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ORIGINALISM AND THE ILLUSIONS OF OBJECTIVITY

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Abstract

Law needs objectivity. If a legal system incorporates rules that are too subjective that system falls short of the goal of the legal enterprise. If the subjectivity becomes too pervasive, the result is actually not law at all, but its opposite: arbitrary power. This Article examines originalism's entitlement to the status of an objective theory of law. It considers first what objectivity means in a legal context, then examines the two main claims of originalism (semantic and normative). After seeing why neither satisfies the test of objectivity, it evaluates recent efforts by originalist scholars to satisfy that test, efforts whose successes come about only at the cost of jettisoning originalism's basic reliance on origin.

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INTRODUCTION

Law needs objectivity. If a legal system incorporates rules that are too subjective—so that the law is whatever the ruler says it is—that system falls short of the goal of the legal enterprise, which is to subordinate human action to the guidance of rules.[1] If the subjectivity becomes too pervasive, the result is actually not *law* at all, but its opposite: arbitrary power. The need for objectivity is probably most obvious in the realm of constitutional law, which specifically regulates the actions of government. The danger of subjectivity here is that it can corrode the legal restraints that protect liberty by keeping government in check, thus undermining government's moral legitimacy and freeing political leaders to do whatever they please.

Legal historian G. Edward White makes the point well when describing the career of Supreme Court Justice William Douglas, often accused of writing his personal beliefs into the Constitution in the guise of legal interpretation. "Judging *is* ideological," White acknowledges, but precisely for that reason, "it requires in its practitioners efforts to show that the ideological position being advanced in a given case is a position based on sources external to its author, a position others with different preconceptions can share."[2] More precisely, a judge must reason objectively, relying on evidence

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[1] *Cf.* LON L. FULLER, THE MORALITY OF LAW 106 (1969) ("Law is the enterprise of subjecting human conduct to the governance of rules.").

[2] G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION 149 (2d ed. 1988).

and verifiable principles if her decisions are to be anything more than mere expressions of her own preferences, and if lawyers and citizens are to be persuaded that her rulings are just.

Since Douglas's retirement in 1974, legal scholars have tried to fashion an objective theory of constitutional interpretation. One candidate in particular, Originalism, has gained a sizeable following—including probably most of today's Supreme Court Justices. Originalism holds that lawyers and judges should apply the Constitution or statutes in the sense in which their authors originally understood them, and Originalist scholars have accordingly produced some fascinating historical research, shedding new light on the development of important legal terms. Yet, despite appearances, Originalism is not actually an objective theory of law. Instead, it is a complicated form of subjectivity, which views the law not as a set of ascertainable principles, but as a function of the beliefs of a specific set of people—that is, those who *originated* the legal language in question. For the Originalist, *origin* plays a defining role, because the Originalist holds that meaning is established by origin—and specifically, by some element of thought breathed into a law at its inception. That belief is misguided. Originalism, in fact, can at best determine not what the law *actually* means, but only what its originators *thought* it meant (or would mean). These are not the same thing.

In this article, I examine Originalism's entitlement to the status of an *objective* theory of law. I consider first what objectivity means in a legal context, then examine the two main claims of Originalism (semantic and normative). After seeing why neither satisfies the test of objectivity, I consider recent efforts by Originalist scholars to rectify this shortcoming—efforts that succeed only at the cost of jettisoning Originalism's basic reliance on origin—a move I call "stone soup"—which results in a theory that has no plausible claim to the title "Originalism."

I. ORIGINALISM'S APPEAL

Law is The Law.
—W.H. Auden[3]

We should begin by acknowledging that Originalism has strong intuitive appeal. It *looks* like objectivity, because it says that the law means a definite thing, and that we can discern that thing through a specific method, so that the law's meaning does not just depend on a

[3] *Law, Like Love* (1939), *reprinted in* THE COLLECTED POETRY OF W.H. AUDEN 74, 75 (1945).

judge's personal opinions. Originalism proposes to establish legal stability, so that a law means today what it meant when it was originated. Professor Lawrence Solum, a leading theorist of Originalism, calls this feature "fixation" or "lock-in."[4] Fixation means that while language may evolve over time, the meaning of a legal document will not. This feature plays the important role of preventing judges from illegitimately manipulating the law—from, so to speak, altering the constitutional bargain after the fact.

But despite this appeal, Originalism faces certain obvious obstacles, many of them well known. For one thing, historical records are simply inadequate and cause intractable problems of bias. James Madison kept extensive notes and wrote many essays and letters explaining his own views of the Constitution's meaning before his death in 1836. But another delegate at the Philadelphia Convention, New Jersey's David Brearley, is hardly remembered at all; he died in 1790 and left a smaller paper trail. Should his views be given the same weight as Madison's? What about Alexander Hamilton, who left the Convention after its first month and did not return until its final days—but wrote most of *The Federalist*? Should his opinions count for more than Brearley's, even though the latter attended the whole convention? Obviously it makes a difference *whose* opinions we consult when trying to find out what the law's originators thought it meant. Our ancestors disagreed over many things—recall Hamilton's famous clashes with Thomas Jefferson—so consulting their opinions about what a law meant in the past is unlikely to yield definitive answers in many cases in which we must determine what the law means today.

The situation is even worse where surviving records are simply too incomplete: The records of Arizona's 1910 Constitutional Convention are quite spotty, for example; most of the important decisions were made by committees that kept no records.[5] And the debates at the Colorado Constitutional Convention of 1876 were not recorded at all.[6] Complications such as these would make it impossible to fairly and consistently interpret constitutional terms based on the opinions of their authors.

To this, Originalists typically respond that they are not seeking the *personal* views of a law's authors—which they call "Original

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[4] Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1 (2015).

[5] *See generally* JOHN S. GOFF, ED., THE RECORDS OF THE ARIZONA CONSTITUTIONAL CONVENTION OF 1910 (1991).

[6] The *proceedings* of the Colorado Convention were recorded, but not the debates.

Intent"[7]—but are instead seeking what they call "Original Public Meaning"—a phrase that refers to the meaning that members of the *general public* would have ascribed to the words in a law at the time that law was adopted. To understand why this fails to resolve the problems of Originalism, however, we must turn to an overview of how concepts work.

