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An Essay on Constitutional Language

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ARTICLES

AN ESSAY ON CONSTITUTIONAL LANGUAGE

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Many contemporary constitutional scholars have explored the extent to which, if at all, judges should go "outside of" or "beyond" the constitutional text for decisional principles in constitutional cases.[1] Although the resulting discussions have been highly illuminating, I do not wish to deal directly with this controversy here. Rather, I propose to discuss what is logically a prior question. For before we can argue intelligently about whether to go outside of the text, we ought to explore the meaning of the words *inside* the text. Only then will we know what counts as going "outside," and until then, it is not clear that there even is an outside because "inside" and "outside" are relative terms.

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1. The contemporary jargon draws a distinction between "interpretivism" and "noninterpretivism," but this is merely one characterization of an issue that predates the current labels. *See generally* J.H. ELY, DEMOCRACY AND DISTRUST 1-14 (1980); Brest, *The Misconceived Quest for the Original Understanding,* 60 B.U.L. REV. 204 (1980); Grey, *Do We Have an Unwritten Constitution?,* 27 STAN. L. REV. 703 (1975) [hereinafter cited as Grey, *Unwritten Constitution*]; Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought,* 30 STAN. L. REV. 843 (1978) [hereinafter cited as Grey, *Origins*]; Linde, *Judges, Critics and the Realist Tradition,* 82 YALE L.J. 227 (1972); Monaghan, *Of "Liberty" and "Property,"* 62 CORNELL L. REV. 405 (1977); Monaghan, *The Constitution Goes to Harvard,* 13 HARV. C.R.-C.L. L. REV. 117 (1978) [hereinafter cited as Monaghan, *The Constitution*]; Perry, *Substantive Due Process Revisited: Reflections on (and Beyond) Recent Cases,* 71 NW. U.L. REV. 417 (1976); Richards, *Human Rights as the Unwritten Constitution: The Problem of Change and Stability in Constitutional Interpretation,* 4 U. DAYTON L. REV. 295 (1979); *Constitutional Adjudication and Democratic Theory,* 56 N.Y.U. L. REV. 259 (1981); *Judicial Review versus Democracy,* 42 OHIO ST. L.J. 1 (1981).

We assume, perhaps too easily, that the language of the Constitution is neither the source of, nor the answer to, our problems, and we then head off into the forbidding jungles of history, political theory, moral philosophy, public policy, and what have you without any clear guide. An examination of the words in the Constitution has been merely the hors d'oeuvre, with high theory as the main course.

There is nothing unseemly about high theory in this sense. Nevertheless, we need to look at the words of the Constitution *as language,* and we need to examine closely some of our rarely questioned presuppositions about constitutional language. Although this examination logically is prior to any broader interpretation of the Constitution, it has received surprisingly little concentrated attention in the literature.[2]

Constitutional cogniscenti talk about "gaps," "great silences," "vague language," and "open texture" as if these were concepts of little controversy.[3] But what makes the requirement that the President be of "the Age of thirty five Years" specific and the requirement of "equal protection of the laws" vague? Why are there "loopholes" in the Internal Revenue Code, but not in the Constitution? In order to understand and to attempt to answer questions like these, we need a theory of constitutional language as much as we need theories of constitutional law.

The Constitution is, after all, a writing,[4] and at bottom we are

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2. One notable exception is Munzer & Nickel, *Does the Constitution Mean What it Always Meant?,* 77 COLUM. L. REV. 1029 (1977). *See also* Alexander, *Modern Equal Protection Theories: A Metatheoretical Taxonomy and Critique,* 42 OHIO ST. L.J. 3, 4-16 (1981); Smith, *Rights, Right Answers, and the Constructive Model of Morality,* 5 SOC. THEORY AND PRAC. 409, 421-25 (1980). Philosophy is at the moment having a good run in the constitutional arena, but, with few exceptions, it is moral philosophy rather than the philosophy of language that is taken to be the most useful for constitional inquiries. Given that we have a *written* constitution, this lack of attention from the perspective of the philosophy of language seems a bit surprising. Although not directed specifically towards constitutional interpretation, there has been some recent attention to legal language from a philosophical perspective. Moore, *The Semantics of Judging,* 54 S. CAL. L. REV. 151 (1981); Stone, *From a Language Perspective,* 90 YALE L.J. 1149 (1981).

3. In addition to the works cited *supra* note 1, see L. TRIBE, AMERICAN CONSTITUTIONAL LAW at iii (1978) ("[T]he Constitution is an intentionally incomplete, often deliberately indeterminate structure for the participatory evolution of political ideals and governmental practices."); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 2 (Supp. 1979) ("open-textured" provisions such as "equal protection" and "due process"; use of "broad terminology" in the Constitution). *See also* Baker v. Carr, 369 U.S. 186, 242 (1962) (Douglas, J., concurring) ("large gaps in the Constitution"); H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 535 (1949) (Jackson, J.) ("great silences of the Constitution"); Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 413 (1946) ("great constitutional gaps").

4. Although it illustrates the focus both of this inquiry and of my conclusions, the phrase in the text is, at this stage, question-begging. For even if we note that the Constitution is written, what does this say about the constitution? This question can

interpreting the *words* of a written document. But how do we do this? What does it mean to "interpret" a constitutional provision? What do we mean when we say that a constitutional provision "means" something? How do we start such an analysis? These are hard and important questions, and we should not dismiss them as irrelevant philosophical speculation. Indeed, answers to these questions underlie any theory of constitutional adjudication, and this Essay attempts to bring some of these answers to the surface for closer inspection.

My intention here is not to offer a completely mature theory of constitutional language. Rather, I wish to explore the way in which the conventions of language affect constitutional theory. At the end of this Essay, I conclude that constitutional language acts as a significant restraint on constitutional decision, but I will not have developed a complete theory of constitutional language which directs any particular substantive outcomes. A complete theory will have to wait for another time.

I. ON THE SUPPOSED UNIQUENESS OF CONSTITUTIONAL LANGUAGE

In his pioneering work on legal language, H.L.A. Hart argued that legal language is fundamentally different from ordinary language.[5] According to Hart, if one fails to recognize the unique context and the distinct presuppositions of legal discourse, then one commits the errors of formalism or conceptualism—giving to words in the abstract an aura of authority and of unique reference inconsistent with the view of language as an activity determined and governed by social rules.[6] If, as Hart and his philosophical

be expressed in terms of how much of the constitution is contained or captured in the (written) Constitution. It is this question that this essay is intended to address. Positing the question in this way suggests the Continental distinction between a material constitution and a formal constitution. *See* H. KELSEN, THE PURE THEORY OF LAW 222-24 (M. Knight trans. 2d ed. 1967).

5. Hart's original foray into the field was *The Ascription of Responsibility and Rights,* in LOGIC AND LANGUAGE (First Series) 145-66 (A. Flew ed. 1955). Hart's later repudiation of this strictly performative view of legal language (H.L.A. HART, PUNISHMENT AND RESPONSIBILITY v (1968)) was the result of the more complex, presupposition-oriented theory first put forth in Hart, *Definition and Theory in Jurisprudence,* 70 LAW Q. REV. 37 (1954) [hereinafter cited as Hart, *Definition and Theory*], and embellished in H.L.A. HART, THE CONCEPT OF LAW 13-17 (1961). *See also* Cohen, *Theory and Definition in Jurisprudence,* 29 PROC. ARISTOTELIAN SOC. (SUPP.) 213 (1955); Hart, *Theory and Definition in Jurisprudence,* 29 PROC. ARISTOTELIAN SOC. (SUPP.) 239 (1955). *See generally* N. MACCORMICK, H.L.A. HART (1981); Hacker, *Hart's Philosophy of Law*, and Baker, *Defeasibility and Meaning*, in LAW, MORALITY, AND SOCIETY: ESSAYS IN HONOUR OF H.L.A. HART 1, 26 (P. Hacker & J. Raz eds. 1977).

6. *See* H.L.A. HART, *supra* note 5, at 126-27; Sartorius, *Hart's Concept of Law,* in MORE ESSAYS IN LEGAL PHILOSOPHY 131-61 (R. Summers ed. 1971). *See also* G.

contemporaries supposed, meaning is use,[7] then legal use ought to produce different meanings than a physicist's use, a sociologist's use, or the use of the man on the Clapham omnibus.[8] And, just as legal language is different in kind from ordinary language, constitutional language may be different from other legal language.[9] In fact, this hypothesis implicitly undergirds many different theories of constitutional interpretation.[10] The various theories of a "living" or "changeable" constitution each presuppose a view of the uniqueness of constitutional language, setting it off from the linguistic raw material with which lawyers normally deal.[11]

GOTTLIEB, THE LOGIC OF CHOICE 48 (1968); Hart, *Problems of Philosophy of Law,* in 6 ENCYCLOPEDIA PHIL. 266, 270 (P. Edwards ed. 1967); Stone, *Ratiocination Not Rationalisation,* 74 MIND 463 (1965).

7. *See* L. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS §§ 30, 43, 120, 138, 340, 532 (G. Anscombe trans. 1958). Although Wittgenstein was the guiding light of the "meaning is use" approach, that approach was in fact the standard under which most of Anglo-American philosophy operated in the 1950s and 1960s. *See, e.g.,* J. AUSTIN, HOW TO DO THINGS WITH WORDS (J.O. Urmson & M. Sbisa 2d ed. 1975) [hereinafter cited as J. AUSTIN, WORDS]; J. AUSTIN, PHILOSOPHICAL STUDIES (3d ed. 1979); Grice, *Meaning,* 66 PHIL. REV. 377 (1957); Strawson, *Propositions, Concepts, and Logical Truth,* 7 PHIL. Q. 15 (1957).

8. The man on the Clapham omnibus is most frequently taken to be the prototypical reasonable man for purposes of tort law, *see, e.g.,* Bolam v. Friern Hospital Management Committee, 1 W.L.R. 582, 586-87 (Q.B. 1957), but he is also the ordinary speaker of ordinary English. *See, e.g.,* Woodhouse A.C. Israel Cocoa Ltd. S.A. v. Nigerian Produce Marketing Co., 2 Q.B. 23, 63 (C.A. 1971). Although we need not recount Hart's arguments, those arguments do suggest that constitutional language may possess a uniqueness of its own. For summary and critique, see N. MACCORMICK, *supra* note 5; Baker, *supra* note 5; Hacker, *supra* note 5. *See also* Shuman, *Jurisprudence and the Analysis of Fundamental Legal Terms,* 8 J. LEGAL EDUC. 437 (1956).

9. "[I]t was by no means self-evident in 1789 that judges should use the same techniques in the construction of constitutional provisions as in the interpretation of ordinary statutory and decisional sources." H. Jones, *The Common Law in the United States: English Themes and American Variations,* in POLITICAL SEPARATION AND LEGAL CONTINUITY 134 (1976). *See also* Bridwell, Book Review, 1978 DUKE L.J. 907, 914-15 (reviewing R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977)).

10. Thus, when John Marshall observed that "we must never forget that it is a *constitution* we are expounding," McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819), he was adopting the thesis discussed in the text, although *McCulloch* is significantly obscure in that Marshall did not explain in what way constitutional interpretation was unique. *See* Frankfurter, *John Marshall and the Judicial Function,* 69 HARV. L. REV. 217 (1955). For a sampling of the various theories that embody this view in one way or other, see C. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969); C. MILLER, THE SUPREME COURT AND THE USES OF HISTORY (1969); Llewellyn, *The Constitution as an Institution,* 34 COLUM. L. REV. 1 (1934); Murphy, *The Art of Constitutional Interpretation: A Preliminary Showing,* in ESSAYS ON THE CONSTITUTION OF THE UNITED STATES 130 (M. Harmon ed. 1978).

