

# Brigham Young University Journal of Public Law

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Volume 31 | Issue 1

Article 13

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11-1-2016

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### Recommended Citation

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## Making the Premises about Constitutional Meaning Express: The New Originalism and Its Critics

*André LeDuc\**

### ABSTRACT

*Perhaps the hottest front in the half-century-old debate over originalism turns on the introduction of semantics, pragmatics, and other techniques from the philosophy of language and linguistic theory. While in some ways these arguments simply build on the now familiar distinction between interpretation and construction defended by the New Originalism, the newest of the New Originalists purport to break new ground in the debate. The originalists argue that they have rehabilitated originalism so as to avoid the criticisms that had been leveled against earlier versions, including those leveled against earlier versions of New Originalism. The newest critics argue that the sophisticated tools of linguistic philosophy, when properly applied in their hands, offer new and decisive challenges to originalism, including the newest of the New Originalisms. While the arguments on both sides of the debate have been welcomed as a new and exciting intellectual development by the academy, this article demonstrates why these efforts are yet another wrong turn to a dead end in the debate.*

*This article thus performs a critical mission. It argues that the linguistic claims of the most recent wave of the New Originalism, like Solum and Soames, and those of their most recent philosophically sophisticated critics, like Marmor and Fallon, fail to advance the debate over originalism. Each side places demands on philosophical argument that cannot be met. Philosophical argument cannot perform that role as a matter of our constitutional practice and as a matter of the nature of philosophical argument. The philosophical sophistication of the newest of the New Originalists and their critics is only*

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\* I am grateful to Stewart Schoder and Laura Litten for thoughtful comments on an earlier draft, and to Dennis Patterson, Charlotte Crane, Jeff Greenblatt, and Kristin Hickman for comments on some closely related material. Errors that remain are the author's own.

*another Ptolemaic epicycle in a debate that should be abandoned, not pursued.*

## I. INTRODUCTION: THE NEW FRONT IN THE DEBATE

Perhaps the hottest front in the half-century-old debate over originalism hinges on the introduction of semantics, pragmatics, and other techniques from the philosophy of language and linguistic theory to resolve the debate.<sup>2</sup> While in some ways the new arguments introduced simply build on the now familiar distinction between interpretation and construction defended by the New Originalism, the newest of the New Originalists purport to break new ground in the debate.<sup>3</sup> The most recent originalist theorists argue that they have

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2. See, e.g., William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. (forthcoming 2017); Richard Fallon, *The Meaning of Meaning*, 82 U. CHI. L. REV. 1235 (2015) [hereinafter Fallon, *Meaning*] (addressing the nature of constitutional meaning to rebut linguistic philosophical arguments against the pluralist account of constitutional law that Fallon had previously defended); ANDREI MARMOR, THE LANGUAGE OF LAW 123 (2014) [hereinafter MARMOR, LANGUAGE] (dismissing originalism as untenable as an account of constitutional meaning and interpretation); Scott Soames, *Deferentialism: A Post-Originalist Theory of Legal Interpretation*, 82 FORDHAM L. REV. 597 (2013) [hereinafter Soames, *Deferentialism*] (defending a modified, limited form of originalism that privileges original meanings in certain cases but recognizing the need for non-linguistic methods when ambiguity and polysemy make the meaning of the constitutional law text too uncertain to admit of interpretation); Lawrence B. Solum, *Communicative Content and Legal Content*, 89 NOTRE DAME L. REV. 479 (2013) [hereinafter Solum, *Communicative Content*] (arguing that there is an important distinction between the semantic, communicative content of a constitutional text and its authoritative communicative content, endorsing the claim that the constitutional text is fundamentally a communication); Lawrence B. Solum, *Semantic Originalism*, III. PUB. LAW & LEGAL THEORY RES. PAPERS SER. NO. 07-24 [hereinafter Solum, *Semantic Originalism*] (offering a comprehensive statement of an originalism that articulates a complex account of the semantic meaning of the constitutional text and distinguishing between those constitutional provisions that are to be interpreted and those for which substantive constitutional construction is required); Cass R. Sunstein, *There is Nothing That Interpretation Just Is*, 30 CONST. COMMENT 193 (2015) [hereinafter Sunstein, *Nothing*] (arguing that the choice among alternative interpretive methods requires normative judgments); Mark Greenberg, *Legislation as Communication? Legal Interpretation and the Study of Linguistic Communication*, in PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW 217 (Andrei Marmor & Scott Soames eds., 2011) (arguing that the purpose and role of legislation is not simply a matter of communication, focusing upon what the legal texts are doing); 1 SCOTT SOAMES, *Interpreting Legal Texts: What Is, and What Is Not, Special about Law*, in PHILOSOPHICAL ESSAYS: NATURAL LANGUAGE: WHAT IT IS AND HOW WE USE IT 403 (2009) [hereinafter SOAMES, *Legal Texts*] (arguing that the particular features of legal texts are less important than the general features of language that have been inadequately understood in the legal literature exploring interpretation).

3. See generally Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 599-600 (2004) [hereinafter Whittington, *New Originalism*] (distinguishing modern forms of originalism from the reactionary, early originalism focused on discrediting the constitutional jurisprudence of the Warren Court). *But see* Mark Tushnet, *Heller and the New Originalism*, 69 OHIO ST. L.J. 609 (2008) [hereinafter Tushnet, *Heller*] (arguing that there is

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rehabilitated originalism so as to avoid the criticisms that had been leveled against earlier versions.<sup>4</sup> The critics respond that the sophisticated tools of linguistic philosophy offer new and decisive challenges to originalism. The arguments on both sides of the debate have been welcomed as a new and exciting intellectual development by the academy.<sup>5</sup> This article demonstrates why these arguments are yet another wrong turn to a dead end in the debate.

In this article I perform a critical mission, arguing that the linguistic claims of the most recent wave of New Originalists, like Solum and Soames, and those of their most recent philosophically sophisticated critics, like Marmor and Fallon, fail to advance the debate over originalism. Each side places demands on philosophical argument that cannot be met. Philosophical argument cannot perform that role as a matter of our constitutional practice and as a matter of the nature of philosophical argument. The philosophical sophistication of the newest of the New Originalists and their critics is only another scholastic twist in a debate that should be abandoned, not pursued.

The efforts by the protagonists to enlist philosophical theory admittedly appear interesting and seemingly important, even to jaded observers of the interminable originalism debate. The protagonists argue that their new techniques will advance the debate. I have previously argued that the debate has been hampered by its protagonists' failure to recognize the tacit premises in the debate.<sup>6</sup> To the extent that the protagonists increasingly articulate their underlying linguistic commitments, articulating and defending the linguistic commitments might appear responsive to my concern that the tacit premises

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less new substance to the New Originalism than is often claimed).

4. See, e.g., Solum, *Semantic Originalism*, *supra* note 2, at 172–73 (concluding that the philosophical arguments he has articulated confirm common sense understandings); Soames, *Deferentialism*, *supra* note 2, at 614–17 (asserting that his deferentialist theory is descriptively and prescriptively superior to non-deferentialist accounts).

5. Thus, a major conference was convened at Fordham Law School to explore these developments. See generally Symposium, *The New Originalism in Constitutional Law*, 82 FORDHAM L. REV. 371 (2013) (including contributions by Barnett, Whittington, Solum, Soames, Marmor, and Balkin).

6. See André LeDuc, *The Ontological Foundations of the Debate over Originalism*, 7 WASH. U. JURIS. REV. 263 (2015) [hereinafter LeDuc, *Ontological Foundations*] (articulating the tacit ontological and other philosophical commitments underlying the claims advanced in the originalism debate); André LeDuc, *The Relationship of Constitutional Law to Philosophy: Five Lessons from the Originalism Debate*, 12 GEO. J. L. & PUB. POL'Y 99 (2014) [hereinafter LeDuc, *Philosophy and Constitutional Interpretation*] (arguing why the philosophical commitments made by the protagonists are generally mistaken).

in the debate have gone unrecognized. That express articulation of the debate's linguistic philosophical premises may appear to represent a step forward in the debate. It is helpful to distinguish the classical debate over originalism with its tacit linguistic commitments from the modern debate where the commitments are express and the role of the philosophical arguments central.

But some originalists also claim that a more sophisticated philosophical analysis of constitutional language will advance the originalist position.<sup>7</sup> While they certainly have the right to call themselves the New New Originalists,<sup>8</sup> they do not. I will simply lump them together with the other New Originalists. The critics make the corresponding claim that their sophisticated linguistic methods will refute the originalist claims. These claims warrant our attention, if not on their own terms, then at least on their merits.<sup>9</sup> I will argue that these claims are more confused and less productive than their proponents and most observers hope.

Second, the claims tacitly challenge the deflationary account of the debate that I have defended.<sup>10</sup> I characterize my account as deflationary because I discount the theoretical or practical significance of the debate over originalism, arguing that it is a confused or, at best, misguided controversy.<sup>11</sup> The sophisticated techniques and arguments offer a seductive and exciting strategy to continue the debate. If I am right, this deflationary account must extend to these new

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7. See, e.g., Solum, *Communicative Content*, *supra* note 2, at 481–82 (arguing that communicative content is prior to legal content, the legal binding force of a legal text, and that the contribution of communicative content to legal content is sensitive to context); Solum, *Semantic Originalism*, *supra* note 2 (employing a sophisticated philosophical account of linguistic content to defend a version of originalism). See also Soames, *Deferentialism*, *supra* note 2 (defending a purported alternative to originalism that privileges the originally understood meaning of the constitutional text in certain cases).

8. Leading examples are Larry Solum, Jack Balkin, perhaps Scott Soames (depending upon whether to classify his deferentialism as a variety of originalism).

9. In order to engage the arguments in the debate derived from philosophical accounts of meaning, it is necessary to accept, at least provisionally, some of the tacit claims by the protagonists. For a fuller account of such a therapeutic approach, see André LeDuc, *Originalism, Therapy, and the Promise of Our American Constitution* (Sept. 19, 2016) (unpublished manuscript) (on file with author) [hereinafter LeDuc, *Therapy and Promise*] (describing the pathological features of the debate and the confused and otiose assumptions of the debate's participants whose force must be acknowledged before they can be left behind).

10. See André LeDuc, *The Anti-Foundational Challenge to the Philosophical Premises of the Debate over Originalism*, 119 PA. ST. L. REV. 131 (2014) [hereinafter LeDuc, *Anti-Foundational Challenge*] (defending an anti-foundational account of our constitutional argument and decisional practice); LeDuc, *Therapy and Promise*, *supra* note 9.

11. See generally LeDuc, *Therapy and Promise*, *supra* note 9, at 30–45 (describing the pathological features inherent in the debate over originalism).

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gambits or it must be rejected. My earlier arguments apply easily to the new moves in the debate and the metaphilosophical argument I offered against the ontological premises of the debate is equally powerful here.<sup>12</sup> That argument is metaphilosophical because it relies on a philosophical account of the nature of philosophy and philosophical argument.<sup>13</sup> I argue that philosophical argument cannot ground our constitutional practice or our constitutional argument and cannot provide a basis for the radical revision of those arguments and practice.

I have previously explored some of the originalism debate's key jurisprudential assumptions.<sup>14</sup> The protagonists have also assumed accounts of meaning that explain what the semantic import of the constitutional text is and how it is communicated (and otherwise functions linguistically). In particular, the protagonists generally assume that the constitutional text has a determinate semantic meaning that is controlling as a matter of constitutional law. Those commitments to an account of semantic meaning are of signal importance to the respective positions taken in the debate. They are important because the underlying account of meaning makes the debate—as a controversy over the meaning of the Constitution—possible. The protagonists generally agree that there is an objective meaning of the Constitution to be determined by interpretation.<sup>15</sup> But they disagree about what that meaning is and what the proper methods of interpretation are. Increasingly, these commitments are articulated and defended in philosophically sophisticated ways.<sup>16</sup> Nevertheless, these positions cannot be sustained. I have not yet explored those commit-

12. See LeDuc, *Therapy and Promise*, *supra* note 9, at 45–55 (describing the ontological foundations of the debate in the reification of the Constitution); LeDuc, *Anti-Foundational Challenge*, *supra* note 10, at 138–78 (describing the anti-foundational arguments of Philip Bobbitt and Dennis Patterson).

13. See generally LeDuc, *Philosophy and Constitutional Interpretation*, *supra* note 6, at 153–54 (arguing that the nature of our constitutional practice and the requirements imposed upon it are inconsistent with the methods and practices of philosophical argument). See also LeDuc, *Therapy and Promise*, *supra* note 9, at 45–55.

14. LeDuc, *Ontological Foundations*, *supra* note 6; André LeDuc, *Paradoxes of Positivism and Pragmatism in the Debate about Originalism*, 42 OHIO N. U. L. REV. 613 (2016) [hereinafter LeDuc, *Paradoxes of Positivism*].

15. See Solum, *Semantic Originalism*, *supra* note 2, at 31 (“there is a ‘fact of the matter’ about the meaning of a given utterance.”); MARMOR, *LANGUAGE*, *supra* note 2, at 132 (“textualism explicitly endorses an objective conception of the assertive content of an utterance.”).

16. See Solum, *Semantic Originalism*, *supra* note 2, at 31. See generally Soames, *Deferentialism*, *supra* note 2 (describing a novel post-originalist account of constitutional interpretation by a contemporary analytic philosopher of language); Solum, *Semantic Originalism*, *supra* note 2.

ments in the depth that they warrant. This article fills this important gap.<sup>17</sup>

Historically, originalism has claimed to be a proudly commonsensical theory.<sup>18</sup> It has eschewed the need for sophisticated philosophical or theoretical foundations or methods.<sup>19</sup> Many of its critics have made corresponding claims.<sup>20</sup> Recently, the protagonists in the debate have become more philosophically sophisticated in their

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17. This article is part of a trilogy exploring related premises about meaning, interpretation, reasoning and positivism in the current debate. See LeDuc, *Paradoxes of Positivism*, *supra* note 14 (exploring the challenge of the legal pragmatists to originalism's account of constitutional interpretation and adjudication); André LeDuc, *Competing Accounts of Interpretation and Constitutional Argument in the Debate over Originalism* (May 27, 2016) (unpublished manuscript) (on file with author) [hereinafter LeDuc, *Interpretation and Constitutional Argument*] (exploring premises about interpretation and practical reasoning in the originalism debate).

18. See ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 134 (1989) [hereinafter BORK, *TEMPTING*] (quoting with approbation Joseph Story's rejection of "metaphysical refinements" in constitutional interpretation). I argue elsewhere that such a purported commonsensical approach also masks important philosophical premises that are, at best, problematic. See LeDuc, *Anti-Foundational Challenge*, *supra* note 10 (defending a non-foundational account of our constitutional law) and LeDuc, *Ontological Foundations*, *supra* note 6 (arguing that originalism and its critics rely on important ontological and linguistic philosophical premises).

19. BORK, *TEMPTING*, *supra* note 18, at 134; ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 115, 117 (Amy Gutmann ed., 1997) [hereinafter SCALIA, *INTERPRETATION*].

20. Among originalism's critics, Sunstein's pragmatism makes claim to a common sense foundation, as when he suggests that the test for all constitutional decisions ought simply to be whether we think the outcome would be desirable. See CASS R. SUNSTEIN, *RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA* 72–73 (2005) [hereinafter SUNSTEIN, *RADICALS*] (arguing that we ought to interpret and apply the Constitution so as to achieve the best results). That approach fails to offer an adequate account of constitutional argument—or the roles of doctrine and precedent. For Sunstein's earlier work developing the theory of minimalism, which Sunstein also appears to believe is a matter of common sense, see CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999) [hereinafter SUNSTEIN, *ONE CASE*]; CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 38–48 (1996) [hereinafter SUNSTEIN, *LEGAL REASONING*] (drawing on Rawls's concept of incompletely theorized agreements to articulate the central minimalist concept of incompletely theorized decisions).

Similarly, Richard Posner appears to claim a commonsense foundation when he suggests that we ought to assess whether a decision or interpretation would produce a utility-maximizing outcome. See generally Richard A. Posner, *Bork and Beethoven*, 42 *STAN. L. REV.* 1365 (1990) [hereinafter Posner, *Bork*] (comparing and contrasting originalism in constitutional theory with the original music movement with respect to classical music in the context of an instrumentalist critique of originalism). Such a consequentialist approach appears practical and consistent with pragmatic strategies. The original music movement did not have the same impact or influence as originalism has had; whether that difference calls into question Posner's analogy is beyond my scope here. I am indebted to Koram Jablonko for calling my attention to this musical history.

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approach to meaning.<sup>21</sup> Often the protagonists refer to what they are describing as semantic meaning, and sometimes this is what they mean.<sup>22</sup> Often, however, they mean to describe linguistic meaning and to incorporate pragmatic import as well as semantic meaning into their account.<sup>23</sup> A charitable reading of the claims takes this broader range of meaning into account, unless the context makes it incontrovertible that a narrower sense is intended.

The protagonists argue that the increased sophistication in their approach has profound consequences for the debate. On the originalist side, for example, Solum argues that sophisticated accounts of meaning and the recognition that legal analysis requires linguistic techniques that begin with the communicative content of a text, and permits a public meaning originalism that answers earlier criticisms of originalism.<sup>24</sup> Moreover, understanding the nature of the text as a communicative artifact also provides an argument for a sophisticated originalism.<sup>25</sup> The communicative content of the constitutional text is derived from more than simply the text's semantic meaning. Among the critics, Soames argues that the originalist commitment to semantic meaning relies on a semantic meaning too austere to do the work that needs to be done.<sup>26</sup> That flawed reliance renders the originalist theory mistaken. Indeed, both sides claim that increased sophistication with respect to linguistic meaning will win the debate. Both sides are wrong. Philosophical sophistication about meaning will not win the originalism debate. This article explains why.

In the classical debate, both sides only tacitly assume or defend a

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21. See, e.g., Soames, *Deferentialism*, *supra* note 2; Solum, *Semantic Originalism*, *supra* note 2; MARMOR, LANGUAGE, *supra* note 2.

22. Even Larry Solum dubs his theory “semantic originalism,” but his argument makes his reliance on pragmatics express. See Solum, *Semantic Originalism*, *supra* note 2, at 31–38 (introducing Grice's theory). See also Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453 (2013) [hereinafter Solum, *Constitutional Construction*] (emphasizing the important role of constitutional construction for those constitutional provisions that do not admit of interpretation).

23. See Solum, *Semantic Originalism*, *supra* note 2, at 31–38.

24. See generally Solum, *Communicative Content*, *supra* note 2, at 480–82; Solum, *Semantic Originalism*, *supra* note 2, at 31–38 (rebutting Dworkin's criticism of originalism).

25. Such a theory naturally recognizes the non-semantic sources of meaning for the constitutional text. See generally Solum, *Semantic Originalism*, *supra* note 2, at 31–33 (exploring the contribution of pragmatics to linguistic content); Solum, *Communicative Content*, *supra* note 2, at 480–82 (articulating a fundamental distinction between the semantic content of a text and its authoritative communicative content as a matter of law).

26. Soames, *Deferentialism*, *supra* note 2, at 599–600 (arguing that the semantic meaning of a statement must be distinguished from what the statement asserts).



variety of conceptual foundations.<sup>27</sup> In particular, originalism and most of its critics assume that constitutional decision begins with constitutional interpretation and that meaning is the object of the interpretative project.<sup>28</sup> But the concepts of interpretation and the nature of constitutional meaning are controversial concepts.<sup>29</sup> The protagonists in the debate generally have historically treated those foundations as a matter of common sense. When challenged, neither the classical originalists<sup>30</sup> nor their critics<sup>31</sup> have historically offered a robust or sophisticated defense of those tacit premises. There have also been important recent efforts to ground the originalist and critical positions firmly on sophisticated analyses of semantic meaning and pragmatic use.<sup>32</sup> Those efforts are flawed, however, and do not

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27. For example, originalism and most of its critics assume the tacit premise that constitutional decision begins with constitutional interpretation. As a result of that assumption, the performative element of the Constitution—the role of constitutional propositions in *doing* something—is largely overlooked and the complexity of constitutional language both as to meaning and use is underestimated. Among the critics of originalism, even Dworkin, who makes so much of his philosophical sophistication, assumes that constitutional decision is a matter of constitutional interpretation. See, e.g., Ronald Dworkin, *Comment, in* ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 115, 117 (Amy Gutmann ed., 1997) [hereinafter Dworkin, *Interpretation*] (defining interpretation very broadly for this purpose). In doing so, questions of constitutional decision are reduced largely to questions of interpretation. That leads to the natural error of inferring that we need an interpretation of a constitutional provision the application of which will determine the decision of the case in the court's opinion. See *infra* Part III.

28. See generally SCALIA, *INTERPRETATION*, *supra* note 19 (titling his Tanner Lectures at Princeton *A Matter of Interpretation*, at once capturing the claim that constitutional decision is a matter of interpretation and the subtler claim that the opponents of originalism's theory of interpretation hold erroneous opinions).

29. See, e.g., Fallon, *Meaning*, *supra* note 2 (exploring the complexity of constitutional meaning in the context of an argument against originalism and emphasizing the limits of philosophical argument in constitutional theory); Michael Moore, *Interpreting Interpretation, in* LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY 1 (Andrei Marmor ed., 1995) [hereinafter Moore, *Interpretation*] (describing the increased emphasis on broad concepts of interpretation in constitutional theory but rejecting that focus as mistaken); Michael Moore, *The Interpretive Turn in Modern Theory: A Turn for the Worse?*, 41 STAN. L. REV. 871 (1989) [hereinafter Moore, *Interpretive Turn*] (criticizing the interpretive turn from a natural law stance).

30. The originalists, of course, often purport to offer a theory or account of constitutional interpretation and decision without theoretical or philosophical commitments, and so may not remark the absence of such a defense. See SCALIA, *INTERPRETATION*, *supra* note 19, at 45; BORK, *TEMPTING*, *supra* note 18, at 253–55.

31. When originalists reject their critics' claim that original understandings are sufficient to interpret the Constitution, the pervasive commitments to positivism and the priority of interpretation shape the critics' response. See, e.g., RONALD M. DWORKIN, *LAW'S EMPIRE* 359–69 (1986) [hereinafter DWORKIN, *EMPIRE*] (employing an idiosyncratic concept of interpretation to criticize originalist theory).

32. See, e.g., Soames, *Deferentialism*, *supra* note 2 (arguing for a limited form of originalism and for a broader concept of linguistic content that goes beyond the austere seman-

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do a much better job of grounding the debate than the tacit commonsensical foundations generally employed. I explore these two jurisprudential foundations of originalism and its critics, articulating the positions underlying originalism's purportedly commonsense approach and the positions of its critics,<sup>33</sup> as well as the purportedly more philosophically sophisticated approaches that have been brought into the debate.<sup>34</sup>

Next, I tease out how these tacit premises inform the classical debate. The fundamental difference between my account and that offered by New Originalism is that my account does not accept the debate's premise that there are important differences between the originalists and their critics that can be resolved by argument in favor of one side or the other. If the debate is not treated as part of a healthy constitutional ideopolis,<sup>35</sup> the role of the new arguments must also be characterized differently. On my account the new arguments are sterile, scholastic contributions to a confused and pathological debate.

Originalism and most of its critics assume that constitutional understanding and decision must begin with determining the meaning of the relevant constitutional text.<sup>36</sup> Some of originalism's defenders—including Larry Solum and Jack Balkin—claim that articulating the nature of the meaning of a constitutional text can provide a stronger originalist theory.<sup>37</sup> Some of originalism's critics like Ronald

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tic meaning of constitutional texts); Solum, *Semantic Originalism*, *supra* note 2 (defending originalism but supplementing the privileged original understandings provided by constitutional interpretation with a more free-ranging constitutional construction for those constitutional texts that do not admit of interpretation); MARMOR, LANGUAGE, *supra* note 2, at 107–29, 132–55 (making sophisticated linguistic philosophical arguments against originalism).

33. See *infra*, Parts II.A, II.B, and II.C.

34. See *infra* Parts II.D and II.E.

35. See generally LeDuc, Therapy and Promise, *supra* note 9 (arguing for a therapeutic strategy to move beyond the pathological debate without delivering victory to either side); André LeDuc, *Beyond Babel: Achieving the Promise of Our American Constitution*, 64 CLEVELAND ST. L. REV. 185 (2016) [hereinafter LeDuc, *Beyond Babel*] (sketching elements of our constitutional practice in the Court and our constitutional theory in the academy in a post-debate world); Jonathan Lear, *An Interpretation of Transference*, INT'L J. OF PSYCHOANALYSIS, reprinted in OPEN MINDED: WORKING OUT THE LOGIC OF THE SOUL 56, 69–73 (1998) [hereinafter Lear, *Transference*] (describing an ideopolis as an idiosyncratic framework she constructs within the shared culture, an *idiosyncratic polis*).

36. For a critical analysis of the triumph of interpretative theories see Moore, *Interpretative Turn*, *supra* note 29. See also Moore, *Interpretation*, *supra* note 29.

37. See Solum, *Communicative Content*, *supra* note 2; Solum, *Semantic Originalism*, *supra* note 2; JACK BALKIN, LIVING ORIGINALISM 103–04 (2011) [hereinafter BALKIN, LIVING ORIGINALISM].

Dworkin,<sup>38</sup> Scott Soames,<sup>39</sup> and Andrei Marmor<sup>40</sup> think attention to theories of meaning ground powerful rebuttals to originalism.<sup>41</sup> They accept the premise that constitutional adjudication begins with the meaning of the constitutional text.<sup>42</sup> But they argue that the originalist account of meaning and of interpretation is flawed and inadequate.<sup>43</sup> They argue that when we pay attention to sophisticated, philosophical accounts of meaning and interpretation we can rebut the claims originalism makes.<sup>44</sup>

The new linguistic philosophical arguments are only cryptically invoked by Dworkin;<sup>45</sup> he seems to think that such theories demonstrate that there is not a meaning of the Constitution in the sense invoked by the originalists.<sup>46</sup> The new linguistic philosophical arguments get a fuller treatment by Marmor and Soames.<sup>47</sup> Marmor is more critical of originalism. He argues that the nature of language and meaning preclude a purely formal account of meaning like that endorsed by originalism.<sup>48</sup> Instead, interpreting constitutional and other texts requires substantive, normative political and ethical choices as a precondition to interpretation and decision.<sup>49</sup> Soames is less critical of originalism, arguing that the meanings it seeks are often available from the text but that the sources of meaning go beyond

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38. Dworkin, *Interpretation*, *supra* note 27, at 117 n.6.

39. See Soames, *Deferentialism*, *supra* note 2.

40. See generally ANDREI MARMOR, INTERPRETATION AND LEGAL THEORY (rev. 2d ed. 2005) [hereinafter MARMOR, INTERPRETATION] (offering a philosophically sophisticated account of constitutional interpretation—and dismissing originalism as worthy of attention only for its puzzling widespread appeal).

41. Others, like Posner, as a pragmatist, do not begin with interpretation. See generally LeDuc, *Paradoxes of Positivism*, *supra* note 14, at Part II.A (arguing that the legal pragmatist skepticism about the priority and centrality of interpretation is well-placed).

42. Fallon, *Meaning*, *supra* note 2, at 1237 (characterizing it as self-evident that interpretation aims at meaning); Dworkin, *Interpretation*, *supra* note 27, at 117–18, 117 (characterizing such interpretation of the constitutional text as *translation* and asserting that we need “complex and subtle” philosophical argument to understand that process); DWORKIN, EMPIRE, *supra* note 31.

43. Fallon, *Meaning*, *supra* note 2, at 1289–95; Dworkin, *Interpretation*, *supra* note 27.

44. Fallon, *Meaning*, *supra* note 2, at 1241 (asserting that legal scholars seeking to understand constitutional interpretation ignore the work done in the analytic philosophy of language at their peril); Dworkin, *Interpretation*, *supra* note 27.

45. Dworkin, *Interpretation*, *supra* note 27, at 117 n.6.

46. See Soames, *Deferentialism*, *supra* note 2.

47. See MARMOR, LANGUAGE, *supra* note 2; Soames, *Deferentialism*, *supra* note 2.

48. MARMOR, LANGUAGE, *supra* note 2, at 154–55 (arguing that Dworkin’s formal argument against Justice Scalia’s originalism fails).

49. *Id.*

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semantics.<sup>50</sup> Soames's theory is designed to fill the gaps when even those broader sources of meaning are not sufficient to render the linguistic import of the constitutional text determinate.<sup>51</sup>

This article first identifies and assesses certain tacit jurisprudential premises that constitutional arguments are semantic arguments. This premise about the nature of constitutional law underlies the debate over originalism.<sup>52</sup> I have previously argued that both sides of the debate have made tacit commitments to claims about the nature of the meaning of constitutional provisions. More recently, the New Originalists and their critics have made their claims about the nature of the meaning of the constitutional text expressly.<sup>53</sup> This article analyzes these more recent contributions to the debate and gives higher denomination currency to the claims I have made in the earlier articles.<sup>54</sup>

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50. See Soames, *Deferentialism*, *supra* note 2, at 600 (asserting that knowledge of the meaning of the English language is inadequate standing alone to understand the meaning of the Due Process Clause).

51. *Id.* at 601 (explaining that determining the meaning of the Due Process Clause “requires historical research.”).

52. I have separately explored the ontological and philosophy of language premises that ground the debate. See LeDuc, *Ontological Foundations*, *supra* note 6. I previously analyzed the epistemological and ontological foundations of originalism challenged by the anti-foundationalist, anti-representationalist critics like Philip Bobbitt and Dennis Patterson in LeDuc, *Anti-Foundational Challenge*, *supra* note 10. See, e.g., PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* (1982) [hereinafter BOBBITT, FATE] (arguing that six modes of constitutional argument and our practice of constitutional decision comprise our constitutional law); DENNIS PATTERSON, *LAW AND TRUTH* (1996) [hereinafter PATTERSON, TRUTH] (extending Bobbitt's anti-foundational account of constitutional law to law generally and shifting the account of argument away from particular canonical modes of argument). I analyze the political philosophy underlying the claims made by originalism and its critics in André LeDuc, *Political Philosophy and the Fruitless Quest for an Archimedean Stance in the Debate over Originalism*, 85 UMKC L. REV. (forthcoming 2016) (arguing that unmediated political philosophical argument does not play a role in constitutional decisional argument and is unnecessary as a foundation to legitimate constitutional argument but that the structural and doctrinal modes of argument do have elements of political philosophical argument). The philosophical foundations raise particular issues with respect to constitutional law. See generally LeDuc, *Philosophy and Constitutional Interpretation*, *supra* note 6 (arguing that the protagonists in the debate over originalism err with their approach to philosophical argument either by missing their tacit philosophical commitments and the role those commitments play in grounding their constitutional claims or in attributing a fundamental, foundational role to philosophical argument).

53. See, e.g., MARMOR, *LANGUAGE*, *supra* note 2; Soames, *Deferentialism*, *supra* note 2; Solum, *Semantic Originalism*, *supra* note 2; Dworkin, *Interpretation*, *supra* note 27, at 117.

54. See, e.g., LeDuc, *Philosophy and Constitutional Interpretation*, *supra* note 6; LeDuc, *Ontological Foundations*, *supra* note 6, at 279–85. I argued that certain unstated shared premises in the originalism debate comprised a tacit ontology and theories of language and truth and that those premises made the debate possible. That article did not explore in depth

I begin my analysis and argument by outlining the traditional claims and assumptions about constitutional meaning. Second, I articulate an alternative account of the meaning of the constitutional text drawing on the concepts of performatives and other concepts of pragmatics and an inferentialist account of the conceptual content of those texts.<sup>55</sup> That account emphasizes that the constitutional texts do things as well as say things. Because of that, the language of the Constitution cannot be understood simply as a collection of declarative sentences. Third, I introduce and assess the arguments made by the New Originalists and their critics with sophisticated linguistic philosophy to defend their respective positions. The arguments made by the New Originalists overstate the role that linguistic philosophical argument can play. Their accounts continue to offer an incomplete description of the nature of our constitutional linguistic practice, because a more complete account marginalizes the entire debate over originalism.

Fourth and finally, I draw out the implications of my argument with respect to these jurisprudential claims about constitutional meaning. Two principal arguments suggest that the introduction of these sophisticated arguments will not significantly advance the debate. First, the philosophical claims that the meaning of the constitutional text can be captured by the same techniques employed to understand the meaning of declarative or constative statements are controversial. Constitutional texts are performative; they do things as well as say things. Even if the meaning of such constitutional texts could be determined in the same manner as declarative statements, however, the resulting account of the constitutional text's meaning yields an inadequate account of our constitutional language and practice. The New Originalists and their critics overlook key features that

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the concepts of meaning and the role that they play in the debate in the hands of the protagonists.

55. The notion of performative utterances or text is that certain statements have a particularly important role in doing something, in addition to ordinary roles in saying or asserting something. Such utterances or texts are not so much true or false as felicitous or infelicitous, insofar as they accomplish the task that they are meant to perform. The concept derives from Oxford ordinary language philosophy. See *generally* PAUL GRICE, *STUDIES IN THE WAY OF WORDS* (1989) [hereinafter GRICE, *STUDIES*] (offering a catalog of normative rules of conversational practice that highlight the place of conversational implicature, the non-semantic meaning of utterances derived from their context in ongoing conversational exchanges); J. L. AUSTIN, *HOW TO DO THINGS WITH WORDS* (1962) [hereinafter AUSTIN, *WORDS*] (introducing the concept of performative utterances, and the concept of the perlocutionary force of an utterance—the effect, whether belief or act, induced in the listener by the utterance).

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inform our constitutional linguistic meaning and use. For example, the New Originalists do not have an adequate account of footnote four of *United States v. Carolene Products Co.*<sup>56</sup> The recognition of the vulnerabilities inherent in the democratic process is not a semantic or linguistic understanding. Second, the role accorded philosophical argument, often only tacitly, in these new strategies in the debate is mistaken as a matter of metaphilosophy. Philosophy and philosophical argument cannot play the role as arbiter of constitutional claims or determinant of constitutional decision. That is because the only arguments that are authoritative in our constitutional decisional practice are those within the canonical modes of our constitutional decisional discourse; unmediated philosophical arguments do not satisfy that requirement. Moreover, the therapeutic nature of philosophical argument precludes it from playing a constructive, foundational role in our constitutional theory.

## II. IMPLICIT AND EXPLICIT SEMANTIC PREMISES IN THE ORIGINALISM DEBATE

Originalism is a semantic theory of constitutional law.<sup>57</sup> It claims that constitutional questions are properly to be resolved by looking to the meaning of the constitutional words or texts;<sup>58</sup> moreover, the relevant meaning is the meaning at the time the provisions were originally incorporated in the Constitution.<sup>59</sup> Originalists are not commit-

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56. 304 U.S. 144, 152 n.4 (1938) (articulating an account of the role of the Court in protecting “discrete and insular minorities”).

57. See SCALIA, INTERPRETATION, *supra* note 19, at 45–46 (describing semantic disagreements about the requirements of the Confrontation Clause and the Eighth Amendment prohibition on cruel and unusual punishments). In characterizing originalism as a semantic theory, I am using a term introduced by Dworkin, but I am not endorsing the claim about theories of law he made. See DWORKIN, EMPIRE, *supra* note 31, at 36–46. Dworkin conflated the claim that legal arguments are made *by reference to* semantic or linguistic meaning with the claim that such disputes are *about* such meanings.

58. See DWORKIN, EMPIRE, *supra* note 31, at 36–46. Because of the account of meaning on which much of the debate rests, the distinction between the meaning of words and the meaning of the larger text is not important. Most of the protagonists in the debate believe that the meaning of the text is a matter of the meaning of the words therein. See *District of Columbia v. Heller*, 554 U.S. 570, 651 n.14 (2008). (Stevens, J., dissenting) (characterizing Justice Scalia’s approach to the meaning of the Second Amendment for the Court: “The Court’s atomistic, word-by-word approach to construing the Amendment calls to mind the parable of the six blind men and the elephant, famously set in verse by John Godfrey Saxe.”).

59. I am here focusing upon originalism’s normative account of what proper constitutional controversies should be. It acknowledges that our constitutional law has departed from such practices. Theories of constitutional interpretation like that defended, for example, by Akhil Amar, which argue that the meaning of key constitutional provisions (like the Bill of

ted to the proposition that disputes are *about* the meaning of the texts; they understand that what is at stake in constitutional disputes is far more than a matter of semantics.<sup>60</sup> That is one of the reasons why originalism so comfortably resorts to dictionaries as authoritative sources of law.<sup>61</sup> One important consequence of this premise is that originalism is an anti-consequentialist theory.<sup>62</sup> The answer to a constitutional question or the resolution of a constitutional dispute does not depend upon the consequences that follow from the result. A second, even more important consequence of the semantic nature of originalism is that it fundamentally disassociates the arguments for constitutional answers from the consequences of those answers.

