Washington University Jurisprudence Review

VOLUME 7 NUMBER 2 2015

TWO DOGMAS OF ORIGINALISM

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ABSTRACT

In the early 1950s, Willlard Quine's Two Dogmas of Empiricism *offered a devastating critique of logical positivism and the effort to distinguish "science" from "metaphysics." Quine demonstrated that the positivists relied on dogmatic oversimplifications of both the world and human practices, and, in the end, suggested that our holistic natural experience cannot be reduced to purely logical explanations. In this piece, I argue that constitutional originalism—which, too, seeks to define a constitutional "science"—relies on similar dogmatisms. In particular, I contend that the "fixation thesis," which claims that the constitutional judge's first task is to fix the text's semantic meaning at a particular historical moment, does not accurately describe the bulk of our current judicial practice. And, because semantic meaning arises predominantly from practice, the text's semantic meaning does not depend upon an interpretive act of historical fixation. I also challenge the so-called "constraint principle," which asserts that the text's fixed semantic*

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meaning should constrain judicial efforts to construct legal rules. I suggest that we should think of this principle as embodying a particular normative theory of adjudication—one that would radically reduce both the number and kind of interpretive tools we have developed through centuries of practical experience. Thus, in the end I side with Edmund Burke and the English conservatives, who caution against replacing the collected wisdom of lived experience with the supposed certainties of abstract theory.

> Modern empiricism has been conditioned in large part by two dogmas. One is a belief in some cleavage between truths which are *analytic*, or grounded in meanings independently of matters of fact, and truths which are *synthetic*, or grounded in fact. The other dogma is *reductionism*: the belief that each meaningful statement is equivalent to some logical construct upon terms which refer to immediate experience. Both dogmas, I shall argue, are ill-founded.
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> —*W.V.O. Quine, Two Dogmas of Empiricism*[1]

Writing in 1951, Willard Quine's attack on empiricism was aimed primarily at the work of Rudolf Carnap and the logical positivists.[2] His complaint, put much too simply, was that the positivists' effort to neatly divide "science" from "metaphysics" tended to oversimplify the complex web of human practices and experience that condition our understanding of the world. Thus, the Kantian concept of *analyticity* makes sense only when embedded in a constructed concept of *synonymy*,[3] and the reduction of meaning to verifiable observation works only within a shared account of how we translate our perceptions to logical assertions.[4] Ultimately, Quine concluded that both dogmas of empiricism founder on the same shoal, which is the impossibility of accomplishing the exact one-to-one translation of one linguistic term into another without semantic remainder.[5] That is to say, our holistic natural experiences of the world simply defy purely "logical" explanation—or, put another way, we have no unconstructed knowledge or experience that can truly differentiate "science" from other epistemologies.

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1. WILLARD V. O. QUINE, *Two Dogmas of Empiricism*, *in* FROM A LOGICAL POINT OF VIEW 20 (1953).
2. *See generally id.* (repeatedly addressing himself to Carnap's work).
3. *Id*. at 22–23.
4. *Id.* at 39–41.
5. *Id.* at 41.

Constitutional originalism is, of course, not logical positivism, but there is, I think, some ground for relevant analogy. Originalism is, after all, an effort to separate constitutional "science"—the true or correct form of constitutional explication—from constitutional "metaphysics," or what some like to call judicial activism. And, like the positivists, contemporary originalists make a determined effort to reduce meaningful constitutional assertions to those that we can verify in terms of the text's historical meanings. Further, the criticisms I intend to level here at originalism are not exactly those that Quine made against positivism, but there are some parallels. For example, I will argue that originalism, too, relies on the mistaken assertion that our constitutional practices rely on some unconstructed or pre-theoretical "semantic meaning" that can constrain our efforts to synthesize relevant "legal" meanings or rules. Likewise, I will argue that the originalist effort to reduce our constitutional practices to particular forms of argument or understanding underestimates the complexity and value of our longstanding social and democratic traditions.

To begin, though, I must set out the dogmas I intend to attack, and here I must rely on the very thoughtful work of Larry Solum, who has done perhaps the most to explain and justify the tenets of originalism, generally, as well as the approach now commonly known as New Originalism.[6] According to Solum, those who identify themselves as originalists, generically speaking, make two fundamental commitments: (1) Constitutional text has a "semantic meaning," which can be fixed empirically at the time of its ratification; and (2) this "semantic meaning" must constrain judicial efforts to construct the legal rules that will apply to modern controversies.[7] The New Originalists, for their part, view these commitments as making up two distinct phases of constitutional explication. Discovering "semantic meaning" is the task of what they call the "interpretation" phase; while identifying "legal meaning" takes place in the so-called "construction" phase.[8] In Part I, I address the first phase, in which originalists arrive at the text's fixed "semantic meaning" by discovering certain "linguistic facts." In Part II, I address the reductionist problem of legitimizing "legal meanings" in terms of a single foundational referent, such as historical understandings.

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6. *E.g.*, Lawrence Solum, *What is Originalism? The Evolution of Contemporary Originalist Theory*, *in* The Challenge of Originalism: Essays in Constitutional Theory 15 (Grant Huscroft & Bradley W. Miller eds., 2011), *available at* http://ssrn.com/abstract=1825543.

7. *Id*. at 1–2.

8. *Id*. at 16.

I. THE FIRST DOGMA: THE FIXATION THESIS

The "fixation thesis" is the first theoretical commitment essential to an inclusive brand of originalism of the sort that Larry Solum, Randy Barnett, and the New Originalists describe.[9] This thesis asserts that at least some constitutional text has a "semantic meaning" which can be "fixed" or frozen at a particular historical moment—usually ratification—and that we can discover this meaning empirically as a matter of certain "linguistic facts."[10] Discovering these facts and fixing this semantic meaning is the aim of the "interpretation" phase of constitutional explication, which, for the New Originalists, is programmatically distinct from the later "construction" phase.[11] As I discuss in more depth in Part II, originalism's second fundamental commitment asserts that the "semantic meaning" discovered during the interpretation phase should constrain our efforts to construct a "legal meaning" in the subsequent phase.[12] In Part I, however, I intend to demonstrate that the Interpretation-Construction Distinction is false, inasmuch as it does not accurately describe the way that constitutional practitioners actually engage and derive semantic meaning from constitutional text in most cases. Thus, the historical fixation of semantic meaning, even if theoretically possible (which I would not concede), is not a significant feature of the language games that make up the practice of constitutional law. In the next part I will offer reasons to think that this is a desirable state of affairs.

To begin discussion of the fixation thesis, it is important to first observe that it relies upon two theoretical assumptions:

- A sentence's semantic meaning can be reduced to its utterer's intentions.[13] In the particular case of a constitutional sentence, the relevant "utterer" is not the text's drafters, but rather its ratifiers. And it is not the individual ratifier's subjective intentions that matter, but rather the contemporary public meaning of the text

9. *See id*.

10. Lawrence Solum, *A Reader's Guide to Semantic Originalism and A Reply to Professor Griffin*, at 3 (Ill. Pub. Law & Legal Theory Research Papers, Ser. No. 08-12, 2008), *available at* http://ssrn.com/abstract=1130665; *accord* Randy E. Barnett, *The Gravitational Force of Originalism*, 82 FORDHAM L. REV. 411 (2013).

11. For a more detailed discussion of the so-called "Interpretation-Construction Distinction" see Lawrence Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95 (2010).

12. Solum, *supra* note 6, at 1.

13. *See, e.g.*, H. Paul Grice, *Logic and Conversation*, *in* 3 SYNTAX AND SEMANTICS: SPEECH ACTS 41–58 (Peter Cole & Jerry Morgan eds., 1974) (presenting account of meaning grounded in "utterer's intentions").

> they approved. For simplicity and consistency, I will call this "original public meaning," and I will contrast it with "modern public meaning," or the semantic meaning that a modern reader might derive when confronted with the text.
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> - "Original public meaning" is discoverable by ascertaining certain "linguistic facts" about the ratifiers' linguistic practices and context.[14]

In what follows, I hope to demonstrate that these basic assumptions do not accurately describe the actual practices that make up the constitutional language game, and, when it comes to semantics, actual practices are what matter. With this in mind, the originalist effort is best seen as a normative project intended to impose preferred theoretical constraints—constraints perhaps borrowed from other language games—onto the lived practice of constitutional semantics. Indeed, to the extent that we can identify stable or "fixed" kinds of semantic meaning in constitutional text, that stability results from modern—not historical—convergences in the practical rules that define the constitutional language game. Finally, while these interpretive convergences may appear to some to be "linguistic facts"—either historical or modern—they are not *a priori* or analytic "certainties" that might move freely through social history or exist independently of their lived communicative contexts.

A. Original Public Meaning and Our Constitutional Language Game

Ludwig Wittgenstein's book *Philosophical Investigations* dramatically altered the way that many modern philosophers think about language, reference, and meaning.[15] He repeatedly reminds us that the best way to understand language is not to theorize about its logical relationship to the world, but rather to *observe how it is used* in relevant communicative contexts, or "language games."[16] "To repeat don't think, but look!"—he famously exhorts when exploring the various meanings of the word

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14. *E.g.*, Solum, *supra* note 10, at 3; *accord* Barnett, *supra* note 10, at 415–17.

15. LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (G. E. M. Anscombe trans., 2d ed. 1958) (hereinafter WITTGENSTEIN, INVESTIGATIONS). On the book's influence *see, e.g.*, ROBERT J. FOGELIN, WITTGENSTEIN (2d ed. 1987); *accord* Brian Leiter, *The Most Important Philosophical Books Since 1950?*, LEITER REPORTS: A PHILOSOPHY BLOG (May 14, 2009, 9:02 AM) (recounting survey of esteemed philosophers that ranked Wittgenstein's book as the most important since 1950), http://leiterreports.typepad.com/blog/2009/05/the-most-important-philosophical-books-since-1950. html?.

16. WITTGENSTEIN, INVESTIGATIONS, *supra* note 15, at 20, 79–81.

"game;"[17] and accordingly it is my intention in this Part to *observe*, not *theorize*, our constitutional interpretive practices. When we do this, it becomes apparent that the semantic meaning of constitutional text is not exclusively reducible to speaker's intentions in any consistent practical sense. Indeed, in identifying the semantic content of the text, constitutional practitioners are generally more concerned with "audience meaning" than with "speaker's meaning," and thus the so-called "interpretation" phase is not a defining feature of the constitutional language game as it is actually played. Constitutional explication is, in other words, all "construction."

