

THE ONTOLOGICAL FOUNDATIONS OF THE DEBATE OVER ORIGINALISM

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ABSTRACT

Because the participants in the debate over constitutional originalism generally understand the controversy to be over a matter of the objective truth of competing interpretations of the Constitution, they do not believe that their mission is to persuade the other side. When what is at stake is a matter of objective truth, subjective opinions are of less moment.

This Article begins the long overdue transcendence of our increasingly fruitless and acrimonious debate over originalism by articulating the tacit philosophical premises that make the debate possible. It demonstrates that originalism, despite its pretensions to common sense and its disavowal of abstruse philosophical analysis, is tacitly committed to three key ontological and linguistic premises. First, language represents the world. Second, propositions or statements are true if they accurately (truly) represent that world. Thus, propositions of constitutional law represent the constitutional world. As a consequence, propositions or statements of constitutional law are true if they accurately (truly) represent that constitutional world. Third, there is an ontologically independent Constitution that our constitutional interpretation describes. For the originalist, that objective Constitution is the semantic understanding of the constitutional provisions when they were originally adopted or amended. Moreover, surprisingly, originalism's critics are also committed to these same premises about the nature of language, the nature of truth and the existence of an objective Constitution. Originalism's critics assert that the objective Constitution has sources beyond the original understanding of its provisions.

These shared premises about the nature of language and the nature of the Constitution permit the debate over originalism to proceed as a debate about the objective truth of constitutional interpretations and the accuracy of each side's description of the objective facts about the Constitution. Because both sides of the debate believe there to be an objective answer to

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the questions they address, the debate can focus upon defending the account of the relevant interpretation rather than on persuading the other side. Understanding that fundamental dynamic to the debate helps explain why it has been so unproductive. Moreover, understanding that the debate over originalism is only possible if these premises are true highlights the underlying question whether such premises are indeed correct.

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I. INTRODUCTION: THE PHILOSOPHICAL FOUNDATIONS OF THE DEBATE OVER ORIGINALISM

Given the proudly unphilosophical tenor of originalism, it may appear more than a little implausible to offer an account of the ontological foundations of originalism and the originalism debate. This Article will nevertheless establish those foundations, without projecting back a set of theoretical or conceptual commitments that the originalists would themselves disavow—even if they may not have been fully mindful of their conceptual commitments. Just as surprising, this Article will show

that certain key assumptions are shared by originalism's critics, and that those shared assumptions make the originalism debate possible.¹ The ontological foundations and other shared philosophical assumptions underlying the debate over originalism have received little attention.² The importance of these philosophical dimensions is neither widely acknowledged³ nor uncontroversial.⁴ At least one leading American legal philosopher has denied that philosophical premises underlie such debates.⁵ After exploring the disparate commitments originalism and its critics make, expressly or implicitly, with respect to these questions, I will demonstrate why those commitments are fundamental to continuing the debate over originalism as it has been conducted over the past decades.

The protagonists' tacit or express answers to four philosophical questions provide the core premises for this analysis. Those questions are: (1) what is constitutional law; (2) how is the truth of propositions of constitutional law determined; (3) how are propositions of constitutional law given meaning; (4) and what is the nature of our disagreements about such propositions? Originalism's theory makes important commitments on these issues, but generally does so in an informal, ad hoc way.⁶ The

1. This claim was made by Philip Bobbitt over thirty years ago, but has played little role in the evolution of the debate. See PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* (1982) [hereinafter BOBBITT, *FATE*]. Bobbitt did not offer a systematic defense of this claim, however, and it has generally not been accepted by the protagonists in the debate. Moreover, given the range of arguments deployed in the debate, including the substantial differences among the protagonists on each side, this claim may appear questionable. Indeed, as I will explore below, some of the critics of originalism flirt with an anti-foundational account of our constitutional law but ultimately fail to appreciate the implications of abandoning their tacit philosophical premises.

2. Dworkin is a prominent exception; he recognizes at least some of his commitments, and defends them. See Ronald Dworkin, *Objectivity and Truth: You'd Better Believe It*, 25 PHIL. & PUB. AFF. 87 (1996) [hereinafter Dworkin, *Objectivity*]; Randy Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611 (1999) [hereinafter Barnett, *Originalism*].

3. Professors Bobbitt and Patterson appear the clearest and largely isolated proponents of this view, at least expressly. See BOBBITT, *FATE*, *supra* note 1; DENNIS PATTERSON, *LAW AND TRUTH* (1996) [hereinafter PATTERSON, *TRUTH*]. For example, the generally thoughtful and acute Jack Balkin apparently missed the central thrust of Bobbitt's analysis in his discussion of Bobbitt in *Living Originalism*. See JACK BALKIN, *LIVING ORIGINALISM* 341–42 n.2 (2011) [hereinafter BALKIN, *LIVING ORIGINALISM*] ("My view is slightly different."). Balkin suggests that Bobbitt chooses conscience as the means to pick amongst the outcomes derived from conflicting modalities and then goes on to pick originalism as the sole modality that he believes trumps. The core of Bobbitt's claim is that there can be no algorithm or rule by which a resolution of conflict can be determined. See *generally* BOBBITT, *FATE*, *supra* note 1.

4. See BRIAN LEITER, *Why Quine Is Not a Postmodernist*, in *NATURALIZING JURISPRUDENCE: ESSAYS IN AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY* 137, 139 n.6 (2007) [hereinafter LEITER, *Quine*] (denying that controversy over judicial review is rooted in a representational theory of language or an empirical theory of legal propositions).

5. *Id.* I explore these arguments below at Part II.C.

6. Originalism, after all, mocks the notion that philosophical reasoning figures in constitutional interpretation. See, e.g., ANTONIN SCALIA, *Common-Law Courts in a Civil-Law System: The Role of*

positions are not always articulated and are rarely defended. But I will demonstrate that they are adopted implicitly and, more importantly, play an important role in originalism's account. Moreover, these premises are shared with many of originalism's critics. This claim may appear particularly surprising since the substance of the opposing positions with respect to the Constitution and the proper methods of interpretation of the Constitution are so different.

The reader may understandably think all of this pretty highfalutin, and wonder where all of this philosophy may take us. Originalists, in particular, may be skeptical. Indeed, the role of philosophical theory in the law has been the focus of controversy in the wake of Judge Posner's 1997 Holmes Lectures.⁷ In those lectures, Posner attacked the notion that moral philosophy had anything to add to law.⁸ That attack was met with a vigorous defense.⁹ Although it is safe to say that Posner's critics had the better part of the exchange, I don't want to re-engage those arguments here; I want only to distinguish the kind of philosophical analysis I am undertaking here from that criticized by Posner.

The argument I will advance will be quite different from that made by Posner. His argument is an anti-theoretical argument against the kind of thinking and analysis that philosophers do.¹⁰ Posner asserts that such analysis and argument is fundamentally confused and ineffectual. That

United States Federal Courts in Interpreting the Constitution and Laws, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 45–46 (Amy Gutmann ed., 1997) [hereinafter SCALIA, INTERPRETATION]. Nevertheless, originalism tacitly invokes a range of philosophical propositions as foundations or premises. For example, originalism takes for granted the commonsensical notion that we know what we are talking about when we talk about the Constitution, however much we may disagree about its interpretation.

7. See Richard A. Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637 (1998) [hereinafter Posner, *Problematics*]; Charles Fried, *Philosophy Matters*, 111 HARV. L. REV. 1739 (1998) [hereinafter Fried, *Philosophy*]; Martha C. Nussbaum, *Still Worthy of Praise*, 111 HARV. L. REV. 1776 (1998); Ronald Dworkin, *Darwin's New Bulldog*, 111 HARV. L. REV. 1718 (1998). Although Posner and his critics focused on the role of ethics and moral philosophy in legal theory, much of the exchange can be easily translated and applied to the more general questions surrounding the role of philosophy in legal theory.

8. Posner, *Problematics*, *supra* note 7, at 1640 (“I confess to a visceral dislike . . . of academic moralism. A lot of it strikes me as prissy, hermetic, censorious, naïve, sanctimonious, self-congratulatory, too far Left or too far Right, and despite its frequent political extremism, rather insipid.”).

9. Fried, *Philosophy*, *supra* note 7, at 1739 (“There is argument here too, but it is too gross and unnuanced to dispose of the arguments [Posner] seeks to refute.”). Posner is tone deaf to important elements in many of the philosophical arguments he attacks. That may help explain his claim to embrace pragmatism while remaining fundamentally committed to empiricist principles.

10. This Article will address only some of the kinds of philosophical premises inherent in originalism and in the originalism debate, those relating to ontology and the philosophy of language. There are other important premises of political philosophy and from jurisprudence that also warrant attention but will not be addressed here.

claim appears unsubstantiated. The analysis defended here provides a counterexample to Posner's assertion of the unimportance of philosophical method. My argument here is that philosophical commitments play an often tacit role in constitutional theory and adjudication. In particular, shared, erroneous, and confused philosophical premises make the debate over originalism possible and, in the eyes of the protagonists, necessary. The philosophy of language and ontology can, however, reveal and disarm those mistaken philosophical premises implicit in the originalism debate.¹¹ But that therapeutic role for philosophy is quite different from the bolder project to derive substantive constitutional conclusions from philosophical premises. On this latter point Posner and I are in accord.¹²

II. THE ONTOLOGY OF THE ORIGINALISM DEBATE: ORIGINALISM'S TACIT ACCOUNT OF CONSTITUTIONAL TRUTH AND MEANING

My analysis begins by articulating the fundamental philosophical commitments of originalism. Second, I describe the relevant philosophical commitments of Ronald Dworkin, one of the leading critics of originalism. Articulating the ontological and linguistic philosophical commitments of originalism is difficult for two reasons. First, originalism is largely untheoretical and, indeed, even sometimes anti-theoretical,¹³ eschewing direct attention to these questions. Therefore, teasing out the originalist positions is more difficult than with respect to the express claims discussed before. Second, these questions, at once practical and philosophical, are simply difficult in themselves. The threshold question is whether originalism has an ontology or epistemology, a theory of language or a theory of truth, and if it does, in what sense is that theory a *philosophical* theory? By philosophical, I mean a functional concept,

11. This strategy is not new; as noted at note 1, *supra*, it was sketched thirty years ago by Philip Bobbitt. But the claim has not been adequately articulated nor has it been generally accepted by either camp in the debate. So in addition to proposing therapy, I will be trying to recast Bobbitt's argument to be more persuasive to the protagonists in the debate over originalism. *See generally* BOBBITT, *FATE, supra* note 1; PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* (1991) [hereinafter BOBBITT, *INTERPRETATION*].

12. For a more complete account of the relationship of philosophy to constitutional law see André LeDuc, *The Relationship of Constitutional Law to Philosophy: Five Lessons from the Originalism Debate*, 12 *GEO. J.L. & PUB. POL'Y* 99 (2014).

13. *See* Barnett, *Originalism*, *supra* note 2, at 613 (“[Originalism] has prevailed without anyone writing a definitive formulation . . . or a definitive refutation of its critics.”). The implications of this feature of originalism have received little attention from originalism's proponents and critics. When Barnett reworked this discussion in *Restoring the Lost Constitution*, he did not include this assessment. *See* RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 9 (2004) [hereinafter BARNETT, *LOST*].

defined by reference to the kinds of theories and addressing the kinds of subjects that contemporary philosophers advance, defend, and criticize. I am here agnostic as to the controversial question whether there are fundamental questions that form the subject of philosophy.

Four questions are key:

- (1) What is constitutional law?
- (2) What is the nature of truth for propositions of constitutional law?
- (3) How are constitutional provisions given meaning?
- (4) What is/are the nature(s) of constitutional disagreements and arguments?

The answers to these questions capture the relevant tacit and implicit philosophical commitments of originalism and its critics.

Originalism implicitly commits to the following theses:

- (1) Constitutional law is an objective thing that is defined by a set of social practices based upon the original understanding of (or intentions and expectations with respect to) the constitutional text.
- (2) Propositions of constitutional law are true if and only if they correspond to facts about the original understanding of the constitutional text.¹⁴
- (3) The meaning of constitutional provisions is determined by semantics and syntax, the meanings of words and the rules of grammar. That meaning is not reducible to use.
- (4) Constitutional disputes are disagreements about the meaning of constitutional provisions. The relevant meanings in this context are semantic.

14. The pervasiveness of originalism's realism is confirmed by Scott Soames's recent work. While Soames distinguishes his position from originalism, his views are probably best understood as a weak form of originalism. See Scott Soames, *Deferentialism: A Post-Originalist Theory of Constitutional Interpretation*, 82 *FORDHAM L. REV.* 597 (2013) [hereinafter Soames, *Deferentialism*]. Some originalists, notably Robert Bork, also make a modal claim about the truth of originalist propositions of constitutional law, but this modal claim is both peripheral to the originalist project and implausible. See generally André LeDuc, *Originalism's Implications* Section II.E (Oct. 20, 2012) (unpublished manuscript on file with author).

These four, interrelated positions describe a classic, semantic account of constitutional law.¹⁵ The first claim is an ontological claim.¹⁶ The second claim offers a theory of the truth of propositions of constitutional law. The third claim is an account of the meaning of the Constitution. These claims, particularly the second and fourth, create the foundation on which the classical debate over originalism has been conducted. Without those foundations, the debate about originalism, if it survives at all, must be very different.¹⁷

A. *The Nature of Constitutional Law*

The originalist ontological commitment to the status of the Constitution as a thing appears so obvious as to be seemingly uncontested. As a threshold matter, the Constitution would appear to be, rather than not to be.¹⁸ Whatever the complexities of being may be,¹⁹ the Constitution would clearly appear to exist. When we are talking about the Constitution, it is not like our talk of unicorns.²⁰ Even if there may be some questions about the nature of the Constitution, most of us are pretty sure that the Constitution, unlike unicorns, exists.²¹ Moreover, because of its legal,

15. This can be characterized as a semantic account of law because it limits the meaning of the constitutional provisions to their semantic meaning. This claim is similar to, but distinct from, Dworkin's account of semantic theories of law; both emphasize the restriction of law to linguistic meaning, and disagreements about law to disagreements about meaning.

16. It is an ontological claim because it asserts a proposition about the nature of the thing that is the Constitution.

17. *But see* LEITER, *Quine*, *supra* note 4, at 139 n.6 (denying that controversy over judicial review is rooted in a representational theory of language or an empirical theory of legal propositions, but without argument or explanation).

18. *But see* ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 183–85 (1990) [hereinafter BORK, *TEMPTING*] (effectively reading the Ninth Amendment out of the Constitution).

19. *See generally* MARTIN HEIDEGGER, *BEING AND TIME: A TRANSLATION OF SEIN UND ZEIT* (Joan Stambaugh trans., 1996) (exploring the fundamentality of being as a philosophical question).

20. When we talk of unicorns, we talk of something that does not exist or, on one account, cannot exist, because they are inherently fictional. As has been remarked, even if we were to encounter in some remote location a white quadruped with a single straight horn in the center of its forehead, we would not conclude that we had discovered a unicorn. When we talk about the Constitution, we are talking about something that contingently exists.

21. It is likely that many of the beliefs of American citizens are not true, as in the case of the belief that the Constitution is a text in the National Archives. *See* AKHIL REED AMAR, *AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* 64–68 (2012) [hereinafter AMAR, *AMERICA'S UNWRITTEN CONSTITUTION*] (describing the slight textual differences between the signed parchment copy of the original, unamended Constitution in the National Archives and the original printed edition that was prepared for the ratifying conventions). There is no reason to think that those dominant false beliefs compromise the general belief in the existence of the Constitution.

political, and cultural importance, the commitment that has been made to the preservation of the authoritative text is extraordinary.²² What is the Constitution that we are preserving as text, document, and touchstone of our constitutional democratic republic? Originalism believes that the law of the Constitution is a thing that corresponds to the constitutional lump in the National Archives.²³ Intuitively, that is certainly how we all start out thinking about the Constitution.

Perhaps the best place to see the tacit commitment to the objective Constitution is in Justice Scalia's seminal defense of originalism.²⁴ There he writes "[n]othing in the text of the Constitution [creates the right and power of judicial review]"²⁵ The absence of such an express grant of the power of judicial review, and the associated power to strike down state and federal legislation found to violate constitutional requirements, leads Scalia to conclude that such authority must be carefully circumscribed.²⁶ As a result, Scalia charges the courts with identifying a historical meaning and a historical understanding of that meaning. Thus, the meaning of the Constitution is reduced to a matter of historical fact.²⁷ To understand why

22. See *Preservation*, NATIONAL ARCHIVES, <http://www.archives.gov/preservation/special-projects.html> (last visited Apr. 12, 2015).

23. One of the dimensions of law and of legal texts that makes them so complex is that they may appear to be at once texts and lumps. For Rorty, of course, there is no question: the Constitution is a text:

[The division between texts and lumps] corresponds roughly to things made and things found. Think of a paradigmatic text as something puzzling which was said or written by a member of a primitive tribe. . . . Think of a lump as something which you would bring for analysis to a natural scientist. . . . A wadded-up plastic bag is a borderline case of a lump.

See 1 RICHARD RORTY, *Texts and Lumps*, in OBJECTIVITY, RELATIVISM, AND TRUTH: PHILOSOPHICAL PAPERS 78, 84–85 (1991). The claim that legal texts may be viewed as lumpy is implicit in originalism. The force of the Constitution to constrain us, to govern us, may appear to give it a place in the space of causes, as well as in the space of reasons. What I mean by this claim is that as a performative written utterance, the Constitution not only admits of interpretation, operating in the space of reasons, but it also constrains those of us in the political community that it governs, thus acting in the space of causes and actions. That is to say, law is a means by which power is channeled and deployed within our society, and it shapes our behavior even if it does not always give us reasons in the strong sense of convincing us as rational actors of the propriety of the course we must follow. Law operates on us, together with the social practices that incorporate it, explicate it, and implement it, in a manner seemingly not entirely dissimilar to the way Mt. Everest constrains the bar-headed geese. See Section III.A, *infra*. In an important sense, understanding the textuality of the Constitution, and its status as a social artifact rather than as a lump, is the task of this article and of André LeDuc, *The Anti-Foundational Challenge to the Philosophical Premises of the Debate over Originalism*, 119 PENN. ST. L. REV. 131 (2014) [hereinafter LeDuc, *Anti-Foundational Challenge*].

24. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 854 (1989).

25. *Id.* (arguing from the absence of express constitutional provision for judicial review that only originalism provides an interpretation of the Constitution consistent with such judicial review).

26. *Id.*

27. *Id.* at 856–57.

Justice Scalia's commitment is ontological in nature, it is important to recognize that he believes that he is simply treating the text of the Constitution like any other text.²⁸ He believes, by contrast, that originalism's critics are treating the Constitution as an unusual type of text.²⁹ According to Justice Scalia, these critics, like Tribe and Dworkin, are willing to ride roughshod over the fixed meaning of the constitutional text in the service of their political goals.³⁰ Scalia thus believes that all texts, not just the Constitution, have such a fixed meaning that constitutional interpretation identifies and applies to particular questions or disputes.³¹ They have that meaning under a particular theory of language, including a theory of meaning and a theory of truth. Those premises are tacitly invoked in Scalia's rejection of originalism's critics' claim that the Constitution can best be interpreted to take into account a whole array of arguments foreclosed by originalism.

Other originalists are also committed to the objective existence of the Constitution and its status as an ontologically independent entity. In the case of Judge Bork, at least in his later writings, the commitment is even more fundamental.³² Bork believes that the very nature of a constitution is to be fixed, and the purpose of a constitution is to restrict or preclude change.³³ Later originalists have maintained these ontological commitments³⁴—for example, Barnett begins his account of the Constitution: “The Constitution of the United States is a piece of parchment under glass in Washington, D.C.”³⁵ Thus, Barnett's account

28. SCALIA, INTERPRETATION, *supra* note 6, at 46. *See also* BORK, TEMPTING, *supra* note 18, at 164 (contrasting doubts about our ability to ascertain the meaning of constitutional provisions with our approach to other texts).

29. *Id.* Elsewhere Justice Scalia himself characterizes the constitutional text as unusual, but in that context the claim appears only to mean that the constitutional text is different from a statutory text. *Id.* at 37.

30. *Id.* at 38–39.

31. *Id.* at 38 (asserting that the principles of constitutional interpretation are the same as those for statutory interpretation).

32. BORK, TEMPTING, *supra* note 18, at 143–44 (“When we speak of ‘law’ we ordinarily refer to a rule that we have no right to change except through prescribed procedures.”).

33. *Id.*

34. Recently, in his novel and thoughtful articulation and defense of originalism as a theory of change (or lack thereof) for positive law, Stephen Sachs also appears to accept the premise of an independent, objective Constitution. This is made apparent in Sachs's claim that “[o]riginal-law originalism is extremely demanding from a historical perspective: there's just an awful lot we need to know.” Stephen E. Sachs, *Originalism as a Theory of Legal Change*, __ HARV. J.L. & PUB. POL'Y __ (forthcoming), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2498838## [hereinafter Sachs, *Legal Change*].

35. BARNETT, LOST, *supra* note 13, at 9; *but see* AMAR, AMERICA'S UNWRITTEN CONSTITUTION, *supra* note 21, at 64–68.

privileges the constitutional lump, not the constitutional text.³⁶ For Barnett, as for Scalia and Bork, the independent existence of the Constitution is the bedrock upon which the originalist project is grounded. Other more canonical originalists share the commitment to the independent existence of the Constitution.³⁷

Because the existence of the Constitution may appear so obvious and because it is so often taken for granted, it may not be apparent what the alternative would be to asserting the independent ontological existence of the Constitution. One possibility, of course, would be that in the absence of an independent Constitution we have nothing. This is sometimes suggested by originalists in defending originalism's claims.³⁸ But there is another possibility besides lawlessness. Our Constitution might consist, fundamentally, simply in our practices.³⁹ The relevant practices and the relevant practitioners can, on this account, be defined with sufficient precision for this notion to be meaningful. The most important practitioners are the current members of the Supreme Court and, to a lesser extent, the judges of the lower federal courts and the state courts. Constitutional advocates who appear before such courts and make arguments would also appear relevant participants, as would academic and other commentators.⁴⁰ This does not generate a precise definition of the

36. See RORTY, *Texts and Lumps*, *supra* note 23, at 84–5.

37. See, e.g., KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* 56 (1999) [hereinafter WHITTINGTON, *CONSTITUTIONAL INTERPRETATION*] (“The constitutional constraint on the people’s agents can emerge from the text as intended, however, only if the text has the fixed meaning it is uniquely capable of carrying.”). This claim appears overstated; even if the text does not carry a unique meaning it could act as a constraint upon judicial decision makers. Scott Soames recognizes the manifold sources of linguistic ambiguity in constructing his originalist account of legal interpretation. See generally Soames, *Deferentialism*, *supra* note 14.

