. The first assumption is that the constitution in the broad sense (as as "text" or "regime") includes at least some substantial role for the constitutional text. The second assumption is that the role for the constitutional text includes (even if it is not limited to) the status of law, where that status is understood as including some conception of legal authority. The third assumption is that the constitutional text has normative significance (whether weak or strong, peremptory or nonperemptory) for officials (including judges, executives, administrators, and legislators) and citizens. These assumptions rule out some possibilities. For example, they rule out the possibility that the content of our constitution is a regime in which the constitutional text serves only a symbolic or rhetorical function, but does not function as a real element of the actual constitutional regime.

These assumptions form the backdrop for the scope of this investigation of constitutional meaning. The object of investigation will be the constitutional text. "Semantic Originalism," as the name of the theory advanced in this Article, refers to a theory of the meaning of text and does not refer to a theory of the constitutional regime to the extent that the regime includes practices that are outside the text. That is, the scope of investigation is limited, and therefore, Semantic Originalism is not a theory that has purchase on the content of the extratextual elements of the constitutional regime—to the extent that there are any such elements.

Some theorists who emphasize the importance of regime theory might argue that limiting the investigation to the constitutional text renders the results of the investigation trivial, unimportant, or misleading. The point of the assumptions is, in part, to suggest that a theory of the meaning of the constitutional text is not trivial if the assumptions are warranted. To put this more plainly but less precisely, the meaning of the written constitution is important enough to make for a substantial mouthful even if it isn't the whole enchilada.

[110] MICHAEL MORRIS, AN INTRODUCTION TO THE PHILOSOPHY OF LANGUAGE 152 (Cambridge University Press 2007).

[111] For clarification of the sense of "normative," see *infra* note 118.

[112] *See supra* Part I.A.1, "The Fixation Thesis: The Semantic Content of Constitutional Provisions is Fixed at the Time of Framing and Ratification," p. 3, text accompanying note 5 (distinguishing three senses of meaning).

about the natural world if humans and their meanings are part of that world). In the context of law, we are frequently interested in determining the semantic content of a legal text. That is, constitutions, statutes, judicial opinions, rules, and regulations, all have semantic content, and both citizens and officials have practical reasons for ascertaining what that semantic content is.

In particular, the Constitution of the United States is a text. That text has syntactic[113] and typographical[114] properties—it is composed of letters, punctuation marks, and spaces in particular syntactic structures (phrases, sentences, and clauses). Although there are rare exceptions,[115] for the most part the syntactic and typographical properties of the Constitution are uncontroversial. As to typography, there are very few cases of significant dispute about whether the arrangement of letters, marks, and spaces in the United States Code are an accurate transcription of the document under glass in the Nation Archives. And likewise, there are few (if any) questions about whether the archived token of the Constitution contains what are called "scrivener's errors," simple mistakes in transcription of the prior penultimate drafts of the Constitution as they were approved by the Philadelphia Convention and ratified by the ratification conventions. Constitutional typography and syntax may be settled, but constitutional semantics are (at least seemingly and on the surface), the subject of dispute. We almost always agree on the word order, letters, marks, and spaces, but we *seem* to disagree about what they mean—the semantic content of the Constitution. Semantic constitutional theories are theories of constitutional meaning;[116] such theories provide conceptual apparatus for framing and answering questions about constitutional meaning.

Semantics is one thing, normative theory is another.[117] By using the term "normativity" and its root word "norm," I mean to refer to reasons for action in a somewhat restricted sense.[118]

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[113] *See* "Syntax," Merriam Webster Online, http://www.merriam-webster.com/dictionary/syntax (visited February 9, 2008) (defining syntax as "the way in which linguistic elements (as words) are put together to form constituents (as phrases or clauses) b: the part of grammar dealing with this").

[114] *See, e.g.,* "Typographical Error," http://en.wikipedia.org/wiki/Typo (visited February 9, 2008) .

[115] *But see* Paul E. McGreal, *There Is No Such Thing as Textualism: A Case Study in Constitutional Method*, 69 Fordham L. Rev. 2393, 2407 (2001) ("State ratifications of the Constitution hold further evidence of historical semi-colon usage. Many states appended a copy of the Constitution to their form of ratification. On several of these copies, punctuation differs in many places from the punctuation of the document promulgated by the drafting convention."); Gary Lawson, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 42 Duke L.J. 267, 291 n. 102 (1993) (discussing likely transcription error in the Georgia Constitution) . *Cf.* William W. Van Alstyne, *A Constitutional Conundrum of Second Amendment Commas: A Short Epistolary Report*, 10 GREEN BAG 489 (2007); Peter Jeremy Smith, *Commas, Constitutional Grammar, and the Straight-Face Test: What if Conan the Grammerian Were a Strict Textualist?*, 16 CONST. COMM. 7 (1999).

[116] The word "seem" is italicized in text to emphasize that not all "seeming disagreement" about meaning is "actual disagreement" about semantic content.

[117] This claim might be misconstrued as asserting something quite different: that there are no necessary or possible connections between semantic facts and normative facts. There are many such connections. For example, the communication of meaning is a practical activity. Speakers want to be understood. Readers want to understand. So there are normative reasons to speak clearly and read carefully. But this fact does not entail the further conclusion that the semantic content of a text is sensitive to normative considerations that bear on what the meaning of the text should be.

[118] In the broadest sense, "normative" might refer to all reason-involving activity. Thus the broadest sense of normative would include reasons of prudence and reasons based on linguistic conventions. In that very broad sense, derivation of "semantic content" is normative, but in this article I am not using "normative" in that broad sense. Some readers may be puzzled that I did not use either "moral" or "ethical" as the preferred term. The difficulty is that those words are sometimes taken as having a very restricted meaning in legal theory. For example, the term "moral" is sometimes read as referring only to deontological normative reasons; in this very restricted sense, consequentialist reasons are not "moral" reasons. I am not endorsing this very restricted sense of the term moral.

Thus, normative theory includes moral philosophy, political theory, and normative legal theory; normative reasons (in this restricted sense) include reasons drawn from consequentialist, deontological, and aretaic moral and political theory. In the context of law, normative theories address "legal practice"—where that term refers to law-involving actions and choices, such as the activities of adjudicating legal disputes or complying with (or disobeying) the law. In the more particular context of the Constitution (or of constitutions generally), the activity of normative theorizing can be called "normative constitutional theory," which we can understand as moral philosophy, political theory, and normative legal theory, as applied to constitution-involving choices, characteristically the activities of judicial interpretation and construction of the Constitution, but also including interpretation and construction of the Constitution by officials and citizens.[119] For the sake of clarity, let us stipulate that these constitution-involving choices and activities can be called "constitutional practice." Normative constitutional theories are theories of the political morality of constitutional practice.

It should now be obvious that there is a difference between a semantic theory of the meaning of legal texts and a normative theory of legal practice. Similarly, there is a distinction between constitutional semantics and normative constitutional theory. And that brings us to two idealized (or "pure") versions of originalism, which we can now formulate *via* the following tentative and revisable definitions:

> *Pure Semantic Originalism*: the semantic content of the text of a constitution is (roughly) the original meaning of the text as it was fixed at the time of framing and ratification.
>
> *Pure Normative Originalism*: Constitutional practice should be substantially guided by the original public meaning of the text.

These definitions are tentative and revisable—as will become clear as the argument of this Article unfolds. Nonetheless, they are sufficient to make the distinction between these two simplified or pure versions originalism clear. A purely semantic originalism is a theory that limits itself to claims about the semantic content of the constitutional text—by itself this theory makes no claims about how constitutional practice should precede. A purely normative originalism would be a theory that limited itself to claims about how officials (judges, legislators, and executive officers) and citizens[120] ought to treat the semantic content of the constitutional

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My point is simply that the different communities of scholars use these terms differently. The only solution is to define terms clearly or to invent a special technical vocabulary. Both options have their drawbacks, but I believe the best communicative strategy is to use the term "normative" and then clearly state that it is being used in a restrictive sense that focuses on the moral or ethical broadly construed to include consequentialist, deontological, and aretaic reasons as applied to both the personal and political dimensions of human conduct.

[119] On the constitution outside the courts, see, e.g., Sotirios A. Barber & James F. Fleming, *The Canon and the Constitution outside the Courts*, 17 CONST. COMMENT. 267 (2000); Lawrence G. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213 (1978); Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 NW. U. L. REV. 410, 419 (1993).

[120] Throughout this essay, I shall bracket the question whether normative originalism should claim that the duties of fidelity that attach to officials as opposed to citizens with respect to the constitutional text are identical, or whether citizens may advocate and advance in what I have called "amending constructions," e.g. constructions that change the constitutional meaning. On this, see Mariah Zeisberg, "Frederick Douglass, Citizen Interpreter" Zeisberg, Mariah. "Frederick Douglass, Citizen Interpreter" Paper presented at the annual meeting of the American Political Science Association, Hyatt Regency Chicago and the Sheraton Chicago Hotel and Towers, Chicago, IL,

text when they act in constitution-involving ways.[121] Most originalist theories are likely to be mixed—making some semantic claims and some normative claims. The theory advanced in this article and that is labeled "Semantic Originalism" is a mixed theory: although it emphasizes semantic claims, it also makes a modest normative argument.

The distinction between semantics and normativity may seem obvious or trivial, and the claim that the semantic content of a text cannot be determined by a normative theory about how the text should figure in some human practice should not be controversial. What words mean is one thing; what we should do about their meaning is another. Nonetheless, constitutional theorists have frequently assumed and sometimes argued that the distinction between semantic theories of constitutional meaning and normative theories of constitutional practice is illusory. Those assumptions and arguments will be addressed in detail below.[122]

B. Five Ideas about Semantics

This Subpart lays out five ideas about semantics. The first idea is that semantics is distinct from typography, syntax, and pragmatics—although the relationship between semantics and pragmatics is an intimate one. The second idea is that speakers meaning can be distinguished from sentence meaning. The third idea is that of implicature—the notion that an expression can mean something it does not say. The fourth idea is that there is (or at least can be) a "fact of the matter" about the meaning of a given utterance. The fifth idea is that the concept of semantic meaning can be detached from particular conceptions (or perhaps theories or views) of semantic meaning that apply to utterance types. The five ideas are followed by an external remark: constitutional theory must answer to the general theories of semantic meaning.

1. Typography, Syntax, Semantics, and Pragmatics

Semantics is about meaning, and it can be distinguished from three other topics. Typography is about the marks or symbols that are used to communicate words in written form. Constitutional typography is mostly uncontested—there are disputes about what symbols provide the authoritative text of the constitution, but such disputes are rare and of only moderate significance. Live constitutional issues rarely, if ever, depend on the question whether a comma was misplaced or letter transposed.[123]

Aug 30, 2007, May 14, 2008, ,http://www.allacademic.com/meta/p211169_index.html; *see also* Mariah Zeisberg, "[no title]" (2008). Schmooze 'tickets'. Paper 84, http://digitalcommons.law.umaryland.edu/schmooze_papers/84.

[121] The phrases "semantic originalism" and "normative originalism" should be understood to have stipulated meanings. In particular, my use of "semantic originalism" is not equivalent to Ronald Dworkin's. Dworkin defined "semantic originalism" as the view that "that the rights-granting clauses be read to say what those who made them intended to say." *See* Ronald Dworkin, *Comment*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 117, 119 (Amy Gutmann ed. 1997). Dworkin's term designates what I refer to as normative original intentions originalism. *See generally* Jeffrey Goldsworthy, *Dworkin as an Originalist*, 17 CONSTITUTIONAL COMMENTARY 49 (2000). Dworkin's views are discussed in more depth below. *See infra* Part III.F.4.b), "Constructive Interpretation: Dworkin's Attempt to Absorb Interpretation into Construction," p. 84.

[122] *See infra* Part III.H.1, "The Normativity Objection: Attempts to Collapse the Distinction Between Normativity and Semantics," p. 98.

[123] One example of a typographical dispute concerns the qualifications clause for the presidency. The clause requires that the President be "a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution." The second comma appears to be a drafting or transcription error. One natural reading would be that the clause confers eligibility only on those persons who were "natural born citizens" "at the time of

Likewise, constitutional syntax, the grammar of constitutional clauses is rarely the subject of explicit constitutional controversy. This is not to say that syntax is unimportant: syntax enables complex expression. Constitutional syntax is rarely controversial because constitutional syntax is usually transparent: the structure of constitutional clauses usually fit our understanding of the sense of their meaning. There are, however, at least two clauses in the Constitution that have unusual syntactic structure—the intellectual property clause in Article I and the Second Amendment.

The second amendment reads, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[124] The initial phrase, "A well regulated Militia, being necessary to the security of a free State" could be read as merely declaring the purpose of the rights declaration that follows. Or it might be read as modifying or restricting the meaning of "the right of the people to keep and bear Arms." In this case, the contribution that the syntax makes to constitutional meaning is not fully transparent (at least to some readers). One can imagine alternative syntactic structures that might have avoided the surface-level ambiguity.

The other example of a clause with unusual syntax is the so-called intellectual property clause. That clause grants "Congress" "Power" "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." The syntax of the clause suggests that the power granted is "to promote the Progress of Science and useful Arts" and that the remainder of the clause is a limitation on the exercise of that power, but a conventional reading of the clause ignores this syntactic structure and reads the clause as if it had the following syntactic structure: "Congress shall have Power to secure for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries" "in order to promote the Progress of Science and useful Arts."[125] On this reading, the surface syntax of the clause does not reflect its meaning.

Putting aside the rare disputes about constitutional typography and syntax, the heart of disputes about constitutional meaning lies in constitutional semantics and pragmatics. Although the term "semantic" is almost surely familiar to every reader of this Article and was explicated above,[126] the term "pragmatics" as it used in the philosophy of language and linguistics may be new or fuzzy for some readers. "Pragmatics" in the philosophy of language has only a remote connection with philosophical pragmatism (associated with Pierce, Dewey, and James) or legal pragmatism (associated with Posner).[127]

Adoption"—membership in this group might be an empty set or it might be limited to those who were born at the time of adoption. In either case, the consequence would be that no one would be eligible for the presidency after all those who became citizens at the time of adoption were no longer living. Without the second comma, the clause would read, "a natural born Citizen, or a Citizen of the United States at the time of the Adoption of this Constitution," and the absurd reading would no longer be suggested by the typographical error. *See* Matthew Yglesias, That Pesky Exception, TheAtlantic.Com, February 19, 2007, http://matthewyglesias.theatlantic.com/archives/2007/02/that_pesky_exception.php. This type of typographical error does not interfere with the actual operation of government because the intended meaning is clear from the publicly available context of constitutional utterance. *See infra* Part III.C.2.c)(1), "First Modification: The Publicly Available Constitutional Context," p. 54.

[124] U.S. CONST. amend. 2.

[125] Lawrence Solum, *Congress's Power to Promote the Progress of Science: Eldred v. Ashcroft*, 36 LOYOLA OF LOS ANGELES LAW REVIEW 1 (2002).

[126] *See supra* Part II, "An Opinionated History of Constitutional Originalism", p. 14.

[127] The best discussion of legal pragmatics of which I am aware is Andrei Marmor, *The Pragmatics of Legal Language*¸ May 2008, available at SSRN: http://ssrn.com/abstract=1130863.

Here is one standard definition of pragmatics:

> Pragmatics deals with *utterances*, by which we will mean specific events, the intentional acts of speakers at times and places, typically involving language. Logic and semantics traditionally deal with properties of *types* of expressions, and not with properties that differ from token to token, or use to use, or, as we shall say, from utterance to utterance, and vary with the particular properties that differentiate them.[128]

This definition depends on a further distinction—the type/token distinction—the ontological (or metaphysical) difference between a general sort of thing (type) and particular instances (tokens).[129]

Stated in this way, the definition of pragmatics is precise, but not edifying or illuminating. What does the study of expression tokens (utterances on particular occasions and hence in particular contexts) add to what we learn from the study of expression types (terms, phrases, sentences, clauses, and so forth)? A rough and ready answer is that looking at particular expressions focuses us on the contribution that context makes to meaning. Expression types are acontextual. Expression tokens are always embedded in particular contexts of utterance.

Another answer to the question about the contribution of pragmatics begins with two aspects of communication that pragmatics investigates. The first aspect of pragmatics concerns topics like the resolution of ambiguity and vagueness. The second aspect concerns with ways in which utterances (or expressions) can convey more information than the literal meaning of the utterance type *or* perform an action that is not explicit in the utterance type.[130] Both aspects are concerned (in part) with the idea that people can do things with words—that is, with the idea of a "speech act."[131]

Speech act theory will be familiar to many readers of this essay, but may be new to others. The core idea is that we can perform a variety of actions when we say things. To use a variant of J.L. Austin's felicitous phrase, "we can do things with words." For example, we can promise, command, or assert. The action performed by an utterance can be called its "illocutionary force." When a speech act succeeds and the audience recognizes its illocutionary force, we can say that there is "illocutionary uptake."

Thus, the illocutionary force of "I promise to meet you at the cafeteria for lunch" may be a promise—if those words are uttered in the right circumstances (that is, in an appropriate context).[132] In many cases, the illocutionary force of an utterance is transparent—it is announced by the conventional semantic meaning of the utterance itself. Sometimes the word "hereby" is a signal of such illocutionary transparency, as in "I hereby promise," "I hereby apologize," and so forth. But such transparency is not always present. Thus, the illocutionary force of "I promise you will regret it if you harm her," may be a threat rather than a promise. Or the illocutionary

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[128] Kepa Korta & John Perry, *Pragmatics*, Stanford Encyclopedia of Philosophy, 2006, http://plato.stanford.edu/entries/pragmatics/.

[129] Linda Wetzel, *Types and Tokens*, Stanford Encyclopedia of Philosophy, 2006, http://plato.stanford.edu/entries/types-tokens/.

[130] The two aspects of pragmatics are sometimes called "near side" (the first aspect) and "far side" (the second aspect. *See* Korta & Perry, *supra* note 128.

[131] The two key texts are JOHN AUSTIN, HOW TO DO THINGS WITH WORDS (Oxford University Press 1962) and JOHN SEARLE, SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE (Cambridge University Press, 1969).

[132] Notice that in the sentence accompanying this note, the words are not uttered in a context in which they constitute a promise. Instead, the sentence, "I promise to meet you at the cafeteria for lunch," was mentioned rather than used.

force of "I promise that the atomic number of Oxygen is 8," may be an assertion, with the word "promise" serving to express confidence in the truth of the assertion rather than any guarantee of performance by the speaker.

Returning then to the interpretation and construction of legal texts, the point of this brief survey is to pinpoint the importance of semantics and pragmatics. When we seek the meaning of a legal text, characteristically the issues are semantic and pragmatic. That is, our aim is to discover the conventional semantic meaning of the expression type and to resolve vagueness and ambiguity by reference to context of the particular utterance token. In rare cases, there may be a typographical dispute over which marks constitute the text or a syntactic dispute over the structure and grammar of a particular provision. In other cases, also rare, there may be disagreement over illocutionary force—that is, over the question whether a particular text is intended to have the illocutionary force of law. But in most cases, constitutional practice is interested in elucidating constitutional meaning, although there may be further questions about what is to be done about that meaning once it is determined.

* * *

The philosophy of language has its own technical vocabulary. Some of that vocabulary is familiar to academic lawyers. Words like "semantics," "syntax," and "typography" are transparent to anyone familiar with learned discourse in the humanities and social sciences. Other terms are more foreboding. Paragraphs that are thickly laden with phrases like "speech act," "speakers meaning," and "sentence meaning" may seem almost impenetrable on first reading. Nonetheless, let me make a plea and give a promise. The plea is: "Please stick with it." The promise is: "I give my personal guarantee that there is a payoff for using a precise and technical vocabulary."

Before we rejoin the argument, let me say something about the word "utterance" and the related terms "utter," "utterer," and so forth. These words are deeply embedded in the tradition of speech act theory in general and the work of Paul Grice in particular. On first acquaintance, all the talk about "utterances" may sound peculiar. Remember that there is nothing special about this term. An "utterance" is a "saying" or "writing." An "utterer" is a "speaker" or "writer." An "utterance token" is just a string of words uttered on a particular occasion. An "utterance type" is just the string of words considered as something that could be said on more than one particular occasion.

All of the philosophical terms and phrases that we are about to encounter will be carefully defined. None of the concepts are especially difficult or complex.

* * *

2. Speakers Meaning and Sentence Meaning

The next step in this brief survey of the theory of meaning is to investigate the distinction between "speakers meaning" and "sentence meaning" (or "expression meaning"), which was introduced by Paul Grice.[133] Grice's idea of speaker's meaning is actually quite familiar. We get

[133] *See* PAUL GRICE, STUDIES IN THE WAY OF WORDS 3-143 (1989). *See also* John F. Manning, *What Divides Textualists From Purposivists?*, 106 COLUM. L. REV. 70, 72 n.7 (2006); B. Jessie Hill, *Putting Religious Symbolism In Context: A Linguistic Critique of the Endorsement Test*, 104 MICH. L. REV. 491, 506 n.80 (2005); Jeffrey

at the idea of speaker's meaning all the time in ordinary conversations: "What did she mean by that?" In the context of legal texts, we ask questions like: "What did the legislature mean by the provision?" "What did the judge mean by that sentence in the opinion?" "What did the framer's mean by that clause in the Constitution?"

Grice contended that speaker's meaning, in turn, can be analyzed in terms of a speaker's (or author's) intentions. His point is illustrated by the following thought experiment:

> [I]magine that you have stopped at night at an intersection. The driver of another car flashes her lights at you, and you make the inference the reason for her doing this is that she wants to cause you to believe that you lights are not on. And based on this inference, you now do, in fact, realize that your lights are not on.[134]

In this example, the meaning of the flashing lights is the product of the following complex intention—as explicated by Richard Grandy and Richard Warner:

1) The driver flashes her lights intending
2) that you believe that your lights are not on;
3) that you recognize her intention (1);
4) that this recognition be part of your reason for believing that your lights are not on.[135]

In the case of imperatives, for example, the intention is that the audience (or reader) performs a certain act on the basis of the reader's recognition of the author's intention that the reader perform the act. Speakers meaning requires that speakers and audiences have "common knowledge"[136] in a technical sense: the speaker must know what the audience knows about the speaker's intentions and vice-versa.

We can tentatively formulate speakers meaning as follows:

> *Speakers meaning*: The speakers meaning (or utterer's meaning) of an utterance is the illocutionary uptake that the speaker intended to produce in the audience on the basis of the audience's recognition of the speaker's intention.

Grice formulated his notion in terms of speakers and audiences, implicitly assuming the context of oral communication between a speaker and an audience contiguous in space and time. At this stage in the argument, we can assume that this notion could be generalized to include written communication—so long as the author of the text and the reader of the text could satisfy the conditions for common knowledge of the author's beliefs regarding audience recognition of the author's intentions. Thus, the "authors meaning" of a text would be the illocutionary uptake

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Goldsworthy, *Legislative Intentions, Legislative Supremacy, and Legal Positivism*, 42 SAN DIEGO L. REV. 493, 510 n.57 (2005).

[134] Grice, *supra* note 90.

[135] Richard E. Grandy & Richard Warner, *Paul Grice*, STAN. ENCYCLOPEDIA PHIL., May 8, 2006, http://plato.stanford.edu/entries/grice/.

[136] On common knowledge, see PeterVanderschraaf & Giacomo Sillari, Common Knowledge, Stanford Encyclopedia of Philosophy, http://plato.stanford.edu/entries/common-knowledge (Aug. 10, 2007) ("distinguishing "mutual knowledge," which is shared without knowledge of the fact of sharing from "common knowledge," which requires knowledge of the fact that content is shared"); *see also* MICHAEL SUK-YOUNG CHWE, RATIONAL RITUAL: CULTURE, COORDINATION, AND COMMON KNOWLEDGE 3, 10 (2001). This idea of common knowledge was introduced (so far as I know) by David Lewis. *See* DAVID LEWIS, CONVENTION: A PHILOSOPHICAL STUDY 52-60 (Cambridge: Harvard University Press 1969).

that the author intended to produce in the reader on the basis of the reader's recognition of the author's intention.

What about sentence meaning? (Sometimes the phrase "expression meaning" is used to refer to the same notion as "speakers meaning.") In its simplest (and perhaps simplified) form, the idea is that words and expressions have standard meanings—the meanings that are conventional given relevant linguistic practices. As Hurd puts it: "[i]n other words, the sentence meaning of a particular utterance can be understood not by reference to the illocutionary intentions of the speaker, but rather by reference to the illocutionary intentions that speakers *in general* have when employing such an utterance."[137] Hurd goes on to criticize this solution, but I want to put this sort of controversy to the side at this point. At this point, let us tentatively use the following formulation:

> *Sentence meaning:* the sentence meaning (or "expression meaning") of an utterance is the conventional semantic meaning of the words and phrases that constitute the utterance.

The phrase "sentence meaning" does not contain the same implicit reference to oral communication under conditions of proximity. Thus, texts and speeches can have "sentence meaning," irrespective of whether the utterance is read or heard in spatial and temporal proximity to the occasion of writing or saying.

3. Implicature

Grice is associated with a second idea that has direct relevance to constitutional meaning. This is his notion of "implicature"—the notion that the illocutionary force of a particular communicative act can be implied rather than directly said. Here is one version of the standard example:

> Professor is asked for a recommendation of Student, who is being considered for a job as a member of the law faculty of a research university. Professor writes only the following in the letter of recommendation: "Student regularly attended class and turned in work on time. Student was never late to class."

The semantic content of the letter is sparse—speaking only to the student's attendance, punctuality, and compliance with deadlines. But given the context, the illocutionary force of the letter goes beyond its semantic content. The implication of the letter is that the student is not qualified for the position. Such a letter would be an extreme case of what we call "damning with faint praise." In the language of speech act theory, we might say that the semantic content of the letter would consist of one set of assertions (about attendance, punctuality, etc.) and the illocutionary uptake of the letter consists of a different set of assertions (about suitability of the candidate for the position).

4. Semantic Meaning as a "Fact of the Matter"

One final point about theories of meaning in the abstract and the meaning of general utterance types and particular utterance tokens: meanings in the semantic sense are facts determined by the evidence. They are not courses of action adopted on the basis of normative concerns. This point is so obvious in a variety of contexts that it is taken for granted. Textbooks about semantics

[137] Heidi M. Hurd, *Sovereignty in Silence*, 99 YALE L.J. 945, 964 (1990).

written for students of linguistics do not discuss the normative reasons for and against various theories of semantic meaning. Translators of chemistry texts or product manuals do not (and should not) ask whether they should use the translation that best expresses the semantic content of the original or some other translation that might be preferred on normative grounds. Of course, translations can be *altered* on normative grounds. For example, in cultures with puritanical sexual mores, the translation of a racy novel might be bowdlerized: a grope might become a touch, intercourse a kiss. The crucial point is that a bowdlerized translation alters and does not preserve semantic content. No normative argument can bestow the property of "accuracy" on a bowdlerized translation. We may prefer that our children read the bowdlerized translation, but this preference does not change the semantic content of the original. Fucking not is kissing and wishing cannot make it so.

Legal meanings are no different in this regard. The question whether a given reading of a legal text preserves its meaning (in the sense of semantic content) is a factual question. Notice, however, that the assertion that meaning is a fact is itself only a factual assertion. The claim that semantic content is determined by the facts does not entail the further claim that the application of legal texts to particular cases in legal practice is determined by the facts. For example, the semantic content of a particular legal rule may be vague. If it is, then application in a particular case may require construction of the rule, and the fact that meaning is determined by the facts does not entail the conclusion that construction is determined by the facts. Theories of construction may be normative, and if they are, then legal practice may be guided by normative considerations in a wide variety of cases. In addition, there may be normative reasons to disregard or alter the semantic meaning of a given legal text.

By making the assertion that semantic meaning is a matter of fact, I am denying that the correct interpretation of the semantic content of a text is necessarily the interpretation of the text that makes the semantic content "the best that it can be." Readers will recognize that this puts my view in possible tension with the account of meaning in Ronald Dworkin's theory, "law as integrity" and/or the earlier view expressed most accessibly expressed in *Hard Cases*. These questions will be addressed below.

One final point: the claim that there is a fact of the matter about "semantic content" is a modest one. Here are some of the ways in which it is modest:

1. The claim is not that we can always know what the facts about meaning are. The original public meaning of a text could be lost, because the information about usage at the time of utterance may not be accessible. The claim that there is a fact of the matter is a metaphysical, not epistemological.
2. The claim is not that the facts about semantic content necessarily settle all, most, or even any cases. If the semantic content is vague, then construction may be required.
3. The claim is not that there is a metaphysically deep distinction between facts and values. My own view of value makes value part of the natural world and that there are moral propositions can express natural facts, but that doesn't entail the further conclusion that the facts about meaning are moral facts. Facts about meaning are linguistic facts.
4. The claim is not that the "principle of charity" in interpretation has no scope of operation in epistemic access to semantic content. We never have complete information about conventional semantic meaning (because there are always a vast number of instances of actual usage and a tiny proportion of those are preserved);

> similarly, we lack complete information about the context of utterance. The principle of charity in interpretation allows us to make inferences about semantic content.[138]

Doubtless there are other possible misunderstandings of the claim that the semantic content of the Constitution is a fact. If you are in doubt about the meaning of the claim, I would ask that you use the following rules of thumb: (a) construe the claim modestly, and (b) avoid extravagant metaphysical interpretations.

5. The Concept of Semantic Meaning Distinguished from Particular Theories of the Meaning of Utterance Types

The concept of semantic meaning (or content) is abstract, and it plays a role in very general claims, such as the claim that the semantic meaning of one-on-one communications is captured by the notion of speakers meaning and the claim that the semantic meaning of written texts not addressed to particular persons is captured by the idea of sentence meaning. Suitably qualified, these general claims are *true*—there are good and sufficient reasons to believe that they accurately describe the actual linguistic behavior of humans.

But from the fact that these claims are *true*, it does not follow that they are *necessarily true*, *self-evident*, or *apodictic*.[139] It is possible to meaningfully disagree with such claims or to posit a possible world in which they would not hold. For this reason, we need a distinction between the concept of semantic meaning and various conceptions, views, or theories of particular meaning types (such as theories of constitutional meaning).[140] For the most part, this article will use the phrases "semantic meaning," "semantic content," and similar expressions to refer to the actual meaning of the constitutional text in accord with a particular conception (theory or view) of that meaning. If this theory is mistaken, but some other theory is true, then much of the argument of this Article may still hold, with appropriate substitutions of what we would come to view as the correct theory of constitutional semantics.[141]

* * *

Making the semantic turn in the theory of constitutional meaning will require an excursus beyond the disciplinary boundaries of the academic study of law (as practiced in the law schools and departments of political science) and into territory within the domain of the philosophy of language and linguistics. The fundamental premise of the move beyond law is that constitutional semantics can only be sensibly understood as applied philosophy of language (or applied

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[138] For further discussion of the principle of charity in interpretation, see *infra* Part IV.C.5, "Charity in Interpretation and Indeterminacy of Translation," p. 149.

[139] By apodictic, I mean "absolutely certain."

[140] On the concept/conception distinction and the related idea of an "essentially contested concept," see Lawrence B. Solum, *Legal Theory Lexicon 028: Concepts and Conceptions*, Legal Theory Lexicon, http://lsolum.typepad.com/legal_theory_lexicon/2004/03/legal_theory_le_1.html; Ronald Dworkin, Law's Empire (Harvard University Press 1988); W. B. Gallie, *Essentially Contested Concepts*, 56 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY 167 (1956); JOHN RAWLS, A THEORY OF JUSTICE ((Revised edition, Cambridge, Massachusetts: Belknap Press, 1999).

[141] In particular, if it were the case that the meaning of a legal text is fixed by the intentions of the drafter, then best version of Semantic Originalism would be approximate original intentions originalism. For further discussion of this point, see Part III.H.2.a)(1), "Intentionalism," p. 106.

linguistic theory). Constitutional texts cannot mean in ways that are fundamentally different than the ways in which other utterances mean. This is not to say that there is nothing special or different about constitutional interpretation or construction. It is to say that a theory of constitutional meaning must be reconciled with our understanding of how humans communicate with language in general and written texts in particular—in a variety of legal and nonlegal contexts. If a position taken in the theory of constitutional meaning is inconsistent with widely accepted views about meaning generally, then there is work to be done. Either the constitutional theorist must convince us that the general views are wrong or that the constitutional (or legal) context is truly different. But there is no plausible reason for relieving constitutional theorists of the burden of reconciliation. The notion that constitutional theory could be sound if it requires demonstrably false beliefs about the nature of meaning is absurd.

* * *

C. Framers Meaning and Clause Meaning

So far, our brief investigation of semantics and pragmatics has been very general. The purpose of that general investigation has been to lay the groundwork for a more particular inquiry into constitutional meaning. That particular inquiry can begin with the obvious parallelism between Grice's discussion of speakers meaning and sentence meaning and contemporary debates in constitutional theory. In that debate, a distinction is drawn between two forms of originalism—"original meaning originalism" and "original intentions originalism." Both forms of originalism are sometimes contrasted with textualism.

In this subpart of the essay, I shall explore the parallelism between speakers meaning and framers meaning, on one hand, and expression meaning and clause meaning, on the other. This investigation shall be limited to constitutional interpretation, but the account that I offer could be generalized to almost any type of legal text that has general and prospective application. Rather that discussing framers meaning and clause meaning, we might instead investigate the role of *legislators meaning* and *section meaning* in statutory interpretation. Indeed, the view that meaning of a statute is distinction from the intentions of legislators has been a commonplace of the theory of statutory interpretation at least since Holmes's 1899 essay, *The Theory of Legal Interpretation*.[142]

One more point of clarification before turning to framers meaning: the account that I offer here will frequently cite the Constitution of 1789 as an example. This account can be generalized to constitutional amendments that are proposed by Congress (playing the role of the framers) and ratified by state legislatures (playing the role of the ratifying conventions and assembly),[143] but I shall simply assume rather than demonstrate that the necessary transpositions of moves could be accomplished.

[142] Oliver Wendell Holmes, Jr., *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1899) (stating, "[w]e do not inquire what the legislature meant; we only ask what the statute means.").

[143] In addition, the theory of constitutional meaning could be generalized to a variety of other constitutions, such as the constitutions of the several states and the written constitutions of other nations.

1. Framers Meaning

Let's begin with the idea that the constitution should be interpreted to have the meaning that was originally intended by the Framers. In this section, I will investigate the possibility that the meaning of the constitution could be understood on the model of speakers meaning, which in the constitutional context can be called "framers meaning."

a) Framers Meaning as the Semantic Equivalent of Original Intentions Originalism

Let's begin with the observation that what is called "original intentions originalism" is actually ambiguous. This might be a semantic theory, about the meaning of the constitution. Or it might be a normative theory, about constitutional practice. Of course, there is a natural relationship between the two kinds of theory. An original-intentions originalist might believe that the semantic content of the constitution is given by the original intentions of the framers and that there are decisive normative reasons for this semantic content to be considered authoritative or binding by officials and citizens. In this section, I want to focus on original intentions originalism as a semantic theory—that is, as a theory about what the constitution means.

In the context of something said by an individual speaker to an audience, there are good reasons to believe that the meaning of the utterance is accurately understood as the meaning the speaker intended the audience to grasp on the basis of the audience's recognition of the speaker's intentions. This is Grice's notion of speakers meaning. Speaker's meaning may be identical to the conventional semantic meaning of the utterance—the meaning of the utterance type—but this is not necessarily the case. For example, if Ben says to Alice, "When I say use the term 'cup,' I mean to refer to what most people call 'fork," then utters, "most cups have four prongs," his utterance will be perfectly intelligible and will succeed in conveying the assertion that Alice will understand as "*most forks have four prongs*" in standard English. Even without Ben's explicit declaration of nonstandard usage, Alice might infer that Ben's usage is idiosyncratic from his linguistic behavior.

The notion of speakers meaning can be narrowed to what we can call *framers meaning*. The framers meaning of the constitution would be the content that the framers intended the audience of the constitution to grasp based on the audience's recognition of the framers' intention. In this case, the audience of the constitution would be a variety of groups, including the members of the various ratifying conventions, officials (including judges, Presidents, officers of executive departments, members of Congress, and various equivalent officers of state and local governments), and citizens. The "intended audience" for the United States Constitution was extended over time. Most immediately, the text was directed at state legislatures and participants in the ratification process. In the next period, the text was directed at those who organized the first Congress, conducted the first election for members of the Electoral College, and so forth. But the primary audience for the Constitution was the collection of citizens and official who would be governed by its provisions for the indefinite period during which provisions of the Constitution of 1789 would remain in effect—an audience that continues today and seems likely to continue for many decades or centuries to come.

b) Framers Meaning, Ratifiers Meaning, Popular Meaning

Who uttered the Constitution? We know quite a bit about the drafting process—with bits of language being contributed by various members of the Philadelphia Convention. And we know

that the Constitution was ratified by various state ratifying conventions. And we know that the Constitution itself begins, "We the People of the United States . . . do ordain and establish this Constitution for the United States of America." Was the text uttered by the framers, the ratifiers, or the people of the United States? The most probative facts are not in dispute, and in some sense this question has no clear answer. But if we view the Constitution as a speech act, then one relevant question is what individual, collectivity, or set of corporate bodies had authority to utter a constitution with the illocutionary forces that the constitution apparently has—bringing a new regime into being and establishing the framework for a national government. A formal answer to that question might be—"the ratifying conventions." An answer rooted in a normative conception of legitimacy might be, "the people themselves." But there is an alternative story about resolving ambiguity and vagueness that suggests that the Constitution could be viewed as the utterance of the Philadelphia convention, and that the relevant speech act was not "constitution" but "proposal."

At this stage in the argument, we shall leave these intriguing questions unanswered and instead proceed (*arguendo* as it were) on the assumption that the Constitution was uttered by the framers—and more particularly by all those who drafted its language in the Philadelphia Convention. Let us use the phrase "framers meaning" as the name for that meaning of the Constitution that the framers intended the Constitution to convey to its audiences based on the audiences' recognition of the framers' intention. That is, *framers meaning* is the constitutional counterpart of *speakers meaning*.

c) The Success Conditions for Framer's Meaning

Is *framers meaning* possible?[144] Or to be more precise, is constitutional communication possible if the content to be conveyed is framers meaning?[145] The criteria for the possibility of successful communication of framers meaning are established by Grice's theory of speakers meaning. For the constitution to have framers meaning, it must have been possible for the framers to intend that citizens and officials, contemporaneously and over an indefinite future span, grasp the illocutionary force of the constitution on the basis of their recognition of the framers' intentions. But as many readers will have surmised, the satisfaction of these conditions

[144] The sense of "possibility" needs to be further specified. My claim is that framers meaning is impossible in *practically accessible possible worlds*, that is, in possible worlds that are historically and nomologically accessible. *See* Lawrence B. Solum, *Constitutional* Possibilities, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=949052 (forthcoming INDIANA LAW JOURNAL (2007)). Without the jargon, my claim is that framers meaning is impossible given the history of the constitution including the circumstances of its framing and adoption that give rise to the four problems specified below. *See infra* Part III.C.1.d)(1), The Collective Intentions Problem, p. 43 to Part III.C.1.d)(4), The Intentional State Problem, p. 51.

[145] The idea of *constitutional communication* is undertheorized in this draft. I am grateful to Guyora Binder for this point. As a preliminary correction for this deficiency, I offer the following remarks. Constitutional communication is the process by which semantic content is communicated by a complex group of constitutional authors (roughly the framers and ratifiers) to a complex group of constitutional readers (the ratifiers are both readers and authors, the initial group of implementing officials, citizens, future courts, future officials, and so forth). The *possibility conditions for constitutional communication* refers to those facts about the *circumstances of constitutional utterance* that enable constitutional communication. The argument of the paper is that one of the success conditions is the existence of "public meaning" or "conventional semantic meaning." Similarly, the paper argues that framers meaning (or speakers meaning) does not satisfy the success conditions for constitutional communication, because the *common knowledge* condition is not satisfied. *See supra* Part III.B.2, "Speakers Meaning and Sentence Meaning," p. 35 especially note 136 and accompanying text.

is problematic, given the conditions of constitutional utterance. At a very high level of abstraction, this point was made by Michael Moore more than a quarter-century ago:

> As utterances, statutes lack many of the non-linguistic, contextual features which constitute the foundation for a pragmatics analysis. Statutes are institutionalized utterances. Consequently, the richness of time and circumstance which the pragmatic approach embraces to interpret the intent of an ambiguous expression is eliminated by this institutionalized nature of statutes.[146]

Moore's point about context is refracted in a variety of criticisms of original intentions originalism. These arguments can be restated as reasons for the failure of framer's meaning as a theory of constitutional semantics.

d) Reasons for Failure of Framers Meaning

There are a variety of familiar criticisms of original intentions originalism. We have briefly surveyed some of these criticisms in connection with our review of the history of originalism.[147] In this section, we will take a second look at these criticisms in a new context. Our account of the success conditions for Framers Meaning gives us the criteria that must be satisfied. Here, we examine four reasons for failure: (1) the collective intentions problem, (2) the collective recognition problem, (3) the publicity problem, and (4) the intentional state problem. The first of these problems will be examined in depth.

(1) The Collective Intentions Problem

The first of these reasons is the familiar problem of collective intentions.[148] Our investigation can begin with a statement of the problem.

(a) A Statement of the Collective Intentions Problem

The Constitution of 1789, for example was not uttered by an individual; rather it was uttered by a collectivity, with individual clauses and passages that reflected many hands and a whole that was the product of the complex interactive processes at the Philadelphia Convention. For the Constitution to satisfy the possibility conditions for framers meaning, all of the members of the Philadelphia Convention would have had to have identical intentions with respect to the each and every clause. Absent such identity, any particular clause with respect to which divergent intentions existed would have a multiplicity of meanings. Of course, the problem becomes worse if we view the ratifiers as the utterers, since there were multiple conventions and the

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[146] Michael S. Moore, *The Semantics of Judging*, 54 S. CAL. L. REV. 151, 186-87 (1981).

[147] *See supra* Part II.B, "The Misconceived Quest & the Original Understanding of Original Intentions," p. 16.

[148] Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 477 (1981) ("[T]here are no, or very few, relevant collective intentions, or perhaps only collective intentions that are indeterminate rather than decisive one way or another."); Jack N. Rakove, *Comment*, 47 Md. L. Rev. 226, 229 (1987) (stating "collective intentions are always difficult to determine--whether the object of inquiry is a law enacted in the most recent session of Congress or a constitution adopted two centuries ago"). *But see* Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. Pa. L. Rev. 1503, 1514 (2000) ("we speak without puzzlement about social groups or collective actors having beliefs, emotions, attitudes, goals, and even characters.").

I am deeply grateful to Richard Kay for extensive comments on the arguments in this session. Kay and I disagree, but my argument is much the better for his objections.

historical evidence suggests that there were differences among the conventions with respect to the relevant intentional states. Constitutional amendments are proposed by the House and Senate and ratified by the legislatures of the fifty states: once again, there are multiple groups with multiple members.

Defenders of Framers Meaning have a variety of replies to the collective intentions problem. In the discussion that follows, we work through some of these defenses in depth.

(b) The Possibility of Collective Intentions

In the 1980s, the best answers to the collective intentions problem were provided by Richard Kay. Kay began with the idea the collective intentions are possible:

> [I]ntent can be attributed to a group without positing the idea of a group mind. When we speak of such an intention we usually mean that each member of the group holds an identical individual intention. If a husband and wife discuss and settle on a list of invitations to a dinner party it seems perfectly proper to say that they have 'an intention' about who their guests will be. This phenomenon would only be impossible if the couple could not articulate and communicate their intentions to each other in a way that let each one know those intentions coincided . . . .[149]

Kay was correct on this point: collective intentions are not impossible. We can imagine a group that forms the requisite intention for Gricean speaker's meaning: Ben and Alice talk about their intentions until they reach agreement in the presence of Carla, they then jointly write a text, and present the text to Carla, who then reads the text in light of his knowledge of Alice and Ben's shared intention.

The problem is not that shared or collective intentions are never possible. The problem is that the various provisions of the Constitution were uttered by a multitude assembled at different places and at different times under conditions such that their intentions were inaccessible to intended readers of the constitution.

Kay continued:

> The possibility of multiple, varying intentions is not, however, fatal to the enterprise of original intentions adjudication. The difficulty is intractable only if there are multiple and totally contradictory intentions. This could happen if, for example, a constitutional provision was created with some constitution-makers intending it to mean X and only X, while other constitution-makers intended it to mean not-X and only not-X. Such contradiction is extremely unlikely, however, because though the intentions involved are held by different people, those intentions are associated with the adoption of identical language. The use of the same language suggests a common core of meaning shared by all. Any different intentions are, therefore, likely to be overlapping not contradictory. Thus, if an ordinance prohibits 'vehicles in the park,' it is safe to assume that all of the enactors intended it apply to ordinary automobiles. Similarly, in a constitutional context, probably all of the enactors of the fifth and fourteenth amendments understood that incarceration would be a deprivation of liberty requiring due process of law. The differences in intention will arise in cases beyond the obvious situations suggested by the language, as that language was ordinarily used and understood. Where there is disagreement it will be with

[149] *See* Richard S. Kay, *Adherence To The Original Intentions In Constitutional Adjudication: Three Objections And Responses,* 82 NW. U. L. REV. 226, 246 (1988).

> respect to the outer reach or scope of the rule. To use the terminology of some modern philosophers of language, these differences will be attributable to the vagueness, not the ambiguity, of the words adopted.[150]

This argument can be interpreted in at least two ways, which we can call the *conventional semantic meaning interpretation* and the *original expected applications interpretation*.

The first way of interpreting Kay's remark is that the substance of his argument depends on conventional semantic meaning. Kay might be arguing that the problem of possible conflicts between and among the intentions of the individuals who make up the relevant group of authors can be resolved by appeal to "identical language" or "the same language" with a "common core of meaning shared by all." One explanation for ability of the "same language" to coordinate intentions is that the language has a shared conventional semantic meaning. This explanation is suggested by Kay's reliance on the idea that shared intentions are a function of the way that "language was ordinarily used and understood." If by this he means the conventional semantic meaning of language, then the necessary collective intentions about the constitution are produced by its public meaning. On this interpretation, the only difference between original intentions originalism and original public meaning originalism would be metaphysical. Kay would be insisting the underlying metaphysically real entity was the collective intentions, whereas public meaning theorists would be insisting that the metaphysically real entity was the public meaning. This metaphysical difference would not make any practical difference—because collective intentions arise if and only if the conventional semantic meaning plays a causal role in producing them—and as a consequence, Kay's theory would be practically identical original public meaning originalism.

The second way of interpreting Kay's remarks depends on his appeal to shared beliefs about original expected applications. This interpretation is suggested by this statement: "if an ordinance prohibits 'vehicles in the park,' it is safe to assume that all of the enactors intended it apply to ordinary automobiles." On this interpretation, Kay's theory suffers from the defects of the view that meaning is expectations about applications: those defects are outlined in detail below.[151]

Kay offers a slightly different account in a more recent paper. Here is the relevant passage:

> The [collective intentions] objection disputes the very coherence of the idea of an intent held by a multi-member body. Intention, on this view, is a psychological state that may only be associated with an individual mind. This reasoning, however, ignores the very common fact of shared intention, the product of mutual communication of individual intentions. This is a phenomenon we encounter and use everyday: "We plan to go in the morning; they intend to wait until afternoon." It is hard to imagine any kind of social environment in which this manner of expression is not constantly employed.[152]

In this passage, the idea is that "shared intentions" are "the product of mutual communication of individual intentions." What does Kay mean? There is an enormous amount in this small package, and a step-by-step reconstruction is required.

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[150] *Id*. at 248.

[151] *See infra*, Part III.H.2.a)(5), "Expected Applications," p. 111.

[152] Richard Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, at 6, April 17, 2008, http://www.law.northwestern.edu/faculty/conferences/research/originalismdocs/originalKay.pdf.

(c) What Mental States?

The discussion that follows is a detailed reconstruction of Kay's proposal. We will start with the question, "What are individual intentions?" Then we will ask, "What kind of agreement is required?"

The first step in reconstructing Kay's position is identifying the relevant "individual intentions". From context it appears that by "individual intentions" Kay means "intended semantic meaning" as opposed to "intended purpose." If this is so, there are two possible construals of the individual mental states that would constitute "intended semantic meanings." The first construal is that these are "occurrent mental states," that is conscious thoughts about the meaning of the provisions. On this construal, the theory would work, but only if the occurrent mental states actually occurred. But that seems unlikely, since many framers or ratifiers will have not actually have had the requisite conscious thoughts about each and every clause. In fact, in many cases, we would expect that some ratifiers would not have read some of the clauses; in other cases, the clause would be read without any occurrent mental state that assigns semantic content to the clause. If the "shared intentions" must be "occurrent mental states," then it seems unlikely that the necessary "shared occurrent mental states" would actually have come into being and done the necessary work of producing meaning.

The second construal of the mental states would be that they are dispositional. This construal is more plausible—since all that would be necessary is that the framers and ratifiers would have been able to provide an interpretation of the semantic content if asked. On this construal, the requisite mental states exist so long as the framers and ratifiers could produce an interpretation of the language when asked.

(d) Dispositional Mental States as Shared Intentions

Our next question is: "Assuming that the relevant mental states are dispositional, what are the necessary and sufficient conditions for saying that the dispositional mental state is shared? There are four possibilities: (1) the states must be identical, (2) some subset must be identical, (3) the content is a superset, or (4) the content is given by conventional semantic meaning. We will examine each of these possibilities in turn.

(i) Identical Mental States

The first possibility is that the mental states are shared if and only if the content of all the dispositional mental states is identical. If identity of content is required, it is very unlikely that the Constitution has any meaning at all. Identity is a very strong condition, and any variation would result in a failure of meaning. It seems unlikely that many clauses of the constitution would have produced identical dispositional mental states in each and every framer and ratifier. For example, suppose that some framers and ratifiers thought "commerce" meant "economic activity," some thought it meant "exchange for value of goods," and some thought it meant "purchase, sale, or transportation of commodities." It might be that one of these meanings was the "conventional semantic meaning," and the other two were deviant meanings—held by only a tiny number of ratifiers. If identity of mental states is required, then the term "commerce" would have no meaning at all.

(ii) A Subset of Mental States

The second possibility is that all that is required is that there be some subset of content that is identical, i.e., that even if the dispositional mental states diverge in some respects, the shared intentions exclude the zone of divergence and include only the zone of convergence. Once again, there are two possibilities, depending on the construal of the group that must have the identical mental states: (1) the group might consist of all the framers or ratifiers, or (2) the group might consist of a sufficient number of framers or ratifiers to secure approval of the relevant provision.

(a) The Subset Shared by All

If the requirements is that the mental states must be shared by all framers and ratifiers, it seems unlikely that the necessary sharing will occur. If even a single ratifier had a nonstandard interpretation that did not converge, then the provision would have no meaning. Moreover, the zone of convergence might not have been endorsed by many or any of the ratifiers—it would depend, of course, on the particular provision and the range of interpretations. This last point can be illustrated with an example. Take the "right to bear arms" in the Second Amendment. Suppose that there was a range of opinion about the meaning of "shall not be infringed." Most of the ratifying state legislators, if asked, would say "infringed" means "prohibition or unreasonable regulation," but a tiny minority would have said "infringed" means "prohibition." If the meaning is provided by the zone of convergence, then the Second Amendment means only "prohibition." But it is quite possible that the Second Amendment would not have been ratified had that meaning been clearly communicated—perhaps because of a worry about the negative pregnant.

