

5-1-2017

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Recommended Citation

Steven Semeraro, *Interpreting the Constitution's Elegant Specificities*, 65 Buff. L. Rev. 547 (2017).

Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol65/iss3/3>

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Interpreting the Constitution's Elegant Specificities

STEVEN SEMERARO†

Chief Justice Roberts coined the phrase “elegant specificit[ies]” to describe the constitutional clauses regulating how different parts of the government interact.¹ In contrast to the founding document’s individual rights-

† Professor of Law, Thomas Jefferson School of Law. I would like to thank my colleague, Professor Bryan H. Wildenthal, whose editorial on the recess appointment case served as an impetus for this Article, and Professor Michael Ramsey who encouraged Prof. Wildenthal and I to debate the role of originalism in that case on The Originalism Blog. See Steven Semeraro, *The Truth About the Supreme Court’s Recess-Appointments Ruling: Concluding Thoughts in Response to Professor Wildenthal*, ORIGINALISM BLOG (Aug. 8, 2014, 10:50 AM), <http://originalismblog.typepad.com/the-originalism-blog/2014/08/a-response-on-originalism-and-recess-appointmentssteven-semeraro.html>. The exchange can also be found on SSRN. Bryan H. Wildenthal & Steven Semeraro, *The Truth About the Supreme Court’s Recess-Appointments Ruling: A Debate* (Thomas Jefferson Sch. of Law, Research Paper No. 2538257, 2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2538257. I also thank Professor Lawrence Solum for being a scholar’s scholar and introducing me to semantic originalism, recommending an early draft of this paper on his Legal Philosophy Blog, and discussing the paper with me at the 2016 University of San Diego Originalism Conference. I am particularly indebted to Chris Guzelian who provided detailed feedback on an earlier draft that has proven extremely helpful. I presented an earlier version of this paper at the Thomas Jefferson School of Law, and the questions and feedback from the participants in that session—particularly from Ilene Durst and Anders Kaye—played a significant role in shaping the final paper. I also thank Jenny Burns for her excellent research assistance.

1. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2678, 2690 (2015) (Roberts, J., dissenting) (interpreting the Elections Clause). The Elections Clause states, “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.” U.S. CONST. art. I, § 4, cl. 1.

defining “majestic generalities,”² commentators have long assumed that courts could easily apply the specific intra-governmental commands in accordance with their plain, original meanings.³ In recent terms, however, the Supreme Court has split bitterly when interpreting ostensibly clear language in both the Elections Clause⁴ and the Recess Appointments Clause.⁵ Although the justices oriented toward an originalist interpretive method found the clauses clear,⁶ the Court’s living constitutionalists carried the day, pointing to potential vagueness and ambiguities. The lack of an interpretive method for the elegantly specific clauses led to disengaged conflict with no hint of common ground between the competing camps.

Proposing a new interpretive method—*farsighted originalism*—this Article bridges the divide. Like the best methods developed to interpret the individual rights-defining clauses,⁷ this one accommodates both of the core commitments of American constitutionalism: (1) that we are governed by a rule of law, not men; and (2) that We the

2. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943); see KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION* 197 (1999) (The living constitutionalism since the Warren Court era has involved judges “exploit[ing] . . . the text’s ‘vague’ phrases to alter inherited meaning. . . . The Constitution is made to ‘grow’ by providing these broad terms with meaning drawn from contemporary sensibilities.”).

3. See JACK M. BALKIN, *CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD* 230 (2011) [hereinafter BALKIN, *CONSTITUTIONAL REDEMPTION*] (“[H]ardwired rules normally will be applied the same way over time.”); JACK M. BALKIN, *LIVING ORIGINALISM* 6 (2011) [hereinafter BALKIN, *LIVING ORIGINALISM*]; Lawrence B. Solum, *We Are All Originalists Now*, in *CONSTITUTIONAL ORIGINALISM* 1, 21–22 (Robert W. Bennett & Lawrence B. Solum eds., 2011) (“It is true that some provisions of the Constitution have a determinate original meaning . . .”).

4. *Ariz. State Legislature*, 135 S. Ct. at 2677 (2015) (Roberts, J., dissenting) (interpreting the Elections Clause, U.S. CONST. art. I, § 4, cl. 1).

5. *NLRB v. Canning*, 134 S. Ct. 2550, 2592 (2014) (interpreting the Recess Appointments Clause, U.S. CONST. art. II, § 2, cl. 3).

6. *Ariz. State Legislature*, 135 S. Ct. at 2679–85 (Roberts, J., dissenting); *Canning*, 134 S. Ct. at 2598.

7. See *infra* Section I.A.

People through self-governance continually seek a more perfect union.⁸

Farsighted originalism analogizes the original meaning of the Constitution's elegant specificities to—wait for it—a quantum particle in *superposition*.⁹ Perhaps surprisingly, this non-legal term communicates more effectively a point that is difficult to make with standard legal language. A particle in superposition simultaneously occupies all possible states in which it might be found until an outside influence triggers its decoherence into a single one. This concept differs fundamentally from ordinary ways of perceiving what appears to be a fixed material reality.¹⁰ But it nonetheless describes that reality more accurately than our sensory methods. As physicist Sean Carroll put it, the concept of superposition in particle physics renders “what we can *observe* about the world . . . only a tiny subset of what

8. See BALKIN, CONSTITUTIONAL REDEMPTION, *supra* note 3, at 237 (“[T]he text of the Constitution begins with the declaration that ‘We the People . . . do ordain and establish this Constitution . . .’ The text is a powerful representation of the commitments that successive generations claim to share and that bind them together as a people; it symbolizes the continuity of America’s constitutional story.”); JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 339–40 (1996) (concluding that the Constitution has a “duality of meaning”); Frank Michelman, *Law’s Republic*, 97 YALE L.J. 1493, 1501 (1988) (“Each of the two constitutionalist formulas—self-government and a government of laws—seems to express a demand that we are all bound to respect as a primal requirement of political freedom: the first demands the people’s determination for themselves of the norms that are to govern their social life, while the second demands the people’s protection against abuse by arbitrary power.”); see also BALKIN, LIVING ORIGINALISM, *supra* note 3, at 3 (“[T]he choice [between living constitutionalism and originalism] is a false one. Properly understood, these two views of the Constitution are compatible rather than opposed.”); Jack M. Balkin, *Original Meaning and Constitutional Redemption* 427, 428 (Yale Law Sch., Working Paper No. 140, 2008), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=987060&download=yes (“[T]he choice between originalism and living constitutionalism is a false one, and . . . I regard myself both as an originalist and as a living constitutionalist.”).

9. See SEAN CARROLL, FROM ETERNITY TO HERE: THE QUEST FOR THE ULTIMATE THEORY OF TIME 228–53 (Penguin Grp. 2010) (1966).

10. *Id.* at 229.

actually *exists*.”¹¹ Just as we normally perceive matter to have a single state, we perceive a legal text to have a single meaning. But that perception can be incomplete, particularly with constitutional language that often emerges from open-ended strategic agreement rather than cooperative resolution.

Farsighted originalism recognizes that the Constitution’s elegantly specific clauses embody more than the semantic meaning of the words. Those clauses convey a rubric designed to respond to a particular problem arising from the interaction between different branches or levels of government. This rubric creates a *superposition of potential original public meanings*, all of which would have rung true for the founding generation as methods to resolve disputes of both well-known and then-unforeseen origins.¹² The meaning conveyed by this problem-solving rubric is broader than the semantic meaning of the text, but it is nonetheless fixed and constrained by that text.

For example, applying farsighted originalism to interpret the Elections Clause phrase “the legislature of the state thereof” would require a judge to explore how the framers’ chosen words addressed a then-contemporary problem. Although the 1789 semantic meaning of the phrase was almost certainly “a representative body,”¹³ the rubric could be broad enough to encompass a citizens’ initiative as well. The answer would turn on the nature of the problem that the founding generation addressed through the clause and the rubric used to solve it. Farsighted originalism respects an original meaning while acknowledging the full potential range—that is, the superposition—of the original problem-solving rubric.

An originalist critic may contend that the proposed method is not true originalism and suffers from the same

11. *Id.* (emphasis in original).

12. *See infra* Section III.C.

13. *See infra* Section II.B.

flaw as living constitutionalism—that modern judges may insert their own subjective values into the Constitution. To be sure, farsighted originalism focuses on the meaning at the time of adoption. But critics may argue that its core is not sufficiently hard, because the method permits the modern judge to choose among the meanings within the superposition of original public meanings. It thus opens the door—in a way similar to investigations into the clause’s purpose—to modern, rather than original, meaning.

This critique rests on the contestable assumption that a coherent fixed semantic meaning exists independently from the use to which the drafters directed the text. To make that claim, however, one must commit to a realm of discoverable, inter-personal and thus ultimately uncontestable historic facts that is distinct from a realm of subjective, individuating, and inherently contestable values. A definitive original meaning—a semantic originalist must believe—can be discovered from the words of the Constitution alone without reference to the subjective values—the whims and desires—embodied in any particular application of a constitutional clause to a specific situation.

But this division between a semantic meaning resting on inter-subjective, uncontestable facts and applicative meanings driven by subjective values may be an artificial one. Significant scholarly work contends that what we perceive as uncontestable facts actually depends on a shared value structure from which the language used to convey those facts emerged.¹⁴ If this view is correct, fact and value cannot be meaningfully separated in the way that semantic originalism requires. The functional understanding of intra-governmental regulatory clauses that farsighted originalism provides may thus most accurately convey an original public meaning from which courts can interpret the Constitution’s elegant specificities.

Part I reviews the originalist/living constitutionalist

14. See *infra* Section V.C.

framework that the Court has used to interpret specific constitutional clauses mediating conflict between branches of government or different sovereigns. It shows that scholars have developed various methods to interpret the Constitution's individual rights-defining majestic generalities that accommodate American constitutionalism's commitments to both original meaning via the rule of law and living constitutionalism via the self-governance commitment.¹⁵ By contrast, those same scholars write as if the elegantly specific clauses essentially interpret themselves because they have clear, non-contestable plain meanings. No accommodative methods exist for the elegant specificities. Part II shows that despite the ostensive clarity of the Constitution's intra-governmental-conflict-resolving clauses, the Court has struggled to interpret them. These recent cases reveal that the intra-governmental regulatory clauses evoke disagreements no less spirited than those in individual rights-defining cases. Part III proposes farsighted originalism and the superposition of original public meanings as an interpretive method for the specific intra-government-conflict-resolving clauses and explains how to apply this new method. Using the Court's recent cases as examples, it produces critically different results and rationales. Part IV responds to the critique that the proposed method insufficiently constrains the courts. It raises the possibility that linguistic meaning cannot exist as a matter of incontestable historic fact in isolation from how the values embedded in the words are applied to specific circumstances. Value choices may thus be inherent in the nature of language and thus a necessary part of what it means to interpret the Constitution to conform to an original public meaning.

I. DIFFERING INTERPRETIVE METHODS FOR DIFFERENT TYPES OF CONSTITUTIONAL CLAUSES

The Constitution includes at least two types of clauses:

15. See *infra* Section I.A.

(1) those that define individual rights with respect to the government; and (2) those that mediate the interaction among branches and levels of government. For nearly a half century, scholars and judges have waged a familiar debate over whether courts should interpret the Constitution to (1) track its original meaning—originalism—or (2) evolve in response to social development—living constitutionalism. This Part explains that while a rich body of scholarship bridges originalist and living constitutionalist thinking when interpreting the Constitution’s rights-defining majestic generalities, no similarly dualistic method has emerged for the specific intra-governmental regulatory clauses.¹⁶ This paucity of theory hinders the courts’ ability in practice to interpret the Constitution’s elegant specificities.

A. *Living Constitutionalism as an Accommodative Interpretive Method*

Charles Reich defined living constitutionalism as embodying the re-evaluative, self-governance commitment

16. Although the concept of differing interpretive methods for different clauses may initially strike a dissonant chord, the scholarship cited in this Part shows that different interpretative methods have been presumed to apply to different types of constitutional clauses. Distinguishing between rights-defining and intra-governmental-dispute resolving clauses also has a strong grounding in constitutional history. The notion that interpretive methods may differ between these two types of clauses dates back to Chief Justice Marshall’s seminal early decisions. See Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975). As Grey has explained, *Marbury v. Madison*, 5 U.S. 137, 174–75 (1803)—the foundation of the originalist approach to judicial review—was a case about an intra-governmental conflict: could Congress expand the original jurisdiction of the Supreme Court? Grey, *supra*, at 707. Grey described this issue as a “technical and explicit constitutional provision” *Id.* Chief Justice Marshall justified judicial review as a necessary means to enforce original meaning, a judicial responsibility “essential to all written constitutions” *Marbury*, 5 U.S. at 180. But this text-focused, originalist approach stood in sharp contrast to the early Court’s grapplings with individual rights. In the latter, the justices looked beyond the text’s original meaning and incorporated into its interpretive method “general principles which are common to our free institutions” but that had no specific textual basis. Grey, *supra*, at 708 (quoting *Fletcher v. Peck*, 10 U.S. 87, 139 (1810)); see also *Fletcher*, 10 U.S. at 143 (Johnson, J., concurring in part) (agreeing only with the reliance on “general principles”).

within American legal culture: “There is no such thing as a constitutional provision with a static meaning.”¹⁷ To “maintain its integrity,” a constitutional clause must move “in the same direction and at the same rate as the rest of society.”¹⁸ Critics deride living constitutionalism as empowering modern judges to interpret the Constitution to require what “would be desirable in modern circumstances” regardless of original meaning¹⁹ or worse yet “what . . . judges want [the Constitution’s words] to mean today[.]”²⁰

17. Charles A. Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673, 735 (1963).

18. *Id.* at 736. In the recent gay marriage decision, the Court described the process in these terms:

The nature of injustice is that we may not always see it in our own times.

The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution’s central protections and a received legal stricture, a claim to liberty must be addressed.

Obergefell v. Hodges, 135 S. Ct. 2584, 2598 (2015) (“History and tradition guide and discipline this inquiry but do not set its outer boundaries. . . . That method respects our history and learns from it without allowing the past alone to rule the present.”); *see also* *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 442–44 (1934) (Hughes, J.) (“[T]he great clauses of the Constitution must [not] be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them” Interpretations must demonstrate “a growing recognition of public needs . . .”).

19. Michael B. Rappaport, *Why Non-Originalism Does Not Justify Departing From the Original Meaning of the Recess Appointments Clause*, 38 HARV. J.L. & PUB. POL’Y 889, 893–94 (2015) (“[P]urpose arguments are not a way of determining what the constitutional enactors were passing, but instead are largely a way of viewing the Clause as intended to do what judges or other modern government officials believe would be desirable in modern circumstances. In other words, purpose comes very close to being a method of engaging in *living constitutionalism*.” (emphasis added)).

20. RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION 105 (2004); *see also* WHITTINGTON, *supra* note 2, at 197; William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 698 (1976) (Judges advancing living constitutionalism are simply “a small group of fortunately situated people with a roving commission to second-guess Congress, state legislatures, and state and

But some living constitutionalists have recognized a place for originalism, insisting that the constitutional text must “maintain its integrity.”²¹ Justice Brennan, for example, acknowledged the relevance of “the history of the time of framing,”²² emphasizing that judges must “respect [the framer’s] fundamental choices and adopt them as their own guide to evaluating quite different historical practices.”²³ He contended that a living constitutionalist remained “faithful to the content of the Constitution . . . [by] interpreting the text [to] account for the existence of . . . substantive value choices and . . . accept the ambiguity inherent in the effort to apply them to modern circumstances.”²⁴

Ronald Dworkin, a living constitutionalist, articulated a theory for interpreting the Constitution’s broad provisions that would follow the original meaning of a *concept*—like the prohibition on cruel and unusual punishments—but not the specific *conceptions* that the founding generation held.²⁵

federal administrative officers concerning what is best for the country.”); Michael B. Rappaport, *Neither Originalism nor Nonoriginalism Allows a Broad Recess Appointments Power*, CONST. DAILY (Jan. 14, 2014), <http://blog.constitutioncenter.org/2014/01/neither-originalism-nor-nonoriginalism-allows-a-broad-recess-appointments-power/> (Living constitutionalism grants judges “the power to update [the Constitution’s] provisions to take into account modern values and circumstances.”).

