University of Richmond Law Review

Volume 53 | Issue 2 Article 2

1-1-2019

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Recommended Citation

Glenn E. Chappell, *The Historical Case for Constitutional "Concepts"*, 53 U. Rich. L. Rev. 373 (2022).
Available at: https://scholarship.richmond.edu/lawreview/vol53/iss2/2

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THE HISTORICAL CASE FOR CONSTITUTIONAL "CONCEPTS"

Glenn E. Chappell *

ABSTRACT

The concepts/conceptions dichotomy is prominent in both the philosophy of language and the field of constitutional interpretation. It is most prominently illustrated through the provisions in the Constitution that contain broad, open-ended moral language. Those who hold the "conceptions" view believe that the legal content of those provisions includes both abstract moral concepts and its communicators' subjective beliefs about, or conceptions of, how those concepts should apply. Under this view, the judge's role is mostly empirical: he is tasked with examining historical evidence to ascertain those conceptions, which in turn supply applicational criteria by which he can decide specific cases. Alternatively, those who hold the "concepts," or conceptual, view believe that the Constitution's language directs the reader to objective moral concepts only; hence, its legal content does not contain any particular person's or group of persons' conceptions of those concepts. Thus, under this view, the judge's task is mostly analytical: he must attempt to analyze the concepts to ascertain their defining criteria and develop applicational criteria from that analysis.

Through a focused study of the interpretive methods of William Cushing, James Madison, and lawmakers in the Virginia House of

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Delegates, this article demonstrates that this debate has existed since at least the founding era, and that the above-named founding-era authorities held a conceptual view of the Constitution's language, as evidenced by the logic-driven, as opposed to historical, research-driven, mode of construction they employed to apply the Constitution's provisions to particular cases. Specifically, they analyzed the Constitution's text, structure, and moral authority to develop an American conception of the concept at issue—a conception wholly unconcerned with the subjective beliefs of any particular person or polity as to how the concept should apply. Finally, this article sets forth a preliminary sketch of the conceptual approach's normative claim. It concludes that the conceptual approach taken by these authorities better respects the constitutional text, the Rule of Law, and the ideal of objectivity in law than those that seek to derive legal content from the conceptions of past actors.

INTRODUCTION

When the Constitution uses abstract, open-ended moral language like "cruel and unusual punishments,"[1] what supplies the criteria for applying that law in specific cases? The answer to this question depends on your theory of language. Some say the words communicate both abstract moral concepts *and* the subjective views of those who ratified the Constitution as to what defines those concepts.[2] We will call this the *conceptions* view. If this view is correct, the communicators' values supply the legal content. And the judge's task is mostly empirical: he looks back in history to the time of enactment to divine the moral values of the ratifiers and then formulates an applicational methodology in accordance with what he finds. If this is the case, what governs is *someone's conception* of the moral principle identified by the law, rather than the concept itself.

From a normative standpoint, this view of legal communication offers some attractive features. Chief among these is judicial restraint—at least to the many who believe that judicial restraint is

1. U.S. CONST. amend. VIII.

2. *See, e.g.*, Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION 3, 146 (Amy Gutmann ed., 1997) ("The Americans of 1791 . . . were embedding in the Bill of Rights *their* moral values, for otherwise all its general and abstract guarantees could be brought to nought.").

a good thing.[3] Assuming the original moral values can be discovered, this view makes the judge a simple historian; thus, he has no opportunity to impose his personal views on the public through the nondemocratic vehicle of judicial decision making. The problem, however, is that this assumes such original values can be found. Do we have enough evidence in the record to state with confidence what those values were? Further, whose values control? Only a fragment of the founding generation got a say in the enactment of the Constitution.[4] And, unless we are looking for the subjective moral values of those who drafted the Constitution, how do we get around the likely fact that the vast majority of the public lacked political and philosophical sophistication such that they probably didn't have a firm grasp on how their values should apply in discrete controversies?[5] These questions are not new, but they only become more salient as time passes.

Others hold a different view of legal language. They say the Constitution's abstract terms communicate only ideas, or concepts, not the conceptions of those concepts espoused by those who communicated them.[6] We will call this the *concepts*, or *conceptual*, view. Thus, the judge must derive rules of application from the moral principle itself, and he is consequently not bound to adopt the past moral conceptions of the ratifiers. If this is so, the judge's inquiry grows less empirical and more logical: he must identify the objective characteristics that define the moral principle identified by the language and develop applicational criteria based on those features. This view of the Constitution assumes necessarily that there are objective, discoverable criteria that distinguish the concepts

3. *See, e.g.*, Thomas W. Merrill, *Originalism, Stare Decisis and the Promotion of Judicial Restraint*, 22 CONST. COMMENT. 271, 275 (2005) ("In a democracy, innovation in law and policy is supposed to come from officials elected by the People, not from unelected judges."); J. Clifford Wallace, *The Jurisprudence of Judicial Restraint: A Return to the Moorings*, 50 GEO. WASH. L. REV. 1, 7 (1981) ("[J]udicial restraint is consistent with and complementary to the balance of power among the three independent branches.").

4. *See* ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 24 (2000) (estimating that at the time of ratification, the franchise was limited to sixty to seventy percent of white, adult, male citizens).

5. *See* Ilya Somin, *Originalism and Political Ignorance*, 97 MINN. L. REV. 625, 629 (2012) (concluding on the basis of historical evidence that "the public may well have been poorly informed about many constitutional issues at the time of ratification").

6. *See* TARA SMITH, JUDICIAL REVIEW IN AN OBJECTIVE LEGAL SYSTEM 154 (2015) ("[A] word stands for all things of the relevant kind, rather than for simply the particular concrete instances of that kind with which particular speakers are acquainted *or* for simply the criteria that speakers employ in determining which things qualify as members of the relevant kind.").

identified by words. At first glance, this approach seems much more consistent with the ideal of the Rule of Law: if a judge using this approach strikes down a punishment under the Eighth Amendment, he does it not because someone *thought* it was "cruel and unusual," but because it *is* "cruel and unusual." Moreover, this grounds the law in the words the Framers actually used. If the judge decides a case like the example above and gets the analysis right, he has made the content of the law squarely match the language of the law.

But the problem with this approach is the difficulty of the logical analysis. While this approach lacks the evidentiary problems inherent in inquiries based on the conceptions of past actors, it also lacks well-defined rules of the game vis-à-vis the logical examination. We don't even agree on the first-order epistemology,[7] so where can a judge turn for neutral criteria, other than to his own moral values? Put differently, what can keep the judge from using his so-called objective examination as a thin veil behind which to make his own moral judgments the sole applicational criteria? (If he does so, he is just giving *his* conception force of law, instead of the conception of past actors.) There are no easy answers to these questions.

What we have just discussed is a fundamental interpretive question that lies at the heart of the debate over what laws mean in practice. To put it into modern parlance, this is the concepts/conceptions dichotomy.[8] The root of this distinction lies in differences in views on how language affects law. If abstract, open-ended laws identify moral ideas, or concepts, then those concepts are the law, and the interpreter must look beyond the "meaning" of the words for rules by which to apply them in discrete cases.[9] If, on the other hand, those laws identify a particular person's or group of persons' conception of those moral principles, then those provisions have a

7. *See generally* W.B. Gallie, *Essentially Contested Concepts*, 56 PROC. ARISTOTELIAN SOC'Y 167 (1956) (positing that some moral concepts appear to be universally accepted in the abstract, but are "essentially contested" in their application (thus evincing widespread disagreement over their defining criteria)).

8. *See* RONALD DWORKIN, LAW'S EMPIRE 70–72 (1986) (introducing and discussing the concepts/conceptions dichotomy in interpretive practice).

9. *See, e.g.*, Jack M. Balkin, *The New Originalism and the Uses of History*, 82 FORDHAM L. REV. 641, 645–46 (2013) ("When the Constitution . . . uses vague language, standards, or principles, an inquiry into original meaning will not be sufficient to decide most contested questions. Hence there is a second activity of constitutional interpretation, called constitutional construction.").

more determinate "meaning" that will decide individual cases more frequently[10] (that is, of course, assuming that there is enough evidence to divine that more determinate meaning).

This article will demonstrate that this fundamental debate about law's true nature has existed in this country since the Revolution. It will do so by scrutinizing legal opinions, correspondence, and legislative debates from the Founding Era. We will focus primarily on only one side of the debate, however: those whose interpretive methods belied a *conceptual* view of the Constitution's abstract language. We do so because this side of the debate has been largely overlooked by modern scholars. This is unfortunate, because conceptual views of the Constitution were held by some of the most prominent lawyers and lawmakers in that era.

Specifically, we will closely examine the interpretive methods of two eminent lawyers, one a prominent Federalist and one a committed Anti-Federalist. The former was Justice William Cushing, a successful Massachusetts lawyer, patriot, decades-long appellate judge, longtime friend of John Adams, and a member of George Washington's inaugural class of Supreme Court justices.[11] Throughout his career, which began before the Revolution and continued into the nineteenth century, Justice Cushing took a conceptual stance toward questions of constitutional interpretation. This is illustrated perfectly by his instructions to the jury in *Commonwealth v. Jennison*,[12] one of the first cases in America in which slavery was held in violation of the law—namely, the Massachusetts Constitution of 1780.[13] It is further elaborated by his correspondence with John Adams over the meaning and application of

10. *See, e.g.*, John O. McGinnis & Michael B. Rappaport, *The Abstract Meaning Fallacy*, 2012 U. ILL. L. REV. 737, 751–52 ("Under an original public meaning analysis that focuses on how a reasonable, well-informed reader would understand the language of a clause, language is ordinarily, if not always, reasonably understood as having a single meaning. . . . Thus, there is little reason to believe that there will be two meanings to a provision that cannot be resolved.").

11. *See generally* HENRY FLANDERS, *The Life of William Cushing*, *in* 2 THE LIVES AND TIMES OF THE CHIEF JUSTICES OF THE SUPREME COURT OF THE UNITED STATES 9, 9–51 (1875) (recounting Justice Cushing's life and career).

12. PROC. MASS. HIST. SOC. 1873–1875, at 293 (1783).

13. *See* John D. Cushing, *The Cushing Court and the Abolition of Slavery in Massachusetts*, 5 AM. J. LEGAL HIST. 118, 132–33 (1961) (reproducing Justice Cushing's instructions to the jury). *See generally* Emory Washburn, *Extinction of Slavery in Massachusetts*, 3 PROC. MASS. HIST. SOC'Y 1855–1858, at 188 (1857) (recounting *Commonwealth v. Jennison* and the series of cases leading up to it).

Massachusetts' version of freedom of the press,[14] as well as his opinion in *Chisholm v. Georgia*,[15] one of the first Supreme Court decisions of significance.[16]

The latter was James Madison, an iconic patriot, a lifelong lawyer, a leading architect of the Constitution, and our fourth president.[17] His conceptual view of the Constitution is illuminated by his comprehensive report to the Virginia House of Delegates[18] in support of the Virginia Resolution of 1800, which declared the federal Alien and Sedition Acts of 1798 unconstitutional.[19]

Finally, to show that these men's very similar methodologies were not historical anomalies, we will look to one of the earliest instances of public constitutional interpretation: the vociferous debate over those same Alien and Sedition Acts.[20] Specifically, we will examine the interpretive arguments made by members of the Virginia House of Delegates, which had among its ranks some of the most notable lawyers and lawmakers of the period,[21] to demonstrate that a conceptual view of the Constitution was quite common.

This article does not purport to prove that the conceptual view of the Constitution was universally held, or even that it was the

14. Letter from William Cushing to John Adams (Feb. 18, 1789), https://founders.archives.gov/documents/Adams/99-02-02-0471 [https://perma.cc/9J9D-BT5T].

15. 2 U.S. (2 Dall.) 419 (1793), superseded by constitutional amendment, U.S. CONST. amend. XI.

16. *See* Randy E. Barnett, *The People or the State?:* Chisholm v. Georgia *and Popular Sovereignty*, 93 VA. L. REV. 1729, 1739 (2007).

17. *See generally* KEVIN R.C. GUTZMAN, JAMES MADISON AND THE MAKING OF AMERICA (2012) (documenting Madison's life and career).

18. *Virginia Report of 1799, and Analysis Thereof*, *in* THE VIRGINIA REPORT OF 1799–1800, TOUCHING THE ALIEN AND SEDITION LAWS; TOGETHER WITH THE VIRGINIA RESOLUTIONS OF DECEMBER 21, 1798, THE DEBATE AND PROCEEDINGS THEREON IN THE HOUSE OF DELEGATES OF VIRGINIA, AND SEVERAL OTHER DOCUMENTS ILLUSTRATIVE OF THE REPORT AND RESOLUTIONS 178, 189–237 (1850) [hereinafter *Virginia Report*].

19. *See Resolutions of Virginia of December 21, 1798, and Debate and Vote Thereon*, *in* THE VIRGINIA REPORT OF 1799–1800, TOUCHING THE ALIEN AND SEDITION LAWS; TOGETHER WITH THE VIRGINIA RESOLUTIONS OF DECEMBER 21, 1798, THE DEBATE AND PROCEEDINGS THEREON IN THE HOUSE OF DELEGATES OF VIRGINIA, AND SEVERAL OTHER DOCUMENTS ILLUSTRATIVE OF THE REPORT AND RESOLUTIONS, *supra* note 18, at 22, 22–23 [hereinafter *Resolutions and Debate*].

20. *See id.* at 24–161.

21. *See* Michael W. Steinberg, *Books for Lawyers: Brandeis, Frankfurter, and Judicial Conduct*, 68 A.B.A. J. 716, 722 (1982) (book review) (calling the Virginia bar in the founding era "star-studded").

predominant view.[22] The historical evidence is simply too thin a basis upon which to make such claims, and the record contains many instances in which interpreters held the conceptions view instead. Here, we are simply showing that the concepts/conceptions divide has existed from the beginning.

But the historical record does more than just show that the conceptual view of constitutional language existed. It also demonstrates how the subjects of our analysis dealt with the critical problem of deriving applicational criteria from abstract, open-ended moral concepts. They did so in a manner much different from, and much more restrained than, Dworkin's open-ended "moral reading" approach, which openly invites judicial fiat.[23] Our subjects employed a two-step interpretive approach. First, they examined the original linguistic meaning of the Constitution's text to uncover the concept the language identified. Then, they derived applicational criteria by considering the structure and moral authority of America's constitutional government and using rigorous logical reasoning to develop a construction of the provision at issue that would protect those principles. This construction was an "American conception" of the concept—a conception derived not at all from the subjective opinions of the drafters, ratifiers, or the public, but from a logical analysis of the concept's operation within the constitutional scheme. Put succinctly, they treated the Constitution as an integrated, rational system that worked in harmony to serve a shared purpose—the purpose of protecting liberty.

This reliance on logical analysis and rational operation in turn bespeaks our subjects' view that the constitutional language identified concepts, not conceptions. They paid fidelity to the government the People created and thus rejected conceptions of particular provisions that ran counter to the text and moral authority of that government, even when those conceptions might have been popu-

22. Others, however, have argued persuasively that the founding generation used interpretive methodologies far broader than those which the conventional wisdom suggests. *See, e.g.*, William Michael Treanor, *Against Textualism*, 103 NW. U. L. REV. 983, 1006 (2009) ("As a substantive matter, the Founding generation also looked beyond text to determine constitutional meaning. They consistently relied on a range of factors, such as structural concerns, policy, ratifiers' and drafters' intent, and broad principles of government. To exclude such nontextual factors from constitutional interpretation is to depart from original public meaning because the Founders gave these factors great weight in ascertaining meaning.").

23. *See infra* note 253.

larly understood to be of narrower application at the time of ratification. The American conception our subjects developed thus remained completely agnostic to contemporary *understandings* of constitutional rights in particular cases, and instead embraced only the contemporary *meaning* of those rights, as directed by the Constitution's text, structure, and moral authority. This logic-driven inquiry separated their method from both Dworkin's open-ended "moral reading" and the methods of those who understand original "meaning" to encompass both the linguistic meaning of the words made into law and the subjective moral opinions of the communicators as to how the law should apply in specific controversies.

Our examination of these early conceptual approaches allows us to situate them in the modern framework with which we categorize interpretive methods. Although they might seem purposive or structural at first glance, we will see that they were, at heart, textual. This is because, more than anything else, the constitutional text dominated their analyses. The structural and moral considerations were important, because they supplied the necessary context in which the concepts identified by the text must be applied. But at the end of the day, these lawyers interpreted the broad constitutional language to protect the broad concepts that naturally flow from that language in the mind of an average reader. This is textualism at heart, but it is not literalism or strict textualism.

Finally, the historical record provides some insight into the conceptual approach's normative claim. A full exposition of that claim would require far more space than this article provides; nevertheless, we can draw a preliminary sketch to advance the debate. We will see that three considerations dominate: textual fidelity, reason, and objectivity.