(b) The Subset Shared by the Enactment Group

The second version of the subset possibility focuses on the group necessary to for proposal and ratification.[153] On this account, the semantic content of a constitutional provision is provided by the subset of the content of the dispositional mental states shared by the group of actors which is the minimum necessary for enactment of the provisions. Let us call this view the *enactment group theory*.

For example, in the case of a constitutional amendment, the minimum group necessary to secure ratification consists of two-thirds of the members of the House of Representatives, two-thirds of the members of the Senate, and a majority of the members of three-quarters of the fifty state legislatures—the enactment group. Let us simplify the problem by assuming that each of these bodies has four members, and that there are only four states. In this simplified version, proposal and ratification requires the votes of 3 Representatives, 3 Senators, and 3 Representatives in each of 3 States. Let us assume that we have an Amendment. We are assuming that the semantic content of the Amendment is not given by its conventional semantic meaning, but is, instead, a function of the individual semantic intentions of the members of the House, Senate, and State legislatures (but in some cases, these intentions may match the public meaning).

We can illustrate this with an example. I am going to describe this example twice. One in nontechnical language and the second time using abstract notation. Here is simple version. Suppose the amendment is the Equality Clause, which reads, "No state shall deny any person

[153] Richard Kay suggested this possibility in email correspondence. *Email from Richard Kay to Lawrence Solum,* May 7, 2008 (on file with the author).

that treatment required by equality." Some of the Senators, Representatives and Legislators have the following linguistic intention: "No state shall discriminate against any racial minority group. And no state shall unreasonably discriminate against women. And no state shall discriminate against gays, lesbians, or transsexuals." But some have different intentions. Some believe that it only applies to race; others that it only applies to race and gender, and so forth. Others believe the clause means: "No state shall discriminate on the basis of race. And no state shall discriminate on the basis of gender. And no state shall discriminate on the basis of sexual orientation." Let us also suppose that there is a deviant understanding: "No state shall deny any person an equal share of wealth and income."

That was the nontechnical version. We can represent this same picture by representing the content of the dispositional mental states that constitutes the linguistic intentions of each member as a series of propositions that are members of sets. We can use the lower case letters p, q, r, s, t, u, and v to represent the propositions. For example, a Senator might believe the content of Amendment is a set with the single member *p* or the set that includes *p* and *q* and so forth. Let us imagine that the conventional semantic meaning of our Amendment is the following set (*p, q, r*) but that the some individual members have deviant intents such as is (*p, q*) and a very small number have a completely different understanding (*r, s, t*). One member has a deviant and unique understanding (*v*). The following table would describe successful agreement on semantic intent. The critical zone is indicated by gray shading.

Table 1: Enactment Group Theory

	Proposal		Ratification			
	House	Senate	State 1	State 2	State 3	State 4
Member 1	*p, q, r*	*p, q*	*p, r*	*p, q*	*p*	*s, t, u*
Member 2	*p, q*	*p, q, r*	*p, q, r*	*p, q, r*	*p, q, r*	*s, t*
Member 3	*p, q, r*	*p, q, r*	*p, q, r*	*p, q, r*	*p, q, r*	*s*
Member 4	*s, t, u*	*q, r*	*s, t, u*	*s, t*	*q, r*	*v*

Recall that we are pursuing the possibility that group intention need not be unanimous. Instead it will be sufficient if there is a subset of intentions upon which the group that is legally sufficient to secure ratification agrees. The linguistic intentions in the gray zone all include agreement on the subset *p*, so the meaning of the Amendment is *p*. Translating back to the nontechnical version, the semantic content is "No state shall discriminate against any racial minority group."

The hypothetical set of linguistic intentions identified in the Table illustrates the difference between the two interpretations of the second possibility. If the meaning of the Amendment was the subset that reflected agreement among all those involved in proposal and ratification, our hypothetical Amendment would have no meaning. There is no single proposition from the list (*p, q, r, s, t, u, v*) upon which all the members agree. But if we limit the group to the enactment group, the Amendment does have meaning: it means *p*, because *p* is the subset that is common to all the sets in gray zone. Notice that *p* is not included in any of the sets outside the gray zone, but that does not matter because the gray zone is sufficient for the amendment to become legally effective.

We are now in a position to assess this option. Notice that it solves the problem posed by the possibility that a deviant understanding by a single member or small group would result in a

constitutional provision that would have no meaning at all. The enactment group theory allows us to disregard deviant mental states held by small groups—only the enactment group counts.

Nonetheless, the idea that the collective intentions problem can be overcome by identifying the meaning of an amendment with a subset of linguistic intentions shared by the enactment group does not work. The enactment group theory is not actually a theory of interpretation (recognition or discovery or the semantic content) of the Constitution; instead, this theory is a theory of the construction of legal content. This point may not have been obvious without consideration of the distinction between semantic content and legal content developed in this Article.[154] The enactment group theory applies a legal rule (the enactment rule) to the supposedly salient linguistic facts (the dispositional mental states) yielding the legal content of the constitutional provision. If the enactment group theory were a theory of linguistic meaning, it would produce the following anomaly: a constitutional meaning would not acquire linguistic meaning until the moment of enactment. If the enactment group theory were a theory of linguistic meaning, the implication would have been that the Amendment was meaningless up to the point when sufficient mental states to create meaning came into being. But this conclusion is absurd: constitutional amendments plausibly acquire legal content when ratified but they must have linguistic meaning *in order to be ratified*.[155]

(iii) A Superset of Mental States

The third possibility is that the shared intention is the superset of all the individual interpretations. The third possibility is a nonstarter for at least two reasons. First, it is possible that the superset can and likely will include inconsistent beliefs about meaning. For example, one framer might believe that "necessary and proper" means "convenient" and another might believe that it means "essential," but it cannot mean both, because things that are convenient can be nonessential. Second, on the superset interpretation, even a single framer or ratifier with a deviant understanding would add to the meaning of the Constitution. If every framer but one, thought that "high crimes and misdemeanors" meant "offenses against the criminal law of some state" and one framer thought it meant "offenses against the criminal law of some state or the criminal law of England," then the meaning would include "offenses against the criminal law of England" because that superset includes the mental states of each and every framer and ratifier. Returning to the prior example, the superset of meanings of the hypothetical equality clause would include both the a prohibition of discrimination against racial minority groups and a prohibition against discrimination on the basis of race, creating potentially contradictory rules as applied to affirmative action programs.

(iv) Conventional Semantic Meaning

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[154] *See supra*, Part III.A, "Semantics and Normativity," p. 29.

[155] A defender of the enactment group theory might try to bite the bullet and argue that constitutional provisions are indeed "meaningless" until enacted, but this bullet will not allow itself to be bitten. Of course, constitutional amendments are "meaningless" in a sense until enacted—they lack meaning *in the sense of* legally effective content. But it is just plain silly to think they have no meaning *in the semantic sense*. Even before ratification, constitutional amendments communicate semantic content. They are debated and discussed. They can even shape behavior as actors who anticipate the enactment of a constitutional provision plan their behavior accordingly. For example, it is plausible to think that the market price of shares in firms that would produce alcohol would have been affected by the 18th Amendment to the United States Constitution, even before formal ratification occurred.

There is a fourth possibility. The key to the fourth possibility is Kay's reference to "mutual communication of individual intentions." What is meant by "mutual communication?" If we were talking about a group engaged in explicit discussion, the answer is simple. If we talk about the meaning, and reach an agreement, then we can have identical semantic intentions. But the circumstances of constitutional utterance do not allow for this solution. Ratification conventions were mass events, and there were multiple conventions. Under these circumstances, explicit agreement on identical semantic content is impossible, and such explicit agreement did not, in fact, occur. But this does not imply that shared intentions are impossible. Shared intentions are possible if the parties rely on conventional semantic meaning, but this solution converts Kay's theory to original public meaning originalism.

In the end, the only viable interpretations of Kay's defense of original intentions originalism transform his view into a version of original public meaning originalism is no accident. Collective speakers' meaning requires that the collective speakers intend their collective audience to collectively understand the collective utterance on the basis of audience's collective recognition of the collective speakers' collective intentions. All those "collectives" are in immediately prior sentence because the "common knowledge"[156] of the speaker's intentions must be shared for collective speakers meaning to satisfy the success conditions for communication. There is a way that this trick can be accomplished short of express or tacit agreement among the collective speakers and the collective audience: the trick can be accomplished through reliance on conventional semantic meaning. Given that express or tacit agreement did not (and could not) occur in the case of the United States Constitution, it follows that its meaning is its clause meaning and not its framers meaning.

(2) The Collective Recognition Problem

The collective recognition problem is the direct correlate of the collective intentions problem. It flows directly from the requirements of speakers meaning. Speakers meaning is conveyed when the audience grasps the meaning on the basis of its recognition of the speaker's intention. When an individual speaker utters a sentence in direct proximity to a single listener, successful illocutionary uptake requires that one listener grasp the intended meaning. When the audience of an utterance consists of many individuals, the precondition for what we might call "total success" is that each and every member of the audience recognizes the utterer's intention. In the context of the Constitution, the requirement for total success would have to be that the collective utterers intended a hugely disparate group of citizens and officials over an extended period of time would all grasp identical intentions. That is the speaker must have intended that meaning be conveyed on the basis of "common knowledge"[157] of relevant intentions by all speakers and audience members.

Total success would not be required for constitutional communication to achieve its goals. Substantial misunderstanding by some judges, officials, and citizens could be consistent with sufficient understanding for the Constitution to serve the settlement function. Instead what would have been required is an approximation of total success. To the extent that the framers could not have believed that the conditions of constitutional utterance could result in something

[156] *See supra,* p. 36, text accompanying note 136.
[157] *See supra,* p. 36, text accompanying note 136.

approximating collective recognition of identical intentions, then they could not have understood their utterance as communicating framers meaning.

(3) The Publicity Problem

For framers meaning to succeed, the framers intentions must have been public. But as we know, the conditions for ratification and interpretation of the Constitution in the framing era did not satisfy the publicity condition. The records of the Philadelphia Convention were not available to the ratifiers, the first Congress, members of the first Cabinet, or the judges first appointed pursuant to the Judiciary Act of 1789.[158] Likewise, if we view the ratifiers of the constitution to be the relevant utters, the records of the ratifying conventions were unavailable as well. This is the familiar problem of "secret intentions." If the constitution was uttered under conditions such that the audience at whom the constitutional utterance was directed could not have recognized the framers intentions, then framers meaning could not have been conveyed. Common knowledge requires publicity.

(4) The Intentional State Problem

The final problem is that framers meaning requires a very particular intentional state on the part of the framers. It requires that the framers have intended that their audience grasp their intentions. But if Jefferson Powell is right and the original understanding of original intent was that the framers intentions were not understood as the meaning of the constitution, then the conditions for the possibility of framers meaning are not satisfied.[159]

This point is subtle, and its force may not be immediately apparent. The success conditions for framers meaning require that the framers have intended that the constitutional audience understand the semantic content of the constitution on the basis of their recognition of the framers intention that they do so. This requirement is very specific, and it implies that not just any intentions will do for framers meaning to account for the possibility and actuality of constitutional communication. As lawyers would say, a *specific intent* would be required. Although there might be a dispute about Powell's thesis, to my knowledge no one has produced evidence that the specific intent required for framers meaning can be found in the historical record. For example, it might be the case that there is evidence that purposes that formed part of the publicly available context of constitutional utterance would have been considered given the practices of judicial interpretation (and other forms of interpretation) in the framing era. Such evidence is consistent with the clause-meaning thesis, and does not provide the right kind of evidence for the intention required for framers meaning to get off the ground.

The intentional state problem is an independent problem with framers meaning. This objection provides a sufficient reason for rejecting original intentions originalism as a theory of the semantic meaning of the Constitution. But in addition to its status as an independent problem, the intentional state problem interacts with each of the prior three problems. The required complex intentional state must have been shared by all of the framers, recognized by the divergent addressees, and publicly available. But none of these conditions appear to have been met.

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[158] The United States Judiciary Act of 1789 (1 Stat. 73).

[159] H. Jefferson Powell, *The Original Understanding of Original Intent*, supra note 54.

e) The Success Conditions for Framers Meaning Were Not Satisfied

More could be said, but enough has been said to make the conclusion intelligible. The success conditions for framers meaning were not met when the United States Constitution was proposed, ratified, and implemented. So the meaning of the Constitution cannot be understood on the model of speakers meaning. This entails the further conclusion that the semantic content and illocutionary force of the Constitution is not its framers meaning.

One more thing. This conclusion is not the consequence of a normative argument. The model of framers meaning fails because the conditions for success of framers meaning were not satisfied as a matter of historical fact. The success conditions derived, not from a normative theory of constitutional practice, but from general considerations in the theory of meaning. It is *not* that we *chose not* to attribute framers meaning to the Constitution. Rather, it is that the Constitution *does not have* framers meaning.

2. Clause Meaning

The alternative to framers meaning is clause meaning. In this subpart, we will develop an account of clause meaning in the following steps. As a first approximation, we will take clause meaning as the semantic and pragmatic equivalent of original public meaning originalism. This account will be supplemented by a second approximation, which views clause meaning as the constitutional equivalent of sentence meaning (or expression meaning). Then the first and second approximations will be modified in three ways: (1) the notion of constitutional context will modify the Gricean notion of "timeless" meaning, (2) the notion of a division of linguistic labor will be deployed to reconcile "public meaning" with the notion of a constitutional "term of art," (3) the notion of constitutional implicature will be introduced to make room for the possibility that the illocutionary force of the constitution goes beyond the semantic content of the constitutional text, and (4) the notion of constitutional stipulation creates room for the possibility that the constitution itself creates terms of art such as "House of Representatives."

a) First Approximation: Clause Meaning as the Semantic Equivalent of Original Meaning Originalism

How can we understand clause meaning? One approximation is provided by original public meaning originalism. As Blackstone wrote, "[w]ords are generally to be understood in their usual and most known signification."[160] The original-meaning version of originalism emphasizes the meaning that the Constitution (or its amendments) would have had to the relevant audience at the time of its adoptions. Thus, the relevant question in the recognition or discovery[161] of clause meaning is, "How would the Constitution of 1789 have been understood by a competent speaker of American English at the time it was adopted?" This question points us to ordinary and conventional meanings of the words and phrases of the Constitution. Rather than assigning these words and phrases special or idiosyncratic meanings based on the secret and divergent intentions of multiple authors, an ordinary member of the public would have been required to look to common usage and public meanings.

[160] 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES 59-61 (1803).

[161] The phrase "recognition or discovery" is chosen with care and used in preference to "determination" or "attribution" in order to convey the factual nature of the inquiry.

We (twenty-first century citizens and officials) are not ordinary members of the public of 1789: contemporary American English is not identical to late-eighteenth century American English. In many cases particular, however, the contemporary meanings of the types corresponding to constitutional utterances tokens will be identical to the meanings at the time of utterance. In theory and practice, however, there can be and are cases of divergence. For us to determinate whether there is divergence with respect to a particular clause, we would be required to consult evidence as to late eighteenth-century usage. So, for example, we might consult newspapers, political pamphlets, and a variety of other general sources for evidence about the meaning of particular phrases.

We might also consult evidence that is directly connected to the drafting and ratification of the Constitution. For example, the debates at the Constitutional Convention in Philadelphia may shed light on the question how the Constitution produced by the Convention would have been understood by those who did not participate in the secret deliberations of the drafters. The ratification debates and Federalist Papers can be supplemented by evidence of ordinary usage and by the constructions placed on the Constitution by the political branches and the states in the early years after its adoption.

One more point about the first approximation. The notion of clause meaning is deployed as part of an account of the semantic content and illocutionary force of the constitution. The theories called "the New Originalism," "original meaning originalism," or "public meaning originalism" may have semantic and illocutionary components, but those components are embedded in theories with explicit normative content. The point of the first approximation is to extract the implicit semantic and pragmatic claims from the New Originalism. The extracted claims are related to but not identical with the claims made by the New Originalists themselves.

b) Second Approximation: Clause Meaning as the Constitutional Equivalent of Speakers Meaning

The problems with framers meaning suggest that our understanding of constitutional meaning should be modeled on Grice's conception of sentence meaning and not on speaker's meaning. Just as the speakers meaning of a Constitution can be called "framers meaning," likewise, the "sentence meaning" (or "expression meaning") of a Constitution can be called "clause meaning." Clause meaning is the semantic content and illocutionary force that the various provisions would be understood as conveying, on the assumption that the clause was written with disparate intentions and with knowledge that it would be ratified and interpreted by readers who would have very limited access to information about the framing.

Grice cashed out sentence meaning or expression meaning in terms of conventional semantic meaning. The second approximation of clause meaning adopts this analysis, and hence can be stated as the view that the clause meaning of the constitution is the conventional semantic meaning of its words and phrases. But as soon as we put that formulation on the table, we also need to note that it will require modification. The discussion that follows qualifies the first and second approximations.

c) Modifications of the First and Second Approximations

The first and second approximations would limit constitutional meaning to the conventional semantic meaning of the constitutional text. That view would is a considerable improvement

over framers meaning, but these are only approximations. A fuller version of the conception of clause meaning requires the introduction of four modifications.

(1) First Modification: The Publicly Available Constitutional Context of Constitutional Utterance

The first modification is a function of the fact that the act of constitutional utterance occurred in a context.[162] The framers and ratifiers of the Constitution would not have assumed that the Constitution would be interpreted by readers who had no information about the context of utterance. Certain features of the context could be assumed to be accessible (under normal conditions) by anyone who would read the Constitution in the course of what we might call "American constitutional practice," that is, as part of the activity of interpreting and construing the Constitution in the role of official or citizen.[163] Not every feature of the context of constitutional utterance could have been assumed to be publicly available in this way. The whole context of constitutional utterance consists of a vast array of facts, ranging from the trivial to the fundamental. But some of these facts would have been assumed by the framers and ratifiers to be publicly available to everyone who engages in American constitutional practice. Call these facts "the publicly available context of constitutional utterance" or "the public context" for short. The precise contours of the public context can only be defined by careful inquiry, but one element is indisputable: the publicly available context of each individual clause includes the whole constitutional text.[164]

The public context is relevant to clause meaning in the following way. Given that framers and ratifiers believed that readers engaged in American constitutional practice would know the public context and that they would also know that the framers and ratifiers would believe that they would have such knowledge, the public available context satisfies the conditions for common knowledge and can successfully determine clause meaning. Here is an example of a fact that lies within the domain of the public context: the constitutional text is the text of the

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[162] This point is clearly made by Jack Balkin. *See* Balkin, *supra* note 78, at 16 n. 30:

> Ronald Dworkin's distinction between "semantic originalism" and "expectations originalism," Dworkin, Comment in A Matter of Interpretation, at 116, may be a little misleading here. The term "semantic originalism" might suggest that Dworkin is making a distinction between semantics– the dictionary definitions of words-- and pragmatics– the meanings of words in use or context. The problem is that original meaning-- either in Dworkin's sense or mine-- cannot be limited to semantics. It is clearly also about pragmatics, that is, meaning in use and context. For example, Dworkin agrees that if we discover that certain words like "bill of attainder" were employed as terms of art, we must use that specialized meaning and not the dictionary definition of the individual words employed. Dworkin, Reflections On Fidelity, 65 Fordham L. Rev. 1799, 1806-1808 (1997). That is a claim about pragmatics, not semantics. In like fashion, we need to know whether, in context of use, what seems to be abstract language in the constitutional text (say of the Fourteenth Amendment's Equal Protection Clause) is attempting to embrace an abstract principle, or whether it was understood in context at the time to refer to a laundry list of relatively specific applications. That too, is a question of pragmatics rather than semantics.

For reasons that are made clear in text, I do not agree with Balkin's rough and ready definition of semantics, but the thrust of this passage is consistent with the general position articulated herein.

[163] Of course, one can imagine possible worlds in which the public context of constitutional utterance would become lost because of some science-fiction calamity that destroyed all the relevant records and memories. These possibilities are non inconsistent with an assumption that in the actual world, some elements of the context of constitutional utterance could be expected to remain accessible as long as the Constitution remained in force.

[164] *See infra* Part III.H.2.a)(3), "Constitutional Holism," p. 109.

Constitution of the United States—the nation state that came into existence as a result of the Revolutionary War between the American Colonies and Britain. Importantly, the publicly available context may include facts about the general point or purpose of the provision (as opposed to "the intention of the author") and those facts may resolve ambiguities.[165]

A full account of clause meaning would include a theory of the criteria for inclusion in the set of facts that constitute the publicly available context of constitutional utterance. Application of the conception of clause meaning to particular issues of interpretation and construction would require the identification of those aspects of the public context that are relevant to the issue at hand. On this occasion, I will provide neither the criteria nor an enumeration of the facts that meet the criteria. Rather, the limited purpose of this discussion is to introduce the public context as a modification of the conception of clause meaning.

Given the notion of the publicly available context, we can give a more precise formulation of the notion of the semantic content of a given constitutional clause:

> The semantic content of a constitutional clause (CC) in the natural language English (E) relative to the publicly available context of constitutional utterance (PAC) is found by taking the semantic values of the parts of CC and combining them in accordance with the semantic and syntactic composition rules of E.[166]

The parts of a clause are the meaningful units of meaning, either words or phrases. If this formulation seems inaccessible because of its mode of expression, here is a paraphrase. To understand what a clause of the constitution means, (1) look at the ordinary meaning of the words and phrases, (2) see how they combine given the rules of English syntax, (3) consider the context, including the whole text of the Constitution and the circumstances of its adoptions that the contemporary and future readers could be expected to know. The first modification focuses on the third element of this paraphrase.

* * *

Originalists are sometimes accused of ignoring context, but that way of framing the issue is far too simple. Context isn't all or nothing. To get clear about the proper role of context in the recognition or discovery of semantic content, we need a theory of meaning and an account of the role of context that is sensitive to the circumstances of communication. Perhaps it is just too cute to say: "we must contextualize the role of context," but that way of saying it gets to the heart of the matter. Semantic Originalism both offers a theory of semantic content and explains both why context matters and which features of context contribute to meaning in ways that are consistent with an account of the possibility conditions for the success of constitutional communication.[167]

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[165] As a consequence, the theory of clause meaning does not suffer from a "missing step" problem. *See* Abner Greene, *The Missing Step of Textualism*, 74 FORDHAM L. REV. 1913 (2006). Assessment of clause meaning does not require arbitrary exclusion of any information about the context of utterance—all such evidence can come in, but only in order to determine the conventional semantic meaning in light of the publicly available context.

[166] Following Herman Cappelen, *Semantics and Pragmatics: Some Central Issues* in CONTEXT SENSITIVITY AND SEMANTIC MINIMALISM 3, 4 (Gerhard Preyer & Georg Peter eds., Oxford: Oxford University Press 2007).

[167] For an example of the criticism, see Saul Cornell, *The Original Meaning of Original Understanding,* 67 Md. L. Rev. 150, 152-53 (2007).

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(2) Second Modification: The Division of Linguistic Labor and Terms of Art

The first approximation treats clause meaning as original public meaning and the second approximation focuses on conventional semantic meaning. Both approximations elide the possibility that some of the words and phrases that comprise the constitutional text are "terms of art," the meaning of which is accessible only to a specialist audience. Blackstone put it this way: terms of art "must be taken according to the acceptation of the learned in each art, trade, and science."[168]

For example, the phrase "letters of marque and reprisal"[169] might not have been familiar to the ordinary citizen or common human at the time the Constitution was drafted, ratified, and put into effect. If the meaning of the Constitution is limited to the ordinary public meaning of the words and phrases, then any terms of art included in the constitution would fail to have any meaning at all and constitutional communication would misfire. It appears, however, that constitutional communication succeeded despite the inclusion of terms of art. Is this a problem for Semantic Originalism?

The solution to this problem of terms of art is to recognize a division of linguistic labor.[170] A full specification (or theory) of the division of linguistic labor is beyond the scope of this paper, but the intuitive idea is simply. When a member of the public at large encounters a constitutional term of art, her understanding of its meaning can be described as involving a process of deferral. Consider the following example. An ordinary citizen reads the phrase "letters of marquee and reprisal," and thinks, "Hmm. I wonder what that means. It sounds like technical legal language to me. If I want to know what it means, I should probably ask a lawyer." That is, ordinary citizens would recognize a division of linguistic labor and defer to the understanding of the term of art that would be the publicly available meaning to those who were members of the relevant group and those who shared the understandings of the members of the relevant group.

This solution requires either that each constitutional term of art refer us to a single group, or to a group of groups that share the same understanding of the term of art. For example, if both sailors and lawyers shared the same understanding of "letters of marquee and reprisal" then constitutional communication could succeed. If different groups had different understandings of the same phrase, constitutional communication could still succeed, assuming the publicly available context of constitutional utterance allowed resolution of the resulting ambiguity.

The contribution of the division of linguistic labor to Semantic Originalism is vividly illustrated by consideration of the controversy over John McCain's eligibility for the presidency as a "natural born citizen" given his birth to American citizens in Mexico.[171] Article II of the Constitution provides:

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[168] BLACKSTONE'S COMMENTARIES, supra note 160, at 59.

[169] U.S. Const. Art. I, Sec. 8.

[170] The idea of a division of linguistic labor is usually attributed to Hilary Putnam. *See* Hilary Putnam, *The Meaning of 'Meaning'* in PHILOSOPHICAL PAPERS, VOL. 2: MIND, LANGUAGE AND REALITY (Cambridge University Press, 1985); *see also* Robert Ware, *The Division of Linguistic Labor and Speaker Competence*, 34 PHILOSOPHICAL STUDIES 37 (1978); Mark Greenberg, "Incomplete Understanding, Deference, and the Content of Thought" . UCLA School of Law Research Paper No. 07-30 Available at SSRN: http://ssrn.com/abstract=1030144.

[171] The discussion that follows is adapted from Lawrence B. Solum, *And yet more on "natural born citizens*," Legal Theory Blog, March 4, 2008, http://lsolum.typepad.com/legaltheory/2008/03/and-yet-more-on.html and Lawrence B. Solum, *McCain, Natural Born Citizens, and Originalism*, Legal Theory Blog, February 29, 2008,

> No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.[172]

Is McCain a "natural born citizen"? Without an account of semantic content that looks to the linguistic division of labor at the time of framing, the phrase is difficult to interpret. The phrase "natural born citizen" does not have a distinctive sense in contemporary usage, and readings informed by contemporary usage of the individual words seem absurd. Does "natural born" refer to "natural childbirth" where the contrast is with birth by Caesarian section or with the aid of painkillers and forceps? If contemporary usage were the only limit on interpretation, this could be the meaning of the clause, but no one has seriously suggested that this is *meaning* of the provision.

For example, we might speculate that linguistic practice at the time would have suggested the following scenario. The relevant evidence might suggest that the key to unlocking the meaning of the phrase "natural born citizen" is recognition that it had become a "term of art" by 1789 with both a core content and a zone subject to legislative determination. The core content is that "natural born citizens" must include persons who status as citizens accrues at birth: no one whose citizenship resulted from a subsequent event, such as naturalization can be a "natural born citizen" and all persons who were born of citizens on American soil must be "natural born citizens." The zone subject to legislative determination concerns the class of persons that can be added to the category. Possibilities include but are not limited to: (1) persons born of foreign parents on American soil, (2) persons born of American citizens on Foreign soil, (3) persons born of mixed (American and foreign parents). The 14th Amendment handles category (1) and part of (3): hence all persons born on American soil are now "natural born citizens," but Congress has the power, through immigration law, to confer citizenship at birth to other groups, e.g., to category (2). If Congress does confer citizenship at birth, then "natural born citizenship" follows automatically--no further action is required.

If this scenario were correct, then the difficulty with interpreting the phrase in the twenty-first century would be that it is would have become a *lost* term of art. First, "natural born citizenship" would have been a "term of art." "Natural born citizen" is not now, and probably was not in 1789 commonly used by ordinary speakers outside of specialist discourse (e.g., writings and other utterances concerning legal and political status among those learned in the law and political theory). The phrase is itself infelicitous--in the following technical sense: the reference of "natural born citizenship" is not derivable from the concatenated word meaning of the phrase. "Natural born citizens" are not citizens whose birth is natural. Indeed, the term natural makes a nonobvious contribution to the meaning of the phrase--apparently being a product of the sense of natural obligation in 17th and 18th century political theory. So "natural born citizen" would have been a term of art the meaning of which was fixed by specialist usage. The meaning of the phrase seems to have changed over time--originally referring only to citizenship acquired at birth

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http://lsolum.typepad.com/legaltheory/2008/02/mccain-natural.html. Extended versions can be found at Lawrence B. Solum, Originalism and the Natural Born Citizen Clause, University of Illinois, Public Law & Legal Theory Research Paper, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1263885 (September 5, 2008) and at Lawrence B. Solum, *Commentary, Originalism and the Natural Born Citizen Clause*, 107 MICH. L. REV. FIRST IMPRESSIONS 22 (2008), http://www.michiganlawreview.org/firstimpressions/vol107/solum.pdf.

[172] U.S. Const. Art. II.

by persons born of native parents on native soil and then extending to other forms of citizenship at birth that resulted from legislative acts. *Second, the specialist usage that would have been familiar in 1789 is now lost*--because the phrase is no longer in common circulation among the relevant specialists--immigration lawyers and political theorists.

If "natural born citizenship" is a lost term of art, that would explain why it is now "semantically inaccessible" to modern readers. We just don't know what it means. To determine the semantic content of the phrase, we need to recover the original meaning--the meaning the phrase had at the time of constitutional utterance. We look for public meaning, and discover that the division of linguistic labor in the late 19th century takes us to a specialist discourse. We examine specialist usage during the relevant period and recover the lost semantic content. This case of semantic opacity illustrates what we might call the "inescapability of originalism." Without resorting to originalist investigation, "natural born citizenship" lacks meaning. The core insight of originalism, that semantic content is fixed at the time of utterance, when combined with the division of linguistic labor, is the key to unlocking the puzzle of "natural born citizenship."

These linguistic speculations are offered for a very limited purpose—to illustrate the second modification of the clause-meaning thesis. It is at least possible that some provisions of the Constitution have semantic content that can only be recovered by positing a division of linguistic labor and the existence of constitutional terms of art. The natural-born-citizenship clause is a plausible candidate for a constitutional term of art, but confirmation of that hypothesis would require a careful examination of the historical evidence.

(3) Third Modification: Constitutional Implicature

The third modification of the two approximations is found in the idea of constitutional implicature. Recall Grice's notion of conversational implicature—we can mean things we do not say. Or to put the same point a bit differently, we can mean things implicitly that we do not say explicitly.[173]

The possibility of implicit meanings is open to constitutions. It is possible that the publicly accessible meaning of the constitution would include illocutionary uptake that is not contained in the semantic content of the constitutional text. For example, in *McCulloch v. Maryland*,[174] Justice Marshall argues that the power to transport and deliver the mail can be implied from the power to establish post offices and postal roads:

> Take, for example, the power "to establish post-offices and post-roads." This power is executed by the single act of making the establishment. But from this has been inferred the power and duty of carrying the mail along the post road from one post office to another. And from this implied power has again been inferred the right to punish those who steal letters from the post office, or rob the mail.[175]

This is a clear example of constitutional implicature—inference from what is said in the text to what is meant but not stated.

Another example of possible constitutional implicature is provided by the Ninth Amendment to the Constitution. The Ninth Amendment reads as follows:

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[173] The treatment here is shallow. For a deeper discussion, see Marmor, *supra* note 127.

[174] 17 U.S. 316 (1819).

[175] *Id*. at 417.

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.[176]

The semantic content of the Ninth Amendment is quite limited. It states a prohibition, "shall not," the scope of which is limited by the syntax of the clause to forbidden constructions, that is, those constructions which deny or disparage rights retained by the people on the basis of the enumeration of certain rights in the Constitution. It does not directly state that the there are "rights retained by the people" it does not forbid the infringement by the federal government of rights retained by the people. But the existence of rights retained by the people and a prohibition on their infringement could be a necessary implication of the Ninth Amendment.

On this occasion, I do not wish to claim that particular instances of constitutional implicature exist, or indeed, that there is even one such instance. The claim that I do wish to make is that if there are instances of necessary constitutional implicature, then those instances are part of the meaning of the Constitution and they should be understood as within the "theory of clause meaning" as that theory is advanced in this article. I use the locution "within the 'theory of clause meaning'" deliberately—as distinct from "within the clause meaning"—to emphasize that constitutional implicature is a distinct phenomenon which is conceptually independent of clause meaning itself.

(4) Fourth Modification: Constitutional Stipulations

Some words and phrases used in the Constitution could not have had conventional semantic meanings that predate the Constitution itself. For example, the Constitution of 1789 uses "Congress of the United States," "Senate," and "House of Representatives." The Constitution brought these institutions into being and named them. So the Constitution of 1789 gives these words and phrases newly stipulated meanings. "Congress" refers to the legislative body composed of the Senate and the House of Representatives; the Senate and the House are the names for the bodies with prescribed compositions and functions.

Because these entities did not exist prior to the actual implementation of the Constitution of 1789, it cannot be the case that the semantic content of their names ("Congress of the United States," "Senate," and "House of Representatives") was fixed by conventional semantic meaning as of the moments of drafting or ratification. To see this clearly, consider the possible world in which the Constitution of 1789 was ratified but not implemented. (Suppose that the English invaded and successfully reimposed colonial status on the thirteen original colonies.) The term Congress would never have come to refer to the Congress of the United States of America that meets in Washington, because that entity would not have come into being.

The Senate and the House of Representatives were brought into being by the implementation of the Constitution—the actual convening of the first Congress. The relevant provisions of Article I stipulate the conditions for implementation. These meaning of these stipulative provisions—which specify the composition of the House and Senate and their functions—are themselves composed of words and phrases with clause meanings (i.e., conventional semantic meanings or meanings given by the four modifications outlined here.)

[176] U.S. CONSTITUTION amend. 9.

d) The First Restatement of Semantic Originalism: Clause Meaning is the Original Semantic Meaning of the Constitution to the Relevant Audience in Context, Plus Any Implications or Stipulated Meanings

At this point, we can restate the tentative version of Semantic Originalism that is implicit in the discussion so far:

> *Semantic Originalism*: Semantic Originalism is the view that the meaning (semantic content and illocutionary force of the Constitution) is the *clause meaning* of the Constitution at the time of adoption and ratification to the relevant audience, given the division of linguistic labor and the publicly available context, plus any additional content and force that results from necessary constitutional implicature or stipulated meanings.

This statement is tentative and subject to further modification and restatement,[177] but it is sufficiently developed and precise so as to point in the direction that a full development of Semantic Originalism would take.

D. What's In a Name, Take Two: The Sense in Which Clause Meaning is Original Meaning

Is the theory of clause meaning that is offered here fairly described as an originalist view? Is Semantic Originalism (at this stage in the argument, the union of the fixation thesis with the theory of clause meaning) really a form of originalism? As before, the answers to these questions should acknowledge that labels are less important than substance. So long as the discussion is clear and terms are defined, we can stipulate different senses of terms and phrases like "originalism" and "living constitutionalism." If living constitutionalists or other anti-originalists insist on the claim that the theory name "originalism" does not encompass the thesis that the original public meaning of the Constitution provides its semantic content, they may so stipulate. Such stipulations will make communication awkward and misleading to casual readers, but so long as the stipulations are explicit and precise, mutual understanding among scholars will remain possible.

I have already noted that the fixation thesis provides the core content of originalism, and that affirmation of this thesis is essential to the normative arguments used to justify the moral salience of originalism. Because Semantic Originalism incorporates the fixation thesis it is a member of the family of originalist theories. But there are two additional reasons for insisting that any attempt to stipulate that Semantic Originalism is not a member of the family of originalist theories be expressed clearly and justified. First, as a matter of intellectual history the relationship between Semantic Originalism and predecessor views, including the New Originalism or original-meaning originalism is clear and beyond dispute.[178] Semantic Originalism traces its origins to the New Originalism.

Second, as a matter of substantive content, it is clear that the notion of original public meaning that is central to the New Originalism is an internal component of view that is called "Semantic Originalism." If the New Originalism is a form of originalism, then given the

[177] *See infra* V.G, "The Second Restatement of Semantic Originalism," p. 175.

[178] As the author of this Article, I am in a unique position to speak authoritatively about its origins and shaping influences, and there is no doubt that this view grew out of my encounters with both original-intentions originalism and the original-public meaning theories of Barnett and Whittington.

relationship between the substance of Semantic Originalism and substance of the New Originalism, it follows that Semantic Originalism is a form of originalism.

Given these two facts about Semantic Originalism, those who wish to stipulate that it is not an originalist theory owe us both an explanation for their stipulation and a clear acknowledgement that their use of the term originalist involves a stipulated definition that is contested by others who write in the field.

E. The Case for the Fixation Thesis Revisited

We have already examined the case for the fixation thesis. The semantic content of an utterance is fixed at the time of utterance[179] under normal conditions. Because the meaning of words and phrases can change over time, the semantic content of an utterance token is necessarily fixed at the time of utterance. This conclusion is consistent with another fact about meaning: the conventional meaning of an expression type can change over time. Thus, the individual words and phrases that comprise the constitution could have different meanings if they were uttered in different contexts. The phrase "We the People of the United States" would have a different meaning if it were uttered in the Preamble of the United States of Brazil in 1889, but it would simply be a mistake to infer the further conclusion that the phrase "We the People" in the Constitution of 1789 could mean "We the People of Brazil in 1889." This move involves a conceptual confusion between the meaning of utterance tokens and expression types.

Although the meaning of expression types can vary over time, the meaning of an utterance token is fixed by the context of utterance.[180] The Constitution of the United States is an utterance token: a text that was framed and ratified in a particular historical context. The original Constitution itself declares that it was uttered in 1789.[181] Various amendments were uttered when they were proposed and ratified. The semantic content of each clause of the Constitution is fixed at the time of utterance by the conventional semantic meaning of the words and phrases (the expression types). Although this point is expressed in technical language, it expresses a

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[179] The "time of utterance" may be a period rather than a moment in the case of any written text. In the case of the Constitution, there will be gaps between the framing period and the ratification period. The most extreme case of such a gap is the 27th Amendment, which was proposed in 1789 and finally ratified in 1992, more than 202 years later. The typical gap between framing and ratification is much shorter. If linguistic practice were to change during the relevant period, then there might be more than one "conventional semantic meaning." Resolution of this question is not urgent, but as a matter of theory, I am inclined to the view that such changes create irreducible ambiguity to be resolved by a rule of construction. The problem is not urgent because it is likely the case that public understanding at the time of ratification will defer to the earlier conventional semantic meaning: this can be seen as a special case of the division of linguistic labor. In that case, the earlier meaning clear controls given the overall structure of the theory of clause meaning.

[180] *See* L.J. COHEN, THE DIVERSITY OF MEANING 3 (2d ed. 1966):

> A speech has a date and duration, not so its meaning. When a speech is over nothing can change what is meant. What has been said cannot be unsaid, though later remarks can contradict it. Even the ambiguities in this evening's speech must remain such forever, though tomorrow's press conference may clarify the speaker's intentions. Though the speech may be differently translated in different countries or at different periods, no one could judge the correctness of each new translation unless he assumed the meaning of the original speech to remain the same. Though expositions of what has been said can change, they can also be criticized, and the question whether a given exposition is loose or close, fair or biased, accurate or inaccurate, would not arise unless the meaning itself were invariant under exposition.

[181] U.S. Const. art. VII ("Done in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eight seven and of the Independence of the United States of America the Twelfth.").

very simple intuition. The meaning of the Constitution is the meaning of the Constitution of the United States of America as it was framed and ratified in our history.[182] Words and phrases mean in context, and the context includes time and place.

There are, however, circumstances in which the meaning of an expression token can seem to change over time. Recall that when the fixation thesis was first introduced it was illustrated with the example of a twelfth-century letter using the term "deer," which then referred to any four footed mammal.[183] David Meyer suggests the following counter example:

> What if we likened the Constitution not to a letter, but to a tattered, 200-year-old traffic manual specifying the "rules of the road" (or even to a traffic sign at a complicated

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[182] The discussion in Stephen R. Munzer & James W. Nickle, *Does The Constitution Mean What It Always Meant?*, 77 Colum. L. Rev. 1029, (1977), begins with the observation that the meaning of utterance tokens as opposed to utterance types is fixed at the time of utterance:

> [P]hilosophers often think of the meaning of an utterance as being fixed for the present and for the future by the author's language and intent. It is not, of course, problematic to say that change occurs in the meanings of words in a language; the meaning of "wonderful," for example, is now somewhat different from what it was prior to the eighteenth century. But it is problematic to say that an utterance which a particular person made at a particular time can have one meaning at that time and another meaning later.

Id. at 1043-44. Munzer and Nickle argue that fixation does not extend to the Constitution for two reasons, but neither is actually inconsistent with the fixation thesis. They express the first reason as follows:

> The first is that the original document cannot be counted an "utterance" in the usual sense. The standard or paradigm case of an utterance is when one person speaks or writes a sentence on a particular occasion; its meaning is typically a function of the utterer's intentions together with the context and the senses assigned to those words in grammatical combinations in a given language. In contrast, the sentences of the Constitution were products of more than one person (draftsmen, framers, ratifiers) and more than one time (successive drafting, debating, adoption, and ratification stages). No doubt in the process statements were made which are susceptible of being analyzed as standard utterances. But the eventual product is not thus susceptible: if the text of the Constitution is an utterance or set of utterances at all, it is not so in the standard sense. Its original meaning may, it is true, still be a function of the various intentions, contexts, and words that led to it. Yet if so, given the number of persons involved at different times and in different situations, that meaning will be an extraordinarily complex function of those elements.

Id. at 1044. In this passage, Munzer and Nickle provide reasons for rejecting what we have called "framers meaning," but their analysis is consistent with what the "clause meaning." The complexity of the process by which clause meaning is produced does not provide a reason for rejecting the fixation thesis.

Munzer and Nickle express their second objection to the fixation thesis as follows:

> The second reason is that the original text serves through authoritative interpreters to give ongoing guidance in changing circumstances. Perhaps the idea that the meaning of a text composed of standard utterances cannot change is satisfactory where no one is empowered to make official determinations of its meaning, or where the language is not intended to provide a reason for action, or where directives supplied by the text apply only in a finite number of static situations. But if we turn our attention to law, it *1045 does not seem so strange that the current meaning of a constitutional provision should be the result of the activities of both the authors and the officials who applied it. Authoritative interpreters, in their institutional capacity of determining what a provision means in unanticipated situations, supplement or modify the meaning or content of the provision.

Id. at 1044-45. Although this argument may (on the surface) appear to argue against the fixation thesis, that appearance may result from Munzer and Nickle's failure to appreciate the ambiguity in the meaning of "meaning" and the distinction between constitutional interpretation and constitutional construction. They are absolutely correct to observe that constitutional construction by "authoritative interpreters" can change the legal consequences that result from the semantic content (or linguistic meaning) of the constitutional text, but from that fact it does not follow that the meaning (in the semantic sense of "meaning") has changed.

[183] *See* Part I.A.1, "The Fixation Thesis: The Semantic Content of Constitutional Provisions is Fixed at the Time of Framing and Ratification," p. 3.

> intersection)? Suppose that, as with "deer," the meaning of some key words used in the sign or manual had evolved over many generations, so that readers today would universally (and perhaps unwittingly) give the word a different meaning than its original speakers or sentence meaning. Suppose also that traffic patterns have evolved to conform to the new understanding, so that the common (though non-original) understanding of the text succeeds in regulating traffic smoothly with a minimum of accidents, even though the traffic now flows in a different pattern from what the original meaning of the text would have directed. Would it be a "factual error" for drivers to adhere to the modern understanding of the traffic sign or manual? If the goal of reading the text is to successfully navigate traffic without collisions – or, from society's point of view, to maximize overall traffic efficiency and minimize accidents – I would guess not.[184]

This is a particularly marvelous hypothetical, because it illustrates the manner in which the linguistic meaning of an utterance can seem to change in a way that would be inconsistent with the fixation thesis. To see why this *seeming* change is not *real*, we need to examine Meyer's hypothetical in some detail.

The key to the example is the assumption that the conventional semantic meaning of the hypothetical 200-year-old traffic manual changed gradually over many generations. Such changes in conventional semantic meaning do occur. But the mechanism of change is important: meanings change because of accumulated errors. Someone uses a word or phrase in a deviant sense. The mistake goes uncorrected and propagates until it gradually becomes the standard usage. If this happens gradually, it can be the case that very few speakers are aware that the change in meaning is underway. During a transitional period, the two meanings may even exist side by side in slightly different groups of users without members of the standard-usage group even recognizing the emergence of the deviant-usage group. Over time, the old meaning gradually disappears and the new meaning becomes standard.[185]

In Meyer's hypothetical, the new meaning assigned to the expression types (the words and phrases that make up the manual) are attributed to the utterance token (the manual itself), because of a linguistic mistake. New readers of the manual are unaware of the change in meaning—indeed, their lack of awareness is what enables the change in meaning to occur. Believing that the new sense of the words and phrases is the linguistic meaning of the old text, their driving behavior conforms to their linguistic mistake rather than the actual linguistic meaning of the text. They believe the new meaning is the correct meaning, but this belief results from their lack of epistemic access to the relevant linguistic facts. That is, they lack access to the conventional semantic meaning of the manual at the time of utterance. *The crucial fact is that the beliefs of the new readers of the manual are not that the meaning of the manual has changed: rather, the new meaning is acquired because of mistaken beliefs that the meaning has stayed the same.*

The crucial role of the mistakes in creating the illusion of changed meaning can be brought out in another way, by revising Meyer's hypothetical. Here is the revised version:

> Once again imagine a 200-year-old traffic manual specifying the "rules of the road." This time let us suppose that traffic patterns have changed so that they no longer conform to the conventional semantic meaning of the text. The universal pattern is driving on the

[184] Email from David Meyer to Lawrence Solum, May 14, 2008.

[185] Examples are collected in Steinmetz, *Semantic Antics*, *supra* note 8.

> right, although the traffic manual requires that that all vehicles drive on the left hand side of the road. Officials recognize that adherence to the rule in the manual would be dangerous, but changing the manual is very difficult, so they post signs that with arrows that direction of traffic: "THIS IS NOW THE "NEW LEFT" SIDE OF THE ROAD. DRIVE ON THE "NEW LEFT." The linguistic practice is self-consciously aware of the distinction between the old and new ways of talking. Children are taught "old right is new left." No one thinks that the *linguistic* meaning of "left" in the manual is "new left": the whole point of saying "new left" is to create a newly stipulated *legal* meaning. In other contexts, the words "right" and "left" retain their old meaning, but there is now a legal fiction that "left" means "right" in the traffic manual.

The difference between the two versions of Meyer's hypothetical is that in the original version, contemporary readers lack access to the linguistic facts (they don't know what the traffic manual really means), but in the revised version, they have access to such facts. In the original version, there is a linguistic mistake. In the revised version, no one makes a linguistic mistake, but practice is informed by a legal fiction.

What would happen if the lost meaning of the manual were rediscovered in the original version of Meyer's hypothetical? Meyer didn't specify the particular pattern of linguistic mistakes, so let us suppose once again that the original meaning was drive on the *left* hand side of the road, but through some wildly improbably chain of events, the word "right" had switched meanings with the word "left." If the original meaning were rediscovered and brought to the attention of contemporary readers and drivers, they would see that their current beliefs about the linguistic meaning of the old traffic manual were mistaken. But this would not be inconsistent with Meyer's observation that if we want to maximize traffic efficiency and minimize accidents, we have good reasons to use the content of the modern reading and not the semantic content of the text as a guide for action. Adhering to the modern reading would not retroactively change the linguistic facts that fixed the semantic content of the text, but it does give us reason to treat the text as if it had a different meaning. We might even say, "The meaning has changed." But if we said that, it would be shorthand for the more complex reality: (1) the meaning of the expression types in the manual have changed, (2) lots of readers acquired false beliefs about the linguistic meaning of the manual as a result, and (3) there are good reasons to now treat the manual as if means what it would have meant if it had been uttered after the change in linguistic practice had occurred.

Meyer's offered his hypothetical as a counter to the example of the change in meaning of the word "deer"—introduced with the fixation thesis above.[186] What distinguished Meyer's traffic-manual example from the twelfth-century letter is the fact that the linguistic mistake became embedded in a social practice, which in turn gave us good reason to treat the text as if the mistake about its meaning was not a mistake at all. This same pattern could occur in the case of a constitution. The expression types (the words and phrases) could change meaning over time. It is at least possible that judges and other officials would have good legal or moral justification for adopting an "amending construction" that reads a constitutional provision as if it had been uttered after the meaning had changed. But if they do adopt such an amending construction, they will not have changed the linguistic facts. The amending construction is something we do about those facts—it is a *legal construction* and not a *semantic interpretation*. In a sense the most

[186] *See* Part I.A.1, "The Fixation Thesis: The Semantic Content of Constitutional Provisions is Fixed at the Time of Framing and Ratification," p. 3.

important point made in "Semantic Originalism" is that the two questions ("What is the linguistic meaning of a text?" *and* "What rule of law should be constructed given that linguistic meaning?") need to be kept distinct if conceptual confusion is to be avoided.[187]

Lawrence Lessig has articulated a point about meaning that is related to the point expressed by Meyer's traffic-manual hypothetical. Lessig's argument is phrased in terms of the importance of context to meaning. Here is the relevant passage from Lessig's essay, *Fidelity in Translation*:[188]

> The lawyer reads normative texts. What distinguishes normative texts from other texts is that normative texts are not just read in context, but are also applied in context. A tort system, for example, may have a statute that says, "Exercise reasonable care." As applied in, say, the context of authorship, a court could conclude that D, who drove sixty-five miles per hour down a narrow, curving road and caused an accident, did not exercise reasonable care, and is therefore liable. The text's meaning (the meaning of the words "exercise reasonable care") is derived against the original context; the application's meaning (D is liable) is derived against the original context as well. In that original context we can say that the application's meaning must be consistent with the text's meaning.
>
> If we speak of the application's meaning, then we must consider the application itself to be a text. And as with any text, its meaning is a function of its context. Here, then, begins the problem faced by the two-step. For while contextualism teaches that we read the original text in the original context, we have no choice but to make an application, not in the original context, but in the current context. If the original and current contexts differ, then the meaning of the same application in the two contexts may differ as well. So again (and obviously), if in the second context, D was driving sixty-five miles per hour down the same road that has been straightened and widened to standards of a major artery then our application of the text (D is liable) should be different (D should not be liable). And if we applied the text in the second context just as we applied it in the first context, the application in the second context would be inconsistent with the meaning of the text in the first.[189]

The key to understanding Lessig's argument is to recall the distinction between three senses of the word meaning:

- *Semantic or linguistic meaning* refers to the semantic content of an utterance.
- *Applicative meaning* refers to the application of a general utterance to a particular case.
- *Teleological meaning* refers to the purpose for an utterance.[190]

Lessig's remarks about "meaning" and context use the word "meaning" in the both the semantic and applicative sense. Lessig emphasizes that legal texts "are applied in context" and the difference in "meaning" he identifies is a difference in application of legal texts and not a difference in their semantic content. Indeed, his reasonable care example recognizes that differences in application must be consistent with "the meaning of the text": to make sense of

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[187] See *infra*, Part III.A, "Semantics and Normativity," p. 27; Part III.H.1, "The Normativity Objection: Attempts to Collapse the Distinction Between Normativity and Semantics," p. 91.

