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Wittgenstein's Poker: Contested Constitutionalism and the Limits of Public Meaning Originalism

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WITTGENSTEIN'S POKER: CONTESTED CONSTITUTIONALISM AND THE LIMITS OF PUBLIC MEANING ORIGINALISM

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ABSTRACT

Constitutional originalism is much in the news as our new President fills the Supreme Court vacancy Antonin Scalia's death has created. "Public meaning" originalism is probably the most influential version of originalism in current theoretical circles. This essay argues that, while these "New Originalists" have thoughtfully escaped some of the debilitating criticisms leveled against their predecessors, the result is a profoundly impoverished interpretive methodology that has little to offer most modern constitutional controversies. In particular, the fact that our constitutional practices are contested—that is, we often do not seek semantic or legal agreement—makes particular linguistic indeterminacies highly problematic for approaches grounded in historical public meaning. Here I highlight two underappreciated sources of such indeterminacy: intentional contemporary ambiguity and incidental evolutionary vagueness. Neither of these indeterminacies are susceptible to the New Originalist method, and, when added to the well-known problem of intentional vagueness, these issues leave public meaning originalism incapable of constraining judges in many of our most controversial cases.

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INTRODUCTION

In March of 2013, Senators Ted Cruz and Dianne Feinstein had a "testy exchange" in the Senate Judiciary Committee over a proposal to renew the assault weapons ban of 2004.[2] Senator Cruz, a Harvard educated lawyer and former Supreme Court clerk, seemingly hoped to overwhelm Senator Feinstein with a constitutional argument. He first reminded Feinstein of the need to respect our "foundational document" and the framers' intentions in drafting the Bill of Rights.[3] He then drew a parallel between the "right of the people" announced in the Second Amendment and the same language in the First and Fourth Amendments.[4] He went on to ask if Feinstein would be comfortable if Congress limited free speech by banning particular books, or if the courts protected only "specified people" from unreasonable searches. Cruz's rhetorical assumption, of course, was that Feinstein could never approve of such restrictions on speech or privacy.

On the surface, Senator Cruz's efforts were fairly unpersuasive as a matter of constitutional argument. After all, almost no one conceives of First or Fourth Amendment protections as absolute. The analogy between assault weapons and searches of "specific people" is simply inapt. The ban would target particular weapons; thus the appropriate analog is to particular *searches*, not people. More interestingly, his basic point that the textual similarity between the three amendments played upon an intentional ambiguity in the original constitutional text. Akhil Amar, among others, noted that "the people" identified in the Second Amendment were actually a subset of the larger group contemplated in the First and Fourth.[5] The latter held what were known as "civil" rights in the 18th century, while the former was a smaller group that enjoyed full "political" rights. Women, for example, had the "civil" right to speak, even if they could not exercise the "political" rights to vote, serve on juries, or—apropos here—join the militia or bear arms.[6] It turns out, then, that the term "the people" had ambiguous constitutional usages at the time of ratification. In 2013, this ambiguity

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[2] Jennifer Steinhauer, *Panel Votes to Renew Assault Weapons Ban, But Prospects in Full Senate Are Dim*, N.Y. TIMES A17 (Mar. 15, 2013). Video of the exchange is available on YouTube. MichaelSavage4Prez, *Ted Cruz & Dianne Feinstein Explosive Debate Over Gun Control In Senate: 'I Am Not A 6th Grader'*, YOUTUBE (Mar. 14, 2013), https://www.youtube.com/watch?v=PWsKJiyesVU.

[3] Jon Healey, *Sens. Ted Cruz and Dianne Feinstein Face Off on Gun Control*, L.A. TIMES (Mar. 15, 2003) http:// articles.latimes.com/2013/ mar/15/news/la-ol-sens-ted-cruz-and-dianne-feinstein-face-off-on-gun-control-2013 0315.

[4] *Id.*

[5] *E.g.*, Akhil Reed Amar, *The Second Amendment as a Case Study in Constitutional Interpretation*, 2001 UTAH L. REV. 889, 892-896 (2001).

[6] *Id.*

allowed Cruz to maintain his originalist pretensions while making a non-originalist claim regarding the text.

Ambiguities of this sort—what I call in this essay "intentional contemporary ambiguities"[7]—present a substantial challenge to "original public meaning" accounts of constitutional interpretation. In particular, New Originalist theories, which claim that we can "fix" or determine the text's original "communicative content" as an empirical matter,[8] seem ill-equipped to account for circumstances when the drafters intentionally made use of ambiguities in existing language conventions to further contested political ends. This difficulty arises, in part, because the New Originalists have sworn off "Intentionalism" and now look solely to "original public meaning" as the touchstone of constitutional semantics.[9] As a result, there is no longer any recourse to the drafters' intentions in resolving the question of which "people" held which rights. The relevant historical language conventions, of course, recognized both meanings of the word, and it is difficult to see how pragmatic or contextual enrichment (at least based on generalized concepts of public meaning) could provide a definitive answer. Such a case, then, is evidence that deriving the text's communicative content may require recourse to authorial intent, and thus may demand both historical and contemporary construction.

More importantly, the phenomenon of intentional contemporary ambiguity helps to illustrate the particular kinds of interpretive problems that can arise within a contested language practice. Even under the best of conditions there are real problems with the notion that communicative content might be empirically fixed and transported through time into different language practices[10] This is because the semantic meaning of

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[7] An indeterminacy may be either (1) *contemporary* or *evolutionary*; and it may be either (2) *intentional* or *incidental*. The first distinction addresses whether constitutional text is indeterminate when ratified, or becomes indeterminate as practices evolve. The second recognizes that indeterminacies may be intentional or unintentional. C*ontentional contemporary ambiguity* and *incidental vagueness* demonstrate the indeterminacy of New Originalism.

[8] Per the New Originalists, constitutional explication takes place in two distinct phases: (1) Interpretation—in which we discover the text's "communicative content"; and (2) Construction—in which we construe the text's "legal meaning" in the context of some modern controversy. The first phase seeks to "fix" the text's "original public meaning" at the moment of ratification. We then carry this meaning into the construction phase, where it constrains our conclusions about the text's legal content, absent weighty countervailing reasons. *See generally* Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95 (2011).

[9] Lawrence B. Solum, THE FIXATION THESIS: THE ROLE OF HISTORICAL FACT IN ORIGINAL MEANING, 91 NOTRE DAME L. REV. 1, 26-27 (2015). Of course, not all originalists have abandoned intentionalism—which at least seems to ask the right questions about linguistic meaning. *See* Larry Alexander, *Originalism, the Why and the What*, 82 FORD. L. REV. 539 (2013) (arguing that interpretation is about trying to discover authorial intent).

[10] *E.g.*, Ian Bartrum, *Two Dogmas of Originalism*, 7 WASH. U. JURIS. REV. 157, 172-75 (2015).

language transposed into an alien communicative culture can arise only out of analysis, construction, and contextualization—or, as this process is often called in other contexts, *translation*. All of the constructive difficulties present in ideal translative endeavors—those where all of the stakeholders want to agree on a meaning, without preconceptions about what that meaning should be—are multiplied many times when the parties do not seek agreement, but rather hope to maximize their own argumentative advantages.

The fact that our constitutional practice involves this sort of contested translation has at least three entailments for interpretation. First, because the relationship between historical text and modern semantics is practical and constructive in nature, it may require an inquiry into intentions, and thus it may not be a matter of "empirical" discovery. Second, the problem of contemporary ambiguity demonstrates that this sort of linguistic uncertainty is not limited to cases of vagueness; and, indeed, public meaning accounts may not have the resources to address intentional contemporary ambiguities.[11] Third, once these types of contested indeterminacies have slipped their nose into the semantic tent, we must reconcile ourselves to the full, rich spectrum of practical linguistic complexity that may arise in nontrivial cases of constitutional contestation. Or, as Karl Llewellyn famously observed of the common law, "Every single precedent, according to what may be the attitude of future judges, is ambiguous."[12] If this is true, then both the text's communicative and legal content are necessarily the product of an ongoing constructive argument. This need not, however, arouse deep anxieties about unfettered judicial activism. Indeed, it is the adversarial contest itself—not some idealized interpretive orthodoxy or posited "law of interpretation"—that most effectively constrains constitutional judges. We should thus embrace our differences in all of their vigor, nuance, and uncertainty.[13] As James Madison observed long ago, a zealous diversity of opinions and interests better safeguards our democratic institutions and liberties than mere "parchment barriers" ever could.[14]

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[11] Larry Solum has at least recognized this possibility, but has not—to my knowledge—attempted to resolve it definitively. *See Id.* at 102 (characterizing this as a problem of "irreducible ambiguity"); *accord Id.* at 107, n. 25 ("My view is that ambiguities can usually be resolved by interpretation [on the basis of the context of the utterance], although it is at least theoretically possible that some ambiguities cannot be so resolved.").

[12] K. N. LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY 71 (1951).

[13] *But see* William Baude & Stephen Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079 (2017); William Baude, *Is Originalism Our Law*, 115 COLUM. L. REV. 2349 (2015).