21. Reich, *supra* note 17, at 735–36; see Balkin, *supra* note 8, at 452–54.

22. William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 438 (1986).

23. *Id.* at 437.

24. *Id.*

25. Ronald Dworkin has articulated a method of interpretation through which broad concepts are drawn from the original understanding of the Constitution while particular conceptions of those concepts are derived through a living constitutionalist method. RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* 131–49 (1977) [hereinafter DWORIN, *TAKING RIGHTS SERIOUSLY*]; see also RONALD DWORIN, *A MATTER OF PRINCIPLE* 48–49, 119–45 (1985) [hereinafter DWORIN, *A MATTER OF PRINCIPLE*]; RONALD DWORIN, *LAW’S EMPIRE* 228–38, 259–60 (1986) [hereinafter DWORIN, *LAW’S EMPIRE*]. Dworkin’s method is used here for ease of exposition and is not intended as an endorsement of it as the best way to deal with interpretive questions flowing from the Constitution’s majestic generalities.

Modern courts could select the conceptions that fit best with modern understandings while remaining faithful to the fixed original concepts.²⁶

Similarly, Jack Balkin has argued explicitly that a living constitutionalist must follow the original meaning of the Constitution's "framework" of rules, standards, and principles. "Fidelity to the Constitution," Balkin contends, "requires us to build out constitutional constructions that best apply the text and its associated rules, standards, and principles to our current circumstances."²⁷ Living constitutionalism, he thus argued, more faithfully applies the original meaning of the text than following the specific expectations of the founding generation.²⁸

The appeal of living constitutionalism is confirmed by the enshrinement within our constitutional framework of many prohibitions and practices that would have no place in a constitutional lexicon that hued to a more restrictive original understanding of the Constitution's text.²⁹

B. *Originalism as an Accommodative Interpretive Method*

Despite living constitutionalism's many successes, virtually no one—and certainly no justice of the Court—claims to reject the relevance of the Constitution's original meaning.³⁰ In Jack Rakove's words, the necessity of

26. See DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 25, at 134–36; DWORKIN, *A MATTER OF PRINCIPLE*, *supra* note 25, at 48–49, 119–45; DWORKIN, *LAW'S EMPIRE*, *supra* note 25, at 228–38, 259–60.

27. BALKIN, *CONSTITUTIONAL REDEMPTION*, *supra* note 3, at 229.

28. See BALKIN, *CONSTITUTIONAL REDEMPTION*, *supra* note 3, at 228–29; Balkin, *supra* note 8, at 452–54.

29. Such decisions include those dealing with racial segregation, inter-racial marriage, the equal protection clause as applied to women and the federal government, and the one-person-one-vote rule. See Balkin, *supra* note 8, at 510.

30. See WHITTINGTON, *supra* note 2, at 199 ("No advocate of living constitutionalism seems willing to embrace the complete rejection of intentions from constitutional interpretation, yet such a rejection would appear to be required by the theory.").

originalism in legal analysis “seems so general that citation is almost beside the point.”³¹ “Any lawyer knows,” James Gardner has pointed out, “the use of originalist vocabulary is simply obligatory for participants in the legal system.”³²

The persistent appeal of originalism rests in our commitment to being governed by laws, not men.³³ By adhering to a written text as opposed to a general understanding of principles as the charter of government,³⁴ we concede the importance of the Constitution’s original meaning. However, this is not because the founders were especially worthy of deference. Rather, their choice to adopt a written constitution embodies our ideal of government *by law* and thus demands recurrence to the meaning of a fixed text that constrains our decisions today.³⁵

Originalism’s central claim, Lawrence Solum has explained, “is that constitutional law includes rules with content that are fixed by the original public meaning of the

31. Jack N. Rakove, *Fidelity Through History (or to It)*, 65 *FORDHAM L. REV.* 1587, 1592 n.14 (1997); see also Lawrence B. Solum, *Semantic Originalism* 33, 139 (Univ. of Ill. College of Law, Ill. Pub. L. & Legal Theory, Research Paper Series No. 07–24, 2008), <http://papers.ssrn.com/abstract=1120244> (“[T]he idea that the meaning (semantic content) of the [C]onstitution contributes in an important way to the content of constitutional law—that’s not controversial among judges, officials, and lawyers.”).

32. James A. Gardner, *The Positivist Foundations of Originalism: An Account and Critique*, 71 *B.U. L. REV.* 1, 5 (1991).

33. The phrase “a government of law, not men” likely has roots in the Seventeenth Century, but was connected in the context of American Constitutionalism most directly with John Adams. *Respectfully Quoted: A Dictionary of Quotations*, BARTLEBY.COM, <http://www.bartleby.com/73/991.html> (last visited Mar. 25, 2017); see HANNAH ARENDT, *ON REVOLUTION* 182 (1965) (“[T]he men of the Revolution . . . prided themselves on founding republics, that is, governments ‘of law and not of men.’”). The benefits of upholding a Rule of Law are widely accepted and include “predictability, fairness, nonretroactivity, coordination, and the restraint of arbitrary power.” BALKIN, *LIVING ORIGINALISM*, *supra* note 3, at 39; see also Solum, *supra* note 3, at 62.

34. The decision to rely on a written constitution contrasts with the British system that rested on “a tradition of practice, general understandings, and occasional declarations.” WHITTINGTON, *supra* note 2, at 50–53.

35. See *id.* at 53.

text—the conventional semantic meaning of the words and phrases in context.”³⁶ Modern originalists thus do not look to the intent of the Constitution’s drafters.³⁷ They believe that the text itself conveys a discoverable public meaning³⁸ that is distinct from the framers’ unknowable psyches.³⁹ “As

36. Solum, *supra* note 31, at 2; *see also* BARNETT, *supra* note 20, at 93–94 n.21 (Barnett quotes Dworkin defining semantic originalism as “what did those who wrote the Constitution mean to say in it.”).

37. The idea for semantic originalism may have arisen with Justice Scalia’s speech urging originalists to move from the concept of intent to the concept of meaning. Antonin Scalia, Address Before the Attorney General’s Conference on Economic Liberties in Washington, D.C. (June 14, 1986), in OFFICE OF LEGAL POLICY, U.S. DEPT OF JUSTICE, ORIGINAL MEANING JURISPRUDENCE: A SOURCEBOOK 101, 106 (1987); *see also* Solum, *supra* note 31, at 14–18. *See generally* Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POLY 599 (2004). A key element of semantic originalism is the distinction between *constitutional interpretation*, which involves uncovering the original public meaning of the words of the document, and *constitutional construction*, which involves answering constitutional questions by applying the full array of legal and policy devices to reach a decision that does not conflict with the original public meaning. BARNETT, *supra* note 20, at 118–30; WHITTINGTON, *supra* note 2, at 7–10; Solum, *supra* note 31, at 19, 63–84.

In the 1970s and 1980s, however, Robert Bork and others argued that the original intent of those who drafted the Constitution should constrain courts. Raoul Berger, *Paul Brest’s Brief for an Imperial Judiciary*, 40 MD. L. REV. 1, 2, 32 (1981) (“[T]he Court is imposing its own values on the people, often in defiance of the framers’ intentions. . . . [T]he Court is not empowered to reverse the unmistakable intention of the Framers.”); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 13 (1971) (“The words are general but surely that would not permit us to escape the framers’ intent if it were clear.”); *see* John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 949 (1973); Hans A. Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L.J. 227, 254 (1972); Edwin Meese III, *Speech Before the American Bar Association* (July 9, 1985), *reprinted in* THE FEDERALIST SOCIETY, THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION (1986). *See generally* RAOUL BERGER, GOVERNMENT BY JUDICIARY (1977) (critiquing the Court’s use of the Fourteenth Amendment to effectively amend the Constitution in ways that disregarded the original intent of the founding fathers as well as Congress ratifying the Fourteenth Amendment).

38. Public meaning for new originalists meant the linguistic meaning of the words, not the purpose to which the drafters thought the words would be put—the teleological meaning—nor how the words would apply—the applicative meaning. Solum, *supra* note 31, at 2–3, 11.

39. *See* Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 221 (1980) (arguing that the drafters’ intent could never be

individuals,” Keith Whittington explained, “the founders were capable of agreeing to a common text with a commonly understood meaning, and it is this meaning that the originalist hopes to uncover.”⁴⁰ Justice Scalia put it this way, “[w]e look for a sort of ‘objectified intent’—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*. . . . It is

determined by modern judges because no unified intent existed and even individual drafters would not have formed intentions sufficient to resolve modern questions). Brest evocatively described the task as “the counterfactual and imaginary act of projecting the adopters’ concepts and attitudes into a future they probably could not have envisioned.” *Id.* at 221. He concluded that the product of this projection would be “a fantasy world more of [the interpreter’s] own than of the adopters’ making.” *Id.*; see Brennan, *supra* note 22, at 435. The original intent is “a view that feigns self-effacing deference to the specific judgments of those who forged our original social compact. *Id.* But in truth it is little more than arrogance cloaked as humility.” A judge cannot “gauge accurately the intent of the Framers on application of principle to specific, contemporary questions.” *Id.*

Worse still, Brest asked, why modern society would want to empower the framers to constrain us given their wildly undemocratic processes; they were, after all, exclusively property-owning white men who believed that neither women nor blacks should participate in political decision-making. See BARNETT, *supra* note 20, at 115 (recognizing that the framers were all white men and the process thus excluded a large segment of the population); Brest, *supra*, at 229–30 (“Besides the methodological and historiographic difficulties of this enterprise, it is prey to a normative problem: The drafting, adopting, or amending of the Constitution may itself have suffered from defects of democratic process which detract from its moral claims.”). “To take an obvious example, the interests of black Americans were not adequately represented in the adoption of the Constitution of 1787 or the fourteenth amendment.” *Id.*

Others scholars offered different critiques of original intent. Grey, *supra* note 16, at 712–13 (claiming that scope of the Constitution was not intended to be limited to specific language); Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 24–25 (1984) (arguing that the specific words in the Constitution play only a limited role in the Supreme Court’s review of the law); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 888, 903 (1985) (The “original ‘original intent’ was determined not by historical inquiry into the expectations of the individuals involved in framing and ratifying the Constitution, but by consideration of what rights and powers sovereign polities could delegate to a common agent without destroying their own essential autonomy. Thus, the original intentionalism was in fact a form of structural interpretation.”). Furthermore, the “framers’ primary expectation regarding constitutional interpretation was that the Constitution, like any other legal document, would be interpreted in accord with its express language.” *Id.*

40. WHITTINGTON, *supra* note 2, at 164.

the *law* that governs, not the intent of the lawgiver.”⁴¹ Historical research into sources ranging from then-contemporary dictionaries to uses and courses of conduct, originalists believe, conveys this original understanding.⁴²

Critics, of course, argue that originalists would enable

41. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 17 (Amy Gutmann ed., 1997) (emphasis in original).

Potential non-rule-of-law justifications for originalism have been largely disowned by leading advocates of this method. For example, originalism might be thought to foster more clarity and precision than living constitutionalism. But Whittington has explained that this is not so: “[A]n originalist judge is faced with many of the same difficulties and temptations that are faced by non-originalist judges [Originalism] cannot be expected to free judges from the exercise of contestable interpretive judgment.” WHITTINGTON, *supra* note 2, at 4; *see also* John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 101 NW. U. L. REV. 383, 383 (2007). This is true both because meaning is often contested and when clear may still be vague and incapable of providing a definitive answer to a particular constitutional question. *See* WHITTINGTON, *supra* note 2, at 9–10.

Similarly, originalism does not necessarily foster judicial restraint. Although original intent scholars made this claim, new originalists generally reject it. *See id.* at 42–43; BARNETT, *supra* note 20, at 266–67. “As is clear from both the text and history,” Whittington explained, “the founders were not pure majoritarians but were also interested in limiting government. . . . [A] philosophy of restraint . . . may not be consistent with advocacy of originalism per se.” WHITTINGTON, *supra* note 2, at 44. New originalists thus acknowledge that “courts do have a special role within the constitutional system” and must enforce not just the clear meaning of the text but the “gaps as well” *Id.* at 40–41, 44 (explaining that originalism cannot be justified on the ground that courts are not adequate to decide policy issues or that originalism is uniquely constraining); BARNETT, *supra* note 20, at 266 (“A reliance on judges . . . is unavoidable in a constitutional system in which only courts are available to stand between individual citizens and majority and minority factions operating through representative government.”); McGinnis & Rappaport, *supra*, at 383 (acknowledging that the Constitution empowers the courts to overturn legislation and block other government action that either (1) conflicts with the original public meaning of the Constitution; or (2) applies vague, undetermined constitutional text consistently with that meaning).

42. BARNETT, *supra* note 20, at 93 (Originalism’s sources are “dictionaries, common contemporary meanings, an analysis of how particular words and phrases are used elsewhere in the document or in other foundational documents and cases, and logical inferences from the structure and general purposes of the text.”).

the dead hand of an unenlightened and undemocratic past to dictate modern law.⁴³ But just as living constitutionalism accommodates original meaning, originalism recognizes that a modern court might legitimately reject a clear original meaning for “overriding reasons of morality.”⁴⁴ Beyond this presumably rare situation, originalists recognize the concept of constitutional implicature.⁴⁵ That is, situations in which the Constitution does not specifically address a particular concept, but the text—given the document’s structure—implies it.⁴⁶ To the extent that the Constitution implies an unenumerated right—such as one-man one-vote—originalism could accommodate it.

More generally, originalism distinguishes between constitutional *interpretation* and constitutional *construction*.⁴⁷ The former draws a specific meaning directly

43. See Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1072–73 (1988); Brest, *supra* note 39, at 225 (“We did not adopt the Constitution, and those who did are dead and gone.”).

44. Lawrence B. Solum, *A Reader’s Guide to Semantic Originalism and a Reply to Professor Griffin* 22 (Univ. of Ill. College of Law, Ill. Pub. L. & Legal Theory, Research Paper Series No. 08–12, 2008).

45. *Id.* at 5, 12 (“[T]he constitution may mean things it does not explicitly say,” and “if there are instances of necessary constitutional implicature, then those instances are part of the meaning of the Constitution and they should be understood as within the ‘theory of clause meaning.’”).

46. *Id.* at 12.

47. Solum, *supra* note 31, at 19 (“This distinction [between interpretation and construction] explicitly acknowledges what we might call the fact of constitutional underdeterminacy. With this turn, original-meaning originalist[s] explicitly embrace the idea that the original public meaning of the text ‘runs out’ and hence that constitutional interpretation must be supplemented by constitutional construction, the results of which must be guided by something other than the semantic content of the constitutional text.” (emphasis removed)); see WHITTINGTON, *supra* note 2, at 7, 10. In distinguishing the interpretation of constitutional meaning from constitutional construction, one must distinguish ambiguity—which can generally be resolved through interpretation—from vagueness that is inherent in meaning.

A word is ambiguous if it has more than one meaning and it is unclear which meaning is intended. Does the right to keep and bear “arms,” for example, refer to weapons or to human limbs? . . . In contrast, vagueness

from the words and thus “has a limited reach.”⁴⁸ But the latter ascribes meaning “after all judgments have been rendered specifying discoverable meaning . . .” and the correct application of the clause in question remains vague.⁴⁹ In this so-called *construction zone*, an interpreter employs “normative principles or powers to the document that were neither envisioned by its adopters *nor contrary to their intentions*, as demonstrated by the language and structure of the document as originally understood.”⁵⁰ Going beyond semantic meaning—because it has run out—a judge may determine how constitutional law will operate in a particular case within the scope of the vagueness embodied in the Constitution’s text.⁵¹ This constitutional construction “bears a more tenuous and alloyed connection with the text but as a result can extend constitutional meaning even further before it too exhausts the possibility of the existing text.”⁵²

Solum, perhaps the leading explicator of modern originalism, has recognized the potential for accommodating originalism with living constitutionalism. Modern originalism, he has explained, “acknowledges the fact that the text contains a number of provisions that are written in abstract, general, and vague language—with the

is the problem of applying a term to a marginal object. Such weapons as guns and knives are clearly included in the term “arms.” How about long heavy flashlights of the sort carried by the police?