[188] Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993).

[189] *Id*. at 1184.

[190] *See supra* Part I.A.1, "The Fixation Thesis: The Semantic Content of Constitutional Provisions is Fixed at the Time of Framing and Ratification," p. 3 text accompany note 5.

Lessig's argument, we need to assume that he means that the *applicative meaning* of text in the context of application must be consistent with the *semantic meaning* of the text in the context of utterance.

Some readers may attempt to resist the fixation thesis by appealing to the apparent ability of readers to assign a new meaning to old texts.[191] For example, we could say that the phrase "domestic violence" has a contemporary sense in which it means "spouse abuse." If the Supreme Court stipulated that this was the meaning of "domestic violence" in the Constitution[192] and if other officials and citizens acquiesced in the newly stipulated meaning, the legal effect of that phrase in the Constitution would be determined by the new meaning. This possibility raises a number of distinct questions, and it is very important that the questions be carefully distinguished, one from another, in order to avoid conceptual error.

If the Supreme Court announced that it will act based on a newly stipulated meaning for a word or phrase in the Constitution, the Court would not thereby alter the semantic content of the utterance token—in the case of "domestic violence," the Constitution of 1789. The reason that the Supreme Court today cannot change the semantic content of an utterance made in the past is that such an act is impossible. Five votes can accomplish much, but they cannot change the past.

The impossibility of present acts changing prior meanings is easy to see from a closely analogous case. Suppose some issue of law were to hinge on the question whether Florida was part of the United States in 1789. The United States Supreme Court could say, "For the purposes our decision, Florida was part of the United States in 1789, and all the legal consequences that would have resulted if that had been the case, are now legally required as a consequence of this decision." This stipulation is contrary to fact or counterfactual, but such counterfactual stipulations are a familiar part of the law. We call them "legal fictions."[193]

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[191] *See infra* Part III.H.2.a)(6), "Readers Meanings," p. 112.

[192] U.S. CONSTITUTION, Art. IV, Cl. 4 ("The United States shall guarantee to every state in this union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence.").

[193] *See* Lon Fuller, *Legal Fictions*, 25 ILLINOIS LAW REVIEW (1930, 1931) , 363, 513, 877 (published in 3 parts); *see also* LON FULLER, LEGAL FICTIONS (1967); LOUISE HARMON, *Falling off the Vine: Legal Fictions and the Doctrine of Substituted Judgment*, 100 YALE L.J. 1 (1990).

When discussing legal fictions and originalism, it is important to correct errors contained in Peter Smith's recent article, Peter Smith, *New Legal Fictions*, 95 GEO. L. J. 1435 (2007). Smith writes:

> Whereas textualism purports to reject the fiction of collective intent, originalism wholeheartedly embraces it. Originalism is a theory of constitutional interpretation that assigns dispositive weight to the original understanding of the constitutional provision at issue, rather than to the different meaning that subsequent generations have ascribed to it. Although there is some debate among originalists over whose understanding matters, there is little doubt that originalists presume that there is--and that it is possible to discern-- one fixed, meaningful, singular meta-original understanding of the Constitution, which originalists seek to discern by reference to historical materials. Originalists presume, moreover, that it is possible to find such an understanding even with respect to questions that the ratifying generation never considered or anticipated.
>
> As discussed above, however, legal realism cast substantial doubt on the assertion that it is possible to discern a collective intent, let alone to reconstruct such an intent for questions that the relevant decisionmaking body did not even consider. Indeed, in the statutory interpretation context, textualists regularly deride such an inquiry as a blatant fiction. To the extent that one accepts this realist criticism, originalism is based on a new legal fiction.

Id. at 1464 (citations omitted). By 2007, when Smith wrote the movement of originalist thought from original intentions to original public meaning was clear. *See, e.g., supra* Part II.E, "Original Public Meaning and the New Originalism," p. 19. Smith's characterization of originalism is misleading given the state of scholarship at the time he wrote. His substantive point about collective intention, although expressed in imprecise language, is close to the

The conventional understanding of a legal fiction is that it does not involve deception: the legal fiction is announced when it is introduced. But no one sensible could think that because there is a legal fiction that stipulates that legal consequences shall flow from a counterfactual assumption that Florida was part of the United States, that it follows that Florida was in fact part of the United States in 1789. Suppose that the Supreme Court were to make the same counterfactual assumption without stipulative language. That might result from an unintentional error or it might result from deliberate deception—lying. No one sensible could think that telling a lie with authority to enforce the legal consequences of the lie makes the lie true.

The power of the Supreme Court to create legal fictions or tell lies about the meaning of the Constitution cannot change the semantic content of the constitutional text. But in the case of constitutional meaning, lawyers and constitutional theorists sometimes confuse the semantic content of a text and the effective legal meaning of the text. Given the institutions of judicial review and vertical stare decisis, the Supreme Court can change the effective legal meaning of the Constitution.[194] The Supreme Court could, for example, adopt "spouse abuse" as the meaning of the phrase "domestic violence." But is simply an error to draw from this fact the further conclusion that the semantic content of the Constitution of 1789 is thereby changed. The Supreme Court cannot do magic. Legal fictions and lies do not change semantic facts.[195]

Resitance to the fixation thesis might be motivated by one of two possible misunderstandings of the implications of the thesis. The first misunderstanding could arise through a confusion of meaning in the semantic sense with meaning the applicative sense. The fixation thesis claims that *semantic content* is fixed at the time of constitutional utterance. This is a claim about meaning in the semantic sense (linguistic meaning), and it is not a claim about meaning in the applicative sense. This point is fundamental to the New Originalism, which distinguishes between original public meaning and original expectations about applications.[196] Fixed semantic content does not imply fixed applications for at least two reasons. First, applicative meaning can change because of changes in belief about the facts that determine application: if at T_1 we believe that punishment X is not cruel because we believe it is painless, but at T_2 we learn that X inflicts horrendous pain, then the applicative meaning of cruel could change while the linguistic meaning remained the same. Second, applicative meaning can change given fixed interpretations given changes in construction: given the fact of the undeterdeterminacy of constitutional meaning, many different constructions may be consistent with the semantic content of a vague constitutional provision.

The second misunderstanding could arise by conflating semantic content and legal content. The fixation thesis claims that semantic content is fixed at the time of constitutional utterance, but it makes no claim about the fixation of legal content. The theory offered by Semantic Originalism does make a claim about legal content, but that claim is contained in the contribution

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mark as a criticism of original intentions originalism. When Smith implicitly endorses a form of living constitutionalism that is based on the assumption that the meaning of the constitution is "the different meaning that subsequent generations have ascribed to," *id*., the constitutional text, he is himself engaging in what he calls a "new legal fiction".

[194] The power of the Court to bind lower courts and the political branches does not imply that the Court's actions are *per se* legally valid. *See infra* Part IV.C, "The Contribution Thesis Revisited," p. 137.

[195] As Justice Sutherland put it, "[a] provision of the Constitution, it is hardly necessary to say, does not admit of two distinctly opposite interpretations. It does not mean one thing at one time and an entirely different thing at another time." *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. at 448-49 (Sutherland, J., dissenting).

[196] *See supra* Part II.F, "Original Applications and Original Methods, p. 21 (discussing Jack Balkin's distinction between "original public meaning" and "original expected applications").

thesis and not by the fixation thesis. The contribution thesis depends on social facts about constitutional practice—these facts are historically contingent. We can imagine a possible world in which the fixation thesis is true, but the contribution thesis is false. For example, there could be a possible world in which the rule of recognition would sanction a legal power for the Supreme Court to stipulate that the legal content of a given constitutional provision is different than the linguistic meaning of the provision. In such a possible world, the fixation thesis would hold, although the contribution thesis would have to be modified.

The two potential misunderstandings of the fixation thesis both point to the relative modesty of the thesis. The only claim made by the fixation thesis is that the linguistic meaning (semantic content) of a given constitutional provision is fixed at the time that provision is uttered. This is not the claim that applications are fixed. It is not the claim that constructions are fixed. It is not the claim that legal content is fixed. Resistance to the fixation thesis may be based on false beliefs about the necessary implications of fixation. When the modesty of the fixation thesis becomes clear, the plausibility of the thesis may begin to come into focus.[197]

Perhaps you are still not convinced by the claim made by the fixation thesis. Consider the following questions. If the linguistic meaning (semantic content) of an utterance token is not fixed at the time of utterance, how is communication across time possible? What accounts for the ability of a writer at T_1 reliably to convey meaning to a reader at T_2? Fixation explains how reliable communication across time is possible. Absent fixation, communication becomes impossible in cases in which the conventional semantic meanings of utterance types happen to change. One answer to these questions is to simply deny the premise, either by denying that reliable communication is ever possible or by denying that it is possible when conventional semantic meanings change in the interim. If you are attracted by the latter possibility, consider the following thought experiment. A typewriter repair manual is written in 1920. It uses the term "platen" to refer to the round thing around which the paper moves. Subsequent to 1920, the term "platen" comes to mean "banana skin." Do you really think the manual might be referring to banana skins? And if you do, do you think that we could repair typewriters by replacing the round things with banana skins? Do you doubt that the manual will only communicate its instructions effectively if we read the semantic content as having been fixed? The fixation thesis explains how the repair manual can reliably enable repairs despite changes in meaning, but if you deny fixation, explaining this fact is impossible.

The truth or falsity of the fixation thesis does not depend on its acceptance as a rule of constitutional law. Because the fixation thesis is a claim about the linguistic meaning or semantic content of the constitution, its truth does not depend on the related (but conceptually distinction question) whether constitutional doctrine (the legal content of constitutional law) is similarly fixed. Nonetheless, the Supreme Court has affirmed something like the fixation thesis. For example, in *South Carolina v. United States*,[198] the Court stated: "The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted, it means now."[199] Of course, this pronouncement by the Court may be amgiguous—because the

[197] I am especially grateful to Marcin Matczak for comments on the argument for the fixation thesis. The clarifications advanced in this paragraph and the two paragraphs that precede it were prompted by Matczak's illuminating objections to the fixation thesis.

[198] U.S. 437 (1905)

[199] *Id*. at 448; *see also* Utah v. Evans, 536 U.S. 452, 491 (2002) (Thomas, J., concurring); McIntyre v. Ohio Elections Com'n, 514 U.S. 334, 359 (1995) (Thomas, J., concurring); Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 450 (1934) (Sutherland, J., dissenting); *see also* Paul Brest, *The Misconceived Quest for the Original*

meaning of "meaning" is ambiguous. The fixation thesis expresses one reading of the Court's pronouncement: because semantic is fixed at the time a constitutional provision is adopted, the linguistic "meaning" of the Constitution "does not alter."

F. Interpretation and Construction

Our next move is to revisit the distinction between interpretation and construction. My use of this distinction is deeply indebted to the work of Keith Whittington[200] and to related work by Randy Barnett,[201] but I will deploy their distinction in a framework informed by work in the philosophy of language on semantics and pragmatics. My version of their distinction is closely related to theirs, but it may differ in some respects and I do not claim either that Whittington's version of the distinction is equivalent to Barnett's or that my version is the equivalent to theirs. But whatever subtle differences there may be, the distinction between interpretation and construction expresses an important insight of the New Originalism: interpretation gleans meaning whereas construction resolves vagueness.

1. Distinguishing Interpretation from Construction

This section returns to the distinction between constitutional interpretation (the activity directed at discerning the semantic content of the constitutional text) and constitutional construction (the activity directed at resolving vagueness, ambiguity, gaps, and contradictions and at constitutional implicature). Interpretation and construction are hermeneutic activities. In the context of constitution involving choices, these activities can be performed by officials (including judges, legislators, executives, and administrators) or citizens. Both interpretation and construction are components of constitutional practice—the application of constitutional content to cases.

Although the distinction between interpretation and construction that we shall employ is technical and theoretical, it is related judicial usage, especially in the early history of the Supreme Court. Consider the following passage from *Gibbons v. Ogden*, in which Chief Justice Marshall is considering the argument that the enumerated powers of Congress should be construed narrowly:[202]

> This instrument contains an enumeration of powers expressly granted by the people to their government. It has been said, that these powers ought to be construed strictly. But why ought they to be so construed? Is there one sentence in the constitution which gives countenance to this rule? In the last of the enumerated powers, that which grants, expressly, the means for carrying all others into execution, Congress is authorized 'to make all laws which shall be necessary and proper' for the purpose. But this limitation, on the

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Understanding, 60 B.U. L. REV. 204, 208 n.21 (1980); Christopher R. Green, *Originalism and the Sense-Reference Distinction*, 50 St. Louis U. L.J. 555, 574 (2006); Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1130-31 (2003); Note, *Original Meaning and its Limits*, 120 Harv. L. Rev. 1279, 1280 (2007).

[200] *See* Whittington, *Constitutional Construction*, *supra* note 75; Whittington, *Constitutional Interpretation*, *supra* note 75.

[201] *See* Barnett, *Restoring the Lost Constitution*, *supra* note 74.

[202] 22 U.S. 1 (1824).

> means which may be used, is not extended to the powers which are conferred; nor is there one sentence in the constitution, which has been pointed out by the gentlemen of the bar, or which we have been able to discern, that prescribes this rule. We do not, therefore, think ourselves justified in adopting it. What do gentlemen mean, by a strict construction? If they contend only against that enlarged construction, which would extend words beyond their natural and obvious import, we might question the application of the term, but should not controvert the principle. If they contend for that narrow construction which, in support or some theory not to be found in the constitution, would deny to the government those powers which the words of the grant, as usually understood, import, and which are consistent with the general views and objects of the instrument; for that narrow construction, which would cripple the government, and render it unequal to the object for which it is declared to be instituted, and to which the powers given, as fairly understood, render it competent; then we cannot perceive the propriety of this strict construction, nor adopt it as the rule by which the constitution is to be expounded.[203]

Marshall's opinion agrees with the principle that the Constitution may not be interpreted so as to "extend words beyond their natural and obvious import." He recognizes the possibility that the natural meaning might be given a broad or narrow construction and refers to what we shall call constitutional construction.

For the purposes of this Article, the phrases "constitutional interpretation" and "constitutional construction" have stipulated meanings. This need not be the case for other purposes. A historian of constitutional ideas might seek to understand the distinction as it has developed in constitutional practice or theory. A philosopher of law might find a deep connection between interpretation and semantics, on the one hand, and construction and pragmatics, on the other. A constitutional practitioner might find doctrinal significance in the distinction. But for our purposes, all that is necessary is that the distinction be made with precision and that the stipulated definitions be employed consistently. With that in mind, let us stipulate as follows:

> *Constitutional Interpretation*: The activity of constitutional interpretation has as its object the recognition of the semantic content of the constitutional text.
>
> *Constitutional Construction*: The activity of constitutional interpretation has as its object the supplementation of the semantic context of the constitutional text based on the context of constitutional utterance.

The *key feature* of the stipulated definitions is that "constitutional interpretation" is limited to the recognition or discovery of semantic content or meaning. When constitutional practice requires that rules of constitutional law go beyond semantic content, then the activity of supplying that content is "constitutional construction."[204] Thus, the distinction can be summarized in the following slogan:

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[203] *Id*. at 187-88.

[204] **Note to readers of this draft:** I see a possible terminological confusion that I don't quite know how to handle. When the constitutional context resolves an ambiguity, we could call that "interpretation." The contextual meaning is *the meaning* of the text given the official theory as stated in Part III.C.2.c)(1), First Modification: The Publicly Available Constitutional Context, *supra* p. 54. In the alternative, we could call this a "necessary construction." This would fit the nifty idea that "interpretation" = "semantics" and "construction" = "pragmatics," and the type-token conception of the semantics/pragmatics distinction. On that see Part III.B.1, Typography, Syntax, Semantics, and Pragmatics, *supra* p. 32. Of course, this is just a terminological difference, but I would like to adopt the most felicitous formulation.

> *Constitutional construction begins when the meaning discovered by constitutional interpretation runs out.*

That is, constitutional construction operates after interpretation yields semantic content that is vague, ambiguous, or contains gaps or contradictions. For the interpretation-construction distinction to be meaningful, it must be the case that meaning does run out before providing sufficient content to determine the outcome of issues faced in constitutional practice. *Why does that happen?* This question is our next topic.

2. Occasions for Constitution Construction: Resolution and Implicature

Constitutional construction characteristically occurs in two very general situation types. The first type of situation might be called "resolution." The second type of situation might be called "implicature."

a) Resolution

Constitutions must be construed when their semantic content does not resolve a particular constitutional issue or case—where we recall that constitution involving choices occur for judges, other officials, and citizens. When the constitution is vague, ambiguous, gappy, or contradictory, construction resolves the ambiguities, draws lines to remove vagueness, fills the gaps, and resolves the contradictions.

(1) Vagueness

Unfortunately, the terms "vague" and "ambiguous" are used both in loose talk and in their strict senses. In loose talk, we might think that "vague" and "ambiguous" are synonyms or even that they express a difference in degree.[205] This Article uses "vague" in the strict (or philosophical sense[206]):

> *Vagueness*: A term or phrase is vague if and only if it admits of borderline (or uncertain) applications.[207]

The term "tall" is vague in the strict sense. Some people are definitely short—Danny DeVito. Others definitely are tall--Shaquille O'Neal. But the term "tall" is vague. 5'11 is almost definitely tall for a woman in the United Sates, but it is probably a borderline case for men. "Tall" is not the sort of quality for which there are definite criteria that sort the world into "tall" things and "not tall" things. In other words, "tall" is vague.

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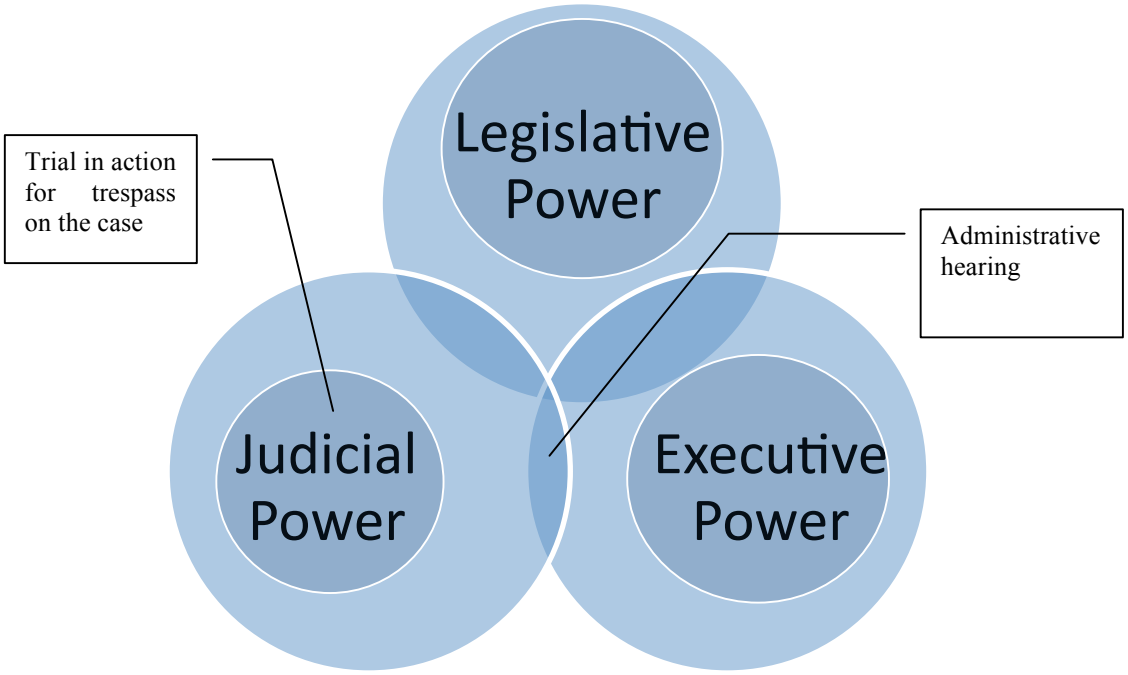
[205] Ambiguity is sometimes defined as having two sense: the first is "doubtful or uncertain" and the second is "capable of being understood in two or more possible senses." Merriam-Webster Online, http://www.m-w.com/dictionary/ambiguous. Vague is defined as unclear or imprecise. Merriam-Webster Online, http://www.m-w.com/dictionary/vague. Neither ordinary usage nor the dictionary definitions capture the strict (or philosophical) senses of these terms.

[206] *See* Legal Theory Lexicon 051: Vagueness and Ambiguity, http://lsolum.typepad.com/legal_theory_lexicon/2006/08/legal_theory_le.html.

[207] A deeper account is offered in TIMOTHY A.O. ENDICOTT, VAGUENESS IN LAW (Oxford: Clarendon, 2000). Endicott identifies two marks of vagueness: (1) borderline cases, (2) a tolerance principle, which states that "a tiny change in an object in a respect relevant to the application of the expression cannot make the difference between the expression's applying and not applying." *Id*. at 33.

The constitution contains a variety of vague terms and phrases. For example, the constitution uses the phrases "executive power," "legislative power," and "judicial power." Is the power to hold an administrative hearing executive or judicial? Arguably, the semantic meaning of these phrases is vague so that their semantic content does not determine their application to administrative hearings. If so, then construction would be required.

Notice, however, that vagueness does not entail that the provisions are indeterminate. For example, it might be the case that conducting a trial on an action of trespass on the case is definitely within the meaning of the phrase judicial power and definitely outside the meaning of the phrases "legislative power" and executive power." If that were the case, then the vague constitutional text would nonetheless determine a case in which it was alleged that Congress's decision to conduct a trial in an action of trespass on the case was unconstitutional as beyond the legislative power. This suggests a picture of vagueness in the case of the relationship among the three powers that can be diagrammed as follows:



In the diagram, each of the three powers has a hard core of determinate meaning—represented by the inner circle. The outer circle (or "penumbra") represents the zone of underdetermination—where the semantic content of the phrase does not determine its application. The shaded overlaps suggest that there are cases in which penumbras of the rules overlap, and a particular action could be characterized as falling under two or more of the three categories. The example of a trial in a trespass action is located in the core of determinate meaning of the phrase judicial power. The example of an administrative hearing is located in the overlapping penumbras of judicial power and executive power.[208]

[208] For a discussion of vagueness and construction in the context of foreign policy and the commander-in-chief clause, see Ingrid B. Wuerth, *International Law and Constitutional Interpretation: The Commander-in-Chief Clause Reconsidered*, MICH. L. REV. (forthcoming), May 25, 2008, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=988509.

In this Article, my official stance towards the actual semantic content of particular clauses is agnostic—I am bracketing all questions about the meaning and application of particular clauses of the United States Constitution. The reason for bracketing is that one must "do the work" in order to determine actual semantic content. If the argument were interrupted by the necessary exegesis and evidence required to demonstrate the actual semantic content of particular clauses, an already long essay would become a multivolume treatise. With that qualification, we can speculate about other constitutional terms and phrases that are vague, such as: (1) freedom of speech, (2) privileges or immunities, (3) rights retained by the people, (4) equal protection of the laws, (5) due process of law, (6) republican form of government, (7) the power to declare war, and so forth.

(2) Ambiguity

A term or phrase is ambiguous in the strict or philosophical sense when it has more than one sense or meaning.[209] "Cool" is ambiguous, because it has one sense related to temperature, another sense related to excitement and emotion, and a third sense related to hipness and style.[210] The word "constitution" is ambiguous, because it can refer to a written or unwritten constitution of an association *or* to the physical makeup of a human or other living thing *or* to an act of establishing.[211] But while the term "constitution" is ambiguous in some contexts, it is not equally ambiguous in all contexts. For example, when used in the capitalized phrase "Constitution of the United States," the term "constitution" does not refer to the physical makeup of a human being; contextual evidence rules out this sense and therefore at least partially disambiguates the term.

The Constitution of the United States uses a variety of words and phrases that would be ambiguous if uttered in a different context. The phrase "we the people" is ambiguous out of context, because it isn't clear to whom the indexical pronoun "we" refers. The phrase "we the people of the United States" is still ambiguous if there is more than one "United States," including the "United States of Belgium," which existed in 1790 and the "United States of Brazil," which was part of the official name of Brazil from 1889 to 1968.[212] The phrase "we the people of the United States" is even ambiguous if we know that it refers to *the people of the United States of America*, because the term "the people" might refer to the human beings who are in the United States or it might be a term of art that refers to *the citizens of the United States of America* or to the citizens as a collective political entity. It may be the case that all of the ambiguity regarding the phrase "We the People of the United States" can be eliminated by resorting to the publicly available context of constitutional utterance.[213] But it is also possible that it is the case that there is ineliminable ambiguity; in that case constitutional construction—going beyond meaning—will be required.

It seems fair to say that most New Originalists (original-public-meaning originalists) believe that most constitutional ambiguities can be resolved by resort to the publicly available

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[209] For discussions of ambiguity, see Michael B. Rappaport, *The Ambiguity Rule And Insurance Law: Why Insurance Contracts Should Not Be Construed Against The Drafter*, 30 GA. L. REV. 171 (1995); Allan Farnsworth, *"Dmeaning" in the Law of Contracts*, 76 YALE L.J. 939, 954 (1967); John T. Valauri, 12 N. KY. L. REV. 567, 570-71 (1985).

[210] http://www.m-w.com/dictionary/cool.

[211] http://www.m-w.com/dictionary/constitution.

[212] http://en.wikipedia.org/wiki/United_States_(disambiguation).

[213] *See supra* Part III.C.2.c)(1), First Modification: The Publicly Available Constitutional Context, p. 54.

constitutional context.[214] There are, however, at least three possible situations in which the linguistic meaning of the Constitution may be irreducibly ambiguous. Briefly, the three situations can be described as follows:

- *Epistemic Ambiguity:* It is possible that some provisions of the constitution were originally unambiguous, but that the information necessary to resolve the semantic content is no longer available. This seems most likely in the case of ambiguity that is subtle, where two or more senses of a term or phrase are closely related to one another. Although the contemporary reader (e.g., a reader of the Constitution of 1789 during the period surrounding framing and ratification) might have recognized which sense was the public meaning, it is at least possible that a modern reader would not be able to resolve the ambiguity. If so, then a construction will be required.
- *Compromise Ambiguity:* It is possible that some provisions of the Constitution were written ambiguously in order to resolve a disagreement about the content. That is, ambiguous language may have been chosen in order to defer resolution of some issue to the future, when officials or judges would be required to apply the language in a situation that exposed the ambiguity. For example, it might be argued that the Necessary and Proper Clause was intentionally ambiguous as between a stricter and looser sense of "necessity." If the original public meaning was itself ambiguous in this way, then a construction will be required.
- *Deceptive Ambiguity:* It is possible that some provisions of the Constitution were written ambiguous in order to convey secure ratification that would have been impossible had unambiguous language have been chosen. For example, it might have been the case that the framers of the original constitution deliberately chose ambiguous language when drafting provisions related to slavery in order to secure ratification from those who opposed any constitutional endorsement of slavery. If this did in fact occur, and if the language would have been understood as ambiguous (or differently by different groups), then a construction would be required to resolve the ambiguity.

For the purposes of Semantic Originalism, we can simply leave it as an open question whether we need to go beyond the theory of Semantic Originalism articulated above[215] to resolve particular ambiguities in the United States Constitution. The three types of ambiguity sketched here may (or may not) apply to particular provisions of the Constitution. The important point from the perspective of Semantic Originalism is that such residual ambiguities may exist, and if they do, construction will be required to resolve them.

* * *

One more point about vagueness and ambiguity. A given constitutional word, phrase, or clause can be both vague and ambiguous. Or a clause might be ambiguous, with one of the multiple senses of the clause being vague and the other providing a bright line. And there are, of course, other permutations.

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[214] *See id.* (specifying "the publicly available context of constitutional utterance" or "the public context").

[215] *See supra* Part III.C.2.d), The First Restatement of Semantic Originalism: Clause Meaning is the Original Semantic Meaning of the Constitution to the Relevant Audience in Context,, p. 60.

* * *

(3) Gaps

The phrases "constitutional gap" or "gap in the Constitution" could mean many things, but we are interested in a particular kind of gap—constitutional incompleteness in the sense that the structure of the Constitution requires that there be a constitutional rule governing a particular issue, but the text fails to provide the required rule. For example, Akhil Amar has argued that the constitutional rules governing presidential and vice-presidential success leave such a gap.[216] Let us set aside the question whether there are any gaps in the semantic content of the Constitution.[217] If there are such gaps, then filling them would be the work of construction.

(4) Contradictions

It is far from clear that there are any contradictions in the semantic content of the constitution.[218] One of the rare examples of a judicial opinion finding such a contradiction is Judge William Norris's famous dissent from the Ninth Circuit's *en banc* decision in *United States v. Woodley*:[219]

> U.S. Const. art. II, § 2, cl. 2, which gives the President the general power to "appoint Ambassadors ..., Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for ...," the language of Article II seems to empower the President to grant recess commissions to fill judicial vacancies.
>
> Article III, on the other hand, seems equally clear that only persons with the independence secured by life tenure and protection against diminished compensation *1017 may exercise the judicial power of the United States. The relevant portion of Article III states simply and unconditionally,
>
> > The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.

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[216] Akhil Reed Amar, *Presidents, Vice Presidents, and Death: Closing the Constitution's Succession Gap*, 48 ARK. L. REV. 215, 228 (1995).

[217] Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 233 (2001) ("The received wisdom would have us believe that the foreign affairs Constitution contains enormous gaps that must be filled by reference to extratextual sources....");

[218] For alleged examples, see William C. Plouffe, Jr., *A Federal Court Holds The Second Amendment Is An Individual Right: Jeffersonian Utopia Or Apocalypse Now?* 30 U. MEM. L. REV. 55 (1999) (positing "an inherent constitutional contradiction in the 'collective right' interpretation of the Second Amendment. If the Second Amendment does, in fact, reserve to the state the right to create an army, it would conflict with Article I of the Constitution, which restricts the military power of the states."); Louis Michael Seidman, *This Essay Is Brilliant/This Essay Is Stupid: Positive And Negative Self-Reference In Constitutional Practice And Theory*, 46 UCLA L. REV. 501, 526-27 (1998) ("If the constitutional commands are read literally, it leads to contradiction because the Constitution would then both prohibit and permit *527 the same conduct. For example, the Constitution would both assert and deny the proposition that the IRS may not support racially discriminatory institutions.").

[219] 751 F.2d 1008, 1014 (9th Cir. 1985) (Norris, J., dissenting).

> U.S. Const. art. III, § 1. On its face, this language admits of no exception; its command is that only judges with Article III protections may wield Article III power.
>
> Hence, we face an extraordinary situation: a direct conflict between two provisions of the Constitution. No accommodation seems possible; one clause must yield to the other.[220]

If Judge Norris's analysis were correct,[221] then his opinion, which resolves the contradiction in favor of Article III's command of life tenure would be an example of constitutional construction—going beyond the semantic content of the Constitution because the contradiction requires this move.

* * *

The typology offered here distinguishes four types of resolution (vagueness, ambiguity, gaps, and contradictions). It could be argued that gaps and contradictions are actually special cases of ambiguity (and perhaps in some cases vagueness). When there is a contradiction, the meaning of the whole text becomes ambiguous, either one of two contradictory provisions prevails or both are modified to effectuate a reconciliation. Choosing among these options resolves the ambiguity. Likewise, it might be argued that gaps are a special kind of ambiguity. Although the question whether the four types of resolution can be reduced to two may be of theoretical interest, for present purposes a less than maximally elegant typology will suffice.

* * *

b) Constitutional Implicature Revisited

Constitutional implicature can play a role in both interpretation and construction. When the semantic content of the constitutional text necessarily has what we can call a "necessary implication," then discovery or recognition of the necessary implication counts as constitutional interpretation. Necessary implications follow from the semantic content of the text: necessarily implications follow from the semantic content. There may be additional implications that are not necessary, but nonetheless are reasonable given a theory of constitutional construction.

This distinction can be illustrated with reference to the relationship (discussed above[222]) between the three power conferring clauses of the Constitution—Article I ("legislative power"), Article II ("executive power"), and Article III ("judicial power"). It can be argued that the conjunction of these three provisions has the necessary implication that each type of power must fall into one of the three categories—that they exhaust the "powers of the Government of the United States." If this were true, then it would be a constitutional interpretation. This necessary implication can be contrasted with a second, nonnecessary but reasonable inference: it might be argued that the structure of the three articles suggests that when a power type is within the

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[220] *Id*. at 1016-17.

[221] It could be argued that there is no actual contradiction in the text, because Article III does not require life tenure. The actual language is "good behavior," and arguably the semantic content of this provision is consistent with a rule of life tenure for regular appointments and tenure during the specified period fore recess appointments. Resolution of the this issue is outside the scope of this Article.

[222] *See infra* Part III.F.2.a)(1), "Vagueness," p. 71.

overlapping penumbras of legislative and executive power, then the judicial branch should defer to accommodations reached by the political branches.[223]

c) The Fact of Constitutional Underdeterminacy

The distinction between interpretation and construction can be explicated by distinguishing constitutional determinacy from constitutional indeterminacy and underdeterminacy. Let us stipulate the following definitions:

> The Constitution is determinate with respect to a given case if and only if the set of results that can be squared with the semantic content of the Constitution contains one and only one result.
>
> The Constitution is indeterminate with respect to a given case if and only if the set of results in the case that can be squared with the semantic content of the Constitution is identical with the set of all imaginable results.
>
> The Constitution is underdeterminate with respect to a given case if and only if the set of results in the case that can be squared with the semantic content of the Constitution is a nonidentical subset of the set of all imaginable results.[224]

Construction occurs in the zone of constitutional indeterminacy. For this reason, the distinction between construction and interpretation depends on what we can call *the fact of constitutional underdeterminacy*. That fact depends on the whether the constitutional text includes at least one instance of vagueness, ambiguity, gap, contradiction, and/or reasonable constitutional implicature. It seems reasonable to assume that the constitution contains many vague provisions, some ambiguities, and a variety of opportunities for reasonable constitutional implicature. That is, the fact of constitutional underdeterminacy appears to hold for the United States Constitution.

3. Theories of Construction

There is a glaring omission from the account of constitutional construction that has been offered so far. Nothing has been said about particular methods of constitutional construction. This omission can be remedied in two steps: first, a quick and dirty survey of the various theories or prescribed methods of constitutional construction, and second, a discussion of the criteria by which such theories could be assessed.

a) A Quick and Dirty Survey of Theories of Constitutional Construction

This survey is neither exhaustive nor deep. My aim is simply to accomplish a rough and ready mapping of the territory. I shall neither adopt nor reject any of these theories of the correct, proper, or best method of constitutional construction. The point of the survey is to illuminate and elucidate the distinction between interpretation and construction and not to set the stage for the endorsement of any of the existing views or the construction of a new one.

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[223] This may be the reasoning of Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

[224] Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 473 (1987).

(1) Construe as Just

Recall that the occasion of constitutional construction is the underdeterminacy of constitutional meaning. We construe in order to draw lines for vague provisions, resolve the residue of ambiguity that remains after interpretation, fill gaps, resolve contradictions, and to select among reasonable alternative formulations of a constitutional implicature. One approach to constitutional construction is based on the simple premise that when we select from among the constructions that are consistent with semantic content of the Constitution, our criterion should be just. We should adopt that construction that is most just.

If we are to construe the constitution as just, then we need a theory of justice. This leads to metaphysical and metaethical questions about the nature of justice and epistemological questions about knowledge of justice. Should officials and citizens rely on their own beliefs about justice? Or should they construe the constitution as just according to some publicly available and shareable conception of justice? For our purposes on this occasion, there is no need to answer these deep questions. It is sufficient to note that a justice-enhancing theory of constitutional construction must have answers to such questions to be complete.

(2) Construe in Deference to the Political Branches

A second possibility is that judges could construe the constitution in deference to the political branches of government. For example, if the executive branch and the legislative branch have resolved a question about the borderline of their respective powers, then the judicial branch could adopt a principle of deference to their resolution of constitutional vagueness.

Notice that the political deference approach constitutional construction is not a complete theory. It provides a principle of judicial construction, but it also explicitly assumes that the political branches (Congress and the President) will engage in constitutional construction. But the President cannot defer to himself; nor can Congress defer to itself. So the political deference approach must be combined with some other theory to yield a complete theory of constitutional constructions.

(3) Construe by the Method of Text and Principle

A third possibility is that the constitution could be construed by what Jack Balkin calls the method of text and principle. An extended passage from Balkin describes the method and its point:

> If the original expected application is not binding, why are constitutional text and underlying principle? The answer comes from two simple assumptions: first, judges must treat the Constitution as binding law, and, second one treats the Constitution as law by viewing its text and the principles that underlie the text as legal rules and legal principles. We ask, in other words, what the people who drafted the text were trying to achieve in choosing the words they chose, and, where their words presume underlying principles, what principles they sought to endorse.
>
> If these assumptions are correct, then we look to the original meaning of the words because if the meaning of the words changed over time, then the words will embrace different concepts than those who had the authority to create the text sought to refer to. We look to underlying principles because when the text uses relatively abstract and general

> concepts, we must know which principles the text presumes or is attempting to embrace. If we read the text to presume or embrace other principles, then we may be engaged in a play on words and we will not be faithful to the Constitution's purposes. Just as we look to the public meaning of words of the text at the time of enactment, we discover underlying constitutional principles by looking to the events leading up to the enactment of the constitutional text and roughly contemporaneous to it. Sometimes the text refers to terms of art or uses figurative or non-literal language; in that case we must try to figure out what principles underlie that term of art or figurative or non-literal language.[225]

There is a good deal going on in this passage. One possibility is that Balkin means to endorse the use of constitutional principles to override the semantic meaning of the text. For the purpose of this survey, I shall set that possibility aside and assume instead that the method of text and principle operates within the constraints imposed by the theory of *clause meaning*. One way of stating this interpretation or modification of Balkin's view is that the method of text and principle requires *fidelity to the semantic content of the text*. Principle might be enable identification of that semantic content, when, for example, the conditions of constitutional utterance include a publicly available principle that would have been understood as the purpose of the text—for the purposes of this essay, the existence of such principles is neither affirmed nor denied.

Whatever the role of text and principle in constitutional interpretation, the method can also be applied to constitutional construction—and especially a method for drawing lines in cases where the constitutional text is vague. We might reconstruct the method in three steps: Step One: Interpretation reveals that the semantic content of a constitutional provision (usually a clause) is vague; Step Two: The principle (or principles, if more than one) that justify the provision are identified and articulated; Step Three: The principle is then used to guide application of the vague constitutional provision to a particular constitutional problem (such as a case in court or a legislative drafting problem). In Step Three, the *principle* returns to the *text* and is employed to resolve ambiguity—that is, to *construe* a vague provision. Call this reconstruction of the method of text and principle the *construction-only version*.

This three-step interpretation of the method of text and principle preserves the distinction between interpretation (Step One) and construction (Steps Two and Three), but one can imagine a different version of the method of text and principle. Suppose that the third step proceeded as follows: Step Three: The principle is then used to resolve the case at hand. In this version of Step Three, the *principle* becomes detached from the text and itself becomes the basis for the decision of all cases. Call this reconstruction of the method of text and principle the *anti-interpretative version*. The anti-interpretative version of the method of text and principle erases the distinction between interpretation and construction; in a sense, it allows construction to "swallow up" interpretation.

For the limited purposes of this discussion, it is the construction-only version of the method of text and interpretation that is on the table. It is this version of the method that joins "construe as just" and "construe in deference to the political branches" as one of several methods of constitutional construction.

(4) Construe by the Methods of Common Law

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[225] Balkin, *supra* note 78, at 15-16.

A fourth possibility is that the constitution could be construed by what we might call "common law methods" or perhaps "common law methods of statutory construction."[226] That is, the courts could use the techniques developed by common law courts—deciding "one case at time," treating prior cases as precedents, and so forth. The figure most associated with a common-law approach to constitutional practice is David Strauss. Strauss describes his theory as "common law constitutional interpretation," and fails to distinguish construction from interpretation, but we can reconstruct Strauss's position in such a way as to limit his method to construction.

> Common law constitutional interpretation has two components.
>
> * * *
>
> The first component is traditionalist. The central idea is that the Constitution should be followed because its provisions reflect judgments that have been accepted by many generations in a variety of circumstances. The second component is conventionalist. It emphasizes the role of constitutional provisions in reducing unproductive controversy by specifying ready- made solutions to problems that otherwise would be too costly to resolve. The traditionalism underlying the practice of constitutional interpretation is a rational traditionalism that acknowledges the claims of the past but also specifies the circumstances in which traditions must be rejected because they are unjust or obsolete. The conventionalist component helps explain why the text of the Constitution is important and how much flexibility judges should have in interpreting it.[227]

Strauss seems to contemplate that at least in some cases, common-law decisionmaking would allow judges to nullify or replace the constitutional text, but we can imagine a modified view that limited the common law method to issues of construction.

(5) Construe by the Original Methods

A fifth possibility, suggested by John McGinnis and Michael Rappaport's recent work might be called "construction by original methods."[228] As Rappaport and McGinnis explain,

> Our theory now suggests that an "original methods" originalism is needed to discover and justify the type of originalism that should be employed. Original methods originalism requires that the Constitution's text be interpreted according to the original interpretive rules of the constitutional enactors.[229]

Notice that Rappaport and McGinnis use the phrase "interpretive rules" to describe "original methods." This usage is ambiguous and can be interpreted in at least two ways. The first interpretation is that Rappaport and McGinnis are using "interpretive" in a sense that does not distinguish between *interpretation* and *construction* in the senses stipulated above.[230] The

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[226] *See* David A. Strauss, Common *Law, Common Ground, and Jefferson's Principle*, 112 YALE L.J. 1717 (2003); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).

[227] Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. at 890-91.

[228] John O. McGinnis & Michael Rappaport, *Originalism and Supermajoritarianism: Defending the Nexus*, 101 Nw. U. L. Rev. 1919, 1928 (2007) (downloadable version can be found at http://www.law.northwestern.edu/lawreview/v101/n4/1919/LR101n4McGinnis.pdf)/

[229] *Id*.

[230] *See infra* Part III.F.1, "Distinguishing Interpretation from Construction," p. 69.

second interpretation is that Rappaport and McGinnis do intend to use *interpretation* in the stipulated sense. On either interpretation, the original-methods theory is not explicitly a theory of constitutional construction, but it can easily be modified so that it will serve in that role. That is, we can imagine a theory of constitutional construction that argues on normative grounds that constitutional vagueness should be resolved by those methods of construction that would have been employed at the time the relevant provision (or perhaps the Constitution of 1789) was drafted and ratified.[231]

(6) Other Theories of Construction

The list of five possible theories of constitutional construction is not intended to be exhaustive. For example, we could construe the constitution in accord with deeply held and widely shared social norms.[232] Another possibility, suggested by the work of Philip Bobbitt, is that the constitution could be construed by a plurality of methods—with precedent, purposes, and contemporary values all playing a role.[233] And a final option, suggested by Posnerian pragmatism would be to construe the constitution pragmatically—matching normative theories of construction to the particular problem on an *ad hoc* all-things-considered basis.[234]

b) Justifying Theories of Construction

The fact that there are several plausible theories of constitutional construction does not entail the conclusion that the choice among such theories is arbitrary. A theory of constitutional construction might be justified on the basis of arguments of political morality or on the ground that theory fits current legal practice. Dworkin's criteria of fit and justification combine the two kinds of justification in a complex relationship. In this Article, I do not take a position on the question as to which theory of construction is best or even on the question as to what are the sound criteria for evaluating theories of constitutional construction. The only claim that I make is that theories of construction cannot be justified on the basis of the semantic content of the constitution. This claim follows from the stipulated definition of constitutional construction: construction takes the stage after interpretation makes its bow and exits the scene.

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[231] It might be argued that original-methods construction is required by the original meaning of the Constitution itself. I have serious doubts that such an argument can succeed. The constitution itself refers to construction in two amendments, the Ninth and the Eleventh, but neither of these refers to original methods. One might attempt to argue that original-methods of construction are part of the meaning of the phrase "judicial power," but this argument seems unlikely to succeed. The phrase "judicial power," on its face, seems to be vague. For example, in the early Nineteenth Century it seems likely that competent speakers of English in the United States would have recognized that judicial power was exercised in France after the adoption of the Napoleonic Code, even though civil law methodology is substantial different than common law methodology. In this Article, I take no position on the ultimate resolution of this point, except to note the doubts expressed in this footnote.

[232] This method of construction would be consistent with the views I expressed in *Natural Justice*. *See* Lawrence B. Solum, *Natural Justice: An Aretaic Account of the Virtue of Lawfulness* in Virtue Jurisprudence (Colin Farrely & Lawrence B. Solum, eds. Palgrave MacMillan 2007); Lawrence B. Solum, *Natural Justice*, 51 AMERICAN JOURNAL OF JURISPRUDENCE 65 (2006).

[233] *See* PHILIP BOBBITT, CONSTITUTIONAL FATE (revised ed. Oxford University Press 2006).

[234] *See* RICHARD A. POSNER, LAW PRAGMATISM, AND DEMOCRACY (Harvard University Press 2003); *see also* Michael Sullivan and Daniel J. Solove, *Can Pragmatism Be Radical? Richard Posner and Legal Pragmatism*, 113 Yale L.J. 687 (2003).

4. Attempts to Collapse Interpretation and Construction

Although the interpretation-construction distinction is rooted in conventional legal understanding, the distinction can be resisted. In this subsection, three lines of objection are considered. The first line of resistance is purely terminological, arguing that the word "interpretation" can and should do the work of 'interpretation' and 'construction." The second and third lines of resistance are substantive. Ronald Dworkin's idea of "constructive interpretation" suggests the possibility of a substantive collapse of interpretation into construction. Some originalists implicitly attempt the opposite move, trying to collapse construction into interpretation.

a) Resistance to the Terminology: "Interpretation" Should Be Used to Refer to Both 'Interpretation' and 'Construction'

The use of the interpretation-construction distinction is not an invention of the New Originalists.[235] The use of these terms to mark the difference between recognition or discovery of meaning and determination of legal content is rooted in the common law and traditional legal scholarship, most prominently in contract law.[236] William Leiber employed the distinction in 1837.[237] Corbin relied on the interpretation-construction distinction in his influential 1919

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[235] *See* Peter M. Tiersma, *The Ambiguity of Interpretation: Distinguishing Interpretation from Construction*, 73 WASH. U. L.Q. 1095, 1096, 1097 (1995) ("Yet there is also a form of legal interpretation that is quite distinct from ordinary language interpretation. This occurs when a legal actor -- usually a court -- declares that certain legal language will have a particular meaning. For purposes of clarity, I propose that we resuscitate the somewhat obsolescent term statutory construction (and the related verb construe). I propose that we limit "interpretation" to refer to the mental process or state referred to above, and use the term "construction" to refer to the process by which a court declares an authoritative interpretation of the meaning of some legal language.").

[236] *See* Keith A. Rowley, *Contract Construction and Interpretation: From the "Four Corners" to Parol Evidence (and Everything in Between)*, 69 MISS. L.J. 73 (1999) (discussing contract interpretation and construction by Mississippi courts); Robert Childres, *Conditions in the Law of Contracts*, 45 N.Y.U. L. REV. 33, 36 (1969) ("In interpreting agreements, one is attempting to determine intention. In construing them, one is attempting to prevent or to resolve controversies by asking how detached people would handle them in light of good faith dealing according to reasonable standards."); Edwin W. Patterson, *The Interpretation and Construction of Contracts*, 64 Colum. L. Rev. 833 (1964).

[237] FRANCIS LIEBER, LEGAL AND POLITICAL HERMENEUTICS, OR PRINCIPLES OF INTERPRETATION AND CONSTRUCTION IN LAW AND POLITICS 43 -137 (William G. Hammond ed., 3d ed., St. Louis, F.H. Thomas & Co. 1880) (1837), republished in 16 CARDOZO L. REV. 1921, 1921 (1995):

> The definition, which has been given of the term Interpretation, shows that it can only take place, if the text conveys some meaning or other. It happens, however, not infrequently, that in comparing two different writings of the same individual, or body of men, they are found to contain contradictions, and yet are not intended to contradict one another. Or it happens that a part of a writing or declaration contradicts the rest, for instance, some provisions of laws issued even by so high a body as the British parliament. When this is the case, and the nature of the document, declaration, or whatever else it may be, is such as not to allow us to consider the whole as being invalidated by a partial or other contradiction, we must resort to construction. Construction is likewise our guide, if we are bound to act in cases which have not been foreseen by the framers of those rules by which we are nevertheless obliged, for some binding reason, faithfully to regulate, as well as we can, our actions respecting the unforeseen case; for instance, when we have to act in politics, bound by a constitution, in a case which presents features entirely new and unforeseen.

For valuable discussion, see Lawrence A. Cunningham, *Hermeneutics and Contract Default Rules: An Essay on Lieber and Corbin*, 16 Cardozo L. Rev. 2225 (1995).

article, *Conditions in the Law of Contract*,[238] and Williston adopted a similar distinction.[239] Historically, the interpretation-construction distinction has played a role in the law of trusts and wills,[240] patent law,[241] choice-of-law,[242] and other fields of law.

The position take by *Semantic Originalism* is that the interpretation-construction distinction is essential to clarity in constitutional theory. The distinction is not arbitrary: it reflects the real difference between recognition or discovery of the linguistic meaning of the Constitutional text and the translation of that semantic content into the legal content of the rules of constitutional law. But the use of the terms "interpretation" and "construction" to denote the real distinction is a matter of the conventional use of language—in this case, the specialized conventions of legal practitioners and academics. Although the interpretation-construction distinction has deep roots in usage by courts and scholars in a variety of contexts[243] and in contemporary debates about constitutional theory,[244] the distinction could be expressed in other language.

For example, we might talk about two stages of interpretation: stage one could be the recognition or discovery of linguistic meaning and stage two could be the translation of linguistic meaning into legal rules. Or we might distinguish linguistic interpretation and legal interpretation. We can imagine a variety of similar terminological moves. So long as the distinction and terminology are articulated clearly, there is no substantive reason to insist on any particular terminology. Given the long legal pedigree and current usage, however, clarity can only be achieved if those who wish to use alternative terminology acknowledge the interpretation-construction distinction when they discuss the work of New Originalists, and then explain their terminology in light of this distinction.

Another possibility is to attempt to do without any distinction at all and use the unadorned word "interpretation" to refer to both the recognition or discovery of linguistic meaning and the development of legal rules that are based on that meaning, with marking the distinction in any systematic way. This terminological alternative requires the utmost care in order to avoid confusion. If the word "interpretation" is used this way in discussions of the New Originalism and the interpretation-construction distinction is not acknowledged and discussed, the result will be substantive misrepresentation of the content of New Originalist theories. In addition, failure

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[238] *See* Corbin, *Conditions in the Law of Contract*, 28 Yale L.J. 739, 740-41 (1919); *see also* 3 A. CORBIN, CONTRACTS § 534 (1960).