This article is one part narrative, one part reflective, and one part argumentative. Part I briefly reviews the concepts/conceptions dichotomy. Part II reviews a series of founding-era cases and debates in which prominent lawyers and jurists employed a conceptual approach to constitutional interpretation. Part III expounds upon the interpretive choices underlying the conceptual approach and, based upon that analysis, situates it within and among the interpretive families we commonly use today. Part IV outlines the conceptual approach's normative claim and proffers some preliminary arguments in its favor.

I. CONCEPTS VERSUS CONCEPTIONS: THE PHILOSOPHICAL BACKDROP

The distinction between concepts and conceptions is critical to understanding the conceptual approach this article lays out. Therefore, we begin with a primer on this fundamental interpretive divide and the scholarly debate surrounding it.

A. *Dworkin and His Discontents*

As we will see, the distinction between concepts and conceptions has been recognized, albeit obliquely, for generations of legal interpreters. However, it appears that the distinction was first identified expressly in the mid-twentieth century by philosopher William Gallie.[24] He posited that some moral concepts that appear to be universally accepted in the abstract are "essentially contested" in their application.[25] In other words, we agree that moral judgments like "fair," "just," "cruel," and "evil" exist, but we do not possess shared criteria for defining those concepts.[26] For example, you and I agree that to consider whether something is "just" is a valid moral inquiry. Suppose we further agree that it is "just" to require a person who has borrowed money from another to repay that person in some way, even if the debtor runs into unexpected financial hardship and cannot honor the original terms of the loan agreement. Let's say I believe it is "just" for the creditor to force the debtor at gun point to work without pay in the creditor's widget factory until he has produced enough widgets to generate profits that cover the principal and interest on the loan. You disagree on the basis that my proposed form of repayment is a fundamentally "unjust" remedy for failure to repay any monetary debt. So while we acknowledge the existence of the moral truth that something is "just," and thus accept the *concept* of "just," you have your own particular *conception* of "just" that differs from mine.

24. Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 43 (2015); *see also* Gallie, *supra* note 7, at 167.

25. *See generally* Gallie, *supra* note 7.

26. *See generally id.* Lawrence Solum expounds helpfully upon Gallie's work in *The Fixation Thesis: The Role of Historical Fact in Original Meaning*. *See* Solum, *supra* note 24, at 43.

The late Ronald Dworkin, a "preeminent legal theorist" among modern scholars[27] and the second-most cited legal scholar of the twentieth century,[28] was perhaps the first to discuss the concepts/conceptions divide in the specific context of constitutional interpretation, and he was certainly the most prominent to do so.[29] Using the Eighth Amendment as an example, he described the concepts/conceptions divide that constitutional interpreters thusly:

> [The interpreter] must choose between two clarifying translations—two different accounts of what the framers intended to *say* in the Eighth Amendment. The first reading supposes that the framers intended to say, by using the words "cruel and unusual," that punishments generally thought cruel at the time they spoke were to be prohibited—that is, that they would have expressed themselves more clearly if they had used the phrase "punishments widely regarded as cruel and unusual at the date of this enactment" in place of the misleading language they actually used. The second reading supposes that they intended to lay down an abstract principle forbidding whatever punishments are in fact cruel and unusual. Of course, if the correct translation is the first version, then capital punishment does not violate the Eighth Amendment. But if the second, principled, translation is a more accurate account of what they intended to say, the question remains open.[30]

Thus, Dworkin treats the concepts/conceptions distinction as a dichotomy inherent in interpretation. He also proposed his own resolution to this divide. A detailed discussion of Dworkin's proposed interpretive method is far beyond the scope of this article, but in short, he argues that we should treat abstract, vague terms in legal texts like "cruel and unusual" and "equal protection of the laws" as identifying moral concepts only.[31] To apply those concepts in our legal framework, interpreters should develop a conception of those moral values that both represents the "best constructive interpretation" of the governing law and is "continuous in principle" with the entirety of our country's legal practice.[32] He termed this "law as integrity."[33]

27. R. George Wright, *What's Gone Wrong with Legal Theory?: The Three Faces of Our Split Personality*, 33 WAKE FOREST L. REV. 371, 374 (1998).

28. Fred R. Shapiro, *The Most-Cited Legal Scholars*, 29 J. LEGAL STUD. 409, 424 (2000).

29. *See* Steven J. Burton, *Ronald Dworkin and Legal Positivism*, 73 IOWA L. REV. 109, 109 (1987).

30. Ronald Dworkin, *Comment*, *in* A MATTER OF INTERPRETATION, *supra* note 2, at 120.

31. *See* DWORKIN, *supra* note 8, at 379–99.

32. *See id.* at 227, 262.

33. *Id.* at 227.

In addition, Dworkin made a historical argument about the concepts/conceptions dichotomy. Namely, he argued that the language employed by the Framers in the Constitution implies that they *meant* to identify concepts, not conceptions. In his view, "[t]he Framers were careful statesmen who knew how to use the language they spoke," and "[w]e cannot make good sense of their behavior unless we assume that they meant to say what people who use the words they used would normally mean to say—that they used abstract language because they intended to state abstract principles."[34] Thus, he concluded, the Constitution's "'vague' standards were chosen deliberately, by the men who drafted and adopted them, in place of the more specific and limited rules that they might have enacted."[35]

Dworkin's historical argument has been attacked ferociously and frequently. Lawrence Solum is a recent outspoken critic. He argues that Dworkin's historical argument rests solely on "armchair speculation" rather than historical evidence, and that such speculation is not supported by "ordinary discourse."[36] In Solum's view, we normally "use general concept words to express our normative judgments; our use of the words is based on our conception of the concept."[37] Thus, he says, "[i]t would be very odd indeed" if, by telling you to "sell my house at the highest price you can, but do nothing unfair," I give you license to employ a selling tactic that I think wrong under my conception of "unfair" but which you find unobjectionable under your own conception of fairness or the general moral concept of fairness.[38] Numerous others have criticized Dworkin's historical argument as well.[39] Dworkin certainly has his

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

35. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 133 (1977).

36. *See* Solum, *supra* note 24, at 47–55.

37. *Id.* at 50.

38. *See id.* at 50–51.

39. *See, e.g.*, Andrei Marmor, *Meaning and Belief in Constitutional Interpretation*, 82 FORDHAM L. REV. 577, 585 (2013) (opining that Dworkin's historical claim "rests on shaky grounds"); Stephen R. Munzer & James W. Nickel, *Does the Constitution Mean What It Always Meant?*, 77 COLUM. L. REV. 1029, 1040 (1977) ("Dworkin has done nothing to . . . support his claim that the framers were merely offering concepts and not their own conceptions for guidance, save to note the vagueness of the language they used and the inconvenience of this approach if one wants to reach the conclusion that capital punishment is unconstitutionally cruel."); Larry Simon, *The Authority of the Constitution and Its Meaning: A Preface to a Theory of Constitutional Interpretation*, 58 S. CAL. L. REV. 603, 641 (1985) ("Dworkin's pitch for abstract over specific intent (or concepts over conceptions) strikes me, as it has others, as entirely unpersuasive—at least if understood as the theory about framers' intent

defenders, too, but these scholars center their defense of Dworkin's "concepts" argument on normative or textual grounds, rather than historical ones about what the Framers or ratifiers likely intended when using the words they used.[40]

B. *The Lockean Perspective*

Dworkin's conceptual stance bears some striking similarities with the writings of John Locke, which "dominated eighteenth-century views on epistemology and language."[41] Locke set forth his theory of language and human understanding in *An Essay Concerning Human Understanding*. He opined that "[w]ords are sensible signs, necessary for communication [of ideas]."[42] Ideas, in turn, are human constructs used to communicate "sorts and ranks of things" to others by relating them according to their intrinsic qualities.[43] But owing to their nature as creations of the mind, words

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that it usually purports to be.").

40. *See, e.g.*, DAVID A. STRAUSS, THE LIVING CONSTITUTION 113 (2010) ("The drafters and ratifiers of the First Amendment may well have thought that blasphemy could be prohibited; the drafters and ratifiers of the Fourteenth Amendment thought that sex discrimination was acceptable. Had the amendments said those things, in terms that could not be escaped by subsequent interpreters, our Constitution would work less well today. But the text does not express those specific judgments. As a result . . . we are able to read our own content into them . . . ."); James E. Fleming, *Are We All Originalists Now? I Hope Not!*, 91 TEX. L. REV. 1785, 1789 (2013) ("[C]oncrete intentionalism is untenable as a theory of interpretation of our Constitution, which establishes a charter of abstract aspirational principles and ends and an outline of general powers, not a code of detailed rules.").

41. *See* Philip A. Hamburger, *The Constitution's Accommodation of Social Change*, 88 MICH. L. REV. 239, 306 n.251 (1989). Hamburger further explains,

> Any discussion of the epistemology underlying constitutional language was most unusual in the late eighteenth century, yet Madison's analysis [of the Constitution in *Federalist Number 37*] is a reminder of Locke's influence upon American epistemological thought in that period. Locke's *Essay* occupies a prominent place in surviving, pre-1791 American library lists. It served as a text at some American schools, and its ideas probably reached other Americans through Isaac Watts' *Logick* of 1725. To the extent that Americans engaged in epistemological thought about language, including constitutional language, they began with the remarkable arguments in Locke's *Essay*. Perhaps more important, the *Essay* contributed much to eighteenth-century American assumptions about language. Thus, Locke's *Essay* should be considered together with the traditions mentioned above as one of the various intellectual influences that probably encouraged Americans—particularly, in the case of the *Essay*, well-educated Americans—to distrust imprecision and uncertainty in language.

Id. at 305–06 (footnotes and citations omitted).

42. JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING bk. III, ch. 2, § 1, at 287 (29th ed. Thomas Tegg 1841) (1690).

43. *See id.* bk. III, ch. 3, § 11, at 287 ("To return to general words, it is plain, by what has been said, that general and universal belong not to the real existence of things; but are

are imperfect vehicles for the communication of objective truths because they cannot fully convey the full scope of the communicator's idea.[44] Particularly difficult, said Locke, is the examination of the meaning of words and the complex ideas they signify in fields of "the highest concernment" like morality, law, and religion.[45]

Nevertheless, Locke contended, when used properly, words can effectively signal moral truths just as much as they can signal mathematical certainties or other physical traits demonstrable in nature.[46] This is so, he said, because moral truths are universal and discoverable—indeed, just as much as mathematical certainties—through the unique human skill of rational investigation and logical deduction, which can fill in the gaps left by the imprecision and volatility of language.[47] Specifically, the remarkable human capacity of abstraction allows us to group types of things with shared characteristics into categories according to their general nature.[48] Hence words—coupled with reason—can effectively convey universal moral truths from one human to another.[49]

Aside from its common acceptance in society at the time, there is limited historical evidence as to whether the Framers had Locke's views on language and human understanding in mind when they drafted the Constitution, though some scholars have pointed out remarkable similarities of thought in Locke's views and those in *The Federalist* and other contemporary sources.[50]

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the inventions and creatures of the understanding, made by it for its own use, and concern only signs, whether words or ideas."); *id.* bk. III, ch. 1, § 6, at 280.

44. *See id.* bk. III, ch. 9, §§ 9–11, at 339–40.

45. *Id.* bk. III, ch. 9, § 22, at 346.

46. *See id.* bk. III, ch. 11, § 16, at 346 ("I am bold to think, that morality is capable of demonstration, as well as mathematics: since the precise real essence of the things moral words stand for, may be perfectly known; and so the congruity, or incongruity, of the things themselves be certainly discovered, in which consists perfect knowledge.").

47. *See id.* ("For were there a monkey, or any other creature, to be found, that had the use of reason, to such a degree, as to be able to understand general signs, and to deduce consequences about general ideas, he would no doubt be subject to law, and in that sense, be a man, how much soever he differed in shape from others of that name.").

48. *Id.* bk. III, ch. 8, § 1, at 334. ("The ordinary words of language, and our common use of them, would have given us light into the nature of our ideas, if they had been but considered with attention. The mind, as has been shown, has a power to abstract its ideas, and so they become essences, general essences, whereby the sorts of things are distinguished.").

49. *See id.* bk III, ch. 11, § 16, at 366 ("The names of substances, if they be used in them, as they should, can no more disturb moral, than they do mathematical, discourses; where, if the mathematician speaks of a cube or globe of gold, or any other body, he has his clear settled idea, which varies not, though it may, by mistake, be applied to a particular body, to which it belongs not.").

50. *See, e.g.*, JOHN HOWE, LANGUAGE AND POLITICAL MEANING IN REVOLUTIONARY

Though the lack of historical evidence prevents authoritative claims about Locke's influence on the Framers' views on language, it is still helpful to keep his views in mind as useful historical context, especially as we turn to an examination of our subjects' interpretive choices.

C. *A New Iteration*

Dworkin and Locke were not the only ones to propose conceptual theories of language and law. Most recently, Tara Smith has developed a conceptual theory of her own, which she grounds in objectivist epistemology.[51] In her most recent book, *Judicial Review in an Objective Legal System*, Smith explains:

> [I]t is crucial to recognize that words designate concepts. Apart from proper nouns, that is, words stand for concepts and concepts stand for *kinds* of things. A word refers to all the discrete instances of things of the same kind . . . . The point . . . is that a word designates all those existents that in fact share those characteristics that distinguish things of that kind (a car, a father, a twin) from things of other kinds.[52]

AMERICA 13–37 (2004) (reporting that Benjamin Franklin cited Locke in support of his proposal to create an Americanized set of "authoritative linguistic standards" to mitigate the inherent uncertainty in language); Jack N. Rakove, *Joe the Ploughman Reads the Constitution, or, the Poverty of Public Meaning Originalism*, 48 SAN DIEGO L. REV. 575, 594 (2011) (observing that in *Federalist 37*, "Madison was concisely distilling major elements of John Locke's discussion of language in Book III of the *Essay Concerning Human Understanding*").

51. *See* SMITH, *supra* note 6, at 154 & n.24. For an exposition of the objectivist epistemological stance, see generally AYN RAND, INTRODUCTION TO OBJECTIVIST EPISTEMOLOGY (2d ed. 1990). Rand explains objectivism thusly:

> Objectivism holds that the essence of a concept is that fundamental characteristic(s) of its units on which the greatest number of other characteristics depend, and which distinguishes these units from all other existents within the field of man's knowledge. Thus the essence of a concept is determined *contextually* and may be altered with the growth of man's knowledge. The metaphysical referent of man's concepts is not a special, separate metaphysical essence, but the *total* of the facts of reality he has observed, and this total determines which characteristics of group of existents he designates as *essential*. An essential characteristic is factual, in the sense that it does exist, does determine other characteristics and does distinguish a group of existents from all others; it is epistemological in the sense that the classification of "essential characteristic" is a device of man's method of cognition—a means of classifying, condensing and integrating an ever-growing body of knowledge.

Id. at 125.

52. SMITH, *supra* note 6, at 151–52.

This means that the objective concepts identified by a word are distinct from the subjective conceptions of that concept the speaker might have:

> [A] word stands for all things of the relevant kind, rather than for simply the particular concrete instances of that kind with which particular speakers are acquainted *or* for simply the criteria that speakers employ in determining which things qualify as members of the relevant kind. People's understanding of the proper criteria for kind inclusion is fallible. Because words designate things, however, rather than people's ideas about things, language's original users' correctable beliefs about the governing criteria are not the appropriate standard by which to measure words' objective meaning.[53]

This is critical for legal interpretation. Because of the conceptual nature of language, Smith argues, valid interpretation of a given law requires "fine-grained discernment" to examine and understand the unique criteria that make up the concepts identified by its text.[54] This careful logical analysis is both constrained and guided by contextualizing the text within the framework of the legal system as a whole—the law's "reason for being" and "authority"—and interpreting it to accord with those fundamental purposes. She explains:

> As with objective thought in any sphere, part of what logic requires for objective judicial review is respect for the relevant context and hierarchy. (I will use "context" to encompass both.) Understanding both the law's reason for being and the authority behind the legal system is crucial to understanding how the government's power may be exercised and, correspondingly, how its laws may be legitimately understood. Judges must thus understand the essentials of the entire legal system: its foundations, its function, its powers, and its limits.[55]

Thus, Smith insists, "[t]he purpose of a legal system constrains the rational interpretation of its laws."[56] Although this approach might at first glance appear to be a form of purposivism, it is not; for Smith's theory of judicial review does not endorse giving purposive policymaking interpretive primacy over the law's written *text*.[57] Rather, her contention is about meaning, rather than interpretive hierarchy: "the letter of a law cannot be understood without

53. *Id.* at 154 (footnotes omitted).
54. *See id.* at 215–16.
55. *Id.* at 225.
56. *Id.*
57. *See id.* at 115, 121–38 (setting forth the reasons for "embracing a *written* constitution as the proper repository of final law" (emphasis added)).

understanding its spirit—that is, without understanding the animating purpose and principles of the larger system."[58] Hence, "[t]he proper understanding of any discrete element of the legal system rests on an understanding of the system's overarching substantive mission."[59]

We will soon see that Smith's treatment of language and her proffered method of constitutional interpretation are strikingly similar to those employed by the subjects of our historical examination. Perhaps this can be attributed to Locke's writings, perhaps not. Whatever their reasons might have been, many prominent lawyers who practiced at the dawn of the Republic used an unmistakably conceptual approach in interpreting the Constitution. We will see some examples of this in the next part.