[14] THE FEDERALIST NOS. 10, 48 (James Madison) 38, 333 (Jacob E. Cooke, ed., 1961). The famous phrase "mere 'parchment barriers'" here underscores the relative weakness of textual, as opposed to structural, constraints on institutional power.

This essay argues that the entailments of understanding constitutional language as a contested practice substantially undermine the quest for judicial constraints grounded in empirical original public meanings. Again, the search for historical meaning (or communicative content) is difficult enough when the relevant speakers and all of the interpretive stakeholders are actually trying, in good faith, to come to a semantic agreement.[15] Those empirical difficulties become exponentially more acute—sometimes irresolvable—when both speakers and stakeholders actively exploit communicative doubt or indeterminacy in order to further contested ends.[16] This argument leans heavily on Ludwig Wittgenstein's later philosophy, which is enigmatic and controverted in its own right—so much so that there is some disagreement about whether he can teach us anything useful about legal interpretation.[17] I remain convinced, however, that a reasonably straightforward application of Wittgenstein's most fundamental and least controversial ideas offers important insights into the limits of a written constitution as source of determinate or objective semantic meanings. I argue that in our contested constitutional context two underappreciated types of indeterminacy—*intentional contemporary ambiguity* and *incidental evolutionary vagueness*—present substantial problems for original public meaning as a source of empirical interpretive constraint. When added to the problem of intentional vagueness—which the New Originalists already largely concede to modern construction—these indeterminacies impose significant limitations on the practical normativity of public meaning originalism.[18]

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[15] Much of Wittgenstein's work on language is an effort to show how the remarkable feat of semantic agreement is possible even among contemporaneous speakers. Brian H. Bix, *Legal Interpretation and the Philosophy of Language*, *in* THE OXFORD HANDBOOK OF LANGUAGE AND LAW 145, 147 (Peter M. Tiersma & Lawrence M. Solan, eds. 2012).

[16] This point is perhaps analogous to that which Scott Shapiro makes in discussing disagreements in conceptual analysis of the nature of "law." *See* SCOTT J. SHAPIRO, LEGALITY 17 (Harvard Belknap, 2011). When ambiguities in reference confound our analytic efforts, Shapiro reasons, a conflict may be irresolvable: "If so, conceptual analysis of law would not be possible because there would be no object to which we are all referring when we use the word "law." *Id.*

[17] *See, e.g.*, Michael Steven Green, *Dworkin's Fallacy, Or What the Philosophy of Language Can't Teach Us About the Law*, 89 VA. L. REV. 1897 (2003); *see also* Stefano Bertea, *Remarks on a Legal Positivist Misuse of Wittgenstein's Later Philosophy,* 22 LAW & PHIL. 513 (2003).

[18] It is true that much of the Constitution is reasonably determinate and infrequently uncontested. That is so, I suggest, because most—if not all—of the accepted forms of constitutional interpretation converge on a stable and shared meaning of that text. Public meaning originalism, of course, may provide some practical normativity in such "easy cases," but so do most other methodologies. What I claim here is that public meaning originalism can rarely provide definitive normative grounds for deciding between divergent interpretive approaches in a robust constitutional contest.

I. LANGUAGE AS A GAME

Perhaps Wittgenstein's most famous claim is that speaking a language is like playing a game.[19] Indeed, as a German speaker, he happily captured the idea in a word mash-up—"Sprachspiel"—or, in English, "language game."[20] He hoped this would "bring into prominence the fact that the speaking of a language is part of an activity, or a form of life."[21] Or, to put it another way, language is something we *do*, not something that we *have*.[22] Further, like a game, language is a rule-governed activity; which is to say that it is *rules,* not *instruments* (e.g. pieces or balls) that give a particular action or utterance a particular "meaning."[23] While this point may seem fairly obvious in the context of a chess match or football game, Wittgenstein observed that philosophers (including himself) had often confused these ideas when analyzing language.[24] They mistakenly assumed that *words,* not *rules*, produce linguistic meanings.[25] He hoped that the game comparison would remove this confusion, so that we might more clearly see that "[w]ords and chess pieces are analogous; knowing how to use a word is like knowing how to move a chess piece. ... [Thus the] meaning of a word is to be defined by the rules for its use."[26]

The importance of this insight may seem a bit obscure until we reflect upon the entailments of the classical idea that words "represent" objects in the world, and that it is these associated objects that define a word's meaning.[27] While this may be roughly true of *some* words used for *some* purposes—perhaps some nouns and names—it is certainly not true of all, or even most, words.[28] With this mistaken "representationalist" premise in mind, however, it is easy to see why many people have believed we could determine a word's meaning by discovering "facts" about what it signifies

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[19] LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS §23 (Blackwell German-English ed., 2007) [hereinafter INVESTIGATIONS].

[20] *Id.*

[21] *Id.*

[22] Indeed, Philip Bobbitt has made precisely the same claim about "law." PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 24 (Blackwell, 1991).

[23] WITTGENSTEIN'S LECTURES: CAMBRIDGE, 1932-1935 Pt. I, § 2 (Alice Ambrose, ed., 1972) [hereinafter LECTURES].

[24] INVESTIGATIONS, §§ 1-3.

[25] *Id.*

[26] LECTURES, PT. I, § 2.

[27] INVESTIGATIONS, §§ 1-3. Wittgenstein's own such account—set out in his earlier *Tractatus-Logico Philosophicus*—claimed that words represented "simples", and that sentences depicted some arrangement or relationship between these basic elements.

[28] *Id.* § 1. Even the meaning of these sorts of words does not *depend* upon a relationship to something in the world—we can understand the meaning of "dragon" even if none exist; and "Napoleon Bonaparte" still has meaning long after the man's death.

in the world. Indeed, Wittgenstein suggested that this sort of confusion about a word's "empirical" or "foundational" meaning has given rise to many, if not all, of the great philosophical questions.[29] For example, Plato notwithstanding, the word "justice" lacks foundational meaning; it is just a piece used according to the rules of various language games.[30] Essentially, for Wittgenstein, such puzzles actually reduce to confusions about language usage, or as he famously put it: "Philosophical problems arise when language goes on holiday."[31]

An analogy to card games may help to illustrate these basic ideas. It is easy to see that the cards in a standard American deck have no meaning in and of themselves. Like a chess piece, a card's meaning derives from the various uses to which a player may put it according to the rules of a given game. Unlike chess pieces, however, the cards have different meanings across a wide variety of games—and this in turn makes cards more readily analogous to words and language games.[32] Still, the card analogy does not quite capture all the complexity of language, because the rules of language games generally evolve more quickly than do the rules of card games. That is, the rules of language games—and thus the meaning of words—are always changing as our forms of life change, and so the competent player must play along alertly in order to remain fluent. One might imagine, as an illustration, a hermit who shut himself away in 1980 and spoke to no one until 2017. Many words would now have uses (and thus meanings) that he would not understand. "Text," for example, has evolved into a verb.

The card analogy also makes it clear *why* the cards themselves have no foundational meaning: It is because there is nothing in the world which the ten of Spades (for example) represents, which could allow us to identify its meaning as a matter of empirical "fact." Thus, contemplating a card's foundational meaning is as nonsensical and futile as were ancient efforts to define "the Good" once and for all. To understand the meaning of the ten of Spades, it turns out, is simply to have the practical ability to play that card appropriately within a particular game at a particular time and place.[33]

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[29] *See* Robert Fogelin, "Wittgenstein's Critique of Philosophy," THE CAMBRIDGE COMPANION TO WITTGENSTEIN 34, 37-48 (Hans Sluga & David G. Stern, eds., 1996).

[30] *See*, PLATO, THE REPUBLIC, BK I (327 A—353 D) *in* GREAT DIALOGUES OF PLATO (W.H.D. Rouse, trans. 1956) (exploring meaning of word "justice"). This, of course, does not entail that "justice" has no meaning; simply that its meaning is a product of particularized and contextual rule following, and not a reference to some immutable form.

[31] *Id.* § 38; *see also* Fogelin, *supra* note 29.

[32] One could, of course, imagine new games played with chess pieces in which the pieces take on new meanings.

[33] *See* LUDWIG WITTGENSTEIN, ON CERTAINTY §§ 61-62 (G.E.M. Anscombe & G.H. von Wright eds., Denis Paul & G.E.M. Anscombe trans., 1969) [hereinafter ON CERTAINTY].

While we might argue that the rules of a game ought to be otherwise than they are—and our efforts may even succeed in modifying future games—it is idle to claim that a play recognized as appropriate in an existing game is invalid based upon some empirical truth about what the card refers to in the world.[34] Again, the card does not refer to anything empirically verifiable—and so there is, as some would have it, no *there*, there.[35] What the card *does* do is ask us to follow certain rules with set criteria in order to participate in a shared social practice.