38. See SCALIA, *INTERPRETATION*, *supra* note 6, at 47 (“By trying to make the Constitution do everything that needs doing from age to age, we shall have caused it to do nothing at all.”). Other non-originalists have made similar arguments against interpretative methodologies that permit external values to inform interpretation. See Richard A. Posner, *The Constitution as Mirror: Tribe’s Constitutional Choices*, 84 MICH. L. REV. 551 (1986) (reviewing Laurence Tribe’s *Constitutional Choices*).

39. See BOBBITT, *INTERPRETATION*, *supra* note 11, at xiv–xv, xv (“So constitutional interpretation is not indeterminate even though it does not always yield unique answers.”); 24 (“Law is something we do, not something we have as a consequence of something we do.”); BOBBITT, *FATE*, *supra* note 1, at 5. See also PATTERSON, *TRUTH*, *supra* note 3, at 151–63. I do not want to defend this characterization of the Constitution here; I want only to sketch out what such a characterization might look like to set the context for discussion in the text as to whether there is a commitment by the various protagonists in the debate over originalism to an ontologically independent Constitution. For an examination of such an account more generally see LeDuc, *Anti-Foundational Challenge*, *supra* note 23.

40. Such commentators would appear relevant only to the extent that they are addressing constitutional interpretation and decision from within the modalities of constitutional argument.

relevant community, but it is not apparent that a precise definition is required. The relevant practices would be the decision of constitutional cases, the reasoning and argument for such decisional outcomes, and the analysis and assessment of such decisions and arguments.⁴¹ The claim of such a characterization of our Constitution is that these practices are sufficiently well defined as to make the concept of the Constitution meaningful and useful. As with the definition of the relevant community, the definition of the relevant practices is admittedly vague, but seemingly sufficient.

Even if originalists are generally committed to the existence of the Constitution independent of our practices of constitutional argument and decision, it may not be immediately clear whether this commitment has any meaningful consequences with respect to the originalist claims or with respect to the originalism debate. How does the originalists' ontological commitment to the existence of the Constitution shape the defense of originalism against its critics?

The objective, independent Constitution of originalism is fixed and unchanging.⁴² As such, it is contrasted with our social and legal practices, which have changed and will continue to change over time as our political choices evolve in our democratic republic.⁴³ Thus, the fundamental consequence for the originalism debate of the ontological commitment to an independent Constitution is that it rebuts the claim of originalism's critics that the original intentions, understandings, and meanings are not dispositive in constitutional interpretation and decision. If such originalist foundations are not dispositive, then there is the possibility of flux in our constitutional interpretation and decision—flux that the originalists reject.

From the objective existence of the Constitution four further premises may be derived. First, if the Constitution has an independent objective existence, then it may appear more plausible to interpret it as a text consisting of declarative statements. That is because in its objective, independent existence it is more easily divorced from its functional, performative role in our social and political practices. Second, it is natural

Sociological or political analysis of decision would not appear to fall within the ambit of the relevant practices.

41. Constitutional amendments, and the arguments for and against such amendments, would also appear part of the relevant practices.

42. *See, e.g.,* SCALIA, INTERPRETATION, *supra* note 6, at 47 (lamenting the passing of the day when “[W]e believed firmly enough in a rock-solid, unchanging Constitution that [we thought change could only come through amendment, as in the case of the 19th Amendment guaranteeing] women the vote.”).

43. *Id.*

to continue to think that constitutional law is a set of legal propositions, the truth of which is a matter of correspondence with the constitutional text. Third, this model of the Constitution provides a more plausible account of constitutional argument and decision that is based upon *knowing* the relevant constitutional truths, rather than, for example, *choosing* outcomes as a matter of our constitutional practice. Fourth, if our constitutional decision is a matter of knowing objective propositions of constitutional law, then constitutional argument consists of arguments about the truth of such propositions. The commitment to the Constitution itself is thus an important building block for the balance of the even more important, and controversial, originalist claims.

B. The Truth of Propositions of Constitutional Law

Only propositions about the Constitution that state propositions of law are examined here.⁴⁴ Originalists believe that the truth of such propositions is not a theoretically difficult or complex topic. The nature of the truth of such propositions is not unlike the way we understand the truth of legal propositions generally. As a matter of common sense we all think that we know what makes legal propositions true; the uncertainty relates to whether particular legal propositions are true. We generally know what would make X a murderer even when we don't know whether X is a murderer. He would be a murderer, and it would be true to assert the proposition "X is a murderer" if X had intentionally killed another human being without defense or excuse.

Originalism employs this commonsensical view to support a claim that interpretive legal propositions about the Constitution are true if the original understandings or semantic intentions with respect to the Constitution were implied by, or themselves imply, the truth of such claim. Thus, for example, the proposition that the Fourth Amendment precludes warrantless wiretaps is true if, and only if, the original understandings, intentions, or expectations were that warrants were

44. Examples are common, and would include: the First Amendment precludes content-based regulation of broadcast television beyond protecting public decency; the Fourth Amendment prohibits the Federal Government from conducting warrantless wiretaps of telephones; the Second Amendment prohibits prohibitions on the ownership of handguns by the federal government; and the Constitution requires the President of the United States to be at least 35 years old when he assumes office. While other kinds of statements may be made about the Constitution, I will not be concerned with propositions about the literary style of the Constitution, its political theory, or its economic foundations, for example.

required for such wiretaps. While largely commonsensical,⁴⁵ such claims may not be a complete or satisfactory account.⁴⁶ An alternative, pragmatist, inferentialist account would turn the focus from truth conditions and correspondence with an external objective world to the role such propositions of constitutional law play in our discursive practices and in our social and political practices as well.⁴⁷

For the originalist, the truth of such propositions can be determined by a careful, historical reading of the Constitution that looks to the understanding and semantic or outcome expectations with respect thereto, and the associated intentions on adoption or amendment, as the case may be.⁴⁸ The originalists do not often speak expressly in terms of the truth of propositions of constitutional law. Instead, they describe the correct or proper interpretation or meaning of the Constitution.⁴⁹ The originalists' approach to the meaning of the Constitution and their relative indifference to the truth of propositions of constitutional law may appear to be some evidence for the deflationary accounts of truth.⁵⁰ The originalists defend their account of constitutional interpretation without much need to articulate an express theory of the truth of propositions of constitutional law.

45. The account appears commonsensical because it is the way we ordinarily speak about others' utterances. See CASS R. SUNSTEIN, *RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA* 57 (2005) [hereinafter SUNSTEIN, ROBES] (describing the task of interpreting a friend's request for a musical recording when buying a birthday present for a friend who likes the music of Barbra Streisand).

46. The principal objection to this account is offered by Bobbitt and Patterson. See BOBBITT, *INTERPRETATION*, *supra* note 11, at xii–xiv; BOBBITT, *FATE*, *supra* note 1, at 4–7; PATTERSON, *TRUTH*, *supra* note 3, at 151–63. Most simply, they deny that we have an objective Constitution that is ontologically or epistemologically independent of our practices of constitutional law to which an appeal can be made to test the truth of propositions of constitutional law. *Id.*

47. See also ROBERT BRANDOM, *ARTICULATING REASONS: AN INTRODUCTION TO INFERENTIALISM* (2000) (describing how an inferentialist account of propositions that focuses upon the use of propositions in making inferences and stating the consequences of inferences can provide an alternative, pragmatist account of language and meaning without reference to representational concepts); ROBERT BRANDOM, *MAKING IT EXPLICIT: REASONING, REPRESENTING, AND DISCURSIVE COMMITMENT* (1994).

48. Originalism is clear that adoption or amendment determines the time at which the understanding, expectations, or intentions are controlling. See, e.g., RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 363–69 (2d ed. 1997).

49. See, e.g., BORK, *TEMPTING*, *supra* note 18, at 3 (“[T]he Constitution is the trump card in American politics, and judges decide what the Constitution means.”); SCALIA, *INTERPRETATION*, *supra* note 6, at 37 (“I wish to address a final subject: the distinctive problem of constitutional interpretation.”).

50. See, e.g., PAUL HORWICH, *The Minimalist Conception of Truth*, in *TRUTH* 239 (Simon Blackburn & Keith Simmons eds., 1999) (defense of a deflationary account of truth). That lack of attention suggests that truth may be a less important concept in the context of constitutional law.

But originalists are committed to the proposition that there is a truth-value for propositions of constitutional law based upon an historical fact of the matter. What infuriated originalists, originally, with respect to the decisions and opinions of the Warren Court was precisely that indifference to such historical facts of the matter.⁵¹ They continue to be offended, indeed, outraged, by the proponents of the living Constitution who deny the relationship of the truth of propositions of constitutional law to those facts identified in the originalist account, while nevertheless generally taking as a given that there is a historical fact of the matter, in the objective world, about the truth of such propositions.⁵²

It is important to recognize the ahistorical nature of the originalist account of the historical truths of constitutional meaning, and the implications of that ahistoricity for the originalist project. The notion of an unchanging historical fact about the meaning of the Constitution is the foundation for the originalist appeal to such meanings to resolve constitutional disputes.⁵³ The originalists take for granted that this project is consistent with the practice of historians.⁵⁴ The historians who have questioned this premise have, to a very large degree, merely challenged such an approach at the margin.⁵⁵ Those critics have assumed that the

51. Cass Sunstein captures this intensity when he describes the originalists as treating their critics as lawless. SUNSTEIN, ROBES, *supra* note 45, at 54.

52. The existence of such a corresponding fact of the matter with respect to propositions of constitutional law lays the foundation for the originalist approach to judicial review. For the originalist, the role of the constitutional judge is to determine the fact of the matter with respect to propositions of constitutional law and then apply those facts to determine whether a given state action conforms to those relevant constitutional facts. Any broader or different role for judges in constitutional adjudication is anti-democratic and unfounded. This is the sense in which the foundational, representational account of constitutional law embedded in the originalist theory grounds and engenders the originalist account of judicial review, and the concern that a different account of judicial review subverts our Republic's democracy.

53. Thus, the core of the originalist project is that there is an unchanging, ahistorical truth as to the interpretation and meaning of the Constitution that can be discovered. *See, e.g.*, SCALIA, INTERPRETATION, *supra* note 6, at 40–41; BORK, TEMPTING, *supra* note 18, at 161–70.

54. BORK, TEMPTING, *supra* note 18, at 161–67; Scalia, *Originalism: The Lesser Evil*, *supra* note 24, at 856–57.

55. *See* Laura Kalman, *Border Patrol: Reflections on the Turn to History in Legal Scholarship*, 66 FORDHAM L. REV. 87 (1997) (writing over 30 years after Wofford and Kelly, Kalman concludes that the Court had continued to write bad legal history, overstating its conclusions and presuming that the questions it faces have historical answers); Suzanna Sherry, *The Indeterminacy of Historical Evidence*, 19 HARV. J.L. & PUB. POL'Y 437 (1996) (arguing by example for the indeterminacy of historical evidence with respect to constitutional questions); Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 147–49 (arguing that the Supreme Court's use of history is not strong as measured by the standards of professional historiography, because it is constrained by the adjudicative context within which such history is written; note this criticism pre-dates the use of history in modern originalism); John G. Wofford, *The Blinding Light: The Uses of History in Constitutional Interpretation*, 31 U. CHI. L. REV. 502 (1964).

historical project undertaken by the originalists is coherent, and only suffers from excessive ambitions and unrealistic optimism about the ability of such a historical inquiry to secure answers.⁵⁶ Historians may choose their lines of inquiry; lawyers and judges are handed their historical inquiries by the cases at hand.⁵⁷ Historians generally do not believe that the courts (or legal scholars generally) have done a distinguished job in their inquiry, whether committed to conservative or liberal agendas.⁵⁸ That critical historical literature, much of which predates the rise of modern originalism, has gone largely unacknowledged by the originalists, and its criticisms unanswered.

Originalism makes two principal arguments for a preeminent role for historical argument. The first is simply an optimistic denial, the assertion, without more, that history can provide the answers.⁵⁹ That response, in the face of the historians' criticism, as well as the record of legal scholars' consistent failure to get the history right, seems easily dismissed. The second, more interesting argument, is that there is no alternative.⁶⁰ On this account, we must turn to history, because we have no alternative method. This, I think, is a variant of the argument of necessity, discussed below, and is no more plausible.⁶¹ In short, it is certainly not clear that historical research can provide a meaningful constraint on the decision of the hard constitutional questions facing the Court. Those questions pose a serious challenge to the originalist project, but there are even more fundamental concerns.

More importantly, and more fundamentally, there are serious reasons to question whether the originalist project is a coherent strategy. The originalist premise of an unchanging Constitution is an ahistorical claim. Such a claim is inconsistent with ordinary historical understandings.⁶² That is because, as our own history continues to unfold, the significance of past

56. As David Strauss and others have pointed out, the historical research skills required by originalism go well beyond those necessary for mere history. Most simply, that is because adjudication presents questions that cannot be avoided and that uniformly require definitive answers. Historians get to pick their questions and need only produce the best history that the evidence will support. See DAVID STRAUSS, *THE LIVING CONSTITUTION* 18–20 (2010).

57. *Id.*

58. See sources cited *supra* note 55.

59. See, e.g., SCALIA, *INTERPRETATION*, *supra* note 6, at 45.

60. See, e.g., BORK, *TEMPTING*, *supra* note 18, at 251–59, 259 (“No matter how tirelessly and ingeniously the theorists of constitutional revisionism labor, they will never succeed in making the results of their endeavors legitimate as constitutional law.”).

61. See *infra* Part II.D.

62. This argument draws heavily from the argument and analysis offered by Arthur Danto. See ARTHUR C. DANTO, *ANALYTICAL PHILOSOPHY OF HISTORY* (1968) (arguing, among other things, that there can be no end of history, because our historical accounts are shaped by our evolving experience).

events may change, and our understanding of the significant causes in the chain of our prior history may evolve.⁶³ Thus, there can be no final historical account of the past.⁶⁴ Even if this claim is admitted, however, it might be argued that there can be a definitive, final account of a particular narrow factual event like the meaning of a particular constitutional provision at the time of its adoption. Put another way, what could happen that could change how we would describe how a particular provision of the Constitution was understood on adoption?

Such a challenge may be grounded on traditional empiricist assumptions (and vestigial intuitions) about knowledge and language.⁶⁵ Implicit in the challenge is the premise that there are foundational facts about the world that are independent of the rest of our language and experience. That empiricist premise has been challenged in a variety of ways over the past half-century or so, however.⁶⁶ Based upon our surviving or vestigial empiricist intuitions, it might appear that whatever else may change, we know that the guarantee of the Seventh Amendment to a jury trial for suits in which the amount in controversy exceeds twenty dollars is certain. But in an inflationary (or a hypothetical deflationary) world, is that guarantee based upon the nominal amount of twenty dollars, or based upon the purchasing power of twenty dollars in 1791?⁶⁷ On reflection, perhaps none of what we now think we know, and certainly

63. This is captured by the perhaps apocryphal story of the exchange between Secretary of State Henry Kissinger and Chinese Premier Cho En Lai. When Kissinger asked whether Cho thought that the French Revolution was the seminal event in modern European history, Cho allegedly replied “It’s too soon to tell.”

64. DANTO, *supra* note 62, at 14–16.

65. Such theories claim that propositions have truth conditions that can be reduced to descriptions of experiences of the world. That claim has largely been rejected in contemporary philosophy of language. *See, e.g.*, WILLARD VAN ORMAN QUINE, *WORD AND OBJECT* (1960).

66. *See, e.g.*, 3 RICHARD RORTY, *The Very Idea of Human Answerability to the World: John McDowell’s Version of Empiricism*, in *TRUTH AND PROGRESS* 138 (1998) (denying that there is any philosophically helpful way of thinking that our language answers to the world); RICHARD RORTY, *The World Well Lost*, in *CONSEQUENCES OF PRAGMATISM* 3 (1982) (exploring how the concept of alternative conceptual frameworks commits us to a Kantian metaphysics that ought to be rejected in favor of a fully contingent, historicist account); DONALD DAVIDSON, *Reality Without Reference*, in *INQUIRIES INTO TRUTH AND INTERPRETATION* 215 (2001); WILLARD VAN ORMAN QUINE, *WORD AND OBJECT* (1960); WILLARD VAN ORMAN QUINE, *Two Dogmas of Empiricism*, reprinted in *FROM A LOGICAL POINT OF VIEW* 20 (2d ed., rev. 1980) (1953) (arguing against the distinction between analytic and synthetic truth and against the claim that the meaning of propositions or sentences can be reduced to an account of sense data); WILFRID SELLARS, *Empiricism and the Philosophy of Mind*, reprinted in *SCIENCE, PERCEPTION AND REALITY* 127 (1963) (arguing against the empiricist claim that experience provides us with the given, upon which concepts and reasoning act).

67. *See generally* Note, *The Twenty Dollars Clause*, 118 *HARV. L. REV.* 1665 (2005) (exploring the uncertain meaning and purpose of the guarantee of a civil jury trial under the Seventh Amendment).

none of what we believe, about the Constitution is free from the potential for change.⁶⁸

C. *The Meaning of the Constitution*

The originalists' analysis of constitutional meaning is more fully articulated than is their analysis of constitutional truth. Thus, for example, Justice Scalia writes:

... the Great Divide with regard to constitutional interpretation is not that between the Framers' intent and objective meaning, but rather that between *original* meaning (whether derived from Framers' intent or not) and *current* meaning.⁶⁹

This is a bit misleading, because originalists assert that the original meaning is the current meaning.⁷⁰ What Justice Scalia means to say here is that there is a divide between those who would interpret or apply the Constitution—and this difference may be very important—between those who are originalists, believing themselves to be bound by the original meaning, and those who consult the original meaning along with other authoritative sources of law in determining the current meaning of the Constitution in the adjudication of current constitutional disputes.⁷¹ Thus, originalists believe that originalism provides a guide to the meaning of the Constitution.

The originalist account of the Constitution is based on a theory of linguistic meaning. In *Evolving Originalism*,⁷² I outlined an interpretation of Justice Scalia's originalism that emphasized the role of implicature in his interpretation of the constitutional text.⁷³ The use of implicature is fundamentally inconsistent with a picture theory of language. It is

68. For the presentation of just such an account of how we might come to eliminate the mind-body dualism of classical western philosophy, see Richard Rorty, *In Defense of Eliminative Materialism*, 24 REV. OF METAPHYSICS 112 (1970); Richard Rorty, *Mind-Body Identity, Privacy, and Categories*, 19 REV. OF METAPHYSICS 24 (1965).

69. SCALIA, INTERPRETATION, *supra* note 6, at 38.

70. Thus, when Justice Scalia refers to current meaning, he does not mean the current meaning of the constitutional text. Rather, he refers to the meaning of a hypothetical similar text created in the present under contemporary meanings and use.

71. Similarly, Bork writes: "What is the meaning of a rule that the judges should not change? It is the meaning understood at the time of the [Constitution's adoption]." BORK, TEMPTING, *supra* note 18, at 144.

72. André LeDuc, *Evolving Originalism: What's Privileged?* (Jan. 11, 2014) (unpublished manuscript) (on file with the author) [hereinafter LeDuc, *Evolving Originalism*].

73. See generally *id.*

inconsistent because implicature is very largely contextual;⁷⁴ the implications of, or inferences properly drawn from, a statement depend very largely upon the context in which it is made and the intent with which it is uttered or written.⁷⁵ No theory of the meaning of the words of a statement as picturing the world can capture this fundamental dimension of its use.⁷⁶

Attention to semantic and pragmatic implicature reveals a couple of examples of hidden semantic uncertainty unacknowledged by the originalists. These are examples selected by Justice Scalia of transparent and unambiguous constitutional language.⁷⁷ Justice Scalia has often discussed, both in his commentary⁷⁸ and in his opinions,⁷⁹ the Confrontation Clause of the Sixth Amendment which provides, in relevant part: “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him”⁸⁰ In discussing this provision, Justice Scalia asserts that the right to be confronted with witnesses also includes the right to confront such witnesses; indeed, he overlooks or ignores the distinction.⁸¹ When one is confronted with witnesses, one is faced with identified individuals and their testimony heard. An accused then has the right to rebut such witnesses and their testimony. Among other things, this requirement prohibits secret witnesses. When one confronts witnesses, one cross-examines them with the ability to impeach them or otherwise challenge their credibility. The two rights are clearly related, but the transitive and intransitive forms of the verb, “to confront” and “to be confronted with” are clearly distinct.

74. See PAUL GRICE, *STUDIES IN THE WAY OF WORDS* 26–31 (1989) (articulating the rules of conversational implicature that inform our ordinary discourse).

75. See *id.*

76. A picture theory of meaning cannot capture this functional account of language because uses of words change based upon their context; in a sense, the picture would always be changing. Thus, a picture theory cannot capture this complexity any more than the account of language in Wittgenstein’s *Tractatus* can capture the richness of language described in his *Philosophical Investigations*.

77. For example, in defending his view of the confrontation clause, Justice Scalia has written: “[t]here is no doubt what confrontation meant—or indeed means today.” SCALIA, *INTERPRETATION*, *supra* note 6, at 43.

78. *Id.* at 43–44. Justice Scalia has emphasized that to expand the scope of the Amendment works to protect the defendant class at the cost of the victims and society, and to narrow the scope of the Amendment is to broaden the rights of victims and society at the expense of the defendant population. There is not a reading of the Amendment that expands rights and freedom *per se*.

79. *Maryland v. Craig*, 497 U.S. 836, 860 (1990) (Scalia, J., dissenting). See also *Crawford v. Washington*, 541 U.S. 36 (2004) (here, too, Justice Scalia, in this case writing for the Court appears to completely gloss over—or overlook—the difference between the passive and active voices, interpreting the passive voice of the Sixth Amendment confrontation clause as if it were active).

80. U.S. CONST. amend. VI.

81. See, e.g., SCALIA, *INTERPRETATION*, *supra* note 6, at 43–44.

Justice Scalia reads the express provision of the right of a criminal defendant to be confronted with the witnesses against him as creating an implication that such a defendant also has the right to confront such witnesses. That is a natural enough implication. Why require that a criminal defendant be confronted with witnesses against him without also giving him the right to impeach them by confrontation? In most situations, that argument seems powerful. The second right supplements and enhances the first, and together they help assure the criminal defendant of a fair trial.

In the case of child abuse cases, however, the situation is more complex. In the case Justice Scalia addressed, the accused was confronted by the witnesses but was, arguably, denied the right to confront them.⁸² The express right of the Sixth Amendment to be confronted with witnesses imposes no severe cost on such child witnesses. Children can be protected by the justice system while giving the defendant the benefit of knowing the testimony against him. But the right to confront such witnesses imposes real costs. Children are more easily intimidated than adults, and our contemporary society recognizes a duty to protect them from certain unsavory elements of adult life.⁸³ Would the original understanding of the Sixth Amendment right of confrontation—a delightfully ambiguous description—have extended to the right to confront children in abuse cases?