II. THE CONCEPTUAL APPROACH IN THE FOUNDING ERA

Now that we clearly understand the concepts/conceptions divide in the legal-interpretive context, we can turn to the historical record. In this part, we will see that a number of influential founding-era figures—including a Supreme Court Justice, at least one President, and a number of influential lawmakers—employed a conceptual approach to legal interpretation.

A. *Justice Cushing*

William Cushing is, unfortunately, an often overlooked historical figure.[60] Though he served twenty years on the Supreme Court, he is often overshadowed by more prominent early Justices like John Jay, Oliver Ellsworth, and, of course, John Marshall. He has even been openly derided: one historian remarked dismissively that "William Cushing served longer with minimal effect than any of the fourteen Supreme Court justices whose terms overlapped

58. *Id.* at 226.
59. *Id.*
60. *See* Arthur P. Rugg, *William Cushing*, 30 YALE L.J. 128, 128 (1920) ("The biographical details of one whose life is chiefly spent in judicial service present little of general interest. No startling events challenge the attention. There is no spectacle of an instant leap from obscurity to fame. Such a life is of necessity one of slow and steady growth, like that of the oak, ring on ring.").

his."[61] A few others disagree.[62] In any event, Justice Cushing was an accomplished and widely respected figure in his time. He was a prominent jurist even among the star-studded Massachusetts bar in the early days of the republic, a conspicuous Patriot, a friend of John Adams, and the chair of the Massachusetts ratifying convention that narrowly approved the Constitution.[63] Indeed, so respected was he that President George Washington nominated him as an inaugural member of the United States Supreme Court, and then nominated him as Chief Justice seven years later.[64] The Senate confirmed him unanimously.[65]

Despite his long career and the number of important positions he held, Cushing is most commonly remembered for a series of cases he presided over in the midst of the American Revolution as Chief Justice of the Massachusetts Supreme Judicial Court.[66] In those cases, he opined to the jury that the Massachusetts Constitution of 1780 prohibited legal recognition and protection of slavery.[67] His instruction resulted in a legal victory for Quock Walker, a former slave, and contributed to (or perhaps even directly caused) the gradual elimination of slavery in the Commonwealth.[68] This

61. Donald O. Dewey, *William Cushing*, *in* THE SUPREME COURT JUSTICES: A BIOGRAPHICAL DICTIONARY 127, 127 (Melvin I. Urofsky ed., 1994); *see also* Scott Douglas Gerber, *Deconstructing William Cushing*, *in* SERIATIM: THE SUPREME COURT BEFORE JOHN MARSHALL 97, 98–100 (Scott Douglas Gerber ed., 1998) (reviewing numerous negative assessments of Justice Cushing).

62. *See* Gerber, *supra* note 59, at 100. Gerber explains:

> There have been a few favorable appraisals of William Cushing. Unfortunately, such appraisals are dated and generally neglected. The more one looks in depth at Cushing's career, however, the more one becomes impressed. . . . Succinctly put, there must be reasons that preeminent Founders such as John Adams and George Washington held William Cushing in high regard for nearly fifty years.

Id.

63. *See generally* FLANDERS, *supra* note 11, at 9–51 (recounting Justice Cushing's life and career).

64. Rugg, *supra* note 60, at 137, 140.

65. *Id.* at 140.

66. *See, e.g.*, PAUL S. BOYER ET AL., 1 THE ENDURING VISION: A HISTORY OF THE AMERICAN PEOPLE 188 (9th ed. 2018) (including Cushing's charge to the jury in Quock Walker's case in its feature on early African-American legal challenges to slavery).

67. *Id.*

68. FLANDERS, *supra* note 11, at 31–32.

was the first judicial decision in the colonies to hold slavery illegal.[69] During his time on the Supreme Court, Cushing's most frequently recognized opinion was in *Chisholm v. Georgia*,[70] in which he, along with a majority of the Court, held that the Constitution did not prohibit a citizen of one state from suing another state for money damages.[71]

The unique procedural posture of Quock Walker's case prevented direct interpretation of a discrete constitutional provision; nevertheless, Justice Cushing showed his interpretive hand in his reconciliation of the state's criminal laws with the governing constitution's statement of purpose. Cushing yet again exhibited his conceptual approach—but not squarely—in his correspondence with his friend, John Adams, about the constitutionality of criminalizing true publications under the Massachusetts Constitution. Finally, in *Chisholm*, Justice Cushing brought his interpretive approach squarely to bear in directly interpreting the federal Constitution. In all three instances, Justice Cushing employed a conceptual approach that is worth examining in detail.

1. Quock Walker's Freedom Struggle

Kwaku, or "Quock," Walker was born in Massachusetts in 1754 to Mingo and Dinah Walker.[72] When Quock was an infant, James Caldwell of Worcester County purchased him and his family.[73] At some point during Quock's childhood, Caldwell promised to free him when he turned twenty-four or twenty-five.[74] After Caldwell died when Quock was ten, his widow told Walker that she would honor her husband's promise, and promised Quock his freedom at age twenty-one.[75]

69. *See* DAVID BRION DAVIS, THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION, 1770–1823, at 508 (1999) (noting that after Quock Walker's case, "Massachusetts could legitimately claim to be the only state that eradicated slavery by judicial action").

70. 2 U.S. (2 Dall.) 419 (1793), superseded by constitutional amentment, U.S. CONST. amend. XI.

71. *Id.* at 479.

72. PETER C. HOLLORAN, HISTORICAL DICTIONARY OF NEW ENGLAND 443 (2d ed. 2017). "Kwaku" means "boy born on Wednesday" in Ghanaian. NOEL RAE, THE GREAT STAIN: *WITNESSING AMERICAN SLAVERY* (2018).

73. Robert M. Spector, *The Quock Walker Cases (1781–83)—Slavery, Its Abolition, and Negro Citizenship in Early Massachusetts*, 53 J. NEGRO HIST. 12, 12 (1968).

74. *See id.*

75. *See id.*

Things changed. The former Mrs. Caldwell soon married Nathaniel Jennison, who had different plans regarding the family's slaves.[76] Mrs. Jennison died when Quock was nineteen.[77] Thereafter, when Quock reached twenty-one and accordingly sought his freedom, Nathaniel refused to honor the Caldwell's promises.[78] Initially, Quock did not resist, but when he reached age twenty-eight in 1781, he walked off Jennison's farm and took a paid job with John and Seth Caldwell, James Caldwell's brothers.[79] Jennison did not acquiesce so easily, however. He tracked Quock down, beat him violently for fleeing, and locked him in a barn.[80]

But Quock Walker was not ready to give up his fight for freedom. He turned to the courts, suing Jennison for assault and battery.[81] Jennison in turn sued the Caldwells for enticing Walker to flee, to the detriment of Jennison's property rights.[82] Subsequently, a state prosecutor charged Jennison with criminal assault and battery.[83]

In the trial court, Walker initially won his assault and battery suit. The jury found that he was entitled to freedom—it is unclear whether the jury based its verdict on a contract claim arising from the Caldwells' former promises or upon a finding that slavery violated the Massachusetts Constitution—and awarded Walker fifty pounds in damages.[84] By contrast, the court found in favor of Jennison in his countersuit against the Caldwells. The court awarded him twenty-five pounds in damages for the Caldwells' enticement of Walker to flee his master.[85]

The losers appealed in both cases. In Walker's assault and battery suit against Jennison, the Massachusetts Supreme Judicial Court dismissed Jennison's appeal because Jennison apparently committed a fatal procedural mistake.[86] In the Caldwells' appeal,

76. *Id.*
77. *See id.*
78. *Id.*
79. *See id.*
80. *Id.*
81. John D. Cushing, *The Cushing Court and the Abolition of Slavery in Massachusetts: More Notes on the "Quock Walker Case"*, 5 AM. J. LEGAL HIST. 118, 119 (1961).
82. *Id.* at 120.
83. *Id.* at 127–28.
84. *Id.* at 120.
85. *Id.* at 120–21.
86. *See id.* at 121–22.

the court reversed the lower court, finding that Walker was a free man and hence that the Caldwells were legally entitled to hire him.[87] Thus, at the end of the day, Walker kept his damages and the Caldwells were off the hook for hiring him away from Jennison.

Cushing, then the Chief Justice of the Supreme Judicial Court, presided over the criminal case, *Commonwealth v. Jennison*,[88] which was tried in 1783 (at the time, that court had original jurisdiction over criminal cases).[89] Jennison raised his ownership of Walker as a defense to the charges, arguing that he was legally entitled to enforce his property rights in Walker by force, and that his punishment of Walker was appropriate.[90] The prosecution centered its theory of the case on contract law, presenting evidence that Walker had been promised his freedom by Caldwell and his wife.[91]

It now fell upon Cushing to present the jury with his opinion on the legal question, which the jury would decide. He did so forcefully. Because it clearly demonstrates his interpretive thought processes, Cushing's opinion is worth quoting in full:

> As to the doctrine of slavery and the right of Christians to hold Africans in perpetual servitude, and sell and treat them as we do our horses and cattle, that (it is true) has been heretofore countenanced by the Province Laws formerly, but nowhere is it expressly enacted or established. It has been a usage—a usage which took its origin from the practice of some of the European nations, and the regulations of British government respecting the then Colonies, for the benefit of trade and wealth. But whatever sentiments have formerly prevailed in this particular or slid in upon us by the example of others, a different idea has taken place with the people of America, more favorable to the natural rights of mankind, and to that natural, innate desire of Liberty, with which Heaven (without regard to color, complexion, or shape of noses— features) has inspired all the human race. And upon this ground our Constitution of Government, by which the people of this Commonwealth have solemnly bound themselves, sets out with declaring that all men are born free and equal—and that every subject is entitled to liberty, and to have it guarded by the laws, as well as life and property—and in short is totally repugnant to the idea of being born slaves. This being the case, I think the idea of slavery is inconsistent with our own conduct and Constitution; and there can be no

87. *Id.* at 125.
88. *See* PROC. MASS. HIST. SOC. 1873–1875, at 293 (1783).
89. Cushing, *supra* note 81, at 129.
90. *Id.* at 131.
91. *See id.* at 131.

> such thing as perpetual servitude of a rational creature, unless his liberty is forfeited by some criminal conduct or given up by personal consent or contract . . . .[92]

Thereafter, the jury convicted Jennison of assault and battery, and Cushing accordingly fined him forty shillings.[93]

In reaching his opinion, Cushing relied on Article I of the Declaration of Rights contained in the Massachusetts Constitution of 1780. That provision stated, "All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness."[94]

We will soon reflect more deeply on Justice Cushing's interpretive methodology. For now, however, a few preliminary observations are in order. First, Cushing placed great weight upon the commonsense meaning of "free and equal." Second, he treated the phrase "free and equal" as an abstract *concept* that was "totally repugnant to the idea of being born slaves." Third, he took that concept at face value, rather than resorting to historical inquiry into how that concept was applied in the past or deferring to predominant political views of the day. Finally, to develop a construction that accorded with the text, he looked to the structure and moral authority of government, or, as he put it, the "new idea" that had taken preeminence over the old of England and had formed the basis of Massachusetts' government, to which the people of the Commonwealth had "solemnly bound themselves" in enacting their Constitution.

Historians have long debated whether and how much Justice Cushing's instruction in *Commonwealth v. Jennison* contributed to the extinction of slavery in Massachusetts, with some arguing that it was *the* cause of slavery's demise and others arguing that it played little or no role.[95] We will leave that debate for others. Here,

92. *Document 15:* Commonwealth v. Jennison—*Charge of Chief Justice Cushing*, *in* CIVIL RIGHTS AND THE AMERICAN NEGRO: A DOCUMENTARY HISTORY 45, 45–46 (Albert P. Blaustein & Robert L. Zangrando eds., 1968).

93. ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 45–46 (1975).

94. MASS. CONST. OF 1780, art. I.

95. *See* Aaron Schwabach, *Thomas Jefferson, Slavery, and Slaves*, 33 T. JEFFERSON L. REV. 1, 15 (2010) (listing the 1780 Constitution and Cushing's construction of it in Quock

our only concern is with the interpretive picture Justice Cushing painted in his charge to the jury, a picture that would sharpen in his correspondence with John Adams and his *Chisholm* opinion ten years later.

2. Letter to John Adams

Justice Cushing further revealed his interpretive method in his correspondence with John Adams. Cushing was a friend of his fellow Massachusetts lawyer for five decades.[96] In early 1789, Cushing wrote Adams a letter concerning "libels & liberty of the press."[97] The subject of the letter was to solicit Adams' thoughts on whether the Massachusetts Constitution of 1780 allowed the state to convict a member of the press of libel of a public official, when the conduct complained of in the publication was true.[98] Although he framed his letter as a question, we are fortunate that Cushing shared his views on the matter as well.

Cushing began by quoting the operative text. In relevant part, Article XVI stated, "The liberty of the press is essential to the Security of freedom in a state," and "ought not, therefore, to be restrained in this Commonwealth."[99] Cushing admitted that he experienced "difficulty about the construction of" this article.[100] He then reviewed the state of the law in England, observing that it was clear under the common law that truth was always a defense to libel in civil suits.[101] By contrast, Cushing observed, "[i]t must be confessed that, as the law of England now stands,—truth cannot be pleaded in bar of an indictment, though it may, of a civil action, for a libel."[102] Cushing explained that this distinction between crimina, l and civil libel laws rested on their divergent purposes:

Walker's case as the causes of slavery's extinction in Massachusetts); A. Leon Higginbotham, Jr., *Race, Racism and American Law*, 122 U. PA. L. REV. 1044, 1051 (1974) (book review) (stating that Quock Walker's case "effectively abolished" slavery in Massachusetts). *But see* Cushing, *supra* note 81, at 134–39 (concluding that Cushing's role in Quock Walker's case did not play a large role in the abolition of slavery in Massachusetts).

96. GERBER, *supra* note 61, at 100.

97. Letter from William Cushing to John Adams, *supra* note 14.

98. *Id.*

99. MASS. CONST. OF 1780, art. XVI.

100. Letter from William Cushing to John Adams, *supra* note 14.

101. *Id.*

102. *Id.*

> But on an indictment for a libel, it is held to be immaterial, whether the matter of it be true or false. And this law, Judge Blackstone says, is founded solely, upon the tendency of libels to create animosities & to disturb the public peace; & that the provocation, & not the falsity, is the thing to be punished criminally. And some books say, the provocation is the greater—if true. The consequence of all which is, that a man ought to be punished more for declaring truth, than for telling lies, in case the truth contains a charge of criminality against any one.[103]

Put succinctly, truth was no defense to criminal libel, because the purpose of that law was to preserve public order, regardless of the truth.

Cushing then turned to consider whether the law in England was "law now, *here*."[104] He recalled that the Constitution of 1780 made all English common law that existed at the time of the Constitution's passage operative in the Commonwealth, "excepting only such parts as are repugnant to the right & liberties of this Constitution."[105] Thus, he took liberty to review the matter de novo under Massachusetts law.[106]

As was his usual method, Cushing began with the text. He did not spend much time there, however. Observing that the language in Article XVI was "very general and unlimited,"[107] he quickly moved to find more detailed answers on how to apply its protections by looking to the structure and purpose of Massachusetts' government. He noted that "one principle object & end" of government was to prevent the press "from injuring characters."[108] Thus, he concluded, Article XVI did not prohibit laws that prevented the press from "propagating falsehoods."[109]

But, Cushing asked, could the same be said for publishing the truth? He readily conceded that this was not the case in England. There, the press received only protection from prior restraint.[110] Indeed, the same exact language—"liberty of the press"—was used there. Nevertheless, Cushing did not rely on this well-established

103. *Id.*
104. *Id.* (emphasis added).
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *See id.*
110. *Id.*

prior usage of the phrase. Instead, he pointed out that "the words of our Article, understood according to plain English & common sense—make no such distinction" between prior restraints and post-publication restraints.[111] He explained that subsequent restraint could just as easily restrict the "liberty of the press" as prior restraint, at least according to a commonsense understanding of the phrase:

> [I]f all men are restrained, by the fear of jails, scourges & loss of ears, from examining the conduct of persons in administration, and, where their conduct is illegal, tyrannical & tending to overthrow the constitution & introduce Slavery, are so restrained from declaring it to the public; that will be as effectual a restraint, as any previous restraint whatever.[112]

Hence, Justice Cushing rejected the English conception of "liberty of the press" and looked to develop one of his own that accorded with the fundamental principles that underlay the Massachusetts Constitution. He found those principles in Article XVI's prefatory clause, which stated that "[t]he liberty of the press is essential to the Security of Freedom."[113] In his view, the true question was: "what is that 'Liberty of the press which is essential to the Security of Freedom?'"[114]

To answer this question, Justice Cushing used logic to carefully examine the concept of a free press under a government like that of Massachusetts. He observed that "propagating literature & knowledge by printing or otherwise, tends to illuminate mens [sic] minds, & to establish them in principles of liberty."[115] So too does pointing out the ways in which government "is subversive of all law, liberty, & the constitution," he said.[116] Indeed, he concluded, the latter form of publication tended "to the Security of Freedom in a State" more so than the former, which only increased knowledge in general.[117] Then he moved from abstract to practical, asking whether the American Revolution would have even been possible

111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*

without the ability of the press to criticize the unlawfulness of England's conduct.[118] Finally, he observed that the liberty of the press to publish the truth about government "can never effectually injure a good government or honest administrators"; to the contrary, it could actually "prevent the necessity of a revolution, as well as bring one about—when it *is* necessary."[119] And, he explained, given that prosecution "with becoming rigour" was available against those who publish falsehoods, under a free press no "honest man" would fear the truth; "[t]he guilty only fear it."[120]

Based upon his examination of the idea, or concept, of press freedom within the framework of a government built upon liberty, Justice Cushing concluded that "truth sacredly adhered to, in all cases without exception can never upon the whole prejudice right religion[,] equal government, or a government founded upon proper ballances [sic] & checks, or the happiness of society in any respect; but must promote them all."[121] Thus, he found that "[s]uppressing this liberty . . . by penal laws" [would] "carry greater danger to freedom than it [would] do good to government."[122]

As he had done in *Jennison*, Justice Cushing demonstrated in his analysis of the "liberty of the press" a firm commitment to the commonsense meaning of the constitutional text, coupled with a logical examination of how the concepts identified by that text applied under the framework of government the people of the Commonwealth created.