[239] *See* 4 S. WILLISTON, CONTRACTS § 602 (3d ed. 1961).

[240] *See* Richard F. Storrow, *Judicial Discretion and the Disappearing Distinction Between Will Interpretation and Construction*, 56 Case W. Res. L. Rev. 65 (2005).

[241] *See* Markman v. Westview Instruments, Inc., 52 F.3d 967, 1000-01 (Fed. Cir. 1995) (Newman, J., dissenting):

> In patent infringement litigation there is often a factual dispute as to the meaning and scope of the technical terms or words of art as they are used in the particular patented invention. When such dispute arises its resolution is not a ruling of law, but a finding of fact. Such findings of meaning, scope, and usage have been called the "interpretation" of disputed terms of a document, as contrasted with the "construction" or legal effect of a document ... It is indeed well understood that the legal effect or construction of the terms of a document, a matter of law, is not to be confused with resolution of disputes concerning the factual meaning of the terms. The former is for the court, the latter for the jury.

[242] *See* Note, *Choice-Of-Law Rules For The Construction And Interpretation Of Written Instruments*, 72 HARV. L. REV. 1154, 1155-56 (1959) (stating "Interpretation, therefore, is essentially a factual, as distinguished from a legal, concept. A rule of construction is defined as a rule that attaches a given legal consequence to the words employed . . . .").

[243] *See* Farnsworth & uses in trust law.

[244] *See* Randy Barnett, *Restoring the Lost Constitution*, *supra* note 7; Keith Whittington, *Constitutional Interpretation*, *supra* note 75; Keith Whittington, *Constitutional Construction*, *supra* note 75.

to observe the substance of the distinction between semantic content and legal content is bound to produce conceptual confusion. Even more distressing would be the possibility that the distinction would be deliberately obscured so as to obviate the need to argue that legal content (constitutional law) is distinct from semantic content (the linguistic meaning of the Constitution).

For these reasons, responsible scholarship regarding the New Originalism should, at a minimum, address the interpretation-construction distinction in some meaningful way: the role of the distinction in New Originalist work should be acknowledged and the term "interpretation" should be defined or explicated in relationship to the distinction between semantic content and legal content.

b) Constructive Interpretation: Dworkin's Attempt to Absorb Interpretation into Construction

Ronald Dworkin's work challenges the interpretation-construction distinction at a more fundamental level. This is explicitly clear in his use of the phrase "constructive interpretation" as the name of (or as a description of) his theory of constitutional interpretation and construction. Of course, Dworkin's has a complete theory of the nature of law and a normative theory of legal practice, and full engagement of that theory is outside the scope of a sub-sub-section of a Part of "Semantic Originalism." Some aspects of Dworkin's theory will be discussed in connection with the concept-conception distinction.[245] Other aspects are will be discussed as objections to the contribution thesis.[246] In this section, Dworkin's idea of "constructive interpretation" will be examined with the sole aim of determining whether it creates a fundamental problem for the distinction between interpretation and construction.

In *Law's Empire*, the notion of "constructive interpretation" is introduced at the end of one of Dworkin's central arguments—the famous "Semantic Sting" argument, which is directed against H.L.A. Hart (but applies to any theory of law that based on the notion that the criteria for legal validity are given by an uncontested concept of law). Often obscured by the notoriety of the semantic sting is a prior move directed at H.L.A. Hart's account of the core and penumbra. Dworkin distinguishes between two kinds of cases, which he calls "borderline cases" and "pivotal cases." Borderline cases are those in Hart's penumbra, and involve *vagueness* in the sense that term is used here.[247] By definition, such cases are not resolved by semantic content, and hence involve construction.

Dworkin's second category, opposed to "borderline cases" are "pivotal cases." Here is the passage in which Dworkin introduces the distinction:

> People sometimes do speak at cross-purposes in the way the borderline defense describes. They agree about the correct tests for applying some word in what they consider normal cases but use the word somewhat differently in what they all recognize to be marginal cases, like the case of a palace [referring to the question whether Buckingham Palace is a "house"]. Sometimes, however, they argue about the appropriateness of some word or description because they disagree about the correct tests for using the word or phrase on *any* occasion.[248]

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[245] *See infra* Part III.G.1., "The Concept Conception Distinction and Constitutional Construction," p. 91.
[246] *See infra* Part IV.C.4.b)(2), "Law as Integrity," p. 148.
[247] *See* Ronald Dworkin, *Law's Empire*, *supra* note 140, at 40-41.
[248] *Id*. at 41.

Are pivotal cases, cases of simple ambiguity? No, because in such cases competent speakers recognize that there are different senses of a word or phrase, and they resolve their disagreement by getting clear on which sense they are deploying. Rather, Dworkin is asserting that there is another kind of disagreement about meaning that is neither vagueness nor ambiguity—this kind of disagreement is about what we can call "contested concepts."[249]

Dworkin then introduces "courtesy" as an example of what a contested concept, and suggests that there can be a disagreement about the *meaning* of "courtesy." Here is his description of the emergence of what he calls the "interpretive attitude" towards courtesy:

> Everyone develops a complex "interpretive" attitude toward the rules of courtesy, an attitude that has two components. The first is the assumption that the practice of courtesy does not simply exist but has value, that it serves some interest or purpose or enforces some principle—in short, that it has some point—that can be stated independently of just describing the rules that make up the practice. The second is the further assumption that the requirements of courtesy—the behavior it calls for or judgments it warrants—are not necessarily or exclusively what they have always been taken to be but are instead sensitive to its point, so that the strict rules must be understood or applied or extended or modified or qualified by that point. Once this interpretive attitude takes hold, the institution of courtesy ceases to be mechanical; it is no longer unstudied deference to a runic order. People now try to impose *meaning* on the institution—to see it in its best light—and then restructure it in the light of that meaning.[250]

All of this will be familiar to anyone who has encountered *law as integrity*—Dworkin's theory of law. The important point at this stage is to notice that the italicized reference to *meaning* is not a reference to the *semantic meaning* of the word courtesy; it is instead a reference to its *teleological meaning*—its purpose or point.

Dworkin then introduces the idea of "constructive interpretation" in the context of the interpretation of a creative work, such as a novel or poem:

> Roughly, constructive interpretation is a matter of imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong. It does not follow, even from the rough account, that an interpreter can make of the a practice or a work of art anything he would have wanted it to be, that a citizen of courtesy who is enthralled by equality, for example, can in good faith claim that courtesy actually requires the sharing of wealth. For the history or shape of a practice or object constrains the available interpretations of it, though the character of that constraint needs careful accounting, as we shall see.[251]

The crucial point is that *constructive interpretation* does not aim at semantic meaning: it aims at *teleological meaning*. The question then becomes, how does the purpose or point of a legal text translate into legal content?

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[249] *See infra* Part III.G.1., "The Concept Conception Distinction and Constitutional Construction," p. 91.
[250] Dworkin, *Law's Empire*, *supra* note 140, at 47.
[251] *Id*. at 52.

Dworkin's clearest discussion about the relationship of semantic content and legal content comes in the portion of *Law's Empire* that considers and rejects what he calls the "speaker's meaning" view.[252] Here is his description of that view:

> I shall call this the "speaker's meaning" view because it assumes that legislation is an occasion or instance of communication and that judges look to legislative history when a statue it not clear on its face to discover what state of mind the legislators tried to communicate through their vote. It supposes, in short, that proper interpretation of a statue must be what I called in Chapter 2 conversational rather than constructive interpretation.[253]

At the risk of redundancy, once again we observe that "interpretation" has two distinct senses in this passage. Conversational interpretation aims at the recovery of semantic content or linguistic meaning. Constructive interpretation aims at the recovery of purpose or teleological meaning. The remainder of Dworkin's discussion of "speaker's meaning" focuses on the problems faced by an imaginary judge, *Hermes*, in making the model of speaker's meaning work in the case of statutes—these problems parallel those discussed in connection with framer's meaning, above. Dworkin himself applies his discussion of speaker's meaning to constitutional interpretation when he discusses "Framer's Intent as Speaker's Meaning."[254]

The point that I am about to make is crucial. Let me state the conclusion first, and then provide the reason. The conclusion is this: Dworkin's account of constructive interpretation is not a rival to the interpretation-construction distinction. The reason for this conclusion is that Dworkin does not have a theory of semantic interpretation, but his theory presupposes that such a theory exists. Dworkin's theory of constructive interpretation does not aim at the recovery of semantic content or linguistic meaning. It aims at the recovery of purpose or teleological meaning. Dworkin assumes that legal texts, such as cases, statutes, and constitutions have semantic content. That content provides input to Hercules (personifying law as integrity) and from that input, Hercules constructs the normative theory that best fits and justifies the semantic content. The theory that Hercules constructs is the output: it is the content of that theory that provides all of the content of the legal rules. In the case of the Constitution, the content of the rules of constitutional law are a subset of the content of the theory that fits and justifies all of the law of the United States, including the semantic content of all the legal texts.

This point can be expressed in different terms. "Constructive interpretation" is a theory of legal content. It does clash with Semantic Originalism, but not with the fixation thesis or the clause-meaning thesis. (Indeed, it provides strong supporting arguments for clause meaning as against framers meaning.) It does clash with the moderate version of the contribution thesis, because it just is an expression of the weak version of the contribution thesis. Dworkin is unclear about all of this. He uses the words "meaning" and "interpretation" in one sense when he describes "speaker's meaning" and a difference sense when he articulates "constructive interpretation." But once this confusion is cleared up, it become apparent that Dworkin simply has no view about linguistic interpretation or semantic content. My suspicion is that he simply didn't see that he needed a view: if so he was mistake. A less charitable reading would be that he did see the distinction, but deliberately chose to conceal it: this seems to me unlikely.

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[252] Dworkin does not acknowledge Grice at any point in *Law's Empire*, even though the phrase "speaker's meaning" is obviously derived from Grice's work.

[253] *Id*. at 315.

[254] *See id*. at 359-363.

Dworkin revisited these issues in his essay entitled *Bork's Jurisprudence* in 1990. His terminology changed, but this discussion provides greater clarity regarding his view of the relationship between what we are calling "interpretation" and "construction." Here is the relevant passage:

> I must begin by emphasizing a distinction rarely explicit in discussions of the original understanding thesis, but which is, I think, essential to understanding its vulnerability to the objection I shall describe. The thesis insists that judges should interpret the Constitution to mean only what the framers intended it to mean. But the framers had two very different kinds of intention that, in very different senses, constituted what they meant. They had linguistic intentions, that is, intentions that the Constitution contain particular statements. They also had legal intentions, that is, intentions about what the law would be in virtue of these statements.
>
> We make constant assumptions about the framers' linguistic intentions, and we never contradict these in our views about what the Constitution says. We assume, for example, that the framers of the Eighth Amendment meant by "cruel"' roughly what we mean by "cruel,"' and that they followed roughly the same linguistic practices we do in forming statements out of words. We therefore assume that they intended the Constitution to say that cruel and unusual punishments are forbidden rather than, for example, that expensive and unusual punishments are forbidden. (We would give up that assumption, however, if incredibly, we learned that "cruel"' was invariably used to mean expensive in the Eighteenth Century.) We also assume that they intended to say something as abstract as we would intend to say if we said, "Cruel and unusual punishments are forbidden."' Suppose we discover that they expected that the bastinado would be forbidden by the Eighth Amendment, but not solitary confinement. We would not then think that they intended to say that the bastinado but not solitary confinement was forbidden. We would have no justification for attributing to them that degree of linguistic incompetence. We would instead classify their opinions about these punishments as part of their legal rather than linguistic intentions. We would say that they thought they were outlawing the bastinado but not solitary confinement, or that that is what they hoped they were doing.
>
> The original understanding asks judges, not merely to make the framers' linguistic intentions decisive over what they said, which is innocuous, but to make their legal intentions decisive over what they did, that is, over what effect their statements had on constitutional law.[255]

This passage is suggestive, but before we explicate, we should be cautious. Dworkin is attacking Bork here. Although this passage might suggest that he endorses a particular view of semantic content, it is perhaps more plausible this passage as context bound. Putting it another way, Dworkin may simply be assuming *arguendo* that linguistic intentions determine meaning.

But if Dworkin did mean what he said in the paragraphs quoted above, then he has in fact endorsed a version of Semantic Originalism and the interpretation-construction distinction. I say "a version of Semantic Originalism," because Dworkin's argument equates meaning with the Gricean intentions of the framers—that is, he endorses the account of semantic content that I have called "Framers Meaning." It would be a mistake to read too much into this. There is no

[255] Ronald Dworkin, *Bork's Jurisprudence*, 57 U. Chi. L. Rev. 658, 661-62 (1990).

indication that Dworkin has a clear awareness of Grice's distinction between speakers meaning and sentence meaning or its application to the meaning of legal texts. Moreover, his example, "cruel" is explicated in a manner that suggests that Dworkin would affirm the clause-meaning thesis: "We would give up [the] assumption [that "cruel" had its contemporary meaning when the Constitution of 1789 was framed and ratified], however, if incredibly, we learned that "cruel"' was invariably used to mean expensive in the Eighteenth Century." Notice that Dworkin says "invariable used to mean" and not "was intended by the framers to mean."

When Dworkin introduces the distinction between "linguistic intentions" and "legal intentions" he actually affirms the conceptual distinction that is at the heart of the interpretation-construction distinction. Of course, Dworkin has a confused picture here. The semantic content of the Constitution is determined by its linguistic meaning. The question addressed by construction should not be framed in terms of "legal intentions" (of the framers, ratifiers, or anyone else). The right way of framing the question is in terms of the relationship between semantic content and legal content. When Dworkin misleadingly distinguished between "linguistic intentions" and "legal intentions," he seems to be pointing at the real distinction between semantic and legal content. Once that distinction is admitted, then the interpretation-construction distinction falls out. Of course, all of this is based on a speculative reconstruction of brief remarks about Bork. Dworkin may not have a view on these matters, or his views may have changed since he wrote *Law's Empire* and *Bork's Jurisprudence*.

Here is the bottom line: Dworkin's idea of "constructive interpretation" in no way undermines the distinction between interpretation and construction that is incorporated in Semantic Originalism.

c) Interpretive Construction: Originalist Attempts to Absorb Construction into Interpretation

The interpretation-construction distinction can be attacked from another angle. Some originalists may object to this distinction on the ground that it permits non-originalist considerations to enter into constitutional practice. They might express this objection is a variety of ways. One angle of attack would be to attempt to argue for the extreme version of the contribution thesis—that the semantic content of the constitution fully determines all of the content of constitutional law. That possibility has already been rejected as implausible.[256]

Another angle of attack would be to attempt to subsume construction within interpretation—arguing that same interpretive techniques that determine the linguistic meaning of the constitution can also be used to determine the proper construction. Interpreted charitably, this view cannot rest on the assumption that the original public meaning of the words and phrases themselves answer all constitutional questions. Rather, the view would have to be that semantic content can be supplemented by methods of construction that somehow derive the content of constitutional law from the linguistic meaning of the constitution.

One can imagine several possibilities. One possibility is suggested by the intellectually powerful and elegant work of Michael Paulsen. Paulson argues that the exercise of power of judicial review presupposes that the political branches have made a choice that is forbidden by the Constitution. When either of the political branches acts in a way that is inconsistent with the

[256] *See supra* Part I.A.3, "The Contribution Thesis: The Semantic Content of the Constitution Contributes to Constitutional Law," p. 7.

semantic content of the Constitution, then the judicial branch has the power to invalidate the action of the other two branches. But where interpretation (and semantic content) runs out, then the Constitution permits the legislature or executive to act and courts may not invalidate their decisions.[257] But Paulsen's argument does not erase the interpretation-construction distinction: it actually assumes it. This becomes crystal clear when we ask how Congress or the President should engage in constitutional construction when a clause is vague. They cannot defer to themselves, but they must act. Of course, Paulsen might say that their decision is entirely discretionary, and that they are free to ignore the constitutional purposes or principles. But if this is his position, he needs an argument for it. It is not self-evident. A different version of this problem occurs when the courts are asked to adjudicate a dispute between the executive and legislative branches—deference is impossible because the courts must, at the very least, arrive at a principle of construction that selects which of the two branches they should defer to. Once again, meaning runs out, construction is required, and the interpretation-construction distinction is vindicated.

There are other alternatives. It might be argued that original intentions originalism provides a method of both interpretation and construction. This possibility is fraught with difficulties. To the extent the original intentions could fix meaning, the meanings that they fix can be vague and require construction. All of the problems that attend original intentions as a guide to semantic content would also attend their use in construction. Another possibility would be to adopt the original methods of constitutional interpretation—but until those methods are fully specified, this is a "buck passing" theory. We need to know to what the buck is passed before we can know whether it preserves the interpretation-construction distinction.

One last point: it is easy to understand why some originalists would be motivated to attempt to erase the interpretation-construction distinction. One of the attractions of originalism was that it offered the promise that constitutional interpretation could be reduced to legal science. Judges would determine the original meaning and then just apply it to the facts. This would be formalism, and formalism has powerful attractions (to which I am hardly immune[258]). The difficulty with good-old-fashioned mechanical formalism is the "mechanical" part. When the semantic content of legal texts is ambiguous, their application cannot be mechanical. A theory of construction simply has to take the stage once interpretation exits the scene.

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Why would constitutional theorists be motivated to deny the interpretation-construction distinction? Of course, there are many possible reasons, but one powerful motivation might arise from the apparent similarities between the interpretation of religious and legal texts. Contemporary interpreters of religious texts have powerful reasons to believe that the semantic content of those texts is morally attractive. Such texts play constitutive roles for religious communities. It isn't easy to say that the New Testament, Torah, or Koran expresses a morally repulsive view of the world. These texts claim inerrant authority. But in the case of religious texts, there may be theological reasons to believe that the true meaning of the text is the morally

[257] Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L. J. 217, 233 (1994).

[258] My own theory of law has been self-described as Neoformalist. *See* Lawrence B. Solum, *The Supreme Court In Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future Of Unenumerated Rights*, 9 UNIVERSITY OF PENNSYLVANIA JOURNAL OF CONSTITUTIONAL LAW 155 (2006).

appealing meaning, even when the "original meaning" seems morally unappealing. Let's pursue that idea.

We might get at reasons for rejecting an original meaning account of religious texts by giving a Gricean account of an imaginary religious text, which we can simply call The Book. The Book consists of discrete Verses and it was authored by a group of real humans: let's call them the Prophets. One theory of the semantic content of The Book is Prophets Meaning—the meaning that each prophet intended readers of the book (Believers) to grasp based on their recognition of the Prophet's intentions. Another theory of the semantic content of Book is Verse Meaning—the conventional semantic meaning of each verse at the time of prophetic utterance.

But there is another theory of the meaning of The Book, which we might call God's Meaning. The theory assumes that The Book is communication by God to Believers. God does not speak directly, but instead inspired the Prophets, who then uttered the Verses based on their imperfect grasp of the content of the inspiration. The true meaning of The Book is God's Meaning, the meaning that God intended Believers to grasp based on their best understanding of God's intentions. Given the circumstances of prophetic utterance, Believers would recognize that God's Meaning is not identical to either Prophets Meaning or Verse Meaning. One of the clues to grasping God's Meaning is that God is benevolent and omniscient: the God's Meaning of an utterance cannot be morally unattractive. Just as the Prophets had an imperfect grasp of inspiration, so too, Believers have an imperfect and evolving understanding of God's Meaning. One way of expressing this process is via the metaphor of Living Prophecy—each generation interprets God's Meaning according to their understanding of the nature of the world and of what goodness requires. Given the relationship between God, Prophet, and Believer, and the circumstances of prophetic utterance, the God's Meaning of a verse is its true or correct semantic content.

As I have told it, this story involves belief in God as the real author of The Book and as the source of prophetic inspiration. But one can imagine that the notion of God's Meaning might survive the loss of belief in God as an actually existing entity with personality and agency. Even if one adopted the belief that God was a metaphorical expression of the ultimate ground of being, one might retain the theory of Living Prophecy as the best way to carry on the traditions of a community of faith that is constituted by its relationship to the prophetic text. In these circumstances, for members of the community the true meaning of the text would continue to be the morally most attractive meaning. Of course, there might be other interpreters of the same text. For examples, there might be academics who attempted to determine the Prophets Meaning or Verse Meaning of The Book: the academics would view their enterprise as the recovery of the actual semantic content. Some of these academics might also be believers. They might see the two kinds of meaning as complimentary rather than contradictory. "Of course, the meaning assigned to The Book by Living Prophecy may vary from the semantic content discovered by historical investigation," they might say. Living Prophecy adopts the <u>construction</u> of the text that puts it in its best light. Historical scholarship <u>interprets</u> the semantic content. If one is engaging in only one of these activities, the distinction between <u>interpretation</u> and <u>construction</u> may be of no practical consequence. It is only when one engages in both that the need for distinction becomes a practical necessity.

Views about theological hermeneutics have had an enormous influence on theories of legal interpretation and construction. Such influences can be direct (conscious reference) or indirect (unconscious or historically mediated influence). In the contemporary era, most constitutional theorists eschew direct reliance on theological views, but it is at least possible that the cultural

heritage of theological hermeneutics has had a shaping influence on the culture of constitutional theory. If so, it would not be surprising if some constitutional theorists came to believe that a Living Constitutionalism that seeks the true, morally attractive, meaning of the Constitution, and eschews Framers Meaning or Clause Meaning, must be the correct view.[259]

* * *

G. Essentially Contested Concepts and Natural Kinds

Discussions about constitutional interpretation sometimes include reference to two philosophical ideas the notion of an "essentially contested concept" and the idea of a "natural kind."

1. The Concept Conception Distinction and Constitutional Construction

We have already deployed the distinction between concepts and conceptions in the context of our discussion of semantic content.[260] That same distinction may be incorporated in a theory of constitutional interpretation or an account of constitutional construction. Ronald Dworkin, among others, has argued that some constitutional clauses include words or phrases that refer to concepts, requiring a construction that singles out some conception of that concept in light of some theory of construction.[261] Because this is a contested and potential important move in constitutional construction, we need a relatively robust understanding of the concept-conception distinction and the role it might play in constitutional meaning and practice.

a) What is the Distinction?

So far as I know, the concept-conception distinction originates with *Essentially Contested Concepts*, a paper written by the philosopher William Gallie in 1956.[262] The core of Gallie's argument was the idea that certain moral concepts are "essentially contested." "Good," "right," and "just," for example, are each moral concepts which seem to have a common or shared meaning. That is, when I say, that the alleviation of unnecessary suffering is good, you understand what I mean. But it may be that you and I differ on the criteria for the application of the term "good." You may think that a state of affairs is good to the extent that it produces pleasure or the absence of pain, while I may think that the criteria for "good" make reference to the conception of a flourishing human life—a life of social and rational activity lived in accord with the human excellences or virtues. We share the concept of "good," but we have different conceptions of what constitutes a good life.

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[259] I owe a great debt of gratitude to Guyora Binder for inspiring this excursion. Binder is unlikely to agree with the thesis advanced in the excursion, but his comments on Semantic Originalism were responsible for my recognition of the importance of the analogy between interpretation of religious texts and the constitutional interpretation.

[260] *See supra* Part III.B.5, The Concept of Semantic Meaning Distinguished from Particular Theories of the Meaning of Utterance Types, p. 39.

[261] *See* RONALD DWORKIN, LAW'S EMPIRE 71 (1986); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 134-36 (Harvard University Press 1977); RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 76 (1996).

[262] W. B. Gallie, *Essentially Contested Concepts*, 56 PROCEEDINGS OF THE ARISTOTELIAN SOC. 167 (1955-56).

Sometimes, when there is this sort of disagreement, we want to say, "Ah, you and I are referring to different concepts." If by "cause," you mean "legal cause," whereas I use "cause" as a synonym for "cause in fact," then we are using the same word to refer to two different concepts. If this were the case, then "cause" would be ambiguous and once the ambiguity had been identified, we would come to realize that we were talking past one another.

But in the case of "good," we seem to be using the same concept. I think that the good really is human flourishing and not pleasure; you have the opposite opinion. So we are contesting the meaning of the concept "good," and each of us has a different conception of that concept. We are not talking past one another; we are disagreeing. Gallie thought that some concepts were essentially contested. That is, Gallie believed that some concepts were such that we would never reach agreement on the criteria for application of the concepts. If a concept is essentially contested, then it is in the nature of the concept that we disagree about the criteria for its application.

Perhaps the most famous use of the concept-conception distinction is found in the political philosopher John Rawls's famous book, *A Theory of Justice*. Rawls appeals to the distinction between the concept of justice and particular conceptions of justice.[263] His theory, justice as fairness, is defended as the best conception of justice. Notice that as used by Rawls, the concept-conception distinction does not imply that the concept of justice is essentially contested. It might be the case that we would eventually come to agreement on the criteria for a just society. In other words, not all contested concepts are essentially contested concepts.

b) How is the Concept Conception Distinction Relevant to the Interpretation Construction Distinction?

Another well-known use of the concept-conception distinction is found in Ronald Dworkin's theory, law as integrity. You may know that Dworkin uses a hypothetical judge, Hercules, to illustrate his theory. Many believe that Dworkin's theory changed over time. The version of the theory that I am employing in this subsection of the Article is that found in his essay *Hard Cases*.

Suppose that Hercules is interpreting the United States Constitution. He finds that the Equal Protection Clause of the Constitution makes reference to the concept of equality. In order to decide some case, about affirmative action say, Hercules must decide what equality means. To do this, Hercules will determine what conception of equality best fits and justifies our legal practices--narrowly, the equal protection clause cases but more broadly, the whole of American constitutional law and indeed the entire institutional history of the Republic. For Dworkin, "equality" is not an "essentially contested concept," because Dworkin does not take the position that there cannot be stable criteria for the meaning of concepts like equality. Rather, "equality" is an interpretive concept--a concept that is subject to interpretation. Interpretive concepts like equality are, in fact, contested, and may, in fact, always be contested, but this is not an "essential" (necessary) characteristic of interpretive concepts.

How does Dworkin's use of the concept-conception distinction relate to constitutional semantics? The most natural interpretation is that concepts are ambiguous in a special way. Conceptions of a concept correspond to senses of an ambiguous word or phrase. But there is a difference. The senses of ambiguous terms are identified by examining usage. We learn that

[263] JOHN RAWLS, A THEORY OF JUSTICE 5 (revised ed. 1999).

"cool" can refer to temperature or style by observing the different senses in which "cool" is used in English. Ambiguous words and phrases are not indeterminate, because the different senses are fixed by usage—subject of course to the fact that usage can change over time.

In the case of Dworkin's deployment of the concept-conception distinction, usage does not constrain in the same way. The main idea of the distinction requires that the limits of a concept be fixed in some way. If this were not so, then various conceptions would not be *of* the same concept. But Dworkin's idea seems to admit of the possibility that when Hercules constructs the theory that best fits and justifies the law as a whole, he might (in principle) discover that the conception implicated by that theory is newly constructed and not sanctioned by current usage.

How does the concept-conception distinction interact with the construction-interpretation distinction? At the stage of interpretation, the question is the original public meaning of the clause—the conventional semantic meaning in context plus necessary implicature.[264] If the semantic theory that underwrites the concept-conception distinction is correct, then, in principle, there is no *a priori* reason to believe that the conventional semantic meaning of the constitutional text never includes *concepts* that require *construction*. If we discover that this is the case, then we move from the stage of interpretation to the stage of construction.

We can illustrate this possibility with respect to Dworkin's own example—the equal protection clause. At the stage of interpretation, the question would be whether the conventional semantic meaning of "equal protection of the laws" is something like "treatment required by the concept of equality." To answer this question, we would look to evidence of usage during the period when the Fourteenth Amendment to the United States Constitution was drafted and ratified. That evidence might support the *concept of equality interpretation* or it might support some other interpretation. If the evidence did support the concept of equality interpretation, then construction of the clause would require construction of a conception of equality. Dworkin's theory—*law as integrity*—would constitute a method of construction. Hercules constructs the theory that best fits and justifies the law as a whole and that theory will include a conception of equality. Other theories of construction provide competing criteria for sound constructions—a topic that is considered below.[265]

The account that I have offered so far reconciles Dworkin's use of the concept-conception distinction with the interpretation-construction distinction, and if this were the correct interpretation of Dworkin's theory, then Dworkin's approach would be broadly consistent with Semantic Originalism. It is far from clear, however, this Dworkin views his own theory in this way. It is possible that Dworkin believes that law as integrity would require Hercules to decide cases in a manner that contravenes the semantic content of the constitution when the theory that best fits and justifies the law as a whole so requires. Notice, however, that this revised understanding of Dworkin's theory is consistent with what I have called the weak version of the contribution thesis.[266]

One more point about concepts, conceptions, and Semantic Originalism. Jed Rubenfeld has argued that reconciliation of the concept-conception distinction with originalism collapses originalism into Dworkin's theory. Here is his argument:

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[264] *See supra* Part III.C.2.d), "The First Restatement of Semantic Originalism: Clause Meaning is the Original Semantic Meaning of the Constitution to the Relevant Audience in Context,," p. 60.

[265] *See infra* Part III.F.3, "Theories of Construction," p. 77.

[266] *See supra* Part I.A.3, "The Contribution Thesis: The Semantic Content of the Constitution Contributes to Constitutional Law," p. 7.

> As soon as an originalist starts saying that the framers' and ratifiers' concrete historical understandings of a constitutional provision were "mistaken" and may therefore be ignored in favor of the semantic or objective linguistic meaning of the words at the time of enactment, he is no longer an originalist but a Dworkinian. Dworkin's distinction between "concept" and "conception" (with Dworkin claiming to honor the concept as opposed to the conception) tracks very closely, if it is not identical to, a distinction between the original semantic meaning of the words in the text and the concrete historical understandings of how that text would apply to particular cases.[267]

There is a good deal of confusion in this passage. First, the references to understandings that were "mistaken" the use of "semantic or objective linguistic meaning" is ambiguous at best and obscure at worst: Goldstein's discussion elides the fundamental difference between Gallie's idea of essentially contested concepts and the Kripke's idea of natural kinds with an essential structure (to be discussed below[268]). It is difficult to exaggerate the magnitude of the difference—essentially contested concepts are the polar opposites of concepts with fixed essences. (**Note to reader**: if you attention was waning, please reread the last sentence.)

Second, the concept-conception distinction does not track the distinction between conventional semantic meaning and original expected applications. Again, this is a fundamental mistake; both concepts and conceptions are intended to function as providers of semantic content. The concept-conception distinction explains how a term like "good" can be a single concept, even though we have different conceptions of that concept. From the point of view of Semantic Originalism, this would be analogous to ambiguity: each conception of the concept is like a different sense of an ambiguous term, but if the concept-conception account is right, the conceptions are *of the same concept*. Suppose interpretation leads us to a particular conception—for now it doesn't matter how that might happen. The conception is now supplying the semantic content of the constitutional word or phrase. But conceptions are not expected applications. Rawls's theory—justice as fairness—is a conception of the concept of justice: it is not a set of expected applications. Dworkin's own theory makes conceptions, not concepts, the providers of legal content. Mistaking expected applications for semantic content leads to an incoherent theory of meaning, as is explained in detail below.[269]

The argument that originalism must choose between a commitment to the incoherent view that meaning is original expected applications *or* Dworkin's theory of law as integrity is utterly implausible and the structure of the argument is invalid (in the formal sense). There is an excluded middle so vast that it includes almost every account of meaning in general and constitutional meaning in particular. One of the options in the excluded middle is Semantic Originalism.

c) Concepts, Conceptions, Constructions

The larger point of this section is to identify relationship of the concept-conception distinction and the construction-interpretation distinction. One picture of that relationship is that the semantic meaning of some constitutional provisions points to concepts. On this picture, interpretation leads to the concept, and then construction selects a particular construction. It is

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[267] Jed Rubenfeld, *Reply to Commentators*, 115 YALE L.J. 2093, 2099 (2006).
[268] *See infra* Part III.G.2, "Natural Kinds, Moral Kinds, and Legal Kinds," p. 95.
[269] *See infra* Part III.H.2.a)(5), "Expected Applications," p. 111.

possible that this picture is the right one, but whether it is (or isn't) depends on what the semantic meaning of the particular clause actually is. The concept-conception distinction is an account of the way that certain word and phrases mean. The concept-conception distinction is not a tool that can be used (for normative reasons) to change the semantic content of the constitution. Thinking of the concept-conception distinction in that way is simply to misunderstand the distinction.

It is possible that interpretation based on the evidence of contemporaneous meaning will lead us to the conclusion that a particular clause incorporates a concept. But this is not necessarily the case. There is no a priori reason that necessitates that all of the general and abstract clauses of the constitution point to contested concepts. Conventional semantic meaning is fixed by linguistic practice at the time of constitutional utterance. The idea that meaning is fixed by linguistic practice is not inconsistent with the idea of contested concepts. Contested concepts explain how meaning can be fixed by linguistic practice and at the same time be contested. Linguistic practice fixes the boundaries of the concept within which the contest occurs.

* * *

The age of interdisciplinarity is upon us, and the full implications of that fact have only recently begun to "sink in." The legal academy includes the smart and the quick, generalists who can take in a distinction, theory, or concept, and put it to brilliant use. And most of the time, that is good enough. If a subtlety is missed or an intricate distinction elided, the money point remains. But the standard for "good enough" is independent of the sociology and psychology of the legal academy. Even the sharp and the quick can miss something fundamental. Sometimes if a subtlety is missed or an intricate distinction is elided, the money point simply disappears. The currency of legal theory is truth. Cleverness lacks cash value.

* * *

2. Natural Kinds, Moral Kinds, and Legal Kinds

The account of constitutional meaning that we have pursued so far ties clause meaning to conventional semantic meaning, which is fixed by usage. But is this account of meaning correct? Or if correct for some words and phrases, are the others for which a different account of meaning is required. A fundamental challenge to the notion that meaning is conventional is posed by the work of Saul Kripke, Hilary Putnam, and others on the notion of a natural kind. Following Morris, let us define a natural kind as follows:

> *Natural Kind:* A natural kind is a kind whose identity as a kind is fixed by reality, and not by human interests or concerns.[270]

Take the word "gold," one sense of which refers to the shiny metal.[271] Gold is a natural kind the identity of which is fixed by its atomic structure. What counts as gold in this sense depends on our best scientific theory of the elements. Whether a given object really is composed of gold

[270] Morris, *supra* note 110, at 95.

[271] Another sense of the word "gold" refers to a color. That sense of "gold" is vague, since it admits of borderline cases. For example: gold!, gold?, gold?? (color display or hardcopy generated on color printer required to view example).

does not depend on usage. It would be quite possible for everyone to be mistaken about the question whether something that seems very much like gold *really* is gold. So this seems like a case in which conventional semantic meaning does not fix reference. Once we had dubbed gold (the element) with the English word "gold" as its name, then reference was fixed by nature and not conventions.

Does the constitution employ natural kind terms? In a subsequent draft, I will have a really good answer to that question. I did browse through Article I as I was writing this paragraph, and the only candidate for a natural kind term was "person." There are some other possible examples that come to me off the top of my head. "Speech" in the sense of "language use" seems like it might be a natural kind. For the purposes of this draft, I am inclined to adopt the position that there are very few natural kind terms in the constitution. For this reason, the existence of natural kinds doesn't seem to threaten the core theory of constitutional meaning articulated above.[272]

If the constitution does contain natural kind terms, then the core theory would need to be modified. This modification would not challenge the essential thrust of either the account of clause meaning or the distinction between interpretation and construction. The meaning (semantic content) of natural kind terms is determinate. Metaphysically, there is always a "fact of the matter" regarding the correct application of a natural kind term. Epistemologically, there may, of course, be uncertainty. The essential thrust of the view argued for this Article requires only that the Constitution have semantic content that is not indeterminate. If the semantic content of the Constitution were largely determined by natural kind terms, that requirement would be satisfied.

This modification of the theory is not as radical as it might seem on first blush. The idea that some words refer to natural kinds is not inconsistent with the notion that the relationship between the word and the natural kind is fixed by convention or usage. Indeed, that conclusion seems inescapable. Because words change their meaning it is possible for a given word to refer to one natural kind at one time and then change its meaning as a result of accumulating errors in usage.

Consider "speech" as an example of the role of conventions and natural kinds. If the word "speech" in the First Amendment refers to a natural kind—oral human communication defined in terms of naturally occurring human capacities to produce sounds and linguistic capacities that are inherent to the human species—the relationship is a function of complex set of conventions that constitute the natural language English. We can see the role of convention, because we can imagine that the word "speech" could acquire a new meaning in English. Suppose the lyrics of rap music were referred to as "speech" and over time the pattern of usage changed so that it became the beat rather than the lyrics which conventional usage identified as speech. It is imaginable that over a long period, the word "speech" would lose its old meaning, coming to refer only to beat in the musical sense. If this occurred, the semantic content of the First Amendment would not change. It would still refer to the natural kind *speech*. It would be possible, of course, for naïve readers of the First Amendment to say, "How cool, the founders guaranteed the right to choose whatever speech [meaning what we call "beat"] you want when you compose music." But this would be a misunderstanding. The semantic content of the First Amendment would not have changed.

The constitution includes few words or phrases that are plausibly understood as natural kinds identified by science. But it does include several words and phrases that could be understood as

[272] *See supra* Part III.C.2.d), "The First Restatement of Semantic Originalism: Clause Meaning is the Original Semantic Meaning of the Constitution to the Relevant Audience in Context,," 60.

having moral content, for example, "freedom of speech," "cruel and unusual punishment," and "equal protection of the laws." Some philosophers have argued that the meaning of moral language is fixed by *moral kinds*.[273] This is not the occasion to interrogate the correctness or plausibility of this position, but we do need to ask whether and how this view, if true, would affect the theory of constitutional content offered here.

If the constitution employs moral kind terms, then moral reality and not semantic conventions fixes their meaning given conventions that attach a word or phrase to the kind. Conventions do the attaching of the word to the moral kind, but moral reality and not the convention fixes the nature of the kind. In this case, the constitution has semantic content but that semantic content includes (but is not exhausted by) content that is independent of the original public meaning of the constitution. This possibility creates a set of options for Semantic Originalism as a theory of constitution meaning. The first option is to absorb "moral kinds" into the theory of clause meaning. In that case the four modifications of clause meaning identified above,[274] would be joined by a fifth modification, and the theory would proceed as modified. There are other options as well, and some of these are discussed in a footnote accompanying this sentence.[275]

Finally, there is at least the logical possibility that there exist "legal kinds," metaphysically real entities that fix the reference of constitutional terms like "Republican form of government," "privileges and immunities," or "full faith and credit." The view that comes closest to this is expressed by Michael Moore in the context of the term "malice" in the criminal law:

> [A] second level realist is committed to something named 'malice' that is neither a natural nor a moral kind. Rather than calling this a 'legal kind,' however, I prefer the label 'functional kind.' The legal realist view of 'malice' is no different than the general realist understanding of terms like 'lawyer', 'knife', 'vehicle', or 'paper weight': all these terms refer to kinds of things whose essence is not given by their structure but by their function.[276]

Again, for the purposes of this essay, the existence of "legal kinds" or "functional kinds" would not require modification of the main thesis—that the constitution has semantic content, that its content has the force of law, and that fidelity to that content is warranted absent overriding reasons of morality. The fixation thesis remains intact, and the clause-meaning thesis would be reconstructed to incorporate the role of linguistic convention in creating the necessary relationships between words and phrases, on the one hand, and functional or legal kinds, on the other.

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[273] *See, e.g.,* Jaegwon Kim, *Moral Kinds and Natural Kinds: What's the Difference for a Naturalist?*, 8 PHILOSOPHICAL ISSUES 293-302 (1997).

[274] *See supra* Part III.C.2.c), "Modifications of the First and Second Approximations," p. 53.

[275] The first option—incorporation of moral kinds into clause meaning—might be problematic for a variety of reasons. Even if "freedom of speech" is a moral kind, it is possible that the circumstances of constitutional utterance were such that the original public meaning of the term would have been understood as referring to a different entity—the conception of freedom of speech embodied in legal practice, for example. If this were the case, we would say that the phrase "freedom of speech" is ambiguous, with one sense being the moral kind freedom of speech, and the other sense being specified by the conventions of legal practice. **Note to reader:** At this stage, I am unsure as to how far to pursue these issues. This footnote might be viewed as a placeholder for a fuller treatment, perhaps expanded to occupy a substantial role in the main text.

[276] Michael Moore, *The Interpretive Turn in Modern Theory* in EDUCATING ONESELF IN PUBLIC: CRITICAL ESSAYS IN JURISPRUDENCE 335, 349 (2000).

Ideally, all of these issues would be resolved in the scope of a single essay. Practically, this requires full consideration of the most fundamental questions in contemporary philosophy of language. Because the existence of natural, moral, and functional kinds can be incorporated within the structure of Semantic Originalism without fundamental alteration in the structure of the theory, the deep questions are deferred.

H. Objections to Pure Semantic Originalism

Even if pure semantic originalism (essentially, the fixation thesis and the clause-meaning thesis) is justified by arguments that are sound, it does not follow that it cannot be contested or resisted. In this Section, I shall examine a variety of objections to pure semantic originalism, beginning with what we can call the "normativity objection," which contests the line that I have drawn in the sand between semantics and normativity.

1. The Normativity Objection: Attempts to Collapse the Distinction Between Normativity and Semantics

The assertion that originalism must be justified on normative grounds is widely shared and deeply held among contemporary constitutional theorists. Richard Kay wrote, "The choice of following or rejecting the original intentions is necessarily not a legal choice, but a moral and political one."[277] A Harvard Law Review student note opined, "The choice among methods of constitutional interpretation is a moral and political choice that implicates the deepest and most basic questions about how government authority may legitimately be allocated and exercised."[278] Richard Fallon wrote, "Choosing between a text-based and a practice-based approach to constitutional theory requires a judgment of normative preferability."[279] Christopher Eisgruber stated, "Originalism, like any other theory about the judiciary's proper role, 'must depend upon a

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[277] Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 285 (1988):

> Adherence to the original intentions, like any other purposive human activity, involves a choice. Legal words cannot magically bring about the state of affairs they describe. The force of law results from the attitudes and reactions of human beings in response to legal rules. These attitudes and reactions, in turn, arise from widely shared (and largely tacit) political preferences. But there is no reason to think that those decisions are made only once, for all time. They are always provisional, always capable of being abandoned. And because these choices inevitably reflect particular values they will always be, when fully understood, potentially controversial.
>
> Put more concretely, the plan of government intended by the creators of the United States Constitution could and can have only those effects which people-both public and private-choose to give it (although the choice is rarely conscious). This essay is about one such choice-reconstruction in practice of a government conforming to the one conceived in theory by the constitution-makers. Original intentions adjudication would entail such a choice by judges, particularly the justices of the Supreme Court.
>
> The choice of following or rejecting the original intentions is necessarily not a legal choice, but a moral and political one. It must be prior to law even-indeed especially-the law of the Constitution and is, in this sense, preconstitutional. Our experience with political and *286 moral differences indicates that we should not be too optimistic about our capacity to resolve them by rational argument. This is certainly true with regard to the questions at issue here.

[278] Note, *Original Meaning and its Limits*, 120 HARV. L. REV. 1279, 1298 (2007).

[279] Richard H. Fallon, Jr., *How To Choose A Constitutional Theory*, 87 Cal. L. Rev. 535, 545 (1999 Article How to Choose a Constitutional Theory).

political philosophy that it takes to be true.'"[280] These authors express a view that is commonly held among constitutional theorists—that theories of constitutional interpretation must be justified on normative grounds.[281]

* * *

I've presented "Semantic Originalism" several times at workshops and conferences. Despite the extended and explicit discussions of the distinction between its normative and semantic claims, my experience is that many readers react to the paper by asking for the normative justification for adopting "clause meaning" as a theory of the semantic content of the Constitution. "Why should we adopt your theory?" "How will it improve constitutional practice?" "What are the practical advantages of Semantic Originalism?" "Will it produce better decisions?" When asked these questions, I pause and then reiterate the arguments for the proposition that the recognition or discovery of semantic content is guided by facts and not values. The most common reaction is an uncomfortable silence. I do not take this silence to indicate agreement. Instead my assumption is that the silence indicates a failure of communication. I have simply failed to get my point across. I imagine my interlocutor silently thinking, "What on earth could Solum mean by that?"

I have a working hypothesis about this failure of communication. I believe that it flows from a failure to appreciate the ambiguity in words like "meaning" and "interpretation." In this Article, I use meaning to refer to semantic content and interpretation to refer to the process of determining semantic content. But "meaning" can be used to refer to the authoritative legal gloss on a text, and we have already distinguished between semantic meaning, application meaning, and teleological meaning. "Interpretation" can refer to the union of what I call interpretation and construction, or it could refer even more generally to constitutional practice—which could be guided by considerations entirely outside of the semantic content of the constitutional text. So when I say that I am using the term "meaning" to refer to semantic content, it is possible for even a careful listener to reverse the direction of my stipulation. That is, I can be interpreted as having said that "semantic content" is whatever guides constitutional practice. Once I am interpreted in this way, my assertion that "semantic content is a matter of fact" seems nonsensical or obviously wrong.

* * *

The claim that the debate over originalism is normative "all the way down" is frequently asserted, but rarely defended. The best, deepest, and most thorough discussion is found in Mitchell Berman's *Originalism is Bunk*,[282] and I will explicate his argument in detail. Berman's argument is advanced in the context of his critique of "intentionalism," which is roughly the

[280] Eisgruber, *supra* note 84, at 30 (quoting Thomas Nagel, *The Supreme Court and Political Philosophy*, 56 N.Y.U. L. Rev. 519-520 (1981).

[281] *See, e.g.,* Jed Rubenfeld, *Reply to Commentators*, 115 Yale L.J. 2093, 2096 (2006) ("Originalism is of course a theory of constitutional interpretation. Perhaps it is not very grand intellectually. But originalism is indeed "grand" if "grand" implies, as I suppose it is meant to do, that the theory rests on a large philosophy of some kind (whether political, linguistic, or something else) that in turn rests on fundamental (and controversial) premises concerning the status, purpose, and legitimacy of constitutional law.").

[282] Mitchell Berman, *Originalism is Bunk*, Draft 12/30/07, at 37,.

underlying view about semantic content that serves as the foundation for original-intentions originalism.

Let's begin with the following passage:

> [M]y modest goal is simply to establish the strong prima facie grounds for believing that the author's intended meaning is not the only possible meaning, hence not the only possible target of interpretation, and therefore (to speak loosely) that the argumentative burden appropriately falls upon the intentionalists.

So Berman has established the aim of his argument. Glossing his point in the vocabulary we have been employing, Berman will argue that author's intended meaning is not the only possible semantic content of a text.

In the next (extended) passage, Berman begins his argument:

> First, words must have meaning prior to their deployment by a particular speaker in a particular context in order to give the speaker reason to select particular words (or signs or marks) as against other particular words (or signs or marks) as the vehicle for conveying his intended meaning. For example, if, wanting the whitish mineral that enhances a food's flavor, I know to ask you to "please pass the salt" and not to "please pass the gas" (let alone, to "flymx groppohurplebinger") that's because "salt" means the thing I have in mind antecedent to my choice to use it in this context, and "gas" doesn't. Likewise, you know that my utterance of the word "salt" in this context is evidence of my wanting salt because of the meaning that our conventions have assigned to the word prior to my usage. Indeed, because intentions are states with semantic content, their content cannot be reducible to intentions on pain of infinite regress.
>
> Second, we need some notion of word or sentence meanings that are nonidentical to the author's intended meanings just to express the mundane idea that a speaker has misspoken or in some other way erred in his use of language. We know that "'meaning' and 'authorial intention' are not conceptually identical . . . by the mere fact that we can meaningfully ask whether a given text really conveys the author's intention." If I do ask you to "pass the gas" when I really want the salt, and then I complain about the consequences, we know that I have erred in my use of language. I erred precisely because "gas" does not mean salt–not because saltness is naturally excluded from the combination of sounds or markings that comprise "gas," but because of common usage and understandings. The simple idea that I misspoke is close to inexpressible if the only meaning of meaning is speaker meaning. For in that event, "gas" does mean salt. So, again, there must be conventional word meanings that are prior to the intent of an author.
>
> Because, for the same reasons, there must be conventional rules of grammar too, it would seem to follow that an utterance has at least two types of semantic meaning – the author's intended meaning and the meaning that a text bears by application of the relevant community's ordinary semantic and syntactic conventions for assigning meaning, given the context of the text's utterance. Eliding some nuances and shades of gray, these two sorts of meaning are variously termed speaker's meaning or utterer's meaning on the one hand, and sentence meaning, utterance meaning or public meaning, on the other.[283]

[283] *Id*. at 37-38.

So far, so good. There is one mistake in Berman's explication, but it is easily corrected. Berman states:

> . . . words must have meaning prior to their deployment by a particular speaker in a particular context in order to give the speaker reason to select particular words (or signs or marks) as against other particular words (or signs or marks) as the vehicle for conveying his intended meaning . . .[284]

But this is incorrect because we can make up new words and assign their meanings in various ways, some of which do not involve definitions that use other words. So if I point at a rabbit and utter the word "gavagai" and then say "Let's catch the gavagai and put it back in its cage," I can begin to create new meaning.

With this one mistake corrected, the rest of Berman's exposition above is essentially correct. His basic point is that speakers meaning is not the only possible meaning type because of the existence of sentence meaning. It is the next move that is problematic:

> And if interpretation is the attribution of meaning to a text, there would seem to be at least two possible targets of interpretation. Importantly, this is not merely an abstract possibility. In many mundane contexts, interpretation in accordance with utterance meaning seems by far the more appropriate course.[285]

The key is the first clause: "if interpretation is the attribution of meaning to a text." This remark is somewhat inaccessible or cryptic. What work is the word "attribution" doing here? The word "attribution" is ambiguous. One sense of "attribution" is "the action of bestowing."[286] If by attribution Berman means that interpretation is an action that creates meaning, then his account is inconsistent with his own account of conventional semantic meaning.

There is another sense of "attribution": "assigning or ascribing of a character or quality as belonging or proper to any thing"[287] In this sense, attribution of meaning is simply an assertion about what the meaning of a thing is. If this is what Berman means by "attribution," then this passage is unobjectionable. In that sense, there can be correct and incorrect attributions of meaning.