This of course means that any inquiry into meaning must focus not on the *cards*, but on the *rules*. Here, again, it is important to recognize that most card games (or languages) do not rely on a "rulebook" to establish foundational principles or meanings.[36] The rules are simply a matter of lived practice, passed on from one person to another one game at a time—which is why, as Wittgenstein pointed out, "it has no meaning to say that a game has always been played wrong."[37] It is true that there are often broad convergences in those practices, so that two people who have never met might successfully play a game of Gin.[38] But it is also true that there may be variations in the ways that each of these people has learned to play the game—"We play it this way at home"—that may leave gaps in the shared practice. In such cases, the players will simply have to work out these inconsistencies as they go along, setting precedents for future play as they move forward. In Wittgenstein's words, "Not only rules, but examples are needed for establishing a practice. Our rules leave loop-holes open, and the practice has to speak for itself."[39] This is why Gin—but even more acutely language—is something we *do*, and keep doing in ever-evolving ways, and not something that we *have* in a foundational sense.

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[34] *See, e.g.*, *Id.* § 496.

[35] *But see* Randy Barnett, *The Gravitational Force of Originalism*, 82 FORD. L. REV. 411, 416 ("[W]hen confronting conflicting interpretive claims about meaning there is (à la Gertrude Stein) a *there* there potentially to resolve the conflict."). Again, the point is not that a card (or word) cannot have a determinate meaning—and in this sense refer to a "there"—but rather that we must establish this meaning practically—thus *contingently*—and not *empirically*.

[36] One might be tempted here to point to dictionaries or books that provide instruction on how to play various card games. Upon closer examination, however, it becomes clear that these sorts of books are ex post *descriptions* of the way that a particular game was played at a particular time or place. They do not, in themselves, constitute the rules of play, nor do they establish how the game will be played in the future. To draw an analogy to the legal world, such sources are something like the Restatements of the common law.

[37] ON CERTAINTY, *supra* note 33, at § 496.

[38] It was, in fact, largely for the existence of these broad convergences—yielding fairly determinate meanings—that Wittgenstein hoped to account. Brian H. Bix, *Legal Interpretation and the Philosophy of Language, in* THE OXFORD HANDBOOK OF LANGUAGE AND LAW 147 (Lawrence M. Solan & Peter M Tiersma, eds. 2012).

[39] ON CERTAINTY, *supra* note 33, at § 139.

Public meaning originalists seem to suggest that we might take a kind of snapshot of a language game at a particular moment in time, discover the rules that governed play at that moment, and then treat those abstracted rules as something like "facts" that can define practical meanings—at least for an instant in time.[40] This view accepts, in other words, that words get their meaning from rules, not objects, but then claims that we can treat these rules *as though they were objects* that we might discover and study empirically.[41] In this way, we might try to play a language game "as it was played" at some discrete historical moment. The card game analogy reveals, however, that this approach simply replicates the representationalist fallacy at a higher level of abstraction. Rules are decidedly *not* facts, not just because they are not objects, but because rules exist as interdependent parts of a lived practice—a form of life—in which they are embedded: To repeat a theme, rules (both linguistic and legal) are something we *do*, not something we *have*. In the case of language, it makes no sense to "play a game as it was played" when the worldly circumstances that gave rise to its particular interlocking rule structures have disappeared, so that no one plays it that way anymore.[42] To do so is actually to play a wholly *new* language game, which may or may not have practical value inasmuch as it serves a new form of life with different communicative purposes.[43]

To illustrate the point, imagine that someone has done an empirical study of all the rules of all the variations of Gin played between 1820 and 1830. Based on this research, she is able to conclude that a player could generally use the ten of Spades as a wild card in certain sets or runs. Now fast forward to 1940, and assume that the rules of Gin have evolved so that wild cards are no longer an accepted part of the game—in fact, the very concept of a "wild card" is widely condemned as part of a watered down and regrettable period in Gin's history. Now, not only has the ten of Spades lost some of the meaning it had in 1825, but the "wild" aspect of the older

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[40] Thus, Larry Solum has argued: "[W]hen we disagree about [semantic content] we are disagreeing about linguistic facts. In principle, there is a fact of the matter about what the linguistic content is." Lawrence Solum, *A Reader's Guide To Semantic Originalism and a Reply to Professor Griffin* 13 *available at* http://ssrn.com/abstract=1130665. This also seems to be the import of the "corpus linguistics" movement in constitutional theory. *See* Lawrence M. Solan, *Can Corpus Linguistics Help Make Originalism Scientific?*, 126 YALE. L. J. FORUM 57 (2016).

[41] *See, e.g.,* Barnett, *Gravitational Force*, *supra* note 35, at 415-17.

[42] For an exceptionally insightful historian's take on this issue, lamenting the lack of "holism" and "historicism" in New Originalist efforts at historical translation, see Jonathan Gienapp, *Historicism and Holism: Failures of Originalist Translation*, 84 FORD. L. REV. 935, 941-44 (2015).

[43] For those constitutional theorists who make this sort of claim, it seems the larger hope is that our current legal practices (or games) might be constrained in ways that they now are not. *See, e.g.,* Solum, *supra* note 9. This would presumably serve our current form of life by reining in activist judges of a particular sort.

ten of Spades no longer fits within the game's broader norms. Thus, not only has playing the card this way become meaningless or "nonsense," but any attempt to do so in 1940 would reveal a player's passé understanding of Gin.[44] This is what Wittgenstein means when he says language games are part of a particular form of life.[45] Indeed, in some ways the attempt to play the old ten of Spades in the new game is something like trying to use the Newtonian terms "mass" and "force" to solve a problem posed in Einsteinian physics.[46]

All this sort of empirical study can show, then, is that given the particular circumstances of a particular world at a particular time, most people played Gin in a particular way. And, in the case of a language game, it is the particular cultural circumstances of that moment—the practical communicative problems that the game arose to solve—which produced the historical rules and meanings. When that cultural or circumstantial paradigm ceased to exist, so did the practice that gave it meaning. At most, we might achieve a kind of translation between older and newer forms of life—so long as we recognize two fundamental points: (1) Translation is always a constructive activity; and (2) as with Newtonian and Einsteinian physics, some important ideas simply will not translate.[47]

To put this critically important point in more expressly Wittgensteinian terms, a given term—"commerce," for example—bears only a "family

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[44] Brian Bix hints at this point in discussing Wittgenstein's earlier efforts to analyze problems of linguistic "verification": "Conventional meanings assume usual circumstances." Brian H. Bix, *Legal Interpretation and the Philosophy of Language, in* THE OXFORD HANDBOOK OF LANGUAGE AND LAW 150 (Lawrence M. Solan & Peter M Tiersma, eds. 2012). When circumstances change, in other words, so do meanings.

[45] INVESTIGATIONS, *supra* note 19, § 23.

[46] Thomas Kuhn has famously pointed out that such an effort is meaningless because the Newtonian and Einsteinian physical paradigms are incommensurable. Thomas S. Kuhn, *Rationality and Theory Choice*, 80 J. PHIL. 563, 566 (1983). Or, as Michael Polanyi has put it, scientists in different schools "think differently, speak a different language, live in a different world." MICHAEL POLANYI, PERSONAL KNOWLEDGE: TOWARDS A POST-CRITICAL PHILOSOPHY 151 (1958). The same incommensurability exists, as Wittgenstein pointed out, across different language games—including language games played at different times as part of different "forms of life." This is what he means when he says, "If a lion could talk, we could not understand him." INVESTIGATIONS, *supra* note 19, at 223.

[47] Again, Jonathan Gienapp has insightfully identified several failures with the New Originalists' "empirical" approach to such translation. Gienapp, *supra* note 42, at 940-44. Perhaps closer to the mark is Larry Lessig's approach. Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993). In the constitutional context, Christina Mulligan and her co-authors have shown just how difficult this process may be across different languages, even at the same historical moment. Christina Mulligan, Michael Douma, Hans Lind, & Brian Quinn, *Founding Era Translations of the Constitution*, 31 CONST. COMMENT. 1 (2016). Indeed, Mulligan points to the nearly unanimous scholarly opinion that, "Translation entails, and has always entailed, a process of analysis. Although this claim is intuitive, establishing it is not trivial. The competing possibility—that translation is some rote process, where word A in the source language becomes word A' in the in the target—come readily to mind." *Id.* at 11.

resemblance" to itself across different historical language games.[48] Thus, the word "commerce" is used today for many—but not all—of the same purposes that it was in 1789. Our changing forms of life have attached new meanings to the term, and other meanings have fallen away.[49] Wittgenstein likened a word's uses across different language games to the individual fibers that make up a piece of spun thread: Each fiber makes up an essential part of the thread, but none spans its whole length.[50] Put another way, each use is *necessary*, but not *sufficient*, to establish a complete account of the word's meaning. This means that "commerce" occupies different space within the complex, evolving web of language rules that serve our modern form of life than it did in older language games.[51] The effort to transpose an old term into our new practice thus requires *choices* about which meanings to emphasize or cast aside—we must reshape 1789's "commerce" to make it fit into our modern jigsaw puzzle—and these choices are, of course, culturally normative and constructive in nature. As a result, establishing even the communicative content of historical language within a changed form of life is always a constructive, and not just an empirical, endeavor.