3. *Chisholm v. Georgia*

One more decision by Justice Cushing is worth discussing. This decision occurred early on in his tenure on the United States Supreme Court, and caused quite the controversy. In fact, it led directly to the first post-Bill of Rights amendment to the Constitution. The case, *Chisholm v. Georgia*,[123] spurred the states to ratify

118. *Id.*
119. *Id.* (emphasis added).
120. *Id.*
121. *Id.*
122. *Id.*
123. 2 U.S. (2 Dall.) 419 (1793), superseded by constitutional amentment, U.S. CONST. amend. XI.

the Eleventh Amendment in order to expressly preserve their sovereign immunity to suits by citizens from other states.[124] Notwithstanding the controversy over the case's outcome, Justice Cushing's *seriatim* opinion in *Chisholm* illuminates his method of constitutional interpretation. It is thus worth reviewing in depth.

In 1790, Alexander Chisholm, executor of Robert Farquhar's estate, attempted to sue the state of Georgia on behalf of the estate to recover money for supplies Farquhar gave to Georgia during the Revolutionary War.[125] Farquhar was a South Carolina resident, so Chisholm invoked diversity of citizenship to bring the case in federal court.[126] After the federal circuit court declined jurisdiction, Chisholm appealed to the Supreme Court.[127] Georgia refused to appear, asserting that the state's sovereign immunity precluded federal jurisdiction over the claim.[128]

In a four-to-one decision, the Court held that Georgia was not immune from the suit because Article III, Section 2 of the Constitution abrogated sovereign immunity in diversity suits.[129] Per the convention at the time, the Justices all wrote separate opinions.

Justice Cushing agreed with the majority that Georgia could not invoke sovereign immunity.[130] His interpretive method was consistent with his prior work in Quock Walker's case and in his correspondence with Adams. Noting that the outcome hinged "not upon the law or practice of England" or "the law of any other country whatever; but upon the Constitution established by the people of the *United States*," he began, as he always did, with the determinative text:

124. *See* Hans v. Louisiana, 134 U.S. 1, 11 (1890) (stating that the Supreme Court's decision in *Chisholm* "created such a shock of surprise throughout the country that, at the first meeting of Congress thereafter, the Eleventh Amendment to the Constitution was almost unanimously proposed, and was in due course adopted by the legislatures of the States.").

125. Ian Bartrum, *James Wilson and the Moral Foundations of Popular Sovereignty*, 64 BUFF. L. REV. 225, 286 (2016); Doyle Mathis, Chisholm v. Georgia*: Background and Settlement*, 54 J. AM. HIST. 19, 20–23 (1967).

126. *See* Bartrum, *supra* note 125, at 286.

127. *Id.* at 286–87.

128. *Id.* at 287.

129. *Id.*; *see* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 429, 450, 453, 466, 469 (1793).

130. 2 U.S. 469 (1793) (opinion of Cushing, J.).

> It is declared that "the Judicial power shall extend to . . . controversies between two or more States and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States; and between a State and citizens thereof and foreign States, citizens or subjects."[131]

Interpreting the plain text, Cushing pointed out that the language granted federal jurisdiction over "controversies between a State and citizens of another State," and drew no distinction between "controversies" in which the state was the plaintiff and those in which it was the defendant.[132] Although he acknowledged that some would argue that Article III's drafters did not intend the provision to authorize jurisdiction over cases in which states were defendants (which, given the backlash that ensued after the opinion issued, was likely a recognition of the popular understanding of the provision at the time), he asked rhetorically, "[I]f it was not the intent . . . that a State might be made Defendant, why was it so expressed as naturally to lead to and comprehend that idea? Why was not an exception made if one was intended?"[133] Accordingly, he remarked that Chisholm's suit "seems clearly to fall within the letter of the Constitution."[134]

Justice Cushing then observed the textual similarities between the provision authorizing federal jurisdiction over suits between states and citizens of different states and the provisions granting jurisdiction over cases between American citizens and foreign states. He observed that a citizen of a foreign nation could not sue a state in the United States without abrogation of sovereign immunity.[135] Abrogation, along with the corollary creation of an impartial federal tribunal to decide such cases, was a proper function of the federal government to prevent international controversies between the United States and a foreign nation that could result from a state claiming sovereign immunity from suit by another country or its citizens as a way to avoid payment of damages.[136] He observed that prevention of such hostility was "[o]ne design of the general Government," because it was "impossible to be conducted,

131. *Id.* at 466–67 (quoting U.S. CONST. art III, § 2, cl. 1, amended by U.S. CONST. amend XI).

132. *See id.* at 467 (quoting U.S. CONST. art III, § 2, cl. 1, amended by U.S. CONST. amend XI).

133. *Id.*

134. *Id.*

135. *See id.*

136. *See id.*

with safety, by the States separately."[137] Thus, with respect to the latter provisions, he concluded that "the reason of the thing, as well as the words of the Constitution, tend to show that the Federal Judicial power extends to a suit brought by a foreign State against any one of the United States."[138]

Turning to the provision at issue in *Chisholm*, Justice Cushing opined that the same considerations applied with respect to suits by citizens of one state against another state. He noted that it was a proper exercise of the federal government to create "a disinterested civil tribunal" to "preserve peace and friendship" between the states.[139] But he did not stop there. Justice Cushing then looked to "the great end and object" of state governments.[140] This, he said, was to "support the rights of individuals."[141] In light of that ultimate purpose of government, he questioned why the rights and justice due to individuals should be subordinated to those of the states.[142] Indeed, he argued, "the latter are founded upon the former . . . or else vain is Government."[143]

Cushing then forcefully rejected arguments over the harm to state sovereignty that would flow from the Constitution's abrogation of sovereign immunity in diversity suits. He again centered his arguments on the rights of individuals: "whatever power is deposited with the Union by the people for their own necessary security, is so far a curtailing of the power and prerogatives of States."[144] Pointing to various restrictions upon the states included in the federal Constitution, he observed that they were all "important restrictions" [of state power] "thought necessary to maintain the Union; and to establish some fundamental uniform principles of public justice, throughout the whole Union."[145] He backed up this argument with an appeal to reason, stating that the proposition was "self-evident . . . ; at least it cannot be contested."[146] Finally, he pointed out, "[i]f the Constitution is found inconvenient

137. *Id.* (emphasis omitted).
138. *Id.* (emphasis omitted).
139. *Id.* at 468.
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.* (emphasis omitted).
146. *Id.*

in practice in this or any other particular, it is well that a regular mode is pointed out for amendment."[147] Until then, however, he was "bound by oath to support it."[148] With these principles in mind, Justice Cushing joined the majority in concluding that the Constitution abrogated state sovereign immunity in diversity suits between citizens and states.[149]

Justice Cushing's method of interpreting Article III, Section 2 displayed two overarching themes, both of which can also be readily observed in the previously discussed interpretations. First, he looked to the linguistic meaning of the provision, and concluded that its broad language clearly covered diversity suits between citizens and states. Second, to develop a construction of the provision, he looked, again, to the structure and moral authority of the federal government to which the People had bound themselves. He did this in spite of the popular public consensus at the time, which apparently understood the provision to apply more narrowly than its language naturally suggested.[150] Indeed, he encouraged the critics to change the language if that was the case![151] This interpretive method—plain-meaning textualism aided by structural and purposive logical reasoning—appears to have remained constant throughout Justice Cushing's long legal career.

B. *James Madison*

President Madison needs no introduction. Unlike Cushing, his contributions to the creation of the Constitution and the development of the early Republic are matters of household knowledge. Much has been written about his views on legal interpretation as well.[152] Indeed, scholars have revealed the influence of Locke's conceptual, or "ideational," theory of language in Madison's works in

147. *Id.*

148. *Id.*

149. *See id.* at 469.

150. *See* Charles S. Hyneman, *Judicial Interpretation of the Eleventh Amendment*, 2 IND. L.J. 371, 373 (1927).

151. *See Chisholm*, 2 U.S. (2 Dall.) at 468 ("If the Constitution is found inconvenient in practice in this or any other particular, it is well that a regular mode is pointed out for amendment. But, while it remains, all offices Legislative, Executive, and Judicial, both of the States and of the Union, are bound by oath to support it.").

152. *See generally*, *e.g.*, Richard S. Arnold, *How James Madison Interpreted the Constitution*, 72 N.Y.U. L. REV. 267 (1997) (evaluating Madison's interpretive methods in detail); Larry D. Kramer, *"The Interest of the Man": James Madison, Popular Constitutionalism, and the Theory of Deliberative Democracy*, 41 VAL. U. L. REV. 697, 703 (2006) (discussing

The Federalist, particularly *Federalist 37*.[153] However, few have considered a striking example of the influence of Locke's conceptual views on Madison's interpretive thinking: his work for the Virginia House of Delegates in opposing the federal Alien and Sedition Acts. In that context, Madison drafted a report for the delegates, commonly known as the Report of 1800, which struck a paradigmatically conceptual tone in interpreting the meaning and reach of the First Amendment.[154]

In relevant part, the Sedition Act of 1798 made it a crime to "write, print, utter or publish . . . any false, scandalous and malicious writing or writings against the government of the United States," or cause or assist in such activities, with the intent to defame.[155] Congress's passage of this and the other acts comprising the Alien and Sedition Acts provoked the legislatures of Kentucky and Virginia to pass resolutions condemning them and declaring them in violation of the still young Constitution.[156] Madison drafted Virginia's resolution.[157]

Before Virginia passed its resolution, Madison submitted his report to the House of Delegates. The report contained a remarkably comprehensive interpretive explanation. After laying out extensive arguments concerning the federal government's lack of enumerated authority to pass the Alien and Sedition Acts,[158] Madison turned to a direct interpretive examination of the right protected by the "freedom of the press" in order to show that the Sedition Act was unconstitutional.[159] We will focus here on that portion of the report. Madison began with the text of the First Amendment, which has become familiar by now: "Congress shall make no

and advocating for a method of "popular constitutionalism . . . . developed by James Madison and articulated in essays he wrote as Publius and after").

153. *See supra* note 41 and accompanying text.

154. In *Reason's Republic*, 10 N.Y.U. J.L. & LIBERTY 522, 557–59 (2016), Evan Bernick masterfully summarizes the conceptual approach Madison employed in his report. The author owes him much appreciation, as he appears to be the first to have framed Madison's method according to the concepts/conceptions framework.

155. Sedition Act of 1798, ch. 74, § 2, 1 Stat. 596, 596–97 (expired 1801).

156. *See* GORDON S. WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815, at 269–70 (2009).

157. *Id.* at 269.

158. *See* James Madison, *Report on the Resolutions*, *in* 6 THE WRITINGS OF JAMES MADISON 341, 348–85 (Gaillard Hunt ed., 1906) (decrying "forced constructions" of the Necessary and Proper Clause that would allow the federal government to aggrandize power over subject matters not enumerated and explaining how the Alien Acts violated the Constitution's separation of powers).

159. *Id.* at 385–93.

law . . . abridging the freedom of speech or of the press."[160] He noted at the outset that Federalists who argued that the Act passed constitutional muster relied on prior usage—namely, contemporary understanding of the same language under English common law.[161] But Madison rejected this method of interpretation. He remarked that "[t]he freedom of the press under the common law" was narrow, "made to consist in an exemption from all previous restraint on printed publications."[162] He countered that "this idea of the freedom of the press can never be admitted to be the American idea of it; since a law inflicting penalties on printed publications, would have a similar effect with a law authorizing a previous restraint on them."[163] To accept such a conception of press freedom, he contended, "would seem a mockery" of the right.[164]

Moving beyond the First Amendment's text, Madison, like Cushing, turned to the fundamental principles beneath America's constitutional government for further illustration. He explained that "[t]he essential difference between the British government and the American constitutions will place the subject in the clearest light."[165] He observed that in Britain, it was thought that only the "executive magistrate" (the monarch) presented a serious threat to the rights of citizens.[166] In contrast, the people's representatives in Parliament were understood to be "sufficient guardians of the rights of their constituents against the danger from the Executive."[167] Pursuant to that understanding, all of the documents relied on by the British people to preserve their rights were aimed solely at the monarch.[168] Thus, the British system of government placed no limitations on parliamentary power.[169] Consistent with that arrangement, the freedom of the press in England was confined to freedom from prior restraint by executive agents employed by the King.[170]

160. *Id.* at 385 (emphasis omitted) (quoting U.S. CONST. amend. I).
161. *See id.*
162. *Id.* at 386 (emphasis omitted).
163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.*
169. *Cf. id.*
170. *See id.*

But, Madison observed, "[i]n the United States the case is altogether different."[171] In America, absolute sovereignty lay solely in the People.[172] This meant that the powers of both the executive *and* legislative branches were limited so as to protect the People's rights.[173] Thus, unlike under English law, the "freedom of the press" should be applied to prohibit both prior restraint *and* subsequent punishment for publication.[174] "The state of the press, therefore, under the common law, cannot, in this point of view, be the standard of its freedom in the United States," said Madison.[175]

Next, Madison used the nature of American government to refute a second argument concerning historical understanding of the meaning of "liberty of the press." He cautioned that some would argue that "the actual legal freedom of the press, under the common law, must determine the degree of freedom which is meant by the terms, and which is constitutionally secured against both previous and subsequent restraints."[176] Put differently, some would argue that the First Amendment only codified that which was already protected at common law—the "original applications" of press freedom. In Madison's view, this could not be the case, either. He pointed out that in England, a fundamental tenet was that the monarch and the nobles in Parliament obtained their authority through hereditary acquisition; thus, they did not answer to the common people at all.[177] Not so in America, said Madison. He argued that "[i]n the United States the executive magistrates are not held to be infallible, nor the legislatures to be omnipotent; and both being *elective*, are both responsible."[178] In light of this distinction, he opined, greater press freedom was necessary to ensure oversight of lawmakers.[179] Indeed, Madison argued that "the practice [of press scrutiny of legislative conduct] must be entitled to much more respect" than that afforded to the press in England.[180]

171. *Id.*
172. *See id.*
173. *See id.* at 386–87.
174. *See id.* at 387.
175. *Id.*
176. *See id.*
177. *Id.* at 388.
178. *Id.* (emphasis added).
179. *See id.* at 388–89.
180. *Id.* at 388.

