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The Fixation Thesis: The Role of Historical Fact in Original Meaning

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THE FIXATION THESIS: THE ROLE OF HISTORICAL FACT IN ORIGINAL MEANING*

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INTRODUCTION

This Article argues for the claim that the meaning of the constitutional text is fixed when each provision is framed and ratified: the claim can be called the *Fixation Thesis*. This thesis is one of the core ideas of originalist constitutional theory. Indeed, the neologism "originalism" may owe its popularity to the connection it implies between the meaning of the constitutional text and the time at which the text *originates*.

From one perspective, the Fixation Thesis is obvious. For example, imagine that you are reading a text written quite some time ago—a letter written in the thirteenth century, for example. If you want to know what the letter means (or more precisely, what it *communicates*), you will need to know what the words and phrases used in the letter meant at the time the letter was written. Some words may be archaic—no longer used in contemporary English. Other words may have changed their meaning over time—and you would want to know what their meaning was in the

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thirteenth century. And meaning is not just a function of the meaning of individual words and phrases; it is also a function of syntax and grammar. Syntax and grammar can change over time; so you might need to know something about thirteenth-century grammar if you wanted to understand a letter written then. Moreover, the meaning of the letter is likely to be a function of the context in which it was written, but that context is also time-bound. All of this seems uncontroversial when the text we are interpreting is a letter. It is hard to imagine someone saying that we should use twenty-first century linguistic practices to understand a thirteenth-century text. And it would be very odd indeed for someone to suggest that we could better understand the letter if we were to disregard the thirteenth-century context in which it was written and instead imagine that the letter had been written today under different circumstances. Ignoring the time and place at which the letter was written would seem like a strategy for misunderstanding!

So the Fixation Thesis seems obvious, even self-evident. But in constitutional theory, the idea that meaning is determined by the original communicative context and linguistic facts at the time of writing seems, at least on the surface, to be controversial. Some living constitutionalists appear to deny the Fixation Thesis when they say that the meaning of the Constitution changes over time. But things may not be as they seem. Perhaps living constitutionalists actually accept that that the "linguistic meaning" (or communicative content) of the constitutional text is fixed, but argue that it is the "legal meaning" (or legal content) of the Constitution that changes over time.[1] To see whether and why the Fixation Thesis might be controversial, we will need to understand the role of the thesis in contemporary debates about originalism. Once we can see what all the fuss is about, we will be in a position to consider the arguments for and against the claim that constitutional meaning is fixed.

Here is the roadmap. We will begin, in Part I, by examining the role of the Fixation Thesis in contemporary originalist constitutional theory. Our next step, in Part II, is to state the affirmative case for the Fixation Thesis. This is the heart of this Article and readers who are looking for the gist might limit themselves to the discussion here. Part III explores a variety of objections to the Fixation Thesis and clarifies the content of the thesis in light of the answers to these objections. The theoretical views that reject the Fixation Thesis are examined in Part IV. Part IV applies the Fixation Thesis to three examples, "domestic violence," "cruel and unusual punishment," and "privileges or immunities of citizens of the United States." The conclusion assesses the landscape of constitutional theory in light of the arguments presented.

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[1] On the distinction between "legal content" and "communicative content," see Lawrence B. Solum, *Communicative Content and Legal Content*, 89 NOTRE DAME L. REV. 279 (2013). The relationship of the Fixation Thesis to communicative content is explored in greater depth below. *See infra* Part III.A.1.

I. THE ROLE OF THE FIXATION THESIS IN ORIGINALIST CONSTITUTIONAL THEORY

We can begin by asking what the word "originalism" means and how the term came into being. Once we have an understanding of originalism in place, we can formulate a preliminary version of the Fixation Thesis and explain the role that it plays in the constitutional theories that are members of the originalist family.

A. What Is Originalism?

What is originalism?[2] "Originalism," the word, was coined by Paul Brest in 1980, in a law review article entitled "The Misconceived Quest for the Original Understanding."[3] Brest stipulated the following definition:

> By "originalism" I mean the familiar approach to constitutional adjudication that accords binding authority to the text of the Constitution or the intentions of its adopters.[4]

So the word "originalism" is a technical term, used in academic and political discourse about constitutional law and theory. Like many technical terms, the meaning of "originalism" is a function of both stipulated definitions (like Brest's) and patterns of usage among linguistic subcommunities (e.g., constitutional lawyers and constitutional theorists).

Brest's article did not have much to say about the content of the "familiar approach" and he did not provide a list of the cases or articles to which he was referring. Nonetheless, there were ideas in the jurisprudential air suggested by Brest's definition. What we might call "proto-originalist" ideas appeared in the writings of Robert Bork,[5] Associate Justice William Rehnquist,[6] and Raoul Berger[7] in the 1970s:

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[2] The answer to the question, "What is originalism?" that follows draws on Lawrence B. Solum, *What Is Originalism? The Evolution of Contemporary Originalist Theory* in THE CHALLENGE OF ORIGINALISM: ESSAYS IN CONSTITUTIONAL THEORY (Grant Huscroft and Bradley W. Miller eds., Cambridge University Press, 2011) and ROBERT BENNETT & LAWRENCE B. SOLUM, CONSTITUTIONAL ORIGINALISM (2011).

[3] Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980). Brest reports that he believes he believes he coined the term. E-mail from Paul Brest, Professor Emeritus, Stanford Law School, to author (Dec. 2, 2009, 6:01 PM) (on file with author).

[4] *Id.* at 204.

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

[6] William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976).

[7] Raoul Berger, *Government by Judiciary* (1977).

it is not clear that these proto-originalists actually had anything like a full-blown theory of originalism, and their writings are a mélange of many ideas—some of which may not be originalist at all.

The public prominence of originalism is usually traced to a speech before the American Bar Association, delivered in 1985 by then–Attorney General Edwin,[8] and he later advocated a "jurisprudence of original intention."[9] The proto-originalists emphasized original intentions, but their writings did not provide a theory of original meaning, nor did they have a clear account of the role that original meaning should play in constitutional practice.

The proto-originalist jurisprudence of original intentions was subjected to a sustained academic critique, with Brest's article as the opening salvo[10] and key contributions from Jefferson Powell[11] and Ronald Dworkin.[12] Much of the criticism focused on the difficulty of ascertaining *the* original intentions of a document drafted by a multimember constitutional convention and ratified by an even larger group who met in conventions convened in each state. Although there were defenders of intentionalism (notably Richard Kay[13]), Justice Scalia urged originalists to "change the label from the Doctrine of Original Intent to the Doctrine of Original Meaning."[14] Scalia's suggestion was taken up, and the resulting theory (which I shall call "public meaning originalism"[15]) was elaborated by Gary Lawson,[16] followed by Steven

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[8] See Edwin Meese III, *Speech Before the American Bar Association* (July 9, 1985), *reprinted in The Great Debate: Interpreting Our Written Constitution* (Paul G. Cassel ed., 1986), online:< http://www.fed-soc.org/resources/id.49/default.asp> [Meese, "Speech Before the American Bar Association"]; *see also* Edwin Meese III, "The Case for Originalism", The Heritage Foundation (June 6, 2005) online:<http://www.heritage.org/Press/Commentary/ed060605a.cfm>; Lynette Clemetson, "Meese's Influence Looms in Today's Judicial Wars," *N.Y. Times*, Apr. 17, 2005, at A1.

[9] Edwin Meese III, T*he Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 S. TEX. L. REV. 455, 465–66 (1986).

[10] *See* Brest, *supra* note 3.

[11] H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

[12] Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 470 (1981).

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

[14] Antonin Scalia, *Address Before the Attorney General's Conference on Economic Liberties in Washington, D.C.* (June 14, 1986), in ORIGINAL MEANING JURISPRUDENCE: A SOURCEBOOK 101 at 106 (U.S. Dep't of Justice ed., 1987).

[15] Sometimes the phrase "original public meaning originalism" is used to refer to this view.

Calabresi and Saikrishna Prakash.[17] In the late 1990s, Randy Barnett[18] and Keith Whittington[19] began to build what has come to be called the "new originalism."[20] It was at this stage that some originalists began to endorse the interpretation–construction distinction, which marks the difference between the discovery of the linguistic meaning of the constitutional text ("interpretation") and the determination of the legal effect associated with the text ("construction").[21]

New originalists who accepted the interpretation–construction distinction and also believed that the Constitution contains some provisions that are vague (admit of borderline cases) were led to the conclusion that the original meaning of the constitutional text does not determine the answers to all constitutional questions. Thus, some new originalists posit the existence of a "construction zone"—where the resolution of constitutional disputes will require judges and officials to develop

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[16] *See* Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859 at 875 (1992).

[17] *See* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 553 (1994).

[18] Randy E. Barnett, *An Originalism for Nonoriginalists,* 5 Loy. L. Rev. 611 (1999).

[19] Keith E. Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* (1999); Keith E. Whittington, *Constitutional Construction: Divided Powers and Constitutional Meaning* (1999).

[20] *See* Evan S. Nadel, *The Amended Federal Rule of Civil Procedure 11 on Appeal: Reconsidering Cooter & Gell v. Hartmarx Corporation*, 1996 ANN. SURV. AM. L. 665, 691 n. 191 ("An example of the 'textualism' to which I refer is the 'new originalism' theory often associated with Justice Scalia."); Randy E. Barnett, *An Originalism for Nonoriginalists, supra* note 18, at 620; Keith Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599 (2004).

[21] For an overview of the interpretation–construction distinction and the role that it plays in contemporary originalism, see Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453 (2013); *see also* Lawrence B. Solum, *The Interpretation–Construction Distinction*, 27 CONST. COMMENT. 95 (2011); Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL'Y 65 (2011). An early use in contemporary constitutional theory can be found in Robert N. Clinton, *Original Understanding, Legal Realism, and the Interpretation of "This Constitution,"* 72 IOWA L. REV. 1177, 1265 (1987). The distinction first became prominent in contemporary debates about originalism in the work of Keith Whittington. Whittington, *Constitutional Interpretation*, *supra* note 19; Whittington, *Constitutional Construction*, *supra* note 19, and subsequently in the work of Randy Barnett. *See* Barnett, *An Originalism for Nonoriginalists*, *supra* note 18; RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION (2004).

constitutional doctrines and practices on the basis of normative considerations that are not fully determined by the communicative content of the constitutional text.[22]

Both the interpretation–construction distinction and the construction zone are controversial. John McGinnis and Michael Rappaport have suggested that their version of originalism, which focuses on the original methods of constitutional interpretation, can eliminate the need for constitutional construction (or eliminate the construction zone).[23] Gary Lawson[24] and Michael Paulsen[25] have argued the construction zone can be contained or eliminated by constitutional default rules: for example, there might be a constitutional default rule that required judges to defer to the political branches when the constitutional text does not provide a clear answer to a constitutional question.[26]

Having set the stage through this very brief historical survey of originalism, we are now in a position to identify the core commitments that characterize contemporary originalist constitutional theory.

B. The Originalist Family of Constitutional Theories

Contemporary originalism[27] is a family of constitutional theories, united by two core ideas, fixation and constraint. [28] The first of these ideas ("the Fixation Thesis") is

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[22] *See* Solum, *The Interpretation–Construction Distinction*, *supra* note 21, at 108.

[23] John O. McGinnis & Michael B. Rappaport, *The Abstract Meaning Fallacy*, 2012 U. Ill. L. Rev. 737, 750.

[24] *See* Gary Lawson, *Dead Document Walking*, 92 B.U. L. REV. 1225, 1233 (2012) (stating "I want to dissent from the originalist construction project and declare the Constitution a 'no-construction zone.'").

[25] *See* Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for its Own Interpretation?*, 103 Nw. U. L. Rev. 857, 882 (2009) ("Where the document's broad or unspecific language admits of a range of possible actions, consistent with the language, government action falling within that range is not unconstitutional.").

[26] *See* Solum, *Originalism and Constitutional Construction*, *supra* note 21, 511–523 (discussing Paulsen and Lawson's default rules approach).

[27] In this Article, I will use the word "originalism" to refer to theories that endorse fixation and constraint: "non-originalist" shall be used to refer to theories that deny one or both of the two theses. "Non-originalism" will be distinguished from "living constitutionalism," which shall be used to refer to theories that endorse the proposition that the legal content of constitutional doctrine changes over time. There are at least two distinctive forms of non-originalism: "Interpretive non-originalism" is the view that the communicative content of the constitutional text changes over time: someone who held the view that the Constitution should be interpreted in light of the contemporary plain meaning of the text would be an interpretive non-originalist. "Constructive non-originalism" is the view that the legal

that the original meaning ("communicative content") of the constitutional text is fixed at the time each provision is framed and ratified.[29] The second idea ("the

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content of constitutional doctrine does not constrain (but may contribute to) the legal content of constitutional doctrine. For discussion of lines between originalism, non-originalism, and living constitutionalism, see Solum, *Originalism and Constitutional Construction*, *supra* note 21, at 534, table 1.

[28] The claim that the family of theories is organized around the Fixation Thesis and the Constraint Principle is widely accepted. *See, e.g.*, Jack M. Balkin, *The New Originalism and the Uses of History*, 82 Fordham L. Rev. 641, 647 n. 12 (2013); Eric Berger, *Originalism's Pretenses*, 16 U. PA. J. CONST. L. 329, 330 (2013) ("Though originalism has changed many times since then, its proponents generally preach these related virtues of "fixation" and "constraint."); Peter Martin Jaworski, *Originalism All the Way Down, or: The Explosion of Progressivism*, 26 CAN. J.L. & JURIS. 313, 316 (2013) (stating that "the fixation and fidelity theses . . . constitute originalism"); Micah Schwartzman, *What If Religion Is Not Special?*, 79 U. CHI. L. REV. 1351, 1404 (2012) (stating that "nearly all forms of originalism accept the fixation and textual constraint theses"); Andrew Koppelman, *Originalism, Abortion, and the Thirteenth Amendment*, 112 COLUM. L. REV. 1917, 1918 n.2 (2012); Jack M. Balkin & David A. Strauss, *Response and Colloquy Concerning the Papers by Jack Balkin and David Strauss*, 92 B.U. L. REV. 1271, 1271 (2012); Thomas B. Colby, *Originalism and the Ratification of the Fourteenth Amendment*, 107 NW. U. L. REV. (forthcoming 2013) (manuscript at 1 n.1); Lee J. Strang, *An Originalist Theory of Precedent: The Privileged Place of Originalist Precedent*, 2010 B.Y.U. L. REV. 1729, 1729 n.1. Sometimes slightly different terminology is used. *See* César A. López Morales, *Jack Balkin's Reclamation of Constitutional Fidelity: A Theory of Abstract Originalism for We the People*, 83 REV. JUR. U.P.R. 117, 124–25 (2014) (discussing Fixation Thesis and Amendment Thesis); Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 378 (2013) (The two crucial components of originalism are the claims that constitutional meaning was fixed at the time of the textual adoption and that the discoverable historical meaning of the constitutional text has legal significance and is authoritative in most circumstances.); Rebecca E. Zietlow, *Popular Originalism? The Tea Party Movement and Constitutional Theory*, 64 FLA. L. REV. 483, 493 (2012) (stating that the "fixation thesis" and "the belief that the original intent or meaning of the Constitution is binding" "unite the various camps of originalist scholars"). Moreover, the Fixation Thesis in particular is accepted as a core component of originalism. *See* S. L. Whitesell, *The Church of Originalism*, 16 U. PA. J. CONST. L. 1531, 1553 (2014) (stating, "Though originalists disagree on much, and though there is no official gatekeeper, all of them hold what Lawrence Solum has dubbed the fixation thesis."); Yvonne Tew, *Originalism at Home and Abroad*, 52 COLUM. J. TRANSNAT'L L. 780, 788 (2014) (Originalism refers to the view that the original understanding of a constitutional provision is fixed at the time it was framed and enacted.); Thiago Luiz Blundi Sturzenegger, *The Second Amendment's Fixed Meaning and Multiple Purposes*, 37 S. ILL. U. L.J. 337, 354 (2013) (stating that "the fixation thesis" "is one of the essential elements of the originalist theory").

[29] On the Fixation Thesis, see Lawrence B. Solum, *Faith and Fidelity: Originalism and the Possibility of Constitutional Redemption*, 91 TEXAS L. REV. 147, 154 (2012); Lawrence B.

Constraint Principle") is that constitutional actors (e.g. judges, officials, and citizens) ought to be constrained by the original meaning when they engage in constitutional practice (paradigmatically, deciding constitutional cases).[30]

The originalist family converges on these two core ideas, but particular versions of originalism differ in many other respects. For example, some originalists focus on the original public meaning of the text, while others believe that original meaning is determined by the original intentions of the framers or the original methods of constitutional interpretation. Debates between the proponents of various forms of originalism have figured prominently in recent originalist scholarship.[31]

Despite their differences, these originalist theories agree that the communicative content of the constitutional text was fixed at the time each provision was framed and ratified. There may be slight differences in the way that different originalists view fixation. "Original intentions originalism" (or "intentionalism" for short) maintains that meaning is fixed by the intentions of the framers of the text: thus, the moment of fixation is the moment the relevant intentions are formed, roughly the moment drafting occurs. Originalists who focus on the understanding of the ratifiers might place the crucial moment at a slightly later time period—the period during which ratification occurs. As a practical matter, these differences are likely to be minor: framing and ratification are likely to be proximate in time, separated by a few years at most.[32] The Fixation Thesis is the main topic of this Article—so much more will be said about its relationship to various forms of originalism in what follows.

Originalists also agree on the Constraint Principle—the notion that the communicative content of the Constitution should constrain constitutional practice, including decisions by courts and the actions of officials such as the president and institutions such as Congress. Most constitutional theorists would agree that the linguistic meaning of the Constitution should make some contribution[33] to the legal

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Solum, District of Columbia v. Heller *and Originalism*, 103 NW. U. L. REV. 923, 944–47 (2009).

[30] On the Constraint Principle, see Solum, *Faith and Fidelity*, *supra* note 29, at 154–55.

[31] *See* Lawrence B. Solum, *What is Originalism*?*, supra* note 2 (discussing the varieties of originalism).

[32] The Twenty-Seventh Amendment is an exception, having been submitted to the states for ratification in 1789 and achieving ratification in 1992. *See generally* Richard B. Bernstein, *The Sleeper Wakes: The History and Legacy of the Twenty-Seventh Amendment*, 61 FORDHAM L. REV. 61 497 (1992).

[33] Mark Greenberg has helpfully discussed the relationship between communicative content and legal content using the notion of *contribution*. *See* Mark Greenberg, *Legislation as*

content of constitutional doctrine. For example, Stephen Griffin and Phillip Bobbitt have suggested that constitutional practice includes multiple modalities or a plurality of methods of constitutional argument.[34] Bobbitt's list of modalities includes text, history, structure, precedent, "ethos" of the American social order, and prudence.[35] Pluralists can accept that the original meaning of the constitutional text should be considered by judges who decide constitutional cases (and other officials when they engage in constitutional interpretation and construction). Characteristically, originalists argue that the role of original meaning is not simply that of one factor among many; originalists typically believe that original meaning should *constrain* constitutional practice. Another way of putting this is to say that originalists characteristically believe that the original meaning is lexically prior to other modalities of constitutional interpretation and construction.

But even if originalists agree that original meaning should have a constraining role in constitutional practice, they might disagree on the precise form that constraint should take. We can imagine a spectrum of constraint. At the minimum, originalists can agree that doctrines of constitutional law and decisions in constitutional cases should be consistent with the original meaning—subject to limited and exceptional defeasibility conditions.[36] At a maximum, we can imagine a

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Communication? Legal Interpretation and the Study of Linguistic Communication in PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW 217 (Oxford University Press, 2011).

[34] PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 12–13 (1991); Stephen M. Griffin, *Pluralism in Constitutional Interpretation*, 72 TEX. L. REV. 1753, 1753 (1994).

[35] Bobbitt, *supra* note 34, at 12–13.

[36] The formulation of what we can call "the Minimalist Version of the Constraint Principle" that is articulated in a text can be made more precise. In prior work, I have offered the following formulation:

> At a minimum, originalists could believe that the legal content of constitutional doctrine must satisfy two requirements. First, constitutional doctrine may not be inconsistent with the [communicative content] of the text in context. Second, the rules of constitutional law must include rules that fairly capture the communicative content of all of the portions of the text that are in force (not repealed). This minimalist version of the constraint principle would allow for constitutional doctrine that supplements the text in various ways—implementing rules (like the prior restraint doctrine in free-speech doctrine) are allowed.

Lawrence B. Solum, *Construction and Constraint*, 7 JERUSALEM REV. LEG. STUD. 17, 22 (2013) (with "communicative content" substituted for the original "linguistic meaning"). In this formulation, consistency means logical consistency in the following sense: actual content of constitutional doctrine must not contradict the legal content that would follow from it if the communicative content were directly translated into legal content. The second part of the minimalist formulation of the Constraint Principle requires more than non-contradiction: it adds the requirement that all of the communicative content must be translated into legal

version of the Constraint Principle that requires that every doctrine of constitutional law be derived directly from the constitutional text. Because the maximalist form of the Constraint Principle includes the minimalist form, we might think of constraint as consistency as a least common denominator, the form of constraint upon which all originalists could agree.

The view that originalism is a family of theories united by agreement on the core ideas of fixation and constraint has been challenged by Thomas Colby and Peter Smith; they contend that "originalism is not a single, coherent, unified theory of constitutional interpretation, but is rather a disparate collection of distinct constitutional theories that share little more than a misleading reliance on a common label."[37] While Colby and Smith are correct to observe that there are significant differences among originalists, they are wrong to deny that originalism has a unifying core. That core is specified by the Fixation Thesis and the Constraint Principle.