A semantic theory of adjudication asserts that appellate adjudication, after the facts of the case have been determined, is principally a semantic or linguistic activity.<sup>63</sup> That is, a theory that asserts that the

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Rights) evolved and changed, with the result that the requirements of the Bill of Rights with respect to the States is different from the requirements that arose under the original meaning of those amendments as originally adopted, pose a subtle challenge to originalism, but are not necessarily inconsistent with an originalist theory. *See generally* AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998) [hereinafter AMAR, *BILL OF RIGHTS*] (emphasizing the evolution of the understanding of the Bill of Rights when it was incorporated by the Fourteenth Amendment in Reconstruction).

60. That recognition is the foundation for the originalists' confidence that the claims that they make for originalism are important. In the case of Randy Barnett, originalism is the method by which to recover The Lost Constitution. *See generally* RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2004) [hereinafter BARNETT, *LOST*] (defending a radical and unorthodox originalism not on traditional (if questionable) social contract arguments but on the basis of an argument that a libertarian natural law underlies the Constitution).

61. *See* ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 415–24 (2012) [hereinafter SCALIA & GARNER, *READING LAW*] (discussing how to use dictionaries in judicial decision, acknowledging that it is not simply a matter of looking up the definitions of the words used); RALPH A. ROSSUM, ANTONIN SCALIA'S JURISPRUDENCE: TEXT AND TRADITION 209–12 (2006) (listing the decisions in which Justice Scalia had cited dictionaries for the meanings of terms of constitutional provisions).

62. *See generally* LeDuc, *Paradoxes of Positivism*, *supra* note 14, at Part II.A.

63. *See, e.g.*, Soames, *Deferentialism*, *supra* note 2, at 604 (“Legal content is determined in essentially the same way that the asserted or stipulated contents of ordinary texts are . . .”); SCALIA, *INTERPRETATION*, *supra* note 19, at 37–38, 37 (characterizing his method of originalist interpretation as ignoring intent but giving the words of the Constitution “an expansive rather than narrow interpretation.”).

Judgment need not be entirely semantic or even linguistic, of course; it may include, even in the arcane constitutional context, expressing ethical or other normative reactions, for example. One might have moral outrage at the police pumping the stomach of the suspect in *Rochin* or empathy with the plight of the interned Japanese Americans in *Korematsu*, for example, and those reactions might be incorporated as proper elements to be taken into account by a judge according to a theory of constitutional decision.

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activity of judging is an activity of determining the meaning of words or sentences.<sup>64</sup> Once that meaning has been determined, the outcome of constitutional and other legal disagreements may be resolved. Originalism is a semantic theory at its core and sometimes exclusively so.<sup>65</sup> Exclusive originalism looks only to the original meanings of constitutional provisions and asserts that constitutional disputes are to be resolved by reference to the original understandings or intentions with respect to the meaning of the relevant constitutional provisions.<sup>66</sup> Non-exclusive originalism admits of other sources of law and, therefore, to the extent it admits of certain kinds of sources, may not be wholly semantic.<sup>67</sup>

Thus, originalism has to account, first, for the meaning of the

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64. Such a baldly stated description is both trivially true and misleadingly reductive. Judges' final decisions and principal orders are written; in general they interpret written law. (Of course, at the trial court level many judicial rulings are oral—although typically captured by a written trial record). As a matter of law they are ascertaining the semantic meaning of authorities. So the description is surely true, at least as a partial description of adjudication. It is equally clear that such a reductive description of adjudication misses important non-semantic activity. The judge studying the demeanor of a witness to determine her credibility is not engaged in working directly with words, although the witness's demeanor is relevant with respect to her verbal testimony. The judge weighing the moral depravity of a criminal or the heinousness of a crime in sentencing is also not engaged primarily in working with words. Neither of these qualifications goes to the core of the claim made.

65. See André LeDuc, *Evolving Originalism: What Is Privileged?*, § II.A (5) (Jan. 12, 2013) (unpublished manuscript) (on file with author) [hereinafter LeDuc, *What Is Privileged?*] (classifying various forms of originalism based upon the nature of the historical elements that each privileges). Weak originalism privileges the original understandings or intentions but also recognizes non-originalist legal authorities—generally non-originalist precedent. Thus, weak originalism might initially appear to offer a role for a non-semantic account by looking to those precedents, not as a matter of the linguistic meaning of the relevant constitutional text but as authoritative statements of relevant constitutional law. In fact, the interpretation of those authorities is best understood as an exception to such weak originalist theory. See SCALIA, *INTERPRETATION*, *supra* note 19, at 139–40.

66. Of course, for the originalist, our history of constitutional adjudication is replete with examples of improper disputes and arguments that failed to look to the original understanding, and looked instead to exogenous moral theory or prudential concerns. See BORK, *TEMPTING*, *supra* note 18, at 95–100 (analyzing *Griswold v. Connecticut* as likely correctly decided but on the basis of an opinion articulating an erroneous rationale) and 151–53 (analyzing the opinion in *Shelley v. Kraemer* striking down a racially discriminatory restriction on private property as articulating an unprincipled theory).

67. Thus, for example, to the extent that prudential considerations are taken into account, such a theory would not be reducible to semantics. Disputes would appear to turn on what is prudent, or whether prudential concerns should be decisive, not on what the meaning of certain prudential statements is. Such disputes are, on the originalist account, disputes about the world. Such weaker versions of originalism would not appear subject to challenge as semantic theories only with respect to their account of the originalist authority. This non-exclusive originalism would appear to continue to argue that the proper approach to the interpretation of the constitutional text is generally semantic (or at least that the semantic analysis of the original understanding has a priority in that interpretive process).



constitutional text and then, second, for how those meanings figure in constitutional decision. More precisely: constitutional appellate adjudication is the decision of a constitutional case by determining which of competing arguments or proposed inferences with respect to the meanings of potentially applicable legal propositions or semantic legal authorities (or both) is correct.

In originalism, the nature of that decision process is not generally explored carefully because it is treated as a straightforward, formal process.<sup>68</sup> For example, in deciding *District of Columbia v. Heller*,<sup>69</sup> the majority took the question to be whether the District of Columbia handgun ordinance before the Court violated the Second Amendment's protection of the right to carry and bear arms.<sup>70</sup> Answering that question turned on a determination of the meaning of the Second Amendment. While the historical argument was extensive and controversial,<sup>71</sup> Justice Scalia betrayed no doubts about what he was after or the role such meaning played in constitutional decision.<sup>72</sup> Once the original understanding of the text was established, however strong the historical arguments for alternative, narrower readings, that historical understanding ought to be applied in deciding contemporary constitutional case claims. I have explored the implicit conflict between originalism's semantic theory and consequentialist accounts of judicial constitutional decision in a companion piece.<sup>73</sup> Here my focus is on the role of the semantic claims themselves in the debate.

### *A. Semantic Originalism's Claims about Meaning*

Originalism tacitly adopts a commonsense notion of the meaning of the language of the Second Amendment without much analysis. In *Heller*, Justice Scalia explored the meaning of the Second Amendment text relying exclusively upon the rules of grammar, syntax, dic-

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68. SCALIA, INTERPRETATION, *supra* note 19, at 46 ("The originalist, if he does not have all the answers, has many of them.").

69. 554 U.S. 570 (2008).

70. *See id.* at 573.

71. *Id.* at 639–53 (Stevens, J., dissenting). *See generally* Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989) [hereinafter Levinson, *Second Amendment*] (arguing that the contemporary widespread academic hostility to the Second Amendment is unjustified).

72. *Heller*, 554 U.S. at 576 ("We turn first to the meaning of the Second Amendment.").

73. *See* LeDuc, *Paradoxes of Positivism*, *supra* note 14.

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tionaries, and examples of common usage.<sup>74</sup> Philosophical questions about the nature of meaning or interpretation did not waylay him, nor did any more prosaic questions about his account of constitutional meaning.<sup>75</sup> Originalism is nevertheless committed to an account of the meaning of the constitutional text and the place of that meaning in constitutional adjudication.<sup>76</sup> There are philosophical dimensions to those commitments and more purely jurisprudential dimensions related to the nature of constitutional law and adjudication. In particular, classical originalism and New Originalism both incorporate, tacitly or expressly, important stances with respect to the nature of the meaning of constitutional texts. These positions are the focus here.

Originalism generally seeks to determine the meaning of constitutional provisions. To do so, the typical method is to offer an interpretation of those provisions.<sup>77</sup> In so doing, it puts into service our ordinary and our not-so-ordinary notions of meaning. Generally, within the debate, particularly on the originalist side, while the meaning of any particular constitutional provision may be acknowledged to be controversial, the nature of meaning is largely tacitly assumed to be familiar and straightforward. By contrast, in philosophy, the concept of meaning—even when confined to its linguistic sense—is not regarded as simple, straightforward, or uncontroversial.<sup>78</sup>

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74. 554 U.S. at 573–628.

75. *Id.* Thus, for example, Justice Scalia assumed without discussion that the first clause of the Second Amendment was simply prefatory and that, as a prefatory clause, had no independent legal import. 554 U.S. at 576–78.

76. See LeDuc, *Ontological Foundations*, *supra* note 6, at 279–85.

77. See Fallon, *Meaning*, *supra* note 2, at 1237 (“Almost self-evidently, meaning is the object, or at least one of the objects, that statutory and constitutional interpretation seek to discover.” (footnote omitted)). Originalists typically reject the notion that such a task is assimilated to translation, although they may accord a significant role to construction. See Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993). For the rejection of notions of translation, see Steven G. Calabresi, *The Tradition of the Written Constitution: A Comment on Professor Lessig’s Theory of Translation*, 65 FORDHAM L. REV. 1435, 1436–37 (1997) (rejecting Lessig’s characterization of the process of understanding constitutional texts as a matter of translation because it cannot explain six important features of our constitutional practice and arguing that Lessig’s theory commits him to endorsing the Court’s decision in *Dred Scott*). For a leading originalist account of the role of construction, see KEITH WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING (1999) [hereinafter WHITTINGTON, CONSTITUTIONAL CONSTRUCTION] (supplementing an originalist account of constitutional interpretation with an account of constitutional construction to enable political choices to complete the indeterminate provisions of the Constitution).

78. Originalists sometimes suggest otherwise. For example, in their emphasis upon dictionary meanings and their repeated claim to distinguish facts from values, originalists make important but unstated commitments to a theory of meaning. The originalist commitments to

Even before we approach the text of the Constitution and the concept of the linguistic meaning of its text, we encounter meanings at many levels and in many contexts. We seek meaning in our lives, and some of us are fortunate to find it in our faiths, in our families, in our friends and communities, and in our work.<sup>79</sup> Words have meanings, signs have meanings, gestures have meanings, and works of art have meanings. Important arguments have been made that talk about meaning is fundamentally different than our talk about explanation, scientific and otherwise.<sup>80</sup> Those arguments emphasize the narrative, normative, and contextualizing nature of accounts of meaning in distinction to scientific explanation that offers predictive accounts of experiments and experience. Constitutional theories, of course, are also predictive as well as narrative in their account of constitutional doctrine and decision.

Fortunately, given the manifest complexity of these disparate notions of meaning, with respect to the debate over originalism and constitutional theory more generally, many of those senses of meaning are not relevant; what matters for our purpose here is the meaning and the use of the language of the Constitution.<sup>81</sup> Accounting for linguistic meaning and use remains philosophically controversial.<sup>82</sup>

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an implicit account of meaning warrant examination. Even in the very precise field of modern analytic philosophy, Gil Harman has argued that accounts of meaning have conflated three separate notions of meaning, with attendant confusion. *See* Gilbert Harman, *Three Levels of Meanings*, in REASONING, MEANING AND MIND 155 (1999) (distinguishing the way that thoughts have meaning, communication has meaning, and shared social practices constitute frameworks within which acts and sayings have meaning). Indeed, modern analytic philosophy has been marked by careful attention to the linguistic dimension of philosophical problems and methods. *See generally* Richard Rorty, *Introduction*, in THE LINGUISTIC TURN: RECENT ESSAYS IN PHILOSOPHICAL METHOD 1–37 (Richard Rorty ed., 1967) (exploring the dramatic shift to the analysis of language in 20<sup>th</sup> century Anglophone philosophy but contextualizing that project within the traditional philosophical project); SCOTT SOAMES, THE PHILOSOPHY OF LANGUAGE 32–49 (2012) [hereinafter SOAMES, PHILOSOPHY OF LANGUAGE] (exploring the complexities and failures in the fundamental efforts to explain meaning by reference to truth conditions).

79. *See generally* VIKTOR FRANKL, MAN'S SEARCH FOR MEANING (1946) (analysis of the sources of existential meaning in the contemporary experience of human life).

80. *See* Daniel Dennett, *The Evolution of "Why?"*, in READING BRANDOM: ON MAKING IT EXPLICIT 48 (Bernhard Weiss & Jeremy Wanderer eds., 2010) (quoting Sellars).

81. Jack Balkin has cataloged some of these varying senses of meaning as well. *See* BALKIN, LIVING ORIGINALISM, *supra* note 37, at 12–13 (cataloguing five types of meaning, only one of them linguistic).

82. *See generally* SCOTT SOAMES, WHAT IS MEANING? (2010) [hereinafter SOAMES, MEANING] (arguing that our theories of meaning have not yet accounted for important features of quantification and that this failure casts doubt upon current theories and the role of propositions in particular); 2 SCOTT SOAMES, PHILOSOPHICAL ANALYSIS IN THE TWENTIETH CENTURY (2003) [hereinafter SOAMES, PHILOSOPHICAL ANALYSIS]. For example, in the sec-

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How linguistic expressions have meaning, as well as the level of language at which meaning arises—words, phrases, sentences, and languages—remains controversial and unsettled. Even within the analytic tradition truth conditions, verification conditions, uses, mental ideas, stimuli, referents, and causal chains have all been thought, among others, to be helpful in defining or supplementing meaning and accounts of meaning.<sup>83</sup>

Philosophers draw a number of distinctions in speaking of linguistic meaning, some of which have entered into the formulation of originalism and the debate with respect thereto.<sup>84</sup> Yet as we think of drawing on that philosophical work, the continuing philosophical controversies over the nature of meaning must be acknowledged and taken into account.<sup>85</sup>

In the debate over originalism, literal meaning and contextual meaning are frequently distinguished.<sup>86</sup> The distinction is also drawn between the meaning intended and the meaning generally understood.<sup>87</sup> When we speak of meaning in this context, which do we intend? Moreover, we often, but not always, also distinguish between the meaning of a word and its use.<sup>88</sup> We must also distinguish the

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ond volume of this work, Soames discusses the introduction of the theory of rigid designators and the controversy that has surrounded it. He has explored some of these issues more fully in SCOTT SOAMES, *BEYOND RIGIDITY: THE UNFINISHED SEMANTIC AGENDA OF "NAMING AND NECESSITY"* (2002).

83. See SOAMES, *PHILOSOPHICAL ANALYSIS*, *supra* note 82; W. V. O. QUINE, *WORD AND OBJECT* (1960).

84. Richard Fallon offers one of the more subtle and sophisticated approaches to the role of philosophical distinctions and claims in constitutional theory. See *generally* Fallon, *Meaning*, *supra* note 2.

85. See *generally* SOAMES, *MEANING*, *supra* note 82, at 1 (exploring current philosophical questions with respect to meaning and endorsing the claim that “for each meaningful expression there are correct answers to the question ‘What does it mean?’”); Michael Dummett, *What Is a Theory of Meaning?*, in *TRUTH AND MEANING: ESSAYS IN SEMANTICS* 67 (Gareth Evans & John McDowell eds., 1976).

86. See SCALIA, *INTERPRETATION*, *supra* note 19, at 37–38 (contrasting his theory providing for a reasonable construction with strict construction).

87. See *id.* at 38 (endorsing the publicly understood meaning as legally controlling).

88. See RONALD M. DWORKIN, *THE PHILOSOPHY OF LAW* 5 (1977) [hereinafter DWORKIN, *PHILOSOPHY OF LAW*] (“Lawyers find difficulty, however, in setting out in any general way what [propositions of law] mean, or, what amounts to the same thing, the conditions under which they are true or false.”). See also ROBERT BRANDOM, *ARTICULATING REASONS: AN INTRODUCTION TO INFERENTIALISM* 69–72 (2000) [hereinafter BRANDOM, *ARTICULATING REASONS*] (defending an alternative to the dominant truth conditional theory of meaning based upon the inferences that support a proposition and the inferences that may be drawn from it, and criticizing theories of meaning as use or based upon truth conditions on the basis that certain words with seemingly identical denotations are freighted with different commitments. The terms “nigger” and “negro” are two of the most obvious and offensive examples,

meaning of what is actually written or said from what is implied by what is actually written or said, and we must then ask whether any of these approaches to public understanding of meanings include only what is actually written or also includes what is implied. We will see that this is a question that has not generally been acknowledged by the classical originalists, but is central to the New Originalist project. Finally, when we include in a potential theory of original meaning the performative meaning of a constitutional provision in context the possibilities of what we mean become more numerous.

At least three<sup>89</sup> potential types of meanings may be distinguished in classifying originalisms:

1. What the relevant terms of a constitutional provision literally mean;<sup>90</sup>
2. What the relevant sentences of a constitutional provision mean, including both what they mean literally together with what they are understood to mean as a matter of presupposition, entailment, implication and related concepts;<sup>91</sup> and
3. What the particular performative sentences mean in context, taking into account what the sentences of the Constitution were understood—and meant—to do.<sup>92</sup>

These three types of public meaning approach features of meaning in particular ways.<sup>93</sup> The first begins with words and seeks to

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the former being so freighted with racist commitments that its use is no longer acceptable and it serves only as an inflammatory provocation when written or uttered today.)

89. The literature is replete with other and more detailed classification schemes. See, e.g., Fallon, *Meaning*, *supra* note 2, at 1245–51 (distinguishing six types of meaning, including, in addition to those described above, real conceptual meaning, reasonable meaning, and interpreted meaning); Solum, *Semantic Originalism*, *supra* note 2, at 34–41 (distinguishing speaker’s meaning, sentence meaning, Framer’s meaning, and clause meaning).

90. Most participants in the originalism debate refer to literal meaning. By that, they mean to capture the meaning of a word that would be found in a dictionary, for example, and to exclude understandings that arise from the context in which a word is used. I think the literal meaning referenced in the originalism debate largely corresponds to the concept of austere semantic meaning employed in contemporary analytic philosophy of language.

91. For a philosophical account of these concepts, see generally GRICE, *STUDIES*, *supra* note 55.

92. See generally AUSTIN, *WORDS*, *supra* note 55 (describing and analyzing the concept of a performative utterance). When we speak here of what the Constitution was meant and understood to do, it is the non-linguistic acts and outcomes that are referenced. In the Constitution’s case, that is outcomes like the creation of a new Republic with an elected chief executive and a bicameral legislature. Note that this formulation encompasses purposive and non-purposive theories; what the Constitution does is not necessarily a purposive concept. As a practical matter the purposive and non-purposive theories will usually be congruent because the Constitution will generally do what it was meant to do.

93. Other types of meaning may also be identified, too. For example, what the drafters

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construct the meaning of a provision from the semantic meaning of its words and rules of English syntax. We'll refer to it as a semantic account of meaning.<sup>94</sup> Dictionaries would appear to properly play an important role in such an approach. Rules of grammar would seemingly also be important as we move from the meanings of words to construct the meanings of more extended linguistic sequences, although grammar has generally taken a back seat to dictionaries for originalists in this process.<sup>95</sup> When looking only to semantic meaning, it is important to note just how austere it is, because it is so natural to take into account presuppositions and implications of statements in our ordinary use of language.<sup>96</sup>

The second approach looks to the meaning of the sentences as entireties and recognizes that dictionary and semantic meanings are not sufficient to capture the entire linguistic content of constitutional texts.<sup>97</sup> Such an approach acknowledges, first, that the words of the Constitution are all incorporated into sentences, and, second, that those sentences appear in contexts that inform the entailments, implications, and presuppositions of those sentences—all of which are relevant in determining the linguistic meaning of the sentences. We'll refer to this as a linguistic account of meaning.

Examples of such presuppositions and implications are common in ordinary usage.<sup>98</sup> Soames gives the example of the utterance, "I have two." Spoken in response to the question, "Do you have any

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were thinking (what they meant) when they chose the language in question, and what the speakers or drafters intended their audience to understand.

94. This account is also often referred to as a theory of literal meaning.

95. One exception has been the recent decisions with respect to the scope of the Second Amendment, where the syntactical analysis of that provision has been very important in its recent interpretation and application. See *District of Columbia v. Heller*, 554 U.S. 570, 600–04 (2008) (relying on the characterization of the first clause of the Second Amendment as "prefatory" to deny it limiting or other substantive effect). The predominance of dictionaries over grammar is perhaps attributable to the relative simplicity of the syntax of the Constitution and to the implicit simplistic account of linguistic meaning underlying the originalism debate.

96. See generally GRICE, *STUDIES*, *supra* note 55 (expressly articulating the informal rules of conversation that make conversation more efficient and allow utterances in the context of ongoing exchanges to carry far more meaning than mere semantics can explain). When Soames emphasizes the inadequacy of the austere semantic meaning of a text he is seeking to make the tacit assumptions we employ in our everyday language express. See SOAMES, *Legal Texts*, *supra* note 2.

97. For an extended, classic discussion of such a holistic approach to sentence meaning, see QUINE, *supra* note 83.

98. See generally SOAMES, *Legal Texts*, *supra* note 2 (arguing that legal language does not present a materially different case of language usage than do other types of texts but that semantic meaning is inadequate to account for the linguistic content of all such texts).

children?” it is understood to mean that I have exactly two children. Spoken in response to the question from a friend who has stopped by my home, “Do you have any beers in the refrigerator?” it would more likely be understood to mean that I have at least two beers in the refrigerator. In the context, the answer assures that my friend and I can each have (at least) one beer. The difference in context changes the linguistic (but not the semantic) meaning of the statement.

More recently, Scott Soames has expressly addressed the nature of legal texts generally, in comparison to other texts. He argues that legal texts are not very different from other texts.<sup>99</sup> But he criticizes the prevalent jurisprudential thinking about meaning because its focus is often confined exclusively to the semantic meaning of provisions.<sup>100</sup> An alternative approach to legal texts would be to consider what Soames refers to as the entire linguistic content of those texts—and then to go on to incorporate historical legal content, too.<sup>101</sup> The entire linguistic content of a text encompasses not only the semantic meaning of that text but also its pragmatics. According to Soames, this prevailing narrow focus creates illusory puzzles where provisions are semantically hard to interpret but not genuinely hard to interpret as a legal matter.<sup>102</sup>

One implication of this claim, Soames argues, is that many of the classical arguments over interpretive challenges are overblown.<sup>103</sup> As a result, his account of constitutional meaning neglects these important sources of guidance and potential controversy. Soames’s analysis tells us that if we take into account the full range of linguistic meaning then the apparent uncertainties of utterances are sharply reduced.<sup>104</sup> Soames therefore concludes that the need for further interpretive tools, like those advocated by Dworkin, is reduced.<sup>105</sup>

The third type of meaning begins with all of the components of meaning identified by the linguistic account of meaning and places the sentences themselves in context, acknowledging that the provi-

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99. *Id.* at 422–23.

100. *Id.* at 403–04 (emphasizing that semantic meaning is more austere than is often recognized in jurisprudence and that other sources are necessary to account for the linguistic content of texts).

101. Soames, *Deferentialism*, *supra* note 2, at 600–02 (describing the historical understanding of the Due Process Clause).

102. SOAMES, *Legal Texts*, *supra* note 2, at 422–23.

103. *Id.* at 422–23.

104. *See* SOAMES, *Legal Texts*, *supra* note 2, at 415–22.

105. *Id.* at 422–23.

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sions of the Constitution not only say things, but do things as well. The Constitution was to create a single central government with far greater powers than had been provided under the Articles of Confederation. It was to create a bicameral legislature balancing the interests of the larger and smaller states with a complex representational formula to balance the interests of the slave and free states. It also sought to redefine the entire relationship between the States and the federal government, and between the people and their government. This third approach asks what the provision of the Constitution was to do.<sup>106</sup> We'll refer to this as a performative account of meaning. This approach builds on certain work that has been done in contemporary analytic philosophy of language.<sup>107</sup>

For example, as Grice points out, utterances of the type "There is a garage around the corner," when spoken in response to another's statement "My car is almost out of gas," conveys the meaning not only that there is a garage around the corner but that such garage sells gasoline and that the other speaker may be able to fill up his gas tank there.<sup>108</sup> Indeed, that is the meaning that was intended. Think of "Fire!" shouted in a crowded theatre. The semantic content of this utterance is not unambiguous. It may mean "there is combustion occurring here and now." Or it may mean, when directed to a squad of soldiers with raised rifles facing a blindfolded and bound prisoner, "discharge your weapons on this command." Neither in the crowded theatre nor at the execution grounds outside a prison are the outcome expectations, indeed, the intended or planned outcome, ambiguous. In the theatre, patrons understand immediately that they face a very serious physical threat, and should immediately proceed to the exits and leave the theatre. They understand that because of the context; without the context of a firing squad receiving orders from a commanding officer, there is no potential *pragmatic* ambiguity. The implication of the utterance "Fire!" in the context of a crowded theatre—and the associated linguistic content, in Soames's terms—is that there is a dangerous fire in the theatre. A further practical implication of that is that the other patrons are in danger and should exit the the-

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106. Although this is conventionally termed the outcome that the provision was intended, expected, or understood to have, it is more accurate to capture the functionality of the provision by focusing upon the intentions, expectations, and understandings as to what the provision would do. The provision acts as a cause itself, or as a reason for agents to cause things to happen in the world and for the community to think certain things about those results.

107. See, e.g., AUSTIN, WORDS, *supra* note 55; GRICE, STUDIES, *supra* note 55.

108. GRICE, STUDIES, *supra* note 55, at 32.



atre in an expeditious but orderly manner. In the face of such an utterance, we expect the theatre to be evacuated pell-mell, with some risk of injuries to such patrons from trampling. At the execution grounds the understanding of the meaning and import of the command is equally clear, and we expect the squad to discharge their rifles on the command, with some implicit potential mitigation of each member's responsibility for the death of the executed prisoner.

In the constitutional context, the pragmatics of the text is more complex and less straightforward than the pragmatics of simpler texts often analyzed. That is because the kinds of information about the speaker, the audience, and the context are missing or washed out for constitutional texts.<sup>109</sup>

Semantic originalists focus solely upon the semantic intentions and expectations of the relevant actors.<sup>110</sup> Semantic here refers to the meanings of the linguistic expressions, words, phrases, and sentences.<sup>111</sup> That is, semantic originalists focus upon the linguistic meanings associated with the utterances or texts, as distinguished from the performative role such texts or utterances may have, or the expectations that the speakers and listeners may have with respect to what such texts and utterances would achieve. What did the speakers, draftsmen, ratifiers, and their audiences intend and expect solely as a semantic matter with respect to their constitutional utterances?

A semantic intention is an intention formed with respect to the meaning of words or sentences; more precisely, it is an intention of a speaker with respect to how a listener—or a writer with respect to a

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109. See Solum, *Communicative Content*, *supra* note 2, at 496–97. That contextual information is washed out with the loss of historical information with the passage of time or, with respect to the nature of the text's audience, with the arrival of new audiences with the passage of time.

110. Dworkin first articulated this concept most clearly in the debate. See Dworkin, *Interpretation*, *supra* note 27, at 116–18; see also SCALIA, *INTERPRETATION*, *supra* note 19, at 141. More recently Larry Solum has offered a complex and comprehensive articulation and defense of semantic originalism. See Solum, *Semantic Originalism*, *supra* note 2, at 40–54 (exploring the questions relating to collective intentions and the identification of the relevant community in the context of a defense of an original public understanding originalism).

111. Reference to the semantic expectations, intentions, and understandings is intended to draw a contrast with what was being done in the adoption of the Constitution or in its amendment as a matter of politics or power. Thus, most clearly, the Thirteenth Amendment was adopted to outlaw slavery and to expressly provide for the freedom of the formerly enslaved people of the slave states. In adopting the Thirteenth Amendment the Congress and the ratifying states intended, expected, and understood certain consequences would follow with respect to the formerly enslaved persons and their purported owners. The Congress and ratifying states also had semantic intentions, expectations, and understanding as to what the Thirteenth Amendment said and should be understood to mean.

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reader—will understand the meaning of an utterance or a text.<sup>112</sup> A semantic intention may be contrasted with a host of other intentions—to marry someone by saying “I do,” or to rob someone by saying “Your money or your life,” for example.<sup>113</sup> In the constitutional arena, a semantic intention may be contrasted with the political intention of constituting a new Federal republican government of limited powers, or the legal intention of outlawing slavery within the United States.

The differences between the two approaches become apparent if we consider the interpretation of the Second Amendment.<sup>114</sup> The first approach would begin with the meaning of the words “Arms”, “keep”, “bear”, “people”, “infringed”, etc. It would then consider the rules of syntax, including the place of introductory clauses like that of the Amendment. This was essentially the approach taken by Justice Scalia writing for the Court in *Heller*.<sup>115</sup> The second approach would look to the meaning of the entire sentence of the Amendment, without seeking to construct it solely from the meaning of its parts and the rules of syntax. Thus, the second approach would seek to reconstruct how the linguistic community originally understood the provisions. Here, the relevant understanding is not limited to semantic understanding or even the more expansive notion of the understanding of the linguistic content. The relevant understanding includes what the constitutional provision was doing.<sup>116</sup> Relevant evidence would include what people contemporaneously did and what they said as they summarized the provision, provided arguments in its favor, and drew inferences from it. Justice Scalia also adopted this approach when he considered analogous state constitutional protections for arms.<sup>117</sup> Dictionaries and their meanings, out of context, would be

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112. This shorthand account glosses over many obvious and not-so-obvious imperfections.

113. It is important to note how little the meaning of such performatives connects with the meanings of the words that make them up. That discontinuity is troubling if one is constructing a Tractarian theory of language; it is not troubling if we think about language as simply one more tool that humans use to get things done.

114. “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” U.S. CONST. amend. II.

115. *District of Columbia v. Heller*, 554 U.S. 570 (2008).

116. It is valuable to compare this concept of the understanding of the provision with more common focus on the original expectations with respect to the application of a provision. The understanding of what a provision was to do is not simply a matter of understanding how it was to be applied. An understanding of what a provision was to do could also operate in abstract terms.

117. *Heller*, 554 U.S. at 599–603.

accorded less weight.<sup>118</sup>

In his fullest and most authoritative statement of his originalist interpretive principles, Justice Scalia asserts that “context is everything” in constitutional interpretation.<sup>119</sup> Justice Scalia would appear to be seeking to privilege meanings beyond the literal “dictionary” meanings of words. A plausible construction of Justice Scalia’s position would be that he is employing the context of a provision to privilege not only what is said but also what may be taken from any further implication. Context thus enables both his broad interpretation of the First and Fourth Amendments and his reading of the Eighth Amendment to permit capital punishment. The latter reading, clearly, cannot be based upon anything expressly written in the Constitution, only upon inference, implication, or implicature from what is said, and perhaps, even, what is unsaid.<sup>120</sup>

With respect to the First Amendment, when Justice Scalia invokes the concept of a synecdoche to interpret the text, he is claiming

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118. The third approach looks not just to the semantics but also to the pragmatics of the provision. Pragmatics looks to the use of a provision, and takes into full account the operative context of action in which the statement is made. *See generally* ROBERT BRANDOM, MAKING IT EXPLICIT: REASONING, REPRESENTING AND DISCURSIVE COMMITMENT (1994) [hereinafter BRANDOM, MAKING IT EXPLICIT]; BRANDOM, ARTICULATING REASONS, *supra* note 88. When the robber accosts me with a dangerous weapon in the darkened street and says “Your money or your life!” he is not simply stating an alternative. He is demanding my money from me and threatening to kill or wound me should I fail to comply with his demand. He also commits a felony. In the context of a series of proposed amendments to the Constitution, statements like that of the Second Amendment may well have had public understandings very different from the literal meaning of their terms.

119. SCALIA, INTERPRETATION, *supra* note 19, at 37. He denies that he is a strict or literal constructionist. In so doing, he is disavowing principles like Thayer’s requirement of clear statement. He is also disavowing any requirement that ambiguities in interpretation be construed against a broader reading of a constitutional provision. *Id.* at 38. *See also* SCALIA & GARNER, READING LAW, *supra* note 61, at 56–58 (stating the supremacy of text principle as applied to the words of the text in context).

120. By suggesting that the linguistic content of the Constitution incorporates what is unsaid I do not mean to endorse concepts of the Unwritten or Invisible Constitutions. *See, e.g.*, AKHIL REED, AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY (2012) [hereinafter AMAR, UNWRITTEN]; LAURENCE H. TRIBE, THE INVISIBLE CONSTITUTION (2008). Instead, I mean to assert only the claim, as a matter of semantics, that what is unsaid is sometimes as important as what is stated expressly. *See, e.g.*, GRICE, STUDIES, *supra* note 55, at 33 (giving the example of an academic letter of recommendation that expressly states only that the candidate regularly attends class and has a command of the English language). In the constitutional context, the prohibition in the Fifth Amendment on takings for public use without just compensation is generally understood to prohibit takings for private use. *See generally* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985) [hereinafter EPSTEIN, TAKINGS] (classic libertarian interpretation of the taking power to reflect natural law property theory and the philosophical theory of the authority of the state).

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an implication from the text.<sup>121</sup> The literal protection of the press is extended by implication to protect broadcast radio, broadcast television (whether high definition, black and white, or color), private correspondence, and other media. This interpretation cannot be supported by the dictionary or literal meanings of the terms or by the meaning of the sentence of the First Amendment out of context. “Speech” and “the press” do not literally mean or include “broadcast television.” The application of the First Amendment to prevent censorship of private letters may be even more problematic insofar as such a medium existed at the time of the adoption of the Bill of Rights.

Justice Scalia is implicitly arguing that the protection of the freedom of speech and the freedom of the press creates an implicature of some sort, as Paul Grice defines the term, that a broader array of communicative freedoms also is protected.<sup>122</sup> The implicit argument is that the original understanding of the protection of the First Amendment for speech and the press would encompass private correspondence or public signs, and that modern broadcast technology plays a role in the dissemination of ideas, arguments, and opinions analogous to that played in the Eighteenth century by the press. Thus, the express protections of the First Amendment for speech and for the press should be extended to broadcast radio and television by implication. It is certainly the case that the law of the First Amendment has construed the text broadly to encompass the variety of means of expression that Justice Scalia now captures with his invocation of the text as a synecdoche.

The source or grounds for the implication that Justice Scalia, Judge Bork, and others have drawn from the express language of the

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121. See SCALIA, INTERPRETATION, *supra* note 19, at 38.

122. Paul Grice does not expressly identify the mechanism of synecdoche as one of the common means of implicature and it is not any more obvious that he implies such an inclusion. I do not think that there is anything in Grice’s theory that would suggest that Justice Scalia’s move—and, of course, here he is firmly in the First Amendment mainstream—is improper. See GRICE, STUDIES, *supra* note 55, at 22–40. The variety of recognized complex strategies in language use continues to expand. See SOAMES, *Legal Texts*, *supra* note 2; 1 DAVID K. LEWIS, *Scorekeeping in a Language Game*, in PHILOSOPHICAL PAPERS 233, 240 (1983) [hereinafter Lewis, *Scorekeeping*] (arguing that if conversation is a game then the rules for keeping score reflect a principle of accommodation that operates to incorporate otherwise seemingly “wrong” moves that is unlike many other kinds of game). The ability of “moves” in the constitutional law game to change the course of the game is captured, in part, by Dworkin’s metaphor of the chain novel. See DWORKIN, EMPIRE, *supra* note 31, at 228–38. While the writing of subsequent installments of Dworkin’s chain novel is not governed by rules as formalized as those that govern games, his account emphasizes the informal rules that apply and constrain the project.