Berman continues:

> Consider an announcement that "applications must be received by 12:00 a.m. Thursday." Possibly, the author or promulgator of the announcement mistakenly believed that "12:00 a.m." means noon, and therefore intended to provide that applications must be received by midday Thursday to be eligible for consideration. Nonetheless, a competent speaker of the language understands that "12:00 a.m." means midnight. The utterance meaning of the announcement is that applications are timely if received, in effect, no later than Wednesday, even though according to the speaker meaning – what the author intended – some applications received thereafter would be timely.[288]

Here Berman has simply made a mistake in his account of speaker's meaning. For speaker's meaning to be communicated, there must be "common knowledge" of the speaker's intention. In

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[284] *Id*. at 37.
[285] *Id*. at 38.
[286] Oxford English Dictionary Online.
[287] *Id*.
[288] *Id*. at 38-39.

cases where a speaker makes a "slip of the tongue" or has an erroneous belief about conventional semantic meaning, speaker's meaning can nonetheless be conveyed—so long as speaker's belief about the audience's recognition of the speaker's intention is true. The success conditions for conveying speaker's meaning can be therefore be met, even where the speaker is mistaken about what was uttered (I thought I said "12:00 p.m.") or what the conventional semantic meaning was (I thought "12:00 a.m." meant twelve noon). If a reader of Berman's announcement successfully recognizes the speaker's intent and does in fact *get the meaning*, then it would simply be a mistake for the reader to say, "I get to choose what the announcement means." Given the context of utterance, it may be perfectly clear that "12:00 a.m." means twelve noon: for example, the reader of the audience may know that applications are only received during business hours, that there is a standard practice of accepting applications until noon, and both the author of the announcement and share common knowledge of this context. In these circumstances, the meaning of the utterance token is *twelve noon* and it would simply be a mistake to arbitrarily assign *twelve midnight*.

The source of Berman's confusion is his failure to distinguish between the conventional semantic meaning of an utterance type (all sentences of the form "applications must be received by 12:00 a.m. Thursday") with the semantic content of a particular utterance token: the posting of an announcement reading "applications must be received by 12:00 a.m. Thursday" on a particular occasion at a particular location by a particular author with a particular audience in mind.

Let me be clear, I am not claiming that as described, there is any fact of the matter regarding the meaning of the hypothetical utterance in Berman's example. That is because Berman's example is hypothetical or fictional. It isn't, in fact, an utterance—it is a fictive utterance. As a consequence, there is no fact of the matter about the context of utterance. It didn't happen. There was no context. And therefore, there is no fact of the matter about what the utterance meant in context.

Let me be clear, I am not defending intentionalism against Berman. Of course not! I am defending Semantic Originalism, which includes the clause-meaning thesis—the assertion that the meaning of the utterance token, the Constitution of the United States, is given by its conventional semantic meaning as modified by the full account of clause meaning. But the case for the clause-meaning thesis does not entail the further conclusion that no utterance token ever has speaker's meaning. That would be silly, wouldn't it? Life is full of examples of speakers meaning: speakers succeed in communicating based on common knowledge of the speaker's intentions all time—billions of times per hour given the size of the earth's population. My point is that the meaning of an utterance token isn't a matter of choice.

Berman's argument continues:

> By recognizing both speaker meaning and sentence meaning as valid meanings of an utterance, nonintentionalists insist merely that insofar as interpretation is the search for meaning, it need not be the search for the originally intended meaning. In this context, interpretation of the text is a search for utterance meaning.[289]

Berman's meaning here may be unobjectionable. There is an ambiguity in the assertion that "interpretation . . . need not be the search for originally intended meaning." If Berman assertion is that there is no general rule that the meaning of all utterance tokens is the speaker's meaning

[289] *Id*. at 39.

of the tokens, then he is absolutely right. If his assertion is that there is no fact of the fact of matter with respect to any utterance token, that the meaning of that token is the speaker's meaning, then is not only wrong, he has failed to produce any argument for his conclusion. To produce such an argument, Berman would need to take into account the success conditions for communication of speaker's meaning and the distinction between the meaning utterance tokens and utterance types.

The assertions made by Berman in the passages quoted above were intended by Berman to support the conclusions drawn in the following passage. This passage contains the crucial moves in Berman's argument, and it requires extended dissection:

> For all these reasons, pluralism about interpretation looks more than plausible. Interpret the grocery list in pursuit of the author's intended meaning because the author had knowledge that you lack that is relevant to your reasons for interpreting the document. Interpret the announcement in pursuit of utterance meaning because doing so best advances the values that surround and inform the use of announcements – to promote shared understandings, notice, fairness. The pluralist claim is not (as one Originalist has suggested dismissively) that utterer's meaning is good enough for insignificant texts, but that we should pursue a different meaning when it comes to texts that are, in some sense, important. It is that our object or target of interpretation should be sensitive to our reasons for engaging in the activity of interpretation. We return, then, to our question of the intentionalists: why not pluralism?[290]

The first sentence here is "For all these reasons, pluralism about interpretation looks more than plausible." The only prior occurrence of "pluralism" in Berman's essay is in the following sentence, which occurs shortly before the passages we have been parsing: "The question concerns what can be said for always interpreting all texts solely in accordance with presumed authorial intent–what can be said, in other words, against pluralism?"[291] If Berman really means "in other words," then this passage is unobjectionable. It is not the case that "always interpreting all texts solely in accordance with presumed authorial intent" results in accurate recovery of semantic content.

The next two sentences of the paragraph we are now examining make the move to normativity. First, "Interpret the grocery list in pursuit of the author's intended meaning because the author had knowledge that you lack that is relevant to your reasons for interpreting the document." And second, "Interpret the announcement in pursuit of utterance meaning because doing so best advances the values that surround and inform the use of announcements – to promote shared understandings, notice, fairness." In both sentences, the meaning of the word "interpret" is crucial. As we have already seen, "interpretation" is ambiguous. If Berman means, determine the semantic content, then these two sentences involve a kind of category mistake. Berman is discussing hypothetical utterance tokens that lack actual contexts, so in his examples, there is no fact of the matter about what the semantic content of the hypothetical utterances is—these are not actual utterances.

In the case of an actual utterance with a context, we may not be able to determine the semantic content of a particular utterance token: there is no guarantee that communication will succeed on particular occasions. But if the success conditions are met, then there is a fact of the

[290] *Id*.

[291] *Id*. at 37 (citing Kent Greenawalt, *A Pluralist Approach to Interpretation: Wills and Contracts*, 42 San Diego L. Rev. 533, 536 (2005)).

matter about the semantic content of the utterance, and considerations of fairness (to which Berman eludes in the second sentence quoted in this paragraph) do not directly bear on what that content is.

But as I said, the meaning of the word "interpret" is ambiguous. Berman might mean interpret in another sense. We might conclude, for example, that the announcement did mean "twelve midnight". That meaning might be clear based on the context of utterance. For example, past announcements may have been worded "12:00 a.m.—THAT MEANS MIDNIGHT." With the passage of time, the "THAT MEANS MIDNIGHT" could come to be omitted, but when the announcement was posted, it could have been misunderstood by someone who was new and unfamiliar with this unusual deadline. The very fact that we would describe this situation as involving "misunderstanding" shows that do not think that the reader of the sign just chooses meaning on normative grounds.

Just because the semantic content of the utterance token was *midnight*, that fact does not entail the conclusion that we must enforce the rule in a case where the misunderstanding was reasonable. We can excuse noncompliance for normative reasons. In that sense, we can adoptive what we might call an "amending construction" of the announcement that treats the announcement *as if* it had said "twelve noon." But it is simply a mistake to move from the fact that the practice of rule application can depart from semantic content for normative reasons to the conclusion that semantic content can be changed for normative reasons. That move would involve a category mistake.

This is not the end of Berman's argument. After additional discussion of interpretivism, he returns to his affirmative case for pluralism:

> The analysis to this point successfully counters the argument that intentionalism is demanded because it alone can satisfy the critical conceptual premises regarding what interpretation is. Because we already saw the insufficiency of the other principal intentionalist arguments (those relying on our untutored intuitions about the frequent propriety of intentionalist interpretation and on the proposition that meaning depends upon some sort of authorial intentions), intentionalism seems defeated. But after intentionalism falls, what is left? We used utterance meaning to defeat intentionalism. But an open question is whether utterance meaning exemplifies the possible other approaches or exhausts them. In other words, the question remains whether we are left with pluralism, as I have intimated, or merely dualism.[292]

Once again, the meaning of the terms "meaning" and "interpretation" are crucial.

If Berman is using interpretation and meaning in what I call their semantic senses, then "dualism" or "pluralism" is true at one level—there are cases in which the semantic content of an utterance is speakers meaning and other cases in which semantic meaning of an utterance is its sentence meaning. But it would be a logically mistake to move from this fact to the conclusion that a single utterance token has both sorts of meaning. That simply doesn't follow.

Moreover, there are cases where our information about the context of utterance is insufficient for us to be able to determine what the semantic content of a particular utterance is: there is no guarantee that semantic content is epistemically accessible. But from these points it does not follow that there is no fact of the matter about the semantic content of a particular utterance.

The same points apply to the Berman's next move:

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[292] *Id*. at 46.

> Roughly, I suggest, we do well to think of interpretation as an effort to attribute to a text the meaning that would best serve the interpreter's reasons for engaging in the activity of interpretation, or would best serve her (possibly inchoate or not wholly conscious) criteria for success. And if one's reasons or criteria are varied, then the best interpretation will be a complex function involving disparate desiderata all satisfied to varying degrees.[293]

Two additional observations are relevant here. First, Berman hasn't actually made out the case for pluralism as opposed to dualism. To do that, he would need to actually articulate and defend multiple accounts of meaning (beyond speakers meaning and sentence meaning) that account for successful communication. He does not assume that burden, so his argument only warrants dualism.

The second observation is more fundamental, but repetitive. If Berman is referring to interpretation as what we do with texts—how we use them—then this paragraph is unobjectionable. But if he believes that semantic content is determined after the fact of communication on the basis of what we would like an utterance to have meant given our practical concerns, then this way of thinking about interpretation is fundamentally confused.

One way of getting at the idea that there is a fact of the matter about semantic meaning is to examine contexts where meaning is unambiguous. The United States Constitution, for example, Article One, Section Three of the United States Constitution provides, "The Senate of the United States shall be composed of two Senators from each State." The semantic content of this provision is neither ambiguous nor vague.[294] For example, Senators come only in whole numbers: there a bright line between one and two, and between two and three. Nor is there any ambiguity in the meaning of two in context—the reference is clearly to the number of senators. This lack of ambiguity is not affected by the fact that the English word "two" is ambiguous: it can refer to either the number or to the numeral. But no one could plausibly maintain that "two Senators" could mean "numeral two Senators"—even though there have been members of the now defunct Washington Senators baseball team who wore the numeral two on their uniforms. Even if there were normative reasons to interpret "two Senators" as referring to those members of the Washington Senators who were designated as numeral two, it would simply be a mistake to assign or attribute than meaning to Article Two, Section Three of the United States Constitution. The Constitution of 1789 could not possibly have referred to players for the Washington Senators baseball team. Baseball did not exist in 1789. The Washington Senators baseball team did not exist in 1789. When the Washington Senators did come into being and put a uniform with the numeral two on a player, this did not create a new possible semantic for the phrase "two senators." No normative argument, no matter how powerful, can change that.

It might be argued that examples like this are trivial, and that objection is answered elsewhere.[295] But even if the example was trivial, that would be no answer to the point that the example makes. If there is a fact of the matter about the semantic content of constitutional provisions that are neither ambiguous nor vague, this shows that interpretation in the semantic sense is not normative all the way down. And because the resolution of vagueness and ambiguity is a matter of construction and not interpretation, the fact that construction is a

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[293] *Id*.

[294] *Cf*. Eisgruber, *Constitutional Self-Government*, *supra* note 84, at 2 (referring to Article I, sec. 3, and stating "This provision and others like it, do constrain the choices that Americans can make.").

[295] *See infra* Part III.I, "What's in a Name, Take Three: Strong Originalism,," p. 122; Part IV.E, "Triviality, Take Two: ." P. 163; Part V.C, "Triviality Take Three, Truth as the Telos of Legal Scholarship," p. 171.

normative enterprise does nothing to show that interpretation in the semantic sense is also normative.

2. Substantive Objections to Clause Meaning and the Fixation Thesis

The normativity objection doesn't directly confront either the fixation thesis or the clause-meaning thesis, but there are a number of arguments that do clash in a substantive way to these two claims.

a) Alternative Theories of Semantic Meaning

Many of the arguments against clause meaning are based on the notion that some other theory of semantic content is either the correct theory or that it provides an alternative kind of meaning that can be chosen by someone trying to interpret the constitution.

(1) Intentionalism

The most obvious alternative to clause-meaning thesis is grounded on intentionalism, the general theory of meaning that grounds original intentions originalism.[296] In a sense, intentionalism doesn't threaten the core of Semantic Originalism: it denies that semantic content is determined by original semantic meaning, but it accepts (or can accept) the fixation thesis, the contribution thesis, and the fidelity thesis. If it were the case that intentionalism was true, then Semantic Originalism would need to be amended, but it would otherwise remain intact.

The case for clause meaning and against framers meaning has already been made.[297] Those arguments will not be repeated here. Instead, I want to consider a different sort of argument for intentionalism, articulated by Steven Smith in his recent book, *Law's Quandary*. Let me give a name to Smith's core position, which I shall call the "semantic intentions necessity thesis." Here is how Smith expresses this idea: "[T]he meaning of a legal text is necessarily given by—indeed, is basically identical with—the semantic intentions of an author or authors *of some sort*."[298] Smith seems to be making an argument for intentionalism that has a special kind of trumping force—it purports to establish the impossibility of sentence meanings in general and clause meanings in particular.

Smith's argument can be tested with an example drawn from Gary Lawson. Lawson argued that the Constitution should be read like a recipe and that recipes should be read in light of their original public meaning, as opposed to the private intentions of the cook (or correspondingly, the Framers).[299] Smith responds:

> Lawson's proposition seems positively perverse. After all, if we are reading the recipe in an effort to cook fried chicken and on the assumption that the recipe was written by someone who was a specialist in the art, then what we care about in reading the recipe is

[296] This interim draft does not fully respond to comments received from Larry Alexander, Guyora Binder, and Steven D. Smith on the issues raised by intentionalism. I deeply grateful to each of these readers for their extensive and illuminating comments.

[297] *See supra* Part III.C.1.c), "The Success Conditions for Framer's Meaning," p. 42.

[298] STEVEN D. SMITH, LAW'S QUANDARY (2004).

[299] Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823 (1997).

> *what the cook intended*. Conversely, we care not at all about the recipe's original public meaning—except perhaps as an aid to figuring out what the cook actually meant.[300]

The recipe example is a good one because it provides a context in which to test the semantic intentions necessity thesis. But in order to get at the test, we need to elaborate the example just a bit. Consider the following hypothetical situation. Let's call it "Anonymous Recipe Bank,":

> *Anonymous Recipe Bank*. Imagine that someone sets up an anonymous recipe bank. Let's suppose it is on the Internet. Contributors submit their recipe via a Web page and the recipe is then indexed and classified.

Now imagine that that Mom submits her recipe for apple pie. The author of the text is Mom; she uploaded the recipe. But because this is an anonymous recipe bank, we do not know who Mom is. So we have no way of acquiring particular knowledge of her semantic intentions. But we do know this: Mom knew that her recipe would be anonymous. So we know that Mom knew that we would not know anything about her particular intentions. Mom would know that we would have to fall back on the ordinary or standard meaning of the various elements that make up recipe. Mom knows that we could not know that by "butter," she means margarine. So Mom knows that her recipe will be given its "public meaning" or "sentence meaning."[301] So we will interpret Mom's recipe by assigning the ordinary meanings to each of the ingredients and measures. To coin a phrase, we will interpret Mom's recipe for apple pie by using the idea of "recipe meaning" and not the idea of "cook's meaning."

At this juncture that Smith can make an intuitive and apparently persuasive move: Smith can say, "Yes, and this example proves my point." In this situation, we are interpreting Mom's intentions. Given the situation, our interpretation is that Mom intended the words to have their ordinary public meaning. In other words, we say that the meaning of the recipe is its "recipe meaning" because "recipe meaning" is "cook's meaning." Suppose that Smith's claim is correct as a general matter.[302] This would imply that sentence meaning is a special kind of speakers meaning. In the case of the Constitution, clause meaning would be a special kind of framers meaning. Because the framers knew that we could know their special individual intentions, they must have intended that Constitution be interpreted in accord with its original public meaning.

If Smith's argument for the semantic intentions necessity thesis were correct, it would provide an alternative understanding of the rationale for assigning clause meaning to the Constitution, but it does not deny that clause meaning is possible. The possibility of clause meaning depends on conventional semantic meaning, which in turn depends on the complex set of conventions that define a natural language. These conventions are created by intentional actions that confer meanings on otherwise arbitrary sounds and marks. But once conventional semantic meaning gets going, it can supply semantic content to a text that is independent of the intentions of any particular author. There is no general metaphysical necessity that makes sentence meaning impossible or requires that every utterance be understood on the model of speakers meaning. As a consequence, the general arguments against framers meaning and for clause meaning can go through even if it is the case intentions play a role in the creation of conventional semantic meaning.

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[300] SMITH, *supra* note 298, at 106.

[301] PAUL GRICE, STUDIES IN THE WAY OF WORDS, 117-37 (1989).

[302] This claim can be contested. *See* Lawrence B. Solum, *Constitutional Texting*, 44 U. SAN DIEGO L. REV. 123 (2007).

In sum, Semantic Originalism makes two replies to intentionalism, in the alternative. The first reply is that the account of meaning offered by intentionalism is incorrect: the semantic content of the Constitution is given by its clause meaning. The second reply is that if intentionalism were true, it could be absorbed into Semantic Originalism: intentionalism can be seen as an explanation for how clause meaning arises.

(2) A Variation of Intentionalism: Communication of Secret Intentions

A variation of intentionalism was suggested by Howard Graham in his 1938 articles on the "conspiracy theory" of the fourteenth amendment.[303] Graham's argument challenges the assumption that the framers' intentions were multitudinous and inaccessible. Suppose that those who drafted a given constitutional provision were able to agree on a "secret" or "coded" meaning and that the authoritative interpreters of the provision, i.e., the Justices of the Supreme Court were in on the conspiracy. Under these conditions, the success conditions for framers meaning would seem to be satisfied. Here is Graham's statement of the argument:

> Social historians have contended that the equal protection and due process clauses were designed to take in "the whole range of national economy;" that John A. Bingham, the member of the Joint Committee chiefly responsible for the phraseology of Section One, "smuggled" these "cabalistic" clauses into a measure ostensibly drafted to protect the Negro race. Others have been skeptical of this view, and have pointed out that it is pyramided on three propositions: (1) that the framers had a substantive conception of due process, (2) that as early as 1866 there existed a number of constitutional cases in which due process had been invoked in a substantive sense by corporations, (3) that the framers knew of these early cases and realized the corporate potentialities of their draft, which were not suspected by the ratifiers.

Of course, Graham, writing in 1938 did not state his three conditions in Grice's terminology, but unsurprisingly his description of the three propositions satisfy the common knowledge conditions for the success of speakers meaning.

This scenario is not impossible. If, in fact, such a conspiracy had existed, then the 14th Amendment's semantic meaning would have been its framers meaning and not its clause meaning. But this would not be the end of the matter. There are at least two further questions. The first of these concerns the legal effect of the cabalistic clauses—given the fraud perpetrated by the framers on the ratifiers, should the cabalistic clauses be considered valid, and if valid, should their semantic content be recognized as their legal meaning. Even if the framers meaning of the cabalistic clauses were their legal meaning, there is a further question whether fidelity to law would extend to this case.

Of course, the possibility of Graham's scenario does not establish its plausibility or truth. So far as I know, this scenario is not supported by historical evidence. The real lesson here is that there is a fact of the matter about the semantic content of an utterance, and that fact is a function of the conditions of constitutional utterance. Under normal conditions, the semantic content of an utterance is given by its original public meaning, but we can imagine possible conditions in which that would not have been the case. This possibility shows that the theory of clause meaning is falsifiable, and that fact provides supporting evidence that the claim that the

[303] Howard Jay Graham, *The "Conspiracy Theory" of the Fourteenth Amendment: 2*, 48 YALE L. J. 171 (1938).

constitution has clause meaning is a theory about facts and not the conclusion of a normative argument.

(3) Constitutional Holism

Let us use the name *constitutional holism* for the view that the meaning of the Constitution is the meaning of the whole document or the *holistic meaning*.[304] Does holism provide an alternative to clause meaning? The clause-meaning thesis asserts that the semantic content of the constitution is a function of the meanings of individual clauses given the publicly available context of constitutional utterance. But what if individual words and phrases cannot be understood in isolation because the Constitution is an organic whole? For example, the phrase "rights . . . retained by the People" in the Ninth Amendment might not be comprehensible without reference to "We the People" in the Preamble: are "the People" individuals or are they a polity? Likewise, the Ninth uses the phrase "the enumeration of certain rights in this Constitution" Gleaning the meaning of this phrase seems to require reference to what is now called "the Bill of Rights," and once that has been accomplished, the meaning of the phrase "rights . . . retained by the People" may be clarified. For example, the "retained rights" which are not to be denied or disparaged may be of the same type or kind as the "enumerated rights" such the freedom of speech and press, the right to bear arms, the right to due process, and so forth.

Does holistic meaning provide a better account of the semantic content of the constitution than does clause meaning? To get at this question, we first need to identify and then deflate a misleading picture of the relationship between the meaning of individual clauses and the whole Constitution. It might be thought that there are only two alternative positions on the relationship of the whole to the parts when it comes to constitutional meaning. The first alternative might be called *clause bound interpretivism*, the view that the meaning of each clause must be determined from within the four corners of the clause. The second alternative might be called *organic unity holism*, the view that meaning only attaches to the whole constitution as an organic unity and that as a consequence individual clauses are not meaningful units of constitutional communication. This picture, which suggests we must choose between clause bound interpretivism and organic unity holism, might be called the *all-or-nothing picture*: either the constitution's meaning is *all* (the whole constitution all at once) or it is *nothing* (no meaning attaches to the individual clauses by virtue of their relationship to the whole document).

The all-or-nothing picture creates a false dilemma. There is an alternative picture of the relationship between the meaning of individual clauses and the whole Constitution: that picture can be expressed *via* two theoretical ideas: (1) the familiar device of the hermeneutic circle, and (2) the related notion of intratextualism.

The idea of hermeneutic circle figured prominently in protestant theological hermeneutics to understand the relationship of the meaning of individual biblical passages to the whole text: the meaning of each individual passage of scripture is gleaned in light of the meaning of the Bible as a whole.[305] As Gadamer puts it, "For it is the whole of scripture that guides the understanding of

[304] *See, e.g.,* Akhil Reed Amar, *A Few Thoughts On Constitutionalism, Textualism, And Populism*, 65 Fordham L. Rev. 1657, 1659 (1997) (observing "the importance of looking at the Constitution as a whole, because what was ratified was the document, not individual clauses" and "[t]he clause is not the unit, or at least the only unit of analysis").

[305] *See* Lawrence B. Solum, *Originalism as Transformative Politics*, 63 TUL. L. REV. 1599, 1608 (1989).

the individual passage: and again this whole can be reached only through the cumulative understanding of individual passages."[306] Justice Story's first recommendation for constitutional construction is based on the same notion: "In construing the constitution of the United States, we are, in the first instance, to consider, what are its nature and objects, its scope and design, as apparent from the structure of the instrument, viewed as a whole, and also viewed in its component parts."[307]

Intratextualism[308] as articulated by Akhil Amar expresses a closely related idea with a different metaphor:

> Textual argument as typically practiced today is blinkered ("clause-bound" in Ely's terminology), focusing intently on the words of a given constitutional provision in splendid isolation. By contrast, intratextualism always focuses on at least two clauses and highlights the link between them. Clause-bound textualism paradigmatically stresses what is explicit in the Constitution's text: "See here, it says X!" By contrast, intratextualism paradigmatically stresses what is only implicit in the Constitution's text: "See here, these clauses fit together!" But there is no clause in the Constitution that says, explicitly and in so many words, that the three Vesting Clauses should be construed together, or that the Article III grant of federal question jurisdiction should be read alongside the Article VI Supremacy Clause. Intratextualism simply reads the Constitution as if these implicit linking clauses existed. Clause-bound textualism reads the words of the Constitution in order, tracking the sequence of clauses as they appear in the document itself. By contrast, intratextualism often reads the words of the Constitution in a dramatically different order, placing textually nonadjoining clauses side by side for careful analysis. In effect, intratextualists read a two-dimensional parchment in a three-dimensional way, carefully folding the parchment to bring scattered clauses alongside each other.[309]

Both the idea of the hermeneutic circle and the idea of intratextualism undermine the all-or-nothing picture. Our choices are not limited to clause-bound interpretivism and organic unity holism. The excluded middle is to read individual clauses in the context of the whole Constitution. The clause-meaning thesis squarely occupies the excluded middle: it insists that clause meaning is bound by the publicly available context,[310] and the whole of the constitutional text is indisputably part of that! Once the all-or-nothing picture is out of the way, it becomes apparent that contextual clause meaning can be reconciled with a plausible version of holistic meaning.

One final point: organic unity holism is utterly implausible as a theory of semantic content. The whole constitution is not the relevant unit for determining semantic content. It is no accident that when we apply the Constitution our focus is on clauses and the interaction between clauses. The Constitution as an organic unity says both too much and too little. Too much, because the whole Constitution from top to bottom considered a single unit of meaning doesn't translate into rules of constitutional law: organic unity holism makes the Constitution one long primal scream. Too little, because organic unity prevents us from assigning meaning at the level

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[306] HANS-GEORG GADAMER, TRUTH AND METHOD 264 (1975).
[307] JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 136 (abridged ed. 1833).
[308] *See* Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1998).
[309] *Id*. at 788.
[310] *See supra* Part III.C.2.c)(1), "First Modification: The Publicly Available Constitutional Context," p. 54.

of particularity required to do the work of constitutional practice: organic unity holism transforms individual clauses into meaningless concatenations of phonemes.

In sum, if holistic meaning is construed plausibly (as incorporating the ideas of the hermeneutic circle and intratextualism) then it is absorbed into the theory of clause meaning via the notion of the publicly available context of utterance. But if construed in accord with organic unity holism, holistic meaning is no meaning at all.

(4) Contemporary Meanings

Why not contemporary meanings? If the meaning of the words and phrases that make up the Constitution have changed over time, isn't it possible for the Supreme Court to use the contemporary meaning of these words and phrases when it interprets the Constitution? This question is ambiguous. In one sense, of course it is possible for the Supreme Court to "interpret" (or quasi-interpret) the Constitution in ways that are inconsistent with its semantic content. The relevant question is whether it is possible for the Supreme Court to correctly interpret the Constitution to have semantic content that is determined by contemporary usage that is different from and inconsistent with the conventional semantic meaning of the words and phrases at the time particular constitutional provisions were framed and ratified. In that sense, it is indeed "impossible"—the Court has the power to alter constitutional law (the rules that define the legal effects of the Constitution), but it does not have the power to change its semantic content.

It is important to remember that at this stage of the argument, we are only discussing contemporary meaning as an alternative to the fixation thesis. In that context, contemporary meaning is a nonstarter. There is another, related, but conceptually distinct inquiry as to whether contemporary meanings can be legally effective and a third conceptually distinct inquiry as to whether authorizing the substitution of contemporary meanings for the actual meaning of the text is justifiable as a matter of political morality.

(5) Expected Applications

Another line of attack on Semantic Originalism might accept the fixation thesis, but embrace expectations about application as the semantic content of the Constitution. It is very important that we distinguish between two different ways in which the expectations of framers, ratifiers, and citizens might relate to the semantic content of the Constitution. Expected applications might be used as evidence about conventional semantic meaning. Such evidence must be used with care, because expectations about application are complex in cases where the semantic content is vague. In such cases, the evidence about expected applications will be ambiguous as between *expected interpretations* and *expected constructions*. Moreover, in complex cases, it is possible have an expectation that is inconsistent with the semantic content of a constitutional provision. For example, the original constitution notoriously had a glitch: the set up of the Electoral College permitted ties between candidates for President and Vice-President. Suppose that we had evidence that framers, ratifiers, and citizens expected that this could not occur: their expectation could be based on the fact that they simply hadn't considered all of the permutations that were possible given the rules governing the Electoral College. This would be a case were their expectations would not match the semantic content.

Although expected applications can be evidence of meaning, they cannot be the meaning of a constitutional provision. This conclusion is easily demonstrated through a thought experiment.

Suppose we limited the application of the Constitution of 1789 to those applications that were expected by the framers. Expectations are occurrent or dispositional mental states—individuals either have an expectation or they don't. Let's assume that framers were of one mind (they all shared the same expectations) and that their expectations were abundant: they thought about lots of possible applications. But even assuming that the framers minds were racing at a mile per minute, their expectations would quickly run out. That is, if the meaning of a constitutional provision were identical to the original expectations, there would simply be "no meaning" in most cases. For example, it might well be the case that no framer would have thought of the possibility of a tie between the President and Vice President in the Electoral College. If the meaning of the relevant provisions were identical with the expectations, then there is simply no constitutional provision at all to deal with this situation.

In fact, once we try to generalize an expected applications account, it becomes apparent it could not work as a theory of semantic. Most utterances are not rules or commands: that is, most utterances have no expected applications. "Thank you" cannot be understood on the model of expected applications, but "thank you" is an utterance. The meaning of an utterance is not its expected applications.

(6) Readers Meanings

What about readers meanings? Why doesn't the Constitution mean whatever readers believe it means? It is hard to know what to make of this proposal. Is the idea that there are criteria by which readers' beliefs about meaning can be true or false? If the answer to this question is yes, then those criteria would provide the theory of meaning. The criteria cannot be "readers meaning" on pain of vicious circularity. If the answer to this question is no, then anything goes. But "anything goes" is not a theory of meaning at all; it is semantic skepticism, which shall be considered below.[311]

(7) Legal Meanings

Another possibility is that the semantic content of the Constitution is the "legal meaning" of its provisions. Formulated in this way the notion of "legal meaning" is ambiguous. "Legal meaning" might refer to: (1) whatever meaning the specialist community of lawyers, judges, and persons learned in the law would assign to the constitution given the conventional semantics of the legal community at the time a given provision was framed and ratified; (2) whatever meaning the legal system (with the Supreme Court at its apex) does assign to the provisions; (3) whatever meaning would result from the correct application of the conventions of legal interpretation and construction. There are surely other variations, but these are sufficient for purposes of discussion.

The first interpretation is a variation of the clause-meaning thesis: the proposal is that given the division of linguistic labor, all of the work is done by the community of lawyers, judges, and persons learned in the law. This is a possible theory of the semantic content of the constitution, and it is consistent with the fixation thesis as well. Whether this theory is correct depends on the facts. Are the circumstances of constitutional communication such that each and every provision of the constitution is a term (or phrase) of art? Probably not, but confirming this hunch would require an inquiry in linguistic history.

[311] *See infra* Part III.H.3, "Semantic Skepticisms," p. 121.

The second interpretation of legal meaning is a variation of the reader's meaning theory, and it suffers from the same defect: the law means whatever judges read it to mean. One version of the second interpretation is associated with John Chipman Gray, wrote, "The Law of the State or of any organized boy of men is composed of the rules which the courts, that is, the judicial organs of that body, lay down for the determination of legal rights and duties."[312] The conceptual poverty of Gray's account is well known: Are there criteria for correct assignment of meaning by the legal system? If not, then the constitution lacks determinate semantic content. If there are criteria, what are they? Whatever the criteria are, those criteria fix the meaning, resulting in the self-effacement of the judges (or lawyers) meaning theory.

The third interpretation of legal meaning also requires further specification. What are the "conventions of legal interpretation and construction" and what constitutes their "correct application"? The answers to these questions will give the third version of lawyer's meaning its content. Depending on the answers, this third version may reduce to the equivalent of the first interpretation: the understandings of the community may be constituted by the convention. Or the conventions may themselves point to some other theory of meaning, e.g., to conventional semantic meaning and the interpretation-construction distinction: in that case, the third interpretation would be precisely equivalent to the clause-meaning thesis. There are many other possibilities as well, but their content will be determined by specification of the conventions: without such specification, the third alternative is not yet a theory of semantic content.

There is an important ambiguity in the third interpretation legal meaning. If the notion of legal meaning is limited to principles of construction, then legal meaning is meaning in the applicative sense and not in the semantic sense. In this case, there is simply *no conflict* between the clause meaning account of the Constitution's semantic content and the legal meaning account of the construction of vague terms and phrases.

But the third interpretation of legal meaning could be developed as an account of semantic content. That is, the actual meaning of the constitution's words and phrases could be understood as the meaning that would be attached by legal conventions. If this were so, then additional questions would have to be answered before the content of the legal meaning account of semantic meaning would be fully specified. One question concerns priority. One account of priority would start with conventional semantic meaning and the division of linguistic labor: if the actual linguistic practices were such that the general public would *always defer* to results of the correct application of the legal conventions, then the clause meaning of the Constitution would turn out to be identical to its legal meaning. But if priority is given to linguistic practice, then it seems unlikely that the rule was *always defer*. Even if the rule was *always defer*, the legal conventions may point back to conventional semantic meaning.

There is another possibility regarding priority. It might be argued that the legal meaning has priority over the conventional semantic reason. If this were the claim, then the question would be: *why?* Why would the Constitution's semantic content be determined by the legal conventions that governed the interpretation of other legal texts? The answer to this question cannot be that the preexisting law required this result: the Constitution itself brought into being a new legal regime. Nor can the answer be that the Constitution itself requires this result. Texts cannot fix their own meaning all the way down. Even if there were a *legal meaning clause* in the Constitution—and there is not—the meaning of that clause would have to be determined in some

[312] JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW 82 (New York: Columbia University Press 1909).

way before the clause could be used as a guide for the interpretation of the remainder of the document.

One final point about legal meaning. All of the discussion in this subsection is directed at a very specific target—the theory that the semantic content of the Constitution is determined by the legal meaning of the text. Nothing in this section addresses the question whether the content of constitutional law (the set of legal rules) is determined by the legal conventions of interpretation and construction. That question is addressed by the contribution thesis.[313]

(8) Historians Meaning

In academic debates about originalism it is sometimes suggested that originalism is flawed because it lacks the methodological sophistication to recover the true *historical* meaning of the constitutional text. The next move is the suggestion that academic historians do have the necessary tools to recover historical meaning, but that this does not yield an original meaning that can be applied to contemporary cases. Stephen Siegel has summarized this point with admirable clarity and brevity, "[O]riginalism is impossible because history is too nuanced and ambiguous to give determinate answers to today's constitutional controversies."[314] This point is frequently made in connection with their criticisms of "law office history"[315] or "history lite."[316] Another version of this criticism focuses on "context": the claim is that the historical meaning of the constitution is contextual, and that radical differences in context between the time of framing and the time of application have the consequence that the historical meaning of a given provision may simply not apply.

But what is historical meaning (or historians meaning)? It cannot be the case that the meaning of legal texts is whatever historians (or political scientists or legal academics who do history) think the texts mean. It could be that the meaning is the meaning determined by correct application of historical method, but then a theory of historical method is required, and it will be the content of that method that will determine meaning. It will not do to say that the historical method is immersion in the archives—that provides no criteria of correctness or account of what one does while immersed.

Is there a distinctive theory of meaning that is implicit in the "historical method"? It seems likely that historians use different methods for different problems and disagree among themselves. Nonetheless, "I don't know, but I've been told"[317] that Quentin Skinner's article, *Meaning and Understanding in the History of Ideas*[318] is a canonical text.[319] If this is the case,

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[313] *See* Part IV.C, "The Contribution Thesis Revisited," p. 137.

[314] Stephen A. Siegel, Review of Jack Rakove, *Original Meanings: Politics and Ideas in the Mking of the Constitution*, Law and History Review Vol. 17, No. 2, Summer 1999, http://www.historycooperative.org/journals/lhr/17.2/br_10.html.

[315] Saul Cornell has writte, "In essence, the "new" originalism is really nothing more than the old law- office history under a new guise." Saul Cornell, *The Original Meaning of Original Understanding*, 67 Md. L. Rev. 150, 150 (2007). Historians are hardly uniform in this charge. For example, Laura Kalman writes, "It seems both bizarre and unfortunate that the law professors would become dismissive of originalism just as historians are coming to appreciate its importance for legal discourse." Laura Kalman, *Border Patrol: Reflections on the Turn to History in Legal Scholarship*, 66 Fordham L. Rev. 87, 122-23 (1997).

[316] Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 Colum. L. Rev. 523, 525-26 (1995).

[317] Robert Hunter, *New Speedway Boogie*, http://arts.ucsc.edu/GDead/aGDL/spee.html (music by Jerry Garcia) from *Workingman's Dead*.

[318] Quentin Skinner, *Meaning and Understanding in the History of Ideas*, 8 HISTORY AND THEORY 3 (1969).

then the conceptual foundations for historical method as a technique for gleaning semantic content are shaky. Skinner's article aims at producing a theory of the meaning of historical texts based on ideas from the philosophy of language. So far as I can tell there are two inconsistent strands of thought in Skinner's account of historical meaning, which we might call the *Wittgensteinian strand*[320] and the *Gricean strand*. The two strands yield inconsistent theories of meaning, and neither strand does the work that some followers of Grice may seem to assume.

The *Wittgensteinian strand* in Skinner is transparent in the following passage: "The appropriate, and famous formula—famous to philosophers, at least—is rather that we should study not the meanings of words, but their use." The famous formula is then attributed in a footnote to Ludwig Wittgenstein. It is true that Wittgenstein is associated with notion that meaning is use, or as he put it, "Words are deeds."[321] The idea is that the meaning of an expression is the use to which it is put. Wittgenstein was on to something, but it wasn't a theory of semantic content. Words are used to accomplish deeds, but the deeds are not the meaning of the words in the semantic sense of meaning. We can extend Wittgenstein's observation about words, to texts. Put crudely, texts can be used to accomplish deeds. Locke's *Second Treatise* could be part of Lord Shaftesbury's political program. Hobbes *Leviathan* could be restoration ideology. Rawls's *A Theory of Justice* could be an apology for the Great Society. There is nothing wrong with calling the political purposes of these historical texts their "meaning" so long as we are clear that this is not their meaning in the semantic sense.

When Skinner says "we should study not the meanings for words, but their use" he may have sound practical advice for historians of ideas whose practical interest is not the content of the *Second Treatise*, *Leviathan*, or *A Theory of Justice*, but the connection of these texts to other historical events. But this would not be sound advice to anyone who is seeking the semantic content of the texts. Were they to follow Skinner's advice, they would be "put off the scent" of semantic content.

What I call the *Gricean strand* is illustrated in the following two passages from Skinner:

> The understanding of texts, I have sought to insist, presupposes the grasp both of what they were intended to mean, and how this meaning was intended to be taken. It follows from this that to understand a text must be to understand both the intention to be understood, and the intention that this intention should be understood, which the text itself as an intended act of communication must at least have embodied.[322]

And the second passage:

> The essential question . . . in studying any given text, is what its author, in writing at the time he did write for the audience he intended to address, could in practice have been intending to communicate by the utterance of this given utterance. It follows that the essential aim, in any attempt to understand the utterances themselves, must be to recover this complex intention on the part of the author.[323]

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[319] *Cf*. Mark A. Graber, *Foreword: Making Sense Of An Eighteenth-Century Constitution In A Twenty-First-Century World*, 67 Md. L. Rev. 1, 1 (2007); Paul Brest, *The Misconceived Quest for the Original Understanding*, in Jack N. Rakove, ed., INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT 227-62 (1990).

[320] *Id*. at 37.

[321] Ludwig Wittgenstein, Culture and Value 46e (Peter Winch trans. 1980) (*Worte sind Taten*." *Id*. at 46.)

[322] *Id*. at 48.

[323] *Id*. at 49.

There are no footnotes to these passages. In prior passages, Skinner relies heavily on Austin's account of illocutionary acts, but the parallelism between Skinner's theory of text meaning and Grice's theory of speaker's meaning is unmistakable. And in a recent interview, Skinner says, "I should add that, rightly or wrongly I regarded Paul Grice's theory of meaning as an appendix to Austin, treating Grice's analysis of communicative intentions as a further analysis, in effect, of Austin's pivotal notion of an illocutionary act."[324]

Skinner was deeply confused about the implications of Wittgenstein and Grice for the meaning of historical texts. The *Wittgensteinian strand* of his account of textual meaning is inconsistent (if viewed as a theory of semantic meaning) with the *Gricean strand*: the notion that meaning is use is not equivalent to the idea that speech acts have illocutionary content. This conclusion is apparent from Skinner own arguments. Skinner's very crude paraphrase of Grice on speakers meaning does not support the claim that the meaning of a text is its use: instead it leads to the very different and inconsistent claim that the meaning of a text is the meaning that the author intended the audience to grasp based on the audience's recognition of the speaker's intention. If this theory were correct, then the meaning of texts would be their "authors meaning" and the meaning of the constitution would be its "framers meaning." In other words, Skinner's *Gricean strand* is predicated on the best theoretical foundation that could be given for original intentions originalism. Of course, Skinner would not endorse this implication of his theory, because Skinner failed to grasp the implications of Grice's account of speaker's meaning for the recognition or discovery of semantic content and seems to have been entirely unaware of Grice's account of sentence meanings.

Thus, to the extent that historians believe that Skinner's theory of the meaning of texts is inconsistent with original intentions originalism, they are twice wrong. Skinner's *Wittgensteinian strand* does not clash with any theory of semantic meaning, because it has nothing to say about semantic content. His *Gricean strand* not only does not undermine the quest for the original meaning, it suggests that historians ought to join the Old Originalist team—reinforcing the aging lineup of Meese and Bork. But original intentions originalist could draw only cold comfort from the company of their new teammates. As we have already seen, Grice's theory of speakers meaning will not do as a theory of the meaning of legal (and other historical) texts—precisely because such text must rely on sentence meaning (conventional semantic meaning) to meet the success conditions for constitutional communication.

The true relationship between the *Wittgensteinian strand* and the *Gricean strand* is that meaning is being used in two different senses. Skinner was under the mistaken impression that the senses were the same, perhaps because he wrongly believed that illocutionary force is identical to use.[325] Once we clear up this misunderstanding, it becomes clear that Skinner has no coherent theory of semantic content.

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[324] *Quentin Skinner on Encountering the Past,* page 48, http://www.jyu.fi/yhtfil/redescriptions/Yearbook%202002/Skinner_Interview_2002.pdf. *See generally K.* R. Minogue, *Method in Intellectual History: Quentin Skinner's Foundations*, 56 PHILOSOPHY 533-552 (Oct., 1981).

[325] This conclusion becomes apparent once we examine what "illocutionary forces" utterances actually can have. Austin for example, notes that an utterance can make promise, issue a command, make an assertion, proffer an offer, and so forth. Historical texts studied by historians of ideas make assertions—the illocutionary force of the text essentially includes the semantic content of that which is asserted. Legal texts make laws (roughly equivalent to issuing commands): the illocutionary force of a constitutional provision essentially includes the semantic content of the provision itself. The illocutionary force of a promise is not the purpose the promise was intended to serve or the "use" of the promise in that sense. Likewise, the illocutionary force of a constitutional provision in not the contextualized purpose of the provision.

A very important qualification is in order. I have used the phrase "historians meaning" and the word "historian" without sensitivity to important differences in the various theories of historiography embraced by different historian and political scientists. Some historians may reject Skinner, and others may have a more sophisticated understanding of Grice and Wittgenstein than is evidenced in Skinner's writing. Most historians are simply uninterested in originalism—at least from a professional point of view. My quarrel is not with history as a discipline—it is with the use of a particular theory of historiography in the argument over originalism.

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Historians and academic lawyers sometimes engage in a turf war over original meaning. Historians may accuse lawyers of "law office history" and academic lawyers may accuse historians of "history common-table law." These disputes could become mean spirited. Historians might accuse legal academics of "cherry picking the evidence," and lawyers could accuse historians of failing to understand the legal content of legal texts. Of course, both cheery picking and gross failures of understanding have occurred, but generalizing to whole academic disciplines from individual cases does not facilitate mutual understanding among the disciplines.

A more nuanced assessment of the relationship between history and law can begin with the possibility that legal academics and historians frequently talk past one another. For example, New Originalists are after conventional semantic meaning: they are searching for evidence of the semantic content of legal texts: when they say "meaning" they mean <u>semantic meaning</u>. When historians are after the meaning of legal texts, they are frequently after something quite different; they are searching for the purpose or reasons for which the text was written. Such purposes are not <u>semantic meanings</u>.

In the original intentions phase of originalism, historians legitimately asked the question whether the original purpose of a legal text in a thick historical context had any application to current circumstances. My speculation is that during this period some historians "hardened their hearts" towards originalism and to some extent lost interest in continued evolution of originalist theory. Moreover, in my experience, few historians (or others who do history in related disciplines) have basic competence in the philosophy of language, and many are unaware of the ambiguity in the meaning of meaning. So to them, "original meaning originalism" might have sounded like a deceptive euphemism—a cheap lawyerly trick to evade the contextuality of historically embedded purposes. But on that score, the historians would have been mistaken. If so, this is no shame. Philosophers make legal mistakes. Lawyers make historical mistakes. Historians make philosophical mistakes. But interdisciplinary turf wares do not excuse interdisciplinary ignorance; they merely explain it. "One way or another this darkness got to give."[326]

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(9) Popular Meanings

121, at 325-26.

[326] Robert Hunter, *supra* note 317.

There is another possible rival to Semantic Originalism suggested by "popular constitutionalism," the recent revival of a set of old ideas in constitutional theory.[327] In the context of constitutional interpretation, the theory might be summarized as follows:

> [P]opular constitutionalism is the view that the people themselves are the agents who make, enforce, and interpret the Constitution. When the Constitution is violated, the people themselves enforce the Constitution, either by voting the rascals out or by rising up against them. When the Constitution is ambiguous, the people themselves are charged with resolving the ambiguity by deliberating about — and articulating—the people's own view of constitutional meaning. These popular interpretations bind the executive, judicial, and legislative branches of government. And finally, if the people are unhappy with their written constitution, they can override, alter, suspend, or ignore it.[328]

Left in this bare form, popular constitutionalism would be mysterious—leaving unanswered questions about the mechanisms by which popular interpretations and constructions might gain the force of law. We can imagine a variety of possibilities, however. For example, the people might mobilize behind political movements focused on dissatisfaction with current constitutional meanings—either the original public meaning or a judicial construction. Bruce Ackerman's notion of *transformative appointments* provides the mechanism by which such "popular meanings" could be institutionalized in judicial decisions. All of this is possible, and at this stage, I want to maintain strict normative neutrality about the further questions whether it would be workable or desirable.

The important point is that such popular meanings may or may not accord with the semantic content of the Constitution itself. If the popular meaning results in an effective change in the effective legal content of the Constitution, then the popular meaning results in what we might call an *amending construction*. An amending construction cannot change the semantic content of the Constitution, but it can nullify its legal force. If the popular meaning is consistent with the semantic content of the Constitution itself, then we have a *popular construction within the semantic meaning of the Constitution*, such popular constructions can overrule judicial constructions or even judicial misinterpretations of the semantic content of the Constitution, but in neither case do they alter semantic content.

What about amending constructions? Can they change the semantic content of the Constitution? We can, of course, talk *as if* an amending construction actually changed the semantic meaning of the Constitution, but when we did so we would either be engaging in a legal fiction (if we admitted the "as if" character of our way of speaking) or a lie (if we did not). This becomes clear once we try describe "what happened" when the meaning changed—any honest description of the process will require a distinction between the semantic content of the Constitution and the *amending constructions*. It is no accident that "transformative appointments" are *transformative*.

Nothing that I have said so far suggests that popular meanings cannot become legally effective or that they are normatively undesirable. It seems indisputable as a matter of fact that an amending construction can become settled law—although the inconsistency with semantic content would, by conventional accounts, leave open an ongoing latent possibility that the

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[327] *See* Lawrence Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 Harv. L. Rev. 1594 (2005).

[328] *Id*. at 1616.

amending construction could be criticized and even reversed on the ground that it is legally incorrect. What is not so clear is whether popular political action in support of an amending construction is consistent with the idea of fidelity to law—a question that I simply leave open.[329]

(10) Textualism and Hypertextualism

The clause-meaning thesis is related to "textualism," the notion that the meaning of the Constitution is the meaning of the text. The affinity is clear: both textualism and clause meaning prioritize the semantic content of the constitutional text. The term "textualism" may be ambiguous, and some versions of textualism could have substantial disagreements with the full implications of clause meaning. The clause meaning of the constitution could differ from the meaning identified by textualism in several ways:

1. Clause meaning includes constitutional implicature, but textualism could be understood as the view that the meaning of the constitution is limited to its semantic content or as the view that only the semantic content can be translated into rules of constitutional law.
2. Clause meaning is determined by going outside the four corners of the text to the publicly available context of constitutional utterance. If textualism, does not allow this use of context, it is inconsistent with clause meaning.
3. Clause meaning is not limited to the public or ordinary meaning of the text, because it acknowledges the division of linguistic labor and incorporates the technical meaning given to terms of art.
4. Semantic Originalism incorporates the moderate version of the contribution thesis, and hence allows for the possibility of extratextual sources of constitutional law. Textualism might affirm the extreme version of the contribution thesis which limits constitutional law to the semantic content of the constitutional text.

Of course, there may be textualists who would assent to the position taken by Semantic Originalism on each of these four issues. In that case, we might say that Semantic Originalism is a variety of textualism or vice versa.

"Hypertextualism," as I employ that term, refers to a variant of textualism that emphasizes a close reading of the constitutional text that prioritizes syntax and word choice. Hypertextualists deny that the precise punctuation or word choice in the constitutional text is accidental. They seek to squeeze every drop of meaning out of each clause. At an abstract level, hypertextualism might be consistent with clause meaning. It is at least possible that the conventional semantic meaning of the Constitution is its hypertextual meaning: this would be the case if the rules of syntax, intratextualist relationships, and fine differences in word choice that are identified by hypetextualists were part of the publicly available context of constitutional utterance. But if these rules, relationships, and fine difference would have been inaccessible to the constitutional audience (citizens, officials, and judges extended over time), then the fact of their accessibility to constitutional scholars who are deeply learned and immersed in the text is not sufficient to win them a place in clause meaning.

[329] The best thinking on this question is contained in unpublished work by political scientist Mariah Zeisberg. My understanding of the issues is strongly shaped by her influence.

(11) Interpretive Pluralism

Yet another suggestion is that the alternative to originalism is interpretive pluralism—a multimodal method for the manipulation of meaning. Interpretive pluralism is simply the idea that courts use a variety of strategies to resolve constitutional questions. They appeal to text, history, precedent, historical practice of the political branches, and explicitly normative argumentation. The fact that courts do, in fact, employ multiple modes in constitutional practice is not in dispute. The question is whether these this fact implies an alternative to clause meaning as a theory of the semantic content of the constitution or falsifies the fixation thesis.

To begin, we should note that multiple modalities of constitutional practice are entirely consistent with Semantic Originalism with the modalities are deployed in constitutional construction. By definition, construction begins after interpretation leaves the stage, and the entrance and exit are defined by the role of semantic content. Paradigmatically, once we determine that semantic content is vague, then something other than the recognition or discovery of original meaning must guide constitutional practice. Semantic Originalism is entirely consistent with the idea that consideration of constitutional purposes, historical practice, precedent, and direct resort to normative considerations would be relevant to construction.