The significance of the core to constitutional theory is illuminated by considering the implications of denying fixation or constraint. Whereas originalists contend that the fixed meaning of the constitutional text constrains constitutional practice, non-originalists argue that the original meaning of the text either cannot or should not constrain our constitutional practice, although many non-originalists may believe that original meaning is a relevant factor. This distinction between originalists and non-originalists marks a deep divide: non-originalists can (at least in theory) endorse amending constructions of the constitutional text, whereas originalists reject such constructions. The power of the Supreme Court to adopt de facto amendments to the Constitution is surely of great moment, both theoretically and practically.

Because originalism is a family of theories that converge on the Fixation Thesis and the Constraint Principle, we can approach originalism from two distinct perspectives. "Ecumenical originalism" seeks the common ground between the distinctive versions of originalism. "Sectarian originalism" develops the case for a

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content—in other words, all of the provisions of the Constitution (that have not been repealed) must be given legal effect. The Minimalist Formulation of the Constraint Principle requires that the content of constitutional doctrine be consistent with the core of settled meaning (that is, the zone of constitutional determinacy). The Minimalist Formulation thus allows for non-originalist considerations to operate in the Construction Zone. This is an incomplete explication of the Constraint Principle, which is not the subject of this article. In a work in progress, tentatively entitled *The Constraint Principle*, I will provide a more complete explication.

[37] Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 Duke L.J. 239, 239 (2009). *But see*, Colby, *Originalism and the Ratification of the Fourteenth Amendment*, *supra* note 28, at manuscript page 1, note 1.

particular version of originalism and hence the case against rival views. The Fixation Thesis is common ground among originalists, and this Article advances the case for the Fixation Thesis from the perspective of ecumenical originalism.

C. Interpretation and Construction

We have already observed that the new originalism embraces a distinction between "interpretation" and "construction." Let us stipulate the following definitions to mark the distinction:

- "Constitutional interpretation" is the activity of that discerns the communicative content (linguistic meaning) of the constitutional text.
- "Constitutional construction" is the activity that determines the content of constitutional doctrine and the legal effect of the constitutional text.[38]

The distinction between interpretation and construction goes back at least as far as 1839 when it was articulated (in a different from) by Franz Lieber in his *Legal and Political Hermeneutics*.[39] The distinction appears in twentieth-century treatises on contract law by Corbin and Williston[40] and has been deployed in many judicial decisions.[41]

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[38] These definitions were presented in Solum, *Originalism and Constitutional Construction*, *supra* note 19, at 457.

[39] FRANCIS LIEBER, LEGAL AND POLITICAL HERMENEUTICS 43–44, 111 n.2 (Roy M. Mersky & J. Myron Jacobstein eds., Wm. S. Hein & Co. 1970) (1839). Lieber's definition of construction is related to the definition offered here:

> Construction is the drawing of conclusions respecting subjects, that lie beyond the direct expression of the text, from elements known and given in the text—conclusions which are in the spirit, though not within the letter of the text.

Id. at 44. Lieber's formulation is ambiguous as between two different versions of construction. Lieber might be drawing the distinction between semantic content and contextual enrichment, but he could also be distinguishing between communicative content and legal content. My own view is that Lieber's distinction imperfectly captures the distinction that is articulated here.

[40] 4 Williston, Contracts §§ 600-02 (3d ed.1961); 3 Corbin, Contracts §§ 532-35 (1960 & Supp.1980).

[41] *See* Fausel v. JRJ Enters., Inc., 603 N.W.2d 612, 618 (Iowa 1999); In re XTI Xonix Technologies Inc., 156 B.R. 821, 829 n. 6 (D.Ore.1993); Berg v. Hudesman, 115 Wash.2d 657, 663, 801 P.2d 222, 226 (1990). For more examples, *see* Solum, *supra* note 19, at 30–31 (pagination of Draft 55 of August 7, 2013).

From the perspective of ecumenical originalism, the interpretation–construction distinction itself should be uncontroversial. It marks the conceptual difference between the activity of discovering the meaning of the text on the one hand (where "meaning" is understood as neutral between public meaning, original intent, original methods, and so forth), and the activity of giving the constitutional text legal effect (either in the form of constitutional doctrine or through the decision of constitutional cases). Some originalists may believe that the communicative content of the constitutional text is sufficiently thick (or "rich") to provide a determinate outcome in all (or almost all) constitutional cases. For these originalists, the interpretation–construction distinction performs two functions: (1) it provides conceptual clarity about the (normatively legitimate) role of communicative content in constitutional practice, and (2) it enables criticism of constitutional constructions that violate the Constraint Principle.

But another group of originalists may believe that the constitutional text is not fully determinate: they affirm what we can call "the Fact of Constitutional Underdeterminacy." Constitutional underdeterminacy[42] occurs when the text is (1) vague, (2) open-textured, or (3) irreducibly ambiguous, and when there are (4) gaps or (5) contradictions in the text.

In this context, "vagueness" and "ambiguity" can be distinguished. A word or expression is vague when it admits of borderline cases. The word "tall" is vague when used to refer to human height, because there is no bright-line cutoff for tallness. This is different than ambiguity: a word or expression is ambiguous when it has more than one sense (or semantic meaning). For example, the word "cool" is ambiguous, because it has several distinct senses, one related to temperature (the room is cool), another related to temperament (he kept his cool), and yet another sense related to personal style (she was a cool chick). A single word or phrase can be both ambiguous and vague—cool is ambiguous and vague in each of the senses specified in this paragraph. For the purposes of this essay, "open texture" will refer to multidimensional underdeterminacy; for example, a term may be vague in multiple dimensions or may involve the application of multiple criteria that are incommensurable.[43]

The constitutional text contains many words and phrases that would be ambiguous if considered acontextually. The word "state" can refer to nation states, to "states of affairs," or to the several states of the United States: in context, it is clear that the Constitution uses the word "state" in the last of these three senses. Vagueness is

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[42] On the notion of "underdeterminacy," see Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462 (1987).

[43] On multidimensional incommensurability, see Hrafn Asgeirsson, *On the Instrumental Value of Vagueness in the Law*, 125 ETHICS 425, 429 (2015).

different. Although it is possible that a seemingly "vague" word or expression will become determinate in a particular context, this is not always the case. Even after context is considered, vague terms in the Constitution may continue to underdetermine the content of constitutional doctrine and the outcome of constitutional cases. For example, Articles One, Two, and Three of the Constitution use the phrases "legislative power," "executive power," and "judicial power." Although there are clear cases of each kind of power, there are also borderline cases. The Affordable Care Act may be a clear case of legislation, but the president's executive order suspending the deportation of young undocumented persons who came to the United States as children might be a borderline case[44]—neither clearly executive, nor clearly legislative in nature.[45]

If true, the Fact of Constitutional Underdeterminacy would create construction zones—particular fact patterns and general issues of constitutional doctrine where the communicative content of the constitutional text does not answer our constitutional questions. In the construction zone, interpretation would run out and we would be required resort to constitutional construction to provide the content of constitutional doctrine and to decide constitutional cases. (But we should not be misled by the construction-zone metaphor: construction gives the constitutional content legal effect, even those in which the constitutional text itself fully determines the content of constitutional doctrine.[46])

Some originalists affirm the existence of construction zones while others deny them. As a consequence, the groups will view implications of the interpretation–construction distinction differently. Nonetheless, from an ecumenical perspective, all originalists can affirm the conceptual distinction between meaning and effect that grounds the conceptual distinction between interpretation (communicative content) and construction (legal effect).

There is one more important point to be made about the interpretation–construction distinction. Interpretation is an empirical inquiry. The communicative content of a text is determined by linguistic facts (facts about conventional semantic meanings and syntax) and by facts about the context in which the text was written. Interpretations are either true or false—although in some cases we may not have sufficient evidence to show that a particular interpretation is true or false. Constructions are justified by normative considerations. This is true even in the

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[44] To be clear, I am not asserting that this is a borderline case. To make out that claim, we would need to examine the relevant linguistic and contextual facts.

[45] For further discussion, see Solum, *Originalism and Constitutional Construction*, *supra* note 19, at 14–19 (pagination of Draft 55 of August 7, 2013).

[46] Solum, *Originalism and Constitutional Construction*, *supra* note 19, at 26 (pagination of Draft 55 of August 7, 2013).

cases where the constructions seem compelled by the meaning of the text. Article One of the Constitution provides that each state is represented by two senators: this is a case where interpretation of the text is easy and hence the construction (legal effect) to be given to the text seems obvious and intuitive. But if we ask why we ought to give the constitutional text the effect that follows naturally from the meaning of the word "two," our answer must be some normative consideration. For example, we might believe that we are obligated to follow the clear directives of the constitutional text, because the United States Constitution was adopted by "We the People" and hence has democratic legitimacy. In the construction zone, we will need some theory of constitutional construction to give legal effect to the underdeterminate constitutional text. That theory might provide a general default rule (resolve underdeterminacy in favor of actions by elected officials), or it might require consideration of first-order normative concerns (resolve underdeterminacy so as to achieve justice).

D. Formulating the Fixation Thesis

Given our understanding of originalism as a family of constitutional theories and the interpretation–construction distinction, we are now in a position to formulate a more precise version of the Fixation Thesis. We can begin with a statement of the fully elaborated version and then proceed to analysis of its elements:

> *The Fixation Thesis*: The object of constitutional interpretation is the communicative content of the constitutional text as that content was fixed when each provision was framed and/or ratified.

The thesis can be unpacked by providing an explanation for each of its major elements:

> *The Object of Constitutional Interpretation:* The Fixation Thesis is a claim about constitutional interpretation—in the sense of "interpretation" specified by the interpretation–construction distinction. That is, the Fixation Thesis is a thesis about the activity of discovering the communicative content of the constitutional text. By itself, the Fixation Thesis does not make a claim about the legal content of constitutional doctrine or the decision of constitutional cases. Such claims require some version of the Constraint Principle and information about the communicative content of particular constitutional provisions. Thus, the Fixation Thesis does not claim that the communicative content of the constitutional text ought to be decisive in constitutional construction.
>
> *The Communicative Content of the Constitutional Text*: The Fixation Thesis is a claim about the communicative content of the authoritative version of the

constitutional text.[47] The phrase "communicative content" is used to provide a more precise formulation than "meaning" or "linguistic meaning." The use of the phrase "communicative content" is intended to be neutral as between various theories of that content, e.g., original public meaning versus original intentions (and other theories). The authoritative version of the text is the particular instance of the writing that was officially promulgated.[48]

As That Content Was Fixed: It is the communicative content that is fixed at the time of origination. Communicative content is not legal content or legal effect. Therefore, the Fixation Thesis is not a claim about the fixation of constitutional doctrine or the fixation of constitutional practice. The notion of "fixation" employed in the Fixation Thesis is intended to be thin, rather than thick.[49] Different accounts of meaning in the philosophy of language may produce slightly different accounts of how fixation occurs and what fixation means. For each such account, there will be a thick theory of fixation, but the Fixation Thesis itself is neutral as between such accounts.

When Each Provision Was Framed and/or Ratified: The Fixation Thesis claims that fixation occurs during a timeframe: "when each provision of the Constitution was framed and/or ratified." The use of "and/or" is intended to reflect theoretical disagreement about the precise moment of fixation, with some originalists endorsing the moment at which the text was created (framing) and others endorsing the moment at which the text became legally operative (ratification).

The precise formulation of the Fixation Thesis and the explanation of its elements reveal an important characteristic of the defense of the Fixation Thesis offered here. Just as originalism is a family of constitutional theories united by the Fixation Thesis and the Constraint Principle, originalists could affirm a variety of slightly different views about fixation. The formulation of the Fixation Thesis offered here is intended to be ecumenical; it is formulated to be as neutral as possible with respect to the variations between these views. Of course, in the end, only one version of the Fixation Thesis can be correct. Nonetheless, the argument for the Fixation Thesis

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[47] By "authoritative," I mean the version of the text that we take as the official version—for example, the version of the Constitution signed in 1787 by the delegates to the Philadelphia Convention. By using the word "authoritative" in this way, I do not mean to smuggle in a further claim that this version should constrain legal practice. Originalists do make that claim in the form of the Constraint Principle, but that principle must be justified by normative arguments. It certainly cannot simply be assumed.

[48] As discussed below, the official version is a token and not a type. *See infra*, Part III.A.2.

[49] The notion of "thick" and "thin" deployed here is borrowed from Rawls. *See* JOHN RAWLS, A THEORY OF JUSTICE 396 (1971) (page 348 in the revised edition) (discussing the theory of the good).

offered here will show that fixation is well supported even when accounting for the theoretical disagreements among originalists and among philosophers of language.

E. A Preliminary Example: Domestic Violence, Take One

The classic example of the Fixation Thesis in action is the reference in the Constitution to "domestic violence."[50] This example will be discussed twice. At this point, it will be used as a preliminary example—to illustrate the gist (or commonsense version) of the argument for the thesis. Towards the end of this essay, the domestic violence example will be analyzed again in light of the various complexities introduced by a full statement of the case for the Fixation Thesis.

The Constitution of 1789 uses the phrase "domestic violence":[51]

> The United States shall guarantee to every state in this union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence.

The contemporary semantic meaning of the "domestic violence" is "'intimate partner abuse,' 'battering,' or 'wife-beating,'" and it is understood to be "physical, sexual, psychological, and economic abuse that takes place in the context of an intimate relationship, including marriage."[52] But if that meaning had been unknown in the late eighteenth century, it would simply be a linguistic mistake to interpret the domestic violence clause of Article IV of the Constitution of 1789 as referring to spouse or child abuse. The anachronistic reading of "domestic violence" would be mistaken because the semantic content is fixed at the time of "constitutional utterance," where that phrase is understood as referring to the time of origin, encompassing the period roughly contemporaneous with the framing (or drafting) and ratification (or formal legal approval) of the particular clause or amendment.[53]

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[50] Mark S. Stein, *The Domestic Violence Clause in "New Originalist" Theory*, 37 HASTINGS CONST. L.Q. 129 (2009).

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

[52] Glossary, Human Rights Watch, http://www.hrw.org/reports/2003/nepal0903/3.htm (visited March 29, 2008); *see* Emily J. Sack, *The Domestic Relations Exception, Domestic Violence, and Equal Access to Federal Courts*, 84 WASH. U. L. REV. 1441 (2006).

[53] I owe this example to Jack Balkin. *See* Lawrence B. Solum, *Blogging from APSA: The New Originalism*, September 3, 2007, http://lsolum.typepad.com/legaltheory/2007/09/blogging-from-a.html (live blogging at the meeting of the American Political Science Association and describing Balkin's presentation); JACK M. BALKIN, LIVING ORIGINALISM 37 (2011).

The point of the domestic violence example is illuminated by considering the general phenomena of "linguistic drift." Words and phrases acquire new meanings over time. This phenomenon can be illustrated by returning to the example of the thirteenth-century letter discussed earlier. Suppose, for example, that we are attempting to determine the semantic content of a letter written in the twelfth century that uses the term "deer." Over time, the meaning of the term "deer" has substantially changed. Today, "deer" refers to a ruminant mammal belonging to the family Cervidae, and a number of broadly similar animals from related families within the order Artiodactyla are often also called deer. But in Middle English, the word "deer" meant a beast or animal of any kind.[54] An ordinary letter written between 1066 and the fifteenth century that employed the term "deer" can only be understood reliably in light of the conventional semantic meaning at the time of writing: to read the letter as using the term "deer" to refer exclusively to a mammal belonging to the family Cervidae would be to make a type of factual error, i.e., a linguistic mistake.[55] Although I have used an example involving a writing (a letter), this feature is not essential to fixation. The communicative content of a twelfth-century oral communication using the word "deer" would also be given by usage in Middle English.[56]

The phrase "domestic violence" and the word "deer" both illustrate the general phenomenon of linguistic drift. Words and phrases change meaning over time. When we interpret a particular communication (a written text or an oral saying), the communicative content is a function of the meaning at the time the communication was produced. Meaning is fixed for another reason: the communicative content of an utterance is also a function of context, and context is time-bound as well.[57]

F. The Shape of Current Debates over Originalism

What role does the Fixation Thesis play in contemporary debates over originalism? It is perhaps unsurprising that there is no clear answer to this question. Living

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[54] Sol Steinmetz, *Semantic Antics: How and Why Words Change Meaning* 49–50 (Random House 2008).

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

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

[57] *See infra* Part II.C.2.b).

constitutionalists and non-originalists usually see themselves as opposed to originalism. If originalism is the family of constitutional theories that affirm the Fixation Thesis and the Constraint Principle, then one can oppose originalism in three distinct ways. One can deny the Fixation Thesis, but accept the Constraint Principle. Or accept the Fixation Thesis and deny the Constraint Principle. Or deny both.

Many living constitutionalists and non-originalists seem to focus their attack on the Constraint Principle. This approach is illustrated by at least one understanding of the multiple modalities or pluralist approach exemplified by Bobbitt and Griffin. We can illustrate pluralism (multiple modalities) via the following diagram (Figure One[58]):

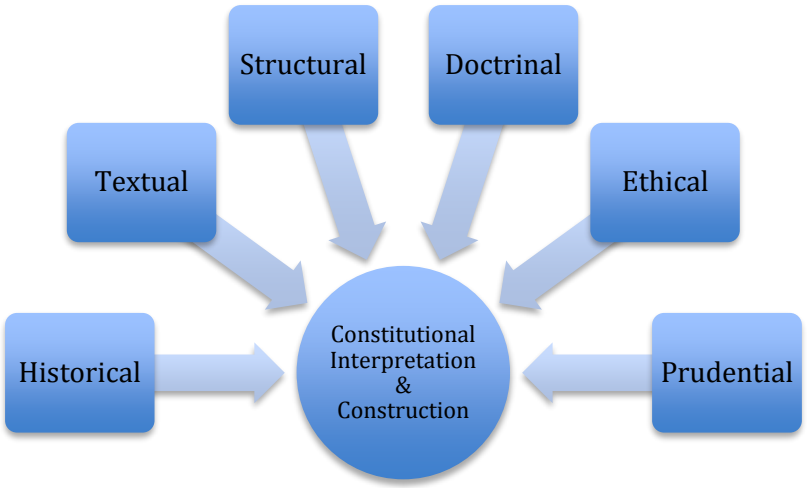

Figure 1: Multiple Modalities

The multiple-modalities view of constitutional interpretation and construction views the text as one of several moves that can be made in the complex argumentative practice of constitutional law. We can imagine a version of this approach that explicitly accepts the Fixation Thesis. Thus, arguments from the communicative content of the text could accept the originalist claim that the content is fixed at the time of framing and ratification. But this version of the multiple-modalities view rejects the Constraint Principle. Text is simply one of the modalities of constitutional argument. Textual arguments might be defeated by compelling arguments from one of the other modalities, e.g., by arguments from prudential concerns or by ethical arguments.

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[58] Figure 1 was first presented in Solum, *Originalism and Constitutional Construction*, *supra* note 21, at 481.

Non-originalists or living constitutionalists who accept fixation but deny constraint are likely to see an elaborate defense of the Fixation Thesis as a bit of a tempest in a teapot. We might imagine such a non-originalist saying, "OK, you've convinced me about fixation. But that is not where the action is. The action is all in the Constraint Principle." In some sense, I want to agree with this. Once the Fixation Thesis is established firmly, the action will shift to the Constraint Principle. But as we shall see, not every non-originalist believes that the Fixation Thesis is obvious and noncontroversial.[59]

Consider a non-originalist who denies fixation (or seems to deny it). I will use Ronald Dworkin as the inspiration for my fixation-denying non-originalist, although Dworkin's views are complex and their relationship to the Fixation Thesis is open to dispute. We can begin our explication of a Dworkin-like view with the concept–conception distinction.[60] Some concepts, like "right" or "good," seem to be the subject of theoretical disagreement. Utilitarians and Kantians, for example, have very different views about what makes an action "right"—they disagree about the criteria for rightness and hence about which actions are right and which are wrong. One way of understanding their disagreement distinguishes between the *concept* of rightness and particular *conceptions* of that concept.

Our Dworkin-like non-originalist might argue that the United States Constitution employs concepts but does not specify particular conceptions of those concepts. For example, the Eighth Amendment forbids "cruel and unusual punishments." Putting aside "unusual," let us suppose that the prohibition applied to all "cruel" punishments. Our Dworkin-like non-originalist might argue that the Eighth Amendment uses the general concept of cruelty, but does not specify a particular conception of that concept. Cruelty is a contested concept and our conceptions of cruelty may change over time. Hence, the meaning of cruelty is not fixed but changes over time.

Of course, this is only a toy version of a non-originalist theory that denies the Fixation Thesis. The point of introducing this Dworkin-like non-originalist theory is to illustrate the role that disputes about fixation may play in contemporary constitutional debate. At this stage in the argument, our aim is simply to show that the Fixation Thesis could be in dispute. We will investigate the concept–conception distinction and its implications for the thesis in detail below,[61] and return to

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[59] See *infra* Part III.B.

[60] The distinction is from W. B. Gallie, *Essentially Contested Concepts*, 56 PROCEEDINGS OF THE ARISTOTELIAN SOC. 167 (1955–56). It was later deployed by John Rawls. JOHN RAWLS, A THEORY OF JUSTICE 5 (revised ed. 1999).

[61] *See infra*, Part III.B.1.