BARNETT, *supra* note 20, at 119; *see also* Solum, *supra* note 31, at 2. And importantly, vagueness is not the result of uncertain meaning but is encapsulated within the meaning itself. For example, Solum uses *tall* as an example of a vague term because the precise point at which something transforms from short to tall is not encompassed within the meaning of the term. *Id.* at 70.

48. WHITTINGTON, *supra* note 2, at 10.

49. *Id.* at 7.

50. Robert N. Clinton, *Original Understanding, Legal Realism, and the Interpretation of “This Constitution,”* 72 IOWA L. REV. 1177, 1264–65 (1987) (emphasis in original); *see also* Barnett, *supra* note 20, at 123–24; Solum, *supra* note 31, at 18–19; WHITTINGTON, *supra* note 2, at 7–10.

51. *See* WHITTINGTON, *supra* note 2, at 2.

52. *Id.* at 10.

consequence that their application to particular cases will require construction.”⁵³ Originalists “can endorse the adaptation of constitutional doctrine to changing circumstances and values—even while they insist that the construction zone in which this evolution occurs is bounded by the fixed linguistic meaning of the constitutional text (unless truly extraordinary circumstances obtain).”⁵⁴ This method, he recognizes, may be compatible with a living constitutionalism that properly respects the original meaning of non-vague constitutional language.⁵⁵

Leading adherents to each interpretive method—though certainly not all—acknowledge this accommodative potential.⁵⁶ The living constitutionalist Paul Brest, for example, believed that courts must “take[] account of the text and original understanding”⁵⁷ And Keith Whittington, a pioneer of modern originalism, articulated a method of *constitutional construction* that applied the full array of legal and policy devices to reach a decision that does not conflict with the original meaning.⁵⁸ Jack Balkin has gone the

53. Lawrence B. Solum, *Living with Originalism*, in CONSTITUTIONAL ORIGINALISM 143, 154 (Robert W. Bennett & Lawrence B. Solum eds., 2011); see also Solum, *A Reader’s Guide to Semantic Originalism*, *supra* note 44, at 36.

54. Solum, *Living with Originalism*, *supra* note 53, at 154–55; see also Solum, *supra* note 44, at 36.

55. Solum, *A Reader’s Guide to Semantic Originalism*, *supra* note 44, at 36–37.

56. The point made in the text is that scholars addressing the Constitution’s individual rights-defining majestic generalities have articulated accommodative methods that have a wide swath of support. To be sure, some adherents to both living constitutionalism and originalism seek to limit or deny the potential for accommodation. Although its desirability remains subject to debate, it has been articulated and is available to courts. Within the realm of the more specific intra-governmental regulatory clauses, no similar accommodative methods have been articulated.

57. Brest, *supra* note 39, at 224.

58. See WHITTINGTON, *supra* note 2, at 7–10. Leading originalists may differ from Whittington in the details, but all recognize the interpretation/construction dichotomy. See BARNETT, *supra* note 20, at 118–30; Solum, *supra* note 31, at 19, 63–84.

furthest in overtly synthesizing American constitutionalism's dual commitments through his theory of living originalism,⁵⁹ and one can find similar—albeit less overt—unifying approaches from many leading constitutional scholars.⁶⁰ All of this work, however, has

59. See Balkin, *supra* note 8, at 433 (explaining that the original meaning of constitutional clauses is embodied in a principle that remains fixed, though the expectations of the ratifiers about the scope of the clause may not remain fixed).

60. The most impressive interpretive theories include: John Hart Ely's approach whereby a court interpreting the Constitution should focus on neither original intent or nor modern values "but rather on whether the opportunity to participate either in the political processes by which values are appropriately identified and accommodated, or in the accommodation those processes have reached, has been unduly constricted." JOHN HART ELY, *DEMOCRACY AND DISTRUST* 77 (1980). Ely rejected the argument that "[e]ither . . . we must stick close to the thoughts of those who wrote our Constitution's critical phrases and outlaw only those practices they thought they were outlawing, or there is simply no way for courts to review legislation other than by second-guessing the legislature's value choices." *Id.* at vii.

Ronald Dworkin proposes an originalist approach to the broad concepts articulated in the Constitution's language, but a living constitutionalist approach for applying those concepts to specific situations. See *supra* note 25.

Lawrence Lessig has demonstrated that uncovering original intent requires a court to examine the presuppositions lying behind the original text. Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1184–86 (1993). To interpret what the framers intended, one must understand the suppositions that they made about the world. If those suppositions have changed, a judge interpreting the Constitution must translate the words to take account of those changes—not to account for modern views of what the Constitution should mean, but simply to best understand what its framers would have understood had they possessed modern suppositions. Using numerous examples, he showed that one who seeks to be faithful to the Constitution's original meaning cannot simply discover that meaning and apply it. One must examine the presuppositions that lay behind the original meaning to translate the constitutional language to a modern context. For example, that the Constitution explicitly requires proportionality in fines, but not prison sentences, may mean that at the time of enactment only fines had to be proportionate. But if a presupposition behind that meaning was that prison sentences did not exist because criminal punishment generally amounted to a fine or death, the constitutional language must be translated to remain faithful to its original meaning. See *id.* at 1185–86. Lessig did not advocate translation as a method of constitutional interpretation; his project was simply to show that it was in some cases more faithful to the original meaning than an interpretative model that ignored changes in presuppositions. See *id.* at 1268.

Similarly, living constitutionalists and originalists could object to narrow originalism on the ground that the semantic meaning of the Constitution's text

focused on the individual rights-defining clauses.

C. *No Accommodative Method Exists to Interpret the Constitution's Elegant Specificities*

In contrast to the rich trove of scholarship accommodating originalism and living constitutionalism when interpreting rights-defining clauses, a sparse, non-rigorous scholarly consensus holds that the Constitution's elegant specificities articulate clear rules that simply mean what they say.⁶¹ An interpretive method is unnecessary for these clauses, this consensus holds, because they interpret themselves. For example, Brest claimed that “many provisions of the Constitution may pose no serious interpretive problems”⁶² The age limits for elected federal officials have been the quintessential example.⁶³ If the Constitution sets a threshold age for the President at

does not incorporate some fundamental concepts that the founders intended to include. *See, e.g.*, BARNETT, *supra* note 20, at 253–62; Grey, *supra* note 16, at 715–18. For example, the right to marry is not mentioned in the Constitution and yet has been the basis for rejecting legislation as unconstitutional. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015) (The Supreme Court held that the Constitution “extend[s] to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs” not mentioned in the document’s text.); *see also* *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996); *Turner v. Safley*, 482 U.S. 78, 95 (1987); *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978); *Cleveland Bd. of Ed. v. LaFleur*, 414 U.S. 632, 639–640 (1974); *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

61. *See, e.g.*, BALKIN, *LIVING ORIGINALISM*, *supra* note 3, at 32–34; BALKIN, *CONSTITUTIONAL REDEMPTION*, *supra* note 3, at 228 (“The Constitution contains ‘hard-wired rules’ [that] . . . normally will be applied the same way over time.”); BARNETT, *supra* note 20, at 123; Solum, *supra* note 3, at 21–22 (“It is true that some provisions of the Constitution have a determinate original meaning”); Brest, *supra* note 39, at 208.

62. Brest, *supra* note 39, at 208.

63. *See, e.g.*, U.S. CONST. art. I, §2, cl. 2 (member of House of Representatives must be at least 25); U.S. CONST. art. II, §1, cl. 5 (President must be at least 35). BARNETT, *supra* note 20, at 123 (“[S]ome provisions of the Constitution are rule-like enough to be applied directly to most cases without need of intermediate doctrine. The most oft-cited example of this is the provision limiting the presidency to persons who are at least thirty-five years old.”).

thirty-five, it has been assumed, one would be hard-pressed to argue that it imposes a different threshold. No interpretive method is necessary.

Most recently, Balkin—despite his professed living constitutionalism in individual rights-defining cases—best articulated why most scholars see no need for a method to interpret what he calls the “constitutional rules” embodied in the elegantly specific clauses.⁶⁴ Constitutional standards and principles—like due process or freedom of speech—Balkin contends, “channel political decisionmaking without foreclosing it.”⁶⁵ By contrast, he argues that the specific intra-governmental-dispute-resolving clauses foreclose interpretation: “[w]here the original meaning of the text states a clear, unambiguous rule, we apply the rule because that is what the text offers us.”⁶⁶

Balkin seems to assume that his categories of constitutional clauses describe a fixed structure of (1) majestic, open-textured rights-defining clauses—principles and standards—requiring a living constitutionalist method to comport with their original meaning; and (2) clear, specific, unambiguous intra-government-regulating rules that require no interpretive method at all because there is no coherent way to read them other than to simply mean what they say.

But one can alternatively understand Balkin’s lexicon as a contingent one that varies depending on the evolution of constitutional meaning. Standards and principles—within

64. BALKIN, LIVING ORIGINALISM, *supra* note 3, at 43, 215. Brest made a similar point in his seminal article *The Misconceived Quest for an Original Understanding*: “The text and original understanding exert the strongest claims . . . where they specify the procedures and numbers relating to elections, appointments to government offices, and the formal validity of laws, where certainty is an important objective or inherently arbitrary lines must be drawn.” Brest, *supra* note 39, at 229.

65. BALKIN, LIVING ORIGINALISM, *supra* note 3, at 43.

66. *Id.* at 42–43 (A general agreement in constitutional interpretative debates is that the “relatively precise rules” in the Constitution “must [be] follow[ed] today, even if we think them unjust or unwise.”).

this alternate view—are clauses in which the modern meaning of the text has evolved from the original expectations of those who drafted and ratified the Constitution. By contrast, Balkin’s “rules” constitute clauses in which our conception of the text has not evolved from the founders’ original expectation. The rule appears clear because we share the value motivating the rule, not because of something inherent in the rule.⁶⁷ Due process may mean something different today from what it meant in 1791. But thirty-five years old still means now what it meant then.

Balkin’s non-method for interpreting the constitutional rules embodied in the elegantly specific clauses may thus rest on a contingent fact—that expectations about how a rule applies remain unchanged—not, as he seems to suggest, a structural aspect of rule-based clauses that necessarily fixes their meaning for all time. And with respect to many specific constitutional clauses, expectations certainly could change. For example, given modern understandings of varying levels of learning abilities and maturity, the meaning of age now likely communicates a public meaning embodying psychological factors quite different from those that it communicated in the 1790s. To be sure, changes in the meaning of age are unlikely to be significant enough to have altered its constitutional meaning. But the possibility exists that it someday could. Should modern learning demonstrate conclusively that twenty-five-year-old individuals definitively lack the maturity needed to make serious governmental decisions, would a chronological twenty-five year threshold remain appropriate for the House of Representatives?⁶⁸ After all, the original meaning of the

67. See ROBERTO MANGABEIRA UNGER, *KNOWLEDGE & POLITICS* 102 (1975) (“In most cases, rules will have plain meanings not because men believe in intelligible essences, but because their common interests lead them to categorize the world, and to subsume facts under the categories, in similar ways.”).

68. In such a case, one could debate whether a court should simply apply the age threshold stated in the Constitution or consider the problem-solving rubric underlying it, that is, that law makers and enforcers obtain a certain level of maturity before holding office. See *infra* Part III. Robert Bennett has argued that

Constitution's age thresholds surely encompassed more than merely revolutions around the sun.⁶⁹

And the meaning of other apparently clear constitutional rules is far less stable than our conception of age. On their face, the Elections Clause (“each State by the Legislature thereof”⁷⁰) and the Recess Appointments Clause (“[v]acancies that may happen during the Recess of the Senate”⁷¹) are rules as ostensibly specific as those setting an age threshold. Indeed, that false clarity led Chief Justice Roberts to adopt the *elegantly-specific* moniker. Yet, as the next Part illustrates, the Court was bitterly divided over how to interpret them.⁷²

In those cases, Balkin's tacit assumption about the fixed nature of the language articulating rule-based clauses did not hold up.⁷³ Modern meaning may remain consistent with original expectations for some rule-like clauses, but not

other seemingly clear rules may similarly create interpretive challenges. Robert W. Bennett, *Originalism and the Living American Constitution*, in CONSTITUTIONAL ORIGINALISM 78, 118–19, 135 (Robert W. Bennett & Lawrence B. Solum eds., 2011) (discussing the language of the Twelfth Amendment and using example of West Virginia's statehood application as an example of questions arising about the meaning of the two Senator rule).

69. Of course, one could argue—as some originalists surely would—that should the meaning of age change in a compelling way, the appropriate response would be to amend the Constitution. The argument over whether and to what extent courts should have the power to alter constitutional law in response to evolving meaning lies at the core of the originalist/living constitutionalist debate. Although it is an important point of conflict that deserves more careful attention than it has received in the constitutional literature, it falls beyond the scope of this Article, which takes as a given that living constitutionalism is a legitimate alternative theory of constitutional interpretation.

70. U.S. CONST. art. I, § 4, cl. 1.

71. U.S. CONST. art. II, § 2, cl. 3.

72. See *infra* Section II.A–B.

73. To be sure, Balkin might legitimately argue that he means to include in his category of rules only those clauses for which the meaning has in fact remained fixed. He might place clauses like the Elections Clause or the Recess Appointments Clause in the category of constitutional standards, even though they look like rules. But then, the category choice would be based on something other than the form of the clause. And Balkin does not address how one would categorize constitutional provisions other than by their form.

others. And in the latter case, the ostensibly specific language can be just as difficult to interpret as the majestically general, rights-defining clauses.⁷⁴ By failing to articulate an interpretive method for these clauses, the scholarly community has left the courts without the guidance available in cases involving the majestic generalities.

II. A DIVIDED COURT GRAPPLES WITH THE CONSTITUTION'S ELEGANT SPECIFICITIES

This Part reviews two recent cases in which the Court bitterly divided in interpreting ostensibly specific intra-

74. With respect to scholarship focusing on specific intra-governmental regulating clauses, the best work has focused narrowly on founding-era evidence, arguing that the rule of law commitment requires modern courts to apply the original understanding. See, e.g., Amelia Frenkel, *Defining Recess Appointments Clause "Vacancies,"* 88 N.Y.U. L. REV. 729 (2013); Edward A. Hartnett, *Recess Appointments of Article III Judges: Three Constitutional Questions,* 26 CARDOZO L. REV. 377, 400–01 (2005); Vasan Kesavan, *Is the Electoral Count Act Unconstitutional?,* 80 N.C. L. REV. 1653, 1750–51 (2002); John O. McGinnis & Michael B. Rappaport, *Originalism and the Good Constitution,* 98 GEO. L.J. 1693, 1733–37 (2010); Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections,* 13 U. PA. J. CONST. L 1 (2010) (analyzing the Elections Clause); Robert G. Natelson, *The Origins and Meaning of "Vacancies that May Happen During the Recess" in the Constitution's Recess Appointments Clause,* 37 HARV. J.L. & PUB. POL'Y 199 (2014) (relying on pre-ratification era sources); Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause,* 52 UCLA L. REV. 1487, 1509 (2005) (analyzing the Recess Appointments Clause); Stephen J. Safranek, *Term Limitations: Do the Winds of Change Blow Unconstitutional?,* 26 CREIGHTON L. REV. 321, 327–43 (1993); Michael A. Carrier, Note, *When Is the Senate in Recess for Purposes of the Recess Appointments Clause?,* 92 MICH. L. REV. 2204, 2208–09 (1994); Jeff VanDam, *The Kill Switch: The New Battle over Presidential Recess Appointments,* 107 NW. U. L. REV. 361, 388–91 (2012); Stuart J. Chanen, Comment, *Constitutional Restrictions on the President's Power to Make Recess Appointments,* 79 NW. U. L. REV. 191, 193 (1984); Kevin K. Green, Note, *A Vote Properly Cast? The Constitutionality of the National Voter Registration Act of 1993,* 22 J. LEGIS. 45, 51–60 (1996).

