The Normativity of Linguistic Originalism

A Speech Act Analysis

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Abstract

The debate over the merits of originalism has advanced considerably in recent years, both in terms of its intellectual sophistication and its practical significance. In the process, some prominent originalists — Lawrence Solum and Jeffrey Goldsworthy being the two discussed here — have been at pains to separate out the linguistic and normative components of the theory. For these authors, while it is true that judges and other legal decision-makers ought to be originalists, it is also true that the communicated content of the constitution *is* its original meaning. That is to say: the meaning is what it is, not what it *should* be. Accordingly, there is no sense in which the communicated content of the constitution is determined by reference to moral desiderata; linguistic desiderata do all the work. In this article I beg to differ. In advancing their arguments for linguistic originalism, both authors rely upon the notion of successful communications conditions. In doing so they implicitly open up the door for moral desiderata to play a role in determining the original communicated content. This undercuts their claim and changes considerably the dialectical role of linguistic originalism in the debate over constitutional interpretation.

Keywords: Originalism; Linguistic Philosophy; Communicated Content; Lawrence Solum; Jeffrey Goldsworthy; Speech Acts; Interpretation; Constitutional Law

1. Introduction

For proponents of an originalist theory of constitutional interpretation, the clauses and articles within a written constitution ought to be interpreted in accordance with their original meaning. Quite what that meaning consists in is a matter of some debate, with some theorists focusing on the *intended meaning* of the framers and drafters, and some focusing on the *public meaning* of the clauses at the time of ratification. Further divisions are sometimes made between the *linguistic intentions* (what they meant to say) of the constitutional framers and their *applicative intentions* (how they intended the law to be applied). And, to somewhat similar effect, conceptual distinctions are sometimes drawn between the judicial tasks of *interpretation* and *construction*. The proliferation of these kinds of conceptual distinctions and clarifications makes originalism an increasingly complex doctrine.

But for all that it is also an increasingly significant one. Although fidelity to text and intentions has always been popular among legal theorists, originalism itself has undergone somewhat of intellectual and cultural sea change in the past three decades. This is most evident in its spiritual home — the United States — where it has been prominently used by the Supreme Court in the *Heller*[1] case, and where liberals have now sought to embrace the doctrine that was once thought to be the hallmark of the conservative legal theory.[2] Academic commentary also abounds with high profile academic presses lending their imprimatur to works on the topic.[3]

One of the more important conceptual developments in originalist theory has been the attempt by some theorists to draw a line between the linguistic and normative (moral/political) aspects of originalism. The work of two such theorists — Lawrence Solum and Jeffrey Goldsworthy — will be the focus of this article. According to both, while it is true that judges and other legal decision-makers *ought* to adopt an originalist approach to constitutional interpretation, it is also true that they really have no other choice. Interpretation is the act of uncovering the communicated content of a text, and the communicated content of a written constitution simply *is* its original meaning. There is no sense in which the communicated content of a constitution is determined by reference to moral desiderata. Linguistic desiderata do all the work.

In this article, I present a challenge to both Solum and Goldsworthy. I highlight how, in defending their own particular views on originalism, both authors rely on the notion of *successful communication conditions*. That is to say, they both argue that the correspondence of communicated content with original meaning arises because of certain assumptions we need to make about what it would take for a constitution to be a *successful legal communication*. But these are dangerous assumptions. Success conditions for communication have been exhaustively studied in speech act theory and several of them — particularly those that apply to the kinds of speech acts that are

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[1] *District of Columbia vs. Heller* (2008) 554 U.S. 570; and also Solum, L. "*District of Columbia v. Heller* and Originalism" (2009) 103 *Northwestern University Law Review* 923.

[2] Balkin, J.M. *Living Constitutionalism* (Harvard: Harvard University Press, 2011)

[3] Solum and Bennett *Constitutional Originalism: a Debate* (New York: Cornell University Press, 2011), and Huscroft and Miller (eds) *The Challenge of Originalism* (Cambridge: Cambridge University Press, 2011)

found within a constitutional text — open up the door for moral desiderata to determine communicated content.

The article develops this argument in three distinct phases. The first phase is *contextual*, illustrating the current role of linguistic arguments in the originalist debate. The second phase is *clarificatory*, attempting to clarify the arguments proffered by Solum and Goldsworthy. And the third phase is *critical*, presenting my objection to both authors, defending it from potential rebuttals, and assessing its broader impact on the originalist debate.

2. The Contextual Significance of Linguistic Originalism

To get a better sense of the contextual role of linguistic originalism, we first need to get a better sense of the conceptual terrain over which the interpretive debate roams. Nothing too elaborate is needed here, just a brief tour of three major landmarks.

The first landmark concerns the competing views about the communicated content of a particular text or speech act. In the originalist debate there are two main views with which to contend. The first is *intentionalism*, according to which the communicated content of the constitutional text is to be determined by reference to the intentions of the drafters/framers. The second is *conventionalism*, according to which the communicated content of the constitutional text is to be determined by reference to the public meaning of the relevant clauses at the time of ratification. Conventionalism is now the dominant view,[4] and the reasons for preferring it over intentionalism feature heavily in both Solum and Goldsworthy's arguments in favour of linguistic originalism.

The next major landmark consists in the central tenets of originalism, *i.e.* commitments that originalists share irrespective of their particular stripe. Solum, in his elaboration of originalism, identifies several such central tenets.[5] Two of them are general and are shared by all originalists. The first is the *fixation thesis*, which claims that the communicated content of the constitution is fixed at particular historical moment. The second is the *constraint principle*, which claims that constitutional practice should (all else being equal) be constrained by the original meaning of the constitution. These two tenets capture the division of labour between the linguistic and normative aspects of originalism.

Finally, the third major landmark is the interpretation/construction divide.[6] This divide separates the two distinctive tasks that the legal decision-maker must perform

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4 See Solum, "What is Originalism? The Evolution of Contemporary Originalist Theory" in *The Challenge of Originalism* (fn 3).

5 In Solum, L "Semantic Originalism" (2008) *Illinois Public Law Research Paper No. 07-24*, introduction, he identified four separate theses. More recently, Solum has focused on the two mentioned in the text: Solum, L "Construction and Constraint: A Discussion of *Living Originalism*" (2013) 7(1) *Jerusalem Review of Legal Studies* 17-34; and Solum, L. "Originalism and Constitutional Construction" (2013) 82(2) *Fordham Law Review* 453-537

6 Barnett, R. "Interpretation and Construction" (2011) 34 *Harvard Journal of Law and Public Policy* 65; Solum, L "The Interpretation-Construction Distinction" (2010) 27 *Constitutional Commentary* 95-118; Solum,L. "Originalism and Constitutional Construction" (previous note). Goldsworthy is slightly more skeptical about the distinction. In his paper "Raz on Constitutional Interpretation" (2003) 22 *Law and Philosophy* 167-193, he accepts a distinction

when confronted with a constitutional text. The *interpretive* task is that of discovering the meaning of the text. Assuming originalism to be correct, this is to be carried out on originalist lines. The *constructive* task is that of applying the meaning of the text to a particular case or controversy. In some cases, this can be done quite straightforwardly, without straying too far from the original meaning. But in cases in which the original meaning is vague or necessarily abstract, it is more difficult: judges may, for instance, have to develop elaborate rules, not found in the constitutional text, for determining whether a punishment counts as "cruel and unusual" or whether a practice amounts to "unequal treatment". Although there is some dispute about this,[7] many originalists concede that the constraints we place on interpretation do not necessarily apply to construction.[8] The interpretation-construction distinction is thus significant in that it opens a new dialectical space, relating to construction, which is adjacent to that occupied by the interpretive debate. The boundaries between these spaces are somewhat fuzzy but an originalist can claim that only linguistic desiderata are relevant to the interpretive act, but that additional desiderata, including moral ones, are relevant to the constructive act. That is a distinction I shall challenge.

So much for the landmarks, what about the role of linguistic arguments within this space? To understand that role we must return to the division of labour between the linguistic and normative aspects of originalism. The easiest way to do this is to consider the following argument for (conventionalist) originalism:

> (1) We ought to interpret the constitution in accordance with its communicated content.
>
> (2) The communicated content of the constitution is fixed by the original public meaning of its clauses.
>
> (3) Therefore, we ought to interpret the constitution in accordance with the original public meaning of its clauses.