That is a difficult question at a number of levels. It requires considering the more general question of whether the original understanding created an implied right of confrontation. Then the particular issues associated with child abuse cases, hardly common in the Eighteenth Century, and with child witnesses in the Eighteenth Century, again hardly common, must be considered. The implication is neither as simple nor as obvious as Justice Scalia's language might suggest.⁸⁴ This example is important because it

82. *Maryland*, 497 U.S. at 840–42. Witnesses were identified and subject to cross-examination, but were permitted to testify by closed circuit television without violation. There is no suggestion that this was an example of technological change properly taken into account in interpreting the Sixth Amendment. *Id.* Admittedly, the majority opinion reflected the same confusion or, at least, conflation between confronting, and being confronted by.

83. Justice Scalia recognizes this, although he thinks it not relevant in light of his reading of the constitutional command. In the face of the constitutional requirement that defendants be confronted by the witnesses against them, Justice Scalia believes that a calculation of the social costs imposed by such a requirement on children who are victims of sexual abuse is beyond the authority of the courts. The trumping by the Constitution is not unlike Dworkin's view of the trumping authority of principle in the face of mere policy. See generally RONALD DWORKIN, *Hard Cases*, in *TAKING RIGHTS SERIOUSLY* 81 (1977) [hereinafter DWORKIN, *TAKING*].

84. See SCALIA, *INTERPRETATION*, *supra* note 6, at 44. Scott Soames remarks upon Justice Scalia's overly simplistic account of language in Justice Scalia's discussion of *Smith v. United States*, 508 U.S. 223 (1993). See Soames, *Deferentialism*, *supra* note 14, at 598–600.

helps to highlight the complexity of language and of meaning. I do not mean to assert that Justice Scalia is necessarily wrong in his interpretation. It may be that defendants are entitled both to be confronted with, and to confront, the adverse witnesses. But the latter right is not stated by the language of the Sixth Amendment. The more natural interpretation is the narrower reading suggested here.

A second example in which linguistic ambiguity has been largely overlooked arises with respect to the Eighth Amendment. There, too, Justice Scalia has articulated his interpretative position clearly and strongly. In relevant part, the Eighth Amendment provides that “cruel and unusual punishment [shall not] be inflicted.” The interpretation of that provision, particularly as it relates to capital punishment, has been highly controversial. Even so, the Eighth Amendment case law and commentary, as well as that debate, gloss over other sources of ambiguity in that provision. The interpretative challenge is more complex than the proponents acknowledge. The initial ambiguity is whether the prohibition on cruel and unusual punishment applies only to punishments that are *both* cruel and unusual or to all punishments that are *either* cruel or unusual. Both are possible readings of the ordinary English. A third possibility is that “cruel and unusual” is a term of art, with a meaning independent of each of the component words. Admittedly, the jurisprudence of the Eighth Amendment has failed to consider all of these options.⁸⁵ Note, however, that if unusual punishments were to be prohibited that interpretation would make a hash of Justice Scalia’s historically limited interpretation. What is unusual varies over time, including with technological change.⁸⁶

As a doctrinal matter, the choice among these options is clear. Eighth Amendment jurisprudence is substantial and well-articulated.⁸⁷ The prohibition on cruel and unusual punishments in the Eighth Amendment is limited to punishments that are both cruel and unusual.⁸⁸ If we resort to original meanings and focus not upon the intents with respect to expectations but only on linguistic intention, the question becomes far

85. *See, e.g., In re Kemmler*, 136 U.S. 436, 444 (1890) (approving electrocution as means of execution, despite novelty and, implicitly, resulting unusualness). *See generally* Note, *The Cruel and Unusual Clause and the Substantive Criminal Law*, 79 HARV. L. REV. 635 (1966).

86. Moreover, to the extent that technological change is a permissible type of change that the originalists like Justice Scalia and Judge Bork would view as properly taken into account in constitutional interpretation, their strenuous objection to the application of the Eighth Amendment to capital punishment might be undermined. *See generally* Originalism’s Implications, Section II.C.

87. *See generally* WAYNE R. LAFAVE & AUSTIN W. SCOTT, CRIMINAL LAW § 2.14(f) (2d ed. 1986).

88. *Id.*

murkier. The academic scholarship has explored the genesis of the language of the Eighth Amendment and there are substantial questions surrounding its provenance and original meaning.⁸⁹ Why should we be surprised at ambiguity?

But I want again to return to the role of implicature in Justice Scalia's Eighth Amendment interpretation.⁹⁰ He reads "cruel and unusual" as requiring that prohibited punishments be both cruel and unusual, or perhaps as a term of art.⁹¹ He draws from the other references to capital punishment in the Constitution and the social practices of the Eighteenth century an implication that capital punishment is not prohibited.⁹² As with Justice Scalia's application of implicature to the reading of the Sixth Amendment, these are very plausible interpretive implications to draw. But it is not a reading that is supported by the meaning of the text alone, and there are implied arguments and inferences that underlie the interpretation.

The implication that I want to draw here from Justice Scalia's interpretive technique, in which he looks to the text, to the implications that may be drawn from the text and to the implications that may be drawn with respect to the text from original social practices, is that his is not a highly formal theory in practice. In its inferential approach it is highly informal.⁹³ Justice Scalia's presentation suggests that his method is more formal than it is, and he may indeed mistake the level of formality in what he does. But we should not lose sight of the powerful, informal inferences that underlie his interpretive method and the results that he obtains repeatedly in key contexts.

89. See Anthony F. Granucci, "Nor Cruel and Unusual Punishments Inflicted:" *The Original Meaning*, 57 CAL. L. REV. 839 (1969) (arguing that there was no proportionality requirement between crimes and their punishment under the Eighth Amendment for the Founders).

90. I am here agnostic about the technical debates regarding Grice's theory of implicature. Even the critics recognize the importance of Grice's concept of implicature, even when they disagree about the precise rules that apply in natural language. See generally WAYNE A. DAVIS, *IMPLICATURE: INTENTION, CONVENTION AND PRINCIPLE IN THE FAILURE OF GRICEAN THEORY* (1998). Recognizing the concept and importance of implicature in explaining meaning and communication is sufficient for my purpose here.

91. As in Justice Scalia's reading of the Sixth Amendment confrontation clause, there is no attention to the grammatical possibility that the Eighth Amendment's prohibition on "cruel and unusual" punishments might be interpreted as prohibiting punishments that are cruel and also prohibiting punishments that are unusual. See SCALIA, *INTERPRETATION*, *supra* note 6, at 145. The constitutional language alone cannot foreclose that possibility. As remarked above, Justice Scalia's account of language, including the language used in the Constitution, does not acknowledge the sources of ambiguity and uncertainty in that language and in its use.

92. See *id.*

93. For example, Justice Scalia asserts that the references to capital punishment in the Constitution demonstrate that capital punishment cannot be prohibited by the Eighth Amendment. *Id.*

Originalism's practice of interpretation is thus largely inconsistent with its own account of meaning and of its interpretive project. The originalists claim to look to the meaning of the text. While they deny looking only to literal meaning, they do not acknowledge the myriad techniques of implicature that they readily employ. The result of the use of those admittedly natural techniques is that the meaning that is derived is deeply embedded in the practices and outcome expectations of the period.⁹⁴ No semantic account of the meaning of the constitutional text is adequate to answer the questions that arise in the course of constitutional adjudication. Recourse to the implications and entailments of use to answer those questions carries more baggage than the originalists acknowledge.⁹⁵ In particular, the required use of those techniques takes the originalists beyond the semantic meaning of the particular constitutional text.

Whatever the weaknesses of originalism's account of linguistic meaning, its principal focus is upon determining the meaning of a single text, the Constitution. On first impression, originalism would appear to be a translation of one meaning—the original meaning—into a second meaning, the current meaning. For Justice Scalia, it would appear to be that such translation is an isomorphism, mapping all of the original meanings onto all of the current meanings (except for a modest subset of erroneous current meanings that arise out of non-originalist precedent). More importantly, that isomorphism is an identity relationship: the original meaning map. (One-to-one, onto the current meanings, subject to the previously noted *caveat*).⁹⁶ But original meaning is a complex thing.⁹⁶ Various originalisms look to various original meanings. Focusing on the dominant originalism of original semantic understandings, those meanings are the publicly understood semantic meanings, the understandings of what words had been spoken and what they were intended to import.⁹⁷ So

94. I outlined the importation of outcome expectations through the natural techniques of attending to implicature in *Evolving Originalism*. Simply, the literal text of the Constitution, without attention to the implications that follow from that text, cannot answer many of the questions that arise, nor does that text capture how the Constitution was understood, or what it was expected to do. So originalists like Judge Bork and Justice Scalia turn very naturally to the implicatures that flow from that text. In so doing, they look to outcome expectations as well as the text itself.

95. *Id.*

96. See generally LeDuc, *Evolving Originalism*, *supra* note 72, at sections II.A.(1) and (5). Important questions include whether to look to the drafters or the ratifying audience, whether to look at the intentions or the public understanding, and how to interpret the level of generality at which a provision is to be understood.

97. See SCALIA, *INTERPRETATION*, *supra* note 6, at 38. Some originalists and some critics have recognized that the importance of the distinction is at most modest. See, e.g., Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. U. L. REV. 703 (2009) (asserting that, as an empirical matter, the overlap necessarily approaches congruence because of the

the meanings of the words in the contexts in which they were used determine the original meaning that was understood.⁹⁸ However, once the original semantic understanding has been derived, that is the meaning that is to be imported into the present as the current meaning of the provision, too.

D. The Nature of Constitutional Argument

It follows from the account originalism offers of the truth of propositions of constitutional law and the meaning of the Constitution that arguments about constitutional law are properly arguments about the meaning of constitutional provisions. Those arguments are, therefore, arguments about the original understanding or intentions with respect to the meaning of the constitutional provisions. Other claims (with the exception of limited arguments from precedent) are not legitimate on the originalist account. But originalists recognize the tension inherent in this description; our constitutional disputes do not feel like disputes over meaning. For example, while it is possible to describe *Brown v. Board of Education* as a dispute over the terms “equal” (or about the terms “separate” and “equal”), that dispute somehow does not capture either how the parties approached the argument, or what anyone thought was at stake. So originalists have frequently invoked a notion of illegitimate constitutional disagreement.

In such illegitimate disagreements, non-originalist moral values and political judgments intrude, infecting the proper semantic content of legitimate constitutional argument. Much of the stridency of originalist constitutional criticism derives from the combination of substantive disagreement and the characterization of the basis of the argument expressly or implicitly made as illegitimate. Sunstein captures this dimension of originalism quite nicely with respect to Douglas Ginsburg.⁹⁹ Other originalists, including Bork and Justice Scalia write in the same way.¹⁰⁰ The originalist account of constitutional argument is very

nature of communication); Mark Tushnet, *Heller and the New Originalism*, 69 OHIO ST. L.J. 609 (2008) (evidence relevant for one form of originalism is largely equally relevant for the other).

98. The rules of syntax also play a role in this construction of meaning. See *District of Columbia v. Heller*, 554 U.S. 570 (2008) (disparate views as to the syntactical role and import of the initial clause of the Second Amendment).

99. SUNSTEIN, ROBES, *supra* note 45, at 54 (“[Judge Douglas Ginsburg] writes as if those who reject originalism reject the Constitution itself. They’re lawless.”).

100. See, e.g., SCALIA, INTERPRETATION, *supra* note 6, at 39 (characterizing the non-originalists, Justice Scalia writes: “Never mind the text that we are supposedly construing; we will *smuggle* these new rights in, if all else fails, under the Due Process Clause (which, as I have described, is textually

important, but before turning to it I want to explore the originalist characterization of legitimate constitutional argument.

Legitimate constitutional arguments are about the meanings of the constitutional provisions. They are not about whether those meanings are prudent, sensible, or moral.¹⁰¹ A good example is the distinction between the dissent by Justice Stevens¹⁰² and the dissent by Justice Breyer¹⁰³ in *Heller*.¹⁰⁴ Justice Stevens engaged almost exclusively on the meaning of the Second Amendment; Justice Breyer considered the prudence of an interpretation of the Second Amendment that would permit widespread legal ownership of handguns in the current United States, as well as the structural issues of overriding a decision by the District of Columbia democratic government. Originalists like Justice Scalia would apparently consider Justice Breyer's dissent to be an impermissible argument.¹⁰⁵ It is impermissible because it relies upon improper, non-originalist interpretations. The Stevens dissent, by contrast, was simply wrong.¹⁰⁶ It purported to look to original understandings, but erred in its historical analysis.

Originalism not only overturns much of our constitutional doctrine but also would exclude much of our practice of constitutional argument. Originalism's account does not easily fit the facts about how constitutional cases are argued, or how the Constitution has evolved. Constitutional argument—before the courts and by the courts—ranges far afield of mere analysis of semantic meaning. Bobbitt's in-depth analysis of *Missouri v.*

incapable of containing them)." (emphasis added)). See also BORK, TEMPTING, *supra* note 18, at 143. Judge Bork's criticism of the legitimacy of the non-originalist position follows from his position that only originalism is consistent with the fundamental structure of our democratic republic.

101. Judge Bork is perhaps clearest on the separation of the originalist Constitution and morality, but that separation is evident in Justice Scalia's rejection of natural law theory, too. See, e.g., BORK, TEMPTING, *supra* note 18, at 251–53; SCALIA, INTERPRETATION, *supra* note 6, at 45.

102. District of Columbia v. Heller, 554 U.S. 570, 636 (2008).

103. *Id.* at 681 ("the protection the Amendment provides is not absolute.").

104. *Id.* at 570.

105. Thus Justice Scalia writes:

We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding "interest-balancing" approach. . . . A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all.

Id. at 634.

106. With respect to Justice Stevens's dissent, Justice Scalia is equally forceful, but tacitly more respectful of the implicit shared originalist premise of that dissent:

Justice Stevens relies on the drafting history of the Second Amendment—the various proposals in the state conventions and the debates in Congress. . . . [E]ven assuming that this legislative history is relevant, Justice Stevens flatly misreads the historical record.

Id. at 603.

Holland captures this richness.¹⁰⁷ From a different perspective, Fried's account of constitutional doctrine shows a complexity in constitutional analysis that cannot be reduced to semantic questions.¹⁰⁸

Originalism must redescribe constitutional argument in order to account for it within the originalist theory of interpretation. Originalism privileges only certain authorities. Originalism's restriction of interpretive privilege to original understandings, intentions and expectations is central to originalism. The characterization of constitutional argument as properly limited to disputes about the original semantic understanding follows from the limited authorities that originalism recognizes. Unfortunately, such a redescription of constitutional disputes appears unpersuasive as a descriptive account. It is unpersuasive because the range of arguments generally accepted by the courts as relevant in constitutional adjudication is not limited to inquiries into semantic meanings. To the extent that this claim needs a defense, originalists concede the inaccuracy of their account as a descriptive matter; that inaccuracy simply reflects the fundamentally reformist thrust of originalism for our constitutional practices. The normative account is derivative of the argument offered for originalism itself. The argument for the illegitimacy of other types of established constitutional argument follows because those other modes of constitutional argument are arguments from the other types of authority. Because of the privilege that originalism gives to the original understandings, expectations, and intentions, it follows either that such other arguments are illegitimate (in the case of exclusive originalism) or weak (in the case of non-exclusive originalism).

Constitutional arguments are, for public understanding originalists, in Dworkin's term,¹⁰⁹ semantic arguments; they are arguments about the meaning of provisions of the Constitution. Because the relevant meanings are historical meanings, those semantic arguments are about historical semantics.¹¹⁰ Even for original expectations or original intent originalists, the focus is at most broadened to include pragmatics.¹¹¹ Such originalists

107. 252 U.S. 416 (1920). *See generally* BOBBITT, INTERPRETATION, *supra* note 11, at 48–63.

108. *See* CHARLES FRIED, SAYING WHAT THE LAW IS: THE CONSTITUTION IN THE SUPREME COURT 42 (2004) [hereinafter FRIED, SAYING WHAT THE LAW IS] (describing constitutional doctrine).

109. *See* RONALD DWORKIN, LAW'S EMPIRE 45–46 (1986) (describing the so-called semantic sting) [hereinafter DWORKIN, EMPIRE].

110. It is for this reason that recourse to historical dictionary meanings is so prevalent. *See, e.g.*, RALPH A. ROSSUM, ANTONIN SCALIA'S JURISPRUDENCE: TEXT AND TRADITION 209–12 (2006).

111. Some sense of pragmatics, the context in which a proposition appears, would appear implicated by Justice Scalia's claim that in constitutional interpretation, context is all. *See* SCALIA, INTERPRETATION, *supra* note 6, at 37.

consider what was expected to be accomplished by the constitutional utterance. For all originalists, the source of the constitutional dispute would appear to be language, and the proper focus for the resolution of such controversies would appear to fall on the language of the original text.¹¹² That characterization of constitutional disputes and the relevant arguments that should be deployed accurately describes much constitutional argument and decision by originalists.¹¹³ But it leaves open what to make of those disputes for which there is no apparent answer as to the original understanding, expectations, or intentions.

Originalists appear to differ as to the nature of those arguments where there is no answer to the choice of original readings. Bork argues that the constitutional text falls away in that case, as if obscured by an inkblot.¹¹⁴ Most originalists are not so radical, however, reverting to other modes of argument to resolve such cases.¹¹⁵ Barnett, for example, would look to the natural law of the founders, for example, to provide arguments for the resolution of such hard questions.¹¹⁶

E. Natural Law Originalism

Natural law originalism warrants a brief separate analysis of its ontology and philosophy of language. Natural law originalism carries its philosophical commitments openly. Justice Thomas and Randy Barnett provide perhaps the clearest statements of natural law originalism.¹¹⁷ Natural law originalism appears paradoxical. There is an obvious inherent tension between a theory of law that does not reduce law to positive law

112. See, e.g., *District of Columbia v. Heller*, 554 U.S. 570 (2008) (addressing the original understanding of the Second Amendment); *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (addressing the original understanding of the Second Amendment and of the Fourteenth Amendment with respect to the incorporation of the rights under the Bill of Rights against the states).

113. See, e.g., *McDonald*, 561 U.S. at 742; *Citizens United v. FEC*, 558 U.S. 310 (2010); *District of Columbia v. Heller*, 554 U.S. 570 (2008).

114. BORK, *TEMPTING*, *supra* note 18, at 166.

115. It is for his willingness to consider such other forms of argument that Justice Scalia characterizes himself as a “faint-hearted” originalist. See Scalia, *Originalism: The Lesser Evil*, *supra* note 24, at 864 (acknowledging that a penal statute prescribing flogging would today properly be struck down as violating the Eighth Amendment). See also SCALIA, *INTERPRETATION*, *supra* note 6, at 139–40 (acknowledging his acceptance of non-originalist precedent under the doctrine of *stare decisis* as a pragmatic exception to his originalism).

116. See BARNETT, *LOST*, *supra* note 13, at 54–60.

117. See *id.*; Clarence I. Thomas, *Toward a “Plain Reading” of the Constitution: The Declaration of Independence in Constitutional Interpretation*, 30 *HOW. L.J.* 983 (1987) [hereinafter Thomas, *Plain Reading*]. See also SCOTT DOUGLAS GERBER, *TO SECURE THESE RIGHTS: THE DECLARATION OF INDEPENDENCE AND CONSTITUTIONAL INTERPRETATION* (1996) [hereinafter GERBER, *DECLARATION OF INDEPENDENCE*].

and a theory of constitutional interpretation that privileges the original understanding or intentions with respect to texts.¹¹⁸

Defining natural law is not uncontroversial,¹¹⁹ but for our purposes, natural law asserts that law is based upon, derived from, and legitimated by, the requirements of morality that are themselves conceived as instrumental for securing or enhancing human flourishing.¹²⁰ Robert George argues that natural law operates at a different conceptual and functional level than positive law.¹²¹ Positive law is the specification of the more general, or conceptual, requirements of natural law.¹²² Functionally, positive law chooses an arbitrary or conventional specification that instantiates the conceptual command of natural law.¹²³ Natural law does not command us to drive the right or left hand side of the road. But it does require that we value health and life and arrange our affairs in a manner that protects them. Accordingly, when we create roads, and particularly as we come to employ mechanical means of locomotion, natural law would

118. In the words of Randy Barnett, “A natural law, whatever that might be . . . seems hardly worth the paper it isn’t written on.” RANDY BARNETT, *THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW* 4 (1998). In light of the apparent consensus among intellectual historians of the early American republic that most of the drafters and ratifiers would have subscribed to a theory of natural law and natural rights, it may also appear paradoxical that natural law originalism is not the canonical form of originalism, and is instead a minority strand. See, e.g., Michael P. Zuckert, *Founder of the Natural Rights Republic*, in THOMAS JEFFERSON AND THE POLITICS OF NATURE 11 (Thomas S. Engeman ed., 2000); BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967) (emphasizing the role of classical republican thinking as well as natural rights theory in the political philosophy of the Founding Generation); CARL BECKER, *THE HEAVENLY CITY OF THE EIGHTEENTH-CENTURY PHILOSOPHERS* (1932); but see GARRY WILLS, *INVENTING AMERICA: JEFFERSON’S DECLARATION OF INDEPENDENCE* (1978) (arguing for the greater influence of Francis Hutcheson and other Scottish philosophers rather than Locke); see also GERBER, *DECLARATION OF INDEPENDENCE*, *supra* note 117.

119. See generally ROBERT P. GEORGE, *Natural Law and Human Nature*, in *IN DEFENSE OF NATURAL LAW* 83 (1999) [hereinafter GEORGE, *NATURAL LAW*] (exploring the necessity of grounding natural law in human nature).

120. See generally GEORGE, *Human Flourishing as a Criterion of Morality: A Critique of Perry’s Naturalism*, in *NATURAL LAW*, *supra* note 119, at 259, 264–66 (arguing that the concept of flourishing provides a metric by which to compare and rank alternative or competing human projects); but see GILBERT HARMAN, *Human Flourishing, Ethics, and Liberty*, in *EXPLAINING VALUE AND OTHER ESSAYS IN MORAL PHILOSOPHY* 151 (2000) [hereinafter HARMAN, *EXPLAINING VALUE*] (arguing that such concepts of human good are inadequate to support moral theory because we cannot define human flourishing with sufficient precision and with sufficient consensus to identify the moral rules that would support such a result). Classically, natural law was purported to be derived from nature and natural laws. See, e.g., GEORGE, *Natural Law and Human Nature*, in *NATURAL LAW*, *supra* note 119, at 83; GEORGE, *Natural Law and Positive Law*, in *NATURAL LAW*, *supra* note 119, at 102.

121. GEORGE, *Natural Law and Positive Law*, in *NATURAL LAW*, *supra* note 119, at 110–11.

122. See generally JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 281–86 (1980) [hereinafter FINNIS, *NATURAL LAW*]; GEORGE, *Natural Law and Positive Law*, in *NATURAL LAW*, *supra* note 119, at 108–11.