Similarly, multiple modalities may be relevant to the process of interpretation. For example, consideration of purposes and expectations may provide evidence of conventional semantic meaning; similarly, early historical practice may provide such evidence. Precedents may be cited for their reasoning and evidence regarding semantic content. In a common law system, precedents may serve as institutional settlements of disputed questions of semantic content. The doctrine of vertical stare decisis is noncontroversial in this regard: even the most ardent originalists believe that lower courts may properly be bound by Supreme Court decisions that are wrong on the semantic merits. It can even be argued that the Supreme Court should consider itself bound by its own prior decisions about the semantic content of the Constitution: a strong formalist may believe that settlement of disputed questions regarding semantic content should, for normative or legal reasons, trump the beliefs of the current justices regarding these disputed questions.[330]

The residual question is whether the multiple modalities provide a distinctive account of the semantic content of the Constitution: the answer to that question is "No." The fact of multiple modalities is not a theory of semantic meaning: it is a theory of constitutional practice. It simply does not compete with clause meaning.

b) Stepping Back from the Alternative Theories

The pattern of argumentation against purported or possible alternatives to clause meaning as a theory of the semantic content of the Constitution is now clear. One of these theories, intentionalism, offers a rival account of semantic content, but fails to give an adequate account of the success conditions for constitutional communication. One variant of intentionalism, the cabalistic (or secret) meanings theory could, in principle, account for success conditions, but is not well confirmed by evidence. The remaining accounts—holistic meanings, expected applications, readers meanings, legal meanings, historians meanings, popular meanings, and interpretive pluralism all fail to compete with clause meaning or the fixation thesis as viable

[330] *See* Lawrence B. Solum, *supra* note 258.

theories of semantic content. These theories either do not address semantic content at all, or they fail to offer an account of the possibility of constitutional communication.

3. Semantic Skepticisms

One more objection must be answered. Semantic skeptics deny that the constitution has semantic content. My answers to semantic skepticism will be brief, because I believe semantic skepticism has few adherents, lacks coherence, and has been adequately answered by multiple arguments on numerous occasions. We can, nonetheless, quickly consider three versions of semantic skepticism: (1) skepticism about the possibility of meaning in general; (2) skepticism about the possibility of legal meaning; and (3) skepticism about the possibility of constitutional meaning given the plurality of language communities.

a) General Impossibility of Meaning

Can it be the case that communication is impossible and hence that no texts have meaning? Not if you are reading this article, it isn't. That is enough, but here is more. The assertion that meaning is impossible is self-effacing. If it were true, it couldn't be asserted. Although it might be the case that which cannot be asserted can still be true, it is surely the case that that which cannot be asserted makes no claims and hence directs its own exit from the stage of argument.[331] More could be said, but no more needs to be said.

b) Indeterminacy of Legal Meaning

The idea that legal texts are radically indeterminate is similarly confused. Why should legal texts be uniquely incapable of communicating meanings? Any account of communication and meaning that establishes the possibility of communication outside of legal contexts will provide conditions under which legal texts can communicate semantic content.

The fact that legal communication is possible does not entail that the semantic content of legal contexts determines the outcomes of all possible or actual cases. Legal texts can be vague, and if they are then some mechanism for the resolution of vagueness will be required when a citizen, official, or court must resolve a case that falls within the zone of underdetermination. But underdeterminacy does not imply indeterminacy,[332] and indeterminacy would be required for semantic skepticism about legal meaning to get off the ground.

c) Multiplicity of Language Communities

A much more modest form of skepticism would take aim at the idea that the Constitution had conventional semantic meaning to speakers of standard American English in 1789 (or later years for the various amendments). The notion of conventional semantic meaning assumes that there was something approximating a national linguistic community which could provide the basis for

[331] David Gray Carlson writes, "That deconstruction is self-refuting—a fact that it full grasps, emphasizes, and even exploits—by no means proves that deconstruction is wrong about meaning." David Gray Carlson, *Liberal Philosophy's Trouble Relation to the Rule of Law*, 43 UNIVERSITY OF TORONTO LAW JOURNAL 257, 258 (1993). Carlson is right that proponents of deconstruction can grasp the fact that it is self-refuting, but once this fact is grasped, the deconstructions cannot deploy their self-refuting thesis without refuting themselves.

[332] Solum, *On the Indeterminacy Crisis*, *supra* note 77.

conventional semantic meanings. Suppose, however, that Americans in 1789 lacked a common tongue, and that the regional dialects were sufficiently divergent such that the various clauses would have meant different things to different readers who spoke various dialects of American English.

In this article, I make no claims about whether this objection is or is not supported by the evidence. It seems unlikely to me, but I have no special knowledge, and it might be true. Even if it were true, the theory of clause meaning could be amended so as to overcome the objections. All that is required is a division of linguistic labor such that clause could be understood by speakers of the constitutional dialect (Philadelphian English) and translated by them so as to become comprehensible by those who spoke other dialects (Bostonian English, Virginian English, Appalachian English, and so forth).

* * *

Semantic skepticism is surely the very last line of defense for die-hard opponents of Semantic Originalism. No jurisprudential theory of the contemporary period has been more thoroughly discredited than the claim that law is radically indeterminate. Modest claims about indeterminacy may engage Semantic Originalism in other ways, but they are not expressions of semantic skepticism.

Almost no one who objects to originalism would really be willing to embrace the legal implications of semantic skepticism. If legal texts are all radically indeterminate, then there the "living meaning" of the living constitution is radically indeterminate. No lower court decision can meaningfully be said to be consistent or inconsistent with a Supreme Court decision. No action by a federal marshal or party can be meaningfully said to be consistent or inconsistent with a judicial order. The attractiveness of living constitutionalism is that it allows legal norms to adapt to changing circumstances and social norms. But if there are no legal meanings, then there is no difference between living and dead constitutions—they are all ghosts. Constitutional ghosts can be frightening or friendly, but they all lack substance. You can walk right through them.

* * *

I. What's in a Name, Take Three: Strong Originalism and Moral Originalism

In this section, we will examine two attempts to define the term "originalism" in ways that would exclude the New Originalists generally and Semantic Originalism in particular. The first attempt was made by Mitchell Berman, and the second attempt was by Christopher Eisgruber. Both offer stipulated definitions of "originalism" that cannot be squared with the actual use of that term in theoretical discourse by self-identified originalists.

Mitchell Berman has suggested that originalist theories can be classified according to the degree to which they are "hard" and "soft." He writes:

> At the weakest end of the spectrum lies the view that the originalist focus (framers' intent, ratifiers' understanding, original public meaning, or what-have-you) ought not to be excluded from the interpretive endeavor. This view–what we might call "weak originalism"–maintains merely that the proper originalist object (whatever it may be)

> should count among the data that interpreters treat as relevant. At a polar extreme from weak originalism rest views that collectively I will label "strong originalism."
>
> Strong originalism, as I will use the term, comprises two distinct subsets. Probably the most immediately recognizable originalist thesis holds that, whatever may be put forth as the proper focus of interpretive inquiry (framers' intent, ratifiers' understanding, or public meaning), that object should be the sole interpretive target or touchstone. Call this subtype of strong originalism, "exclusive originalism." It can be distinguished from a sibling view a shade less strong–viz., that interpreters must accord original meaning (or intent or understanding) lexical priority when interpreting the Constitution, but may search for other forms of meaning (contemporary meaning, best meaning, etc.) when the original meaning cannot be ascertained with sufficient confidence. Call this marginally more modest variant of strong originalism "lexical originalism."[333]

Berman then argues that the term "Originalism" should be reserved for what he calls "strong originalism":

> As Dennis Goldford put it in his recent book-length examination of the originalism debate, what distinguishes originalism from non-originalism is the claim "that the original understanding of the constitutional text always trumps any contrary understanding of that text in succeeding generations." Self-described originalists differ regarding countless details–whether the proper interpretive focus is framers' intent, ratifiers' understanding, or original public meaning; whether the best reasons for originalism concern what it means to interpret a text, or what must be presupposed in treating a Constitution as binding, or how best to constrain judges and provide stability and predictability; whether extra-judicial constitutional interpretation is subject to the same constraints as is judicial constitutional interpretation; and so on. The contention urged consistently – from originalist icons Raoul Berger and Robert Bork to standard bearers from the younger generation like Gary Lawson and Michael Paulsen – is that judges should interpret the Constitution solely in accordance with some feature of the original character of the constitutional provision at issue.[334]

Berman's conclusion is "Translated into my proposed terminology and shorthand: Originalism is strong originalism. The Great Divide, to complete Scalia's observation, lies between those who attend exclusively to the original object and those who attend to changed meanings too."[335]

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[333] Berman, *supra* note 22, at 7-8.

[334] Berman, *supra* note 22, at 15-16 (citing DENNIS J. GOLDFORD, THE AMERICAN CONSTITUTION AND THE DEBATE OVER ORIGINALISM 139(2005); Raoul Berger, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 3 (1977) (contending "that the 'original intention' of the Framers . . . is binding on the Court"); ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 5 (1990); (arguing that a judge "is bound by the only thing that can be called law, the principles of the text, whether Constitution or statute, as generally understood at the enactment"); Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1142 (2003). ("original meaning textualism is the only method of interpreting the Constitution."); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1250 (1994) ("originalist interpretivism is not simply one method of interpretation among many

– it is the only method that is suited to discovering the actual meaning of the relevant text").

[335] Berman, *supra* note 22, at 17.

Berman's argument that we should reserve the name "Originalism" for strong originalism is invalid. Almost all of the evidence that he cites suggests that the core commitment of originalism is to the fixation thesis: the semantic content of a given constitutional provision is fixed at the time of constitutional utterance.[336] But the fixation thesis is about semantic content, whereas the distinction between hard and soft originalism is about normative force. Some of Berman's evidence goes to what may be another feature of the core of originalism—the view that the original meaning's contribution to law is moderate and not weak,[337] but all of Berman's evidence is consistent with the fact that the fixation thesis is the focal point for the originalist family of constitutional theories.

Another proposal for limiting the term "originalism" in a way that excludes the New Originalists from the family has been made by Christopher Eisgruber. Here is his proposal:

> My proposal is this: a theory should count as "originalist" if and only if, in some cases involving ambiguous moral and political concepts in the Constitution, it dictates that we must comply with a certain moral view because it was held in the past (when the Constitution or a relevant amendment was ratified), even though we now think that view erroneous.. In short, any originalist theory worthy of the name will permit historical fact to trump moral judgment in one or more controversies about the meaning of the Constitution's abstract moral and political concepts.[338]

The two sentences are supplemented by a footnote, which reads as follows:

> Not all abstract constitutional concepts are moral or political in character. For example, the Seventh Amendment provides, "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." The concept of a "suit at common law" is an abstraction, but it is probably best viewed as describing a technical legal convention, not a moral, political, or jurisprudential idea. For that reason, someone might believe that "suits at common law" should be define pursuant to some historical test (e.g., a suit is "at common law" if it would have been treated as a common-law action at the time when the Seventh Amendment was written and ratified) without becoming, under my definition, an originalist.[339]

There is a lot going on in those two sentences. Our first task will be to reconstruct Eisgruber's meaning, and then we can consider the question whether his criterion (or criteria) for originalism are defensible.

Given the conjunction of the text and the footnote is clear that the work is being done by the phrase "ambiguous moral and political concepts in the Constitution." Despite his admirable clarity, Eisgruber does not offer a definition of these key notions. Some clues are found elsewhere in the text. Without using the phrase "moral concepts," he writes, "Many, if not all, of the Constitutions abstract provisions share an important feature: they refer to, or directly implicate, moral issues. That characteristic is especially apparent in the constitutional

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[336] *See supra* Part I.A.1, "The Fixation Thesis: The Semantic Content of Constitutional Provisions is Fixed at the Time of Framing and Ratification," p. 3.

[337] *See supra* Part I.A.3, "The Contribution Thesis: The Semantic Content of the Constitution Contributes to Constitutional Law," p. 7.

[338] *See* Christopher Eisgruber, *Constitutional Self-Government*, *supra* note 84, at 27.

[339] *Id*. at 218 n. 43.

amendments that protect individual rights."[340] He then goes on to discuss the "abstract structural provisions" and observes, "Some people might suppose that these provisions articulate descriptive concepts of political science,"[341] but concludes moral considerations may bear on these concepts and that the structural provisions may be regarded as "expressing political principles."[342]

Tentatively, then we can identify the moral concepts as including "establishment of religion," "free exercise of religion," "freedom of speech," "freedom of the press," "the right to bear arms," "unreasonable search and seizure," "due process of law," "equal protection of the laws," "rights retained by the people," "privileges or immunities," and so forth. The political concepts include "executive power," "legislative power," "judicial power," and perhaps the idea of "necessary and proper."

Eisgruber's definition suffers from two minor glitches, but these are easily corrected. The core of the definition is contained in this formulation:

> [A] theory should count as "originalist" if and only if, in some cases involving ambiguous moral and political concepts in the Constitution, it dictates that we must comply with a certain moral view because it was held in the past

If read literally, Eisgruber's definition would be limited to cases involving both "moral and political concepts," but his definitions seem to suggest that the abstract concepts fall into one of three categories "moral," "political," or "legal." If so, then by definition originalism would be an empty set. We can fix this problem by substituting "moral or political" for "moral and political." The second problem is that he stipulates that originalist theories must dictate that we "comply with a certain moral view because it was held in the past." Here Eisgruber must mean "certain moral or political view": otherwise, he would be requiring originalists to hold the view that controversies regarding political concepts must be settled by moral views of the past.

Finally, Eisgruber oddly permits a theory to count as originalist so long as it would resort to the original or moral views of the past in "one or more" cases. This definition seems too permissive. It would count a theory as originalist if it included an arbitrary stipulation that one case shall be resolved by the moral views of the past. For example:

> Constitutional controversies involving the abstract moral or political provisions of the Constitution shall be resolved in accord with the best (or morally correct) conception of the concept, unless that controversy involves the "titles of nobility" clause, in which case the Republican values of the founding era shall govern.

Once again, Eisgruber's theory can easily be corrected. Surely he means that a theory is originalist if it characteristically resorts to the moral or political conceptions of the time at which the constitutional provision in question was adopted. By substituting the notion of "characteristically" for "in at least one," we preserve the possibility that originalists will make exceptions but avoid the odd consequences of making a single instance the criterion for satisfaction of the definition.

With all of these corrections in place, we now have the following reconstructed version of Eisgruber's statement of the necessary and sufficient conditions for a theory to count as originalist:

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[340] *Id*. at 52.
[341] *Id*.
[342] *Id*. at 52-53.

> A theory should count as "originalist" if and only if, in cases involving ambiguous moral or political concepts in the Constitution, the theory characteristically requires that we must comply with a certain moral or political view because that view was held at the time the provision in question was adopted.

Assuming we now have Eisgruber's view in hand, the next question is whether this definition of originalism "saves the appearances." Does Eisgruber's stipulated definition account for the way the term originalism has been used by theorists who self-identify as originalist?

The answer to this question is surely "no." First, the "great divide," to use Scalia's phrase,[343] is between those who affirm or deny the fixation thesis. The fixation thesis is best understood as a claim about the fixity of semantic content, and Eisgruber's definition would therefore exclude many theorists who are clearly originalists, including both original-intentions originalists and original-public-meaning originalists. Second, Eisgruber's definition excludes almost all of the New Originalist theories. Such theories characteristically affirm the interpretation-construction distinction, and observance of that distinction results leads to the conclusion that the abstract moral and political provisions that Eisgruber identifies require construction. Third, so far as I know, no originalist has every used the term "originalism" to mean what Eisgruber suggests it means. This is not to say that no originalist has ever satisfied Eisgruber's criterion; some have. Rather, it is to say that no originalist defines originalism in the way that Eisgruber defines it. This is particularly important because Eisgruber uses "if and only if" to express his definition: this means that Eisgruber believes his formula captures the necessary and sufficient conditions for a theory counting as originalist. If no self-identified originalist has used the terms "originalism" or "originalist" in this way, then it is very difficult to see how Eisgruber could claim that his definition reflects the actual pattern of usage in debates over originalism.

Eisgruber might answer this argument by claiming that his stipulated definition is nonetheless appropriate because it captures the true essence of originalism. I have tried to construct arguments on Eisgruber's behalf for this claim, but I have failed to devise an argument that would be more than a straw man. (**Note to readers:** If you have such an argument, I would be grateful if you would share it with me.) Of course, Eisgruber's argument does serve a useful purpose in the context of his argument in *Constitutional Self-Government*: it creates a clear distinction between his position and originalism. Serving that purpose would be a sufficient warrant for the definition if Eisgruber had coined the term "originalism" for the purpose of clarity of exposition. But given the fact that originalism was a term in wide circulation when Eisgruber introduced his definition, the use of a stipulated definition that is contrary to usage is likely to introduce confusion rather than clarity.

One more comment about Eisgruber's definition. Eisgruber can be seen as defining "originalism" as a particular theory of constitutional construction and simply excluding "originalism" from the realm of constitutional interpretation altogether. That allows Eisgruber to claim the high ground of fidelity to law for his theory, and to relegate originalism to largely indefensible territory. The propriety of this move will be examined in the concluding Part of this Article.[344]

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[343] Scalia, *A Matter of Interpretation, supra* 31, at 38.

[344] *See infra* Part V.B, "What's in a Name, Take Five: The Topography of Constitutional Theory," p. 170.

J. Triviality, Take One: The Hard Wired Constitution

If Semantic Originalism is correct, then much of the structural provisions of the Constitution are "hard wired" in the sense that their semantic content does indeed determine their application. No one doubts that there is a Senate and a House, that there are two and only two Senators per state, that the Constitution cannot be formally amended by ordinary legislation, and so forth. At this point, a critic of living constitutionalism might argue that Semantic Originalism as it has been presented thus far is true but trivial. All of the really interesting and contested cases, it could be argued, involve construction. No one is arguing that California should have ten senators or that twenty-two year olds should be eligible for the presidency. The easy cases are trivial, and if the only claims that Semantic Originalism makes are trivial claims, then theory is simply uninteresting.[345]

Is the hard-wired Constitution trivial? The full answer to the triviality objection will be built in three stages, with two of the stages built in subsequent sections of this Article.[346] At this first stage, we will assume, *arguendo*, that an implicit premise of the objection is correct: that assumption is that the only provisions of the Constitution that draw bright lines are the power conferring provisions that create basic institution and define their compositions and the rights conferring provisions that confer rights that draw bright lines. Such provisions include those that establish the House and the Senate and define their composition, bicameralism and presentment, the establishment of a Supreme Court, the Article V procedure for amendment, the electoral college, the power to create of a permanent national military, the assignment of foreign policy power including the treaty power to the national government, the retention of the states as separate and independent units of government, the amendments abolishing slavery, enfranchising women, and providing for the direct election of women, and so forth. All of these provisions have relatively sharp-edged semantic content.

Is the semantic content of these provisions trivial? In one sense, the bright line provisions of the constitution are "trivial," because their semantic content is not in dispute. The meaning of these provisions is not the subject of the same kind of intense controversy that attends the meaning of the general, abstract, and vague provisions such as "freedom of speech," "equal protection," or "executive power." This fact is consistent with the Semantic Originalism which predicts exactly this result: interpretation of the bright-line constitutional provisions should not be controversial, because the meaning of these provisions was fixed at the time of framing and ratification and because the conventional semantic meaning was neither vague nor ambiguous.

But this does not entail the further conclusion that the semantic content of the "trivial" provisions is practically unimportant or even that these provisions normatively unproblematic. The bright-line provisions that establish the basic plan of government are obviously of great

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[345] In my experience, this claim is made frequently in conversation and workshop comments, but leaves only traces in print. *See, e.g.,* Aileen Kavanagh, *Original Intention, Enacted Text, and Constitutional Interpretation*, 47 Am. J. Juris. 255, 293-4 (2002); Jeremy Waldron, *Legislator's Intentions and Unintentional Legislation*, in LAW AND INTERPRETATION 329 (Andrei Marmor ed., Oxford U. Press 1995). The same point can be made without using the word "trivial." *See* Jed Rubenfeld, *Reply to Commentators*, 115 Yale L.J. 2093, 2098 (2006) (asserting "The problem is not that Brown cannot be squared with the original linguistic meaning of the Fourteenth Amendment. Of course it can. The problem is that a great many other things can too. An originalism that cuts anchor with concrete historical understandings in this way can no longer coherently present itself as originalism," but providing no reasons for the claim.).

[346] *See supra* Part IV.E, "Triviality, Take Two: ," p. 163; Part *V.C, "*Triviality Take Three, Truth as the Telos of Legal Scholarship," p. 171.

practical import: they define the basic plan of government. So far as pragmatic significance is concerned, the hardwired constitution is the exact opposite of trivial: the hardwired constitution simply dwarfs the contestable constitution if consequences are the measure of importance. Moreover, these provisions are not trivial in the sense that they are the subject of universal normative agreement. Sandy Levinson has persuasively argued that some of these provisions should be the most controversial: the Electoral College, the malapportionment of the Senate, and the practical impossibility of the Article V amendment process, Levinson argues, are profoundly undemocratic.[347]

If the correct standard for judging the triviality of theory is "Does the theory have important consequences that are normatively contestable?" then by that standard, Semantic Originalism cannot fairly be categorized as a trivial theory.

K. Monsters and Apparitions, Take One: Herein of Ink Blots

There is one last objection to Semantic Originalism. If the semantic content of the Constitution is given by its conventional semantic meaning, this raises the disturbing possibility that some provisions of the Constitution might "fail to mean." What if the phrase "privileges or immunities" had no conventional semantic meaning when the Fourteenth Amendment was framed and ratified? What if the Ninth Amendment is semantically inaccessible (metaphorically, an "ink blot")? What if the power conferring phrases of Articles I, II, and III ("legislative power" "executive power" and "judicial power") were so vague that the Constitution's semantic content failed to confer any power at all.

This objection could be pressed for a variety of reasons. It might be articulated by living constitutionalists as a *reduction ad absurdum*: public meaning originalism, the argument would go, cannot be correct because it leads to the absurd consequence that constitutional provisions can be meaningless. The same objection might be advanced by the advocates of original intentions: the meaning of the constitution has to be given by the intentions of the framers, they might say, in order to avoid the failure of meaning.

The specter of ink blots and meaningless clauses is not, by itself, a good reason to reject Semantic Originalism as a theory of semantic content. In fact, the fact that Semantic Originalism creates the possibility of failed meaning (and that other theories do not allow for such a possibility) is strong confirming evidence for the theory. That is because in the general case, it is very clear that failures of meaning are not only possible, they actually occur. It is possible to construct a meaningless utterance. Readers of this essay, when you get to this sentence, stand up and propinquity placid mellifluousness! Do it now! (If that example didn't work for you, then sit down and gdklw skoekd flwuw! Right away!) Any theory of semantic content that does not allow for failure of meaning has a problem.

Of course, if it were actually the case that one or more of the significant clauses in the Constitution was meaningless, that would create a practical problem. That problem might be addressed by simply ignoring the provision in question—or a mending construction might be required, with officials or courts filling the "gap" with semantic content created after the fact. And we can certainly agree that constitutional drafting that fails to create semantic content is poor drafting, but if there are any constitutional provisions that lack semantic content, our

[347] SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) (2006). I am not endorsing Levinson's claim, nor am I disputing it.

normative judgments about that fact would not actually change the meaning of the text itself. We may wish for the magical power of semantic transubstantiation, but wishing will not make it so.

IV. The Normative Implications of Semantic Originalism

So far, Semantic Originalism has been advanced as a claim about meaning: we have called this limited version of the theory "pure semantic originalism." At this point the article pivots, and makes claims about the legal and moral significance of the clause meaning of the Constitution. But before advancing those claims, one point needs to be made absolutely clear: the claims about meaning stand on their own. The fixation thesis and the clause-meaning thesis have content that is independent of their normative implications. If these theses are true, then legal and normative theories of the Constitution must take them into account.

This Part of "Semantic Originalism" will make arguments that are sketchy and programmatic—especially when compared to the deeper, more fully articulated, and elaborate arguments of Part III. The point of this essay is not to offer a comprehensive normative theory of constitutional practice. Indeed, the main point of the essay is mark clearly the distinction between theories of semantic content and normative theories of constitutional practice. The normative claims offered here are based on the weakest (in the sense of "least controversial") premises necessary to establish the minimum legal and moral significance of Semantic Originalism. That is, my aim is to establish a floor and not a ceiling for the normative implications of normative originalism.

A. The Possible Relationships between Semantic and Normative Originalism

The first step is a brief survey of the conceptual space. What are the possible relationships between law, morality, and pure semantic originalism?[348] One possibility is that is that *pure semantic originalism* has no legal or normative significance. This would be true, for example, if our theories of law denied the contribution thesis entirely: if the semantic content of the Constitution is a legal dead letter and makes no contribution to the law of any kind, then it would be unlikely that its semantic content would have significance for political morality. The semantic content would be a mere historical curiosity.

Even if the semantic content of the Constitution does have legal significance, it is at least conceivable that it has no moral significance. Some philosophical anarchists may believe that law in general lacks normative force. Some comprehensive moral doctrines might reach the conclusion that our moral obligations always trump our legal obligations and that law has no effect on our moral obligations. Some theories of political morality may reach the conclusion that when a constitutional order fails to satisfy criteria of minimal justice, then the conditions for an obligation of fidelity to law fail: and it is possible that a case could be made that these criteria are not satisfied in the case of the United States in the early twenty-first century.

But it is also possible that the semantic content of the constitution has both legal and normative significance. Consider legal significance first. The contribution thesis expresses the idea that the semantic content is a source of law, but that idea can be interpreted in several ways. The extreme version is that the semantic content fully determines constitutional law, but that claim is radically implausible. The moderate version of thesis is that the semantic content does

[348] *See supra* Part III.A, "Semantics and Normativity," p. 29.

provide rules of law, but that these rules can be supplemented and modified under limited circumstances. The weak version holds that the semantic content makes only indirect contributions, with the content of the constitutional law primarily determined by something else—such as the decisions of judges or the requirements of political morality.

What about normative significance? Even if the moderate version of the contribution thesis is correct, there remains the question whether the legal contribution of the Constitution's semantic content is morally significant. Here the conceptual space is wide open—ranging from philosophical anarchism, which denies that the law creates any duties, to the most rigorous deontological duty of absolute obedience to the commands of any effective legal authority. The fidelity thesis that is incorporated in Semantic Originalism asserts that there is at least a defeasible obligation for citizens and officials to respect the law in general and the Constitution in particular.

* * *

At this point, the most important work of "Semantic Originalism" has been accomplished. That work could aptly be described as reconfiguration of argumentative space. Once pure semantic originalism is on the table and the distinction between interpretation and construction put by its side, then a transformation of the debate over originalism become possible. Originalists can begin to see that their normative arguments must be about contribution or fidelity (or some other normative issue). Likewise, antioriginalists can begin to see that the true substance of their objections to originalism are <u>not</u> about originalism as a theory of linguistic meaning or semantic content; their true objections are about the relationship of semantic content to legal content or about the political morality of constitutional practice.

As I was writing "Semantic Originalism," it occurred to me that the argument might be clearer if I were to stop at this point, and take no stand on the legal or moral implications of pure semantic originalism. The Article continues for two reasons. First, I believe that the contribution thesis and the fidelity thesis are supported by good and sufficient reasons. Second, I believe that discussing the normative implications of Semantic Originalism will illuminate rather than obscure the originalism debate. But I could be wrong about that!

* * *

B. The Standard Normative Arguments for Originalism

Although the account offered within Semantic Originalism focuses on the conjunction of the contribution thesis and the fidelity thesis, Semantic Originalism opens a new perspective on familiar arguments for originalism.

1. Popular Sovereignty

The most common justification for originalism is rooted in the ideas of popular sovereignty and democratic legitimacy. In the legal academy, this theory focuses on the idea that "We the People" are the authors of the Constitution, because its central provisions, the Constitution of 1789 and the Reconstruction Amendments were the result of constitutional politics—periods of extraordinary mobilization where popular attention was focused and the formal ratification

reflected the popular will. If these facts are combined with dualism—the view that ordinary politics (including the elections for Congress and the Presidency) does not reflect the will of "We the People," a case is made that the constitutional text has democratic legitimacy that is not shared by ordinary legislation or routine executive action. The arguments for and against popular sovereignty theory are legion and the central claims well know: the will not be rehearsed on this occasion.

How does popular sovereignty interact with Semantic Originalism? In particular, can a case be made that popular sovereignty theory provides normative grounds for treating the semantic content as law or for the recognition of fidelity to constitutional law as an obligation of political morality? Notice that from the perspective of Semantic Originalism the question is not "Does popular sovereignty theory give us normative reasons to attribute the original public meaning to the constitutional text?" That question involves a category mistake: semantic content is not conferred on texts by normative arguments. So from the point of view of Semantic Originalism, the questions are whether there are normative reasons to treat the original public meaning as law or to treat the legal content contributed by the semantic content as the object of fidelity.

Consider the first question: does popular sovereignty theory give us a normative reason to treat the semantic content of the Constitution as law? It is not clear that this question is fully coherent. Eliding the differences between various forms of legal positivism, most contemporary positivist theories of the nature of law do not admit the possibility of moral "rules of recognition." If legal content must be determined by sources, social facts, or social rules, then *normative* popular sovereignty theory is the wrong place to look for warrants that confer legal status on norms.

Of course, popular sovereignty theory has as in its name the word "sovereignty" and sovereign-command theory is a form of legal positivism. Could it be the case that command by the popular sovereign is criterial for legal validity? Deep waters await anyone who would attempt to cross that ocean of argument, but on its choppy surface, waves of objection present themselves. The move to popular sovereignty deprives sovereign-command theories of their already meager resources: how do we identify the commands of the popular sovereign absented conventions that determine what constitutes a popular command?

If popular sovereignty theory is not a promising source of warrants for the contribution thesis, might it be more promising as the basis for obligations of fidelity to law? We have now arrived at the well worn debate over the relationship between democratic legitimacy and the obligation to obey the law. Huge clusters of complex argument contend. The bones of contention are familiar. "Democratic law binds for reasons of fairness" is met by observations about lack of consent, lack of ability to withhold consent given the lack of exit options, dead hand problems, and a host of others.

Assuming that a normative case for fidelity to law can be grounded in democratic legitimacy or popular sovereignty, is Semantic Originalism consistent with that grounding? Because constitutional law is fundamental and because Semantic Originalism identifies the content of constitutional law with public meanings, it seems reasonable to argue that Semantic Originalism is consistent with democratic justification for fidelity to law.

2. The Rule of Law

A second familiar justification for originalism is based on the great value of the rule of law and its associated values, predictability, certainty, and stability of legal rules. One of the virtues

of Semantic Originalism is that it offers a conceptually satisfying grounding and formulation of the argument that adherence to original meaning facilitates the rule of law values.

We can begin by trying to imagine how the rule of law argument if we were to try to justify what might be called *nonsemantic originalism* on rule of law grounds. Nonsemantic originalism is a very unusual theory.[349] It does not make the claim that the semantic content of the constitution is, as a matter of fact, the original meaning. (For the very limited purposes of this argument, it does not matter whether we are discussion *original public meaning nonsemantic originalism* or *original intentions nonsemantic originalism*.) Nonsemantic originalism claims that for normative reasons we should *deem* that the legally effective meaning of the constitutional text is the original meaning—although in fact that is false. For nonsemantic originalism, the assignment of meaning is a matter of choice. The Constitution's meaning is constructed out of the marks (the constitutional typography) by rules of quasi-interpretation (where *quasi-interpretation* is the name for the assignment of meanings to a text as a matter of normatively guided choice and not as an attempt to discover the true meaning).

How might we argue for nonsemantic originalism on the basis of the rule of law? The argument would have to be that nonsemantic originalism would yield greater predictability, certainty, and stability than alternatives methods of quasi-interpretation. To make this argument nonsemantic originalist rules of quasi-interpretation would have to be compared with alternatives methods of quasi-interpretation. We can imagine, for example, that there could be (i) the common-law method of quasi-interpretation, (ii) contemporary meanings quasi-interpretation, (iii) Supreme-Court discretion quasi-interpretation, and so forth. When we do the comparison, it may be the case that nonsemantic originalism would produce greater predictability, certainty, and stability than its rivals, but I do not see any *a priori* guarantees of this conclusion. What if original meaning is relatively more difficult to determine than are contemporary meanings, with the consequence that contemporary meanings are more predictable? What if the common-law method actually makes the system of law more stable, because it requires gradual doctrinal evolution and general doctrinal coherence and thus avoids the disruptive potential that a newly discovered or long forgotten original meaning can create for originalists.

Here is another way of getting at the same point. Nonsemantic originalism is vulnerable to Mitch Berman's criticism of the rule of law argument:

> Even granting arguendo that some of the values that flesh out the rule of law ideal – predictability, stability, publicity, prospectivity, procedural regularity, principled adjudication, and the like – are better promoted by judicial adherence to the original meaning, that does not entail that an interpretive posture of, say, moderate originalism is inconsistent with the rule of law. Consider by analogy that, although many theorists have contended over the years that statutory law promotes this congeries of values better than common law does, very few would conclude that a commitment to the rule of law thereby forecloses common law adjudication.[350]

Berman's argument is premised on the notion that we can choose among methods of interpretation on the basis of all-things-considered normative reasoning. This makes the rule of

[349] In order to avoid misunderstanding, let me clearly state that "nonsemantic originalism" is not the view that adherence to original meaning should be justified on normative grounds. It is the view that we should adhere to original meaning despite the fact that it is <u>not</u> the meaning of the Constitution, but is instead imposed on the constitution for normative reasons. I am grateful to Michael Ramsey for pointing out the need for this clarification.

[350] Berman, *supra* note 22, at 63.

law values just a list of factors to be weighed against all the other relevant factors in the overall balance of reasons. Once we have adopted this picture of the evaluation process, the case for nonsemantic originalism on the basis of the rule of law is necessarily incomplete without consideration of the countervailing advantages of competing methods and the possibility that there are alternatives that are "good enough" on the rule of law measure, but much better when evaluated on other criteria.

In sum, it is possible that nonsemantic originalism could be justified on the basis for the rule of law values: I see no *a priori* reasons for believing that the case could not be made. But making the case would require consideration of all the alternatives and all of the other factors that would go into making an all-things-considered judgment.

How does this compare with the case for Semantic Originalism? At this stage in the argument, it should be clear that the component ideas that constitute Semantic Originalism cannot given the same kind of normative foundations that nonsemantic originalism seeks. The fixation thesis and the clause-meaning thesis are factual claims about semantic content. Normative arguments cannot justify such claims. So the rule of law values cannot justify Semantic Originalism as a theory of constitutional *interpretation*—where interpretation (as opposed to quasi-interpretation) is understood as the activity that seeks the truth about semantic content.

If the rule of law values come into the case for Semantic Originalism as a theory of meaning, law, and political morality, the point of entry must be as a warrant or support for some version of the contribution thesis or the fidelity thesis. Each of these possibilities can be examined in turn.

The contribution thesis asserts that the semantic content of the constitution contributes to the content of the law. The moderate version of the thesis suggests that the semantic content of the constitution provides rules of constitutional law, absent some special countervailing consideration. Could the rule of law argument provide support for the contribution thesis? The standard positivist story suggests a negative answer to this question. If we assume that rules of recognition are social facts, not the conclusion of normative arguments, then arguing for the contribution thesis on the basis of a normative argument would involve a category mistake.

There is another possibility. One could argue that while the current shape of the rule of recognition is a matter of fact, it would be possible to argue for a change in the rule of recognition on normative grounds. That is, one might argue that we should *stop* recognizing the semantic content of the constitution as providing content in the way that the moderate version of the contribution thesis specifies, and coordinate on a new rule of recognition. Some such process must be possible; since rules of recognition do change: arguably such a change occurred when the Articles of Confederation gave way (through a process that was extralegal under the Articles) to the Constitution of 1789.

One argument against changes in the rule of recognition could be based on the rule of law. Let's stick with the existing rule of recognition. If we try to change it, we will go through a period of legal instability, uncertainty, and unpredictability. That is an argument from rule of law values, and it looks plausible.

The remaining option is that we could see the rule of law values as arguments for fidelity to the law. Of course, this argument seems almost too easy. Of course, fidelity to law serves the rule of law: how could it not? The alternative to fidelity to law is infidelity. With general fidelity to law, the law can do its work of producing predictable, certain, and stable rules that enable coordination, protect expectations, facilitate liberty, and constrain arbitrary power.

What role does the semantic content of the Constitution as specified by the fixation thesis and the clause-meaning thesis play in this story? The fixation thesis specifies that the semantic content of constitutional provisions is fixed at the time of framing and adoption. This entails that the semantic content never changes, but not that legal force never changes. The legal force of a given provision can be changed through amendments that repeal or supersede the provision. Moreover, the rule of recognition and the power conferring provisions of the Constitution may under some circumstances render the semantic content inoperable in other ways. For example, Supreme Court decisions that are legally incorrect (because they misinterpret or ignore semantic content) may nonetheless be binding on lower courts. The fact that semantic content is, as a matter of fact, fixed, when combined with the fact that the semantic content contributes to legal meaning explains why fidelity to law serves the rule of law values of predictability, certainty, and stability.

To see why this is the case, let us consider a possible world in which the Constitution of 1789 was replaced by a Magic Eight Ball. Imagine a particularly large Magic Eight Ball. On each facet of the icosahedron contained in the giant Magic Eight Ball is a complete constitutional code. On one facet is a constitution that institutes parliamentary democracy. On another facet is the Constitution of 1789. On a third facet is found a constitution that resembles the current constitution of Canada, but with United States substituted for Canada, the states substituted for the provinces, and Texas substituted for Quebec. The remaining facets have other constitutions. Printed on the outer shell of the Magic Eight Ball is the instruction:

Supreme Court, shake me and apply the constitution that appears in order to resolve cases with constitutional questions that come to you!

Let us suppose that the content of each of the constitutions were drafted and that the Magic Eight Ball itself was ratified under conditions such that the semantic content of each facet of the Magic Eight Ball is the original public meaning of the text. Original public meaning originalism would not produce the rule of law values of certainty, predictability, and stability. The whole constitutional regime would change each time the Supreme Court decided a case, producing uncertainty, unpredictability, and instability.

Now imagine that someone proposes a modification to the Magic Eight Ball. The current facet of the Magic Eight Ball is attached to the window by superglue. Now, when the Supreme Court shakes the dodecahedron does not move, and the semantic content of the Constitution remains fixed. As a result of the superglue, Supreme Court decisions no longer produce uncertainty, unpredictability, and instability. The superglue fixes the semantic content and the fact of fixation plus acceptance of the moderate version of the contribution thesis and affirmation by a critical mass of officials and citizens of the fidelity thesis produce the rule of law.

We are lucky. In the actual world, we have one Constitution of the United States of American. That fact plus the facts about the world identified by the fixation thesis and the clause-meaning thesis entail the further conclusion that the moderate version of the contribution thesis when combined with fidelity to law will produce the rule of law values of certainty, predictability, and stability. General acceptance of Semantic Originalism works like superglue.

But what about the alternatives? In particular, what about a variation of "interpretive pluralism" that recommends that different methods of constitutional interpretation (or quasi-interpretation) should be used to resolve different cases? This version of interpretive pluralism allows us to take a constitution with fixed semantic content, and make that content indeterminate. Imagine a second possible world. Like the first possible world, there is a Magic Eight Ball. This

time the Constitution of the United States is printed on the outside of the Magic Eight Ball, plus one more sentence:

> *Supreme Court, shake me each time you decide a case and interpret this Constitution using the methodology that appears in the window!*

Each of the twenty facets of the icosahedron contains one of the various interpretive (or quasi-interpretive) methods that constitute interpretive pluralism. One facet reads: Use the text. Another facet reads: consult framers intent. A third facet reads: consult contemporary meanings. A fourth face reads: use contemporary values. A fifth facet reads: consult moral reality. A sixth facet reads: vote your political preference. A seventh facet reads: maximize social welfare. An eighth facet reads: follow precedent. A ninth facet reads: defer to the political branches. Some of the facets direct interpretation using a complex combination of the individual methods.

By itself, the text of the Constitution would have fixed semantic content. But with the addition of the Magic Eight Ball, this is no longer the case. Depending on which of the plurality of interpretive methods appears in the window, the same provisions of the Constitution could have different legal content in different cases. If we really wanted to mix things up, we could have each Justice of the Supreme Court shake the Magic Eight Ball in each case. In some cases, this will produce a majority opinion. In others we might get a complex structure with pluralities, concurrences, concurring and dissenting opinions, and, with luck, more than one pure dissent, each opinion with its own method of interpretation (or quasi-interpretation).

Of course, at this point the defender of this version of interpretive pluralism will surely object: interpretive pluralism will not be as unpredictable as the Magic Eight Ball. The deployment of different methods will be sensitive to context, to the values of the justices, to the possible reactions of the political branches, and so forth; these factors will constrain interpretive pluralism. But this objection must be accompanied by a concession. No one who defends interpretive pluralism can affirm the proposition that the semantic content of the constitution is fixed. The whole point of interpretive pluralism is to *unfix* the content. Interpretive pluralism would not be utterly random—that much must be conceded to the defenders of interpretive pluralism. But one thing we know for certain: *interpretive pluralism doesn't work like superglue*.

3. Writtenness

A third standard argument for originalism focuses on the fact that the constitution is a written text. Randy Barnett's monograph, *Restoring the Lost Constitution*, presents one version of this argument.[351] Barnett begins with an analogy to contract law that serves to identify the functions served by a written (as opposed to unwritten) constitution: (1) a written constitution provides evidence of what terms were actually enacted in the event of later dispute, (2) written provisions induce deliberation and caution in the process of constitutional amendment, and (3) formal processes of written amendment facilitate the amendment process by providing those who seek amendments with a clear set of expectations about what consequences their actions will produce.[352], and (4) "constitutions are put in writing to better constrain the political actors that [the constitution] empowers."[353] Originalism serves this fourth function: "in the constitutional

[351] Barnett, *Restoring the Lost Constitution*, *supra* note 3.
[352] *Id*. at 101-102.
[353] *Id*. at 103.

sphere, writtenness ceases to perform its function of constraining political actors if meaning can be changed by these actors in the absence of an equally written modification or amendment whose ratification is outside their power."[354]

Why the original meaning?

> With a constitution, as with a contract, we look to the meaning established at the time of formation and for the same reason: If either a constitution or a contract is reduced to writing and executed, where it speaks it establishes or "locks in" a rule of law from that moment forward. Adopting any meaning contrary to the original meaning would be to contradict or change the meaning of the text and thereby to undermine the value of writtenness itself. Writtenness ceases to perform its function if meaning can be changed in the absence of an equally written modification or amendment.[355]

How does Barnett's argument from writtenness relate to Semantic Originalism? The notion of "lock in" is related to the fixation thesis which asserts that semantic content is fixed at the time of constitutional utterance. But Barnett is presenting the argument without a clear distinction between semantic and normative originalism. When Barnett says "[a]dopting any meaning contrary to the original meaning would be to contradict or change the meaning of the text and thereby to undermine the value of the writtenness itself" he alternates between semantic and normative claims. One the one hand, "change the meaning of the text" seems to assume that "the meaning of the text" just is its semantic content—a semantic claim. On the other hand, phrases like "[a]dopting any meaning" and "value of writtenness" suggest that we make a normatively guided choice about what texts mean—a normative claim. Semantic Originalism sorts out the precise claim being made.

Semantic Originalism also clarifies the role that writtenness plays in fixing semantic content. Imagine a possible world in which the Constitution (and all other legal texts) were oral rather than written. We can imagine that certain individuals in this culture specialize in the memorization of important texts: this would be analogous the oral transmission of Icelandic sagas or Homeric poetry. The fact that the Constitution was transmitted orally rather than in writing would not change the fact that the semantic content: oral recitation in this case would be "quotation" of the original, just as printing a new copy of a written Constitution is "quotation." The semantic content of the Constitution would not be changed by the fact of oral transmission. Of course, in the actual world oral transmission is likely to lead to the introduction of errors—just as the copying of manuscripts by hand can lead to such introduction. But in the case of written texts, errors can be corrected by comparison of copies. In the case of orally transmitted texts, this is more difficult and it becomes impossible when the bearer of one copy (a human being) dies or becomes incapacitated. Writtenness thus facilitates the stability of the text, but it does not, by itself, create fixation.

This concludes our brief survey of normative justifications for originalism. The point of the survey was not to make the case for originalism. Rather, the point of the survey is to illuminate the ways in which these justifications interact with Semantic Originalism. The thin normative component of Semantic Originalism is found in the contribution thesis and the fidelity thesis to which we now turn.

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[354] *Id*. at 107.
[355] *Id*. at 105-06.

C. The Contribution Thesis Revisited

The contribution thesis asserts that the semantic content of the Constitution (identified by fixation and clause meaning) makes some contribution to constitutional law. Recall the distinction between three versions of the contribution thesis:

- *The extreme version* asserts that a rule is a rule of constitutional law if and only if the content of the rule is identical to the semantic content of some provisions of the Constitution.
- *The moderate version* asserts that if the content of a rule is identical to the semantic content of a constitutional provision, then the rule is a rule of constitutional law, unless some exception applies, but it does not assert that this is the only source of constitutional law.
- *The weak version* asserts that the semantic content of the constitution makes only indirect contributions to constitutional law.

There are undoubtedly other possibilities as well.

What case can be made for the moderate version of the contribution thesis? One approach to this question would take us deep into the philosophy of law and would require that a particular theory of the nature of law be elaborated and defended, but on this occasion we can pursue an alternative strategy, sketching overlapping reasons for affirming the moderate version. The aim here is to make the case for the plausibility of the moderate version of the contribution thesis.

1. The Semantic Content of the Constitution is the Supreme Law of the Law

The first argument for the moderate version relies on conventional legal argumentation—that is, the first argument operates from a point of view that is internal to constitutional practice. From that point of view, is it fair to say that the semantic content of the Constitution is viewed as law? The Supremacy Clause of the Constitution asserts that "This Constitution shall be the supreme Law of the land; and the Judges in every State shall be bound thereby."[356] What does "this Constitution" refer to? The use of the indexical article "this" points the reader to the Constitution of 1789. Because the Supremacy Clause asserts that the Constitution of 1789 is law, it must be referring to the semantic content of the Constitution. Bare typography, the set of marks without their meaning, cannot provide legal content, but the semantic content of the constitution can provide the content of legal rules. What else could?

Even if the Constitution of 1789 self-referentially asserts that its semantic content provides legal content, that fact does not entail that this assertion is correct. It could be the case that agents engaged in constitutional practice (judges, officials, and citizens) do not regard the semantic content of the Constitution as the source of legal content. That is, the Supremacy Clause could be a "dead letter" (a metaphorical representation of the state whereby a text's semantic content is drained of legal force and becomes mere typographical marks or "dead letters").

Is the semantic content of the Constitution regarded as a source of legal content by judges, officials, and citizens today? The first and most compelling piece of evidence that the semantic

[356] U.S. Constitution, Art. VI, Cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

content is a source of legal content comes from the manner that constitutional practice treats those provisions of the Constitution that are neither vague nor ambiguous. The original public meaning (or conventional semantic meaning at the time of utterance) of these provisions is almost unfailing is treated as the content of the corresponding rules of constitutional law. Each state has two senators—no state no matter how populous has more than two. There is one and only one President. Statutes are not entered into the United States Code unless the formal requirements of bicameralism and presentment are satisfied. The Electoral College continues to meet despite the general feeling that it is utterly lacking in justification and the now obvious fact that its institutional structure can determine the outcome of a close election. The Senate continues to tolerate the tie-breaking role of the Vice-President and to allow him to preside when he so chooses, although informal pressures discourage him from exercising the latter power on a regular basis.

No one argues that we have a living constitution that allows us to dispense with these normatively unattractive features of our constitutional practice. Even Arnold Schwarzenegger would not authorize an action for an injunction terminating equal suffrage of California and Wyoming in the Senate. The unambiguous bright-line provisions of the Constitution provide rules of constitutional law that reflect their semantic content which is, as a matter of fact, their conventional semantic meaning at the time of constitutional utterance.

But aren't these examples trivial? Not for the purpose for which they are proffered within the confines of this argument. Here we are seeking to establish that the semantic content of the Constitution contributes to the content of the law in the way specified by the conjunction of the fixation thesis, the clause-meaning thesis, and the moderate version of the contribution thesis. If the constitutional provisions that are neither vague nor ambiguous fix constitutional practice, this creates a prima facie case that the assertion made by the moderate version is true.

But once again, this is not the end of the matter. If the only provisions that contribute constitutional law were the provisions that are neither vague nor ambiguous, then the moderate version of the contribution thesis would be false, and some milder version would need to be substituted.

2. Consistency of Constitutional Practice with the Moderate Version of the Contribution Thesis

Is Semantic Originalism consistent with current constitutional practice with respect to those Constitutional provisions that are either vague or ambiguous? To answer this question, we need an account of consistency. As is usually the case in constitutional theory, the requirements of the theory are two dimensional. For a given constitutional practice, for example an action by the Senate or a Supreme Court decision to be fully consistent with the semantic content of the Constitution, the outcome must actually be consistent with the semantic content and reason for the action must be fairly traceable to the legal contribution of the content.

This point about tracing is important and it points two different ways in which the semantic content could shape outcomes. The first and most obvious way is that the agent engaging in a given constitutional practice could engage in deliberation that incorporates the original meaning. But there is a second, less obvious, and more pervasive way that semantic content shapes meaning: constitutional issues are frequently resolved at one point in time, T_1 on the basis of deliberation that incorporates the semantic content of the text as a reason for action. This resolution then may become settled practice, such that a constitutional actor at a subsequent point

in time, T_2, follows the settle practice without deliberating at all or by deliberating about the practice itself without explicit consideration of the semantic content of the text. These settled practices may themselves be embodied in subordinate legal rules—precedents, statutes, rules of procedure, etc., or they may simply be customs. A decision that is made on the basis of a settled practice that connects in the right way to the original meaning is fairly traceable to the semantic content, and such a decision is fully consistent with the moderate version of the contribution thesis.

In the cases in which the agent engaged in constitutional practice deliberates, the requirement is that the deliberation incorporates the original meaning. Deliberation is rarely fully explicit. In unusual cases, the constitutional agent might actually deliberate on the basis of an explicit theory of original meaning. But explicit articulation of a theory is not required for full consistency. The theory offered here suggests that competent language users have an intuitive grasp of the ideas of conventional semantic meaning, context, implicature, and the division of linguistic labor. They act on the basis of these ideas when they read and write ordinary nonlegal texts. Given this intuitive grasp, the normal case of full consistency will involve unconscious adherence to the fixation thesis and the clause-meaning thesis. Conscious resort to these theories should occur only when things are not going in the usual way and the semantic content has been problematized. In the legal context, this can occur because an adversary system is likely to result in attempts by lawyers to convince judges to ignore or contradict meanings that are unfavorable to the interests of the lawyer's client. All that is required for full consistency (in the case of deliberation, as opposed to the case of historical practice discussed in the prior paragraph) is that the agent engaged in constitutional practice incorporate the semantic content explicitly or tacitly, and then reach a decision that comports with the semantic content.