11. *See, e.g.,* R. DWORKIN, TAKING RIGHTS SERIOUSLY 131-49 (1980); H. MCBAIN, THE LIVING CONSTITUTION (1927); Brest, *supra* note 1; Grey, *supra* note 1; Munzer & Nickel, *supra* note 2; Perry, *supra* note 1; Miller, *Notes on the Concept of the "Living" Constitution,* 31 GEO. WASH. L. REV. 881 (1963); Reich, *The Living Constitution and the Court's Role,* in HUGO BLACK AND THE SUPREME COURT 133 (S. Strick-

There *seem* to be readily apparent differences between constitutional language and other legal language. Grandiloquent phrases like "freedom of speech," "equal protection of the laws," "due process of law," and "privileges and immunities of citizens of the United States" have few counterparts in the Internal Revenue Code or the Public Utility Holding Company Act of 1935. Indeed, many constitutional provisions are more than merely indeterminate. They have a powerful emotive component. The Constitution is more an eloquently written manifesto[12] than it is a code, and in many ways we are much better for that. But the eloquence and emotive force of the document further reinforce the view that the Constitution's words are as different as they are special. To construe its language too literally or too much like the language in a conventional statute would be both unrealistic and inconsistent with its deeper purposes. In some ways, the Constitution is a metaphor.[13]

Not unrelated to the Constitution's metaphorical quality is its permanence. Statutes are frequently amended, and the common law is continually changing, but the Constitution has a special sort of durability. Not only is amending the Constitution extremely difficult, but we also seem remarkably averse to doing so.[14] Many

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land ed. 1967); Richards, *supra* note 1. *Contra* Rehnquist, *The Notion of a Living Constitution,* 54 TEX. L. REV. 693 (1976). In terms of a theory of meaning, some of the foregoing theses could be said to assume that the meaning of constitutional provisions changes over time, while others would hold that the meaning remains the same while the applications change. Exploring that distinction at this point would serve little purpose, because it and related issues are the focus of the balance of this Essay.

12. In this sense, the Constitution combines both argument and aspiration with a statement of existing principles, not unlike Joel Feinberg's "manifesto sense" of a right. J. FEINBERG, SOCIAL PHILOSOPHY 67 (1973). I derive some support for this view from the similarity between the largely enforceable American Constitution and the many largely unenforceable international treaties, declarations, and conventions dealing with human rights. Learned Hand, of course, treated this manifesto sense as virtually the *sole* function of some constitutional provisions. L. HAND, THE BILL OF RIGHTS 33-34 (1958).

13. One of the purposes of a metaphor is to get us to think in different ways, to block intentionally some of our routine thought processes. *See, e.g.,* I. HUNGERLAND, POETIC DISCOURSE 127 (1958); Black, *Metaphor,* in MODELS AND METAPHORS 25 (1962). It seems to me quite likely that this process is at least one of the implicit purposes of the Constitution, but proving that hypothesis is beyond the purview of this Essay.

14. Fear of the possible results of judicial interpretation may explain a large part of this aversion. It has been 114 years since any very broad language was added to the Constitution (the ratification of the fourteenth amendment), and the rough road travelled by both the Equal Rights Amendment and the various proposed "right to life" amendments suggests that we may never again add a constitutional provision of similar openness. Quite possibly, it is only a fortunate historical accident that aggressive judicial review arose only after the enactment of those constitutional provisions which now occupy most of the Supreme Court's time. Perhaps such active review has, for all practical purposes, foreclosed the possibility of ever again achieving the consensus necessary to add similar provisions to the Constitution.

have feared a constitutional convention because too much might be changed,[15] even though such changes would still require ratification by the states. On the other hand, we certainly do not suspend Congress or the state legislatures for fear that they might legislate too much—however appealing that suggestion may at times seem.

Despite these important differences, we would be mistaken to view constitutional language as a wholly unique creature. The seemingly intentional openness of many constitutional terms, upon which most of the supposition about the uniqueness of constitutional language is based,[16] has counterparts in other areas of law, especially in American law. The generality of "equal protection of the laws" or "the freedom of speech" differs little from the language in Rule 10b-5 of the Securities and Exchange Commission, which prohibits the employment of "any device, scheme, or artifice to defraud."[17] Likewise, the fourth amendment's prohibition of "unreasonable" searches and seizures provides no more guidance than the Sherman Act's ban on "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce . . . ."[18] As a result, the task of the courts in putting flesh on the skeleton of the Constitution is not wholly different from the task that courts have undertaken in developing the elaborate structure of tests, rules, and standards that surround and govern the application of the securities laws, the antitrust laws, and many other statutory schemes.[19]

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15. *See generally* Dellinger, *The Recurring Question of the "Limited" Constitutional Convention,* 88 YALE L.J. 1623 (1979); Dellinger, *Who Controls a Constitutional Convention?—A Response,* 1979 DUKE L.J. 999; Fordham, *Some Observations Upon Uneasy American Federalism,* 58 N.C.L. REV. 289 (1980); Gunther, *The Convention Method of Amending the United States Constitution,* 14 GA. L. REV. 1 (1979); Tribe, *Issues Raised By Requesting Congress to Call a Constitutional Convention to Propose a Balanced Budget Amendment,* 10 PAC. L.J. 627 (1979); Van Alstyne, *Does Article V Restrict the States to Calling Unlimited Conventions Only?—A Letter to a Colleague,* 1978 DUKE L.J. 1295; Van Alstyne, *The Limited Constitutional Convention—The Recurring Answer,* 1979 DUKE L.J. 985; Note, *Good Intentions, New Inventions, and Article V Constitutional Conventions,* 58 TEX. L. REV. 131 (1979). The implicit theme of most of the recent literature, whieh has attracted an all-star lineup of constitutional scholars, is that an unlimited convention is fraught with danger.

16. *See supra* note 3. A pervasive problem in attempting to generalize about constitutional language is that constitutional language is hardly uniform in degree of generality, in purpose, or in historical origin. This recognition of the diversity of constitutional language is most prominently associated with Justice Frankfurter. *See, e.g.,* Malinski v. New York, 324 U.S. 401, 414-15 (1945). *See generally* H. THOMAS, FELIX FRANKFURTER: SCHOLAR ON THE BENCH 127-47 (1960).

17. 17 C.F.R. § 240.10b-5(a) (1981).

18. 15 U.S.C. § 1 (1976).

19. Note, for example, the intermingling of examples from both constitutional and statutory interpretation in E. LEVI, AN INTRODUCTION TO LEGAL REASONING (1949).

If the openness of constitutional language does not provide its uniqueness, perhaps the notion of presupposition,[20] which undergirds Hart's argument in "Definition and Theory in Jurisprudence,"[21] can explain the uniqueness. Statements of law, or *in* law (as opposed to statements *about* law), presuppose the existence of a legal system, and particular statements of legal rules themselves contain presuppositions.[22] Thus, the statement "the corporation is liable in damages" presupposes a body of law creating and defining a "corporation." But presupposition is hardly unique to law. When we use "home run" or "small slam," we presuppose the systems of baseball and bridge, respectively, and when we use "professor" or "hour examination," we similarly presuppose the existence of a college or university, which is in turn defined by a (probably looser) set of constitutive rules.[23] Legal language is not special because it contains presuppositions, but rather because it alone contains presuppositions which relate to the existence of a legal system.

In this sense, then, constitutional language is unique because it, and no other language, presupposes the existence of a constitution, and incorporates those particular presuppositions which concern the role of a constitution in a given legal system. But this is not going to get us very far, because the presuppositions of constitutionalism are themselves both vague and contested. Unlike the specific terms of a general legal system, which, to some extent, relate to relatively uncontroversial presuppositions about the way the legal system operates, the terms of a constitution *themselves* determine the differences between the constitutional presuppositions and other legal presuppositions. Therefore, an initial search for constitutional uniqueness reduces itself to circularity because the presuppositions of a constitutional system are dependent on our view of the language of a constitution. Perhaps constitutional language *is* unique. But we cannot articulate the differences which make it unique simply by examining the presuppositions of constitutionalism. Rather, we must examine the *language* in order to discover the differences between the presuppositions embedded

20. "When did you stop beating your wife?" contains a prototypical presupposition in that it presupposes, but does not assert, that you have a wife and that you have beaten her. Presuppositions are not asserted to be true or false, but undergird the thought and language of people. *See also* J. AUSTIN, WORDS, *supra* note 7, at 48-52; J. SEARLE, SPEECH ACTS (1969). *See generally* Strawson, *On Referring,* 59 MIND 320 (1950).

21. Hart, *Definition and Theory*, *supra* note 5, at 37. *See supra* note 5.

22. This notion is embodied in Hart's theory of the "internal" point of view. H.L.A. HART, *supra* note 5, at 54-60, 84-88, 97-107, 138-44.

23. *See* J. SEARLE, *supra* note 20, at 33-42, 184-87. *See also* Harris, *Do Performatives Still Exist?* (Paper presented at the Pacific Division of the American Philosophical Association, March, 1980) (copy on file at *UCLA Law Review*).

in that language and the presuppositions included in the language of statutes or the common law.

These observations on the presuppositional nature of constitutional language are neither interesting nor important enough to provide the touchstone for a theory of constitutional language. They show, however, that certain uses of language have distinct meanings because of the context in which they occur.[24] When an entomologist talks about "bugs," when a physicist describes something as "solid," and when a logician refers to "implication," each uses those terms in a more technical and precise sense than the ordinary person uses them. We know this because we know something about the special context in which entomologists, physicists, and logicians speak.[25] Similarly, the context in which lawyers talk determines their use of "real property" (which is not the opposite of "fake property") or "wrongful" (which refers to conduct that may have no moral counterpart in ordinary language). Unlike strictly technical legal terms, such as "habeas corpus," "demurrer," and "curtesy," which have no ordinary language meaning, the technical uses of "real property" and "wrongful" are parasitic on ordinary language.[26] If this phenomenon occurs in conventional (non-constitutional) legal language, then the equally parasitic nature of certain constitutional terms, such as "equal protection of the laws," "free exercise of religion," and "search and seizure" should not surprise us. These are expressions derived from ordinary language, but their constitutional meaning in the context of constitutional adjudication diverges in important ways from the ordinary meaning that first generated each expression. The constitutional presuppositions of constitutional language may not establish the complete uniqueness of constitutional language, but they do emphasize the context from which the words take their meaning.

II. THE INTENTIONAL PARADIGM

Most discussion of constitutional language takes place within what I call the "intentional paradigm"—the assumption that any

24. On contextual definition, see J. AUSTIN, *supra* note 20; J. SEARLE, *supra* note 20; L. WITTGENSTEIN, *supra* note 7; Frankena, *Some Aspects of Language,* in LANGUAGE, THOUGHT & CULTURE 121-23 (P. Henle ed. 1958); Ryle, *Ordinary Language,* in ORDINARY LANGUAGE 24 (V. Chappell ed. 1964). For a somewhat controversial application of the notion of contextual definition to the problem of obscenity, see Schauer, *Speech and "Speech"—Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language,* 67 GEO. L.J. 899 (1979).

25. There has been surprisingly little discussion of technical language in the philosophical literature, but one noteworthy source is Caton, *Introduction* to PHILOSOPHY AND ORDINARY LANGUAGE at v (C. Caton ed. 1963).

26. *See generally* Morrison, *Technical Language (and the Law),* 10 COLONIAL LAW. 18 (1980).

interpretation of the constitutional text must comport with the explicit, implicit, reconstructed, or fictionalized intentions of the drafters. In its crudest and least plausible version, the intentional paradigm focuses on the results that the drafters specifically had in mind.[27] Thus, because we can show that the drafters of the due process clauses of the fifth and fourteenth amendments intended to invalidate lengthy imprisonment without trial, we can be confident that we are correct in applying those provisions to that end.[28] Conversely, because we can fairly clearly infer that those same drafters did not intend to invalidate prejudgment real estate attachment for the purpose of securing a potential money judgment,[29] we can be equally confident that we are correct in refusing to apply the due process clause to invalidate prejudgment real estate attachment. Use of the same methodology would support the

27. The nature of the ratification process makes the search for original intent in constitutional adjudication especially problematic. Are the states presumed to have ratified the intent of the drafters as well as the language those drafters wrote? What if legislative history from state legislatures shows that different states ratified for different reasons? What if the intent of the drafters is unavailable to the states? Given the nature of my conclusions, I need not attempt to answer these very troubling questions, but they cannot be avoided by any theory that is tied to original intent.