Continuing with his discussion of the concept of press freedom under the American form of government, Madison pointed out that there would no doubt be individuals who would abuse the freedom afforded them.[181] But, said Madison, you must take the bad with the good:

> And can the wisdom of this policy be doubted by any who reflect that to the press alone, chequered as it is with abuses, the world is indebted for all the triumphs which have been gained by reason and humanity over error and oppression; who reflect that to the same beneficent source the United States owe much of the lights which conducted them to the ranks of a free and independent nation, and which have improved their political system into a shape so auspicious to their happiness? Had "Sedition Acts," forbidding every publication that might bring the constituted agents into contempt or disrepute, or that might excite the hatred of the people against the authors of unjust or pernicious measures, been uniformly enforced against the press, might not the United States have been languishing at this day under the infirmities of a sickly Confederation? Might they not, possibly, be miserable colonies, groaning under a foreign yoke?[182]

Madison then returned to the constitutional text. He observed that the First Amendment also contained protections for "[t]he freedom of conscience and of religion," in addition to the freedom of the press.[183] "It will never be admitted," he argued, "that the meaning of the former, in the common law of England, is to limit their meaning in the United States."[184]

But these, he said, were not the dispositive arguments.[185] At this point, Madison returned to his analysis of the federal government's authority, rather than on the textual meaning of the First Amendment.[186] Nevertheless, his argument is still worth examining here because it, too, demonstrated conceptual interpretive principles.[187] He looked for explicit textual assistance to buttress his interpretation.[188] After discussing how concerns about lawmakers adopting forced constructions of the Constitution to usurp power and infringe the People's rights motivated the creation and ratification of the Bill of Rights, Madison called the express statement of purpose

181. *See id.* at 389.
182. *Id.*
183. *Id.*
184. *Id.*
185. *Id.* at 389–90.
186. *Id.* at 346.
187. *Id.*
188. *Id.*

in the preamble to the Bill of Rights "still stronger" evidence that the Constitution prohibited all federal power over the press.[189] The statement said,

> The Conventions of a number of the States having, at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstructions or abuse of its powers, that further declaratory and restrictive clauses should be added; and as extending the ground of public confidence in the Government will best insure the beneficent ends of its institution.[190]

In Madison's view, this express statement of purpose was "the most satisfactory and authentic proof that the several amendments proposed [including the First Amendment] "were to be considered as either declaratory or restrictive . . . and as extending the ground of public confidence in the Government."[191] Here, he employed logical reasoning to consider how the concept of "freedom of the press" should apply under the American system of government: no construction of the "freedom of the press" clause, he argued, could further that purpose other than one that removed Congress's power to regulate the press entirely.[192]

Finally, Madison addressed those who might argue that a total elimination of Congress's authority in this area might be an unwise policy choice.[193] He dismissed that argument: "[T]he question does not turn either on the wisdom of the Constitution or on the policy which gave rise to its particular organization."[194] Instead, said Madison, "[i]t turns on the actual *meaning* of the instrument."[195]

To summarize, like Cushing, Madison began with the text, which he interpreted broadly in accord with its commonsense meaning. Then, he evaluated how the concept of press freedom should operate in America's constitutional system, using logic to sharpen his view of how it should apply in the "case" before him. In short, his interpretive approach was remarkably similar to that of Cushing's.

189. *Id.* at 390–91.
190. *Id.* at 391.
191. *Id.*
192. *See id.* at 391–92.
193. *See id.* at 392–93.
194. *Id.* at 393.
195. *Id.* (emphasis added).

In the Report of 1800, Madison incorporated a number of different interpretive techniques. Here, we have focused only on the conceptual approach he utilized in applying the First Amendment to the Sedition Act. This should not be read as a representation that Madison used only this approach, nor should it be read as ignorant to the fact that he was arguing from a *political* standpoint as well as an interpretive one. But it should be read as evidence that he embraced a conceptual theory of language as part of his constitutional-interpretive practice.

C. *Lawmakers in the Virginia House of Delegates*

Madison was not the only influential lawyer to work on the Virginia Resolution of 1800, nor was he the only one to interpret the First Amendment conceptually. Members of the House of Delegates debated adoption of the Resolution vigorously, and we are fortunate to have a comprehensive record of their debates that spans many pages.[196] Those pages record a bevy of arguments, the majority of which concern the nature of constitutional sovereignty and the scope of federal power under the Necessary and Proper Clause.[197] Here, however, we will again narrow our focus on the debates over the meaning of the First Amendment in the context of the constitutionality of the Sedition Act.

The primary disagreement between Federalists (who supported the Sedition Act and thought it constitutional) and Anti-Federalists (who opposed it and thought it unconstitutional) went right to the heart of this article's subject: the concepts/conceptions dichotomy. Several Federalist lawmakers took what we might today call an "original expected application" approach to interpretation.[198] They contended that "freedom of the press" was a term of art incorporated from English common law that included a static, relatively narrow set of protections for the press. For example, Archibald Magill of Frederick County[199] argued that "what the doctrines of the common law were prior to, and at the establishment of the

196. *See generally Resolutions and Debate*, *supra* note 19, at 24–161.

197. *See generally id.*

198. *See* Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 222–24 (1980) (identifying and explaining "strict" forms of originalism that seek to uncover and give effect to how the drafters and ratifying public would expect the Constitution's provisions to apply in specific cases).

199. *Id.* at 159.

Constitution of the United States, must then be the rule, and the term liberty of the press, as then understood, an important consideration."[200] To shed light on this original context, Magill "read the history of the liberty of the press, as laid down by Blackstone, in the fourth volume of his Commentaries," which stated that "the history of the term freedom of the press . . . . was an exemption from all power over publications, unless previously approved by licensers."[201] This was simply a prohibition on prior restraint, and "did not extend to an exemption from legal punishment."[202] Hence Magill argued that the Sedition Act did not run afoul of the Constitution: "[t]he freedom of the press, correctly understood, and as it was considered by the framers of the Constitution . . . was not abridged by the law."[203]

George K. Taylor of Prince George County[204] advanced a similar argument, though his analysis centered on the Framers' intentions, rather than on original understanding of the language. He argued that the Framers "were certainly men of distinguished abilities and information," including many lawyers "whose peculiar study had been the common law."[205] He speculated that they were all familiar with Blackstone's Commentaries, which made clear that "freedom of the press" in English law "had an appropriate signification, to wit: exemption from previous restraint on all publications whatever, with liability, however . . . for slanders affecting private reputation or the public peace."[206] Moreover, he observed that under the laws of every state, "freedom of the press" meant what it meant in England.[207] Thus, Taylor asked rhetorically, "When, then, in the amendments to the Constitution they speak of 'the freedom of the press,' must it not be presumed they intended to convey that appropriate idea, annexed to the term both in England and in their native states?"[208]

To summarize, Federalists like Magill and Taylor argued that the Constitution protected a particular *conception* of "freedom of

200. *Id.* at 74.
201. *Id.*
202. *Id.*
203. *Id.*
204. *Id.* at 161.
205. *Id.* at 137.
206. *Id.*
207. *Id.*
208. *Id.*

the press" as it existed at the time of ratification, whether it was that of the Framers or of the public.

The Anti-Federalists, on the other hand, countered those arguments by advocating for a conceptual reading of the First Amendment that was nearly identical to Madison's. In a lengthy speech, William Daniel of Cumberland County[209] responded directly to the Federalists' common-law reading of the First Amendment. If the law in America was the same as it was in England, he said that he "would be glad to be informed for what purpose was it declared by the Constitution, that the 'freedom of the press should not be restrained?'"[210] In other words, why didn't the Constitution mean what it *said*?

To this textual argument, he added a purposive one. How, he asked, were Americans "more free in the United States, than the people of any other nation whatsoever?"[211] To elaborate, he, like Cushing and Madison, investigated the concept of press freedom more closely:

> If the press was subjected to a political licenser, the discretion of the printer would be taken away, and with it his responsibility; and nothing would be printed but what was agreeable to the political opinions of a certain set of men; whereas subsequent restraints have the same operation, by saying, if you do "write, print, utter, or publish," anything contrary to the political opinions, reputation or principles of certain men, you shall be fined and imprisoned.[212]

Continuing with his logical investigation, Daniel then considered how the Sedition Act infringed the concept of press freedom. He noted that while the Act purported to outlaw only that which was false, "[t]he truth was that it was not the facts, but the deductions and conclusions drawn from certain facts, which would constitute the offence."[213]

To illustrate, he offered an example. Suppose a man stated that Congress passed the Alien and Sedition Acts.[214] Then, suppose he stated that passage of the Acts constituted an unconstitutional aggrandizement of congressional and executive power, and that the

209. *Id.* at 159.
210. *Id.* at 94.
211. *Id.*
212. *Id.* (emphasis omitted).
213. *Id.* at 94–95.
214. *Id.* at 95.

American people should resist them.[215] The first statement was clearly a true fact, but his follow-up analysis was an "inference or conclusion" that could not be proven either true or false.[216] Yet, Daniel argued, because he could not prove the analysis was "true" to a jury, he could be convicted and imprisoned for printing it.[217] "[P]olitical opinion," he deduced, "was the real object of punishment."[218] Thus, he concluded, "the provisions of this act abridged and infringed the liberty of the press."[219]

Daniel went into an even more detailed logical analysis of why the Sedition Act abridged the concept of press freedom that is worth reading in full,[220] but that analysis is too lengthy to discuss in depth here. However, it is worth noting that he devoted the entirety of his analysis on the *concept* of press freedom in the American system of government, not on how the Framers or the public understood it to apply at the time of ratification.[221]

John Taylor of Caroline County[222] similarly criticized the Federalists' narrow interpretation of "freedom of the press." In his view, their approach was an "extravagant and unjustifiable mode of construing the Constitution."[223] The proper mode of construction was simply to look to the Constitution *itself*: if the Constitution required looking to Blackstone, "the law of nations, the common law of England, the laws of the several states, the opinions of English judges, and the private letters of individuals" to find its meaning, then, "it had only launched us upon the ocean of uncertainty, instead of having conducted us into a safe and quiet harbor."[224]

215. *Id.*
216. *Id.*
217. *Id.*
218. *Id.* (emphasis omitted).
219. *Id.*
220. *See id.* at 94–98.
221. *See id.* (focusing on the logical reasons why the constitutional guarantee of freedom of the press led to the conclusion that the Alien and Sedition Acts were unconstitutional, not on the Framers' intended meaning at the time of ratification).
222. *Id.* at 159.
223. *Id.* at 118.
224. *Id.* at 118–19.

Taylor then examined the concept of press freedom, concluding that Blackstone's definition of the right, which the Federalists supported, "wholly quibbles away the liberty of the press."[225] He observed:

> Was it not obvious that the end meditated by the liberty of the press, can as effectually be defeated in one mode as the other, and that if a government can by law garble, suppress and advance political opinion, public information, this great end, upon which public liberty depends, will be completely destroyed.[226]

"Read," said Taylor, "the Constitution, and consider if this was all it meant to secure."[227]

The interpretive debates between the Federalist Delegates and the Anti-Federalists over the Virginia Resolution laid bare the concepts/conceptions dichotomy. The Federalists treated the matter as wholly empirical. In their view, a historical study of prior usage would reveal the conception that the Framers or the ratifying public had in mind at the time. This, in turn, would supply the legal content of the First Amendment. The Anti-Federalists rejected this method in favor of a conceptual analysis. They relied on the everyday linguistic meaning of the constitutional text to identify a certain right, coupled with contextual analysis and logical reasoning to examine the nature of that right and how it should apply under the American system of constitutional government. While the Anti-Federalists won that particular battle (the Alien and Sedition Acts were not renewed),[228] the war still drags on.

In the next part, we will draw out the nature of the disagreement even more, by looking at the interpretive choices underlying the conceptual approach and contrasting them with its alternatives.

III. THE INTERPRETIVE CHOICES UNDERLYING THE CONCEPTUAL APPROACH

Now that we have canvassed the use of a conceptual approach in the founding era, we can turn to a more thorough reflection upon the interpretive choices that underlay this approach.

225. *Id.* at 119.

226. *Id.*

227. *Id.*

228. *See* Sedition Act of 1798, ch. 74, § 4, 1 Stat. 596 (expired 1801); Judith Schenck Koffler & Bennett L. Gershman, *The New Seditious Libel*, 69 CORNELL L. REV. 816, 827–28 (1984).

A. *Textual Fidelity*

All of the historical interpreters began with the constitutional text, and their ultimate constructions did not run afoul of it. Clearly then, textual fidelity was crucial to them. Sure, they relied on a limited set of extratextual considerations to develop their constructions, but they used those considerations to provide context for the words, not to extend the law beyond them. There was no talk of penumbral or unenumerated rights; there was only talk of what the Constitution *said*.

This was partly because there was no need for talk of such rights: as Madison's and Taylor's comprehensive interpretations indicate, their fidelity to the Constitution's textually mandated structure and the moral principle of individual liberty it was meant to protect demanded strict limitations on the federal government's authority, which in turn foreclosed the need to recognize unenumerated rights.[229] But it was also because they anchored their interpretations in the linguistic meaning of the Constitution's language. They were textualists at heart.[230]

229. *See* RANDY E. BARNETT, THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW 257–83 (2d ed. 2014) (discussing how the Constitution's limited-government framework protects individual liberty).

230. The concept of "textualism" is itself open to multiple and sometimes incompatible scholarly conceptions. *See generally* Andrew Tutt, *Fifty Shades of Textualism*, 29 J.L. & POL. 309, 310–14 (2014) (discussing various conceptions of textualism and attempting "to identify and describe what divides Textualists"). Here, this article uses the term "textualist" or "textualism" simply to identify an interpretive method that places ultimate primacy in the meaning of the law's words themselves, rather than in what the drafters *meant* to say. *See* Jonathan R. Siegel, *The Inexorable Radicalization of Textualism*, 158 U. PA. L. REV. 117, 117, 131–32 (2009) ("Textualism's prime directive—the formalist axiom that statutory text is the law—fundamentally distinguishes textualism from other interpretive methods."); George H. Taylor, *Textualism at Work*, 44 DEPAUL L. REV. 259, 259 n.3 (1995) ("Textualism endorses constrained judicial decision based on an interpretation of the language and structure of the text and basically rejects reference to extra-textual evidence such as legislative history.").

However, they were not literalists or strict textualists.[231] Their constructions were contextual.[232] Consider Cushing's discussion of the "liberty of the press" protected by the Massachusetts Constitution.[233] He began with the text and pointed out that the language was broad, yet he turned to first principles in an attempt to figure out "what guard or limitation [could] be put upon it."[234] In other words, he sought out a *reasonable* interpretation of the text in the context of Massachusetts' constitutional government, not a strictly literal one that would have treated the right as absolute. He found that "guard or limitation" in moral principles: since protecting the People's reputational rights was "one principle object & end of . . . government," it was an acceptable, yet appropriately singular, limitation on the expansive language that squared with valid governmental interests.[235]

Moreover, their textualism exhibited a "thin" view of meaning in that it found the linguistic meaning of the terms underdeterminate vis-à-vis the provisions' legal content.[236] Hence, our subjects were

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231. *See* Melvin Aron Eisenberg, *Strict Textualism*, 29 LOY. L.A. L. REV. 13, 13 (1995) ("[S]trict textualism . . . holds that in interpreting a statute a court should confine itself to a literal—or 'straightforward'—reading of the relevant canonical text, unless the text is ambiguous on its face or such a reading would lead to an absurd or bizarre result. Subject to those two qualifications and the use of a dictionary and grammar, all elements outside the relevant canonical text—for example, the historical condition, that gave rise to the statute, and propositions of policy, morality, and experience that provide the social context of the statute or otherwise bear on its subject matter—are inadmissible." (footnotes and quotation omitted)).

232. *See* Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 67 (1994) ("'Plain meaning' as a way to understand language is silly. In interesting cases, meaning is not 'plain'; it must be imputed; and the choice among meanings must have a footing more solid that a dictionary—which is a museum of words, an historical catalog rather than a means to decode the work of legislatures.").

233. Letter from William Cushing to John Adams, *supra* note 14.

234. *Id.*

235. *Id.*

236. Lawrence Solum explains the distinction between "thick" and "thin" views of constitutional meaning thusly:

> Some originalists may believe that the communicative content of the constitutional text is sufficiently thick (or "rich") to provide a determinate outcome in all (or almost all) constitutional cases. For these originalists, the interpretation-construction distinction performs two functions: (1) it provides conceptual clarity about the (normatively legitimate) role of communicative content in constitutional practice; and (2) it enables criticism of constitutional constructions that violate the Constraint Principle.
>
> But another group of originalists may believe that the constitutional text is not fully determinate: they affirm what we can call "the Fact of Constitutional Underdeterminacy." Constitutional underdeterminacy occurs when the text is (1) vague, (2) open-textured (in a very broad sense), or (3) irreducibly ambiguous,

not afraid to move from interpretation to construction when so warranted.[237] Importantly, however, their constructions did not overtake the text—they were well within a reasonable reading of the constitutional language. Thus, the construction phase, which was augmented by structural and moral principles, was illuminative of the language, not transformative.[238] Contrast this with stronger forms of purposivism that allow interpreters to "derive or invent abstract principles from texts and *substitute* those principles for the words of the text,"[239] or, as we will discuss, so-called forms of textualism that allow for intentionalism to creep into the back door under the guise of fidelity to an overly thick conception of "original meaning."[240]

B. *Fixation*

Our subjects' form of textualism is compatible with the "Fixation Thesis."[241] Developed by Lawrence Solum, the Fixation Thesis proposes that "[t]he meaning of the constitutional text is fixed when each provision is framed and ratified."[242] Solum states that all forms of originalism are united by their shared acceptance of the Fixation Thesis.[243] So is the conceptual approach we have witnessed in this article. Here's how: if our observations are correct, a necessary implication from our subjects' method is that the original concepts—or ideas, as Locke would term them—identified by the Constitution's language supply the Constitution's substantive content. The structural and moral principles, which were themselves fixed by the Constitution's structure, shape application of those concepts to particular cases. Thus, all of the applicational criteria to which the conceptual interpreter looks for interpretive

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and when there are (4) gaps or (5) contradictions in the text.

Solum, *supra* note 24, at 10–11 (footnotes omitted).