It is probably true that semantic meaning is completely reducible to speaker's intent in some language games, perhaps paradigmatically specific, literal, one-to-one conversations. Paul Grice, upon whose work the New Originalists build, offered the following basic account of "meaning" in such circumstances: "[Saying] *'U meant* something by uttering *x*' is (roughly) equivalent to [saying] *U* intended the utterance of *x* to produce some response in an audience by means of the recognition of this intention."[18] For example, suppose I return home from a walk, and my wife—who has just put the baby down for a nap—greets me at the door with her index finger pressed vertically across her lips. Upon seeing the gesture, I understand her to mean that the baby is asleep, thus I should be quiet.[19] We might break this act of intention and meaning (what Grice called an "M-intention") down into three parts. My wife put her finger to her lips intending: (1) that I believe I should be quiet because the baby is asleep; (2) that I recognize her intention that I form this belief; and (3) that this recognition is part of my reason for forming this belief.[20] My wife could, of course, simply have said, "Please be quiet, the baby is sleeping" and conveyed the same meaning in a sentence. Thus, the gesture and the sentence have (roughly) the same semantic meaning, though the gesture

17. In this famous passage, Wittgenstein wrote:

> [Here] I mean board-games, card games, ball-games, Olympic games, and so on. What is common to them all? . . . To repeat: don't think, but look!—Look for example at board-games with their multifarious relationships. Now pass to card-games; here you find many correspondences with the first group, but many common features drop out, and others appear. When we pass next to ball-games, much that is common is retained, but much is lost.—Are they all 'amusing'? Compare chess with noughts and crosses. Or is there always winning and losing, or competition between players? Think of patience.

Id. at 31–32.

18. PAUL GRICE, *Meaning*, *in* STUDIES IN THE WAY OF WORDS 220 (1989) (emphasis added).

19. This is actually probably a case of "imperative" meaning, which is slightly more complicated than basic "indicative" meaning. *See id.* at 123.

20. This breakdown is helpfully explained in Richard E. Grandy & Richard Warner, *Paul Grice*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Summer 2009 ed.), http://plato.stanford.edu/archives/sum2009/entries/grice/.

example makes it perhaps easier to see the relationship between intentions and meaning.[21] The relevant difficulty, of course, is in explaining how and why I should recognize my wife's gesture (or sentence) to convey the meaning she intended. For now, though, we can assume that this recognition arises from a fairly uncomplicated set of shared communicative assumptions and practices—as long as we note that more complex circumstances will require considerably more complex explanations.

All in all, Grice's model provides a helpful description of what it is for a person to "mean" something in a conversation, but it does not fully address other more nuanced and difficult communicative questions, such as what it is for a disembodied text to mean something as a matter of law. And, of particular interest in the constitutional context, it certainly does not address the questions that arise when that text addresses a future audience that may not share its authors' language assumptions. In what follows, I illustrate the problem of complex contexts like these, where it is impossible to reduce "meaning" to "speaker's intent" without semantic remainder. I will then argue that constitutional explication presents just such a circumstance.

1. Original Public Meaning and Figurative Language

A good example of a context in which we cannot fully assess meaning (even semantic meaning) in terms of original intentions is metaphorical or figurative language usage.[22] Certainly a speaker may have an intention when constructing a metaphor, but the meaning of that metaphor will undoubtedly change as each member of the audience reconstructs it. In other words, modern public meaning is a vital and unavoidable part of communication in figurative language games. Consider, for example, the final two stanzas of E.E. Cummings's poem:

> nothing which we are to perceive in this world equals
> the power of your intense fragility: whose texture

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21. Grice himself moved on to consider several more complex kinds of interactions, perhaps the most notable of which is conversational implicature. *See* Grice, *Logic and Conversation*, *supra* note 13, at 43.

22. Larry Solum has drawn a distinction between *applicative*, *teleological*, and *semantic* meanings. *See* Lawrence Solum, *Semantic Originalism*, at 3 n.5 (Ill. Pub. Law & Legal Theory Research Papers, Ser. No. 07-24, 2008), http://papers.ssrn.com/abstract=1120244. I do not find these distinctions useful, and, in any case, throughout Part I use the word "meaning" to include even the more specific concept of "semantic meaning."

compels me with the colour of its countries,
rendering death and forever with each breathing

(i do not know what it is about you that closes
and opens; only something in me understands
the voice of your eyes is deeper than all roses)
nobody, not even the rain, has such small hands[23]

It is, I suppose, possible to believe that this text—complete with irregularities in format, capitalization, and punctuation—is ultimately reducible to Cummings's specific and particular intentions when writing it.[24] But that would be a very much impoverished and immature view of language, apropos to the child who repeatedly asks, "Yes, but what does it *mean*?"[25]

Part of the reason for this is that it is unlikely here that Cummings has a literal intention. He is trying to communicate something that he may not fully understand with any specificity himself. And even if Cummings does have something concrete in mind, it is likely to be something that he cannot quite say literally. Rather, he is condemned, as Wittgenstein famously said, to "running against the walls of our [language] cage."[26] Indeed, in such a circumstance a figurative speaker leaves it up to the audience to construct possible meanings out of his grammatical and syntactic irregularities, much like the example Max Black offers of a person shown a drawing of a straight line and asked to imagine a "collapsed triangle, with its vertex on the base."[27] And, further, it is these potential "audience" constructions that actually define the poem's semantic, as well as its figurative, meaning.

To further complicate matters, unlike the example of the sleeping baby, Cummings may not necessarily have any intentions about his audience's beliefs, or about his poem's effect on that audience. These are simply not necessary features of the language game that Cummings is playing when

23. E.E. CUMMINGS, *Somewhere I Have Never Travelled, Gladly Beyond*, *in* COMPLETE POEMS: 1904–1962 367 (George J. Firmage ed., 1991). I must thank Robert Fogelin for introducing me to this wonderful poem in ROBERT J. FOGELIN, FIGURATIVELY SPEAKING 110 (1988).

24. Donald Davidson, among others, has vigorously defended the view that "metaphors mean what the words, in their most literal interpretation, mean, and nothing more." Donald Davidson, *What Metaphors Mean*, *reprinted in* THE PHILOSOPHY OF LANGUAGE 415–26 (A.P. Martinich ed., 3d ed. 1996).

25. The time-honored answer to this question is, of course, "What does it mean to *you*?"

26. Ludwig Wittgenstein, *A Lecture on Ethics* (1929), *reprinted in* 74 THE PHIL. REV. 3, 12 (1965).

27. Max Black, *More About Metaphor*, *in* METAPHOR AND THOUGHT 19, 32 (Andrew Ortony ed., 2d ed. 1993).

writing the poem. Rather, he may simply hope to reveal something of himself to the audience—something that the audience can then reconstruct within the context of their own individual experiences.

To put it simply, poetry is not language uttered within the same social context as shushing a potentially noisy father. It is, instead, part of a different, more complicated, language game in which meaning—even semantic meaning—is not completely reducible to original intentions.

2. Original Public Meaning and Constitutional Explication

Metaphorical or figurative language games are not the only deviations from the simple Gricean model. Indeed, constitutional explication is its own language game, which is neither quite figurative nor exactly like a literal one-to-one conversation. Here a legal text, submitted for ratification to hundreds of thousands of "the People," is at the center of a complex communicative practice exercised within a unique and controverted social context. As with figurative language games, in the constitutional setting "speaker's meaning"—even if it exists—is not the primary source of meaning. The initial reasons for this should be fairly clear on the surface: How can we know that the "ratifier"—from whom the constitutional text gets its legal authority—successfully understood the drafters' meanings? What if the ratifying audience constructed and gave legal force to an entirely different meaning than that which the drafters intended? In other words, in the constitutional language game, it is not the speaker's words that govern, but the ratifying audience's understanding of those words.

As I have noted above, the New Originalist solution to this initial problem is to treat the "ratifier" as the "speaker" for constitutional purposes.[28] But this shift creates its own epistemological problems, for now the "speaker" is a plural and diverse entity, with plural and diverse intentions. Even in the most simplistic cases, when those intentions might theoretically be broken down to something fairly specific and literal, how can we hope to discover what tens of thousands of different minds intended to communicate in a text? And, even if we could discover and codify all those possible intentions, which should count in cases of

28. Barnett, *supra* note 10, at 419–20; *accord* Solum, *What is Originalism?*, *supra* note 6, at 10 (claiming that scholarly consensus has come to recognize that "the original intentions of the Framers could not serve as the basis for a viable theory of constitutional interpretation and construction"). *But see* Larry Alexander, *Originalism, the Why and the What*, 82 FORDHAM L. REV. 539, 540 (2013) (arguing that "[t]he meaning of a legal norm is just its authorially intended meaning").

conflict? The most common? The most learned? The most "reasonable?"[29] In the face of these questions, the New Originalists have generally moved away from subjective individual "intentions" and embraced the concept of "original public meanings"—or a theoretically objective account of legitimate contemporary language conventions and practices.

Although these shifts—from "drafters" to "ratifiers" and from subjective "intentions" to objective "public meanings"—do seem to get the New Originalist theoretically clear of the initial obstacles that plagued their predecessors, they do not resolve a more fundamental problem with the originalist (or, in truth, *any* normative) approach to textual interpretation: meaning is simply not a matter of *theory*—it is quite decidedly a matter of *practice.* And in the actual constitutional language game—as it is played here and now—we do not always, or even regularly, understand semantic meaning as an entailment of speaker's meaning. Instead, in actual constitutional practice, what I have called modern public meaning has become the most important and determinative source of semantic meaning. Put another way—in phrasing that must resonate among students of statutory interpretation—in the practice of constitutional law we generally do not worry about discovering what the ratifiers *intended*, but rather work to better understand the *text* that they enacted.[30] Sometimes, of course, we do turn to historical meanings in our interpretive efforts, but this is by no means our *exclusive* practice. And saying it *ought* to be our practice is simply inapposite when we are engaged in the purely descriptive enterprise of accounting for semantic meaning.