Amicus briefs filed in *Canning* by originalist scholars and constitutional law scholars similarly urged the court to focus exclusively on founding era evidence. Brief of Originalist Scholars as *Amici Curiae* in Support of Respondent, *Nat'l Labor Relations Bd. v. Canning*, 134 S. Ct. 2550 (2014) (No. 12-1281), 2013 WL 6213265; Brief of Constitutional Law Scholars as *Amici Curiae* in Support of Respondent, *NLRB v. Canning*, 134 S. Ct. 2550 (2014) (No. 12-1281), 2013 WL 6213263.

governmental dispute-resolving clauses. The analysis in both cases tracked the originalist-living constitutionalist paradigm. The dissenting originalist justices cited founding era evidence of the most natural reading of the clauses, treating subsequent developments as irrelevant.⁷⁵ The prevailing living constitutionalists found ambiguity.⁷⁶ This uncertainty, they claimed, freed them to conclude that the purpose of the clause justified an interpretation different from the most natural reading of the text.⁷⁷

The following sub-sections briefly review each case, revealing the utter lack of any path to accommodate both originalist and living constitutionalist methods into a single method for this type of constitutional clause.

A. NLRB v. Canning⁷⁸—*The Recess Appointment Case*

In 2010, expiring terms left the National Labor Relations Board (NLRB) “without a full slate of five members.”⁷⁹

75. See discussion *infra* Section II.B–C.

76. Commentators suggested that the majority opinions manufactured ambiguity to reach a desirable result. See, e.g., *Constitutional ‘Chumps,’* WALL STREET J. (June 29, 2015), <http://www.wsj.com/articles/constitutional-chumps-1435614085> (“A miserable Supreme Court term got worse on Monday when another 5-4 majority decided to rewrite the Constitution’s Elections Clause to limit legislative redistricting.”); Gene Veith, *Supreme Court Can’t Tell What ‘Legislature’ Means*, CRANACH BLOG (July 7, 2015), <http://www.patheos.com/blogs/geneveith/2015/07/supreme-court-cant-tell-what-legislature-means/> (The majority in *Arizona State Legislature* did “not want[] the Constitution to get in the way of their favored policies.”); Mike Rappaport, *The Statutory Limitation on Recess Appointments*, LIBRARY LAW & LIBERTY (May 28, 2015), <http://www.libertylawsite.org/2015/05/28/the-statutory-limitation-on-recess-appointments/> [<https://perma.cc/EH7K-TJXA>] (“Justice Breyer’s opinion for the majority [in *Canning*] has . . . misinterpreted the Recess Appointments Clause.”); Michael Ramsey, *NLRB v. Noel Canning and Originalism (Updated)*, ORIGINALISM BLOG (June 27, 2014 6:32 AM), <http://originalismblog.typepad.com/the-originalism-blog/2014/06/nlr-b-v-noel-canning-and-originalism-michael-ramsey.html> (describing the majority opinion in *Canning* as “an ugly bit of non-originalism”).

77. See discussion *infra* Section II.B–C.

78. 134 S. Ct. 2550 (2014).

79. Mark Landler & Steven Greenhouse, *Vacancies and Partisan Fighting*

Angered by the Board's filing a case against Boeing and its general opposition to the Board's mission, the Republican minority in the Senate filibustered the President's nominees.⁸⁰ To prevent the Board from losing its three-member quorum, the President used a recess appointment to provide a third member.⁸¹ In late 2011, the Senate still had not confirmed permanent members; the initial recess appointment expired; and the Board lost its quorum.⁸²

The President had nominated three candidates to fill the open seats, one in early 2011 and two others toward the year's end.⁸³ In December 2011, the Senate recessed having failed to confirm (or explicitly reject) any of the nominees.⁸⁴ Although the Democratic majority controlling the Senate would likely have supported the nominees, the Republican minority threatened to filibuster.⁸⁵ But the Senators in opposition did not argue that the appointees were the President's cronies or otherwise lacked labor law expertise. In early 2012, the President exercised his recess appointment power to place his three nominees on the Board.⁸⁶

With its newly appointed members participating, the NLRB held that Noel Canning, a Pepsi distributor, violated the labor laws.⁸⁷ Canning appealed, arguing that the

Put Labor Relations Agency in Legal Limbo, N.Y. TIMES (July 15, 2013), <http://www.nytimes.com/2013/07/16/us/politics/vacancies-and-partisan-fighting-put-labor-relations-agency-in-legal-limbo.html>; see also Melanie Trottman, *Obama Makes Recess Appointments to the NLRB*, WALL STREET J. (Jan. 4, 2012), <https://www.wsj.com/articles/SB10001424052970203513604577141411919152318>.

80. Landler & Greenhouse, *supra* note 79.

81. See Trottman, *supra* note 79.

82. See *id.*

83. *Canning*, 134 S. Ct. at 2557.

84. *Id.*

85. See Landler & Greenhouse, *supra* note 79.

86. *Canning*, 134 S. Ct. at 2257.

87. See *id.*

President had unconstitutionally appointed three of the five members, and the Board thus lacked a quorum and could not legitimately decide the case.⁸⁸

The Constitution ordinarily requires the President to obtain “the advice and consent of the Senate” before appointing a federal official.⁸⁹ But the Recess Appointments Clause empowers the President “to fill up all vacancies” unilaterally where an opening “may happen during the recess of the Senate.”⁹⁰ Canning argued that the early 2012 appointments violated the clause because the recess—only three days—was too short to permit legitimate unilateral appointments.⁹¹ Although the Senate had stopped doing business on December 17, 2011, and did not intend to return until January 23, 2012, it resolved to meet twice a week in *pro forma* session.⁹² Rather than a single five-week break, the Senate rotated between recesses of no more than three days and *pro forma* sessions.⁹³

The D.C. Circuit ruled for Canning, holding that President Obama exceeded his constitutional authority. According to the court, the Recess Appointments Clause applied only to:

- recesses between sessions (inter-session), not within a session (intra-session);⁹⁴ and
- vacancies originally opening—“that may happen” in

88. *Id.* (citing *New Process Steel, L.P. v. NLRB*, 560 U.S. 674, 687–688 (2010) for the proposition that in the absence of a lawfully appointed quorum, the Board cannot exercise its powers).

89. U.S. CONST. art. II, § 2, cl. 2.

90. U.S. CONST. art. II, § 2, cl. 3.

91. *Canning*, 134 S. Ct. at 2557.

92. *Id.*

93. *Id.*

94. On January 3, 2012, the new session of Congress formally began—although the Senate was in recess—and the President appointed the Board members the next day. The appointment thus technically occurred during an intra-session recess. *Id.* at 2557–58.

the language of the clause—during the recess and not to vacancies that existed before the recess began.⁹⁵

Because the NLRB openings had originated before the Senate stopped doing business, and the President waited until the inter-session recess had ended and an intra-session recess had begun before appointing the board members, the Circuit Court rejected the appointments.

The Supreme Court granted the Board's petition for certiorari, and a five-member majority rejected the two grounds on which the D.C. Circuit had relied.⁹⁶ But, it ruled in favor of Canning on the length-of-the-recess ground.⁹⁷ Justice Breyer, writing for the Court, found the language of the clause ambiguous with respect to both: "the Recess" and "vacancies *that may happen* during . . ."⁹⁸ The former could refer to any recess of the Senate, not just inter-session recesses.⁹⁹ Similarly, the phrase "may happen" ambiguously could mean either a vacancy opening after a recess had begun or one that continued to be open during a recess even if it had originated earlier.¹⁰⁰ In finding ambiguity, Justice Breyer acknowledged that the Court did not interpret the phrases in the most natural way.¹⁰¹ But he believed that any ambiguity permitted the Court to resolve the issue by looking to the clause's underlying purpose,¹⁰² that is, to permit the

95. *Id.* at 2558.

96. *See id.* at 2557–58.

97. *Id.* at 2557.

98. *Id.* at 2562–73 (emphasis in original).

99. *Id.* at 2561.

100. *Id.* at 2568–69.

101. *See id.* at 2568.

102. *Id.* ("[T]he linguistic question here is not whether the phrase can be, but whether it must be, read more narrowly. The question is whether the Clause is ambiguous. And the broader reading, we believe, is at least a permissible reading of a "doubtful" phrase. We consequently go on to consider the Clause's purpose and historical practice." (internal citations omitted)). The majority's acknowledged need to "hesitate [before] upset[ting] the compromises and working arrangements that the elected branches of Government themselves have

President unilaterally to appoint officials when the Senate was out of session, regardless of the type of recess.¹⁰³

Citing a brief filed by originalist scholars, the majority acknowledged that “the Founders would likely have intended the Clause to apply only to inter-session recesses, for they hardly knew any other.”¹⁰⁴ But that reasoning, Justice Breyer explained “does not fully describe the relevant founding intent.”¹⁰⁵ The proper focus, the Court insisted, was whether “the Founders intend[ed] to restrict the scope of the Clause to the form of congressional recess then prevalent, or did they intend a broader scope permitting the Clause to apply, where appropriate, to somewhat changed circumstances?”¹⁰⁶ Because they knew that the Constitution would be “a document designed to apply to ever-changing circumstances over centuries,” the Court concluded, “the Framers likely did intend the Clause to apply to a new circumstance that so clearly falls within its essential purposes, where doing so is consistent with the Clause’s language.”¹⁰⁷ The Court thus rejected the grounds on which the D.C. Circuit had found the appointments unconstitutional.¹⁰⁸

With respect to Canning’s argument that the recess had

reached” belies any true commitment to follow the clause’s original meaning. *Id.* at 2560.

103. *See id.* at 2559 (The clause “grant[ed] the President the power to make appointments during a recess but not offering the President the authority routinely to avoid the need for Senate confirmation.”); THE FEDERALIST NO. 67, at 455 (Alexander Hamilton) (The Recess Appointment Clause superseded the Advice and Consent Clause when the Senate recessed, and “it might be necessary for the public service to fill [the vacancy] without delay.”).

104. *Canning*, 134 S. Ct. at 2564 (citing Brief of Originalist Scholars as *Amici Curiae* in Support of Respondent, *supra* note 74, at 27–29).

105. *Id.*

106. *Id.* at 2564–65.

107. *Id.* at 2565–66 (“The Framers’ lack of clairvoyance on that point is not dispositive.”).

108. *See id.* at 2561–73.

been too short, however, the Court saw things differently.¹⁰⁹ To fit within the constitutional scheme, Justice Breyer explained, a recess must continue for at least ten days before a court may treat an appointment as presumptively valid; a shorter recess would not support a unilateral appointment, unless an unusual circumstance—not including “political opposition”—compelled an immediate appointment.¹¹⁰

The government argued that, as a practical matter, the recess in question lasted longer than ten days because the Senate did not meet as a functional body for a month.¹¹¹ The Court rejected that reasoning because the Senate “retain[ed] the capacity to transact Senate business” during its *pro forma* sessions.¹¹² A recess existed only when the Senate was “unable,” not just “unwilling,” to act.¹¹³ The clause, Justice Breyer concluded, “is not designed to overcome serious institutional friction. It simply provides a subsidiary method for appointing officials when the Senate is away during a recess.”¹¹⁴

In a conflicting opinion concurring in the judgment, Justice Scalia, writing for four members of the Court, agreed with the D.C. Circuit that the clause’s original meaning limited it to inter-session breaks and vacancies opening during such a recess.¹¹⁵ Although he did not believe that the Court should consider the clause’s purpose,¹¹⁶ he argued that

109. *See id.* at 2567, 2573–77. The Court also relied heavily on a history of recess appointments lacking significant opposition to intra-session appointments to fill vacancies originating before the recess began. *See id.* at 2561–64.

110. *Id.* at 2567.

111. *See id.* at 2573–77.

112. *Id.* at 2574. The Court explained that despite the absence of a quorum, the Senate could and often did do business via unanimous consent agreements. A single Senator, by noting the absence of a quorum, could throw the Senate into recess if the members could not be brought to the chamber. *Id.* at 2576.

113. *Id.* at 2575 (emphasis removed).

114. *Id.* at 2577.

115. *See id.* at 2592, 2598 (Scalia, J., concurring).

116. *See id.* at 2598.

it was consistent with the clear original meaning—to limit the President’s ability to make appointments without Senate input to times when the Senate could not possibly provide timely advice and consent.¹¹⁷

B. *Arizona State Legislature v. Arizona Independent Redistricting Commission*¹¹⁸

Through a public initiative—without the participation of the state’s legislative body—Arizona empowered an independent commission to redraw its Congressional district lines.¹¹⁹ The initiative’s proponents intended the commission to combat partisan gerrymandering,¹²⁰ a practice that the Supreme Court had previously acknowledged to be problematic.¹²¹

The Arizona Legislature challenged the initiative’s constitutionality. It argued that the commission’s redrawing of the district lines violated the Elections Clause, which provides that “[t]he times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations”¹²²

The Arizona Legislature argued that the clause permitted only “the representative body which makes the laws” to draw Congressional district lines.¹²³ The Commission countered that the Elections Clause required only that the state draw lines in accordance with its legislative power as defined by its own constitution, which in

117. *See id.*

118. 135 S. Ct. 2652 (2015).

119. *Id.* at 2658.

120. *Id.*

121. *See id.* (citing *Vieth v. Jubelirer*, 541 U.S. 267, 292 (2004) (plurality opinion)).

122. U.S. CONST. art. I, § 4, cl. 1.

123. *Arizona State Legislature*, 135 S. Ct. at 2659.

Arizona included the initiative.¹²⁴ A divided three-judge District Court panel dismissed the case.¹²⁵

Justice Ginsberg, writing for a five-justice majority, acknowledged that in the late-1700s the initiative process was largely unknown.¹²⁶ Nevertheless, then-contemporary dictionaries established ambiguity as to whether “the Legislature” meant exclusively a representative body.¹²⁷ As the *Canning* majority had done, Justice Ginsberg explained that this ambiguity allowed the Court to examine the clause’s purpose. Because it empowered Congress to draw or override state-drawn lines, the Elections Clause protected against the possibility that a state might fail to (1) draw Congressional district lines at all; or (2) do so improperly out of a conflict of interest.¹²⁸ The founders did not intend, the Court held, for the clause “to restrict the way States enact legislation.”¹²⁹ Justice Ginsburg added that “[w]hile attention [during the founding era] focused on potential abuses by state-level politicians, and the consequent need for congressional oversight, the legislative processes by which the States could exercise their initiating role in regulating congressional elections occasioned no debate.”¹³⁰

The majority then recognized that, when the initiative process came into wide use in the early twentieth century, Congress recognized it as a legitimate basis for redistricting.¹³¹ And Ginsburg agreed with the legislature, explaining that “the people themselves are the originating

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* at 2671 (Dictionaries of the late eighteenth to early nineteenth centuries defined legislature as “the power that makes laws”).

128. *Id.* at 2672.

129. *Id.*

130. *Id.*

131. *Id.* at 2669.

source of all the powers of government,”¹³² and “it is characteristic of our federal system that States retain autonomy to establish their own governmental processes.”¹³³ Acknowledging the counter-originalist nature of its decision, the Court explained that, although the founding generation “may not have imagined the modern initiative process in which the people of a State exercise legislative power coextensive with the authority of an institutional legislature[,] . . . the initiative was in full harmony with the Constitution’s conception of the people as the font of governmental power.”¹³⁴

Dissenting on behalf of four justices, Chief Justice Roberts cited overwhelming evidence that objective readers in the 1780s would have understood the term *legislature* to mean a representative body.¹³⁵ He described Arizona’s use of the initiative process as a “deliberate constitutional evasion,” and the Court’s decision to approve it as a “magic trick.”¹³⁶

C. *The Common Pattern*

Both *Canning* and *Arizona State Legislature* followed a similar pattern in which five member majorities prevailed over vigorous dissents with no apparent accommodative efforts on either side. The problem was not a lack of scholarly attention. In both cases, academic theorists filed multiple amicus briefs. But those briefs provided no method to accommodate the Constitution’s dual commitments to both a Rule of Law and ongoing self-governance. The winner was simply the one that gathered the most votes. The following Part presents a new method that would enable the courts to move past this stalemate.

132. *Id.* at 2656–57.

133. *Id.* at 2673.

134. *Id.* at 2674.

135. *Id.* 2679–85 (Roberts, J., dissenting) (“Legislature’ was ‘not a term of uncertain meaning when incorporated into the Constitution.’”).

136. *Id.* at 2677–78.