II. THE EPISTEMOLOGY OF LEGAL OBJECTIVITY

"That is not it at all,
That is not what I meant, at all."
—T.S. Eliot[8]

To speak of objectivity is to speak of there being a "fact of the matter" about something.[9] By contrast, a statement is *subjective* if its truth value is exclusively a function of the mental state of the person uttering it.[10]

One helpful way to grasp the principle of objectivity is "the *Euthyphro* dilemma," named for the Platonic dialogue in which Socrates sees a young man named Euthyphro on his way to file a lawsuit against his own father for the crime of impiety. In his characteristic way, Socrates asks him to pause and explain what "impiety" is. The man replies that piety is "what is pleasing to the gods," and impiety is that which displeases them. This does not satisfy Socrates. "Is [piety] holy because the gods approve it," he asks, "or do they approve it because it is holy?"[11]

His question gets at a vital point: If something is good just because the gods approve of it, then "the good" is subjective; it is nothing more than a function of what the gods happen to like, not for

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[7] It's doubtful that any Originalist ever actually sought "original intent" as here defined. Even Robert Bork rejected it as early as 1990. *See* ROBERT BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 161-64 (1990). *But see* Robert G. Natelson, *The Founders' Hermeneutic: The Real Original Understanding of Original Intent,* 68 OHIO ST. L.J. 1239 (2007) (arguing that the Constitution's framers intended the lawmaker's subjective intent to play an important role in interpretation).

[8] T.S. Eliot, *The Love Song of J. Alfred Prufrock* (1915), *reprinted in* T.S. ELIOT: THE COMPLETE POEMS AND PLAYS 1909-1950 at 3, 6 (1952).

[9] In fact, it is, strictly speaking a solecism to speak of something being "objectively true," because reality is neither objective nor subjective; it simply is. It is one's behavior, or one's understanding of reality, that can be objective or subjective.

[10] Or as Tara Smith puts it, "'[s]ubjectivism,' in essence, is the belief that a thing's nature is dependent on the consciousness of the person(s) considering it. TARA SMITH, JUDICIAL REVIEW IN AN OBJECTIVE LEGAL SYSTEM 25 n.14 (2015). Not every self-authenticated statement of personal attitudes is necessarily "subjective." For example, someone who claims to be sick might in fact not be sick; there is a fact of the matter about her sickness, meaning that sickness is not subjective.

[11] *Euthyphro* 9e, *in* EDITH HAMILTON & HUNTINGTON CAIRNS, EDS., THE COLLECTED DIALOGUES OF PLATO 178 (1961).

any reason, but based on their whims, which might change at any moment. It is therefore arbitrary, and that means that there is actually no such thing as "the good." There are simply arbitrary preferences. On the other hand, if the gods approve of good things because they are *truly* good—because there is a fact of the matter about their goodness—then the gods must consult some criteria or formula to determine whether those things are worthy of their approval. And if such a formula exists, then human beings should also be able to figure out that formula and use it to decide for themselves what things are good or not. On this theory, "the good" is objectively discernible. (In fact, the gods' approval may play no role at all in the thing's goodness.)

To fully appreciate how objectivity and subjectivity affect law, we must start with epistemology. Law involves the analysis and application of complex concepts, so a theory of concepts must precede any discussion of the practicalities of implementing law in a rational, consistent, and just manner. Concepts are mental tools that help us isolate and comprehend innumerable particular entities, qualities, actions, and relationships in the world. They enable us to understand reality and to interact with it in vastly more complicated ways than if we were to operate solely on the basis of what we perceive at any given moment. By forming mental integrations—classifications or categories—of things that possess the same distinguishing characteristics, we can grasp immensely complicated phenomena and use our knowledge to think and act long-range. We form concepts by recognizing the characteristics that the objects in the world have in common, and disregarding differences in the degree to which they possess those characteristics. The resulting concepts refer to and integrate our knowledge about those concrete instances.

So, for example, after observing multiple black and white, mooing, milk-producing animals, we recognize their similarities and form the concept "cow." The facts that they produce milk and make a distinctive noise figure into our classification, although we disregard how *much* milk particular cows produce or how often they moo. We have now formed the *concept* of "cow." Later, we formulate a *definition* of that concept by ascertaining basic, shared characteristics that explain their distinctive qualities.[12] This eventually enables us to differentiate between true cows and cow-like animals, or between different subcategories of cow. We perform

[12] I draw here on AYN RAND, INTRODUCTION TO OBJECTIVIST EPISTEMOLOGY (2d ed. 1991), and *Wallace I. Matson, How Things Are What They Are* (1972), *reprinted in* UNCORRECTED PAPERS: DIVERSE PHILOSOPHICAL DISSENTS 65-80 (2012).

the same steps for all concepts, even highly complex ones, such as "love," "expediency," or "justice."

The finest model of concept formation is, of course, Linnean classification, in which the scientist seeks to categorize all life forms by genus and differentia. He begins by observing their similarities, articulating those similarities, and then distinguishing them by a differentium. This process is "defining" the concept, and its goal is to arrive at the most fundamental element of the concept, meaning the one that explains the most about that concept. And, as the *Euthyphro* teaches, while this process takes place in the mind, it is *objective*, because the similarities and distinctions we employ are facts of the matter, not a mere function of our say-so.

A critical point: *definition* is an ongoing process—and definitions are always contextual, meaning that we form them with the knowledge we currently have on hand. As we learn more about cows, we can refine our definition. Where we had previously defined "cow" was "an animal that gives milk and moos," a better-informed definition of "cow" might refer to mammary glands and a rumen; at a later stage of scientific discovery, it might even specify the DNA sequences that program for the phenotypic characteristics of *Bos taurus*. These later, more sophisticated definitions do not *invalidate* or overturn the facts identified by our earlier definitions; on the contrary, the earlier identifications remain *correct*—cows really do moo and give milk—but because the more sophisticated definitions articulate qualities about cows that also explain mooing and milk-giving, these new definitions are more fundamental. They do not overthrow the earlier definitions but *encompass* them.

To emphasize: a concept is *not* the same thing as that concept's definition. This is crucial. The meaning of a *concept* is its *referents*—that is, all particular cows.[13] But the *definition* of that concept is our best explanation for why all particular cows are alike. If asked for our *definition* of cow, the answer, within the context of the knowledge we have, is "a cloven-hooved mammal with a rumen," or "animals of a certain DNA sequence." But if asked what "cow" *means*, the correct answer is, *that type of animal*—with all its features and characteristics, including those we may not yet know about.

In other words, the concept "cow" does not refer merely to any specific group of cows and does not refer only to a list of agreed-upon specifications. Cows are real things, and the characteristics they have in common—including those of which we might not yet be aware—

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[13] *But see* Wallace Matson, *Rand on Concepts, in* DOUGLAS J. DEN UYL & DOUGLAS B. RASMUSSEN, EDS., THE PHILOSOPHIC THOUGHT OF AYN RAND at 33 (1986) (proposing that a concept is actually an "ability" generated by the mind's grasp of the essential characteristics of the units subsumed under the concept).

are real, too. Their nature is metaphysically given, not changeable by any decision or decree on our part. Our efforts at defining concepts are descriptive, not prescriptive, and the nature and meaning of their referents (the countless cows that actually have existed, do exist, and will exist in reality) cannot be limited by our understanding (or lack thereof). So the *concept* "cow" is not the same as, nor is it limited by, the *definition* we formulate of that concept. Rather, the *concept* encompasses all cows (past, present, and future) and all their characteristics, including those we do not yet know—whereas the *definition* articulates our best *theory* of the concept's nature (e.g., "an animal with the following DNA sequence…").[14]

This distinction—the fact that *definitions* are contextual explanations, whereas a *concept* includes even aspects of a phenomenon that we do not yet comprehend—is why we can integrate new knowledge about cows into our existing concept, instead of having to create an entirely new concept every time we learn a new fact about cows. The person who first learned that cows have four stomachs, for instance, could still sensibly use the concept "cow" to refer to the same animals she had known before learning that fact. If "cow" meant only things specified by some conventionally agreed-upon list of necessary and sufficient criteria, that would not be the case.