The real question, then, is how, in practice, we *do* go about determining the content of semantic meaning as a modern textual audience. As with all language games, understanding meaning is a question of proper usage according to contextual rules; it is, in other words, a matter of social rule following,[31] which is generally reflexive or instinctive, and not a matter of

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29. Paul Brest lodged this compelling objection against the "old" originalism. Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980).

30. The following passage from the pen of a prominent originalist is instructive:

> The Constitution gives legal effect to the "Laws" Congress enacts not the objectives its Members aimed to achieve in voting for them. If [the statute's] text includes state and local administrative reports and audits, as the Court correctly concludes it does, then it is utterly irrelevant whether the Members of Congress intended otherwise.

Graham Cnty Soil & Water Conservation Dist. v. United States, 559 U.S. 280, at 302 (2010) (Scalia, J., concurring).

31. Norman Malcolm, *Wittgenstein On Language and Rules*, 64 PHIL. 5, 10 (1989). I suggest here, as I have elsewhere, that Philip Bobbitt has offered the best account to date of these rules as practiced in the constitutional language game. *See generally* PHILIP BOBBITT, CONSTITUTIONAL FATE:

conscious calculation.[32] Thus, as linguist Steven Pinker has pointed out, a fluent English speaker knows instantly—for reasons she likely cannot explain—that "plast" and "thole" could be English words, whereas "ptak" and "nyip" could not,[33] or that the sentence "He didn't a few things" is improper, even when "He did a few things" is fine.[34] As a product of instinctive rule following, then, semantic meaning often is not—as the "fixation thesis" suggests—a matter of discovering empirical facts about the world.[35] As an example, think of commonplace words such as "not," or "and," or even "LOL." There is nothing, no "referent," to which we can point in the world to demonstrate these words' meanings. Their meaning, in other words, is not absolute or empirically verifiable—and so the search for empirical referents is plainly not a part of the language practice that utilizes these words. Rather, we learn their contextual meaning by repeatedly playing language games that consist of particular linguistic rules, which we then learn to follow in rough—but not fully determined—ways. Again, for example, "not" means, roughly, that the audience should reverse the truth-value of the subsequent proposition. In various contexts, "and" might ask us to think of the sum of prior and subsequent terms, or to hold those terms together in logical space, or to imagine some superimposition of those terms, and so on. To know what "LOL" means we would need to learn to follow the emerging rules of the "texting" language game. And, importantly, it is neither here nor there to theorize that "LOL" *ought* to mean "lots of laughs" instead of "laugh out loud"; all that matters is what it *does* mean in practice.

This is not to say that we can never discuss or argue about how we *ought* to construct or follow social rules.[36] It is to say, however, that this is not properly a question for the so-called "interpretation" phase of constitutional explication because, again, semantic meaning—inasmuch as it arises from shared assumptions and practices—is a matter of *is*, not *ought*. Again, it makes very little difference what one thinks a word *should* mean, if, in practice, it actually means something else—unless we think

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THEORY OF THE CONSTITUTION (1982) (describing the accepted "modalities" of constitutional argument).

32. *See* BOBBITT, *supra* note 31, at 185, 198, 211, 219. There is some scholarly disagreement on this point, s*ee* Malcolm, *supra* note 31, at 5, but I feel safe in saying that I have captured the consensus sentiment.

33. STEVEN PINKER, THE LANGUAGE INSTINCT 173 (1994).

34. *Id.* at 272.

35. WITTGENSTEIN, INVESTIGATIONS, *supra* note 15, at 20, § 43; *accord* Dennis Patterson, *Conscience and the Constitution*, 93 COLUM L. REV. 270, 303–04 (1993).

36. This is a question I have tried to answer in some depth elsewhere. *See* Ian Bartrum, *Constitutional Value Judgments and Interpretive Theory Choice*, 40 FLA. ST. U. L. REV. 259 (2013).

there is some utility in the concept of a private language.[37] So, for now, I simply reiterate my contention that actual constitutional practitioners do not make regular—much less *exclusive*—recourse to speaker's meaning when following the rules of the constitutional language game. Thus, speaker's meaning is not the exclusive, nor even the primary, source of the text's semantic meaning. With that assertion in mind, it may be illuminating to consider whether I have accurately described (rather than theorized) our constitutional practices by exploring what we might call the "easy cases" of textual explication.

3. Original Public Meaning and Easy Cases

Quite often there is a broad social convergence or agreement on the appropriate usage rules governing constitutional text, and thus we collectively understand a great many constitutional phrases in specific and seemingly stable terms. We might here think of the Presidential Age Requirement, mentioned above, or the guarantee that each state shall have two Senators.[38] In such circumstances, the social rules that determine textual meaning are uncontroversial and broadly recognized, thus making for easy cases. The existence of such cases leads some commentators to suggest that these broad convergences or agreements on social rules are like "linguistic facts," which we can discover as though they were empirically verifiable.[39] In the "easy cases," then, these commentators suggest that practitioners actually go through something like a two-step "Interpretation-Construction" process, in which they first identify the "linguistic facts" that define semantic meaning, and then construct congruent legal meanings. For the originalist—who, again, would focus primarily on original public meaning—this means that we can look back and determine what convergences—or, again, "linguistic facts"—existed at the relevant moment of textual ratification.[40] This is what they mean when they suggest that constitutional language has a historically fixed semantic meaning that is discoverable as an empirical matter.

Some years ago, Randy Barnett undertook just such a process in making his case for the original public meaning of the Commerce

37. Wittgenstein, famously, did not believe in private languages, precisely because language is a *social* practice. WITTGENSTEIN, INVESTIGATIONS *supra* note 15, at 81, § 202.

38. U.S. CONST. art I, § 3.

39. *See, e.g.*, Solum, *supra* note 10, at 13 ("[W]hen we disagree about [semantic content] we are disagreeing about linguistic facts. In principle, there is a fact of the matter about what the linguistic content is.").

40. *Id*. at 3.

Clause.[41] Barnett engaged in an exhaustive, computer-aided search of language usage in founding-era dictionaries, the Constitutional Convention, the *Federalist*, the ratification conventions, and judicial interpretations between 1824 and 1935.[42] After surveying all of these sources, he was able to conclude that a broad convergence of linguistic rules existed at or around ratification, which gave the Commerce Clause the following "fixed" public meaning:

> "Commerce" means the trade or exchange of goods (including the means of transporting them); "among the several States" means between persons of one state and another; and the term "To regulate" means "to make regular"—that is, to specify how an activity may be transacted—when applied to domestic commerce, but also includes the power to make "prohibitory regulations" when applied to foreign trade. In sum, Congress has power to specify rules to govern the manner by which people may exchange or trade goods from one state to another, to remove obstructions to domestic trade erected by states, and to both regulate and restrict the flow of goods to and from other nations (and the Indian tribes) for the purpose of promoting the domestic economy and foreign trade.[43]

In response to critics who pointed out some possibly broader usages,[44] Barnett later increased the scope of his empirical inquiry by having research assistants perform an independent electronic search for every use of the word "commerce" in the *Pennsylvania Gazette* between 1728 and 1800.[45] After this search, he was able to conclude that, once ambiguity and anomaly were accounted for, his original historical fixation of the Commerce Clause still stood.[46]

Owing to some argumentative backlash over the past two decades, the Commerce Clause may not be quite so "easy" a case as the Presidential Age Requirement or Senate apportionment, but neither is it a truly "hard" case of textual vagueness like those I discuss in Part II.[47] While there is

41. Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001).

42. *Id*.

43. *Id*. at 146.

44. Robert J. Pushaw, Jr. & Grant S. Nelson, *A Critique of the Narrow Interpretation of the Commerce Clause*, 96 NW. U. L. REV. 695 (2002).

45. Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 ARK. L. REV. 847, 856–57 n.32 (2003).

46. *Id*. at 865.

47. On the evolution of constitutional meanings through argumentative practice, see Ian Bartrum, *The Constitutional Canon As Argumentative Metonymy*, 18 WM. & MARY BILL OF RTS. J. 327 (2009).

still debate around the living edges,[48] the basic meaning of the Commerce Clause in our constitutional practice has not been in much doubt for nearly three-quarters of a century,[49] and the word "commerce" does not seem inherently vague like other problematic phrases such as "equal protection of the laws" or "cruel and unusual punishments."[50] Indeed, what makes the Commerce Clause particularly instructive for purposes of this discussion is the contrast between the broad historical convergence on its meaning, and a different, but similarly broad, agreement today. Put another way, what Barnett's exhaustive study allows us to see, in bold relief, is the conflict between the Commerce Clause's "original" and "modern" public meanings. And, despite vigorous originalist protest,[51] the original public meaning that Barnett so persuasively defends is simply *not* the semantic meaning that the phrase "to regulate commerce . . . among the several States" has in our current constitutional practice.[52] Thus, in our constitutional language game, it is plainly modern—not original—public meaning that carries the day.

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48. The most controversial commerce case in recent memory involved the anomalous assertion of a federal power to compel individuals to purchase health insurance. National Fed. of Indep. Bus. v. Sebelius, 567 U.S. ___, 132 S. Ct 2566 (2012). As such, that case presented a novel question of Commerce Clause jurisprudence that did not call into question the clause's central meaning over the last 75 years.

49. *See*, *e.g.*, Wickard v. Filburn, 317 U.S. 111, 119–20 (1942) (holding that activities once thought distinct from commerce—"such as 'production,' 'manufacturing' and 'mining'"—fall within Congress's purview under the Commerce Clause, which cannot be delimited by any "formula"). It is certainly true that some modern decisions—notably United States v. Lopez, 514 U.S. 549 (1995) and United States v. Morrison, 529 U.S. 598 (2000)—have somewhat narrowed the scope of congressional authority under the clause, but there is still, I think, broad modern agreement that "commerce" includes activities (such as agriculture and manufacture) that remain well outside Barnett's historical definition. (This is probably as good a place as any to note that, in the constitutional language game, reference to precedent is an important part of the rule following that establishes semantic meaning.). It is also true that some commentators—perhaps most notably Justice Antonin Scalia in concurrence in Gonzales v. Raich, 545 U.S. 1 (2005)—have tried to preserve a narrower semantic meaning for the Commerce Clause itself by arguing that so-called "substantial effects" analysis actually arises under the Necessary and Proper Clause. *Id.* at 34 (Scalia, J., concurring). But this distinction, while quite plausible (even as a matter of modern "audience" meaning), is certainly not one that the Court or practitioners always (or even usually) make. Indeed, the distinction is only interesting if one already believes that constitutional explication should involve something like an "interpretation" phase directed to uncovering historical semantic meanings. Nonetheless, originalist efforts like Scalia's are slowly refining (or perhaps "reforming") the Commerce Clause's modern public meaning in an attempt to bring it back in line with its original public. *See* Bartrum, *Metonymy*, *supra* note 47, at 346–93 (discussing argumentative refinement of constitutional meanings). With all of this in mind, though, I think I am still safe in saying that the Clause's modern meaning (even its semantic meaning) remains significantly broader than the historical meaning Barnett asserts.