The first premise of this argument contains a simple claim about the interpretive task. It is motivated by what originalists deem to be a conceptual truth about interpretation: what can interpretation be if it is not the act of uncovering communicated content?[9] It also states something akin to the constraint principle in that it claims we "ought" to

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between meaning and application as being useful (p178). In his 2011 paper "The Case for Originalism" (in Huscroft and Miller (eds), n 3), he worries that the colloquial understanding of the term "interpretation" covers both tasks and suggests instead that we distinguish between "clarifying" interpretation and "creative" interpretation. Finally, in his 2012 article "Constitutional Cultures, Democracy and Unwritten Legal Principles" [2012] *University of Illinois Law Review* 683-710, he critiques Balkin's use of the distinction, but doesn't seem to reject the distinction at a fundamental level.

[7] See McGinnis and Rappaport "The Abstract Meaning Fallacy" [2012] *University of Illinois Law Review* 737

[8] See Barnett (n 6) on this point. It is also worth noting that the presence of the interpretation-construction distinction is something that (as I read it) has encouraged liberal legal theorists like Balkin to endorse the doctrine.

[9] There are those who dispute this conceptual claim, arguing that there is a distinction between communicated content and legal content, and that it is uncovering and applying the latter that matters in the case of judicial decision-making. Greenberg, M. "Legislation as Communication? Legal Interpretation and the Study of Linguistic Communication**"** in Marmor, A. and Soames, S. (eds) *Philosophical Foundations of Language in Law* (Oxford: OUP, 2011) pushes the view that legal communication is so divorced from other, everyday, forms of communication, that the focus on purely linguistic considerations and communicated content may be misguided in the legal context. My argument ends up agreeing with this view, but for reasons that I hold are internal to linguistic originalism.

follow the communicated content. The second premise sums up the essence of conventionalist forms of originalism. The conclusion follows. Whether the argument is persuasive is irrelevant here. What matters is its normative power. I want to suggest that the argument has a great deal of normative power from an internalist perspective. That is, from the perspective of one who is already an engaged and committed participant in a legal system with a written constitution.

The notion of internal and external perspectives on the law is common,[10] but I want to spend a little time elaborating it nonetheless. Doing so will pay dividends later on. To this end, I call upon some work done on the normative power of rules.[11] Classically, rules are divided into two classes: constitutive, and regulative. A regulative rule is one that takes a previously intelligible activity (*e.g.* driving) and tells us how it ought to be performed; a constitutive rule is one that creates a new type of activity (*e.g.* playing chess instead of just moving carved wooden piece around a board). In their canonical abstract form, constitutive rules are said to look like this:[12]

Constitutive Rule: In context C, (doing) X counts as (doing) Y.

Thus, in a certain context moving a carved wooden pieces across a checkered board counts as playing chess. That's what the rules of chess tell us. They don't regulate; they create.

There are some obvious affinities between the constitutive rule concept and a constitutional legal order. The similarity in the names is no accident. Constitutions, be they written or unwritten, consist to a large degree of constitutive rules. For instance, constitutions often contain rules stipulating that certain kinds of activities will count as "enacting an authoritative piece of legislation", "electing a president with a set of authoritative powers" and so on. Constitutions can also contain other kinds of rules but constitutive rules would seem to be the most obvious and basic type that they contain.

The problem with constitutive rules is that, at least as they are classically conceived,[13] they are normatively inert. Constitutive rules simply tell us what certain activities *are*, not that they ought to be *performed*. Thus, while it is true that moving carved wooden pieces across a board can count as chess, it does not follow that we ought to play chess. There may be other games that are more worthy of our time and effort. To make the case that we ought to play chess, external normative arguments will have to be made extolling the merits of that particular game. Those arguments will encourage us to enter the domain constituted by the relevant rules.

But once we enter that constituted domain things start to look different. From an external perspective, the rules of chess may lack normative power; but from an internal one — that is, from the perspective of someone already committed to playing chess —

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10 Hart, HLA *The Concept of Law* (Oxford: Oxford University Press, 1961).
11 David Lauer "Anti-Normativism and the Fraud with Ought: On the Normativity of Constitutive Rules", talk at the colloquium *Normativity of Meaning: Sellarsian Perspectives*, Prague, Villa Lana, 27 May 2011. And Haugeland "Truth and Rule-Following" in Haugeland, J. *Having Thought: Essays in the Metaphysics of Mind* (Cambridge, MA: Harvard University Press, 1998).
12 Searle, J. *Making the Social World* (Oxford: OUP, 2010).
13 Lauer (n 11) has argues against this thesis.

the rules have great normative weight. After all, if they cease to play by the rules, they cease doing what they are committed to doing.

This gives us all we need to understand the normative power of the argument under consideration. As I said, the argument is an internalist one. It starts from the premise that we ought to interpret the constitution in a particular way, but that premise itself assumes that we are already committed to the constitutional text itself. This need not be the case. Normative arguments may be needed to cajole us into accepting the constitution, to lure us into the domain that is constituted by the text. Thus, the simple argument for originalism is substantially limited in its normative power: it only works on committed players within the constituted domain.

But this, in a somewhat perverse way, is why the linguistic arguments are so significant in the originalist debate. For within that debate, most of the key participants — lawyers, judges, and other public officials — are already committed players in the constituted domain. Indeed, some of them will have gone so far as to have sworn an oath to uphold the constitutional text and many take that oath to mean they must be committed to its communicated content.[14] Thus, from their perspective, the linguistic arguments have decisive weight. Since they already accept that they *ought* to be adhering to the communicated content of the constitution, they are more open to be persuaded by any (sound) argument that tells them that the communicated content is fixed by the original public meaning.

None of this is to suggest that external, moral arguments are not relevant to originalism. Of course they are, and many proponents of originalism have proffered them over the years.[15] It is, however, to suggest that linguistic arguments are peculiarly forceful to certain legal actors. So if the likes of Solum and Goldsworthy are correct in saying that communicated content is determined solely by reference to linguistic desiderata, they will have shown something significant. The question is: are they right?

3. The Purity of Linguistic Originalism

> *"When we make assertions about what an utterance means, we are making factual assertions about the world…Semantics is one thing, normative theory is another."*[16]

[14] Cf. Greenberg (n 9). If they reject the view that legal communications are sufficiently similar to everyday communications, they may not embrace this commitment. In that case, they will have a different conception of the internal rules. It is possible that judges will have this philosophically nuanced view of legal communication, but I suspect to many the notion that legal communication is analogous to other forms of communication will be alluringly straightforward.

15 Such arguments are well-aired in Goldsworthy "The Case for Originalism" in Huscroft and Miller (eds) *The Challenge of Originalism* (n 3) and to some extent in Solum "Semantic Originalism" (n 5) and *Constitutional Originalism: a Debate* (n 3). For others see: Barnett, R *Restoring the Lost Constitution* (Princeton, NJ: Princeton University Press, 2005); and McGinnis and Rappaport "A Pragmatic Case for Originalism" (2007) *North Western University Colloquy* 1.

16 Solum, "Semantic Originalism" (n 5), p. 27.

This section tries to clarify the central premises in both Solum and Goldsworthy's defence of linguistic originalism. It does so from a jaunty angle. It starts with a challenge to their view. The challenge comes from the work of Mitchell. It proposes that every text has at least two types of communicated content, and hence our choice as to which content shall govern our interpretation must be guided by moral considerations, not linguistic ones. It is in avoiding this challenge that both Solum and Goldsworthy open themselves up to the counterargument that I present. To explain this, the remainder of this section proceeds in four steps. The first step introduces the distinction between *speaker's meaning* and *sentence meaning.* The second step presents Berman's pluralistic critique of pure linguistic originalism. The third step reconstructs Solum's riposte to Berman and his defence of linguistic originalism. And the fourth step outlines Goldsworthy's argument.

3.1 - Speaker's Meaning vs. Sentence Meaning

The distinction between speakers' meaning and sentence meaning is commonplace in the originalist debate. I have no wish to present an elaborate account of the distinction here.[17] It is, however, essential for understanding Berman's critique, as well as the position being advanced by Solum and Goldsworthy. Furthermore, there is scope for confusion since Solum and Goldsworthy differ somewhat in their use of this terminology. So a brief exposition of the distinction, with some attempt to close off avenues of potential confusion, is needed.

Consider the following speech act:

Pass-the-salt: "Would you please pass the salt?"

Suppose that this speech act is performed by me as you and I are sitting around the dinner table. What is its communicated content?

One way to parse that question would be to look at my intentions. Why did I utter that particular sentence? What was I trying to get you to do by uttering it? Another way to parse that question is to look at the conventionally accepted meaning of the utterance. What do people in general use those words, strung together in that particular manner, to do? These two ways of parsing the question correspond, roughly, to the distinction between *speaker's meaning* and *sentence meaning*. These meaning-types have analogues within the originalist debate, with *intentionalists* cleaving to something like speaker's meaning and *conventionalists* cleaving to something like sentence meaning (though there are some subtleties here, as we shall see).