III. INTRODUCING FARSIGHTED ORIGINALISM

This Part proceeds in four sections. First, it introduces the challenge of identifying an interpretive method for the Constitution's elegant specificities that incorporates the dual commitments to both self-governance and the Rule of Law. This Part explains that farsighted originalism meets this challenge by recognizing the superposition of original public meaning flowing from the problem-solving rubric embodied in each relevant clause. Second, it places this new interpretive method within the context of an existing critique of originalist methods that rely solely on the semantic content of constitutional clauses. Third, using examples, this Part explains and justifies this new way of looking at original meaning. Fourth, it sets out a five-step procedure that a court would use to apply farsighted originalism, and it then applies that procedure to the Court's recent cases interpreting elegantly specific clauses.

A. *The Challenge in Interpreting the Constitution's Elegant Specificities*

The best interpretive methods developed for the Constitution's majestically general individual rights-defining clauses are inappropriate for cases involving the elegant specificities because the two types of clauses serve different purposes. The generalities are, well, general in scope and designed to articulate universal principles mediating the interaction between power-wielding governmental actors and more or less powerless people. Accommodative interpretive methods for these clauses focus on the extent to which the founding generation would have expected the vague, open textured constitutional language to evolve or remain fixed.¹³⁷

The specificities, by contrast, address particular problems embodying conflict across branches or levels of

137. See discussion *supra* Part I.

government, all of which possess roughly equal power.¹³⁸ Because the terms are so clear, the sparse scholarship engaging these clauses assumes that interpretive difficulties will not arise.¹³⁹ But the Court's recent cases confirm that they do.¹⁴⁰ The challenge is to develop an interpretative method that—like the best methods applied in the majestic generalities' cases—accommodates (1) the rule of law embodied in the Constitution's original meaning; without (2) stifling the document's self-governance commitment.¹⁴¹

Farsighted originalism meets this challenge by recognizing that the original public meaning of an intra-governmental-conflict-resolving clause embodies a superposition of ways that the rubric embodied in the constitutional language could be applied to disagreements between branches of government or different sovereigns. Farsighted originalism is consistent with the Rule of Law because it rests on the problem-solving rubric embedded in original meaning of the constitutional text. Historical evidence of the type normally accepted by originalists defines this superposition of meanings.

The proposed method also accommodates the self-governance commitment by recognizing the range of meanings within the superposition, all of which would have rung true for the founding generation and from which the current generation can resolve modern problems. The citizens of the early 1790s may not have foreseen the particular modern problem that we face today. But because the superposition of original public meanings flows from the problem-solving rubric conveyed by the Constitution's words, if the founding generation had faced our challenge, they

138. See Terrance Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033, 1046 (1981) ("Intentions do not exist in the abstract; they are forged in response to particular circumstances . . .").

139. See discussion *supra* Section I.C.

140. See discussion *supra* Part II.

141. *Id.*

would have understood and accepted the farsighted originalism interpretation.

This approach thus provides for a spectrum of interpretive options allowing each American generation to seek a more perfect union consistent with and bounded by the superposition of original public meanings embodied in the elegantly specific constitutional clauses resolving intra-governmental disputes.¹⁴²

B. *Farsighted Originalism and the Existing Critique of Semantic Originalism*

The critical aspect of the interpretive method proposed here—that semantic meaning cannot convey the full original public meaning of the Constitution—is not new. Other scholars have emphasized that constitutional language is “generally modeled on strategic, not cooperative, principles.”¹⁴³ By its nature, the Constitution incorporates “tacitly acknowledged incomplete decisions,” if not conflicting meanings, because agreement on a single understanding proved elusive to the founders and the broader public.¹⁴⁴ This critique generally concludes that semantic originalism has failed to overcome the interpretative challenges that plagued intent-based

142. To step beyond the superposition of original public meaning would require a constitutional amendment. An originalist might argue that any interpretation exceeding the precise application to which an intra-governmental conflict resolving clause should require an amendment. The dividing line between amendment and legitimate interpretation of existing language has been addressed many times, albeit unsatisfactorily. This Article does not seek to define the precise dividing line between interpretation and amendment.

143. Saul Cornell, *Meaning and Understanding in the History of Constitutional Ideas: The Intellectual History Alternative to Originalism*, 82 *FORDHAM L. REV.* 721, 732, 750 (2013) (providing an example of the differing Federalist and anti-Federalist approaches to interpreting the Constitution).

144. Andrei Marmor, *Can the Law Imply More Than It Says? On Some Pragmatic Aspects of Strategic Speech*, in *PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW* 83, 97 (Andrei Marmor & Scott Soames eds., 2011) (emphasis removed); see also Cornell, *supra* note 143, at 731–40; Michelman, *supra* note 8, at 1501, 1520.

originalism and thus rejects the originalist method.¹⁴⁵

By contrast, farsighted originalism incorporates the range of meaning embodied in the Constitution into an originalist method, positing that the original public meaning incorporates the entire superposition of meaning embedded in the rubric that the framers chose to resolve a particular intra-governmental conflict. Rather than use the existence of a range of meaning to condemn originalism as prior critics have done, the method proposed here celebrates that range of meaning, allowing originalism to accommodate the constitutional commitment to self-governance more effectively than have some existing forms of originalism.

C. *Explaining Farsighted Originalism*

The elegantly specific constitutional clauses aimed at intra-governmental conflict embody problem-solving rubrics, constituting a *superposition of original public meaning*. The founding generation may have considered only one or a small number of meanings within this superposition. But because they understood the meaning of the rubric, they could comprehend the full superposition of meanings and, in historian Quentin Skinner's words, "be brought to accept [them] as a correct description of what [the Constitution's words] had meant"¹⁴⁶

145. See Cornell, *supra* note 143, at 731–40

146. *Id.* at 728–29 (quoting Quentin Skinner, *Meaning and Understanding in the History of Ideas*, in *MEANING AND CONTEXT: QUENTIN SKINNER AND HIS CRITICS* 29, 48 (James Tully ed., 1988)). This approach to extracting meaning bears a resemblance to Skinner's work. He relied on the language philosopher J.L. Austin's theory of speech acts that claimed that "to understand a historical text one must first define *the range of possible meanings* an utterance might have had at a given historical moment." *Id.* at 728 (citing Quentin Skinner, *Motives, Intentions and the Interpretation of Texts*, 3 *NEW LITERARY HIST.* 393 (1972)) (emphasis added). To uncover a text's meaning, Skinner emphasized a scholar must explore not just semantic meaning, but also what the relevant interpreter was doing with the words when they were written. *Id.* at 730. More recent historical work in this vein incorporates the work of Paul Grice, P.F. Strawson, and John Searle, referring to the aspect of meaning transcending semantic content as the assertive content of the words. See *id.* Although these approaches

The non-legal term *superposition* better communicates a point that is difficult to convey with standard legal language—that the elegantly specific clauses mediating intra-governmental conflict embody an “attribute of openendedness prior to the prompted choice.”¹⁴⁷ An elementary particle in superposition occupies multiple potential states simultaneously.¹⁴⁸ But when prompted, it decoheres, fixing itself in only one.¹⁴⁹ Although the physical world appears to exist in a fixed state, it consists of fundamental particles in a superposition of all possible positions in which they might be found. Reality differs from standard perception.¹⁵⁰

Just as we misleadingly perceive our physical environment as existing in a single state, we misperceive the Constitution’s specific clauses to have a single meaning. Farsighted originalism’s challenge is to show that the original public meaning of a specific intra-governmental-conflicting-resolving clause extends beyond a single nominal meaning to a superposition of potential original meanings that are all consistent with the problem-solving rubric embodied in the clause.¹⁵¹ The members of the founding generation may have decohered a clause to the specific

to history and language did not incorporate the problem-solving rubric insight of farsighted originalism, they do share the intuition that understanding meaning requires an inquiry into something beyond the semantic meaning of the words.

147. CYD C. ROPP, *A SIMPLE EXPLANATION OF ABSOLUTELY EVERYTHING* 32 (2015).

148. CARROLL, *supra* note 9, at 228–53 (2010) (“The miracle of quantum mechanics was that there is no longer any such thing as ‘where the object is’; it’s in a true simultaneous superposition of the possible alternatives, which we know must be true via experiments.”).

149. *Id.* at 251.

150. *Id.* at 229 (The concept of superposition in quantum mechanics renders “what we can *observe* about the world . . . only a tiny subset of what actually *exists*.” (emphasis in original)).

151. *See* Solum, *supra* note 31, at 38 (Semantic originalism is generally referring to “the actual meaning of the constitutional text in accord with a particular conception (theory or view) of that meaning” but other theories of meaning are possible).

meaning resolving the problem on which the clause was originally focused. But they understood that rubric could extend to other problems, producing a broader original public meaning. Farsighted originalism thus recognizes that the meaning of an intra-governmental-conflict-resolving constitutional clause includes all meanings that thoughtful members of the founding generation would have anticipated given the problem-solving rubric that they understood to be embodied in the text.¹⁵² And this method seeks to uncover the specific decoherence that the founding generation would have culled from the superposition of original public meanings had they faced the problem we face today.

For example, imagine a simple constitution drafted to govern a rural community. A clause of this constitution responded to a then-existing problem—farmers were using large caliber firearms to rid property of gopher infestations, creating an unsafe condition. The responsive constitutional provision read “only small caliber ammunition shall be used to rid the property of varmint infestations when the property is unoccupied.” A semantic originalist might conclude that the original public meaning of the clause limited varmint control to firearms, the only method—let’s assume—that was available to them. A modern proposal to use an ultra-sonic device to rid the property of gofers would thus violate this constitutional clause absent an amendment.

By contrast, a farsighted originalist would recognize that the problem addressed in the clause is varmint infestation,

152. Even one day after ratification, a thoughtful member of the public would have realized, issues would arise on which the Constitution’s words may apply, but that neither the drafters nor the ratifying voters would have anticipated. Rakove explores an early example involving James Madison’s struggle in the 1790s as a member of the House of Representatives with the meaning of the Treaty Clause. As a framer himself, he understood the clause to limit the role of the House. But as a legislator he struggled with his sense that the clause’s meaning should encompass a larger legislative role in the context of considering the Jay Treaty. RAKOVE, *supra* note 8, at 355–65 (In considering the scope of the House’s authority with respect to treaty approval “it seems apparent that the House [including Madison himself] was prepared to entertain interpretations reconstructing the positions of framers, ratifiers, and ‘the people.’”).

and the problem-solving rubric imposes a safety-oriented control method. The superposition of potential original meanings might thus include traps, poisons, predator animals, or ultra-sonic devices if they could be employed safely. In the context of government-conflict-resolving clauses, this superposition of potential original meanings accurately ascribes a fixed meaning to the Constitution's text, albeit one that is broader than semantic meaning.

The Recess Appointment Clause—the focus of one recent case—provides a real-world illustrative example of how farsighted originalism differs from semantic originalism.¹⁵³ That clause nominally responded to the problem of long Senate recesses in the context of the era's slow travel and communication speeds. Justice Scalia and the justices joining his originalist opinion in *Canning* would have strictly limited the clause to that specific meaning.¹⁵⁴ But farsighted originalism would require a court to uncover the superposition of potential original meanings that the problem-solving rubric could embody—that is, how the text addressed the problem of Senate-caused appointment delays—to resolve governance problems. Even though the founding generation may not have foreseen the possibility of long confirmation delays in conjunction with short recesses, a rubric designed to accelerate appointments in response to Senate-caused delay would permit unilateral appointments during a short recess if the Senate had caused a long delay.¹⁵⁵

This farsighted method is originalist because it focuses on the text at the time it was adopted, acknowledging that constitutional clauses have (1) a fixed meaning; (2) that contributes to the content of constitutional rules; and (3) that

153. To be sure, semantic originalism encompasses a wide swath of scholars who understand originalism in a variety of different ways. The comparison drawn in the text, however, incorporates the fundamental core of semantic originalism: principles that would likely be accepted by most originalists.

154. *NLRB v. Canning*, 134 S. Ct. 2550, 2598 (2014) (Scalia, J., concurring).

155. This issue is analyzed in more detail at *infra* Section III.D.

deserves our fidelity and constrains courts.¹⁵⁶ Importantly, the superposition of potential meanings does not include all possible meanings. For example, a particle capable of spinning left or right has both spin qualities in superposition. But when prompted, it will be spinning left or right. It won't decohere to a state spinning on a horizontal axis.¹⁵⁷ Just as particles have a limited range of possible spins, farsighted originalism retains the fixation thesis essential to the originalist method by limiting itself to the particular range of potential meanings within the rubric that would have been understood by the founding generation.

Farsighted originalism thus retains originalism's core requirements, seeking to rely objectively "on external, demonstrable historical evidence . . ." ¹⁵⁸ and prohibits new conceptions of clauses not within the ambit of the problem-solving rubric.¹⁵⁹ The superposition of potential meanings would *not*, for example, include an interpretation of an ambiguous clause if the founding generation would have rejected that interpretation through the interpretive methods they would have used.¹⁶⁰ And vagueness leading to under-determinateness would remain in the realm of constitutional construction,¹⁶¹ enabling the text to retain

156. Solum, *supra* note 31, at 2–9.

157. ROPP, *supra* note 147, at 32; see CARROLL, *supra* note 9, at 231–32.

158. WHITTINGTON, *supra* note 2, at 195.

159. See Solum, *supra* note 31, at 2 (“[T]he fixation thesis is the claim that semantic content of the Constitution (the *linguistic meaning* of the Constitution) is fixed at the time of adoption.” (emphasis in original)).

160. John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. L. REV. 751, 752 (2009) (Original public meaning includes “the interpretive rules that were customarily applied to such a document” by the founding generation.).

161. Farsighted originalism would not run afoul of Whittington's concern that “[t]he new meanings that words may acquire over time could not have been foreseen and intended by anyone, and the meaning they may appear to give the law is not a meaning that has been authorized by any legitimate body.” WHITTINGTON, *supra* note 2, at 59. But this is true only in limited contexts such as the sense in which “bad” now sometimes means “good.” See *Bad*, THE FREE

originalism's fuzzy frame quality limiting potential constructions.¹⁶² To be sure, the farsighted method will not produce easy clear answers. Like all forms of originalism, however, this method “neither pretend[s] to uphold nor [should it] be criticized for failing to meet,” in Whittington’s words, “standards of proof that eliminate the significance and role of an interpreter making an argument.”¹⁶³

D. *Applying Farsighted Originalism*

A farsighted originalist interpreting an intra-governmental-conflict-resolving clause would engage in the following five-step process:

- (1) search for the original semantic meaning of the clause at issue;
- (2) identify the problem that the clause sought to

DICTIONARY, <http://www.thefreedictionary.com/bad> (last visited July 17, 2015) (“The first known example [of using bad to mean good] dates from 1897. . . . This is by no means uncommon; people use words sarcastically to mean the opposite of their actual meanings on a daily basis. What is more unusual is for such a usage to be generally accepted within a larger community. Perhaps when the concepts are as basic as ‘good’ and ‘bad’ this general acceptance is made easier.”). Whittington is certainly correct that if the original Constitution used the word “bad,” a modern court should not now interpret it to mean “good” despite the modern meaning of the word. That would conflict with the common meaning understood during the founding era. But text incorporating a problem solving rubric addressed to a particular problem could be extended to solve a related—but unanticipated—problem without contradicting original meaning. It could be both foreseen in principle and therefore embodied in the original public meaning. To be sure, the founding generation might not have intended or expected a particular result. But Whittington has made clear that the interpreter must account for meanings and not “expectations about effects.” WHITTINGTON, *supra* note 2, at 178, 187. Meaning can include an evolutionary aspect even if the citizens of the late seventeenth century would not then have anticipated particular outcomes that would flow from the words. *See supra* Section III.C (discussing the superposition of potential meanings).

162. *See* Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 430 (1985) (Constitutional text “establishes a boundary, or a frame, albeit a frame with fuzzy edges. Even though the language itself does not tell us what goes on within the frame, it does tell us when we have gone outside it.”); BARNETT, *supra* note 20, at 125 (citing Schauer, *supra*, at 430).

163. WHITTINGTON, *supra* note 2, at 195.

address;

- (3) determine how the public meaning of the text engaged that problem, that is, what problem-solving rubric does the meaning embody;
- (4) determine how that rubric would be applied to the current question consistently with the original public meaning embodied in the problem-solving rubric; and
- (5) if the original meaning cannot tell us how to apply the problem-solving rubric to the current question, engage in constitutional construction to resolve the issue.