237. *See id.* at 10 (defining "construction" as "the activity of giving the constitutional text legal effect (either in the form of constitutional doctrine or through the decision of constitutional cases)").

238. *See* Daniel B. Rodriguez, *The Substance of the New Legal Process*, 77 CALIF. L. REV. 919, 932 (1989) ("[T]extualism merely requires that the interpreter obey the statute's text above all else, without describing what it means to interpret a text . . . .").

239. *See* Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, 103 NW. U. L. REV. 857, 873 (2009) (emphasis added).

240. *See infra* Part IV.C.

241. Solum, *supra* note 24, at 1.

242. *Id.*

243. *Id.* at 6.

guidance were locked in at the moment of ratification. Those criteria, of course, could not be identified correctly without understanding the *original* linguistic meaning of the words in context.

Not surprisingly, nothing in the historical record suggests that our subjects would support the proposition that the meaning of the Constitution changes over time. Indeed, compelling evidence suggests that the subjects of our historical inquiry would have accepted the Fixation Thesis. Their repeated focus on the historical context surrounding the Constitution's enactment[244] refutes this, for there would be no need to examine this context if the current context governs. Indeed, the conceptual approach they employed demanded fidelity to the original linguistic meaning, because the fixed moral concept signaled by the language would be misidentified if the wrong linguistic meaning was used.[245] To use a modern example, using the modern meaning of "domestic violence" to interpret the Domestic Violence Clause to "mandate that the federal government must agree to fund a state's spousal abuse prevention program"[246] would have seemed absurd to our interpreters. Such a reading would be a misidentification of the concept that was fixed via ratification.

By the same token, giving original, incorrect *conceptions* primacy over the original concepts would be equally invalid under our subjects' methodology. Nor does this run afoul of the fixation thesis. This methodology concerns legal *authority*, not legal permanency. If a punishment is cruel and unusual according to the concept of "cruel and unusual punishments"[247] as applied to our constitutional form of government and in consonance with its animating purpose, then it violates the Eighth Amendment, notwithstanding that the public in 1789 thought it did not. There is thus room for correction of logical error.[248] This does not deny fixation,

244. *See, e.g.*, Letter from William Cushing to John Adams, *supra* note 14 ("Without this liberty of the press, could we have supported our liberties against british administration? Or could our revolution have taken place? Pretty certain, it could not at the time it did. Under a sense & impression of this Sort I conceive this article, was adopted.").

245. *See* SMITH, *supra* note 6, at 167 ("Remember that language is *about*: words point to existents, to the specific instances that a particular word identifies as units of specific kinds (be those existents physical objects, properties, actions, emotions, relationships, etc.). The language that people use to express certain ideas represents reality." (footnote omitted)).

246. Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 752 (2011).

247. U.S. CONST. amend. VIII.

248. Professor Smith explains this point succinctly:

though, because the governing *concept* was and is fixed until amended by proper procedures. The original concept wins when it and the original conception clash. In such a case, our erroneous conception has changed, not the fixed, universal concept, which meant the same thing in 1789 as it means today.

C. *Structure and Moral Authority*

The observation that the Framers used structural principles to illuminate their constitutional-interpretation methods is far from novel. Thirty years ago, Jefferson Powell demonstrated in a celebrated historical study that the Framers interpreted the Constitution "not by historical inquiry into the expectations of the individuals involved in framing and ratifying the Constitution, but by consideration of what rights and powers sovereign polities could delegate to a common agent without destroying their own essential autonomy."[249] This predominant mode of construction was thus a form of structural interpretation.[250]

Our subjects certainly made structural principles a major part of their interpretive methodologies, such that it is fair to categorize them as falling within this structuralist camp. Discussion of these principles dominated the debates over the Virginia Resolution, with just one example being Madison's report to the House of Delegates, in which he devoted the majority of his analysis to examining the power dynamic the Constitution commanded between the states and the federal government.[251] But their interpretations of the discrete constitutional provisions we have reviewed here

> Even written laws do not make their proper application self-evident. Putting things in writing does not put them beyond thought; it does not obviate people's need to reason, in order to understand and objectively respect the law that is written. The words used to state a law reflect man's thoughts about existents but they do not replace the existents as the fundamental referents of their words or, as such, as the fundamental determinants of meaning.

SMITH, *supra* note 6, at 167.

249. H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 888 (1985).

250. *Id.* at 948.

251. *See* Madison, *supra* note 158, at 341, 348–85 (decrying "forced constructions" of the Necessary and Proper Clause that would allow the federal government to aggrandize power over subject matters not enumerated and explaining how the Alien Acts violated the Constitution's separation of powers); Powell, *supra* note 249, at 937 (explaining that Madison relied on "structural inference" to clarify ambiguity he thought unavoidable due to the "imperfect nature of human communication").

demonstrate that in addition to these structural principles, they also considered more fundamental *moral* principles—namely, the proper relationship between the state and the individual. Perhaps the clearest example of this is Cushing's discussion of why he thought Article III permitted citizens to bring diversity suits against states in federal court. He argued that "the great end and object" of government was to "support the rights of individuals."[252] This conclusion was more than just structural; it was a clear argument about the moral authority of the state.

But these were not *their* personal moral judgments on the proper relationship between the state and the individual.[253] Rather, they were values they derived from the governing document, usually from the plain text but occasionally from implied values. For instance, in his correspondence with John Adams, Cushing observed that protection of an individual's reputation was "one principle object & end . . . of government."[254] He could easily derive this conclusion from the preamble of the Massachusetts Constitution of 1780, which stated that "[a]ll men" had "the right of enjoying and defending their lives and liberties . . . and obtaining their safety and happiness,"[255] and that "[t]he end of the institution, maintenance, and administration of government is to secure the existence of the body-politic, to protect it, and to furnish the individuals who compose it with the power of enjoying, in safety and tranquility, their natural rights and the blessings of life."[256] And structural principles were part and parcel of these moral judgments: Madison, taking the Constitution's preamble literally in assuming that sovereignty was granted to the government entirely by ["t]he People," argued that both the legislative and executive branches should be restrained from abridging the People's right to a free press in order to preserve their sovereignty.[257]

252. Chisholm v. Georgia, 2 U.S. 419, 468 (1793) (opinion of Cushing, J.).

253. This stands in contrast to Dworkin's proposed interpretive method, which would give judges freedom to impose their personal moral values into the interpretive enterprise. *See* RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 3–4 (1996) (arguing that judges should interpret the Constitution according to their "own views about political morality," and not according to "metaphorical" considerations like "historical 'intentions'" or "constitutional 'structure'").

254. Letter from William Cushing to John Adams, *supra* note 14.

255. MASS. CONST. OF 1780, art. I.

256. *Id.* pmbl.

257. *See* Madison, *supra* note 158, at 388.

In sum, while our subjects' approaches were firmly rooted in textual fidelity, such that they can fairly be called "textualists," they supplemented their textual methods with both structural and moral considerations. Importantly, however, those considerations were derived, expressly or impliedly, from the Constitution itself, not from their subjective personal views.

D. *Reason*

Our subjects all made reason the heart of their interpretive practices. The knee-jerk reaction to this observation might be, "Of course, what method doesn't employ logical reasoning? That's the primary skillset required of a lawyer." But the conceptual approaches they took employed reason in a way that differs subtly, yet importantly, from others.

Our interpreters rigorously applied logical reasoning to determine how the laws or practices they analyzed squared with the concepts identified by the Constitution's language. They did so from both concept-facing stances and government conduct-facing stances. They considered how the constitutional concept at issue should operate within the framework of the government the Constitution created, and, based upon that framework, what, if any, "guard or limitation [could] be put upon it."[258] This was done by considering both the government's delegated power over the subject matter (the structural inquiry) and its moral authority to limit the concept (the moral-purpose inquiry). Then, they analyzed whether the challenged measure overstepped its bounds in either regard or furthered those aims.

It bears mentioning that this type of reasoning was also central to Locke's theory of language, which might have influenced our subjects' understanding of legal texts.[259] Locke opined that while words identify ideas in the mind of the speaker that only the speaker can access,[260] those ideas, or concepts, are incomplete human creations used to organize and categorize objective truths that

258. Letter from William Cushing to John Adams, *supra* note 14.

259. *See* Bernick, *supra* note 154, at 555 ("There is compelling evidence that the Framers embraced a conceptual theory of language. Their writings disclose the influence of John Locke's epistemology, as set forth in his Essay Concerning Human Understanding." (footnote omitted)).

260. LOCKE, *supra* note 42, bk. III, ch. 2, § 2, at 281 ("The use men have of these marks being either to record their own thoughts, for the assistance of their own memory or, as it

exist independent of human conception.[261] In other words, words categorize objective truths by "sorts and ranks of things."[262] Thus, the true and complete definition of the concept identified by a word or group of words is discoverable through rigorous application of reason—specifically, careful examination into "what the sorts and kinds" of things are signified by linguistic terms, "wherein they consist, and how they come to be made."[263]

Whether Locke's writings directly influenced our subjects or not, the evidence demonstrates that their views of language were remarkably similar. Their conceptual interpretations manifested the logical investigation of the type Locke discussed: these approaches rested upon inquiry into the "sorts and kinds" of things identified by the Constitution's words and phrases—"wherein they consist, and how they come to be made"—and assumed that such investigation can supply both a constraining principle and an effective way of applying the Constitution to particular cases.[264] The empirical part of their analyses was limited at best, looking only to the original linguistic meaning of the text and the public history that shed light onto the structure and moral theory that underlay the Constitution's government. The brevity here was partly due to immediacy: they interpreted their constitutions only a few years after they were enacted. But even if they had been interpreting today, the limited scope of their historical inquiry would have made the empirical phase pass by relatively quickly.

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were, to bring out their ideas, and lay them before the view of others: words, in their primary or immediate signification, stand for nothing but the ideas in the mind of him that uses them, how imperfectly soever or carelessly those ideas are collected from the things which they are supposed to represent.").

261. *Id.* bk. III, ch. 3, § 11, at 287 ("To return to general word, it is plain, by what has been said, that general and universal belong not to the real existence of things ; but are the inventions and creatures of the understanding, made by it for its own use, and concern only signs, whether words or ideas.").

262. *See id.* bk. III, ch. 1, § 6, at 280.

263. *Id.* Locke's full statement is as follows:

> Since all (except proper) names are general, and so stand not particularly for this or that single thing, but for sorts and ranks of things; it will be necessary to consider, in the next place, what the sorts and kinds, or, if you rather like the Latin names, what the species and genera of things are; wherein they consist, and how they come to be made.

Id. (emphasis omitted).

264. *See* SMITH, *supra* note 6, at 167 ("A word's meaning and people's beliefs about a word's meaning are two different things. . . . Remember that language is *about*: words point to existents, to the specific instances that a particular word identifies as units of specific kinds (be those existents physical objects, properties, actions, emotions, relationships, etc.). The language that people use to express certain ideas represents reality." (footnote omitted)).

Contrast this with other theories that treat original conceptions as the governing applicational criteria. They treat the judge's role as purely empirical: he is a robed historian tasked solely with searching and sorting the documentary record for evidence of how whoever has legal authority under their chosen theory—the Framers, the original public, etc.—would have understood the language to apply.[265] Of course, the judge might often use logic and reason to draw inferences or conclusions about the full scope and import of the conception being studied.[266] But used this way, logic and reason is an auxiliary tool, rather than the central component, of the judge's in deciding the constitutional case before him.

IV. CONSTITUTIONAL CONCEPTS: THE NORMATIVE CLAIM

We can now briefly shift from a historical argument to a moral one. Using our observations on the interpretive choices that underlay our subjects' conceptual view of the Constitution, we can make out a preliminary sketch of the conceptual approach's normative claim. A full exposition will take far more pages than we have left here,[267] but we can at least begin. Here's the gist: by relying on the Constitution's text, its structure, and the moral authority that can be derived logically from those objective criteria, the conceptual approach presents a picture of the Constitution as a coherent, harmoniously functioning charter of government. This pays fidelity to the Rule of Law and allows judges to escape the intentionality trap that forces other interpretive approaches that rely on particular conceptions of the Constitution's provisions to stray from the document as it was actually written and ratified.

A. *Textual Fidelity Is Fidelity to Democracy and the Rule of Law*

As Cushing, Madison, and the lawyers in the Virginia House of Delegates all demonstrated, the conceptual inquiry begins *and* ends with the constitutional text. This textual fidelity makes out two normative claims worth discussing here. The first is fidelity to democracy, and the second is fidelity to the Rule of Law.

265. J. HARVEY WILKINSON III, COSMIC CONSTITUTIONAL THEORY 45 (2012) ("If the courts are merely enforcing the Constitution as the Framers intended, then the legitimacy problems should be directed at the Constitution itself, not the judicial messengers.").

266. *See id.* at 43 ("Originalist constitutional interpretation bears remarkable similarities to interpretation of statutes, precedents, contracts, and other legal sources that judges work with every day").

267. For a far more comprehensive examination of the moral justification for a conceptual approach, see generally SMITH, *supra* note 6.

1. Textual Fidelity as Respect for Democratic Self-Governance

The first dimension relates to compatibility with democratic self-governance. By its plain terms, the Constitution vests sovereign authority in "the People."[268] And by its plain structure, it actuates this sovereign authority by filtering the People's will through the instrument of representative republicanism.[269] This has important repercussions for judicial review: put succinctly, the act of ratifying the constitutional text was a democratic exercise, while the act of interpreting that text is not.[270] Thus, a method of interpretation that hews as closely as possible to the actual exercise of democratic will pays greater fidelity to the democratic form of government that the Constitution created and was designed to protect.

Textualism does this, because the *text* of the law—not subjective mental intentions, legal traditions, or individual moral values—was voted on and approved. But there is a deeper level of nuance to consider. Recall that we found that the conceptual approach embraces a "thin" version of meaning, in that it accepts the linguistic meaning of the constitutional text as an identification of the concept behind the language as well as a limitation upon the interpretation of the provision.[271] This thin view of meaning pays greater fidelity to democratic self-government than does a "thick" view of textualism. In the first phase of the conceptual approach, the "meaning" phase, a judge will attempt to understand the commonsense meaning of the constitutional text at the time of the enactment, because this language identifies the governing concept. To do so, he will not look to technical or hidden meanings, such as legal conceptions or applications, of the words. Thus, owing to its acknowledgement that language is an imperfect vehicle for identifying the objective truth behind the words,[272] the conceptual approach relies on a rather superficial understanding of the text before turning to a different, limited set of interpretive tools in the construction phase. But in addition to accounting for language's shortcomings, it also acknowledges another inconvenient truth: it

268. U.S. CONST. pmbl.

269. *See generally id.* art. I.

270. *See* Andrei Mamor, *Textualism in Context* 4 (USC Gould School of Law, Legal Studies Research Paper Series No. 12-13, 2012), https://papers.ssrn.com/abstract=2112384 [https://perma.cc/Z3GN-JJAH].

271. *See supra* notes 236–40 and accompanying text.

272. LOCKE, *supra* note 42, bk. III, § 9, at 286; *see also* FEDERALIST NO. 37, at 229 (James Madison) (Clinton Rossiter ed., 1961) ("The use of words is to express ideas. . . . But no language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many equivocally denoting different ideas.").

reflects, and attempts to account for, the inevitable degree of political ignorance inherent in our system of democratic self-government.[273]

The vast majority of the ratifying public—those with legal authority to create the Constitution, at least according to the plain language of its Preamble—were not lawyers or legislators, and they lacked education or training on how to apply legal texts to specific cases and factual scenarios.[274] So, what does this mean for legal interpretation? As an empirical matter, it suggests strongly that the public who supported the Constitution viewed its provisions in a general sense rather than in terms of specific applications. For example, the average citizen in 1789 would understand the simple, general meaning of the words "freedom of the press"—in other words, that it protected the *idea* of a free press—but likely would be ignorant to particular conceptions of that freedom as they existed historically under English law.[275] Nor would most of those citizens have thought extensively about which conception would best further the concept they were enacting.

The conceptual approach's "thin" version of textualism incorporates this reality into the interpretive enterprise. It places ultimate primacy on the original meaning of the Constitution's words, but it does not hesitate to move from interpretation to construction when the text is underdeterminate. It does so because it treats the text the same way as the original public would—as identifying broad, abstract concepts that can only be further fleshed out in concrete cases by additional construction. It does *not* attempt to apply the Constitution's provisions by over-interpretation of the text to divine a narrow, historical conception of the rights enumerated. This is far more consistent with the notion that the People—rather than the People's lawyers or the People's representatives—created the Constitution and the underlying form of government it was written

273. For a detailed discussion of the problem of accounting for political ignorance in constitutional interpretation, see generally Somin, *supra* note 5. Somin examines contemporary evidence on political education and posits that "the public may well have been poorly informed about many constitutional issues at the time of ratification." *Id.* at 629. He therefore cautions that interpretive theories that rely on fidelity to original meaning "must take account of the problem of political ignorance." *Id.* at 628.