To get a little more precise, and to follow Solum, speaker's meaning can be analysed in Gricean terms.[18] According to Grice, speaker's meaning can be reduced to the common knowledge of intentions in a conversational context. In other words, the request to pass the salt has speaker's meaning iff (a) you know what my intention was in uttering that sentence and (b) I know that you know what my intention was in

[17] Solum, "Semantic Originalism" (n 5) pp 32-36.
[18] Grice "Meaning" (1957) 56 *Philosophical Review* 377-388.

uttering that sentence[19] and so on ad infinitum. This is to be contrasted with *sentence meaning*, which analyses the meaning of an utterance in terms of the conventionally understood sense and reference of the signs, symbols and syntactical rules that make up that particular utterance.

This, in essence, captures Solum's understanding of the distinction between speaker's meaning and sentence meaning and feeds into his analysis of original menaing. Goldsworthy finds this inadequate and calls for a further distinction to be drawn. For him, sentence meaning is akin to literalism, *i.e.* to looking purely at the surface meaning of the words and ignoring the context in which the utterance was made. There are reasons for thinking literalism is a problematic account of meaning — reasons with which I shall not engage — and so there is a need for to identify a separate category of meaning, namely that of *utterance meaning*:

> "*Utterance meaning is the full meaning of an utterance, implied as well as expressed, and it depends on what the speaker's meaning appears to be, given evidence that is readily available to his or her intended audience, including the sentence meaning of the utterance and other clues such as its context."*[20]

This account of meaning appears to straddle the divide between speaker's meaning and sentence meaning. It engages with pragmatic considerations, as well as semantic ones.[21] It suggests that communicated content depends not just on intent and conventions, but also on features of the pragmatic context in which the utterance was made.[22] If we have epistemic access to those contextual features, they too must play a role in the communicated content of the utterance. This emphasis on pragmatic context, as well as the claims about how that context influences communicated content, will prove significant when I articulate my own argument.

Goldsworthy presents this account in explicit contrast to that offered by Solum.[23] But this doesn't seem to be fair to Solum. Solum's characterisation of sentence meaning, at least as it pertains to constitutional interpretation, does not fall directly into the literalist trap that Goldsworthy seeks to avoid. In fact, Solum explicitly acknowledges that the pragmatic context can affect the original communicated meaning.[24] Again, this will prove to be a significant acknowledgment.

In any event, the strengths of Goldsworthy and Solum's accounts of meaning will be discussed later. For now, let us work with the assumption that there are at least two distinct types of meaning — speaker's and sentence (with the latter not necessarily being equivalent to literalism) — and see how Berman uses this as the basis for an argument against pure linguistic originalism.

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19 Solum, "Semantic Originalism" (n 5), p. 33 and *Constitutional Originalism: a Debate* (n 3), p 13.
20 Goldsworthy "The Case for Originalism" (n 6) p. 48
[21] The pragmatics/semantics distinction is common in linguistic theory. Roughly, semantics is the study of the general properties of language; pragmatics is the study of the context and token-specific properties. See Marmor, A. "The Pragmatics of Legal Language" (2008) 21(4) *Ratio Juris* 423-452.
[22] Goldsworthy is even more explicit about the importance of context in "Constitutional cultures, democracy and unwritten principles" (n 6), pp. 698-701
23 Goldsworthy "The Case for Originalism" (n 6) p. 49
24 Solum, L. "Originalism and the Unwritten Constitution" [2013] *University of Illinois Law Review* 1935-1984

3.2 - Berman's Pluralistic Argument

Berman's argument[25] is targeted at originalist intentionalists and suggests that the determination of communicated content, particularly in the constitutional context, must be guided by at least some moral desiderata.[26] The argument is based on three premises.

The first premise states that the existence of *plural meanings* is a fact. Although the preceding description of speaker's meaning and sentence meaning highlights this possibility, it is worth noting the two reasons that motivate Berman's defence of this premise:

> *"First, words must have meaning prior to their deployment by a particular speaker in a particular context, because the speaker must have a reason to select particular words (or signs or marks), rather than others, as the vehicle for conveying his intended meaning….*
>
> *…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 use of language."*[27]

In other words, there must be a sentence meaning, distinct from speaker's meaning, in order to explain why speakers choose particular signs and symbols to convey their intentions, and there must be sentence meaning, distinct from speaker's meaning, to explain the possibility of misspeaking. Solum notes that Berman's reasoning here is flawed in one respect. It is possible for new words to be stipulatively created and defined by speakers, hence words do not always need to have prior meaning.[28] But Solum still accepts the general point: texts and utterances *can* have plural meanings.

If there are plural meanings, and if interpretation is the act of uncovering meaning, then it follows that there can be more than one "target of interpretation".[29] Of course, it is possible that speaker's meaning and sentence meaning are always perfectly coincidental such that no matter which target of interpretation is chosen the same communicated content is discovered (in fact, as we shall see, this appears to be Solum's view). Here we encounter Berman's second premise. It points out that such perfect coincidence of meanings is unlikely to always occur, *i.e.* that plural meanings can sometimes *clash*. Berman gives the example of a public announcement. The announcement states that applications are to be received by "12:00 a.m. on Thursday". The person who wrote this actually intended for the deadline to be 12 noon, but the problem is that "12:00 a.m." is conventionally understood to mean "12 midnight". So there is a clash here between speaker's meaning and sentence meaning. How is the clash

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25 Berman, M. "Originalism is Bunk" (2009) 84 *New York University Law Review,* 1 section II.
26 Berman *ibid* pp. 43-47 and pp. 56-59.
27 Berman (n 25), p. 44
28 Solum "Semantic Originalism" (n 6), pp. 92-93
29 Berman (n 25) p. 47.

to be resolved? Berman suggests that, given the pragmatic context of the utterance, sentence meaning is to be preferred over speaker's meaning.

But why is this? This is where the third premise of Berman's argument comes into play. It provides us with a principle for resolving such clashes. The principle is derived from the following argument: If linguistic desiderata reveal that an utterance has two or more possible meanings, and if those meanings clash, then there is no linguistic desideratum that allows us to determine what the communicted content is. But if there's no linguistic desideratum that will do the trick, some other desideratum must fill the gap. Admittedly this could be anything. Berman comments that when interpreting a poem with multiple divergent meanings, personal preferences could be adopted in order to resolve the interpretive problem. But that's because the satisfaction derived from the interpretation of poems is essentially a private aesthetic one. A similar approach would be inappropriate in the case of a legal text like a constitution or a non-legal text like the public announcement in the example given above. Since legal texts must win public support and loyalty – that's what they are designed to do – the best thing would be for the non-linguistic desiderata used to resolve the interpretive problem to be moral in nature.[30]

And that's the essence of Berman's argument. The argument presents a challenge to the proponent of linguistic originalism. Far from it being the case that a text has one distinct discoverable meaning, texts often have multiple meanings. What's more, these meanings can diverge and clash. This presents interpreters with a dilemma: which meaning shall prevail? Since linguistic desiderata have been exhausted (they just reveal multiple possible meanings) non-linguistic desiderata must be used to resolve the interpretive dilemma. In the context of legal interpretation, the most appropriate non-linguistic desiderata would be moral ones. The claim that linguistic originalism can be neatly separated from normative originalism is false: the interpretive act is a moral one, down to its core.

Proponents of linguistic originalism have two possible responses. They can deny Berman's pluralistic thesis and argue that, despite what he says, there is only one kind of meaning in every text or utterance. Or they can accept the pluralistic thesis, but argue that strictly linguistic desiderata can be used to resolve the interpretive problem. Goldsworthy takes the first approach; Solum takes the second. We'll deal with them in reverse order.