Another important point about conceptualization is that grasping a concept is not a passive act; it is not mere rote memorization, but an active procedure. As James G. Lennox puts it, "to form a concept is to make *a commitment to a constant process* of integrating and differentiating its units as we learn more about them."[15] Not only does a concept enable us to classify cows we've never seen before—Highland Cattle, for instance—as essentially similar to the Jerseys and Holsteins we have seen, and to integrate new information about cows into our existing concept and refine our definition when we discover more explanatorily fundamental traits, but the concept also effectively *obligates* us to do so. One might say that "to comprehend" is an active, not a passive, verb; it requires us to assimilate new data and refine our definitions accordingly. Or, to borrow a phrase from John Milton, it requires us to adhere to "the

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[14] Leonard Peikoff, *The Analytic-Synthetic Dichotomy*, *in* RAND, INTRODUCTION TO OBJECTIVIST EPISTEMOLOGY, *supra* note 13, at 98-99.

[15] James G. Lennox, *Concepts, Context, and the Advance of Science*, *in* ALLAN GOTTHELF & JAMES G. LENNOX, EDS., CONCEPTS AND THEIR ROLE IN KNOWLEDGE 122 (2013) (emphasis added). *Cf.* J. BRONOWSKI, THE COMMON SENSE OF SCIENCE 30 (1978): "Science does not consist only of finding the facts…[but of] a continuous to and fro of actual discovery, then of thought about the implications of what we have discovered, and so back to the facts for testing and discovery—a step by step of experiment and theory, left, right, left right, forever."

golden rule" of "unit[ing] those dissevered pieces which are yet wanting to the body of truth . . . closing up truth to truth as we find it."[16]

The same is true of legal concepts. Consider an example offered by one of the premier scholars of legal objectivity, Professor Michael S. Moore: the concept of "death."[17] There are effectively two theories about how a term such as "death" acquires meaning. The first, which Moore calls the "Conventionalist" theory, holds that words have meaning as a result of a kind of social agreement.[18] According to Conventionalist theory, when we use a word like "death," we do so based on a sort of collective stipulation that the word shall apply to a specified list of circumstances. Centuries ago, the list of necessary and sufficient criteria for death were specified as (1) the cessation of breathing, (2) the loss of consciousness, and (3) the cessation of heart-beat. But, Moore points out, this raises a problem, because today's medical technology is capable of reviving a person who presents with all three of these symptoms. If the Conventionalist theory were correct, someone who falls through the ice into a freezing river, and whose heart and breathing stop, and who loses consciousness—but who can still be revived if treated quickly with today's technology—would nevertheless be *dead*, because she meets all the criteria of the concept.[19] It is obviously absurd to conclude that someone is dead who can still be revived.[20] But because the Conventionalist theory of

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[16] John Milton, *Areopagitica* (1644), *reprinted in* ENGLISH PROSE WRITINGS OF JOHN MILTON 342 (Henry Morely, ed. 1889).

[17] Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277 (1985).

[18] Another term for "Conventionalism" is "epistemic constructivism." See the discussion in DOUGLAS J. DEN UYL & DOUGLAS RASMUSSEN, THE REALIST TURN: REPOSITIONING LIBERALISM ch. 7 (2020).

[19] Moore, *Natural Law Theory, supra* note 18, at 293.

[20] We might instead say that such a person is "constructively dead" or "dead" in some stipulative sense with quotation marks around it, or (to borrow from *The Princess Bride*) "mostly dead." But that is just to say that the person in fact was *not truly dead*—i.e., did not cease to live. This is important, because the terminology here can become tricky and confusing. The point Moore is making is not about words, but about reality: the Conventional (or stipulative) theory of concepts *denies* that concepts mean *actual* things. It holds that there is no deeper reality to our concepts than the conventions we adopt, so that the three factors listed above *simply are death*. This means the Conventionalist is bound to regard the person in the hypothetical as *dead*—as truly dead as it is possible to be. The Conventionalist cannot, if she is consistent, resort to such a phrase as "medically dead" or "mostly dead." She must instead say that the person who has been revived, *is not continuing her pre-existing life, but is experiencing a second life*. To the "Realist" (or objectivist), by contrast, this is nonsense. The Realist theory holds that the concept of "death" refers to an underlying reality—the metaphysically given phenomenon of actually ceasing to live, including those features of that phenomenon with which we may not yet be familiar. Thus the Realist can (rightly) say that the revived person is merely continuing to live, because he was never truly dead to begin with; he is *not* experiencing a second life. *See infra* Section III.A.

concepts depends on consulting a list of agreed-upon specifications rather than reality, anyone holding a Conventionalist concept of death would find that in such a case reality has, in Moore's helpful term, "outrun" his concepts.[21] The only alternative such a person could have, in describing the person who has fallen through the ice but was later revived, would be to *change the meaning* of the word "death" by stipulating some *new* convention.

But that's not what actually happens. Instead, we employ, not a Conventionalist theory, but what Moore calls a "Realist" (i.e., "objective") theory of meaning.[22] In this theory, a word's meaning is not created by any convention; instead, words point to things in the actual world and *mean those things*, whatever their natures might turn out to be. The word "death" refers not to a stipulated set of circumstances, but to the actual phenomenon, whose nature we may not fully comprehend, but which nonetheless exists. Just as our concept "cow" refers to all facts about cows, including those we may not yet know, so our concept of "death" refers not to a definition or a list of criteria, but to *the fact of the matter* about death, whatever it might be. As Moore puts it, the Realist "guide[s] [his] usage . . . not by some set of conventions we have agreed upon as to when someone will be said to be dead; rather, [he] will seek to apply 'dead' only to people who are really dead, which [he] determine[s] by applying the best scientific theory we can muster about what death really is."[23]

If someone holding a Realist concept of death were asked what "death" means, she might recite a definition—but she would add the caveats that a *definition* is always contextual, and that the word "death" means not the *definition*, but the actual *phenomenon itself*. For the Realist, reality never "outruns" language. The Realist has no difficulty saying that someone who has fallen through the ice and lost consciousness, and whose heart and breathing have stopped, is *not actually dead*, even though previous generations might have thought she was. That's because the Realist understands that whereas our *definitions* of concepts are contextual, and might prove inadequate in light of future knowledge, our *concepts* refer to real-world phenomena, including all their known and unknown characteristics.