123. See FINNIS, *NATURAL LAW*, *supra* note 122, at 284–85.

require that we adopt a convention, reinforced by law, of driving on either the right or left hand side of the road to avoid the confusion, delay, and injuries that would arise in the absence of such a convention. The legal specification of the side of the road on which to drive is thus consistent with natural law grounded on a concept of human flourishing, at least for natural law theorists. Some natural law translates more directly into positive law, of course, as in the case of prohibitions on murder. It is not clear that there are elements of constitutional law that relate so directly to natural law. The requirement of attaining a minimum age in order to run for Congress or the presidency, and the twenty-dollars clause, for example, would not appear to be directly derived from natural law. But to the extent that the Constitution creates a democratic federal government that makes provision for the protection of the natural rights of individuals, it may be derived from the requirements of natural law according to natural law theorists. Thus, while such positive constitutional law is not determinately required by natural law, under modern natural law theory it is nevertheless valid if and to the extent it is consistent with a determination implementing such natural law.¹²⁴

Justice Thomas, the clearest example of a natural law proponent on the bench, incorporates natural law into his originalism because he views the natural law prism as the best theoretical framework within which to analyze the understandings and intentions of the constitutional text. That is in part because he reads the Constitution as almost *in pari materia* with the Declaration of Independence.¹²⁵ To strip the interpretative theory of a natural law dimension would, on Justice Thomas's published view, forfeit an important source of constitutional meaning.¹²⁶ But the meaning he seeks is the original meaning of the provisions of the constitutional text. Natural law's Constitution may be understood as a positive instantiation of the natural law, a *determinatio* in the classical lexicon of natural law.¹²⁷ What is somewhat problematical in such a characterization, however, is the extent to which the Constitution is expressed in broad, normative terms. It is more difficult to interpret certain provisions as merely

124. GEORGE, *Natural Law and Positive Law*, in NATURAL LAW, *supra* note 119, at 108.

125. See Thomas, *Plain Reading*, *supra* note 117; see also Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POL'Y 63 (1989) [hereinafter Thomas, *Higher Law*].

126. See Thomas, *Plain Reading*, *supra* note 117, at 985 (arguing that recourse to the natural principles of the Declaration of Independence avoids the "sideshow" of states' rights interpretative approaches).

127. See generally FINNIS, NATURAL LAW, *supra* note 122, at 281–86; GEORGE, *Natural Law and Positive Law*, in NATURAL LAW, *supra* note 119, at 108–11.

specifications. For example, when the Constitution provides that citizens are entitled to the equal protection of the law,¹²⁸ unless that statement of positive law is also taken as a statement of natural law, it must be characterized as a specification of the natural law. The difficulty arises because the abstraction with which the constitutional directive is stated appears more like a statement of the natural law than a *determinatio* or specification of that law. If that provision of the Fourteenth Amendment is at once positive and natural law, then it would appear to be valid only insofar as it correctly states the natural law.

In natural law originalism, the truth of propositions of constitutional law would appear to depend upon whether that law was characterized as positive or natural law. In general, it would appear that much of the Constitution, like the balance of our law, is best characterized as positive law. In that case, the truth of propositions of constitutional law would be determined by their correspondence with the text of the Constitution.¹²⁹ The more fundamental elements of natural law would not appear to be textual, of course.¹³⁰ They are true because of the nature of man and of the world, generally.¹³¹ Thus, for natural law originalism, the truth of propositions of constitutional law is determined by constitutional text and natural law, depending upon the nature of the law expressed by the particular constitutional provision in question.¹³² One example of the interaction of positive and natural law arises with respect to the natural law precepts articulated by the Declaration of Independence and the Preamble to the Constitution. Traditional positivist originalism rejects an authoritative status for such texts.¹³³ Natural law originalists like Justice Thomas and Barnett regard texts like the Declaration of Independence as interpretively authoritative, along with the Preamble to the Constitution. In

128. U.S. CONST. amend. XIV § 1.

129. This claim is neither as obvious nor as uncontroversial as might appear. Some natural law theorists appear to argue that the truth of propositions of law is determined only by the positive law which may vary from the natural law. See, e.g., GEORGE, *Natural Law and Positive Law*, in *NATURAL LAW*, *supra* note 119, at 102, 110.

130. Instead they are discovered by the application of practical reason, not unlike natural laws. It is thus reason, not history, that establishes natural law.

131. They are made true by the nature of the world, and their very existence is a matter of the nature of that external world.

132. Thus, for Justice Thomas, the truth of a proposition of natural rights would appear to determine the truth of proposition about the scope of the privileges and immunities clause of the Fourteenth Amendment. See text *infra* notes 152–64.

133. See, e.g., SCALIA, *INTERPRETATION*, *supra* note 6, at 136 (contrasting the aspirational language and substance of the Declaration of Independence with the prosaic language and positive law of the Constitution, and arguing from that difference that the principles of the Declaration ought not to be taken into account in the interpretation of the Constitution).

those texts they find express statements of the theory of natural rights that they argue should be incorporated in the interpretation of the original understanding and intentions with respect to the constitutional text. Nevertheless, those natural law texts are authoritative only as interpretive aids in the interpretation of the constitutional text.

Justice Thomas appears to equivocate when he addresses how he would use such natural law theory.¹³⁴ Sometimes he characterizes the natural law theory of the original relevant actors as giving us the principles with which to read and interpret the Constitution: “[t]he first principles of equality and liberty should inspire our political and constitutional thinking.”¹³⁵ Elsewhere he puts the point more directly:

Rather than being a justification of the worst type of judicial activism, higher law is the only alternative to the willfulness of both run-amok majorities and run-amok judges.¹³⁶

What Justice Thomas means by “inspire” and by his direct appeal to higher law appears to be that the principles of natural law should be read into the textual interpretation of the Constitution.¹³⁷ With such principles, including in particular the principle of equality, the alleged errors of both *Plessy* and *Brown* would be avoided. Similarly, invoking the principle of liberty can assist in the interpretation of the Constitution, including the Privileges and Immunities Clause.¹³⁸

Natural law’s account of meaning is generally based upon a classical representational account of language.¹³⁹ Under that theory, the meaning of words arises from the representation of the world by such words.¹⁴⁰ Words

134. See Thomas, *Plain Reading*, *supra* note 117, at 985 (“the jurisprudence of original intention’ cannot be understood as sympathetic with the *Dred Scott* reasoning, if we regard the ‘original intention’ of the Constitution to be the fulfillment of the ideals of the Declaration of Independence.”); Thomas, *Higher Law*, *supra* note 125; Justice Thomas appeared to distance himself from such an approach in his confirmation hearings. See *Nomination of Judge Clarence Thomas to Be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 102d Cong., 1st Sess. 112 (1991) (“I don’t see a role for the use of natural law in constitutional adjudication.”), available at https://www.senate.gov/pagelayout/reference/one_item_and_teasers/Supreme_Court_Nomination_Hearings.htm.

135. Thomas, *Plain Reading*, *supra* note 117, at 995.

136. Thomas, *Higher Law*, *supra* note 125, at 64.

137. Thomas, *Plain Reading*, *supra* note 117, at 991–92 (endorsing the Justice Harlan’s theory of a color blind Constitution and criticizing the reliance upon a finding of psychological and sociological harm arising from racial discrimination as the stated rationale for *Brown*).

138. See Thomas, *Higher Law*, *supra* note 125, at 66–67.

139. See generally Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 286 (1985) [hereinafter Moore, *Interpretation*] (interpretive theory based upon real moral values, not mere social practices or conventions).

140. *Id.* at 300–01.

generally correspond to things in the world.¹⁴¹ On this theory, there is a fact of the matter about the Constitution in the world, and what we say about the Constitution refers to that objective Constitution and its provisions. It is a very commonsensical and intuitive account of linguistic meaning, and an account by no means confined to natural law originalism.¹⁴² Indeed, the notion that the truth of propositions is determined by their meaning and the world is sometimes referred to as the meaning-truth platitude.¹⁴³ Such an account, classically, is an account of the truth of declarative propositions.¹⁴⁴ While propositions about the Constitution may appear to be of that nature, the provisions of the Constitution are themselves manifestly not declarative propositions.¹⁴⁵ It may be questioned whether propositions stating interpretations of the Constitution are themselves declarative or not. If not, the force of the meaning-truth platitude may be diminished or lost.

For natural law originalists, constitutional controversies are not reducible to semantic questions.¹⁴⁶ That is because such controversies must address what the natural law is, and that law is not reducible to semantics because it makes substantive claims about real moral values.¹⁴⁷ Such disputes are substantive disputes about the substantive natural law. The arguments that natural law originalists deploy, however, are not so different from their positivist brethren. They, too, look to the original

141. *Id.*

142. *See, e.g., id.* at 341 (“people intend in their use of words like ‘death,’ ‘bird,’ ‘malice,’ or ‘vehicle,’ to refer to kinds of things they believe really to exist in the world.”).

143. *See* Crispin Wright, *Kripke’s Account of the Argument against Private Language*, 81 J. PHIL. 759 (1984). For a sophisticated example of taking the proposition that meaning is about representing the world, see SCOTT SOAMES, *PHILOSOPHY OF LANGUAGE* 1 (2010); *but see* 3 RICHARD RORTY, *The Very Idea of Human Answerability to the World: John McDowell’s Version of Empiricism*, in *TRUTH AND PROGRESS* 138 (1998) (denying that there is any philosophically helpful way of thinking that our language answers to the world).

144. *See generally* J. L. AUSTIN, *HOW TO DO THINGS WITH WORDS* (J. O. Urmson & Marina Sbisa eds., 2d ed. 1962) (arguing that certain kinds of utterances may be infelicitous or unsuccessful, but not true or false).

145. This seemingly obvious claim, applicable to the Constitution as well as to all other authoritative statements of law, is rarely noted or its implications explored. *But see* Charles Fried, *On Judgment*, 15 LEWIS & CLARK L. REV. 1025, 1026–28, 1041–43 (2011) (distinguishing statements of historical facts from statements of legal and constitutional judgments).

146. For example, for a natural law originalist, the question of what rights are retained by the people under the Ninth Amendment is not a question of the semantic meaning of the Ninth Amendment, but a question of the scope of natural rights retained under our federal democratic republic.

147. The natural law has a substantive content, and disputes may arise with respect to that content. Thus, for example, there may be a substantive dispute whether slavery is permissible, or whether intermarriage between persons of different races may be prohibited by the state. Those are not aptly described as semantic disputes.

understanding of the text, but in so doing, they take into account the natural law context that the original actors shared in adopting such texts. It is helpful to highlight some examples in which those different approaches have yielded the same result, and instances in which natural law originalism appears to support a different outcome. One of the simplest ways to do this is to look at the relatively infrequent constitutional cases in which Justices Scalia and Thomas disagreed.¹⁴⁸

When Justice Thomas invokes natural law to reach a different result or to challenge Justice Scalia's originalism as facile or simplistic, he is often pursuing one of several strategies. First, Justice Thomas is more skeptical of precedent that cannot be supported on a natural law originalist interpretation. Thus, for example, Justice Thomas appears prepared to overturn the *Slaughter House Cases*¹⁴⁹ as adopting too narrow and crabbed a reading of the concept of privileges and immunities protected under the Constitution.¹⁵⁰ Similarly, Justice Thomas has indicated that he is prepared to reverse settled precedents on the scope of the condemnation power permitted under the Fifth Amendment.¹⁵¹

Second, and more importantly, Justice Thomas relies upon a theory of natural law to inform his analysis of the structure of the Constitution and the rights protected by it. *McDonald v. Chicago*¹⁵² presented an example of such a use. Decided two years after *Heller* struck down a restrictive gun control ordinance of the District of Columbia, *McDonald* considered the constitutionality of a similar ordinance enacted by the City of Chicago, Illinois. Thus, the *McDonald* Court had to consider whether the provisions of the Second Amendment applied against the states and their instrumentalities. In an opinion written by Justice Alito and joined by Justice Scalia, the Court held that the requirements of due process on the Fourteenth Amendment incorporated the protection of the Second Amendment,¹⁵³ thus invalidating the City of Chicago's ordinance.¹⁵⁴ The

148. See also Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7 (2006) (criticizing Justice Scalia as neither endorsing nor defending the implications of his originalism).

149. *Slaughter-House Cases*, 83 U.S. 36 (1873).

150. *McDonald v. City of Chicago*, 561 U.S. 742, 805 (2010) (Thomas, J., concurring).

151. *Kelo v. City of New London*, 545 U.S. 469, 522 (2005) (Thomas, J., dissenting).

152. *McDonald*, 561 U.S. at 805 (Thomas, J., concurring).

153. *Id.* at 778 ("In sum, it is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty.").

154. *Id.* at 790.

Court's reasoning thus relied on a traditional application of the doctrine of substantive due process to a case of first impression.¹⁵⁵

Justice Thomas concurred in the result, but declined to join key parts of the Court's opinion.¹⁵⁶ In particular, by declining to join parts IV and V of the Court's opinion (in which Justice Scalia also concurred), Justice Thomas repudiated the substantive due process argument of the Court.¹⁵⁷ Instead, Justice Thomas proposed to protect the Second Amendment rights of the petitioners by implicitly overruling over a century of Fourteenth Amendment precedent¹⁵⁸ and finding those rights protected as privileges and immunities of citizens, protected under the Privileges and Immunities Clause of the Fourteenth Amendment.¹⁵⁹ In so doing, Justice Thomas stood the reasoning of the *Slaughter House Cases* on their head.¹⁶⁰ That case, after all, held that pre-existing rights that arose under natural law were not within the ambit of the Privileges and Immunities Clause of the Fourteenth Amendment.¹⁶¹ He did so on two grounds. Justice Thomas's principal argument was based upon natural law.¹⁶² Justice Thomas proposed to read the meaning of the Fourteenth Amendment by reference to natural law.¹⁶³ While that amendment spoke literally in terms of "privileges and immunities" Justice Thomas argued that it would have been originally understood to have encompassed rights as well.¹⁶⁴ Thus, in

155. It was novel because the rights protected by the Second Amendment presented a case of first impression, but the analysis of whether such rights were incorporated by the Fourteenth Amendment and protected against the States employed by the Court was the classic inquiry into whether such rights were fundamental.

156. *McDonald v. City of Chicago*, 561 U.S. 742 (2010). Justice Thomas's opinion elicited an almost hysterical reaction in parts of the academy. See, e.g., *Incorporation of the Right to Keep and Bear Arms*, 124 HARV. L. REV. 229, 239 ("Before assuming office, judges take an oath to uphold the Constitution—it will be a sad day for liberty and law if we can no longer take seriously any judge who means it.").

157. *McDonald*, 561 U.S. at 806 (Thomas, J., concurring) ("I cannot agree that [the right to keep and bear arms protected by the Second Amendment] is enforceable against the States through a Clause that speaks only to 'process.'").

158. Expressly limited, or overruled, in this context, would be the *Slaughter-House Cases*, 83 U.S. 36 (1873) and *United States v. Cruikshank*, 92 U.S. 542 (1876).

159. *McDonald*, 561 U.S. at 812–19, 821–35 (Thomas, J., concurring).

160. That case concluded that the privileges and immunities of a citizen of the United States did not include the rights of a citizen as a citizen of a state. *Slaughter-House Cases*, 83 U.S. at 78–79. The Court reached that conclusion even while implicitly relying on a natural law theory of citizens' rights. Justice Thomas would use natural law theory as the measure of the privileges and immunities protected under the Fourteenth Amendment.

161. *Id.* at 76 (citing classical natural law reasoning of *Corfield v. Coryell* articulating the fundamental rights under natural law that are protected by the Privileges and Immunities Clause).

162. *McDonald*, 561 U.S. at 812–23 (Thomas, J., concurring).

163. *Id.* at 852–55 (Thomas, J., concurring) (leaving open the question whether unenumerated rights are incorporated into the Fourteenth Amendment).

164. *Id.* at 812–14 (Thomas, J., concurring).

McDonald, natural law is employed to derive a fundamentally different approach to a classic problem of modern constitutional law, and a fundamentally different rationale for striking down the ordinance in that case.

Natural law originalism thus highlights the limitations imposed upon the context taken into account in determining constitutional meaning by positivist originalism. Positivist originalism must disregard the moral and philosophical premises of the relevant original actors, even with respect to the constitutional provisions that are written in abstract, principled terms. Positivist originalism imposes its own positivist premises on the articulation and interpretation of original understandings, intentions and expectations. Natural law originalism is a plausible form of originalism, as Justice Thomas and others¹⁶⁵ have demonstrated. But there is a real tension between natural law and the fundamental claims of originalism. Natural law originalism purports to harmonize the demands of natural law with positive law through the concept of specification or *determinatio*. That harmonization is not easy with respect to the constitutional provisions that speak in broad, principled terms. Finally, perhaps most startling of all is the degree to which natural law originalism results in constitutional interpretation similar to that of classical positivist originalism.

Natural law originalism is a natural law theory, relying expressly upon philosophical premises.¹⁶⁶ Those premises identify the sources of law, however, and natural law originalism may not as apparently rely upon ontological and linguistic commitments. Natural law originalism is committed, however, to an objective constitution. That Constitution is derivative of the natural law grounded in nature.¹⁶⁷ Moreover, for natural law originalism the truth of propositions of that constitutional law is determined by the relationship of such propositions to that natural world.¹⁶⁸ Thus, while the content of natural law originalism's Constitution differs from the Constitution of positive law originalism (although substantively much less than we might have anticipated),¹⁶⁹ its underlying

165. See BARNETT, LOST, *supra* note 13; GERBER, DECLARATION OF INDEPENDENCE, *supra* note 117.

166. See generally, e.g., BARNETT, LOST, *supra* note 13.

167. See Robert P. George, *Natural Law and Human Nature*, in NATURAL LAW THEORY: CONTEMPORARY ESSAYS 31 (Robert P. George ed., 1992).

168. See Jeffrey Stout, *Truth, Natural Law, and Ethical Theory*, in NATURAL LAW THEORY: CONTEMPORARY ESSAYS, *supra* note 167, at 71, 76–77.

169. Given the intensity and perceived importance of the Hart-Fuller debate in the mid-twentieth century, we might have anticipated more substantial substantive differences between natural and positive originalist constitutional law.

ontological and other linguistic philosophical commitments are largely the same.

F. The Implications of Originalism's Philosophical Commitments

Originalists are committed to the existence of the Constitution and constitutional law independent of what we argue and say about that law.¹⁷⁰ They are committed to the existence of such an objective Constitution, and the project of constitutional adjudication is principally a matter of interpreting that Constitution and applying it to the facts at hand. The objective Constitution is the touchstone to which they appeal in the argument that the “Lost” Constitution is to be restored and in criticizing the constitutional jurisprudence of their non-originalist critics.¹⁷¹ Accordingly, if there is a disagreement as to the proper interpretation or application of the Constitution, it is a question about that objective Constitution as to which there will be, at least generally, a single correct answer. The commitment to that objective, external existence is what supports the originalists’ radical critique of current constitutional law. They can reject our established practices of interpretation and construction by appealing to that objective Lost Constitution.¹⁷² This ontological commitment shapes the originalist approach to the debate. It grounds the originalist confidence that their critics are not merely mistaken; they are lawless, as Sunstein has pointed out.¹⁷³ Many of originalism’s critics share this same ontological commitment, although the Constitution they articulate is radically different. Natural law originalism carries the same ontological commitments, but grounds the objective existence of the Constitution in natural law. The source and legitimacy of the Constitution is natural law.

One particularly important and controversial claim flows from the originalist account of meaning. Originalism claims to solve the purported problem of determining the level of generality at which a constitutional provision speaks.¹⁷⁴ Tribe challenges the originalist project, and,

170. See BORK, TEMPTING, *supra* note 18, at 176; SCALIA, INTERPRETATION, *supra* note 6, at 37–41 (implicitly assuming that there is a constitutional text whose meaning can be ascertained and applied in adjudication).

171. See, e.g., BARNETT, LOST, *supra* note 13.

172. See, e.g., *id.*, at 354–57.

173. See SUNSTEIN, ROBES, *supra* note 45, at 54.

174. See SCALIA, INTERPRETATION, *supra* note 6, at 135 (arguing that context may be taken into account to disarm Tribe’s challenge that the level of generality at which a constitutional provision is to be interpreted is indeterminate).

implicitly, its account of constitutional meaning, based upon what he characterizes as the problem of the level of generality in constitutional statement. According to Tribe uncertainty as to level of generality or particularity is inherent in the natural language formulations of the Constitution.¹⁷⁵ Thus, a provision may state a particular rule or an abstract principle. According to Tribe, determining the better reading is a complex, ad hoc task that cannot be accomplished under the principles of originalism.¹⁷⁶

Originalists generally deny that there is a problem of generality.¹⁷⁷ Under originalism, constitutional decision-making is relatively simple. An originalist merely extracts from the language of the relevant constitutional provision a governing principle that is then applied to the case at hand.¹⁷⁸ This is the methodology Judge Bork¹⁷⁹ and Justice Scalia¹⁸⁰ endorse, for example. According to originalism, therefore, there is no problem as to the generality of a constitutional provision; the text—together with the context—supplies the answer.¹⁸¹ The text and context supply the answer in the same way that they supply the answer to other interpretive questions. On the originalist view, there is nothing peculiar about the problem of generality. Indeed, as we have seen, the originalists are surprisingly unexamining in their appeal to constitutional principles and to the reading of constitutional synecdoches.¹⁸²

175. Elsewhere Tribe reiterates his argument that the constitutional text does not have a single level of generality expressed in its text with the question whether there is a First Amendment law for Betamax video cassettes that is different from the law for VHS video cassettes. See LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 79 (1991) [hereinafter TRIBE & DORF, READING]. If there is such a First Amendment law of Betamax video cassettes, it is presumably increasingly of less importance.

176. *Id.* at 14–15.

177. See SCALIA, INTERPRETATION, *supra* note 6, at 134–42; BORK, TEMPTING, *supra* note 18, at 235–40 (endorsing Justice Scalia’s appeal to a principle of least generality to determine the scope of constitutional guarantees in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989)).

178. See BORK, TEMPTING, *supra* note 18, at 147–49 (the role of a judge is “to find the meaning of a text . . . and to apply that text to a particular situation”).

179. *Id.*

180. See SCALIA, INTERPRETATION, *supra* note 6, at 37–38 (example of the interpretation and application of the First Amendment to prevent censorship of private letters despite not qualifying as either speech or press, the only forms of expression mentioned expressly in the text).

181. Thus, Judge Bork writes:

The role of a judge committed to the philosophy of original understanding is not to “choose a level of abstraction.” Rather, it is to find the meaning of a text—a process which includes finding its degree of generality, which is part of its meaning—and to apply that text to a particular situation.

BORK, TEMPTING, *supra* note 18, at 149.