3.3 - Solum's Defence of Linguistic Originalism

Of the two authors under consideration here, Solum is the one that deals most directly with Berman's pluralistic challenge. He does so in the process of defending a conventionalist brand of linguistic originalism. Solum accepts that *either* speaker's

[30] Berman (n 25), pp. 56-58. Berman also thinks that populist criteria might be employed to resolve the interpretive problem since it is essentially one of public persuasion. I have substituted in moral criteria since I adopt a more idealistic approach to public persuasion.

meaning or sentence meaning *can* be present in a constitutional text.[31] What he denies is the claim that non-linguistic desiderata are needed to determine which of the two varieties is actually present in a constitutional text. He thinks that purely linguistic desiderata can do the trick and that, at least in the case of the US Constitution,[32] this leads to conventionalism prevailing over intentionalism.[33]

The quickest way to see what Solum is getting at is to consider the following example that he uses to make his case:

> *"Suppose you wanted to send a message in a bottle and thereby successfully communicate with an unknown reader, perhaps in a distant land generations from now. You couldn't rely on the reader's knowing anything about you, your intentions, or the context in which you wrote the message. You would have to rely on the plain [i.e. public/conventional] meaning of the words you used and the rules of English syntax and grammar. Of course, those meanings and rules might change over time, so it would be a good idea for you to date your message: if the reader were interested enough, he or she could check his or her assumptions about the plain meaning of your text against historical evidence of linguistic practices."*[34]

The example is somewhat compelling: if you really wanted to communicate with an unspecified reader, via a message in a bottle, then you probably couldn't expect them to know much about you or your semantic intentions. Thus, if you wanted to make a successful communication, it probably would be best to rely on public conventional meaning. This suggests that, in such a communicative context, speaker's meaning needs to coincide with sentence meaning. In other words, if the speaker wishes to successfully communicate with another, he or she must intend for the conventional sentence meaning (and perhaps other accessible features of the pragmatic context) to carry the content they wish to convey. This is a modified form of speaker's meaning. To extend the point to the constitutional context, Solum simply needs to build the analogy between messages in bottles and constitutional texts:

> *"We get "messages in a bottle" all the time. Almost every day, we read scraps of texts that are detached from their authors. You see a flyer on the bulletin board of a coffeehouse. You read a memo from someone you don't know who does a job you've never heard of…When you read texts like these, your ability to comprehend their meaning depends on the conventional semantic meanings (the public meanings) of the words and phrases…*

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31 The most telling example comes when he accepts the possibility of a conspiracy theory analysis of the 14th Amendment of the US Constitution, "Semantic Originalism" (n 5) pp. 98-100

32 The fact that Solum's case is tied to a particular jurisdiction may be thought to limit the significance of the arguments discussed here. However, the particular conclusion about the US Constitution is not important. It is the premises, not the conclusion, that I take issue with.

33 "Semantic Originalism" (n 5) pp. 38-48, explains why the conditions of success for speaker's meaning are not met, and pp. 91-97, makes many of the same points, but in direct response to Berman's argument.

34 *Constitutional Originalism: a Debate* (n 3) pp. 14-15

...Writing a constitution is like putting a message in a bottle. To communicate successfully, you must rely on the public meaning of the words and phrases you employ and the standard rules of grammar and syntax."

Solum adduces additional reasons for thinking that constitutions are like messages in a bottle and not like regular conversational speech acts.[35] First, constitutions have multiple authors and ratifiers, so there may be no collective intention (although that is *possible*) underlying the text. Second, even if there were, there is (usually) no common knowledge of those intentions: the diverse and potentially temporally distant audience cannot be expected to know what the speakers intended, and the speakers cannot know what the audience will know about those intentions.

We have here the bones of an argument. Solum is claiming that both types of meaning — speaker's and sentence — come with associated conditions of success. In the case of speaker's meaning, there must be common knowledge of intentions; in the case of sentence meaning, there must be epistemic access to the linguistic conventions that prevailed at the time of the communication. Since the conditions of success for speaker's meaning are not met in the case of the US Constitution, but those for sentence meaning are, it follows that the communicated content of the US Constitution is to be determined by reference to conventional meaning at the time of ratification. Furthermore, since the conditions of success are linguistic in nature – they have to do with what is appropriate for successful communications not with what is morally ideal – it follows that Berman is wrong: from the mere possibility of pluralism it does not follow that non-linguistic desiderata are needed to guide the interpretive act. As Solum himself says:

"*The success conditions [are] 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 [speaker's] meaning to the Constitution. Rather, it is that the constitution does not have [speaker's] meaning."*[36]

3.4 - Goldsworthy's Defence of Linguistic Originalism

Though not directly construed as a response to Berman's pluralistic argument, Goldsworthy's defence of linguistic originalism[37] — which is part of a broader normative defence of originalism — follows Solum in partly denying that the search for communicated content is guided by non-linguistic desiderata (the "partly" is crucial, as we shall see). Where he differs from Solum is in rejecting Berman's pluralistic thesis. Goldsworthy argues that texts and utterances do not have multiple meanings; they have one and only one type of meaning.

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35 "Semantic Originalism" (n 5) pp. 38-48

36 "Semantic Originalism" (n 5), p 48. Solum actually refers to framer's meaning, not speaker's meaning. In the interests of consistency I substituted the latter for the former.

37 Goldsworthy, J "The Case for Originalism" (n 6), pp. 46-51

He sums up his position in "Proposition 3" of his broader defence of originalism.[38]

> **Proposition 3**: The original meaning of a constitution is neither its original literal meaning (called "sentence meaning" by philosophers) nor its originally intended meaning (called "speaker's meaning"); it is, instead, its "utterance meaning", which is determined by a restricted range of evidence, extra-textual as well as textual, of what its founders intended it to mean.

This proposition bears some resemblance to a disjunctive syllogism (either X, Y or Z; not Y or Z; therefore X). But the resemblance is superficial. Unlike Solum, Goldsworthy does not think that the other types of meaning are live possibilities. He thinks there is only ever utterance meaning:[39]

> "*Instead of the meaning of an utterance sometimes being speaker's meaning and sometimes sentence meaning, and sometimes something in between — such as sentence meaning "with modifications" (as in the case of Lawrence Solum's account of "clause meaning") — the meaning of an utterance is always its utterance meaning."*

In making this exclusivity claim, Goldsworthy is correcting for one of the apparent tensions in Solum's argument, *viz*. the role that a speaker's original communicative intentions play in determining whether speaker's meaning or sentence meaning prevails. We saw this most clearly in the message-in-a-bottle example: it is the fact that the speaker wishes to successfully communicate with an unknown and temporally distant reader that leads to the success conditions for speaker's meaning being absent and the success conditions for sentence meaning being present, suggesting that there is really only one type of meaning, with different success conditions in different contexts. The broader concept of utterance meaning seems to capture this point: it combines intentions, conventional meanings and contextual factors.

But of course, this really ends up being similar to Solum's conception of constitutional meaning. Indeed, in supporting his exclusivity claim Goldsworthy appeals to success conditions for communication that are just like those to which Solum appeals. To be more precise, he appeals to different types of success condition, two of which are linguistic, and one of which is explicitly normative. The presence of this normative success condition is problematic, so we shall pay it close attention, but first let us examine the linguistic ones.

The first excludes speaker's meaning:[40]

> "*First, the meaning of a communication cannot be something hidden within the speaker's mind and inaccessible to its intended recipient, such as an intended meaning that is confided only to the speaker's spouse or written in a private diary."*

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38 *ibid*, p. 46
39 *ibid*, p. 49
40 *ibid* p. 48

Here, Goldsworthy is saying that since an utterance is supposed to convey meaning to a recipient, the communicated content of the utterance has to be determinable by evidence that is accessible to that recipient. This is to identify a success condition for communication that excludes a purely privatised understanding of speaker's meaning. This success condition alone does not exclude the viability of literalistic forms of sentence meaning, something more is needed for that. Goldsworthy provides this by appealing to the phenomena of presupposition and implication: the fact that texts and utterances often mean things they do not explicitly say.[41] The problem is that implications cannot be identified purely by looking at the conventional meaning of the language used in the utterance. As Goldsworthy puts it:[42]

> "*Most implications cannot be inferred from the text of the law in question; they can only be inferred from the text understood in light of the information about the intentions or purposes of the lawmaker that is (or was) readily available to the lawmaker's intended audience."*

This is to identify another success condition for the conveyance of communicated content, one that rules out a purely literal conception of sentence meaning. Because utterances have implications that cannot be determined solely by reference to literal meaning, attention must also be paid to the pragmatic context in which the utterance was made. Features of that context that are known, or that are obvious to speaker and hearer, form part of the communicated content of an utterance.[43] And knowledge of those things forms part of the success conditions for communication in that context.[44]

The conjunction of these two success conditions endorses the exclusivity claim that Goldsworthy is making. The conditions stipulate requirements for the communication of content, not the communication of *morally desirable* content. And since interpretation is the task of determining the communicated content of an utterance, this would give us a purely linguistic conception of that task.

But Goldsworthy goes beyond this in his discussion and gives an additional normative reason for preferring his account of communicated content. When highlighting the need for publicly accessible evidence in the conveyance of meaning, Goldsworthy also says:[45]

> "*The law can only provide a practicable framework for social interaction if its meaning is public, or at least publicly ascertainable, and imposing penalties or costs for a failure to comply with hidden intentions is obviously unfair*."