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[21] Moore, *Natural Law Theory, supra* note 18, at 294.

[22] In this article, I shall use the term "realism" and "objectivity" interchangeably, notwithstanding the frustrating confusion caused by the use of the term "Legal Realism," which denotes an entirely different phenomenon. The term "Legal Realism" is particularly maddening because it actually uses the term "realism" to mean exactly the *opposite* of what philosophers typically intend by that word. Ordinarily a "Realist" about abstractions is one who believes that such abstractions are *real*—whereas a Legal Realist believes that legal abstractions are *not* real.

[23] Moore, *Natural Law Theory, supra* note 18, at 294.

The fundamental problem with the Conventional theory of concepts is that it is not reality-based. It is subjective, not objective. The Conventionalist holds that concepts are groupings of specifications chosen (potentially arbitrarily) by human beings, lacking any necessary basis in reality—and she is therefore focusing not on the facts of the matter, but on criteria that, by custom or agreement, she treats as superior to reality. If she encounters some previously unknown feature of cows or of death, she finds herself stuck. Reality has outrun her.

III. THE PREMISES OF ORIGINALISM

I hear babies cry.
I watch them grow.
They'll learn much more
Than I'll ever know.
—Louis Armstrong[24]

A. The Semantic Originalism of Death

With these principles in mind, let us turn to Originalism. Originalism holds that a word, in a statute or a Constitution, means whatever "a reasonable listener would place on [it as] used in the constitutional provision at the time of its enactment."[25] This thesis rests on two basic propositions, which we will call Semantic Originalism and Normative Originalism.[26]

Semantic Originalism is not confined to the legal realm; it's an assertion about how words mean things *at all*—specifically, that they have meaning solely as a consequence of their origin. What the speaker and listener understood by the word at the time it was uttered simply *is* what that word means. Words are therefore like empty vessels into which their users pour meaning. Speakers and authors, according to Semantic Originalism, are therefore authoritative about what their words mean. They are Authoritative Meaning Givers.

Normative Originalism, by contrast, is not a claim about language, but about political morality. It holds that we are bound to follow the beliefs of past generations about the meaning of legal terms, not because the structure of language requires this, but for

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[24] WHAT A WONDERFUL WORLD (1967).

[25] Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOYOLA L. REV. 611, 621 (1999).

[26] As discussed below, Solum—who employed this terminology in his paper *Semantic Originalism* (Illinois Public Law Research Paper No. 07-24), [https://perma.cc/8NFZ-9ZAE]—has ceased to employ it in more recent writings.

ethical or political reasons. We will set Normative Originalism aside temporarily, because Semantic Originalism is the more fundamental theory. In Solum's view, "semantic claims are at the heart" of Originalism,[27] and this is true: Semantic Originalism is primary because it purports to give us the *what*—the *fact* of a law's meaning—while Normative Originalism addresses the secondary question of whether and why we are bound to follow the law, once its nature has been established.[28]

There's a common-sense appeal to Semantic Originalism: when asking what an old document meant, we ordinarily ask what its authors contemplated when drafting its language.[29] But this intuition is misleading, because words do not, in fact, get their meaning in this way. While we may be legitimately interested in what previous generations believed a word to mean, that is not the same inquiry as asking what the word actually *does* mean. Words are concepts and get their meanings from reality. Words like "rock," "car," or "baseball," derive their meaning from actual things in the world, and so do more abstract words like "property" or "liberty." As Professor Tara Smith, one of Originalism's most insightful critics, puts it, "words point to existents, to the specific instances that a particular word identifies as units of specific kinds . . . . The meaning of a word depends, at its most fundamental level, on the nature of the things it refers to, not on what a group of people thinks it refers to."[30]

More simply, a word's meaning is not given to it by any Authoritative Meaning Giver, whether that Meaning Giver be an individual or a group; a king, Congress, or the general public.[31] Recall

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[27] Lawrence Solum, *Semantic and Normative Originalism: Comments on Brian Leiter's "Justifying Originalism,"* LEGAL THEORY BLOG, Oct. 30, 2007, [https://perma.cc/G42R-SWZS].

[28] Solum, *Semantic Originalism, supra* note 28, at 36-37.

[29] *See generally* Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L. J. 1823 (1997).

[30] *See* SMITH, *supra* note 11, at 167-68.

[31] To speak precisely, *which* word is attached to a meaning (say, "hat" instead of "chapeau" or vice-versa) is, indeed, determined by general public usage. But the *meaning* of the word—what a hat actually is—is not. The general English-speaking public is, indeed, authoritative on the question of whether "hat" is the token by which the concept of hat is expressed, but it is not authoritative regarding what things are necessary and sufficient for a piece of clothing to count as a hat. We know this is true because, if the public were to decide tomorrow that from now on the word "hat" would refer to a piece of clothing worn on the hand, we would find it necessary to invent some new token to use for the concept to which "hat" previously referred. Consider the unfortunate main character of the 1985 *Twilight Zone* episode "Wordplay," who awakens one day to discover that the entire language has swapped around, so that, for example, "dinosaur" now means "lunch." A jarring experience, no doubt—but it does not change the nature of the underlying *concept* of lunch. The point, again, is that the language-using public is not authoritative about the *meaning* of their words—i.e., the nature of the concepts to which words point.

Professor Moore's example of the word "death." According to an *objective* theory of meaning, this word refers to an actual phenomenon, the precise nature of which we might not fully grasp, but which nevertheless exists. When asked what the word death *means*, the Realist—that is, the person holding an objective theory of meaning—would point to the phenomenon itself: the cessation of life, with all its features, including those we don't understand at present. But the Semantic Originalist cannot do that. Given her premise that words get their meaning from an Authoritative Meaning Giver at a particular time and place, she must hold that because the word "death" originated at a time before modern medical technology—which can revive a person who falls through the ice into a river, and whose heartbeat and breathing stop—such a person is *dead*, in the only sense in which that word *can* have meaning. Thus if the person is revived, that person can only be described as experiencing a second life, rather than as having been not actually dead to begin with. As Moore puts it, she would have to say, "We don't use the word 'death' now to refer to that state . . . but our ancestors were not wrong, and we are not right."[32] Yet that is nonsensical. "We will not allow erroneous judgments to insulate themselves in this way," Moore concludes:

> People in the past were *wrong* about when someone was dead. They and we meant the same thing by our usages of the word "death," namely, to name the natural kind of event that death (really) *is*. They got it wrong, and we, by our present knowledge, are closer to the truth. . . . Both we and they intend to refer to the *thing*, the naturally occurring kind of event, that death is. If *they* knew what we know about the revivability of persons submerged in cold water, they would also say that such persons are not dead.[33]