These insights give rise to a number of difficult questions for constitutional interpreters, especially those who seek determinate meanings that might closely cabin judicial decision-making. Such individuals might ask whether our games might at some point evolve so much that we can no longer properly say we are playing "Gin"—or that we are still doing "American constitutionalism." To assess this sort of question, we must remember the fundamental insight already underfoot—neither the terms "Gin" nor "American constitutionalism" refer to objects in the world that

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[48] INVESTIGATIONS, *supra* note 19, §§ 66-67. *See also,* Sean Wilson, *The Fallacy of Originalism: What Philosophy of Language and Law Says About 'Original Meanings'*, 14-15 Working Paper *available at*: http://ssrn.com/abstract=1405451.

[49] Some years ago, Rick Hills put the point quite nicely in a post on *Prawfsblawg*:

> Constitutional terms like "the rights ... retained by the people" refer not to some trans-historical nugget of meaning, some referent like the Potomac River to which "the Potomac[k] River" referred in 1791 and still refers today. Instead, such terms are ideologically loaded markers referring to what Wittgenstein would call a "form of life"—a vast array of values, beliefs, and points of salience that have often vanished long ago. Assuming that some judge with the powers of Quentin Skinner actually succeeded in reconstructing this array of beliefs, she would never enforce it, because it would be too unpalatable to the modern society that, in the long run, chooses the judges.

Rick Hills, *How Kurt Lash Cured Me of Originalism*, PRAWFSBLAWG (Sept. 6, 2009), http://www.typepad.com/services/trackback/6a00d8341c6a7953ef0120a54f9880970b.

[50] *Id.* at § 67.

[51] *Id.*

we might use to verify their meanings. Instead, both terms identify their own rule-governed social practices, and so the only way to answer our question is to look at whether practitioners generally treat our evolving actions or utterances as recognizable parts of their respective practices. If so, we are still using the terms appropriately, even if the games have changed in important ways.

Perhaps the most common kind of confusion on this point arises when critics point to the American Constitution as the sort of foundational object that can verify or falsify contested meanings within our practice of constitutionalism. The claim here is that "the American Constitution" is a proper noun, thus there is an object to which the term refers, and so our "constitutionalism" must be bound to that reference point in some verifiable way.[52] Such a claim is certainly relevant if we are trying to distinguish the American Constitution from some other document or object, but that is rarely the communicative problem that people who make this argument are trying to solve. Rather, they hope to use the Constitution's *words* as a foundational and limiting source of constitutional *meaning*. But again, many words do not refer to objects that can provide the sort of foundation or limits these critics seek. As a result, the Constitution's text cannot speak for itself: its meaning arises only as a product of a shared, rule-bound communicative practice.[53] While it is certainly true that the text may limit constitutional meaning, it does so not by reference to objects or as a matter of "fact," but rather because *we* impose those limits as part of a shared interpretive practice.[54] Once more (for good measure) the Constitution is

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[52] I take this to be the essence of those theories that rely in significant ways on the Constitution's "writteness." *See* Andrew Coan, *The Irrelevance of Writteness in Constitutional Interpretation*, 128 U. PA. L. REV. 1025 (2010) (canvassing theories).

[53] In Philip Bobbitt's words, "Texts may speak, but they don't decide." Philip Bobbitt, *The Constitutional Canon,* in LEGAL CANONS 331 (Jack Balkin & Sanford Levinson, eds. 2000). Or, in Mitch Berman and Kevin Toh's formulation, "[T]ext is not itself law." Mitchell N. Berman & Kevin Toh, *On What Distinguishes New Originalism from Old: A Jurisprudential Take*, 82 FORD. L. REV. 545, 570 n. 82 (2013); *accord* Mitchell N. Berman, Book Review, *Judge Posner's Simple Law*, 113 MICH. L. REV. 777, 804 n. 113 (2015) ("Text is not law, for they are different sorts of things. A text is an assemblage of signs and symbols; a law is a normative entity.").

[54] I was once posed something like the following hypothetical: Imagine the Constitution provides that the Presidential inauguration ceremony must be held outside if the temperature is "at or above 40 degrees." It is well known that the founding generation used Fahrenheit's temperature scale, but in the intervening years the United States has switched over to the Centigrade system. As a result, based on contemporary language conventions, the "Temperature Clause" now seems to require an outdoor ceremony in extreme heat (at least 104 degrees Fahrenheit). Surely, my interlocutor suggested, this problem demonstrates that we must adopt historical language conventions to make sense of the constitutional text. My answer (though clumsy at the time) was that we would very likely translate the historical meaning into modern terms with something like "5 degrees Centigrade," but that this would be a matter of *our* shared interpretive practices—contemporary constitutional contestation and

something we *do,* not something we *have.*

We might call this practice of constructing both semantic and legal meaning "constitutionalism," and I suggest that it is this practice we are most often referring to when we talk about "the Constitution."[55] To say, in other words, that, "The Constitution does not permit ϕ" is really to say something like, "Our practice of constitutionalism does not recognize ϕ as legitimate." Consider, for example, Jack Balkin's observation that, "[o]riginalism is mostly unknown outside of the United States."[56] Unknown even to our northern neighbors, so that even if Canadians had *our* constitutional text as their written charter, their practical constitutionalism would undoubtedly produce different meanings than those we know.[57] Again, it is the practice, not just the text, which bestows constitutional meanings.

In the remainder of this essay, I will argue that the American practice is one of *contested constitutionalism*, which is to say that in our constitutional language game meanings often arise out of a contest. That is, both the semantic and legal content of at least some significant constitutional language are the product of a contest involving competing assertions, arguments, and decisions. Wittgenstein teaches us that this contest, like any language game, is rule-governed—some assertions and arguments are legitimate and some are not—and these rules arise out of the practical problems that shape our current constitutional forms of life. A fundamental feature of this contest is the role that judicial decisions play in settling particular disputes—at least temporarily—thus filling in gaps in meaning that arise out of our changing forms of life. These decisions then serve as something like the loophole-filling "examples" Wittgenstein described in our language practices.[58] Most importantly, the fact that our constitutional language game often takes the form of a contest undermines the relative semantic determinacy that the text can produce, particularly in

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construction—and there is nothing about the text itself which "represents" a particular temperature. Indeed, although it seems *unlikely*, there is nothing *illegitimate* about reading the Clause to reference 40 degrees Centigrade, so long as that is the meaning that our practical interpretive contestation settles upon. In any case, this is an (likely uncontroversial) example of the sort of "evolutionary ambiguity" discussed in Part II. A below.

[55] This might be something similar to the "disciplining rules" that Owen Fiss sees constraining legal interpretation. Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 744 (1982).

[56] Jack Balkin, "Why Are Americans Originalist?" *in* LAW, SOCIETY AND COMMUNITY: SOCIO-LEGAL ESSAYS IN HONOUR OF ROGER COTTERRELL, (David Schiff & Richard Nobles, eds. 2015).

[57] On Canada's interpretive practices, see Peter Hogg, "Canada: From Privy Council to Supreme Court" *in* INTERPRETING CONSTITUTIONS: A COMPARATIVE STUDY 55, 83 (Jeffrey Goldsworthy, ed. 2006). On "living tree" constitutionalism, see Edwards v. Attorney-General for Canada [1930] A.C. 124, 9.

[58] *See* note 22, *supra* and accompanying discussion.

controverted cases. Knowing constitutional text, history, and even doctrine is therefore insufficient to understand American constitutionalism without understanding the current rules of the interpretive contest.

Philip Bobbitt's remarkable efforts to identify and describe these rules provide a very valuable—if perhaps not entirely complete—picture of the "grammar" of our constitutionalism.[59] He has described a practice composed of six distinct modalities of constitutional argument: textual, historical, structural, doctrinal, prudential, and ethical.[60] While these modalities coexist as parts of the same larger practice, they remain incommensurable in important respects—like Newtonian and Einsteinian physics[61]—which is one important reason that our constitutionalism takes the shape of an argumentative contest.[62] This much Bobbitt has demonstrated beyond much reasonable debate—even if there is still much left to understand about how or why we choose one contested meaning over another in particular cases.[63] The next section, however, explores a different set of questions. It uses comparisons to poker games to illustrate the problems of indeterminacy that persist even within those modalities of constitutional argument that adhere most closely to the constitutional text. In other words, even if our constitutional practice were to evolve to recognize only textual or historical arguments, constitutional meaning would still be contested and indeterminate in a substantial number of cases.

II. CONTESTS OF AMBIGUITY AND VAGUENESS

While the accepted modalities of American constitutionalism are undoubtedly a product of complex and ever-evolving social rule-following practices, it seems likely that these interpretive practices generally reflect some larger body of constitutional values near the center of our political imaginations.[64] Certainly among those values is a strong desire that the

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[59] *E.g.*, PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION (Basil Blackwell, 1991); on "grammar" see SEAN WILSON, THE FLEXIBLE CONSTITUTION 14-15 (2014).

[60] BOBBITT, *supra* note 59, at 12-13.