First Amendment can be found in a variety of potential authorities.<sup>123</sup> Justice Scalia, however, would likely turn to an implicit political theory that highlights the role of free expression; that political theory is grounded in Anglo-American political tradition. As such, it is part of the context that can be invoked to support the constitutional implications that fill in the canvas of the First Amendment's protection of a system of freedom of expression. Justice Scalia does not need (or want) natural law; the implicature that he endorses can be made based on a functional analysis of the media in the Eighteenth and Twenty-First Centuries, and by the political theory that endorses the democratic public's right to engage in the intellectual and political debate of the issues of the day. What are the differences, and the similarities, between Justice Scalia's synecdoche, which is a permissible means of originalist interpretation, and Justice Douglas's penumbra in *Griswold v. Connecticut*?<sup>124</sup>

At the outset it should be acknowledged that the foundations of the right to privacy identified and protected in *Griswold* could not have been created by characterizing the references to those rights as a synecdoche for a litany of similar rights. Similarly, interpreting the express reference to the press in the First Amendment as creating a penumbra that extended to other media would have resulted in a different First Amendment jurisprudence. On the other hand, one might argue that the willingness to extend the protections of the First Amendment to a broad spectrum of media reflects a penumbral analysis of the protection of speech and the press. That argument would also explain why there is little attention to whether such protection is a matter of protecting speech or the press—or what the difference between such protections might be.

*Smith v. United States*<sup>125</sup> has emerged as a critical example for the articulation and analysis of the linguistic philosophical claims of the New Originalism. In that case a defendant was accused of having conspired to violate a federal criminal statute that prohibited using a firearm in the commission of a felony. The defendant had proposed

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123. See, e.g., *Citizens United v. FEC*, 558 U.S. 310 (2010) (striking down limits on political contributions by corporations to produce a movie on the basis of the First Amendment). See also SCALIA, INTERPRETATION, *supra* note 19, at 38 (characterizing the term “press” in the First Amendment as like a synecdoche, without ever acknowledging the question why reading the term like a synecdoche is consistent with the semantic claims of originalism—or why the reading treats the term like a synecdoche rather than as a synecdoche).

124. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

125. *Smith v. United States*, 508 U.S. 223 (1993).

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to deliver a firearm in payment for the purchase of illegal drugs.<sup>126</sup> The Court looked to the literal semantic meaning of the statute and found the language of the statute satisfied.<sup>127</sup> Justice Scalia dissented, on the basis that the phrase “uses a firearm” in the statute required interpretation in its context, and that that context demonstrates that only more paradigmatic deployments of a firearm were within the ambit of the statute.<sup>128</sup> Justice Scalia acknowledged that his reading of the statute treats the statutory language as including a tacit or suppressed phrase “as a weapon” to modify the predicate of use. He argued that implying that limitation was appropriate because constitutional interpretation must look to the “ordinary meanings” of words and phrases.<sup>129</sup>

Justice Scalia has himself cited *Smith* as an example of his approach to originalism.<sup>130</sup> The case highlights the question of how originalism will depart from the austere semantic meaning of the constitutional text. Justice Scalia has made the sweeping claim that context is “everything” in constitutional textual interpretation.<sup>131</sup> He does not mean this claim literally, and cannot mean this claim literally, because if it were true, semantic meanings would be unimportant and meaning would be reduced to that found in the world of Humpty Dumpty.<sup>132</sup> Instead, he must mean that after identifying the original semantic meaning of the provision context may be looked to in determining whether the semantic meaning is controlling.

Justice Scalia never expressly articulates his theory of when the ordinary semantic meaning can be disregarded or overridden by context. He begins by noting that the term “use” is elastic, with a variety of meanings.<sup>133</sup> But he does not conclude that all the meanings that fall within its semantic range are included and given legal effect. Instead, he simply describes what he believes is the most common and dominant sense of the verb “to use” and then asserts that it is that

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126. *Id.* at 225–27.

127. *Id.* at 240–41.

128. *Id.* at 242–43 (Scalia, J., dissenting).

129. *Id.* at 242.

130. See SCALIA, INTERPRETATION, *supra* note 19, at 23–24.

131. *Id.* at 37.

132. LEWIS CARROLL, THROUGH THE LOOKING-GLASS Ch. 6 (1898) (1872) (Humpty Dumpty’s assertion that the meaning of a word may be anything that the speaker chooses it to be).

133. *Smith*, 508 U.S. at 241–42.

sense that is employed in the relevant statute.<sup>134</sup> Justice Scalia offers additional arguments based upon the structure of the statute, but these seem strangely inconclusive.<sup>135</sup>

Andrei Marmor urges that the disagreement in *Smith* should be understood as a failure to recognize the *polysemy* of the word “use.”<sup>136</sup> Polysemy is the semantic property of having distinct, but closely related, meanings.<sup>137</sup> Marmor contrasts polysemy with the more commonly encountered semantic property of ambiguity in which a word or expression has multiple, separate meanings. On Marmor’s account, Justice Scalia was right in choosing the more common, dominant meaning in his interpretation of the statute because, in the absence of any other indicators, “use” is used with respect to guns to mean used as a gun.<sup>138</sup> Thus, Marmor believes that there is likely an empirical linguistic practice that supports Justice Scalia’s intuition and argument. In most instances, he suggests, multiple meanings are distinct and disjoint, not parallel and similar, and as a result the dominant meaning must generally be the meaning taken for words in their constitutional usage.<sup>139</sup> Moreover, Marmor believes that such semantic analysis is sufficient to make Justice Scalia’s conclusion that the statute ought not to apply correct.

Marmor does not appear to consider the question whether such arcane and nuanced semantic analysis ought to be dispositive of the legal question presented in *Smith*. He seems to believe that answering the semantic question is sufficient to decide the case. There are, of course, reasons to doubt that argument and conclusion. Marmor’s tacit premise that constitutional decision begins with an interpretation of the semantic and pragmatic meaning of the relevant constitutional or legal text is untenable.<sup>140</sup> Constitutional decision likely does not begin with linguistic meaning or interpretation, but with judgment and consideration of the relevant constitutional or other legal arguments that bear on decision.<sup>141</sup> The modes of argument that

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134. *Id.* at 242–43.

135. *Id.* at 243. Thus, for example, Justice Scalia cites the sentencing guidelines which provide that “other use” of a firearm means use that is more than merely “brandishing, displaying, or possessing” of a firearm.

136. MARMOR, LANGUAGE, *supra* note 2, at 123.

137. *Id.* at 121–22.

138. *Id.* at 123–24.

139. However, Marmor thinks the case presented in *Smith* is likely atypical. *Id.* at 124.

140. See generally LeDuc, Interpretation and Constitutional Argument, *supra* note 17.

141. See generally RICHARD A. POSNER, REFLECTIONS ON JUDGING 120–30, 178–236

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come into play in *Smith* are more varied and complex than Marmor's account permits.

The more precise formulation of the adjudication process above excludes the non-semantic fact-finding role of trial courts and strengthens the claim as to the semantic nature of adjudication. Semantic theories seek to capture and emphasize the critical verbal dimension of law. Written laws have permitted and, perhaps, perversely encouraged, verbal dispute.<sup>142</sup> Portia's argument, after all, turned upon the semantic meaning of Antonio's bond.<sup>143</sup> It disregarded context and the unspoken understanding of the parties. More generally, when the written text is elevated to be a definitive statement of law, it invites the community to privilege that statement in lieu of the understanding and arguments that inferentially support that statement but may not support the case at hand.

Semantic dispute lies at the interpretative core of many cases, constitutional and otherwise, whether there are other elements to those cases as well.<sup>144</sup> Semantic theories assert more than that constitutional disputes should be resolved on the basis of semantic arguments. As a semantic account of constitutional interpretation and controversy, originalism fundamentally severs the connection between legitimate constitutional argument and consideration of the consequences of constitutional readings and decisions. Constitutional argument is to proceed only by debating the semantic meanings of the constitutional provisions (and other authoritative sources of constitutional law, like precedent). It is an entirely deontological account; consequences do not figure into the express argumentative

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(2013) [hereinafter POSNER, JUDGING]; Charles Fried, *On Judgment*, 15 LEWIS & CLARK L. REV. 1025 (2011) [hereinafter Fried, *Judgment*] (arguing for the importance of the exercise of judgment in adjudication).

142. Authoritative statements of law, while making the application of such rules simpler and potentially more uniform, thus may also invite disputes about the semantic and other implications of such statements.

143. WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE*, ACT 4, SC. 1 (arguing that Antonio's bond entitles Shylock to a pound of flesh but none of his blood naturally a part thereof). A similar example appears in a lighter context in *THE PIRATES OF PENZANCE* (age of a man born on February 29th does not conform to usual norms, thus saving the hero from a life of piracy). W. S. GILBERT & ARTHUR SULLIVAN, *THE PIRATES OF PENZANCE* (1879).

144. For example, *Maryland v. Craig*, 497 U.S. 836 (1990), turned on the meaning of the right of criminal defendants under the Sixth Amendment to be confronted by the witnesses against them; *District of Columbia v. Heller*, 554 U.S. 570 (2008), turned on the meaning of the Second Amendment; *Bowers v. Hardwick*, 478 U.S. 186 (1986), presented the question of the meaning of the Eighth Amendment protection against cruel and unusual punishment, at least to Justice Powell in his concurring opinion; and *Brandenburg v. Ohio*, 395 U.S. 444 (1969), turned on the meaning of the term "speech" in the First Amendment.



discourse in constitutional decision. Originalism's critics have been critical of, and have often rejected, this disassociation.<sup>145</sup>

Originalism generally defends that disassociation only indirectly. It does not defend the anti-consequentialist stance of originalism as desirable or good in itself but as a consequence of the need to confine constitutional argument to the original meaning of the constitutional text.<sup>146</sup> That restriction is needed to cabin judicial discretion and the exercise of judges' subjective preferences.<sup>147</sup>

### *B. Challenging Classical Originalism's Semantic Account*

In reducing constitutional disputes to matters of language and meaning, originalism does not deny the importance or stakes of the disputes.<sup>148</sup> When the question of whether the continued segregation of the Topeka schools was presented to the Court in *Brown*, the stakes for our country, white and black citizens alike, were profound. Originalists assert that this debate before the Court (as distinguished from parallel prudential or political debates before the Topeka Board of Education, or moral debates before God or among ourselves as moral agents) was necessarily properly cast in constitutional legal terms.<sup>149</sup> For the originalist, those legal, constitutional terms were whether the requirements of the Equal Protection Clause of the Fourteenth Amendment—its meaning—were satisfied by purportedly “separate but equal” racially segregated public school systems.<sup>150</sup>

Both the New Originalists and the anti-originalists challenge the classical originalists' semantic account. Three arguments challenge the implicit semantic account of originalism. Dworkin challenges originalism as a semantic account of constitutional controversy. He

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145. See generally Posner, *Bork*, *supra* note 20, at 1380 (“The originalist faces backwards, but steals frequent sideways glances at consequences.”); DWORKIN, *EMPIRE*, *supra* note 31, at 31–37 (characterizing legal positivism as a semantic account of law that fails to take its normative dimension into account adequately).

146. See SCALIA, *INTERPRETATION*, *supra* note 19, at 45–46, 144–46.

147. See BORK, *TEMPTING*, *supra* note 18, at 69–100 (criticizing the innovative, free-wheeling constitutional jurisprudence of the Warren Court).

148. See, e.g., SCALIA, *INTERPRETATION*, *supra* note 19, at 149 (predicting that there will be important substantive constitutional implications of an ascendant originalism).

149. Bobbitt captures this element forcefully when he notes that arguments from kinship or based upon the self-interest of a judge would not be made in court, or if made, treated as anything other than a profound misstep—or contempt. See BOBBITT, *FATE*, *supra* note 52, at 6.

150. See generally *Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding separate but equal racially segregated facilities under the Equal Protection Clause).

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begins by challenging originalism's semantic account of constitutional meaning. Dworkin has captured the importance of context with his example of a boss speaking to an employee about how to evaluate the candidates for a position when one of those candidates is the boss's child.<sup>151</sup> Dworkin appears to introduce the example to show the difference between the semantic meaning of an utterance and its expected application.<sup>152</sup> But he does not stop to explore or even to acknowledge the pragmatics of the utterance and that source of potential linguistic content.<sup>153</sup> Instead, he focuses immediately on the difference between what the speaker intends his listener to do and what the semantic meaning of the utterance is.

The directive to choose the best candidate may be misunderstood by the employee to require nepotism; but as a matter of the literal or austere semantic meaning of the boss's directive, the utterance says no such thing.<sup>154</sup> Indeed, the express statement neither entails the truth of such a statement nor implies it.<sup>155</sup> At most, the statement suggests to the employee the choice of the son. Dworkin thinks this example shows that the austere meaning of the language is what should be followed and that it is the employee's duty to hire the best candidate, even if she knows that her judgment is different from that of her boss.<sup>156</sup> Some support for Dworkin's argument may come from the very limited pragmatic import carried in this asymmetrical context where the employee's boss speaks from a position of power. Yet, one suspects that in many such situations, an employee understands that it is the boss's son who should be hired unless manifestly unqualified.

151. See RONALD M. DWORKIN, *JUSTICE IN ROBES* 124 (2006) [hereinafter DWORKIN, ROBES]. See also Ronald Dworkin, *The Arduous Duty of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 65 *FORDHAM. L. REV.* 1249, 1255 (1997) [hereinafter Dworkin, *Arduous*] (articulating Dworkin's earlier treatment of these issues in the immediate aftermath of Justice Scalia's Tanner Lectures at Princeton).

152. DWORKIN, ROBES, *supra* note 151, at 124. In Austin's terms, Dworkin may appear to be focused on the difference between the illocutionary act and the perlocutionary act—what the listener took away from the utterance, but this does not quite capture it. In Dworkin's hypothetical, what is intended to be done is not captured by the semantics of the utterance.

153. *Id.*

154. *Id.*

155. Entailment is a logical concept when one or more propositions or statements logically insure the truth or falsity of another proposition or statement. Implication is a broader concept. The statement "My daughter is asleep." implies that I am committed to the claim that I have a daughter, although it does not entail that my claim is correct or that the statement "I have a daughter." is true.

156. See DWORKIN, ROBES, *supra* note 151, at 124. Dworkin's account of this exchange is one of his more opaque treatments of what are so often compelling hypotheticals.

Dworkin never explains or defends his claim that it is the austere semantic meaning, rather than any richer linguistic meaning that ought to be applied and followed by the courts when we shift to the constitutional context. In the constitutional context, of course, it may be that Dworkin thinks that the fuller linguistic meaning is too uncertain, or too susceptible to misinterpretation or manipulation. It may also be that Dworkin believes that the account of the legitimacy of law as a matter of political philosophy requires that it be limited to its semantic meaning, but he never articulates such claims. They are certainly not obviously true. The political legitimacy of the intended or expected force of law properly enacted by a democratic majority would also appear a strong candidate for qualification as a legitimate law. Moreover, in the context of Dworkin's law as integrity theory, which relies on abstract philosophical theory, such an argument from methodological simplicity or certainty appears out of place.

Dworkin's account of the conversation in which this utterance is made rules out certain contextual elements (like a wink) that would bear heavily on the meaning (broadly understood) of what is said. We may nevertheless suspect that Dworkin's austere account of the example leaves many elements of the context unexplored. How qualified is the son? How qualified does the boss think his son is? Those elements of context, among others, go directly to what the boss should be understood to mean. Thus, for example, if the employee knows that the boss thinks his son is extremely qualified and thinks the employee shares that assessment, it could likely be that the boss ought to be understood to be encouraging the employee to choose his son. In other contexts, that meaning could be absent, as in the case in which the boss is known to have no confidence in his son.

Dworkin denies that any semantic theory of law can give an adequate account of legal disputes, including constitutional disputes.<sup>157</sup> Dworkin insists that our theory must account for constitutional disagreements as substantive, not merely semantic.<sup>158</sup> That is, Dworkin denies that any theory that reduces legal disputes and arguments to disputes and arguments over meanings can give an adequate account of law.<sup>159</sup> Dworkin asserts that constitutional disputes are ultimately

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157. DWORKIN, *EMPIRE*, *supra* note 31, at 36–46.

158. *Id.* at 40–43.

159. See RONALD M. DWORKIN, *The Model of Rules: I* [hereinafter DWORKIN, *Rules I*], in *TAKING RIGHTS SERIOUSLY* 14, 43–45 (1977) [hereinafter DWORKIN, *TAKING*]; DWORKIN, *EMPIRE*, *supra* note 31, at 36–46. Dworkin also denies that any positivist account, of which originalism is one, can give an adequate account of law. See DWORKIN, *Rules: I*, at 45.

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disputes about moral philosophy and values.<sup>160</sup> Instead of reducing constitutional and other legal questions to questions of philosophy, constitutional disputes should be recognized as implicating non-semantic disagreements. Correspondingly, the arguments properly made in our constitutional practice go beyond semantic arguments—although semantic arguments are permissible arguments, too. Dworkin tests our intuitions with a case that presents the question whether a child who has killed his grandfather may take under his will under the rules of inheritance or whether allowing a murderer to profit from his crime should be denied under the common law.<sup>161</sup> Dworkin argues such a dispute does not appear to be confined to a question of meaning.<sup>162</sup> Although Dworkin's argument is controversial<sup>163</sup> and Dworkin has not expressly deployed it against originalism,<sup>164</sup> I want to explore here whether such an argument would apply against originalism, and, if so, whether it would be persuasive.

According to public meaning or semantic expectations originalism, disputes about constitutional questions are to be resolved by determining what the Founders and Ratifiers understood the meaning of one or more relevant constitutional provisions to be.<sup>165</sup> The New Originalists temper this claim by restricting it to disputes with respect to those provisions that admit of interpretation. With a determination of that meaning, and an understanding and conceptualization of the facts presented by the case at hand, the constitutional

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I discuss the implications from the positivist character of the dominant originalism in LeDuc, *Paradoxes of Positivism*, *supra* note 14.

160. See DWORKIN, *EMPIRE*, *supra* note 31, at 379–89 (describing how Justice Hercules would have approached *Brown*).

161. See *Riggs v. Palmer*, 115 N.Y. 506 (1889) (creating a rule under common law that a potential heir who murders his testator cannot take under the will of his victim).

162. See DWORKIN, *EMPIRE*, *supra* note 31, at 36–46.

163. See, e.g., MARMOR, *INTERPRETATION*, *supra* note 40, at 5 n.6 (acknowledging that Dworkin's semantic sting argument has been mislabeled); H. L. A. HART, *THE CONCEPT OF LAW* 244–48 (2d ed.1997) (rejecting Dworkin's claim that he has offered a semantic theory of law and legal disputes). A more radical challenge that applies both to the originalists and to Dworkin denies that law is principally an interpretive activity. See, e.g., Dennis Patterson, *Interpretation in Law*, 42 *SAN DIEGO L. REV.* 685 (2005) [hereinafter Patterson, *Interpretation*] (arguing against the priority of interpretation in understanding or applying law on philosophical grounds); Dennis Patterson, *The Poverty of Interpretive Universalism: Toward the Reconstruction of Legal Theory*, 72 *TEX. L. REV.* 1 (1993).

164. See, e.g., Dworkin, *Interpretation*, *supra* note 27, at 115–27; RONALD DWORKIN, *The Forum of Principle*, in *A MATTER OF PRINCIPLE* 33–71 (1985) [hereinafter DWORKIN, *Forum*].

165. See BORK, *TEMPTING*, *supra* note 18, at 262; SCALIA, *INTERPRETATION*, *supra* note 19, at 38.

decision properly follows.<sup>166</sup> Dworkin denies that account. According to Dworkin, the parties do not dispute the meaning of the Constitution, nor does an appeal to the original understandings, intentions, and expectations with respect to the relevant provision answer the question posed in the dispute.<sup>167</sup> Many disputes are about rights and things, not about words.<sup>168</sup> A semantic account of the dispute is, therefore, inadequate because the constitutional dispute does not reduce to a dispute about meanings.

Originalists might reply that Dworkin's argument is a little off the mark; they do not argue that the dispute is about meanings but that the arguments that may be advanced in such disputes must be about meanings. Thus, Dworkin's criticism has conflated what the constitutional argument is about with how the constitutional argument is made. On this response, originalism's semanticism is about how constitutional arguments are made, not what they are about. Originalism merely asserts that the judicial decision must be made on the basis of arguments about historical semantic understandings of meaning. Originalism also needs an account of why constitutional cases are about one thing while constitutional arguments are about another. On its face, that is a puzzling relationship. Originalism has not generally offered such an argument expressly.

But a powerful argument is available to originalists. That argument has been hinted at in the originalist emphasis of formality in constitutional reasoning and on the rule of law.<sup>169</sup> Any formal account of law and any account of the Constitution that contextualizes our constitutional law within the rule of law must acknowledge that there is a potential for the relevant legal arguments to depart from the arguments about what is at stake in the dispute. Procedural arguments make this disconnect most clearly; arguments about standing, about jurisdiction, and about statutes of limitation, for example, do not engage the substance of the underlying legal dispute. All originalism needs to do to explain why semantic arguments control the determination of substantive constitutional arguments is to assim-

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166. See BORK, *TEMPTING*, *supra* note 18, at 262; SCALIA, *INTERPRETATION*, *supra* note 19, at 38.

167. See DWORKIN, *Forum*, *supra* note 164.

168. See generally DWORKIN, *EMPIRE*, *supra* note 31, at 40–43.

169. See generally LeDuc, *Interpretation and Constitutional Argument*, *supra* note 17; Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989) (emphasizing that the fairness of the equal application of rules as well as justice is an important element of the concept of the rule of law).

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ilate the semantic and linguistic arguments to this formal model. They can defend such an assimilation on the basis that our constitutional law is a fundamental element in the rule of law and, as such, must remain formal in significant respects with respect to its argument and doctrine.

The second, most radical criticism attacks originalism's implicit reliance on the premise that appellate constitutional adjudication is simply a matter of semantic interpretation. It may be helpful to consider the richness of the ways in which language is used. Utterances such as "Your money or our life!", uttered in an appropriate context, have a meaning that is very different from ordinary statements of propositions. That is, while we speak customarily of the meaning of these performatives, perhaps that is a type of meaning sufficiently distinct from the meaning of such other statements that it confuses more than it illuminates. The performative nature of the constitutional imperatives might appear to leave a semantic analysis of constitutional provisions open to the same objection. Wittgensteinian philosophers of language would likely reply by reminding us that both kinds of utterances are doing certain things, and to the extent that we use meaning to refer to that dimension of communication that carries a linguistic message, the two kinds of utterances certainly appear to share a common feature ordinarily called their meaning. Moreover, while utterances like "Fire!" or "Your money or your life!" have their own particular usages, many other utterances have meanings that depart from the literal meanings of the words that comprise them. If context is indeed everything, that's the meaning that we need to focus on, even if it arises contextually by implication or by the performative role of the text rather than solely from the semantic or linguistic meaning of the words in the text. The claim that the performative nature of the Constitution gives it meaning apart from mere semantic analysis has generally received little attention from the originalists, or their critics.<sup>170</sup>

Second, even if it is sensible to speak of meanings with respect to these imperative performative utterances, the provisions of the Constitution present no similar usages independent of the performative

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170. Exceptions would include Larry Solum and Jack Balkin, whose originalism is hardly entirely traditional. See generally Andrew Koppelman, *Why Jack Balkin Is Disgusting*, 27 CONST. COMMENT. 177 (2010); Steven G. Calabresi & Lina Fine, *Two Cheers for Professor Balkin's Originalism*, 103 NW. U. L. REV. 663 (2009) (praising Balkin's living originalism and contrasting it with classical originalism before concluding that it requires refinement).

role of the provisions. That is, the Constitution should be viewed only as a performative, and analyzed on that basis. Even if that strong claim is rejected, however, it should be conceded that the Constitution is not merely a series of statements of propositions. The very *constitutive* role of the Constitution formulating the political and legal framework for the Republic commits it to a performative role. Because the Constitution outlines the rules under which the federal government operates, it must play a performative role, doing as well as saying. Our analysis of the meaning of the Constitution's provisions would appear to need to acknowledge that role and account for it in our interpretation. Moreover, the constitutional law—if not the Constitution itself—includes locutions seemingly disassociated from the terms thereof; “substantive due process” would appear to be the most obvious.<sup>171</sup> In sum, whether the intuitive concept that contextual meaning may often not be derivative from (in ordinary semantic ways) the meaning of the words comprising provisions will carry the theoretical weight placed on it will be explored below.

This line of argument takes us back to focus on the constitutional text. The Constitution is, after all, a particular kind of text.<sup>172</sup> It not only says certain things but also does certain things. For example, it commands Congress not to enact certain laws, and commands the states not to treat their own citizens in certain ways, and requires those states affirmatively to treat their citizens in other ways (at least since the Reconstruction Amendments).<sup>173</sup> It also commands the President.<sup>174</sup> The meaning that the Constitution has as a result of these performative roles is fundamentally different than the import

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171. The doctrine of the dormant Commerce Clause, the concept of “separate but equal” and the concept of desegregating schools with “all deliberate speed” would appear to be others. I think that the ability in constitutional discourse to use constitutional expressions very loosely, indeed, almost metaphorically, helps to explain why John Hart Ely’s otherwise devastating contempt for the concept of “substantive due process” fails to tell. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 18 (1980) [hereinafter ELY, *DEMOCRACY*]. It is not just that there is too much precedent that would need be overturned if the concept were abandoned; the concept resonates with our contemporary constitutional intuitions. Bobbitt’s account of constitutional discourse explains why this is so—arguments from doctrinal precedent are an accepted mode of constitutional argument, and substantive due process, whatever its flaws, is part of that accepted precedent.

172. See SCALIA, *INTERPRETATION*, *supra* note 19, at 37 (characterizing the Constitution as “an unusual text” but without explaining how it is unusual).

173. Thus, for example, U.S. CONST. amend. XV (proscribing racial discrimination by the States with respect to voting rights).

174. See U.S. CONST. art. II, § 1 (prescribing the precise text of the President’s oath of office).

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and role that Tribe's treatise on constitutional law has, for example, as a treatise.

The difference arises from the role of Tribe's treatise principally as a saying, not a doing. The role such a treatise plays is in saying what the constitutional law is, not in a legally binding way, but expressively, explaining how it arose, as a matter of reason and of history. The role of that treatise as a doing is much smaller, although it exists. The treatise helps establish Tribe as a towering twentieth-century constitutional scholar; it satisfies certain contractual terms between Tribe and his publisher, etc. One act that Tribe's treatise does not accomplish is to authoritatively state what the law is, as Supreme Court constitutional opinions do.

It is precisely that authoritative role in saying what the law is that makes constitutional law opinions and decisions more than mere interpretations, and the task of deciding the case and announcing the decision more than one of mere interpretation. We can capture the performative significance of a Supreme Court majority opinion by considering a commonplace response to criticism. If criticized with respect to a Court opinion that she had written, a Supreme Court justice might say, truly if not truthfully,<sup>175</sup> "Well, it's only my opinion," as if to deflect the criticism with an implicit relativist response. Such a response would miss the critical performative dimension of such a writing and the consequences such a writing has, not merely for the particular litigants, but for our republic and its law.<sup>176</sup>

It might be argued that this hypothetical simply relies on a conflation of two senses of opinion, one general and one narrowly legal. The hypothetical Justice's response simply trades on this ambiguity and is not otherwise of interest as a theoretical matter. The example does rely on the multiple meanings of opinion, but it does so highlight the different performative value of an opinion from the Court and opinions otherwise expressed about the Constitution.

Third, I argue against a semantic account of constitutional law

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175. See BERNARD WILLIAMS, TRUTH AND TRUTHFULNESS 102 (2002) (recounting the example of St. Athanasius's statement to the pursuing Roman soldiers who had failed to recognize him as to the whereabouts of Athanasius which was literally true, but wholly misleading).

176. For a contemporary discussion of the binding effect of Supreme Court opinions and decisions see STEPHEN BREYER, MAKING OUR DEMOCRACY WORK 1-2 (2010) [hereinafter BREYER, DEMOCRACY] (arguing that the force of Supreme Court decisions relies upon a foundation of public trust and that the Court's mission of preserving that trust shapes its interpretive and decisional practice).



and disputes. A better account substitutes—or at least adds—a focus on pragmatics for, and to, a focus on, semantics. Pragmatics focuses on the meaning of the Constitution in context, in action. It emphasizes the role of the Constitution as both a saying and as a doing.<sup>177</sup> When the priority of the Constitution as a doing—rather than a saying—is recognized, any effort to restrict constitutional analysis to semantics quickly collapses. That is because the meaning or import of performative statements or utterances turns on their context in critical and often determinative ways.<sup>178</sup>

The constitutional provision that the Vice President serves as the President of the Senate is an example showing that the force of the Constitution is generated by its performative role, not merely its semantic meaning.<sup>179</sup> The performative text thus has a meaning or import that is different from its semantic meaning and different from the corresponding declarative text. Other examples can be easily called up. For example, the First Amendment expressly protects only the freedom of the press. As a semantic matter, that protection would not encompass sound trucks, broadcast radio, or television. As a performative matter, by contrast, the courts have not hesitated to read the provision to encompass such technologies. The recognition of the performative nature of the constitutional text is more helpful than, for example, simply asserting that the term “press” is to be read as a “sort of” synecdoche in the First Amendment.<sup>180</sup> I explore these arguments below.

*C. Performatives, Inference, and an Alternative Account of the  
Conceptual Content of Constitutional Law*

An alternative account of the constitutional text asserts both that its meaning and import is not limited to its semantic or linguistic meaning and that the semantic content of the constitutional text arises from the role of propositions of constitutional law in inference. The force of the constitutional text arises not only from the content of the text but also from the inferences that may be properly drawn from it. That account emphasizes two elements of constitutional law

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177. See, e.g., Solum, *Communicative Content*, *supra* note 2, at 486–89 (rejecting the term pragmatics in favor of the term “contextual enrichment” in writing for an American legal audience because of the potential confusion with legal pragmatism).

178. See *id.* and authorities cited therein.

179. See *id.*

180. See SCALIA, *INTERPRETATION*, *supra* note 19, at 38.

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that have generally not been recognized nor adequately taken into account. Both elements emphasized in this account have a pragmatist tenor; each emphasizes the Constitution's role and place in our social and individual lives. The increasing recognition of sources of meaning for legal and constitutional provisions now comes from a wide range of philosophers of language.<sup>181</sup> There is an increasing recognition that the austerity of semantic meaning is an incomplete account of the salient features of constitutional language.<sup>182</sup> In the account defended here, not only is the pragmatics of constitutional language emphasized but, more importantly, I will argue that the constitutional text is a performative.<sup>183</sup> The Constitution in its entirety and in its discrete provisions is a doing. The salient feature of a performative utterance or a text is its role to do something by saying something.<sup>184</sup> Examples of performatives abound: wedding vows exchanged in a wedding ceremony and bets made by gamblers in entering into a wager are among those most celebrated.<sup>185</sup>

The second element of constitutional law is its propositional or conceptual content. The propositional or conceptual content of provisions of the Constitution or of opinions interpreting or applying the Constitution are those propositions asserted or denied by such texts and the consequences of the inferences such propositions support, as well as the other propositions that support such propositions of constitutional law.<sup>186</sup> This is neither an uncontroversial account nor is it outside the mainstream of contemporary philosophical theory.<sup>187</sup>

181. See, e.g., Solum, *Communicative Content*, *supra* note 2; SOAMES, *Legal Texts*, *supra* note 2. But see Greenberg, *supra* note 2 (articulating a widely held theory that the semantic content of law generates its legal content but arguing that such a theory is mistaken).

182. See SOAMES, *Legal Texts*, *supra* note 2; Solum, *Communicative Content*, *supra* note 2.

183. See generally AUSTIN, *WORDS*, *supra* note 55 (developing a theory of performative language (initially in the context of speech acts)).

184. *Id.* at 6, 12 (“[B]y saying or in saying something we are doing something.”).

185. *Id.* at 5 (wedding vows).

186. In describing the conceptual content of the Constitution in terms of the inferences that the constitutional text permits, I am drawing on the work of Robert Brandom. See generally ROBERT B. BRANDOM, *ARTICULATING REASONS*, *supra* note 88, at 165–66 (introducing the inferentialist account of meaning based upon the inferential function of the conceptual content of propositions); BRANDOM, *MAKING IT EXPLICIT*, *supra* note 118.

187. See generally Danielle Macbeth, *Inference, Meaning, and Truth in Brandom, Sellars, and Frege*, in *READING BRANDOM: ON MAKING IT EXPLICIT* 197 (Bernhard Weiss & Jeremy Wanderer eds., 2010); Michael Dummett, *Should Semantics Be Deflated*, in *READING BRANDOM: ON MAKING IT EXPLICIT* 197 (Bernhard Weiss & Jeremy Wanderer eds., 2010).

A few examples can demonstrate the inferential role of propositions of constitutional law. Turning first to the role of provisions in drawing inferences, the Fifth Amendment provides that private property may not be taken for public use without just compensation.<sup>188</sup> Casting that provision in the form of the affirmative proposition, “private property may be taken by the federal government for public use on payment of just compensation” can allow that proposition to be employed in inferences to the conclusions that private property may not be taken for private use and that private property may not be taken for public use without the payment of just compensation. Alternative inferences are also possible.<sup>189</sup> With the adoption of the Fourteenth Amendment, additional important inferences may be constructed with respect to the eminent domain power of the states.

Constitutional provisions also stand as conclusions from inferences drawn from other provisions of constitutional law. The role as consequences of inferences admittedly may appear a little puzzling since the text of the Constitution provides a sufficient basis for such propositions and their role as consequences of inferences may appear inconsequential. Those inferences enable us to choose among competing, grammatically possible readings of ambiguous provisions or sets of provisions. Consider the two provisions of the Constitution that provide the general rule that the Vice President shall preside over the Senate<sup>190</sup> and the exception to that rule that the Chief Justice shall preside when the Senate sits to try the President for impeachment.<sup>191</sup> No comparable express exception provides that the Vice President shall not preside over her own impeachment trial. While the potential for the Vice President to exercise such a role may appear manifestly implausible, there has been significant academic attention to the question of how to reach that conclusion in light of the text.<sup>192</sup>

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188. U.S. CONST. amend. V.

189. The text of the Fifth Amendment could also be deployed in inferences that private property may be taken for private use and, indeed, that private property may be taken for private use without payment of just compensation. Those inferences are not made in our constitutional law of taking and have apparently never been seriously entertained. What counts as public use, of course, has not been uncontroversial. *See, e.g.*, *Kelo v. City of New London*, 545 U.S. 469 (2005) (upholding the state condemnation power for urban redevelopment in the absence of urban blight or other nuisance); *see also* EPSTEIN, *TAKINGS*, *supra* note 120, at 161-81 (exploring what he terms the “invisible” public use clause).

190. U.S. CONST. art. I, § 3, cl. 4.

191. *Id.* cl. 6.

192. *See, e.g.*, Joel K. Goldstein, *Can the Vice President Preside at His Own Impeach-*

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Focusing on the inferences to the statements of constitutional law that may be understood from the constitutional text helps solve this conundrum. The Constitution may be understood to incorporate a number of principles. These principles are embedded in the Constitution, if at all, in an inferential sense. More precisely, the conceptual content of the constitutional provisions, coupled with our practice of practical inference, generates the principles as consequences of the express constitutional propositions. Those principles are not expressly stated or a matter of the semantic or linguistic meaning of the constitutional text.

One important example of such an implied principle is the separation of powers.<sup>193</sup> One of the most fundamental particulars of the doctrine of separation of powers is that no man, including the sovereign, should be a judge in his own case.<sup>194</sup> If we endorse that principle, then from it we can construct an inference to a proposition that extends the express principle that the Vice President shall not preside over the trial of the impeachment of the president, *a fortiori* to the proposition that the Vice President shall not preside at the trial of her own impeachment.

A little background on pragmatics and the theory of performatives may clarify the importance of the performative role of the Constitution. The initial focus of the analysis of performatives was on utterances,<sup>195</sup> but texts can also be performatives.<sup>196</sup> Translating the theory of performatives to written texts is not simple, however, as the context of a text, the author, and the audience are more complicated than the corresponding notions for utterances. A written exchange of promises may make a contract, for example.<sup>197</sup> Austin identifies a number of conditions that are necessary for a text or utterance to op-

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*ment Trial? A Critique of Bare Textualism*, 44 ST. LOUIS U. L.J. 849, 850–51 (2000) (exploring the question whether the vice president, as the presiding officer of the Senate, may preside over her own trial). See also AMAR, UNWRITTEN, *supra* note 120, at 6–16. Few appear to be persuaded that the provision for the Chief Justice to preside over the impeachment trial of the President creates an implication that the Vice President may preside over her own trial, despite the semantic meaning of the constitutional text.