Full consistency can be contrasted with partial consistency and total inconsistency. Partial consistency can occur in a variety of ways. One form of partial inconsistency occurs when an agent engaged in constitutional practice engages in deliberation aims at fidelity to the original meaning of the text, but the agent misunderstands the text. Misunderstanding can occur for a variety of reasons. The text may be ambiguous, and the agent may assume without adequate deliberation that one sense provides the semantic content, when consideration of the publicly available context of constitutional utterance would have lead the agent to reach the opposite conclusion. The agent may simply be mistaken about the meaning of a term. For language to work, most agents must get most meanings most of the time, but this is fully consistent with the fact that almost all speakers will have false beliefs about the meanings of some words. Some of the language in the constitution is archaic, and the agent could simply make an erroneous guess about the original meaning. This sort of partial inconsistency does not undermine the moderate version of the contribution thesis. Legal rules can be misunderstood, but that fact doesn't entail that they aren't legal rules.

Another form of partial inconsistency occurs when an agent engaged in constitutional practice acts in a way that is consistent with the semantic content of the text, but does so on the basis of reasons that display indifference or hostility to original meaning. This form of inconsistency is more troubling from the point of view of the moderate contribution thesis: indifference or hostility to the semantic content is an indication that the agent has not internalized the requirements of the contribution, at least in the particular case, but the extent of the trouble will depend on context.

For example, given the complex power-conferring rules that constitute define the authority of the Supreme Court, the lower courts, and officials, many agents are legally obligated to respect

decisions of the Supreme Court on constitutional question: such rules include the institution of judicial review and doctrine of vertical stare decisis. For this reason, focus by these actors on Supreme Court decisions (as opposed to the semantic content of the constitutional text) may not be evidence that the subordinate agent is truly indifferent to the semantic content of the text. Such agents might, if asked about their seeming indifference, reply: "I'm legally obligated by the Supreme Court precedent, but if the Supreme Court disregarded the semantic content of the text when it set the precedent, then that precedent is incorrect as a matter of law." On the other hand, the agent might say, "I'm legally obligated by the Supreme Court precedent, and the Supreme Court has fully legal authority to disregard the semantic content of the Constitution and create rules of constitutional law that directly contravene that content. There is no such thing as a legal mistake when it comes to Supreme Court constitutional decisions." Such fully explicit articulations are rare, and explicit disavowals of the moderate version of the contribution thesis are very rare indeed.

Finally, there is the case of full inconsistency—paradigmatically a decision of the Supreme Court that explicitly acknowledges that the outcome is inconsistent with semantic content of the Constitution in a context where that inconsistency is not required by some constitutionally sanctioned power-conferring rule (such as textual commitment of an issue to a coordinate branch of government).

Remember that Semantic Originalism acknowledges that the semantic content of the Constitution underdetermines outcomes in a wide range of particular cases, so there will be a variety of circumstances in which a range of outcomes is consistent with the semantic content of the Constitution. In such cases, the outcome depends on construction and not interpretation. Constructions of vague provisions that operate within the zone of underdetermination are not examples of full inconsistency—even if the opinions of the justices are confused about the line between interpretation and construction, and even if the reasoning of the opinion mistakenly identifies semantic content, by identifying original meaning with framer's intent or original expected applications.

If constitutional practice is pervasively characterized by full inconsistency, then the case for the moderate version of the contribution thesis would face a very substantial obstacle. If a pattern of fully inconsistent decisions triggered persistent criticism from outside the Supreme Court, such that the best characterization was something like, "The legal culture agrees that this pattern of Supreme Court decisions (that willfully disregard the original meaning to reach outcomes) is lawless and the decisions are legally incorrect, the moderate version of the contribution thesis might be saved.

This abstract discussion can be made more concrete by schematic discussion of some examples. My aim is not to convince by offering detailed exegesis. Instead, the idea is to illustrate the view by simply stating its possible and plausible implications:

- The Supreme Court applied the first amendment freedom of the press as a limit on judicial power in *New York Times v. Sullivan*,[357] but the text says "Congress shall make no law . . ." *This is an example of partial inconsistency. The original meaning relevant to this case is located in the privileges or immunities clause of the 14th Amendment and this case would be located in the zone of underdeterminacy. The partial inconsistency stems from the Slaughterhouse Cases[358] and the Court's*

[357] *New York Times v. Sullivan*, 376 U.S. 254 (1964).
[358] 83 U.S. 36 (1873).

incorporation doctrine which is inconsistent with the text of the due process clause of the 14th, but which had been entrenched by precedent.

- The Supreme Court applied equal protection clause doctrine to the District of Columbia in *Bolling v. Sharpe*[359] via the due process clause of the Fifth Amendment. *This is an example of partial inconsistency. The original meaning that might have justified the outcome in Bolling v. Sharpe results from the implication in the Ninth Amendment that fundamental natural rights are retained by the people. The content of such rights is vague or ambiguous, so this case requires constitutional construction.*
- The Supreme Court upheld the application of the Controlled Substances Act to intrastate, home-grown, marijuana in *Gonzales v. Raich*,[360] despite the limitation of Congress's power to commerce among the several states. *This may not even be an example of partial inconsistency, because the court's foundational rationale relies on the necessary and proper clause and a theory of deference to the legislative power of Congress, involving abstract and general provisions, the vagueness of which creates a substantial zone of underdetermination.*

The point of these highly schematized and incompletely explicated examples is to illustrate the paucity of evidence that points to clear cut cases of full inconsistency. When this fact is combined with the very substantial evidence of large zones of full consistency, the pattern of evidence suggests strong support for the moderate version of the contribution thesis.

This same point can be made more plainly. "Originalism" may have been hugely controversial, but much of the controversy was motivated by crude versions of originalism in the academy or nonacademic use and misuse of "originalism" in ideological and political struggles. But the idea that the meaning (semantic content) of the constitution contributes in an important way to the content of constitutional law—that's not controversial among judges, officials, and lawyers. It takes a fancy theory or politically motivated resistance to get an argument going that seriously challenges the contribution thesis.

Constitutional practice is based on the premise that the semantic content of the constitution constrains constitutional law. When courts ignore the original meaning or get it wrong, they make legal mistakes. The Supreme Court's decisions may be final, but hardly anyone believes in what we might call *the Doctrine of Supreme Inerrancy*. But even those who believe in the inerrancy of the United States Reports, are likely to recoil at the logical implication of their positions—that decisions of the United States Supreme Court cannot be overruled by constitutional amendment. Does anyone really think the Supreme Court would have been legally correct to declare the Eleventh Amendment null and void on the ground that it was directly contrary to a Supreme Court decision? Whatever else the Eleventh Amendment did, it surely overturned the Supreme Court's decision in *Chisholm v. Georgia*.[361] Were the Supreme Court to assert a power to ignore constitutional amendments, this assertion would be incorrect as a matter of law.

One final point of clarification. The moderate version of the contribution thesis does not entail the claim that the Supreme Court (or other institutions and officials, including lower court judges and officials in the political branches) have no power to adopt supplementary rules of constitutional law that are inconsistent with the semantic content of the Constitution. The claim

[359] *Bolling v. Sharpe*, 347 U.S. 497 (1954).
[360] *Gonzales v. Raich*, 545 U.S. 1 (2005).
[361] *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793).

made here is that there is no power of wholesale revisions. That claim is consistent with the possibility that there are limited and exceptional circumstances in which a departure from the semantic content might be required—for example, where a mending construction is required to prevent a tear in the constitutional fabric. (Such a mending construction might be required to permit continuity in the case of a catastrophic event that deprived Congress of the ability to continue effective functioning, or a plague that resulted in the death or incapacity of every person who met the requirement that the President be at least age 35.) Nor does the moderate version of the contribution thesis require the immediate correction of all constitutional mistakes: a variety of supplementary constitutional transition rules (including rules of stare decisis) might allow for the gradual correction of constitutional errors over an extended period of time when immediate correction would disrupt settled expectations and undermine the rule of law. In "Semantic Originalism," I do not offer a full account of mending constructions or other circumstances in which constitutional practice authorizes temporary (or even permanent) deviation from the semantic content of the Constitution.

3. Semantic Content and Legal Positivism

Thus far the argument for the moderate contribution thesis has been stated from within the conventions of legal practice. In other words, the argument has been a lawyer's argument. The next stage in the argument steps outside of the conventions of legal argument and enters the arena of analytic legal philosophy.

a) Stating the Positivist Case for the Contribution Thesis

So far, the argument for the contribution thesis has been advanced without deploying the technical machinery of analytic legal positivism. In this section, I will provide a brief description of the relationship between the contribution thesis and positivist accounts of the nature of law. Legal positivism comes in many flavors—Hartian, Razian, Colemanical, and Shapiroesque, inclusive and exclusive, and so forth. The story told here will be simple and perhaps simplistic and it will proceed in two stages. The first stage will use Hart's idea of a rule of recognition;[362] the second stage will view legal positivism as a distinctive claim about the relationship between moral facts and legal content.

If John Austin's legal positivism asserted that the criteria for legality were provided by the notion of a sovereign command backed by the threat of punishment, Hart thought the defects in Austin's view could be remedies by the idea of a rule of recognition—a social rule that identifies the criteria for legality in a given society.[363] Does the rule of recognition for the United States confer legality on the semantic content of the United States Constitution?[364] There is many a slip between the cup and the lip, and many mistakes that could be made in articulating the rule of

[362] I use Hart's theory because it is the version of legal positivism most familiar with a nonspecialist audience. The argument could be restated using the conceptual apparatus of more contemporary versions of legal positivism. For example, on Shapiro's planning theory, the contention would be that the text of the constitution provides part of the content of the plan. "Semantic Originalism" is agnostic as between the Hart's theory and its most contemporary rivals.

[363] H.L.A. HART, THE CONCEPT OF LAW (2d ed. Oxford: Oxford University Press 2002).

[364] Kent Greenawalt, *The Rule of Recognition and the Constitution*, 85 MICH. L. REV. 621 (1987); Kenneth Einar Himma, *Making Sense Of Constitutional Disagreement: Legal Positivism, The Bill Of Rights, And The Conventional Rule Of Recognition In The United States,* 4 J. L. SOCIETY 149 (2003).

recognition for the United States. But whatever formulation of the rule we might ultimately adopt, it seems unlikely that a plausible version would deny legal status to the content of the Constitution.[365] Indeed, consistency the content of the Constitution might be thought to supply or be a component of the rule of recognition itself. Hart wrote, the "criteria provided by the rule of recognition . . . may . . . be substantive constraints on the content of legislation such as the Sixteenth or Nineteenth Amendments to the United States Constitution respecting the establishment of religion or abridgements of the right to vote."[366] Brian Leiter writes that a "rule is a valid rule of law in the United States if it has been duly enacted by a federal or state legislature and it is not inconsistent with the federal constitution."[367] We do not need to endorse these very strong views of the relationship of the Constitution to the rule of recognition in order to find support for the moderate contribution thesis. The essential point is that any plausible candidate for the rule of recognition will lend support to something approximating the moderate version of the contribution thesis.

Another way to approach legal positivism is via an understanding of the relationship between moral facts and legal content. Natural lawyers might be understood as asserting that it is necessarily the case that moral facts contribute to legal content. Exclusive legal positivists could be understood as making the claim that it is necessarily the case that only social facts can contribute to legal content, and hence that it is not possible that moral facts contribute. Inclusive legal positivists would then claim that it is possibly but not necessarily the case that moral facts determine legal content—moral facts can be incorporated into legal content, but only in virtue of some social fact about them.

Both exclusive and inclusive legal positivists agree that social facts determine legal content. So if the social facts that determine legal content do so via the semantic content of the Constitution, then the contribution thesis is correct. But if the social facts that determine legal content cut the semantic content of the Constitution out of the picture, then the contribution thesis is false. But for a legal positivist, it cannot be the case that moral facts necessarily determine moral content. This means that the question whether the semantic content of the Constitution determines legal content cannot be normative "all the way down." If the question were normative, all the way down, then moral facts would necessarily determine legal content. Natural lawyers could embrace this view, but not legal positivists.

Both exclusive and inclusive legal positivists can embrace the idea that the contribution thesis might not hold in a possible world that is close to ours. For example, we can imagine a possible world that shares the history of the actual in which the constitutional text becomes a dead letter and the social facts pick out the content of the decisions of the Supreme Court as the facts that fix the content of constitutional law. In other words, the contribution thesis is nothing remotely like a necessary truth: it would be false in possible worlds are very close to the actual world.

From the perspective of contemporary analytic legal positivism, the truth or falsity of the contribution thesis depends on nonmoral facts: "Just the social facts, ma'am." The sorts of facts that would be relevant are the same kinds of facts that were discussed in the immediately prior subsection—facts about legal practice.[368] We have already examined some of the relevant evidence and the ways in which it would relate to the positivist case for the moderate version of

[365] *See* Greenawalt, supra note 364, at 463.
[366] Hart, supra note 363, at 250.
[367] Brian Leiter, *Legal Realism and Legal Positivism Reconsidered*, 111 ETHICS 278-301 (January 2001).
[368] *See supra* Part IV.C.1, "The Semantic Content of the Constitution is the Supreme Law of the Law," p. 137.

the contribution thesis: there is strong evidence for that case and very little or no evidence that is unambiguously inconsistent with it.

b) Normativity and the Rule of Recognition

Deep discussions of the issues raised by the positivist case for the contribution thesis are few and far between. One of the best comes from Richard Fallon's *How to Chose a Constitutional Theory*.[369] Fallon's argument is complex and I will quote at length:

> Although this chain of reasoning might draw support from an older brand of legal positivism that equated law with the "command" of a sovereign (such as the Framers or ratifiers), this equation is untenable. As modern positivists such as H.L.A. Hart have argued, the foundations of law (including constitutional law) do not lie in sovereign commands, but rather in social practices involving the acceptance of authority. Though perhaps obscured in stable legal systems, the crucial role of acceptance becomes manifest in cases of what we call "revolution." The commands of Parliament did not cease to be law in the United States because Parliament commanded that its decrees should no longer be law here; British enactments ceased to be law because they ceased to be accepted as such in the former American colonies.[370]

On this score, Fallon is absolutely correct. The argument for the contribution thesis does not, and should not depend on a primitive Austinian theory that law is the command of the sovereign backed by the threat of punishment.[371] Contemporary analytic positivism relies on "social facts," "social rules," or 'social practices," as Fallon notes in the continuation of his argument, "the status of the Constitution as law depends on contemporary practices accepting it as such."[372]

Taking analytic positivisms move to social facts as premise, Fallon makes the next move:

> If the Constitution's status as ultimate law depends on practices of acceptance, then the claim that the written Constitution is the only valid source of constitutional norms loses all pretense of self-evident validity. As originalists candidly admit, originalist principles cannot explain or justify much of contemporary constitutional law. Important lines of precedent diverge from original understandings. Judges frequently take other considerations into account. Moreover, the public generally accepts the courts' non-originalist pronouncements as legitimate—not merely as final, but as properly rendered.[373]

This paragraph makes several different moves, and requires a good deal of unpacking. First, Fallon is correct to observe that "self-evident validity" is a red herring: we need a social practice that recognizes the semantic content of the Constitution as law, and the text of the Constitution itself cannot be that social practice. The social practice will need to include facts about how judges, officials, and possibly citizens treat the Constitution.

Second, Fallon's observation that "originalists candidly admit, originalist principles cannot explain or justify much of contemporary constitutional law" needs to be contextualized. Fallon's

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[369] Richard Fallon, *How to Choose a Constitutional Theory*, *supra* note 279.

[370] *Id*. at 547.

[371] JOHN AUSTIN, *The Province of Jurisprudence Determined*, in THE PROVINCE OF JURISPRUDENCE DETERMINED AND THE USES OF THE STUDY OF JURISPRUDENCE 1 (H.L.A. Hart ed., Noonday 1954).

[372] Richard Fallon, *supra* note 279, at 547.

[373] *Id*.

footnote cites Raoul Berger and Robert Bork—archetypes of the "Old Originalism."[374] New Originalists should not make this concession, and the claim of "Semantic Originalism" is that the social facts do support the contribution thesis, as has been argued in detail above.[375] The bright-line unambiguous semantic content does, in fact, provide rules of constitutional law, and the inconsistency of doctrine with the semantic content of the text provides a basis for legal criticism of the doctrine.

Third, the point about "legitimacy" is not well supported. The sources that Fallon cites,[376] Charles Black and H.L.A. Hart, do not assert that that the public accepts nonoriginalist reasoning as legitimate, and the most certainly do not assert that there is a rule of recognition that authorizes the Court to depart from the semantic content of the Constitution.

The next passage moves to a different argument:

> In urging that existing judicial practices should be altered, originalists are not pure positivists, who insist that the "rule of recognition" prevailing in the United States reflects originalist principles. Rather, originalists, like all other participants in constitutional theoretical debates, carry a burden of normative justification. They must attempt to establish that the constitutional regime would be a better one--as measured by relevant criteria--if constitutional practice were exclusively text-based and if originalist precepts were consistently followed. Indeed, as I shall argue below, many originalists implicitly acknowledge as much: like proponents of other theories, originalists commonly appeal to values associated with the rule of law, political democracy, and individual rights in defending their interpretive methodology.[377]

The premise of this passage is that originalism does <u>not</u> assert the moderate version of the contribution thesis. While that may have been true of the Old Originalism, it is most certainly not true of Semantic Originalism and it need not be true of the New Originalism (which can incorporate Semantic Originalism). Once this now false premise is eliminated, the rest of the passage becomes irrelevant. Semantic Originalism is explicitly not an argument for a change in the rule of recognition, and it follows from Fallon's own premises that Semantic Originalism does not bear the normative burden that advocates of a change in the rule of recognition must carry.

4. Objections to the Moderate Contribution Thesis

How might the moderate contribution thesis be resisted? Here are some possibilities.

a) No Contribution Claims

Are there reasons to believe that the semantic content of the Constitution makes no contribution to the content of law? It is remarkably difficult to motivate claims that the semantic content of the constitution makes no contribution to legal content. To see why, we can return to the idea that the claims made by legal positivism can expressed as relationships between the role

[374] *Id*. at note 60.
[375] *See supra* Part IV.C.1, "The Semantic Content of the Constitution is the Supreme Law of the Law," p. 137.
[376] *See* Richard Fallon, *supra* note 279, at 548 notes 63 & 64.
[377] *See id*. at 548.

of social facts and moral facts in determining legal content.[378] Both inclusive and exclusive legal positivism plus some plausible assumptions about social facts support the moderate version of the contribution thesis, but one can imagine making a case using either form of legal positivism for the weak thesis as an alternative. But it is very difficult to see how any form of positivism can support claims that the semantic content of the Constitution does not even make an indirect contribution to the content of constitutional law. How would that go?

What story could be told that has the content of constitutional law determined by social facts, with no role of the semantic content of the text? What could possibly account for the fact that constitutional law tracks the semantic content of the Constitution in situations where the content is neither vague nor ambiguous? If the semantic content of the Constitution makes zero contribution to the content of constitutional law, then what does account for the fact that the rule is that there are two Senators per state?

These rhetorical questions are urgent. We can imagine stories where the semantic content plays an indirect role (the content of law is directly determined by a convention that fixes practice and the semantic content served as a focal point that led to the emergence of the convention), but on that story the weak version of the contribution thesis still holds.

* * *

My aim in this Article has been to answer every plausible objection I can imagine. I just cannot imagine any plausible argument for "no contribution" that is consistent with legal positivism. If you think of one, please let me know!

* * *

If legal positivism is inconsistent with no contribution claims, what about antipositivism. Recall that antipositivism affirms the claim that it is necessarily the case that moral facts determine legal content. There are two possible variants of antipositivism. Exclusive antipositivism asserts that it is necessarily the case that only moral facts determine legal content. Inclusive antipositivism asserts that it is possibly the case that social facts determine legal content, but only if moral facts point to the social facts.

Exclusive antipositivism would be consistent with denial of the contribution thesis. The semantic content of the Constitution is a social fact, and therefore it cannot determine content if exclusive antipositivism is true. The problem is that exclusive antipositivism is radically implausible. Essentially, exclusive antipositivism goes far beyond the natural law thesis, *lex injusta est non lex* (unjust positive laws are not law), and makes the radical claim that there is no such thing as positive law and that legal texts play no role at all in determining the content of law. This would seem to imply that none of the legal content that can only be explained (directly or indirectly) by the semantic content of legal texts is actually law. Thus, there is no law providing that there are two senators per state, no law that one is to drive on the right hand side of the road, and no law that requires that testamentary contracts be in writing. Most legal theorists find *lex injusta est non lex* implausible, troubling, or at least in need of a defense. So far as I know, no one has ever argued that exclusive antipositivism is even plausible.

[378] *See supra* Part IV.C.1, "The Semantic Content of the Constitution is the Supreme Law of the Law," p. 137.

That brings us to inclusive antipositivism and the arguments for the weak version of the contribution thesis as an alternative to the moderate version.

b) Arguments for Weak Contribution

How might one argue for the weak version contribution thesis? Recall that the contribution of the semantic content of the Constitution to constitutional law is weak, if and only if the meaning of constitutional provisions plays no direct role in providing the content of constitutional law. Weak versions of the contribution thesis are based on the idea semantic content plays a role in fixing legal content, but that role is direct. I have already mentioned the view that only judicial decisions are sources of law, and provide some further discussion of that theory in a footnote.[379]

(1) Greenberg's Theory of Law

Mark Greenberg's theory is a form of inclusive antipositivism which maintains that the semantic content of legal texts contributes to legal content by changing the "moral profile"—the sum total of moral obligations. Although it may usually be the case that the obligations that result from these changes are consonant with the semantic content, this is not necessarily the case. For example, if the moral profile (taking into account the impact of the Constitution) contradicts the semantic content of a given Constitutional provision, then, for Greenberg, that provision would not have the force of law. On Greenberg's account, the semantic content *contributes* to the content of constitutional law—but that contribution is *indirect* and *defeasible*.

Greenberg offers rich and sophisticated arguments in support of his theory. Most relevant in this context are two claims. First, Greenberg argues that it when we equate the semantic content of a rule with the law, we are speaking loosely. Statutes and constitutional provisions are sources of law, but they are no law itself, Greenberg claims. This first argument is plausible, but it is not quite so powerful as it might first appear. Consider the following way of phrasing the relationship between constitutional meaning and legal content:

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[379] *See supra* Part I.A.3, "The Contribution Thesis: The Semantic Content of the Constitution Contributes to Constitutional Law," p. 7. Exclusive positivists could believe that only judicial decisions are law. The semantic content of constitutions, statues, rules, and regulations play an indirect role, they are sources that are consulted by adjudicators when the adjudicators render the decisions that constitute the law. If this theory were true, then the legal validity of constitutional decisions could not depend on their tracking the semantic content of the Constitution: it would just be the decisions of the Supreme Court and not the Constitution itself that fixed the content of constitutional law.

Is the view that only judicial decisions fix legal content plausible? Two arguments provide some motivation for this view. First, in some circumstances decisions by a court of law resort that are fully inconsistent are very difficult to correct: impeachment or removal from office may theoretically be available, but practically speaking such courts seem to have the freedom to ignore the semantic content of legal texts. Second, so far as the litigants to a dispute are concerned, it is the "law in action" that matters, and when cases are litigated, the law in action is provided by judicial decisions. However, a closer examination of the second point undermines rather than supports the view that the content of legal texts make no direct contribution to legal content. The law in action is overwhelmingly provided by actions that guided by the "shadow of the law" and that shadow is cast by the content of legal texts; when there are no cases, the shadow of the semantic content of the text is the only shadow. Moreover, the shadow of the semantic content is surely cast on their courts themselves, who at least sometimes view the semantic content as binding. None of these phenomena make sense if judicial decisions are, but legal texts are not, direct contributors to the content of the law.

> Yes, it is true that the text of the constitution is a source of constitutional law and not the law itself. That is true for two reasons. First, the text of the Constitution is the source of the semantic content and it is the semantic content of the text and not the text itself that provides the content of constitutional law. Second, the conventional semantic meaning of the text underdetermines the content of constitutional law for a variety of reasons, including the fact that vague provisions require construction, that some rules of constitutional law arise by implicature and that in some cases the clause meaning may be overridden by other legal considerations.

Once the relationship between text and content is put this way, Greenberg's "loose talk" objection loses much or all of its force.

More substantively, Greenberg argues that the semantic content of the text can be altered or superseded in cases where we might say that moral profile resists or bends the semantic content of the text. Greenberg's examples are not examples of constitutional law, and such examples would be required to make the point as an objection to the moderate version of the contribution thesis. In the context of statute law, desuetude might provide an example, but it is difficult to find a clear cut example of constitutional desuetude. Even the Second Amendment seems capable of making a comeback. For the purposes of this article, the important point is that those who resist the contribution thesis on the basis of Greenberg's theory will need to "do the work" and make the case for his theory in the constitutional context.

Even if Greenberg's theory were established as correct on the basis of good and sufficient reasons, it is not clear that Semantic Originalism would suffer substantial damage. On Greenberg's account, much of the semantic content of the constitution would make it into constitutional law via the indirect route. Greenberg's theory has the internal resources to argue that most of the semantic content of the Constitution produces changes in the moral profile that closely track that content. So long as the fixation thesis and the clause-meaning thesis hold, Greenberg's theory can and should accommodate a substantial role for the original public meaning of the Constitution in the fixation of legal content. If opponents of originalism want to argue that this is not the case, then they are obliged to provide the arguments.

One last point about Greenberg's theory. On his account, the fidelity thesis becomes unnecessary. If we accept Greenberg's theory, then it follows from the nature of law that law provides all-things-considered moral obligations.

(2) Law as Integrity

Yet another form of inclusive antipositivism is Ronald Dworkin's theory, law as integrity. Dworkin's hypothetical judge Hercules articulates the theory that best fits and justifies the institutional history (including legal texts) as a whole. According to law as integrity, the content of that theory (and not the content of the texts which Hercules considers in constructing the theory) provides legal content. Dworkin's theory, like Michael Greenberg's view, is inconsistent with the moderate version of the contribution thesis, but it supports what I call the weak version. For the purpose of this discussion, we can assume that the fixation thesis and the clause-meaning thesis are true.

How would Hercules treat the semantic content of the United States Constitution? Law as integrity surely would give the semantic content an important role: the Constitution of the United States is indubitably an important feature of the institutional history. The theory that best fits and justifies that history will give pride of place to the Constitution: much of the content of

constitutional law will be identical to the semantic content of the Constitution. Of course, law as integrity may authorize substantial departures from the original meaning: the theory that best fits and justifies our whole institutional history might effectively nullify whole clauses of the Constitution, with the consequence that these clauses would not be law at all. And in some cases, the theory might assign a meaning to a particular clause that is inconsistent with the original meaning: for example, Hercules might interpret the equal protection clause so that its content would correspond to: "No state shall deny to any person that treatment which is required by the best conception of the concept of equality," even if this is inconsistent with the semantic content of "equal protection of the laws." For Dworkin, this would be unproblematic, but for Semantic Originalism, Hercules's interpretation would be legally incorrect and would, at least prima facie, be inconsistent the fidelity to law.

Two more observations. First, just as with Greenberg's theory, Dworkin's theory seems to obviate the need for the fidelity thesis. Law as integrity would itself provide the reasons of political morality for law abidance.

5. Charity in Interpretation and Indeterminacy of Translation

This subsection deals with the relationship between the contribution thesis and some ideas in the philosophy of language associated with Quine and Davidson. Two questions arise. First, what is the relationship between the idea that the constitutional text contributes to constitutional law and Quine's discussion of indeterminacy of translation (from one natural language to another) or Davidson's extension of that discussion to interpretation (within one natural language)?[380] A second question arises in connection with the idea of the principle of charity in interpretation.

In connection with the first question, we can ask whether Quine's idea of indeterminacy of translation or Davidson's extension to interpretation imply indeterminacy of translation between the constitutional text and constitutional law. "Indeterminacy" and "charity in interpretation" have particular philosophical meanings that may differ from the use of these phrases in legal theory. In particular, the word "indeterminacy" as used in this subsection refers to "Quinean indeterminacy," the meaning of which we shall now examine.

Moving quickly through a dense thicket of ideas, we can begin with the idea of radical translation. Imagine a newly discovered natural language, and task of devising a translation manual. Such a manual must satisfy two constraints: (1) sentences in the foreign language that are assented to only in certain observational circumstances should be translated as sentences we would assent to in similar circumstances, and (2) sentences that are accepted as true in foreign language should be translated into sentences that would be absurd in our language, and sentences that are rejected in the foreign language should not be translated into sentences we regard as obviously true. Quine argues that these constraints do not determine a unique translation manual: there will be more than one manual that preserves the truth of observation sentences and satisfies avoids the errors of translating sentences understood as true as obviously false and *vice versa*.

Donald Davidson extended Quine's account from translation to interpretation (where interpretation means understanding within a single natural language) and he collapsed Quine's

[380] *See generally* Donald Davidson, *Radical Interpretation*, in INQUIRIES INTO TRUTH AND INTERPRETATION (1984); WILLARD VAN ORMAN QUINE, WORD AND OBJECT 26-79 (1960).

two constraints into one *principle of charity* which is *maximize agreement*. Dagfinn Föllesdal correctly identified a problem with Davidson's principle of charity, which he explained as follows:

> I am together with a person who speaks a language which I do not know, but would like to learn. He frequently uses the phrase 'Gavagai' and I have formed an hypothesis that it has to do with rabbits. While we are in a forest and I note a rabbit I try out the phrase 'Gavagai'. However, my friend dissents. According to Davidson's thesis of maximizing agreement this would be a reason against my hypothesis that 'Gavagai' should be translated by 'Rabbit'. If I now discover that there is a big tree between my friend and the rabbit, I immediately have an explanation for our disagreement: I take it for granted that my friend, like me, is not able to see through trees and that he therefore does not think that there is a rabbit there. I even take my friend's dissent as confirming my hypothesis, I do not expect him to believe that there is a rabbit there.[381]

Thus, we can articulate a *modified principle of charity* as follows: "Maximize agreement where you expect to find agreement."[382] One more point: all of this discussion is in the context of sentences that make assertions about the world that are true or false, but legal interpretation takes place in a context where many of the crucial sentences to be interpreted are legal rules of the familiar sorts, prohibiting, conferring powers, and so forth. Moving from the context of assertions to the context of legal rules is nontrivial.

The idea of charity in interpretation is familiar to lawyers. When we attempt to glean the semantic content of a legal text, we avoid absurd interpretations, but the principle of charity in interpretation does not lead us to assume that we always agree with the meaning of legal texts. Most constitutional provisions were uttered long ago in circumstances that differ from contemporary circumstances and were framed and ratified by persons who had background beliefs and values that vary systematically from our own. Given our knowledge of the publically available circumstances of constitutional utterance, an interpreter (or translator) should not expect that the original meaning of the Constitution is identical to the content of the Constitution that the interpreter would utter knowing the publicly available context if the interpreter were in the circumstances of constitutional utterance.

Now back to indeterminacy of translation. If Quine's notion carries over to the legal context, we could formulate it as follows. Let us imagine that a legal interpreter is given the task of writing a translation manual that translates sentences in the text of the Constitution into sentences of constitutional law, and that the translation manual must comply with Föllesdal's modified principle of charity.[383] To make this imaging vivid, we can describe the same situation using conventional legal terminology:

> A legal scholar is asked to write a treatise of constitutional law that formulates the semantic content of the constitutional text expressed in the language used when in each provision was framed and ratified as a set of legal rules expressed in contemporary American English. (This special treatise only deals with the semantic content of the text; it

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[381] Dagfinn Föllesdal, *Meaning and Experience*, August, 1999, http://hektor.umcs.lublin.pl/~zlimn/school/2/frames/courses/dagfinn.htm.

[382] *Id*.

[383] *Cf*. Lessig, *Fidelity in Translation*, *supra* note 188 (deploying analogy between translation and constitutional interpretation).

does not constructions except to note the need for constructions when the text is vague.) The treatise translates each sentence of constitutional text into a rule of constitutional law.

Indeterminacy of legal interpretation, in the special sense we are using the word "indeterminacy," implies that there could be many treatises of constitutional law that would comply with the modified principle of charity. Many sets of legal rules could accurately express the semantic content of the constitution in contemporary English, if by "accuracy" we mean compliance with the modified principle of charity.

If Quinean indeterminacy were to hold for the case of constitutional law treatises, this would not entail the strong indeterminacy thesis discussed in connection with debates associated with the Critical Legal Studies movement.[384] Even if there are many (or even a vast number) of such treatises, it does not follow that every possible treatise would provide an accurate translation. Many treatises (or a vast number) will violate the modified principle of charity.

At this point, some readers may draw the conclusion that Quinean indeterminacy adds *nothing* to our understanding of legal interpretation, but that conclusions would be incorrect. If Quine is right and if legal translation is indeterminate in the Quinean sense, then it follows that even with knowledge of the full circumstances of constitutional utterances, there can be more than one correct version of the clause meaning of the Constitution. Putting it more crudely, we could express this point as follows: the semantic content of the Constitution is irreducibly ambiguous, but in ways that satisfy the modified principle of charity.

How would New Originalists handle irreducible ambiguity of the Quinean sort? The answer is, "The same way they would handle the less fancy sort of ambiguity that results from epistemological problems such as our lack of complete knowledge of the patterns of conventional usage at the various times constitutional provisions were uttered." Irreducible ambiguity requires construction. If Quinean indeterminacy holds of a constitution, then even a constitution that had only bright-line provisions (and therefore had no vague provisions) would require constructions. When it comes to application, many of the permissible constructions would produce identical outcomes, but it seems likely (and at least possible) that in at least some cases the outcomes would differ.

We are now in a position to answer the question whether Quinean indeterminacy threatens the moderate version of the contribution thesis. The answer is clearly "no." Indeed, Quine's picture of radical translation and Davidson's extension of that picture to interpretation assumes that something analogous to the moderate version of the contribution thesis holds in the case of sentences that make assertions. For this reason, it is difficult to see how Quinean indeterminacy could pose a threat to the contribution thesis in the context of law.

* * *

Recall that Semantic Originalism embraces four theses: (1) the fixation thesis, (2) the clause-meaning thesis, (3) the moderate version of the contribution thesis, and (4) the fidelity thesis. The first three theses have now been articulated, motivated, and defended against a series of possible objections. With some minor exceptions, all of this has been accomplished without recourse to arguments of political morality. One way that we can summarize the argument so far is this: "The original meaning of the constitution is the law." The remainder of this part

[384] *See* Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462 (1987).

adds the following: ". . . and because it is the law we have good reasons to follow it." Those "good reasons" are provided by the fidelity thesis.

* * *

D. The Fidelity Thesis Revisited

The fidelity thesis asserts that there is a principle within political morality of fidelity to law.[385] The basic idea is simple and familiar. In a reasonably just society, we have good reasons to abide by the law. In this section, we will elaborate on the content of the fidelity thesis and then make the case for its acceptance.

Before we proceed any further, the purpose of this inquiry should be clarified. Our aim is not to produce the best account of the moral relationship between constitutional law, on one hand, and the obligations or virtues of citizens, officials, and judges, on the other hand. That task is too large. Instead, the more limited goal of this subsection is to articulate a minimalist conception of fidelity to law. The minimalist conception can be articulated as follows: in a reasonably just society, citizens, officials, and judges should adopt an attitude of loyalty towards the law and comply with a corresponding obligation to comply with the law absent overridden reasons of morality.

1. The Fidelity Thesis: Law Obligates Citizens, Officials, and Judge Absent an Overriding Reason of Morality

What is "fidelity to law"? Under what circumstances does morality authorize disobedience? Who owes fidelity to law?

a) Fidelity to Law

Fidelity to law can be understood in various ways. One understanding focuses on the idea of fidelity as an orientation towards the law as a source of reasons for action. One such orientation could be an attitude of loyalty and respect to the law. A second orientation could be conceived dispositionally: in aretaic terms, we can think of a virtue of lawfulness. Another way of understanding fidelity to law is in terms of obligation or duty. We can imagine various conceptions of the obligation to obey the law. There could be a very strong obligation that overrides both self-interest and individual beliefs about morality in all but the direst circumstances, or a very weak obligation, that provides only a bursting-bubble presumption in favor of law abidance.

Let us stipulate that fidelity to law consists of both an orientation of respect towards the reasons for action that law provides and an obligation (with appropriate force) to obey the law. To have fidelity to law is to respect the reasons the law provides and to acknowledge that law obligates.

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[385] Gregory C. Keating, *Fidelity to Pre-Existing Law and the Legitimacy of Legal Decision*, 69 NOTRE DAME L. REV. 1 (1993); Lon L. Fuller, *Positivism And Fidelity To Law--A Reply To Professor Hart*, 71 HARV. L. REV. 630 (1958); Kent Greenawalt, *The Natural Duty To Obey The Law*, 84 MICH. L. REV. 1 (1985).

b) The Overriding Reasons Proviso

One understanding of the authority of law is that the reasons that law provides must displace moral reasons. This understanding is usually accompanied by an account of legitimate authority, such that one has reason to acknowledge authority as legitimate only if acting in compliance with the authority results in a greater likelihood of acting in accord with the overall balance of reasons than would direct reliance on the reasons themselves. A quite different account of obligation to obey the law assumes that the obligation obtains in normal circumstances, but that it is defeasible and can be overridden or displaced by reasons of the right kind and force. The former account gives law's authority the ability to preempt direct reliance on moral reasons, but imposes strict conditions on its legitimacy. The latter account lacks preemptive force, but imposes less stringent conditions on legitimacy.

Let us assume the weaker account of law's authority, which allows agents who affirm fidelity to law to engage in disobedience for overriding reasons of morality.[386] Some may argue that this idea denies to law the full authority it claims and ought to have, but for our purposes on this occasion, this weaker conception of obligation is sufficient to the task at hand.

What then would count as an overriding reason of morality? One type of case involves systematic failure of the legal system as a whole to meet minimum standards of morality and justice: wicked legal regimes like Nazi Germany and Apartheid South Africa are of this type. A second type of case involves a reasonably just and moral legal regime in which the content of a particular law or cluster of laws is substantial unjust or immoral: Jim Crow laws might be described as a cluster of injustice embedded in reasonably just society. A third type of case involves the application of a law with reasonably just content, the application of which to particular circumstances would work a substantial justice.

The minimalist conception of fidelity to law that is offered here acknowledges that there can be overriding reasons of morality in each of the three kinds of cases. Such reasons of morality must be serious and substantial to be overriding. For an agent to reach the conclusion that the reason truly overrides, the agent must give due regard to the reasons of the law and the great value of the rule of law. In particular, it is never enough to say, "This rule of law is not the best rule of law. I can imagine a better rule. Therefore, I am excused from compliance with the law." That kind of reasoning is inconsistent with fidelity to law because it displays an orientation towards the reasons that law provides that does not incorporate an attitude of respect or a virtue of lawfulness.

c) Who Owes Fidelity to Law?

Recall the distinction between *general* and *special constitutional fidelity*. *General constitutional fidelity* applies to all citizens; *special constitutional fidelity* applies only to officials. The conventional wisdom is that judges owe fidelity to law for reasons and with a force that do not apply to other officials and citizens. Judges voluntarily assume their office and typically swear an oath of fidelity to the Constitution and laws. If judges lack respect for the law and the virtue of justice, then the power the law gives them may be the power act despotically or arbitrarily. The role of judge involves a special relationship to the law: the job of the judge is to correctly identify and apply the law to particular disputes. Fidelity to law is thought to be

[386] This account is broadly consistent with the analysis offered by Richard Fallon. *See* Richard Fallon, *Legitimacy and the Constitution*, *supra* note 28, at 1834-35.

especially important for doing this job well. Moreover, the conditions for the exercise of judicial power are especially conducive to deliberation that fully considers and incorporates constitutional law in judicial action. This is especially true of appellate judges who act after adversary contestation and collegial deliberation resulting in opinions that make explicit their reasons for decision.

Some of these same special reasons for fidelity to law also apply to other officials. Legislators and the occupants of high executive office also swear an oath of fidelity and choose their offices voluntarily. They exercise power over others, and one of the functions of constitutional law is to constrain them. Nonetheless, it might be argued that the ties that bind officials to fidelity are less constraining than those that bind judges. Executive officials must act in real time: they sometimes need to act expeditiously, without the opportunity for full deliberation and the light that might be shed by the adversary process. Legislators have more opportunity for deliberation, and the institutional mechanisms for seeking broad public input on constitutional questions. Both types of officials may believe that they may appropriately defer to judicial judgments on some constitutional questions given the institution of judicial review.

More controversially, but in my opinion rightly, good citizens in a reasonably just society with legitimate institutions owe fidelity to law. Citizens may be born into citizenship and exit may be costly. Moreover, it is widely believed that citizens have the right to change the regime through legal or extralegal processes under at least some circumstances. Moreover, individual citizens ordinarily have only imperfect knowledge of the content of constitutional law. Given these caveats, fidelity to law in the case of individual citizens may have a different shape and force than it has for judges and officials.

2. Reasons for Affirming the Fidelity Thesis

So far, we have investigated the content, force, and scope of fidelity to law. The next task is to survey the reasons that judges, officials, and citizens might have for adopting the attitudes and duties implied by fidelity. These reasons can be divided into two kinds, public reasons and reasons provided by comprehensive moral doctrines.

a) Public Reasons for Fidelity to Law

The familiar idea of public reasons is strongly associated with John Rawls and resembles the idea of an incompletely theorized agreement found in the work of Cass Sunstein. Rawls's notion of public reason "Public reason" is the common reason of a political society; it is the shared capacity of citizens to engage in political deliberation. An ideal of public reason provides a systematic answer to the following question: what limits does political morality impose on public political debate and discussion by the citizens of a modern pluralist democracy?[387]

Rawls's idea of public reason is marked by three features. First, Rawls understands public reason as the common reason of a political society. A society's reason is its "way of formulating its plans, of putting its ends in an order of priority and of making its decisions accordingly."[388] Public reason contrasts with the "nonpublic reasons of churches and universities and of many other associations in civil society."[389] Both public and nonpublic reason share features that are

[387] *See* Lawrence B. Solum, *Public Legal Reason*, 92 VA. L. REV. 1449 (2006).
[388] Rawls, *Political Liberalism*, *supra* 29, at 212.
[389] Id. at 213.

essential to reason itself, such as simple rules of inference and evidence.[390] Public reasons, however, are limited to premises and modes of reasoning that are accessible to the public at large. Rawls argues that these include "presently accepted general beliefs and forms of reasoning found in common sense, and the methods and conclusions of science when these are not controversial."[391] By contrast, the nonpublic reason of a church might include premises about the authority of sacred texts and modes of reasoning that appeal to the interpretive authority of particular persons. Nonpublic reasons are not, however, limited to religious reasons. The deep and controversial premises of any comprehensive moral conception, such as utilitarianism or Kantian deontological ethics, are also nonpublic reasons.

Are there public reasons for fidelity to law? One answer to this question might appeal to the very great value of the rule of law as value is both embedded in the public political culture and that it is not disqualified as a public reason because it is inaccessible to reasonable citizens by virtue of its incorporation of the deep and controversial premises of a comprehensive moral doctrine. That is, one can affirm the very great value of the rule of law without affirming any particular comprehensive doctrine. The values of certainty, predictability, and stability, which allow humans to coordinate their behavior, make plans, avoid getting in trouble, and so forth, do not depend on any particular comprehensive conception of morality.

More directly the idea that judges, officials, citizens owe fidelity to law is itself strongly embedded in the public political culture. Not only is this idea explicitly articulated, it is also a presupposition of a wide variety of legal practices. Judges, officials, and citizens are expected to follow the law: they are taken to be acting badly when they break the law. Oaths that pledge fidelity to law are direct evidence that fidelity is entrenched in the public political culture.

Of course, even if fidelity to law is a public value, it does not follow that the public political culture is right in this regard. We could query the public political culture in at least two distinctive ways. One query would operate from within the public political culture and it would ask whether our commitment to lawfulness is consistent with our other deep commitments. If it could be shown that fidelity to law is inconsistent with those commitments, then it might be the case that we could be induced to give up our commitment to fidelity to law on the basis of public reasons.

b) Reasons Grounded in Comprehensive Moral Doctrines

There is a second way in which we could query the public political culture. Each of us might ask whether the duty of fidelity is consistent with the deeper commitments of her own comprehensive doctrine. This query would operate from outside the public political culture, but could form the basis for an "overlapping consensus" or "incompletely theorized agreement" on fidelity to law. This subsection sketches some possible arguments for fidelity to law from comprehensive doctrines.

Our aim here is not to produce knock-down arguments that demonstrate that each comprehensive doctrine necessarily leads to fidelity to law. Rather, the aim is to show how a variety of doctrines could be consistent with fidelity to law. Given that the public political culture includes the rule of law as a very great value and demands fidelity to law of judges, officials, and citizens, this modest showing is sufficient for the purpose at hand—which just is

[390] Id. at 220.
[391] Id. at 224.

establishing the plausibility of the minimalist normative case for adherence to the law as component of Semantic Originalism.

(1) The Deontological Argument: Duties of Officials, Duties of Citizens

From a deontological perspective, morality is seen as a system of moral rules, creating duties, rights, and permissions. For a deontologist, the question is whether there is a duty to obey the law, and if there is some such duty, what are its limitations? There are many versions of deontological theory, including, for example, Kant's theory,[392] contractarianism (associated in contemporary philosophy with Thomas Scanlon[393]), and Stephen Darwall's theory, which emphasizes the second-person standpoint.[394] A variety of arguments can be made for and against a general duty of law abidance.[395]

The conventional wisdom is that the case for an obligation to obey the law is more easily made for officials, including judges, that for citizens. Officials voluntarily choose to be bound by the legal system by entering their offices: frequently officials swear an oath of office that explicitly promises obedience. Officials directly benefit from the law, and as a matter of fair play (or reciprocity) may be obligated to respect the rules that create these benefits. Most issues of constitutional interpretation come to officials. Judges engage in judicial review. Legislators consider constitutionality when they decide whether to enact statutes. Executives consider rules of constitutional law as defining and limiting their powers. Even if the duty to obey the law were limited to officials, as a practical matter this would be sufficient for the limited purposes of Semantic Originalism.

The question whether there is a general duty for citizens to obey the law is difficult, and respected philosophers doubt whether the case has been or can be made. Citizens do not explicitly consent to obey the law, and tacit consent is problematic because the only alternative is exit (emigration), expressive for all and practically unavailable to some. There are, however, several promising lines of argument. For example, John Rawls has argued for an obligation to obey the law based on the ideas of fair play and reciprocity: citizens who receive the benefits of compliance by others would act unfairly (as free riders) if they were to disobey the laws for reasons of self-interest. Kant famously argued for a very strict duty of obedience to law.

(2) The Consequentialist Argument: The Law as a Coordination Mechanism

Can consequentialism provide the foundations for respect for law? At first blush, this looks like a difficult task. Take act utilitarianism. For the act utilitarian, evaluations of the decisions to obey the law are made one act at a time. In any given case, the harms generated by complying with the law may exceed the benefits. This suggests that there is no general obligation to obey

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[392] *See, e.g.,* IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS (Mary Gregor ed., Cambridge: Cambridge University Press, 1998).

[393] *See, e.g.,* THOMAS SCANLON, WHAT WE OWE TO EACH OTHER (New ed., Cambridge: Harvard University Press, 2000).

[394] *See, e.g.,* STEPHEN DARWALL, THE SECOND-PERSON STANDPOINT: MORALITY, RESPECT, AND ACCOUNTABILITY (Cambridge: Harvard University Press 2006).

[395] *See, e.g.,* CHRISTOPHER WELLMAN & JOHN SIMMONS, IS THERE A DUTY TO OBEY THE LAW? (Cambridge: Cambridge University Press, 2005); THE DUTY TO OBEY THE LAW (William A. Edmundson ed., Rowman & Littlefield, 1999); WILLIAM A. EDMUNDSON, THREE ANARCHICAL FALLACIES: AN ESSAY ON POLITICAL AUTHORITY (Cambridge: Cambridge University Press, 1998).

the law: indeed, on this reason, there are no general obligations of any kind. Of course, this point about act utilitarianism could be advanced as a criticism rather than a consequence. One standard utilitarian line of reply appeals to a two-level view of morality. Utilitarianism operates at the level of ultimate evaluation: applying the utilitarian calculus is something we do after the fact with time for reflections. When individuals make actual decisions, they rely on rules of thumb because it would be impractical, costly, and likely harmful to engage in a utilitarian calculus. Thus, the obligation to obey the law could be seen as a rule of thumb—subject to override when the disadvantages of law compliance clearly outweigh the advantages.[396]

A different sort of consequentialist argument for fidelity to law might utilize the resources of rational choice theory to show that a system of law can provide a coordination mechanism that creates good consequences. This story would should that laws create a focal point for coordination, and that legal sanctions and rewards prevent free rider problems. One way of understanding this story is that it explains the rationality of complying with the law in a way that does not require the notion of fidelity to law, but another way to understand the story is that it offers an interpretation of what "fidelity to law" means that avoids reliance on what the consequentialist sees as obscure deontic intuitions. The rule-of-thumb story of the two level view, and the focal point for coordination story of the rational choice view, might be seen as complimentary, with the latter providing a theoretically robust foundation for the former.

(3) The Aretaic Argument: Virtue of Justice as Lawfulness

Deontological theories focus on right action. Consequentialist theories focus on good states of affairs. Aretaic theories focus on excellence of character. There are a variety of aretaic theories, but the most prominent of these is neoAristotelian virtue ethics. For virtue ethics, the question to ask is whether fidelity to law is a virtue or entailed by one of the virtues. There are two strategies that might be pursued here. One strategy, associated with William Edmundson, is to argue for a distinctive virtue of law abidance.[397] Edmundson's argument is elegant and persuasive, and shall not be repeated here. A second strategy, associated with virtue jurisprudence, focuses on the virtue of justice. Does the virtue of justice require fidelity to law? There are two different conceptions of the virtue of justice: *justice as lawfulness* and *justice as fairness*. The better understanding is that the virtue of justice requires lawfulness: justice as lawfulness supports the fidelity thesis.

One influential conception of the virtue of justice is based begins with the premise that the just and the lawful are separate and distinct. If this were so, then *the virtue of justice as fairness* might be articulated as a disposition to act in accord with the best conception of fairness. One might think that someone who possessed this virtue would act solely on the basis of fairness[398] with reference to the law, but this is not the case. If this were true, it would provide the basis for a devastating objection to the fairness conception—because it would require each individual to

[396] Rule-utilitarianism is the view that an action is right, if and only if, the action complies with a system of ideal (or actual) rules that would produce the best consequences. The rule-utilitarian case for fidelity to law would need to demonstrate that the ideal system of rules would include a rule requiring obedience to law. This seems unlikely, however, since one can easily imagine ideal (or actual) rules that would excuse compliance with the law in a variety of situations.

[397] William Edmundson, *The Virtue of Law-Abidance*, 6 PHILOSOPHERS' IMPRINT 1, 1-21 (December 2006).

[398] For our purposes, the content of fairness does not need to specified. The content of fairness could be provided by consequentialist, deontological, or aretaic theories.

substitute her private judgments about what fairness requires for the duly enacted constitutions, statutes, and rules. It seems plain that this would be a recipe for chaos. For that reason, persons with the virtue of justice as fairness would take the positive laws into account—complying with the law when doing so would be fair under the circumstances.