[61] The Newtonian terms 'force' and 'mass' provide the simplest sort of example. One cannot learn how to use either one without simultaneously learning how to use the other. Nor can this part of the language-acquisition process go forward with resort to Newton's Second Law of Motion. Only with its aid can one learn to how to pick out Newtonian forces and masses, how to attach the corresponding terms to nature." Kuhn, *Rationality and Theory Choice*, 80 J. PHIL. 563, 563 (1983); *see also supra* note 44.

[62] BOBBITT, *supra* note 59, at 12-13. Bobbitt has further suggested that it is the existence of this contest that justifies the institution of judicial review. If constitutional meanings were determinate, we would hardly need a trained judiciary to interpret the document.

[63] *See e.g.*, Ian Bartrum, *Constitutional Value Judgments and Interpretive Theory Choice*, 40 FLA. ST. U. L. REV 259 (2012).

[64] I have made this argument in more detail elsewhere. *See Id.*

Constitution have determinate and discoverable meanings—meanings that impose clear substantive limits on the government's structure and authority.[65] To this end, there are those who would like to narrow the acceptable range of our constitutional argumentative practices with the hope of reducing the number or kind of our interpretive disagreements.[66] Indeed, a particularly strong version of this claim might suggest that our practices should evolve so as to treat prudential, ethical, structural, and doctrinal arguments as presumptively illegitimate interpretive modalities. This would mean that only textual and historical assertions could legitimately inform the judicial decisions that fill in emergent gaps in our sense of constitutional meaning. Even if such a drastic (and wildly imprudent) change in our practice were to occur, however, constitutional meaning would remain at least partially indeterminate and contested, our contests would simply change their form or grammar. The chimera of the Umpire Judge as bound conduit of constitutional truth would still run up short against the inevitability of contested textual ambiguity and vagueness.[67]

Ambiguity occurs when the rules of a language game allow us to use the same term in at least two different ways—for example, a "right" answer

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[65] Associate Justice Antonin Scalia was perhaps the most prominent advocate (at least rhetorically) of this sort of view, often telling audiences that the Constitution's text is "dead, dead, dead." *E.g.*, Tasha Tsiaperas, "Constitution a 'dead, dead, dead' document, Scalia tells SMU audience," DALLAS MORNING NEWS (January 28, 2013) http://www.dallasnews.com/news/community-news/park-cities/headlines/20130128-supreme-court-justice-scalia-offers-perspective-on-the-law-at-smu-lecture.ece

[66] *Id.*

[67] To be clear, this is not to surrender the constructive field entirely to the sorts of subjectivism that characterized the realist or critical legal studies movements of the last century. *See, e.g.*, Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed*, 3 VAND. L. REV. 395 (1950) (deconstructing statutory interpretation); *and* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (David Kairys, ed. 1982) (anthologizing critical legal studies scholarship). I recognize that the originalist revival of the 1980s was in many ways a direct response to the profound anxieties those movements aroused, *e.g.* RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 402-6 (1977); ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 15-18 (1990), but it has largely been a failed response. In part for the reasons discussed herein, originalism simply cannot provide the broad sorts of empirical constraints that its early proponents sought. Much more promising in this regard is the contemporaneous work of people like Philip Bobbitt, Stanley Fish, and Owen Fiss, which describes and analyzes the internal, practical constraints that *arise out of* our efforts to construct constitutional meanings. PHILIP BOBBITT, CONSTITUTIONAL FATE (1982) (suggesting that interpretive practices constitute their own norms); STANLEY FISH, IS THERE A TEXT IN THIS CLASS? (Harvard, 1980) (arguing that meaning arises from the practices of "interpretive communities"); Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982) (arguing that interpretive communities generate "disciplining rules" for practitioners). My own views fall somewhere on the spectrum of these latter scholars—with perhaps more emphasis on the role that adversarial interpretive contestation plays—but those claims are not this essay's principal concern.

or a "right" hand.[68] Vagueness occurs when the language rules are themselves underdetermined, so that there is uncertainty about whether it is correct to use a particular term in a particular way—for example, we might wonder whether or when it is appropriate to say that a friend is driving "dangerously."[69] There are undoubtedly a lot of ways to think about problems of legal indeterminacy,[70] but, for contested constitutional purposes, this essay draws two fundamental distinctions: An indeterminacy may be either (1) *contemporary* or *evolutionary*; and it may be either (2) *intentional* or *incidental*.[71] The first distinction suggests that constitutional

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[68] *See, e.g.*, Lawrence M. Solan, *Vagueness and Ambiguity in Legal Interpretation*, *in* VAGUENESS IN NORMATIVE TEXTS 73, 79 (Vijay K. Bhatia, ed. 2005). The standard example compares a commercial "bank" with a river "bank." *Id.*

[69] *See, e.g.*, H. PAUL GRICE, STUDIES IN THE WAY OF WORDS, 177 (Harvard, 1989).

[70] *See, e.g.*, TIMOTHY ENDICOTT, VAGUENESS IN LAW (Oxford, 2000) (describing multidimensional indeterminacy inherent in "extravagantly" vague terms like "reasonable"); Ralf Poscher, *Ambiguity and Vagueness in Legal Interpretation*, *in* THE OXFORD HANDBOOK OF LANGUAGE AND LAW (Lawrence M. Solan & Peter M Tiersma, eds. 2012) (describing logical, ontological, epistemological, and semantic approaches to vagueness); Scott Soames, *Vagueness and the Law*, *in* THE ROUTLEDGE COMPANION TO PHILOSOPHY OF LAW (Andrei Marmor, ed. 2012) (positing "partial definition theories" and "epistemic theories" of vagueness); Andrei Marmor, *Varieties of Vagueness in the Law*, University of Southern California Legal Research Paper Series No. 12-8, *available at*: http://papers.ssrn.com /sol3/papers.cfm?abstract_id=2039076 (differentiating "transparent" and "extravagant" vagueness); Hrafn Asgeirsson, *On the Instrumental Value of Vagueness in the Law*, 125 ETHICS 425 (2015) (exploring problem of incommensurate multi-dimensionality) Brian H. Bix, *Legal Interpretation and the Philosophy of Language*, *in* THE OXFORD HANDBOOK OF LANGUAGE AND LAW (Lawrence M. Solan & Peter M Tiersma, eds. 2012) (canvassing literature on indeterminacy and "open-textured" language); Brian H. Bix, "Vagueness and Political Choice in Law," *in* VAGUENESS AND THE LAW: PHILOSOPHICAL AND LEGAL PERSPECTIVES (Geert Keil & Ralf Poscher, eds. Oxford Univ. Press 2016) (forthcoming, on file with author); Roy Sorensen, *Vagueness Has No Function In Law*, 7 LEGAL THEORY 387 (2001).

Much of this scholarship has begun pulling from the philosophical end of the thread, using the specific case of legal interpretation to better understand general linguistic principles. Thus, some theorists have debated the lessons that legal usages may have for existing philosophical accounts of vagueness. Scott Soames, for example, has argued that the controversial "epistemic" theory of vagueness (the precise borders of vague reference exist, but are not knowable) has very limited utility, at least in legal practice. Andrei Marmor has explored the distinct sorts of problems that "ordinary," "transparent," and "extravagant" vagueness pose within the legal context. More law-oriented theorists have begun to explore the sorts of instrumental values and purposes that linguistic indeterminacy may serve in particular legal settings. Thus, folks like Timothy Endicott and Hrafn Asgeirsson have suggested that vague language has certain instrumental value in statutory drafting: for example, it helps to avoid certain types of arbitrariness and has a power-allocating function in certain kinds of controversies. Brian Bix has suggested that statute or contract drafters may utilize indeterminate language to avoid the costs associated with resolving disagreements up front, possibly with the hope that those indeterminacies do not produce actual future disputes. Others, like Roy Sorensen, have argued that vagueness serves no purpose at all in law, and we should thus work to avoid it whenever possible. My goal here is to begin a discussion about the ways that textual indeterminacies both *ensure* and *inform* enduring constitutional contests.

[71] The concept of an "incidental" indeterminacy may be similar to the more standard classification of a "latent" ambiguity—where a text appears clear, but some extrinsic evidence renders the reference uncertain. *See, e.g.*, Gideon Rosen, *Textualism, Intentionalism, and the Law of Contract*, *in*

text may be indeterminate at the moment it is ratified, or that it may become indeterminate as our language practices evolve. The second recognizes that such indeterminacies may be intentional, or they may be unavoidable or unanticipated incidents of constitutional drafting and contested language. I am principally concerned in what follows with two particular types of indeterminacy: *intentional contemporary ambiguity* and *incidental vagueness*. The former is a species of indeterminacy that New Originalism largely ignores or brackets,[72] while the latter does not seem susceptible to empirical historical inquiry.