Dworkin's view, which he calls "constructive interpretation," when we investigate the rivals of fixation. [62]

II. THE AFFIRMATIVE CASE FOR THE FIXATION THESIS

The affirmative case for the Fixation Thesis can be articulated via intuitive and commonsense observations about the nature of written communication. If we want to know what a text means and the text was not written very recently, we need to be aware of the possibility that it uses language somewhat differently than we do now. Moreover, meaning is in part a function of context—and context is time-bound. So if we want to know what a text means, we need to investigate the context in which the text was produced. In this section, these simple ideas are elaborated.

A. The Meaning of "Meaning"

Informally stated, the Fixation Thesis claims that the meaning of the constitutional text is fixed at the time of framing and ratification. But what does the word "meaning" mean? In the legal context, the word "meaning" is ambiguous and it can be used in at least three distinct (but related senses).[63]

Sometimes when we ask about the "meaning" of a legal text, we are asking about the implications it will have, usually in a particular context. For example, we might ask, "What does First Amendment freedom of speech mean for my defamation suit? Does it provide me a defense?" When "meaning" is used in this sense in the context of a legal text, we are concerned with the application of the text to particular case or to some set of cases. We can call this *meaning in the applicative sense*.

"Meaning" is also used to refer to the purpose or motive that produced a particular legal text. For example, we might ask about the aim of a constitutional provision by saying, "What did the drafters mean to accomplish through the Privileges or Immunities Clause of the Fourteenth Amendment?" We can call this *meaning in the purposive sense*.

Finally, "meaning" can be used in the sense of the communicative content of a legal text. We sometimes call this "linguistic meaning." For example, we might ask what the framers meant by using the phrase "arms" in the Second Amendment: were they

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[62] *See infra* Part IV.B.

[63] On the ambiguity of "meaning," see C.K. OGDEN & I.A. RICHARDS, THE MEANING OF MEANING 186–87 (1923) (exploring different senses of "meaning"); Michael L. Geis, *The Meaning of "Meaning" in Law*, 73 WASH. U. L.Q. 1125 (1995); A. P. Martinich, *Four Senses of "Meaning" in the History of Ideas: Quentin Skinner's Theory of Historical Interpretation*, 3 J. PHIL. HIST. 225 (2009).

referring to weapons or the upper limbs of the human body? We can call this *meaning in the communicative sense*.

The Fixation Thesis is a claim about meaning in the communicative sense: what is fixed is communicative content. It is not a claim about the purposes for which the text was adopted—although those purposes are time-bound (since the purpose for an action is set when the action is performed). And the Fixation Thesis is not a claim about the correct applications of the constitutional text to particular fact patterns or to general types of fact patterns—although the fixed communicative content may be given legal effect that determines or partially determines such applications.

Because the meaning of "meaning" is ambiguous in the way we have just specified, the Fixation Thesis can easily be misunderstood. If the Fixation Thesis were a claim about meaning in the applicative sense, it might be understand as the claim that all future applications of the constitutional text are fixed at the time the text is framed and ratified. This claim seems implausible for a variety of reasons. Constitutionally relevant facts may change over time. Do the freedoms of speech and press apply to the Internet? If the application of these provisions had been fixed at the time they were framed and ratified, the implication would seem to be that somehow a text written in 1791 had the future of communication technology baked in. Does infrared surveillance constitute a search? It seems implausible to believe that the answer to this question was fixed when the Fourth Amendment was framed and ratified.

Of course, the fixed communicative content of the constitutional text can, when combined with facts about the world, determine (or partially determine) the outcome of particular cases. But the facts about the world to which the constitutional text can be applied are not themselves fixed at the time the text is written. We might summarize this idea in the following way: *the communicative content of the constitutional text is fixed at the time of framing and ratification, but the facts to which the text can be applied change over time*.

B. The Fixation Thesis and Communication Generally

The best way to understand the Fixation Thesis is to consider the role of fixation in communication, considered as a general phenomenon.

1. The Generalized Fixation Thesis

The generalized version of the Fixation Thesis might be stated as follows:

> *Generalized Fixation Thesis*: The communicative content of a communication (oral or written, verbal or nonverbal) is fixed at the time the communication occurs.

The generalized version of the thesis can be restated in less formal ways:

- You mean when you say.

- Meaning happens at the time when communication occurs.
- The meaning of a writing is set at the time the writing is produced.

This idea can undoubtedly be formulated in a variety of other ways, but the Generalized Fixation Thesis expresses our commonsense understanding of how meaning works. When I give a lecture, the communicative content of my lecture comes into being then—and not at some later time. It would be strange to think that the content of my lecture changes after the lecture ends, and even more strange to think that a lecture that I gave in 2013 would acquire a new meaning (in the communicative sense) if linguistic practices were to change gradually over the decades so that words I used then have totally difference senses in 2089.

One of the difficulties with thinking about the Fixation Thesis in the constitutional context is that the examples are all normatively charged. The Generalized Fixation Thesis points to more prosaic examples, where fixation is intuitively obvious and unlike to be controversial. Thus, if you are reading a thirteenth-century letter that uses the word "deer" and you learn that "deer" meant four-legged mammal at the time the letter was written, you are very likely to accept this linguistic fact as crucially important to understanding the letter.[64] Similarly, if you were reading a book of recipes written in the eighteenth century and your learned that "kale" was the eighteenth-century word for what we now call "radishes," you would be very unlikely to insist that the recipe actually referred to the acephala group of brassica oleracea, the green or purple leafed vegetable, which is quite unlike what we call a "radish." Of course, you might be inspired to try the recipe with some leaves from a plant in the acephala group of brassica oleracea, but that would be an experimental deviation from the recipe and *not* a case of following the recipe.[65]

Just to be clear, the Fixation Thesis claims that meaning itself is fixed and not our beliefs about meaning. So it might well be the case that someone would read the old recipe and believe that it referred to what we now call "kale." And then they might learn of their mistake, and their belief about the meaning of the recipe might change. Communicative content is fixed; beliefs about communicative content can change.

2. Conventional Semantic Meaning and Semantic Drift

The Generalized Fixation Thesis is a function of two distinct mechanisms by which communication occurs. First, when authors or speakers attempt to convey meaning

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[64] *See supra* text accompanying note 54.

[65] The example is inspired by Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L. REV. 1823 (1997).

to readers or listeners, they can take advantage of conventional semantic meanings and the rules (or regularities) of syntax and grammar. Second, the contextual enrichment of semantic content is determined by the context at the time communication occurs. Each of these two mechanisms requires further explanation.

The first mechanism is the fixation of conventional semantic meaning by linguistic facts at the time a communication occurs. Thus, as I write this sentence, I rely on the conventional semantic meanings of the words and phrases comprised by the sentence and the grammatical relationships between these units of meaning. Conventional semantic meanings are time-bound: because of the phenomenon of linguistic drift, the words that I am using now (as I write in 2015) could change—as could the syntactic regularities that we sometimes call "rules of grammar." The relevant linguistic facts upon which I rely are facts about patterns of usage in 2015. It is difficult to even imagine how I could communicate on the basis of conventional semantic meanings that do not yet exist—setting science-fiction scenarios aside.[66] To the extent that meaning is conveyed using conventional semantic meanings and regularities of syntax, meaning is fixed by linguistic facts as they exist at the time a text is written (or a speech is made).

A few examples of linguistic drift may illuminate these ideas. In the thirteenth century, "abode" meant the act of staying, whereas it now refers to homes or dwellings.[67] We now use the word "average" to refer to what mathematicians call the "mean" or "arithmetic mean," but in the fifteenth century it referred to a tax or duty leveled on the shipment of goods. Linguistic drift is one of the reasons that the fixation is important. The Generalized Fixation Thesis properly directs us to read a text using the linguistic information that was available to the author and readers at the time the text was written.

The phenomenon of linguistic drift can be illuminated by considering some of the mechanisms that are responsible for changes in the meanings of words and phrases. Linguistic drift frequently occurs as the result of a mistaken usage that "takes off" and eventually becomes standard, but it might occur as the result of deliberate repurposing of a word.[68] For example, the word "satellite" originally meant a bodyguard, but Johannes Kepler adapted this word to refer to the moons of Jupiter

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[66] There may be ways to accomplish the trick of using semantic meanings that become conventional in the future. For example, one might write a novel that uses new vocabulary. If the novel is widely read, it might change linguistic practices. Anthony Burgess's novel *A Clockwork Orange*, which uses invented slang, might be an example of this, or one could imagine that it could have been an example. *See* ANTHONY BURGESS, A CLOCKWORK ORANGE (1962).

[67] *See* Steinmetz, *supra* note 54.

[68] For a brief account, *see id.* at vii–xii.

and then Jules Verne tweaked Kepler's usage to refer to imaginary man-made devices orbiting the earth. Verne's usage was then applied to Sputnik, an actual version of Verne's fictional device.[69] That usage of satellite eventually became standard. Today, no one uses the word "satellite" to refer to bodyguards.

To the extent that meaning is conveyed by the conventional semantic meanings of words and phrases, the relevant meanings are fixed by linguistic facts at the time the words or phrases are employed. If you wanted the correct interpretation of a ship's log from the fifteenth century, you would translate "average" as a tax or duty and not as a reference to an arithmetic mean. If you were reading a historical account of the security measures for the king of France written in the sixteenth century, you would understand that "satellites" were bodyguards and not some early version of the Death Star ready to fry English assassins with high-energy particle beams. If you want to know what Shakespeare meant by "Sweet friends, your patience for my long abode—not I but my affairs have made you wait," you would do well to follow the usage of Shakespeare's time: "long abode" does not refer to an elongated dwelling.

In sum, the first mechanism of fixation is semantic. The semantic content of a writing is fixed by linguistic facts about patterns of usage at the time the text is authored.[70] Subsequent linguistic drift does not change the meaning of a prior writing, although it could result in changing beliefs about that meaning.

3. Contextual Enrichment and the Time-Boundedness of Context

The second mechanism by which meaning is produced is context. Conventional semantic meaning is a powerful tool for communication, but its power is not unlimited. Consider the second independent clause of the sentence immediately prior to this one: "its power is not unlimited." The semantic content of this clause is ambiguous—it could mean many different things. That ambiguity is brought out by imbedding the same clause in a different sentence: "The Tesla Model S has a powerful battery, but *its power is not unlimited*." The clause means two different things in the two contexts. The original occurrence of the clause refers to the capacity of conventional semantic meanings to convey communicative content; the second occurrence of the clause is about the capacity of the electrical batteries of the Tesla Model S to propel the automobile at high speeds for long distances. The context in which a writing occurs is time-bound. Thus, the communicative content of the first occurrence of the clause I have been discussing ("its power is not

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[69] *See id.* at 200.

[70] This assumes, of course, that conventional semantic meanings are being employed and not being used as code words for the conventional semantic meanings usually represented by other words.

unlimited") is in part determined by contextual facts that are fixed once I have completed the writing of this Article.

The Generalized Fixation Thesis follows from the fact that conventional semantic meanings and contextual facts are time-bound. The meaning of language changes over time, and as a consequence, the meaning of a communication depends in part on the way language is used at the time the communication occurs. The meaning of a writing or saying is in part a function of the context in which the communication occurs; the relevant context is the context at the time of writing or saying.

Legal communication is distinctive in various ways, but it is still communication. If we want to understand a judicial decision from the sixteenth century, we will need to know about sixteenth-century linguistic facts and the sixteenth century context in which the decision was written. If we want to understand a contract written in 2013, we should pay attention to the conventional meanings that contract terms have in the twenty-first century and the contemporary context in which the contract was written. If we want to understand the communicative content of Warren Court cases, we will need to know how language was used in the fifties and sixties and understand the legal and political context in which the Warren Court's opinions were written. Legal communication uses conventional semantics and syntax and context to produce meaning—and for this reason, the Generalized Fixation Thesis holds for legal communications.

Constitutional communication is simply a form of communication and a particular subspecies of legal communication. If the Fixation Thesis holds for communication generally and for legal communication in particular, then it would be somewhat mysterious if it did not hold for constitutional communication. Conventional semantic meanings and regularities of syntax and grammar, when combined with context, provide an account of how communication is possible. We can convey meaning because words and phrases are used in regular ways and can be combined using regular patterns of syntax and grammar. We can deliver more content still by relying on our readers' knowledge of the communicative context. But once we understand these mechanisms, they imply fixation. Anyone who accepts the Generalized Fixation Thesis, but denies that the communicative content of the constitutional text is fixed, owes us an explanation. How does constitutional communication occur? How do we understand the words and phrases and combine them into meaningful clauses? What is the context of constitutional communication if it isn't time-bound?

C. Fixation as a Thesis Internal to Particular Versions of Originalism

With the generalized Fixation Thesis in place, we can now examine the way that fixation occurs within various versions of originalism. Recall that originalism is a family of constitutional theories that cluster around the Fixation Thesis and the Constraint Principle. One of the ways that versions of originalism differ is that they offer different accounts of how the communicative content of the Constitution is produced. As a result, these different versions of originalism have different accounts

of how and when fixation occurs. We can begin with original intentions originalism, or intentionalism.

1. Fixation and the Original Intentions of the Framers

Intentionalism is the view that the communicative content of the constitutional text is determined by the original intentions of the framers. Although phrases like "legislative intent" and "the original intentions of the framers" are commonplace, it is not always clear what precisely is meant by "intent" and "intention."[71] This is because the word intention is itself ambiguous. The relevant intentions might be "communicative intentions"—the mental state that specifies the communicative content the author meant to convey through the text. Or the relevant intentions might be purposes—the legal effects that the author intended to produce in the case of legal writings.

Let us assume that the relevant intentions are communicative. Thus, the intent of a constitutional provision is a mental state that specifies the communicative content which the framers of that provision intended to convey through the provision. One way of understanding this content is the model of speaker's meaning suggested by Paul Grice.[72] Let us adopt the following simplified version:

> *Speaker's Meaning*: The speaker's meaning of an utterance is the meaning that the speaker intends to convey to the audience on the basis of the audience's recognition of the speaker's communicative intentions.

For the purposes of giving an intentionalist account of the Fixation Thesis, nothing much hangs on the particular version of "original intent" that we use. Thus, one could also think of the relevant intentions as mental states that are encoded in linguistic representations. Or the mental states might be expectations about the applications of the text or about the content of the legal rules that the framers wanted the text to produce.

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[71] The idea of "original intention" has been articulated in various ways. Richard Kay writes, "I mean by that term the meaning that textual language had for the relevant enactors when they approved the text in question." Richard Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. U. L. REV. 703, 709 (2009). Raoul Berger suggests, "'original intent'" is "'the sense in which the Constitution was accepted and ratified by the Nation.'" RAOUL BERGER, GOVERNMENT BY JUDICIARY 364 (1977) (quoting 9 JAMES MADISON, THE WRITINGS OF JAMES MADISON 191 (Gaillard Hunt ed., 1910)).

[72] *See* PAUL GRICE, STUDIES IN THE WAY OF WORDS 3–143 (1989). *See also* John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 72 n.7 (2006); B. Jessie Hill, *Putting Religious Symbolism in Context: A Linguistic Critique of the Endorsement Test*, 104 MICH. L. REV. 491, 506 n.80 (2005); Jeffrey Goldsworthy, *Legislative Intentions, Legislative Supremacy, and Legal Positivism*, 42 SAN DIEGO L. REV. 493, 510 n.57 (2005).

Whatever our account of original intentions, it is clear that they are fixed at the time the text is framed or ratified. So long as the relevant mental states are those of particular persons who either authored the constitutional text or made it legally effective by participating in its ratification, the content of the mental states is fixed at a particular point in time—the time of framing or ratification. For the intentionalist, the Fixation Thesis is obviously true—since communicative content is fixed by time-bound intentional mental states.

2. Fixation and the Original Public Meaning of the Constitutional Text

As we have already observed, new originalism has embraced public meaning originalism—the view that the original meaning of the constitutional text is its public meaning. For public meaning originalism, the communicative content of the constitutional text is fixed at the time the text of each provision was communicated to the public. In the case of the original Constitution, that would be the period during which the work of the Philadelphia Convention was made public and the process of ratification began.[73]

The public meaning of the constitutional text is a function of the mechanisms by which communicative content can be conveyed given the circumstances of constitutional communication. These mechanisms are familiar from the account of the Generalized Fixation Thesis offered above: public meaning is conveyed by conventional semantic meanings and context. Once the mechanisms are understood, it becomes apparent that the public meaning of the text is fixed at the time of public promulgation.

a) Semantic Content Is Fixed by Public Linguistic Facts at the Time of Framing and Ratification

Each provision of the Constitution was promulgated to the public at a particular time. For ease of discussion, we can focus on the Constitution as it was proposed in 1787. The text was drafted in the Philadelphia Convention, which met in nonpublic sessions. The wording of the particular provisions of the Constitution was the result of a complex process, including the work of the Committee on Detail and the Committee on Style.[74] The communicative situation of the framers was structured in a particular way. At the macro level, drafting was done by the convention as an institution. At the micro level, the particular words and phrases were contributed

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[73] For an account of the history, see Pauline Maier, *Ratification: The People Debate the Constitution, 1787–1788* (2010).

[74] *See* Robert N. Clinton, *A Brief History of the Adoption of the United States Constitution*, 75 Iowa L. Rev. 891 (1990); John R. Vile, The Critical Role of Committees at the U.S. Constitutional Convention of 1787, 48 AM. J. LEGAL HIST. 147 (2006).

by different individuals at different times with substantial work done by the Committee on Detail and the final drafting done by the Committee on Style. The convention met in secret and neither the records of its deliberation nor the unrecorded deliberations of the Committee on Style were made public during the ratification period.

The public meaning of the text that was proposed in 1787 was necessarily determined in large part by the conventional semantic meanings of the words and phrases that make up the text and the regularities of usage that are sometimes summarized as rules of grammar and syntax. Conventional semantic meanings and syntax are determined by linguistic facts—that is, by regularities in usage. And the relevant linguistic facts are those that formed the basis for public understanding of the document, from the promulgation of the text in 1787 and throughout the process of ratification. These facts partially fixed the original public meaning of the text.

b) Contextual Enrichment is Fixed by the Public Context of Framing and Ratification

From the perspective of public meaning originalism, facts about patterns of usage do much of the work of determining the communicative content of the constitutional text—but not all. Additional work is done by the public context of constitutional communication—the facts about the context of constitutional communication that were accessible to the members of the general public at the time the constitutional text was make public and subsequently ratified. That is, the original public meaning was, in part, determined by the public context of constitutional communication. Thus, the public at large would have been aware of (or had access to) the basic history of the Constitution.

The public context of constitutional communication is time-bound. The public would have had access to a variety of facts about context in the period leading up to ratification, but could not have had access to facts about the future. Thus, the communicative content of the Constitution of 1789 could not have been produced by public knowledge of the Civil War, the Great Depression, or Word War II—these events hadn't happened yet and could not have shaped public understanding in 1787. What facts would form the publicly available context of constitutional communication? The set of facts can only be established by evidence, but it seems likely that the public would have had access to facts about the American Revolution, experience under the Articles of Confederation, and the general shape of the Common Law legal regime in effect throughout the United States (and perhaps awareness of regional variations within that regime). Whatever the precise content of the publicly available context, it was time-bound—consisting of events to which the public had access in 1787.

3. Fixation in Other Versions of Originalism

Similar observations can be made about other versions of originalism. For example, originalists who focus on the original understanding of the ratifiers will view original meaning as fixed no later than the end of the ratification process. The gist of this form of originalism is that the relevant communicative content is the content that was understood by the participants in the ratification process. The original understandings of the ratifiers are time-bound—the relevant period is bounded by the start and finish of the ratification process—roughly from September 20, 1787[75] through May 29, 1790.[76]

Original methods originalists will believe that original meaning is fixed by the methods of legal interpretation that existed at the time the Constitution was framed and ratified—and not later. John McGinnis and Michael Rappaport, the primary defenders of original methods originalism, imply the time-boundedness of original methods in the following passage:

> Ultimately, the legal interpretive rules that applied to the United States Constitution are those that people at the time would have regarded as applying to a document like the Constitution. Examining the particular interpretive rules that early interpreters of the Constitution actually applied provides some evidence of these rules. Other evidence turns on which existing legal documents the enactors thought were most like the federal Constitution. The enactors would have been likely to apply the interpretive rules that were regularly applied to documents like the Constitution.[77]

Thus, for original-methods originalism, meaning is fixed at the time expectations regarding the legal interpretative rules are established, roughly the period of framing and ratification.

D. Summarizing the Affirmative Case for the Fixation Thesis

The core of the affirmative case for the Fixation Thesis is rooted in commonsense intuitions about the meaning of old texts of all kinds. When we encounter an older text, we run into two interpretative problems. First, the language may be unfamiliar or familiar words may seem to be used in unfamiliar ways. When we read a contemporary text, we rely on our knowledge of conventional semantic

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[75] The date upon which the text was made public. *See* http://www.archives.gov/education/lessons/constitution-day/ratification.html.

[76] The date upon which the final state, Rhode Island, ratified. *See* http://www.archives.gov/education/lessons/constitution-day/ratification.html.

[77] *See* John McGinnis & Michael Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case against Construction*, 103 NW. U. L. REV. 751, 769 (2009).

meanings and contemporary syntax. When we read an old text, we may need to access the semantic and syntactic conventions of the time when the text was written. Second, the text may be ambiguous because we lack knowledge of the context in which the text was written. This same problem can occur with a contemporary text, or not. When we read an old text, we may need to learn about the context in which the text was produced—this will enable us to "read between the lines" and resolve ambiguities.