To reiterate an important point: The Semantic Originalist is making a claim about language, not about justice or other normative

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Indeed, it cannot be authoritative because language is a spontaneous order—that is, it is an evolved design without a designer. Nobody invented the English language or vested its words with meaning. *See, e.g.*, Nick Chater & Morten H. Christiansen, *The Spontaneous Origins of Language,* WALL ST. J., Feb. 26, 2022, [https://perma.cc/YS9G-REHP]. So even those few people who actually do coin words, who might plausibly claim to be Authoritative Meaning Givers, soon see their purported authority vanish as the words they invent evolve over time. Perhaps the most amusing example is "meme," a word coined by evolutionary scientist Richard Dawkins, and which has now taken on a life of its own. Alexis Benveniste, *The Meaning and History of Memes,* N.Y. TIMES, Jan. 26, 2022, [https://perma.cc/54A3-5JC4]. (Of course, the *concept* of meme remains unchanged.)

[32] Moore, *Natural Law Theory, supra* note 18, at 297.

[33] *Id.*

considerations. He is asserting that the word "death" means—and can only mean—what our ancestors, the Authoritative Meaning Givers who fashioned that word, believed it meant. Originalism, in short, is committed to what Moore calls the Conventionalist semantic theory—a theory that severs language from reality in a drastic way.

B. Time-Traveling

This becomes clearer still if we ask a simple question: If words are given their meaning by their originators—i.e., the Authoritative Meaning Givers—where did the originators get that meaning to begin with? There are only two possible answers: Either they got it from reality somehow, or they manufactured it. The Originalist cannot endorse the first answer, because her semantic premise is that words get their meaning from their originators, not from nature. Thus, she must hold that the originators of words create meaning *ex nihilo*—the meaning that Authoritative Meaning Givers pour into their words comes not from reality, but from their beliefs; from the minds of particular people (the originators). But that's equivalent to the proposition that meaning is subjective.

Consider a thought experiment. Imagine we're tasked with interpreting the meaning of the word "liberty" in the Fourteenth Amendment. Taking the advice of an Originalist, we use a time machine to travel back to 1868, when the Amendment was written, and ask our ancestors what the word means. But it turns out that our ancestors, too, are Originalists. "Hold on," they say; "We'll be right back!" They jump into their own time machine, to travel back to 1768. When they arrive, they ask their ancestors what *they* thought the word meant. It just so happens that these ancestors are Originalists, too—so they get in their own time machines and travel back to 1668 . . . *ad infinitum*. If words acquire their meaning from their originators instead of from reality, there's no stopping point where anybody can gesture toward reality and say, "the word means *this*."

No Originalist appears to endorse that idea. Instead, they appear to hold that our time-traveling ceases when we arrive at the date when the law was adopted.[34] Thus we stop when we reach 1868, because "documents ordinarily, though not invariably, speak to an audience at the time of their creation and draw their meaning from that point."[35] But if that's true, we must again confront the *Euthyphro* dilemma: If our ancestors in 1868 could point to reality to explain their meanings, then we can, too. We do not actually need not ask

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[34] *See, e.g.*, Lawson, *On Reading Recipes*, *supra* note 30, at 1826 ("Every document is created at a particular moment in space and time.").

[35] *Id.*

what they thought the law's words meant; we might as well save our time-machine fuel and simply ask what their words *actually* mean. As Smith puts it:

> [A]ccording to the Originalist picture, the law's authors are not seen as simply inheriting words' meaning from still earlier people. Rather, they are portrayed as having had a particular understanding of their own of what various words meant. That is what they enacted into law, the Originalist contends, and that is what later generations are bound to adhere to. But, it is logical to ask, if those people are not seen as having necessarily inherited words' meaning from the "public understanding" of some still earlier time, why are we? If we must accept that our predecessors who enacted laws were capable of identifying what various words did and did not refer to—in effect, of using language objectively—Originalism offers no reason to suppose that people today are not capable of doing the same.[36]

Originalism cannot refute this point without abandoning its Conventionalist theory of meaning, which is a premise that separates language (and consequently law) from reality. Not only must the Semantic Originalist say that the person who falls through the ice into the river is dead, despite being revivable, but she cannot even answer a question such as "Does the First Amendment's free speech protection apply to a Tweet?" or "Does the Fourth Amendment's search warrant requirement apply when police use infrared cameras to look at a suspect's house?" because these technologies were not around when the First and Fourth Amendments were written, and they cannot have formed any part of the conventions that supposedly give words their meaning. (Or she answers "no" because she relies on the "expected applications" theory discussed in Section IV below.) And, of course, law severed from reality would be severed from morality, too. Among other things, that would make it impossible to answer such crucial questions as, "what constitutes 'cruel and unusual punishment'?" or "what does 'due process of law' mean?"

The better alternative is to recognize that words do not get their meanings from the conventions of Authoritative Meaning Givers. Words specify *concepts* (such as "death"), and concepts, properly understood, mean all their specific units (i.e., every actual death, past, present, and future). We grasp the essential qualities of these units by definitions (e.g., "cessation of brainwave activity"), but

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[36] Tara Smith, *Originalism's Misplaced Fidelity: "Original" Meaning Is Not Objective*, 26 CONST. COMM. 1, 54 (2009).

definitions are always contextual—that is, they are our best explanation within what we currently know—and therefore they are always open to greater levels of specification. A word, or a concept, means not its *definition*, but the real things themselves. A law that employs the word "death" refers to *actual deaths*—not some closed list of agreed-upon beliefs about death uttered at a particular time by some Authoritative Meaning Giver.

IV. "EXPECTED APPLICATIONS" OR CONCEPTS?

The idea, for example, that each particular erases
the luminous clarity of a general idea. . . .
Or the other notion that,
because there is in this world no one thing
to which the bramble of blackberry *corresponds,*
a word is elegy to what it signifies.
—Robert Hass[37]

A. Infinite Lists

Some Semantic Originalists have offered a reply to this challenge, in the form of a theory called "Expected Applications."[38] To understand this idea—and why it doesn't work—let's try our time-travel experiment again. This time, when we arrive in 1868 and ask our ancestors what "liberty" means, they don't get into their own time machine, but instead, hand us a piece of paper: A long list of specific actions that fully exhausts their understanding of what actions count as "liberty." The things on this list, our ancestors tell us, are what "liberty" means—no more and no less. Originalists call this a list of "expected applications."