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41 This is widely recognised in the philosophy of language. Indeed, Grice, the architect of the common knowledge of conception of speaker's meaning, wrote at length about the phenomenon. It is part of a more general phenomenon known as pragmatic enrichment, whereby contextual factors "enrich" the literal meaning of an utterance.
42 Goldsworthy "The Case for Originalism" (n 6) p. 50.
43 *Ibid* and Goldsworthy "Constitutional cultures, democracy and unwritten principles" (n 6) pp 701-706.
44 It's not clear how different this really is from Solum's position since he does recognise the significance of implication and pragmatic context, "Semantic Originalism" (n 5) pp 48-56
45 Goldsworthy "The Case for Originalism" (n 6), p. 48

This is to use considerations of justice and fairness to guide our commitment to discovering the original utterance meaning of the constitution. And while I certainly agree that such considerations play a role in the interpretive task, I propose leaving that possibility to the side for now and considering Goldsworthy's argument as defence of the view that moral desiderata play no role in determining communicated content. I do so for two reasons. First, as highlighted above, the two linguistic desiderata to which Goldsworthy appeals seem sufficient to defend his exclusivity claim, the addition of the moral desiderata is a bonus. Second, although I ultimately think moral desiderata do play a role in the determination of communicated content, I think they do so in a more subtle way than that covered by this normative desideratum. I now move on to the defence of this view.

4. Why Linguistic Originalism is Normative to the Core

With the clarificatory task out of the way, the critical one can begin. As we saw, for linguistic originalist, the interpretative act is the act of discovering communicated content. This act is carried out by appealing to linguistic, not moral, desiderata. Berman's pluralistic argument challenges this and opens up the door to at least some moral desiderata playing a role in interpretation. Solum and Goldsworthy try to shut the door on this possibility once more. They do so by using slightly different arguments. Solum argues that although there could indeed be two meaning types in every text, purely linguistic desiderata — *viz.* the conditions of success for the conveyance of meaning in a particular communicative context — can tell us which of the two is actually present. Goldsworthy rejects this reasoning, arguing instead that every text (every utterance) has one and only one type of meaning. But, like Solum, he makes his case by appealing to the conditions of success for the communication of content in different contexts.

My argument is straightforward: by allowing pragmatic, context-dependent factors to play a role in determining the communicated content of an utterance, Solum and Goldsworthy do not shut the door on moral desiderata. Rather, they open it up even wider. Their account forces us to ask questions about what the communicators were trying to do in a particular historical context. But if we ask what they were trying to do in that context, we must then ask questions about the nature of the speech acts they were trying to perform. And, if we have to ask about the nature of the speech acts they were trying to perform, we have to start making moral assumptions about *the type, scope* and ultimately *non-literal content*[46] of those speech acts. This leads us back to a revised version of Berman's interpretive dilemma, and back to a more robust role for moral desiderata in the interpretive task.

In more formal terms, my argument is as follows:

(1) If Solum and Goldsworthy are right that in order to determine the communicated content of an utterance we must look to the original communicative context and the conditions of success for the communication of

[46] By this, I mean, the implied or presupposed content that arises as a function of the relevant pragmatic context of the speech act.

meaning in that context, then we must also work out the nature (*i.e.* type, scope and non-literal content) of the speech act that the communicators were originally trying to perform.

(2) If we must work out the nature of the original speech act, then we must appeal to moral desiderata, not just linguistic desiderata.

(3) Therefore, if Solum and Goldsworthy are right, in order to determine the communicated content of an utterance we must appeal to moral desiderata, not just linguistic desiderata.

The antecedent of the first premise is relatively uncontroversial since it is essentially what Solum and Goldsworthy argue. The consequent of the first premise is rather more dubious so I shall defend it below. The second premise is the most controversial and its defence will occupy the majority of our time. And, finally, the conclusion is open to a number of objections and misconceptions that need to be addressed.

We start by looking at the consequent of premise (1). The term "speech act"[47] is used to describe the way in which certain deeds or outcomes are accomplished through speech. A speech act is usually broken down into two main components: (a) propositional content; and (b) illocutionary force.[48] The former is what the utterance is *about* (the objects, events and states of affairs in the world or in the speakers' mind), whereas the latter is what the utterance is designed to accomplish. Take the "pass the salt" example from earlier. In terms of propositional content, this utterance is about the salt on the table, but in terms of illocutionary force the utterance is designed to accomplish a certain goal: to get you to actually pass me the salt. That is to say, the utterance is a request (or directive).[49]

Because the content and force of an utterance are distinguished in this way, one might be inclined to think that premise (1) is false, *i.e.* that contrary to what is claimed we can work out the communicated *content* of an utterance without also considering the kind of speech act the utterance was intended to perform. But this is to misunderstand the connection between the content and force of an utterance, and to misunderstand the nature of the interpretive act.[50] This is for two reasons. First, as both Solum and Goldsworthy accept, the communicated content of an utterance is not exhausted by the propositional content of the words it contains: features of the pragmatic context are also needed to flesh out the implications and enrich the meaning of those words. Second, to

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47 Austin, J.L. (2nd Edition edited by Urmson and Misa) *How to do things with Words* (Cambridge, MA: Harvard University Press, 1962); Searle, J. *Speech Acts*: *an Essay in the Philosophy of Language* (Cambridge: Cambridge University Press, 1969); and Green, Mitchell "Speech Acts" (2014) *Stanford Encyclopedia of Philosophy* available at http://plato.stanford.ed/entries/speech-acts (accessed 20/12/14)

48 Green "Speech Acts" *ibid*. Solum (n 5) also makes this distinction.

49 Searle and Vanderveken break illocutionary force into seven components in their *Foundations of Illocutionary Logic* (Cambridge: Cambridge University Press, 1985)

50 A lengthy defence of the connection between illocutionary force and content is to be found in Alston, W. *Illocutionary Acts and Sentence Meaning* (Ithaca, NY: Cornell University Press, 2000). Alston holds that the semantic content is equivalent to illocutionary act potential. In other words, that sentence X means such and such because it is usable to perform illocutionary acts of a certain type.

resolve ambiguities and constrain vagueness (as originalists are keen to do),[51] substantive assumptions often have to be made about the *nature* of the speech act being performed, where "nature" encompasses the *type*, *scope* and ultimately *non-literal content* of utterance.

Take another example. Suppose I say to you "Please, give me a ring". Divorced from any particular communicative context, that sentence could mean at least one of two things: (i) give me a piece of jewellery; or (ii) call me on the telephone. This is because the utterance — in particular the word "ring" — is *ambiguous* without a context.[52] It is only by examining the original communicative context, and considering the (publicly accessible) intentions of the speaker and the evidence available to the listener, that the ambiguity can be resolved and the communicated content determined. But that is simply to say that in order to work out communicated content we must work out the type, scope and non-literal content of the speech act the original speaker was trying to perform. We must work out: what was the point of this particular request? Who was the intended audience? What did the speaker want them to do? What *reasons* did she presuppose they had for doing it? And this is true in all cases, not just those involving ambiguous words. This is because speech acts are inherently vague: the same propositional content can be used to perform a number of different speech acts.

This can be seen more clearly if we consider the different types of speech act one can perform. The classic taxonomy is that of Searle, which identifies five types of speech act:

> **Assertives**: Speech acts that commit the speaker to the truth of the proposition being asserted.
>
> **Directives**: Speech acts that are intended to cause the hearer to perform some sort of action, e.g. requests, demands, advices.
>
> **Commissives**: Speech acts that commit the speaker to some future course of action, e.g. promises.
>
> **Expressives**: Speech acts that express the speaker's attitudes toward certain objects, events or states of affairs, e.g. congratulations.
>
> **Declaratives**: Speech acts that create something or bring about a change in something, e.g. baptisms, marriages.

Each type breaks down into a number of sub-types, each of which has different success conditions attached to them. The problem is that the same string of words, can be used to perform very different speech acts.[53] For example, I can request that you give me a

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[51] Barnett "The Misconceived Assumption about Constitutional Assumptions" (2009) 103 *Northwestern University Law Review* 614-662.

[52] As opposed to being *vague*. An ambiguous word/sentence is one with two possible meanings. A vague word/sentence is one with an indefinite categorical boundary.

[53] This is due to the linguistic phenomenon of polysemy. As Marmor notes, the kinds of evaluative principle used in constitutional speech acts are often *super-polysemous*. See Marmor, A. "Meaning and Belief in Constitutional Interpretation" (2013) 82(2) *Fordham Law Review* 577-596

ring, or I can demand it, or I can advise it, using the same string of words. Working out which type of speech act is being performed in a given context will require the interpreter to make some significant normative assumptions about its illocutionary force.