Even if we put the "whose intent?" question aside, we must still address two different questions. The first is "What results would the drafters have intended had they been confronted with the problems and context of today's world?" This question seems largely unanswerable, inviting the most speculative kind of historical psychoanalysis. This formulation of the issue has, however, attracted a substantial following. *See, e.g.*, L. LUSKY, BY WHAT RIGHT? 21 (1975); Murphy, Book Review, 87 YALE L.J. 1752, 1770 (1978).

The other question that could be asked is "What results did the drafters specifically intend?" This question is, at least, one that is possible to answer, although much of this Essay contends that it is still the wrong question. This question is at the heart of the much discussed theories of Raoul Berger. R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977). The assumption that clear or unmistakable intent, as evidenced in historical documents, is the exact equivalent of a textual statement to that effect is central to Berger's thesis. *See, e.g., id.* at 368; Berger, *A Political Scientist as Constitutional Lawyer: A Reply to Louis Fisher,* 41 OHIO ST. L.J. 147, 162-63, 167 (1980). *See also* Oregon v. Mitchell, 400 U.S. 112, 203 (1970) (Harlan, J., concurring and dissenting in part); Harper v. Virginia Board of Elections, 383 U.S. 663, 677-78 (1966) (Black, J., dissenting); West Coast Hotel Co. v. Parrish, 300 U.S. 379, 402-03 (1937) (Sutherland, J., dissenting). Among current members of the Supreme Court, Justice Rehnquist most clearly subscribes to the view that original intent is dispositive. *See, e.g.*, Trimble v. Gordon, 430 U.S. 762, 777-86 (1977) (Rehnquist, J., dissenting); Sugarman v. Dougall, 413 U.S. 634, 649-64 (1973) (Rehnquist, J., dissenting in *Sugarman* and also in *In re* Griffiths, 413 U.S. 717 (1973)). Because, as should be apparent from all of this Essay, I disagree with Berger's assumption as to what is the proper question, I have no need to deal with the issue of whether Berger's own answers to his question are even correct. It is certainly not abundantly clear that they are. *See, e.g.*, Murphy, *supra,* at 1754-60.

28. *See* Palko v. Connecticut, 302 U.S. 319 (1937); Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1856).

29. *See* Sniadach v. Family Finance Corp., 395 U.S. 337, 344-51 (1969) (Black, J., dissenting); Ownbey v. Morgan, 256 U.S. 94 (1921).

first amendment's application to prior restraints and at the same time justify excluding its application to obscenity, defamation, commercial speech, and blasphemy.[30]

The specific intention theories of constitutional interpretation, of which the writings of Raoul Berger represent the most extreme example,[31] are the least plausible of any of the theories discussed in this Essay. They are implausible precisely because they ignore the distinction between the meaning of a rule (such as a constitutional provision) and the instances of its application.[32]

When we draft any rule, we envision certain particular applications of that rule, certain cases where the rule will produce a particular outcome. We do not merely list these outcomes in a series of specific commands because we do not see those particular outcomes as exhaustive. They are only instances of a more general problem, and we analyze the problem to discover some underlying unity in the instances that we wish to treat.[33] We then formulate the rule to deal with this general unitary problem. By formulating a rule in general terms, the rule extends, by the nature of language, further in time or space than those particular applications envisaged by the drafters of the rule.

This is a commonplace observation,[34] and we can easily im-

30. Patterson v. Colorado, 205 U.S. 454 (1907), is the Supreme Court's most explicit statement of the now-repudiated "prior restraints only" interpretation of the first amendment. *Id.* at 462. For references to other historical exclusions, see, e.g., Roth v. United States, 354 U.S. 476 (1957); *Ex parte* Jackson, 96 U.S. 727 (1877); L. LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY (1960).

31. *See supra* note 27.

32. "The provisions of the Federal Constitution, undoubtedly, are pliable in the sense that in appropriate cases they have the capacity of bringing within their grasp every new condition which falls within their meaning. But, their *meaning* is changeless; it is only their *application* which is extensible." Home Bldg. & Loan Assn. v. Blaisdell, 290 U.S. 398, 451 (1934) (Sutherland, J., dissenting) (footnote omitted). *See also* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926) (Sutherland, J.); 1 T. COOLEY, CONSTITUTIONAL LIMITATIONS 124 (8th ed. 1927).

This distinction parallels the philosopher's related distinctions between connotation and denotation, and intension and extension. *See* W. ALSTON, PHILOSOPHY OF LANGUAGE 17 n.8 (1964); J.S. MILL, A SYSTEM OF LOGIC (8th ed. 1904); W. SALMON, LOGIC 122-29 (2d ed. 1973). *See also* J. HOSPERS, AN INTRODUCTION TO PHILOSOPHICAL ANALYSIS 40-54 (2d ed. 1967). The distinction also parallels those between sense and reference. *See* FREGE, *On Sense and Reference,* in TRANSLATIONS FROM THE PHILOSOPHICAL WRITINGS OF GOTTLOB FREGE 58 (P. Geach & M. Black eds. 1952) ("Sense" and "referenee" are the generally accepted English translations of Frege's "*Sinn*" and "*Bedeutung.*"). But, not wishing to carry more philosophical baggage than I must, I will stick to a distinction between the meaning of a rule and the instances of its application.

33. "[A] principle to be vital must be capable of wider application than the mischief which gave it birth." Weems v. United States, 217 U.S. 349, 373 (1910), *quoted in* Gregg v. Georgia, 428 U.S. 153, 171 (1976) (opinion of Stewart, J. joined by Powell and Stevens, JJ.).

34. *See* Munzer & Niekel, *supra* note 2, at 1031; Bridwell, *supra* note 9, at 914-15.

agine examples of the distinction between meaning and instances of application in constitutional interpretation. For example, punishment by electric shocks to the genitalia falls plainly within the eighth amendment's prohibition of cruel and unusual punishments even though the drafters could not have imagined this particular procedure in 1791.[35]

This much is relatively uncontroversial, but it does not take us very far because, at some point, the new applications are so different that the meaning has changed.[36] The "meaning" of a cruel and unusual punishment clause prohibiting only painful and humiliating punishment is different from one prohibiting capital punishment.[37] The "meaning" of an equal protection clause prohibiting only racial discrimination is different from the meaning of an equal protection clause prohibiting discrimination on the basis of, say, gender,[38] alienage,[39] illegitimacy,[40] or wealth.[41] And the meaning of "the freedom of speech" that includes only political argument[42] is different from the meaning of "the freedom of speech" that includes the right to advertise pharmaceutical prices[43] or the right to display a "For Sale" sign on a front lawn.[44]

I am not contending that such shifts in constitutional meaning are constitutionally impermissible. I am saying only that they

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On generality as part of the nature of law, see H.L.A. HART, *supra* note 5, at 20-23, 234.

35. *Cf.* United States v. Seeger, 380 U.S. 163 (1965) (broad extension of concept of religion for purposes of statutory exemption from conscription for conscientious objectors). *But cf.* Wisconsin v. Yoder, 406 U.S. 205 (1972) (emphasis on the historical legitimacy of the Amish church).

36. *See* Munzer & Nickel, *supra* note 2, at 1-31. This seems to have been Justice Sutherland's point. *See supra* note 32.

Whether there is a shift in meaning may depend on why a particular provision is in the Constitution. The narrower the reason, the more likely it is that a new application will be beyond the scope of that reason and will therefore constitute a shift of meaning. Conversely, the broader the reason taken to justify the provision in the text, the more likely it is that subsequent applications will still be within the scope of that reason, and therefore not represent a change of meaning.

37. *See supra* note 34. But if you define the first meaning differently, then the application may involve no shift.

38. *See* Craig v. Boren, 429 U.S. 190 (1976).

39. *See* Graham v. Richardson, 403 U.S. 365 (1971).

40. *See* Levy v. Louisiana, 391 U.S. 68 (1968).

41. *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973) (rejecting strict scrutiny).

42. *See* A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948), *reprinted in* A. MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE (1960); BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle,* 30 STAN. L. REV. 299 (1978); Bork, *Neutral Principles and Some First Amendment Problems,* 47 IND. L.J. 1 (1971); Meiklejohn, *The First Amendment is an Absolute,* 1961 SUP. CT. REV. 245.

43. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

44. Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85 (1977).

are shifts in meaning, and thus are neither explained nor justified by the distinction between the meaning of a rule and the instances of its application. For such explanation or justification we must look elsewhere.

The defects of the specific intention approach have been amply documented in the literature,[45] and there is little need for me to belabor these criticisms here. Intriguingly, however, even the most vehement critics of the specific intention approach still feel obliged to tether their arguments to some form of original intent. According to Laurence Tribe[46] and Ronald Dworkin[47], for example, the extremely general language in the Constitution conclusively proves the drafters' intent that subsequent generations should work out their own theories applying such phrases as cruel and unusual punishment, due process of law, equal protection of the laws, and so on. John Hart Ely implicitly criticizes wide excursions from the text as a whole,[48] but his argument is as revealing as it is interesting. Ely bases his deference to the text on the idea that the text constitutes *the best evidence* of the drafters' intent.[49] The text, for Ely as for the others, is still a way of bringing forward the intentions of the framers.

Those who argue within the framework of this "intentional paradigm" appear to operate on the model of the "convention" in the game of bridge. When bridge players reach a certain level of proficiency, they begin to use artificial conventions in bidding. These bids do not represent the intended contract, but rather aim at describing specific features of the bidder's hand or at asking questions about the partner's hand. The bids are in a *code* whose primary ordinary meaning ("clubs" means clubs) may be irrelevant to the specific contextual use. Most bridge players use simple conventions like Blackwood or Stayman, and more advanced players are likely to use complex systems containing a high percentage of so-called "artificial" bids. These systems and conven-

45. *See, e.g.,* Bridwell, *supra* note 34; Lusky, *"Government By Judiciary": What Price Legitimacy*?, 6 HASTINGS CONST. L.Q. 403 (1979); Munzer & Nickel, *supra* note 2, at 1030-33; Murphy, *supra* note 27; Nathanson, Book Review, 56 TEX. L. REV. 579 (1978); Perry, Book Review, 78 COLUM. L. REV. 685 (1978). Although it is possible that we have ignored the relevance of history and original intent, *see* Monaghan, *The Constitution*, *supra* note 1, at 117, it seems that we have more often succumbed to the error of ignoring Joseph Story's admonition that "Nothing but the text itself was adopted by the people." 1 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 300 (4th ed. 1873).

46. *See supra* note 3.

47. R. DWORKIN, *supra* note 11, at 133; Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469 (1981).

48. J. H. ELY, *supra* note 1; Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 (1973).

49. "[T]he most important datum bearing on what was intended is the constitutional language itself." J.H. ELY, *supra* note 1, at 16.

tions are languages designed in part, like other languages, to convey information. But the important feature of a bridge convention (or indeed the notion of bidding at all) is that the use of conventions is derived from and directed towards one quite simple fact—in the game of bridge, you are not permitted to look at your partner's cards. If a player could look at his partner's hand before arriving at the final contract, he could dispense with every convention yet devised.

Many people understand constitutional language in much the same way as a bridge convention. Under the intentional paradigm, constitutional language exists only because we are unable to know the specific intentions (the cards) of the drafters. If we could ascertain that specific intention, or if we knew how the drafters would treat the constitutional problems of the present, we would have no need for constitutional language. To the extent that we know that intention, then the importance of the text is diminished *pro tanto*.[50]

This is not a useful model, for it fails to capture the sense in which a text is authoritative *as a text*. No amount of looking into the minds of the framers, or constructing fictionalized intentions at various levels of abstraction, can render the text less authoritative.[51] The text is not only the starting point, but is also in some special way the finishing point as well. Constitutional language exists not only because the constitutional convention is not still sitting, nor because James Madison and his colleagues were not immortal. The text interposes itself between the intentions of the framers and the problems of the present, cutting off the range of permissible access and references to original intent, thereby reducing the extent to which original intent persists after the text's

50. This is implicit in any view that treats "unmistakable intention" as being equivalent to text. *See supra* note 27. The difficult question occurs, however, when the text and the legislative history are in some way inconsistent. On this point, the canons of interpretation are not helpful, because one canon suggests that we look at the legislative history only when the text is unclear, and another says that we can look at legislative history to reject a textual statement inconsistent with that history. *Compare* Caminetti v. United States, 242 U.S. 470, 490 (1917), *with* United Steelworkers v. Weber, 443 U.S. 193, 201-02 (1979). *See generally*, Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 HARV. L. REV. 892 (1982).