193. See generally CHARLES FRIED, SAYING WHAT THE LAW IS: THE CONSTITUTION IN THE SUPREME COURT 53–68 (2004) [hereinafter FRIED, SAYING] (emphasizing the autonomy of our constitutional doctrine within the social and political practices of the Republic).

194. See generally Goldstein, *supra* note 192.

195. BRANDOM, ARTICULATING REASONS, *supra* note 88, at 4–7.

196. AUSTIN, WORDS, *supra* note 55, at 5 (giving the example of a bequest made in a will). Indeed, in the case of purported contracts subject to the statute of frauds *only* written texts can be successful performatives.

197. *Id.* at 150–51.

erate as a performative.<sup>198</sup>

Austin distinguishes five types of performatives.<sup>199</sup> Only two types appear in the Constitution: the exercitive and commissive. An exercitive takes an action or exercises a power that is vested in the speaker.<sup>200</sup> The right or power attributed to the speaker may be vested in her formally or informally, but Austin remarks the prevalence of exercitives in the legal context, where there is significant formality in the vesting.<sup>201</sup> As Austin notes, an exercitive “is a decision that something is to be so.”<sup>202</sup> In the Constitution, the creation of the Congress, the creation of the Presidency, and the creation of the Supreme Court as constitutive elements of the sovereign federal government are all obvious examples of exercitives. The creation of rights, as under the First and Second Amendments, and the limitation of the power of the Federal or state governments, as under the First, Second, and Fourteenth Amendments, are also important examples of exercitives. The constitutional provision that the President may be impeached and tried for high crimes and misdemeanors is another example. A commissive is made by a speaker or writer with the power to commit herself to a particular course of action.<sup>203</sup> In the Constitution, the provision that the President shall exercise due care that the laws are enforced is an example of a commissive. As such, it is a little puzzling because it is made on behalf of the President but it is not made by the President.<sup>204</sup>

Performatives are significant because they behave differently from ordinary declarative utterances or textual statements—what Austin terms constatives.<sup>205</sup> Most constitutional interpretation, and certainly most of the protagonists in the classical debate over

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198. *Id.* at 14.

199. *Id.*

200. *Id.* at 154.

201. *Id.* Such formality serves certain well-recognized functions, including those of ensuring certainty and simplifying proof. See generally BARNETT, LOST, *supra* note 60, at 106–09 (describing the functions of a writing, in private contract and in public constitutional law).

202. AUSTIN, WORDS, *supra* note 55, at 154.

203. *Id.* at 156–57.

204. The cited provision nevertheless qualifies as a commissive. When the president or members of Congress swear the required oath to uphold the Constitution, it would appear that they also affirm such undertakings as part of their respective constitutional duties. This affirmation may be thought of as an incorporation by reference (in a legal perspective) or as implied by their oath (on an inferentialist account). In either case, the commissive expressed in the constitutional text is affirmed by the individuals who, individually or as a member of the collective body, commit to the performance.

205. *Id.* at 3.

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originalism, have tacitly treated the constitutional text and the texts of authoritative constitutional opinions as constatives.<sup>206</sup> That assumption has misled many of the participants in the originalism debate. For example, if we read, apply, and interpret the constitutional text only as constatives or declaratory, we ignore the dimension of what the text does as well as what it was understood, expected, and intended to do. That changes the way we read, apply, and interpret the text. For example, consider truth conditions. Rightly or wrongly, we generally think that statements of fact are true or false.<sup>207</sup> Do propositions of constitutional law have truth conditions? To the extent that such texts constitute performatives and Austin is right, then the statements or propositions that comprise such texts do not have non-trivial truth conditions.<sup>208</sup>

Austin focused first on the apparent absence of truth conditions for performatives and observed that performatives are instead measured by a different, novel metric.<sup>209</sup> Austin terms his account of the ways in which performatives fail the doctrine of the infelicities.<sup>210</sup> Those failures arise because the utterances don't fit with, or conform to, the social practices or contexts in which they are embedded. In the case of a wedding vow, a participant might already be married, might be under the legal age of consent, or might think she was only acting in a play.<sup>211</sup> In such cases the wedding vows would be ineffective—the couple would remain unmarried—but the vows would not

206. Most do not even acknowledge the concept of performatives. While Dworkin makes a passing reference to Grice's work, he does not make clear what he is referring to, or how that work figures into Dworkin's critique of originalism. See Dworkin, *Interpretation*, *supra* note 27, at 117, n.6. An important exception, of course, is Larry Solum, who employs Grice's analysis in his account of originalism. See Solum, *Communicative Content*, *supra* note 2 (expressly relying on Grice's theory for an account of the importance of intention and context in constitutional interpretation).

207. See generally, e.g., David Lewis, *General Semantics*, in SEMANTICS OF NATURAL LANGUAGE 169 (Donald Davidson & Gilbert Harman eds., 1972) (asserting the relationship of meaning and truth conditions).

208. AUSTIN, WORDS, *supra* note 55, at 154. For an extended discussion of the question of the existence of truth conditions for propositions of constitutional law, see LeDuc, *Anti-Foundational Challenge*, *supra* note 10; LeDuc, *Ontological Foundations*, *supra* note 6.

209. AUSTIN, WORDS, *supra* note 55, at 13–14.

210. *Id.* at 14. It is important to note certain failures that are excluded from Austin's account. In the case of the performatives uttered in a marriage ceremony, Austin does not include the failure of an unhappy marriage or an infelicitous match. That is important because the failures that Austin captures are confined to failures to do the act that the performative is designed and (ordinarily) intended to accomplish. Whether that act has good or happy consequences falls outside the ambit of Austin's theory. That limitation makes sense because he is concerned with language, not with action theory.

211. See *id.* at 16.

be false. Many of the complexities of Austin's account are irrelevant here; for example, because of the success of the Constitution,<sup>212</sup> Austin's account of how performatives fail<sup>213</sup> would appear unimportant in constitutional theory.

But Austin's core insight is that certain utterances (and texts) do not reduce to declarative statements and the linguistic usage implicated in such utterances is very different from a Cartesian predication or an empiricist report of sense data. Because constitutional texts fall within that category of performatives, Austin's theory is important and very relevant to the analysis and understanding of those texts. Austin's denial of truth values to performatives has not been uncontroversial, of course, and some have sought to rehabilitate the truth values of performatives by arguing that performatives are true by their utterance.<sup>214</sup> For my purposes here, I will simply adopt an approach to performatives like that outlined by Austin.

Constitutional texts (including judicial decisions) are often (perhaps, in the case of constitutional provisions themselves, always) performatives,<sup>215</sup> and it is important to understand the performative dimension of the constitutional text. I want to focus on four elements. First, are constitutional texts performatives? Second, who is the author with respect to such texts? Third, who is the audience? Fourth, what are the objections to such a performative characterization?

Whether constitutional texts or other legal texts are performatives is not a new question.<sup>216</sup> That inquiry has been part of the analy-

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212. The success of the Constitution, in this context, is a matter of its having been understood and effective in constituting a new sovereign federal government with certain generally understood features. This characterization is not a normative assessment of the justice of the government created or its provision for the rights of its citizens.

213. See LEO TOLSTOY, ANNA KARENINA I (Richard Pevear & Larissa Volokhonsky trans., 2013) (1877) ("All happy families are alike; each unhappy family is unhappy in its own way.").

214. See Lewis, *Scorekeeping*, *supra* note 122, at 247–48.

215. In claiming that constitutional texts are generally performatives, I am not claiming that such texts are speech acts (which had admittedly been the focus of the analysis of performatives). Nor am I claiming that such texts are to be analyzed with a model of speech. Thus, the argument here is, I believe, and is intended to be, agnostic on the claims that Jed Rubenfeld has made about the inadequacy of the model of speech. See generally Jed Rubenfeld, *Reading the Constitution as Spoken*, 104 YALE L.J. 1119 (1995) [hereinafter Rubenfeld, *Reading the Constitution*] (arguing that the atemporality of the Constitution's legal authority precludes simple, speech metaphors for constitutional interpretation).

216. See Geoffrey P. Miller, *Pragmatics and the Maxims of Interpretation*, 1990 WIS. L. REV. 1179 (1990) (arguing that maxims of interpretation are simply specific examples of Grice's more general account of the rules of conversational implicature); DWORKIN, *Forum*, *supra* note 164, at 400 n.13 (questioning whether legislative votes are speech acts).

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sis of legislation as a particular form of communication.<sup>217</sup> If we start with the fundamental questions—whether the Constitution is intended to do something, on the one hand, and whether it does, in fact, do something, on the other—the answers seem apparent. The Constitution is intended to, and does, do something.<sup>218</sup> It is the *what* of that intended performance that is more complex.<sup>219</sup>

Constitutional performatives do different things and, indeed, different kinds of things, than many simpler utterances and texts. As noted above, the types of performatives employed in the Constitution that fit into Austin’s categories are exercitives and, possibly, commissives.<sup>220</sup> But these two types of performatives would not appear to exhaust the kinds of things that the Constitution does. It may be helpful to provide at least a partial catalog of what the Constitution does. It creates a sovereign state, the United States of America. It constitutes the legislative, executive, and judicial branches of that state, and creates a bicameral legislature, and provides certain rules as to the individuals that are eligible to serve. It grants limited powers to that sovereign state. It limits the powers of the otherwise sovereign States that are subsumed within that state. It provides a rule for the ratification of the instrument that created the new sovereign state and for the amendment of such instrument. The performative analysis of these diverse and complex provisions is not simple.

First, the provisions of the Constitution that instruct or constrain the States would appear to be performatives of a type not easily captured by the categories described by Austin.<sup>221</sup> The provisions of the Constitution instruct the otherwise sovereign States as to their obligations or restrict their powers on behalf of the superior federal sovereign. For example, when Article I, Section 10 provides “No State

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217. See, e.g., Solum, *Communicative Content*, *supra* note 2, at 486–89 (endorsing a Gricean pragmatics to account for constitutional meaning); Greenberg, *supra* note 2.

218. See Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL’Y 817, 821 (2015) [hereinafter Sachs, *Legal Change*] (“What’s important about the Constitution of 1788 isn’t what it *said*, but what it *did* . . .”).

219. Thus, whether we attempt to assimilate the adoption of the constitutional text or the decision of a constitutional case and issuance of an associated opinion to orthodox communication theory, the performative act appears central. See Greenberg, *supra* note 2.

220. Such provisions exercise powers on the part of the sovereign to limit the powers of the otherwise sovereign States (exercitives) and commit the national government to certain actions, as in the prohibition in Article I, Section 9 of any legislation restricting the slave trade before 1808 (as commissives).

221. See AUSTIN, WORDS, *supra* note 55, at 150–63 (distinguishing five general classes of performatives).



shall enter into any Treaty [or] Alliance,”<sup>222</sup> that provision prohibits the States from exercising powers that would otherwise be theirs as sovereigns. That is a performative act.<sup>223</sup> The provision, by its terms, imposes a limit on the otherwise available powers of the States. This is done by the constitutional provision and requires no further saying or doing to be effective.<sup>224</sup> With Article I, Section 10, the States’ powers to enter into treaties have been eliminated. What sort of performative is such a provision? It does not appear to fit easily into any of Austin’s categories.<sup>225</sup> When the First Amendment provides that the “Congress shall make no law . . . abridging the freedom of . . . the press,” that, too, is a performative provision, prescribing a limit on the power of the Federal government.<sup>226</sup>

When Article I, Sections 2 and 3 provide for the creation of the House of Representatives and the Senate, respectively, and provides for the powers thereof, those provisions are constitutive and, as such, are also performative texts.<sup>227</sup> That provision would appear to be an exercitive because it employs a sovereign power to create or constitute the two houses of Congress. All of the provisions of the Constitution,<sup>228</sup> other than the Preamble,<sup>229</sup> are likely performatives because the Constitution and each of its provisions are doing something.

Opinions in constitutional cases are more complex than the sim-

222. U.S. CONST. art. I, § 10.

223. In particular, in Austin’s terminology it is an exercitive. AUSTIN, WORDS, *supra* note 55, at 154–56.

224. Were a state to enter illegally into such a treaty or alliance, action to enforce the prohibition would need be required, of course; the constitutional provision does not magically operate in the space of causes to prevent a state from entering into such a treaty or alliance.

225. It is most like an exercitive, if it fits into any of the categories enumerated by Austin, but none of the many exercitives identified by Austin prohibit actions by another. But Austin does expressly define an exercitive as including performatives for which the “consequences may be that others are . . . ‘not allowed’ to do certain acts.” AUSTIN, WORDS, *supra* note 55, at 154. While I think this definitional note is accurate, I do not think it is very important. The failure of these provisions to qualify within Austin’s taxonomy is a function of the complexity of the political institutions of the Republic. These provisions are, in a sense, second-order performatives within an existing political legal context.

226. U.S. CONST. amend. I.

227. U.S. CONST. art. I, §§ 2, 3.

228. *District of Columbia v. Heller*, 554 U.S. 570 (2008), held that the preamble of the Second Amendment was without legal force and therefore would not qualify as a performative in the relevant sense here.

229. The preamble may not appear to be a performative because it seems simply to recite or state the basis upon which the Constitution was made. On the other hand, it may be performative, under the political theory of the Founding. On such an account, grounded on social contract theory, the preamble recites the exchange of consideration that supports the contractual rights and obligations created or memorialized in the balance of the document.

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ple kinds of utterances that Austin analyzes. The holding of the case, and the reasoning of the case, are performatives. That is, the authoritative, precedential core of a case is performative. But unlike the text of the Constitution, there may be non-performative elements in constitutional cases. Opinions may state historical or sociological facts that are relevant to the case,<sup>230</sup> or they may state facts relating to the procedural history of the case itself.<sup>231</sup> For our purposes, I can focus upon the performative elements of the constitutional text.

Dissenting or concurring opinions appear to present a problem under this analysis because they do not authoritatively state the law. Are they also performatives and, if so, what is it that they *do*? On their face, dissenting opinions may appear to do nothing, creating the apparent paradox that the authoritative kernel of controlling opinions are performatives while other opinions are composed of constatives. While concurring and dissenting opinions lack the performative force of controlling opinions, they have a weaker, modal performative status. Such opinions are in the nature of counterfactual hypotheticals: they purport to provide what the authors would have held if they had held the power to decide. Thus, in a counterfactual form, such opinions indicate what the law might have been. As signals or signposts with respect to the direction of the law such opinions also carry significant performative force. Despite the apparent paradox, that substantial difference between the controlling opinion and all other opinions under a performative analysis simply reflects the common law lawyers' understanding of the nature of precedent.<sup>232</sup> The controlling opinion states the law and, in so doing, makes the precedent. That congruence between the performative text and the legal precedent that states the controlling law is powerful evidence of the performative role of constitutional (or other legal) opinions.

The second step in the analysis requires that we determine to whom we attribute the constitutional text. If we begin with the Constitution originally adopted by the Constitutional Convention and ratified by the votes in the States, to whom ought the constitutional

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230. See, e.g., *District of Columbia v. Heller*, 554 U.S. 570, 684–87 (2008) (Breyer, J., dissenting).

231. *Id.* at 573–77.

232. See generally Arthur L. Goodhart, *Determining the Ratio Decidendi of a Case*, 40 YALE L.J. 161 (1930); Max Radin, *Case Law and Stare Decisis: Concerning Prajudizienrecht in Amerika*, 33 COLUM. L. REV. 199, 200–02; (1933) (classical statement of some of the obvious puzzles inherent in the doctrines of stare decisis and precedent); Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987).

text to be attributed to for purposes of a performative analysis under Austin's theory?<sup>233</sup> Are there impediments to such an attribution and associated analysis? Some have questioned the very existence of collective understandings.<sup>234</sup> Originalism requires that we be able to identify the relevant actors or community whose intentions, expectations, or understandings are to count in determining the original import of the constitutional text.<sup>235</sup> To employ Austin's concepts, we need to identify the utterer or author to whom the speech or text is attributed. That question of attribution also arises with respect to judicial decisions applying and interpreting the Constitution. Who is the author in those cases for purposes of an analysis of the texts as performatives? Do we adopt the fiction that the Court is merely channeling the authors of the relevant constitutional text? Or do we treat the Court as an author?

It is not clear that this question is of more than theoretical interest, because it is unclear that different choices of author would make a material difference in the performative analysis. Whoever is treated as the author, the pragmatics of the context and the intent of the author appear substantially congruent. They would be substantially congruent because all of the actors who stand as potential authors in the performative analysis were engaged in a common social enterprise; they had a coordination strategy with respect to the constitutional texts adopted.

In the case of the Constitution as originally adopted, the candidates for authorial status would appear to include particular members of the constitutional community (with respect to particular provisions, for example): the members of the Convention voting to propose the Constitution, the entire Convention, the members of the respective State ratifying conventions (perhaps excluding those from North Carolina and Rhode Island),<sup>236</sup> the voters who elected the del-

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233. This restates as a question a criticism that Dworkin leveled against originalism. See DWORKIN, *Forum*, *supra* note 164, at 43–45.

234. *Id.* at 400 n.13.

235. See, e.g., *id.* at 43–45 (offering classical statement of concerns with respect to group intentions or expectations); Paul Brest, *The Misconceived Quest for Original Understanding*, 60 B.U. L. REV. 204 (1980).

236. The delegates and voters from those two states ought perhaps to be excluded because the Confederation Congress adopted a resolution providing that the Constitution would become effective when ratified by eleven of the thirteen states, and North Carolina and Rhode Island were the last two states to ratify. In addition, the voters and delegates from the final four states ratifying should perhaps also be excluded because the Constitution specified that it would be effective when adopted by nine State ratifying conventions, and those states ratified after the

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egates to the State ratifying conventions, and the People. These are the same persons whose intentions and expectations are taken into account under original intentions and original expectations originalism.<sup>237</sup> For purposes of the discussion here, we may assume that the same kinds of answers available with respect to identifying the relevant actors for originalism are generally available for purposes of a performative analysis.<sup>238</sup> Moreover, it is unclear that there are good reasons to believe that the different candidates to be treated as author would have had materially different intentions and expectations relevant to a performative analysis.

Third, in addition to identifying the author with respect to constitutional law texts, we must also identify the audience if we are to construct a performative account.<sup>239</sup> Is the audience limited to the initial, or original, audience or can we endeavor to construct an account of an audience that stretches out into time? This question is, of course, at the heart of the dispute between originalism and its critics with respect to the originalists' temporal account of the meaning of constitutional provisions.<sup>240</sup> The originalists look only to the original speech act and the original authors and audience.<sup>241</sup> One strategy that

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requisite majority of states had already adopted the Constitution. *See* U.S. CONST. art. VII. *See generally* PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–88 (2010).

237. *See generally* DWORKIN, *Forum, supra* note 164, at 43–44. They are also most of the classes of persons considered relevant under the New Originalism looking to the original understanding of the constitutional provisions (missing are certain broader linguistic communities).

238. The question that is unanswered by originalism is whether the court may be treated as the author; that is not a possibility for originalism. In certain respects, when the Court provides a specification of an open-ended constitutional provision, for example, it is hard not to treat the Court as the author, at least as to the specification. *See, e.g.*, *National Labor Relations Board v. Canning*, 134 S. Ct. 2550, 2550 (2014) (providing an express rule as to how many days the Senate must be in recess before the Recess Appointments Clause becomes potentially applicable).

239. In ordinary utterances, this is not a problem, because acoustics defines who is within earshot, and the context generally indicates who is intended to hear. But drama is rife with instances of asides and utterances directed to hidden listeners, or couched in terms that only some of those present can be anticipated to understand in the manner intended.

240. *See* SCALIA, INTERPRETATION, *supra* note 19, at 140; Laurence Tribe, *Comment, in* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 65, 84 (Amy Gutmann ed., 1997) [hereinafter Tribe, *Interpretation*] (“[M]uch of the Constitution simply cannot be understood as a law enacted by a particular body of persons on a specific date but must instead be comprehended as law promulgated in the name of a ‘people’ who span generations.”). *See also* BORK, TEMPTING, *supra* note 18, at 144 (identifying the relevant class as the ratifiers of the Constitution).

241. *See* SCALIA, INTERPRETATION, *supra* note 19, at 140. For an exploration of some of the puzzles of temporality raised by the competing theories of constitutional interpretation, see

the originalists may offer for their position is to challenge the notion that atemporal speech acts are a plausible, or perhaps even a meaningful, concept. The originalists may argue speech acts, including textual acts, are social artifacts that are always embedded in a historical moment. The notion that we can pluck such texts out of that context while retaining a coherent notion of the text's meaning may be confused and mistaken.<sup>242</sup> Yet it would appear that we have a range of texts, often in the religious context, that are understood to prescribe natural or religious law, among their other roles, and, to the extent that those texts do so, are understood by the relevant observant religious community to speak to and for eternity.<sup>243</sup> In the case of the key sources in the Judeo-Christian tradition, these texts are familiar to many originalists and, indeed, important models for interpretation.<sup>244</sup> But for many secular contemporary citizens the model of divine religious texts is problematic. The timeless authority of such texts derives, after all, from their divine status or source. Nevertheless, if we stand the question on its head, why must texts or utterances speak only to a particular temporal context? Mathematical propositions, for example, appear to have a timelessness that even an agnostic contemporary can acknowledge. So it is not clear that the notion of speaking to the ages is a flawed or impossible performative project—just ambitious.

But originalists are generally not prepared to imagine such an atemporal or temporally extended audience in the interpretation of the constitutional text because of their pursuit of a meaning based upon a temporally defined original understanding or expectation.<sup>245</sup> In attributing this position to originalists, new and old, I am simply restating the originalists' claim that it is the original understanding of

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Rubinfeld, *Reading the Constitution*, *supra* note 215.

242. On this objection attempting to state an atemporal unchanging meaning or application for texts or utterances is as misguided as trying to state an unchanging meaning for indicative or other indexical terms. Such a strategy misunderstands the nature of such terms, which derive their meaning from their context.

243. See, e.g., THE KORAN; THE BIBLE.

244. See BORK, TEMPTING, *supra* note 18, at 164 (describing the status and interpretation of the Ten Commandments which were understood to be a divine law binding upon God's chosen people); but see Sanford Levinson, *On Interpretation: The Adultery Clause of the Ten Commandments*, 58 S. CAL. L. REV. 719 (1985) (playfully exploring the complex and difficult interpretative questions that would immediately arise in contemporary society on a codification of the Ten Commandments).

245. See SCALIA, INTERPRETATION, *supra* note 19, at 140 (acknowledging Tribe's claim that constitutional provisions are trans-temporal but asserting that the meaning remains invariant over time).

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the text or the original intentions or expectations, as the case may be. Frank Easterbrook, an originalist himself, has denied that originalism is committed to the understanding at that historical moment, however.<sup>246</sup> He attempts to deflect the claim by asserting that New Originalists look to the meanings of the text, and, as textualists, do not stand within a historical moment.<sup>247</sup> The text is invariant over time. Yet it is the historical meaning that controls.<sup>248</sup>

Fourth, and finally, there are three objections to this performative account. First, originalists (or their critics) might argue that this performative account of the meaning of the constitutional text is unnecessary. They might argue that the concept of context—which is already central to their account—does the same work that the concept of performatives does without the complexity or philosophical baggage.<sup>249</sup> The appeal to context certainly does do some of the same work that the concept of performatives does in explaining the meaning of constitutional texts. But it does so in an entirely opaque way: context is a black box or *deus ex machina* that miraculously effects a change to the semantic meanings of a text without any explanation of why. When Justice Scalia asserts that in constitutional law “context is everything,”<sup>250</sup> what does that mean, and how does that help us to identify the semantic content or import of the constitutional text? He does not explain. One approach is to consider what context is employed to do in other interpretations.

In the end, I do not think that an explanation for the role of context for Justice Scalia can be articulated. Context, for Justice Scalia, functions as a non-semantic source of constitutional linguistic content that cannot be reconciled with the fundamental express claims of

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246. See Frank Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1119, 1119–20 (1998) [hereinafter Easterbrook, *Dead Hand*] (arguing that the source of the commitment to the original understandings is the originalist philosophical or theoretical account of political legitimacy that makes the original understanding of the text the goal of the interpretive theory that follows from that political theory).

247. *Id.* at 1119–23

248. *Id.*

249. Austin’s theory of performatives and Grice’s theory of implicature remain live topics in the contemporary philosophy of language, with many issues still without agreement, along with the relationship and relative importance of semantics and pragmatics. See, e.g., WAYNE A. DAVIS, *IMPLICATURE: INTENTION, CONVENTION, AND PRINCIPLE IN THE FAILURE OF GRICEAN THEORY* (2007) (criticizing the particular claims and aspirations of the Gricean project but acknowledging the importance of Grice’s contribution to the understanding of meaning). See generally Charles Travis, *Pragmatics*, in *A COMPANION TO THE PHILOSOPHY OF LANGUAGE* 87, 87 (Bob Hale & Crispin Wright eds., 1st paperback ed. 1999).

250. SCALIA, *INTERPRETATION*, *supra* note 19, at 37.

originalism. Or, to put it more charitably, the relevant context of the constitutional text arises out of its performative character. What the text is to be understood to mean is in part a matter of what it does. That use of linguistic pragmatics would be foreclosed to Justice Scalia's semantic understanding originalism except to the extent that it is introduced through a notion of context. The concept of a performative statement and the assimilation of the performative constitutional text to more common, widely recognized performative utterances and texts *explains* why the meaning of the constitutional text is not simply a matter of semantics. We need the concept of performatives because the originalists' appeal to context explains so little.

The second objection to this performative account of the constitutional text argues that it conflates the potentially performative constitutional text with non-performative statements about those provisions.<sup>251</sup> On this objection, arguments about the Constitution and interpretations of the constitutional text are not performatives, and do have truth conditions. Thus, whether the Eighth Amendment prohibits capital punishment is true or false, and a statement or decision that the Eighth Amendment bars capital punishment is true or false and has truth conditions. This is an intuitively engaging objection, not least because it salvages our intuition that such statements about the Constitution are true or false, as well as the notion that the Constitution has, itself, an important performative dimension or character.

I want to reject this criticism and to claim that statements about the Constitution *in the context of authoritative reasoning about, or holdings of, constitutional law* are also most importantly performative statements. Such statements are to be contrasted with non-authoritative statements by constitutional theorists or constitutional historians. Such latter statements are true or false, at least for those who endorse the importance of accounting for truth. It is easiest to see the performative nature of judicial statements about the Constitution in the case of holdings by the Court. When the Supreme Court holds that, for example, the Eighth Amendment prohibition on cruel and unusual punishment prohibits capital punishment of the mentally impaired,<sup>252</sup> that statement is fundamentally a performative. It pro-

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251. A more radical version of the objection would challenge Austin's claim that performatives do not have truth conditions. See Lewis, *Scorekeeping*, *supra* note 122, at 247–48; MARMOR, LANGUAGE, *supra* note 2, at 61. I cannot explore that objection here.

252. *Atkins v. Virginia*, 536 U.S. 304 (2002).

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hibits the execution by the State of one or more mentally impaired human beings.<sup>253</sup> When the Court's holding does that, it is neither non-trivially true nor false. It may be consistent or inconsistent with other constitutional law, it may be foolish or wise, it may be easy or difficult to reconcile with historical understandings or with the text of the Eighth Amendment, but it is not true or false.<sup>254</sup> It is so because the Supreme Court so holds. On this reply, it is the critics who have conflated authoritative performative statements of constitutional law with non-performative statements about the Constitution.<sup>255</sup>

The third apparent objection to an account of the constitutional text that emphasizes its performative role is that such an account appears to deprecate the conceptual or propositional content of the constitutional text. At Chief Justice Roberts's confirmation hearings he famously (perhaps infamously) characterized the role of a judge, including a judge facing constitutional questions, to that of an umpire in the game of baseball, impartially calling balls and strikes.<sup>256</sup> That metaphor is apt insofar as it captures the performative role of judicial decisions in what might be termed, also a little misleadingly, as the game of constitutional law. That metaphor is misleading, however, insofar as it misses or ignores the conceptual dimension of judicial decision.<sup>257</sup> The conceptual content of judicial decisions in our practice of American constitutional law is very different from the very limited conceptual content of umpires' calls in the game of baseball.

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253. *Id.*

254. I take this to be the somewhat subtle point Charles Fried makes. See Fried, *Judgment*, *supra* note 141, at 1026 (exploring the import of a contemporary United States legislative resolution characterizing the massacres of Armenians in the waning days of the Ottoman Empire early in the Twentieth Century as genocide).

255. It is more complicated than this because non-authoritative statements about the Constitution's provisions are often made in a performative context, too, as in the case of dissents or arguments presented directly or indirectly to the Court. Such statements, while not authoritative, also have an important performative dimension. They do so, while also potentially being true or false and having truth conditions. Thus, for example, there is a historical answer or answers to the questions whether the relevant actors in the adoption of the Fourteenth Amendment intended or understood that Amendment to prohibit or to permit segregated schools. But that historical account does not determine how any constitutional case must be decided.

256. See *Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States: Hearing Before the Comm. on the Judiciary*, 109th Cong. 66 (2007) (statement of John G. Roberts, Jr.). For a brief discussion of this testimony and the controversy it generated, see MARK TUSHNET, *IN THE BALANCE: LAW AND POLITICS ON THE ROBERTS COURT* 70–72 (2013) (describing the firestorm of controversy that the metaphor rightly created in the academy). It is a metaphor that the Chief Justice has continued to employ.

257. On the spectrum of texts and utterances, rulings by umpires in sports have a very limited conceptual content.



Calls in baseball support few inferences. The inferences that they do support are generally strongly constrained by the rules of the game. “Strike three!” entails “You’re out!” and may entail that the team at bat has been retired for the inning.

But while simple performatives may have less conceptual content than many other statements, it is not inherent in the concept of a performative that it be without conceptual content.<sup>258</sup> The tension between the performative and inferential dimensions arises because of the contrast between truth conditions for ordinary statements (which are often thought to have truth conditions)<sup>259</sup> and performatives, which are thought to be felicitous or infelicitous, for example, but often not true or false.<sup>260</sup> The semantic theory of originalism begins with a premise that the semantic meaning of the Constitution conveys a substantial conceptual content.<sup>261</sup> We see this, for example, when Robert Bork writes that the Constitution furnishes the major premise for syllogistic constitutional inference.<sup>262</sup> The conceptual content of the constitutional provision permits it to stand as the major premise in such a syllogism.<sup>263</sup>

The conceptual content of such constitutional propositions does not play a performative role in constitutional argument in Austin’s sense. The utterances of propositions that together state a proof of a mathematical theorem are not performatives, even though they per-

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258. Many performatives are also freighted with substantial conceptual content. For example, in the celebrated example of the bridegroom saying “I do” in a classical Christian marriage ceremony, that performative utterance is freighted with conceptual content that commits the groom, at least ordinarily, to certain expressive claims with respect to the bride and to certain affirmative and negative obligations that he has assumed. Ordinarily, the groom would have committed to such conceptual claims, and would assent to a wide range of implications from the simple act of uttering “I do.” There may be exceptions to these general rules, as in the case of the groom who marries the bride for her money, or to obtain a so-called green card as a matter of United States immigration law, for example, but such cases are exceptions, not counterexamples to the truth of the general conceptual implications of the utterance.

259. R.M. Dworkin, *Introduction* to THE PHILOSOPHY OF LAW 5 (R.M. Dworkin ed., 1977).

260. AUSTIN, WORDS, *supra* note 55, at 6, 13–14.

261. The conceptual content is the substantive, propositional content of constitutional law. When we state constitutional doctrine, we are summarizing the propositional content of that law.

262. BORK, TEMPTING, *supra* note 18, at 262.

263. *See generally* BRANDOM, ARTICULATING REASONS, *supra* note 88, at 165–66 (arguing that propositional content is the property of figuring as a premise and as a conclusion in inferences employed in our discursive practice of asking for, and giving, reasons); BRANDOM, MAKING IT EXPLICIT, *supra* note 118. More generally, the conceptual content of the Constitution permits constitutional arguments from that text and practical inferences about how to resolve questions of constitutional decision.

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form the act of proving the theorem.<sup>264</sup> The performative acts that Austin focuses upon are embedded more concretely in social behavior and practice. Yet the conceptual content of constitutional texts and, in the rare case of constitutional decisions read from the bench, utterances are substantial and important. Indeed, most lawyers approach a constitutional question with a focus upon that doctrinal content. That is much of what legal education teaches as well as much of what lawyers work with in their ordinary legal practice.<sup>265</sup> That conceptual, propositional content—hornbook law—is important and cannot be ignored in an account of our constitutional law.

Moreover, subject to any deflationary account of truth that may be adopted, such statements about such conceptual content have truth values. For example, when we assert the following, “the Second Amendment protects an individual’s right to own a hand gun, without regard to service in the National Guard or any other militia,” we make an assertion that has a truth value. Since the decisions in *Heller* and *McDonald*, that assertion is true; before those decisions, the truth value of the statement would have been unknown and controversial. This recognition of such truth values is hardly surprising. But what makes the claim important and interesting here is the tension that it creates with the performative analysis that I have earlier outlined. If such statements have truth values, then how are such truth values reconciled with the performative analysis?

The reconciliation requires that we distinguish authoritative statements of constitutional law from statements about constitutional law. The two can look very similar in form, but depending upon the author and the context, their force and function are entirely different. A statement of the law by the Court makes itself true, just as the en-

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264. The reason such propositions are predominantly constatives, rather than performative, is because such conceptual content is largely independent of non-linguistic behavior and practices. Proofs of mathematical theorems are largely atemporal and independent of context. Yet even mathematical knowledge has a social dimension that is not immediately apparent. See generally PHILIP KITCHER, *THE NATURE OF MATHEMATICAL KNOWLEDGE* (1984) (arguing against the accepted *a priori* characterization of mathematical knowledge in favor of an account that looks at the growth of mathematical knowledge and the discursive practices of mathematicians to create what Kitcher styles an empirical account).

265. Characterizing such practice as ordinary captures not only the quotidian nature of such practice but also the notion of a normal practice in the Kuhnian sense. See generally THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (3rd ed. 1996) (defending a now classical account of the incommensurability of alternative scientific theories and arguing that the process of replacing one scientific theory with a different theory is not simply a matter of following experimental evidence). Recognizing Kuhn’s insight here and its import for understanding legal argument need not commit the reader or me to the entire Kuhnian project.

actment of a statute creates the law (subject to effective dates and potential constitutional infirmities). A statement about the law has a truth value that is determined by facts of the matter beyond it or, on a more pragmatist account, by how we treat such statements themselves and their inferential implications. It is the performative dimension of the Court's pronouncements *about* the law that make such statements the law. The Court's pronouncements also have the conceptual content I have described. The Court's opinions engage in practical reasoning and inference. Those inferences and their conceptual content have the unusual truth value feature that arises from their performative role. Saying makes them so.

It may, therefore, appear to the protagonists in the debate that my criticism of the originalism debate for its failure to recognize the performative role in the constitutional texts is too harsh. In the debate, at least off the Court, the statements made about constitutional law and decision lack the performative dimension I have described. While that is so, my criticism has focused on the failure of the protagonists generally to recognize the performative role of the authoritative constitutional texts, not a performative role for their own texts.<sup>266</sup>

A second dimension of the constitutional text that goes beyond its semantic meaning, as traditionally understood, articulates the inferential role and implicature associated with constitutional texts. As the debate has articulated an account of the meaning of constitutional texts the protagonists in the debate have generally overlooked the inferential role of statements of constitutional law in our constitutional discourse. When we endorse particular claims about the Constitu-

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266. It is important to recognize the parallel between the performative analysis outlined above and Mark Greenberg's challenge to the communication theory of law. See Greenberg, *supra* note 2, at 217–20. My analysis is consistent with Greenberg's criticism, because both emphasize the performative dimension of legal texts in making law. *Id.* at 256 (focusing expressly on statutes). The Constitution is not simply a communication, just as the affirmation of the marriage vows is not simply a matter of communication. Reciting marriage vows in an otherwise felicitous ceremony not only communicates a bride or groom's intent to marry, it legally effects the marriage. While one could characterize the utterance as a communication that one is marrying, that seems somewhat misguided for at least a couple of reasons. First, so characterizing the utterance as a communication does not appear to add anything. Second, the utterance of the felicitous marriage vow by the groom would not appear equivalent to the statement "I am marrying the bride now" at the appropriate time in the ceremony, even though characterizing the two as communications would appear to render them equivalent. But my account of the meaning of the Constitution also recognizes the inferential, conceptual content of our constitutional law. In rejecting an account of our constitutional law exclusively as a matter of communication, we should not lose sight of that important conceptual content.