182. See, e.g., SCALIA, INTERPRETATION, *supra* note 6, at 38. The entire project of determining inherent principles or reading constitutional provisions as synecdoches opens up a degree of

Judge Bork and Justice Scalia acknowledge the necessity of extracting, constructing and unearthing the principle underlying and inherent in the constitutional text. They generally propose to do so based upon the original expectations or semantic intentions of the draftsmen and ratifiers. They do not acknowledge that task either to be particularly difficult or to require a departure from originalism. For Tribe, however, the problem of the appropriate level of generality to be accorded constitutional provisions is pervasive and difficult. Tribe's interpretive problems appear to grow out of his tacit premise that the application of every constitutional rule requires an interpretation. For the reasons referenced above, however, that premise is questionable.¹⁸³

For Justice Scalia, it is as if he need do nothing more than read the provision, recognizing it either as a specific rule or as a constitutional synecdoche. In his account of originalism, he sometimes sounds almost Wittgensteinian, emphasizing that the judge does not need an interpretation; he simply grasps the rule.¹⁸⁴ Occasionally, however, Justice Scalia acknowledges the need for more theory or analysis in the judicial interpretative exercise. In those cases he invokes one or more of three aids. First, of course, is to look at what the contemporaries of the provision said about the provision.¹⁸⁵ Second, Justice Scalia sometimes seems to invoke not the semantic intentions with respect to the provision but the drafters' and ratifiers' expectations.¹⁸⁶ Although Justice Scalia denies endorsing

creativity—and loosens the tethers of interpretation and application to the text in ways that originalism does not defend or even, ordinarily, acknowledge. See generally LeDuc, *Evolving Originalism*, *supra* note 72, at Section II.A.(5). For an example of apparent tolerance for, and comfort with, the imputation of synecdoche into constitutional text, see BALKIN, *LIVING ORIGINALISM*, *supra* note 3, at 13.

183. See André LeDuc, *Positivism, Formalism and Interpretation: Unstated Premises in the Debate over Originalism*, Section II.C.1 (Nov. 21, 2014) (unpublished manuscript on file with author).

184. Thus Justice Scalia writes:

I do not suggest, mind you, that originalists always agree upon their answer. . . . But the originalist at least knows what he is looking for: the original meaning of the text. Often—indeed, I dare say usually—that is easy to discern and simple to apply.

SCALIA, *INTERPRETATION*, *supra* note 6, at 45. Justice Scalia's analysis does not build on Wittgenstein, of course, because Justice Scalia does not appear to acknowledge or perhaps even recognize that his casual use of concepts like that of synecdoche obscures a wide range of questions about linguistic meaning and use. Thus, the sophistication of the later Wittgenstein's account of language is not part of Justice Scalia's theory of constitutional interpretation.

185. *Id.* at 38 (explaining that equal weight is to be given to the writings of John Jay (who was not a delegate to the Constitutional Convention) in *The Federalist* as to James Madison (who was both a delegate and a principal draftsman of the Constitution), as well as to the writings of Jefferson).

186. See *id.* at 46. Tribe remarks this tacit invocation of expectations, rather than meanings, in his comments. See Laurence H. Tribe, *Comment*, in SCALIA, *INTERPRETATION*, *supra* note 6, at 65–66 [hereinafter Tribe, *Interpretation*]; see also RONALD DWORKIN, *JUSTICE IN ROBES* 125–26 (2006) [hereinafter DWORKIN, *ROBES*].

such an approach, he generally fails to persuade his critics.¹⁸⁷ Third, in a celebrated footnote to a case Justice Scalia and Tribe have each recognized as very instructive for these questions, Justice Scalia has proposed a least general statement principle to be invoked if there is uncertainty.¹⁸⁸ That is, constitutional provisions are to be read as narrowly as possible.¹⁸⁹ This strategy raises at least two very important questions. First, when is such a strategy of narrow interpretation to be invoked? Second, how is the least general statement to be determined?

On its face, Justice Scalia's account provides an answer to the question of when the principle of least generality is to be applied: that principle must be applied when there is a *bona fide* dispute to the meaning of a constitutional provision.¹⁹⁰ It is important to recognize the nature of the dispute that is required. It must be a dispute as the original understanding with respect to the meaning of a provision.¹⁹¹ For the originalist, disputes whether to interpret the Constitution based upon such original understanding are not legitimate disputes. Additionally, it would appear that the dispute over the original understanding or intentions with respect to the text must be *bona fide*.¹⁹² Thus, a plausible case must be made for two or more interpretations. In that case, Justice Scalia has proposed to choose the narrower interpretation.

The problem of articulating how the principle of least generality applies is more difficult, however. At least a couple of approaches might be articulated. The first would be an approach that looked to the breadth of application that a provision would have under different interpretations.

187. See Dworkin, *Comment*, in SCALIA, INTERPRETATION, *supra* note 6, at 115, 120 [hereinafter Dworkin, *Interpretation*].

188. Michael H. v. Gerald D., 491 U.S. 110, 127–28 (1989) (Scalia, J., dissenting). See TRIBE & DORF, READING, *supra* note 175, at 73–76.

189. Justice Scalia introduced this interpretive principle only in a footnote to one of his opinions. In that context, Justice Scalia was seeking to rebut Justice Brennan's abstract characterization of the liberty interest that Justice Brennan sought to protect. Justice Scalia sought to reject that abstract characterization and to defend the choice of the narrower principle. Tribe and Dorf nevertheless treat this principle as central to Justice Scalia's originalism. TRIBE & DORF, READING, *supra* note 175, at 97–98, 101–04. It should be noted, however, that Justice Scalia did not restate this principle in his Princeton Tanner lectures, so there is at least some uncertainty as to whether this principle plays a key role in Justice Scalia's jurisprudence. Moreover, as we have seen, the basic principles of originalism can be articulated and defended without invoking the principle of least generality. See LeDuc, *Evolving Originalism*, *supra* note 72 and *Originalism's Claim*.

190. See generally Frank Easterbrook, *Abstraction and Authority*, 59 U. CHI. L. REV. 349, 351 (1992) [hereinafter Easterbrook, *Abstraction*] (describing Justice Scalia's principle of least generality in the context of Michael H. v. Gerald D.).

191. See generally SCALIA, INTERPRETATION, *supra* note 6, at 45.

192. Absent these constraints on the dispute, the principle of least generality would narrow the meaning of the Constitution in a manner that Justice Scalia clearly eschews. See *id.* at 38.

That is, the broader interpretation that applied to the greater range of particulars. A second, more conceptual approach would look to the conceptual breadth to be accorded a provision under competing interpretations. The latter approach would apply a classification of concepts, from the more general to the more particular, choosing to apply the concept with the least specificity. That application might not result in an interpretation with a narrower application in practice. While both approaches would appear to permit a comparison of the specificity or generality of potential interpretative concepts, it is not clear that either would produce a precise metric that would, for example, create a transitive ordering of concepts.¹⁹³ Moreover, it is not clear whether it would permit the identification of a principle that is the upper bound of all narrower principles.¹⁹⁴

Judge Bork offers an express response to the argument that the Constitution presents an intractable problem of indeterminate generality.¹⁹⁵ Although he focuses upon the argument made by Brest, that argument is substantially similar to the argument made by Tribe.¹⁹⁶ According to Bork, the text of the Constitution (and its history) provides the inputs necessary to determine the generality at which a constitutional text is to be interpreted:

With many if not most [constitutional] textual provisions, the level of generality which is part of their meaning is readily apparent. . . . Original understanding avoids the problem of the level of generality in equal protection analysis by finding the level of generality that interpretation of the words, structure, and history of the Constitution fairly supports.¹⁹⁷

Thus, Bork believes that the problem of generality is a pseudo-problem derived from a failure to attend to the original understanding of the constitutional text. How, then, do “the words, structure and history” of the

193. A transitive ordering insures that if X is narrower than Y, and Y is narrower than Z, then X is narrower than Z.

194. Such a greatest least narrower principle would require a transitive ordering of principles by their scope.

195. See BORK, TEMPTING, *supra* note 18, at 148–51.

196. Compare Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063 (1981) (arguing that the various positions in the debate over the Supreme Court’s fundamental rights jurisprudence are theoretically unsustainable) with TRIBE & DORF, READING, *supra* note 175, at 76–80 (arguing that judges must look to substantive values to determine the level of generality or abstraction with which to interpret and apply constitutional provisions, and defending the legitimacy of such an approach).

197. BORK, TEMPTING, *supra* note 18, at 149–50.

Constitution provide an interpretive or other rule for determining the level of generality of a provision?

Bork's approach can be described in the context of Philip Bobbitt's account of constitutional law. Although Bork does not articulate his methodology in those terms, he accepts only three or four of the modes of argument that Bobbitt identifies as the modalities of constitutional argument.¹⁹⁸ Bork privileges only arguments from language, history, and, perhaps, the structure of the Constitution.¹⁹⁹ If Bork is characterizing such arguments—or modes of argument, to be more precise—as the sources of interpreting generality then, at least to the extent we think we understand Bobbitt's account, there is no mystery as to how the level of generality problem may be solved. As described more fully below, the problem of generality would be only one element in the interpretation and application of constitutional provisions. On Bobbitt's theory, the modes of argument he identifies provide the necessary and sufficient tools for that project of interpretation. But that problem is traded for an equally serious problem for Bork's originalism. If originalism incorporates such additional modes of argument in its core to determine the original meaning of constitutional provisions, then to what extent is such a theory distinguishable from Bobbitt's? Most simply, only three of Bobbitt's modes of argument are excluded: the prudential, precedential, and ethical. Moreover, precedential argument is incorporated, perhaps grudgingly, into Bork's and Justice Scalia's weak originalism. So there remains, on this account, a significant difference between the two, albeit not quite so dramatic as may have initially appeared.²⁰⁰

In conclusion, Judge Bork and Justice Scalia do not offer a persuasive account of a self-interpreting Constitution that can determine the level of generality of its provisions. In this regard originalism is vulnerable to the theoretical challenges that its critics make. Moreover, the view is not supported by originalist judges' judicial decisions. The need for extra-textual interpretative principles, like the principle of least generality or Bork's requirement of clear statement, is a troubling, largely hidden

198. For Bobbitt's exposition of his modalities of constitutional argument see generally BOBBITT, *FATE*, *supra* note 1.

199. It is not entirely clear that Bork would accept an argument from the structure of the Constitution. His criticism of Ely's rejection of clause-bound interpretivism suggests that such structural approaches—perhaps because so closely associated with Charles Black—are likely not acceptable to Bork.

200. Moreover, having admitted structural argument into originalist interpretation, Judge Bork needs an account of why Bobbitt's other three non-originalist modes of argument should be impermissible.

feature of originalism. Such extra-textual sources of law are never acknowledged or addressed; their existence is consistently denied.²⁰¹ In order to deliver the neutrality and democratic theory consequences originalism advertises, this gap must be filled in a manner compatible with those claims.²⁰² Thus, both as a theoretical matter and in the determination of particular constitutional questions,²⁰³ Justice Scalia fails to show that his methodology excludes extra-textual sources.

The only strategy apparently available to Justice Scalia that would salvage the originalism project would be one that, while conceding that originalism does not answer all questions, nevertheless asserts that originalism answers many questions. But if this gap-filling project is to retain the principal claimed benefits of originalism, it must fill the gaps neutrally, without permitting judges' own values to operate freely and without limit. This may be the sense, after all, in which Justice Scalia acknowledged that originalism does not eliminate ("inoculate against") willfulness.²⁰⁴ It is unclear how originalism would go about filling those gaps. This, too, is one of the fronts on which originalism may advance the dialogue by acknowledging the theoretical and practical gap, and outlining an analysis of a response.

It is not clear that originalism needs a response to such criticisms, however. First, to the extent that originalism makes a claim of non-exclusive privilege that the original understandings or expectations are to be given a priority in constitutional decision, the potential gaps in the originalist Constitution are not particularly troubling.²⁰⁵ Second, given that originalism privileges the original understandings, intentions, and expectations, so long as such understandings, intentions, and expectations exist (and it is not clear that the critics' challenges have called that

201. Part of the confusion arises from the focus upon the stated mission of originalism—the interpretation of the original meaning of the text—with the method of that interpretation which permits the use of extratextual sources in that interpretation, whether it be other writings or the construction of principles from which to infer and extend the meaning of the text. See SCALIA, INTERPRETATION, *supra* note 6, at 38.

202. In particular, that use of extra-textual sources must be reconciled with the claim to provide a theory of interpretation and adjudication that narrowly cabins judges' discretion.

203. See, e.g., *Boumediene v. Bush*, 553 U.S. 723, 849–50 (2008) (Scalia, J., dissenting) (citing the threat to national security that the Court's decision creates as another *prudential* factor arguing against that decision).

204. SCALIA, INTERPRETATION, *supra* note 6, at 140.

205. This is the approach taken, for example, by Keith Whittington in his elaboration of a distinction between constitutional interpretation and constitutional construction. See generally WHITTINGTON, CONSTITUTIONAL INTERPRETATION, *supra* note 37; see also Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 455 (2014).

existence into doubt), then originalism sets up a plausible mode of argument.

The ontological and related philosophical premises underlying originalism also shape the originalists' defense against their critics in more general ways. If there is an objective, independent Constitution and if the truth of propositions of constitutional law consist in such statements corresponding to such Constitution-in-the-world, then those premises must shape the debate about originalism. First, if there are such objective truths about our constitutional law, then argument about such objective truth must begin by stating the correct propositions of constitutional law that comprise that law. The arguments to be made in favor of such propositions are arguments about the objective Constitution. To the extent that there is disagreement, argument is not a matter of persuading a protagonist with an opposing position that her position is a poor choice or unsound or even incoherent. Rather, the argument can only be by reference to the objective facts about the Constitution, and why the protagonist's position does not accord with the facts. That is a very constrained form of argument, and if the protagonists disagree about the facts about the Constitution-in-the-world, the argument becomes very difficult, and the potential for persuasive arguments to be made by either side of the debate becomes remote.

Finally, the theory of constitutional interpretation, meaning, and truth commits originalism to underlying general claims about meaning and truth.²⁰⁶ Truth is the correspondence of propositions about the Constitution with how the constitutional world is, and meaning of constitutional provisions arises not from the use of those provisions (that would provide scant foundation for the originalist restoration project) but from the meaning of the words and the rules of syntax and grammar.²⁰⁷ The account of constitutional argument derives from the limited constitutional authorities that originalism privileges. That limited scope commits originalism (except natural law originalism) to the proposition that constitutional disputes are disputes about semantics or about the historical practices that envelop those semantic understandings.²⁰⁸ Natural law

206. The truth of a proposition of constitutional law derives from its correspondence with the original understanding of or expectations with respect to the provision of the Constitution that the proposition speaks to.

207. For an application of the rules of syntax in interpretation, see *District of Columbia v. Heller*, 554 U.S. 570 (2008) (disregarding the initial clause of the Second Amendment as merely a prefatory clause).

208. See SCALIA, INTERPRETATION, *supra* note 6, at 45 (acknowledging occasional potential disputes as to the original understanding of the Constitution).

originalists would deny that such constitutional disputes are semantic.²⁰⁹ They are instead in whole or in part disputes about the substantive natural law.²¹⁰ Lastly, the account of our knowledge on propositions of constitutional law relies upon a classical model of judges and citizens as language users and historians, a community that both knows how to speak, and knows that the ways we spoke in the past may have been different from how we speak today. These are non-trivial commitments, however plausible and intuitive they may be.

Originalists would likely defend these largely unstated commitments on a variety of grounds. First, they would likely suggest that there are no plausible alternatives to their intuitive premises about the nature of reference and meaning and their appeal to the notion of an objective, existent Constitution.²¹¹ They would likely endorse the argument made by Dworkin that the alternative to the theory that there is no such objective existent Constitution is an incoherent skeptical stance.²¹² It is difficult, of course, to deny the existence of alternative accounts of truth and meaning, in light of the voluminous philosophical literature.²¹³ Dworkin makes just such a point in his criticism of Scalia at Princeton.²¹⁴ Nevertheless, the tacit account of the Constitution, truth, and meaning employed by the positivist originalists may appear plausible and seemingly commonsensical.

III. THE PHILOSOPHICAL COMMITMENTS OF ORIGINALISM'S CRITICS

It is perhaps even more surprising that originalism's principal critics are as committed to an ontologically independent Constitution and a realist

209. That is because the relevant interpretation of the text looks only to the original meaning. *See id.*

210. *See supra* note 147.

211. *See generally* BORK, TEMPTING, *supra* note 18, at 176 (denying that the Constitution is merely what judges say that it is).

212. *See generally* Dworkin, *Objectivity*, *supra* note 2. Michael Moore makes a similar point, citing a letter from Rorty to Sanford Levinson that he claims reveals the pragmatic incoherence of Rorty's stance. *See* Moore, *Interpretation*, *supra* note 139, at 310 n.71 (arguing that those who reject realism are conceptually schizophrenic, and that their claims are not unlike the statements of the Cretan in the eponymous paradox).

213. *See, e.g.*, JOHN SEARLE, *SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE* (1969) (describing the complexity of semantics and pragmatics, building on the work of Austin); AUSTIN, *supra* note 144 (distinguishing locutionary, illocutionary, and perlocutionary acts, and emphasizing the absence of truth conditions for performative utterances); WILLARD VAN ORMAN QUINE, *WORD AND OBJECT* (1960) (challenging empiricism with a holistic account of language).

214. Dworkin, *Interpretation*, *supra* note 187, at 116 n.4.

account of constitutional truth as are the originalists.²¹⁵ That is because the critics argue for sources of constitutional law that are not as narrowly circumscribed by the constitutional text. That broader definition of sources of constitutional law might appear more consistent with an anti-foundational stance. As we will see, the principal critics of originalism share, and thus the overall originalism debate is informed by, the same philosophical claims tacitly held by the originalists. Moreover, the critics' attack on originalism relies on those underlying commitments.

A. Professor Dworkin's Account of What the Constitution Is

To establish that these philosophical premises are shared by the critics of originalism there is no better strategy than examining the claims of one of originalism's most powerful foundationalist critics, Ronald Dworkin.²¹⁶ In light of the fundamental differences between originalism and its critics as to both the proper methodology of constitutional interpretation and decision and as to many substantive positions of constitutional law, it is surprising that shared philosophical premises underlie the debate over originalism. I will first seek to show that Dworkin shares the key philosophical premises that ground the originalist side of the debate. Then, I will show how other critics of originalism share Dworkin's commitments, albeit generally less expressly. We will see that those philosophical premises play a corresponding role for originalism's critics.

Dworkin agrees with originalism on at least three premises embedded in the four claims identified above. First, Dworkin believes that there is an objective thing that is the Constitution, although he does not believe that it derives solely (or even primarily) from the original understanding.²¹⁷

215. This analysis of the philosophical foundations of the debate over originalism will necessarily exclude some participants. Notably absent will be any discussion of the stance of the critical legal studies participants in the debate.

216. See Ronald Dworkin, *Pragmatism, Right Answers, and True Banality*, in PRAGMATISM IN LAW AND SOCIETY 359 (Michael Brint & William Weaver eds., 1991). The focus and much of the substance of this analysis draws upon Dennis Patterson's analysis in *Law and Truth*. That work is focused generally upon theories of how legal propositions are true as well as offering Patterson's own theory which builds on and generalizes Bobbitt's account of the truth of propositions of constitutional law. Bobbitt believes that Dworkin's theory has been informed by a focus on the relationship between truth conditions and meaning for propositions of law; that account is not entirely persuasive, but Patterson's project, and his execution, advance the analysis in this area dramatically. See generally PATTERSON, TRUTH, *supra* note 3.

217. See Dworkin, *Objectivity*, *supra* note 2, at 136–38; see also Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 65 FORDHAM L. REV. 1249 (1997) [hereinafter Dworkin, *Arduous*].

Dworkin is fiercely committed to the existence of an objective world.²¹⁸ That objective world includes the fact of the matter not only with respect to facts, but also with respect to values.²¹⁹ The existence of objective values is important to Dworkin; he believes that such existence offers a conclusive repudiation of what he regards as a seductive but incoherent challenge from relativists like Richard Rorty.²²⁰ Absent such objective values, the siren call of relativism would appear at least more powerful to Dworkin.²²¹ With the objective, external world made safe, Dworkin can describe the project of constitutional interpretation and of adjudication as a matter of constructing an interpretation that best fits our Constitution, as construed to maximize integrity and justice.²²²

Dworkin also believes that the meaning of constitutional provisions is a matter of correspondence between what is and what is said; the relevant statements are those interpreting the Constitution.²²³ More precisely, he believes that the meaning of such propositions of constitutional interpretation is determined by their truth conditions.²²⁴ That is, their meanings are determined by the circumstances in which they are true, and the circumstances in which they are false.²²⁵ This claim merely advances the meaning-truth platitude.²²⁶ Again, he does not believe that such correspondence is between the fact of the original understanding of the constitutional text and the propositions of constitutional law. Instead, the correspondence is with an interpretation that best harmonizes the positive doctrinal law and our fundamental moral intuitions about justice.²²⁷

218. See DWORKIN, ROBES, *supra* note 186, at 36–41.

219. See generally *id.* at 37 (“Ordinary citizens think that the war in the Persian Gulf really was just or unjust.”). By this, Dworkin does not mean simply that such individuals are committed, logically, to the law of the excluded middle.

220. *Id.* at 36–41. Rorty would not characterize himself as a relativist, of course.

221. The objectivity of values would not appear to be a necessary element in Dworkin’s rebuttal of relativism. Dworkin’s rejection of what he terms Archimedean skepticism would appear to stand (to the extent it does) even if values are not objective. To the extent values are objective, then that argument has a broader import.

222. See Ronald A. Dworkin, “Natural” Law Revisited, 34 U. FLA. L. REV. 165 (1982) (asserting that his theory of law as integrity may properly be characterized as a natural law theory because it looks to principles of morality that are a matter of the natural world, not merely a matter of positive law); but see FRIED, SAYING WHAT THE LAW IS, *supra* note 107, at 242. While Fried emphasizes how unusual and subtle political arguments are even in constitutional argument, his emphasis on the primacy of doctrine also ensures that express moral arguments would be unusual.

223. Dworkin, *Objectivity*, *supra* note 2, at 88–89. See also DWORKIN, EMPIRE, *supra* note 109, at 279–92 (describing Hercules’s methods of interpreting the Constitution).

224. RONALD DWORKIN, THE PHILOSOPHY OF LAW 5 (1977).

225. *Id.*

226. See *supra* note 143.

227. See generally DWORKIN, EMPIRE, *supra* note 109.

I can articulate those positions expressly as follows:

- (1) The Constitution is an objective thing that provides a unique correct answer to all questions of constitutional law. It is composed of a historical text (including amendments), a historical understanding of that text's semantic meaning, and an interpretation that draws upon that text and understanding, precedent, and a unifying legal and moral theory.
- (2) Propositions of constitutional law are true if and only if they correspond to the facts of the matter with respect to the unique correct interpretation of the Constitution that offers the best comprehensive account of the text and precedent and which maximizes justice and fairness.
- (3) The meaning of constitutional provisions is given by the interpretation of such provisions, and that interpretation is given meaning by a complex reasoning process that seeks to develop a consistent body of legal rules and principles that accords adequate respect both to legal precedent and our own moral intuitions.
- (4) Constitutional disagreements are not merely disagreements about the semantic meaning of constitutional provisions but also about values.