Perhaps this list is what the word "liberty" in the Fourteenth Amendment means: it contains all the things the Amendment's authors thought the word meant at the time they wrote it. But there are many problems with this answer.[39] For one thing, it's almost certain that our ancestors never made such a list. It's extremely unlikely that anybody involved in deciding whether to adopt the Fourteenth Amendment ever tried to exhaustively spell out every concrete action it would cover. In fact, such a list would have to be infinitely long, because it is an attempt to substitute concretes for abstract concepts—as if, instead of using the word "cow," a person

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[37] *Meditation at Lagunitas* (1979), *reprinted in* ROBERT PINSKY & MAGGIE DIETZ, EDS., AMERICANS' FAVORITE POEMS 107, 108 (2000).

[38] Lawrence Rosenthal, *Originalism in Practice*, 87 IND. L.J. 1183, 1190–1209 (2012).

[39] Justice Neil Gorsuch discussed some of these problems in *Bostock v. Clayton County*, 590 U.S. 644, 673–81 (2020).

were to identify every cow that exists, has existed, or will exist—or, instead of using the concept "death," identified every death that has ever occurred or will occur. For a word such as "liberty," the list would have to include everything one has a right to do: "the right to wear a red baseball cap on a Tuesday," "the right to wear a *blue* baseball cap on a Tuesday," "the right *not* to wear a red baseball cap on a Tuesday" . . . *ad infinitum.* Being infinitely long, such a list would be useless.[40]

Third, the list would be arbitrary and subjective. Recall that it's *only* a list of *concrete* examples—it employs no *conceptual* formula drawing similarities between any of the items on the list. (To use such a conceptual formula would be to appeal to *reality* as the basis of our concepts, which is something Originalism cannot do, being wedded to a Conventionalist theory of meaning.) But without a conceptual formula, we cannot identify any commonality between the items on the list—any principle connecting them—to explain *why* any particular item is on the list. Why is wearing a blue hat on a Tuesday part of "liberty"? *Simply because it is on the list*—no other reason—and the presence of this item on the list is totally unrelated to the fact that wearing a red hat on a Tuesday is also on the list.

That means the list is not *justifiable*. Any attempt at justification would necessarily employ some formula that connects things on the list (such as "because wearing headgear is harmless to others"). But *ex hypothesi*, the ancestor holding the list *cannot* do this; she cannot say "we put wearing a hat on the list *because X*," because there is not, and cannot be, any *X*. Since there cannot be any underlying commonality connecting the items on the list, there is consequently no *concept* to isolate. That means there is no way to identify any *reason* for including any particular item on, or excluding it from, the list. To justify an item's placement on the list—to say "the reason we included *wearing hats* on the list is because . . . "—would require some theory or formula which would specify a *category* of items that belong on the list—that is, it would have to employ a concept (say, "because harmless headgear choices are . . . ")—and that's precisely what the "expected applications" hypothesis forbids. Conceptual

[40] The authors of the Bill of Rights were well aware of this problem. It was one reason figures such as James Wilson and James Madison opposed even attempting a Bill of Rights. During the debates preceding the adoption of the first ten amendments, Congressman Theodore Sedgwick observed that the amendments would have to be written in broad concepts, because otherwise the authors of the amendments "might have gone into a very lengthy enumeration of rights; they might have declared that a man should have a right to wear his hat if he pleased; that he might get up when he pleased, and go to bed when he thought proper." 1 ANNALS OF CONG. 759-60 (Aug. 15, 1789).

categorization—the use of a classification such as "harmless headgear choices"—is unavailable.

Thus the "expected applications" theory would entail that the *sole* reason something qualifies as "liberty" is because it is on the list, full stop—merely because the convention that gives the word "liberty" its meaning includes this item. Precisely like the gods approving something in the *Euthyphro*, the items on the list are rights *just because* the ancestors approve of them.

Fourth, and relatedly, this theory would hold that the list *cannot be wrong*. Because an action's presence on the list is the definitive answer to the question of whether it's "liberty," it cannot be the case that something on the list was actually put there by accident or misjudgment, or that for some other reason, it doesn't belong on the list. Yet, the very arbitrariness of the list also means that one ancestor's list probably conflicts with the lists held by his contemporaries, especially for terms such as "liberty" that are hotly contested and therefore most likely to require justification and a clear definition. Originalism provides no way to reconcile any such conflicts. The list is then an *ipse dixit*, with no way to mediate between the ipses who are dixiting.

B. Concepts versus "Conceptions"

For reasons like these, most Originalists purport to disavow the "expected applications" approach.[41] Yet they cannot actually sustain that disavowal. Solum, for example, argues that Moore's dichotomy between the Conventionalist and Realist (i.e., objective) theories of meaning is a false one. In law, he argues, it's possible for words to refer *neither* to concepts anchored to the real world, *nor* to lists of specific "expected applications," but to a third alternative, which he calls "original conceptions of general concepts."[42]

"Conception" is Solum's word for what I have called the "definition" of a concept—and recall that definitions are always context-specific. Definitions are our best efforts to grasp the essential elements of a concept, within the range of the knowledge we possess, even though we know that we may later discover more information about the concept and may have to revise our definition accordingly. Solum's contention, then, is that when interpreting the Constitution, we should follow neither the list of "expected applications," nor the concept—not the reality to which a word points—but instead *our*

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[41] *See, e.g.*, RANDY E. BARNETT & EVAN D. BERNICK, THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT 165 (2021) ("we deny that the original expected application[s] of the amendment comprises its meaning.").

[42] Solum, *Fixation Thesis*, *supra* note 5, at 49, 19 n.67 (emphasis removed).

ancestors' definitions of the concept, *even if* these have been rendered obsolete by newly discovered facts. This means, for example, that when interpreting a law referring to death, we must understand it to say that the person who falls through the ice *is dead*, despite being revivable—not because he's *actually* dead (we can admit he's not), but because our ancestors *would have thought* he was.

Although Solum offers this "conceptions of concepts" idea as a third alternative to the Conventional/Realist dichotomy, it fails to provide a true *tertium quid*. For one thing, if we were to travel back in time to ask our ancestors what "death" means, they would respond in one of two ways. Either they would offer a list of "expected applications," or they would point at reality—at the cessation of life—and say "we meant *that* phenomenon; we did our best to define it, in context, but definitions are contextual, and we meant the phenomenon, including features that we did not yet understand." What they certainly would *not* say is, "'Death' means our conceptions about 'death,' but does *not* mean *actual* death—it means just the set of *beliefs* my generation held about death, but *not* the real phenomenon."

One way we know they would not answer this way is because if Semantic Originalism's basic premise is true—that words mean just what their originators thought they meant—they *could* not say this. They would have no means of recognizing any distinction between their conception of death and death itself. If "death" *just means* what our ancestors believed it meant, it would be impossible for their legal language to accommodate any gap between their beliefs about the phenomenon and the phenomenon itself. Thus they would find the concept/conception distinction incomprehensible.