274. *See* Paulsen, *supra* note 239, at 875 ("Whoever 'We the People' is/are, these words plainly describe a public persona. The Constitution's meaning is not secret, the private province of some clandestine order, or accessible only to an elite class of high priests who serve as stewards of the document. The Constitution's words' meaning are their public meaning, not any hidden meaning. They are the publicly spoken words of the people."(emphasis omitted)).

275. *See* Somin, *supra* note 5, at 628.

to preserve.[276] This is so because it attempts to understand the words in the same way as the People would have understood them: as broad, generalized statements of principle.

Consider the converse. Given that the People who enacted the Constitution likely thought of the document as a broad statement of principle, eschewing the Constitution's overarching principles in favor of how *someone*—the Framers, jurists of the day, or some ill-defined segment of the population—thought it should apply in this case or that essentially treats the Constitution as a deceitful document.[277] Though its provisions bespeak objective criteria (stating that "due process of law" is required, rather than "the procedural protections thought to constitute due process of law under the laws of England on Wednesday the fourth of March, one thousand seven hundred and eighty nine"), a "conceptions" approach accepts as given that the words can never have intrinsic meaning, because they can never be considered according to objective criteria. They can only be examined according to subjective criteria, namely, the words *as applied* by whoever the interpreter deems to have the authority to make his view of what satisfies those criteria authoritative until amended.[278] Under this view, the "People's" Constitution can never really mean what *it says*.

276. *See* RANDY E. BARNETT, OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE 31–51 (2016) (discussing the Framers' view that a form of government vesting ultimate sovereignty in "We the People" would more effectively protect the populace's individual than would purely democratic or republican forms of government that vested ultimate authority in the legislature).

277. *See* Paulsen, *supra* note 239, at 873 ("What spare language there is in the Constitution all tends to reinforce the natural inference that the text's meaning is its objective, public, original meaning and that the Constitution does not invite, and indeed forbids, interpreters from assigning to its words secret, private, idiosyncratic, shifting meanings. Nor does it permit interpreters to derive or invent abstract principles from texts and substitute those principles for the words of the text."(emphasis omitted)).

278. *See* Note, *Textualism as Fair Notice*, 123 HARV. L. REV. 542, 558 (2009) ("[T]extualism looks to the plain text of the statute and asks whether the plain meaning of the text unambiguously resolves the case. If it does, then the textualist stops there and applies the text according to that clear meaning. For example, if a textualist were asked whether a statute stating that 'no dogs are allowed in the park' prohibits bringing a cat into the park, he would say clearly not. He would read the statute, which by its plain terms does not apply to cats, and stop there. Any reasonable person would do the same because the scope of the prohibition—though perhaps not clear as applied to all circumstances—is clear as applied to this circumstance. To read the term 'dogs' to include 'cats' would require the reader to move from the text itself to the potential purposes behind the prohibition, or perhaps into the realm of desirable policy. At that point, however, the reader's interpretation would no longer reflect the most widely shared and commonsense interpretation of the text. Rather, it would reflect the judgment of *that* particular reader. The same is true when a judge employs purpose or bald policy to stray from the text of a statute—he potentially subjects citizens to his own personal interpretation of the rule, rather than the most widely shared and reasonable interpretation."(footnote omitted)).

This is not the only empirical problem with relying on the original conceptions of a right. Doing so invites the ages-old, yet still-devastating criticism that there really isn't such thing as a singular "original" conception of a right.[279] Justice Scalia famously opined that the "original meaning" of the Constitution's provisions includes the "moral values" of the generation that ratified it.[280] But this conception of the text's "original meaning" is incredibly elusive. Consider the Equal Protection Clause. The linguistic meaning of the words "equal protection of the laws" is largely unchanged from its meaning in 1868. But looking beyond that linguistic meaning into how the "moral values" of the general public in 1868 would have dictated the result in a case today is an empirically impossible proposition. The nation was starkly divided in those days, having just emerged from the Civil War. Southern states were offered the Hobson's choice of either ratifying the Fourteenth Amendment or being denied readmission into the Union, the result of which would be military occupation and governance.[281] Not surprisingly, debate and discussion over the Fourteenth Amendment's meaning, or the "moral values" behind that meaning, was limited or non-existent in the records of many southern ratification proceedings.[282] So it is

279. *See, e.g.*, Brest, *supra* note 198, at 212–22 (eviscerating the proposition that accurately recovering original expected applications of the Constitution's provisions is a feasible exercise). Brest explains,

> The act of translation required [in attempting to divine original expected application] involves the counterfactual and imaginary act of projecting the adopters' concepts and attitudes into a future they probably could not have envisioned. When the interpreter engages in this sort of projection, she is in a fantasy world more of her own than of the adopters' making.

Id. at 221.

280. SCALIA, *supra* note 2, at 146 (emphasis added).

281. *See* JAMES EDWARD BOND, NO EASY WALK TO FREEDOM: RECONSTRUCTION AND THE RATIFICATION OF THE FOURTEENTH AMENDMENT 5 (1997).

282. *See* Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1, 37–38 (2011). Calabresi and Rickert observe:

> In reality, America's unusual post-Civil War political situation complicated state legislatures' discussions of the Fourteenth Amendment's propriety, meaning, and scope, and undoubtedly confused the public. The struggle between North and South, Republicans and Democrats, and federal and state authorities frequently dominated discussion of the Amendment, and in Southern legislatures, insidious prejudice and wounded pride sometimes led them to refuse to discuss the merits of the Amendment at all.
>
> Many of the states that did consider the Amendment at length did not record the debates in detail. For the most part, we are left with governors' addresses and committee reports, which sometimes and to some degree illustrate how the proposed amendment was understood. The bulk of objections to ratification rested on states-rights arguments, at least nominally. The indisputable fact

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likely safe to assume that the officials in the southern states' ratifying conventions—and, more importantly, the public they represented—possessed "moral values" that starkly opposed ratifying the clause at all, regardless of meaning. From their perspective, ratification was purely strategic.[283] By contrast, other ratifiers appeared to impute values far more liberal into the Equal Protection Clause, such that widely practiced customs in operation at the time of its enactment would be prohibited. In 1872, Charles Sumner, one of the Fourteenth Amendment's architects, decried the ubiquitous practice of segregation in the South:

> [It is] vain to argue that there is no denial of Equal Rights when this separation is enforced. The substitute is invariably an inferior article. . . . Separation implies one thing for a white person and another thing for a colored person; but equality is where all have the same alike.[284]

So, under an interpretive approach that purports to pay fidelity to "original public meaning," but in truth relies on original conceptions of the right, whose moral values, or conceptions, govern?[285]

By contrast, the conceptual approach tries to square the generality in the Constitution's most difficult provisions with the objective criteria those words suggest. It neither seeks out someone's

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> that the Fourteenth Amendment increased the power of Congress at the expense of the states gave pause even to some in the North. But the wildest pronouncements came from Southern anti-Amendment forces seeking to discourage ratification. They ranged from claims that the Amendment would give Congress plenary power over the states to warnings that Southern Democrats would be made permanently powerless. Governor Thomas Swann of Maryland explained that Section Five "may leave the Southern and Border States at the mercy of the majority in Congress, in all future time," which he found "subversive . . . of every principle of justice and equality among the States, and in times of high party excitement and sectional alienation, dangerous to the liberties of the people." Others in the South took a more practical view, recognizing that ratification of the Amendment was the only path back to representation in Congress: they argued for it solely on that ground.

Id. (footnotes omitted).

283. *See id.*

284. *Id.* at 42–43 (alterations in original) (quoting Sumner in CONG. GLOBE, 42d Cong., 2d Sess. 382–83 (1872)).

285. Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 68 (1994) ("Intent is empty. Peer inside the heads of legislators and you find a hodgepodge. Some strive to serve the public interest, but they disagree about where that lies. Some strive for re-election, catering to interest groups and contributors. Most do a little of each. And inside some heads you would find only fantasies challenging the disciples of Sigmund Freud. Intent is elusive for a natural person, fictive for a collective body. The different strands produce quite a playground—they give the judge discretion, but no 'meaning' that can be imputed to the legislature." (emphasis omitted) (footnote omitted)).

particular conception of "free exercise of religion" as the authoritative view of the matter, nor does it permit the judge to make his own views of what constitutes the "free exercise of religion" authoritative. Instead, it seeks out objective criteria: under the idea of government to which the people of America have bound themselves, is the challenged government action compatible or incompatible with the concept of the "free exercise of religion"? In doing so, it relies on that which the People enacted in both the "interpretation" and "construction" zones. In the interpretation zone, it obtains the original, commonsense linguistic meaning of the text, which is all that was ratified. Then, it shapes application of the concept identified by that text in accordance with the type and structure of government the people ratified. At every stage, then, the interpreter relies on applicational methodology derived directly from the exercise of democratic will.

2. Textual Fidelity as Commitment to the Rule of Law

The conceptual approach's commitment to the Constitution's text furthers the Rule of Law. The Rule of Law is a crucial ingredient in a legal system that accepts fairness as a core moral value and, accordingly, rejects arbitrary rule as morally unacceptable.[286] It requires, among other things, legal rules to be presented to the public with sufficient clarity to provide notice, and that those rules be applied in particular cases according to objective, neutral criteria.[287] This is because advance understanding of the content of law and how it will apply provides fair notice to a polity's citizens of their rights and duties under the law.[288]

286. *See* SMITH, *supra* note 6, at 79 ("[T]he rejection of arbitrary rule is central to the Rule of Law's appeal.").

287. *See, e.g.*, Friedrich A. Hayek, THE ROAD TO SERFDOM 72 (1944) (stating that the Rule of Law mandates "that government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances"); Robert S. Summers, *The Principles of the Rule of Law*, 74 NOTRE DAME L. REV. 1691, 1693–94 (1999) (listing, among the requirements of the Rule of Law, that "all forms of law be appropriately clear and determinate in meaning" and "that a form of law be interpreted or otherwise applied in accord with an appropriate, uniform (for that type of law), and determinate interpretive or other relevant applicational methodology, itself a methodology duly respectful of the expressional form and content of that type of law").

288. *See* Note, *Textualism as Fair Notice*, *supra* note 278, at 543 ("From the inception of Western culture, fair notice has been recognized as an essential element of the rule of law. Most importantly, the American Founders and the Enlightenment thinkers who influenced them viewed fair notice as a requirement for fairness, legitimacy, and social utility.").

Multiple scholars have advocated for textualism as the best method of interpretation for upholding the Rule of Law,[289] which is unsurprising given that textualism gives ultimate primacy to law's language, the most public interpretive cornerstone available. Textual fidelity in interpretation is simply an extension of the more fundamental principle that written law is essential to the Rule of Law. Smith explains that written laws represent "[b]edrock [l]egal [a]uthority."[290] She observes that a written constitution, "[w]hen properly made . . . translates the mission and moral commitments of a government into legal practice by using those commitments to establish the government's specific powers and the boundaries around those powers."[291] Without this fixed, *written* authority, says Professor Smith, the Rule of Law inevitably yields to the powerful coercive pressure of the rule of men, for "[l]aw's identity is pliable, in ceaseless flow, evolving in ways that widen, narrow, reverse, leap ahead, or veer off along extraneous, tangential paths."[292] Textualism is an extension of this principle: when law's *content* is anchored firmly to law's *language*, the citizenry can use law's language to reasonably predict its application, and can thus order its affairs in accordance with the legal framework.

Thus, unlike a common-law system or any other system that allows for ex post facto "evolution" of law by a means other than public amendment to the written law, a system of written laws furthers the Rule of Law by providing prospective notice of the legal system's structure and its basic requirements. But a written system cannot do this alone: without a firm anchoring of the law's content to the law's words, the Rule of Law must inevitably give way to retrospective, and thus arbitrary, changes in law's content according to evolving conceptions.[293]

The conceptual approach allows law's content to be anchored to law's language. As discussed, the approach is textualist at heart,

289. *See, e.g.*, *id.* at 558 ("Textualism's entire analytical framework is set up to reach the interpretation of the text that most accurately reflects how citizens would understand it."); Scalia, *supra* note 2, at 17 ("[I]t is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated. That seems to me one step worse than the trick the emperor Nero was said to engage in: posting edicts high up on the pillars, so that they could not easily be read.").

290. SMITH, *supra* note 6, at 112–13.

291. *Id.* at 113.

292. *Id.* at 124.

293. *See id.* at 167.

and nothing about conceptual interpretation would allow the linguistic meaning of constitutional provisions to change with time.[294] Indeed, the first step of the conceptual approach is to examine the linguistic meaning of the words employed at the time of enactment to identify the concept that the language originally identified, and to constrain application of the provision to that original concept.[295] This approach thus furthers the Rule of Law by anchoring law's content to law's language.

B. *Reason as the Rule of Law*

At this point, a critic might point out that we have only covered the easy part thus far. Surely, textual fidelity furthers the rule of law in the abstract, but the reams of paper written and gallons of ink spilled on trying to solve the problem of constitutional interpretation demonstrate that the Constitution's language makes textualism an incomplete solution at best. Put simply, the Constitution's text—namely, its broad, abstract language—got us here in the first place. But we should pause to reflect upon the considerable work we have already done.

With respect to Rule of Law considerations, we have, in fact, put considerable distance between the conceptual approach and other approaches. Many competing approaches that look to divine legislative or public intent, and many forms of living constitutionalism, cannot make an equal claim to furthering the principle of fair notice. To do so would be impossible, because all of those approaches give primacy to some subjective value over the objective meaning of the Constitution's words. For example, the pragmatic approach requires a policy analysis to determine which interpretation would provide the most social utility.[296] To that end, a pragmatist judge must necessarily choose a reading of the Constitution that he thinks will produce the best public outcome over one required by

294. *See supra* Part III.A.

295. *See* SMITH, *supra* note 6, at 166 ("[C]ontemporary interpreters must honor the same concept insofar as we may not substitute a different one (for example, by reading a law's reference to 'banks' to designate land bordering a body of water when the context makes clear that it was used to designate certain financial institutions, or reading a law's reference to 'gay behavior' to designate a lighthearted manner of action when the context clearly indicates its reference to homosexual activity).").

296. WILKINSON, *supra* note 265, at 82.

its language. Thus, we have shown already that the conceptual approach stakes out a normative claim much different from other, non-textualist approaches when it comes to the Rule of Law.

Versions of originalism that look to original meaning fare better in this regard, because they accept the fixation thesis and the corollary "[c]onstraint [p]rinciple," both of which bind the content of law to its original meaning.[297] But there is also marked distance between many "original meaning" approaches that still rely on original conceptions and the conceptual approach (which itself embraces a version of original meaning) because the conceptual approach furthers the Rule of Law in ways that those approaches cannot. Specifically, the conceptual approach makes reason, rather than historical inquiry, the heart of interpretive practice.

Recall that written law (which includes the corollary principle of textual fidelity) is only one ingredient to the Rule of Law. While textualism alone can provide fair notice in some cases, more is needed when the text being examined is abstract. Indeterminate phrases like "the free exercise of religion" bespeak indeterminate, open-ended moral and legal concepts, rather than fixed applications. So what other considerations, if any, can further the Rule of Law when the written law's language makes its application unclear?

In such a case, valid applicational methodology can mitigate lack of textual specificity. Robert Summers explains that to comport with the Rule of Law, "a form of law [must] be interpreted or otherwise applied in accord with an appropriate, uniform (for that type of law), and determinate interpretive or other relevant applicational methodology, itself a methodology duly respectful of the expressional form and content of that type of law."[298] In other words, "a well-formed methodology of statutory interpretation channels the exercise of reason into the construction and articulation of instances of those general types of arguments that are themselves authorized by the accepted general methodology of interpretation."[299] So when the meaning of law's words is unclear, the Rule of Law requires consistency and reason in the "construction

297. Solum, *supra* note 24, at 1 (emphasis omitted).
298. Summers, *supra* note 287, at 1694.
299. *Id.* at 1706.

zone."[300] Lawyers, and the citizens they represent, must clearly know the rules of the game.

By placing reason and logic at the center of the interpretive exercise, the conceptual approach our subjects employed provides such a valid applicational methodology. It requires the interpreter, who has identified the constitutional concept signaled by the text, to rigorously examine that concept's application under the system of government created by the Constitution. In doing so, it honors the Rule of Law's requirement of a valid, reliable applicational methodology, and it does so more effectively than approaches that depend upon divining original conceptions. This is so for multiple reasons. First, it rejects the often unreliable and easily manipulable methodology of performing extensive historical research to uncover the predominant conception of a provision that existed at the time of the Constitution's ratification. In contrast to those conceptions, which are deeply obscured by the mists of history (assuming they were ever ascertainable), the original structure of the government and the limits of its powers are self-evident from the face of the Constitution, and the theory of its moral authority is easily derivable from that structure via natural implication.[301] This means that the empirical pitfalls associated with researching historical conceptions are far more limited under the conceptual approach.

300. Lawrence Solum coined the term "construction zone" in this context. He explains it thusly:

> Irreducible ambiguity, vagueness, contradictions, and gaps create constitutional questions that cannot be resolved simply by giving direct effect to the rule of constitutional law that directly corresponds to the communicative content of the constitutional text. Such cases are underdetermined by the meaning of the text—they are in the construction zone.

Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 471 (2013).

301. *See* Bernick, *supra* note 154, at 562–63. Bernick explains:

> The American Constitution is not a treatise in political philosophy but a plan for constituting a particular government. Nonetheless, it is designed to implement a political philosophy and that political philosophy is evident in its design, content, and structure. The Constitution's preamble announces that it is designed to "secure the blessings of liberty"—not to grant them—and even the unamended 1787 Constitution contained a number of explicit safeguards for individual rights. The separation of legislative, executive, and judicial powers, the division of the national legislature into two houses, and the distribution of power between the federal government and the states, among other components of the Constitution's structure, serve to prevent any governmental entity from attacking individual rights unopposed.

Id. (footnotes omitted).

Far more importantly, however, logic and reason do not require specialized training or skills to evaluate. Assuming there is enough historical evidence to do the job effectively, an "original conceptions" approach relies on extensive research performed by specially trained historians and lawyers who have the time to dedicate to the task.[302] But logical reasoning is universal. A reasonably informed and intelligent citizen of any vocation who seeks to understand his rights under the Constitution and his government's consequent limitations can examine the structure it sets forth and apply critical thinking to predict how it will likely apply to particular circumstances. No legal training is necessary, nor is the time, training, and intense effort involved with sorting through centuries-old legal commentaries and corpora in an attempt to incorporate the Framers' or the original public's subjective conceptions of how the Constitution should apply. Moreover, the form of structural and moral reasoning demanded by the conceptual approach establishes the default assumption that the American system of laws is a coherent, harmoniously functioning system structured around protecting a central aim[303]—individual liberty. Such is a natural and fair assumption any reasonable citizen can make when trying to understand how the law will function in an area where the law's boundaries are unclear.[304]

Of course, this does not mean that the conceptual approach offers perfect fair notice. No method could: the Constitution's broad

302. WILKINSON, *supra* note 265, at 50–52.

303. *See, e.g.*, Neil MacCormick, *Coherence in Legal Justification*, *in* 176 THEORY OF LEGAL SCIENCE PROCEEDINGS OF THE CONFERENCE ON LEGAL THEORY AND PHILOSOPHY OF SCIENCE, LUND, SWEDEN, DECEMBER 11–14, 1983, at 235, 235 (Alexander Peczenik et al. eds., 1984) (explaining that "[c]oherence in reasoning is one important test of its soundness as reasoning," and that "[i]n the specific context of legal justification," coherence demands both "normative coherence" and "narrative coherence").

304. As Jeremy Waldron explains:

> [A] legal system is not just a succession of legislated norms . . . . [T]here is a felt requirement essential to law that its norms make some sort of sense in relation to one another . . . . This broader sense of the systematicity of law helps explain why we think of a body of law as consisting of not just legislation and decisions in particular cases, but also principles whose content reflects powerful themes that run implicitly through the whole body of law and that are reflected in various ways in its explicit norms.

Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 33–34 (2008); *see also* DWORKIN, *supra* note 8, at 165–66 (outlining the normative claim of "political integrity," which assumes that government functions in a morally principled and coherent manner); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 39–45 (1977) (explaining the importance of recognizing the principles underlying legal rules and incorporating them into legal adjudication such that legal decisions comport with those principles).

language and the elusive nature of the rights it protects forecloses that possibility. A conceptual inquiry based on logical reasoning will not always be an easy or infallible one,[305] but it does offer a more accessible method that respects the straightforward linguistic meaning of the Constitution's words, the type of government it created, its moral authority, and the universality of human reasoning. This applicational methodology is far more accessible to the governed than one premised on specialized historical research or unbridled judicial policymaking.

To recapitulate, by tethering the Constitution's legal content to the commonsense meaning of its words, and then requiring the use of logical reasoning based on readily available criteria, the conceptual approach offers a coherent applicational methodology that furthers the Rule of Law.

C. *Escaping the Intentionality Trap*

Finally, our subjects' conceptual view of the Constitution offers a way to avoid falling into what I term the "intentionality trap." This trap springs open when an interpreter who rejects as unworkable theories of interpretation that seek intent (legislative or public) in favor of seeking meaning overleverages his understanding of a law's "meaning" to the point that the interpretive inquiry slides back into intentionalism. Doing so undermines his entire approach, because he ultimately ends up giving primacy to the subjective intent of someone, rather than the objective meaning of the law that the text commands. A common understanding of the word "meaning" is the existent or existents a given word signifies. This is linguistic meaning. But in law, this linguistic meaning is oftentimes too imprecise to completely identify and distinguish its distinguishing characteristics, such that it cannot prescribe the applicational criteria for deciding particular cases.[306] At this point, the interpreter has a critical choice to make: he must either conduct an

305. *See* SMITH, *supra* note 6, at 40–41 ("An assertion of a claim's objectivity is not a profession of infallibility about that claim. Remember that objectivity is context relative and much of the relevant context is a person's other knowledge at a given time.").

306. *See* Randy E. Barnett, *The Gravitational Force of Originalism*, 82 FORDHAM L. REV. 411, 419 (2013) ("With respect to vagueness, however, the original meaning of the text can run out—by which I mean, the text simply does not specify whether a particular item is in or out—for example, whether a particular search is 'reasonable' or a particular punishment is 'cruel.'").

objective inquiry into the nature of the referents identified by the language or make a moral value choice to give primacy to the speaker's subjective opinions as to what those referents are. It is clear at this juncture that the interpreter has pivoted from seeking "meaning" to seeking applicational guidance. Moreover, if he chooses the latter approach, he has entered the territory of intentionalism.

In legal discourse, however, we use the term "meaning" to describe both of these divergent exercises.[307] The conceptual approach treats "meaning" as the linguistic meaning of a word or phrase at the time and in the context in which it is uttered. It then acknowledges a moral value choice that must be made to actuate that meaning in legal practice, but it defers to the value choice that flows naturally from the Constitution—that which was *ratified*. But others insist that "meaning" can do much more. Take for example a certain type of originalist who espouses a "thick" conception of "meaning." In this originalist's view, the "meaning" of a constitutional provision incorporates the contemporary linguistic meaning of its words, its historical context, *and* rules of application derived from political understandings of the time.[308]

For example, suppose an interpreter of this school is tasked with finding the original meaning of "due process of law" and applying

307. Richard Fallon has demonstrated this problem powerfully in a recent article. *See generally* Richard H. Fallon Jr., *The Meaning of Legal "Meaning" and Its Implications for Theories of Legal Interpretation*, 82 U. CHI. L. REV. 1235 (2015). Fallon explains,

> [I]n claiming what a statutory or constitutional provision means, judges, lawyers, and scholars often invoke or refer to what I characterize as its literal or semantic meaning, its contextual meaning as framed by the shared presuppositions of speakers and listeners, its real conceptual meaning, its intended meaning, its reasonable meaning, or its previously interpreted meaning. Among the foremost challenges for legal interpretation is to determine which of these possible senses constitutes legal meaning, either categorically or in a particular instance.

Id. at 1239.

308. John McGinnis and Michael Rappaport espouse this thick view of "meaning." They contend:

> Under an original public meaning analysis that focuses on how a reasonable, well-informed reader would understand the language of a clause, language is ordinarily, if not always, reasonably understood as having a single meaning. In some cases, this language will have a clear meaning. In other cases, it may be ambiguous or vague, but there are various tools in the interpretive rules, such as history, structure, and purpose, that can be employed to resolve uncertainty as to the single meaning of a provision. Thus, there is little reason to believe that there will be two meanings to a provision that cannot be resolved.

McGinnis & Rappaport, *supra* note 10, at 751–52 (footnotes omitted).

it to a case. He will begin by examining the linguistic meaning of the words. Indeed, this is how proponents of "original public meaning" originalism describe their approach. For example, Justice Scalia, perhaps the most prominent proponent of original public meaning, stated:

> The theory of originalism treats a constitution like a statute, and gives it the meaning that its words were understood to bear at the time they were promulgated. You will sometimes hear it described as the theory of original intent. You will never hear me refer to original intent, because as I say I am first of all a textualist, and secondly an originalist. If you are a textualist, you don't care about the intent, and I don't care if the framers of the Constitution had some secret meaning in mind when they adopted its words. I take the words as they were promulgated to the people of the United States, and what is the fairly understood meaning of those words.[309]

Fair enough, but a member of Scalia's interpretive school would not stop there. Assume at this stage he concludes that the phrase "due process of law" linguistically meant the same thing it means today: fair and appropriate adjudicatory procedures. Next, the interpreter will conduct a historical inquiry in search of applicational criteria. Speaking on whether the death penalty could fall within the Constitution's prohibition of "cruel and unusual punishments," Judge Scalia stated:

> The Americans of 1791 surely thought that what was cruel was cruel, regardless of what a more brutal future generation might think about it. *They were embedding in the Bill of Rights their moral values*, for otherwise all its general and abstract guarantees could be brought to nought. Thus, provision for the death penalty in a Constitution that sets forth the moral principle of "no cruel punishments" is conclusive evidence that the death penalty is not (in the moral view of the Constitution) cruel.[310]

So in Scalia's view, "meaning" embraces both linguistic comprehension and the founding-era public's moral judgments. Thus, the interpreter must examine past usage of the terms to learn about what types of procedures the ratifying public would have understood to constitute fair and appropriate adjudicatory procedures, or, as Justice Scalia would term it, what their "moral values" were

309. Justice Antonin Scalia, A Theory of Constitution Interpretation, Remarks at The Catholic University of America (Oct. 18, 1996), http://web.archive.org/web/19980119172058/www.courttv.com/library/rights/scalia.html [https://perma.cc/2EHS-Z5GP].

310. SCALIA, *supra* note 2, at 146 (emphasis added).

concerning due process. Once he has done so, he has found his applicational criteria: the words "due process of law" really "mean" something like "the adjudicatory procedures thought fair and appropriate in eighteenth-century society."

The problem with this practice for our hypothetical "meaning" seeker is that he has leaned too far into his conception of "original meaning," such that he has obscured to himself the interpretive choice he has made. It is true that examining historical usage of a term might well be needed to identify the linguistic meaning of a word or phrase (indeed, an interpreter using the conceptual approach might need to examine historical usage as part of the first step of his interpretive inquiry—for example, "domestic violence" had a different linguistic meaning in 1789 than it does today, and identifying the correct concept is the first step in objective interpretation). However, when the linguistic meaning of a word is reasonably clear, poring over usage and past legal understandings of the statutory terminology or other historical evidence to understand which objects the original public would have associated with the textual referents is simply shoehorning intentionalism into the "meaning" inquiry. This is because the interpreter's use of this evidence has opened the door to original *conceptions*—that is, what the founding generation *thought* the concept behind the language embraced. This is just picking up intent and dropping it into a different place. Thus, the "original meaning" method we have just described is just as much an intentionalist method as the other methods it decries. And it is not textualist, either, because the fair import of the Constitution's language does not govern. At the end of the day, the interpretive perils that drove him to eschew intentionalism in favor of the "original meaning" approach have crept back in as a result of his choice of original conceptions over original concepts. This is the inescapable intentionality trap inherent in relying on overly thick conceptions of "meaning."

By contrast, the conceptual approach relies on the constitutional structure and the moral authority readily inferable from that structure, the only objective criteria with which to construct the Constitution's provisions. These criteria do not represent moral conceptions; rather, they are derived through reasoning from the law itself, as ratified. Our conceptual interpreters treated the value choices as having already been made by the People in their choice of government and the limits they placed upon it. By doing

so, they ensured that they remained objective throughout their interpretive endeavors, including both their initial inquiries into "meaning" and their subsequent developments of constructions in particular cases.

Justice Cushing's construction of the "liberty of the press" clause in the Massachusetts Constitution of 1780 demonstrates this. Employing his characteristic textualism, he observed that the words "liberty of the press" were "very general and unlimited."[311] In light of that broad text, he asked his friend John Adams, "what guard or limitation can be put upon it?"[312] Thus, Justice Cushing had little trouble divining the clause's linguistic meaning, but recognized the difficulty in applying it. At this point, his inquiry shifted from the empirical to the logical. He examined the government of Massachusetts and compared it to that of England, in which truth was not a defense to a libel indictment (in other words, "liberty of the press" in England only protected the media from prior restraint).[313] But given that the Constitution of 1780 derived its moral authority from its protection of liberty and its structure was designed to protect that moral authority, he found the criminal libel law's stated purpose of protecting public order and preventing revolution repugnant to those criteria:

> The propagating literature & knowledge by printing or otherwise, tends to illuminate mens [sic] minds, & to establish them in principles of liberty. But it cannot be denied also—that a Free scanning the conduct of administration, & shewing the tendency of it, & where truth will warrant, making it manifest, that it is subversive of all law, liberty & the constitution; it cannot be denied, I think, that this liberty tends "*to the Security of Freedom in a State*;" even more directly & essentially, than the liberty of printing upon literary & speculative subjects in general. Without this liberty of the press, could we have supported our liberties against british administration? Or could our revolution have taken place? Pretty certain, it could not at the time it did. Under a sense & impression of this Sort I conceive this article, was adopted.[314]

Thus, notwithstanding the conception of press freedom that existed in England and the colonies at the time the Constitution of 1780 was enacted (and which used the same identical words to

311. Letter from William Cushing to John Adams, *supra* note 14.
312. *Id.*
313. *See id.*
314. *Id.* (emphasis added).

identify that conception at common law), the criminal libel law offended the concept of a free press, insofar as that concept operated in the colonies. Cushing's use of historical evidence here is much different from those who read "meaning" to include original conceptions. He used examples from American history to support his logic-driven conclusion that "liberty of the press" must be broader under the Massachusetts Constitution than under the laws of Britain, not to support a history-driven conclusion that the Framers or the ratifying public would have *thought* that it must be.

Thus, like Madison and the other conceptualists we have identified, Justice Cushing moved from interpretation to construction without sliding into the intentionality trap. He certainly inquired into the original linguistic meaning of the words, but quickly concluded that the meaning was "very general and unlimited"[315] and thus turned to a more nuanced analysis of the concept behind the language, using the readily available structure and moral authority inherent in the government the Massachusetts Constitution created. He did not inject his own moral values into the question, and he did not embark on a historical inquiry into subjective understandings or "moral values" of those who ratified the language. The result was a construction that paid fidelity to both the original meaning of the language *and* the underlying principles behind the provision, not one that relied on the ratifying public's anticipated construction of the provision at issue, the inevitable result of which would have been a forced, under fixed construction that failed to accommodate the actual words used.[316]

CONCLUSION

Suppose in 1780 a copy of Massachusetts' newly minted constitution made its way onto the Jennison farm, and Quock Walker got his hands on it. He flipped it open to give it a glance and happened to notice Article I: "All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties." What would his reaction have been? Would this language

315. *Id.*

316. Sure, the strictest construction of "liberty of the press" could be read to prohibit the publication of falsehoods, but this strict construction was, in Cushing's view, not a *reasonable* one, any more than a strict reading of "keep and bear arms" could be reasonably read to embrace carrying around a severed limb. *See id.*

have triggered in his mind a historical question about freedom and equality under English law? Or would those words have caused him to reflect upon the moral values of those who put those words into law? Most likely, he would have done neither. Instead, he would have done what most of us do when reading abstract moral language: he would have assigned the terms their natural linguistic meaning. This was the language of freedom, and it communicated the *idea* of freedom. Then, he naturally would have reflected upon his own situation. His was not a "free and equal" existence, but the law *said* otherwise. What's more, further reading would have shown that the document in his hands created a government built upon, and deriving its moral authority from, individual liberty.[317] He thus could not have reasonably concluded that his situation was lawful. He didn't, because he dared to bring his lawsuit. He won his freedom because Justice Cushing's instruction to the jury accorded with both the Constitution's words and, more importantly, the concept of freedom and equality that lay beneath those words.

This assumed scenario is more than "armchair speculation;"[318] it is a reasonable conclusion from the historical record and from common logic. So, too is the conclusion that our interpreters used the conceptual approach. Though they might not have employed modern scholarly terminology, they clearly saw the constitutional language as giving force to more than just the framers' or the ratifiers' subjective expectations, or to technical legal doctrines. They saw it as recognizing, and protecting, the idea of liberty. Perhaps we can learn something from their approach.

317. Time and again, the Massachusetts Constitution of 1780 refers to its various protections as crucial to the protection of liberty. *See, e.g.*, MASS. CONST. OF 1780, art. XIII ("In criminal prosecutions, the verification of facts in the vicinity where they happen, is one of the greatest securities of the life, liberty, and property of the citizen."); *id.* art. XVI ("The liberty of the press is essential to the security of freedom in a state; it ought not, therefore, to be restrained in this commonwealth."); *id.* art. XVIII ("A frequent recurrence to the fundamental principles of the constitution . . . [is] absolutely necessary to preserve the advantages of liberty and to maintain a free government. The people ought, consequently, to have a particular attention to all those principles, in the choice of their officers and representatives . . . .").

318. *See* Solum, *supra* note 24, at 47–55.