A. Evolutionary and Contemporary Ambiguities

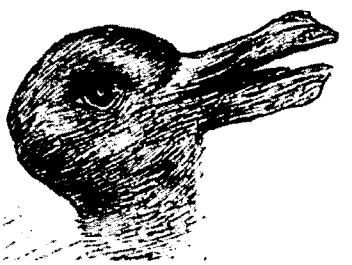
Evolutionary ambiguities are generally the easiest to identify and resolve. The word "text" offers a modern illustration. For many years, "text" was primarily used to discuss written words. With the invention and rapid ubiquity of cell phones, however, "text" is probably more often used now to describe words sent electronically across a cellular data network. Thus, as our forms of life have evolved, an assertion that would likely not have been ambiguous twenty years ago certainly might be now. Perhaps the most commonly cited example of an evolutionary ambiguity in constitutional language is Article IV's promise of federal protection against "domestic violence."[73] At the time it was ratified, this language referred unambiguously to intrastate hostilities or unrest; now, of course, the term is most commonly used to describe spousal abuse. Thus, in our current language practices it has become ambiguous. Evolutionary ambiguities of this sort do not present much of a problem in language generally, or in our constitutional practice. They are generally resolved without much contest or controversy by looking to broadly shared historical practices and contexts, and it is not worth spending more time on them here.

PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW, 130, 156 (Andrei Marmor & Scott Soames, eds., 2011). I, however, intend the "incidental" label to include both this circumstance and those where the text, on its face, is unintentionally indeterminate.

[72] *See* SOLUM, *supra* note 9, at 102 (bracketing "irreducible" ambiguity).

[73] U.S. CONST. art. IV, § 4. For an interesting discussion of this example, *see e.g.* Mark S. Stein, *The Domestic Violence Clause in "New Originalist" Theory*, 37 HASTINGS CONST. L. Q. 129 (2009).

Contemporary ambiguities, however, present a more difficult case of indeterminacy. This type of ambiguity occurs when contemporaneous language conventions allow us to use the same term to make at least two different references. In such a circumstance, the term's meaning is potentially indeterminate at the moment it is uttered. One of Wittgenstein's favorite drawings—the "duck-rabbit"—provides a simple illustration. Though he usually used it for other purposes, the image captures the problem of contemporary ambiguity quite nicely.[74] If one takes the animal to be facing left, then it depicts a duck. If, however, one imagines that the creature is facing right, it becomes a rabbit. Without further clues or instructions from the artist, the viewer is left to construct the drawing's symbolic meaning on her own—either as a duck, a rabbit, or both. In the constitutional context, the word "arms" (for shooting or hugging?) in the Second Amendment provides a comparable example. There are several ways we might resolve this sort of ambiguity—contextual or pragmatic enrichment, authorial intentions, or popular opinion, among others—each of which are, of course, subject to construction and debate. But this is just the beginning. It is also important to understand how this relatively simple problem may become far more complex when contemporary ambiguities function within a nuanced network of *contested* language practices—within which a speaker might gain certain advantages by using terms ambiguously.[75] This requires a correspondingly richer illustration, which brings us back to the world of cards.



Omaha Hi/Lo is a very popular poker game around the world. Each player is dealt four "private" cards, which only she may see. Five "communal" cards—which every player may use—are then dealt face down in the center of the table. Betting continues in stages as the communal cards

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[74] Wittgenstein most famously used the "duck-rabbit" as a way of illustrating the cognitive experience of "seeing as," or perceiving an aspect of something that one had not seen before. INVESTIGATIONS, *supra* note 19, at 194e. Would that he had lived to see the debate over the infamous "blue and black" or "white and gold" dress. *See* Jonathan Mahler, *The Dress That Melted the Internet*, N.Y. TIMES, B1 (Feb. 28, 2015).

[75] If it turns out, for example, that the picture was meant to depict *both* a duck and a rabbit (which, in fact, seems likely) this becomes an *intentional* indeterminacy. In that case, we would likely want to know *why* the artist was deliberately ambiguous—what purposes this might have served—and whether the indeterminacy formed part of a *contested* communicative practice. These sorts of inquiries are likely unavailable within public meaning originalism.

are gradually revealed. In the first stage, known as the "Pre-Flop," the players evaluate the potential strength of their hands based solely on their private cards, and bet accordingly. The dealer then turns over the first three communal cards—the "Flop"—and the players reassess and bet again. Another communal card, known as the "Turn" is revealed, followed by more betting. After the final communal card—the "River"—is turned the players make their final bets, and the hands are revealed. Each player must compose a five-card poker hand using both of their private cards and three of the communal cards.

The object of the game is to have either the "high" hand or the "low" hand—which then split the pot—or, if you are really good, *both*. To that end, each player may compose two separate hands from the available cards—one intended to compete for the high hand, and one for the low. To qualify as a low hand, however, the five cards must include nothing higher than a seven, and if no such hands exist the high hand takes the entire pot. Sometimes, however, the *same* five-card hand can be *both* the high and the low hand, which is known as a "scoop." This is possible because straights and flushes count in high hands, but not in low hands.

The rules of Omaha Hi/Lo thus illustrate not only the basic problem of contemporary ambiguity—in which multiple cards have ambiguous contextual meanings—but also the complexities of *contested* contemporary ambiguities. That is, a player can *choose* which ambiguous meaning to give a card, hand, or suit in order to best serve her interests in the context of a particular contest; and, in fact, she may choose to use *both* meanings within the same hand. With this in mind, her opponent must produce a strategy that accounts for each of these potential meanings, at least inasmuch as they appear in the communal cards. This adds significant complexity to contemporary ambiguity as a source of intentional indeterminacy. The possibility of these sorts of motivated choices also leads us naturally into a discussion of *incidental* and *intentional* ambiguity.

B. Incidental and Intentional Ambiguities

There is little doubt that some ambiguous usages are unavoidable, or at the very least, unintentional. For example, the fact that both players in a game of Omaha Hi/Lo might have completed the best possible low hand—they might each have held the lowest cards in different suits[76]—is simply an

[76] Note that even this sentence produces a contemporary ambiguity with the phrase "of different suits": Different from the other cards in the player's hand, or different from the cards in her opponent's hand? A bit of contextual enrichment, however, suggests the latter meaning, as suits are of no

incidental feature of the game's rules. In such a circumstance, the players split the low pot, but neither reaps a benefit from the ambiguous rules that recognize two possible "nut" low hands.

Likewise, in a recent study of founding era translations of the Constitution, Christina Mulligan and her co-authors have identified several incidental contemporary ambiguities in the text.[77] These translations—made for distribution to the Dutch and German communities in Pennsylvania during the ratification debates—evince some notable ambiguities in the text's original meaning. For example, the meaning of the controverted verb "to regulate" in the Commerce Clause was rendered differently in the two languages:

> [The Dutch translator] chose a Dutch cognate of the English word. In Dutch, 'regulate' or 'reguleeren' means subject to imposition of rules or control, or to supervise. However, the German translator chose the verb 'einrichten,' a somewhat ambiguous term, which could mean any of: to establish something previously nonexistent, to furnish something existing, or to establish oneself somewhere. (For comparison, the translator could have used the word 'regulieren,' which means to subject something to rules or to control, now commonly used in the European Union.)[78]

While this particular ambiguity is highly relevant to the historical arguments made in *NFIB v. Sebelius*—which centered on whether the power to "regulate" commerce empowers Congress to bring about commercial activity[79]—there is little evidence that the differing translations demonstrate any intentional choice by the framers or ratifiers.[80] Thus, at least based on the evidence we have, this sort of contemporary ambiguity is of the incidental variety. That does not make it unproblematic, of course—it still requires constructive decision-making by an interpretive community (of the sort noted in the "duck-rabbit" discussion)—but it presents fewer, or at least

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consequence within an individual's low hand.

[77] Mulligan et. al., *supra* note 47.

[78] *Id* at 25.

[79] NFIB v. Sebelius, 567 U.S. 519 (2012).

[80] *See* Mulligan et. al, *supra* note 47, at 52-53 ("[S]emantic dissociation between the two translations can be understood as either an example of differing interpretations, or as the contingent result of the translation process as a more or less conscious and controlled activity that inevitably leads to differences and even errors. The latter possibility might often be the case with these translators' work.").

different, complexities than would an intentional ambiguity.

This brings us finally to the problem of *intentional contemporary* ambiguities, which are those utilized to promote their user's ends within a particular contest.[81] The ambiguous usages of cards that could contribute to either high or low hands in the Omaha Hi/Lo example demonstrate this phenomenon in the context of card game. The practice is certainly also a part of American constitutionalism, as illustrated in the earlier story about Senators Cruz and Feinstein about the proposed assault weapons ban. The question, then, is *why* would the drafters be intentionally ambiguous? What advantage might have been gained in our contested constitutional practice by intentionally using the term "the people" ambiguously? The answer may be fairly straightforward. Using "the people" to refer to both the larger and smaller groups of citizens had at least two purposes. First, it continued the argumentative effort to legitimize the Constitution as the act of as broad a popular sovereign as possible, while functionally limiting political rights to a much smaller subset of the population. Second, by using the aspirationally inclusive term, the language set up an enduring constitutional contest about which citizens should enjoy full membership in the American political project.