Dworkin does not believe that we may simply reduce constitutional law to a series of legal rules, but, like the originalists, he asserts that there is a thing we call constitutional law that is independent of our talk about it, even as he emphasizes the claim that law is fundamentally an interpretive activity.²²⁸

Dworkin's claim with respect to interpretation is fundamental to his theory of law as integrity and to his account of what constitutional law is.²²⁹ For Dworkin, the interpretation constitutes the Constitution.²³⁰ Every application of the Constitution in adjudication requires an interpretation.²³¹

228. *See id.* at 65–68.

229. *Id.* at 353–55. *See generally* Dennis Patterson, *Interpretation in Law*, 42 SAN DIEGO L. REV. 685 (2005) (criticizing Dworkin's emphasis on interpretation in adjudication, arguing that interpretation is derivative of other more fundamental practices in understanding and applying law).

230. *See generally* Dworkin, *Arduous*, *supra* note 217, at 1260 (“[W]e cannot give a text ‘primacy’—or, indeed, any place at all—without a semantic interpretation . . .”). When Dworkin refers to giving a text primacy, he would appear to mean simply that we cannot interpret a text as having any meaning (rather than being a random set of characters created, for example, by a primate without the benefit of language) without an account of that meaning.

231. *See* DWORKIN, *EMPIRE*, *supra* note 109, at 353–55.

An interpretation takes a text or other source (such as an utterance) and translates or restates it in a factual and conceptual context.²³² In so doing, it makes clear the inferences that support it, the implications that follow from it, and the evidence that speaks for it.²³³ Most importantly, the interpretation is normative; it must either endorse or disavow, in whole or in part, the purported legal or constitutional right, power, or obligation.²³⁴ Interpretations for Dworkin are the granular statements that provide reasons for legal decisions by judges.²³⁵

For Dworkin, the authoritative interpretation constitutes the Constitution,²³⁶ and that interpretation may evolve with moral progress.²³⁷ Thus, Dworkin's constitutional law includes not only more authority, but more kinds of authority than exist for the originalist. But Dworkin believes that that authority is independent of human social practice.²³⁸ That is the fundamental difference between Dworkin's account of constitutional law as integrity and positivist theories of constitutional law, like originalism, that reduce law to a set of semantic and social practices. Dworkin and many positivists endorse the view that adjudication turns principally on interpretation and that the interpreted text exists as a matter of objective fact.²³⁹ Those practices are following the rules provided by the original understanding of the Constitution. In Dworkin's constitutional law as integrity there is no reduction to practice but there is a reduction to a set of legal and ethical rules and principles. Dworkin's law does not stand apart from our moral theory; moral theory is very much a part of that law, providing direction and, in certain hard cases, providing the dispositive source of the correct decision.²⁴⁰ This account of what law is, like the

232. See *id.* at 49–53. See also RORTY, *Inquiry as Recontextualization: An Anti-Dualist Account of Interpretation*, in OBJECTIVITY, RELATIVISM, AND TRUTH: PHILOSOPHICAL PAPERS, *supra* note 23, at 93.

233. See generally DWORKIN, *Hard Cases*, in TAKING, *supra* note 83, at 81 (describing the role of the implications of moral and political theory in determining the outcomes of hard legal cases).

234. DWORKIN, EMPIRE, *supra* note 109, at 64 (distinguishing interpretations of what others in the community understand with respect to a practice of the community from interpretations to which one, as a member of the community, is committed).

235. *Id.* at 87.

236. *Id.* at 356–57, 387–89 (describing how Chief Justice Marshall's actual interpretation of the Court's power of judicial review became part of our constitutional law and describing a hypothetical interpretative approach to decide *Brown*).

237. See generally Dworkin, *Interpretation*, *supra* note 187, at 122–27.

238. See DWORKIN, ROBES, *supra* note 186, at 37–43 (challenging relativist and skeptical accounts of law as incoherent).

239. DWORKIN, EMPIRE, *supra* note 109, at 65–68 (identifying the existence of social practices as the prerequisite to the project of interpretation); DWORKIN, ROBES, *supra* note 186, at 12.

240. See RONALD DWORKIN, *The Forum of Principle*, in A MATTER OF PRINCIPLE 70–71 (1985) [hereinafter DWORKIN, *Forum*] (arguing that judicial review insures that fundamental moral principles

corresponding originalist account, shapes how we determine the meaning of law, the truth of propositions about that law, the nature of disputes about that law, and our knowledge of that law.

Dworkin's account of the truth of propositions of constitutional law appears to be either evolving or inconsistent. Sometimes he suggests a simple correspondence theory, sometimes a much more holistic account of truth. With respect to certain propositions of law, Dworkin asserts that truth is a matter of correspondence.²⁴¹ It is a correspondence with facts about the world: the proposition that no one may drive over 55 miles an hour in California "could not be true if" a majority of the California state legislature had not voted for such a law.²⁴² Not only does Dworkin endorse this view, but he asserts that everyone else thinks so, too.²⁴³ But the correspondence with the world that establishes the truth of propositions of constitutional law is not the originalists' correspondence with the historical original understanding of the Constitution.²⁴⁴ The correspondence is between the propositions of constitutional law and that law as derived by Dworkin's theory of law as integrity. But the correspondence relationship is apparently no different. In each case the linguistic expression corresponds to an objective thing—the Constitution—in the world. Elsewhere, however, Dworkin appears to abandon or supplement his correspondence account of the truth of legal propositions. He asserts that certain propositions of law cannot be established by a positivist account of social facts.²⁴⁵ But even those propositions are true by virtue of their correspondence with moral truths, positive law, and the inferences that follow from them.²⁴⁶ For example, the proposition that flogging is a cruel and unusual punishment, and is thus

will be taken into account in constitutional adjudication, citing the example of the judicial decisions foreclosing certain forms of racial discrimination); DWORKIN, *EMPIRE*, *supra* note 109, at 262.

241. *See id.* at 4–5 ("Everyone thinks that propositions of law are true or false (or neither) in virtue of other, more familiar kinds of propositions . . . The proposition that no one may drive over 55 miles an hour in California is true, most people think, because a majority of that state's legislators said 'aye' . . .").

242. *Id.* at 4.

243. *Id.*

244. It is not entirely clear whether an originalist interpretation would ever be a sufficient ground for a proposition of constitutional law to be true for Dworkin. I think the answer must be that it would not, because such a ground for a potentially true proposition of constitutional law would have to be backed up, as it were, by the web of deduction and inference that informs the overall theory.

245. *See* DWORKIN, *ROBES*, *supra* note 186, at 14.

246. *Id.* ("A proposition of law is true . . . if it flows from the principles of personal and political morality that provide the best interpretation of the other propositions of law generally treated as true . . ."). This statement is somewhat startling, at least for a philosopher, in its vagueness and imprecision.

prohibited by the Eighth Amendment cannot be derived from the original understanding of the relevant actors with respect to the adoption of the Bill of Rights, or from any positive law of the 18th century Republic. What makes that proposition true is the text of the Eighth Amendment coupled with our contemporary view of human dignity and the ethics of punishment by the State.

This correspondence masks a very important element in Dworkin's account of the truth of propositions of constitutional law, however, that arises out of his non-positivist account of law as integrity. According to Dworkin, fundamental claims about constitutional law often must take into account, and be affected and informed by, our moral choices.²⁴⁷ It follows, therefore, that Dworkin's account of the truth of propositions of constitutional law (or something like it) must also hold for propositions of morality. If the two domains (the realm of propositions of law and the realm of moral propositions) had different truth conditions, then it would appear extraordinarily difficult and complex to reconcile those disparate truth conditions in a manner that permitted the role of inference from moral propositions to legal propositions required by Dworkin's jurisprudence. For example, let us assume that for Dworkin's account of law as integrity, for some moral proposition M and some legal proposition L, M entails L. If M is true, then it would appear that L is also true. If the truth conditions for M and L were different, then we would have an inconsistency. Dworkin appears to recognize this implication, embrace it, and defend it.²⁴⁸ According to Dworkin, propositions about morality are true in the same way that legal and other factual propositions are true.²⁴⁹ Such propositions can, therefore, be invoked by Dworkin to make propositions about how to decide hard cases true.²⁵⁰ Such a view of morality is, of course, highly controversial.²⁵¹ It is beyond the scope of this article to wade into this debate in any depth. It may be valuable, however, to note some of the principal objections to this view, because I believe that

247. See DWORKIN, *EMPIRE*, *supra* note 109, at 365–66, 374.

248. See RONALD DWORKIN, *THE PHILOSOPHY OF LAW* 5 (1977) (equating what a proposition means with the truth conditions of such a proposition).

249. Dworkin, *Objectivity*, *supra* note 2, at 134–35. See also RONALD DWORKIN, *JUSTICE FOR HEDGEHOGS* 27 (2011).

250. See generally DWORKIN, *Hard Cases*, in *TAKING*, *supra* note 83, at 81.

251. Compare HARMAN, *EXPLAINING VALUE*, *supra* note 120 (defending moral relativism but conceding that there is no conclusive rebuttal argument against moral absolutism) with PETER SINGER, *PRACTICAL ETHICS* (1979) (defending utilitarianism), and with BERNARD WILLIAMS, *ETHICS AND THE LIMITS OF PHILOSOPHY* (1985) (defending deontological theories of ethics). Dworkin addresses some of these potential challenges in Dworkin, *Objectivity*, *supra* note 2.

they certainly parallel, and may underlie, some of the originalist concerns with Dworkin's project.

Morality has often been thought a very different realm than the world of facts. The differences that have been identified to distinguish the moral or ethical realm have been various. Two indicative distinctions that warrant note are those attributable to David Hume and Gilbert Harman. Hume is celebrated for calling out the distinction between propositions about what is and propositions about what we ought to do.²⁵² According to Hume, judgments or propositions about what we ought to do cannot be derived from what is.²⁵³ The implication of this fundamental separation, at least for Hume, was that propositions or judgments about morality were derived from a particular human faculty for moral judgments.²⁵⁴ Such a theory would appear very difficult to reconcile with an attempt to integrate law and morality, because it would raise the question of which faculties we employ in determining the truth of legal propositions.²⁵⁵ On Dworkin's account, we are to employ such moral judgments in our interpretation of legal authorities. It would be possible, of course, to offer a composite or syncretic account of such reasoning, in which we employ our moral faculty to make the moral judgment, and then use our other rational faculties with respect to the legal authorities. But this would be a cumbersome and complex account. Of course, Dworkin does not deny that law and morality fall into such different realms. His strategy for reconciliation appears to be that while morality constitutes its own world, the world of law is, as it were, contiguous to that world and shares more features with it (and with the other evaluative realms) than with the world of facts.

Harman has also sought to distinguish the moral and other worlds in support of his moral relativism.²⁵⁶ Harman tentatively notes that we cannot test our beliefs about the truth of moral propositions by testing them in the

252. See generally David Fate Norton, *The Foundations of Morality in Hume's Treatise*, in *THE CAMBRIDGE COMPANION TO HUME* 270, 304 (David Fate Norton & Jacqueline Taylor eds., 2d ed. 2009).

253. DAVID HUME, *A TREATISE OF HUMAN NATURE*, bk. III, pt. III, § I (L. A. Selby-Bigge ed., 2d ed. 1978) (1740) (arguing that reason can never give us a reason to desire or choose).

254. *Id.* at bk. III, pt. III, § II.

255. A similar kind of distinction between propositions about morality and other propositions was defended by G. E. Moore. According to Moore, the ascription of the value "good" to a thing or action could not be restated or defined in terms of any of the natural properties of that thing or action. See G. E. MOORE, *PRINCIPIA ETHICA* 6–21 (1903) (defending the irreducible, indefinable nature of the good in moral theory).

256. See, e.g., GILBERT HARMAN, *THE NATURE OF MORALITY: AN INTRODUCTION TO ETHICS* 3–10 (1977) (arguing that the inability to test our ethical theories experimentally constitutes a fundamental distinction between ethics and science) [hereinafter HARMAN, *MORALITY*].

world; experiment is useless.²⁵⁷ Harman wants to employ this distinction to support his theory of moral relativism without conceding that all of our beliefs (and knowledge) are relative, too. But Harman concedes, ultimately, that he has no conclusive argument to establish the truth of moral relativism.²⁵⁸ If Harman is right that moral relativism ranks intellectually at least *pari passu* with moral absolutism, then where does that leave Dworkin's reliance on moral theory to provide right answers to hard legal questions?

Dworkin believes that he can refute critics of his ethical theory like Harman and thereby establish his account of the truth of legal proposition and, indeed, his theory of law as integrity, on a firm foundation. That is a heavy burden, indeed. As I have explored elsewhere,²⁵⁹ originalism purports to offer an interpretive methodology that is immune to the controversy and uncertainties enveloping ethics and morality. Dworkin's account of law, and his account of the truth of legal and moral propositions, denies the originalists' fears about the uncertainty of such moral propositions. He claims to have retained the certainty of the truth of legal propositions—witness his defense of the “right answer” thesis²⁶⁰—while also permitting the introduction of moral theory into constitutional decision making. It is easy to see why the originalists, among others, would be dubious of such claims.

Dworkin claims to be a more philosophically sophisticated constitutional theorist than the originalists he criticizes.²⁶¹ How does that claimed philosophical sophistication present in his account of constitutional meaning?²⁶² Dworkin subscribes to no Wittgensteinian or Kripkensteinian²⁶³ account of language because he appears committed to

257. *Id.* at 19 (“My conclusion is that relativism can be formulated as an intelligible thesis . . . that morality derives from an implicit agreement and that moral judgments are true or false only in relation to such an agreement.”).

258. See HARMAN, *Is There a Single True Morality?*, in *EXPLAINING VALUE*, *supra* note 120, at 77.

259. See LeDuc, *Evolving Originalism*, *supra* note 72, at Section III.

260. See, e.g., RONALD DWORKIN, *Is There Really No Right Answer in Hard Cases?*, in *A MATTER OF PRINCIPLE* 119 (1985) (arguing that there is indeed one right answer, even to hard legal questions).

261. See, e.g., Dworkin, *Interpretation*, *supra* note 187, at 117 (“When we are trying to decide what someone meant to say, in circumstances like these . . . [i]t is a matter of complex and subtle philosophical argument . . .”).

262. One important implication of Dworkin's theory of meaning is his rejection of what he takes to be the originalist theory of meaning. But here I want only to focus upon Dworkin's own theory.

263. See SAUL A. KRIPKE, *WITTGENSTEIN ON RULES AND PRIVATE LANGUAGE: AN ELEMENTARY EXPOSITION* (1982); see also G. P. BAKER & P. M. S. HACKER, *SCEPTICISM, RULES AND LANGUAGE* (1984) (challenging the attribution of Kripke's skeptical argument to Wittgenstein).

the position that we need an interpretation of a rule or of an utterance before we can follow it or understand it.²⁶⁴ Like the originalists, he believes that we always (or at least generally) need interpretations of constitutional rules.²⁶⁵ His theory of law as integrity is just such an interpretative enterprise. As to the meanings of the provisions themselves, they are certainly more complex than those in the originalist world. Dworkin's meanings must be interpreted for the level of generality at which they are to be interpreted, and the act of interpretation must often go beyond merely finding meanings and on to infusing the text with meaning like, at some level, multiple authors writing a serial novel.²⁶⁶ So while the task remains one properly termed interpretation, according to Dworkin, the scope of his mandate is broad.

The goal of Dworkin's theory of constitutional interpretation is very different from the goal of the originalist project. Dworkin's method of interpretation is not a matter of determining what was originally intended or understood by the constitutional words. He rejects that task as illusory;²⁶⁷ instead, his mission is to find the best interpretation of the text.²⁶⁸ For Dworkin, the best interpretation of the constitutional text is that interpretation that maximizes justice and fairness, while preserving integrity.²⁶⁹ Maximizing legal justice is a particularly complex task.²⁷⁰ It is

264. See generally Dworkin, *Interpretation*, *supra* note 187; DWORKIN, EMPIRE, *supra* note 109.

265. The need for interpretation arises from a variety of sources. One is the need to specify the conceptions that amplify and instantiate the concepts that are captured in abstract constitutional provisions. More fundamentally, however, Dworkin argues that law is an interpretive activity. See DWORKIN, ROBES, *supra* note 186, at 13–15. That is, it counts in favor of the truth of a proposition of constitutional law if and to the extent that a narrative account may be constructed that harmonizes such proposition of law with other accepted propositions of law but also with our moral judgments and intuitions. Such a narrative Dworkin terms an interpretation. Constructing, articulating, and defending such narratives is central to law on Dworkin's account, because those interpretations actually constitute the substantive law.

266. See DWORKIN, EMPIRE, *supra* note 109, at 229–38, 229 (“We can find an even more fruitful comparison between literature and law, therefore, by constructing an artificial genre of literature that we might call the chain novel.”).

267. DWORKIN, *Forum*, *supra* note 240, at 43–55. For Dworkin, that project is fruitless because, crudely, the text of the Constitution is stated in the terms of concepts, and we need the more granular, particular conceptions of those concepts to apply the constitutional text to the particular cases presented in constitutional law.

268. See, e.g., DWORKIN, EMPIRE, *supra* note 109, at 361–63. That best interpretation requires, among other things, balancing specific and general intentions with respect to the constitutional text, and the interpretation of the best underlying principle of the particular provision in its textual context. That project precludes any exclusive reliance upon historical interpretations for Dworkin.

269. *Id.* at 225. Integrity for Dworkin is a theoretical or doctrinal constraint that reflects the important, but not necessarily dispositive, claims of *stare decisis* and precedent. It appears to be a constraint peculiarly applicable to law, in contrast to other conceptual regimes. The integrity of a legal system in general or a legal interpretation in particular consists in balancing the incommensurable demands of justice and fairness. See generally DWORKIN, ROBES, *supra* note 186, at 140, 171

not, on the one hand, to be confused with articulating a general theory of justice.²⁷¹ Maximizing justice as a legal matter is a more conservative, but not necessarily simpler or more limited, task.²⁷² The difference is that none of us are innocent; no one has the benefit of the original position. Dworkin, and his alter ego, Chief Justice Hercules, must play the ball as it lies, so to speak. The legitimate expectations of the community must be taken into account and the values, economic and emotional, of preserving such settled expectations must be recognized, but also limited.²⁷³ Hence, the inherent conservatism of legal justice. On the other hand, maximizing legal justice requires far more than a legally sophisticated reading of the Constitution and constitutional precedent. The demands of the general theory of justice get a place at the table, to be weighed and taken into account in the process of adjudication and interpretation.²⁷⁴

It may be argued that Dworkin's project is not interpretative.²⁷⁵ Certainly the originalists would generally deny that Dworkin is engaged in legitimate constitutional interpretation.²⁷⁶ That is because Dworkin's interpretative project is not confined to determining the original intentions, expectations, or understandings with respect to the relevant constitutional text. Instead, Dworkin seeks to articulate the best interpretation of the text itself, and in so doing, does not confine himself to the original intentions or understanding of the text.²⁷⁷ But Dworkin would disagree with the

(“identifying true propositions of law is a matter of interpreting legal data constructively . . . [R]efinement [of our concept of interpretation] would require a more careful analysis of other, discrete political values through which to understand these dimensions more thoroughly, so that we might see, for example, how to integrate [fit (fairness) and justification (justice)] in an overall judgment of interpretive superiority when they pull in opposite directions.”)

270. *Id.* at 225–26.

271. *Id.* at 177. As I will explore below, law must acknowledge the legal claims that have arisen under an existing legal and political system, even if the justice of that system is not clear. Transition issues, as it were, are entitled to more attention in the practical reasoning associated with legal justice.

272. Indeed, Dworkin acknowledges that his account describes only an ideal. *See* DWORKIN, *EMPIRE*, *supra* note 109, at 265 (“Hercules is useful to us just because he is more reflective and self-conscious than any real judge need be or, given the press of work, could be.”).

273. *Id.* at 140–50.

274. *See id.* at 338 (“Hercules is not trying to reach what he believes is the best substantive result, but to find the best justification he can of a past legislative event.”). Although Dworkin is here focused on statutory interpretation his account of constitutional interpretation is no different in any relevant way.

275. Because Dworkin's project encompasses a purposive re-interpretation of precedent and text, it may appear (and certainly does so appear to many originalists) to range well beyond the constraints of a merely interpretative strategy.

276. *See* SCALIA, *INTERPRETATION*, *supra* note 6, at 44–45 (generally criticizing non-originalist constitutional theories as faulty interpretations).

277. *See generally* DWORKIN, *EMPIRE*, *supra* note 109.

characterization of his project as other than interpretive.²⁷⁸ He believes that the project of fashioning the best reading of a text, including the constitutional text, is a matter of interpretation.²⁷⁹

Dworkin believes that he breaks fundamentally with the originalists (and with all other positivist accounts of law) by denying that constitutional disputes may be reduced to semantic disputes.²⁸⁰ Dworkin rejects the account of constitutional and other legal disputes as semantic for two principal reasons. His first reason is built on originalism's description of constitutional disputes as controversies about meaning. According to Dworkin our constitutional disputes are not reducible to disputes over the meaning of legal texts. To demonstrate that proposition, Dworkin begins by describing the arguments that are made and the opinions judges write to resolve disputes.²⁸¹ Second, in light of his theory of what law is and the privileged sources of legal authority, disputes about meaning are only a subset of the kinds of disputes over legal authorities that arise. Other types of dispute may arise with respect to our ethical intuitions. How is the freedom of expression that would permit pornography reconciled with the requirements that we treat each other with respect and recognize others' dignity?²⁸² Similarly, when the Constitution provides for equal protection of the laws, while we characterize disputes as about the meaning of the guarantee, that description is not seemingly particularly apt.²⁸³ Disputes about the answers to such questions are not semantic disputes, although one could have a go

278. *Id.* at 226 (“Law as integrity is therefore more relentlessly interpretive than either conventionalism or pragmatism.”).

279. *Id.*

280. *Id.* at 45–46.

281. *Id.* at 37–43.

282. Compare RONALD DWORIN, *Pornography and Hate*, in FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 214 (1996) [hereinafter DWORIN, FREEDOM'S LAW] and Mackinnon's *Words*, in *id.* at 238 (defending a robust theory of free speech that encompasses pornography) with Catharine Mackinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1 (1985) (advocating restricting the definition of protected speech to exclude pornography, on the basis of the harm that pornography causes).