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tion, we are entitled to certain inferences from those claims. We are also committed to certain other claims that implicate these initial claims. This is the conceptual content of the law made by judicial decisions generally without parallel in umpires' calls in sports.

Brandom has constructed an account of language that accounts for meaning not simply as use, but by reference to the inferential commitments we make and the inferential consequences we become entitled to in our discursive practice.<sup>267</sup> That account seems generally plausible for our constitutional decisional discourse. Authoritative statements of constitutional law have the conceptual content and carry the inferential commitments and entitlements that Brandom describes. As a result, when the Court states the law, the conceptual relationship of that statement with other elements of the law may be articulated logically. This is the limited sense in which Dworkin's theory of the consistency of our constitutional law is correct. That conceptual consistency need not extend to our moral and political philosophy, however.

The second element in this account of the conceptual content of the constitutional text, implicature, is elucidated by Paul Grice in his account of the non-semantic sources of linguistic meaning.<sup>268</sup> Several constitutional theorists have recognized the potential importance of Grice's work for their respective projects.<sup>269</sup> There has been some recognition of the role of implicature, the ability of context to give utterances or texts additional meaning. But the general approach has been highly cautious.<sup>270</sup> Grice emphasizes the pragmatics of linguistic meaning, how the context in which ordinary statements are made informs the meanings potentially conveyed by semantically identical statements.<sup>271</sup>

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267. BRANDOM, *ARTICULATING REASONS*, *supra* note 88, at 45–77.

268. See GRICE, *STUDIES*, *supra* note 55. In lumping Austin and Grice together, I am doing at best only very rough justice to philosophical theories that are different and perhaps inconsistent in important ways. See *id.* at 1–21 (criticizing Austin and Searle). But the inconsistencies do not appear material to the use I want to make of the insights each offers. See also Solum, *Semantic Originalism*, *supra* note 2.

269. See, e.g., Solum, *Communicative Content*, *supra* note 2; Dworkin, *Interpretation*, *supra* note 27 at 117 n.6 (merely citing Grice's name).

270. See MARMOR, *LANGUAGE*, *supra* note 2, at 34 (“In ordinary conversations, pragmatic enrichment is the norm, not the exception; in statutory law, it is the exception.”). I think constitutional law is like statutory law for this purpose.

271. See GRICE, *STUDIES*, *supra* note 55, at 24–27 (introducing the concept of implicature to capture the myriad ways in which conversational context permits efficient communication with utterances conveying far more meaning than semantics alone can account for). See also DAVIS, *supra* note 249 (quarreling with the particular description Grice offers while en-

An example of widely accepted implicature in the constitutional text may help clarify the claim. The First Amendment prohibits Congress from making any law “abridging the freedom of the . . . press.”<sup>272</sup> The Court has had no difficulty reading that protection to extend to broadcast television and to the Internet. Explaining that extension has proved more difficult, however. As a matter of syntax and semantics, the reading would appear wrong. Justice Scalia has suggested that the courts have read the term *press* as a “sort of synecdoche.”<sup>273</sup> More recently, the even more arcane concept of a hendiadys has been pressed into similar service.<sup>274</sup> A much more direct approach is to recognize the pragmatics of implicature. Grice’s work is important because it captures the way context can be analyzed to highlight our rule-like conventions or practices that enrich the semantic meanings of utterances and texts.

Yet it must also be acknowledged that Grice’s pragmatics do not translate *verbatim* into legal and constitutional contexts. In the context of disclosure statements under the federal securities laws, for example, a special Bauhausian maxim of caution applies: less is almost always more, subject only to the threshold requirement that the disclosure omitted does not make the disclosure made misleading and a bias in favor of identifying all the material risks that a business or investment may face. The particular pragmatics of the constitutional context have never had an adequate Gricean analysis and catalog. In response to those who might argue that pragmatic enhancement is unusual in the constitutional context, the best argument may be to simply note the manifold, important texts in which it apparently figures.

Any adequate account of the authoritative constitutional texts must therefore also account for the conceptual content of both the constitutional text and the authoritative judicial decisions applying and interpreting the Constitution.<sup>275</sup> The conceptual content of such

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dorsing the soundness of the project).

272. U.S. CONST. amend. I.

273. SCALIA, INTERPRETATION, *supra* note 19, at 38.

274. Samuel L. Bray, “*Necessary and Proper*” and “*Cruel and Unusual*”: *Hendiadys in the Constitution*, 102 VA. L. REV. 687 (2016) (introducing the concept of hendiadys—phrases with meanings distinct from the mere syntactical synthesis of the semantic meanings of their component terms—to determine the meaning of certain important provisions of the Constitution). Bray’s article is another Ptolemaic epicycle in the debate.

275. The strategy here has parallels to Larry Solum’s strategy to distinguish communicative content and legal content. Solum properly emphasizes the richness of constitutional meaning that is all too often lost in constitutional theory. See Solum, *Communicative Content*, *supra*

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constitutional texts is distinguishable from the performative content of those same texts.<sup>276</sup> The conceptual content of constitutional provisions is the propositional content that allows such texts to provide acceptable, licensed grounds from which to infer conclusions of constitutional law. For example, such content permits constitutional texts to figure in constitutional reasoning and the decision of constitutional cases. The conceptual content of the constitutional provisions is substantial.<sup>277</sup> That content has generated our constitutional jurisprudence from a relatively modest seminal text.<sup>278</sup>

It is important to articulate how the propositional or conceptual content of the constitutional texts has generated the larger, more ful-

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note 2. But there are important differences. Characterizing the distinction as between communicative content and legal content, at least in the constitutional context, may be misleading. The classic example of substantive due process is a good counterexample for Solum's account. As a matter of communicative content, the phrase would appear incoherent, as Ely has argued. *See* ELY, DEMOCRACY, *supra* note 171 (comparing the phrase "substantive due process" to the phrase "red green pastelness"). If Ely were right, the phrase has no communicative content, yet effectively communicates an array of legal norms. Solum's theory cannot, or cannot easily, account for this radical discontinuity. On the other hand, because his proposed interpretative method begins with communicative content, it is unclear how he would account for the concept of substantive due process. *See* Solum, *Communicative Content*, *supra* note 2, at 494–502. Perhaps the best strategy would be to characterize the words as constituting a technical term of constitutional art—or perhaps even as a hendiadys. Yet none of the elements of such a term would appear to have technical meanings, and the term itself would appear meaningless, as Ely argues. It is an interesting question whether this analysis may help redeem the Court's decision in *Morse v. Frederick*, 551 U.S. 393 (2007) with respect to the cryptic text "Bong hits 4 Jesus" but I cannot explore that question here.

276. It is distinguishable because the performative dimension does not have the conceptual or discursive content. For lawyers, the example of representations in commercial contracts stands as a good example. Representations are often included, not to assert or record the truth of the propositions they state, but to allocate the risk of falsehood between the parties. Thus, in negotiating contracts, the frequent primitive gambit that a party does not know the truth of the representation stated is easily dismissed by an explanation of the role played by the performative representation in the contract. Whether representations are knowable or whether any of the parties knows or even believes such representations made is not relevant for such purpose. *See generally* CHARLES M. FOX, WORKING WITH CONTRACTS: WHAT LAW SCHOOL DOESN'T TEACH YOU § 2:2:3 (2002) (highlighting that contractual representations are a means of allocating risk between or among the parties and *not*, as many young lawyers mistakenly think initially, a matter of asserting the truth of propositions). The role of representations in contracts is a simplified model that is instructive for a more general non-representational account of language.

277. *See generally* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW (2d ed. 1988) (offering an extensive discussion and analysis of only selected parts of American constitutional doctrine).

278. How that doctrinal content has been generated and, indeed, its very legitimacy is not free from doubt, of course. *See generally* FRIED, SAYING, *supra* note 193, at 3–10 (describing the place of precedent in articulating the conceptual content of constitutional law); Charles Fried, *Constitutional Doctrine*, 107 HARV. L. REV. 1140 (1994) [hereinafter Fried, *Constitutional Doctrine*].

ly elaborated constitutional doctrine. That process can be seen most clearly when the Court confronts a constitutional dispute that is a matter of first impression and without direct precedent,<sup>279</sup> as in *Heller*,<sup>280</sup> for example. It is clearer in the context of those hard cases because the Court must construct an argument that extends further from the available authorities to reach the instant case.

*Heller* considered the question of whether a strict and comprehensive regulatory regime enacted by the District of Columbia violated the Second Amendment prohibition against Congress limiting citizens' right to bear arms. The Court held that it did.<sup>281</sup> In a purportedly semantic analysis, the Court, in an opinion by Justice Scalia, explored the original understanding of the Second Amendment, including in its analysis the dictionary definitions of key terms of the Amendment.<sup>282</sup> In articulating that individual right the Court answered many questions,<sup>283</sup> but left many other questions unanswered.<sup>284</sup> The Court expressly addressed the syntactic implications of the Second Amendment text, holding that the first clause of the Amendment was prefatory, not restrictive.<sup>285</sup> The Court did not explore the pragmatics of the adoption of the Second Amendment.<sup>286</sup> To do so would have required an examination of what the adoption of the Second Amendment was intended and expected to do; that inquiry would have been inconsistent with Justice Scalia's public meaning originalism. The resulting decision striking down the District of Columbia law was a significant development in our Second Amendment constitutional jurisprudence.

The methods the Court employed to derive its conclusions were

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279. My formulation in the text may seem unduly circumspect and perhaps even redundant, but the nature of precedent and the extent to which a precedent is controlling or even particularly relevant is often a matter of judgment.

280. 554 U.S. 570 (2008).

281. *Id.* at 635.

282. *Id.* at 578–604.

283. For example, the Court interpreted the first clause of the Amendment as prefatory, and without limiting effect. *See id.* at 594–600. And the Court rejected the dissent's argument that the right protected under the Second Amendment generally had to be balanced against state interests in regulating firearms. *Id.* at 634–36.

284. The question whether the Fourteenth Amendment incorporated the right protected under the Second Amendment was not before the Court in *Heller*. The Court therefore did not need to consider what limitations might be imposed upon such right, but the Court expressly acknowledged that some limits (like restrictions on firearms being carried in court houses) might be permissible. *See id.* at 625–28.

285. *Id.* at 571.

286. *Id.*

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not simple. Those methods ranged far beyond simple syllogisms whose premises state the propositional content of the constitutional text.<sup>287</sup> Grammatical and syntactical rules, invoked tacitly as a matter of apparent common knowledge, form part of the argument.<sup>288</sup> In other cases the argument appears to proceed with analogical reasoning.<sup>289</sup> Yet the starting point for that derivation of the constitutional doctrine and constitutional decision, as in *Griswold*<sup>290</sup> and *Roe*,<sup>291</sup> was the constitutional text.<sup>292</sup> As constitutional doctrine develops, courts may increasingly decide cases by reference to the precedents that articulate the relevant constitutional law more directly. This doctrinal development permits decision without constructing arguments from direct applications or interpretations of constitutional provisions—which may need to be more complicated and complex.<sup>293</sup>

This sketch of the performative and inferential dimensions of constitutional texts is only schematic. Many elements would need to be more fully articulated and the potential objections addressed before we could claim to have made a dispositive case for such an approach. For example, the nature of performatives and the use of the theory of performative texts to analyze the law generally and the Constitution in particular are not uncontroversial.<sup>294</sup> The argument

287. See Part II.B, *supra*.

288. *Heller*, 554 U.S. at 599 (“[T]he Second Amendment’s prefatory clause announces the purpose for which the right was codified.”).

289. See generally SUNSTEIN, *LEGAL REASONING*, *supra* note 20, at 62–83 (exploring the diverse ways that analogical reasoning and similar techniques figure in legal reasoning).

290. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

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

292. See generally Fried, *Constitutional Doctrine*, *supra* note 278 (emphasizing constitutional text as the beginning but not the exclusive source of our rich constitutional doctrine). The judicial reasoning of *Roe*, in particular, has been controversial. See, e.g., John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 *YALE L.J.* 920 (1973) [hereinafter Ely, *Wages*] (foreshadowing the argument Ely would later make in *Democracy and Distrust*, arguing that the legal academy’s intemperate criticism of the Warren Court’s constitutional jurisprudence stripped the academy of credibility when confronted by a genuinely questionable decision).

293. For example, when the Court recently considered the scope of States’ power to condemn private property under the Fifth and Fourteenth Amendments, its analysis focused almost entirely upon its precedent, not the text of the Constitution. See *Kelo v. City of New London*, 545 U.S. 469 (2005). As constitutional doctrine develops and becomes more complex, constitutional decision relies more heavily upon the statement of such doctrine in the case law. See FRIED, *SAYING*, *supra* note 193.

294. See, e.g., Greenberg, *supra* note 2 (challenging the model of legislation as communication); DAVIS, *supra* note 249 (challenging the specifics of the Gricean project); DWORKIN, *Forum*, *supra* note 164, at 400 n.13 (questioning in passing whether legislative votes are speech acts).



sketched here warrants further development.

There is a great deal of intuitive appeal to the sketch outlined here. The constitutional texts do appear to be doing something. They also appear freighted with substantial conceptual and propositional content. It is hard to imagine an adequate account of the constitutional texts and their place in constitutional adjudication and law that does not account for both elements.

If we do account for both the performative element and the inferential roles of the constitutional texts, however, we are able to account for doctrines, like substantive due process, and to explain why Sunstein's example of the interaction between normative commitments and speaker's intention in choosing a friend's birthday present is not an apt analogy for the project of constitutional adjudication.<sup>295</sup> In the case of substantive due process, the semantic puzzle it creates<sup>296</sup> must be understood to be ancillary to the performative role that the doctrine plays. The doctrine is the means by which the doctrinal gap in post-Reconstruction Amendment substantive protections created by the crabbed interpretation of the Privileges or Immunities Clause jurisprudence has been filled.<sup>297</sup> It has been cobbled together to create substantive protections that might easily have been sourced in the Privileges or Immunities Clause, absent the direction that the Court's jurisprudence took. In that process, the Court rode roughshod over the finer semantic meanings of the constitutive elements of the doctrine. But it is, as a performative matter, far from the oxymoron Ely claimed.

In the case of Sunstein's puzzle about why we do not approach the application of the Constitution in the same way that we likely disregard our own normative preferences in choosing a birthday gift for a friend who likes the music of Barbra Streisand, the solution lies in understanding the performative role of the constitutional text in constitutional decision. In Sunstein's example, he posits that a gift giver would seek to purchase the kind of music that his friend would most

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295. See SUNSTEIN, *RADICALS*, *supra* note 20, at 57.

296. See ELY, *DEMOCRACY*, *supra* note 171, at 18 (characterizing the term "substantive due process as an oxymoron and comparing it to the phrase "red green pastelness").

297. The interpretation of the Privileges or Immunities Clause has been controversial since the *Slaughter-House Case* was decided. See generally KURT T. LASH, *THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENS* (2014) (defending a complex historical argument for an intermediate position on the scope of the Privileges and Immunities Clause of the Fourteenth Amendment); AMAR, *BILL OF RIGHTS*, *supra* note 59; ELY, *DEMOCRACY*, *supra* note 171, at 22–32.

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enjoy listening to; the goal in choosing the gift is controlled by the subjective preferences and choices of the donee.<sup>298</sup> Sunstein asks why a similar approach ought not to be taken in constitutional interpretation and decision in reading the Constitution and the resolution of constitutional controversies by following the intentions and preferences of the Founders (and the later relevant actors) in adopting and amending the Constitution. While Sunstein rejects such an approach in favor of following, on a limited, minimal basis, the normative judgments that our society would make today,<sup>299</sup> he never adequately explains why such an approach is right. His tacit instrumentalism explains his choice, but it would hardly convince an originalist who hews to the competing deontological approach.

One critical reason for the different stance toward the friend's request for music she would like and the text of the Constitution lies in the very different performative roles the two texts play. In the case of the friend's request, the utterance or, if conveyed in writing, the text is to provide guidance in selecting a present. There is rarely a compelling reason, in the context for the gift giver to seek to substitute his preferences or to select a better gift on the basis of what he thinks would be better for the donee. We can alter the hypothetical to bring into play just such constraints if we assume that the friend is compromised as an autonomous rational agent or has asked for something that is manifestly dangerous or harmful. In such case, Sunstein would be surely prepared to nudge the hypothetical friend with a gift different from that which the friend might have preferred.<sup>300</sup>

In the case of reading and applying the Constitution to resolve constitutional controversies, we have to consider what the performative role the Constitution was intended, expected, and understood to play, and what role it does, in fact, play today. That is obviously a complicated question because the constitutional text plays a variety of performative roles and those roles have evolved over time. At the least, there can be no easy assimilation of the constitutional text to the description of what the gift giver's friend has asked for. Unlike that example, there is little in the pragmatics of the constitutional text

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298. See SUNSTEIN, *RADICALS*, *supra* note 20, at 57–59.

299. *Id.* at 61–78.

300. See generally RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (2008) (defending a paternalistic approach setting, decisional defaults and employing other techniques to harness decisional inertia to increase human welfare at some cost in autonomy).

that would make the normative judgments of the interpreting and conforming citizens unimportant. Justice Scalia emphasizes that the purpose of a Constitution is to protect individuals and minorities from the will of the majority and that Constitutions reflect a concern that rights and the good may erode over time.<sup>301</sup> That is likely quite true, but it is not a complete description of the performative role of the Constitution. The Constitution, in the aspirational and general language it employs, signals that it is performing a more open-ended role than merely providing legal rules.<sup>302</sup> The originalists deny this characterization, of course,<sup>303</sup> but that denial appears hollow and unpersuasive in light of the formulations of the constitutional text.

The performative roles that the Constitution plays, as Balkin has astutely remarked,<sup>304</sup> are several. Here, I want to focus only on the performative legal roles. The Constitution constitutes a federal government, limits the sovereignty of the several states, provides the rules for the amendment of itself, guarantees the rights of citizens and persons, and limits the rights of others—most notably slaves until the Reconstruction Amendments and women, with respect to the franchise, until the adoption of the Nineteenth Amendment. But it is also important to note the different ways that the Constitution performs those varying missions, because there are also importantly different performative techniques deployed in the text of the Constitution. Thus, for example, when the Constitution imposes a minimum age for the holding of key Federal offices,<sup>305</sup> that performative states a prescriptive rule with respect to whom the Republic may empower by elevating to the enumerated offices as well as with respect to who is eligible to seek such offices. That rule is simple and clear; academic efforts to suggest otherwise are unpersuasive.<sup>306</sup> The language of a variety of other provisions appears different.<sup>307</sup>

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301. SCALIA, INTERPRETATION, *supra* note 19, at 40–41 (raising the possibility that over time that society may not so much mature as rot).

302. See generally BALKIN, LIVING ORIGINALISM, *supra* note 37; Tribe, *Interpretation*, *supra* note 240, at 68–72.

303. SCALIA, INTERPRETATION, *supra* note 19, at 134–36.

304. BALKIN, LIVING ORIGINALISM, *supra* note 37, at 59–64.

305. *E.g.*, 30 years for a senator and 35 years for the president. U.S. CONST. art. I, § 3; *id.* at art. II, § 1.

306. See, *e.g.*, RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 265–67 (1990) [hereinafter POSNER, PROBLEMS].

307. See Tribe, *Interpretation*, *supra* note 240, at 67–72 (distinguishing among different language in various provisions of the Constitution but denying that such provisions can be neatly sorted into two categories and insisting on the complexities inherent in approaching such

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Originalism responds to the manifest differences in the language employed in different provisions of the Constitution in a couple of related ways. One is indirect: the introduction of the concept of construction, discussed above. The second is Balkin's concept of framework originalism.<sup>308</sup> Each of those moves is intended to protect the privileged role of arguments from original understanding or meaning while acknowledging that such arguments are not available to answer all of our questions. They are, in a sense, an alternative to Bork's ink-blot approach to the Ninth Amendment.<sup>309</sup> But what evidence do the New Originalists present for such a distinction? Their general approach is to make an argument from the nature of the constitutional language.<sup>310</sup> But in so doing, the New Originalists assume that the distinction they want to draw is manifest in the text of the different provisions themselves. Tribe has powerfully refuted that claim.<sup>311</sup>

Originalists may respond by asking what evidence we have or what arguments we may make for the multiple performative roles ascribed to the constitutional text. The originalists generally limit their account of the constitutional text to its semantic or linguistic meaning.<sup>312</sup> The multilevel performative analysis sketched above is inconsistent with that semantic account because it goes beyond linguistic meaning to the performative role of the constitutional text. One argument for ascribing multiple roles to the constitutional text proceeds from the premise that, taken as a whole, the Constitution did something and was originally understood, intended, and expected to do something: to constitute a new supreme, sovereign national government of limited powers and to establish certain individual rights. The originalists generally do not dispute that global characterization.<sup>313</sup> But if the whole played a performative role, why should we

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variation in constitutional interpretation).

308. BALKIN, LIVING ORIGINALISM, *supra* note 37, at 3, 21–23 (contrasting framework originalism with skyscraper originalism on the basis of the difference in their respective approaches to constitutional construction).

309. See BORK, TEMPTING, *supra* note 18, at 183–85 (suggesting that the historical uncertainty as to the original understanding of the Ninth Amendment leaves that Amendment without legal force today).

310. See KEITH WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 7 (1999) (characterizing the constitutional texts that require construction as having “no discoverable meaning”); Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611 (1999).

311. See Tribe, *Interpretation*, *supra* note 240, at 67–72.

312. SCALIA, INTERPRETATION, *supra* note 19, at 144 (agreeing substantively with such a characterization but insisting on a different terminology).

313. See, e.g., *id.* at 40 (describing the mission of the Constitution to protect individual

doubt that each provision ought to be read to contribute to that performance? The originalists, of course, never articulate or address these questions on these terms because they do not acknowledge that the performative nature of the Constitution entails that its language cannot be read or understood simply as a series of declarative sentences.

Finally, this account of constitutional meaning recognizes the two very different dimensions of the text, as performative and as articulating conceptual content with inferential commitments and entitlements. Both aspects are important to understanding constitutional law and the nature of constitutional arguments and decision. The debate over classical originalism and New Originalism emphasize the meaning of the constitutional text to the virtual exclusion of the performative role of the text and constitutional decision. Moreover, the account of constitutional meaning is itself mistaken, ignoring the inferential content of that meaning in favor of a representational account.

*D. Enlisting Philosophy in the Semantic Claims of the New Originalism*

Both sides of the debate over originalism have enlisted recent philosophical work with respect to meaning and pragmatics to buttress their respective claims. Larry Solum, on behalf of originalism,<sup>314</sup> Andre Marmor as a critic of originalism,<sup>315</sup> and Scott Soames, as the proponent of a post-originalist synthesis,<sup>316</sup> have all, among others,<sup>317</sup> employed this strategy. I discuss certain key arguments they have made here for two reasons: first, because they are original; second, because they constitute an effort to employ philosophical argument in a foundational way in the debate. I have previously argued that such a use is a wrong turn.<sup>318</sup>

A couple of years ago I argued against the claim to employ philosophical argument to defend the claims advanced in the debate over

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rights against the will of the majority).

314. See Solum, *Semantic Originalism*, *supra* note 2.

315. See MARMOR, *LANGUAGE*, *supra* note 2, at 132–36 (exploring the Scalia-Dworkin debate).

316. See Soames, *Defeasibility*, *supra* note 2.

317. See, e.g., Greenberg, *supra* note 2 (rejecting the dominant legal theory that focuses on legal authorities as communicative texts).

318. See LeDuc, *Philosophy and Constitutional Interpretation*, *supra* note 6.

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originalism.<sup>319</sup> Protagonists on both sides of the debate have either missed or ignored that argument.<sup>320</sup> I want to explore here the extent to which my claims continue to be persuasive against the foundational use made of philosophical arguments in the debate. I think they are.

Larry Solum breaks from the two other theorists, Scott Soames and Andrei Marmor, discussed below, in two central respects: he emphasizes semantic meaning (although he acknowledges the importance of pragmatics) in his account of constitutional meaning and he defends originalism.<sup>321</sup> In doing so, Solum constructs a theory that purports to rely on objective linguistic theory.<sup>322</sup> He styles his account as semantic originalism as distinguished from traditional normative originalist theories and asserts that his theory can be defended on objective arguments.<sup>323</sup> Solum has offered an extended, comprehensive defense of a sophisticated account of the meanings that originalism privileges. It is more philosophically sophisticated than the theories defended by most other originalists.<sup>324</sup> It is a new version of originalism he dubs *semantic originalism*.<sup>325</sup> Solum articulates four principal theses of semantic originalism: the fixation thesis, the clause meaning thesis, the contribution thesis, and the fidelity thesis.<sup>326</sup> Solum's semantic originalism is not a semantic account of constitutional meaning; it incorporates implicature and pragmatics as sources of meaning. But it is an originalist account of constitutional meaning. Solum defends all four of these theses, at least in part, on philosophical arguments.<sup>327</sup>

First, the fixation thesis asserts that the semantic content of the constitutional text was "fixed at the time of its adoption."<sup>328</sup> Perhaps because Solum formulated his theory before Soames and Marmor fully developed their accounts of the limitations of austere semantic meaning, Solum initially associates constitutional meaning with se-

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319. *See id.*

320. *See, e.g.,* Fallon, *Meaning*, *supra* note 2.

321. *See* Solum, *Semantic Originalism*, *supra* note 2.

322. *See id.* at 30.

323. *Id.* at 28–30.

324. *Id.*

325. *See* Solum, *Semantic Originalism*, *supra* note 2.

326. *Id.* at 2.

327. *See* Solum, *Semantic Originalism*, *supra* note 2.

328. *Id.*

mantic meaning.<sup>329</sup> Solum argues that meaning, in the relevant sense, is determined as a matter of historical fact and that the task in constitutional decision is a matter of determining the historical facts about linguistic usage.<sup>330</sup>

As Solum refines his analysis, he incorporates an account of pragmatics into his account of constitutional meaning.<sup>331</sup> On Solum's account pragmatics may contribute to the meaning of constitutional texts by potentially resolving "ambiguities and vagueness" and by conveying meaning beyond the semantic.<sup>332</sup> But Solum does not explore these aspects of constitutional meaning in any detail, and the introduction of the pragmatic dimension appears almost an afterthought to Solum's account. While Solum acknowledges that meaning is not simply a matter of semantics, he is nevertheless committed to an account that accords semantic meaning primacy.

Central to Solum's account is a positivist claim that there is an objective fact of the matter with respect to semantic meaning.<sup>333</sup> It is an intuitive claim,<sup>334</sup> but I have argued elsewhere that it is ultimately implausible.<sup>335</sup> It is implausible because the performative role of constitutional texts within our practice of constitutional argument and decision does not reflect the existence of an objective meaning that the project of interpretation can discover or recover. Instead, the meaning and import of such texts reflects their use within the practice of constitutional argument and decision. There those texts are used to make arguments, employed as premises in making arguments, and, as the conclusions of other arguments, commit us to other premises.<sup>336</sup>

Second, Solum's clause meaning thesis is complex.<sup>337</sup> It asserts

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329. *Id.* at 2–3. As Solum develops and refines his descriptive theory of the linguistic meaning of the constitutional text he takes pragmatics into account in limited ways.

330. *Id.* at 3–4.

331. *Id.* at 32–33.

332. *Id.*

333. *Id.* at 36–37 (arguing that questions about a constitutional text's meaning are "factual" questions).

334. See generally André LeDuc, *Originalism's Claim*, sec. I (July 15, 2014) (unpublished manuscript) (on file with author) [hereinafter LeDuc, *Originalism's Claim*] (acknowledging and exploring the intuitive appeal of originalism). But see LeDuc, *Therapy and Promise*, *supra* note 8 (presenting a therapeutic strategy to work through the intuitive appeal of originalism and its alternatives).

335. See LeDuc, *Anti-Foundational Challenge*, *supra* note 10.

336. See generally LeDuc, *Therapy and Promise*, *supra* note 9; LeDuc, *Anti-Foundational Challenge*, *supra* note 10.

337. Solum, *Semantic Originalism*, *supra* note 2, at 50–51.

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that the meaning of the Constitution may be constructed in five steps.<sup>338</sup> It is not immediately clear, however, why Solum terms it the clause meaning thesis, but Solum goes on to explain that it is by analogy to the concept of sentence meaning in the philosophy of language.<sup>339</sup> This thesis provides the core of Solum's claims about constitutional meaning. Solum begins by offering two statements of the thesis that he styles approximations.<sup>340</sup> The first defines clause meaning as the semantic and pragmatic meaning of the provision from the perspective of the relevant drafters.<sup>341</sup> The second amends that definition to introduce pragmatic meaning associated with the public understanding of the relevant sentence or clause itself as adopted in its original context.<sup>342</sup> Solum then introduces a number of special rules to take into account technical meanings, stipulated or constituted concepts and terms, and implicature.<sup>343</sup> On incorporation of the semantic and pragmatic meaning and import of the constitutional text, refined with the particular conventions for meaning and use in the constitutional text, Solum believes that he has constructed a substantially complete originalist account of the meaning of the constitutional text.<sup>344</sup> Without according it the status of a separate, named thesis, Solum accompanies his defense of semantic originalism with his extended account of the distinction between construction and interpretation and the role of that distinction in constitutional theory.<sup>345</sup>

Third, Solum's contribution thesis explains how that constitutional meaning translates into law. It states that the semantic content of the Constitution contributes to the legal content of the Constitution.<sup>346</sup> Solum insists that this thesis is independent of the first two theses he defends.<sup>347</sup> While the thesis asserts an important conse-

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338. *Id.* at 50–58.

339. *Id.* at 52 (“Just as the speakers meaning of a Constitution can be called ‘framers meaning,’ likewise, the ‘sentence meaning’ (or ‘expression meaning’) of a Constitution can be called ‘clause meaning.’”).

340. *Id.* at 50–52.

341. *Id.* at 51.

342. *Id.* at 52.

343. *Id.* at 52–58.

344. *Id.* at 58–59.

345. *Id.* at 67–89. I explore Solum's account in more detail in LeDuc, Interpretation and Constitutional Argument, *supra* note 17, when I explore the role of interpretation in the debate over originalism.

346. Solum, *Semantic Originalism*, *supra* note 2, at 5, 134–49.

347. *Id.* at 126.



quence of the existence of the constitutional meaning asserted by semantic originalism, the interpretative claim stated by the first two premises of that theory stand independently of the truth of the contribution and fidelity theses.

The contribution thesis states one of Solum's most abstract claims. Solum distinguishes three forms of the contribution thesis, but his focus is on the moderate version.<sup>348</sup> According to that version, if the meaning of a provision of the Constitution, as determined by semantic originalism, is identical to a rule of law, then that rule is a rule of constitutional law, unless an exception applies.<sup>349</sup> Solum is agnostic on the question whether any exceptions exist, noting only that any such exceptions would be very limited if they do.<sup>350</sup> Thus, the contribution thesis begins with the assumption that we can identify rules of law. Somewhat puzzlingly, under the contribution thesis the text of the Constitution, standing alone, does not necessarily state rules of law. Solum is largely silent in his account as to how rules of law arise and can be recognized or known.<sup>351</sup> He notes arguments from practice as well as positivist jurisprudential arguments. He dismisses the nihilist claim that the meaning of the Constitution can make no contribution to our law.<sup>352</sup>

Fourth, Solum's fidelity thesis asserts that we are obligated to conform to the legal content of the Constitution.<sup>353</sup> That obligation arises because it is law; Solum acknowledges that his analysis does not explore how law creates obligations.<sup>354</sup> According to Solum, the fidelity thesis is independent of the other three theses of semantic originalism.<sup>355</sup> More importantly, it is a thesis that asserts the existence of an obligation of political morality, not a claim about the nature of constitutional law and semantics.<sup>356</sup> Thus, Solum's defense of

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348. *Id.* at 134–39 (distinguishing the moderate version from the strong version that asserts that the constitutional law is congruent with the linguistic content of the constitutional text and with the weak version that asserts only that the linguistic content of the constitutional text contributes indirectly to constitutional law).

349. *Id.* at 134.

350. *Id.* at 7 (“the power to adopt supplementary rules of constitutional law that contradict the semantic content of the constitution is limited to exceptional cases of constitutional necessity.”).

351. *Id.* at 134–43.

352. *Id.* at 143.

353. *Id.* at 149.

354. *Id.*

355. *Id.* at 9.

356. *Id.* at 149.

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our political obligation to conform to the Constitution is based upon conventional accounts of legal obligation in the Republic; there is little that is novel in this part of Solum's theory.

Much of Solum's defense of semantic originalism is based upon his account of constitutional texts as communications.<sup>357</sup> On Solum's functional account the constitutional text communicates legal content, legal rules that the polity has put in place to bind the political community. That legal content is communicated to the community as law.<sup>358</sup> Solum's account is thus focused on providing an explanation of how that communication works best. But Solum is at pains to distinguish communicative content and legal content of a constitutional text.<sup>359</sup> The distinction between the two is that legal content is "the content of the legal norms the text produces."<sup>360</sup> That conceptual content is produced, according to Solum, through the accepted constitutional decision process, albeit constrained by originalist theory.<sup>361</sup> More precisely, the legal content augments the austere communicative content through originalist judicial decision.<sup>362</sup>

A good example of the difference between linguistic meaning and the law may be found in the Court's recent decision addressing the scope of the recess appointments clause.<sup>363</sup> In *Canning*, the Court confronted the question of when the Senate was to be treated as in recess. It articulated a relatively bright line rule that a recess arose when the Senate was not in session for at least ten days.<sup>364</sup> This rule, however sensible it may be, is nowhere to be found, at least expressly, in the linguistic meaning of the Constitution. The constitutional text refers only to Senate recesses. Communicative content is the lingu-

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357. Solum, *Communicative Content*, *supra* note 2, at 480 (asserting that all legal texts have communicative content, but distinguishing communicative content from legal content); *but see* ELY, *DEMOCRACY*, *supra* note 171, at 18 (characterizing the term "substantive due process" as an oxymoron).

358. Solum, *Communicative Content*, *supra* note 2, at 507–08.

359. *Id.*, at 480–82 (taking the First Amendment's protection of freedom of the press as an example of a text for which the legal content now extends well beyond the semantic or linguistic meaning of the text). Justice Scalia addressed the same challenge when he characterized "press" as a *synecdoche* in an effort to explain how, as a matter of public meaning originalism, the broader legal content could be created. *See* SCALIA, *INTERPRETATION*, *supra* note 19, at 38.

360. Solum, *Communicative Content*, *supra* note 2, at 480.

361. *Id.* at 480–82.

362. *Id.*

363. *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014).

364. *Id.* at 2566–67.

tic meaning of the text.<sup>365</sup> According to Solum's semantic originalism, the legal content of the Recess Appointments Clause now incorporates that rule; it does so now because that legal content has been constructed by the Court in its holding and opinion.<sup>366</sup> Neither legal content nor communicative content is a proper subset of the other; one is a linguistic notion and the other is a legal notion.

Solum argues that the communicative content is prior to the legal content.<sup>367</sup> But the legal content of a text may be far richer than the communicative content.<sup>368</sup> That richness is not simply a matter of the difference between the austere semantic meaning and the additional import or force carried by pragmatics.<sup>369</sup> It also incorporates the contribution of constitutional content created by the Court through its decisions, both by its decision and in its opinions. Legal content goes beyond the communicative content. It is context specific, but Solum does not articulate a comprehensive theory of how legal or constitutional content may be derived from communicative content, although he notes that the question whether constitutional content may be inconsistent with the communicative content is controversial.<sup>370</sup> But communicative content always contributes to the constitutional content.

Solum's semantic originalism expressly incorporates insights and claims from contemporary analytic philosophy of language.<sup>371</sup> But Solum's account fails to acknowledge the fundamental conflict between his normative account of constitutional law and the actual practice of constitutional argument and decision. To put it another

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365. Solum, *Communicative Content*, *supra* note 2, at 480 (“‘communicative content’ is simply a precise way of labeling what we usually call the ‘meaning’ or ‘linguistic meaning’ of the text.”).