These commonsense principles apply to legal texts in general and the Constitution in particular. If we want to glean the communicative content of the Constitution of 1789, we may need to know something about the way words were used then and about the circumstances in which the Constitution was produced. Similarly, if we want to discern the meaning of the Reconstruction Amendments, we will need to look to mid-nineteenth-century linguistic practice and the context in which the Thirteenth, Fourteenth, and Fifteenth Amendments were framed and ratified.

Originalism is a family of constitutional theories; prominent members of that family include public meaning originalism, intentionalism, and original methods originalism. Despite their differences, all the members of the originalist family agree on the Fixation Thesis, and all of them agree that fixation occurs during the period when a provision is framed and ratified—although the precise point during that period may be a matter of dispute. As a practical matter, this means that the commonsense case for the Fixation Thesis can be affirmed in broad outline by all or almost all contemporary originalists.

III. CLARIFICATIONS AND OBJECTIONS

Having made the affirmative case for the Fixation Thesis, we need to get into the weeds, root out the confusions about fixation, and take a whack at the objections. In broad outline, the thrust of the discussion that follows is that the Fixation Thesis should not be controversial. Once the confusions are cleared away, we will see that fixation is consistent with most plausible views about constitutional meaning. Most of the actual controversy is not about fixation, per se, but about two related issues. First, some of the theorists who appear to be resisting the Fixation Thesis are actually contesting the Constraint Principle: their real point is that *legal content* (e.g., constitutional doctrine) is not fixed by original meaning. Second, much of the remaining controversy is not about the question whether the communicative content of the constitutional text is fixed, but is rather focused on the question whether (or more precisely, *to what extent*) the fixed content is determinate or underdeterminate.[78] In other words, the real point in controversy, at least with respect to some constitutional provisions, is whether the original meaning of the text is radically vague, open-textured, or irreducibly ambiguous.

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[78] For discussion of debates about indeterminacy, see Solum, *supra* note 42.

These real controversies are important, but they are not the subjects of this Article. In this Article, I am not providing the arguments for the Constraint Principle—that is a topic for another day. In this Article, I am not providing originalist interpretations of the provisions of the Constitution that some believe are especially open-ended. That work can only be completed by many originalist scholars over an extended period of time. This Article is about the Fixation Thesis, and if it makes a powerful case that the Fixation Thesis is true, the Article will have achieved its objective.

One more preliminary comment: *explicit* objections to the Fixation Thesis are rare.[79] There are many reasons for the paucity of explicit objections. First and perhaps

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[79] Three objections are considered in detail below. *See infra* Part III.B. Another explicit objection is found in Geoffrey Schotter, Note, *Diachronic Constitutionalism: A Remedy for the Court's Originalist Fixation*, 60 CASE W. RES. L. REV. 1241 (2010). Full consideration of Schotter's arguments is outside the scope of this Article. In brief, Schotter seems to have conflated interpretation and construction and confused the content of the Fixation Thesis (which addresses linguistic meaning) and the Constraint Principle (which addresses legal practice).

Another explicit objection is articulated by Saul Cornell in the following passage:

> Grice's method has a number of important consequences for understanding the historical meaning of the Constitution and other Founding-era legal texts. Most originalists have assumed that constitutional communication involves a process of fixation that is largely anchored by the semantic content of the Constitution's text. Marmor's neo-Gricean framework suggests that meaning may not be fixed by the semantic content of the Constitution's text. To achieve consensus at the moment a text is enacted, the parties involved might agree on a common language but not on a common meaning. By compromising on language that underdetermines constitutional meaning, legal actors can leave the resolution of what a text means to subsequent actors to sort out through politics or judicial determination. If Marmor is correct, there may well be no original constitutional meaning to discover for many of the more open-ended provisions of the Constitution. Instead of establishing a fixed original meaning, the text of the Constitution may do no more than set some minimal constraints on a range of possible constitutional meanings to be determined by pragmatic features of the original constitutional conversation. If this is true, then the fixation thesis, central to so much of originalism, may rest on a philosophical error. The process of fixation of constitutional meaning would not be semantically encoded at a Founding moment, but would be resolved by pragmatic processes.

Saul Cornell, *Meaning and Understanding in the History of Constitutional Ideas: The Intellectual History Alternative to Originalism*, 82 FORDHAM L. REV. 721, 732 (2013). Cornell's objection conflates two distinction points—neither of which is inconsistent with the Fixation Thesis as formulated here. The first objection is based on the idea that the constitutional text may be underdeterminate: as already noted, many new originalists explicitly endorse this idea when they embrace the Fact of Constitutional Underdeterminacy and embrace the existence of construction zones. *See supra* Part I.C & text accompanying

foremost, much of the discourse in contemporary constitutional theory is conducted without the benefit of the interpretation–construction distinction. The phrase "constitutional interpretation" is used to refer to both the discovery of communicative content and the determination of legal effect. The phrase "constitutional meaning" is used to refer to both linguistic meaning and legal effect. Given this conflation of meaning and effect, the Fixation Thesis and the Constraint Principle become indistinguishable and objections to the latter are easily mistaken as objections to the former. Clarifying this confusion will be our first order of business.

A. Clarifying the Fixation Thesis

Recall the "official statement" of the Fixation Thesis:

> *The Fixation Thesis*: The object of constitutional interpretation is the communicative content of the constitutional text as that content was fixed when each provision was framed and/or ratified.

Although this formulation is precise, debates about originalism since the early 1980s have largely proceeded on the basis of looser (and more ambiguous) formulations of the idea that the meaning of constitutional text is fixed. The first step toward answering objections to the Fixation Thesis is to articulate the ways in which clarification of the content of the thesis disarms many of the objections to the notion of fixed original meaning.

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note 46. Underdeterminacy and fixation are conceptually distinct. *See infra* Part III.A.3 (explaining the distinction between underdeterminacy in application and fixation of communicative content). The second objection is based on the unexplained and undefended assertion that the contribution of context to communicative content ("pragmatics" or "pragmatic enrichment") is for some reason inconsistent with the fixation of meaning. In fact, the opposite is true, because context is time-bound, the contribution of context to meaning is the second general reason that the Fixation Thesis is true. *See infra* Part II.C.2.b).

It should be noted that living constitutionalists and non-originalists do not bear unilateral responsibility for the failure to engage the Fixation Thesis. Originalists themselves only began to embrace the interpretation–construction distinction in the late 1990s—and that process is still underway: without a distinction between communicative content and legal content, claims about fixation could not be formulated clearly. The Fixation Thesis was explicitly formulated as a claim about linguistic meaning (communicative content) even more recently. My first systematic exposition was in Lawrence B. Solum, *Semantic Originalism*, (November 22, 2008). Illinois Public Law Research Paper No. 07-24. *Available at* SSRN: http://ssrn.com/abstract=1120244 or http://dx.doi.org/10.2139/ssrn.1120244.

1. Fixation of Communicative Content, Not Legal Content

The Fixation Thesis is a claim about communicative content—meaning in the communicative sense, or roughly, linguistic meaning. It is not a claim about legal content. The communicative content of the constitutional text is fixed at the time each provision is framed and ratified, but this does not entail that the legal content of constitutional doctrine is fixed as well. The Fixation Thesis is a thesis about constitutional interpretation; it is not a claim about constitutional construction.

* * *

Perhaps at this stage in the exposition, readers may have grown weary of the repetition of this point. "Fixation of communicative content—I get it already." But we are now ready to draw on the implications of this clarification for points that are frequently made in discussions about originalism. The critics of originalism frequently argue that legal content changes and draw the conclusion that "meaning" is not fixed. All well and good if what you mean by "meaning" is "doctrine." Originalists argue that doctrine should be constrained by the fixed communicative content of the constitutional text—and most emphatically not *that as a matter of fact the content of constitutional doctrine has been fixed.*

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Consider the oft-made observation that originalism does not account for the obvious need to adapt the Constitution to changing circumstances. We will also consider a related objection that uses the metaphor of a "dead hand."[80] If the original meaning of the text is fixed, how can we apply the freedom of speech to the Internet or the Fourth Amendment to overflight of private homes by drones with infrared sensors? Let us call this point the "Novel Applications Objection." The assumption of the Novel Applications Objection is that fixed meaning entails fixed legal effect. If the meaning of the Fourth Amendment is fixed, then so too must be the content of Fourth Amendment doctrine and the set of situations to which the Fourth Amendment does (and does not) apply.

But the assumption that fixed communicative content entails static doctrines and a frozen set of applications is false—for two reasons.

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[80] *See generally* Adam Samaha, *Dead Hand Arguments and Constitutional Interpretation*, 108 COLUM. L. REV. 606 (2008).

First, the argument that fixation of linguistic meaning entails fixed legal effect is conceptually confused. Communicative content is simply the meaning of the text: you need more than meaning to get legal effect. Compare the meaning of the Constitution of the Confederate States of America to the legal effect of that document, if you have any doubt on this score. For the Fixation Thesis to have any logical implications for legal practice, it must be combined with some other premise (like the Constraint Principle).

Second, to the extent that the Fixation Thesis does have implications for constitutional practice when it is combined with the Constraint Principle, this does not imply that either doctrine or applications are frozen. This point can be illustrated by considering the case of non-legal commands generally. Suppose that a college dormitory adopts a regulation that prohibits residents from placing their own furniture in the common areas: "No resident may position furniture in common areas, except temporarily for the purpose of moving the furniture either in or out of the resident's own room." At the time the regulation was written, there were tables, chairs, and many other types of furniture, but no "bean bags" or "futons." New types of furniture are invented from time to time—presumably, love seats and chaise lounges have not existed since pre-historic times. The semantic content of the term "furniture" can be fixed, even though new kinds of furniture are invented. This commonsense point about general terms in ordinary language use extends to the Constitution: even if the semantic content of "search" is fixed, that does not entail that there cannot be novel methods by which searches are conducted.

Notice that this answer to the Novel Applications Objection is ecumenical: it can be embraced by new originalists who accept the existence of construction zones and by originalists who believe that the communicative content of the constitutional text is thick enough to provide determinant (or nearly determinant) constitutional doctrine.

To be clear, our analysis of the Novel Applications Objection does not answer a related objection—that the communicative content of the text may need to be changed to keep up with the times. Let us call this objection, the "Dead Hand Objection."[81] Imagine that the world changes in a way that renders some provision of the Constitution obsolete. The Constitution assumes that there is a plentiful supply of humans over the age of thirty-five—the constitutional minimum for becoming president. What if that were to change because of a disease that killed everyone over the age of 30? Obviously, we would amend the Constitution if we could, but what if we couldn't? (The plague has disrupted so many state legislatures that it is simply not possible to enact an amendment for a two- or three-year period, and we need a president now.) This is a case where the dead hand of fixed communicative content would prevent us from doing something we need to do. This would be a reason to suspend or disregard the Constitution (to act contrary to the

[81] *Id.*

Constraint Principle), but it is not an objection to the Fixation Thesis.[82] Indeed, the Dead Hand Objection *assumes that the Fixation Thesis is true!* The Dead Hand Objection is a challenge to the Constraint Principle—and that topic is simply outside the scope of this Article.

The thrust of this subsection of the Article is that the Fixation Thesis is a claim about communicative content and not legal content. But that claim could itself be contested. It might be argued that there is no such distinction. That is, one might argue that the communicative content of legal texts reduces to their legal effect. I have explored this objection in considerable depth elsewhere.[83]

The basic idea is that legal texts have no communicative content other than the legal content they produce. One way of expressing this objection draws on Justice Holmes's idea of the bad man. The bad man doesn't care about the "meaning" of legal texts; he cares about what the law will do to him.[84] Suppose that were true: the fact that bad men don't care about communicative content does not establish that it doesn't exist. In fact, this way of putting things assumes that there is a linguistic meaning that bad men ignore. The same point could be made about the realist distinction between the law on the books and the law in action.[85] The law in action may be what most care about, but that doesn't mean that there is no such thing as the law in the books.

There is another reason to resist the attempt to reduce communicative content to legal content. Some of the ways that we talk about law only make sense if there is a real distinction between communicative content and legal content. For example, contract law has mandatory rules; these rules override the communicative content of the contract itself. The whole point of mandatory rules is to override the communicative content of the contract, but that notion would make no sense if there were no communicative content to override. Similarly, default rules supply legal

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[82] To be clear, I am not taking a position on the Dead Hand Objection here. My own view is that the Constraint Principle is subject to limited defeasibility conditions triggered by extraordinary circumstances, but their elaboration is well beyond the scope of this Article. *See generally* THE LOGIC OF LEGAL REQUIREMENTS: ESSAYS ON DEFEASIBILITY (Jordi Ferrer Beltran & Giovanni Battista Ratti eds., 2012) (collecting essays that discuss the idea of defeasibility in law).

[83] *See* Lawrence B. Solum, *Communicative Content and Legal Content*, *supra* note 1, at 486, 494, 509.

[84] Oliver Wendell Holmes Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

[85] Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 32–33 (1910).

content that was not supplied by the contract itself. Again, the idea of default rule only makes sense if there is communicative content with gaps.[86]

For these and other reasons, it is simply not the case that communicative content collapses into legal content—and likewise the meaning of the constitutional text is not the same thing as the set of effects that the text produces. The Fixation Thesis is a claim about communicative content—not legal content or legal effect.

2. Fixation of Expression-Token Meaning, Not Expression-Type Meaning

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Upon reading the title of this subsection, I imagine some readers will be silently mouthing "uh oh," "huh?" or even "WTF!" Phrases like "expression-token meaning" reek of terminological obfuscation, plus they sound a bit boring or even intimidating!

Please bear with me. I promise that I will explain the type–token distinction and that it will do valuable work in clarifying the Fixation Thesis and dissolving a certain kind of objection to the idea that constitutional meaning is fixed.

* * *

Here is the gist of what follows. Originalism is a thesis about the meaning of the text of the Constitution of the United States that was adopted by the Philadelphia Convention—the text as it was written in ink on sheets of parchment at a particular place and time. There is a manuscript version of the Constitution that was produced at the Philadelphia Convention and signed by the framers: that manuscript is a *token* of the constitutional text. (Of course, there are similar manuscript versions of each of the amendments.) The words and phrases that were used in the canonical version of the text could have different meanings if they were uttered at a different time and place: the semantic content of the phrase "freedom of speech" in a constitution written for South Africa in 1996 could be different than the same words

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[86] There is a large literature on default and mandatory rules in contract law. *See, e.g.,* Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989); Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 Va. L. Rev. 821 (1992); Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 Minn. L. Rev. 703 (1999); Lawrence B. Solum, *The Boundaries of Legal Discourse and the Debate over Default Rules in Contract Law*, 3 S. CAL. INTERDISC. L.J. 311 (1993).

as they appear in the original version of the First Amendment of the United States Constitution—the version produced by the First Congress.[87]

Just as individual phrases and clauses from the United States Constitution can be reused on other occasions, the string of words that constitute the constitutional text can be uttered on new occasions. Imagine an author using the actual text of our Constitution in an alternative history novel. We can imagine a possible world in which the words of the Constitution had different meanings and the context in which the words were written was radically different. In such worlds, the Constitution would have a different meaning, even though the *type* (the string of letters, punctuation marks, and spaces) would be identical. The Fixation Thesis does not claim that the Constitution as an expression type has a fixed meaning. That claim would simply be false—because the expression type can and does have meanings that change with circumstances of utterance. The Fixation Thesis applies to the Constitution as an expression token promulgated at a particular time and place; it is not a claim about the constitutional text as an expression type that could be uttered in a vast variety of circumstances.

a) The Type–Token Distinction

Let's begin with the type–token distinction itself.[88] Tokens are particular individuals. So the particular MacBook Air upon which I wrote most of this Article is a *token* notebook computer. Types are collections of particulars. The phrase "MacBook Air" can also be used to refer to a model (or related series of models) of personal computers manufactured by Apple. The device that I used to type this Article is a token, Lawrence Solum's MacBook Air, of a type, the MacBook Air model line manufactured by Apple. The concrete particular is a token; the general and abstract sort to which the concrete particulars belong is a type. That is the type–token distinction.

Now consider the application of the type–token distinction to expressions, written or oral. Consider the expression, "This MacBook Air belongs to Lawrence Solum." Suppose that I utter that expression at a particular place and time—on August 24, 2013, in the Kogod Courtyard of the Smithsonian Museum of American Art in Washington, D.C. (In fact, as I was writing an earlier version of this Article, I did exactly that!) This utterance is an expression token—a particular instance of a string of sounds. But the very same words could be used over and over again. I

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[87] The actual Constitution of South Africa does contain a free speech clause: "freedom of speech and expression, including freedom of the press and academic freedom. Explicitly excluded are propaganda for war, incitement to violence and hate speech." Constitution of South Africa, Chapter 2, Section 16 (1996).

[88] For a succinct introduction, see Linda Wetzel, "Types and Tokens," *Stanford Encyclopedia of Philosophy*, http://plato.stanford.edu/entries/types-tokens/ (2006).

could point to my neighbor's MacBook Air, and say, "This MacBook Air belongs to Lawrence Solum." That is a different token of the expression, but the new utterance is an expression of the same type. All token expressions of the form, "This MacBook Air belongs to Lawrence Solum," belong to that type.

Next consider the application of the type–token distinction to legal expressions. Take a provision of the Model Penal Code. The Model Penal Code itself is not a statute—it is a model for statutes. A Model Penal Code provision might be enacted by several different states. Each state's version of the provision, as enacted by the legislature and signed into law at a particular time and place, is an expression token. And at the same time, all the state statutes with the identical wording are members of an expression type.

It is possible that all of the different enactments of a single Model Penal Code provision have identical communicative content, but it is actually quite likely that this is not the case. For example, when the Model Penal Code defines "statute" it includes "a local law or ordinance of a political subdivision of the State." The official Alabama token[89] of the Model Penal Code means "of Alabama" when it uses this definition, but the official Mississippi token refers to Mississippi—even though the wording (the expression type) is the same.[90]

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That is the type–token distinction. I am using philosophical jargon to express the distinction. But the distinction itself is very simple and intuitive—we use and recognize the distinction all the time, even if we don't know the technical vocabulary. We all know the difference between a general sort of thing (type) and its particular concrete instances (tokens).

If you are still having trouble, try this example: Gertrude Stein wrote, "Rose is a rose is a rose is a rose." How many words were there in Stein's famous line? Three—if we are counting word types ("rose," "is," and "a"). Ten—if we are talking about word tokens: four tokens of "rose," three of "is," and three of "a."

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[89] The copy signed by the governor might be the official token.

[90] Model Penal Code § 1.13 ("General Definitions. In this Code, unless a different meaning plainly is required: (1) "statute" includes the Constitution and a local law or ordinance of a political subdivision of the State").

b) Fixation of Communicative Content of the Official Token Constitutional Text, Not the Type

The Generalized Fixation Thesis is a claim about expression tokens. When we say that the communicative content of an expression is fixed at the time of utterance—the saying or writing at a particular place and time, our claim is that the meaning of the expression token is fixed. The very same words in the same order could have different communicative content if uttered on a different occasion. This is obviously true in the case of expressions that include indexicals, words like "here," "now," "I," and "you." If I walk into the restaurant at the Chateau Marmont and say, "Here I am," it means that Lawrence Solum is at the restaurant at the Chateau Marmont. If Lindsey Lohan walks into the Bar Marmont, located down the street and says, "Here I am," she means that Lindsey Lohan is at the Bar Marmont. Same expression type, different expression token, different meanings. Each token expression has a fixed meaning, but the meaning of the expression type is not fixed in this way. And for that reason, the meanings of different expression tokens of the same type need not be identical.[91]

The Fixation Thesis is a claim about the meaning of a collection of expression tokens. The first element of the collection is the Constitution of 1789—the text that was framed in 1787 at the Philadelphia Convention. To that first element, we have added various amendments. The text of each amendment is itself an expression token—drafted at a particular time and place. The collection gathers together the expression tokens. We call this collection, the "Constitution of the United States."

* * *

Are you with me? The token meaning of the authoritative version of each part of the constitutional text is fixed. The next step is to consider the meaning of expression types.

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Fragments of the Constitution of the United States are also expression types. For example, "freedom of speech," "due process of law," and "judicial power" are expression types. These phrases are used over and over again—in judicial opinions,

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[91] The claim is that the meaning of different expression tokens need not be identical, but not that they cannot be identical.

legal scholarship, and ordinary talk. Each particular use is an expression token, and the meaning of these tokens are not necessarily identical to the original meaning of the corresponding and identical text in the official token part of the Constitution of the United States.

The United States Supreme Court frequently quotes the text of the Constitution.[92] Originalists believe that when the Supreme Court uses the language of the Constitution, it should give that language its original meaning—the meaning that the text had in the original expression token. But you cannot make the Supreme Court do this. For one thing, the Supreme Court can misunderstand the Constitution and assign a meaning to a constitutional word or phrase that differs from its original meaning. And even if the Supreme Court understands the original meaning, it could decide to deliberately introduce a new meaning—and that new meaning would bind lower courts and officials, because the Supreme Court is, well, supreme! Moreover, the meaning given by the Court to constitutional language could then influence other language users. Misunderstandings or deliberate distortions introduced by the Supreme Court could affect the way contemporary speakers and authors use constitutional language. For this reason, the Fixation Thesis does not apply to the Constitution as an expression type.