50. U.S. CONST. amend. XIV, § 2; U.S. CONST. amend. VIII.

51. *E.g.*, United States v. Lopez, 514 U.S. 549, 584 (1995) (Thomas, J., concurring); United States v. Morrison, 529 U.S. 598, 627 (2000) (Thomas, J., concurring).

52. U.S. CONST. art. I, § 8, cl. 3.

The New Originalist likely wants to object here that the modern meaning of the Commerce Clause is actually just a constructed legal rule, and that the clause's "semantic" meaning remains quite similar to that which Barnett identifies. To the contrary, I contend that the semantic content of the word "commerce" is different today than it was in 1820—that we could do a similar modern search and come up with a different public meaning—and that it is the *modern* content that better explains the clause's meaning in our practice. It is of no moment, semantically speaking, that this modern content derives, at least in part, from the Supreme Court's shifting opinions on the question. That, again, is just a part of what *is* in terms of our modern constitutional language practice. Put another way, we simply do not, as a practical matter, go around trying to "fix" historical meanings; we rather play the only constitutional language game we can: our own.

Indeed, it is difficult to imagine that the ratifiers whose intentions so concern originalists could have thought that, as a practical matter, we would use the text in the stilted and technical ways that the Interpretation-Construction Distinction hypothesizes. Barnett himself concedes that a historical fixation project such as the one he undertook would have been "highly impractical" before the advent of electronic searches,[53] which we can hardly expect the ratifiers to have foreseen. Nor does it seem reasonable to suppose that the ratifiers would have expected that understanding "the People's" document would, as a threshold matter, require the kinds of specialized knowledge and painstaking research that this sort of historical fixation entails. No, for whatever it is worth, it is much easier and more reasonable to believe that the ratifiers thought *we* would interact with the text in much the same way that *they* interacted with legal texts: we would read the words and reflexively follow appropriate, socially constructed rules to give the sentences practical meaning.

When we do this—when we, in Buck Owens's words, "act naturally"—it becomes clear that the basic meaning of the Commerce Clause is actually a fairly easy case of constitutional explication.[54] But what makes it easy is a broad convergence on the appropriate rules of constitutional language usage *today*—as employed by those reading the text—and not the kind of convergence that Barnett identifies among the language community that ratified it. Conversely, to the extent that the

53. Barnett, *New Evidence*, *supra* note 45, at 856 n.30.
54. BUCK OWENS & THE BUCKAROOS, ACT NATURALLY (Capitol Records 1963).

Commerce Clause sometimes presents more difficult interpretive questions, that difficulty results from a *lack* of modern convergence in our language practices. So, even if "easy cases" seem to provide evidence of stable constitutional meanings, these cases are not, in point of fact, examples of the historical meanings contemplated in the "fixation thesis." And there are actually very good normative reasons why our constitutional language practice relies primarily on modern convergences in "audience meaning" rather than historical convergences in "speaker's meaning," but those, again, are best discussed in the context of the "constraint principle," which I take up in Part II. For now, it is also important to emphasize that these modern convergences and the resulting "easy cases" are the product of holistic social phenomena, not "linguistic facts" that we might think of as capable of "fixation" in some unchanging or empirically "certain" kind of way.

4. Social Rules Are Not Facts

In thinking about the concept of "certainty" in the context of empiricism, Wittgenstein famously likened our knowledge practices to the relationship between a river and its banks:

> It might be imagined that some propositions, of the form of empirical propositions, were hardened and functioned as channels for such empirical propositions as were not hardened but fluid; and that this relation altered with time, in that fluid propositions hardened, and hard ones became fluid.[55]

Of course, Wittgenstein's thoughts here describe the potential fluidity of *any* supposed fact, but they apply so obviously and dramatically to the case of language that the very idea of a "linguistic fact" seems an especially egregious sort of empiricist dogmatism. Indeed, for Wittgenstein the case of linguistic instability was perhaps the most readily apparent manifestation of our more general empirical uncertainty—and thus the concept of a "linguistic fact" seems conceptually oxymoronic.[56]

With this in mind, we can return to our observation of easy cases in the constitutional language game. An easy case of constitutional explication

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55. LUDWIG WITTGENSTEIN, ON CERTAINTY 15e, § 96 (G.E.M. Anscombe & G.H. von Wright eds., Denis Paul & G.E.M. Anscombe trans., Harper & Row 1972) (1969).

56. Dennis Patterson has made the point very well: "The central tenet of Wittgenstein's writing after 1929 is that knowledge is not achieved by the individual subject's grasp of a connection between word and object. Rather, knowledge turns out to be the grasp of the topography of a word's uses in activities into which language is woven." Patterson, *supra* note 35, at 303–04.

simply reflects the existence of a "hardened" spot in the constitutional riverbank, which amounts to a broad convergence on the appropriate usage rules among the constitutional audience. Thus, easy cases are examples of stable constitutional meaning only inasmuch as the audience largely follows particular linguistic rules in a particular way. And, as Wittgenstein points out, even this stable ground can always shift—it is not actually "certain" or "factual" in any unchanging sense—and today's easy cases may quickly become tomorrow's hard ones.[57] We need only briefly peruse the United States Reports to understand this point: As hard as it may be to imagine, there was a time when the phrase "due process" had a seemingly specific and stable meaning. Most importantly, we must not confuse these temporarily "hardened" spots with "facts" to which we might, like Odysseus, "fix" ourselves. They are nothing more (nor less) than rule convergences in a social practice woven into a particular historical form of life, and it is a profound mistake to try to rip those convergences from their lived context and import them into a different—in this case, a modern—world.[58] Barnett's theorized "commerce," in other words, is simply not a part of our present form of life.[59]

Notwithstanding all of this, one sometimes hears originalists claim that virtually every constitutional practitioner uses their approach when it comes to the easy cases; particularly those, like the Presidential Age Requirement, which do not seem to require the exhaustive kind of research Barnett undertook in the commerce context.[60] The point seems to be that

57. This, of course, is just as true of historical meanings as it is of modern ones.

58. WITTGENSTEIN, INVESTIGATIONS, *supra* note 15, at 8–9, 20, §§ 19–20, 43. The "form of life" reference here speaks to Wittgenstein's larger philosophical claims. For a word to have meaning, it must function within an actual practice of life. It is when the philosopher extracts a word from its lived context and employs it in abstract theoretical pursuits that "language goes on holiday" and philosophical problems appear. *Id*. at 19, § 38 (emphasis removed). This, again, is why we must *look* and not *think*.

59. Another way of saying this is that our "historical" and "modern" forms of life (and corresponding language games) are *incommensurable*; thus, one cannot understand a phrase in one context without understanding a network of related concepts that simply do not exist in the other. *See* Thomas S. Kuhn, *Rationality and Theory Choice*, 80 J. PHIL. 563, 566 (1983) (making the same point about Newtonian and relativistic paradigms in physics); *accord* Batrum, *supra* note 36, at 259, 266–67. Another, perhaps helpful, way to understand this point is through the lens of "translation." Trying to "fix" semantic meaning across different historical language games is very much like translating or "paraphrasing" between different languages. For a fascinating account of these difficulties in the specific case of the Constitution, see Christina Mulligan, Michael Douma, Hans Lind & Brian Patrick Quinn, *Founding-Era Translations of the Federal Constitution*, CONST. COMMENT. (forthcoming), *available at* http://ssrn.com/abstract=2486301. Translation and paraphrase are, of course, acts of *construction*.

60. I recently heard Randy Barnett make this sort of claim at the Fordham Law Review symposium entitled *The New Originalism in Constitutional Law*. *See* Barnett, *supra* note 10.

we are all originalists at heart—but this is simply not so. Though it is not as easy to see as with the Commerce Clause—where, again, a clear contrast exists between "original" and "modern" public meaning—when reading the Presidential Age Requirement we are all *textualists*, not *originalists*.[61] That is to say, we all follow broadly shared *modern*, not *historical*, language rules to arrive at an uncontroversial meaning. It just so happens that, in the case of the Presidential Age Requirement, the "original" and the "modern" public meanings are virtually identical. While it is undoubtedly true that in some—but not all—cases a convergence of modern rules asks us to refer to historical language uses, this sort of easy case requires no such recourse to history. It requires only that we understand and follow fairly clear-cut modern usage rules.

A more interesting version of this same sort of claim is sometimes made using the case of textual anachronisms. A common example is Article IV's guarantee of federal protection against "domestic violence."[62] If we were to go strictly by modern usage rules, so the argument goes, we would likely treat this text as referring to spousal abuse rather than intrastate hostilities—but that is clearly not what we do. So, the originalist claims that we must be looking to historical usage rules to clear up anachronism and arrive at the proper semantic meaning. Hence, again, we are all originalists. This is a more interesting case because here our modern usage rules *do* ask us to consider historical meanings.[63] Again, however, when we *look* rather than *think* it becomes apparent that the historical usage rules do not actually determine the text's semantic meaning. Rather, we perform a fairly simple sort of disambiguation that our *modern* usage rules require. The context in which the phrase appears seems nonsensical given modern practice, and so our rules refer us to historical usages to construct an alternate meaning. In the end we choose the historical meaning not because we are somehow bound by a speaker's intentions and historical usage as the exclusive source of semantic meaning, but because, in this particular case, that meaning makes better sense of the text as we read it today. More importantly, this is simply an initial act of disambiguation, not a determinative account of semantic meaning. To determine what kinds of intrastate hostilities the phrase

61. The distinction, again, derives from Philip Bobbitt's modalities of constitutional argument. PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 12–13 (1991).