It is unfortunately common for commentators to conflate textual and historical approaches to constitutional interpretation. *See, e.g.*, Bork, *supra* note 42, at 8; Grey, *Unwritten Constitution, supra* note 1, at 712-13; Perry, *Interpretivism, Freedom of Expression, and Equal Protection*, 42 OHIO ST. L.J. 261, 280-81 (1981). The two approaches are, however, fundamentally different. *See* Bobbitt, *Constitutional Fate*, 58 TEX. L. REV. 695, 707 (1980). *See also* Alexander, *supra* note 2.

51. J. STORY, *supra* note 45, at 300; Chafee, *The Disorderly Conduct of Words*, 41 COLUM. L. REV. 381, 399-402 (1941); Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L.J. 227, 254 (1972). *See also* Chevigny, *Philosophy of Language and Free Expression*, 55 N.Y.U. L. REV. 157, 174 (1980).

adoption. A theory of constitutional language is incomplete if it does not recognize the way in which a text is authoritative — the way in which we treat the Constitution, but not, for example, the Declaration of Independence or the Mayflower Compact, *as law.*

The authoritativeness of a text is by no means a peculiar feature of a written constitution. Although constitutional law is exciting and popular at the moment, we should not forget our basic law school contracts principles. One such basic principle requires that the parties be held to the reasonable meaning of the terms they have used, regardless of their subjective intent at the time they used those words.[52] And the considerations that led to acceptance of this "objective" theory of contracts[53] are the same as those that generated other common law rules, for example the "plain meaning" rule in the common law of defamation.[54]

What the analogy with contract law shows us, however, is not something about contracts, or even about law. The analogy illuminates, rather, something about language in general, of which the language of a written constitution and the language of a contract are subsets. In order to make sense of language, we presume

52. "If, however, it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them, he would still be held, unless there were some mutual mistake, or something else of the sort." Hotchkiss v. National City Bank of New York, 200 F. 287, 293 (S.D.N.Y. 1911) (Hand, L., J.).

53. *See, e.g.,* Ricketts v. Pennsylvania Ry. Co., 153 F.2d 757 (2d Cir. 1946) (Frank, J., concurring). *See also* Mansfield v. Hodgdon, 147 Mass. 304, 17 N.E. 544 (1888); Embry v. Hargadine, McKittrick Dry Goods Co., 127 Mo. App. 383, 105 S.W. 777 (1907); Smith v. Hughes, 6 Q.B. 597 (1871). *See generally* 1 A. CORBIN, CORBIN ON CONTRACTS § 106 (1963); 3 A. CORBIN, CORBIN ON CONTRACTS § 539, at 82 (1963); L. SIMPSON, HANDBOOK OF THE LAW OF CONTRACTS 10 (2d ed. 1965).

Corbin maintains that it is an "illusion" that words have meaning independent of those who use them. 1 A. CORBIN, *supra*, § 106, at 474. Were it not for that "illusion," however, we would have no way of understanding each other. This is the whole point of any theory of meaning that stresses language as a rule-governed form of behavior. *See, e.g.,* J. SEARLE, *supra* note 20, at 33-50; B. HARRISON, AN INTRODUCTION TO THE PHILOSOPHY OF LANGUAGE 165-258 (1979).

Moreover, Corbin's critique of a strictly objective view exposes an important ambiguity in our use of the term "objective." To the extent that "objective" suggests certainty or precision, then Corbin's criticism is well taken. But if "objective" suggests only that we interpret on the basis of external factors, including the conventions of language, but excluding the intentions of the language user, then a theory can be objective without making any claim of precision or certainty. It is the latter sense of "objective" that is at the heart of the objective theory of contracts and also at the heart of the theory of constitutional interpretation suggested in this Essay.

54. *See, e.g.,* Lorentz v. R.K.O. Radio Pictures, Inc., 155 F.2d 84, 87 (9th Cir. 1946), *cert. denied,* 329 U.S. 727 (1946); Lyman v. New England Newspaper Pub. Co., 286 Mass. 258, 260, 190 N.E. 542, 543 (1934); Roberts v. Camden, 103 Eng. Rep. 508, 509 (K.B. 1807). *See generally* W. ODGERS, A DIGEST OF THE LAW OF LIBEL AND SLANDER § 93, at 144 (2d ed. 1887); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 111, at 747 (4th ed. 1971).

that it represents the intentional acts of human beings.[55] But there is a difference between the intention of a text and the human thoughts that accompanied the creation of that text. Although the authority of a text is derived in part from the intention that it be authoritative, a text can have purpose without reference to the psychological condition of its creator, as we see in the attempts of courts to derive purpose from statutes themselves.[56] As one philosopher has put it, "[c]ommunication is a public, social affair and [the communicator] is not exempted from responsibility for aspects of his performance he failed to notice."[57] Thus, "a speaker is not the sole arbiter over what import his utterances have,"[58] and our touchstone must be the rules of language rather than largely futile explorations into the mind of the communicator. So long as the distinction between "what he said" and "what he meant to say" is meaningful, then we must recognize that the conventions of language use are superior, in the hierarchy of interpretive tools, to the intentions of the speaker. This is even more true when the language used has an authoritative embodiment, as in a statute or in a written constitution.

The intentional paradigm implicitly confuses a language with a code (as in "morse code" rather than in "Uniform Commercial Code"). Codes, such as bridge conventions, are only one form of language,[59] and it is wrong to assume that every language is a code. In theory, codes are dispensable, as the bridge example demonstrates, but language is not. Moreover, language operates only because *it* has meaning, quite apart from what the speaker may have *meant* to say.[60] Perhaps meaning is use,[61] but the inten-

55. In Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824), John Marshall noted that those who ratified the Constitution "must be understood . . . to have intended what they have said." *Id.* at 188.

56. *See* Frankfurter, *Some Reflections on the Reading of Statutes,* 47 COLUM. L. REV. 527, 538-39 (1947). *See generally* P. BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 31-44 (1975).

57. P. JONES, PHILOSOPHY AND THE NOVEL 183-84 (1975). The dispute between the "intentionalists" and the "anti-intentionalists" is prominent in contemporary philosophy of literary criticism. The dispute is described and fully documented in P. JUHL, INTERPRETATION: AN ESSAY IN THE PHILOSOPHY OF LITERARY CRITICISM (1980). Juhl himself is an intentionalist. There is much in the corpus of writing about literary interpretation that is of great importance to the constitutional theorist, both for intentionalists and anti-intentionalists like myself.

58. P. JONES, *supra* note 57, at 183-84. *See also* S. CAVELL, MUST WE MEAN WHAT WE SAY? 32 (1969).

59. Perhaps the characteristic feature of a code is that it is perfectly translatable into some language. Natural languages, however, arising in the context of particular cultures, are not necessarily perfectly translatable into other natural languages. *See* W. QUINE, WORD AND OBJECT (1960).

60. *See generally* P. JONES, *supra* note 57, at 182-99; J. SEARLE, *supra* note 20; J. SEARLE, EXPRESSION AND MEANING: STUDIES IN THE THEORY OF SPEECH ACTS (1979). For a more intention-oriented theory of meaning, see Grice, *supra* note 7, at

tions of the user do not determine exclusively, or even mainly, the use.

In arguing for greater attention to the Constitution as an authoritative text, I do not urge a literalist, conceptualist, or formalist approach to constitutional adjudication.[62] The view that the text can be interpreted as self-defining, or as ordinary language,[63] or without reference to purpose[64] does not follow from the proposition that the text is authoritative. In many instances, we can derive purpose from a text,[65] and we can apply canons of interpretation peculiar to the nature of the Constitution itself. Working out the details of such a program is difficult, but it is a task that cannot be avoided if we are to develop a theory of constitutional interpretation that captures both the authoritativeness of the text and the necessity of contextual interpretation.

III. MORAL THEORY AND CONSTITUTIONAL LANGUAGE

Many issues of constitutional interpretation concern the Constitution's incorporation or non-incorporation of moral values. We must, then, examine the way in which the text either mandates, prohibits, or permits the use of certain moral arguments. Thus, I will propose questions that are metaethical, but in a rather special way. For, unlike most of the others who have asked metaethical questions,[66] I will not ask how we reason about ethics, but rather *when* and *how much* we reason about ethics—at least in this constitutional law context.

377; Grice, *Utterer's Meaning and Intentions,* 78 PHIL. REV. 147 (1969). A more sophisticated version is found in S. SCHIFFER, MEANING (1972).

61. *See supra* note 7.

62. The term "literalism" is ambiguous, because it is unclear where the literal meaning of the term at issue comes from. In one sense, every textually oriented theory, including this one, is a version of literalism. But we more commonly equate literalism with the ordinary language definition of constitutional terms, or with the notion that the text provides clear answers to all of our problems. In this sense, literalism shares both the characteristics and the flaws of what we usually refer to as "formalism" or "conceptualism." *See* H.L.A. HART, *supra* note 6, at 126; J. STONE, THE PROVINCE AND FUNCTION OF LAW 149-65 (1946); Hart, *supra* note 6, at 270. On the distinction between literalism and interpretivism, see Grey, *supra* note 50, at 703, 706 n.9.

63. In addition to the authorities cited *supra* note 63, see Stone, *supra* note 6, at 466, 472.

64. On purpose-oriented interpretation, see Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart,* 71 HARV. L. REV. 630 (1958). *See also supra* note 56 & accompanying text.

65. *See* P. JONES, *supra* note 57, at 183-84, 194-95; Frankfurter, *supra* note 56.

66. Whether there is a distinction between ethics and metaethics (between substantive ethical principles and the methodology of ethical inquiry) is by no means clear, because some metaethical views, particularly versions of relativism and subjectivism, may tend to collapse the distinction. But the distinction serves tolerably well for my present purposes.

At the conclusion of his essay on "Constitutional Cases,"[67] Ronald Dworkin notes that the problem of rights against the state "argues for a fusion of constitutional law and moral theory, a connection that, incredibly, has yet to take place."[68] This statement is both revealing and ambiguous, for the key word "fusion" admits of a number of importantly different interpretations.[69] Two items may become fused in a strong sense when they are merged so that the two are no longer separately identifiable; or they may become fused in a weaker sense when, although tightly joined, we can continue to identify the originally separate components.

If we are to accept Dworkin's incredulity as justified, we must determine how much moral theory is to be merged into constitutional law, where and how that merger is to take place, and how much of the resultant product will be fused in the strong sense. I propose therefore to explore several "strategies of fusion," and their presuppositions about the Constitution and moral theory.

A. *Moral Theory as Constitutional Command*

In his essay "Cruel and Unusual Punishments,"[70] Jeffrie Murphy introduces his argument by saying that "if one can mount a good argument that to treat a person in a certain way is gravely unjust or would violate some basic human right of his, this is also and necessarily a good argument that it is unconstitutional to treat him in this way."[71]

The import of Murphy's characterization of constitutional argument is that if he is correct, then he has, in the same forty-six words, *just written the Constitution?!* For if any good moral argument is *eo ipso* a good constitutional argument, the text becomes superfluous.[72] But surely the text must serve some purpose other than to offer a *carte blanche* for moral philosophizing. In fact, it defines the contours of permissible moral arguments. The authori-

67. R. DWORKIN, *supra* note 11, at 131-49.

68. *Id.* at 149.

69. I do not mean to take Dworkin to task for this one word. The rest of his essay, as well as Dworkin's use of the word "connection" in the same sentence, cautions us against taking Dworkin's metaphor as an argument.

70. J. MURPHY, *Cruel and Unusual Punishments,* in RETRIBUTION, JUSTICE, AND THERAPY 223-49 (1979).

71. *Id.* at 223.