Let us restate the main points:

- The Fixation Thesis applies to the constitutional text as an expression token—the official version of the Constitution of 1789 and of each amendment as ratified.
- The Fixation Thesis does not claim that subsequent token uses of the constitutional text have a meaning that is identical to the fixed meaning of the original token.
- Courts, scholars, and citizens can and do use fragments of the constitutional text to convey communicative content that differs from the original meaning.
- The Constraint Principle expresses the claim that judges and officials should not substitute new meanings for the constitutional text when they give the Constitution legal effect, but "should" does not imply "will" or "must."

c) The Type-Meaning Fallacy

At this point, we have laid out the type–token distinction and related that distinction to the Fixation Thesis. We are now in a position to understand how a

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[92] Supreme Court opinions are themselves both tokens and types. There is an official token version of each Supreme Court opinion, which is then copied and quoted—other tokens of the same type.

certain kind of argument against the Fixation Thesis is based on a mistake, in particular, a confusion between types and tokens. We can call this mistake, the "Type-Meaning Fallacy."

Let's approach the fallacy in stages. We can begin with an argument based on a very simple thought experiment. Here is a statement of the argument:

> We can imagine that the United States Constitution or parts of it were written today for the first time. If the Constitution were written today, it would not have the same meaning as does the actual Constitution, written at various times starting in 1787. From this fact, it follows that meanings can change over time, and therefore the Fixation Thesis is false.

Perhaps this argument is not even superficially appealing. It is clearly based on a fallacy. The meaning of the constitutional text token written in 1787 does not change in the hypothetical; it is a new token of the same type of text that has a different meaning. But the Fixation Thesis does not claim that different tokens of the same type cannot have different meanings. So the thought experiment does not show that the Fixation Thesis is false.

Here is a slightly different and more sophisticated version of the argument of the thought experiment. Let's call this version the "Contemporary Meaning Argument." The argument proceeds as follows:

> When we use constitutional language today, we understand the meaning of that language as it is used today. Contemporary usage is influenced by Supreme Court opinions and popular beliefs about the meaning of phrases like "freedom of speech," "equal protection," and "unreasonable search." The contemporary conventional semantic meanings of the words and phrases that make up the constitutional text system changes over time. Therefore, the communicative content of the constitutional text is not fixed. Moreover, we have good reason to give these contemporary meanings legal authority. It is this contemporary meaning that is endorsed by "We the People" today and popular sovereignty vests in the contemporary polity—not the dead hands of "They the People of 1787" or "They the People of 1865." Therefore, the Fixation Thesis is false. The meaning of the Constitution of the United States changes to reflect the changing beliefs, values, and linguistic practices of the American People.

The Contemporary Meaning Argument may seem appealing (or not), but it does not refute the Fixation Thesis. That thesis is about expression tokens, not expression types. To the extent that the argument based on evolving linguistic practice is presented as a refutation of the Fixation Thesis, it commits the Type-Meaning Fallacy.

The Contemporary Meaning Argument can be reformulated so as to avoid the fallacy. The reformulation can begin by conceding that the Fixation Thesis is true. The reformulated version then switches its target to the Constraint Principle. The

argument then becomes that the original meaning should not constrain contemporary practice and that constitutional changes are legitimate so long as they are reflected in the contemporary meaning of the corresponding constitutional text tokens—that is, contemporary uses of the phrases that also appear in the original version. A fully specified version of this theory of legitimate constitutional change will need to provide an account of what makes these changes legitimate. Presumably, the argument for legitimacy based on contemporary meaning will not be that the Supreme Court can make any change it wants—so long as the change succeeds in altering linguistic practices so that the conventional understanding of the constitutional text is altered.

The revised version of the Contemporary Meaning Argument would run into severe difficulties: those problems will be explored in depth below.[93] For now, the important point is that the plausibility of the revised version of the Contemporary Meaning Argument is actually beside the point so far this Article is concerned, because the revised version of the argument leaves the Fixation Thesis untouched. The revised Contemporary Meaning Argument does not claim that the meaning of the original token is not fixed; it does claim that the communicative content of the original Constitution should not constrain contemporary constitutional practice—in other words, the argument is directed at the Constraint Principle.

3. Fixation of Meaning, Not Determinacy of Meaning

Legal texts can be more or less determinate in application. This truism can be expressed in a variety of ways. One helpful distinction is between "determinacy," "indeterminacy," and "underdeterminacy."[94] We can say that a legal text is fully determinate with respect to a set of possible applications, if the legal rule that corresponds to the text produces outcomes for all the applications in the set. We sometimes call such rules "bright-line rules," because they fully sort the cases to which they are applied. We can say that a legal text is completely indeterminate with respect to a set of possible applications if the rule corresponding to the text produces outcomes for none of the applications of the set. A rule of this kind would do no work at all—because any outcome is consistent with the rule. We can say that a legal text is underdeterminate with respect to an application set if the rule corresponding to the text produces outcomes for some but not all of the applications in the set. These are the rules captured by Hart's picture of the core and penumbra.[95]

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[93] *See infra* Part IV.A.

[94] *See* Solum, *On the Indeterminacy Crisis*, *supra* note 42.

[95] H.L.A. HART, THE CONCEPT OF LAW 119–50 (1961).

The Fixation Thesis claims that communicative content is fixed, not that it is fully determinate. Indeed, the Fixation Thesis makes no claim about determinacy at all: if the communicative content of the constitutional text were radically indeterminate, that would be consistent with the Fixation Thesis. As we shall see, many of the objections that might seem to apply to the Fixation Thesis are actually claims that the rules corresponding to particular parts of the constitutional text are underdeterminate. Arguments based on the concept–conception distinction and open texture might seem to threaten the Fixation Thesis, but on a closer look, they would show (if true) that the constitutional text is relatively less determinate (or relatively more underdeterminate) than they seem on first inspection.

Finally, there is one important qualification of this clarification of the relationship between fixation and determinacy. If it were the case that the actual text of the Constitution was radically indeterminate, then, depending on how you look at things, we might say that the Fixation Thesis was irrelevant. For the purposes of this Article, we shall simply put that objection to the side.[96]

* * *

We have now clarified the Fixation Thesis in three ways. The claim is that communicative content (not legal content) is fixed. Moreover, the Fixation Thesis is a claim about particular tokens of the constitutional text. And finally, the Fixation Thesis is a claim about communicative content and not about determinacy of the legal rules that correspond to that content.

These clarifications tell us what would count as a real objection to the Fixation Thesis. For an objection to clash directly with fixation, it must: (1) be directed at communicative content (and not legal content), (2) be directed at the meaning of relevant tokens (the concrete particular version that is the officially promulgated text) and not contemporary tokens of the same type, and (3) be directed at fixation of meaning and not at determinacy of meaning.

On to objections!

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[96] For discussion of the indeterminacy thesis in general jurisprudence, see *id.* Heidi Kitrosser argues that originalism is implicitly based on what she calls the "Determinism Premise." Heidi Kitrosser, *Interpretive Modesty* p. 2 (draft on file with the author) (also available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2463366).

B. Answering Objections to the Fixation Thesis

We are now in a position to consider four objections to the Fixation Thesis. Each objection is based on a distinctive account of meaning. The first objection relies on the concept–conception distinction. The second objection is based on the idea that legal concepts have essential structures; in its best form, the idea would be that the language of the Constitution refers to functional kinds that are analogous to natural kinds. The third objection draws on Wittgensteinian ideas about meaning, including the idea of family resemblance and the related notion of open texture. The fourth objection uses the idea of reader's meaning, arguing that readers' understandings of the communicative content changes over time.

1. Concepts and Conceptions

Let's begin with what I believe is the most common objection to the Fixation Thesis—an objection that deploys the concept–conception distinction, introduced above.[97] The argument is frequently made in the context of discussions of the Eighth Amendment, which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.[98]

The objection zeroes in on the word "cruel" and paraphrases the amendment as a prohibition of cruel punishments. The next move is to invoke the concept–conception distinction. The objection asserts that the word "cruel" invokes the general concept of cruelty and not a particular conception of cruelty.[99] This point can then be applied to the Fixation Thesis: the meaning of cruel is not fixed, the objection maintains, because our conception of cruelty changes over time. This point can then be generalized to other provisions of the Constitution: "equal protection," "due process," "freedom of speech," and so forth. Let us call the generalized objection, the "Concept–Conception Argument."

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[97] *See supra* text accompanying note 60.

[98] U.S. Const. amend. 8.

[99] The Concept–Conceptions Argument is strongly associated with Ronald Dworkin. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 103, 147 (1977). For invocations of the argument, see Timothy P. O'Neill, *Constitutional Argument as Jeremiad*, 45 VAL. U. L. REV. 33, 43 (2919). For criticism, see Christopher R. Green, *"This Constitution": Constitutional Indexicals as a Basis for Textualist Semi-Originalism*, 84 NOTRE DAME L. REV. 1607, 1633 (2009).

a) Understanding the Concept–Conception Argument

Before we formulate an answer to the objection, we need to understand it. When the objection is made, the concept–conception distinction is rarely developed in depth and this may lead to mistakes about what the objection actually shows. So far as I know, the concept–conception distinction originates with *Essentially Contested Concepts*, a paper published by the philosopher William Gallie in 1956.[100] The core of Gallie's argument was the idea that certain moral concepts are "essentially contested." "Good," "right," and "just," for example, are each moral concepts that seem to have a common or shared meaning. That is, when I say that the alleviation of unnecessary suffering is good, you understand what I mean. But it may be that you and I differ on the criteria for the application of the term "good." You may think that a state of affairs is good to the extent that it produces pleasure or the absence of pain, while I may think that the criteria for "good" make reference to the conception of a flourishing human life—a life of social and rational activity lived in accord with the human excellencies or virtues. We share the concept of "good," but we have different conceptions of what constitutes a good life.

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

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

Perhaps the most famous use of the concept–conception distinction is found in the political philosopher John Rawls's famous book, *A Theory of Justice*. Rawls appeals to the distinction between the concept of justice and particular conceptions of justice.[101] His theory, justice as fairness, is defended as the best conception of justice. Notice that as used by Rawls, the concept–conception distinction does not imply that the concept of justice is essentially contested. It might be the case that

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[100] Gallie, *Essentially Contested Concepts*, *supra* note 60.

[101] John Rawls, *A Theory of Justice* 5 (revised ed. 1999).

we would eventually come to agreement on the criteria for a just society. In other words, not all contested concepts are essentially contested concepts.

b) Dworkinian Versions of the Concept–Conception Argument

This brings us back to the use of the concept–conception distinction found in Ronald Dworkin's theory, "law as integrity." You may know that Dworkin uses a hypothetical judge, Hercules, to illustrate his theory. Many believe that Dworkin's theory changed over time.[102] The version of the theory that I am employing in this subsection of the Article is that found in his essay *Hard Cases*.[103]

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

How does Dworkin's use of the concept–conception distinction relate to the communicative content of the constitutional text and in particular to the Fixation Thesis? The most natural interpretation is that concepts are ambiguous in a special way. Conceptions of a concept correspond to senses of an ambiguous word or phrase. But there is a difference. The senses of ambiguous terms are identified by examining usage. We learn that "cool" can refer to temperature or style by observing the different senses in which "cool" is used in English. Ambiguous words and phrases are not indeterminate, because the different senses are fixed by usage—subject of course to the fact that usage can change over time.[104]

In the case of Dworkin's deployment of the concept–conception distinction, usage does not constrain in the same way for two reasons. First, Dworkin's theory does not select among conceptions on the basis of context. When we encounter an ambiguous

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[102] Lawrence B . Solum, *The Unity of Interpretation*, 90 B.U. L. REV. 551, 553–558 (2010).

[103] RONALD DWORKIN, *Hard Cases* in TAKING RIGHTS SERIOUSLY, *supra* note 99. A more elaborate version of the theory appears in RONALD DWORKIN, LAW'S EMPIRE (1986).

[104] *See* Steinmetz, *supra* note 54.

word in a text, we ordinarily can discern which sense of the ambiguous term is intended by considering the context. Thus, in the sentence immediately preceding this one, "term" is used in a sense that is roughly equivalent to "word" and not in the sense of "period or duration" as in "term of office." But Dworkin chooses among conceptions on the basis of moral argument: his theory requires that Hercules use the best conception of cruelty, equality, or freedom of speech.

Second, in the case of ordinary ambiguity, the set of alternative meanings is closed. Membership in the set of alternative meanings is established by usage. Dworkin's idea seems to admit of the possibility that when Hercules constructs the theory that best fits and justifies the law as a whole, he might (in principle) discover that the conception implicated by that theory is newly constructed and not sanctioned by current usage. Even for Dworkin, usage plays a role. For a general concept to be meaningful (and not merely an empty vessel into which any content whatsoever could be poured), the concept must have content that limits what would count as a conception of that concept. So even for a Dworkinian, usage should fix the outer limits of the concept, but not the list of eligible conceptions.

c) The Dworkinian Argument for the General Concept Interpretation of General or Abstract Constitutional Language

We can illustrate the Dworkinian version of the Concept–Conception Argument with respect to Dworkin's own example—the equal protection clause. At the stage of interpretation, the question would be whether the conventional semantic meaning of "equal protection of the laws" is something like "treatment required by the general concept of equality." Call this, the "General Concept Interpretation." Dworkin assumes that the alternative to the General Concept Interpretation is an interpretation based on beliefs about the cruelty of particular punishments. In recent constitutional theory, these beliefs are sometimes called "original expected applications."[105] Let's call this rival of Dworkin's interpretation the "Original Expected Applications Interpretation."

To answer the question whether the General Concept Interpretation (or its rival) is correct, we would look to evidence of usage during the period when the Fourteenth Amendment to the United States Constitution was drafted and ratified.

From the perspective of originalism, the question is which of these two competing interpretations provides the actual communicative content of the Fourteenth Amendment. What kind of evidence bears on this question? One kind of evidence is

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[105] Jack Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 444 (2007). The idea (but not the phrase "original expected applications") was introduced earlier by Mark Greenberg and Harry Litman. *See* Mark Greenberg & Harry Litman, *The Meaning of Original Meaning*, 86 GEO. L.J. 569 (1998).

based on armchair speculation about which interpretation is more likely, given our knowledge of the communicative situation and our general knowledge of the human situation: call this kind of evidence "armchair speculation." Another kind of evidence is based on linguistic facts (patterns of usage during the Reconstruction Era) and context (the circumstances in which the Fourteenth Amendment was drafted and ratified): call this kind of evidence "historical facts."

Dworkin relies on armchair speculation: he argues that the framers of the Fourteenth Amendment must have meant the general concept of equality and not any particular conception. Dworkin provides no historical evidence about linguistic practices or the context of ratification. For example, he has no historical evidence that shows that those involved in the framing and ratification of the Fourteenth Amendment implicitly recognized the concept–conception distinction and intended to use the general concept of equality in the equal protection clause. To show that Dworkin reasons in this way, we need to examine an extended passage that reveals his method of argument:

> When we come to the word "cruel" in the Eighth Amendment, the equal protection language of the Fourteenth, the freedom of speech language of the First, and the due process language of the Fifth and the Fourteenth, however, we have more difficult problems of translation. We have to choose between an abstract, principled, moral reading—the authors meant to prohibit punishments that are in fact cruel as well as unusual or meant to prohibit whatever discriminations are in fact inconsistent with equal citizenship—and a concrete, dated reading—they meant to say that punishments widely thought cruel as well as unusual at the time they spoke, or discriminations then generally understood to reflect unfair distinctions, are prohibited. If the correct interpretation is the abstract one, then judges attempting to keep faith with the text today must sometimes ask themselves whether punishments the framers would not themselves have considered cruel—capital punishment, for example—nevertheless are cruel, and whether discriminations the framers themselves thought consistent with equal citizenship—school segregation, for example—are nevertheless a denial of equal protection of the laws. If the correct interpretation is the dated one, on the other hand, these questions would be out of place, at least as part of an exercise in textual fidelity, because the only questions a dated understanding would pose is the question of what the framers or their audience thought.
>
> If we are trying to make best sense of the framers speaking as they did in the context in which they spoke, we should conclude that they intended to lay down abstract not dated commands and prohibitions. The framers were careful statesmen who knew how to use the language they spoke. We cannot make good sense of their behavior unless we assume that they meant to say what people who use the words they used would normally mean to say—that they used abstract language because they intended to state abstract principles. They are best understood as making a constitution out of abstract moral

> principles, not coded references to their own opinions (or those of their contemporaries) about the best way to apply those principles.[106]

In this passage, Dworkin relies on armchair speculation and not historical facts. Let me be clear. I do not mean to imply that armchair speculation is irrelevant. Done well, the method of armchair speculation can provide evidence that is relevant and might even be decisive. But when we are looking for communicative content, the method of armchair speculation does not provide direct evidence. That evidence will be found in historical fact—that is, evidence about how the relevant language was actually being used at the time and evidence about the context in which the language was used.

At this point, we are almost ready to take Dworkin's argument head on, but before we do we need to clear up a problem in the argument as Dworkin and others have stated it. The problem is that Dworkin's argument suppresses the real alternative to the General Concept Interpretation of words like "cruel" and phrases like "equal protection of the laws." In other words, Dworkin and others have committed the fallacy of the excluded middle.

d) The Excluded Middle Problem: Either Original Expected Applications or Dworkinian Interpretivism

Jed Rubenfeld has argued that reconciliation of the concept–conception distinction with originalism collapses originalism into Dworkin's theory. Here is his argument:

> As soon as an originalist starts saying that the framers' and ratifiers' concrete historical understandings of a constitutional provision were "mistaken" and may therefore be ignored in favor of the semantic or objective linguistic meaning of the words at the time of enactment, he is no longer an originalist but a Dworkinian. Dworkin's distinction between "concept" and "conception" (with Dworkin claiming to honor the concept as opposed to the conception) tracks very closely, if it is not identical to, a distinction between the original semantic meaning of the words in the text and the concrete historical understandings of how that text would apply to particular cases.[107]

So for Rubenfeld, we must choose between "framers' and ratifiers' concrete historical understandings" *or* "the semantic or objective linguistic meaning of the words," *with no middle ground*.

Rubenfeld's argument is closely related to a similar move made by Dworkin himself, using the Eighth Amendment and equal protection clause as examples:

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[106] Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 65 FORDHAM L. REV. 1249, 1253 (1997).

[107] Jed Rubenfeld, *Reply to Commentators*, 115 YALE L.J. 2093, 2099 (2006).

> The Eighth Amendment of the Constitution forbids "cruel" and unusual punishment. Does that mean punishments that the authors thought were cruel or (what probably comes to the same thing) punishments that were judged cruel by the popular opinion of their day? Or does it mean punishments that are in fact—according to the correct standards for deciding such matters—cruel? The Fourteenth Amendment says that no state shall deny any person "equal protection of the laws." Does that mean that no state may deny anyone the equality of treatment that most states have accorded over our history? Or does it mean that no state may perpetuate any distinctions that contradict genuine equal citizenship, whether Americans have understood that contradiction before or not?[108]

Dworkin then translates the rhetorical questions into a version of Rubenfeld's point in the following passage:

> We have to choose between an abstract, principled, moral reading—the authors meant to prohibit punishments that are in fact cruel as well as unusual or meant to prohibit whatever discriminations are in fact inconsistent with equal citizenship—and a concrete, dated reading—they meant to say that punishments widely thought cruel as well as unusual at the time they spoke, or discriminations then generally understood to reflect unfair distinctions, are prohibited.[109]

Just as Rubenfeld argued that we must choose between concrete historical understandings and linguistic meaning, Dworkin says we must choose between "a concrete, dated reading" and our general concept of "equal citizenship" or "in fact cruel[ty]."

Both Rubenfeld and Dworkin assume that the communicative content of constitutional provisions is either the original expected applications (beliefs about what particular practices were cruel or consistent with equality) or the best conception (in the eyes of the interpreter) of the relevant contested concept.[110]

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[108] Dworkin, *The Arduous Virtue of Fidelity*, *supra* note 106, at 1252.

[109] *Id.* at 1253.

[110] There is a confusion in Rubenfeld's version of the argument. Rubenfeld suggests that "original semantic meaning" corresponds to Gallie's notion of "concept" and that "original expected applications" are the equivalent of "conceptions." This is simply a mistake. Assuming that the concept–conception distinction applies, both concepts and conceptions function as providers of semantic content. If one is using "good" in the sense of a general concept, the concept has communicative content—which specifies what features a conception must have in order for that conception to count as a conception of the "good." Likewise, particular conceptions of the good (e.g., the hedonic conception) have communicative content.

The argument that we must choose between the view that original meaning is constituted by original expected applications *or* Dworkin's theory of law as integrity commits the fallacy of the excluded middle. The assumption of the argument is that these are the only two alternatives—general concepts or expected applications. But in fact there are a variety of views about meaning that are neither expected applications nor Dworkin's theory of law as integrity. Most contemporary versions of originalism (including public meaning originalism) occupy this excluded middle. Dworkin himself recognizes that there is another alternative, "semantic originalism," which takes what the legislators meant collectively to say as decisive of constitutional meaning."[111] As Dworkin recognizes, semantic originalism is very different from "'expectation originalism,' which makes decisive what they expected to accomplish in saying what they did."[112] And Dworkin further recognizes that semantic originalism is not his own theory, law as integrity.[113]

In fact, one position that occupies the excluded middle is provided by the concept–conception distinction itself. The concept–conception distinction assumes that words like "good" have multiple senses. Once sense of "good" is provided by the general concept of goodness. When used in this sense, the content of "good" provides the conditions a conception of good must meet in order to be a conception of the good. Someone who used the word "good" to mean "furniture" would be making a linguistic mistake and not providing a conception of goodness.[114] Another sense of "good" is provided when a speaker deploys her own conception of goodness. So when hedonistic utilitarians say, "Actually, recreational drugs are good for you as long as they are pleasurable and don't have painful side effects," what they mean by "good" is the hedonistic conception of goodness, not the general concept and not some other conception.