62. U.S. CONST. art. IV, § 4. For the example, see Solum, *supra* note 22, at 64; *accord* Barnett, *Gravitational Force*, *supra* note 10.

63. As Bobbitt has made clear, history does play an important—but not exclusive or necessarily determinative—role in our constitutional language game. BOBBITT, *supra* note 61, at 12.

"domestic violence" refers to we must again return to our modern language rules. Thus, the anachronism example shows only that historical meanings are sometimes a *part* of how we construct semantic meaning in our modern constitutional language game; it does not show that this recourse to history is required in every—or even most—interpretive undertakings.[64]

In truth, it is only in these sorts of easy cases—those where we can identify specific and literal speaker's intentions—that the New Originalists would even apply the "fixation thesis" in any strong sense.[65] They would leave the more difficult cases of vague semantic meaning to modern constitutional "construction," which I discuss in Part II. In other words, they concede that in such "hard" cases language and text ultimately fail to capture a specific semantic meaning—indeed, these may be the sorts of areas that Wittgenstein famously says "we must pass over in silence."[66] I hope, though, that I have shown that even in the easy cases it is primarily modern public meaning that establishes the semantic content of constitutional text—even if sometimes the rules that determine modern public meaning point us towards historical practices for purposes of disambiguation. And, contrary to the New Originalist account, these cases are actually just less controversial versions of the same process we engage when confronted with the hard cases of vague constitutional text. What this means, in the end, is that in *our* constitutional language practice the text's constructed legal meaning *is* its semantic meaning—there simply is no distinct, a priori, "fact of the matter" to which we might bind ourselves. Constitutional explication is, as I have already said, all "construction."

II. THE SECOND DOGMA: THE CONSTRAINT PRINCIPLE

Originalism's second essential commitment is the "constraint principle," which asserts that, as a general matter, the fixed semantic meaning discovered during constitutional "interpretation" should constrain our efforts to come up with legal rules in the "construction" phase of

64. We might, in other words, agree with the ratifiers that "domestic violence" refers to political hostilities rather than spousal abuse, but then make our own assessment of the sorts of political hostilities that count for constitutional purposes.

65. Solum, *supra* note 10, at 2.

66. LUDWIG WITTGENSTEIN, TRACTATUS LOGICO-PHILOSOPHICUS § 7 (D. F. Pears & B. F. McGuiness trans., 2001). Though I do not take up the argument in this paper, I believe that we have difficulty "speaking" about these areas because they invoke moral or ethical reasoning of the kind Wittgenstein thought logically ineffable.

constitutional explication.[67] In what follows, I hope to demonstrate that imposing such a reductionist constraint on judicial practice undervalues and undermines our complex and pluralistic interpretive traditions. I further suggest that we should always be wary of such efforts to cast aside a rich practical ethos in favor of any abstracted normative theory—no matter how intuitively attractive the new approach may seem.

Larry Solum initially began to explore the ideas underlying the "constraint principle" when he articulated three possible formulations of what he called the "contribution thesis":

> *The extreme version* asserts that a rule is a rule of constitutional law if and only if the content of the rule is identical to the semantic content of some provisions of the Constitution.
>
> *The moderate version* asserts that if the content of a rule is identical to the semantic content of a constitutional provision, then the rule is a rule of constitutional law, unless some exception applies, but it does not assert that this is the only source of constitutional law.
>
> *The weak version* asserts that the semantic content of the Constitution makes only indirect contributions to constitutional law.[68]

In later work, Solum acknowledged that people who identify themselves as originalists might hold beliefs that range across this spectrum.[69] But in truth it would probably be hard to find any constitutional practitioner who would not agree to at least the "weak version" of the "contribution thesis" as described above, and even many "living constitutionalists" would probably go along with the "moderate version." With this in mind, Solum has more recently asserted that "[m]ost originalists agree on a fairly strong version of the contribution thesis, which we might call *the constraint principle* (constitutional doctrine must be consistent with original meaning absent very weighty reasons)."[70]

There is still some potential ambiguity, however, about what it means for a decision to be "consistent with original public meaning." In the

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67. For a thorough description of this principle, see Solum, *supra* note 6, at 32. The "constraint principle," of course, assumes that the "fixation thesis" is correct. It should be clear by now that I do not concede that point, but for argument's sake I will proceed in this part as though I had. I should also note that, as we have now entered the realm of normative justification, in this part I generally depart from my earlier Wittgensteinian effort to *look* rather than *think*.

68. Solum, *supra* note 22, at 134.

69. Solum, *supra* note 6, at 31–32.

70. *Id*. at 32.

context of a so-called "constraint" principle, I take this to mean that constitutional doctrine should neither *add to nor subtract from* historical understandings. Thus, for example, the Court should not recognize an Equal Protection claim made on behalf of a class of persons (e.g., women) whom the ratifiers did not intend to protect in 1868.[71] It is possible, I suppose, that "consistent with" could mean only that the Court should not subtract from historical understandings—for example, it would be impermissible to rule that the Equal Protection Clause does not apply to African-Americans. If the latter is all that the "constraint principle" entails, then, as a practical matter, it is doing very little constraining, and it seems to leave originalism with very little to say.[72] My argument thus assumes and addresses only the former, stronger version of the "constraint principle," and may therefore be inapposite to some weaker originalist theories.

With that said, the first important point to make here is that while the "fixation thesis" makes a descriptive or empirical claim about the semantic content of constitutional text, the "constraint principle" makes a normative claim about how we ought to translate that content into legal rules. A normative claim of this sort requires justification, and originalists offer what might fairly be described as a hodgepodge of possibilities.[73] Solum has catalogued several varieties:

> Some originalists emphasize the rule of law. Others focus on the idea of popular sovereignty. Yet others emphasize the notion that the conventions of legal practice do not permit judges to deliberately overrule the linguistic meaning of the constitutional text. And still others may make the claim that adherence to original meaning is justified because it will produce better decisions in the long run than the alternative methods of constitutional interpretation and construction. It seems likely that many originalists will rely on some combination of these arguments, and others as well.[74]

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71. Other similar examples might include the Court recognizing new "fundamental rights," or contemplating new kinds of "commerce," or concluding that the death penalty is "cruel or unusual."

72. Such an understanding also creates ambiguities of its own, as we often cannot clearly distinguish what counts as "adding," as opposed to "subtracting," constitutional meanings. For example, "adding" to the scope of Congress's commerce power necessarily "subtracts" from the states' sovereign independence—as does adding "fundamental rights" or "suspect classes" to the substance of the Fourteenth Amendment.

73. *See* Solum, *supra* note 6, at 32 (listing some of these justifications).

74. *Id*. at 32–33.

All of these suggestions, of course, require some clarification of the relevant standards. We must know, in other words, what counts as a "better decision," or a relevant "convention of legal practice," or, for that matter, the "rule of law." Originalist theorists have had varying degrees of success answering those questions. To assess these myriad efforts in limited space, it is necessary to make some (I hope justifiable) generalizations about their nature.

To help with this, I turn to recent work by Mitchell Berman and Kevin Toh, which draws a very insightful distinction between approaches that attempt to justify the "constraint principle" as a *theory of law*, and those that attempt to justify it as a *theory of adjudication*.[75]

Though Berman and Toh eventually disagree, I suggest that, as a general matter, "old" originalists—writing during the 1980s and early 1990s—tended (rather uncritically) to treat their accounts as *theories of law*.[76] That makes a good deal of sense when we recall that those commentators' project was largely to critique the work of the Warren and Burger Courts. After all, the charge leveled against those Courts was that they tended to "make" the law rather than "interpret" it—they had, in other words, strayed from original meanings and had thus left "the law" behind.[77]

The New Originalists, on the other hand, have taken on a different and much more difficult project, as they attempt to move originalism from *critique* to *prescription.* That is, they hope to offer an originalist methodology that the disciplined jurist might put into interpretive practice. As such, the New Originalists make it very clear that they are offering only a *theory of adjudication*—that, after all, is the gravamen of the Interpretation-Construction Distinction: the text's semantic meaning is distinct from its "legal" meaning.[78] In the remainder of this part I consider both types of justification for the "constraint principle," and find neither satisfying.

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75. Mitchell Berman & Kevin Toh, *On What Distinguishes New Originalism from Old: A Jurisprudential Take*, 82 FORDHAM L. REV. 545, 552 (2013).

76. *Id*. at 545.

77. *See, e.g.*, Edwin Meese, III, *Speech Before the American Bar Association*, Washington, D.C. (July 9, 1985) *reprinted in* STEVEN G. CALABRESI, ORIGINALISM: THE QUARTER-CENTURY OF DEBATE 47 (2007) (chastising the Warren and Burger Courts for engaging in a "jurisprudence of idiosyncrasy").

78. Berman & Toh ultimately conclude that, despite the seemingly adjudicatory nature of constitutional "construction," the New Originalists are actually offering a theory of law. Berman & Toh, *supra* note 75, at 575–76.

A. The Constraint Principle as a Theory of Law

Perhaps the most intuitively attractive justifications for the "constraint principle" are those that assert that we should be bound to the original public meaning of constitutional text because that is what counts as "the law." Indeed, the originalist protagonists of the 1980s seemed almost to take this point for granted. Robert Bork, for example, explained the need for originalist constraint as follows:

> If the Constitution is law, then presumably its meaning, like that of all other law, is the meaning the lawmakers were understood to have intended. If the Constitution is law, then presumably, like all other law, the meaning the lawmakers intended is as binding upon judges as it is upon legislatures and executives. There is no other sense in which the Constitution can be what article VI proclaims it to be: "Law."[79]

The normative claim here is straightforward, if not much explained: the text's original public meaning simply *is* "the law"; thus, whatever obligations law places upon us, as a general matter, also justify the "constraint principle." It is rather remarkable, however, that Bork makes almost no effort to justify his claim that we should view original public meaning as "the law." Indeed, the quoted language is about as close as he comes to making out that case—and the operative word in that argument appears twice: "presumably."