Or that, at any rate, is what premise (2) goes on to claim. One of the key developments in speech act theory has been the identification of the various success conditions associated with each of the different kinds of speech act.[54] And one of the key insights of this development is the fact that these success conditions can be highly moral in nature. To take the obvious example, in performing a directive speech act, a speaker commits themselves to presenting the listener with reasons for performing an act.[55] The strength of those reasons varies with the sub-type of directive. If the speaker is simply *requesting* that the listener do something, they are presenting *a* reason for doing or forbearing from some act, such as when I ask you to pass the salt. You may have countervailing reasons that discourage you from passing the salt, but in interpreting my request you must at least acknowledge that I am implying that you have some reason for passing me the salt: that is a success condition for the performance of the relevant speech act. The situation is slightly different if the speaker is *demanding* or *commanding* the listener to do something. In that case, the speaker is not just offering *a* reason for doing something, they are purporting to offer a *decisive*, maybe even *exclusionary* reason for doing something. For example, if we are on a boat and I say that you must wear a lifejacket, I am not merely suggesting that you have some reason to wear a lifejacket; I am suggesting that you have an overwhelming reason to do so, that lifejacket-wearing is non-optional for you whilst on the boat. Again, in interpreting my command you must engage with the normative force behind it, *i.e.* you must ask yourself "Do I have decisive reason to wear a lifejacket?". Something similar is true in the case of commissive speech acts like promises. The only difference is that when a speaker commits to doing something they are not presenting the listener with decisive reason for action, they are presenting themselves with such reasons. In other words, they are claiming "I have decisive reason to do or forbear from doing X".

So the first point in defence of premise (2) is that non-linguistic desiderata, like the presence or absence of decisive reasons for action, will have a role to play in working out what type of speech act has been performed by a particular utterance and whether that speech act is successful or not. But that's not enough. To get us to the further claim that *moral* desiderata have a role to play, we must recognise a deep constitutive connection between decisive reasons for action and morality. This is not the place to defend such a view, but it is one with a long pedigree. Within metaethics, the notion that morality (if it exists) provides decisive (categorical) reasons for action is a commonly-accepted one.[56] So I take it that if one must decide whether a particular speech act is a demand or commissive, and if in working out whether it is a demand or

[54] Alston (n 50) provides an exhaustive account.
[55] Murphy *Natural Law in Jurisprudence and Politics* (Cambridge: Cambridge University Press, 2006) makes the argument quite forcefully. Alston *(*n 50) makes a similar case.
[56] Joyce, R. *The Myth of Morality* (Cambridge: Cambridge University Press, 2002) takes the provision of decisive reasons for action to be an essential component of morality. Similarly, Beyleveld, D. in *The Dialectical Necessity of Morality* (Chicago, IL: University of Chicago Press, 1992) identifies the provision of overriding reasons for action as one of the key features of morality. See also Enoch, D. *Taking Morality Seriously* (Oxford: OUP, 2011) and Smith, M. *The Moral Problem* (Blackwell Publishing, 1994) on the platitudes of morality.

commissive one must consider whether it presents the listener with decisive reason for action, then one is necessarily drawing upon moral desiderata in determining the nature of the speech act.

This would be an uninteresting conclusion were it not for the fact that the kinds of speech act that are generally performed by constitutions are directive (demands) and commissive in nature. Constitutions typically commit the state to the protection of fundamental rights and freedoms and demand that people perform certain actions and refrain from certain others (e.g. "Congress *shall make no law…*). Constitutions may perform other speech acts. For instance, they may perform declaratives insofar as they will create new entities and states of affairs. Thus, in the case of most constitutions new legislative institutions are created by the constitutional text. But ultimately those creative speech acts are then linked to commissive and directive speech acts. This occurs in the "Congress shall make no law…" example: the US constitution creates the institution and then commits the institution to refrain from doing something. Since constitutions engage in these kinds of speech act, the argument here is not just that moral desiderata have a role to play in working out the nature of *some* speech acts, but that they have a role to play in working out the very kinds of speech act that are most plausibly performed by the framing and ratification of a constitutional text.

But that's only the start. The linguistic claims of both Solum and Goldsworthy actually entail a far more substantive engagement with moral desiderata. For them, working out the *type* of speech act is only one element of the interpretive task. One must also work out the *scope* of the speech act – *i.e.* to how many people, over what period of time, is it purporting to offer decisive reasons for action. This is clear from Solum's message-in-a-bottle analogy. He explicitly makes the point that the success conditions for communication must factor in the scope of the audience. And also that one must work out the *non-literal, implied or "enriched" content* of the speech act.[57] That is to say: one must decide which features of the pragmatic context of the original communicative situation will be taken to enrich the meaning of the text. Solum and Goldsworthy may claim that there are non-moral criteria for determining these two things, but there aren't. One must make a number of moral decisions when determining both. In the first instance, one must decide whether the moral commitment or demand embedded in the constitution is supposed to apply indefinitely and in the second instance one must suppose that certain conceptions of the moral reasons underlying those commitments or demands determine the application of the law over that indefinite period. The basis for either decision is non-linguistic and moral in nature.

That's an initial defence of the argument. A variety of objections and misconceptions must now be addressed.[58]

4.1 - Success vs. Defectiveness in Constitutional Speech Acts

[57] I am indebted to an anonymous reviewer for encouraging me to clarify this point.

[58] I ignore one possible criticism here: that the constitution cannot be understood in terms of speech acts because speech acts can only be performed by intentional agents. Murphy (n 55) deals with this criticism.

The first complication that needs to be addressed is the precise nature of the "appeal" to moral desiderata going on here. One concern might be that even if one must work out the nature of the speech act in order to determine communicated content, one can do this without really appealing to *moral* desiderata. There are two ways to make this criticism. First, by drawing on the theoretical distinction between successful and defective speech acts. Second, by adopting something I shall call the *normative-belief* objection. They both amount to the same thing, but the different articulations help to better explain the nature of the criticism.

Let's start with the success-defectiveness version. If I were to utter the sentence "there is a pink unicorn in my garden", I would be making an assertive speech act. I would be making a truth claim about a certain state of affairs in the world. As it happens, this truth claim is false: there is no pink unicorn in my garden. But, provided I am being sincere in my assertion, the speech act is nevertheless a successful one. You could work out the communicated content of my speech act without assuming that there really was a pink unicorn. This is because the success conditions for assertive speech acts normally relate to the commitments of the speaker, not those of the listener or interpreter. In performing a speech act it is the speaker who *takes responsibility* for certain things, *i.e.* holds themselves out for blame or other repercussions if those things don't exist. So, in making my claim about the pink unicorn, I am committing myself to its existence and holding myself out for blame if it does not. But it does not follow that I fail to successfully make an assertion if the unicorn doesn't exist. The non-existence of the unicorn renders my assertion *defective* not unsuccessful. You can interpret what I say, without assuming the truth of what I say.

This distinction can be applied to the case of constitutional interpretation and the role of moral desiderata in that act. A defender of originalism could argue that all their position requires is that you are able to work out what moral reasons the speaker(s) was holding themselves out as having for performing the given speech acts, not whether those moral reasons are compelling. For instance, a constitution may command that women not be allowed to vote. In doing so, the original drafters and ratifiers of the constitution may have committed themselves to the existence of a decisive reason for not allowing women to vote. But that does not mean that the modern generation of interpreters are equally committed to the existence of such a decisive reason. The command that the constitution makes is defective, but it is still successful and that's all that matters from the interpretive point of view.[59]

The same basic point can be made by way of the normative-belief objection.[60] This objection accepts that in order to work out the nature of the constitutional speech act – and thereby determine its communicated content – the interpreter must engage with a range of extra-textual factors. However, it rejects the notion that this requires the interpreter to make substantive moral commitments about the nature of those speech acts. Instead, all the interpreter has to engage with is the normative beliefs and assumptions that were operative in the original communicative context (*i.e.* those of the original "speakers" and/or those of the society at the time). These are psychological and

[59] In Razian terms: the constitution purports to offer decisive reason for that command; but it may fail to actually do so: Raz, J. "Authority, Law and Morality" (1985) 68(3) *The Monist* 295

[60] I am indebted to an anonymous reviewer for raising this version of the objection.

social facts, not normative ones. One can engage with those, use them to flesh out the communicated content of the speech act, and never appeal to moral desiderata.

This is, I suspect, the most compelling objection to the argument I am making. My response will develop through a number of stages. Taken together, these clarify the original argument and permit it to go through, though perhaps in a slightly modified form.