283. For example, when we consider whether the state may prohibit persons of different races to marry, we are not plausibly interpreting what it means to be equal, or what means to have the equal protection of the laws. Rather, we would appear to be addressing a substantive set of questions about individual autonomy, the scope of state power, and the grounds on which the state may classify persons under fundamental social legislation. Why is one characterization of the dispute more persuasive or less? We do not think we are arguing about the meaning of words; we recognize that we may be arguing about what was understood, or what would be precedent, or what would have doctrinal fit, or what would be just—but it does not feel to the participants in the argument that it is only about semantics.

at recharacterizing such disputes as about the meaning of “freedom of expression” and about the meaning of “respect” and “dignity.”²⁸⁴

Dworkin makes his philosophical commitments more expressly than the originalists, and they are at least equally important. Those commitments support both his criticism of originalism and his defense of his own position. Dworkin wants to introduce the sophistication of modern analytic philosophy of language into the interpretive project of determining the meaning of the Constitution’s provisions.²⁸⁵ In analyzing meaning and interpretation, Dworkin deploys modern philosophy of language to highlight the implicit allegedly primitive concepts of meaning that Dworkin argues underlie the originalist position.²⁸⁶ In particular, Dworkin suggests that modern philosophy of language demonstrates that language is richer and more complicated than the originalists acknowledge.²⁸⁷ Those performative elements in language, the important role of informal implicature, and the flaws in correspondence theories of truth all undermine the tacit philosophical assumptions of originalism. Dworkin thinks modern philosophy thus undercuts the originalist project.²⁸⁸

But Dworkin nevertheless shares with the originalists other philosophical premises. In particular, Dworkin is committed to the existence of an objective Constitution. He is committed to a theory of the truth of propositions of constitutional law based upon their correspondence (or lack thereof) with that objective Constitution. Finally, he is committed

284. That characterization of the constitutional argument appears strained, however, because of the terms and grounds on which the debate is conducted. The argument is made in terms of the duties we have to each other and with respect to the nature of dignity, not the definition of “dignity.” Additionally, the participants in the debate do not characterize themselves as engaged in a semantic argument. While self-consciousness is hardly dispositive, both the terms of the debate and the self-consciousness of the participants suggests that recharacterization of the debate as one of semantic understandings and intentions is difficult at best.

285. Dworkin, *Interpretation*, *supra* note 187, at 117.

286. *Id.* at 116–17.

287. That is the import of Dworkin’s cryptic citation of Davidson, Quine, and Grice. *Id.* at 117 n.6. Thirty years later Scott Soames has offered similar criticisms of originalism’s account of language, without breaking with its fundamental premises. See Soames, *Deferentialism*, *supra* note 14.

288. *Id.* at 117. From the philosophers that he cites, Dworkin appears to believe that such modern analytic philosophy undermines the originalist account by capturing the complexity of linguistic practices, both with respect to their semantic and pragmatic content. The simpler model of language incorporated into the originalist discussions of meaning are apparently the commitments that Dworkin believes are put at risk. *But see* Easterbrook, *Abstraction*, *supra* note 190, at 360 n.41 (suggesting that Bork’s focus on the understanding of the original community to determine the meaning of constitutional provisions follows the later Wittgenstein). Easterbrook’s suggestion is highly implausible because Bork appears to accept that words picture the world, and has no ear for the complexities of meaning and use.

to the position that the meaning of such propositions is determined by their truth conditions. All of these positions are shared, albeit often only tacitly, with the mainstream of originalism.²⁸⁹

B. The Philosophical Commitments of Other Critics

Other critics of originalism appear equally committed to the existence of the Constitution, as well as to the other philosophical premises attributed here to Dworkin.²⁹⁰ For example, two of the early, seminal criticisms of originalism by Paul Brest and Jefferson Powell,²⁹¹ take the objective Constitution for granted.²⁹² Powell inquired into the history of the original understanding of the proper role to be played by the original understanding of the constitutional text in constitutional decision. That project starts with the implicit premise that inquiring into such original understanding is important. More fundamentally, Powell tacitly assumes that such historical fact exists. The answer to Powell's historical inquiry, that the original understanding was that the original understanding of the Constitution was not controlling for constitutional decision, is presented as a telling objection to the originalist position.²⁹³ Powell is tacitly committed to an objective Constitution, the meaning of which is to be interpreted and applied.²⁹⁴ Brest's commitment to constitutional doctrine and precedent is

289. There are, admittedly, forms of originalism that might not share these premises, but the principal originalists have tacitly endorsed them.

290. This statement applies to many, but not all, critics of originalism. I explore the stance of two of those critics who appears to eschew Dworkin's ontology in LeDuc, *Anti-Foundational Challenge*, *supra* note 23.

291. Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

292. For Brest, the objective constitution would appear to be the original text as it has been interpreted and elaborated upon by constitutional doctrine and precedent. *See* Brest, *supra* note 291, at 234. Brest takes those precedential texts as objectively authoritative in our contemporary constitutional law.

293. Powell, *supra* note 291, at 948. I characterize Powell's claim somewhat cautiously because literally Powell claims only that the historical evidence does not determine the legitimacy of the originalist claim. But the tacit premise that such an inquiry might end with such an historical inquiry already demonstrates Powell's ontological commitment.

294. Admittedly, one could reconstruct Powell's position without an affirmative commitment to an objective Constitution. Historical argument might play only a critical role. Powell could be read to invoke history simply to rebut the originalist project of constructing the objective, historical Constitution. Having refuted the originalist project on its own terms, Powell might go on to reject any objective Constitution and instead propose to apply the Constitution in another way. But I do not think that interpretation is the better reading of Powell's argument. Powell appears committed to the claim that there is a right answer to constitutional questions and never questions the existence of an independent, objective Constitution.

invoked against the originalist reduction of the Constitution to the original understanding or expectations.²⁹⁵

Ely's rejection of originalism is based upon an argument that we cannot determine the meaning of the particular provisions of the Constitution without taking into account the entire structure of the Constitution.²⁹⁶ Ely believes, moreover, that there is an alternative.²⁹⁷ The interpretative method Ely endorses for the Constitution rejects Dworkin's recourse to philosophy to identify fundamental values.²⁹⁸ Instead, Ely proposes to employ a structural argument to identify fundamental values inherent in the Constitution itself.²⁹⁹ In so doing, Ely is committed to the existence of a Constitution to which we may turn and to the truth of the propositions of constitutional law that he defends.³⁰⁰ Ely also reveals his ontological commitments when he objects to the jurisprudence of substantive due process.³⁰¹ Ely does not expressly address the questions of how propositions of constitutional law are made true or how such propositions are to be made meaningful. Nevertheless, Ely seems to accept that questions of constitutional law are properly answered by looking to the entire text of the Constitution (not simply any particular clause that may appear relevant or controlling)³⁰² and not by reference to the judicial decision maker's values or preferences. Thus, Ely appears to endorse a traditional realist account that relies upon the existence of facts about the

295. Brest, *supra* note 291, at 234.

296. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 18–33 (1980) (exploring the open-ended provisions of the Equal Protection, Privileges and Immunities and Due Process Clauses to demonstrate the difficulty if not the impossibility of interpreting such language on a stand-alone basis) [hereinafter ELY, *DEMOCRACY AND DISTRUST*].

297. *Id.* at 33.

298. *Id.* at 58.

299. *Id.* at 73–179 (defending the particular importance under the Constitution of enhancing democracy, preventing political entrenchment, and protecting the rights of minorities in the democratic process).

300. Thus, in criticizing clause-bound interpretivism and the importation of extra-constitutional values in constitutional interpretation, Ely argues not only that such methodologies are flawed, but implicitly assumes that because of such methodological error, he need not engage with the claims. *Id.* at 57–60 (criticizing Dworkin and the proposed reliance on philosophical theory).

301. *Id.* at 18 (“[W]e apparently need periodic reminding that ‘substantive due process’ is a contradiction in terms—sort of like ‘green pastel redness.’”) (citation omitted). When Ely claims that substantive due process is an oxymoron, he is tacitly committed to the view that the meaning of a term in constitutional law is determined outside our practice of constitutional argument and decision. A performative, anti-representational account of the Constitution can explain this apparent paradox by recognizing that substantive due process plays a performative role in our constitutional jurisprudence, filling a gap arising from the narrow interpretation of the Privileges or Immunities Clause. That performative role is not tied to, or constrained by, the conceptual content that declarative, non-performative texts may best be understood to have.

302. *See id.* at 11–41.

world. Ely's use of the traditional dichotomy between facts and values suggests that the truth of propositions of constitutional law consists for Ely in the correspondence of such propositions to an objective Constitution.

More recently, in criticizing originalism, Laurence Tribe appears equally committed to an objective Constitution. At first impression, Tribe's metaphoric description may not appear to describe an objective Constitution.³⁰³ An invisible Constitution may not appear ontologically independent, but while invisible, its existence remains, and Tribe is at pains to emphasize its force. Moreover, to the extent that Tribe argues that constitutional interpretation and adjudication requires recourse to extra-constitutional values, it may appear that Tribe has abandoned the concept of an ontologically independent Constitution.³⁰⁴ But for Tribe, even an invisible Constitution is an ontologically independent entity.³⁰⁵ Thus, Tribe consistently criticizes Dworkin as being unfaithful to the constitutional text in his approach to constitutional interpretation.³⁰⁶ Indeed, Tribe's criticism of the twin errors of disintegrative and hyper-integrative constitutional interpretations is premised on a concept of a controlling, independent constitutional text.³⁰⁷

Tribe's insistence that there is a problem of generality in interpreting the Constitution that the text of the Constitution cannot answer may appear inconsistent with the claim that Tribe is committed to an ontologically independent Constitution. Tribe and Dorf assert: "The question [of interpretation] then becomes one of characterization: *at what level of generality should the right previously protected, and the right currently claimed, be described?*"³⁰⁸ Although Tribe takes *Griswold* as his example, the question is presented even more forcefully in his discussion of the First

303. See, e.g., LAURENCE H. TRIBE, *THE INVISIBLE CONSTITUTION* (2008) (describing the constitutional doctrine that is unarticulated yet shapes constitutional decision as the *invisible* constitution) [hereinafter TRIBE, *INVISIBLE*]; TRIBE & DORF, *READING*, *supra* note 175, at 112–14 (defending the position that there are essential elements of constitutional doctrine and precedent).

304. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 452 (1st ed. 1978) *cited in* ELY, *DEMOCRACY AND DISTRUST*, *supra* note 296, at 204 n.3. Certainly sophisticated critics have so read Tribe; erroneously, I think, however. See Richard A. Posner, *The Constitution as Mirror: Tribe's Constitutional Choices*, 84 MICH. L. REV. 551 (1986) (criticizing Tribe for needlessly injecting his own values into his constitutional interpretation).

305. See TRIBE, *INVISIBLE*, *supra* note 303, at 7–8 (describing the role of the invisible Constitution in telling us what is part of the more well-known visible Constitution, including, in particular, the 27th Amendment).

306. See TRIBE & DORF, *READING*, *supra* note 175, at 17 ("The moment you adopt a perspective as open as Dworkin's, the line between what you think the Constitution *says* and what you wish it *would* say becomes so tenuous that it is extraordinarily difficult, try as you might, to maintain that line at all.")

307. See *id.* at 19–30.

308. *Id.* at 73–80, 97–104. See also Tribe, *Interpretation*, *supra* note 186, at 87 n.52.

Amendment and the separate suggestions by Justices Jackson and White that there “is a law . . . [of] the soundtrack” and a “law of billboards.”³⁰⁹ These suggested approaches suggest that the level of generality is very limited, indeed. Thus, Tribe and Dorf provocatively ask: “Must there be a unique ‘law of compact discs’ distinct from the prior ‘law of phonograph records’?”³¹⁰

According to Tribe, the level of generality is never established by the text. It must be a matter of interpretation.³¹¹ A couple of examples may make this claim clearer. I have already introduced the question of whether the First Amendment applies to radio, broadcast television, hate speech, commercial speech, pornography, and expressive action. How one determines the scope of the First Amendment—and how one answers the question of whether to extend its protections to such types of “speech”—will be determined, wholly or in part, by how generally the text of the First Amendment is stated.

We ordinarily think it easy to recognize specific or particular linguistic formulae as well as general or abstract ones. Even acknowledging that those concepts define a spectrum rather than discrete categories, our confidence in our ability to distinguish the two remains. How could constitutional texts pose such a different and difficult interpretive task?³¹² Tribe writes, moreover, of the need for constitutional *choices*.³¹³ He concludes: “I hope my words will be understood as shorthand not for a conclusion . . . with which I mean . . . [not] to end debate but [instead] always to advance it.”³¹⁴ Thus, Tribe may appear to endorse our constitutional law as a practice rather than our constitution as a thing.

Tribe’s commitment to the limitations of the constitutional text, captured by the problem of generality, as well as his emphasis on the tentativeness of his conclusions, are not inconsistent with his commitment to an ontologically independent Constitution. Despite his emphasis on practice and on choice, in the end Tribe looks to the text of the

309. TRIBE & DORF, *READING*, *supra* note 175, at 79 (citation omitted).

310. *See id.*

311. Tribe, *Interpretation*, *supra* note 186, at 71 (“The task of deciding which provisions to treat as generative of constitutional principles broader or deeper than their specific terms might at first suggest . . . lies at the core of the interpretive enterprise.”).

312. Tribe’s account may be questioned, but our goal here is only to sketch Tribe’s theory and its relationship to the existence of an independent Constitution.

313. LAURENCE H. TRIBE, *CONSTITUTIONAL CHOICES* 4 (1995) (describing the goal of the book as “simply to illuminate the choices involved in actually doing [constitutional law].”).

314. *Id.* at 8.

Constitution for much of his analysis and doctrine.³¹⁵ In summarizing the principal areas of agreement with Justice Scalia, Tribe proclaims:

that the Constitution's written text has primacy and must be deemed the ultimate point of departure; that nothing irreconcilable with the text can properly be considered part of the Constitution; and that some parts of the Constitution cannot plausibly be open to significantly different interpretations³¹⁶

Tribe's formulation leaves open a number of questions. Whether Tribe is committed to the independent ontological existence of the Constitution is not among them. While Tribe believes that the Constitution of our positive law is not a theoretically consistent text,³¹⁷ he also believes that there are answers in the objective text. Tribe also appears committed to the premise that the truth of a proposition of constitutional law consists in its correspondence with the Constitution.³¹⁸

The other leading critics of originalism are also committed to the truth of their claims about the Constitution. Thus, despite Tribe's flirtation with the notion that constitutional decision is a matter of constitutional choice, in the end, he defends his constitutional claims as true or correct.³¹⁹ Thus, for example, in criticizing Justice Scalia's interpretation of the First Amendment, he makes it clear that what is at stake is the "correct" interpretation of that provision.³²⁰

In conclusion, originalism's critics make a commitment to the concept of an objective constitution and to an account of the truth of propositions of constitutional law. The content of that Constitution is very different from the Constitution of the originalists; but its ontological status is not. Similarly, both sides are committed to an account of language and the world that allows each to characterize the debate as about the truth of propositions of law, and to believe that there is a fact of the matter as to the resolution of the debate.

315. Tribe, *Interpretation*, *supra* note 186, at 77.

316. *Id.*

317. *See generally* TRIBE & DORF, *READING*, *supra* note 175.

318. *See generally* TRIBE, *INVISIBLE*, *supra* note 303; Tribe, *Interpretation*, *supra* note 186; TRIBE & DORF, *READING*, *supra* note 175.

319. Tribe claims that constitutional interpretation and decision is a matter of determining the meaning of the constitutional text. Tribe, *Interpretation*, *supra* note 186, at 65.

320. *Id.* at 79–81.

C. *The Implications of the Critics' Philosophical Commitments*

Originalism's critics' philosophical commitments generally make their critical stance toward originalism possible. When Dworkin rejects the originalist commitment to original intentions, understandings, and expectations as capturing the meaning of the Constitution, he would substitute in its place the Constitution of Hercules. For Dworkin, that Constitution has an independent, objective existence.³²¹ That alternative account, and the ontological independence of that Constitution, ground Dworkin's attack on originalism. Unlike the originalists, Dworkin expressly invokes his philosophical claims.³²² He argues that the originalist account of constitutional meaning is untenable.³²³ Originalism cannot answer the questions it confronts, Dworkin argues, without admitting arguments from moral and political theory.³²⁴ But those arguments are permissible for Dworkin; indeed, they are *necessary*.³²⁵ That is because they are necessary to discover the objective truths of the Constitution.³²⁶ So Dworkin's realism and commitment to the ontologically distinct and prior Constitution is central to his arguments against originalism.

The objective Constitution appears equally central to most other critics of originalism in their argument against originalism. I have sketched Tribe's argument for the problem of generality above.³²⁷ Tribe argues that Justice Scalia's suggested principle of least specificity is fundamentally untenable. Tribe rejects the concept that we can create a metric for specificity pursuant to which we can rank interpretations and provisions as more or less specific.³²⁸ This claim seems not only counterintuitive, but seems to challenge the claims made across a much broader range of legal theory than merely those claims made by constitutional originalism.³²⁹

321. See generally Dworkin, *Objectivity*, *supra* note 2.

322. Dworkin, *Interpretation*, *supra* note 187, at 117–18.

323. *Id.* at 119–27.

324. DWORKIN, *EMPIRE*, *supra* note 109, at 359–63.

325. There is, after all, according to Dworkin, a single right answer to all legal and constitutional questions. RONALD DWORKIN, *Is There Really No Right Answer in Hard Cases?*, in *A MATTER OF PRINCIPLE* 119 (1985).

326. For Dworkin, the judicial project is necessarily one of discovery, not construction, because of his philosophical realism, as much as it might appear (at least to Dworkin's critics) that Hercules is constructing a constitutional interpretation rather than discovering constitutional truth.

327. See *supra* text at notes 308–10.

328. TRIBE & DORF, *READING*, *supra* note 175, at 101.

329. For example, if we cannot distinguish constitutional provisions of greater or lesser generality, how does Dworkin's notion of distinguishing between general concepts and more specific or particular conceptions hang together? It may be that Dworkin's distinction between concept and conception is

Legal theory generally tacitly assumes that legal rules may be stated with various degrees of generality or specificity and that we can tell the difference between statements that are more or less general than others. Thus, for example, in the Federal legislative context, we think that we can recognize special provisions of particular, rather than general, application, and therefore a prohibition on earmarking—the provision of spending for particular projects—is a coherent if politically difficult project. In the constitutional context, we think that we can tell the difference between general and specific constitutional provisions on their face, as it were. As noted above, the provision against quartering troops in homes, the guarantee of a jury trial in cases involving twenty dollars or more, and the requirement that the President be at least thirty-five years of age would all appear to be specific provisions. The Privileges and Immunities Clause and the Equal Protection Clause would appear to be general provisions. Tribe seeks to redeem his counterintuitive claim by attributing to originalism a need for a metric that orders provisions such that for any provisions, P and P1, P is more specific than P1, equally specific or less specific. As Tribe puts it, “[t]he absence of a single dimension of specificity is a pervasive problem for the tradition-bound program.”³³⁰ This is a precision in measuring specificity that intuitions do not have. Does originalism need an ordering rule of such precision?

Tribe offers an example why Justice Scalia is committed to the existence of such a well-ordering principle. *Roe v. Wade*³³¹ presented the question whether a woman has a right to abort a fetus she is carrying. How does Justice Scalia’s proposal to choose the principle with the least generality apply in *Roe*? The first step may be to remark what the principle of least generality does not generate from *Roe*: the principle yields neither a right to exercise exclusive control over one’s own reproductive life (if that is not an oxymoron for a sexual species) nor a right to engage in intimate relationships in the manner and on the terms of one’s own choosing. Both principles are manifestly too broad. Note that the principle of least generality by rejecting such broad readings already collides with interpretative conclusions Tribe³³² and Dworkin³³³ would reach. But the principle calls for the least general statement of the constitutional right.

not as simple as a matter of respective generality. Another way to distinguish the two would be with respect to levels of specificity.

330. *Id.*

331. *Roe v. Wade*, 410 U.S. 113 (1973).

332. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 15-10 (2d ed. 1988).

333. DWORKIN, *Roe in Danger*, in *FREEDOM’S LAW*, *supra* note 282, at 44–59.

While it is plausible that *Griswold* could be construed as a decision about the constitutional limits on criminal statutes that have fallen into desuetude,³³⁴ that reading cannot help with respect to abortion; anti-abortion laws were seriously enforced at the time of *Roe*. Of course, that may be the point Justice Scalia is implicitly making: under the principle of least generality, what alternative constitutional principle can be drawn from *Griswold* to support the holding of *Roe*? The options to found such a least general principle would appear to be privacy, equal protection, or substantive due process. A principle of least generality would necessarily limit the majority's legislative power in favor of the individual right of the woman seeking the freedom to abort. Constructing such a principle, however, is difficult and to the extent that it can be constructed, it would appear that Justice Scalia would be (or become) committed to the outcome of *Roe*. Nevertheless, even such a successful construction would not explain why such a limiting construction is proper.

Tribe claims that interpretation is required for an utterance or for a text before it can be understood.³³⁵ That is the fundamental source of Tribe's claim that there is an insoluble problem of generality in reading the Constitution. The view that an utterance or text must be interpreted before it can be applied, followed, or understood has been challenged in a variety of ways.³³⁶ I do not think Tribe proves his case. Tribe is in any case committed to the view that there is an answer in each case to the question of generality.³³⁷ He simply believes that such an answer comes from the Constitution, but from outside the bare constitutional text.³³⁸ Moreover, that answer comes from the Constitution, and is not merely a matter of a constitutional choice to be made by the courts.³³⁹ Tribe's position emerges

334. Perhaps for Justice Scalia the principle of *Griswold* is that criminal statutes that are rarely enforced fall into desuetude and, at that point, due process bars further selective enforcement.

335. Tribe, *Interpretation*, *supra* note 186, at 76 (referring to "the simple but ultimately deep problem of self-referential regress whenever one seeks to validate, from within any text's four corners, a particular method of giving that text meaning.").

336. See generally KRIPKE, *supra* note 263; Lewis Carroll, *What the Tortoise Said to Achilles*, 4 MIND 278 (1895) (whimsically demonstrating that even the rules of logic cannot easily be demonstrated logically to be true), and discussion in André LeDuc, *What Were They Thinking?: Reconceptualizing the Originalism Debate*, Section II.B.1 (July 15, 2014) (unpublished manuscript on file with author).

337. That answer must be found not in the constitutional practice but in our other sources of constitutional law. See Tribe, *Interpretation*, *supra* note 186, at 77–79; see also TRIBE & DORF, *READING*, *supra* note 175, at 73–80 (describing the problem of generality).