But even if individuals with the virtue of justice as fairness take law into account, they only do so for content-dependent and situation specific reasons. Their primary disposition is to exercise their own private judgment about first-order questions of fairness. The objection to the fairness conception of the virtue of justice is that disagreements in private judgments about fairness would undermine the very great values that we associate with the rule of law. How bad this would be is a matter of dispute. A Hobbesian answer to this question is *very bad indeed*—in the absence of coordinating authority, life would be "solitary, poore, nasty, brutish, and short."[399] A Lockean answer is that reliance on private judgment leads to "inconveniences,"[400] but even an optimist about the state of nature would surely concede that the inconvenience of a society that cannot secure the rule of law would be serious. Given the fact that individuals will disagree (sometimes radically) in their judgments about fairness, a society composed of individuals with this version of the virtue of justice would have great difficulty achieving the rule of law.

If the fairness conception of the virtue of justice is unsatisfactory, is there an alternative? In the *Nicomachean Ethics*, Aristotle suggests an alternative understanding of justice as lawfulness, but to understand Aristotle's view, we need to take a look at the Greek word *nomos* which is usually translated as "law." For the ancient Greeks, *nomos* had a broader meaning that does "law" in contemporary English. Richard Kraut, the distinguished Aristotle scholar, explained the difference as follows:

> [W]hen [Aristotle] says that a just person, speaking in the broadest sense is *nomimos*, he is attributing to such a person a certain relationship to the laws, norms, and customs generally accepted by some existing community. Justice has to do not merely with the written enactments of a community's lawmakers, but with the wider set of norms that govern the members of that community. Similarly, the unjust person's character is expressed not only in his violations of the written code of laws, but more broadly in his transgression of the rules accepted by the society in which he lives.
>
> There is another important way in which Aristotle's use of the term *nomos* differs from our word 'law': he makes a distinction between *nomoi* and what the Greeks of his time called *psēphismata*—conventionally translated as 'decrees'. A decree is a legal enactment addressed solely to present circumstances, and sets no precedent that applies to similar cases in the future. By contrast a *nomos* is meant to have general scope: it applies not only to cases at hand but to a general category of cases that can be expected to occur in the future.[401]

If officials and judges were to rely on their own private, first-order judgments of fairness as the basis for the resolution of disputes, then it follows inexorably that their judgments will be decrees (*psēphismata*) and not decisions on the basis of a second order, public judgment—in other words, not on the basis of a *nomos*. In other words, a judge who decides on the basis of her

[399] THOMAS HOBBES, LEVIATHAN 76 (Edwin Curley ed., Hackett Publ'g Co. 1994) (1668).

[400] JOHN LOCKE, TWO TREATISES OF GOVERNMENT 276 (Peter Laslett ed., Cambridge University Press 1988) (1694).

[401] RICHARD KRAUT, ARISTOTLE 105-06 (2002).

own private judgments about which outcome is fair—all things considered—is making decisions that are tyrannical in Aristotle's sense.

"How can this be?," you may ask. "Aren't decisions that are motivated by fairness the very opposite of tyranny?" But framing the question in this way obscures rather than illuminates the point. Of course, if there were universal agreement (or even a strong consensus) of first-order private judgments about fairness, then decision on the basis of such judgments would be *nomoi* and not *psēphismata*. But our private, first-order judgments about the all-things-considered requirements of fairness do not agree. So in any given case, a decision that the one person believes is required by fairness will be seen by others quite differently—as biased, mistaken, or arbitrary.

We are now in a better position to appreciate why rule by decree (*psēphismata*) is typical of tyranny. Decision on the basis of private, first-order judgments about fairness is the rule of individuals and not of law. From Aristotle's point of view, a regime that rules by decree does not provide the stability and certainty that is required for human communities to flourish.[402] Kraut continues:

> We can now see why Aristotle thinks that justice in its broadest sense can be defined as lawfulness, and why he has such high regard for a lawful person. His definition embodies the assumption that every community requires the high degree of order that that comes from having a stable body of customs and norms, and a coherent legal code that is not altered frivolously and unpredictably. Justice in its broadest sense is the intellectual and emotional skill one needs in order to do one's part in brining it about that one's community possesses this stable system of rules and laws.[403]

And with that point in place, we can now formulate the lawfulness conception of the virtue of justice: an individual possesses the *virtue of justice as lawfulness* if the individual is disposed to act in accord with the *nomoi* (positive laws and widely shared and deeply held social norms of the community).

The virtue of justice does not dispose its possessors to conformity with their private, first-order judgments of fairness. Someone with the virtue of justice is disposed to act on the basis of the *nomoi*—which are shared public norms. In other words, the lawfulness conception holds that someone who has the virtue of justice is a *nomimos*, someone who grasps the importance of lawfulness and is disposed to act on the basis of the laws and norms of her community. Someone who is *nomimos* is disposed to fidelity to law, because she respects and internalizes the positive laws of her community. Judges, officials, and citizens who are nomimos will internalize the rules and values of constitutional law: the contribution thesis establishes that those rules and values reflect the original public meaning of the Constitution.

In sum, fidelity to law finds support in aretaic moral and political theory. That support can be articulated in two ways, *via* Edmundson's idea of a virtue of law abidance or by interpreting the virtue of justice as a virtue of lawfulness. Both articulations show that a morality of virtue can support the fidelity thesis.

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[402] *Id*. at 106.
[403] *Id*.

c) The Relationship Between Public and Comprehensive Reasons: Overlapping Consensus on Fidelity for Law

Our brief survey of the reasons for fidelity to law that are grounded in comprehensive doctrines is intended to demonstrate the plausibility of an overlapping consensus on fidelity to law as a public reason. The brief survey is not a demonstration: I have not claimed to have demonstrated that there is an overlapping consensus because each of the comprehensive conceptions held by reasonable citizens does endorse fidelity to law. Rather, my much more modest aim was to argue that the public values of the rule of law and fidelity to law are not obviously inconsistent with a variety of comprehensive doctrines, and thus the notion of an overlapping consensus or incompletely theorized agreement on these values is not implausible.

Readers who reject the Rawlsian notions of public reason and overlapping consensus and Sunstein's idea of incompletely theorized agreement will believe this stage of the argument as unnecessary. For these readers, the only question will be, "Does the true or correct comprehensive doctrine support fidelity to law?" Obviously readers will differ in their beliefs about which comprehensive doctrine is true or correct, and I cannot hope to canvass all the doctrines or resolve the enduring questions of political and moral philosophy in a footnote or appendix. The strategy that is pursued here is the only possible strategy given the fact of pluralism.

3. Fidelity to Law, the Supreme Court, and Original Meaning

Assuming that fidelity to law is plausible, how does it apply to the claims made by Semantic Originalism? What is the significance of the fidelity thesis? We answer those questions in a concrete way by asking how fidelity to law would operate for the Justices of the Supreme Court when they consider constitutional questions.

a) The Justices and Fidelity

At this stage in the argument, we are assuming that the fixation thesis, the clause-meaning thesis, and the moderate version of the contribution thesis are correct. That is, we are assuming that the content of constitutional law includes the semantic content of the Constitution, which is its original public meaning (with four modifications). Legally correct interpretations of the Constitution track original meaning; constructions of the Constitution supplement that meaning by resolving vagueness.

Fidelity to law by Supreme Court Justices would require that their constitutional decisions both comply with and be grounded on the semantic content of the Constitution. Decisions that are inconsistent with the semantic content should be considered "out of bounds" and opinions that do not respect the legal force of the original meaning are illegitimate. These conclusions are qualified, however. One source of qualification is the doctrine of precedent or stare decisis. A second qualification is introduced by the possibility of constitutional evil: semantic content that would trigger the overriding reasons proviso that is a component of the ideal of fidelity to law.[404]

The overriding reasons proviso will be discussed below.[405] What about the first qualification? May Justices make decisions and write opinions that contravene or ignore the original meaning if

[404] *See supra* Part IV.D.1.b), "The Overriding Reasons Proviso," p. 153.
[405] *See infra* Part IV.D.3.c), "Justifications for Opaque Amending Constructions," p. 162.

the prior decisions of the Court are inconstant with that meaning? There is more than one plausible answer to these questions. One view is that concern for the rule of law (and especially for reasonable reliance) justifies the Court in relying on its own prior decisions, even when they are in error. Another view is that such reliance is never or almost never justified: both Randy Barnett[406] and Kurt Lash[407] have argued for variations of this view. My own view is that the Court can and should properly consider itself bound by the narrow holdings of its own prior decisions when such decisions represent good faith attempts to interpret the Constitution's original meaning. Such errors can be corrected over time as decisions based on the better understanding accumulate, and a pattern of such holdings could eventually lead the Court to properly overrule its prior decision—on the ground that the decision is inconsistent with the whole body of precedent.[408]

Whatever view one takes of the role of precedent, fidelity to law suggests that prior decisions that are inconsistent with the original meaning should not be given generative force, and used as the basis for extending the error outside the scope of the precedent.

b) Transparency and Sincerity

The claim that judicial reasoning should be transparent and sincere seems plausible.[409] Absent extraordinary circumstances, judges should state the reasons for their decisions, and these reasons should be the real reasons. Transparency and sincerity are limited to factors relied upon in conscious deliberation: the idea is not that judges should reveal all the causal influences (that would be impossible) or all the notions that they considered and then rejected as the basis for their decisions.

If transparency and sincerity are combined with fidelity to the original meaning, there are implications for constitutional opinion writing. Supreme Court Justices have a special obligation to identify the relevant provisions of the Constitution when they write their opinions. Their opinions should explain how the semantic content (the text) either requires or allows the result reached in the case. If the opinion departs from original meaning, it should explain why and offer a justification. These requirements may sound minimal and trivial, but any serious student of constitutional law knows that it is possible for the Justices to write opinions that decide a question of constitutional law that never even mentions the relevant provision of the Constitution, much less the implications of its original meaning for the case at hand.

This means that if the opinion calls for an *amending construction of the Constitution* (a construction that alters the original public meaning), the opinion should identify the amending construction, state the inconsistency, and then offer a justification for the departure from original

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[406] Barnett, Faint Hearted Originalism.

[407] Lash, Reverse Stare Decisis.

[408] *See* Lawrence B. Solum, *The Supreme Court In Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future Of Unenumerated Rights*, 9 UNIVERSITY OF PENNSYLVANIA JOURNAL OF CONSTITUTIONAL LAW 155 (2006).

[409] *See* David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731 (1987); Susan Estrich, *The Justice of Candor*, 74 TEX. L. REV. 1227 (1996); Micah Schwartzman, *The Principle of Judicial Sincerity*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=931435 (September 2006). *Cf.* Scott C. Idleman, *A Prudential Theory of Judicial Candor*, 73 TEX. L. REV. 1307, 1347 (1995) (arguing for a balancing approach to candor with uncertain implications for the issues discussed in text). *But see* Nicholas S. Zeppos, *Judicial Candor and Statutory Intepretation*, 78 Geo. L.J. 353, 406 (1989) (arguing that judicial candor may undermine legitimacy). I am grateful to Micah Schwartzman for comments on the role of candor and sincerity in the argument presented in texts.

meaning. Most judges were lawyers, and this frequently results in the writing of *persuasive judicial opinions* (opinions that present the most persuasive case for the result and therefore do not disclose the judge's actual beliefs or carefully distinguish between plausible arguments and reasons that are true). A persuasive opinion might conceal the inconsistency between the result and the original meaning, or dissimulate by making an insincere argument that an amendment construction is actually consistent with the original meaning. Persuasive opinions with this feature are inconsistent with transparency and sincerity, and should be eschewed without extraordinary justification. If the constitution is interpreted in a way that is inconsistent with the original meaning, the opinion should offer a *transparent amending construction* (a frank acknowledgement that the construction is inconsistent with the original meaning).

Of course, it is possible that transparent amending constructions will stretch the court's legitimacy, fail to gain votes from other justices, and result in normative criticism to which the court may be sensitive. For these reasons and others, justices who adhere to a norm that requires that amending constructions be transparent may be more reluctant reach results that require disclosure of departures from original meaning. That is, observation of norms of transparency and sincerity might actually affect the content of constitutional doctrine as it binds lower courts.

c) Justifications for Opaque Amending Constructions

Even if there is a general obligation to write transparent and sincere opinions, it is at least possible to imagine circumstances in which there would be moral justification for rendering an opaque amending construction (an amending construction that is opaque in the sense that it is not transparent or disclosed).[410] This could be done by avoiding the text entirely, or by dissimulating about the original meaning of the text. Vagueness can be exaggerated and ambiguity can be manufactures.

What circumstances could justify opaque amending constructions? The clearest cases involve wicked legal cultures, such as that of Nazi Germany. In a wicked legal system, there is not obligation of fidelity to law and judges are *free moral agents*, who ought to do the most good they can under very bad conditions. If a Nazi judge had to dissimulate to avoid the evil consequences of the racial laws, that (and obviously much more) would have been justified. Perhaps less clear is the case of a zone of substantially evil law in an otherwise reasonably just legal system: the evil laws that institutionalized segregation may be examples of this kind. In my opinion, the result in *Brown v. Board of Education* can be squared with the original meaning of the Privileges or Immunities Clause of the Fourteenth Amendment, but it may be that the Court itself believes that it could not have defended its decision on originalist grounds. If this was the case or if there were good reasons to believe that it was the case, then the Justices may have been justified in concealing this fact in order to provide their decision greater legitimacy. Suppose that this (possible) interpretation of *Brown v. Board of Education* is correct: from that supposition, it would not follow that the Court should adopt the method of dissimulation through opaque amendment constructions as its ordinary mode of doing business.

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[410] Paul Butler, *When Judges Lie (And When They Should)*, 91 Minn. L. Rev. 1785, 1827 (2007) (discussing justifications for judicial subversion of law, but stating "Ironically, subversion--an extreme tool--now is employed by many moderate judges. As an extreme tactic, it should be reserved for extreme cases of injustice.").

Opponents of Semantic Originalism may be tempted to fall back on the argument that there neither citizens nor officials owe fidelity to law, but if they do so, they need to be aware of the implications of their argument. Suppose that infidelity is morally permissible as a general matter. The implication is that neither the original meaning nor a living constitution generates obligations. Lower court judges are not obligated to respect the decisions of the Supreme Court. Officials are not obligated to respect judicial decisions. If the aim of a critique of originalism is to defend the moral authority of the living constitution, then embracing infidelity to law can hardly do the job.

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E. Triviality, Take Two: Normative Argument and Constitutional Practice

We now have the minimalist normative component of Semantic Originalism in view. Taken as a normative theory, are the commitments of Semantic Originalism so thin as to render it trivial? Recall that we have already seen one respect in which these minimal commitments are not trivial at all. They provide the normative warrant for adhering to the bright line rules that define the basic constitutional structure. That is not trivial. It is a normative implication of fundamental significance. It might be objected that this implication of Semantic Originalism doesn't result in change, but that is no objection at all. The triviality of normative arguments is entirely distinct from their vector. If change were required for normative arguments to be nontrivial, then Hobbes's argument for an absolute sovereign would have been trivial so long as the existing sovereign were close to absolute. There is no good reason to think that defense of the status quo is always trivial.

There is a second respect in which Semantic Originalism is nontrivial: it calls for substantial revision in interpretive methodology. When Semantic Originalism is combined with plausible views about transparency and sincerity, it suggests revision in the criteria by Supreme Court opinions should be judged. This is no small matter, given the important role of Supreme Court opinions in our constitutional system. They cast a long "shadow of the law" and if they refocus the attention of other constitutional actors on original meaning, the implications (although not subject to precise prediction) will surely be significant.

There may be a third respect in which Semantic Originalism will have nontrivial normative implications. The stance of this article is neutral towards constitutional substance. I take no committed position towards the actual substance of particular constitutional provisions, much less their application to concrete constitutional controversies. But consistent with that stance, we can at least speculate about some of the ways in which Semantic Originalism might put existing constitutional doctrine on new and more reliable foundations. One example may be a possible new role for the Privileges or Immunities Clause of the Fourteenth Amendment in fundamental rights jurisprudence. If the doctrine of substantive due process is inconsistent with the semantic content of the text of the Due Process Clauses, then the reasoning of the Court would shift as new fundamental rights were claimed and either recognized or rejected by the Court. Eventually this would result in a complete redescription of the rationales for implied fundamental, as old areas were revisited in light of the new doctrine.

The third respect in which Semantic Originalism may have nontrivial implications might lead to a fourth. Semantic Originalism might result in substantial revisions in the content of constitutional law over the long haul. Take the privileges or immunities clause again. It is

possible that "privileges or immunities" is such an abstract, general, and vague phrase, that almost all of the work that it does is produced by constitutional construction. If this were the case, then even the Supreme Court's decision in the *Slaughterhouse Cases* might be defended as a construction that gives the clause the narrowest construction that is consistent with its minimal semantic content. Or it is possible that "privileges or immunities" would have been understood as a term of art, referring the general public on to Justice Bushrod Washington's opinion *Corfield v. Coryell*[411] and to Blackstone's formulation in his *Commentaries on the Laws of England*.[412] In that case, Semantic Originalism, if actually put into practice, could result in substantial changes in constitutional doctrine.

For all these reasons, the charge of triviality, if levied against Semantic Originalism, would not be well founded. To put the point more bluntly, Semantic Originalism makes ambitious claims about how constitutional business should be done. For this reason, Christopher Eisgruber is simply wrong when he states, "Everyone agrees that interpreters must respect the framers' *linguistic* intentions."[413] (I think it is fair to substitute "linguistic meaning" for "framers' linguistic intentions.") Not everyone thinks that the original public meaning of the Constitution must be respected. In fact, it is not even clear that Eisgruber thinks that. What if it turned out that the original public meaning (or "framers' linguistic intentions") actually referred to a particular conception of some moral or political concept? The question whether this is so is a factual question—Eisgruber cannot rule this possibility out on conceptual or *a priori* grounds. Would Eisgruber agree that we are then bound by the original public meaning? If so, the Eisgruber is properly described as an originalist, and if he disagrees then he surely must admit that originalism is not trivial in its normative implications.

F. What's in a Name, Take Four: The Family of Normative Originalisms

Now that both the conventional justifications for originalism and the minimalist normative claims of Semantic Originalism are on the table, we can revisit the question whether Semantic Originalism is properly understood as a form of originalism. Up to this point the following four points have been establish:

- Semantic Originalism affirms the fixation thesis, which provides the core content around which all or almost all originalist theories are organized.[414]
- The clause-meaning thesis is a particular formulation of original public meaning originalism, a view that is clearly in the mainstream of originalist theory.[415]
- Semantic Originalism traces its intellectual history through the New Originalism which resulted from criticism and reform of the Old Originalism.[416]
- The claim that the term "originalism" should be reserved for what might be called "strong originalism" is based on an argument that is both invalid and based on false premises.[417]

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[411] 6 Fed. Cas. 546, no. 3230 (C.C.E.D.Pa. 1823).

[412] WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *125 (W.S. Hein & Co. reprint 1992) (1768).

[413] Eisgruber, *Constitutional Self-Government*, *supra* note 84, at 31.

[414] *See supra* Part I.B, "What's in a Name, Take One: Is it "Originalism"?", p. 12.

[415] *See id*.

[416] *See supra* Part II, "An Opinionated History of Constitutional Originalism," p. 14; *id*. Part III.D, "What's In a Name, Take Two: The Sense in Which Clause Meaning is Original Meaning," p. 60.

[417] *See supra* Part III.I, "What's in a Name, Take Three: Strong Originalism," p. 122.

We are now in a position to integrate our understanding of the normative implications of Semantic Originalism into our analysis of the terminological dispute. Critics of originalism themselves emphasize the idea that the normative case for originalism sometimes seem to rest on the claims that the meaning of the Constitution *just is* the original meaning and that *just is* the law: Semantic Originalism provides a full explication of these claims and explains their minimal normative significance via the fidelity thesis.

In addition, we can now see that Semantic Originalism allows for a reinterpretation and absorption of the other main normative arguments for originalism (popular sovereignty,[418] the rule of law,[419] and writtenness[420]). Each of these arguments depends for its validity on the fixation thesis and some version of the clause-meaning thesis (or an originalist substitute such as framers meaning), and the minimalist normative component of Semantic Originalism relates to those two theses in the same way. Each of the leading versions of normative originalism can be reinterpreted as a member of a well defined type of theory, which we can call the family of Semantic Originalisms. Putting it another way, there is a family of normative originalisms, and members of the family have more in common than mere resemblance.

G. Monsters and Apparitions, Take Two: The Constitutional Big Bang

Opponents of originalism might argue that its implications are too radical and therefore it is normatively unattractive. Sometimes this charge is made as the charge that originalists want to return to "the constitution in exile."[421] Cass Sunstein articulated a version of this charge in a different context[422] as follows

> There is a genuine Constitution in Exile movement, in the form of an effort to make radical revisions in constitutional understandings to recover some "lost" document. For two decades and more, a number of people, parsing text and mining history, have claimed that the Constitution requires a set of identifiable outcomes: It invalidates some or many affirmative action programs, campaign finance reforms, gun control laws, environmental laws, congressional grants of standing to ordinary citizens, and restrictions on commercial advertising. It contains no right of privacy. It invalidates independent agencies, forbids regulatory agencies from exercising broad discretionary power, and bans many post-New

[418] *See supra* Part IV.B.1, "Popular Sovereignty, p. 130.

[419] *See supra* Part IV.B.2, "The Rule of Law," p. 131.

[420] *See supra* Part IV.B.3, "Writtenness," p. 135.

[421] For an illuminating discussion, see Debate Club 5/2/05, Constitution in Exile, Cass Sunstein and Randy Barnett debate, Legal Affairs, http://legalaffairs.org/webexclusive/debateclub_cie0505.msp (visited April 13, 2008).

[422] Sunstein claim may not apply to original meaning originalism, as is evidence from the interchange with Barnett. *See id*. For this reason, it is important that I emphasize that I am not arguing that Sunstein would argue that Semantic Originalism would lead to reinstatement of the constitution-in-exile or that I am part of a constitution-in-exile movement. It would not and I am not. Sunstein has directly suggested that originalism leads to radical results. *See* Cass Sunstein, *Burkean Minimalism*, 105 Mich. L. Rev. 353, 358 (2006) ("For example, Burkean minimalists have little interest in originalism. From the Burkean perspective, originalism is far too radical, because it calls for dramatic movements in the law, and it is unacceptable for exactly that reason."). But this passage should be read cautiously, because it is not clear that Sunstein was considering the academic version of original public meaning originalism in its most recent formulations. Were Sunstein to address the full implications of Semantic Originalism, he might conceive of Burkean minimalism as usually serving to guide construction, but reserving the possibility of a Burkean override on semantic content if there is a deeply entrenched practice that would be disturbed a return to the original meaning. Of course, the override would only prevent disruptive change. Burkean minimalism could endorse a return to original meaning that proceeds one step at a time, looking both ways before crossing the street.

Deal exercises of congressional power. It might even throw civil rights laws into question.[423]

If originalism really had these implications and if the term "Originalism" only refers to what Berman calls "strong originalism," the result of an originalist constitutional practice might be a "constitutional big bang"[424] with radical changes in the constitutional order implemented in a single term of the Supreme Court. It as if Godzilla were to stride through Washington DC breathing originalist fire that incinerates the FCC, SEC, NLRB, CPSC, and the FTC and whole titles the United States Code. The entire contents of the Federal Register might be entirely consumed in the resulting inferno. Only the national archive would be unscathed!

Even the strongest version of the most doctrinaire originalism would not be committed to this, and Semantic Originalism has not been demonstrated to have these implications. First, even if originalism had these implications and even if "strong originalism" were the only steady state originalist theory, hard originalists could adopt transition rules for the gradual transition to originalism. During the transition, constitutional amendments and adaptive legislation would undoubtedly mitigate the transitional effects. Second, many originalists believe that originalism is consistent with a role for constitutional stare decisis and respect for historical practice.[425] Third, the premise of the argument assumes that the semantic meaning of the constitution requires these radical implications, but this cannot be assumed, it must be demonstrated: Semantic Originalism is a member of the originalist family, but it has its own identity. Many of the supposedly radical implications of originalism are premised on the idea that original expected applications fix constitutional meaning, but Semantic Originalism explicitly rejects this conclusion.

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Debates over originalism have taken a number of wrong turns, and on more than one occasion, originalists themselves have been behind the wheel. One of these wrong turns involves affirming originalism for the wrong reasons. Some originalists seem to support originalism because they believe it compels judges to reach results they find normatively attractive. Such originalists may be especially to the idea that "original expected applications" directly determine the meaning of the constitution. This involves a fundamental mistake. The real attraction of originalism is that it aims to get the meaning right, and not that it just so happens to get the right meaning. The normative foundation of originalism is fidelity to law, and not fidelity to particular outcomes.

Antioriginalists are the ones behind the wheel when a second wrong turn is taken. Here is how they get lost. An antioriginalist might reason as follows. The motivation for some

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[423] *Id.*

[424] *See* Lawrence B. Solum, *Getting to Originalism*, Legal Theory Blog, January 8, 2005, http://lsolum.blogspot.com/2004_01_01_lsolum_archive.html#107351756559826553 (also posted at http://lsolum.typepad.com/legaltheory/2004/01/getting_to_form.html).

[425] My own position is outlined in Lawrence B. Solum, *The Supreme Court in Bondage*, *supra* note 330. Richard Fallon observes, "nearly all originalists accept that at least some mistaken decisions must now be accepted on the basis of stare decisis." Richard H. Fallon, Jr., *Marbury and the Constitutional Mind: A Bicentennial Essay on the Wages of Doctrinal Tension*, 91 Calif. L. Rev. 1, 47 (2003).

originalists is find theoretical support for their constitutional agenda—for example, they may be in favor of overruling Roe v. Wade or against the expansion of Congress's Commerce Clause Power. Therefore, the essence of originalism, the theory, just is the constitutional agenda of these originalists. This wrong turn involves a simple fallacy—equating the psychology motivation for a theory with the content of the theory.

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V. Conclusion: Semantic Originalism and Living Constitutionalism

The semantic and normative case for Semantic Originalism has now been articulated and defended in depth. We can now step back and look at theory as a whole, the role it might play in the ongoing contest between originalism and living constitutionalism, and the criteria by which the Semantic Originalism might be evaluated.

A. Is Originalism Compatible with Living Constitutionalism?

What about the relationship between Semantic Originalism and the theory that is sometimes called "living constitutionalism"? There is a preliminary difficulty in answering this question. Just as "originalism" is a family of theories, there are disagreements among scholars about the meaning of "living constitutionalism." The roots of living constitutionalism might be found in Chief Justice Hughes's opinion in *Home Building & Loan Ass'n v. Blaisdell*:[426]

> It is no answer to say that this public need was not apprehended a century ago, or to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time. If by the statement that what the Constitution meant at the time of its adoption it means to-day, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation. It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning--"We must never forget that it is a constitution we are expounding"--"a constitution intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs."[427]

Hughes doesn't use the phrase "living constitution" and because of the ambiguities in the word "interpretation" it isn't clear whether he means to claim that the Court can change the semantic content or whether he is arguing for flexible constructions within meaning that is fixed.

Another important formulation was provided by Charles Reich in his 1963 article, *Mr. Justice Black and the Living Constitution*:[428]

> [I]n a dynamic society the Bill of Rights must keep changing in its application or lose even its original meaning. There is no such thing as a constitutional provision with a static meaning. If it stays the same while other provisions of the Constitution change and society itself changes, the provision will atrophy. That, indeed, is what has happened to

[426] 290 U.S. 398 (1934).

[427] 290 U.S. at 443 (emphasis added) (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407, 415 (1819)).

[428] Charles A. Reich, *Mr. Justice Black and the Living Constitution*, 76 Harv. L. Rev. 673 (1963).

> some of the safeguards of the Bill of Rights. A constitutional provision can maintain its integrity only by moving in the same direction and at the same rate as the rest of society. In constitutions, constancy requires change..[429]

It is apparent that the meaning of the word "meaning" in this definition of living constitutionalism is ambiguous. Recall that the word "meaning" has (1) a semantic sense, referring to semantic content, (2) an applicative sense, referring to applications, and (3) a teleological sense, referring to purposes or functions. Reich could be asserting: "The application meaning of the Constitution must change in order for the semantic content to remain the same." Or he might be asserting: "The semantic content of the Constitution must change in order for the teleological meaning to remain the same."

A third influential formulation of living constitutionalism was offered by Justice William Brennan:

> To remain faithful to the content of the Constitution, therefore, an approach to interpreting the text must account for the existence of the substantive value choices and must accept the ambiguity inherent in the effort to apply them to modern circumstances. The Framers discerned fundamental principles through struggles against particular malefactions of the Crown: the struggle shapes the particular contours of the articulated principles. But our acceptance of the fundamental principles has not and should not bind us to those precise, at times anachronistic, contours.[430]

Brennan's formulation could be glossed in a variety of ways. One natural reading is the following:

> In order to remain faithful to the semantic content of the constitution, principles (understood as animating purposes or values) must guide the application of vague constitutional provisions to contemporary circumstances. The precise formulations of constitutional purposes by the framers were made in the context of specific disputes. When we apply the purposes to contemporary circumstances we should not be bound by those precise formulations.

But this passage could be read differently, because "articulated principles" could refer to the constitutional text (the text could be the articulation of the principles). On that reading, Brennan is suggesting that the semantic content of the Constitution may need to be altered in order to be faithful to purposes for which that content was articulated.

Not only are Brennan and Reich's formulations ambiguous, there are other ways we could formulate the idea of living constitutionalism. Some of the possibilities include:

- Living constitutionalism is the view that constitutional law evolves to adapt to changing circumstances and values.
- Living constitutionalism is a political theory that aims to justify New Deal national bureaucratic welfare state.[431]
- Living constitutionalism is the view that the semantic content of the constitutional text changes to adapt to changing circumstances and values.

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[429] *Id*. at 735-36.

[430] William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 437 (1986).

[431] *See* Eric R. Claeys, *The Limits Of Empirical Political Science And The Possibilities Of Living-Constitution Theory For A Retrospective On The Rehnquist Court*, 47 ST. LOUIS U. L.J. 737, 745-46 (2003).

- Living constitutionalism is the view that constitutional constructions change to adapt to changing circumstances and values.
- Living constitutionalism is the view that functions or purposes attributed to constitutional provisions change to adapt to contemporary values, and these purposes should guide constitutional construction.

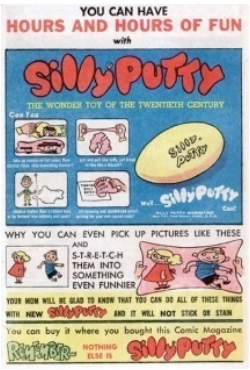
And so forth.

To get clear about living constitutionalism, we would need to undertake a project similar in scope to that which this article has undertaken for originalism. Rather than pursue that project on this occasion, I will articulate two different accounts of the possible relationships between living constitutionalism and originalism. Both accounts are heavily indebted to the work of Jack Balkin, who should be credited for seeing the possibility of a compatabilist account of the relationship.[432]

The compatabilist story about the relationship between living constitutionalism and originalism can be articulated via the distinction between constitutional interpretation and constitutional construction. Compatibilism could be the view that originalism and living constitutionalism have separate domains. Originalism has constitutional interpretation as its domain: the semantic content of the constitution is its original public meaning. Living constitutionalism has constitutional construction as its domain: the vague provisions of the constitution can be given constructions that change over time in order to adapt to changing values and circumstances. A fully specified living constitutionalism would have to provide a theory of constitutional construction that satisfies this description, and we can imagine that there could be a variety of such theories.

If living constitutionalism accepts the fixation thesis, some theory of semantic content, and some version of the contribution thesis, then living constitutionalism is committed to the idea that the Constitution provides constitutional law a *hard core*. Metaphorically, the idea of a hard core might be expressed in terms of materials. Living constitutionalists might see the hard core as made of wood, hard enough to constrain and bind but capable of change in response to the saws of amendment and the chisels of enduring constructions. Let us call this kind of living constitutionalism *hard core living constitutionalism*.

Jack Balkin has demonstrated that hard core living constitutionalism is compatible with originalism. But some living constitutionalist may deny that there is a hard core. They might believe that even the core of constitutional law is malleable and subject to manipulation. That is, they might assert that the living constitution has a *soft core*. Once again, we might express this idea through a metaphor. We can think of a soft core in terms of silly putty[433] and not wood: silly putty can take on a shape in response to manipulation, but it offers only slight resistance, easily giving way to the warm hands of the Justices. We can call this version of living constitutionalism *soft core living constitutionalism*.



[432] I believe that Jack Balkin first made this claim in 2006. *See* Lawrence B. Solum, Blogging from APSA: The New Originalism, September 3, 2007, *supra* note 13.

[433] Thomas Jefferson used a similar metaphor: "The constitution, on this hypothesis, is a mere thing of wax in the hands of the judiciary, which they may twist, and shape into any form they please." Thomas Jefferson to Spencer Roane, 6 Sept. 1819, Works 12:135—38, The Founders' Constitution, http://press-pubs.uchicago.edu/founders/documents/a1_8_18s16.html.

What then about incompatibilism? The incompatibilist story assumes that originalism and living constitutionalism compete for the same domain. In the case of Semantic Originalism, that domain must be limited to constitutional interpretation. Hence, the incompatibilist story must interpret living constitutionalism as a theory of content. There are, however, at least two different ways in which living constitutionalism could be viewed as a theory of content.

One possibility is that living constitutionalism is a theory of semantic content. That is, living constitutionalists could be understood as denying the fixation thesis and asserting that the semantic meaning of a given constitutional provisions changes in response to changing circumstances. If the argument made in this Article is correct, then *semantic-content soft core living constitutionalism* is simply false as a matter of fact.[434]

But there is a more charitable interpretation of living constitutionalism that would result in incompatibilism. The more charitable interpretation would view living constitutionalism as a theory of legal content. Articulation of a full version of what we can awkwardly label *legal-content soft core living constitutionalism* would require the articulation of a theory of the relationship between semantic content and legal content. That account might deny the contribution thesis, or more plausibly it might be based on some version of the weak contribution thesis. We have already rehearsed many of the arguments for modest, and against weak, compatibilism.[435] If living constitutionalists want to affirm soft core living constitutionalism, they have a good deal of work to do.

Jack Balkin argues persuasively that living constitutionalists should opt for compatabilism. Semantic Originalism supports that argument and provides foundations for its semantic component by providing a theory of constitutional meaning. But the relationship between living constitutionalism and originalism is a two-way street. Originalists can embrace *hard core living constitutionalism* without abandoning originalism. Whether they should do so depends on the best theory of constitutional construction, and on that subject "Semantic Originalism" is silent.

B. What's in a Name, Take Five: The Topography of Constitutional Theory

One last time. Does it matter what theories are attached to the labels "originalism" and "living constitutionalism"? So long as we are clear, it should not matter to the substance of the arguments. One of the main purposes of the title to this article is mark off a distinctive position and to give that position a name, "Semantic Originalism," that will avoid the confusion that might be generated by the assertion this position is simply "true originalism" or "real originalism" or "the New Originalism" or "Originalism with a capital O."

Nonetheless names matter, because the names for theoretical positions resonate and ramify throughout the space of theoretical discourse. This creates a temptation that should be avoided. Scholars should not attempt to manipulate terminology with the undisclosed purpose of recasting the topography of theoretical space to gain the high ground and force their opponents into an indefensible position. For example, an opponent of originalism might attempt to define originalism as the theory that the original intentions of the framers fully determine the content of constitutional doctrine and its applications and that original intentions should trump all other considerations in all imaginable circumstances. This move simply stipulates that originalism is an indefensible position. If the party that makes this move then attempted to declare victory, that

[434] *See supra* Part III.E, "The Case for the Fixation Thesis Revisited," p. 61.
[435] *See supra* Part IV.C, "The Contribution Thesis Revisited," p. 137.

declaration would be hollow at best and disingenuous at worst. What is good for the goose is good for the gander. If proponents of originalism were to attempt to define originalism as the view that original public meaning sometimes makes some contribution to legal content and that it should on some occasions be given some normative force, then originalism would almost surely be true.

Semantic Originalism is a robust theory that makes strong claims. The fixation thesis claims that semantic content is fixed at the time of constitutional utterance. The clause-meaning thesis fully specifies the determinants of this content with original public meaning doing the work. The moderate version of the contribution thesis claims that the constitutional law always or almost always includes this content. The fidelity thesis claims that we owe fidelity to this content. The relationship of these claims to other versions of originalism and to the historical development of originalism has been fully specified, and good and sufficient reasons have been advanced for the fixation thesis as the focal point for the family of originalist theories. Given the work that has been done, a great deal would have to be said to justify the claim that Semantic Originalism doesn't lie near core of originalist theory. If the arguments offered here are not refuted, then Semantic Originalism is the unifying focal point around which originalist theories cluster.

C. Triviality Take Three, Truth as the Telos of Legal Scholarship

Again, one last time. Semantic Originalism is not trivial in the claims it makes or in its normative implications, but there is one more sense in which it would not be trivial even if it did not have significant normative implications. The significance or triviality of legal theories should not be judged solely or even primarily by the scope of their normative implications. Legal theories should be judged by the contribution they make to truth—to the fund of theoretical knowledge about the law. Legal theories answer to the virtue of *sophia*—theoretical wisdom. Legal practice answers to the virtue of *phronesis*—practical wisdom.

The claim that legal theories should be judged by their contribution to truth may be controversial. Some legal scholars may believe that legal scholarship is primarily a practical activity with the aim of *telos* of making the world a better place. There may be room for this kind of "advocacy scholarship," but I am doubtful. The primary goal of legal scholars is not to persuade, it is to enlighten. Advocacy scholarship must, by definition, be on a political, ideological, or legal side. Advocates must make arguments on the basis of their ability to persuade the reader that their side should win.

Let me be clear, I am not claiming that advocacy scholars are insincere, that they distort evidence, or that they dissimulate. But for effective advocacy, weaknesses cannot be brought to the fore, counter arguments cannot be cast in their strongest and most defensible forms, and gaps in the argument cannot be highlighted. Again let me be clear: I am not claiming that any group of scholars is immune from the temptation to persuade rather than enlighten. Nor am I claiming that persuasive prose is inimical to the conception of legal scholarship as aiming at truth. Persuasion that is oriented toward truth can be the engine of enlightenment. One last time, let me be clear: I am certainly not claiming that advocacy scholarship is limited to one side of the debate over originalism.

What I am claiming is that the significance of theoretical legal scholarship should be judged by the contribution it makes to truth. If the fixation thesis, the clause-meaning thesis, and the contribution thesis contribute to our understanding of constitutional theory, then Semantic Originalism is nontrivial as judged by the criterion that is appropriate to judging the significance

of theorizing about law. This would be true even if Semantic Originalism left constitutional practice entirely unchanged. Legal theories do not become significant because of the contribution they make to one side of a political, ideological, or legal struggle.

D. Monsters and Apparitions, Take Three: The Colonization of Law by Philosophy

One more time, one last time. Semantic Originalism redescribes disputes in constitutional theory using vocabulary, concepts, and tools borrowed from the philosophy of language. Some readers may resist this redescription on the ground that a line should be drawn between the disciplines. I imagine that the worry might be expressed colloquially as follows:

> Our colleagues in torts and contracts have to deal with the Coase theorem, transaction costs, property rules and liability rules, not to mention distributive justice, option luck, corrective justice, moral realism, and all the rest. If we accept the claims of "Semantic Originalism" (the article), then constitutional theory will be colonized by the philosophy of language. We already have to know Thayer, Bickel, and Ely, and have a passing acquaintance with Rawls and Dahl. Surely it cannot be the case that we also need to know Austin, Grice, Quine, Davidson, and Wittgenstein. Redescribing the problems of constitutional theory in terms of "semantic content," "implicature," and "illocutionary force" just makes things more confusing.

In this regard, I believe the situation of constitutional theory is no better or worse than tort theory, contract theory, or any other lively domain of legal scholarship. Legal theorists must avail themselves of the tools that give them the best purchase on the problems at hand. In this day and age, I venture to guess that no one would attempt to do serious torts scholarship without mastery of the Coase Theorem or the notion of a transaction cost. Even those who reject the economic approach need to be able to discuss the issues that it raises intelligently.

Whether a particular set of theoretical tools illuminates rather than obfuscates is not a question that can be settled a priori. The proof of the pudding is in the eating. If philosophical tools make significant contributions to fundamental issues of constitutional theory, then constitutional theorists must master them.

But constitutional theory and constitutional practice are two different activities: officials (including judges) and citizens need an intuitive understanding of the basic principles of constitutional theory, but there understanding can be shallow and not deep. For example, the ideas contained in the fixation thesis and the clause-meaning thesis can be expressed in language that is easily accessible to both judges and ordinary citizens: look to the meaning of the text for ordinary people at the time it was written. The theoretical apparatus of the philosophy of language provides foundations for a practical imperative accessible to common sense. In this regard, *Semantic Originalism* surely fares no worse (and likely does better) than its rivals. Pluralism, with its emphasis on multiple modalities, whatever its merits, is hardly a simpler view.[436]

[436] *See* [Add citation to Steven D. Smith, *That Old Time Originalism*, pp. 16-18 (2008) (draft on file with author).

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In the culture of the legal academy, one of the most frequent reactions to theoretical claims and arguments is "I don't buy it." This comment may, on the surface, seem innocuous, but it is, in fact, a symptom of deep dysfunctionality among academic lawyers. "I don't buy it," assumes that theoretical claims are accepted or reject on the basis of evaluative attitudes. "I buy it" equals "I like this idea and its normative implications and therefore I am willing to be persuaded." "I don't buy it" equals "I don't like this idea or its normative implications and therefore I refuse to be persuaded." Taking up this stance towards theoretical discourse is to abandon the search for truth. To paraphrase, Clausewitz, "Scholarship becomes the continuation of politics by other means."

A reorientation towards truth would involve a different attitude towards theoretical claims and arguments. One can say, "That argument is invalid—the conclusions do not follow from the premises, and here's why." Or, "The premises of the argument are false, and here's why." Moreover, reorientation towards truth allows for suspension of judgment. Arguments that appear on their surface to be sound may after reflection and investigation be invalid or rest on false premises. But suspension of judgment is not refutation.

"I don't buy it" will not do.

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E. Overcoming the Hermeneutics of Suspicion

Can we make progress in constitutional theory? It may be that the lay of land is such that an affirmative answer to this question will require a change in attitude on the part of constitutional scholars. It is possible that constitutional theory is pervasively characterized by what might be called "the hermeneutics of suspicion" following Ricouer.[437] Theoretical arguments are construed as disguised politics. Consider the following imaginary internal dialog of a constitutional theorist:

> When my ideological enemy makes a theoretical move, I should resist, because it is likely to be the thin end of the wedge and the thick end will surely be something that is normatively unattractive. If my ideological friend embraces a position shared by my enemies, then one of two possibilities obtain. Either my friend has gone over to the dark side and is my friend no longer. Or my friend has seen a strategic opportunity to turn my enemies' arguments against them. My attitude should be "wait and see." If it turns out that the former possibility obtains, then I will have avoided embarrassment. If the latter turns out to be the case, and if my friend is right, I can jump on the bandwagon once the political consequences are clear. In no event should my attitude towards theoretical moves be detached. I must always be on my guard.

If the hermeneutics of suspicion becomes the operating principle for discourse in constitutional theory, then progress seems unlikely.

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[437] *See* PAUL RICOUER, FREUD AND PHILOSOPHY: AN ESSAY ON INTERPRETATION 33 (New Haven: Yale University Press, 1970).

The alternative to the hermeneutics of suspicion involves a shift in attitude, from advocacy scholarship to an orientation towards truth; from a presumption of distrust to an attitude of constructive engagement.

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I have been thinking about originalism for more than thirty years. When I first wrote about originalism more than twenty years ago, I had an imperfect grasp of the philosophical issues, and reached conclusion that I now see were incorrect. But I had the intuition that the core of originalism expressed a fundamental truth about the meaning of the constitutional text and its relationship to constitutional law. I remember in the summer of 1986 that I started to opine, "Everyone will be an originalist," and I thought that originalism would lose much of its political valence as a consequence of its reformulation in response to criticism. I believe that after many years of work, I have a much firmer grasp on the grounds for my intuition, and I am now confident that the most important claims made by Semantic Originalism are supported by good and sufficient reasons. But I am no longer saying, "Everyone will be an originalist."

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F. Evaluating the Argument: Demonstration or Reflective Equilibrium?

The argument for Semantic Originalism is now complete. Before concluding, one last topic needs to be put on the table. What are the appropriate standards of evaluation? How should constitutional theorists decide whether to reject or accept the four claims made by the fixation thesis, the clause-meaning thesis, the contribution thesis, and the fidelity thesis? At a very high level of abstraction, the answer to this question is: these claims should be accepted by a constitutional theorist if they are true or perhaps "correct".[438] But this simply begs the question: under what circumstances should we accept these claims as true?

One approach to this question might borrow the idea of reflective equilibrium from the work of John Rawls.[439] Given the nature of the problems of constitutional theory, we should not expect that the claims made about constitutional meaning will usually be justified by deductive proof. Of course, deductive proof is likely to play a role at the level of supporting detail. Some positions in constitutional theory may involve contradictions, and these positions are demonstrably false. But in other cases, our starting points will be our prereflective beliefs about various matters, ranging from the particular to the general. Such starting points will include relatively particular beliefs like "*Brown v. Board* was rightly decided" and relatively abstract beliefs like "The Constitution of the United States serves democratic values." On this picture, the method of constitutional theory starts with an examination our prereflective beliefs and their relationships. Some beliefs may be inconsistent. In that case, one or more of the beliefs may need to be reexamined and revised. Gradually, our prereflective beliefs will become more refined and coherent. At some stage, the theorist will begin to regard some of these beliefs as considered judgments. A successful constitutional theory will bring all of our considered judgments into reflective equilibrium, a relationship of consistency and mutual support.

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[438] I assume that the claims of normative legal theory can be correct, but on some views in metaethics this might not be the case. "Correct" is suggested as an alternative to "true" in order to meet this possible objection.

[439] JOHN RAWLS, A THEORY OF JUSTICE (1971).

So far, the description of the method of reflective equilibrium has treated constitutional theory as a operating within the discourse of constitutional practice. But it is not the case that our beliefs about constitutional theory fall or stand independently of our beliefs about other matters. Consider once again the analogy to tort law. Normative tort theory may require recourse to general normative legal theory which in turn must be reconciled with moral philosophy and political theory. Given a consequentialist approach to tort theory, the normative evaluation of particular tort rules may best be accomplished by utilization of the tools of economics, which themselves may involve formal techniques. Semantic Originalism makes claims about meaning (the fixation thesis and the clause-meaning thesis) and these claims involve issues from the philosophy of language and linguistics. Likewise, the contribution thesis makes a claim about the relationship of the semantic content of legal texts to the content of legal rules: this claim involves issues of the philosophy of law as well as claims that are internal to the conventions of legal practice as those conventions are understood by lawyers and judges.

Because constitutional theory is not an island unto itself, the standards for the evaluation of constitutional theories may incorporate the standards of other disciplines and practices. This is hardly remarkable in the era of interdisciplinary and multidisciplinary legal scholarship: no one thinks that the methodological soundness of empirical studies should be evaluated by the recourse to the Federal Rules of Evidence. Legal arguments about cognitive processes must answer to the standards of psychology. In other word, the claims made by legal theorists should be evaluated by the standards that are appropriate to the nature of the claim.

G. The Second Restatement of Semantic Originalism

The arguments made on behalf of Semantic Originalism have established four theses: fixation, clause meaning, contribution, and fidelity.

The warrants for the fixation thesis established the claim that the semantic content of each constitutional provision is fixed at the time the provision is framed and ratified: subsequent changes in linguistic practice cannot change the semantic content of an utterance. "Domestic violence" cannot become "spouse abuse" because of a change in linguistic practice.

The reasons adduced on behalf of the clause-meaning thesis established the claim that the semantic content is given by the conventional semantic meaning (or original public meaning) of the text with four qualifications. The first modification is provided by the publicly available context of constitutional utterance: words and phrases that might be ambiguous in isolation can become clear in light of those circumstances of framing and ratification that could be expected to be known to interpreters of the Constitution across time. The second modification is provided by the idea of the division of linguistic labor: some constitutional provisions, such as the "natural born citizen" clause may be terms of art, the meaning of which are fixed by the usages of experts. The third modification is provided by the idea of constitutional implicature: the constitution may mean things it does not explicitly say. The fourth modification is provided by the idea of constitutional stipulations: the constitution brings into being new terms such as "House of Representatives" and the meaning of these terms is stipulated by the Constitution itself.

The conjunction of the fixation thesis and the clause-meaning thesis recovers "common sense" about constitutional meaning. The terminology may be fancy but the aim is simple. The text of the constitution should be read sensibly given the context, the ordinary meanings of the words and phrases at the time, and the fact that some of its clauses use terms of art. All the talk

of "sentence meaning," "illocutionary force," and "semantics" provides a philosophical grounding for these simple ideas.

The justifications offered for the contribution thesis established the claim that the semantic content of the Constitution contributes to the law: the most plausible version of the contribution thesis is modest, claiming that the semantic content of the Constitution provides rules of constitutional law, subject to various qualifications. Our constitutional practice provides strong evidence for the moderate version of the contribution thesis. It takes a pretty fancy argument to resist the idea that constitutional law should accord with the meaning of the Constitution. In this regard, the Eleventh Amendment has exemplary significance: it is indisputable that the semantic content of the Constitution can trump constitutional doctrine as articulated by the Supreme Court.

The reasons surveyed in connection with the fidelity thesis established the plausibility of the claim that we have good reasons to affirm fidelity to constitutional law: virtuous citizens and officials are disposed to act in accord with the Constitution; right acting citizens and officials obey the constitution in normal circumstances; constitutional conformity produces good consequences. Our public political culture affirms the great value of the rule of law. Once again, the idea is simple and intuitive. Without really good reasons for doing otherwise, judges should follow the law, and so should other officials and citizens.

We can summarize Semantic Originalism as a slogan. The slogan recapitulates each of the claims made by Semantic Originalism, but it is potentially misleading because it does not clearly distinguish between the semantic claims made by the fixation and clause meaning theses, the legal claim made by the contribution thesis, and the normative claim made by the fidelity thesis. Those distinctions are important, and the slogan should not be quoted out of context. Here is the slogan in the vernacular:

> *The original public meaning of the constitution is the law and for that reason it should be respected and obeyed.*

There is nothing surprising or remarkable about this idea. Some who resist do so because they misinterpret its meaning and misconstrue its implications. Some who resist do so because they believe (rightly or wrongly) that it will stand in the way of their constitutional agenda. Some who endorse originalism do so for the wrong reasons. *Semantic Originalism* provides the correct interpretation, the most reasonable construal, and the right reasons. Here is the slogan again, this time translated from the vernacular into the language of high constitutional theory:

> *The semantic content of Constitution was fixed at the time of utterance by conventional semantic meaning, and the conventions of legal practice make that content the supreme law of the land to which officials and citizens owe fidelity as a matter of political morality.*