Farsighted originalism is identical to various well-articulated forms of semantic originalism at the first and fifth steps. The intermediate steps are new and reject at the interpretative stage a semantic meaning limited to the founding generation's specific expectation as to the role the intra-governmental-conflict-resolving clause would play. These steps incorporate the notion that the framers aimed the Constitution's specific intra-government-conflict-resolving clauses at anticipated problems, and those clauses thus embody problem-solving rubrics that embody a superposition of original public meanings. To acknowledge the complete meaning of the clause, an interpreter must consider all of the potential ways that the rubric could be employed to deal with the identified problem and those within a similar frame, that is, the superposition of all potential original meanings.

This Part applies the five parts of the farsighted originalist method to the Court's recent decisions in *Canning* and *Arizona State Legislature*, producing results and rationales that differ from the majority opinions in significant ways.¹⁶⁴

164. This Part is intended to illustrate how a judge should apply farsighted originalism, relying on the information available from the opinions in the two cases. To the extent that additional historical information were to come to light bearing on the meaning of the problem-solving rubric in each clause, the analysis

1. *Canning* & Farsighted Originalism

Under the facts in *Canning*, farsighted originalism—like the Court itself—would hold that a unilateral appointment during an intra-session recess to fill a vacancy existing when the Senate adjourned would not *per se* violate the Recess Appointments clause. The problem-solving rubric should reach all vacancies and recesses because of the broad authority the clause granted the President to fill vacant offices during a recess.

But the Court's narrow focus on the formal length of a recess is inconsistent with the result that farsighted originalism would reach. The clause's problem solving rubric permitted the President to unilaterally appoint an official during the recess, regardless of how little time remained before the Senate planned to commence doing business. If the President could fill a recess opening just one day before the Senate was set to return, making the length of the recess the critical factor is inconsistent with the farsighted original public meaning of the clause. A test focusing on whether Senate-caused delay prevented the President from filling a vacancy for several months would better comport with the rubric embodied in the text.

This Section applies each of the five steps of the farsighted originalism test to the *Canning* facts.

a. Semantic Meaning. Justice Scalia's opinion concurring in the judgment¹⁶⁵ and Michael Rappaport's 2005 law review article on the Recess Appointment Clause¹⁶⁶ demonstrated that the founding generation understood that clause to permit the President to fill a vacancy without the Senate's advice or consent when the office came open during an inter-session recess. The plain meaning of the text; contemporary practice; and contemporary expert views all coalesce to

here could change.

165. *NLRB v. Canning*, 134 S. Ct. 2550, 2592–618 (2014) (Scalia, J., concurring).

166. See Rappaport, *supra* note 74.

support this conclusion.

b. Identifying the Problem. The problem to which the Recess Appointments Clause addressed itself was Senate-caused delay in filling vacancies. The normal constitutional process required the Senate to advise the President and consent to an appointment before a federal official could begin work. The founding generation would thus have understood the relevant constitutional language to require the President typically to present a nominee to the Senate and receive advice and consent in short order. That process could not function efficiently, however, when the Senate took what were anticipated to be multi-month recesses.

To combat the problem of Senate-caused delay in filling vacancies that resulted from long recesses, the Recess Appointment Clause granted the President unfettered discretion to make time-limited unilateral appointments at any point during the recess. The Federalist Papers confirm this understanding: “it might be necessary for the public service to fill [vacancies] without delay, the [Recess Appointments Clause] is evidently intended to authorize the President *singly* to make temporary appointments.”¹⁶⁷

Justice Scalia disagreed with this interpretation of the clause, contending that delay in permitting officials to begin their government work was only a small part of the problem.¹⁶⁸ He emphasized what he called the “self-evident purpose of the Clause: to preserve the Senate’s role in the appointment process—which the founding generation regarded as a critical protection against ‘despotism.’”¹⁶⁹

Upon close (or even cursory) examination of the constitutional language, however, no such purpose emerges. To be sure, in the context of modern concerns over the imperial presidency, the problem of a diminished role for the

167. THE FEDERALIST NO. 67, *supra* note 103, at 455 (emphasis in original).

168. *Canning*, 134 S. Ct. at 2597, 2607 (Scalia, J., concurring).

169. *Id.* at 2597; *see also* Rappaport, *supra* note 74, at 1494.

Senate might seem apparent. But the issue for Justice Scalia was original meaning, not a modern interpretation. And if the founding generation understood the Recess Appointments Clause to combat despotism, it was anything but self-evident. The clause conveyed the President a strikingly broad and unlimited unilateral appointment power to fill “all vacancies” during recesses, even though the Senate was expected to recess every year for many months. It included neither limits on how long an office would remain open without a unilateral appointment nor any other sort of urgency threshold. The President could simply make a recess appointment to fill a vacancy that opened just one day—even just one hour—before the next Senate session was set to begin even if the official in question would not need to perform any essential duties until after the Senate planned to return to session.

The only limit that the Clause placed on the President was that the unilaterally appointed official could serve only until the end of the next session. But that is really no limit at all, because the President could simply reappoint the official when the vacancy arose in the next recess. The Recess Appointment Clause included no bar to serial recess appointments. That hardly suggests a strong concern with preserving the Senate’s role to combat presidential despotism.

To be sure, the Recess Appointment Clause must be understood in conjunction with the Advice and Consent Clause.¹⁷⁰ But that clause did not facially empower the Senate to approve or veto appointments at its discretion. On the contrary, the chosen phrase—and commentary in the Federalist papers¹⁷¹—points to a principle that the Senate

170. Although originalism focuses on clause meaning, each clause is interpreted in light of other relevant parts of the Constitution. So, reference to the Advice & Consent Clause is appropriate. See Solum, *supra* note 31, at 108.

171. Publius emphasized that the *nomination* power rested in the President alone because “one man of discernment is better fitted to analyse and estimate the peculiar qualities adapted to particular offices, than a body of men of equal,

should generally play a joint role with the President in ensuring that federal appointees are qualified experts in their fields, not political cronies of the President. But cronyism is not despotism, and consent is not approval. We all consent to many things that we would never approve if we had a cost-free veto power. And the text does not even mandate the modern procedure through which the Senate votes to accept or reject a nominee. A system that presumed consent after a reasonable period unless the Senate advised the President that it had found a nominee unacceptable would comport with the text.

One might contend that the Advice and Consent Clause required political methods—compromise or personnel changes brought about by elections—to resolve differences between the Senate and the President on a nominee. But the idea of waiting—potentially for years—for elections to break a logjam would contradict the clear meaning of the Recess Appointments Clause, which permitted unfettered unilateral appointments to avoid potentially very short delays whenever the President felt that the appointment was necessary. If the framers had meant to give the Senate broad power to reject qualified appointees for any reason, the Constitution would have included words with that meaning instead of the words the framers chose.

By limiting the President's unilateral power of appointment to *the recess*, it follows that the Recess Appointment Clause and the Advice and Consent Clause taken together prohibited the President from circumventing Senate input.¹⁷² The President could not, for example, fail to nominate anyone to fill a vacancy, waiting for the recess in

or perhaps even of superior discernment.” THE FEDERALIST NO. 76, *supra* note 103, at 510. The Advice and Consent Clause was understood to provide “an excellent check upon a spirit of favoritism in the President, and would tend greatly to preventing the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity.” *Id.* at 513.

172. THE FEDERALIST NO. 67, *supra* note 103, at 455 (“[T]he President and Senate *jointly*” act on appointments. (emphasis in original)).

order to unilaterally appoint his cronies. But if the President nominated a qualified candidate, and the Senate despite adequate time for consideration recessed without acting on the nomination, nothing within the meaning of the clauses would prevent a recess appointment regardless of the length of the recess. The constitutional text thus reveals that the problem the founding generation would have understood the Recess Appointment Clause to address was delay in qualified appointees commencing their government work where that delay was attributable to the Senate.

c. Problem-Solving Rubric. This step uncovers the rubric that the founding generation would have understood the clause in question to employ to address the identified problem. Care must be exercised here so as not to over-emphasize one aspect of the rubric over another. Just as an analysis of purpose can be manipulated by focusing on one of many possible purposes,¹⁷³ the problem-solving rubric must be applied with care.

With respect to the Recess Appointment Clause, the rubric operates to ensure that:

- (1) if the President desires to fill a vacancy; and
- (2) the Senate caused the delay; then
- (3) the President can fill the vacancy unilaterally during a recess.

The clause anticipates a particular circumstance that tilted the balance in favor of allowing the President to act unilaterally—the Senate decided to take a multi-month inter-session recess. To deal with the problem of unfilled vacancies during this period, the rubric granted the President unfettered discretion to fill all vacancies that arose at any time before the Senate returned to session.

173. Rappaport, *supra* note 74, at 1494; *see also* Rappaport, *supra* note 19, at 893–94; Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616, 624, 633–34 (1949) (exploring the interpretive error of focusing on one of many purposes that may underlie a written law in the context of a mock case).

This rubric would prohibit a President from unilaterally appointing someone during a recess when an opportunity existed to present a nominee to a sitting Senate, but the President failed to do so. The Advice and Consent Clause requires that. But otherwise, it is hard to imagine a broader unilateral appointment power. The President need not specify under the language of the clause why an uncounseled appointment was necessary before the Senate returned to session, even if the Senate would be returning the very next day.¹⁷⁴

Through the prism of this rubric, the clause's original meaning can be seen to embody the notion that promptly filling positions that might otherwise lay vacant outweighed the value of Senate consultation if the Senate chose to recess without confirming a qualified appointee. With respect to the clause's nominal meaning, the Senate's decision to recess for many months created a substantial risk that offices would go unfilled for too long, and thus the clause empowered the President to make unilateral appointments without restriction. Had Senate input been understood to be equally or more important, the clause would have limited the President's unilateral power to demonstrably exigent situations or at least to circumstances where the Senate could not participate for a substantial period of time. The clause would have included something like *if filing the vacancy promptly is in the national interest* or *unless the appointment would come within the final thirty days of the scheduled recess*. Of course, it included neither limitation.

Given the broad discretion granted to the President during the inter-session recess, the problem-solving rubric would grant the President unilateral appointment authority in situations bearing the same characteristics as those addressed in the clause. The text explicitly grants the

174. Justice Breyer's majority opinion captured the idea quite well, concluding that the clause granted "the President the power to make appointments during a recess but not offering the President the authority routinely to avoid the need for Senate confirmation." *NLRB v. Canning*, 134 S. Ct. 2550, 2559 (2014).

President virtually unlimited appointment authority in the one context that was apparent to the founding generation—a multi-month, Senate-caused delay in filling vacancies. To deny the President any ability whatsoever to make a recess appointment in other circumstances arising from Senate-caused delays, no matter how compelling, would contradict the meaning embodied in this rubric.

d. Applying the Rubric to the Facts. This step applies the rubric to the challenged conduct—President Obama’s recess appointments to the NLRB. Under the rubric described above, the *Canning* majority correctly held that the clause permitted recess appointments during some intra-session recesses and to fill vacancies arising before or during a recess. Because the rubric addresses the need to fill open vacancies caused by delays attributable to the Senate, the type of recess or the status of the Senate when the vacancy arose are irrelevant to the scope of the recess appointment power.

The majority also correctly focused on timing as a critical consideration in deciding when the President would have a unilateral appointment power. The problem-solving rubric embodied in the clause was premised on potential delays in filling vacancies, making timing an important component. So, allowing a recess appointment after a short delay would be inconsistent with the rubric.

The majority erred, however, in making the length of the recess the critical delay-assessing factor rather than the Senate’s delay in confirming the appointment.¹⁷⁵ Focusing on the length of the recess would permit the President to fill vacancies unilaterally during a ten day recess, even if the

175. The majority’s schema provided that:

- a recess of less than three days would not permit an appointment;
- a three- to ten-day recess would presumptively be insufficient absent evidence of an extraordinary need for an official to quickly take office; and
- a recess of ten days or more would presumptively be sufficient.

Id. at 2566–67.

vacancy opened before the recess began and the President failed to present a nominee to the Senate. But the Advice and Consent Clause prohibits the President from using recess appointments to frustrate the Senate's joint role in the appointment process. The Senate must be the cause of the delay to trigger the recess appointment power. Moreover, nothing in either clause suggests that the recess must be an extended one. On the contrary, the Recess Appointments Clause explicitly permits the President to immediately fill a vacancy opening even on the final day of the recess when the vacancy could be just a matter of hours.

The proper approach looks to whether the continuing vacancy is attributable to the President or the Senate. If a vacancy arose before a recess began, the President should nominate a candidate to satisfy the Advice and Consent Clause. If the President fails to submit a nomination before the Senate recesses, then the appointment would not fit within the meaning of the rubric, because the Senate did not cause the delay. Congress apparently agreed with this understanding of the recess appointment power, enacting a law generally barring payment to recess appointees—if the position opened before the recess—unless the President had nominated a candidate before the recess began.¹⁷⁶

When the President presented a nominee to the Senate, the analysis would be different. If a nomination is pending and the Senate recessed without voting on the nominee, then the delay is attributable to the Senate and the President could unilaterally appoint someone to fill the vacancy

176. 5 U.S.C. § 5503 prohibits payment of a recess appointment made to fill a vacancy opening prior to the beginning of a recess unless a nomination was pending before the Senate. 5 U.S.C. § 5503(a) (2012). The statute would also permit payment to a recess appointee if the vacancy arose within thirty days of the end of the session; or the Senate had rejected a nomination within thirty days of the end of the session and the recess appointment was of someone other than the nominee who had been rejected. *Id.* § 5503(a)(1), (3). This statute also requires the President to submit a nominee to the Senate for any position filled by a recess appoint under § 5503(a) within forty days of the beginning of the next session. *Id.* § 5503(b).

regardless of the recess's length. It would be incongruous to permit unfettered recess appointments if the Senate causes delay in filling vacancies via a recess, but prohibit unilateral appointments entirely when the Senate causes the same delay but manipulates its schedule to make the recesses appear short.¹⁷⁷ Similarly, empowering a President unilaterally to fill a vacancy initially opening shortly before the end of a recess, but prohibiting the President from filling a vacancy during the recess that the Senate had refused to fill for potentially many months smacks of incongruity.

Both of the *Canning* opinions wrongly suggest that the clauses at issue compel more deference to the Senate's role in the appointment process than the above analysis would require. Justice Breyer's majority opinion improperly refers to Senate "approval" and limits the recess appointment power to cases in which the Senate is unable—rather than unwilling—to confirm a nominee.¹⁷⁸ But the Constitution's text does not require Senate approval. And while the Recess Appointment Clause does describe a situation in which the Senate would have been technically unable to act, its meaning was not so limited. Recall again that the Clause allows the President to fill unilaterally all vacancies until the moment the Senate resumed a session. To conclude that a Senate coming back into session within hours is *unable* to act unreasonably elevates form over substance in a way that does not comport with the farsighted original meaning embodied in the text. If the Senate is in session, the President may not unilaterally fill a vacancy because the Advice and Consent Clause requires respect for the Senate's

177. One of the benefits of farsighted originalism's focus on the problem-solving rubric embodied in constitutional text is that it opens up the excluded middle in this way. Rappaport's originalism posed a choice between vacancies that arose during the recess, on the one hand, and all vacancies with no limitation, on the other. Given that binary choice, he correctly identifies the public meaning as the former. Rappaport, *supra* note 74, at 1543–46. By changing the focus to the problem-solving rubric, the interpreter can see how other possibilities may accord with the rubric embodied in the text.

178. *Canning*, 134 S. Ct. at 2558–59.

on-going assessment process. But once the Senate recesses without addressing a nominee, the recess appointment power kicks in, at least where (1) the Senate has had a reasonable amount of time to provide advice and consent; or (2) the President could not have made a pre-recess appointment because the vacancy opened after the recess had begun.