72. The quoted sentence is hardly crucial to Murphy's fine analysis of the problem of punishment, and in that sense I suppose I am being unfair. But the sentence is there, and it provides a concise statement of a position that has at times surfaced in constitutional theory. *See, e.g.,* Thomas Grey's description of a now "moribund" first form of non-interpretivist review in Grey, *Origins*, *supra* note 1, at 844 n.8 (1978). For a powerful critique of theories that strive for congruence between constitutional law and "correct" moral theory, see Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981).

tative nature of the text, and the existence of a substantive content beyond a mere formal authorization[73] for judges to philosophize, compels us to reject Murphy's notion of one-to-one fusion of constitutional law and moral theory. In addition, we can find counterexamples to Murphy's theory; there are moral arguments that appear good yet irrelevant to the Constitution (for example, rights to safety in the workplace). Conversely, there are constitutional issues, even in the Bill of Rights, that are only dimly illuminated by moral argument (for example, the right to trial by jury in civil cases,[74] and the right to keep and bear arms).

Murphy's statement erroneously suggests a model of constitutional law and moral theory as congruent circles. The more apt geometric metaphor is that of intersecting circles, which leaves areas of both constitutionally irrelevant moral argument and morally sterile constitutional argument. Viewed in this way, a good moral argument is no longer "necessarily" a good constitutional argument. That one has a moral duty to support one's parents in their dotage is fairly clear, but the Constitution does not deal with this duty, nor does it require that it be enforced or supplemented by the state. Conversely, a good constitutional argument is not necessarily a good moral argument, as for example the argument one would deploy in challenging the constitutional qualifications of an able and mature thirty-three year old to hold office as President of the United States. A good moral argument is therefore a good constitutional argument only if it falls within that area of moral theory embraced by the Constitution as relevant. The crucial task remains, then, to define the contours of this area, and to determine the manner in which the constitutional text identifies constitutionally relevant moral theory.

B. *The General/Particular Theory*

A more plausible theory than an interpretation that takes the moral or political flavor of the Constitution as a mandate for rendering the text irrelevant is the "general/particular" theory of textual interpretation. This theory, which appears in various forms, takes the morally or politically oriented constitutional provi-

73. Without getting too deeply into the issue of the meaning and scope of judicial discretion here, I use formal authorization to refer to a norm that grants authority without specifying the substantive standards or constraints for the exercise of that authority. *See* Paulson, *Material and Formal Authorisation in Kelsen's Pure Theory,* 39 CAMBRIDGE L.J. 172 (1980).

74. U.S. CONST. amend. VII. My unargued assumption that this provision has little moral content derives some support from the fact that it remains one of the few provisions of the Bill of Rights that has not been incorporated by the fourteenth amendment. *See* Melancon v. McKeithen, 345 F. Supp. 1025 (E.D. La.), *aff'd sub nom.* Hill v. McKeithen, 409 U.S. 943 (1972).

sions—for example, freedom of speech, equal protection of the laws, and freedom of religion—not as discrete repositories of self-contained moral or political theories, but rather as instances, or more particularized expressions of the single moral or political theory embedded in the Constitution. The theory, as most commonly expressed, does not merely say that instantiated constitutional values are derived from higher and more general principles. It says that they are derived from *one* higher and more general principle. This theory is implicit in the work of theorists as diverse as David Richards[75] and John Hart Ely,[76] and is suggested in some parts of Ronald Dworkin's writings.[77] Its proponents view the text as the raw material from which to construct a general moral or political theory of the Constitution. Because the generated theory must encompass the more particularized values explicitly stated in the text, it is not totally unbounded, but can claim a mandate from the text itself.

The general/particular theory (or metatheory) is attractive because it evolves out of the text, while, at the same time, it is not constrained by the more uncomfortable moral or political gaps[78]

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75. *See, e.g.,* D. RICHARDS, THE MORAL CRITICISM OF LAW 51-54 (1977); Richards, *Constitutional Privacy, The Right to Die and the Meaning of Life: A Moral Analysis,* 22 WM. & MARY L. REV. 327 (1981) [hereinafter cited as Richards, *Constitutional Privacy*]; Richards, *supra* note 1; Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution,* 30 HASTINGS L.J. 957 (1979); Richards, *Unnatural Acts and the Constitutional Right to Privacy: A Moral Theory,* 45 FORDHAM L. REV. 1281 (1977). For Richards, "the concept of human rights" is his "unwritten constitution," Richards, *supra* note 1, at 300-01, and it is this concept that he proceeds to use for the decision of particular cases. Richards acknowledges that there may be different conceptions of that concept, but that is not inconsistent with the theory that there is, for a particular analyst at a particular time, *one* unitary constitutional theory, and that is the methodology with which I take issue.

76. J.H. ELY, *supra* note 1. I have heard Professor Ely's theory of the Constitution described as "one big equal protection clause." His theory is far richer and more complex than that, but it is still *one* theory. For a quite different critique of unitary constitutional theories, including Ely's, see Gerety, Book Review, 42 U. PITT. L. REV. 35 (1980).

77. Dworkin's general theory of adjudication is similarly both unitary and reconstructive in that he would have judges construct the unifying theory that provides "the best justification . . . for the body of propositions of law already shown to be true . . ." Dworkin, *No Right Answer?,* in LAW, MORALITY, AND SOCIETY: ESSAYS IN HONOUR OF H.L.A. HART 58, 82 (P. Hacker & J. Raz eds. 1977). *See also* R. DWORKIN, *supra* note 11, at 81-130. Dworkin, however, explicitly recognizes the underdetermination problem discussed in the text. *Id.* at 64-68. *See* Alexander & Bayles, *Hercules or Proteus? The Many Theses of Ronald Dworkin,* 5 SOC. THEORY & PRAC. 267 (1980). It is questionable whether Dworkin's solution is really a solution. *Id.*. In any event, there is much in his theory that would provide support for any particular/general theorist.

78. The right to privacy, *see* Griswold v. Connecticut, 381 U.S. 479 (1965), and the right to travel, *see* Shapiro v. Thompson, 394 U.S. 618 (1969), are perhaps the most prominent of these gaps.

in the Constitution. Thus, if we use the mentioned particulars as the building blocks for a theory, and then apply that general theory directly to future cases, we can easily find a particular right to privacy,[79] a particular right to travel,[80] and so on, as well as even more particular rights derived from these rights.[81] So long as these rights are part of the general theory constructed from the mentioned particulars and are not inconsistent with the text, the absence of these particular rights in the text does not undermine their existence and application. The text operates somewhat like a ladder.[82] We use it to build the theory, or perhaps to reconstruct the theory that was implicit all along. Having built the theory, we can kick away the ladder and then apply the theory directly.

This methodology appeals to us because it captures, at a rather high level of abstraction, the intuitive feeling that the Constitution is incomplete. It also reflects the sense in which not only particular applications but also more general principles must change to accommodate changing circumstances.[83] Moreover, it justifies a wide range of morally or politically attractive results without totally rejecting the importance of the text.[84] Indeed, this methodology would be ideal but for the fact that it rests on two mistakes and one controversial assumption.

First, any general/particular theory mistakenly assumes that one general principle (or theory) can be uniquely, or at least most correctly, derived from a set of particulars, or instances. This assumption, however, ignores the extent to which any theory—scientific, moral, or interpretive—is underdetermined by any number of specific instances or observations.[85] Theory is underdetermined

79. The methodology under discussion here was most notable in Griswold v. Connecticut, 381 U.S. 479 (1965). In that case, the Court used specific particulars, embodied in the first, third, fourth, and fifth amendments, to construct a right to privacy and then applied that constructed right to the issue (contraception) at hand. *See* D. RICHARDS, *supra* note 75, at 81-109.

80. *See* J. H. ELY, *supra* note 1, at 177-79.

81. Thus, Richards talks about various specific rights being generated by the right of privaey. *See, e.g.,* Richards, *Constitutional Privacy, supra* note 75.

82. *See* L. WITTGENSTEIN, TRACTATUS LOGICO-PHILOSOPHICUS (D. Pears & B. McGuinness trans. 1961). I do not claim to be using Wittgenstein's ladder metaphor for the same purpose for which he used it.

83. *See* A. BICKEL, THE LEAST DANGEROUS BRANCH 63 (1962); A. BICKEL, THE MORALITY OF CONSENT 25-30 (1975); Munzer & Nickel, *supra* note 2; Richards, *supra* note 1.

84. *Griswold* did not generate nearly the avalanche of scholarly criticism that befell Roe v. Wade, 410 U.S. 113 (1973). *See, e.g.,* J. H. ELY, *supra* note 48, at 15, 66; Epstein, *Substantive Due Process By Any Other Name: The Abortion Cases,* 1973 SUP. CT. REV. 159. Part of the explanation might be that the statute at issue in *Griswold* was substantially more ridiculous than that in *Roe.* The more likely explanation, however, is that the reliance on specific textual provisions, rather than on general liberty/due process considerations, made *Griswold* seem more palatable.

85. The *loci classici* for the underdetermination thesis are P. DUHEM, THE AIM

in this sense because any number of empirical observations, or specific instances, can generate and be consistent with a large and perhaps infinite number of explanatory theories. Moreover, each such explanatory theory will yield different predictions or results for future cases.[86] For example, a given set of symptoms can be consistent with a number of different medical diagnoses, and to that extent the diagnosis is underdetermined by the observation of symptoms. Similarly, several different theories about the formation of the solar system might be equally consistent with our observations about the solar system. The principle of underdetermination of theory applies to a wide range of activities, and it has been frequently discussed in reference to the philosophy of science,[87] to literary criticism,[88] to historical explanation,[89] and so forth. In each of these disciplines, theory acquires a different role, but the point remains the same: specific examples, instances, observations, or events can produce more than one theory equally consistent with those examples, instances, observations, or events.

We see the same phenomenon in constitutional theorizing because a large number of different overarching theories would be consistent with the specific moral or political principles specified in the text. We may have good reasons to choose one theory rather than another, just as a doctor may have good reasons to choose one medical diagnosis over another that is equally consistent with the same symptoms. But the constitutional text does not determine the choice among theories equally consistent with it, and thus the argument that the theory is generated by the Constitution is seen to be a fake. Certainly we can require that the particular theory fit all of the textualized particulars as a necessary condition of its validity. But if this is taken to be a sufficient con-

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AND STRUCTURE OF PHYSICAL THEORY (P. Wiener trans. 1954); W. QUINE, FROM A LOGICAL POINT OF VIEW (2d ed. 1961); W. QUINE, *supra* note 59.

86. One practical, rather than strictly logical, objection to the underdetermination thesis is that a large enough number of observations will cause "convergence" towards only one theory. *See* M. HESSE, REVOLUTIONS AND RECONSTRUCTIONS IN THE PHILOSOPHY OF SCIENCE at viii (1980). This seems to be the point implicit in Dworkin's references to "density." Dworkin, *supra* note 77, at 83-84. Apart from the fact that the convergence thesis itself has some logical difficulties, M. HESSE, *supra,* at viii-x, it seems plain to me that the constitutional *text* is hardly dense enough to rebut the problem of underdetermination in reference to constructing a theory from the text.

87. *See, e.g.,* C. GLYMOUR, THEORY AND EVIDENCE (1980); M. HESSE, *supra* note 86; M. HESSE, THE STRUCTURE OF SCIENTIFIC INFERENCE (1974); T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2d ed. 1970).

88. *See* Rader, *Fact, Theory, and Literary Explanation,* 1 CRITICAL INQUIRY 245 (1974).

89. *See generally* R. ATKINSON, KNOWLEDGE AND EXPLANATION IN HISTORY (1978); R. MARTIN, HISTORICAL EXPLANATION: RE-ENACTMENT AND PRACTICAL INFERENCE (1977).

dition, then there is little limit on the extent to which quite different theories can find their source in the Constitution. If that is so, the text does not control the result in future cases and does not affect our decision of which competing coherent theory to accept. This does not mean that judges should be forbidden to construct moral or political theories,[90] but it does defeat the claim that the theory so constructed is either mandated by or derived from the text.

A general/particular theory makes its second mistake by presuming that the selection of particulars from which to construct or reconstruct the general theory is itself independent of theory. The process of selecting particulars is not and cannot be value-neutral.[91] Textually explicit particulars are analagous to observations from which we construct a theory, and we cannot lightly ignore the extent to which such observations are controlled by theory.[92] The instances are not just there waiting for us to build a theory around them. We have to select the particulars to use, and this selection process contains implicit judgments of value and importance.