Bork and his contemporaries are not alone in this view, however. More recently Michael Stokes Paulsen and Vasan Kesavan have made similar noises about historical meanings as the authoritative "law":

> [T]o avoid creeping or lurching anachronism infecting the interpretation of an authoritative legal text, the proper approach must be one of "originalist" textualism—faithful application of the words and phrases of the text in accordance with the meaning they would have had at the time they were adopted as law, within the political and linguistic community that adopted the text as law.[80]

To be fair, Paulsen and Kesavan are slightly more circumspect about their argument than was Bork—there is something more here than bald

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79. ROBERT BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 145 (1990).

80. Michael Stokes Paulsen & Vasan Kesavan, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1131 (2003).

presumption—but the essence of the claim is the same. Indeed, I think it is fair to say that the sorts of justifications Solum places under the heading "rule of law," and, in other work, "writtenness," both flow from this same basic commitment to historical meaning as "the law."[81] Thus, we might raise the same objection to each sort of account; namely, these "theory of law" approaches seem simply to beg the question. Or, to put it another way, deciding exactly what counts as "the law" is, in fact, the goal of the entire constitutional explication project. Indeed, if knowing what counts as "constitutional law" were as straightforward as discovering the "linguistic facts" that determine the text's semantic content, we would hardly need an expert judiciary or a Supreme Court. Thus, as Philip Bobbitt has observed, these sorts of accounts are really an attack on the institutional legitimacy of judicial review as a whole—after all, we really have no reason to think that judges are better historians than are legislators, or anyone else for that matter.[82]

But let us back up for a moment and consider these "theory of law" claims in light of the predominant jurisprudential approaches to the time-honored question of "What is law?"[83] Though there is some variation, the general thrust of the *legal positivist* account is to view "law" as a norm given a special kind of authority by a legal system's "rule of recognition."[84] This "rule of recognition" is a secondary rule—a rule about other rules—and its content is based on the existence of certain social facts and group-wide behaviors.[85] That is to say, the "rule of recognition" depends upon the kinds of broad convergences in social practices and reflexive rule following discussed in Part I—with a particular focus on the practices of relevant legal officials. Or, in Scott Shapiro's much more elegant words,

> [T]he rule of recognition exists and has the content it does because, and only because . . . members of a group take the internal point of view toward a certain behavioral regularity and use it to evaluate the validity of norms that fall within their purview.[86]

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81. Solum, *supra* note 22, at 133–34.

82. BOBBITT, *supra* note 61, at 156–62, 178–86.

83. *See* SCOTT J. SHAPIRO, LEGALITY 1–34 (2011) (positing this question at the center of the jurisprudential tradition).

84. *See, e.g.*, H. L. A. HART, THE CONCEPT OF LAW 100 (2d ed. 1994). Though there is a fair amount of modern variation on Hart's argument, the broad contours of his positivist account of law remain the starting point for most discussions of the subject.

85. SHAPIRO, *supra* note 83, at 79–117.

86. *Id.* at 84. The phrase "internal point of view" is one of Hart's terms of art, which means roughly that relevant officials follow the rule of recognition reflexively—or, more precisely, that they

The "rule of recognition" may also, on some accounts, incorporate certain moral norms in certain contexts, effectively giving those norms legal authority.[87] The important point for purposes of this discussion, however, is that it turns out that legal positivism answers the question "What is law?" in much the same way that Wittgenstein approached questions about linguistic meaning: by *looking* at our actual practices.[88]

When we apply this method to constitutional law, the claim that the text's historical semantic meaning is, exclusively, "the law" does not fare very well. It is not the case, in other words, that relevant officials reflexively treat historical meanings as the only source of constitutional law.[89] In practice, as Bobbitt has so insightfully observed, relevant officials actually engage in a complex sort of rule-following that involves several "modalities" of analysis and argumentation.[90] In a given case, these officials might recognize norms generated by any or all of these modalities as legally authoritative. Historical arguments are plainly *one* such modality, but they are certainly not the *only* legitimate source of law. Indeed, at first blush we might easily make the case for ordinary textualism (the text's current public meaning) or doctrinalism (reliance on precedent) as more regular determinants of what counts as constitutional law. On the positivist account, then, those that would justify the "constraint principle" as a theory of law face an uphill battle.

With that said, the sorts of justifications that would seem to be closest to the mark here are those that Solum describes as "notion[s] that the conventions of legal practice do not permit judges to deliberately overrule the linguistic meaning of the constitutional text."[91] And it is of course possible that someday this sort of convention *will* actually govern constitutional practice, but I have not seen a persuasive case made that it does so today.[92]

The other predominant jurisprudential school has its roots in the *natural law* tradition. Modern natural lawyers, again, hold a variety of

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believe they are doing their job when they follow it. For more, see Scott Shapiro, *What is the Internal Point of View?*, 75 FORDHAM L. REV. 1157 (2006).

87. This is sometimes referred to as "inclusive" or "positive" legal positivism. *See, e.g.*, Jules L. Coleman, *Negative and Positive Positivism*, 11 J. LEG. STUD. 139 (1982).

88. Thus, for the positivist the content of law ultimately seems to be a question of "is" rather than "ought."

89. I need only refer back to the discussion of the Commerce Clause in Part I to illustrate this point. *See supra* notes 41–55 and accompanying text.

90. *See* BOBBITT, *supra* note 61, at 12–13.

91. Solum, *supra* note 6, at 32. *See supra* notes 73–74 and accompanying text for discussion on the potential ambiguity of the word "overrule" in this context.

92. *See* discussion *infra* note 101 and accompanying text.

views about what counts as law,[93] but the core idea is that both social *and moral* facts determine the content of "the law."[94] To be "law," in other words, a norm must have something like the descriptive characteristics Hart asserts, *and it must be just*.[95] On this account, we can discover "just" laws in nature, or through natural processes, but they are not simply "created" or "recognized" by legal systems. For many natural lawyers, the evolutionary model of the common law can function as one such natural process.[96] The most important point, however, is that the content or legitimacy of "the law" is ultimately a matter of moral reasoning or philosophy.

On a natural law account, then, the sort of justifications Solum labels as "popular sovereignty" theories would seem the most promising. Such a justification might claim something like the following:

- Constitutional text gets its moral authority from the ratifying vote of the sovereign "People."
- That moral authority extends only to those textual meanings the "People" understood themselves to authorize.
- Therefore, changes made to this meaning without the "People's" authorizing consent do not count as "law."

On such a view, then, the reason that original public meaning should constrain constitutional construction is that it, and only it, has the requisite moral authority to be "the law." This seems to be something close to what pundits are claiming when they assert that the Supreme Court should "interpret" rather than "make" the law.

The problem with such a justification, however, lies in its second premise, which asserts that *only* the text's original public meaning has sufficient moral authority to be law. There may, in fact, be compelling moral justifications for other sources of constitutional law; indeed, many commentators view at least some development of common law principles

93. John Finnis provides a sophisticated modern approach, which sometimes looks a lot like legal positivism. *See, e.g.*, John Finnis, *The Truth in Legal Positivism*, *in* THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM 195 (Robert P. George ed., 1996).

94. *See, e.g.*, Brian Bix, *Natural Law Theory*, *in* A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 211 (Dennis Patterson ed., 2d ed. 2010).

95. *Id.* The essential commitment that divides positivists and natural lawyers is sometimes called the positivists' "separation thesis," which asserts that there is no *necessary* connection between law and morality. *See* Jules Coleman, *On the Relationship Between Law and Morality*, 2 RATIO JURIS 66 (1989).

96. *See, e.g.*, John C. H. Wu, *The Natural Law and Our Common Law*, 23 FORDHAM L. REV. 13 (1954) (exploring the connections between natural and common law).

as just such a natural and justified source.[97] Even more troubling for such a view, the text itself expressly authorizes a federal judiciary with jurisdiction to decide "all Cases, in Law and Equity, arising under the Constitution"[98]—with an original public meaning (by most accounts) that implies the power of judicial review.[99]

With these thoughts in mind, it seems that the originalist who would justify the "constraint principle" must demonstrate that modern judicial decisions do *not* enjoy the moral authority—perhaps even derivative of "the People's" moral authority—necessary to count as constitutional law. The originalist might respond, of course, by suggesting that only *some* judicial decisions—those related to original public meaning in the right sorts of ways—have the requisite moral authority. But such a refinement would not seem capable of dealing with hard cases of unknown or vague original meaning, in which we simply cannot identify "speaker's meaning" with any real certainty.[100] In such a case, this approach suggests that there *could be no constitutional law*, because there is no underlying original meaning to bestow the necessary moral authority. This result seems very much at odds with many natural law approaches, which would instead charge the judge with reasoning her way to a just rule.[101]

Despite the intuitive attraction, then, real obstacles lie in the path of those who would justify the "constraint principle" as a theory of law in either the positivist or natural law traditions. That is not to say, of course, that these obstacles cannot be overcome, and it may be that I am overlooking some accounts that have made a serious attempt to do so.[102] It

97. *See, e.g.*, DAVID A. STRAUSS, THE LIVING CONSTITUTION 43–46 (2010) (defending the candor and Burkean legitimacy of the common law model of constitutional development); *see also* ROBERT LOWRY CLINTON, GOD AND MAN IN THE LAW: THE FOUNDATIONS OF ANGLO-AMERICAN CONSTITUTIONALISM (1997) (justifying the Constitution primarily in terms of its common law foundations); *see also* BOBBITT, *supra* note 31 (rooting the modalities of constitutional argument in the common law tradition).

98. U.S. CONST. art. III, § 2.

99. *See, e.g.*, THE FEDERALIST NO. 78 (Alexander Hamilton).

100. This might result either from the use of vague terms—such as "cruel or unusual"—of from cases of unforeseen application—such as whether a wiretap counts as a "search or seizure."

101. *See generally* Wu, *supra* note 96 (surveying intellectual history of connection between natural and common law).