Justice Scalia went even further than the *Canning* majority. The interaction between the two clauses, he asserted, conveyed an original public meaning permitting the Senate to “refuse to confirm any nominee for an office, thinking the office better left vacant for the time being.”¹⁷⁹ The balance struck by the clauses, he believed, permitted unilateral appointment only when *no possibility existed* for prompt Senate input to fill an important vacancy—that is, the vacancy arose during a long recess and the Senate could not reassemble promptly.¹⁸⁰

But it is hard to see how that interpretation could comport with the problem and the rubric developed to address it. Nothing—not text, constitutional structure, nor history—suggests that the founding generation would have understood the Advice and Consent clause to grant the Senate the ability to prevent qualified nominees indefinitely from doing the government’s work simply because the Senate believed that the work did not need to be done. Indeed, the Recess Appointment Clause flatly contradicted that view by granting the President broad discretion to make unilateral appointments—not just when the Senate could not be assembled for long periods, but even when the Senate was on the cusp of reconvening if in the President’s sole discretion a prompt appointment was deemed appropriate.

Farsighted originalism would thus recognize that the President has the power to unilaterally appoint an official during any recess if the Senate had an adequate opportunity

179. *Id.* at 2599 (Scalia, J., concurring).

180. *See id.*

to provide advice and consent, but failed to do so, before the President exercised the unilateral power.

Given generally available information, it appears that the Senate had adequate time to consider the unilaterally-appointed nominee that President Obama had presented nearly a year before the recess. But the other two had been nominated just shortly before their recess appointments. The Senate had very little time to consider them, and thus under farsighted originalism, the President's unilateral appointment of those two nominees violated the Recess Appointment Clause.

e. Constitutional Construction. Given the analysis above, a court would not need to enter the construction zone to resolve how the Recess Appointment Clause should apply to the NLRB appointments at issue in *Canning*. The meaning embodied in the rubric designed to solve the problem of Senate-caused delay in filling vacancies is broad enough to encompass unilateral appointments during a recess of any length if the Senate had failed to provide advice and consent to the President after having a reasonable opportunity to consider a nominee.

Because farsighted originalism is historically based, however, additional evidence of the public meaning understood to be embodied in the Recess Appointment Clause's problem-solving rubric could demonstrate that the meaning is vague with respect to the particular facts presented in *Canning*. For example, evidence of a historic understanding of the President/Senate relationship could show that the meaning embodied in the rubric may be vague with respect to factors such as the length of the delay in acting on a nomination and the conditions producing that delay. Perhaps any nomination sent to the Senate before it commenced a recess could receive a recess appointment if the Senate stopped doing business without first confirming or rejecting the nominee.¹⁸¹

181. The Congress enacting 5 U.S.C. § 5503 appears to have believed that the

If the meaning were vague in this respect, the Court would need to employ the tools of constitutional construction to develop a rule consistent with the meaning. The analysis would encompass factors flowing from the clause's original public meaning within the framework of the problem-solving rubric, such as the length of the delay in acting on a nominee; whether legitimate concerns existed about the nominee's qualifications; and whether the Senate was engaged in ongoing evaluative work or simply sitting on a nomination.

2. *Arizona State Legislature* and Farsighted Originalism

In *Arizona State Legislature*, the problem-solving rubric in the Elections Clause did not encompass restraining a state's authority to decide how to draw district lines so long as it in fact properly drew them. The rubric gave Congress oversight authority, and the available evidence suggested that Congress would not object to the initiative process.

This Section applies each of the five farsighted-originalism steps to the *Arizona State Legislature* facts.

a. Semantic Meaning. Chief Justice Robert's dissenting opinion demonstrated that the founding generation understood the use of the term "legislature" in the Elections Clause nominally to mean a representative body.¹⁸² The plain meaning of the text, contemporary practice, and contemporary expert views all coalesce to support this conclusion.¹⁸³

recess appointment power legitimately extended to any situation in which the President nominated a candidate, no matter how close to the beginning of the recess. Indeed, Congress would have permitted recess appointments where the President failed to present a nominee to the Senate if the position opened less than thirty days before the end of the session. 5 U.S.C. § 5503(a)(1). A later Congress's view, of course, cannot establish the original public meaning of a clause. And in this case, the rubric embodied by the clause may grant less authority to the President than a later Congress did.

182. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2679–80 (Roberts, J., dissenting).

183. *See id.* at 2679–85 (Roberts, J., dissenting).

b. Identifying the Problem. The Elections Clause responded to a two-pronged problem. Although the new government depended on states holding elections and sending representatives, the framers were concerned that states would not play ball because they feared that the new national government would improperly usurp state authority.¹⁸⁴ The Clause responded to that problem by granting states the power, in the first instance, to draw election district lines while also empowering Congress to step in if the state failed to act properly. So long as the state used its authority responsibly, it could control the election of House members within the state.¹⁸⁵

c. Problem Solving Rubric. The problem-solving rubric involved explicitly respecting state authority—to assuage concerns about an intrusive federal government—while maintaining a reserve federal power, just in case.¹⁸⁶ Had the Constitution been silent, the presumption under the Tenth Amendment would have been that a state would need to draw its own district lines.¹⁸⁷ The only reason to include the Elections Clause was to ensure that the state did in fact fulfill this responsibility by creating a federal backup. The rubric embodied in the Elections Clause essentially used explicit respect as the sugar to help the backup congressional power medicine to go down.

184. *Id.* at 2672.

185. See Brief for Jack N. Rakove & Richard R. Beeman et al. as *Amici Curiae* Supporting Appellees, *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652 (2015) (No. 13-1314), 2015 WL 309083, at *21–*26 [hereinafter *Historian Brief*].

186. See RAKOVE, *supra* note 8, at 181–84 (discussing Anti-Federalist concerns with expansive national powers).

187. See U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

d. Applying the Rubric to the Facts. The Elections Clause's rubric permitted a state's use of an initiative procedure to create a district line-drawing commission that could act without input from the state's legislative body. The existing evidence indicates that the rubric did not incorporate any restraint on state authority beyond ensuring that proper district lines were drawn.¹⁸⁸ Of course, the question is one of historical fact, and it is possible to imagine rational reasons to require a representative body rather than another legislative method to draw district lines. But there appears to be no historical record supporting a substantive preference for a representative body within the Elections Clause's problem-solving rubric.¹⁸⁹

Absent historical evidence that the rubric sought to restrict the scope of state authority, the original meaning of the Clause could not have been to prohibit line-drawing by initiative. The public meaning embodied in the first state-respectful aspect of the rubric designed to safeguard state authority could not be infringed by Arizona's use of a legitimate means of exercising the legislative power.

Arizona's reliance on the initiative process could potentially have triggered the aspect of the rubric that empowered Congress to re-draw improper lines if (1) the process were not a legitimate exercise of the legislative power; or (2) the line-drawing that emerged was substantively improper. But here, the initiative process was

188. See *Historian Brief*, *supra* note 185, at *32–*33, *35 (“Given the political context of 1787–1788, when the victorious Federalists were heaping so much obloquy on state legislatures, the idea of creating an independent commission to perform such a task would not have been inconsistent with this theory of the people’s ultimate capacity to act constitutionally.”). Further, “the decision by the people of Arizona to establish an independent redistricting commission is fully consistent with the political values underlying the Constitution, even if the legislative initiative had yet to be conceived in the 1780s.” *Id.*

189. See *Ariz. State Legislature*, 135 S. Ct. at 2672 (explaining that the framers focused on the states’ potential reluctance to draw district lines or to draw them properly, but not on how the state power to draw lines should be exercised).

used to overcome concerns about gerrymandered congressional district lines. Far from being an improper line-drawing method, it amounted to a state-initiated device to solve the sort of problem that the Elections Clause empowered Congress to fix.

Even if the commission-drawn lines could have been deemed improper, the rubric would have been understood to empower Congress to step in. It is hard to see how the state's decision to use the initiative process within a rubric that in large part sought to acknowledge state authority could have originally meant that a court could condemn the state's choice in the absence of Congressional action.

e. Constitutional Construction. As with the Recess Appointment Clause, absent additional historical evidence, constitutional construction is unnecessary to resolve how the Elections Clause should apply to these facts. The original public meaning embodied in the rubric designed to solve the problem of ensuring that states elect House members without trampling state authority encompasses a state's use of a legitimate process for exercising the legislative power.

If new evidence emerges suggesting that the meaning of "legislature" is vague, the Court would need to employ the tools of constitutional construction to develop a rule consistent with that meaning. The analysis required would encompass factors flowing from the Clause's original public meaning within the framework of the problem solving rubric. As an initial matter, a court would consider what alternatives may have been excluded by the choice of the term "legislature." Since the initiative process was largely unknown in the late eighteenth century, it is extremely unlikely that the rubric would have meant to exclude it. But if any viable alternative could have been understood by the public to be excluded, constitutional construction would need to account for it.

Another approach within the construction process would be to examine how Congress responded with respect to its Elections Clause responsibilities when, in the early

twentieth century, the initiative process emerged as a significant tool for exercising state legislative power.¹⁹⁰ The view of a later Congress, of course, could not definitively establish the 1789 original public meaning. But because the clause conveyed to Congress the power to redraw a state's district lines, any Congress's view on what sort of line-drawing would be improper is relevant. That, of course, is exactly what Justice Ginsberg's majority opinion did, pointing out that Congress in 1911 recognized that the initiative process would be an acceptable one for drawing district lines.¹⁹¹

IV. THE SEMANTIC MEANING CRITIQUE

Semantic originalism embodies a core belief that the best method to interpret the Constitution rests on discovering the intersubjective, historical fact of an original meaning to guard against the influx of subjective modern values into the

190. According to the National Conference of State Legislatures, as of December 2015, twenty-six states and the U.S. Virgin Islands had some form of initiative process that enabled laws to be enacted without the approval of a representative legislative body. *Initiative and Referendum States*, NAT'L CONF. ST. LEGISLATURES, www.ncsl.org/research/elections-and-campaigns/chart-of-the-initiative-states.aspx (last visited May 2, 2017).

191. Justice Ginsberg explained that in a 1911 Act addressing redistricting Congress focused on the fact that several States had supplemented the representative legislature mode of lawmaking with a direct lawmaking role for the people, through the processes of initiative (positive legislation by the electorate) and referendum (approval or disapproval of legislation by the electorate). 47 Cong. Rec. 3508 (statement of Sen. Burton)[.] . . . To accommodate that development, the 1911 Act eliminated the statutory reference to redistricting by the state "legislature" and instead directed that, if a State's apportionment of Representatives increased, the State should use the Act's default procedures for redistricting "until such State shall be redistricted *in the manner provided by the laws thereof.*" Ch. 5, § 4, 37 Stat. 14 (emphasis added).

Ariz. State Legislature, 135 S. Ct. at 2668–70 (A similar 1941 Act also recognized the legitimacy of redistricting "in the manner provided by the law thereof—as Arizona did by utilizing the independent commission procedure in its Constitution . . .").

interpretive calculus.¹⁹² The founding generation, originalists emphasize, “is best understood as the clause meaning of its provisions . . . that would have been assigned at the time the Constitution was ratified”¹⁹³ Any method that grants modern interpreters “substantial discretion to apply constitutional provisions as they see fit” raises a red flag for many originalists, because this flexibility makes “it . . . a little difficult to see what is left of a recognizable originalism.”¹⁹⁴ Courts must therefore “focus on the meaning of specific clauses rather than on the animating principle that resulted in those more specific clauses being drafted and ratified.”¹⁹⁵

To be sure, one can debate the content of original public meaning. But that debate, as Whittington recognized, must rely on “intersubjective standards of evaluation” and “be supported by the weight of historical evidence.”¹⁹⁶ The facts may not be obvious, but they are facts. When all the information is in, an objective answer must be determinable without reference to subjective, inherently contestable values.¹⁹⁷

Farsighted originalism appears to run counter to this approach. By opening the interpretive method to all potential original public meanings, the critique runs, the firewall

192. WHITTINGTON, *supra* note 2, at 195 (Originalist analysis must rest on “intersubjective standards of evaluation.”).

193. Lawrence B. Solum, *Constitutional Texting*, 44 SAN DIEGO L. REV. 123, 150 (2007).

194. John O. McGinnis & Michael Rappaport, *Original Interpretive Principles as the Core of Originalism*, 24 CONST. COMMENT. 371, 381 (2007).

195. WHITTINGTON, *supra* note 2, at 37, 195.

196. *Id.*

197. The recent *procedural turn* within originalism takes this approach a step further by narrowing the scope of the construction zone in which value-laden analysis may creep in. By following the procedural approaches recognized at the time of the framing, this branch of originalism claims that one can resolve most instances of vague meaning without entering the construction zone. See McGinnis & Rappaport, *supra* note 160, at 753 (A focus on “[o]riginal methods is . . . normatively superior to constructionist originalism.”).

between discoverable, inter-subjective, historical fact and inherently contestable subjective value choices becomes too thin. Like the problematic search for the *purpose* of a constitutional clause, the problem-solving rubric embodying the superposition of original public meaning may temptingly open cracks for subjective modern values to creep in.¹⁹⁸ Only by honing closely to the historical fact of semantic meaning does originalism fulfill its true promise of precluding the subjective values of modern judges from infecting constitutional interpretation.

The validity of this critique rests on the belief that a dichotomy exists between, on the one hand, discoverable, inter-subjectively true objective facts about the world and, on the other, individuating subjective values that are inherently contestable. If facts and values can be separated in this way, then the originalist vision of an interpretive method grounded on the discovery of the objective fact of semantic meaning can be achieved.

But if this dichotomy is false, and non-contingent, value-free historical facts do not exist, then the coherent semantic meaning that originalists seek can never be found. The meaning of a constitutional text would be inherently embodied in a structure of value-laden action. One could not understand the meaning without understanding the values motivating the use of the language in a particular way.

An originalist method would remain possible without the fact-value dichotomy. But that method would have to acknowledge that values are not entirely subjective. They can be uncovered and meaningfully debated just as facts can. Farsighted originalism—by focusing on the superposition of potential meanings embodied in a problem-solving rubric—takes this step. Assuming that a coherent, value-free semantic meaning does not exist, farsighted originalism seeks to uncover the founders' value structure by examining

198. Cf. Rappaport, *supra* note 74, at 1494 (explaining the danger of relying on a constitutional clause's purpose as an interpretive tool).

how that generation's words were used to resolve particular intergovernmental conflicts.

Since values are on the table, modern values may threaten to infect the analysis. But if the fact-value dichotomy is false, that risk cannot be avoided. And by revealing the necessity of considering both fact and value, we may increase the likelihood that courts will interpret the Constitution with the appropriate degree of respect for original meaning. This Part shows that semantic originalism rests on the fact-value dichotomy. Relying principally on Wittgenstein's use theory of language, it provides an alternative account through which meaning is best uncovered by examining value through application.

A. *Farsighted Originalism and Linguistic Meaning*

Solum has argued that originalists distinguish the fixed and inter-subjectively determinable linguistic meaning that forms the interpretive core of their method from meaning derived from the text's value-laden, and thus subjective consequence, application, purpose, or function.¹⁹⁹ A function-independent semantic meaning, however, may be incomplete to the extent that it ignores the rubric embodied in the text that solved the particular problem motivating the framers to include the clause in the Constitution. If one could divorce semantics from application, a purely semantic meaning would be derivable. But it could tell us only the meaning of words disassociated from *how they were to be used*. Originalism claims to provide an interpretation with sufficient content to resolve real constitutional questions without looking to the values of the speakers. But if the original meaning is somehow cut off from how the founding generation understood it to be applied, that meaning cannot alone answer real questions about the intra-governmental regulatory clauses.²⁰⁰ It leaves out the critical step—*and*

199. See Solum, *supra* note 31, at 2.

200. In Saul Cornell's words, "[t]o analyze Gricean sentence meaning

here's how members of the public in 1791 would have understood the manner in which those words would be used to respond to the particular problem we now face.

Within the philosophy of language, Gerald Graff has addressed this problem in a more general form. He explained that *knowing* a language means more than learning the semantic meaning of words and the structure of sentences: “a set of codes” exist separately from the words that enable speakers to make “inferences about . . . situations or contexts in which particular words and sentences tend to be used.”²⁰¹ If we didn't have the codes, “we would have no way of inferring any intention and thus no way of deciding what any utterance meant. Without the codes that enable us to determine the context, ‘the words on the page’ of a text would tell us nothing.”²⁰² We possess the codes, in a sense, “unconsciously” and thus perceive that the words tell us more than they actually do.²⁰³

In the context of interpreting the Constitution's elegantly specific clauses mediating intra-governmental conflicts, one cannot understand the clause's original public meaning adequately to interpret it in the context of related future problems without understanding how that clause addressed the original problem it was drafted to resolve. A truly inter-subjective semantic meaning would not be enough to meaningfully guide future decisions.²⁰⁴ The

historically one would need to look at how patterns of *usage* correlated with patterns of *intentionality* at a given historical moment.” Cornell, *supra* note 143, at 734 (emphasis in original).