Interestingly, in this connection, most people who seek to build unitary moral or political theories of constitutional rights select (i.e., observe) the same constitutional provisions—the first amendment, the due process clause, the equal protection clause, the prohibition on cruel and unusual punishment, the amendments extending the franchise, and so on. They thus impose a theory on the Constitution more than they extract one from it.[93] If the process of selection concentrates on different provisions, a different theory results. For example, John Hart Ely,[94] who concen-

90. Even though the actual theory constructed will not, in my view, be textually mandated, the process of theory construction still aids in assuring principled adjudication. Thus, theory construction serves methodological goals of the legal system that are independent of the substance of the theory. *See* Golding, *Principled Decision-Making and the Supreme Court,* 63 COLUM. L. REV. 35 (1963); Greenawalt, *The Enduring Significance of Neutral Principles,* 78 COLUM. L. REV. 982 (1978).

91. In this sense, "values" incorporates not only particular views about particular subjects, but also the experiences and training of the selector. Imagine an automobile accident observed by a surgeon, a tort lawyer, and an automotive engineer. If we asked each of them the question "What happened?," we would get fundamentally different answers which varied in the particular facts reported and the language used to describe the reported facts.

92. *See generally* P. ACHINSTEIN, CONCEPTS OF SCIENCE: A PHILOSOPHICAL ANALYSIS (1968); M. HESSE, *supra* note 86; K. POPPER, UNENDED QUEST 52 (1976) ("There is no such thing as a perception except in the context of interests and expectations . . . .").

93. The story of the blind men and the elephant suggests just how easy it is to generalize on the basis of preselected and incomplete versions of the evidence. Saxe, *The Blind Men and the Elephant: A Hindoo Fable,* in STORY POEMS 267 (L. Untermeyer rev. ed. 1961).

94. J. H. ELY, *supra* note 1, at 87-101.

trates on the majoritarian provisions of the Constitution, derives a theory quite unlike the theories derived by Dworkin and Richards, who concentrate on individual rights and anti-majoritarian aspects of the Constitution.[95] And imagine the theory we might derive if we concentrated on the property-protecting provisions of the Constitution,[96] perhaps including the second amendment as well?! Our selection depends on what we think is most important, and what we think is most important is pre-textual. Although some of these theories might be better than others, any theory based on something less than *all* of the constitutional text is selective,[97] and the process of selection is hardly value-neutral. We see what we want to see and ignore what we want to ignore, and theories that purport to "explain" the Constitution usually explain only those portions of the Constitution that the theorist finds, for non-textually based reasons, to be most significant.

The controversial assumption contained in any particular/general theory is that the morally or politically loaded clauses of the Constitution are particulars instead of more general irreducible principles, and also that they are particulars of the same general principle.[98] Some constitutional provisions, of course, are derived from higher principles. For example, the first amendment's protection of freedom of speech might be plausibly derived from the political principle of popular sovereignty,[99] and the equal protection clause is plausibly derived from some sort of "golden rule" or universalization principle.[100] But in order to construct *a* theory of the Constitution, we must assume that all of the textual provisions are reducible to one overarching principle. Thus, the methodology of a particular/general theory presupposes a unitary moral or political theory (albeit perhaps a highly complex one[101]) that explains and unites all but the purely structural constitutional provisions.

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95. *See* R. DWORKIN, *supra* note 11; D. RICHARDS, *supra* note 75.

96. Art. I, § 10; amend. III; amend. IV; amend. V; amend. XIV.

97. Even if all of the text is used, the weighting is selective. It is a mistake to assume that even "equal" weighting would be value-neutral, because the notion of equality is dependent upon the context. How would we react to a constitutional law casebook that devoted as much space to the third and twenty-third amendments as it did to the first and fourteenth?

98. *See supra* notes 75-76. For Professor Dworkin the principle is that of "equal concern and respect." Dworkin, *Liberalism,* in PUBLIC & PRIVATE MORALITY 113, 126 (S. Hampshire ed. 1978).

99. *See* A. MEIKLEJOHN, *supra* note 42.

100. On universalization, compare R. HARE, FREEDOM AND REASON 7-50 (1963) to Schwartz, *Against Universality,* 78 J. PHIL. 127 (1981).

101. There are, in fact, two kinds of unitary theories. One kind involves only one ultimate principle, such as Dworkin's principle of "equal concern and respect." *See supra* note 98. Other theories have two or more principles, but incorporate theories that relate those principles to each other in a priority relationship. *See, e.g.,* J. RAWLS,

In order to evaluate this presupposition, we must question whether such an overarching theory can conceivably exist. If we follow Rawls,[102] Richards,[103] Dworkin,[104] Gewirth,[105] and others in believing that such a theory exists or can be constructed, then the search for a unifying theory of constitutional morality is highly plausible. But if one accepts ethical pluralism[106] as a more accurate reflection of reality, then freedom of speech, fair procedure, equality, and so on may be ultimate and irreducible primary values with no necessarily coherent relationship.[107] If this is true, then we need not tie these values together nor fill the gaps between them. If there is a plurality of first principles, then that, of course, means that in some cases they will conflict.[108] The pluralist would not wish to deny this, but would deny the existence of any conflict-resolving higher theory.[109] This makes constitutional intepretation more difficult than it would be under a single unifying principle, but one cannot validly move from "it would be nice if it did" to "therefore it must," despite the prevalence of this move in many arguments for non-pluralist ethical theories.[110]

A THEORY OF JUSTICE (1971). The distinction is therefore best expressed in terms of the complexity of the single ultimate principle.

102. *Id.* at 34-53.

103. D. RICHARDS, A THEORY OF REASONS FOR ACTION (1971).

104. Dworkin, *supra* note 98.

105. A. GEWIRTH, REASON AND MORALITY (1978) ("Principle of Generic Consistency").

106. Perhaps the foremost pluralist of modern times is Isaiah Berlin. Berlin's most important works are collected in I. BERLIN, AGAINST THE CURRENT: ESSAYS IN THE HISTORY OF IDEAS (H. Hardy ed. 1980); I. BERLIN, CONCEPTS AND CATEGORIES: PHILOSOPHICAL ESSAYS (H. Hardy ed. 1979); I. BERLIN, FOUR ESSAYS ON LIBERTY (1969); I. BERLIN, RUSSIAN THINKERS (H. Hardy & A. Kelly eds. 1978). *See also* B. WILLIAMS, PROBLEMS OF THE SELF 166-86 (1973); Feinberg, *Rawls and Intuitionism,* in READING RAWLS: CRITICAL STUDIES ON RAWLS' *A Theory of Justice* 108 (N. Daniels ed. 1975); Williams, *Conflicts of Values,* in THE IDEA OF FREEDOM: ESSAYS IN HONOUR OF ISAIAH BERLIN 221 (A. Ryan ed. 1979). *See generally* B. BARRY, POLITICAL ARGUMENT (1965); R. BRANDT, ETHICAL THEORY (1959); H.L.A. HART, PUNISHMENT AND RESPONSIBILITY (1968).

107. The relation of coherence is stronger than the relation of consistency. Two propositions, such as "It is snowing today" and "Napoleon lost at Waterloo" may be consistent with each other, although not possessing the relation of mutual entailment implicit in the idea of coherence. *See generally* A. WOOZLEY, THEORY OF KNOWLEDGE 129-75 (1949). A claim of coherence in any normative philosophy—moral, political, or legal—is a claim that in some way all of the norms of the system "fit together." Thus, coherence requires consistency, but the reverse is not true. I am now in the process of developing a fuller analysis and explication of the notion of coherence in the philosophy of law, and my remarks here are a specific and tentative embodiment of this larger project.

108. J. RAWLS, *supra* note 101, at 34-40.

109. *Id. See also* B. BARRY, THE LIBERAL THEORY OF JUSTICE 5-6 (1973).

110. Rawls, concedes, however, that the desirability of having conflict-resolving higher principles is not *eo ipso* evidence of their existence. J. RAWLS, *supra* note 101, at 39.

I do not wish here to join further the debate between the pluralists (Rawls' "intuitionists"[111]) and the coherence theorists.[112] But that dispute exists, and we must recognize that the argued mandate for constructing unitary moral theories around or through the Constitution derives from only one side of a highly contested deontological debate. Moreover, this one-sided view presupposes not only that ethical pluralism is wrong, but it must presuppose as well that pluralism is totally implausible despite the structure of the constitutional text which suggests plurality rather than unity. The arrangement of the text, with particular and discrete provisions and with no expressed unifying principle save a vacuous Preamble,[113] appears to be the embodiment of pluralistic ethics. Thus, the task of the constitutional coherence theorist is not only to show that ethical pluralism is wrong, but also to refute the appearance of ethical pluralism in the text of the Constitution.

IV. LANGUAGE AND THEORY

In a much more promising start toward constructing a theory of constitutional language, Ronald Dworkin distinguishes "concepts" and "conceptions."[114] His theory is incomplete, but its gaps can direct us toward a more satisfactory formulation.

Despite its similarity to ordinary language associations, Dworkin's distinction between concepts and conceptions does not parallel the distinction between connotation and denotation, or between intension and extension. Rather, his distinction admits the existence of, and is derived from, differences in meaning rather than various applications of an agreed meaning.[115] A con-

111. Because "intuitionism" has been used to refer to a method of identifying moral values rather than the relation among them (and in this sense Rawls, Richards, Dworkin, and Gewirth may all be intuitionists), Rawls' terminology is a trifle misleading. It has been suggested that "pluralism" would be a better appellation, as a plurality of values is used. B. BARRY, *supra* note 109, at 6.

112. I use "coherence theorist" to refer to anyone who holds that there is one ultimate system of moral values, whether they be monists like Dworkin or priority-ranked pluralists like Rawls. *See supra* note 101.

113. *See* Monaghan, *Our Perfect Constitution,* 56 N.Y.U. L. REV. 353, 371 (1981).

114. R. DWORKIN, *supra* note 11, at 134-37; Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469 (1981). *See also* J. RAWLS, *supra* note 101, at 10. For commentary on the distinction, see Munzer & Nickel, *supra* note 2, at 1037-41; Saphire, *Professor Richards' Unwritten Constitution of Human Rights: Some Preliminary Observations,* 4 U. DAYTON L. REV. 305 (1979). *See also* D. RICHARDS, *supra* note 75, at 44-56.

115. This is so, except to the extent that changes in meaning (different conceptions) are built into what Dworkin means by a concept. R. DWORKIN, *supra* note 11, at 103, 134-37. In this sense, the meaning of a concept never changes, but this is only because in another sense the concept itself has no meaning apart from some conception of it. The real problem is that there is an inevitable tension between open concepts and most traditional theories of meaning. *See generally* M. WEITZ, THE OPENING MIND 25-48 (1977).

ception in Dworkin's scheme is a particular (but not necessarily particularized, in the sense of highly detailed) theory which is thought to explain the meaning of a concept.[116] A concept, therefore, allows competing theories of its meaning, and no one of these theories is necessarily more or less correct as a definition or explanation of the concept.[117] A concept is something[118] whose definition requires references to a theory, but no theory provides a uniquely correct definition. If only one plausible theory existed, then that theory would provide the definition of the concept, and there would be no need for the distinction between concept and conception. In order for the distinction to survive, then, there must be at least two competing conceptions (theories), neither of which is demonstrably better or more correct than the other as a definition of the concept.

This distinction seems to hold great potential for a theory of constitutional interpretation, because, as Dworkin maintains, it enables us to argue alternative conceptions within the framework of the existing concepts set forth in the constitutional text. But the utility of the distinction rests on the exact nature of a "concept." In order for any word, including a concept, to have a potential use, it must have some meaning which allows us to understand its use in the face of competing theoretical conceptions. One candidate for "some meaning" is the existence of a paradigm, or exemplar. W.B. Gallie contrasted "essentially contested concepts"[119] (the notion from which Dworkin derives his distinction[120]) with those words whose use was merely "radically confused."[121] For Gallie, the existence of an exemplar makes it possible to meaningfully use words whose essential characteristics are contested.[122]

Gallie offers the concept of a "champion" to demonstrate the

116. R. DWORKIN, *supra* note 11, at 103, 134-37.

117. *Id.*

118. I use the word "something" deliberately, because there is a long tradition of philosophical debate about just what concepts are, some claiming they are words of a particular sort, some claiming they are mental images, and so on. *See generally* M. WEITZ, *supra* note 115, at 3-24; N. CAMPBELL, FOUNDATIONS OF SCIENCE 45 (1957).