But there's another problem with Solum's "conceptions of concepts" argument: It commits a fallacy. Solum begins by arguing that the meaning of a word (such as "death") *just is* the meaning given to it by our ancestors; they are the Authoritative Meaning Givers whose beliefs about death are what fill that word with meaning. That's a *semantic* argument. But the "conceptions of concepts" argument is *not* a semantic argument. It's an argument that begins with a concession that the words do *not* mean what our ancestors thought they meant, and then proceeds to hold that we should *nevertheless* still follow their beliefs about what those words meant. Whatever else one might say about this argument, it's no longer a semantic argument about what words mean; it's a *normative* argument about our moral or political obligations—a claim that we should employ one understanding of words (theirs) instead of another (ours) because doing so serves some goal (justice, fairness, or the like). That may be true, or it may be false—we will address that

below—but here it is significant that Solum is attempting to offer the "conceptions of concepts" theory as a *semantic* third alternative between the Realist route (which holds that words get their meaning from reality) and the "expected applications" route (which holds that they get their meaning from our ancestors' mere say-so), when in fact it is not a semantic alternative at all. It's a normative alternative. So when it comes to semantics—to *what words mean*—we are indeed left to choose between either the "expected applications" route or the path of ordinary conceptual analysis, in which we seek the actual meaning of concepts, not just what our ancestors thought about them—i.e., the Realist theory of concepts.

To put this point another way, Solum holds that "fixation" in the law is a feature of *language*—a description of how words mean things—*not* a normative theory about how we should act. That's consistent with Originalism's attempt to stand on a higher ground, above normative arguments, from which it can dispassionately tell us what the law *is*. But "fixation" is not actually a semantic principle at all; it's not a feature of language. Indeed, one reason Originalists regard the principle of "fixation" as so important is precisely because they concede that language is *not* fixed—that it constantly evolves—so that the word "deer," for example, might not mean today what it meant centuries ago. It's because Originalists view this as a danger that they proceed to argue that we can and should freeze a word's meaning at some specific moment—to "lock it in." And how do we accomplish this? Not through any *linguistic* device, but through a *normative* or political one—i.e., through some ritual, whereby we solemnly pledge to adhere to a particular meaning, regardless of how language might change. Such promises certainly are commonplace in the law, but they are not *semantic or linguistic* principles. They're *normative*—they're based on what people think is moral, just, or proper.[43] That means it's fallacious for Solum to switch from the semantic realm to the normative realm by arguing for fixation in this way. The argument that we should follow the ancestors' "conceptions" rather than concepts tied to reality is an illicit crossing into the normative realm in the guise of a semantic argument.

Perhaps all these technical issues are beside the point, however. Maybe there's a good normative argument that we ought to follow our ancestors' "conceptions" of what words mean, even where those

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[43] For example, a contract can incorporate a statute by reference, and the contracting parties can choose whether to also incorporate any amendments to that statute that are adopted after the contract is made. The difference depends on the language the contracting parties use. The general rule is that subsequent amendments are incorporated by operation of law only if they are reasonable and foreseeable. *See, e.g.*, Cao v. PFP Dorsey Invs., LLC, 545 P.3d 459, 467–68 (Ariz. 2024) (parties can contract to incorporate prospective changes in the law into their contract).

conceptions turn out to be underinformed or even wrong. After all, there are some situations in which people do just that. People sometimes stipulate in contracts, for example, to use words in a special way different from what those words would ordinarily mean, or agree to be bound by some rule as it now stands, but not by changes that might be made to that rule in the future. They may do this, however, only by saying so outright—by including a "definitions" section in their contract, for example, that says "for purposes of this agreement, 'vessel' shall mean *X*." And even when people do this, the words in that definitions section cannot *themselves* be used in a subjective manner. In any event, the Constitution contains no definitions section, and nothing in its actual text suggests that its meaning is confined to the understandings of people at any particular time.[44]

Moreover, as Smith observes, there are legal and moral limits to the kinds of agreements people can make, and one is that others cannot bind us to their own subjective notions about what words mean. "Individuals are not entitled, when entering into legally binding agreements with others, to confine their words' meaning to their own current understanding of that meaning," she writes. "They may not alter words' meaning by fiat, declaring: 'the word x means

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[44] As Professor Lawson puts it, "One can certainly have a concept that is limited to the particular entities or aspects of entities known or contemplated at a specific moment in time, and there may well be cognitive contexts in which that is an appropriate content for a concept, but that is not the usual, or presumptive, cognitive character of concepts. In order to determine whether a concept is limited to those specific instantiations . . . one would have to look very carefully at the concept and the cognitive context in which it appears. In other words, it is an empirical question whether a particular concept is meant to function in its presumptive cognitive fashion by referring to a whole set of actual, known and unknown, entities or attributes of entities or to serve a more limited cognitive role by referring only to a specific subset of those entities or attributes. Thus, if an author refers to 'the freedom of speech,' it is possible that the author intends to refer only to some quite specific conceptions or instantiations of a potentially wider idea. But because that is not the standard cognitive role for concepts, one would expect to see some direct indication that the author so intends. Otherwise, the normal assumption would be that the author is referring to all past, present, and future instances of 'the freedom of speech,' including all of their known and unknown attributes." Gary Lawson, *Reflections of an Empirical Reader (or: Could Fleming Be Right This Time?)*, 96 Boston U. L. Rev. 1457, 1467–68 (2016).

There's also a relevant distinction between using the *wrong words* for concepts (while nevertheless knowing their differences), and using a word with one definition in mind, only to have the advance of knowledge supersede that definition. The former case would be one such as that which occurs when people indifferently use the word "spatula" to refer both to actual spatulas and to rubber scrapers and hamburger flippers—even though they know there are differences between these things. The latter case is involved in the "deer" example given in Section IV.A below. Any full legal theory of interpretation would have to account for these situations. Incidentally, some people have sought to argue that the Constitution's text *does* restrict us to the understandings that existed at the time the Constitution was written, because it requires public officials to take an oath to support "this" Constitution. For a refutation of this idea, see Cass R. Sunstein, *This*, 46 HARV. J. L. & PUB. POL'Y 395 (2023).

only as much as I presently think it does' and thereby be legally accountable only to that understanding of x. Such an idiosyncratic use of language would make it impossible for parties to know what they were agreeing to and for the government to enforce their agreement."[45] This explains why contract law follows the objective theory, which holds that a contract means "not what the party making it thought it meant or intended it to mean, but what a reasonable person in the position of the parties would have thought it meant."[46]

V. NORMATIVE ORIGINALISM AND STONE SOUP

O, throw away the worser part of it,
And live the purer with the other half.
—William Shakespeare[47]

A. Hunting for Deer and for Meaning

Having dealt with Originalism's semantic half, let's turn to Normative Originalism: Should we follow the law in terms of what previous generations thought, instead of our own understanding, not because language requires us to, but because something about the nature of constitutional law binds us in this way?