201. GERALD GRAFF, *Determinacy/Indeterminacy*, in CRITICAL TERMS FOR LITERARY STUDY 163, 166 (Frank Lentricchia & Thomas McLaughlin eds., 2d ed. 1995).

202. *Id.*

203. *See id.*

204. STEVEN MAILLOUX, *Interpretation*, in CRITICAL TERMS FOR LITERARY STUDY 121, 133–34 (Frank Lentricchia & Thomas McLaughlin eds., 2d ed. 1995) (“[I]nterpretive theories are not foundational but rhetorical, establishing no permanent grounding or guiding principles guaranteeing correct interpretation but certainly providing much rhetorical substance for interpretive debate. . . . We

interpreter perceives guidance from that meaning only because bound up with it are unperceived value-laden assumptions and suppositions about how meaning applies to particular problems. To say the focus must be on semantic and not applicative meaning is either (1) to say nothing—because the meaning we find can't answer any real questions—or (2) to read tacitly a possible applicative meaning into the semantic meaning.

If the goal is to identify a fixed core of constitutional meaning that would have been understood by the founding generation and can guide future decision, something like farsighted originalism with its explicit focus on value laden action is more likely to produce an interpretation free of modern values than a pure semantic originalism driven by tacitly assumed hidden values.

B. *Analogy to One-Step and Two-Step Originalism*

The relationship of semantic originalism to farsighted originalism bears some resemblance to Lawrence Lessig's description of one-step and two-step originalism.²⁰⁵ He pointed out that constitutional meaning for the founding generation was necessarily bound up with a set of pre-suppositions.²⁰⁶ If those pre-suppositions have changed, then the correct question should be what the text *would have meant* to the founding generation if it had had modern pre-suppositions. For example, the Eighth Amendment requires that fines, but not prison sentences, be proportionate.²⁰⁷ But in the late eighteenth century, the penitentiary system did not exist. The founding generation likely pre-supposed that

are always arguing at particular moments in specific places to certain audiences. Our beliefs and commitments are no less real because they are historical, and the same holds for our interpretations. If no foundationalist theory will resolve disagreements over poems or treaties, we must always argue our cases. In fact, that is all we can ever do.”).

205. See Lessig, *supra* note 60, at 1184–86, 89.

206. *Id.* at 1212–15.

207. U.S. CONST. amend. VIII.

the relevant penal options were fines and the death penalty, only the former could meaningfully be proportioned.²⁰⁸

But if prison sentences were the standard form of punishment for a serious crime, as they are now, a constitution requiring proportional fines would surely have required the same for prison sentences. Unless an interpreter engages this second step in determining the original constitutional meaning, she is virtually certain to arrive at a meaning that the founding generation would not have understood had it had modern presuppositions.²⁰⁹ But some originalist justices have argued for exactly this dichotomy between fines and prison sentences.²¹⁰

Farsighted originalism also looks to the context from which the original public meaning is derived. But the superposition of potential meanings embodied by the problem-solving rubrics of the intra-governmental-conflict-resolving clauses differs from Lessig's presuppositions in a critical way. Where Lessig contended that we need to attribute modern thinking to the founding generation to remain faithful to original meaning, farsighted originalism does not import modern suppositions. Rather, it looks to the full range of possible meanings for the founding generation given the suppositions that it had.

Solum critiques Lessig in a way that could be extended to farsighted originalism. Lessig refers, Solum explains, to applicative meaning—that can change within originalism—as opposed to semantic meaning that remains fixed.²¹¹ To

208. See Lessig, *supra* note 60, at 1185–86.

209. *Id.* at 1264 (“For reasons tied to how meaning changes across contexts, one-step originalism as a practice must systematically defeat any ideal of fidelity. Blind to the effect of context on meaning, originalism allows context to change constitutional meaning.”).

210. *Harmelin v. Michigan*, 501 U.S. 957, 966–85 (1991) (applying originalist reasoning to conclude that the Constitution does not require proportionality in prison sentences); *accord* *Ewing v. California*, 538 U.S. 11, 31–32 (2003) (Scalia, J. concurring); *Ewing*, 538 U.S. at 32 (Thomas, J., concurring).

211. Solum, *supra* note 31, at 65.

illustrate, Solum uses an example drawn from Lessig's paper: assume that punishment X was not thought to be cruel when the Eighth Amendment was ratified because it was believed to be painless. At a later time, we learn that punishment X inflicts "horrendous" pain.²¹² Solum contends that "the applicative meaning of cruel could change while the linguistic meaning remained the same."²¹³

Solum then points out that many constructions of a clause may be consistent with a single vague semantic meaning, and thus constitutional construction—which originalism incorporates—adequately deals with Lessig's examples.²¹⁴ Farsighted originalism too focuses on the function of specific constitutional clauses to understand how they deal with particular problems. Solum may thus contend that farsighted originalism is really just a form of constitutional construction.

C. *Originalism and the Fact-Value Problem*

Although it is certainly possible that I have misunderstood Solum's example about cruel and unusual punishments, it appears to truncate the definition of semantic meaning shorter than some originalists would. For example, originalists, including Solum himself, have concluded that when the founding generation understands the text to embody a particular conception, then the original public meaning is fixed as that conception, even though the concept embodied in the clause might be broad enough to include different conceptions.²¹⁵ If the founding generation

212. *Id.* at 66.

213. *Id.* at 65–66.

214. *Id.* at 66.

215. See BALKIN, *LIVING ORIGINALISM*, *supra* note 3, at 7 (explaining that originalists use expectations to establish original public meaning); WHITTINGTON, *supra* note 2, at 184–85 (contending that constitutional meaning is limited to the conceptions held by the founding generation); McGinnis & Rappaport, *supra* note 194, at 378–79 (only the expectations of the founding generation were actually adopted); Solum, *supra* note 31, at 109 (expectations are evidence of meaning).

understood that the Eighth Amendment permitted punishment X, that conception would seem to be part of the fixed semantic meaning of cruel unless modern understandings could be used to alter the conceptions, which of course originalism prohibits.²¹⁶

A likely originalist response would be that interpreters must distinguish between mistakes of inter-subjective fact and the evolution of individuating expressions of subjective value. The former are incorporated within originalism; the latter are excluded.

In Solum's hypothesized punishment example, he presumably assumes that the founding generation made a mistake of fact about how painful the punishment was. The founding generation erroneously believed that the hypothetical form of punishment was not painful. And a subsequent discovery somehow demonstrated via an inter-subjective, value-free method that the founder's belief was wrong. The constitutional interpretation could thus change without the need to evaluate subjective values, and thus the founding generation's mistake could be corrected without originalism.

This analytic process, however, must be distinguished from assessing whether any particular individual or group would conclude that the *level of pain* inflicted by a punishment justified finding the punishment cruel. But all punishment incorporates some type of pain, physical or mental. And whether a punishment falls into the category of *acceptable punishments* is not a value-free decision. All categories that a group uses to describe reality are purposive, what Mark Kelman describes as "creatures of our own interests in naming."²¹⁷ They reflect our values, and are not

216. See BALKIN, *LIVING ORIGINALISM*, *supra* note 3, at 7; WHITTINGTON, *supra* note 2, at 184–85; McGinnis & Rappaport, *supra* note 194, at 378–79; Solum, *supra* note 31, at 109.

217. MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* 64 (1987); UNGER, *supra* note 67, at 32–33 (“[A] fact becomes what it is for us because of the way we categorize it.”). If things in the world have intelligible essences that individuals

objectively discoverable, indisputable facts about the real world. What we mean by *an acceptable level of pain* is thus not separable from the values we hold. The two are bound up together. We thus can never know as a matter of indisputable, inter-subjective, historic fact what level of pain constitutes cruelty. It always embodies our values.

But we can know more about shared values than the traditional fact-value dichotomy suggests. Solum tacitly recognizes this in his hypothetical. Despite the value-laden nature of the question, we are not hopelessly ignorant about how much pain constitutes an unconstitutionally cruel punishment. Although some sadists might not agree that excruciating pain would be unconstitutionally cruel, Solum concludes—and I agree—that American society would share the value that any punishment falling into the category we have named *excruciating* would be unconstitutional. The answer cannot be derived without engaging values. But we can be confident in the result nonetheless.

D. *Fact, Value, and Language*

Within the philosophy of language, the fissures in the fact-value dichotomy were implicitly acknowledged by Ludwig Wittgenstein in his argument that meaning and action are inseparable. One cannot meaningfully distinguish between the use of language and the meaning it conveys in a purely semantic way. As Hanna Pitkin explained, Wittgenstein “does not seem to permit” a distinction between meaning, on the one hand, and application or use, on the other—he “teaches that for most purposes the meaning of a

may comprehend separate from language, objective agreement may be possible. But the possibility of intelligible essences has been largely rejected in modern philosophy. See THOMAS HOBBS, *LEVIATHAN* 463–66 (Richard Tuck ed., Cambridge Univ. Press 1991) (1651); DAVID HUME, *A TREATISE ON HUMAN NATURE* bk. III, at 293–306 (David Fate Norton & Mary J. Norton eds., Oxford Univ. Press 2000) (1888); 1 JOHN STUART MILL, *A SYSTEM OF LOGIC* 123–27 (9th ed. 1875). And even if some intelligible essences exist, a theory like originalism that rests on language as a means to avoid the problem of subjective values could not directly access an objective essence.

word is its use; that if we are conceptually puzzled about its meaning we should look at its use; that the meaning is learned from the use, is abstracted from it.”²¹⁸

At some level, everyone knows that language evolves from use. But we often act as if the linguistic overlords have imposed a rulebook on us as a matter historical, intersubjectively determinable fact. It is important to consistently recur to the reality that societies develop language via value-laden actions. As Roberto Unger put it, “the only measure of the ‘truth’ of language is its power to advance the ends of the communities of men who speak it”²¹⁹ and “the real sovereigns that stand behind the demiurge are the interests that lead men to classify things as they do.”²²⁰

Solum contends that Wittgenstein’s use-theory of language poses no threat to semantic originalism because it is not a theory of semantic meaning.²²¹ Solum explains correctly that Wittgenstein’s “idea is that the meaning of an expression is the use to which it is put.”²²² But then Solum adds that “[w]ords are used to accomplish deeds, but the deeds are not the meaning of the words in the semantic sense of meaning.”²²³ He then uses the example that Locke’s *Second Treatise* was used as part of a political program, but that program was not the meaning of Locke’s book.²²⁴

Wittgenstein, however, appears to have connected function and meaning in a more fundamental way. The “primitive” language game at the beginning of *Philosophical Investigations* demonstrated that the use theory directly countered the idea that “meaning is correlated with the

218. HANNA FENICHEL PITKIN, WITTMENSTEIN AND JUSTICE 174–75 (1972).

219. UNGER, *supra* note 67, at 32.

220. *Id.* at 80.

221. Solum, *supra* note 31, at 113–14.

222. *Id.* at 113.

223. *Id.*

224. *Id.*

word.”²²⁵ Meaning, he contended, was directly tied to action, explaining that we understand a word by acting “in such-and-such a way”²²⁶ and asking “doesn’t the fact that sentences have the same sense consist in their having the same *use*?”²²⁷

When my daughter was four, she once responded to my instruction to sit in her car seat by saying “that’s not fair.” I asked her, “what does that mean?” She responded, “it’s something you say when someone tells you to do something that you don’t want to do.” She learned to use the phrase “that’s not fair” and from that use a fuller understanding would gradually emerge. Toward the end of his life, Wittgenstein wrote that the concepts that a society recognizes do not rest on how language reflects a real world that one can observe in an inter-subjective way; on the contrary, “it is our acting, which lies at the bottom of the language-game.”²²⁸

Wittgenstein appears to be attempting to show that meaning is fundamentally embodied in use and function. “How words are understood,” he wrote, “is not told by words alone.”²²⁹ And “[i]t might almost be said: [m]eaning *moves*, whereas a process stands still.”²³⁰ Semantic meaning and

225. See LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS I*, at 2e–3e (G.E.M. Anscombe trans., 2d ed. 1967).

226. *Id.* at 4e.

227. *Id.* at 10e.

228. LUDWIG WITTGENSTEIN, *ON CERTAINTY* ¶ 204, at 28e (G.E.M. Anscombe & G.H. von Wright eds., Denis Paul & G.E.M. Anscombe trans., 1969) (emphasis removed).

229. LUDWIG WITTGENSTEIN, *ZETTEL* ¶ 144, at 26e (G.E.M. Anscombe & G.H. von Wright eds., G.E.M. Anscombe trans., 1967). Stanley Cavell makes a similar point: “We can understand what *words* mean apart from understanding *why* you say them; but apart from understanding the point of your saying them we cannot understand what *you* mean.” Stanley Cavell, *The Claim to Rationality: Knowledge and the Basis of Morality* 258–59 (Apr. 1961) (unpublished Ph.D. dissertation, Harvard University) (dissertation available in the Cornell University Library) (emphasis in original).

230. WITTGENSTEIN, *supra* note 229, ¶ 237, at 44e (emphasis in original).

the function of a clause, especially one included in a constitution, may be inseparable. And if that is correct, then farsighted originalism correctly interprets meaning by looking to the problem-solving rubric, that is, the way that the clause was originally used to solve a problem of intra-governmental conflict.

CONCLUSION

Farsighted originalism provides a method for interpreting the Constitution's elegant specificities that effectively accommodates American constitutionalism's dual commitments to both a rule of law and on-going self-governance. Its central claim is that the founding generation's grammar encompassed the notion, as Justice Oliver Wendell Holmes put it, that "words that also are a constituent act, like the Constitution of the United States, . . . have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters."²³¹

As any form of originalism must, the farsighted approach acknowledges that the Constitution locks in meaning.²³² But what the intra-government-conflict-resolving clauses locked in was not idiosyncratic. It was programmatic. Although the founding generation internalized its specialness, it understood that its giant was one on whose shoulders future generations would stand and comprehend a larger—but consistent—meaning in the Constitution's words.²³³

Farsighted originalism respects the founding generation's foresight by extending without contradicting its

231. *Missouri v. Holland*, 252 U.S. 416, 433 (1920).

232. The phrase "locks in" is borrowed from the leading originalist scholar Randy Barnett's description of the value of writtenness. See BARNETT, *supra* note 20, at 104.

233. See ROBERT BURTON, *THE ANATOMY OF MELANCHOLY* 20 (Floyd Dell & Paul Jordan-Smith eds., 1927) (1628) ("A dwarf standing on the shoulders of a Giant may see farther than a Giant himself; I may likely add, alter, and see farther than my predecessors.").

vision to encompass a superposition of potential original meanings embedded within the problem-solving rubric that the constitutional text employs. Although farsighted originalism permits the rubric embodied in the clause to apply to situations that the founding generation did not foresee, it does not toss aside the Constitution's language to serve modern policy considerations. Rather, farsighted originalism contends that the problem and the rubric resolving it are—at least for the Constitution's specific intra-governmental-conflict-resolving clauses—essential to communicate effectively their full meaning *to those who adopted them*. Narrower, less flexible interpretations would not capture critical aspects of the original public meaning.

Farsighted originalism's historically-based problem-solving-rubric meaning is thus faithful to the methodological underpinnings on which originalists claim the method's worthiness rests. That is, the meaning the clause held for those who adopted it constrains future interpretations. The first American generation did not understand the constitutional language to embody the single semantic meaning that it held for them. But neither did it believe that future generations would be unconstrained by an original meaning. Employing the superposition of potential original public meanings allows the Constitution to live within bounds that the founding generation would have understood and accepted.

And if that is true, modern notions of good government may infect constitutional interpretation in a way that displeases some originalists' sensibilities about how judicial review should work. But that infection may be an unavoidable byproduct of relying on original public meaning as the touchstone of constitutional interpretation.