Dworkin and Rubenfeld commit the fallacy of the excluded middle by suppressing the possibility that constitutional words and phrases like "cruel," "equal protection,"

Both the concept and the conception have applications and both can have "expected applications." Equating "conception" and "application" is a conceptual mistake.

[111] Dworkin, *supra* note 108, at 1256.

[112] *Id.*

[113] *Id.* at 1258 n. 18 ("I did not mean, in my brief remarks, to abandon either my long-standing opposition to any form of originalism."). Dworkin's critique of originalism is found in *Law's Empire*. *See* Dworkin, *Law's Empire*, *supra* note 103, at 359–69. The account in *Law's Empire* is structurally similar to the arguments considered in depth here.

[114] Of course, there can be "good furniture" and furniture can be good, but having furniture as one's conception of goodness would involve a mistake about the concept. One can imagine a conception of the good life that involved living conditions of which furniture was a part, but that would still not be "goodness as furniture."

and "freedom of speech" refer to the original conceptions of general concepts. For example, the evidence might suggest that the phrase "equal protection of the laws" was used to express a particular conception of equality—the conception held by those who participated in the framing and ratification of the equal protection clause (or the conception that prevailed generally at the time). Call this interpretation, the "Original Conceptions Interpretation" and call Dworkin and Rubenfeld's contrasting interpretation, the "Original Concepts Interpretation."

Once we look at the relevant historical facts, direct evidence of linguistic practices, and context, we might discover that the Original Conceptions Interpretation of the relevant provisions is better supported by the direct evidence. But this Article is not the appropriate venue for the consideration of the relevant linguistic and contextual facts. Even for a single word like "cruel" or a phrase like "equal protection," canvassing the historical evidence would require an extended treatment—a very long Article and not a short subsection. Nonetheless, using Dworkin's own method of armchair speculation, we will be able to show that there are good reasons to prefer the Original Conceptions Interpretation.

e) The Case for the Original Conceptions Interpretation

For the purposes of making the case for the Original Conceptions Interpretation of the equal protection clause (or any other similar provision), let us assume that the concept–conception distinction is correct. Some words and phrases have a general-concept sense and multiple senses corresponding to conceptions of that concept. "Good" and "right" would be clear examples, but let us further assume that constitutional words and phrases like "cruel," "equal protection," and "freedom of speech" can be used to express either a general concept or a particular conception of that concept.

Before we turn to the legal case, let's investigate the way in which the concept–conception distinction operates in ordinary discourse. Suppose Ben and Alice use the word "right" with respect to the situation in Syria as it existed in the summer of 2013:

> Ben: Unilateral military intervention in support of the rebels in Syria is clearly the right thing to do after the government's massive nerve gas attack.
>
> Alice: What do you mean by "right"?
>
> Ben: I mean that intervention will clearly save more lives than it will cost.

Ordinarily, we use general concept words to express our normative judgments; our use of the words is based on our conception of the concept. So Ben is a consequentialist, and his use of "right" reflects a consequentialist conception of right action. It would be very odd indeed if the conversation had gone as follows:

> Alice: What do you mean by "right"?
>
> Ben: I mean to refer to the general concept of rightness, whatever that may be.

Of course, the conversation could continue in that way—especially if Ben and Alice had just studied Gallie, Rawls, and Dworkin. But that way of continuing the conversation would mark a turn from first-order, normative talk to meta-ethics or theory.

Now consider the possibility that Ben is giving Alice an order that employs the kind of term that can be used to express a concept or a conception. Let us suppose that Ben is a homeowner and that Alice is his real estate agent:

> Ben: Do whatever possible to sell my house at the highest price you can, but do nothing unfair.[115]
>
> Alice: What do you mean by "fair"? There is a Real Estate Code of Ethics, and it says that agents are permitted to use deceptive tactics in order to achieve the best price—so long as they do not commit fraud as defined by law.
>
> Ben: Oh, that's not what I meant. When I use the word fair, I mean the kind of fairness I was taught by my parents. Deception isn't fair—even if it isn't illegal.
>
> Alice: I understand.

In this conversation, Ben uses "fair" and "unfair" to refer to his conception of fairness. This hypothetical is based on one by Dworkin, and we can imagine a Dworkinian continuation of the conversation that is a bit different.

> Ben: Do whatever possible to sell my house at the highest price you can, but do nothing unfair.
>
> Alice: OK, no bluffing.

Dworkin uses a slightly different scenario to make his point:

> Suppose she [Alice in my hypothetical] thinks that a particular negotiating strategy—bluffing—is unfair, but she knows that I disagree. She might well think that I had ruled out bluffing even though I did not intend to do so.

In Dworkin's version, Alice doesn't seek clarification and so she concludes that Ben's initial directive prohibited bluffing, although Ben didn't believe that it did so. This is quite possible because words that can be used to express either general concepts or different and competing conceptions of those concepts create ambiguity. Dworkin observes that Alice might resolve the ambiguity in a particular way so as to rule out bluffing—even if Ben would not have thought bluffing is unfair.

Here is the crucial point. Although it is possible that Ben used "fair" to express the general concept of fairness, leaving it to Alice to determine what conception of

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[115] This example is directly borrowed from Dworkin. Ronald Dworkin, *Bork's Jurisprudence*, 57 U. CHI. L. REV. 657, 662 (1990).

fairness is best and then to apply that concept to bluffing, this isn't necessarily the case. In fact, Dworkin's scenario seems rather implausible. We can see the implausibility of Dworkin's position by imagining a continuation of the conversation, which starts as before:

> Ben: Do whatever possible to sell my house at the highest price you can, but do nothing unfair.
>
> Alice: OK, no bluffing.
>
> Ben: Wait a second! Bluffing is fair. Real estate negotiations are like poker and bluffing is part of the game.
>
> Alice: No, bluffing is unfair. So "no bluffing" unless you tell me that I should use unfair methods.
>
> Ben: You don't understand what I mean by fair. My understanding of "fair negotiation" requires honest representations about the underlying facts, but it does not require disclosure of the negotiator's intentions. Given my general understanding of fair negotiation, the particular tactic of bluffing is not unfair.
>
> Alice: No, my conception of fairness in negotiation is the best conception. When you said, "nothing unfair," you meant "unfair according to the true conception" and not your conception. So, no bluffing unless you instruct me to use unfair methods.
>
> Ben: That isn't what I meant then, and I think I am being perfectly clear now. Bluffing is "fair" as I use the word "fair." That is what I meant.
>
> Alice: No, it isn't. You have told me not to bluff.

At this point, it is apparent that Alice is not "asking what—on the best evidence available—[Ben] intended to say"[116] (as Dworkin himself puts it). There was an ambiguity about the meaning of fairness. Ben clarified the ambiguity by directly stating that he intended to use the word "fair" to express his conception of fairness in negotiation. When Alice refuses to accept the clarification, she is no longer engaging in the enterprise of attempting to understand Ben on the basis of the best evidence of what he intended to say. Rather, she is disregarding his instructions and substituting her own.

Notice that in this example, Ben does not offer an expected applications interpretation of his own utterance. Rather, his understanding of what he meant by "fair" is abstract: he offers a conception of fairness in negotiation. He reasons from that conception to a conclusion about a particular practice, bluffing, but he does not say that by "fair," he meant to convey "bluffing is OK" as the communicative content of "fair." Ben is not reducing the meaning of fair to expected applications.

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[116] Dworkin, *supra* note 106, at 1252.

Now consider the legal case. Using the method of armchair speculation, we can ask whether someone writing a constitution would use words and phrases like "cruel," "equal protection," or "freedom of speech" in their general concept senses, or whether they would be more likely to employ these words and phrases to express some particular conception of the general concept. Of course, if they recognized the ambiguity and its potential importance down the line, they might have used less ambiguous language. For example, they might have said, "cruel as generally understood at the time this provision was written" or "equal protection understood as prohibiting any discrimination on the basis of race or former condition of servitude" or "freedom of speech as specified by the best theory of political morality" (or alternatively, "the right to freedom of speech at common law shall be preserved."[117] But as we have seen, this kind of disambiguation is rare in ordinary conversation and even normal legal drafting: such explicit disambiguation is only likely to occur in theoretical discussions.

One option is simply unavailable to us. We cannot write a legal command that will guarantee that law appliers (future judges or officials) will always use the best or true conception of contested concepts. One of the reasons that contested concepts are the subject of disagreement is what Rawls calls "the fact of pluralism."[118] In a democratic society, there are likely to be disagreements about which conception of rightness, goodness, fairness, and so on, is the best conception. So if we were to draft a constitution that unambiguously required future judges to use the best conception of general concepts like fairness, we could not guarantee that this is what they would do. The only thing they can do is use their own best judgment. Inevitably, their own best judgment will reflect their own beliefs. To the extent that these questions of constitutional meaning are politically salient, it is likely that the processes for selecting judges will take their beliefs into account. Majoritarian politics do not guarantee correct moral judgments; moral correctness is only one of the many motivations (some venal, some noble) that shape the outcome of political processes.

Take the situation of the Reconstruction Congress adopting the equal protection clause. Suppose the members of the Reconstruction Congress believed that the best conception of equal protection permitted or required what we now call "affirmative action" in some circumstances. And suppose they recognized that by using the phrase, "equal protection," they were inviting a future court to decide that they

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[117] Similar phrasing was in fact used on the Seventh Amendment. U.S. Const. amend. 7 (stating "right to trial by jury at common law shall be preserved").

[118] John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765, 765–66 (1997) ("[A] basic feature of democracy is the fact of reasonable pluralism—the fact that a plurality of conflicting reasonable comprehensive doctrines, religious, philosophical, and moral, is the normal result of its culture of free institutions.").

intended to use the general concept and not any particular conception. And that future court might invalidate affirmative action, because the court might decide that the best conception of equal protection requires strict racial neutrality. It seems likely that if they were to anticipate this development, they would attempt to foreclose this possibility by expressing their own conception of equal protection unambiguously.

Now consider the possibility that the Reconstruction Congress drafted the equal protection clause without explicitly considering the concept–conception distinction. Is it more natural to interpret the language they chose as expressing the general concept or their own conception? In ordinary speech, it is natural to use words and phrases to express our own conceptions of contested concepts. Ordinarily, we use these terms to express our own judgments, evaluations, and normative wishes—and not to talk about theoretical disagreement about contested concepts. So in the absence of evidence to the contrary, if we are seeking the intended meaning of constitutional language that could be used to express the concepts or conceptions, we are likely to believe that the evidence points to the Original Conceptions Interpretation and not the General Concept Interpretation.

We can generalize the points made in the last two paragraphs. Dworkin's account of the communicative intentions of the framers of various constitutional provisions actually works fairly well under certain ideal conditions. Suppose that the world were such that judges were very good at discovering the truths of political morality and that their opinions routinely were understood by a wide and deep consensus among citizens as having done just that. In that possible world, we can imagine that the framers of a new constitution or an amendment to the existing constitution would have the communicative intentions that Dworkin argues actual framers have. In this possible world, framers can rely on judges to get it right—to articulate conceptions of "equality," "freedom of speech," and "cruelty" that are both correct and legitimate (legitimate in the *positive* sense of legitimacy, because they are seen to be correct by citizens). That is, Dworkin's theory works well under certain idealizing assumptions—it is an "ideal theory."

Now imagine a different world. In this world, judges are not especially good at discovering moral truths. These judges are selected by political processes; their positions on various issues must be acceptable to the executive who appoints them and the legislators who confirm them. In this world, the judges disagree among themselves about questions of morality and are controversial among citizens. When a political movement is able to obtain a supermajority that enables constitutional change, they do not trust future judges to get morality right. Instead, the whole point of their movement is to entrench their constitutional vision.

Real-world constitution makers (like the framers of the Reconstruction Amendments) are not likely to understand constitution drafting as an exercise in ideal theory. Rather, they draft for the real world of politics and disagreement. They know that in the real world, moral conceptions are *sticky*—it is always difficult and sometimes impossible to dislodge them with moral argument. And if the time

frame is the span of time allowed an appellate court judge to decide a case (from when the judge first reads the briefs to the conference after oral argument), then the likelihood that deliberation will track moral reality (and not the judge's priors) seems almost vanishingly small. If offered a choice between entrenching their conception of a contested concept, on the one hand, and "kicking the can down the road" to future judges, on the other, they will choose their own conception every time.

One can imagine various replies to this argument. For example, it might be argued that the drafters of a particular constitutional provision disagreed among themselves about substance. Perhaps there were various factions in the Reconstruction Congress and "equal protection" was intended to mean "the concept of equality" and not any particular conception. This would be an example of deliberate ambiguity; the drafters of the equal protection clause would have "kicked the can down the road."[119] Absent knowledge of the historical facts, this is a possibility, but to establish this argument, the proponents of the General Concept Interpretation would need to show that this is in fact what occurred. So far as I know, no one has made a convincing case for the deliberate ambiguity argument about the equal protection clause,[120] but I do know that we cannot settle this question by appealing to armchair speculation; the kind of evidence we need must be found by resort to historical facts.

I am not sure we can get much further than that on the basis of armchair speculation. The next step would be to examine the historical facts, but that requires a systematic investigation of linguistic practices and context—a task that is outside the scope of this Article.

f) The Concept–Conception Argument and the Fixation Thesis

After this extended discussion of the Concept–Conception Argument, we are now in a position to ask how the argument affects the Fixation Thesis. The first point follows directly from the discussion above.[121] The actual substance of the concept–

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[119] I am grateful to Michael Corliss for pressing this objection.

[120] It has been suggested to me that this argument can be found in William Nelson's book. WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE (1998). Nelson certainly does believe that there were disagreements among the framers and ratifiers of the Fourteenth, but these disagreements are about purposes and aims. For example, different members of Congress may have had different motives for voting to propose the amendment for ratification and different hopes about how it would be put into operation. I do not see a single sentence in his book suggesting that these disagreements were deliberately translated into semantic ambiguities in the text of the Fourteenth. **[But if you know of a passage that does say this, please let me know!]**

[121] *See supra* Parts III.B.1.a) to III.B.1.e).

conception distinction does not work to show that the meaning of particular constitutional provisions cannot be a fixed conception, even for those provisions where the language of the provision includes a word or phrase that is plausibly understood as having a sense that refers to a general concept of which there are multiple competing conceptions.

The second and more important point may come as a surprise. Even if the Dworkinian version of the concept–conception were correct, it would not form the basis of an objection to the Fixation Thesis *per se*. The Fixation Thesis claims that the communicative content of the text is fixed at the time each provision is framed and ratified. The Concept–Conception Argument, if it were true, would establish that the communicative content of certain provisions is limited to a general concept. For example, if Dworkin's argument worked, then the communicative content of "equal protection" might be the general concept of equality. This creates a special kind of irreducible ambiguity as between eligible conceptions of the concept. From the perspective of originalists who accept the interpretation–construction distinction, this irreducible ambiguity creates a construction zone, limited by the boundaries of the concept. Nothing about this story is inconsistent with the Fixation Thesis.

It turns out that the real point of the Concept–Conception Argument is not to deny fixation; the real point is to expand the construction zone. In other words, general concepts are relatively more underdeterminate than are particular conceptions. So long as the boundaries created by the general concept are respected, Dworkinian elaboration of the best version of a constitutional concept is consistent with the Constraint Principle as well. That is, the Concept–Conception Argument accepts that the meaning of a general concept word, even when it is used in its general-concept meaning, is fixed.

So the Concept–Conception Argument does not threaten the core of the originalist family of constitutional theories, fixation and constraint. The real action created by the Concept–Conception Argument is an argument that the communicative content does not provide as much constraint as some originalists might hope. To make out that argument in a convincing way, there needs to be an investigation of the relevant evidence, the historical facts regarding linguistic practices and context. At this point in the dialectic, that argument has not moved beyond the method of armchair speculation. But even using Dworkin's own method, there is very good reason to reject his conclusions.

2. Natural Kinds

At this point, some advocates of the Concept–Conception Argument may have a complaint. They might say something along the following lines:

> We see what you have said about concept and conceptions, but that was never really the basis of our argument. What we really meant to say is that the Constitution uses moral terms that require us to investigate moral truths. We

> did not mean that the general and abstract moral language of the Constitution is ambiguous; we meant to say that it unambiguously requires judges do what is really required by an injunction to achieve equality, avoid cruelty, and protect the freedom of expression. Judges must seek the true essence of these moral concepts.

This argument might seem to have a superficial resemblance to the argument based on Gallie's idea of essentially contested concepts, but it is different in important ways. The new version of the argument is premised on the idea that the moral language of the Constitution points to concepts that have objective criteria for their application. Rather than contested concepts, we have moral truths. The difference between the Concept–Conception Argument and the new argument is enormous and profound.

The most powerful expression of the new argument's view borrows from the idea of a natural kind, strongly associated with Hilary Putnam and Saul Kripke.[122] Consider a natural-kind term like "gold" or "water." When the connection between the word "gold" and the substance with a certain atomic structure was first established (through a kind of dubbing), the connection between the word and the natural kind was fixed. This connection does not depend on the psychological states of individual language users. Thus, even if I mistakenly believe that pyrite (fool's gold) is gold, I do not refer to pyrite when I use the word "gold." The nature of gold, water, or other natural kinds is given by our best scientific theories—even when those theories fail to correspond to linguistic conventions.

The actual Constitution of the United States does contain a clause that refers to gold. Article One, Section Ten provides:

> *No state shall* enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; *make anything but gold and silver coin a tender in payment of debts*; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.[123]

Let us call the italicized portion of this clause, the "gold and silver legal tender clause."

The natural-kinds theory suggests that the meaning of "gold" in the gold and silver legal tender clause is limited to instances of the element *gold* as specified by the best scientific theory of the elements. The material used to make coins or held in reserve

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[122] *See generally* SAUL KRIPKE, NAMING AND NECESSITY (9th ed., Harvard U. Press 1996) (1972); HILARY PUTNAM, *The Meaning of "Meaning"*, in MIND, LANGUAGE, AND REALITY: PHILOSOPHICAL PAPERS 215–71 (1975).

[123] U.S. Const. Article I, Section 10.

to back paper money would have to have the right atomic structure, including the atomic number 79 (representing 79 protons), six energy levels with the appropriate number of electrons at each level, and so forth. Even if pyrite were functionally indistinguishable from gold (soft, malleable, ductile metal, same color, same weight per cubic centimeter, etc.), it would not *be* gold. And even if the framers believed that this fictional version of pyrite were gold, that belief would not control the meaning of the word "gold," because the word refers to the natural kind.

If we try to apply this theory to other provisions in the Constitution, it looks like we will not be able to rely directly on the sort of natural kinds investigated by the physical sciences. Equality, cruelty, and freedom of speech are moral concepts—or have some moral content. Nonetheless, it might be the case that there are moral kinds, legal kinds, or as Michael Moore puts it, "functional kinds."[124] (Moore's development of the functional kinds idea is the most sophisticated version of which I am aware.) Unlike natural kinds, the essence of which is given by their microstructure (e.g., atomic structure in the case of elements), the essence of a functional kind would be given by its function. This is a terribly brief and wholly inadequate statement of a very complex and sophisticated theory, but this brief exposition will have to do for present purposes. Let us call this provision version of the theory the "Functional Kinds Theory."

Suppose then that the constitutional text employs functional kinds and that phrases like "equal protection" and "freedom of speech" point to kinds of this sort. Is this account of constitutional meaning consistent with the Fixation Thesis? The answer to this question is obviously yes. Once the phrase "equal protection" becomes associated with the corresponding functional kind, the meaning of the phrase is fixed. Even if a Functional Kinds Theory of the meaning of the constitutional text were to incorporate a theory of linguistic drift, such that a word or phrase could lose its connection with a natural or functional kind (with a new term emerging for the kind and the old term acquiring a new meaning[125]), it would still be the case that the meaning of the relevant token text (e.g., the official draft of the Constitution promulgated in 1787) remains fixed. The relevant functional kind would be the kind

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[124] *See* Michael Moore, *Law as a Functional Kind* in NATURAL LAW THEORY (Robert P. George, ed. 1992);

[125] Gareth Evans uses the example of Madagascar to illustrate semantic drift in the case of proper names. *See* Gareth Evans, *A Causal Theory of Names*, 47 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY (SUPPLEMENTARY VOLUME) 87–208 (1973), *reprinted in* Gareth Evans, THE VARIETIES OF REFERENCE (1982). The name "Madagascar" originally referred to a region on the mainland of Africa, but later became associated with the island now called "Madagascar" as the result of a misunderstanding. *See* Sam Cumming, *Names*, Stanford Encyclopedia of Philosophy, http://plato.stanford.edu/entries/names/ (March 19, 2013).

to which the constitutional word or phrase was associated at the time the relevant provision was framed and ratified.

Indeed, the standard account of natural-kind terms is structurally similar to originalism. A natural-kind term becomes associated with its kind by an act of "dubbing." Once dubbing has occurred, the relationship between the term and the kind is fixed.[126] This relationship between the term and the natural kind is similar to the relationship between proper names and the particulars of which they are names: thus, "Lawrence Byard Solum" is my name and the meaning of my name was fixed at the time my parents named me; let us call this event my "baptism."[127] The word "baptism" (used to refer to naming ceremonies) is used interchangeably with "dubbing" in philosophical accounts of the relationship between natural-kind terms and their referents.[128] The meaning of my name is its original meaning fixed at the time of my baptism. The meanings of natural-kind terms are their original meanings fixed at the time of dubbing.