119. Gallie, *Essentially Contested Concepts,* 56 PROC. ARISTOTELIAN SOC. 167 (1955). *See also* W.B. GALLIE, PHILOSOPHY AND THE HISTORICAL UNDERSTANDING (1964). For commentary, see Kekes, *Essentially Contested Concepts: A Reconsideration,* 10 PHIL. & RHETORIC 71 (1977); Garver, *Rhetoric and Essentially Contested Arguments,* 11 PHIL. & RHETORIC 156 (1978). *See also* Booth, *"Preserving the Exemplar" or, How Not to Dig Our Own Graves,* 3 J. CRITICAL INQUIRY 407 (1977); McIntyre, *The Essential Contestability of Some Social Concepts,* 84 ETHICS 1 (1973). Also useful is C. STEVENSON, *Persuasive Definitions,* in FACTS AND VALUES 32 (1963).

120. R. DWORKIN, *supra* note 11, at 103.

121. Gallie, *supra* note 119, at 178-79.

122. *See id.* at 176-86. Munzer and Nickel are cautious about taking up the question of the ultimate validity of the concept/conception distinction and presumably are equally cautious about Gallie's original notion of essentially contested concepts. Munzer & Nickel, *supra* note 2, at 1039 n.46.

operation of an exemplar.[123] Modifying this example, we might contend that the New York Yankees of 1927 were the exemplar of a "great" baseball team. If, in this context, "great baseball team" marks an essentially contested concept, we nonetheless understand the use of the concept because we recognize the authority and unattainable standards[124] of the exemplar. Thus, if one baseball team's hitting and depth were stronger than that of the 1927 Yankees, but its pitching was weaker, and if another team's pitching and depth were stronger but its hitting was weaker, we could contest whether either or both of these teams were entitled to the "great baseball team" designation. Although the concept is contested, it retains meaning through a core of settled meaning, the exemplar, which allows us to debate about the shape and extent of the fringe.

A more plausible candidate than the "exemplar," for "some meaning" that makes understanding of a contested concept possible, could be a "family resemblance."[125] Unlike the unattainable standards of the exemplar, the family resemblance has no set of necessary and sufficient defining characteristics,[126] but rather is an interlocking relationship among the appropriate uses of a term. Although the Wittgensteinian "family resemblance" does not admit of a core and fringe characterization,[127] it still contains exemplars. While we might debate whether some novel form of amusement is "really" a game, we have no doubt that Olympic games and party games are games, despite the absence of identifiable shared features. Without the existence of exemplars of some kind, we have not a contested concept, and perhaps not even Gallie's "radically confused" concept, but perhaps just loose talk, or, even worse, vacuous talk.

If this is so, then Dworkin's concepts have run into heavy weather. Almost certainly exemplars for freedom of speech, equal protection, and many other similar constitutional concepts have

123. Gallie, *supra* note 119, at 176-79.

124. The standard of being unattainable is important, although neglected by Gallie, for if the exemplar were attainable there would be little to contest. The question would only be whether one had attained identity in all respects with the exemplar, in which case the concept would apply—or had not, in which case the concept would not apply. But if the exemplar is unattainable, then we can argue about which features are necessary in order for the concept to apply.

125. L. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS §§ 65-72 (3d ed. G. Anscombe trans. 1958). Wittgenstein's famous example is that of games. *Id.* at § 66.

126. *Id.*

127. *See* G. PITCHER, THE PHILOSOPHY OF WITTGENSTEIN 215-27 (1964); Chandler, *Three Types of Classes,* 3 AM. PHIL. Q. 77 (1966). Hart has claimed that all legal terms could fit into the core and fringe characterization. Hart, *Scandinavian Realism,* 1959 CAMBRIDGE L.J. 233, 239-40. This seems mistaken, however, because it ignores the existence of terms, such as family-resemblance terms, that do not have a single core.

never existed. There are exemplars for some, and Dworkin properly points out that an exemplar exists for cruel and unusual punishment.[128] But surely no exemplar for "the freedom of speech" shares the common agreement implicit in Gallie's original formulation of the essentially contested concept. Is imprisonment of a newspaper editor for publishing criticism of the government the exemplar of a free speech violation? It is not if we understand an aversion to prior restraint to be the essential feature of the meaning of the "freedom of speech,"[129] or if we take individual self-expression through communication as the paradigm.[130] The identification of an exemplar in the absence of general agreement is dependent upon a particular theory. In the absence of an exemplar, however, it is difficult to see how a particular theory or conception is or is not related to the concept at hand.

From this perspective, constitutional adjudication *builds* exemplars. But we encounter difficulty in locating the foundation on which to build the exemplar or theory. Though the words of the Constitution are the starting point, they give us very little guidance.

Perhaps we should forget about concepts and conceptions, and look instead at *words*, but words of a certain sort. Here, we encounter a particular variety of words that cannot be understood without reference to a theory.[131] Not all words share this characteristic equally, but some words or terms, such as "anal-retentive personality" or "kinetic energy" or "wave function,"[132] can only be understood with reference to a theory. When we use terms such as these, we presuppose the existence of some theory, even though we do not explain the theory every time we use the terms. If theory-laden words can appear in non-legal texts, then similar terms ought to be able to appear in legal texts, and it seems promising to look at terms such as "the freedom of speech" and "equal protection of the laws" as such theory-laden words, except that

128. R. DWORKIN, *supra* note 11, at 136 n.1.

129. *See supra* note 30.

130. *See, e.g.*, Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964 (1978). The focus is similar in Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45 (1974).

131. Most of the existing literature is in the philosophy of science, although the point has much more universal application. *See generally* P. ACHINSTEIN, CONCEPTS OF SCIENCE 157-201 (1968); N. HANSON, PATTERNS OF DISCOVERY (1958); C. HEMPEL, PHILOSOPHY OF NATURAL SCIENCE 75 (1966); G. RYLE, DILEMMAS 90-91 (1956). Philosophers of science refer to theory-ladenness in reference both to terms of this type and to observation, *see supra* note 91 & accompanying text, but it is important to keep the two ideas distinct.

132. For a discussion of the theories to which these terms refer, see generally P. ACHINSTEIN, *supra* note 131, at 180-83; N. HANSON, *supra* note 131, at 60.

here the use of the term precedes the development of the theory, rather than following after it.

If the use of the terms precedes the development of the theory, the terms themselves may have no meaning other than some ordinary language associations and some syntactic meaning. Notwithstanding this fact, they are still in a text which we take to be authoritative. Their irremovable presence in the text must then be taken as a mandate for the development of a theory that will give content to the terms used. Significantly, the mandate does not derive from the personal intentions or states of the mind of the drafters of the document. It derives from the conventions that govern language use, conventions that operate without regard to the intentions of the user.[133] We argue unnecessarily and misleadingly when we argue that the use of such terms provides evidence of an original intent by the framers that the underlying theories be developed and changed, an intent we can assume from the failure to use more specific terminology.[134] The constructed intent here is unnecessary, because the rules and conventions of language cut off the necessity and possibly even the permissibility of looking behind them into the mind of the speaker or writer.

Philosophers commonly argue that if a speaker says p, and p logically entails q, then the speaker is committed to q even if he had never thought of q and never would have intended to say q.[135] A similar convention of language use appears applicable to the use of theory-laden terms. When a speaker uses a theory-laden term, the speaker is committed to the theory that may at any time surround the use of the term, even if the speaker did not intend that result. If, for example, I accuse someone of having an anal-retentive personality, my use of that term commits me to accusing him of having whatever an anal-retentive personality entails as a matter of psychiatric theory. And if I use terms such as "equal protection of the laws," that too commits me to having authorized the incorporation (and, if necessary, the creation) of a theory without which the term's meaning is incomplete.

Given that theories change, we can legitimately commit the user of theory-laden terminology to the possibility of change implicit in any theory. Thus, the users of theory-laden language such as "the freedom of speech" and "privileges and immunities

133. *See supra* notes 27-65 & accompanying text.

134. *See supra* notes 46-49 & accompanying text.

135. P. JONES, *supra* note 57, at 182. *See also* S. BARKER, THE ELEMENTS OF LOGIC 7 (3d ed. 1980). The notion of commitment in this sense is central in the writings of John Searle. *See* J. SEARLE, *supra* note 20. For an interesting application, see Finnis, *Scepticism, Self-Refutation, and the Good of Truth*, in LAW, MORALITY, AND SOCIETY: ESSAYS IN HONOUR OF H.L.A. HART 247 (P. Hacker & J. Raz eds. 1977).

of citizens of the United States" are committed to the theory whose construction they have authorized by their choice of words. Whether or not the user of those terms intended to be so committed does not matter. It's just part of the rules of the game. Theory-laden terms are incomplete, and the use of an incomplete term commits the user to the fact that the completion is going to come from somewhere else. The interpreter of the Constitution is thus, in some sense, like a musician working with a score that is not complete until it is interpreted; and in some sense like a trial lawyer who is expected to make the best case possible with the available evidence. An interpretation becomes an explication rather than an explanation,[136] and we can hope for no more.

Additionally, we can argue that all of ordinary language is theory-laden,[137] and indeed this is the assumption of much of Western metaphysics, embodied, for example, in the categories of Aristotle[138] and Kant.[139] But even if not all of ordinary language is theory-laden, it is fairly uncontroversial that at least much of it is. In some sense, the word "lunch" is theory-laden, at least as compared to "eating" or "placing organic matter in one's mouth for the purpose of introducing it into the digestive system." So, too, are terms like "time," "space," "hailing" a cab, "playing" a game, "sending" a letter, and "understanding" a book. We constantly use expressions which presuppose or incorporate theories that do more than identify a physical object or activity.

Thus, when we say that a term is theory-laden, we presuppose a particular point of view of the speaker with respect to which a term is theory-laden. I cannot explain to a person ignorant of baseball what a "home run" is without explaining a great deal of baseball, but it seems strange to describe "home run" as theory-laden when one baseball player is talking to another. Similarly, I cannot explain a "trick" to a non-bridge player without explaining at least the rudiments of the game of bridge, even though "trick"

136. *"Explication,* when not simply a synonym for 'explanation,' is the process whereby a hitherto imprecise notion is given a formal definition, and so made suitable for use in formal work. The definition does not claim to be synonymous with the original notion, since it is avowedly making it more precise." A. LACEY, A DICTIONARY OF PHILOSOPHY 66 (1976). The idea of *explication* is usually attributed to Carnap. R. CARNAP, MEANING AND NECESSITY 7-8 (2d ed. 1956). *See also* W. QUINE, *supra* note 59, at 258-59. I am using "explication" in a slightly looser sense. We explicate when we work out a theory, and when we explicate we put something in, rather than just pulling something out.

137. *See* Hesse, *Theory and Value in the Social Sciences,* in ACTION AND INTERPRETATION 1, 1-2 (C. Hookway & P. Pettit eds. 1978). *See also* P. FEYERABEND, AGAINST METHOD 66 (1975). Whether there is or can be a value-free or theory-free observation language has been one of the perennial problems in the philosophy of science.

138. *See* G. ANSCOMBE & P. GEACH, THREE PHILOSOPHERS 5-63 (1961).

139. *See* J. HOSPERS, *supra* note 33, at 184-86.

is not highly theory-laden in conversations between bridge players. But suppose that after a sequence of bidding I explain to my opponents at the bridge table that a particular bid was an "impossible negative." I must then explain a bidding system or theory known as "Precision," without which the term "impossible negative" cannot be understood.