366. See generally Solum, *Semantic Originalism*, *supra* note 2.

367. *Id.* at 481–82. My claim that Solum makes the communicative content of statements of constitutional law logically prior to the legal content of such statements is not made expressly by Solum. But he is committed to that claim, both because he begins his analysis with communicative content or linguistic meaning and because of the contribution thesis that asserts that the communicative content of statements of constitutional law contributes to the legal content of such statements.

368. *Id.* at 511 (“In practice, many legal texts are associated with legal content that is richer than the communicative content of the text.”).

369. See generally SOAMES, *Legal Texts*, *supra* note 2 (explaining that the linguistic content of a legal text is not derived exclusively from its semantic meaning).

370. Solum, *Communicative Content*, *supra* note 2, at 480, 511–12 (noting that the constitutional content of the term “Congress” in the First Amendment is not the same as that text’s communicative content because constitutional law understands the protection of the Amendment to extend to acts by the courts and the Executive Branch of the federal government).

371. Solum, *Semantic Originalism*, *supra* note 2, at 31–38.

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way, while Solum recognizes the performative dimension of the constitutional text as a matter of accounting for the meaning of that text, he fails to understand the implications of that performative role for an account of constitutional law. He fails to recognize that the embedding of authoritative statements of constitutional law in our practice of making constitutional arguments to courts, and by courts, and the decision of constitutional cases gives those statements a pragmatic dimension that is independent of the dimension or metric of linguistic meaning. Statements of constitutional law are markers within a language game, but the social practice they are part of is also a matter of political power and moral authority and legitimacy.

Returning to Solum's example of the First Amendment, the term "Congress" in that text acquires its force not as a matter of semantic or pragmatic linguistic meaning, but as a matter of our practice of deciding the limit, first of federal power and, since the adoption of the Fourteenth Amendment, of all state power. The Court's choice to extend the protection of the First Amendment to actions by the Executive Branch and by the courts can be understood not as a judgment about semantics, pragmatics, or communication, but about how to decide the cases the courts faced, including *New York Times Co. v. Sullivan*.<sup>372</sup> In that case, after all, the Court's opinion did not rely upon the language of the constitutional text but upon a consideration of the chilling effect libel verdicts would have upon the exercise of classical free speech addressing public questions in the public space of reason.<sup>373</sup> Thus, the Court's holding relied upon precedent that had interpreted First Amendment protections broadly, prudential considerations about the impact of libel judgments on the press and other exercise of free speech, and, perhaps, to implicit ethical arguments, in Bobbitt's sense,<sup>374</sup> of the place of public discourse in our republic. The task of interpreting or construing the language, meaning, or import of the constitutional text was quickly glossed over. The opinion is thus a stark demonstration that the meaning of the First Amendment follows the flag of our constitutional practice. Attempting to reduce that practice to linguistic meanings is a fool's game.

Solum expressly addresses the challenge that philosophical analy-

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372. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) (adopting a restrictive interpretation of the protection of libel law for public officials on First Amendment grounds).

373. *Id.* at 268–70 (emphasizing the importance of robust and uninhibited public discourse on public questions).

374. *See generally* BOBBITT, FATE, *supra* note 52.

sis cannot resolve the questions that face constitutional theory and practice, but he dismisses the challenge in a short paragraph in his several hundred-page long *magnum opus*.<sup>375</sup> His response is simple: the test whether analytic philosophy can make a contribution to constitutional theory is whether the application of the methods and insights of analytic philosophy to constitutional theory makes a contribution to constitutional theory.<sup>376</sup> That is a fair standard.

It is nevertheless far from clear that Solum makes his case that his arcane philosophical argument has enhanced his constitutional theory. In introducing philosophical arguments and analysis, Solum acknowledges that such analysis is admittedly complex. He pointedly notes that pluralist or modal accounts of constitutional law are complex, too.<sup>377</sup> But his claim for the contribution of philosophical argument to constitutional theory and constitutional decisional practice turns on the power of his semantic originalism. If that theory fails to explain how mere philosophical theory can change our practice of constitutional law, then the metaphilosophical claim fails, too.

Solum accords philosophy a systematic, foundational role.<sup>378</sup> In so doing, he would fundamentally change the nature of constitutional argument and practice.<sup>379</sup> He asserts that philosophical analysis and argument about language can generate conclusions about constitutional decision theory and about the proper decision of constitutional cases.<sup>380</sup> But he does not offer an argument for that claim beyond pointing to the account of the Constitution that he has articulated. Most fundamentally, Solum asserts that his sophisticated philosophical analysis simply confirms the intuitive, common sense view that the Constitution is binding, authoritative law and that the original linguistic understanding of the Constitution is that law.<sup>381</sup> That theory appears problematic as a description of our practice of constitutional argument and decision, and unconvincing as a prescriptive matter.

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375. Solum, *Semantic Originalism*, *supra* note 2, at 169–70.

376. *Id.* at 31–38 (introducing the philosophy of language of Austin, Searle, Grice, and Lewis).

377. *Id.* at 169–70 (addressing the objection to semantic originalism that it is an illicit colonization of law by philosophy).

378. *Id.*

379. *See generally id.* at 21–22 (endorsing the radical implications claimed by the classical originalists as a matter of the philosophy of language while arguing that more sophisticated arguments are needed).

380. *Id.* at 168 (“Semantic Originalism is a robust theory that makes strong claims.”).

381. *Id.* at 173.

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Solum's use of philosophical argument to radically reform our constitutional practice is flawed. Three objections warrant particular mention. First, his emphasis upon the semantic meaning of the constitutional text, even as enriched by pragmatics, fails to give adequate attention to the fundamentally performative character of authoritative statements of constitutional law. That performative role provides the reasons for the constitutional arguments made and accepted as well as the associated statements of constitutional law advocated and accepted. That process does not require the intermediation of a sophisticated and comprehensive theory or account of the meaning of the constitutional text. Moreover, such a theory cannot capture the performative dimension of our constitutional argument and the statement of the conclusions derived in such argument.<sup>382</sup> That performative dimension is central to the Constitution and to our understanding of the constitutional text. It is inconsistent, however, with an originalist theory, even one as sophisticated as Solum's. Our practice of constitutional argument and constitutional decision does not fit Solum's originalist account. Solum can privilege the semantic or linguistic content of the constitutional text only by ignoring the performative role of that text and the rest of our constitutional practice.

Second, Solum's account of the relationship between communicative content and constitutional or other legal content is ultimately unsatisfactory on its own terms. That account fails to explain how communicative content can contribute to, or generate, constitutional content. The distinction produces a black box, seemingly without particular explanatory power or falsifiable consequences.

Solum might respond that his account is no more or less opaque than the pluralist, modal account that I defend.<sup>383</sup> In the modal account, conflict between or among the various canonical types of constitutional argument can only be resolved by the exercise of an unspecified faculty of judgment.<sup>384</sup> But the modal account has the advantage that it offers a compelling description of our constitutional

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382. Admittedly, of course, there is also conceptual content to the statements of constitutional law and to constitutional argument, as discussed above, and a performative account does not capture that dimension.

383. See LeDuc, *Therapy and Promise*, *supra* note 9; LeDuc, *Anti-Foundational Challenge*, *supra* note 10.

384. See PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 178–86 (1991) [hereinafter BOBBITT, *INTERPRETATION*] (describing the decision of cases in the face of inconsistent incommensurable modalities of argument perhaps somewhat misleadingly as a matter of “moral decision”).

decisional argumentative practice. Moreover, the modal account makes a place for the exercise of judgment in constitutional decision. Solum's semantic originalism appears to provide a decisional algorithm—at least for constitutional provisions that do not require construction. In the end, Solum's analysis delivers little more than the recognition that an account of communicative content—linguistic meaning—provides an incomplete account of our constitutional argument, decision, and law. Solum is right in that conclusion, but he draws the wrong lesson from it.

Third, Solum's strategy is also questionable as a matter of metaphilosophy. I have previously argued that the course of the classical debate over originalism demonstrates that there are metaphilosophical reasons to doubt a constitutive role for philosophy in constitutional theory or decision.<sup>385</sup> I will take that argument as a foundation for my review of the use of philosophical argument by the New Originalists like Solum. Solum argues that the analytic philosophy of language can provide the tools to reformulate originalism and refute its critics;<sup>386</sup> that's the source of Solum's *semantic* originalism. Solum argues, for example, that his originalism rebuts Dworkin's attack on originalism's central concept of a shared understanding of meaning.<sup>387</sup> Solum believes that the common sense appeal of originalism, buttressed by appropriate philosophical argument, can trump our established constitutional practice. Philosophical argument can radically reform that practice and discredit the non-originalist modes of that argument. Those arguments are available, if at all, not as a matter of interpretation of the constitutional meaning but, where that meaning is missing or indeterminate, as part of the process of constructing constitutional law consistent with the available text.

Solum offers no evidence or argument for that bold and ambitious claim.<sup>388</sup> Solum makes his claim for the power of philosophical argument by largely ignoring the pluralist, anti-foundational alternative. All he says about the pluralist theory is that it is complex.<sup>389</sup> He

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385. See LeDuc, *Philosophy and Constitutional Interpretation*, *supra* note 6.

386. Solum, *Semantic Originalism*, *supra* note 2, at 169–70 (arguing that the contribution of philosophy to constitutional theory and decision is in the pudding, but arguably failing to bring that pudding to the table).

387. *Id.* at 82–86 (defending the distinction between interpretation and construction against potential criticism).

388. See LeDuc, *Philosophy and Constitutional Interpretation*, *supra* note 6.

389. Solum, *Semantic Originalism*, *supra* note 2, at 169–70.

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does not engage the anti-foundational alternative at all. With respect to his implicit metaphilosophical claim, Solum simply fails to address the question whether philosophical argument can be deployed to fundamentally reform our constitutional practice. In fairness, he is only making the same mistake that others, like Dworkin, have made before him. Given Solum's general philosophical sophistication, his metaphilosophical stance may appear puzzling. Nothing about Solum's sophisticated originalist philosophical argument makes it more potent than the tacit philosophical argument of his predecessors or the express arguments of critics like Dworkin.

*E. Classical and Modern Critics of Originalism's Semantics*

Originalism's semantic account of the Constitution's language has attracted substantial criticism. A couple of examples may help capture the alleged weaknesses of the originalists' account. At issue for both the majority and the dissent in *Heller* was what the protected right "to keep and bear arms" covered. The dueling opinions of Justice Scalia, writing for the Court, and Justice Stevens, writing in dissent, explored principally the original understanding of the meaning of the Second Amendment.<sup>390</sup> The Court appeared to treat the dispute as a controversy to be resolved on a semantic analysis of the meaning of the text of the Second Amendment.<sup>391</sup> By so doing, the Court eschewed and, indeed, foreclosed, consequentialist argument and considerations. At least in the Court's opinion and in the dissent by Justice Stevens, there was no particular attention paid to the Court's precedent, to the question of how the protections of the Second Amendment should be carried forward into the Twenty-First Century, or the prudential considerations that might bear on the case before the Court.<sup>392</sup> None of these non-semantic considerations were treated as relevant in these two opinions.<sup>393</sup> The dissent by Justice Breyer, by contrast, directly addressed some of these considerations

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390. *District of Columbia v. Heller*, 554 U.S. 570, 636–37 (2008) (Stevens, J., dissenting).

391. *Id.* at 576 ("We turn first to the meaning of the Second Amendment.")

392. Justice Breyer, by contrast, after suggesting that the right protected by the Second Amendment must be balanced against the governmental interest in the regulation of firearms, proceeds to a prudential analysis of the stakes involved in that interest in regulation. *See id.* at 681–89.

393. In the Court's opinion, once the semantic analysis was complete, the consequences of the decision were considered only to dismiss Justice Breyer's concern with the societal costs imposed by the Court's decision. *See id.* at 635–36.



and made arguments for the decision of the case based upon them, including, in particular, the prudential issues.<sup>394</sup>

Second, the Court recently considered the scope of federal and states' power of eminent domain in *Kelo*.<sup>395</sup> At issue was the import of the requirement of the Fifth Amendment that such takings be for a public use. The majority opinion followed the Court's precedent, finding that requirement satisfied by a legislative finding that need withstand only the most deferential judicial scrutiny.<sup>396</sup> That precedent emphasized the prudential claims of economic redevelopment; *Kelo* also applied a prudential analysis.<sup>397</sup> The dissents, by contrast, focused on the language of the Constitution.<sup>398</sup> They made several arguments, the most direct of which was that the original meaning—the original understanding of the meaning—of the requirement of “public use” precluded the taking of property from one private party for the benefit of another private party.<sup>399</sup> Thus, the dissent by Justice O'Connor answered the prudential and precedential arguments of the majority with an argument from original meaning. Justice O'Connor would have left the precedents finding the public use requirement satisfied in the case of redevelopment of blighted urban areas but would have declined to extend those precedents to the facts of *Kelo*.<sup>400</sup> The dissent by Justice Thomas went further, highlighting the inconsistency between the precedent and the constitutional text and would have overturned the precedent on which the Court relied.<sup>401</sup> In so doing, Justice Thomas emphasized that an expansive reading of the power of eminent domain would likely disadvantage insular minorities unable to adequately protect themselves in the political process from rapacious majorities.<sup>402</sup> That argument was deployed against the expansive reading of the Taking Power endorsed

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394. *See id.* at 681 (Breyer, J., dissenting) (addressing the potentially undesirable social consequences of liberalizing the regulation of handguns and permitting broader handgun ownership).

395. *Kelo v. City of New London*, 545 U.S. 469 (2005). In that case, the private property taken was promptly transferred to a private developer in support of its development project, which was part of a local government's so-called community redevelopment plan.

396. *Id.* at 483–92 (citing *Berman v. Parker*, 348 U.S. 26 (1954)).

397. *Kelo*, 545 U.S. at 480–81.

398. *Id.* at 494, 495–99 (O'Connor, J., dissenting); *Id.* at 505, 505–06 (Thomas, J., dissenting).

399. *Kelo*, 545 U.S. at 496 (O'Connor, J., dissenting).

400. *Id.* at 498–99.

401. *Id.* at 514–21 (Thomas, J., dissenting).

402. *Id.*

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by the Court.

The Court and the dissenters' opinions largely failed to engage in a persuasive way.<sup>403</sup> The dissent asserted that "public use" means use by the public, and that the Court's Fifth Amendment jurisprudence had effectively read that requirement of the text out of Constitution.<sup>404</sup> The majority was making prudential and precedential arguments about the needs of modern government and the doctrine of Fifth Amendment that had developed in the Court's precedents; the dissents' were arguing from the original meaning of the Fifth Amendment. While the dissenting opinions clearly make arguments about the meaning of the term "public use," the Court's opinion, and Justice Kennedy's concurrence, cannot easily be characterized as holdings about semantic meaning or the understanding thereof. Nor do the opinions present themselves in that way. Instead, the opinions purported to explore the concept of "public use". Thus, the core of the Court's analysis of *Kelo* is twice removed from an interpretation of the constitutional text. First, the majority focused on the requirement of "public use", which is a requirement that has been articulated in the Court's constitutional jurisprudence, not expressly stated in the Constitution itself. Second, the majority did not purport to analyze semantic or linguistic meaning of that term; instead, it explores the nature of the substantive requirement. The Court found that the textual requirement of "public use" is satisfied by a finding that the taking is for the public good. It does not hold that "public use" means found to be in the public interest. Justice Kennedy's arguments do not appear to be examples of positivist or semantic modes of constitutional adjudication.

These two cases demonstrate that Dworkin's claim that constitutional disputes are not linguistic is overstated. Dworkin fails to capture the complexity of our constitutional decision practice. Some of these authorities exemplify the kind of linguistic argument that originalism mandates; in those disputes, textual and historic arguments are made and may be decisive. In other cases they are not. Dworkin would sometimes appear to deny any legitimacy to the con-

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403. Bobbitt's typology of constitutional argument is one way to articulate what was happening. The Court was making prudential arguments, and the dissent, historical and textual arguments. See BOBBITT, FATE, *supra* note 52, at 7–8. But there may be better ways to describe the failure of the various opinions to engage with each other because Bobbitt's typology does not capture Takings Clause jurisprudence very successfully.

404. *Kelo*, 545 U.S. at 494 (O'Connor, J., dissenting).

struction of constitutional argument as a debate over meanings.<sup>405</sup> At other points Dworkin would appear to acknowledge a role for arguments from original meaning as arguments from one strand in the holistic, comprehensive web of legal obligation that Hercules must weave.<sup>406</sup> But Dworkin's theory clearly explains both why the prudential considerations raised by Justice Breyer and the associated prudential deference appear powerful arguments. Dworkin's analysis also explains the power of Justice Thomas's non-originalist Elyesque *Carolene Products*<sup>407</sup> argument.<sup>408</sup>

That description of a constitutional case as a dispute that is to be resolved as a controversy about the meaning of a constitutional provision cannot be reconciled with our experience. Constitutional disputes do not feel like disputes about linguistic rules. The kinds of arguments that are made do not fit that description; the Brandeis brief, emphasizing the consequences of social legislation and arguing that those consequences must be taken into account in constitutional adjudication is a notable example of a type of argument that does not fit the semantic description. The originalist asserts not just that those cases present disputes about rules, but a very specific set of rules: those set forth in the Constitution by the Founders (or their counterparts with respect to later amendments). Finally, how compelling is Dworkin's claim that the dispute is not about linguistic rules?

The claim about rules and principles in Dworkin's first formulation of his attack on Hart's positivism,<sup>409</sup> and his claim of the semantic sting in his later formulation,<sup>410</sup> have captivated, transfixed, and

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405. See generally DWORKIN, *EMPIRE*, *supra* note 31, at 31–44, 43 (“If legal argument is mainly or even partly about pivotal cases, then lawyers cannot be using the same factual criteria for deciding whether propositions of law are true or false. . . . So the project of the semantic theories must be doomed to fail.”) (emphasis added). That would appear, perhaps, to go too far and to strip significance from the underlying text. Textual and historical arguments are themselves canonical forms of argument in our constitutional practice. See, e.g., *District of Columbia v. Heller*, 554 U.S. 570 (2008); *McDonald v. Chicago*, 561 U.S. 742 (2010) (extending the protections of the broad reading of the Second Amendment in *Heller* to apply to state legislation).

406. See generally DWORKIN, *EMPIRE*, *supra* note 31, at 176–86.

407. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) (giving classic statement of the role of the Court when ordinary democratic processes may break down).

408. See *Kelo*, 545 U.S. at 520–23 (Thomas, J., dissenting) (arguing that the broad eminent domain power upheld by the Court will disadvantage minorities); see also *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).

409. See DWORKIN, *Rules I*, *supra* note 159.

410. See DWORKIN, *EMPIRE*, *supra* note 31, at 33–35, 43–44. The relationship between Dworkin's two arguments—that against rules and that against semantic accounts of law—has not been clearly articulated. They share a broader conception of law and of the sources of law.

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distracted—and generally set the agenda for—theoretical English-speaking jurisprudence for nearly half a century.<sup>411</sup> Any theory that reduces legal disputes to disputes about language alone or about the application of legal rules alone does appear to lose much of the richness and complexity of legal disputation. Portia's argument<sup>412</sup> may capture one dimension of the law, but it does not follow that such an argument is the exclusive paradigm of legal argument. So, without conceding Dworkin's argument, I will for purposes of argument acknowledge the intuitive appeal of such an argument against any reductive theory that seeks to assimilate legal disputes to disputes about language. According to Dworkin, one of the prevalent flaws in jurisprudence is the reduction of legal disputes to disputes over rules or the meaning of rules.<sup>413</sup> Such controversies all too often require the working through, and working out, of previously unarticulated visions of our humanity<sup>414</sup> and fundamental value choices for our society;<sup>415</sup> it is particularly and peculiarly the mission of judges to engage

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A theory of law that reduces legal disputes to disputes about rules is not necessarily a semantic theory. But if one adds an account of legal rules as interpreted by judges in adjudication then the model of rules becomes a semantic theory. It is less natural to reduce a theory of law as encompassing both rules and principles to a semantic theory, because the nature of principles' role in adjudication turns so much less on the precise formulation of the stated principle. Principles don't appear to operate on Dworkin's account like linguistic meaning, even recognizing the vagueness and other complexities inherent in natural language. Thus, dispute over the application of the principles is not easily reduced to semantic dispute.

411. See, e.g., *EXPLORING LAW'S EMPIRE* (Scott Hershovitz ed., 2006); *DWORKIN AND HIS CRITICS* (Justine Burley ed., 2004); JULES COLEMAN, *THE PRACTICE OF PRINCIPLE: IN DEFENSE OF A PRAGMATIST APPROACH TO LEGAL THEORY* 103–07, 105 (2001) (“Although . . . no one nowadays considers [Dworkin's] argument convincing, it would be hard to find an essay that has been more influential in the development of contemporary jurisprudence.”); but see Brian Leiter, *The End of Empire: Dworkin and Jurisprudence in the 21<sup>st</sup> Century*, 36 *RUTGERS L.J.* 165 (2005) (arguing that Dworkin's attack on positivism and his own theory of law as integrity had been largely a sideshow in Anglo-American jurisprudence and that his most notorious claims had been broadly rejected).

412. See SHAKESPEARE, *supra* note 143, at act 4, sc. i, lines 309–10, 312–13, 315–22, 336–44.

413. *DWORKIN, EMPIRE, supra* note 31, at 31–43; *DWORKIN, Rules I, supra* note 159.

414. Thus Dworkin writes, describing the application of his theory of adjudication to the decision of *Brown v. Board of Education*:

The Constitution is different from ordinary statutes in one striking way. The Constitution is foundational of other law, so Hercules' interpretation of the document as a whole, and of its abstract clauses, must be foundational as well. It must fit and justify the most basic arrangements of political power in the community, which means it must be a justification drawn from the most philosophical reaches of political theory.

Lawyers are always philosophers . . . .

*DWORKIN, EMPIRE, supra* note 31, at 380.

415. *Id.*

in such a project.<sup>416</sup>

Turning away from Dworkin's own surprising diffidence in arguing that the originalists are vulnerable to the semantic sting, what accounts for the power of the claim that legal controversies are not to be treated simply as controversies about the meaning of words? The answer lies in the kinds of arguments our practice of constitutional argument includes. Simply put, these arguments are not exclusively about meaning. This claim is not that arguments about the meanings—including the original meanings—of words are not themselves good arguments, sometimes even conclusive arguments. The claim is only that such arguments are not the *exclusive* type of arguments that our constitutional practice permits.

This observation is not merely a description of our constitutional practice. It is also an affirmation of the way in which constitutional decisional discourse is practiced. For most of us, and for most of the participants in our constitutional practice, the broad array of types of argument actually employed in our constitutional decisional practice are, to a greater or lesser degree, persuasive or compelling. So the claim that we should dispense with these forms of argument is inconsistent with our endorsement of these arguments, and our choice, as constitutional practitioners, to keep them available to us. To establish the claims of exclusive versions of originalism we must therefore delegitimize large parts of practice and broad swathes of our constitutional precedent.<sup>417</sup>

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416. Dworkin's semantic sting argument would appear an obvious choice for deployment against originalism. Originalism, after all, offers an account of interpretation and, implicitly, disputes about constitutional interpretation, as disputes about the meaning of constitutional provisions. Why does Dworkin fail to deploy the semantic sting argument against originalism? The answer crudely put, I believe, is that Dworkin does not believe he needs this argument, and does not care to dignify originalism by including it among other semantic theories that Dworkin finds more plausible and cogent. Thus, in *Law's Empire*, while criticizing, positivism, conventionalism, and pragmatism, Dworkin clearly finds them worthy adversaries. See DWORKIN, *EMPIRE*, *supra* note 31, at 33–35 (legal positivism); 114–75 (conventionalism and pragmatism). He never shows originalism—in any of its forms—the same respect. See *generally id.* at 359–69. It is not that the semantic sting would not tell against originalism; it would. But for Dworkin, it is perhaps too subtle and strong an argument to make against a fundamentally unsatisfactory theory. Dworkin may not want to distract attention from what he implicitly views as more obvious and fundamental flaws; he does not want to treat originalism with the same respect as other positivist theories. See also MARMOR, *LANGUAGE*, *supra* note 2, at 150 (suggesting that Dworkin sought to refute originalism on its own terms).

417. The doctrinal impact of a robust originalism has been articulated by, among others, Cass Sunstein and David Strauss. See, e.g., SUNSTEIN, *RADICALS*, *supra* note 20, at 18–19; DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 12–16 (2010) [hereinafter STRAUSS, *LIVING*].

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Some originalists recognize this choice; those who would so disavow our precedents frequently invoke the metaphor of the Lost Constitution.<sup>418</sup> They are prepared to radically excise significant portions of our constitutional law.<sup>419</sup> In so doing they would restore the Lost Constitution. That strategy appears grounded, at least in part, on certain ontological commitments. We can meaningfully and properly talk about excising portions of our constitutional law if we have a theory about the truth of propositions of constitutional law that looks to the correspondence of these propositions with the constitutional world. Such a correspondence theory of truth would hardly be novel,<sup>420</sup> even if increasingly under assault in the philosophical academy.<sup>421</sup> On the basis of such a theory, the propositions of constitutional law that do not correspond to the Constitution in the world can be safely and neatly excised from our constitutional doctrine because those propositions are false.

By contrast, if we believe that our constitutional law is simply the law that is supported and determined by our current constitutional arguments and practices, then such radical surgery appears more difficult to sustain. We do not have a correspondence theory of truth by which to test propositions of constitutional law that are generally accepted and believed within the constitutional interpretative or adjudicative communities. Because the originalist critique requires running roughshod over many of our established practices, the basis for the rejection of such practices and arguments must be established on other grounds. So, on this reply to the originalist project, there is no foundation from which we can so radically revise our constitutional law.<sup>422</sup>

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418. See, e.g., BARNETT, LOST, *supra* note 60. See also Akhil Reed Amar, *Our Forgotten Constitution: A Bicentennial Comment*, 97 YALE L.J. 281 (1987) (exploring the question of what constitutes the definitive constitutional text but without the radical agenda defended by Barnett).

419. See BARNETT, LOST, *supra* note 60, at 354–57.

420. See, e.g., H. H. JOACHIM, THE NATURE OF TRUTH § 1 (1914) (giving classic statement of a robust correspondence theory of truth); J. L. Austin, *Truth*, 24 ARISTOTELIAN SOC. 111 (1950) (arguing that truth describes a relationship between statements and the world).

421. See, e.g., P. F. Strawson, *Truth*, 24 ARISTOTELIAN SOC. 129 (1950) (arguing that “the correspondence theory [of truth] requires, not purification, but elimination.”); Donald Davidson, *The Folly of Trying to Define Truth*, 93 J. PHIL. 6 (1996) (arguing that the fundamental nature of the concept of truth makes a reductive definition of truth impossible); Hartry Field, *Tarski’s Theory of Truth*, 64 J. PHIL. 347 (1972) (analyzing a classic, deflationary account of truth).

422. See generally LeDuc, *Anti-Foundational Challenge*, *supra* note 10 (arguing that our constitutional law in general and the practice of judicial review in particular neither needs nor

Without invoking such an anti-representationalist, anti-foundationalist account, however, the ability of originalism's critics to reject the semantic originalist account must turn on defending an alternative, non-semantic theory as preferable. From this vantage, which Dworkin apparently shares,<sup>423</sup> the originalists are wrong not because they believe that propositions of constitutional law are true if they correspond to an external constitutional world.<sup>424</sup> But, because their critics believe the world is different, richer, and fuller and that correspondence is more complex than the originalist account of meaning and truth would allow.<sup>425</sup> It should thus be apparent why the dispute here is so fundamental. The critics of the semantic account of law need to persuade us that law can have the richness they describe, without creating the specter of unstructured law that dissolves into a pattern defined by mere judicial discretion.<sup>426</sup> Were that to happen, as the originalists fear, we are left lawless.<sup>427</sup> The strongest argument that the critics of the semantic account offer is that a semantic account of fundamental constitutional disputes appears inadequate and unrealistic.

Critics of originalism's account of constitutional meaning and semantics have also pressed philosophy into action.<sup>428</sup> Andrei Marmor initially dismissed originalism, questioning whether it ought to

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can have a foundational defense; it is already bedrock).

423. See DWORKIN, *EMPIRE*, *supra* note 31, at 4 ("The proposition that no one may drive over 55 miles an hour is true . . . because a majority of that state's legislators said 'aye' or raised their hands when a text to that effect lay on their desks.").

424. There is reason to question this shared correspondence theory. See LeDuc, *Anti-Foundational Challenge*, *supra* note 10.

425. See, e.g., Dworkin, *Interpretation*, *supra* note 27, at 117 n.6 (cryptically referencing the philosophical work of Quine and Davidson). For the argument that originalism's critics generally share originalism's commitment to a correspondence theory of truth, see LeDuc, *Ontological Foundations*, *supra* note 6 (attributing such an account to Dworkin).

426. Dworkin, for example, believes that moral theory must be introduced to ground constitutional theory and decision making, and Tribe believes value choices must be made in constitutional decision and interpretation. DWORKIN, *EMPIRE*, *supra* note 31, at 285–86 (describing the requirement of articulating a moral theory as an intrinsic element of constitutional decision); Tribe, *Interpretation*, *supra* note 240, at 87–93 (exploring the implications of those constitutional provisions that Tribe characterizes as "aspirational").

427. See SUNSTEIN, *RADICALS*, *supra* note 20, at 54; BORK, *TEMPTING*, *supra* note 18, at 261–65.

428. One critic who enlists philosophical arguments with substantial sophistication whose views will not be explored here is Richard Fallon. See generally Fallon, *Meaning*, *supra* note 2. Those sophisticated views are, given their pluralist commitments, likely closer to the position defended here than other originalists or critics whose views are explored here. The constraints of time and space preclude an exploration of Fallon's views here.

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be taken seriously as a theory of constitutional interpretation.<sup>429</sup> More recently, Marmor has treated originalism and its semantic and interpretative claims more seriously, while continuing to reject its claims.<sup>430</sup> After a sophisticated and complex analysis of language in law, Marmor concludes that the philosophy of language cannot provide the tools or arguments to choose sides between originalism and its critics.<sup>431</sup> Instead, that choice must be made on normative or political grounds.<sup>432</sup> The choice between the competing methods requires a substantive judgment about the kind of constitutional law we want.

The analysis here will focus on two of Marmor's important claims. Marmor claims that statements of constitutional law have truth values.<sup>433</sup> Second, Marmor claims that the debate between Justice Scalia and Ronald Dworkin and, by extension, the debate over originalism, can be resolved only on the basis of normative moral and political judgments. Marmor's claim for the existence of truth values is important, because he asserts that if that were not the case, then legal inferences could not be validly made.<sup>434</sup> Marmor simply makes this bald assertion, but offers no argument.<sup>435</sup> We frequently make practical inferences on the basis of expressive claims that do not have truth values.<sup>436</sup> Moreover, Marmor's account is fundamentally schizophrenic, because together with his argument for the truth content of constitutional propositions he argues that the truth content of such propositions is like that of propositions about fiction.<sup>437</sup> On Lewis's account, truth in fiction is not a concept that is congruent with truth in fact.<sup>438</sup> Marmor believes that the legal and constitutional domain is

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429. MARMOR, INTERPRETATION, *supra* note 40, at 155 (characterizing the widespread appeal of originalism as a classic jurisprudential puzzle).

430. MARMOR, LANGUAGE, *supra* note 2, at 132–36, 152–155 (criticizing Dworkin's arguments against originalism as ineffective).

431. *Id.* at 146–50.

432. *Id.* at 150–55.

433. *Id.* at 61–84.

434. *Id.* at 61 (“It is difficult to see how [legal] inferences can be valid if the premises are not truth-apt . . .”).

435. *Id.*

436. Thus, for example, when I assert, I like ice cream and then order ice cream for dessert at dinner, my expression of a preference for ice cream is the basis for the practical conclusion that I should order ice cream for my dessert. While Marmor might assert that there is a truth value to my claim to like ice cream—I do or I don't—it is not clear that such a trivial truth condition adds anything to the analysis of my practical reasoning.

437. *Id.* at 77–84.

438. See generally 1 DAVID K. LEWIS, *Truth in Fiction*, in PHILOSOPHICAL PAPERS 261 (1983) [hereinafter LEWIS, *Truth in Fiction*] (exploring the discontinuities between statements



similarly distinct, such that what is true as a matter of law may not be true in fact.<sup>439</sup> Marmor, in both respects approaches acknowledging the import and implications of his recognition that, in constitutional law, saying makes it so, but in both cases seems to pull back. The importance of the property of authoritative statements of constitutional law that saying makes it so, is that it signals to us that the performative role of such statements is as important in our constitutional practice of adjudication as the conceptual content of such statements.

Marmor takes almost for granted that constitutional reasoning employs logical inference as a central form of argument.<sup>440</sup> He characterizes inference as a common form of reasoning in law, characterizing it as part of the “regular business” of lawyers.<sup>441</sup> Inference is part of that business but there are many other forms of practical reasoning in law, too.<sup>442</sup> Marmor’s examples of constitutional inference are more complicated than Marmor acknowledges. First, such inferences play a smaller role in constitutional argument than Marmor at least implicitly suggests.<sup>443</sup> Practical reasoning, including constitutional reasoning in adjudication, relies more heavily on reasoning from analogy, synthetic argumentative strategies, and the drawing of distinctions.<sup>444</sup> Logical inference is not a dominant form of constitutional reasoning.

An even more important objection may be made on the basis of an alternative account of material inference that Brandom refines and endorses.<sup>445</sup> Materially good inferences, like logical inferences, draw new true consequential statements or performatives from true antecedent statements or performatives.<sup>446</sup> But such material inferences do not necessarily express a logical relationship between the premises

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about characters and events in fiction and statements about characters and events outside those fictional contexts).

439. MARMOR, LANGUAGE, *supra* note 2, at 78–80.

440. *Id.* at 61.

441. *Id.*

442. See generally LeDuc, Interpretation and Constitutional Argument, *supra* note 140 (describing the tacit models of constitutional reasoning in the debate and arguing against the formal account endorsed by many originalists); PATTERSON, TRUTH, *supra* note 52, at 169–76 (describing the complex and informal process of legal reasoning); SUNSTEIN, LEGAL REASONING, *supra* note 20, at 74–93 (describing the role of analogical reasoning).

443. MARMOR, LANGUAGE, *supra* note 2, at 61. See generally PATTERSON, TRUTH, *supra* note 52, at 169–76.

444. See generally STEPHEN TOULMIN, THE USES OF ARGUMENT (1958).

445. See BRANDOM, ARTICULATING REASONS, *supra* note 88, at 79–92.

446. *Id.*

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and the conclusion.<sup>447</sup> They are often true because of the content of their nonlogical vocabulary, as Brandom puts it;<sup>448</sup> for Brandom, there is nothing privileged about logical inference.<sup>449</sup> Brandom offers a number of examples and it is easy to construct others from statements of constitutional law. For example, consider the inference:

The First Amendment protects freedom of the press.

In the twenty-first century, the Internet serves as a medium for communication in the public sphere like the public press of the eighteenth century.

Therefore, the protection of the First Amendment extends to the dissemination of opinions and information on the Internet.

Such an inference is not, and could not, be cast in a logical form as a syllogism.<sup>450</sup> It is easy to see that this inference is not cast as a syllogism. The critical second step simply employs an analogy between the function of the Internet and that of the press to support the extension of the protections of the First Amendment for the press to communication on the Internet.

My stronger claim is that the inference could not be recast as a syllogism or series of syllogisms. The critical second step, analogizing the Internet to the classical press on the basis of its communicative and socio-political function expresses a judgment—a synthetic judgment, in Kantian terms—that cannot be reduced to a logical, syllogistic form solely on the basis of premises that state propositions expressed by the constitutional text. The additional premises necessary to support the inference do not appear to be matters of fact; rather these premises require normative judgments about the nature of our social practices and our technology. The dissemination of news and information in the public sphere is a feature common to the tradi-

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447. *Id.*

448. *Id.* at 85.

449. *Id.* at 85–86.

450. In particular, such an inference could not be cast as:

The First Amendment protects the freedom of all press.

The Internet is a press.

Therefore the First Amendment protects the freedom of the Internet.

That is because the Internet is not a press. There are features of the Internet—including, importantly as we have learned—its disintermediating role with respect to the dissemination of news and information that leaves it potentially particularly vulnerable to fakery and deception, for example. But there are also features of the Internet that make it like a press that ought to entitle publication on the Internet to the protections of the First Amendment. The argument for that inference is not easily, if at all, reducible to one more syllogisms, at least in the way that we articulate and, Brandom argues, actually make such arguments.

tional press and to the Internet that has overriding importance in defining the scope of First Amendment protection. These premises may also require judgments about our values. The dissemination of news and information is a critical function in the so-called marketplace of ideas protected by the First Amendment. Recognizing that centrality and thus the value of such dissemination factors into the conclusion that communication on the Internet is entitled to First Amendment protection.