Moreover, the Functional Kinds Theory is consistent with the Constraint Principle. Indeed, to the extent that the constitutional text points to functional kinds with real essences, it seems likely that the case for constraint might be very strong indeed. This is especially true in the case of functional kinds that have moral content. If freedom of expression is a real functional kind and the meaning of the First Amendment free speech clause is fixed to that kind, then one can imagine a variety of arguments for following this meaning. Moreover, the Functional Kinds Theory may lead to the minimization of underdeterminacy. If freedom of speech has a real functional structure that can be discovered, then it might turn out that it really does provide determinate answers to a wide variety of questions that we would otherwise believe are in the construction zone.

Nonetheless, some originalists may be uncomfortable with the Functional Kinds Theory of constitutional meaning. Of course, some originalists may simply reject the notion that constitutional words and phrases name functional kinds with real essences. But even originalists who accepted this theory might doubt the

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[126] *See, e.g.,* Helen Beebee & Nigel Sabbarton-Leary, *Introduction*, in THE SEMANTICS AND METAPHYSICS OF NATURAL KINDS, 1, 38–41 (Helen Beebee & Nigel Sabbarton-Leary eds. 2010);

[127] *See* Cumming, *supra* note 125 (stating, "[T]he reference of a name is established by a dubbing ceremony (or "baptism") at which the dubee is indicated by a demonstration or uniquely referring description. All uses of the name that derive from this source (uses deriving from the baptism itself, or acquired from someone who was present at the baptism, or from someone who acquired it from someone who was present at the baptism, etc.) refer to the *original* dubee, even if the speaker associates the name with a description that is untrue of that dubee.") (emphasis added to "original" in parenthetical).

[128] *See id.;* Beebee & Sabbarton-Leary*, supra* note 126, at 38–41.

institutional capacity of judges to reliably track the real essences of the functional kinds when they decide constitutional cases. There may be epistemological problems; even if relevant functional kinds have real essences, it does not necessarily follow that we can discover them. And even if the ideal judge can do this, there may be problems of social epistemology. The institutional practices that constrain judges might make it difficult for actual judges to make decisions that reliably reflect the true natures of the functional kinds. In particular, originalists might fear that the implementation of a functional kinds view will result in judges who simply rely on their own, ideologically determined beliefs. That is, content that is determinate in theory might be underdeterminate in practice.

But so far as the thesis of this Article is concerned, epistemological or practical underdeterminacy is beside the main point. The Functional Kinds Theory is fully consistent with the Fixation Thesis—and with the Constraint Principle. Moreover, the Functional Kinds Theory entails metaphysical determinacy.

3. Family Resemblance and Open Texture

Consider a third objection,[129] inspired by Ludwig Wittgenstein's idea of family resemblance[130] and the related notion of "open texture," developed by Frederic Waismann as an extension Wittgenstein's idea.[131] Waismann's notion of open texture was subsequently used by H.L.A. Hart.[132] The basic idea of the objection is that at least some constitutional provisions are open-textured—there are no necessary and sufficient criteria for the application. Put in terms of family resemblance, the point is that the meaning of these provisions is like family resemblance. Two brothers may share many characteristics in common with each other, and some of these may be shared with their mother, but while their mother may resemble her sister—their aunt—the two brothers may have little in common with their aunt, and nothing at all in in common with their aunt's daughter, their

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[129] For a version of this objection, see Ian Bartrum, *Constructing the Constitutional Canon: The Metonymic Evolution of Federalist 10*, 27 CONST. COMMENT. 9, 11–12 (2010).

[130] *See* LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 67–77, 108 (4th ed., G.E.M. Anscombe, P.M.S. Hacker, & Joachim Schulte trans., P.M.S. Hacker, & Joachim Schulte eds. 2009) (citations are to numbered remarks and not pages).

[131] Friedrich Waismann, *Verifiability* in LOGIC AND LANGUAGE (Anthony Flex ed. 1968) *republication from* 19 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY, SUPPLEMENTARY VOLUME (1945).

[132] H.L.A. HART, THE CONCEPT OF LAW 124 (2d ed. 1994) ("Whichever device, precedent or legislation, is chosen for the communication of standards of behavior, these, however smoothly they work over the great mass of ordinary cases, will, at some point where their application is in question, prove indeterminate; they will have what has been termed an open texture.").

cousin. They are all members of the same family, but there is no set of features that all the members of the family share.

How might the notion of family resemblance relate to interpretation of the constitutional text? The argument might be that the Fixation Thesis assumes that the meaning of the constitutional text is static on the basis of a false picture of how meaning works. That picture assumes that words and phrases have a static meaning that consists of a set of necessary and sufficient conditions for the application of the word or phrase. This picture is false, because the meaning of language is dynamic—there are no necessary and sufficient conditions for the application of a word to things in the world. Rather, words are adapted to new uses, gradually extending to new cases and withdrawing from old ones. For this reason, one can never know at any point in time what a word will extend to and what it will not.

Take "freedom of speech" for example. If the freedom of speech is open-textured (or is a family resemblance concept), then at any given point in time there will be cases where we will not be able to say whether these cases are (or are not) covered by the freedom of speech—even if we knew everything that could be known about existing linguistic practice. And over time, the phrase "freedom of speech" might come to cover situations that were clearly outside its boundaries at an earlier point in time.

This suggests that the argument against fixation from open texture or family resemblance has two different aspects. The first aspect is synchronic: at any given point in time, an open-textured provision of the Constitution will underdetermine the set of applications. The second aspect is diachronic: over an extended period of time, the set of cases to which a provision clearly applies (or clearly does not apply) can change.

Consider the relationship of each of these two aspects of open texture or family resemblance to the Fixation Thesis. The synchronic aspect of open texture is fully consistent with the idea that the meaning of constitutional language is fixed at the time a constitutional provision is framed and ratified. Indeed, this aspect of open texture is fully embraced by originalists who accept the existence of the construction zone created by vagueness or irreducible ambiguity: open texture can be viewed as a special kind of multidimensional vagueness (or perhaps as a special sort of irreducible ambiguity). While conventional vagueness exists in a single dimension (as with height and the word "tall"), open texture exists when a word or phrase is vague in multiple dimensions, as may be the case with a complex (multidimensional) notion such as freedom of speech. So long as competent speakers of the language can distinguish clear cases (in the core of settled meaning) from the cases where the application of the constitutional provision is unsettled (in the penumbra), the Fixation Thesis holds.

What about the diachronic aspect of open texture? Can the fact that core and penumbra shift over time be reconciled with the Fixation Thesis? Once again, the Fixation Thesis not only can accommodate the fact that meanings change over time,

that fact (which is one of the mechanisms which enables linguistic drift) is a central motivation for originalism. If the meaning of the words and phrases used in the constitutional text did *not* change over time, then there would be no distinction between the original meaning of the text and the contemporary meaning. The Fixation Thesis does not claim that word types have static meaning: that claim would rather obviously be false.[133] Rather, the Fixation Thesis claims that word tokens have static (but not fully determinate) meanings.

IV. THE RIVALS OF FIXATION

So far our investigation of the Fixation Thesis has focused on the case for the fixation of communicative content and answers to objections. This Part examines the rivals of fixation, competing theories of constitutional meaning that implicitly or explicitly deny that "meaning" is fixed. The first and most obvious rival of originalism accepts the phenomenon of linguistic drift, but argues that it is the contemporary meaning of the text should guide constitutional interpretation and construction.

A. Contemporary Readers' Meaning (and Fictional Meaning)

There is another account of meaning that might form the basis of an objection to the Fixation Thesis. Texts have meanings for readers. Let us call the meaning a text has for a community of readers, the "readers' meaning" of the text. Of course, different readers may understand a text differently, but let us assume that at any particular point in time, the community of contemporary readers of a text will have a shared understanding of the meaning of the constitutional text. We can call this, the "Contemporary Readers' Meaning Theory" of constitutional interpretation.[134] This abstract theory has variations, corresponding to different specifications of the relevant interpretive community. Once such community would be the general public. The theory that is now on the table claims that the relevant meaning of the constitutional text is given by the communicative content that is grasped by the public at large now (or in the future at a particular point in time).

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[133] Or at least, the claim that meanings are static is obviously false for terms that are not "rigid designators," as proper names and natural-kinds terms are alleged to be. *See* Joseph LaPorte, *Rigid Designators*, Stanford Encyclopedia of Philosophy (October 24, 2006), http://plato.stanford.edu/entries/rigid-designators/.

[134] This theory is inspired by the early views, since modified, of Stanley Fish. *See* STANLEY FISH, DOING WHAT COMES NATURALLY 157–59 (1989); Stanley E. Fish, *Interpreting the "Variorum*," 2 CRITICAL INQUIRY 465, 483–85 (Spring 1976). Fish's current position is a version of intentionalism. *See* Stanley Fish, *The Intentionalist Thesis Once More,* in THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION 99, 113 (Grant Huscroft & Bradley W. Miller eds., 2011).

Something like this view was articulated by the eminent Canadian constitutional scholar Peter Hogg: "Under the doctrine of progressive interpretation the words of the text are given a meaning that seems natural to contemporary eyes, not a meaning that has been distilled from historical records extrinsic to the actual text."[135] The consequence of this view would be that linguistic drift would change the communicative content of the constitutional text: if "domestic violence" now means violence within the family, then that meaning could determine the communicative content of the guarantee clause.

Contemporary Readers' Meaning might be combined with a theory of contemporary ratification, a version of which was sketched by Justice William Brennan.[136] The idea would be that the legitimacy of the Constitution is a function of its contemporary acceptance by "We the People." But this acceptance is based on Contemporary Readers' Meaning—the way the text is understood today. Therefore, the argument might go, the normatively legitimate communicative content of the text is derived from the way the text is understood today.

There is a deep difficulty with the Contemporary Readers' Meaning Theory; this difficulty requires a bit of explanation. How do contemporary readers approach an old text? Consider again the example of the thirteenth-century letter that uses the word "deer." Suppose that you are a contemporary reader, and that you know (1) that the letter was written in the thirteenth century, and (2) that the semantic meaning of "deer" at that time was equivalent to the modern phrase "four-legged mammal." Under these circumstances, it would be natural for you to understand "deer" as meaning four-legged mammal. This process is quite similar to reading a letter in a dialect that is similar to (but distinct from) standard American English. In other words, our ordinary way of reading older texts is based on our intuitive understanding of the Generalized Fixation Thesis. Thus, the Contemporary Readers' Meaning Theory collapses into the Fixation Thesis.

Of course, we can fix up the theory in the following way: we ask what contemporary readers would think the constitutional text meant if they were to assume that the text were written today (or in the very recent past).[137] Of course, the hypothetical

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[135] Peter Hogg, *The Charter of Rights and American Theories of Interpretation*, 25 Osgoode Hall L.J. 1 at 101–02 (1987). Tom Bell has argued for a version of Contemporary Meaning Theory. *See* Tom W. Bell, *The Constitution as if Consent Mattered*, 16 CHAPMAN L. REV. 269 (2013). Hillel Levin has developed a Contemporary Meaning Theory of statutory interpretation. *See* Hillel Y. Levin, *Contemporary Meaning and Expectations in Statutory Interpretation*, 2012 U. ILL. L. REV. 1103.

[136] William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 437 (1986).

[137] This hypothetical bears at least a superficial resemblance to the "always speaking" doctrine found in some common-law systems. Here is one recent articulation:

assumption that the Constitution was written today is a fiction (or counterfactual). Let us call the modified version of the theory the "Fictional Contemporary Readers' Meaning Theory" (or "Fictional Meaning Theory" for short) of constitutional interpretation. And this brings us to the deep difficulty: the counterfactual assumption is based on the Type Meaning Fallacy. The Fictional Meaning Theory is not a theory of the meaning of the actual Constitution—the collection of tokens that begins with the copy of the Constitution that is preserved in the National Archives. Rather, it is a theory of the meaning of a nonexistent constitutional text that hypothetically was written today.

For this reason, the Fictional Meaning Theory is not a true rival of the Fixation Thesis. The Fixation Thesis can accept that a fictional token of the constitutional type would not have its meaning fixed at the times that each provision of the actual Constitution were framed and ratified. Of course, the Generalized Fixation Thesis claims in the possible worlds in which a given fictional constitution was written in the present, the meaning of that fictional constitution was fixed at that time. Hence, the fictional constitution written today would have a meaning fixed by today's conventional semantic meanings and the fictional context in which the constitution is imagined to have been framed and ratified. For this reason, the Fictional Meaning Theory must posit a never-ending succession of hypothetical constitutions—each of which potentially has a different meaning.

At this point, it may strike some readers that the Fictional Meaning Theory is positing epicycles that render it implausible when compared with the simpler and intuitively more plausible view that communicative content is fixed. But the important point is that the Fictional Meaning Theory does not deny the claim made by the Fixation Thesis. The Fixation Thesis is a claim about particular tokens—the authoritative embodiments of the constitutional text as the original Constitution and each amendment was framed and ratified. The claim made by the Contemporary Meaning Theory does not deny that this meaning is fixed; rather it simply points to another meaning that we could give to another token text of the

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> If the interpretation of older statutes is to be realistic and meaningful, it is necessary that a court undertaking this exercise should interpret statutes according to their contemporary meaning at the time of interpretation. The basic interpretative rule governing this area is the presumption that legislation is always speaking from the present; that each enactment is to be viewed as a living part of the current legal system and not limited by circumstances which were current at the time of its enactment.

THE LAW REFORM COMMISSION, REPORT ON STATUTORY DRAFTING AND INTERPRETATION: PLAIN LANGUAGE AND THE LAW (2000) (http://www.lawreform.ie/_fileupload/Reports/rPlainLanguage.htm). It is not clear, however, that the notion that the law always speaks is a doctrine of interpretation (as opposed to construction). The charitable understanding of the metaphor is that it expresses the idea that statutes must be applied to new circumstances—and not that their meaning changes because of linguistic drift.

same type. To the extent that the Fictional Meaning Theory is combined with a theory of contemporary ratification, the combination targets the Constraint Principle and not the Fixation Thesis. It argues that the original meaning should not constrain; the combined theory does not deny that the communicative content of the constitutional text is fixed.

B. Constructive Interpretation

Ronald Dworkin calls his general interpretive method (including his view of constitutional interpretation and construction) "constructive interpretation."[138] Dworkin is sometimes hard to pin down, and his theory was elaborated in many texts over the course of five decades. One understanding of Dworkin might be that because constructive interpretation aims to make our practices "the best that they can be" in light of the institutional history, his theory implies that meanings can change over time. Our "moral readings" of the constitutional text are not fixed, but instead evolve in response to changing circumstances and our evolving constitutional values.[139]

But is this correct? Or is Dworkin's theory actually consistent with the Fixation Thesis? There are some very good reasons to think that Dworkin actually accepts fixation. For example, in 1997, he introduced an example from Milton's *Paradise Lost*:

> Hamlet said to his sometime friends, "I know a hawk from a handsaw." The question arises—it arises for somebody playing the role, for example—whether Hamlet was using the word "hawk" that designates a kind of a bird, or the different word that designates a Renaissance tool. Milton spoke, in *Paradise Lost*, of Satan's "gay hordes." Was Milton reporting that Satan's disciples were gaily dressed or that they were homosexual?[140]

His answer to these questions seems to endorse the Fixation Thesis in all but name. The italics mark *emphasis* that I have added:

> We must begin, in my view, by asking what—on the best evidence available—the authors of the text in question intended to say. That is an exercise in what I have called constructive interpretation. It does not mean peeking inside the

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[138] RONALD DWORKIN, LAW'S EMPIRE 62–86 (1986).

[139] The phrase "moral reading" is Dworkin's. *See* RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 2–3 (1996), but it is now strongly associated with James Fleming's Dworkinian theory of constitutional interpretation and construction. *See* James E. Fleming, *Fidelity, Change, and the Good Constitution,* 62 AM. J. COMP. L. 515, 515 (2014).

[140] Dworkin, *supra* note 106, at 1251–52 (1997).

> skulls of people dead for centuries. It means trying to make the best sense we can of an historical event—someone, or a social group with particular responsibilities, speaking or writing in a particular way on a particular occasion. If we apply that standard to Hamlet, it's plain that we must read his claim as referring not to a bird, which would make the claim an extremely silly one, but to a Renaissance tool. Hamlet assured his treacherous companions that he knew the difference between kinds of tools and knew which kind he was dealing with in them. *In the case of poor Satan's gay hordes, there's a decisive reason for thinking that Milton meant to describe them as showy, not homosexual, which is that the use of "gay" to mean homosexual postdated Milton by centuries.*[141]

In the italicized passage, Dworkin recognizes the phenomenon of linguistic drift and argues that the relevant "mean[ing]" of the word "gay" is a function of its conventional semantic meaning at the time Milton wrote. Dworkin goes on to explicate the concept–conception distinction, which we have already discussed. Recall that Dworkin's critique of Scalia was simply fallacious and that his affirmative argument that essentially contested concept words must have been intended to express the concept and not a conception of that concept was speculative and likely wrong.

But that is not the end of the matter. Dworkin continues to discuss the role of the text in constitutional practice, juxtaposing his view with that of Laurence Tribe. Here is the passage, which includes an internal (double-indented) quotation from Tribe:

> Tribe endorses a very strong form of textual fidelity. Tribe states:
>
> > I nonetheless share with Justice Scalia the belief that the Constitution's written text has primacy and must be deemed the ultimate point of departure, that nothing irreconcilable with the text can properly be considered part of the Constitution; and that some parts of the Constitution cannot plausibly be open to significantly different interpretations.[142]
>
> That is a stronger statement of textual fidelity than I [Dworkin] would myself endorse, because, as I said, precedent and practice over time can, in principle, supersede even so basic a piece of interpretive data as the Constitution's text when no way of reconciling them all in an overall constructive interpretation can be found. I agree with the Tribe of this statement, however, that the text must have a very important role: We must aim at a set of constitutional

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[141] *Id.* at 252.

[142] Laurence H. Tribe, *Comment*, in ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 23 (1997).

> principles that we can defend as consistent with the most plausible interpretation we have of what the text itself says, and be very reluctant to settle for anything else.[143]

Dworkin does not use the same conceptual vocabulary as we have been employing here, but his point can be translated. Dworkin recognizes that the communicative content of a text is fixed at the time the text is written. But in the case of the constitutional text, the legal content of constitutional doctrine can change, because the "constructive interpretation" of the law as a whole can override the communicative content. In other words, Dworkin accepts fixation as a thesis about "interpretation" (communicative content), but rejects the constraint principle.

But even if Dworkin himself does not reject the Fixation Thesis, it may be that one could construct a different version of his theory that applied his notion of constructive interpretation to communicative content. And perhaps Dworkin himself did this in *Justice for Hedgehogs*, his penultimate monograph.[144] Elsewhere,[145] I have argued that in this late work, Dworkin argues for what I call the Unity of Interpretation Thesis—the claim that all "interpretation" involves the same essential structure. Here is the key passage:

> We find it natural to report our conclusions, in each and every genre of interpretation, in the language of intention or purpose. We speak of the meaning or significance of a passage in a poem or a play, of the point of a clause in a particular statute, of the motives that produced a particular dream, of the ambitions or understandings that shaped an event or an age.[146]

What does Dworkin mean by "purpose"? He does not mean the psychological state that constitutes the motive of the author of the text.[147] His understanding of purpose is identified in the following passage:

> We can state the purpose of statutory interpretation very briefly in the abstract: the practice aims to make the governance of the pertinent community fairer, wiser, and more just. That description fits what lawyers and judges do when they interpret statutes; it justifies that practice, in a general way, and it

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[143] *Id.* At 1259–60.

[144] RONALD DWORKIN, JUSTICE FOR HEDGEHOGS (2010).

[145] Lawrence B. Solum, *The Unity of Interpretation*, 90 B.U. L. REV. 551, 558 (2010).

[146] Dworkin, *Justice for Hedgehogs*, *supra* note 144, at 79–80 (pinpoint is from manuscript pagination).

[147] Solum, *The Unity of Interpretation*, *supra* note 145, at 558–59.

> suggests, also in a very general way, what standards are appropriate for deciding which interpretation of a particular statute is most successful.[148]

I have argued in detail that the Unity of Interpretation Thesis is false,[149] but the gist of that argument can be stated simply: We use the word "interpretation" (in one of its senses) to refer to the activity of recovering communicative content. But that activity does not aim to recover purpose—although understanding purposes may help. What we communicate by writing a text is one thing, the purpose for which we wrote it is another.

To sum up, to the extent that Dworkin has a sensible view, he endorses the Fixation Thesis. If Dworkin rejects the Fixation Thesis on the basis of his claim about the unity of interpretation, his argument is demonstrably invalid.

C. Multiple Meanings

Consider one final candidate for a rival of the Fixation Thesis—the claim that texts have "multiple meanings" rather than a single fixed meaning: call this the Multiple Meanings Theory of constitutional interpretation. No theorist has articulated this view as an explicit rival of the Fixation Thesis, but it is "in the air" of contemporary constitutional theory.[150] The gist of the argument would go something like this: Texts do not have a single meaning (in the linguistic sense); instead, they have multiple meanings. Some of these meanings are fixed, but others are not. Because there are multiple meanings, we must select between them, and this process of selection must be guided by normative consideration. Because some of the possible meanings are not fixed in time, it follows that the Fixation Thesis does not hold with respect to the complete set of the multiple meanings of the constitutional text.