We can clarify things by distinguishing between two forms of theory-ladenness. In the weaker sense, many of the terms of ordinary language are theory-laden. But in a stronger sense, terms are only theory-laden if they force us to go outside the domain of discourse in which they are used. Thus, "lunch" and "time" are theory-laden in the weaker sense but not in the stronger, because the theory that they presuppose is as much a part of ordinary language as is the language itself. But "straight flush" or "anal-retentive personality" or "habeas corpus," if used in ordinary conversation, are theory-laden in the stronger sense because they presuppose theories outside the domain of ordinary discourse.[140]

Therefore, we can say that terms are theory-laden in a strong sense only when they require us to go outside the context in which we are speaking. And that is why "habeas corpus" may be theory-laden in ordinary language but not in law, as is even more true for terms like "pleading," "statute of limitations," or "appeal."

This distinction applies directly to constitutional language. The requirement that the President shall have attained "the Age of thirty-five years" is theory-laden in the weak sense because it presupposes a theory of determining age. It also presupposes the deeper idea of determining growth with reference to chronology. But it is not theory-laden in the strong sense because it is uncontroversially known to all participants speaking *within* the domain. A reference in the Constitution to "habeas corpus," or "Congress," or "amendment" is similar. But a term in the Constitution is theory-laden in the strong sense when it sends us outside the legal domain. "Freedom of speech" and "equal protection of the laws" are different from "habeas corpus" or "Congress," because they send us outside of the legal domain and into the moral or the political. That is also why the use of terminology that lacks meaning within the domain in which it is used can be said to commit

140. "[O]ne must always specify the theory with respect to which a given term is or is not 'theory-laden.'" P. ACHINSTEIN, *supra* note 131, at 183. Although we often talk, especially in the context of constitutional theory, about vague or general terms, it is important to remember that vagueness is relative as well, and the degree of vagueness will depend on the particular context in which a term is used and the particular purposes for which it would or would not be vague. *See* I. SCHEFFLER, BEYOND THE LETTER: A PHILOSOPHICAL INQUIRY INTO AMBIGUITY, VAGUENESS AND METAPHOR IN LANGUAGE 49-50 (1979).

the user to whatever meaning may appear in or be provided by another domain.

V. LANGUAGE AS A CONSTRAINT

Characterizing constitutional terms as theory-laden is problematic because the language then provides little if any guidance in our search for theory. Perhaps, therefore, a theory-authorizing view of constitutional language gives no weight to the text of the Constitution. Yet this view would mistakenly ignore the important asymmetry between positive and negative responses.[141] Constitutional language can constrain the development of theory, or set the boundaries of theory-construction, without otherwise directing its development. Constitutional language can tell us when we have gone too far without telling us anything else. The statement that "It doesn't mean that" need not necessarily occasion the response "Then what does it mean?" I can know some of what a term does not mean without knowing what it does mean,[142] just as I can tell you quite confidently that "the theory of relativity" does not mean "shirt collar" even though I have only the dimmest perception of what "the theory of relativity" does mean.[143]

In this sense, we might do best to look at constitutional language as a frame without a picture,[144] or, better yet, a blank canvas. We know when we have gone off the edge of the canvas even though the canvas itself gives us no guidance as to what to put on it.

But if language constitutes the frame, then how does it do that? The ordinary language associations of theory-laden terms do not explain the frame-like quality of the words, because we would not hesitate to extend freedom of speech to black armbands[145] or oil paintings, although neither is "speech" in ordinary

141. This is at the heart of the assertion that scientific theories can be falsified, but not verified. K. POPPER, CONJECTURES AND REFUTATIONS (1963); K. POPPER, THE LOGIC OF SCIENTIFIC DISCOVERY (1959).

142. In one sense, of course, the more we know of what a term does *not* mean, the more we know of what it *does* mean. But the point is that our ability to exclude some possibilities is relatively independent of how many possibilities remain.

143. One might point out in response that I *do* know what "shirt collar" means, and that is all I need to know that it is different from the theory of relativity. But I could make the same assertion about knowing that there is a difference between the theory of relativity and the Rule in Shelley's Case, although *pace* Professor Michelman, I could no more tell you what the Rule in Shelley's Case is than I could tell you what the theory of relativity is.

144. H. KELSEN, *supra* note 15, at 245.

145. *See* Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969).

language.[146] Furthermore, we would have little difficulty in holding universal tongue-boring to be a violation of the eighth amendment, although the universality would prevent a finding that the punishment was "unusual" in the ordinary language sense.[147] We do, however, incorporate some very rough, pre-theoretical understandings into our sense of the limits of language. For example, it is probably largely pre-theoretical that castration as a punishment for jaywalking does not violate the principles of freedom of speech and that a fine of $1.00 for criticizing the President does not violate the prohibition on cruel and unusual punishment.[148] But this helps very little in most real cases.

Perhaps, at best, we can only note the importance, as in all development of language, of moving in small steps. Highly theory-laden constitutional language is like the ship, imagined by the philosopher Neurath, which is to be rebuilt while afloat and therefore can only be rebuilt plank by plank.[149] So long as the ship stays afloat during the process, it is no objection that the finished product bears little or no resemblance to the original. With constitutional language, so long as the enterprise stays afloat it is no objection that the current conception bears no close relation to the ordinary language meaning of the text.[150] If we have moved in small steps from the original text, the enterprise stays afloat. The question, then, is not necessarily whether the putative move is justified by the text, but whether the move is justified by the last move.

In some ways, constitutional interpretation parallels some theories of literary criticism.[151] In literary criticism, or indeed in any artistic interpretation, we do not demand *the* uniquely correct interpretation, but only *an* interpretation justified by the text. The

146. *See* Schauer, *supra* note 24, at 906-07; Schauer, *Categories and the First Amendment: A Play in Three Acts,* 34 VAND. L. REV. 265 (1981).

147. The Court's eleventh amendment doctrine represents perhaps the most direct repudiation of plain language to be found anywhere in constitutional law. *See* Monaco v. Mississippi, 292 U.S. 313 (1934); Hans v. Louisiana, 134 U.S. 1 (1890).

148. For this point and the examples, I am indebted to Philip Devine.

149. W. QUINE, *supra* note 59, at 3. Neurath used the metaphor to illustrate the progress of science.

150. This seems to be part of the thrust of Munzer & Nickel's "ancestral relation." Munzer & Nickel, *supra* note 2, at 1054. Although the premises and conclusions are different, there are important parallels with the dialectic process described by Michael Perry. Perry, *Noninterpretive Review in Human Rights Cases: A Functional Justification,* 56 N.Y.U. L. REV. 278 (1981). *See also* Jones, *The Brooding Omnipresence of Constitutional Law,* 4 VT. L. REV. 1 (1979); Monaghan, *Professor Jones and the Constitution,* 4 VT. L. REV. 87 (1979); Monaghan, *Taking Supreme Court Opinions Seriously,* 39 MD. L. REV. 1 (1979).

151. The statement in the text is, to some extent, true even for "intentionalist" theories, *see* Rader, *supra* note 88, but is even more true for "non-intentionalist" theories. *See* Fish, *Facts and Fictions: A Reply to Ralph Rader,* 1 CRITICAL INQUIRY 883 (1975). *See also supra* note 58.

paint or text underdetermines an interpretation (a theory) of an oil painting or a literary work in the same way that the text of the Constitution underdetermines a constitutional theory.[152] The interpretation must be plausibly coherent with the painting or the text, but an interpretation cannot be uniquely derived from the text or painting alone. Therefore no one interpretation is uniquely acceptable, just as no constitutional theory is uniquely acceptable in terms of the text. Although non-textual sources may mandate a particular result, such a mandate is not the function of the language. The language limits, but does not command.

The analogy with literary criticism should not be pressed too far, because the literary critic has the freedom to select particularly important parts of his text for attention, a freedom not nearly as available in constitutional interpretation. But the analogy does effectively capture the relationship between flexibility and an authoritative text, a relationship that lies at the core of understanding the nature of constitutional adjudication.

Were this theory to be more fully developed, it might be said to be horizontally clause-bound, but not vertically clause-bound.[153] That is, it recognizes, as more free-wheeling theories do not, that the values specified in the text are more or less discrete, and that they have a textual preeminence over values not so specified. In this sense, it is horizontally clause-bound because each interpretation must derive originally from some particular portion of the text or from some justified interpretation of that portion of the text. It is vertically open because there is no limit on the source from which we can derive the full theory for the textually stated value, other than the intuitive, pre-theoretical limits placed on that theory by the language.[154]

These discrete constitutional values are like a series of funnels, separate from each other, but open to receive anything of the right size that may be poured into them. Of course, if we extend the rims of the funnels too far, the funnels bump into each other, and the important conceptual separation becomes difficult to maintain. But that is a caution against the extremes, and not necessarily a crippling failure of the notion of conceptual separation.

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152. *See supra* text accompanying notes 75-90.

153. I draw the term "clause-bound" from J. H. ELY, *supra* note 1. Ely uses the term to refer to interpretation that views constitutional provisions as (a) self-contained units and (b) capable of interpretation on the basis of the language and the legislative history alone. *Id.* at 12-13. Ely's theory substitutes his view of the underlying theme of the entire document (which he gets from the document itself) for both (a) and (b). I describe my suggestions as horizontally clause-bound because I accept (a), more or less, but reject (b). Underlying my idea is the assumption that if we stick moderately close to (a) we can reject (b) without suffering most of the dangers of non-interpretivism that Ely properly identified.

154. *See supra* text accompanying note 148.

Courts must supply content to those theory-laden terms that send us outside the domain of legal knowledge and legal discourse. That content need not come from philosophy (as argued by Dworkin[155] and Richards[156]) or from history (as argued by Berger[157]) or from somewhere else. As I have argued in this Essay, the conventions of language demonstrate that Berger's extreme form of historical reference and even the more mild forms of historical interpretation[158] are mistaken as a matter of textual derivation. Historical reference is neither mandated nor implicit in a permanently authoritative constitutional text. But although the text does not require a reference to history, it does not necessarily prohibit such reference. The text requires that we supply the theory, but there may be extra-textual, or extra-constitutional, reasons for constructing it from one source rather than from another. History is one possible source, but not the only possible source, and the same can be said for moral philosophy, or political policy, or any other source of values.

CONCLUSION

The Constitution has been written in a language, and a user of language must be taken to know and intend that the language is open to interpretation. Although a user of language has intentions that are relevant in determining what the user meant to say, the user has no power to veto the conventions of the language that have been used. Constitutional interpretations can change because the linguistic conventions and presuppositions change, even though the words remain the same.[159] Thus, a fixed reference to history or original intent seems curious. Even historians expect to interpret the past anew for each generation,[160] because perspective, and therefore meaning, is mutable. Of course, our craving for certainty[161] may cause us to search for the immutable. This is

155. *See supra* text accompanying notes 153-54.

156. *See supra* note 75 & accompanying text.

157. *See supra* note 27.

158. *See, e.g.*, Van Alstyne, *The Fourteenth Amendment, The "Right" to Vote, and the Understanding of the Thirty-Ninth Congress*, 1965 SUP. CT. REV. 33.

159. One reason that literal and historical approaches tend to be conjoined, *see supra* note 50, is that the meaning of words changes over time. Without the historical supplement, most literal approaches would be far less concrete than the literalist usually desires. Although I cannot explore the issue fully here, I am inclined to argue that language change is one of the conventions accepted by a user of language, especially one who puts language into an authoritative text. This argument touches more deeply on the very nature of law than is appropriate here.

160. "Historically oriented critics seem curiously reluctant to follow the lead of most historians, who expect to reinterpret the past and its works for each generation." P. JONES, *supra* note 57, at 185. *See generally* Passmore, *The Objectivity of History*, in THE PHILOSOPHY OF HISTORY 145 (P. Gardiner ed. 1974).

161. "[C]ertainty generally is illusion, and repose is not the destiny of mankind."

most apparent in law, where the myth of certainty has a persistent appeal.[162] But the law cannot be certain, in large part because language itself is not certain. What is unfortunate is that quixotic quests for certainty are likely to interfere with more fruitful quests for an intelligent understanding of the causes and management of our uncertainty.

Holmes, *The Path of Law,* 10 HARV. L. REV. 457, 466 (1897). *See also* J. FRANK, LAW AND THE MODERN MIND (1930).

162. J. FRANK, *supra* note 161.