102. It is important to note here that several scholars have made excellent arguments—including positivistic arguments—asserting that the text's original public meaning is *one important* source of constitutional "law"—but I have not seen a persuasive claim made that it is the *only* source of that law. *See, e.g.*, Solum, *supra* note 10, at 27 (defending his "moderate version" of the "contribution thesis"); William Baude, *Is Originalism Our Law* (forthcoming) (on file with author) (arguing that "inclusive originalism" is our positive law). These may be successful defenses of the "moderate contribution thesis," which I take to be a fairly inclusive theory of *adjudication* (with which I might agree), but they

is to say, however, that it is a mistake for originalists simply to assume that the text's original public meaning is "the law" in a way that doctrinal, structural, or contemporary readings of the text are not. It may be that historical meanings deserve to have exclusive priority either in our practices or in our moral philosophizing, but, if that is true, it cannot be so simply because a particular interpretive theory makes that claim. In a liberal state what counts as "the law" is, at the very least, something more than bare fiat.

B. The Constraint Principle as a Theory of Adjudication†

The New Originalists—folks like Larry Solum, Randy Barnett, and Keith Whittington—seem to understand the difficulties in justifying the "constraint principle" as a theory of law, and thus make it clear that their approach is to treat it as a *theory of adjudication*. Indeed, this is the basic claim of the Interpretation-Construction Distinction, which asserts that the *semantic* meanings fixed during the "interpretation" phase are not—at least not exclusively—the Constitution's *legal* meaning, which we arrive at (under historical constraints) during the "construction" phase.[103] Thus, original public meaning is not "the law," but it should nonetheless constrain our adjudicative efforts to apply the text to actual legal controversies.

Seen this way, the "constraint principle" seems to make a consequentialist rather than a deontological claim. That is, we should constrain judges to original public meaning not because of an obligation to follow "the law," but rather because judging in this way will tend to produce better results over time. Thus, Randy Barnett has argued that originalism is the best guarantee of our civil liberties in the face of ever-shifting (but always avaricious) political winds.[104] If this is true, we could justify the "constraint principle" instrumentally in terms of its service to civil rights, rather than trying to argue that original public meaning is the

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do not justify the "constraint principle" on the grounds that original public meaning is the exclusive source of constitutional law.

† Some of the material in this part first appeared in Ian Bartrum, *Originalist Ideology and the Rule of Law*, 14 JCL ONLINE 1 (2012), http://scholarship.law.upenn.edu/jcl_online/vol14/iss1/2/.

103. *See, e.g.*, Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 456 (2013).

104. RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 117 (2004) ("Only if lawmakers [including judges] cannot change the scope of their own powers can the rights of the people be in any way assured.").

only true source of constitutional law.[105] This sort of argument is certainly more sophisticated—and frankly more plausible—than claims that ground constraint in the deontological primacy of original public meaning.

Offered as an instrumental or consequentialist theory of adjudication, however, the ultimate value of the "constraint principle" is contingent on what we think should count as "better" results or consequences. This is a significant difficulty, because, again, in constitutional explication this is essentially to beg the question. That is to say, deciding what is a "better" constitutional result—in the short term, or over time—is exactly the question facing the judge in such cases. And to claim that historical meanings should always constrain the judge in the service of "civil liberties" (for Barnett) is really just to claim that courts should always work to maximize, or at least protect, those liberties. While that seems like a laudable goal in many cases, there are certainly instances in which competing interests—say, "national security," or "law and order"—may complicate matters. For this reason, I contend that no single foundational approach to adjudication—historical or otherwise—can adequately explain or justify our constitutional practices. The contours of this argument, however, are easier to make out when we confront the problem of "hard cases" of constitutional explication—those involving certain kinds of textual vagueness or unforeseen applications—which I have not yet examined in any detail.

In practice, disputes about textual meaning rarely arise over determinate constitutional provisions like the Presidential Age Requirement. I hope I have shown that this is not because the *historical* meaning of this text is clear and binding, but instead because in such cases the relevant *modern* linguistic rules are suitably precise and our practices well enough settled that the law essentially speaks for itself.[106] Instead, it is the underdetermined or vague constitutional language that gives us trouble, exactly because the underlying rules and practices governing its meaning are themselves imprecise and controversial. Logically speaking, the vagueness problem is straightforward: A vague proposition may have no determinate truth-value.[107] Whether it is true, for example, that a

105. *See id.* ("In this way, constitutional legitimacy based on natural rights, rather than popular sovereignty or consent, can ground a commitment to originalism.").

106. We do not, in other words, go through a two-step Interpretation-Construction process in such cases, but instead reflexively play our contemporary language games.

107. The late and eminent David Lewis summarized the issue well:

> If Fred is a borderline case of baldness, the sentence "Fred is bald" may have no determinate truth value. Whether it is true depends on where you draw the line. Relative to some perfectly reasonable ways of drawing a precise boundary between bald and not-bald, the sentence is

particular kind of punishment is "cruel or unusual" depends upon how we evaluate cruelty, and it may be the case that two perfectly reasonable kinds of evaluation yield contradictory results. And with ordinary language such as the Constitution, we cannot, as David Lewis says, "pick a delineation once and for all . . . but must consider the entire range of reasonable delineations."[108] Thus, unlike the Presidential Age Requirement, the Eighth Amendment cannot speak for itself, and so requires an interpreter. In our legal tradition, that job lies primarily with the judge, who draws upon her expertise and experience as a constitutional practitioner to fill in the gaps in constitutional law.[109]

At this point, for the New Originalists, semantic meaning begins to thin out and constitutional "fixation" or "interpretation" becomes increasingly difficult. In particularly difficult or borderline cases, semantic meaning may run out entirely, making "fixation" of any sort impossible, and in such circumstances there is simply nothing left to "constrain" our efforts at constitutional "construction." Thus, the New Originalists concede that these cases may require judges to rely on non-originalist reasoning.[110] Originalism then, "new" or "old," is simply not applicable in cases of genuine textual vagueness, and so I will not dwell on those here. Rather, the focus must be on what I will call the "hard cases," those where there is *some* original public meaning that might constrain construction, but not enough to be determinative. These are often cases of unforeseen application—those where our constitutional "speakers" did not anticipate (or could not have anticipated) a particular controversy—but they may also be what I will call *aspirationally vague* cases, in which the ratifiers clearly had a particular textual meaning in mind, but may not have intended to foreclose other potential meanings.[111] An example of the latter

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> true. Relative to other delineations, no less reasonable, it is false. Nothing in our use of language makes one of these delineations right and all others wrong. We cannot pick a delineation once and for all (not if we are interested in ordinary language), but must consider the entire range of reasonable delineations.

1 DAVID LEWIS, *Scorekeeping in a Language Game*, *in* PHILOSOPHICAL PAPERS 233, 244 (1983).

108. *Id*. "Reasonable" here points toward the accepted practical usage conventions, which may, again, be underdetermined.

109. Note here that these are the very gaps that confound the "theory of law" justifications—particularly natural law justifications—given for the "constraint principle."

110. *See, e.g.*, Solum, *supra* note 103, at 535–37.

111. For example, Ronald Dworkin has famously made the distinction between a *concept* and its *conceptions*:

> Suppose I tell my children simply that I expect them not to treat others unfairly. I no doubt have in mind examples of the conduct I mean to discourage, but I would not accept that my 'meaning' was limited to these examples . . . . I might say that I meant the family to be guided

situation might be the question of whether the ratifiers intended for the Equal Protection Clause to outlaw preferential treatment for African-Americans. In these sorts of cases, there is clearly still a role for the "constraint principle." In cases of unforeseen application, original public meaning can offer constraining points from which to extrapolate our constructive constitutional line; and in aspirationally vague cases it can eliminate some potential future meanings as plainly out of bounds (think here again of women and the Equal Protection Clause). Indeed, if originalism is to have any meaningful bite in our constitutional practices, it seems it must be in constraining judges as they decide these sorts of cases.

As discussed above, the "constraint principle" does not, as a descriptive matter, univocally govern our constitutional practices in these "hard" cases. Rather, practitioners make a number of different—sometimes competing—claims grounded in something like the six modalities of argument that Bobbitt has described.[112] This is in keeping with the common law tradition from whence these modalities arose, and it is in these longstanding judicial practices that we have placed our constitutional trust in cases of unforeseen application and aspirational vagueness.[113] That is to say, within our conception of the "rule of law," the application of text to real world controversies is what Brian Tamanaha has called the "special preserve of judges,"[114] whom we trust to develop particular expertise in our constitutional language game.[115] With this in mind, we can see that efforts to constrain this judicial authority in the service of external value or policy preferences—even those as laudable as protecting civil liberties—are essentially ideological or normative claims made *against* our constitutional tradition and practice.

Indeed, as I have argued at length elsewhere, the decision to adopt a particular argumentative modality to decide a constitutional case is ultimately a matter of choosing between competing constitutional

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by the *concept* of fairness, not by any specific *conception* of fairness I might have had in mind.

RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 167 (2013).

112. *See* BOBBITT, *supra* note 61, at 12–13.

113. On the structural and prudential legitimacy of the common law development of aspirational text, see STRAUSS, *supra* note 97, at 43–46.

114. Brian Z. Tamanaha, *The History and Elements of the Rule of Law*, 2012 SING. J. LEGAL STUD. 232, 244 (2012); *see generally* BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY (2004).

115. Sean Wilson has very insightfully analogized this expertise to the kind of "connoisseur judgment[s]" Wittgenstein described in his later work on aesthetics. SEAN WILSON, THE FLEXIBLE CONSTITUTION, at 89–99 (2013).

values.[116] In other words, the judge who places particular value on civil liberties might, in a particular case, choose to rely on historical conceptions of constitutional meaning, while the judge who values constitutional flexibility might ground her decision in prudential or ethical arguments.[117] And this is exactly as it should be. In cases of unforeseen application or aspirational vagueness, our legal tradition and our longstanding ideas about the rule of law ask us to entrust our judges and the common law tradition with our constitutional fate. Put another way, in a government dedicated to the rule of law, the lawmaker who hopes to bind future generations to specific or determinate legal conceptions must make those conceptions explicit in the enacted text; otherwise she turns the matter over to common law development. There is a difference, in other words, between declaring that the President must be "mature" and requiring that he "have attained to the age of thirty-five years," and tradition requires us to recognize the law in the particular form that it appears. When that form is aspirationally vague or otherwise underdetermined, we must accept that the law leaves questions of explication to its designated interpreter—the constitutional judge.