It is unclear that those premises qualify as authoritative sources of constitutional law for the originalists because they are so obviously extraconstitutional in origin. It is not clear how Marmor or New Originalists would respond to this inference. It hardly seems that they would reject the conclusion—or could be right if they did. But on what basis can they to reject the inference itself? The originalist account of extraneous sources of constitutional law is complex and perhaps inconsistent.<sup>451</sup> If the New Originalists are to reject the inference they likely must do so on this basis of rejecting one of the premises. If they do so, however, it is unclear how they can constructive an alternative inference that would extend the protections of the First Amendment to the Internet.

Like his former colleague Scott Soames, Marmor acknowledges the performative, illocutionary role of statements of constitutional law and asserts that it makes an important contribution to the import of statements whose meaning is not adequately captured by mere austere semantic meaning.<sup>452</sup> He also acknowledges that statements of constitutional law do not express propositions about the world.<sup>453</sup> Marmor argues that propositions of constitutional law have truth functional content by analogy to conversational exhortatives.<sup>454</sup> Marmor asserts that exhortatives have truth conditions and that an exhortative is true if the speaker uttered the exhortative sincerely (and certain other contextual conditions are satisfied).<sup>455</sup> Thus, on

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451. See André LeDuc, Originalism's Claim and Its Implications, Part II.D, *Accounting for Constitutional Flux* (Oct. 31, 2016) (unpublished manuscript) (on file with author).

452. MARMOR, LANGUAGE, *supra* note 2, at 22–27

453. *Id.* at 62.

454. *Id.* at 61–70. In this discussion of Marmor's philosophical account of statements of law, I shall accept *arguendo* his assumption that the concept of truth and truth conditions are generally useful and well understood concepts. I have elsewhere explored reasons to be skeptical of this premise. See LeDuc, *Anti-Foundational Challenge*, *supra* note 10.

455. *Id.* at 64. The relevant contextual conditions parallel the requirements that Austin identified for a felicitous utterance of a performative.

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Marmor's account, as he notes, saying makes it so.<sup>456</sup>

Marmor's claim that exhortatives have non-trivial truth conditions appears problematic. When someone utters a performative, we do not ordinarily think that such an utterance is true or false. When a couple exchanges wedding vows, we do not ordinarily attribute truth or falsehood to the respective utterances (although we may, in unhappy situations, recognize that one party is committing a fraud), and when two persons exchange utterances to make a wager, again, we do not think such utterances are true or false. Austin was right in his substitution of felicity conditions for truth conditions, at least as a matter of our linguistic practice and, at least for me, linguistic intuitions.<sup>457</sup> Marmor does not address Austin's argument that the salient feature of performative utterances is their felicity, not their truth value, expressly. Marmor's intuition that we need an account of the conceptual content of statements of constitutional and other law is sound. It is not enough to assess the felicity *vel non* of such statements and texts.

Marmor argues for the existence of truth values and truth conditions for exhortatives on the basis that the truth of an exhortative E consists in the utterance or creation of the text E.<sup>458</sup> Marmor thus accords truth aptness to utterances or texts that, in Brandom's phrasing, *make* something true rather than beliefs or assertions that *take* something as true.<sup>459</sup> Marmor does not appear to attach any significance to this move. He also does not address the apparent incorporation of the practice of inference in other contexts in which the premises lack truth values. For example, some ethical theories assert that moral judgments express feelings or emotions.<sup>460</sup> On that expressivist or emotivist account, such judgments do not assert propositions about the world, but instead merely express feelings about the world.<sup>461</sup> While we sometimes talk about the truth of moral judgments, that talk is limited and may be reducible to endorsement of the judgment

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456. *Id.* at 84.

457. AUSTIN, WORDS, *supra* note 55, at 139–45 (simplifying substantially, arguing that the truth aptness of performative utterances is less significant than their performative felicity, and the opposite relationship holds for constatives).

458. MARMOR, LANGUAGE, *supra* note 2, at 64–65.

459. BRANDOM, ARTICULATING REASONS, *supra* note 88, at 83.

460. *See generally* GILBERT HARMAN, THE NATURE OF MORALITY 26–40 (1977) [hereinafter HARMAN, MORALITY].

461. *Id.* at 27–32.

asserted to be true.<sup>462</sup> But expressivists do not think that there is any problem with inference in moral theory.<sup>463</sup> Marmor might reply that such expressivist statements also have self-referential truth conditions. It is not clear what such a claim adds.

Marmor also explores the parallel between truth with respect to fiction and truth with respect to statements of law at some length, arguing that it sheds light on the nature of truth in law.<sup>464</sup> Truth with respect to propositions about places, persons, and events described in fiction has received ongoing philosophical attention.<sup>465</sup> For example, David Lewis, in an account that Marmor endorses, has argued that statements about fictional events and persons must be understood to be true or false only within the context of the fictional world.<sup>466</sup> Marmor is particularly concerned with the logical relationships between statements about the world and statements about the fictional world.<sup>467</sup> Marmor takes as his point of departure what he terms Lewis's paradox, which calls out the confusions that arise when statements about the real world are combined with statements about the fictional world, leading to error and confusion.<sup>468</sup> Marmor asserts that a similar problem arises with respect to inferences that draw on statements of law and statements about the world, leading potentially to similar confusion and error.<sup>469</sup> To solve that potential problem, Marmor adopts a solution analogous to that proposed by Lewis with respect to fiction, the concept of restricting statements that serve as premises for legal inference to statements that are, at least implicitly, statements about facts or conditions within the realm of legal discourse.<sup>470</sup> While Marmor has to work hard to make that argument for an implicit restriction plausible (and it remains at odds with our ordinary truth talk with respect to exhortatives), its introduction is central to Marmor's argument as to how to make the rules for logical inference work in law.<sup>471</sup>

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462. *Id.* at 33–35 (exploring the tensions that arise when expressivism denies ordinary truth values to moral statements).

463. *Id.* at 36–39, 41 (describing expressivist moral reasoning and argument in the terms of ordinary logical inference).

464. MARMOR, LANGUAGE, *supra* note 2, at 77–84.

465. *See generally* LEWIS, *Truth in Fiction*, *supra* note 438.

466. *Id.* at 77–78; MARMOR, LANGUAGE, *supra* note 2, at 77–78.

467. MARMOR, LANGUAGE, *supra* note 2, at 77–84.

468. *Id.*

469. *Id.*

470. *Id.* at 82–84.

471. Marmor asserts that such statements are self-referentially true. *Id.* at 65–66. It is far

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Marmor's claim that statements of law have truth conditions appears open to challenge. The first question is what the concept of truth adds to Marmor's account of statements of law. Marmor acknowledges that statements of law are not statements about the world, and in so doing, both distinguishes the concept of the truth of such statements from traditional accounts of truth and accords it a small importance with respect to such statements.<sup>472</sup> Moreover, many, like Austin, have doubted that such statements have significant truth conditions.<sup>473</sup> Marmor asserts that the concept of truth is necessary for inferences to be valid.<sup>474</sup> Marmor believes that he must make statements of law truth-apt to make inference possible in the world of law.<sup>475</sup>

Classically, the rules of first order logic permit the construction of truth value or truth tables for logical inferences that relate the truth of premises with the truth of the conclusion.<sup>476</sup> But while that is a valuable project, Brandom explains why it is not a necessary element in accounting for inference in practical reason.<sup>477</sup> Briefly, Brandom argues that logical inference is simply the formalization for premises stated in a logical vocabulary of a type of materially good inference that is used across a wide array of contexts.<sup>478</sup> Such inference is not limited to logical inference and it is not limited to true or truth-apt premises. One possibility would be to jettison the concept of truth for authoritative statements of law, substituting a concept, say, of "generally accepted after inquiry" and define rules of inference with respect to law as those rules that preserve such concept of generally accepted after inquiry. Such a concept of generally accepted after inquiry (drawn from classical pragmatist accounts of truth) would not appear to be a proxy for truth in any classical sense. Even if we

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from clear what such a reductive concept adds to our understanding of law, language, or inference.

472. MARMOR, LANGUAGE, *supra* note 2, at 61–67.

473. See generally AUSTIN, WORDS, *supra* note 55, at 139–46. But see Lewis, *Score-keeping*, *supra* note 122, at 247–48 (defending the existence of truth conditions for such utterances).

474. See MARMOR, LANGUAGE, *supra* note 2, at 61 ("It is difficult to see how such [legal] inferences can be valid if the premises are not truth-apt . . .").

475. *Id.*

476. See, e.g., GEOFFREY HUNTER, METALOGIC: AN INTRODUCTION TO THE METATHEORY OF STANDARD FIRST ORDER LOGIC 48–51 (1973); see generally WILLARD VAN ORMAN QUINE, ELEMENTARY LOGIC 54 (rev. ed. 1980).

477. See generally BRANDOM, ARTICULATING REASONS, *supra* note 88, at 84–87.

478. *Id.* at 85.

characterize such statements generally accepted after inquiry as taken as true or treated as true, the implicit contrast with statements that are true remains.<sup>479</sup> Yet we would have a formal account of inference for such concepts that would seem to work just fine. An inference from premises that are taken as true is as good as an inference from premises that are true, as a matter of inference.

Marmor might respond that statements that are taken as true or treated as true are true enough to satisfy his account of the truth of authoritative statements of law. He might declare himself agnostic on the question whether such statements are, in fact, true. What, then, is important in Marmor's concept of truth for exhortative or other performative utterances or texts? It is, I think, that we act with respect to what Marmor characterizes as the truth or falsity of such texts and utterances in ways that resemble the ways that we act with respect to the truth or falsity of declarative statements. That is, truth is good, falsehood is bad.

Also important in the approach to authoritative sentences about constitutional law is often their place and mission as performatives. That is, the most salient feature of such utterances or texts is what they are doing, not what the statements are saying. For example, in *Cohen v. California*, the Court confronted the conviction of a young man for disturbing the peace.<sup>480</sup> The defendant had worn a jacket with a printed slogan "Fuck the Draft" into a Los Angeles courthouse.<sup>481</sup> In the context of the Court's review of the conviction, when the Court asserted in its opinion that "words are often chosen as much for their emotive as their cognitive force"<sup>482</sup> the conceptual content of the Court's recognition of the importance of rhetorical punch (which in a different context might have been significant) was less important than its place in a practical inference as to why offensive speech about public questions in the public square had to be protected under the First Amendment. In that context, simply reminding us that public argument and discourse is far from a world of cold, crystalline, dispassionate reason. If we recognize the richness and the emotional and rhetorical dimension of public discourse in the public sphere then we also understand the breadth of the protections needed for a robust and vital free speech. That recognition, captured in part

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479. As is classically emphasized in criticisms of pragmatist theories of truth.

480. 403 U.S. 15 (1971).

481. *Id.* at 16.

482. *Id.* at 26.

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by the statement quoted, makes for a compelling opinion holding for the defendant.

Most fundamentally, Robert Brandom's theory of the nature of logic and inference, introduced above,<sup>483</sup> is inconsistent with Marmor's argument. Brandom's inferentialism begins, in a sense, with our practice of reasoning, finding the meaning of propositions not simply in their use, but in the inferential commitments they support and the commitments they entail.<sup>484</sup> Brandom argues that it is the concept of materially good inferences rather than formal validity that is important in our language.<sup>485</sup> This is the alternative to Marmor's tacit endorsement of the critical importance of syllogistic inference in law. From Brandom's stance, our inferential practice with respect to authoritative statements of law accounts for the meaning of those statements on a non-representational theory. That account is necessary because a performative account of such statements, while needed to account for important aspects of our practice with respect to such statements, does not adequately capture the conceptual content of our authoritative statements of constitutional law or our practice of constitutional argument. With Brandom's theoretical apparatus in hand we can dispense with a need for truth conditions to account for the meaning of statements of constitutional law, contrary to Marmor's account<sup>486</sup> (and to Dworkin's account before him).<sup>487</sup> Neither do we need such an account to explain the practice of inference in our constitutional decision.<sup>488</sup> Brandom's account of practical inference explains constitutional argument and reasoning without the need for a non-trivial notion of truth conditions.

An example may make this clear. Consider the following practical inference drawn, loosely, from the Court's opinion in *Kelo v. City of New London*.<sup>489</sup>

The Takings Clause requires that private property may only be

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483. See generally BRANDOM, ARTICULATING REASONS, *supra* note 88, at 10–15. Brandom's theory is hardly uncontroversial, but it appears to shed light on our constitutional practice, both in providing a non-representational account of meaning and truth and in emphasizing the inferential role of our texts and utterances.

484. *Id.* at 45–77.

485. *Id.* at 52–55.

486. See MARMOR, LANGUAGE, *supra* note 2, at 70–74.

487. See DWORKIN, PHILOSOPHY OF LAW, *supra* note 88, at 5 (characterizing the question of what legal propositions mean is “the same thing” as when those propositions are true).

488. See generally BRANDOM, ARTICULATING REASONS, *supra* note 88, at 80–96.

489. 545 U.S. 469 (2005) (upholding a state taking of non-blighted urban land for private redevelopment as satisfying the public use requirement of the Fifth Amendment).



taken for public use.

If private property is taken for a public purpose, then it is taken for public use.

The subject property was taken for the public purpose of urban redevelopment.

Therefore the public use requirement of the Takings Clause is satisfied.

It is not clear that the any of the sentences in the inference have non-trivial truth conditions.<sup>490</sup> They are true because the Court asserts them in the course of its decision (they are not dicta). Saying makes them so. We can agree with the decision or disagree with it, but it qualifies as a summary of an important part of the relevant constitutional on takings. Truth aptness hardly appears a requirement for our practice of constitutional reasoning and argument.

If Marmor's account of truth is unnecessary to ground the concept of inference, does that notion have any other virtues that makes it valuable and can it withstand our skepticism about the concept of truth that Marmor has created? If we look at statements of and about the law and reasoning about those statements in the context of our practice of constitutional adjudication, we find that, to a significant degree, what a court says about the constitutional law makes it so. In the case of a lower court a more senior court may overrule such statements (thus making them false), and in the case of the Court a subsequent case may overrule a decision (again, thus making the earlier decision false as to its statements of the law). There is not otherwise any fact about the Constitution or about the world that makes such statements true or false.

Marmor concludes with a review of the debate between Justice Scalia and Ronald Dworkin.<sup>491</sup> In scoring the debate between Justice Scalia and Dworkin, Marmor concludes that Dworkin's arguments against originalism were unpersuasive.<sup>492</sup> Briefly, he rejects those ar-

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490. These statements have the trivial truth conditions of being true by virtue of having been stated. But if we look at the second premise, for example, it is unclear what states of the world might make the conditional true.

491. MARMOR, LANGUAGE, *supra* note 2, at 132–55. The debate is most expressly articulated by the protagonists in SCALIA, INTERPRETATION, *supra* note 19 (direct engagement by Dworkin and Tribe with an important statement of originalism by Justice Scalia, along with rebuttals of those criticisms by Justice Scalia).

492. MARMOR, LANGUAGE, *supra* note 2, at 150 (concluding that Dworkin needed a moral-political argument, not a linguistic argument against Justice Scalia's originalism). One of the puzzles in Marmor's account is that he denies that Dworkin is a moral realist. *Id.* at 138 n.15 (citing Ronald M. Dworkin, *Objectivity and Truth: You'd Better Believe It*, 25 PHIL. &

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guments because he denies that linguistic arguments can refute the originalist claims. Marmor claims that Dworkin sought to show that the originalist methodology relied upon a conception of the Constitution that Dworkin rejects.<sup>493</sup> The originalists' conception of the Constitution relies on the historic, original meanings of what Marmor calls the *super-polysemic* constitutional terms.<sup>494</sup> Marmor makes it clear that he believes this to be a semantically proper choice—howsoever suspect it may be as a matter of political or moral theory.<sup>495</sup> Dworkin's conception, by contrast, is of a Constitution that is pervasively informed by moral and political philosophical argument in a Rawlsian liberal vein. That Constitution is not and cannot be fettered to historic understanding of political and moral philosophy or historical values or rights.<sup>496</sup>

Marmor denies that any argument from the philosophy of language can show that Dworkin's Constitution is right.<sup>497</sup> That is, on Marmor's account, that Dworkin's Constitution is the right interpretation of the Constitution for us to choose. Marmor rejects Dworkin's claim that philosophical accounts of language determine the force of the Constitution because the constitutional text is too indeterminate to admit of definitive interpretation. Instead, Marmor asserts that the choice between originalist and non-originalist theories requires a normative, moral and political philosophical judgment.<sup>498</sup> Thus, on Marmor's account, the debate over originalism can be resolved not on philosophical grounds, but on the basis of a substantive normative judgment underlying a substantive, normative conflict. The implication of Marmor's criticism is that constitutional decision cannot be determined merely on the basis of a linguistic, philosophical account of the force of the constitutional provisions. If he is right about that—and I think that he is—then the determination

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PUB. AFF. 87 (1996) [hereinafter Dworkin, *Objectivity*]). Marmor does not explain his claim, and Dworkin's unified value theory is a moral realist theory; Dworkin believes that there are moral facts. See RONALD M. DWORKIN, *JUSTICE FOR HEDGEHOGS* (2011).

493. MARMOR, *LANGUAGE*, *supra* note 2, at 146–50.

494. *Id.* Marmor defines a super-polysemic term as one encompassing a particularly wide range of meanings sensitive to a wide range of contexts and considerations. One might question whether this concept is similar to Molière's dormative power, but I cannot explore that possibility here.

495. *Id.*

496. *Id.* at 149–50.

497. *Id.* at 150 (concluding that Dworkin's claim needs a “moral-political argument, not a linguistic one.”).

498. *Id.* at 150.

of what the Constitution says, or how to decide cases, must be made on another ground.

Marmor characterizes the determination of the meaning of the Constitution as a matter of moral and political theory.<sup>499</sup> While he is right to reject linguistic considerations as determinative of constitutional meaning, he is mistaken in turning to another, extra-constitutional source for the determination of what the Constitution says. Marmor does not explore or defend his claim that political and moral choices are prior to the constitutional determinations, so his conclusion may perhaps not reflect a considered view.<sup>500</sup> But Marmor endorses the view that the determination of the linguistic content of the Constitution is determined by logically prior moral and political choices.<sup>501</sup> He asserts that the anti-democratic nature of the Constitution's fundamental status as a pre-commitment social construct creates the fundamental theoretical constitutional question.<sup>502</sup> That is, how far and in what directions are we willing to go in limiting or reversing democratic decision making because of the Constitution? Marmor simply generalizes the statement of Bickel's countermajoritarian challenge to judicial review. Marmor rightly highlights that the undemocratic features of the Constitution go beyond the exercise of judicial review by the Court.

Having posited the pre-commitment puzzle as the fundamental theoretical metric to constitutional theory, Marmor places the originalists and their critics on different places with respect to this puzzle.<sup>503</sup> The originalists give the pre-commitment commitment greater weight than do originalism's critics.<sup>504</sup> I have argued in earlier articles that our constitutional decisional practice does not need a foundation and cannot be grounded on a foundation.<sup>505</sup> Our constitutional decisional practice is a matter of determining whether a constitutional case makes a claim for relief on the basis of one or more of our accepted, canonical modes of constitutional argument and then,

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499. *Id.*

500. *Id.* at 148–50 (giving the example of the Eighth Amendment prohibition of cruel and unusual punishment as an instance of a constitutional text that cannot be interpreted on the basis of a linguistic account of meaning alone).

501. *Id.* at 150.

502. *Id.*

503. *Id.* at 150–52.

504. *Id.* at 151–52.

505. See generally LeDuc, *Anti-Foundational Challenge*, *supra* note 10; LeDuc, *Philosophy and Constitutional Interpretation*, *supra* note 6.

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if so, deciding whether that claim is sufficiently compelling, in light of any canonical arguments against relief. Even if that claim cannot be sustained, Marmor's reduction is manifestly simplistic.<sup>506</sup>

More fundamentally, Marmor denies that linguistic content alone can provide us the meaning of constitutional texts.<sup>507</sup> Many of the originalists simply assert that the meaning of the constitutional text is generally clear; Justice Scalia made this claim expressly at Princeton.<sup>508</sup> But originalists have a second, last line of defense against Marmor's claim. Even if moral and political choices are necessary, they argue, those choices are inherent in, and made by, the Constitution itself.<sup>509</sup> Those choices are sufficient to determine the meaning of the Constitution.

This reply misses the force of Marmor's criticism, but that criticism is misdirected. Marmor is arguing that we need a political or ethical reason to adopt an originalist account of the meaning of the Constitution. In a sense, he is offering a philosophical version of the Dead Hand argument.<sup>510</sup> That the normative choices are inherent in the Constitution is not an argument for following those choices. Marmor's argument relies upon the tacit premise that we need such an argument.<sup>511</sup> The anti-foundational account I have defended before entails that no such argument is necessary for arguments from the historical understanding of the text or from the text itself, as canonical forms of our constitutional decisional argumentative practice, remain good modes of argument.<sup>512</sup> If we do not need such an argument to support the originalist modes of argument nor the non-originalist modes of argument then Marmor's argument has not advanced the fruitless debate over originalism in any way that makes a difference to our constitutional practice.

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506. Thus, for example, in the three important recent cases I discuss in LeDuc, *Beyond Babel*, *supra* note 35, Marmor's claim that we can reduce the argument to a two step process—choice of political/moral theory coupled with an interpretation of the constitutional text—appears wholly unsatisfactory as a description of the arguments of the Court and the dissenting Justices. *See generally* LeDuc, *Beyond Babel*, *supra* note 35.

507. MARMOR, LANGUAGE, *supra* note 2, at 154–55.

508. SCALIA, INTERPRETATION, *supra* note 19, at 45.

509. BORK, TEMPTING, *supra* note 18, at 176–77.

510. *See generally* Frank Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1109 (1998); BORK, TEMPTING, *supra* note 18, at 170–73 (addressing an objection attributed to Terry Sandalow and Paul Brest).

511. MARMOR, LANGUAGE, *supra* note 2, at 154–55.

512. *See generally* LeDuc, *Anti-Foundational Challenge*, *supra* note 10; LeDuc, *Ontological Foundations*, *supra* note 6.

As noted above, in a claim paralleling Dworkin's linguistic argument, Solum claims to construct an originalist theory that is grounded on objective, non-normative philosophy of language.<sup>513</sup> Although Marmor does not address Solum's theory directly, confining his focus to the Scalia-Dworkin debate, it is valuable to explore how Marmor would respond to Solum's expansive originalist claims. Because Solum defends semantic originalism on semantic grounds, it may appear that Marmor would need to reject Solum's claim if he is to maintain his stance that resolving the debate over originalism and constitutional interpretation generally requires substantive, normative judgments.

That conclusion is questionable for two reasons. First, Solum's contribution thesis masks substantial gaps in his explanatory theory. The contribution thesis, which states that the linguistic content of statements of constitutional law contributes to the constitutional content of such statements, is a black box. How that contribution arises is never made very clear.<sup>514</sup> The leading argument is made from within our constitutional practice in support of the moderate version of the thesis, which states that the linguistic content of the constitutional text is the privileged, non-exclusive source of constitutional law.<sup>515</sup> According to that argument our constitutional practice treats the linguistic content of the Constitution as the law.<sup>516</sup> Solum makes an independent argument that this version of the contribution thesis is consistent with our constitutional practice more generally.<sup>517</sup> But Solum's claim to privilege linguistic content is inconsistent with prudential, structural, and doctrinal arguments made routinely in the Court—and accepted as determinative of constitutional cases presented there.

Solum's claim that the linguistic content of the constitutional text is privileged is mistaken. Solum recognizes the tension between his claim and our practice of constitutional argument and decision and tries to rehabilitate apparent counterexamples.<sup>518</sup> For example, he ar-

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513. Solum, *Semantic Originalism*, *supra* note 2, at 21–22 (endorsing the claim of classical originalism that the original meaning of the Constitution controls because it is the law).

514. See Solum, *Semantic Originalism*, *supra* note 2, at 134–39 (distinguishing three versions of the Contribution Thesis).

515. *Id.* at 134–36.

516. *Id.* at 136–37.

517. *Id.* at 136–39.

518. *Id.* at 138. Baude undertakes a similar but more ambitious effort to rehabilitate the non-originalist precedents. See William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV.

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gues that restrictive reading of the Privileges and Immunities Clause is now part of our law only as a matter of precedent.<sup>519</sup> That is, Solum's account fails to acknowledge the diverse modes of constitutional argument that often trump the linguistic import of the constitutional text. Our practice does not privilege any of the canonical modes of constitutional argument. There is nothing special about the linguistic content or historical understanding of that content.

It might be that Marmor would accept or reject Solum's theory depending on the nature of the contribution mechanic. To the extent that linguistic content contributes to the content of the law while allowing room for a fundamental contribution by political and moral normative choices, Marmor could accept Solum's theory. It is more likely that Solum's claim that the contribution thesis states a non-normative objective claim about the source of constitutional law would compromise Solum's theory for Marmor. Marmor asserts that the choices of interpretation (if done) and decision require moral and political judgment. Solum's claim to derive some significant content of the constitutional law without recourse to such judgment would appear mistaken on Marmor's account. The second path to harmonize Solum's theory with Marmor's criticism of Dworkin's argument in the debate with Justice Scalia relies on Solum's acknowledgment of the normative nature of the fidelity thesis. Solum characterizes the source of our obligation to be faithful to the constitutional content of semantic originalism as grounded in moral and political theory. That requirement of a normative argument might also reconcile Solum's theory with Marmor's criticism. Again, however, I think that reconciliation would be problematic. Marmor rejects the claim that semantic analysis or theory can answer hard constitutional cases; he throws in his lot with Dworkin.<sup>520</sup> As a result, it is not enough that constitutional law rely globally on normative claims; the content of local constitutional disputes must be determined by substantive normative claims. Solum's fidelity theory does not satisfy this requirement.

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2349, 2376–86 (2015) (making a masterful, yet unpersuasive effort to demonstrate that our constitutional decisional practice is overwhelmingly originalist, including the decision of precedents like *Brown* that are widely thought to fall outside the originalist canon). Baude's brilliant rendition of this reinterpretation is one of the most powerful pieces of evidence for the pathological scholasticism of the originalism debate.

519. Solum, *Semantic Originalism*, *supra* note 2, at 138.

520. Ronald Dworkin, *Is There Really No Right Answer in Hard Cases?*, in *A MATTER OF PRINCIPLE* 119, 119 (1985) (arguing that there is indeed one right answer, even to hard legal questions, through the application of moral and political philosophical argument). Marmor might permit some constitutional law to be determined semantically.

Marmor's argument that the debate over originalism is fundamentally a substantive political disagreement is mistaken. Proof of that error arises from careful attention to the practice of constitutional argument and decision. Argument in constitutional law is not made as, and is not reducible to, what we recognize as political or moral argument.<sup>521</sup> Doctrine and the other modes of constitutional argument have a vitality that appears resistant to such political re-characterization.<sup>522</sup> Thus, disagreement over constitutional cases and questions, while admitting of an obvious political dimension, also proceeds within the autonomous realm of constitutional argument. The debate over originalism is a debate purportedly about the proper methods to decide such cases. It is similarly irreducible to political or moral argument or calculus.

More subtly, Marmor is mistaken because there can be no winner or loser in the debate over originalism. That debate is founded on mistaken premises. Marmor is right, I think, in recognizing that both originalists and Dworkin appeal to an objective Constitution, but those Constitutions are very different. He is mistaken in his tacit assumption that one of those objective Constitutions exists as the realization of our collective political choices. Neither has an independent, objective existence. Both Constitutions are partial descriptions of the potential result of the application of particular modes of constitutional argument. The nature of constitutional argument precludes that either will be realized, and neither is an ideal to which dispositive appeal may be made in constitutional argument. To the extent Marmor is a moral relativist, this conclusion may not be far from the result that obtains on his account, but the path is radically different than he argues. To the extent that he is not, and thinks that Dworkin has the stronger side of the moral and political philosophical argument, Marmor's assessment of the originalism debate is fundamentally mistaken. In sum, Marmor's philosophical account of language in law is insightful and creative, but flawed in fundamental respects. In particular, he argues that constitutional interpretation must be premised on normative constitutional choices outside our constitutional law. He, too, fails in his philosophical assault on the debate over originalism despite the sophistication of his philosophical arguments and tools.

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521. See generally FRIED, SAYING, *supra* note 193; Fried, *Constitutional Doctrine*, *supra* note 278.

522. See generally Philip Bobbitt, *Is Law Politics?*, 41 STAN. L. REV. 1233, 1249–50 (1989) (generally rejecting the reduction of law to politics).

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Scott Soames has recently defended a purportedly post-originalist account of constitutional interpretation that he dubs *deferentialism*.<sup>523</sup> His account is a *tour de force*, at once suggesting a defense of *Lochner*,<sup>524</sup> while discrediting *Griswold*<sup>525</sup> and *Roe v. Wade*.<sup>526</sup> Soames calls his interpretative theory deferentialism because it defers both to the rationale of the authoritative legal actors who adopted the relevant authoritative law and to the legal content of such law.<sup>527</sup> Soames characterizes his account as “post-originalist” because his theory offers “a new conception of legal interpretation that has close affinities with originalism, while shedding much of its accumulated baggage.”<sup>528</sup> He contrasts it as looking to linguistic content, not merely semantic meanings, on the basis that the austerity of semantic meanings is inadequate to perform the communicative function of the constitutional text.<sup>529</sup> Soames defends a theory of interpretation that looks first to linguistic content of the legal text and only then to the purposes of the authors.<sup>530</sup>

Soames begins with Justice Scalia’s analysis and decision in his dissent in *Smith v. United States*.<sup>531</sup> He scores Justice Scalia as right in identifying the central question in the case, wrong in his semantic and linguistic analysis, and right in his decision.<sup>532</sup> Although Soames would articulate it differently, Justice Scalia correctly focused on the question of what the legal content of the relevant statute was. For Soames, that is a question of what was asserted by the enacting democratic legislative body.<sup>533</sup> Soames denies Justice Scalia’s claim to re-

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523. Soames, *Deferentialism*, *supra* note 2. The name derives from Soames’s theory of a unified theory of interpretation, applying both to statutory and constitutional interpretation. Soames’s account largely glosses over the different performative missions of statutes and constitutions. *Id.* at 597 n.1. It is a subtle but perhaps unimportant question whether Soames’s deferentialism ought to be treated as a variety of the New Originalism or whether he ought to be treated as a critic, as I do here. Given my stance with respect to the debate over originalism, I do not believe much of substance turns on this classification.

524. *Lochner v. New York*, 198 U.S. 45 (1905).

525. *Griswold v. Connecticut*, 381 U.S. 479 (1965) (recognizing a constitutional right of privacy).

526. 410 U.S. 113 (1973); Soames, *Deferentialism*, *supra* note 2, at 606–13.

527. Soames, *Deferentialism*, *supra* note 2, at 606.

528. *Id.* at 597. The baggage that Soames believes originalism carries includes overly ambitious and mistaken claims about the nature of semantic meaning and the failure to recognize that in certain limited circumstances that the judge must make law.

529. *Id.* at 598; *see also* SOAMES, *Legal Texts*, *supra* note 2.

530. Soames, *Deferentialism*, *supra* note 2, at 597.

531. *Id.* at 598–600.

532. *Id.*

533. *Id.* at 598–99.



duce the meaning to the most common semantic meaning, instead emphasizing what Marmor would style the polysemy of the phrase.<sup>534</sup> Soames argues that in the absence of context that would support an alternative choice among the multiple semantic meanings the phrase “uses a firearm” should be understood in the same way urged by Justice Scalia.<sup>535</sup> That is because the enacted statute “was used to *assert* or *stipulate*” that the firearm must be used as a firearm in the commission of the crime for the enhanced penalty to apply.<sup>536</sup> Soames immediately assumes that the judicial decision is determined by the identification of the asserted content of the statute.<sup>537</sup>

Soames argues affirmatively for his approach on the basis that legal and constitutional texts, like other natural language utterances and texts, often have underdetermined semantic meaning and underdetermined purpose on the part of the speaker or relevant actor.<sup>538</sup> Thus, while the identification of the legal content of a constitutional (or other legal) provision is the first step in interpretation, the process cannot end there. Instead, the second step of the interpretative process in deferentialism, rectification, requires that the judge make law.<sup>539</sup> Soames’s account of interpretation does not make that project a matter of filling the indeterminate interstices of the otherwise determinate meaning of the text.<sup>540</sup> He does not adopt a model of determinate core, indeterminate penumbra and his account of the sources of indeterminate meaning are richer than that traditional model.<sup>541</sup> But while theoretically different, the process appears in many ways similar on its face to that traditional account.

Soames identifies three types of rectification. The first he terms precisification.<sup>542</sup> In that step, the judge seeks to adopt the (i) mini-

534. *Id.*; MARMOR, *LANGUAGE*, *supra* note 2, at 121–23.

535. Soames, *Deferentialism*, *supra* note 2, at 600.

536. *Id.*

537. *Id.*

538. *Id.* at 603–04 (arguing sarcastically that when the legal text does not have a determinate meaning “we should not pretend that Beneficent Providence has rescued the legislation by transubstantiating the lawmakers’ flawed performance into a determinate, consistent, rationalized, and morally acceptable product.”).

539. *Id.* at 604 (“[T]he task of the judge is *not* to discover an idealized law that is already there; *it is to make new law.*”).

540. For what has been generally read as a classical statement of the interstices theory, see H.L.A. Hart, *The Separation of Law and Morals*, 71 HARV. L. REV. 593, 608 (1957).

541. Soames, *Deferentialism*, *supra* note 2, at 598–603.

542. *Id.* Soames adopts the barbarism of “precisification” because while he believes it possible to make the statement of constitutional authorities more precise, he does not believe that those statements will always determine a unique semantic meaning.

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mum (ii) principled determinate content consistent with the (iii) rationale of the enacting or adopting body.<sup>543</sup> Soames acknowledges that this “process is not algorithmic”;<sup>544</sup> by that I understand him to mean that it requires the exercise of judgment and is, itself, not fully determined. Yet without a concept of measurement, it is unclear how the process he describes could proceed. Like Justice Scalia defending the certainty possible with originalism, Soames asserts that the content sought is “epistemically discernable.”<sup>545</sup> Each of the elements of Soames’s theory warrants comment. Soames repeatedly characterizes the process as requiring a minimal determination, but he never explains what that means. Soames requires the process of precisification to be principled, but does not explain what that requirement demands. Soames articulates the concept of the rationale for a constitutional provision to which his theory appeals more fully. Beginning with what the rationale is not, Soames distinguishes the causal motives behind the adoption.<sup>546</sup> Instead, he focuses upon the express public reasons advanced for the adoption.<sup>547</sup> Soames wants to offer an account of constitutional meaning in the space of reasons, not in the space of causes.

The second type is harmonization of conflicting authorities.<sup>548</sup> Here Soames addresses the problem of potentially inconsistent sources of law.<sup>549</sup> According to Soames, such potential inconsistencies are to be resolved and the potential conflicting legal authorities harmonized by minimizing the surgery that must be done to the existing legal authorities while maximizing the realization of the rationales for the disparate enactments.<sup>550</sup> Soames does not explain his metric for

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543. *Id.* at 605.

544. *Id.*

545. *Id.*

546. *Id.* (“By ‘rationale,’ I do not, of course, mean the causally efficacious motives that led them to act, which are often epistemically inscrutable and constitutively irrelevant.”).

547. *Id.* (characterizing the rationale as the “chief reasons publicly offered to justify and explain the law’s adoption”).

548. *Id.*

549. A constitutional example is the general provision that the Vice President presides over the Senate and the express provision that the Chief Justice presides over the impeachment trial of the President in the case of an impeachment trial of the Vice President—although technically, of course, there is not literal conflict. This example highlights, I think, that the concept of conflict is subtler and less formal than we sometimes imagine.

550. Soames, *Deferentialism*, *supra* note 2, at 606 (“[T]he judge is required to fashion the minimal modification of existing laws that removes the inconsistency and allows a unique verdict to be reached, while maximizing the fulfillment of the discernable legislative rationales of the laws in question.”).

measuring the modification that must be made to existing authority, and the challenge of formulating a measure that would at least permit an ordering of potential readings would appear substantial.