The first stage is a simple one of re-emphasis. The originalist assumption in a case like that of the denial of female suffrage would, presumably, be that the original speech act is a demand and it clearly denies female suffrage, for whatever reason the original "speakers" had in mind. A modern interpreter cannot twist its meaning into something more morally desirable – they just have to accept the speech act on the original speaker's terms. They might refuse to apply it, of course, but then they would have moved beyond interpretation. But note that in reaching such a conclusion a substantive moral assumption has been made, namely: that the constitution is indeed purporting to demand something, i.e. offer decisive reason for this denial, over a long period of time, to an indefinite group of people, and that it is not merely advising or suggesting optional reasons for the denial, or doing so ironically or otherwise insincerely. In making such an assumption the interpreter is, I want to suggest, drawing upon moral assumptions about the communicative "game" in which the constitutional speech acts were performed. It is these assumptions which then allow further assumptions to be made about the nature of the speech act being performed in that context. At every point, moral desiderata are engaged.

The originalist may reject this. They might reply that even if one has to make those assumptions about the communicative context, one can do so without relying on moral desiderata. After all, is it not obvious that *legal* and, more precisely, *constitutional* speech acts are sincere, that they purport to offer decisive reasons for action; and that they purport to commit us to those reasons for an indefinite period of time? Wouldn't it simply be perverse to deny that constitutional speech acts function as pan-generational commissives and directives? Aren't there widely-known linguistic facts about the communicative context in which the constitutional text was produced that allow us to make those assumptions about the nature of the speech acts being performed? Certainly, both Solum and Goldsworthy would seem to believe this. The former arguing that certain features of the communicative context are "common knowledge" between the speaker and listener,[61] and these allow us to make non-moral assumptions about the content of the constitutional speech acts; the latter speaking of certain "obvious" presuppositions and implications[62] that flesh out the meaning of the speech acts.

The problem is that it is not clear that either is entitled to such claims. At least, not without first making substantive moral assumptions about the nature of the communicative context. Both authors assume that certain analogies hold between

[61] See, for example, "Semantic Originalism" (n 5) p. 51, *Constitutional Originalism* (n 3) p. 23, and "Originalism and the Unwritten Constitution" (n 24).
[62] For example, "Constitutional cultures, democracy and unwritten principles" (n 6) p. 698-699; "Raz on Constitutional Interpretation" (n 6) at 172-173 where he talks of obvious original purposes.

ordinary conversational contexts and constitutional communicative contexts. In ordinary conversational contexts, there are indeed obvious and commonly-known features of the context that allow one to make assumptions about the nature of the speech acts being performed. This is because those conversations have fairly definite boundaries, and involve conversational partners who are, broadly speaking, cooperating with one another, *i.e.* who try to understand and want to be understood.[63] It is not at all clear that those kinds of conversational conditions hold in the constitutional setting.[64] The constitutional communicative setting has indefinite temporal boundaries, indistinct classes of speakers and listeners, and is often highly strategic.[65] These conditions make it much more difficult to determine what features of the context are "obvious" or are "common knowledge" between speaker and listener.[66] This in turn makes a difference when it comes to determining the type, scope and non-literal content of the constitutional speech acts. To assume that the analogy holds, one must make a moral assumption about the nature of the communicative act. So moral desiderata enter into the picture at some point, either in making assumptions about the nature of the speech act, or in making assumptions about the nature of the communicative context.

The point can be understood by appealing to the distinction between thick and thin versions of originalism.[67] Liberals like Ronald Dworkin and Jack Balkin have embraced "thin" versions of originalism. They agree that constitutional texts historically fix an abstract set of principles. These principles provide a general framework to which more substantive flesh (sets of moral reasons and moral conceptions) is added, and amended, over the years. Consequently, they think the original communicative context has a very limited role to play in understanding the communicated content of the text. We do not add in "obvious" or "common knowledge" features of the original communicative context in order to make the principles less abstract. Contrariwise, proponents of "thick" originalism argue that, although it is possible for the constitution to contain abstract principles, we should not just assume that this is the case.[68] Obvious and common knowledge features of the original pragmatic context can constrain and restrict the meaning of those principles in various ways. Thus, in the case of a constitutional provision that appears to commit the state to upholding equality, the thin originalists will argue that, linguistically speaking, this merely commits us to an abstract principle of equality, fleshed out by different conceptions of equality (with different associated moral reasons) at different times; the thick originalists will argue that, linguistically speaking, obvious features of the pragmatic context commit us to a particular conception of equality for the long haul. In this debate between thick and thin originalists there is a basic agreement about the type and scope of the constitutional speech act – they both agree that there is some long-term commitment to equality – but there is disagreement about the original non-literal content of that speech act. The

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[63] Poggi, F. "Law and Conversational Implicature" (2011) 24(1) *International Journal for Semiotics of Law* 21-40

[64] This is Andrei Marmor's argument from "The Pragmatics of Legal Language" (n 23) and "Can the law imply more than it says? On Some Pragmatic Aspects of Strategic Speech" in Marmor and Soames *The Philosophical Foundations of Language in Law* (Oxford: OUP, 2011).

[65] Everyday conversations can be highly strategic too, as per Pinker, S., Nowak, M. and Lee, J. "The Logic of Indirect Speech" (2008) 105(3) *Proceedings of the National Academy of Sciences* 833-838

[66] The strategic nature of legal utterances also, arguably, blocks the route to common knowledge. See Pinker, Nowak and Lee *ibid* for this argument.

[67] I base the distinction on the discussion in Balkin, J. "Must we be faithful to Original Meaning?" (2013) 7(1) *Jerusalem Review of Legal Studies* 57-86

[68] For example McGinnis and Rappoport "The Abstract Meaning Fallacy" (n 7)

former think the original content is thin and abstract; the latter think it is thick and fixed by a historical set of opinions about what constituted equality. Who is right?

Linguistically speaking, there is no answer. This is because what belongs in the set of linguistic facts both sides use to answer that question is actually determined by moral and political views about the nature of constitutional communication. Marmor has suggested that it is *because* thick originalists think that a constitution functions as an intergenerational commitment device – *i.e.* something that commits us to a particular historical set of moral reasons – that they think constitutional speech acts function much as they would in an ordinary conversation. This is why they think certain features of the original communicative context are allowed to contribute to the communicated content of the speech acts. But if you reject that moral view of the constitution, and if you worry about the moral legitimacy of such prolonged intergenerational commitment, you will be more inclined to the thin view.[69]

The argument I am defending comports with what Marmor says, but extends it a little. I am suggesting that moral views don't simply determine one's understanding of the non-literal content of the constitutional speech acts but also one's understanding of the type and scope of those speech acts. Thus, viewing something as a long-term demand or commitment – *i.e.* as something that purports to offer decisive reasons for doing or forbearing from some act – and not as something less demanding, itself involves taking a moral stance on the nature of constitutional communication. This explains why the success-defectiveness and normative-belief objections fail. In order to say that something is a successful, albeit defective, speech act, or that certain normative beliefs contribute to communicated content, one must first accept a certain set of views about the background rules governing constitutional communication. One cannot do that without engaging with moral desiderata about what a constitutional communication should be and how it should operate.

4.2 - Could law provide Content Independent Reasons for Action (CIRAs)?

A second objection to the argument I have advanced is implied by the work of Jules Coleman[70]. Coleman is concerned primarily with defending a form of legal positivism that is centrally committed to the *sources thesis*, *i.e.* the view the content and identity of a legal norm is determined by social facts alone, not by moral ones. This positivist thesis is compatible with the view of pure linguistic originalists.

There is, however, a problem. As Coleman points out,[71] the law seems to play an important role in our practical lives by supplying "a set of directives about what is to be done".[72] That is to say, the law seems to supply us with reasons for action. But reasons for action are normative in nature, not factual. So how is it that normatively inert social facts can supply us with reasons for action? Surely we are faced with a dilemma: either

[69] Marmor, A. "Meaning and Belief in Constitutional Interpretation" (n 53) pp. 594-595
[70] Coleman, J. "Beyond the Separability Thesis: Moral Semantics and the Methodology of Jurisprudence" (2007) 27 *Oxford Journal of Legal Studies* 581, pp. 585-597
[71] *ibid*, p. 586
[72] *ibid*, p. 586

legal rules supply us with reasons for action, in which case their content and identity cannot solely be determined by social facts, or they do not supply us with such reasons, in which case their content and identity can be determined solely by social facts. This is a dilemma for positivism and it resembles, in some ways, the dilemma I posed to the linguistic originalists: they assume that the constitution performs certain speech acts and that this determines communicated content, but they can only make that assumption by drawing on normative considerations.