C. The Constraint Principle As Radical Challenge to Our Interpretive Traditions

It is true that entrusting judges with the kind of broad authority I have described presents its own substantial risks to the rule of law. There is the danger, as Tamanaha points out, "that the *rule of law* might become *rule by judges*"; that is, if the courts cannot remain politically neutral and "loyal to the law alone," we might just as easily find ourselves subject to the arbitrary whim of a judge as of any other man.[118] Indeed, it is precisely this danger that inspired the originalists of the 1980s and early 1990s. But, such fears notwithstanding, it is simply not the case that a theorized "constraint principle" is the only normative restraint capable of thwarting a tyrannical judiciary. In fact, it is difficult to identify a single period of our history when anything like a strong version of the "constraint principle" univocally governed our interpretive practice,[119] and yet we still live in a

116. Bartrum, *supra* note 36, at 263–64.

117. *See id*. at 287.

118. Tamanaha, *supra* note 114, at 244 (emphasis in original).

119. For a well-researched and thoughtful account of these practices, see H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985). Powell presents two fundamental schools of antebellum American legal thought—an anti-hermeneutical tradition born of Protestant biblical interpretation and a constructivist approach rooted in common law adjudication. *Id.*

generally democratic political community free from oppressive judicial whim.

This is so because judges *are*, in fact, bounded in their decision-making by a complex and evolving body of interpretive norms—something like those that Bobbitt and others have described—which define and legitimate their published opinions. Indeed, Bobbitt and others have persuasively analogized these norms to the kinds of social rules Wittgenstein saw governing our linguistic practices.[120] And so in a very real sense, judges must speak fluently in our constitutional language, and opinions that depart too radically from the inherited interpretive norms (think here, perhaps, of *Dred Scott v. Sandford*) are very much like assertions offered in a foreign tongue.[121] In truth, these evolving practical norms, built and adapted over centuries of lived democratic experience, better keep judges within the contours of our collected political wisdom than any external normative theory ever could.

The "constraint principle," at least in its strong versions, presents just such an external normative theory, and so represents a radical challenge to these longstanding interpretive traditions. I have suggested repeatedly that any realistic description of our constitutional practices must acknowledge a fairly diverse set of interpretive approaches, and I hope I need not take up too much space here justifying that claim. Whether it is structural argument in *McCulloch v. Maryland*,[122] doctrinal argument in *United States v. Morrison*,[123] or ethical argument in *Reynolds v. Sims*,[124] even a brief tour through the United States Reports refutes any notion of a practice constrained to historical arguments or original public meaning.[125] As Richard Fallon has put it,

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The constraint principle is, of course, a hermeneutic (and thus outside of the first school), and—as an exclusive method—an approach without foundations in the common law tradition. *See, e.g.*, RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 3 (2001) (observing that originalists concede that their approach has never rigidly governed Supreme Court practice); *accord* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849, 852 (1989) ("[O]riginalism is not, and ha[s] perhaps never been, the sole method of constitutional exegesis.").

120. *See* Dennis Patterson, *Wittgenstein and Constitutional Theory*, 72 TEX. L. REV. 1837 (1994) (assessing the Wittgensteinian roots of Bobbitt's work).

121. Scott v. Sandford, 60 U.S. 393 (1857).

122. 17 U.S. 316, 428 (1819).

123. 529 U.S. 598, 613–17 (2000).

124. 377 U.S. 533, 557–58 (1964).

125. For more discussion of these cases and interpretive approaches, *see* Ian C. Bartrum, *The Modalities of Constitutional Argument: A Primer*, *in* READINGS IN PERSUASION: BRIEFS THAT CHANGED THE WORLD 203 (Linda H. Edwards ed., 2012).

> [T]he originalist model departs radically from actual Supreme Court practice. As originalists themselves acknowledge, doctrines that are of central importance in contemporary constitutional law could not be justified on originalist grounds. These include doctrines that ensure broad freedoms of speech, enforce so-called one person, one vote principles, and prohibit various forms of race and gender discrimination. Had the Court been rigidly originalist in the past, important steps toward social justice and fair political democracy likely would have been postponed, if not forgone.[126]

Once we recognize, with Fallon, that the "constraint principle" would replace well-worn interpretive traditions with a normative theory imposed from without, it is not too great a leap to understand originalism as a radical kind of movement—a movement born in reaction to the perceived extravagances of the Warren and Burger Courts. Indeed, despite the cloak of "conservatism" often cast over it, modern originalism asks us to break sharply with legal interpretive practices rooted in English traditions that predate the Constitution.[127] Thus, perhaps ironically, the judicial philosophy most closely associated with the American Right is open to many of the same criticisms that English conservatives have long made against abstract liberalism.

Perhaps most famously, Edmund Burke championed the liberating wisdom of lived experience, contextualized traditions, and modest evolution over the "pretended rights of [the] theorists."[128] In a particularly relevant passage, he offers a stern warning against reductionist efforts to adopt any *a priori* principle as settlor of future, real-world political controversies:

> The world of political contingency and political combination is much larger than we are apt to imagine. We can never say what may, or may not happen, without a view to all the actual circumstances. Experience, upon other data than those, is of all things the most delusive. Prudence in new cases can do nothing on grounds of retrospect. A constant vigilance and attention to the train of things as they successively emerge, and to act on what they

126. FALLON, *supra* note 119, at 3 (citations omitted).

127. *See generally* MARY SARAH BILDER, THE TRANSATLANTIC CONSTITUTION: COLONIAL LEGAL CULTURE AND THE EMPIRE (2004).

128. EDMUND BURKE, BURKE'S REFLECTIONS ON THE REVOLUTION IN FRANCE 50 (Paternoster Row 1793), *available at* http://find.galegroup.com/ecco/infomark.do?&source=gale&prodId=ECCO&userGroupName=sain79627&tabID=T001&docId=CW3303795547&type=multipage&contentSet=ECCOArticles&version=1.0&docLevel=FASCIMILE.

> direct, are the only sure courses. The physician that let blood, and by blood-letting cured one kind of plague, in the next added to its ravages.[129]

It is, then, dangerous to set out in advance any binding, foundational theory of judicial interpretation; and it is all the more dangerous when that theory would radically reduce the number and kind of interpretive tools available to the judicial practitioner—tools that have emerged from centuries of lived experience. Indeed, Michael Oakeshott has employed the tool analogy to make largely the same point: "The carpenter comes to do a job, perhaps one the exact like of which he has never before tackled; but he comes with his bag of familiar tools and his only chance of doing the job lies in the skill with which he uses what he has at his disposal."[130] Much the same might be said of the judge, upon whose judicial skill and expertise the rule of law depends; and we should be wary indeed about limiting the number of tools in her kit, or the circumstances under which she may use them.[131]

Burke's warnings are perhaps most apropos to the particular instrumental benefit Randy Barnett sees justifying the "constraint principle." Recall that Barnett grounds the principle's normative authority in his belief that historical interpretive constraints will best protect "the rights of the people" against tyrannical encroachment.[132] But Burke offered a particularly acute criticism of the notion that natural rights or freedoms are the product of abstract or theoretical constraints on state authority:

> Civil freedom, gentlemen, is not, as many have endeavoured to persuade you, a thing that lies hid[den] in the depth of abstruse science. It is a blessing and a benefit, not an abstract speculation; and all the just reasoning that can be upon it is of so coarse a texture, as perfectly to suit the ordinary capacities of those who are to enjoy, and of those who are to defend it. Far from any . . . metaphysics, which admit no medium, but must be true or false in all their latitude; social and civil freedom, like all other things in common life, are variously mixed and modified, enjoyed in very

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129. 4 EDMUND BURKE, *Thoughts on French Affairs*, *in* THE WORKS OF EDMUND BURKE 324, 352–53 (Oxford University Press 1907) (1791).

130. MICHAEL OAKESHOTT, *On Being Conservative*, *in* RATIONALISM IN POLITICS 168, 180 (1962).

131. For an enlightening account of judicial expertise in terms of "connoisseur judgment[s]," see WILSON, *supra* note 115, at 89–99.

132. BARNETT, *supra* note 104, at 117.

> different degrees, and shaped into an infinite diversity of forms, according to the temper and circumstances of every community.[133]

Again, Burke reminds us that true civil rights are not the product of speculative political science, but rather emerge from lived experiences, from hard-won conciliations, and from the trial and error resolution of actual human controversies. The practical interpretive norms that define modern judicial decision-making and justification represent just the sort of collective, experiential wisdom that Burke celebrates; while the imposition of a theorized "constraint principle" in the name of civil rights is exactly the hubris he laments. As with many would-be reformers, the originalists are much too ready to cast aside the work that has come before—in this case, centuries of interpretive tradition and practical expertise—in their zeal for a new and better world. Better, I suggest, to try to understand our traditions as they are, and to add our own experiences to the many political lessons woven into the interpretive fabric we are blessed to have inherited.

CONCLUSION

Contemporary originalism is not the same theoretical approach that dominated political headlines in the 1980s and 1990s, but the underlying normative motivations are quite similar. They are both efforts to separate legitimate and illegitimate judicial approaches, in something like the way that Rudolf Carnap and the logical positivists hoped to distinguish "science" from "metaphysics" in the first half of the last century. And just as Willard Quine exposed the dogmas upon which the positivists depended, I hope I have here offered some reasons to question the "fixation thesis" and the "constraint principle" at the heart of modern originalism. To that end, I have argued that we do not, as a practical matter, engage in the kind empirical search for historical meanings that the "fixation thesis" supposes—and linguistic meaning is, after all, a matter of *practice* and not a matter of *fact*. Nor do historical understandings actually constrain our practice of constitutional "construction," which is governed instead by the inherited norms of the common law interpretive tradition. Efforts to justify historical constraint as a preferred theory of adjudication amount to the elevation of one particular constitutional value in all, or at least most, cases; and this kind of value foundationalism tends to

133. Letter from Edmund Burke to John Farr and John Harris, On the Affairs of America (Apr. 3, 1777), *in* EDMUND BURKE: SPEECHES ON THE AMERICAN WAR AND LETTER TO THE SHERIFFS OF BRISTOL 167, 205–06 (A. J. George ed., D. C. Heath & Co. 1891).

deprecate and destabilize our longstanding democratic traditions. This is not to say, of course, that those traditions cannot, or will not, change over time, but it is to say that such a change must emerge organically from our practice itself and not from the imposition of theoretical dogmas on the practiced art of constitutional judging.