The "people" like the Declaration of Independence's "all men" of equal creation was very much like an Ace of Clubs in a hand of Omaha Hi/Lo. It had both a "high" meaning—the aspirational appeal to universal equality before the law—and a "low" functional meaning, encompassing only an elite subset of citizens.[82] Senator Cruz utilized the more inclusive modern meaning of "the people," which has largely won the constitutional contest set up in the original text. Perhaps ironically, he was able to make a non-originalist argument about constitutional meaning by taking advantage of the intentional contemporary textual ambiguity in the framers' language.

Several types of ambiguity, then, make some contests over the text's semantic and legal meaning inevitable. The simplest of these contests might arise over incidental evolutionary ambiguities—such as "domestic violence"—which seem unlikely to provoke much actual debate. Incidental contemporary ambiguities present more difficult problems, however,

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[81] Some philosophical accounts suggest that ambiguities are almost never intentional. *See* Marmor, *supra* note 70. This may, then, be an example of a circumstance in which constitutional law differs from other kinds of communicative practices.

[82] For more on the Declaration's "aspirational" and "functional" meanings, see Ian Bartrum, *The Constitutional Canon As Argumentative Metonymy*, 18 WM. & MARY BILL RTS. J. 327 (2009). The same sort of aspirational ambiguity exists in the Fourteenth Amendment's promise of equal protection to "any person." U.S. CONST. amend. XIV.

particularly for historical arguments that make claims based solely on original public meanings. Whether the German translation of 'to regulate' as 'einrichten' is evidence of a broader public meaning than some modern interpreters have supposed, for example, is certainly ground for a fairly robust modern constitutional contest. The most complex sources of ambiguous indeterminacy, however, are intentional contemporary ambiguities. These are circumstances in which the text's authors deliberately used language in ways that the relevant public would have found ambiguous. Such usages purposefully establish the grounds for future debate and disputation, and confirm that constitutional meaning—even within the confines of a severely limited interpretive practice—must remain the product of an ongoing practical contest.

C. Incidental Vagueness

Vagueness is a different type of indeterminacy than ambiguity. An ambiguous term may be used to make at least two different references, but the referents themselves are generally not indeterminate. Thus, in Omaha Hi/Lo there is no confusion about what meaning attaches to the "highest" or "lowest" cards in the deck per the rules of the game; nor is there much historical debate about which groups of "people" held full political rights at the time of constitutional ratification. Not so with a vague term, however, which occupies indeterminate space within the rules of the language game itself. Consequently, in borderline cases a vague usage fails to identify a determinate referent, and so leaves the truth or falsity of a proposition open to interpretive contestation. Thus, we might reasonably agree or disagree with the assertion that lethal injection is a "cruel" form of punishment.

Most instances of intentional vagueness have both "contemporary" and "evolutionary" dimensions ("cruel punishment" was intentionally vague in 1789, and was likely intended to be vague within different parameters today), and these changing boundary lines are the focus of much debate.[83] Intentional vagueness is not, however, the focus of this paper, as I hope instead to draw attention to problems of incidental vagueness. Incidental vagueness, like incidental ambiguity, reflects the practical limits of contested language and the drafting process. A more precise term—one that invokes more specific linguistic rules—may be unavailable, or the drafters may be unable to agree on more exacting language. I will call this a case of *incidental contemporary vagueness*. Alternatively, the drafters

[83] *See* Marmor, *supra* note 67.

may not recognize the potential vagueness in a term they choose to employ. I will call this *incidental evolutionary vagueness*, though we might also call it "latent" vagueness in keeping with some of the literature on ambiguity.[84] This latter form of vagueness, in particular, deserves considerably more attention.

Another Wittgenstein-based example illustrates the problem with a question: "How many pieces of wood are in a broom?"[85] The answer that springs immediately to most minds is "one"—there is just the wooden handle. But there is actually a latent vagueness here; the answer depends upon what you think constitutes a "piece of wood" and/or a "broom," which in turn depends on how you want to *use* the wood or the broom. If you need two shorter pieces of wood, you could, of course, break the handle in half. If you need 100 toothpicks, you might find a way to reduce the handle to splinters. Apparently, prison inmates sometimes deconstruct broom handles and turn them into zip guns.[86] If you just need a broom, or if you simply think a "broom" consists of a wooden handle of a certain length and its attached bristles, then you are probably back to the answer "one." The larger point is that we may not see the potential vagueness in a term until a practical problem arises (such as the need for toothpicks) that draws out the underlying indeterminacy.

Another poker example may be helpful. Imagine you are watching a game of Five Card Draw on television. There are three players, and each has already exercised their option to draw new cards. The television broadcast allows you to see all three hands: Player 1's highest hand is a pair of 5's; Player 2 has three Jacks; and Player 3 has three Aces. Imagine that, at that moment, you are asked which player has the "worst" hand. Most people would likely answer, reflexively, that Player 1's pair of 5's is worst. But, again, there is a potential vagueness here, which arises out of the practical problems that contested betting strategies bring into the game. Player 1, knowing her lowly 5's are unlikely to win, is likely to fold her hand without risking any further money. Player 2, on the other hand, probably feels pretty good about his three Jacks, and is likely to risk more

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[84] In contract or estate law, for example, a "latent" *ambiguity* is one that may arise out of changed circumstances. For example, although a testator had only one nephew named Lester at the time her will was executed, two such nephews existed at her death. In such a circumstance parol evidence may be admissible to resolve the ambiguity. Extrinsic evidence, however, would not seem helpful to a case of latent *vagueness*.

[85] *See* INVESTIGATIONS, *supra* note 19, § 60 (discussing whether the word "broom" refers to all the constituent parts, or just the whole).

[86] BEV CHRISTENSEN & LAURA ZIELKE, GRAB THE DEVIL'S TAIL: CONFESSIONS OF A CONVICT TURNED POLICE INFORMANT 89 (2007).

money by increasing his bets against Player 3. In the end, assuming Player 3 stays in, Player 2 will lose that money. One could certainly make a case, given these probabilities, that Player 2 actually has the "worst" hand at the moment you are asked to decide.[87] How much lower would Player 2's hand have to get before he, too, would fold and cut his losses early? A pair of 10's? A pair of 7's? At whatever point that is—and that, of course, is open to debate—most people would likely agree that Player 1's hand has definitively become the "worst" of the three, for most people, the initial question contains an incidental or latent vagueness that future contestation may reveal. It is the question "Worst in what way?" that reveals the latent vagueness of "worst" hand.

Incidental evolutionary vagueness often occurs in the constitutional context as well. As an example, we might consider the Establishment Clause of the First Amendment: "Congress shall make no law respecting an establishment of religion."[88] In particular, the use of the word "respecting" produces what is likely an incidental vagueness. Justice Clarence Thomas has argued that the First Congress chose the word "respecting" because its intention was to prevent Congress from interfering with the existing religious establishments in the various states.[89] In this sense, the word "respecting" means something like "affecting," and the Establishment Clause was intended as a federalism provision reserving to the state governments the power to either establish or disestablish an official church.

When the Court began to incorporate various provisions of the Bill of Rights against the states, however, the Clause's federalism meaning had to evolve. After all, it makes no sense for an incorporated Establishment Clause to deny the states the very power the original Clause had specifically reserved to them. So "respecting" began to change from "affecting" into "effecting," and the Clause came to prohibit the states not only from establishing a church, but also from taking certain steps in that direction. To wit, in the seminal Establishment case of the twentieth century—*Lemon v. Kurtzman*—Chief Justice Burger could claim that, "[a] given law might not *establish* a church but nevertheless be one 'respecting' that end in the sense of being a step that could lead to such establishment and hence offend

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[87] I must thank my colleague Peter Bayer for this example.

[88] U.S. CONST. amend, I.

[89] *E.g.*, Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 50 (Thomas, J., concurring) (citing AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 36-39 (1998)). Where Justice Thomas seems to part company with Amar, however, is when the latter recasts the Establishment Clause's "reconstructed" meaning following the Civil War. For Amar, an intense constitutional contest had dramatically reshaped the Clause, so that it came to guarantee an *individual* and not a *state* right. AMAR, *supra* at 249-54.

the First Amendment."[90] Exactly which steps might "respect" an Establishment end, of course, remains open to interpretive debate. The ongoing contest over the Establishment Clause's meaning, then, has brought to the surface a textual vagueness that the First Congress likely did not anticipate.

Two cases of incidental evolutionary vagueness were also at the center of the Court's recent decision in *NLRB v. Noel Canning*, which challenged the constitutionality of several executive appointments to the National Labor Relations Board.[91] The text in question was the President's Article II authority to make unilateral appointments to fill "vacancies that may happen during the recess of the Senate."[92] When the Senate took its customary holiday break in December of 2011, Republicans were wary that the President might try to push through several appointments upon which the Senate had refused to act.[93] With this in mind, they passed a resolution "providing for a series of *pro forma* sessions, with no business transacted, every Tuesday and Friday through January 20, 2012," so that a formal recess would not occur.[94] The President made the appointments anyway, and the Court was asked to decide whether the word "recess" included customary intra-session breaks (like Christmas), or just the formal break between sessions of Congress.[95] Further, the challengers argued that the phrase "vacancies that may happen" referred only to positions that become open *while* the Senate is in recess, not to those that opened up before the break began.[96] The Court decided in the President's favor on both questions, but nonetheless concluded that the *pro forma* sessions kept the Senate from going into intra-session recess over the holiday.[97]

Again, there is no evidence that the framers were intentionally vague in adopting the recess appointments language,[98] but a potentially unforeseen use of this Executive power arose fairly quickly within the politics of contested constitutionalism. Thomas Jefferson, as the first overtly "party"

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[90] Lemon v. Kurtzman, 403 U.S. 602, 612 (1971)(emphasis added).