338. Tribe, *Interpretation*, *supra* note 186, at 76.

339. That is why he objects to Dworkin's interpretative methodology. See TRIBE & DORF, *READING*, *supra* note 175, at 17.

most clearly in his criticism, not of the originalists, but of Dworkin.³⁴⁰ Tribe criticizes Dworkin as not being true to the textual facts.³⁴¹ That criticism reveals Tribe's commitment to the notion that there is an objectivity of the constitutional text that must be acknowledged—not simply a textual or historical mode of legitimate argument that may count against another legitimate mode of argument in our constitutional practice. He believes that objective constitution discredits Dworkin's mode of argument.³⁴² That delegitimization strategy is the hallmark of an appeal to an independent Constitution. Tribe does not think he need engage with Dworkin's constitutional interpretations. Similarly, he does not think he need engage with the originalists like Scalia and Bork, again because their position is not consistent with Tribe's objective Constitution.³⁴³

Brian Leiter has challenged Bobbitt and Patterson's claim that the debate over originalism turns on flawed, shared premises about the nature of language and truth.³⁴⁴ He denies Bobbitt's claim that the debate about judicial review is premised on a representational account of language.³⁴⁵ While Leiter expressly challenges only Patterson's claims about judicial review, the broader claim that Patterson and Bobbitt make is that such shared erroneous premises underlie not just the debate about the legitimacy of judicial review but originalism and the place of original understandings, intentions, and expectations generally.³⁴⁶ The controversy surrounding judicial review is only a particular instance of the controversies flowing from the underlying philosophical premises outlined above. It is not clear what Leiter rejects in Bobbitt and Patterson's

340. See *TRIBE & DORF, READING*, *supra* note 175, at 17.

341. *Id.*

342. Tribe's position might be defended on the basis that Dworkin's constitutional jurisprudence is not, in fact, within our constitutional practice and the philosophical arguments Dworkin seeks to deploy are not accepted modes of argument within that practice. But that is not the basis upon which Tribe criticizes Dworkin. Tribe's criticism is not that Dworkin's argument falls outside our accepted constitutional practice but that Dworkin is not true to the ontologically prior Constitution.

343. See Tribe, *Interpretation*, *supra* note 186, at 66 (arguing that Justice Scalia departs from the constitutional text of the Eighth Amendment by looking to the expectations of the Founders with respect to capital punishment).

344. LEITER, *Quine*, *supra* note 4, at 139. Although Leiter focuses his disagreement on whether Quine is properly characterized as a postmodernist, I am entirely agnostic on that question here, and shall ignore it. It is important to Leiter because he wants to enlist Quine on his side of the question whether jurisprudence can and should be naturalized, which would be inconsistent with a postmodern characterization. If one is skeptical of the naturalization project, it is likely a less interesting or important question.

345. *Id.*

346. See *PATTERSON, TRUTH*, *supra* note 3, at 151–63; *BOBBITT, INTERPRETATION*, *supra* note 11, at xii.

account.³⁴⁷ Certainly one could imagine a constitutional debate about the role and legitimacy of judicial review without commitments to a representational account of language and the meaning of the Constitution. But Bobbitt is not denying that such a debate would be possible; he is only claiming that the debate that we have is grounded on a representational account.³⁴⁸ Bobbitt is right that the protagonists in the debate are committed to a representationalist account.

Leiter may be claiming that our debate over judicial review could be easily rehabilitated without its representationalist foundations. Our debate is about the objective truth—whether the Founders contemplated judicial review with the scope and force that has evolved. Instead, the debate could engage on the merits of such review and over the constitutional virtue of choosing such a form of judicial review. But that would not be a rehabilitation of our debate; it would be the construction of a very different debate, and one, moreover, in which the originalists could participate only in a very different capacity. Such a debate would not place in controversy the privilege to be accorded the original understanding of judicial review, and that such privilege is a question of objective, historical fact. It is fundamental to our debate over judicial review that it purport to be conducted within our constitutional practice, but rely upon a reified, objective Constitution. The nature of our constitutional practice is that there is no touchstone that permits the construction of an irrefutable, irresistible argument on any important constitutional question. Thus, the premise of the countermajoritarian dilemma that we could, within our constitutional practice, reject judicial review is incoherent. Therein lies the fundamental flaw in the purported dilemma that Bobbitt has called out.

Leiter refers to Bobbitt's second claim only as a mistake about truth.³⁴⁹ That claimed error is that the truth of propositions of constitutional law is a matter of correspondence with the world.³⁵⁰ Unfortunately, Leiter does not articulate the argument to support his claim, so we must endeavor to reconstruct it ourselves. Leiter simply denies that the disputants in the debate over originalism have the two commitments that Bobbitt attributes to them.³⁵¹ One way to begin to assess Leiter's claim would be to reformulate the originalism debate with each side expressly committed to

347. Leiter expressly addresses his criticism only to Patterson's claim, but this is a punctilious distinction without a difference. LEITER, *Quine*, *supra* note 4, at 138 n.5.

348. See BOBBITT, INTERPRETATION, *supra* note 11, at xii.

349. LEITER, *Quine*, *supra* note 4, at 139 n.6.

350. See BOBBITT, INTERPRETATION, *supra* note 11, at xii.

351. LEITER, *Quine*, *supra* note 4, at 139.

a coherence, rather than a correspondence theory of truth. What would that debate look like?

Neither side would be able to argue that the claims of the other side in the dispute are false because they do not correspond to the historical or other relevant facts about the objective Constitution. For example, the grounds advanced by the originalists against their critics would instead have to turn on our linguistic practices. The originalists would need to make the case that those practices and, in particular, our commitment to certain other propositions of constitutional law or of other matters were inconsistent with or, at the least, difficult to reconcile with the propositions of constitutional law that originalism's critics defend. At the least, this would seem to describe a very different debate about originalism than we have. It does not necessarily follow that such a modified debate over originalism would commit either side to untenable claims. Before dismissing Leiter's claim I will revisit Bobbitt's claim that both sides share such commitments, and endeavor to construct the argument Leiter may have in mind.

Leiter would be correct if Bobbitt claimed that such commitments to a theory of truth and a theory of language were expressly articulated by the originalists and their critics, because, with the exception of Dworkin, the participants in the debate—on either side—do not articulate any philosophical commitments as to the nature of truth or the nature of language.³⁵² When the participants contest what the Constitution means and when they dispute whether a proposition about the meaning of the Constitution is true, they tacitly assume that there is an objective reality about the Constitution, a historical fact, that confirms or disproves their respective claims. Thus, for example, when Powell addressed the historical understanding of original intent, he treated the question at hand as a historical inquiry.³⁵³ Justice Scalia treats the questions whether the Eighth Amendment prohibits the death penalty or the Sixth Amendment encompasses the right to confront witnesses as well as the right to be confronted by them as a matter of historical inquiry.³⁵⁴ That inquiry is into the objective fact about the Constitution, and the propositions about the meaning of the Constitution are thus true (or false) to the extent they correspond to that objective fact.

352. Indeed, classical originalism prides itself on eschewing such fancy philosophical analysis.

353. See Powell, *supra* note 291, at 886 ("The purpose of this Article is to examine the *historical validity* of the claim that the 'interpretive intention' informing the Constitution was . . .") (emphasis added and footnote omitted).

354. SCALIA, INTERPRETATION, *supra* note 6, at 43–44, 144–46.

Leiter may reject this account of the originalism debate because he believes that debate could be translated into a debate about originalism without such philosophical commitments. On this account, Justice Scalia's claims about the Sixth and Eighth Amendments could be translated from historical claims into claims about our practices of interpreting the Constitution, or claims about how we ought to interpret and construe the Constitution. This translation is as unsuccessful as a non-representational account of the debate over judicial review. Such a translation would lose much of the force of Justice Scalia's claim. That translation would require Justice Scalia to engage, for example, Cass Sunstein on Sunstein's own terms, and to confront the challenge Sunstein (like Posner before him) makes to originalism: Why is it better to interpret the Constitution solely in historical terms?³⁵⁵ Justice Scalia's originalism derives much of its force not from a prudential defense, but from a claim that there is an objective historical reality that we are properly required to respect and follow in our constitutional interpretation.³⁵⁶ Stripped of that claim, if Justice Scalia were to acknowledge that he were engaged in an argument about how we ought to interpret and apply the Constitution within the same framework that such arguments have been conducted in the past,³⁵⁷ then he would need to consider arguments beyond the textual/historical inquiry into original understanding. That is a debate that classical originalism will not concede to be legitimate or proper.

The critics' commitment to an objective Constitution and a theory of the truth-value of propositions of constitutional law that tests correspondence with the Constitution-in-the-world may seem less clear. Critics like Powell, when he defends an alternative historical understanding of the importance of original intentions and understandings, and like Dworkin, when he denies the existence of an original intention or an original understanding,³⁵⁸ or Tribe, when he asserts the indeterminacy of constitutional meaning,³⁵⁹ all derive much of the force of their claims from an implicit appeal to the notion that they are not merely making

355. See CASS R. SUNSTEIN, *RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA* (2005).

356. See SCALIA, *INTERPRETATION*, *supra* note 6, at 45.

357. This formulation is agnostic on Bobbitt's claim of exclusivity for the six modalities of constitutional argument Bobbitt identifies. See generally Jack M. Balkin, *The New Originalism and the Uses of History*, 82 *FORDHAM L. REV.* 641, 658–63 (arguing that Bobbitt's modalities ought to be refined to distinguish eleven distinct modes of constitutional argument).

358. See Dworkin, *Arduous*, *supra* note 217, at 1253–57 (distinguishing semantic originalism and expectations originalism, and the difficulties in the choice between them); see also DWORKIN, *Forum*, *supra* note 238, at 33.

359. See TRIBE & DORF, *READING*, *supra* note 175, at 73–80.

arguments within our practice of interpreting the Constitution, but that there is fact of the matter that can be determined. Similarly, when Fried challenges the originalists on the basis that their account leaves no place for the exercise of non-historical judgment on the part of an appellate court considering what the Constitution says and how it is to be applied (on facts already found at trial), he appears to cast his argument in a posture that presumes that there is a right answer that may be determined by the exercise of such faculty of judgment.³⁶⁰ Moreover, if the critics are to meet the originalist claims about the objective facts about the Constitution on their own terms, on a basis that can potentially convince the proponents of such positions, the critics must also purport to identify an objective Constitution incompatible with the originalist position. It is not clear that any such Leiterian translation can be made to an originalism debate without the representational premises Bobbitt identifies and rejects.

Thus, while the critics of originalism dispute originalism's claims as to what the Constitution means and originalism's claims as to the proper interpretative methodology, they agree with the originalists that there is a right answer to the questions they address, and that that right answer is inherent in the independent, ontologically prior Constitution. The express or tacit commitment to that claim makes the debate over originalism possible as a debate over the truth of propositions of constitutional law, rather than a debate over the merits or wisdom of particular decisions of constitutional questions.

D. Rejecting Originalism without the Support of an Objective Constitution

Before attaching much significance to the claim that shared philosophical premises underlie the debate over originalism we have, it is important to explore a little further how such a debate might proceed in the absence of such premises. This is an exercise that can be undertaken by looking to mainstream critics of originalism who appear to reject or at least remain agnostic on the ontological and philosophy of language claims explored here. It can also be done on a more abstract basis without the limitations of the positions taken by particular protagonists.

360. See Fried, *On Judgment*, *supra* note 145 (defending an account of adjudication that focuses on the role of judgment and denying that such judgment can be reduced to an algorithm or other formal decision process).

Some critics of originalism do not share the ontological and linguistic commitments outlined above.³⁶¹ Thus, for example, Posner appears to reject the notion of an objective Constitution independent of our constitutional practice.³⁶² If our Constitution is only our constitutional practice, then it would not appear that there is any role for an ontologically independent constitutional thing. Yet Posner also rejects originalism.³⁶³ Posner would thus appear to stand as a counterexample to our claim that the debate over originalism is grounded on the philosophical premises I have outlined.³⁶⁴

Although Posner claims to endorse an account of the Constitution as no more than our constitutional practice, his other jurisprudential commitments are inconsistent with that position. Posner clearly wants to distance himself from parts of Rorty's position.³⁶⁵ Posner may be distancing himself from Rorty's politics, or from Rorty's ontological and linguistic stance.³⁶⁶ But in so doing, Posner implicitly disavows the ontological reduction of the Constitution to practice. In his early writings Posner was committed to a narrow, economic functional account of law generally.³⁶⁷ That narrow, economic functional account of constitutional

361. The arguments of anti-foundational, anti-representational critics like Bobbitt and Patterson will not be discussed here. See generally LeDuc, *Anti-Foundational Challenge*, *supra* note 23.

362. See RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 232 (1990) (referring, in passing, to the fallacy of thinking of law as a concept rather than an activity, but without any explanation or defense of the claim that such a characterization is erroneous) [hereinafter POSNER, *JURISPRUDENCE*]. Cass Sunstein is probably best characterized as a critic of originalism, despite his kind words for what he calls "soft" originalism. See Cass R. Sunstein, *Five Theses on Originalism*, 19 HARV. J.L. & PUB. POL'Y 311, 313–15 (1995). His criticism of originalism has become more focused in his later work. See SUNSTEIN, ROBES, *supra* note 45, at 25–27. See generally SUNSTEIN, ROBES, *supra* note 45 (criticizing the originalist project as resulting in a radical, unpalatable change to our federal government and the elimination of important checks on the powers of the States); CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999). Sunstein's defense of minimalism and of incompletely theorized arguments may also appear better characterized as arguments for choices rather than arguments from truth. Choosing an incompletely theorized argument suggests that Sunstein is rejecting the notion that constitutional decisions are compelled by the applicable arguments. Yet Sunstein does appear committed to the premise that there are right answers to constitutional questions, and that originalism must, ultimately, be rejected because the constitutional answers it offers are mistaken. Moreover, Sunstein appears committed to the fact-value distinction of traditional empiricisms. Space does not permit a fuller exploration of Sunstein's position here.

363. See Richard A. Posner, *Bork and Beethoven*, 42 STAN. L. REV. 1365, 1369 (1990), *reprinted in* RICHARD A. POSNER, *OVERCOMING LAW* 237 (1995) [hereinafter Posner, *Bork and Beethoven*] (arguing that methods of constitutional interpretation, like methods of musical interpretation, must ultimately be defended on the basis of the merits of the results that they provide).

364. Our reading of Posner may be too charitable. See Dworkin, *Darwin's New Bulldog*, *supra* note 7, at 1718–19.

365. POSNER, *JURISPRUDENCE*, *supra* note 362, at 384–87.

366. *Id.*

367. See generally RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* (1981).

law accords economic facts a priority that is inconsistent with our constitutional practice.³⁶⁸ But in the past twenty years Posner appears to have abandoned some of these claims.³⁶⁹ Posner also challenges Dworkin's claim that legal disputes have a single right answer.³⁷⁰ These current positions might suggest that Posner rejects the premise that the Constitution has an independent ontological existence, and that our constitutional practice must be measured against that independent standard.

Despite characterizing our Constitution as a matter of our practice, Posner nevertheless makes similar ontological commitments to the existence of an objective Constitution as do the originalists.³⁷¹ Posner's empiricism trumps his pragmatist aspirations.³⁷² Thus, when Posner challenges Bork's originalism, he takes for granted that the inquiry is into a matter of fact rather than a matter of choosing within a context of highly structured reasons and arguments.³⁷³ The difference is that for Posner, the inquiry is instrumental, into the consequences of the alternative interpretations. The instrumentally most advantageous interpretation is correct, according to Posner.³⁷⁴ Once Posner's decision-making methodology is articulated expressly, it is not clear what remains of the description of our constitutional law as *practice*. Our constitutional law would appear equally well described as that objective body of law that is understood to achieve the instrumentally most favorable outcomes.³⁷⁵

368. It is inconsistent, as Posner later came to recognize, because it fails to account for our concepts of rights and our associated rights talk. See generally POSNER, JURISPRUDENCE, *supra* note 362, at 374–87 (“wealth maximization . . . has nothing to say about the distribution of rights—or at least nothing we want to hear”). For one of the key criticisms that articulated this gap, see Jules L. Coleman, *Economics and the Law: A Critical Review of the Foundations of the Economic Approach to Law*, 94 ETHICS 649 (1984).

369. POSNER, JURISPRUDENCE, *supra* note 362, at 374–92.

370. *Id.* at 197–203.

371. Dworkin characterizes Posner's self-proclaimed postmodernism as a “flirtation.” Dworkin, *Darwin's New Bulldog*, *supra* note 7, at 1719 n.6.

372. Posner's empiricism underlies his acceptance of the assumption that there is a bright line between matters of fact and matters of value. See POSNER, JURISPRUDENCE, *supra* note 362, at 362–74 (defending the economic theory of law against criticism on the basis of classical empiricist premises and authorities).

373. Posner, *Bork and Beethoven*, *supra* note 363, at 1380 (“In the capacious, forward-looking account of interpretation that I am calling pragmatic, the social consequences of alternative interpretations are decisive . . .”).

374. *Id.* at 1381–82.

375. Posner's account clearly leaves a place for error; not all understandings as to what the most felicitous constitutional doctrines and outcomes are correct, and they may evolve over time. Nevertheless, at any given time, that corpus of the Constitution would appear to exist independent of our constitutional practice. The instrumental texts would appear decisive, and would appear to stand, for Posner, as a canon from which to critique our constitutional practice.

Despite Posner's express description of our Constitution as a matter of practice, it does not appear that Posner means to deny the objective Constitution to which appeal may be made in our constitutional interpretation and application. Despite his occasional pragmatist rhetoric, Posner therefore does not stand as a counterexample to our claim that the critics have relied upon ontological and other philosophical commitments, shared with the originalists, to ground their side of the originalism debate.

The debate about originalism may be reconstructed more abstractly, without reliance upon the underlying philosophical foundations explored above. In the absence of the ontological premise that there is an independent, objective Constitution, what would an alternative be? One possibility would be that the Constitution is a matter of our constitutional practice, and the substantive provisions of our constitutional law a matter of the practices within the relevant authoritative communities of our constitutional law.³⁷⁶ That will strike many, originalists and critics alike, as a frighteningly open-ended definition. It was the fear of judicial discretion, after all, that provided much of the impetus toward early originalism. But when we look at the practice of that community, and the kinds of arguments that are acceptable and persuasive, it appears far less open-ended than may initially appear.³⁷⁷ In any case, if we consider what the debate about originalism would look like in such a world, it is immediately apparent that the arguments that would need to be deployed would be intended to persuade the other members of the authoritative constitutional law community, not all of whom, even today, are originalists. There would be no crystalline appeal to the facts of the constitutional matter that could prove a necessarily decisive argument.

IV. CONCLUSION

The originalism debate rests on a handful of seemingly obvious philosophical premises shared by most of the protagonists on both sides of the debate. The philosophical commitments of both sides of the debate over originalism extend beyond those premises of political philosophy generally acknowledged. Originalism cannot claim a philosophical agnosticism. Nor can its critics. Originalism's claims tacitly endorse philosophical theories about ontology, language, and truth. Those premises are neither manifestly mistaken nor manifestly correct; they are shared in

376. See generally PATTERSON, TRUTH, *supra* note 3; BOBBITT, FATE, *supra* note 1.

377. For a defense of the claim that our constitutional practice is not reducible to matters of preference or to politics, see generally Philip Bobbitt, *Is Law Politics?*, 41 STAN. L. REV. 1233 (1989).

important respects, both with respect to ontology and the theory of truth, with many of originalism's most fervent critics. Originalism and most of its critics assume or endorse an ontology in which our constitutional law is objective, and the goal of interpretation is to articulate that law. So when we disagree about that law, there is a shared assumption or express commitment to the claims that there is a fact of the matter with respect to that disagreement, and that there are accordingly right and wrong answers as a matter of the facts about our constitutional law.³⁷⁸ If that foundational premise is wrong, then our account of constitutional disagreements and arguments must be fundamentally revised.

Although originalism generally eschews philosophical analysis in favor of appeals to common sense, implicit in the originalist canon is an account of the status of the Constitution and the truth of propositions of constitutional law. Originalism endorses a representational account of our language and a correspondence account of truth. Those commitments provide the originalists with the project of identifying and articulating an objective Constitution. The disagreement over the scope and authority of the original intentions, expectations, or understandings, therefore, is cast over a disagreement about that which is. Originalism's critics, to the extent that they are equally committed to that representational account of meaning and truth, are willing and eager to join the debate on just those terms.

Most of the critics of originalism share these philosophical premises with the originalists. Dworkin believes that there is an objective world that is represented by language. He claims a greater sophistication for his philosophy of language than that tacitly endorsed by the originalists.³⁷⁹ The truth of propositions generally, and propositions of constitutional law in particular, is determined by whether they correspond with that objective world. The existence of that objective world, and making our propositions true by virtue of corresponding with that world, are critically important to Dworkin.³⁸⁰ Dworkin simply denies that the originalists' propositions of constitutional law do so correspond.³⁸¹ Dworkin seeks to articulate the propositions of constitutional law that correspond to the objective constitutional world. Those are the true propositions. Similarly, he

378. See Dworkin, *Objectivity*, *supra* note 2, at 136–38. For Bobbitt's statement of this claim, see BOBBITT, *INTERPRETATION*, *supra* note 11, at xii.

379. See Dworkin, *Interpretation*, *supra* note 187, at 117 n.6.

380. See DWORKIN, *ROBES*, *supra* note 186, at 36–41; Dworkin, *Objectivity*, *supra* note 2.

381. See Dworkin, *Interpretation*, *supra* note 187, at 121–22 (defending his conceptual reading of the Eighth Amendment).

believes that his account gives a better description of the actual practice of constitutional argument as a matter of objective fact.³⁸² In particular, Dworkin believes that his account is better both because constitutional disputes cannot be reduced to semantics (or to pragmatics) and because the nature of constitutional arguments is inherently moral in certain cases.³⁸³ For Dworkin, then, as for the originalists, the dispute over the meaning of the Constitution is a dispute about an objective fact. There is a right answer, and the debate about originalism is a debate over which of the competing answers obtains in fact. Without that objective Constitution to which the originalists and Dworkin, among other critics appeal, the debate cannot survive in its current form.

More importantly for the nature and tone of the debate, the originalists and their critics seek to challenge the opposing position, not by persuading the other with respect to the merits of the constitutional decision, but by discrediting the arguments and interpretations offered by the opposing side. Each side does so by appealing to an intuitive, seemingly commonsensical notion of the nature of the Constitution (there, under glass, in the National Archives, after all) and the nature of truth for propositions of constitutional law. In so doing, however, each side largely eschews convincing, or even acknowledging the need to convince, the other side. The tacit account of the ontology of the Constitution and the nature of the language in which propositions of constitutional law are expressed permits the debate to be conducted as if there is a correct, objective answer to questions of constitutional interpretation and decision. Moreover, because the interpretative and decisional methodologies defended by the protagonists are so different and seemingly so inconsistent, neither side in the debate believes that it is necessary (or perhaps even possible) to convince the other side. The result is a barren assertion and free-standing defense of the results each side derives. Finally, it should be noted that the use to which each side puts the commonsensical notions that it invokes goes well beyond their ordinary use.³⁸⁴ Each side seeks a meta-constitutional stance from which to discredit the very arguments of their opponents in the debate. The philosophical premises at least tacitly shared by most of the participants in

382. See DWORKIN, *EMPIRE*, *supra* note 109, at 43–44.

383. See generally *id.* at 189–91 (describing the requirement of moral theory underlying the concept of law as integrity).

384. Each side seeks to invoke those commonsensical notions to answer hard contemporary constitutional questions. That is a use that our ordinary notions of the Constitution or of truth do not have in our ordinary speech.

the debate over originalism make that debate possible. The importance of that role invites our careful inquiry into whether those premises are true—or useful.