Measuring the extent of a modification to an authoritative constitutional provision cannot be simply a matter of counting the number of words that must be imputed or deleted. In the absence of a canonical formal language to state constitutional provisions, that measure would be unworkable because it would vary with the linguistic expression of constitutional provisions. The measure must instead be a matter of the conceptual legal content of the subject. That is a complex and unacknowledged and unarticulated concept. Moreover, the metric would somehow need to measure the rationales underlying the disparate authorities. Such a notion would be required for Soames to be able to measure the difference between a constitutional or other legal provision before the modification occurring in harmonization and the authority after such harmonization. A judgment must be made about the scope of the application of a provision and the nature of that application. The effect of some provisions, when and if they apply, is more profound than others. It is not clear how Soames thinks this judgment ought to be made under his theory. At the least, the philosophical precision that he purports to offer appears questionable.

Soames cannot simply discard a notion of measure in his account of harmonization. A notion of measure makes it possible for Soames to assess the potential competing ways to harmonize conflicting or incomplete constitutional authorities without falling back on judgments outside those authorities. The notion of measure purports to allow Soames to assess competing harmonizations for their fit and power. Without that measure he must acknowledge that the conflict and gaps cannot be resolved within the four corners of the linguistic content of the constitutional text. That linguistic step is central to Soames's strategy to privilege the original linguistic content of the constitutional text.

Third, and last, harmonization is also required when a case presents a conflict between the semantic meaning of a constitutional authority and its rationale.<sup>551</sup> Here, too, the modification of the existing authority is the least necessary to reach consistency with the rationale.<sup>552</sup> A similar problem of measurement arises as with the modi-

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551. *Id.*

552. *Id.*

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fication of inconsistent authorities. Soames appears to assume that a problem of inconsistency between the relevant authoritative provision and its rationale will be apparent. That inconsistency may in fact be quite uncertain and problematic.<sup>553</sup>

In light of Soames's commitment to principle and to harmonization and his goal of maximizing the realization of the rationale, it is also helpful to compare deferentialism with Dworkin's interpretative theory of law as integrity. The key difference is the role of political and moral theory. That theory is central in Dworkin's account, delivering the fundamental measure for both consistency and justice in constitutional adjudication.<sup>554</sup> It is invisible in Soames's formulation of deferentialism,<sup>555</sup> but it is perhaps not entirely missing. Soames expressly takes into account the "background" within which a constitutional text is adopted.<sup>556</sup> The potential scope of that opaque and perhaps open-ended notion becomes clear when Soames discusses *Lochner*.<sup>557</sup> There, Soames explains what he believes would have been required for a robust inclusion of unenumerated rights within the ambit of the Due Process Clause.<sup>558</sup> He argues that a clear Thayerian statement of such a rule would be controlling, even in the absence of an express constitutional provision.<sup>559</sup> Although Soames asserts that the historical evidence fails to support such a broad reading of the Clause, his discussion suggests that with an express endorsement of natural law theory, for example, unenumerated rights would be protected under the Due Process Clause.

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553. For example, when the First Amendment provides that the Congress "shall make no law. . . abridging the freedom of speech. . ." the relationship between legislative rationale and text is complex and controversial. The Court has never interpreted the provision to mean what it says, as a matter of linguistic content. By contrast, what makes the question of who presides over the impeachment of the vice president such a delightful academic parlor game is that the conflict between text and rationale is so manifest—even if we do not precisely how to reason to the right result. See generally Goldstein, *supra* note 192.

554. See generally DWORKIN, *EMPIRE*, *supra* note 31, at 225–75 (describing adjudication under his theory of law as integrity).

555. Soames, *Deferentialism*, *supra* note 2, at 598 (asserting that the original public understanding of what the legislation meant—not the linguistic content of the words employed in the legislative enactment—is the law).

556. *Id.* at 598–603 (exploring the history of the adoption of the Due Process Clause in the Bill of Rights and the Fourteenth Amendment).

557. *Id.* at 608 ("[O]ne would have to argue that the framers and ratifiers of the Fifth and Fourteenth Amendments *understood and announced* in the public rationale offered on behalf of the amendments that the Due Process Clause was an intentionally vague, *tabula rasa* on which future interpreters could write.").

558. *Id.* Soames denies, of course, that there was any such express public statement.

559. *Id.*

Soames claims his interpretative stance avoids some of the powerful challenges that originalism faces. In particular, he argues that the originalist commitment to a unique semantic meaning for constitutional provisions should be discarded.<sup>560</sup> Soames argues that commitment is implausible as a matter of linguistic theory and the austerity of mere semantic meaning.<sup>561</sup> In its place he would introduce a broader semantic and pragmatic account of the meaning of the constitutional text.<sup>562</sup> He would also, however, go beyond that linguistic meaning.<sup>563</sup> In doing so, he acknowledges that judges are sometimes called upon to make law.<sup>564</sup>

Soames gives the example of the application of his theory in assessing the development of the Court's line of precedent in *Griswold*<sup>565</sup> and *Roe v. Wade*.<sup>566</sup> Under deferentialism, Soames argues that the opinions in those cases were wrongly argued and the cases themselves wrongly decided, as were their progeny, including *Lawrence v. Texas*.<sup>567</sup> Beginning with *Griswold*, Soames argues that the reasoning that created the right to privacy that was held to be violated in that case is fundamentally flawed. As he puts it, "there is no epistemically legitimate inference from which a general right to privacy encompassing matters of sexual morality such as contraception . . . can be derived."<sup>568</sup> When Soames asserts that there is no *epistemically* legitimate inference, what does he mean? How is the judgment epistemic, rather than as a matter of logic or our constitutional practice? Why is the focus on what we may know rather than on what is or what we do? Both logic and constitutional practice would appear plausible candidates to explain and characterize the inference. Although I cannot explain Soames's claim, it is fully consistent with his metaphilosophical stance that accords philosophical argument the power the authority to substantively reform our constitutional law.

Soames does not explain why he rejects Justice Douglas's assertion that a right to privacy is inherent in the other specific protections of the Constitution and that the penumbra of that general right

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560. *See id.* at 598.

561. *Id.* at 604–07.

562. *Id.*

563. *Id.*

564. *Id.* at 604.

565. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

566. 410 U.S. 113 (1973).

567. 539 U.S. 558 (2003).

568. Soames, *Deferentialism*, *supra* note 2, at 609–10.

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extends to the Griswolds' right to procure contraceptives. From Soames's position there is nothing inherently improper in such a construction of constitutional principle. Moreover, it warrants note, after all, that just such structural and principled arguments are expressly endorsed (if not the particular argument to a right to privacy) by New Originalists endorsing constitutional construction.<sup>569</sup>

When Soames asserts that such an inference is not epistemically valid he is asserting that such an inference is not valid, either as a matter of induction or deduction. Yet, such kinds of arguments are made all the time—with respect to the First Amendment to extend its protection to broadcast television and to the Internet and, in the case of the academic question whether the Vice President may preside over her own impeachment trial, from principles of separation of powers—and perhaps from common sense—to conclude that she may not. The only flaw that Soames calls out echoes Bork's own criticism of *Griswold*.<sup>570</sup> He challenges the implicit distinction drawn between personal rights, which were constitutionally protected, and economic rights, which were not. Soames asserts that such a distinction is unfounded and impermissible under deferentialism.<sup>571</sup> This argument tracks pretty closely Bork's earlier argument that principles of constitutional law must be neutral.<sup>572</sup> Thus, the objection under deferentialism is substantially an argument that the underlying distinction is not neutral. Deferentialism, in this context, adds little to the five-decade-long debate about the existence of a constitutional right of privacy. So Soames's cryptic claim that deferentialism adds an important insight into the nature of the linguistic content of the constitutional text is more puzzling than persuasive.

Soames deploys his theoretical apparatus to characterize the Court's reasoning in *Griswold* and *Roe* as Lochnerian.<sup>573</sup> By that he means that the Court accepted or treated the constitutive guarantees of the Bill of Rights as fundamental in a reading of the Due Process Clause. Those rights, whose penumbra created the right of privacy

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569. See, e.g., BALKIN, *LIVING ORIGINALISM*, *supra* note 37, at 3–4; BARNETT, *LOST*, *supra* note 60, at 122–25, 126 (“[C]onstitutional constructions are not *wholly* ‘political’ nor *wholly* ‘extraconstitutional.’”).

570. See Soames, *Deferentialism*, *supra* note 2, at 609; BORK, *TEMPTING*, *supra* note 18, at 257–59 (arguing that the reasoning of the Court's decision in *Griswold* was not based upon the application of neutral constitutional principles).

571. Soames, *Deferentialism*, *supra* note 2, at 609.

572. See BORK, *TEMPTING*, *supra* note 18, at 96–100, 146–47,

573. *Id.* at 609–10.

recognized in *Griswold*, encompass unenumerated rights that the Court may, virtually without limitation, recognize and give constitutional force. On Soames's deferentialist account, that reasoning departs from the constitutional law. Soames purports to discredit *Roe* in two paragraphs, characterizing it as doing nothing more than "vastly extending" the right of privacy recognized in *Griswold* through Lochnerian reasoning and the application of *stare decisis*.<sup>574</sup>

Soames's criticism of *Roe* is startling for its naiveté. The argument moves so fast and boldly that it is difficult to reconstruct in a more reasoned way—ironically, Soames's argument is not unlike Soames's characterization of the Court's reasoning in *Roe* itself. Soames concludes that the argument from *stare decisis* fails and the decision (and opinion) is flagrantly non-deferentialist and therefore wrong.<sup>575</sup>

Although Soames does not discuss *Brown*,<sup>576</sup> it is instructive to test the reasoning and decision in that case under deferentialist theory. One of the threshold issues presented is how to assess *Plessy* as precedent under that theory.<sup>577</sup> It might be possible to read *Brown* simply as applying the separate but equal test of *Plessy* and finding that separate is never equal in public education.<sup>578</sup> The deferentialist inquiry would begin with determining what the legal content of the separate but equal test, as prescribed by *Plessy* is. The school system in Kansas City pretty clearly satisfied the requirement of separateness. The difficult questions turn on the content of the requirement that the two systems be equal. Under Soames's deferentialism, the precisification of the content of the requirements of "equal protection" as glossed by the requirement that the benefits of state action be at least "separate but equal" is an inquiry that goes beyond the semantic meaning of the words. It is hard to believe that the historical record showing that segregated schools were common, widely accepted, and expressly embraced by many of the members of the Con-

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574. *Id.* at 610.

575. *Id.*

576. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

577. Soames acknowledges the issues presented for deferentialism by precedent. See Soames, *Deferentialism*, *supra* note 2, at 613.

578. That is, after all, a rather literal reading of the Court's opinion. Read less literally, even before *Loving v. Virginia*, 388 U.S. 1 (1967), the Court's decision may be understood to signal that the racially discriminatory Jim Crow laws and associated structures of racial discrimination were to be struck down under the Constitution. The view that I am defending is that the choice between those competing interpretations could only be made over time as the Court wrestled with the cases that came before it—and chose those cases (and rejected others).

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gress that proposed the Fourteenth Amendment<sup>579</sup> would not be dispositive of the historical question as to the public understanding of the scope of the Fourteenth Amendment. Under deferentialism, a new understanding that equal protection requires a richer equality than was accepted as sufficient at the time of Reconstruction is not available. Raoul Berger and Alexander Bickel have the better side of the historical controversy.<sup>580</sup> We have made political and moral progress in our thinking about racial equality in the past two centuries.

Soames might argue that the semantic meaning of “equal” precluded the understanding and expectations that the relevant original actors had on adoption of the Fourteenth Amendment. Soames cannot make that argument, given the polysemy of equal, particularly in the context of the phrase “equal protection of the laws.” In that context, it appears implausible to assert that equality has some crystalline precision that was understood to preclude separate provision of education. Soames’s deferentialism is freighted with the understanding of the constitutional text at the time of its adoption. Thus, it would appear, *Brown* was mistakenly decided and reasoned under deferentialism.<sup>581</sup> If that is right, deferentialism would appear to be a theory of interpretation with an extraordinarily short half-life.<sup>582</sup>

There is nevertheless a lot in Soames’s theory that is important and original; three insights warrant highlighting. First, his focus on the performative dimension of the Constitution and the need to read

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579. See Michael W. McConnell, *Originalism and The Desegregation Decisions*, 81 VA. L. REV. 947 (1995) (stating a classic originalist defense of *Brown*); Michael J. Klarman, *Brown, Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881 (1995) (rejecting McConnell’s originalist defense of *Brown*).

580. See RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1977); Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955).

581. See generally GREGORY BASSHAM, *ORIGINAL INTENT: A PHILOSOPHICAL STUDY* 106 (1992) (characterizing *Brown* as the cliff over which originalism may be thrown). See also Posner, *Bork*, *supra* note 20, at 1374 (“No constitutional theory that implies that *Brown v. Board of Education*—which held that public school segregation violates the equal protection clause of the fourteenth amendment—was decided incorrectly will receive a fair hearing nowadays, though on a consistent application of originalism it *was* decided incorrectly.”) (footnote omitted). Moreover, even if, following McConnell, one could make an argument that *Brown* was correctly decided, it is hard to imagine such an argument reaching the decision striking down anti-miscegenation laws in *Loving*. That decision, under deferentialism, would therefore appear to be wrong, because it adopts an expansive reading and application of the Equal Protection Clause that was inconsistent with the understandings and expectations when the Fourteenth Amendment was adopted.

582. Whether Soames’s deferentialism is more successful as a theory of non-constitutional legal interpretation is beyond my scope here.



the constitutional text in light of that performance is an important step forward. It is fully consistent with the arguments that I have been making. Soames is unduly cautious in recognizing the implications of the performative dimension of the constitutional text. He does not give the performative role primacy and so maintains the focus of his account of constitutional law on legal meaning.

Second, Soames acknowledges that semantic meanings are too austere to capture the communicative content of legal texts. That recognition begins to move us beyond the dead end we have encountered in the debate over original semantic meanings—and captures the flaw in the public semantic meaning strategy of the New Originalism. Again, however, Soames believes that a more robust strategy to articulate the linguistic and legal content of the constitutional text can generate an adequate account of our constitutional practice.

Third, Soames's careful attention to the description of legal argument is important, even as it does not go far enough. It acknowledges why text and semantic meanings alone are inadequate as well as why any theory must face a threshold descriptive test.<sup>583</sup> It does not go far enough, however, in recognizing the disparate sources of decision because the kinds of arguments that are accepted in our constitutional decisional process go well beyond those permitted by deferentialism. Deferentialism does not permit prudential or ethical argument and struggles with doctrinal or precedential argument. Soames acknowledges this feature of his account but views it as a badge of honor rather than a count in an indictment.<sup>584</sup> But Soames never explains why political or other philosophical theory may trump the law.

Soames's theory is remarkable for its gaps and omissions. The most glaring gap arises in his move from interpretations to decisions. Soames simply assumes here that the project of constitutional adjudication begins—and effectively ends—with interpretation.<sup>585</sup> That assumption is inconsistent with his attention to the practice of constitutional argument and decision and with his recognition of the performative, illocutionary, and perlocutionary force of constitutional

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583. Soames, *Deferentialism*, *supra* note 2, at 212–13.

584. *Id.* at 613–16 (criticizing the underlying rationale for non-deferentialist decisions).

585. Scott Soames, *Toward a Theory of Legal Interpretation*, 6 N.Y.U. J.L. & LIBERTY 231, 231 (2011) (“The constitutive task [in interpretation] is to render an authoritative judgment that itself plays a role in determining what the content of the law is.”).

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texts. It is inconsistent with his attention to those practices because constitutional argument and decision do not begin and end with interpretation, although interpretations and arguments from interpretations are an important, canonical mode of constitutional argument. It is inconsistent with the recognition of the performative, illocutionary force of constitutional texts (including opinions) because what constitutional cases do is to decide cases, first, and to provide guidance as to the likely decision of future controversies, second. The decision of those cases by stating a decision, is not, as Marmor acknowledges, a matter of describing or representing the world.<sup>586</sup> Soames likely attributes interpretation the central role in constitutional decision because he is committed to a classical, non-pragmatist philosophy of language.<sup>587</sup> He appears to be committed to an account of meaning that relies upon truth conditions.<sup>588</sup> For Soames, it is a bold step to move beyond semantics to pragmatics. He is not comfortable with a philosophically pragmatic, functionalist account of the language of law. By contrast, interpretation, employing semantic and syntactic analysis, is a recognized and comfortable concept. It is easy for him to exaggerate and misunderstand its place in constitutional adjudication.

In conclusion, two criticisms challenge the accounts defended by Solum, Marmor, and Soames. First, all three employ philosophical argument at the core of their claims about constitutional originalism. Their theories are not defended as better descriptions of our constitutional practice. Indeed, Scott Soames argues that his theory of deferentialism explains why *Griswold* and *Roe* are wrongly decided.<sup>589</sup> But that argument appears to prove too much, because it also appears to explain why *Brown* and *Loving* were wrongly decided too, and that is not a viable constitutional theory in the 21<sup>st</sup> century. As with Solum's use of philosophy to support originalism, none of these critics articulates their respective methodological defense for their respective projects to employ foundational philosophical arguments in

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586. MARMOR, LANGUAGE, *supra* note 2, at 61–62.

587. *See generally* 1 SCOTT SOAMES, PHILOSOPHICAL ANALYSIS IN THE TWENTIETH CENTURY (2003); 2 SCOTT SOAMES, PHILOSOPHICAL ANALYSIS IN THE TWENTIETH CENTURY (2003); SOAMES, PHILOSOPHY OF LANGUAGE, *supra* note 78.

588. *See* Soames, *Deferentialism*, *supra* note 1, at 597, 599–600 (asserting, without argument, that the legal content of the law must have truth conditions); *see generally* SOAMES, PHILOSOPHY OF LANGUAGE, *supra* note 78, at 33–49 (describing the theoretical problems that have been encountered in building a theory of meaning on a theory of truth).

589. Soames, *Deferentialism*, *supra* note 2, at 609–10.

their account of constitutional theory and decision. Their ambitious claims are subject to the same metaphilosophical objections sketched above.<sup>590</sup> Soames's endorsement of philosophical arguments that would discredit *Brown* and *Loving* inadvertently provides a compelling demonstration why constitutional argument is not subject to philosophical confirmation.

As a philosopher, Soames might be inclined to reject the premise that a constitutional theory cannot reject *Brown* and *Loving*. In the philosophical context, a theory is not easily discredited simply because the consequences of inconsistent theories are inconsistent with it. In the context of constitutional law, most theorists, including most participants in the originalism debate, believe that there are fixed points and that *Brown* and *Loving* are among them. If Soames concedes that constraint on constitutional theory, it is unclear how deferentialism could be defended or rehabilitated. Even if McConnell's outlying analysis of the historical understanding of the Equal Protection Clause is endorsed, extending that analysis to *Loving* is impossible.<sup>591</sup>

Second, a semantic account cannot account for the meaning of the Constitution as a doing. Indeed, a semantic account is also inadequate for judicial decisions, which are also performatives. Judicial decisions carry consequences beyond the inferences that follow from what the associated judicial opinions say.<sup>592</sup> *Bush v. Gore*<sup>593</sup> stands as a classic example of just that role.<sup>594</sup> The Supreme Court's decision

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590. See the text accompanying notes 385–410, *supra*.

591. See Walter Wadlington, *The Loving Case: Virginia's Anti-Miscegenation Statute in Historical Perspective*, 52 VA. L. REV. 1189, 1189–90 (1966); see generally Alfred Avins, *Anti-Miscegenation Laws and the Fourteenth Amendment: The Original Intent*, 52 VA. L. REV. 1224 (1966) (arguing that the historical understanding of the Fourteenth Amendment permitted anti-miscegenation laws).

592. As verdictives, at the least, a final judicial decision will determine which of the parties before the Court prevails and the remedy prescribed. Other decisions may simply order further proceedings, of course, and if verdictives, operate in this sense directly only on the lower courts, not upon the parties, although the parties must themselves comply with the rules and orders of the further proceedings. Philip Bobbitt has suggested that *National League of Cities v. Usery*, 426 U.S. 833 (1976) played an expressive role in signaling to Congress the limits on the national government's authority in the federal system. See BOBBITT, FATE, *supra* note 52, at 191–95 (describing a cueing function in judicial review).

593. 531 U.S. 98 (2000) (holding that the recount of ballots cast in Florida in the 2000 United States presidential election ordered by the Florida Supreme Court violated the Equal Protection clause).

594. See generally BUSH V. GORE: THE QUESTION OF LEGITIMACY (Bruce Ackerman ed., 2002) (generally expressing alarm as a matter of constitutional law at the role the Court played in the presidential election of 2000). The initial performative role of that case in ending

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put in motion the determination of the result of the 2000 presidential election.<sup>595</sup> But the equal protection analysis of that case has, at least in its first fifteen years, been ignored. Once we recognize that performative role, and the critical importance of context, we can understand why our account of the meaning and force of the Constitution cannot be confined to its semantic content. When we expand our account of our constitutional law and the argumentative and decisional processes of that law, the inadequacy of the originalism debate's strategy of grounding the account of argument and decision on the interpretation or discovery of the meaning of the constitutional text becomes apparent.

### III. THE IMPLICATIONS OF THE PREMISES ABOUT SEMANTICS, TACIT AND EXPRESS

The unstated premises and tacit assumptions underlying the classical debate over originalism account for important confusions. First, because originalism and many of its critics characterize constitutional disagreements as semantic, based on a particular semantic theory, the richness of the constitutional pragmatics—including, in particular, the performative character of the Constitution goes unrecognized. As a result, originalists and their critics have treated constitutional provisions as if they were declarative texts that merely state something, rather than performative texts that do something. This mistaken stance toward the linguistic nature of the constitutional text (and the constitutional precedents' texts as well) has led to fruitless controversies in the debate about originalism.

For example, by disregarding the performative character of the Constitution, both sides in the debate assume that our constitutional law is composed of the propositions stated by the constitutional text, or inferred from that text and that those propositions are true—are made true—by some fact in the world. If the constitutional provisions are recognized as performatives that are not true or false and that therefore have no non-trivial truth conditions, the exercise in constitutional decision must be very different from that envisioned by the

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the contest in the courts over the outcome of the United States presidential election of 2000 has proved apparently more important than the conceptual content, as the case has never been cited by the Court. Moreover, the failure to cite the case has given the case a further performative role. The sound of its precedential silence, as Tribe might put it, reveals it as limited to its earlier performative role—at least for now.

595. *Id.*

protagonists in the debate over originalism. With respect to constitutional texts, saying makes it so. In Brandom's terms, they are taken as true by us rather than made true by the world.<sup>596</sup> Thus, when the Court announces a holding, trying to explain the decision process itself as well as to assess the legitimacy of that process solely on the basis of whether the holding can be derived by valid inference from the original meaning of the constitutional text is a misguided mission.

The clearest example of this performative feature of our constitutional texts may be the doctrine of substantive due process. As explored above, that doctrine is to be understood for what it has done in our constitutional doctrine in the wake of the restrictive precedents interpreting the Privileges and Immunities Clause. Even as sophisticated a theorist as John Hart Ely was flummoxed by the doctrine because he approached it looking for its semantic meaning.<sup>597</sup> But there are other examples as well. Much of the originalist criticism of *Griswold* and its progeny, including that leveled by Robert Bork, fails to understand that once the Court has announced its decision and its opinion, the law may be different from what it had been before the decision. Charles Fried appears to have recognized this dimension of doctrine even while he failed to articulate it expressly;<sup>598</sup> no originalist appears to have recognized the same dimension of our constitutional law.

Originalism's critics are generally in no stronger position with respect to understanding the performative dimension of constitutional texts and its implications for accounts of constitutional meaning. For example, Marmor began by dismissing originalism (and the kinds of constitutional arguments it emphasizes). He apparently did so on the basis that it was mistaken as a matter of political and linguistic philosophy. Marmor's position is untenable because the historical and textual arguments made by the originalists are canonical arguments in our constitutional practice; they do not need an interpretive theory or a foundation. Those forms of argument cannot be excised from our constitutional decisional practice with a philosophical argument on the basis of a sophisticated account of linguistic meaning. There is no objective meaning of the Constitution that can be compared with the applications and associated meanings those arguments would yield.

Originalism's critics, like most originalists, have argued or as-

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596. See Brandom, *Articulating Reasons*, *supra* note 88, at 83.

597. See ELY, *DEMOCRACY*, *supra* note 17, at 18.

598. See generally FRIED, *SAYING*, *supra* note 193.

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sumed that identifying and articulating the meaning of the constitutional text requires interpretation. Some, like Tribe, have expressly invoked an argument that there is an infinite regress in the constitutional text absent extraconstitutional sources of law and interpretation. Others make that argument more directly. Marmor has claimed that while linguistic philosophy and a theory of meaning cannot resolve the choice among interpretive methodologies, including originalism, that choice can only be made with extraneous, extraconstitutional normative theory.<sup>599</sup> Marmor is wrong to assert that extraconstitutional theory can determine the resolution of constitutional controversies just as he was earlier mistaken to dismiss the force of originalism's historical and textual arguments. Sunstein makes a comparable mistake when he asserts that normative choices must precede the selection of an interpretive methodology. While recognizing the limitations on the nature of interpretation, Sunstein appears to have assumed that there is something that constitutional meaning just is. There is not. Both Marmor and Sunstein err, as I have argued elsewhere, in assuming that the determination of the meaning of the constitutional text must be made through interpretation. They also err in the associated premise that such interpretation must precede constitutional decision.<sup>600</sup>

An inferentialist account of constitutional meaning also undermines the classical originalism debate. The inferentialist account explains why we do not need a representational account of constitutional language to explain the meaning or truth of constitutional provisions or authoritative statements about those provisions. The classical debate has proceeded as if there were an objective Constitution whose meaning the constitutional interpretation reveals. The concept of the existing meaning of the Constitution's provisions is the North Star of that entire project. If, instead, statements of constitutional law derive their meaning from their inferential content, shaped by the practice of constitutional argument and decision, then that meaning is very different than the debate's protagonists assume.

The failure to understand the meaning of the constitutional texts inferentially has led both originalists and their critics astray. In the case of the originalists, a representational account of the meaning of

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599. MARMOR, LANGUAGE, *supra* note 2, at 149–50.

600. See LeDuc, Interpretation and Constitutional Argument, *supra* note 17 (arguing that constitutional rules can be applied to decide cases without first settling on an interpretation of such rules).

the constitutional text underlies the associated confidence that there is a fact of the matter as to the accuracy of any particular account of such meaning. Whether that meaning is confined to semantic concepts or understood somewhat more broadly with the New Originalists, both mistakenly think that there is a meaning that may be articulated with interpretation. If we instead understand the meaning of our statements of constitutional law to consist in what we may do with those statements inferentially—and couple that understanding with our practice of practical constitutional inference—then we are more likely to appreciate that there is no benchmark of meaning that can adequately and independently constrain our constitutional decisional practice apart from that practice itself. Originalism's critics are more willing to acknowledge the limits of meaning but move immediately to the conclusion that in the absence of a controlling linguistic meaning we must need exogenous moral or other normative judgments to determine our constitutional interpretation.

The tacit jurisprudential premises of classical originalism and its critics with respect to meaning thus have substantial implications for the debate. It is not clear that any hope of resolution is reasonable because while the premises about semantic meaning provide the foundation for the debate over originalism, a more sophisticated understanding of those premises does not resolve the competing aspirations that support the theories of the originalists and their critics. The relevant constitutional meaning is more than semantics and the failure to look to those other sources of meaning has resulted in needless, fruitless argument and confusion. The performative role of the constitutional texts is more than a matter of semantic or linguistic communication. But even when we have a more complete account of the linguistic content of our constitutional texts, our constitutional arguments and constitutional practice cannot be adequately described as focused exclusively on identifying that content.<sup>601</sup>

When we begin with the classical originalists and their critics we see that the debate over the question whether the original public understanding of the semantic or linguistic meaning of the Constitution is grounded on a commonsensical account of meaning that treats the meaning of words and sentences as derived from their correspondence with objects and states of affairs in the world.<sup>602</sup> But the litera-

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601. See generally *id.* (arguing that interpretation is not prior to application of the Constitution in constitutional adjudication).

602. See generally LeDuc, *Ontological Foundations*, *supra* note 6.

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ture of the debate exploring the nature of constitutional meaning is increasingly complex and arcane. We all learn to laugh at the parodies of historical debates within Scholasticism (for example, debates about how many angels could dance on the head of a pin) but, even in a post-Kuhnian world, we never learn to consider what a modern scholastic debate would look like—or to recognize one when we see it.<sup>603</sup>

The premises about the nature of meaning for constitutional texts offered by classical originalism and its critics have contributed to the confusion in the debate and to the stalemate therein. In particular, the assumption that semantic meanings have the definiteness and determinacy that the protagonists generally assume has led those protagonists to a simplistic and misleading account of constitutional argument and decision. Those jurisprudential foundations are not the exclusive source of confusion and error in the debate, but they make a significant contribution.

The New Originalists and their critics have offered a more complex account of language and meaning. The New Originalists and their critics make their sophisticated linguistic analysis express and employ that analysis in defending their respective claims in the debate. Substantively, they introduced the distinction between constitutional interpretation and constitutional construction, but they also introduced the concept of pragmatic import into their account of the meaning of constitutional provisions. But the New Originalists recognize limited pragmatic import. In their focus on constitutional semantics, they treat the meaning of the performative text of the Constitution as like that of declarative or, in Austin's terms, constative sentences. That is a mistake because he misses the performative dimension of the Constitution. That performative dimension explains (and rehabilitates) apparent barbarisms like substantive due process.

When we look beyond the semantic meaning of the constitutional text we find that its pragmatic import, performative role, and inferential content are significant elements in an account of the meaning of the Constitution. But those performative dimensions of the constitutional meaning are not accounted for adequately by either side in

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603. *But see* Tushnet, *Heller*, *supra* note 3, at 623 (“[C]riticizing [that] the new originalism, . . . is futile and, more importantly, uninteresting. We can examine originalism’s variations—in my view, Ptolemaic epicycles” and suggesting that the entire debate over originalism has become unproductive). Tushnet is clearly moving toward the reductive approach to the debate that I defend here, but as a long-time participant in that debate he is unable to fully extract himself from engaging in the debate so as to be able to construct the path forward.



the originalism debate. Indeed, the missing elements of constitutional meaning call the very project of both sides of the debate into question because the assumed importance of linguistic meaning is exaggerated in the debate. When we have articles urging that the public understanding of the constitutional text was of synecdoches and hendiadyses and analyses of the meaning of those texts in terms of polysemy and super polysemy—as well as arguments that *Brown, Loving*, and *Roe v. Wade* should be understood as originalist decisions—we should begin to wonder if the originalism debate has become—or has been revealed as—scholastic and pathological.

Once the underlying premises about meaning are identified and articulated, it might appear that the New Originalists and their critics will have put the debate on a firm foundation from which it can now proceed at a new, more sophisticated level.<sup>604</sup> Originalism may now defend its semantic account of constitutional meaning, or choose to supplement that semantic account with other sources of linguistic or communicative content. Correspondingly, originalism's critics may articulate and defend their account of the linguistic and communicative content of the constitutional texts, and incorporate those express premises into their challenge to originalism. Such a development would reshape the respective stances in the debate, as the purported commonsensical stance sometimes assumed on each side would no longer be tenable. Nevertheless, when the debate over originalism is recast each side may believe that the debate may be finally won, although the protagonists would disagree about which side would prevail.

There is little or no potential for the protagonists to rehabilitate the debate over originalism in light of the concerns developed here. The debate over originalism relies upon the confusion about its underlying premises. An originalism that acknowledges its philosophical commitments inherent in endorsing a constitutional theory that relies exclusively on the semantic meaning of the language of constitutional

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604. For fifty years or so the protagonists in the debate have tried unsuccessfully to bring the debate to a successful conclusion. See, e.g., Sachs, *Legal Change*, *supra* note 218 (offering a novel positivist argument for originalism on the basis that originalism's critics cannot explain how the constitutional changes from its original content); SUNSTEIN, *RADICALS*, *supra* note 20; SCALIA, *INTERPRETATION*, *supra* note 19, at 149 (concluding, presciently, that the critics of originalism face future reverses in the courts); Posner, *Bork*, *supra* note 20 (concluding, mistakenly, that Bork's *Tempting* will result in the demise of originalism); BORK, *TEMPTING*, *supra* note 18, at 251 (concluding, mistakenly, that non-originalist theories of constitutional interpretation are impossible).

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provisions, on the one hand, or an originalism that goes beyond those semantic meanings and acknowledges employing methods of implicature which go well beyond that meaning, is very different from the naïve and purportedly commonsensical originalism defended by Robert Bork and Justice Scalia. Those originalisms are different not just in being more sophisticated and complex, and less a matter of common sense. They are also different in being less easily accessible to the political society bound by the Constitution as well as less intuitively compelling. That is because those modern originalisms can no longer style themselves as unphilosophical, common sense theories. They might be true, as Solum asserts, but they are no longer simple.<sup>605</sup> As a result, the New Originalism cannot deliver the accessible and commonsensical alternative to the constitutional jurisprudence of the Warren Court that the originalism articulated by Robert Bork and Antonin Scalia promised.

But there is little reason to believe that the philosophical and constitutional claims made by the New Originalists are true, either. The New Originalists' account attributes too strong a role to philosophical argument, too limited a role to the inferential account of the meaning of the Constitution, too exaggerated a role to the Constitution as communication, and too limited a role to the performative dimension of the Constitution.

Originalism's critics are generally no more sensitive to these elements of meaning in the Constitution.<sup>606</sup> They do not recognize the performative and inferential elements in the Constitution. As a result, the critics generally employ more traditional, semantic accounts of constitutional meaning. Even when the critics acknowledge the relevant meaning and import beyond the austere semantic meaning of the constitutional authority, their account of the language of authoritative constitutional texts and our decisional practice with respect to such language ignores important aspects of that language and prac-

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605. Solum also claims that the sophisticated, philosophical account of semantic originalism that he defends is substantively consistent to or congruent with simpler, commonsensical understandings. Solum, *Semantic Originalism*, *supra* note 2, at 172–73. If that were so, the complexity would be a second order phenomenon affecting the *theoretical* explanation of our constitutional practice. It would therefore perhaps be less troubling to the claims of originalism expressed in commonsensical terms.

606. Soames and to a lesser extent, Solum, are exceptions because they recognize the importance of pragmatics for constitutional texts. See Soames, *Deferentialism*, *supra* note 2; Solum, *Communicative Content*, *supra* note 2. But both are committed to an account that reduces constitutional content to linguistic content; that account fails to recognize the full range of performative roles of the Constitution and the other constitutional authorities.

tice.<sup>607</sup> In doing so, the critics find support for a project of interpretation and a search for the semantic meaning of the Constitution that can support their competing interpretations. Thus, the powerful methods of linguistic analysis have proven of little practical help in determining which of the competing claims in the debate are stronger.<sup>608</sup>

Attention to the tacit and express premises about the meaning of constitutional language in the debate over originalism ought to make us skeptical about the promise of a productive resolution of the debate between the originalists and their critics.<sup>609</sup> To the extent that critics like Marmor and Solum challenge the originalist theory on the basis of a more philosophically sophisticated account of constitutional meaning, the originalism debate is poised to continue. Yet the competing theories cannot carry the burden their respective proponents would place on them. If the debate over originalism is to be ended or transcended, a deeper therapeutic strategy that builds on the work done here and articulates the other flawed premises grounding the debate is necessary. That is the mission of my *Ontological Foundations*, *Anti-Foundational Challenge*, and *Therapy and Promise* articles.

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607. Compare Greenberg, *supra* note 2 (criticizing the communication theory of law).

608. Philosophical methods are valuable in highlighting some of the assumptions that underlie some of the claims in the debate about the nature and methods of constitutional interpretation. See LeDuc, *Philosophy and Constitutional Interpretation*, *supra* note 6. The nature of constitutional rules and rule following and whether there is a problem of generality that must be resolved by extratextual interpretative methods are good examples of how philosophical argument may provide help in our constitutional theory making.

609. Other unstated premises exacerbate these concerns. See generally LeDuc, *Ontological Foundations*, *supra* note 6; LeDuc, *Paradoxes of Positivism*, *supra* note 14 (describing the role in the debate of the generally unstated commitment to positivism and the implications of the pragmatist commitments of many critics); LeDuc, *Philosophy and Constitutional Interpretation*, *supra* note 6.