Some of the premises of the Multiple Meanings Theory are correct, but from them it does not follow that the Fixation Thesis is false. Mark Greenberg makes the point that there is more than type of linguistic content in the context of a discussion[151] of *Smith v. United States*[152]—the Supreme Court case in which the question was

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[148] Dworkin, *Justice for Hedgehogs*, *supra* note 144, at 85 (pinpoint is from manuscript pagination).

[149] Solum, *The Unity of Interpretation*, *supra* note 145, at 559–566.

[150] My reconstruction of the argument has been influenced by a work-in-progress by Cass Sunstein, *see* Cass R. Sunstein, *There Is Nothing that Interpretation Just Is*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2489088 (August 29, 2014), and by exchanges with Richard Fallon. My version of the argument should not be taken as representing their positions.

[151] Mark Greenberg, *The Moral Impact Theory of Law*, 123 YALE L.J. 1288, 1291–92 (2014)

[152] 508 U.S. 223 (1993).

whether offering to trade a gun for cocaine constituted use of a firearm for the purpose of a penalty enhancement provision.[153]

> As the contemporary study of language and communication has made clear, there are multiple components and types of linguistic content. In *Smith*, there are at least two types of linguistic content plausibly associated with the statutory text that would yield opposite outcomes in the case. First, there is the semantic content of the statutory text—roughly, what is conventionally encoded in the words. Second, there is the communicative content—roughly, what the legislature intended to communicate (or meant) by enacting the relevant text.[154]

So far, so good. Semantic content is distinct from communicative content. Moreover, the Gricean speaker's meaning of an utterance is not necessarily identical to the meaning that the audience actually takes from the utterance.

We can translate Greenberg's point into constitutional terms. For the sake of simplicity, we can focus on three distinct "meanings":

- *Framers' Meaning*: The content that the authors of a constitutional provision intended to convey to the relevant readers (e.g., the public) through the readers' recognition of the framers' communicative intentions.
- *Clause Meaning*: The content that competent readers of a constitutional provision would have attributed to a constitutional provision, given the conventional semantic meanings of the words and phrases given their syntactic structure.
- *Ratifiers' Meaning*: The content that the ratifiers (or the subset of ratifiers who were competent speakers of English and who actually read the text) actually attributed to a constitutional provision.

In theory, the three forms of meaning can come apart. Clause meaning is bare semantic content, and hence strips the text of contextual enrichment. Framers' meaning can differ from ratifiers' meaning; for example, the framers might have been mistaken about the conventional semantic meaning of a word or phrase.

So Greenberg is right; there are more than one type of content that we could call "linguistic content of the text." But from this fact, it does not follow that the Fixation Thesis is false. That is because all of these forms of content (framers', clause, and ratifiers') are fixed, albeit at slightly different times. Framers' meaning is fixed at the time the constitutional provision is drafted, whereas ratifiers' meaning is fixed at the time the provision is ratified. Because clause meaning is fixed by conventional semantic meanings that are unlikely to undergo rapid change,

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[153] *Id.*

[154] Greenberg, *supra* note 151, at 1291–92.

the period of fixation can be thought of as extended in time, beginning with the initiation of the drafting process and ending with official promulgation.

In order to get the Multiple Meanings Theory off the ground as a rival to fixation, we need to add *unfixed meanings* to the set of multiple meanings. But what meanings are unfixed? We have examined two possibilities. One type of *unfixed meaning* is the fictional meaning that we discussed above in connection with the Contemporary Readers' Meaning theory. Another type of *unfixed meaning* would have been provided by Dworkin's theory—if his theory had really made the claim that the linguistic meaning of a text is altered by our beliefs about what meanings would have been morally best. Both of these *unfixed meanings* are "meanings" in some sense, but they are not plausible candidates for the linguistic content of the authoritative tokens of the constitutional text. The communicative content of the original Constitution, written in 1787, cannot be plausibly viewed as identical to the content that would be morally attractive today or the content that contemporary readers would assign to a fictional constitution, written today, but with the same words and phrases as the original.

* * *

Here is another way to get at the problem with the Multiple Meanings Theory. Once we go beyond the plausible candidates (framers' meaning, clause meaning, and ratifiers' meaning), what is the stopping point. Why not say that the meaning of the equal protection clause is that Congress is constitutionally required to enact legislation to create a Scandinavian-style social welfare state? Why not say that the constitutional text that seems to require that the president be thirty-five years of age actually requires that he be a mature member of the Republican Party? Presumably, the answer to these questions is that those interpretations of the text would be unreasonable. But why? What makes them unreasonable? The answer, of course, is that those interpretations cannot be tied to the conventional semantic meanings of the words at the time and in the context in which the Constitution was adopted. But this answer assumes that there is a "meta-meaning" that sets limits on what meanings count as reasonable. But that meta-meaning must itself be subject to some version of the Fixation Thesis, because it is the connection between a candidate "multiple meaning" and the original meaning of the authoritative token of the constitutional text that makes the candidate plausible or reasonable.

* * *

In the end, the Multiple Meanings Theory provides no independent argument against the Fixation Thesis. It is simply a fancy way of packaging other theories. If

none of the *unfixed meanings* is plausible on its own, these unfixed meanings do not acquire respectability by putting them in a box with other plausible but *fixed meanings*.

V. FIXATION IN ACTION: THREE EXAMPLES

The issues raised by the Fixation Thesis may be clarified by examining its application to particular examples. In the discussion that follows, we will examine the theoretical application of fixation to three constitutional phrases, "domestic violence," "cruel and unusual punishment," and "privileges or immunities." Importantly, I will not be making any claims about the actual "original meaning" of these provisions. Such claims can only be redeemed by deep and comprehensive research—which I have not done. Instead, I will make certain assumptions about linguistic facts and context. These assumptions will draw from the research of others, but that research is being used to inspire the hypothetical assumptions and not as evidence for claims about the actual original meaning of the three phrases.

A. "Domestic Violence," Take Two

The phrase "domestic violence" has already been considered as an illustration of the phenomenon of linguistic drift: the communicative content associated with a string of text (the letters and spaces that make up the phrase) or a string of phonemes ("dəˈmestik ˈvī(ə)ləns") can change over time.[155] At this point, we will take a closer look at the example in light of the objections and clarifications considered above[156] and the scholarly commentary on the example.

The point of the domestic violence example in this essay is to illustrate the Fixation Thesis. The phrase "domestic violence" had an original meaning, roughly "violence that is internal to a state." That meaning is one of the factors determining the communicative content of the domestic violence clause of the Constitution. The fact that "domestic violence" has undergone linguistic drift and is now used almost exclusively to refer to violence within a family does not change the meaning of the phrase in the constitutional text.

Mark Stein's essay "The Domestic Violence Clause in 'New Originalist' Theory," does not directly engage the Fixation Thesis, but it does suggest that the meaning of the phrase "domestic violence" could change over time. Stein's central argument is based on a thought experiment, which should be quoted in full:

> Consider the following imaginary history of the Domestic Violence Clause. Before the Civil War, the Clause was applied only to insurrections against

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[155] *See supra*, p. 15, text accompanying notes 51–53.

[156] *See supra*, Part III.

> state authority. In the late nineteenth century, the Clause was applied to gang warfare. In the mid-twentieth century, it was applied to ordinary street crime. Then, in the late twentieth century, it was applied to spousal assaults. These expansions of the Domestic Violence Clause were challenged in the courts, and all were upheld by the Supreme Court. In upholding the application of the Domestic Violence Clause to spousal assaults, the Court noted evolving attitudes that see crime within a state as a problem requiring federal assistance, and that further see crime within the home as a problem of public concern. The Court also observed that the conventional semantic meaning of the term "domestic violence" includes spousal assaults. Although not in itself enough to justify expanding the constitutional term "domestic violence" to include spousal assaults, the Court said, this newer conventional meaning of the term "domestic violence" connotes that violence within the home is a problem of public concern. That represents a shift in attitude from the founding generation: While some men of the founding generation undoubtedly thought wife beating was immoral, they did not see it as a major problem of public concern.[157]

Does Stein's thought experiment show that the Fixation Thesis is not correct? I hope that at this point the answer to that question is clear: Stein's thought experiment shows that the legal meaning associated with the phrase domestic violence could, as a matter of fact, change over time. But this fact is consistent with the Fixation Thesis. The claim made by the Fixation Thesis is that the communicative content of the clause was fixed at the time the clause was written: Stein's thought experiment actually assumes that this is the case. Indeed, Stein does not use the shift in linguistic practice to show that the communicative content of the constitutional text changed. Rather, his argument is that the change in linguistic practice evidences a change in public attitudes toward domestic violence and that change in attitude is relevant to what the law should be. Using the vocabulary of the interpretation–construction distinction, Stein's argument is that a change in linguistic practice could partially motivate a new construction of the words "domestic violence"—and not that the meaning communicated by those words in the constitutional text itself was changed.

Another objection to the "domestic violence" example (but perhaps not the Fixation Thesis) has been made by Michael Dorf and by Martin Redish with Matthew Arnould. Both of them focus on the question whether the example shows that originalist theory is necessary as a means to the discovery of constitutional meaning. Dorf puts the point this way:

> But one need not be a semantic originalist to reach [the conclusion that "domestic violence" refers to civil conflict and not violence within a family].

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[157] Stein, *supra* note 50, at 131.

> The new meaning[] of "domestic Violence" . . . ha[s] supplemented, rather than supplanted, [its] original meaning[]. Any competent reader of modern English will understand from the context that the Guarantee Clause uses "domestic Violence" to mean civil conflict.[158]

A similar argument is made by Redish and Arnould:

> [O]ne need not resort to a search for originalist meaning in order to dispel the specious notion that the words "domestic violence" in Article IV could be properly construed to include spousal abuse. Rather, one needs merely to employ a form of structural textualism, a concept which we can comfortably include as an element of our version of "no brainer" exclusionary textualism. The entire context of Article IV, Section 4, expresses a concern with the need for federal protection of the states from invasion, and the need for the federal government to protect the states against violence or insurrection. The text of the provision reveals no other conceivable function or purpose for the provision as a whole. Thus, by examining exclusively the text of the relevant provision, we are able to conclude that a construction of the words "domestic violence" refer[s] to a need for the federal government to protect the states from an activity that presents no existential threat to the state would render them incoherent, in light of their textual context and structure as determined on the provision's four corners.[159]

The point made by Dorf and Redish with Arnould is that the violence within the family reading of "domestic violence" would be unlikely to gain traction even if no one did research on the original meaning of the phrase in light of linguist practice in the eighteenth century. Thus, they disagree with the thrust of Stein's thought experiment—which is intended to show that such a reading could be plausible, given the right sequence of events.

It is not clear whether Dorf, Redish, and Arnould would view their remarks as undermining the Fixation Thesis, but whatever their own view, it should be clear that nothing they say about the domestic violence example is inconsistent with the Fixation Thesis. Their point is about the epistemology of original meaning. Frequently, we can grasp the original meaning of the constitutional text without doing historical research. In the case of the domestic violence clause, the context is sufficient to point us to original meaning, and hence we are not led astray by the recent idiomatic sense of "domestic violence." That point assumes that the phrase "domestic violence" has fixed communicative content—so it cannot be an objection to

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[158] Michael C. Dort, *The Undead Constitution*, 125 Harv. L. Rev. 2011, 2014 (2012).

[159] Martin H. Redish & Matthew B. Arnould, *Judicial Review, Constitutional Interpretation, and the Democratic Dilemma: Proposing a "Controlled Activism" Alternative*, 64 FLA. L. REV. 1485, 1529–31 (2012).

the Fixation Thesis. But the whole point of the domestic violence example is to show the plausibility of the Fixation Thesis. So the Dorf, Redish, and Arnauld discussion is simply beside the point.

B. "Cruel and Unusual Punishment"

Consider another example that has already been discussed, the Eighth Amendment's prohibition of "cruel and unusual punishment." The discussion above was in connection with Dworkin's distinction between concept and conception. At this point, we will examine the same constitutional provision for a different purpose—to show how a change in conventional semantic meaning might obscure the communicative content of a constitutional provision. The argument will turn on the meaning of the word "unusual"—a topic that is sometimes omitted in discussions of the Eighth Amendment.

In the discussion that follows, I will not be claiming to show what the original meaning of the Eighth Amendment actually is. A claim like that would require extensive research, which I have not done for the preparation of this article. Rather, I will assume the correctness of the account offered in John Stinneford's article, "The Original Meaning of 'Unusual': The Eighth Amendment as a Bar to Cruel Innovation."[160] The gist of Stinneford's position is that the word "unusual" had a different meaning in the late eighteenth century than it does today. A contemporary reader of the phrase "cruel and unusual punishment" would be likely to gloss "unusual" as equivalent to "rare," "out of the ordinary," or "exceptional." Thus, a cruel punishment would also be unusual if it were rarely administered. Stinneford summarizes his interpretation as follows: "As used in the Eighth Amendment, the word 'unusual' was a term of art that referred to government practices that are contrary to 'long usage' or 'immemorial usage.'"[161]

If Stinneford is correct, the Fixation Thesis makes a difference to the meaning of the Eighth Amendment. The contemporary version of that meaning would prohibit cruel punishments that are no longer usual, but which have been continuously in existence over a long period of time. The original version of the meaning would allow all punishments supported by long usage, but would prohibited contemporary punishments that are cruel, in widespread use today, but which do not have a history of long usage.

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[160] John Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739 (2008); *see also* John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 Va. L. Rev. 899 (2011).

[161] Stinnerford, *The Original Meaning of "Unusual"*, *supra* note 160, at 1745.

The point of the example is simply to show that linguistic drift can make a difference. In the case of the Eighth Amendment, the immediate context provided by the words of the amendment itself is not sufficient to give us access to the original meaning. Without examining the relevant history, we might assume that the contemporary meaning is identical to the original meaning.

Just to be clear, the Fixation Thesis alone does not demonstrate that contemporary courts should be constrained by the long-or-immemorial-usage interpretation of the Eighth Amendment. Normative arguments would be required to show that the best legal construction of the Eighth Amendment should follow the correct interpretation. The example shows only that the fixed communicative content of the Eight Amendment is plausibly viewed as different from what many contemporary interpreters might assume given ignorance of the relevant facts.

C. "Privileges or Immunities of Citizens of the United States"

Another example of the Fixation Thesis in operation may be provided by the privileges or immunities clause of the Fourteenth Amendment. After languishing in relative obscurity for decades, the clause is now a focus of renewed interest by originalist scholars. The clause is especially difficult for contemporary interpreters because the phrase "privileges or immunities of citizens of the United States" is opaque to modern readers. Without access to evidence of original meaning, we simply don't know what the clause meant. Robert Bork and J. Harvie Wilkinson have even endorsed the view that the clause is like an "inkblot" and hence should be denied legal effect.[162]

But it is at least possible that the original meaning of the privileges or immunities clause is not empty. For example, in a forthcoming book, Kurt Lash argues that the words "privileges or immunities of citizens of the United States" can be understood as a phrase of art, with communicative content which (if given legal effect) would set a clear ceiling and floor on the set of rights that a state may not violate.[163] As of today, there is still dispute about the meaning of the privileges or immunities clause, but it is at least possible that some theory (by Lash or someone else) will come to be accepted as providing the best account of the original meaning. The fact that the fixed original meaning was forgotten would not entail that the original meaning did not exist or that the meaning had changed, becoming an inkblot, as access to

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[162] *See* ROBERT H. BORK, THE TEMPTING OF AMERICA 166 (1990) (endorsing the treatment of the privileges or immunities clause as like an inkblot with no discernable meaning); J. HARVIE WILKINSON III, COSMIC CONSTITUTIONAL THEORY: WHY AMERICANS ARE LOSING THEIR INALIENABLE RIGHT TO SELF-GOVERNANCE 49–50 (2012) (endorsing Bork's view of the privileges or immunities clause).

[163] Kurt T. Lash, *The Fourteenth Amendment and the Privileges and Immunities of American Citizenship* (forthcoming Cambridge University Press 2014).

linguistic facts about the phrase ("privileges or immunities of citizens of the United States) became difficult.

Whether the fixed original meaning of the Fourteenth Amendment should become its legal meaning is not a question to which the Fixation Thesis provides an answer. Characteristically, originalists affirm some version of the Constraint Principle—which would require courts (and other officials) to revise constitutional doctrine to come into line with the original meaning of the Constitution. But the Constraint Principle must be justified by normative considerations (by legal norms or arguments of political morality). In the defense of the Fixation Thesis, the point of the privileges or immunities example is illustrative. The example shows that fixation can make a difference—if it is combined with constraint.

CONCLUSION

I hope to have convinced you that the Fixation Thesis is true, and, more than that, that fixation should not even be controversial—even to those committed to the deep philosophical premises of Dworkin's general theory of interpretation. Once we understand the Fixation Thesis clearly, the seeming objections begin to dissolve. Consider each of the four objections that we have surveyed:

- The Concept–Conception Argument does not deny the Fixation Thesis; instead, it identifies a particular kind of ambiguity (as between general concepts and particular conceptions). If the argument were correct, it would show that the fixed communicative content of some provisions is limited to general concepts, creating a considerable construction zone. But it is not clear that the argument is correct, because it seems likely that the communicative content of the relevant provisions is given by the conception of the concept affirmed by the framers.
- The Functional Kinds Argument is fully consistent with the Fixation Thesis: it assumes that the meaning of functional kind words and phrases is fixed by a real essence.
- The Open Texture (Family Resemblance) Argument does not contradict the Fixation Thesis. If this argument were true, it would show that the family-resemblance words and phrases in the text are open-textured at their periphery—a claim that is fully consistent with the Fixation Thesis.
- The Contemporary Readers' Meaning Argument is actually consistent with fixation of original meaning—the real force of this argument is to deny the Constraint Principle.

It turns out that none of these arguments actually clash with the Fixation Thesis. That should not surprise us. The Fixation Thesis is based on our common sense understandings of the way that communication works. When we communicate using

language, we rely on linguistic conventions and context—and both are time-bound. The conventional semantic meanings of the words and phrases used in the Constitution were fixed by linguist facts at the time each provision of the Constitution was framed and ratified. The context of constitutional communication is time-bound—each provision is framed and ratified at a particular point in time.

When we examine the seeming objections to the Fixation Thesis closely, it turns out that almost all of these objections go to two issues that are conceptually distinct from fixation. The first of these issues concerns constraint. Even if the communicative content of the constitutional text is fixed, there is a further question whether the original meaning should constrain constitutional practice. When opponents of originalism deny that the meaning of the Constitution is fixed, their real point may be about *legal meaning* and not *communicative content*. For some living constitutionalists, the important point is that the abstract and general provisions of the Constitution create construction zones that allow the application of the fixed meaning to contemporary circumstances. For other living constitutionalists, this may not be sufficient: they may insist that judges and officials should have the power to change constitutional doctrine even if that requires overriding the text. But for either form of living constitutionalism, their true opponent is not the Fixation Thesis.

The second issue concerns determinacy. Many of the seeming objections to the Fixation Thesis turn out to be claims that the fixed communicative content of the constitutional text underdetermines constitutional doctrine and the decision of constitutional cases. Many originalists accept some degree of underdetermination and freely admit the existence of a construction zone. Other originalists have argued the default rules or the original methods of constitutional interpretation can reduce or eliminate the construction zone. But these debates between originalists and living constitutionalists and between originalists themselves are not about the Fixation Thesis—they are debates about the shape and size of the construction zone.

So this article simply does not engage some of the most important issues at dispute between originalists and some living constitutionalists. Rather, the strategy employed here is "one step at a time." We begin by securing the points upon which agreement is most easily obtained, and then proceed stepwise through progressively more difficult terrain.

Finally, none of the rivals of fixation provides an alternative to those theories of meaning that entail fixation:

- The Contemporary Readers' Meaning Theory is entirely consistent with fixation, so long as the contemporary readers know they are interpreting an older text. The *Fictional Meanings* variant is simply implausible as a theory of the meaning of the authoritative tokens of each provision of the constitutional text.

- The method of Constructive Interpretation, as presented by Dworkin himself, accepts the Fixation Thesis. To the extent that it is modified to make the claim that communicative content is transformed by normative beliefs about what the meanings should be, Dworkin's theory becomes implausible.
- There are Multiple Meanings, but the ones that are plausible candidates for the linguistic content of the constitutional text are all fixed. For the Multiple Meanings Theory to provide a rival to the Fixation Thesis, there must be *unfixed meanings*, but none of these provides a plausible alternative when considered separately. Lumping them together doesn't help.

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If this Article has done its job, the Fixation Thesis should come to be regarded as true and even obvious. Some non-originalists might characterize this as a trivial truth—the real action is elsewhere—either the constitutional text does not constrain or the text itself is indeterminate. But originalists are likely to regard the Fixation Thesis as a profound truth. The core of originalist constitutional theory affirms the Constraint Principle, and therefore is committed to the belief that the fixation of communicative content entails the limits on constitutional practice. From an originalist perspective, the further question of determinacy must be answered by investigation of the original meaning of the constitutional text, but it should come as no surprise that originalists reject claims that the constitutional text is radically indeterminate. For originalists, the obviousness of the Fixation Thesis does not entail its triviality. If originalists are right about the Constraint Principle, then the truth of the Fixation Thesis should have important implications for constitutional practice.