[91] NLRB v. Noel Canning, 573 U.S. ___, 134 S.Ct. 2550, 2556 (2014). As noted above, the Court itself refers to these indeterminacies as "ambiguous," *Id.* at 2561, but according to the stipulated definitions common in the literature, they are actually cases of vagueness. To wit, there is no question about the sorts of things a "recess" or a "vacancy" are, rather the question is whether the relevant phenomena are *cases* of "recess" or "vacancy."

[92] *Id.* at 2556.

[93] *Id.* at 2557.

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] *Id.*

[98] *See* JAMES MADISON, JOURNAL OF THE FEDERAL CONVENTION 681-82 (1898).

President, "managed to appoint 120 officers during a single Senate recess, including 30 judges in the newly created courts for the District of Columbia."[99] And a century later Theodore Roosevelt would elevate the recess appointment to an art form when he appointed 168 officers—some very unpopular among Southern Senators—during the "split second" between two consecutive legislative sessions.[100] Over the past half century, as judicial confirmations have become more politicized and the Senate has become increasingly intransigent, the recess appointment power has become a standard tool in the Executive kit—reaching a high water mark in the 1980s, which saw Ronald Reagan make 243 recess appointments.[101] But the Senate has since pushed back by holding *pro forma* sessions to prevent recess, and some presidents responded by using three-day weekends to push through controversial appointees. Thus, changes in our constitutional forms of life have made us revisit constitutional language and have revealed a latent vagueness in the original text.

Like ambiguity, then, the existence of several types of vagueness entails that the text's semantic meaning must sometimes arise out of constructive contestation. Some of this vagueness is undoubtedly a product of intentionally indeterminate usages on the part of the constitutional speakers. This sort of vagueness is the source of a great deal of modern contestation, and even the New Originalists (necessarily) concede that such cases are not particularly susceptible to empirical semantic constraints. Less discussed, however, are cases of incidental or latent vagueness, which occur either when the speakers could not agree on a more precise term, or when emergent constitutional problems reveal unforeseen textual vagueness. I suggest that this last type of vagueness is particularly undertheorized, even though it is significant source of constitutional controversy. When considered alongside the problems of ambiguity discussed above, these issues of vagueness demonstrate that there are number of significant cases in which the text cannot provide an empirical constraint on constitutional meaning.

D. The Limits of Public Meaning Originalism

I suggest that the thought experiment of a constitutional practice limited to the historical and textual interpretive modalities helps to

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[99] Jeff VanDam, *The Kill Switch: The New Battle Over Presidential Recess Appointments*, 107 NW. U. L. REV. 361, 370 (2012).

[100] *Id.* at 371.

[101] *Id.*

demonstrate that the text's semantic meaning must often arise from constructive contestation. The table below helps to emphasize the scope and importance of the limitations that these indeterminacies entail for public meaning originalism. Upon examination, of the seven types of indeterminacy indicated, only the two types of incidental ambiguity would seem to benefit much from analysis of original public meaning—and even these, only contingently so.

TYPES OF INDETERMINACY	CONTEMPORARY	EVOLUTIONARY
INCIDENTAL		
INTENTIONAL	**Ambiguity**: "Omaha Hi/Lo"; "Ted Cruz" **Vagueness**: "Due process"; "Cruel Punishment"	**Vagueness**: "Due Process"; "Cruel Punishment"

Public meaning originalism, particularly Larry Solum's work, has done much to analyze and clarify the difference between ambiguity and vagueness in constitutional explication, but the problems of intentional contemporary ambiguity and incidental vagueness suggest that these advances may have come at the cost of constructive constraint. According to the New Originalists, ambiguity is generally encountered in the "interpretation" phase of explication, where it is usually overcome as an empirical matter.[102] This may be generally true of *evolutionary* ambiguities ("domestic violence"), which often require only straightforward recourse to broad convergences in historical language practices. It might also be true—perhaps contingently—of *incidental contemporary* ambiguities (Dutch and German translations of "to regulate"), when there is enough uncontroversial contextual evidence available to make resort to authorial intentions unnecessary—though even this would require constructive translation. It is difficult to see, however, how it could be true of *intentional contemporary* ambiguities, which were used to further their authors' ends in a particular

[102] Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 11-12 (2015); *see also* Solum, *supra* note 9, at n. 25.

political contest. These sorts of ambiguities—being, after all, intentional—would seem to require constructive recourse to drafters' intent, and a good deal more construction regarding the relevant historical contest.[103] This hardly seems to be the sort of communicative content we might hope to establish as a matter of linguistic fact.

In the case of intentional vagueness, it may be that the distinction between *contemporary* and *evolutionary* indeterminacy is not particularly helpful. In such circumstances, the communicative parameters of a controverted term may be fuzzy along shifting fault lines, but the basic interpretive problems remain the same. The role that historical practices might play in guiding our construction of vague terms, however, would seem to be quite different depending on whether we are dealing with *intentional* or *incidental* phenomena. On the one hand, the potential scope of intentional vagueness may be constrained or delimited by broad convergences in historical legal or linguistic conventions. We might, for example, derive some constructive guidance from "paradigm cases" or "expected applications"; and (if we are willing to go beyond public meanings) we might even eliminate some meanings as plainly unintended.[104] Incidental vagueness, however, seems much less susceptible to historical guidance or constraint, at least in the two forms described above. First, if the authors used a vague term because they could not agree on a more precise term, or because none was available, the best we might hope to accomplish historically (and, again, only if we are willing to resort to intentionalism) is to divine something about the scope of their disagreement. Otherwise, the history is just as indeterminate as the text. Second, if an unforeseen vagueness arises over the course of time, as our world and constitutional problems change, it is difficult to see what insight the ratifying history might provide. This sort of incidental vagueness—like a Kuhnian paradigm shift—is simply a product of our evolving forms of life, on which historical language practices can provide very little, if any, useful guidance.

CONCLUSION

The last two decades have seen an explosion in scholarship exploring the intersection between linguistic indeterminacy (usually vagueness), as

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[103] This move, of course, is unavailable to public meaning originalists.

[104] On "paradigm cases," see JED RUBENFELD, REVOLUTION BY JUDICIARY: THE STRUCTURE OF AMERICAN CONSTITUTIONAL LAW (Harvard Univ. Press, 2005). On "expected applications," see *e.g.*, Michael McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995).

analyzed within the philosophy of language, and legal interpretive theory.[105] I have suggested that such indeterminacies are an inevitable, and even valuable, part of contested language games, which exploit linguistic uncertainty to further different communicative or political ends. I have further suggested that two particular types of constitutional indeterminacy—intentional contemporary ambiguity and incidental evolutionary vagueness—present substantial problems for public meaning theories of constitutional originalism. Resolving an intentional ambiguity seems to require at least some recourse to authorial intentions—which are beyond the scope of public meaning originalism—and historical usages can offer little guidance when new constitutional problems reveal a latent textual vagueness.

When combined with cases of intentional vagueness—which the New Originalists already concede to modern construction—these types of indeterminacy seriously undermine the practical value of public meaning originalism as an interpretive method. Indeed, many—if not most—of our nontrivial constitutional disputes are contests over just these sorts of textual uncertainties. In all of these cases, then, the public meaning originalist must either resort to intentionalist theories—with all of their well-known epistemological and jurisprudential problems[106]—or concede the question to modern judicial construction. This, in turn, means that public meaning originalism's claims about the existence of "empirical" constraints on our constructive practices can inform only a small, and relatively uncontroversial, set of actual constitutional controversies.[107] In the end, however, this need not arouse the sorts of existential anxieties that beset the originalists of the 1980s,[108] because the constitutional contest itself generates deeper and more enduring constraints on constitutional meaning than any posited theory ever could.

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[105] *See* Marmor, *supra* note 67.

[106] *See, e.g.*, Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 209-17 (1980) (discussing the difficulty of discovering intent, and the weakness of individual or institutional intent's claim to legal authority).

[107] This does not, of course, mean that we cannot or should not be originalists; but it does mean that a robust conception of "original communicative content" may require recourse to original intentions, and so will not be "empirical" in the sense the New Originalists hope.

[108] *See* Edwin Meese, III, *Speech Before the American Bar Association*, Washington, D.C. (July 9, 1985) ("A Constitution that is viewed as only what the judges say it is, is no longer a constitution in the true sense"), *reprinted in* ORIGINALISM: THE QUARTER-CENTURY OF DEBATE 47, 53 (Steven G. Calabresi ed., 2007).