Coleman thinks there is a way to resolve the dilemma. He thinks that law could supply us with content-independent reasons for action (CIRAs). In other words, a set of social mechanisms (which can be factually described) could work so as to convert what was formerly a morally neutral directive into one with moral force.[73] To motivate the argument, he appeals to analogous cases in which CIRAs are created by purely social mechanisms. For example, the obligations created by the institution of promising and the duties entailed by family relationships. If I promise to do something for you, or if my father or mother directed me to do something, I would have reason to do it. But this reason would be independent from the content of the promise or directive. That is: it doesn't matter exactly what is promised or directed since it is the structure of the institution (in the case of promising) or the familial relationship that creates the reason for action. And although he admits to not knowing how legal institutions manage to create similar CIRAs, Coleman argues that it is at least possible that they do and that there are other reasons for thinking that this is what they do when functioning properly. At the same time, Coleman accepts that legal mechanisms may "misfire" and fail to create CIRAs.

One can imagine how this might apply to the interpretive context which is being examined in this article. Defenders of linguistic originalism might accept most of my argument. They might accept that the constitution is a set of speech acts, and they might accept that such speech acts are structured in such a way that one must accept certain moral commitments when determining their identity. But at the same time they might reject the suggestion that those moral commitments have anything to do with the communicated content of the constitutional speech act: the reasons for action could be content independent. This would mean a judge could respect the moral structure of the speech act, without this having an impact on their determination of communicated content.

There are several replies that one could make at this juncture. The easiest is to dismiss Coleman's argument since it fails to specify exactly how law achieves this momentous conversion of morality-free communicated content into morally-compelling directives. It would also be easy to argue that law might be able to create CIRAs once the legal system is up and running but that constitutions, due to the fact that they lay out the parameters for a socially acceptable legal system, occupy a distinct location within the space of legal norms — one that is more likely to be content-dependent than others. But both of these responses concede too much to Coleman's suggestion. I think the objection fails because the analogies it uses to support the possibility of CIRAs are unpersuasive.

[73] *ibid*, pp 590-591

The problem lies in the insufficient attention given to the moral status of acts. Under standard deontic logic there are at least three moral statuses that can be attached to a particular act token. We can say that the act is *forbidden*, *obligatory* or *permissible*.[74] I would submit that the mechanisms that allow for the creation of CIRAs in the case of promising and familial duties can at best be used to convert a permissible act into one that is forbidden or obligatory. They can never convert a forbidden act into a permissible or obligatory one, nor an obligatory act into one that is merely permissible or forbidden. To take an obvious example, my promising you that I will kill your mother does not create a CIRA. Because the intentional killing of your mother is forbidden, a mere promise cannot create an obligation to do it. That which is forbidden remains as such, irrespective of the promise. It would be foolish to promise to do something without knowing anything about the content of the promise. If you came to me asking me if I would promise to do something for you, I would say "Sure, but what is it that you want me to do?" The promise would always be conditional on its content.

If this is right, then moral desiderata would still have a role to play in the interpretation of constitutional speech acts. The constitution may create new obligations out of actions that were once permissible, but it cannot create obligations out of actions that were forbidden, or forbid that which is obligatory. So if there are ambiguities and abstractions in the constitutional text that suggest such impossibilities might be demanded, the interpreters, assuming they are committed to the constitutional order, must appeal to moral desiderata in order to determine whether they are being demanded (as might be thought by the thick originalist) or whether they are not (as the thin originalist would suggest).

4.3 - The Construction-Interpretation Divide?

The final objection that a defender of pure linguistic originalism might make is to say that they have already allowed for moral desiderata to play the kind of role I envisage by allowing for a distinction between construction and interpretation. As pointed out earlier, many contemporary originalists draw a line between the interpretive task — which is concerned with discovering communicated content — and the constructive one — which is concerned with applying that content to particular facts. The former task is one which is entirely guided by linguistic desiderata; the latter, however, could be guided by moral desiderata.

But how robust a role moral desiderata have to play in construction depends on what we take the communicated content to be. As Barnett notes, when the communicated content is sufficiently clear and unambiguous, the gap between the interpretive and constructive tasks is narrow indeed.[75] A constitutional provision saying that there must be two senators is clear and unambiguous: there is little room for moral

[74] Some systems of deontic logic are even more elaborate than this, distinguishing for instance between omissible and permissible acts.
[75] Barnett "Interpretation and Construction" (n 6) p. 67. Solum, L. "Originalism and Constitutional Construction" (n 6) is clear that construction is always part of the judicial task, but he is also clear that the space for construction can be constrained by the original communicated content.

desiderata to determine the application of that provision to a particular case. When the provision is vague or ambiguous the situation is different. Ambiguity arises when a word or phrase can have multiple connotations. Context usually helps to determine which of the connotations applies, and context is exactly the kind of thing that originalists like Solum and Goldsworthy are happy to allow play a role in interpretation. But vagueness they might argue is a distinct problem. A word or phrase is vague when the boundary of its application is fuzzy. For instance, a constitutional provision that referred to "unreasonable searches" would be vague: while there are paradigmatic instances of unreasonable searches, there are also many borderline cases. Determining where the border lies is a constructive task and so can be guided by moral desiderata. Thus, for Barnett and other originalists, vagueness creates a domain in which construction becomes necessary, and construction permits the use of moral desiderata.

Certainly the argument I have advanced has made much of the problems of vagueness and abstraction, and how moral desiderata must be used to resolve them. So to that extent it may seem that my argument merely recapitulates something that most originalists accept, but does not get at the core of their linguistic thesis. But this is to misconstrue my argument and fail to appreciate how deep it goes. The response I gave to the arguments of Solum and Goldsworthy wasn't merely claiming that moral desiderata have a role to play *after* we have looked at the linguistic content of a constitutional speech act and determined that it is vague. My argument was that we cannot even tell whether the linguistic content of a speech act is vague until we have appealed to the moral desiderata relevant to determining the nature of the speech act. And if we cannot tell whether something is vague until after moral desiderata are applied, then the domain of construction cannot itself be determined until after moral desiderata are applied.

Consider the directive speech act "You must keep the doors closed at all times". Viewed in abstracta, *i.e.* divorced from the context in which it was uttered, the directive is vague: it could refer to any door at all. But in the original context it probably had a very clear intended meaning: to both the speaker and the audience in that original context it was understood to refer to the doors of the room or building they happened to be in. It is only if we assume that the directive was intended to supply a reason for closing other doors, to a spatially and temporally broader audience, that the content of the directive becomes vague. In other words, it is only when we think that the speech act had a different scope and different purpose that its meaning becomes vague. Something similar is true of constitutional provisions like "there will be no unreasonable searches". If we take the thick view of that constitutional speech act, the boundary of that category of searches might be limited and unfuzzy. If we take the thin view of that constitutional speech act, we might reason that it is abstract and vague. In order to be morally compelling to an unknown audience, the provision must have a sufficient amount of flexibility and uncertainty to cope with social change. The point is that making such decisions involves making moral choices about the nature of the constitutional speech acts. It is only if you do this that questions about the scope of the domain of construction arise.

5. Conclusion

Originalism has developed into a philosophically sophisticated theory. In the process, some of its most prominent defenders have been keen to distinguish between its linguistic and normative components. According to them, the interpretive act is the act of uncovering communicated content, and that act is guided solely by linguistic desiderata. I have argued that this is not true. To advance their linguistic thesis, originalists like Solum and Goldsworthy appeal to certain facts about the pragmatic context in which the constitution was drafted and ratified. They say the context will reveal that the constitution has one, and only one, general type of meaning. But this only works if certain assumptions are made about what the constitution was supposed to do, *i.e.* the nature of speech act it was intended to perform. The problem is that working out the nature of constitutional speech acts requires some appeal to moral desiderata since we can only distinguish between different speech acts on moral grounds. Consequently, originalism does not have a purely linguistic core. Rather, it is moral all the way down.

None of this implies that originalism is false. Indeed, the argument I have advanced here is entirely consistent with some version of the fixation and constraint principles. Just because we need to make moral decisions about the nature of constitutional communication in order to determine communicated content, does not imply that communicated content ought not to be fixed or that we ought not to follow it. But the peculiar contextual strength of the linguistic arguments is lessened. Since the interpretive task is moral all the way down, officials who are committed to the constitution need not apologise for appealing to moral desiderata when working out what the constitution demands (or, indeed, if it makes *demands* at all). In fact, they can be encouraged to make the best possible use of them, for in their act of interpretation they will take responsibility for those speech acts anew. And if they are committed to the constitutional order in this way, they owe it to themselves to make the text as morally persuasive as it can be.

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