Many people would say yes. They are often drawn to Originalism not by abstruse ideas about language, but by the idea that law should be anchored—that government officials and citizens should follow *the Constitution*, instead of doing whatever they think is right. This is the "fixation" principle. We've seen some reasons why Originalism's *semantic* theory cannot establish it, but there's a simpler way of showing that: namely, the fact that *obligation* arises from *normative* considerations, not from features of language. We are bound by our promises, not because language somehow commands it, but because of the *moral* considerations that give promises their binding force. Likewise, nothing about the nature of language dictates that we are bound to follow the law; we are bound to it for normative and practical reasons.

So perhaps there are principles of morality or justice that oblige us to follow past understandings of the meaning of words, *even if* those past understandings were imprecise or outright errors. That's what Normative Originalism claims.

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[45] Smith, *Misplaced Fidelity*, *supra* note 37, at 53.

[46] Ray v. William G. Eurice & Bros., 93 A.2d 272, 279 (Md. 1952) (quoting Samuel Williston).

[47] *Hamlet*, Act III sc. iv.

There seem to be two paths we can take in seeking normative reasons why we might be bound to follow our ancestors' beliefs about what the law meant. First, following their beliefs might serve our own era's purposes—that is, doing so might result in a more just, stable, or fair society for people living today. Second, doing so might serve some value that relates to past generations, such as reverence or duty to our forebears.

It should be obvious that the second option is not a rational argument. Morality, justice, and similar matters can only apply to the living, not the dead, and the fact that our ancestors believed something about the law is not sufficient reason for us to follow their beliefs.[48] An old saying holds that "the past is another country,"[49] and for the same reason, we can be bound by our ancestors' understanding of the law only in the same way that American judges are "bound" by the legal precedents of judges in England, France, or Japan. That is, such precedents might be *persuasive*, but American judges are not required to follow them. Our ancestors may have been *right* in their beliefs about the law, but if so, we should follow their views because they were right, not because they were our ancestors.

What, then, of the first argument?—that we should abide by past generations' understanding of the law to serve our own normative goals? Before answering this, observe what this question does to the role that the law's *origin* plays in our legal theory. According to Originalism, the law's origin played a *defining* role: It was the source of legal meaning and thus of obligation. But now, origin is no longer the centerpiece of either linguistic meaning or of our legal obligations. Instead, we're asking whether we should follow our ancestors' understanding of law for *our own* reasons, not for reasons that relate in any significant way to the law's creation. In other words, this argument dethrones "origin" from the role that Originalism ascribes to it and requires us to address the possibility that alternative (non-Originalist) methods of interpretation might better serve our present-day needs and values. So our standard of value is no longer, as it was for the Originalist, *seeking to discern what the law's originators believed*; instead, our goal has become *seeking an interpretation of the law which best serves principles of justice today*. And

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[48] This is not to deny that there's virtue in, and benefits from, honoring, respecting, and imitating (some of) our ancestors—only that such virtue and benefits redound to the living, and that, whatever else may be said of the dead, the consequences of our choices on *this* metaphysical plane must typically outweigh our concern for the consequences that our choices might have for those who have passed on.

[49] This phrase appears to have originated in the 1953 novel *The Go-Between* by L.P. Hartley.

if the *origin* of the law's language is no longer the deciding factor, our theory can no longer be called Originalism.

Many people are drawn to the argument that we should follow our ancestors' understandings of the law due to the principle Solum calls "constraint": that government officials should be bound by the Constitution's meaning, rather than being able to alter that meaning based on changing circumstances. And many believe that this constraint principle is irreconcilable with the proposition that the definitions of concepts can be refined over time. Indeed, it strikes some as *unfair* to interpret older laws in light of present-day understandings. For example, it's obvious that those who wrote the Fourteenth Amendment did not anticipate that courts would interpret the word "liberty" to include the right of two people of the same sex to marry.[50] Many regard it as an unjust surprise for a court to say it does.

This intuition is misguided, however. To begin with, such "surprise" is a pervasive feature of law, which according to which the judge "finds" her decision through the application of the statute to the facts in such a way that the outcome, if correct, *has always been* the law, in an abstract sense. When a judge finds that a set of facts constitutes a "murder," or a "breach of contract," or an "unreasonable search," her ruling is equivalent to saying that such circumstances *have always been* a murder or breach or search. For anyone other than "Legal Realists," this feature of the law is a ubiquitous feature of legal logic and should cause us no particular concern when we encounter it in the realm of constitutionalism.[51]

More to the point, it's certainly true that officials should follow the Constitution's meaning, and not change that meaning; but the question is, what *is* that meaning? To the Originalist, it's the understanding of the law held by those who made that law at the time they made it. Under an objective theory of meaning, by contrast, the law's meaning—except perhaps in rare circumstances[52]—derives from the actual things of the world, as best understood *today*. An

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[50] Obergefell v. Hodges, 576 U.S. 644, 675 (2015).

[51] To the Legal Realist, of course, there is no truth to a singular legal proposition prior to the judge reaching a verdict, because a verdict is a coercive act which both creates and definitively settles the law.

[52] There may be situations in which it would be proper for a judge to inquire about what the understanding of the law was at some past time, rather than what the law actually is, and to issue judgments in accordance with those subjective understandings. Courts do this, for example, in cases involving qualified immunity, where the question is not what the law actually is, but what the officers understood the law to be at the time they acted. See, e.g., Hansen v. California Dep't of Corr., 920 F. Supp. 1480, 1495 (N.D. Cal. 1996) ("the issue before us is not what the law is or where it is likely to go, but whether the law was clearly established at the time of the conduct giving rise to this action.").

objective understanding of the law as I've described it does not propose to *change* the meaning of laws, but rather to implement them in light of our best understanding *of* that meaning—even if that understanding differs from the understanding held by the law's authors.

Consider a hypothetical that Solum himself offers. Suppose a law was adopted in the twelfth century, which prohibits the hunting of "deer" in the forest.[53] At that time, the word "deer" referred, not to hooved ruminants of the family *Cervinae*, which is how we now define the word, but to all beasts of any kind. In our hypothetical, the law remains unaltered to the present, and a man who hunts a bear in the forest is arrested and charged with violating the law. Should the judge convict? The Normative Originalist would answer yes, because the understanding of "deer" at the time the law was written included bears. Yet convicting this man would clearly be unjust: he did not, in fact, hunt deer; he hunted a bear—and it would be an injustice to surprise him with the news that his act was illegal.[54]

In fact, to employ an obscure, antique definition of "deer" that virtually nobody today knows about would risk violating the principles of due process of law, which require the government to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly."[55] A legal theory that, due to some abstruse fact about language, penalizes

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[53] I borrow this example, with modifications, from Solum, *Fixation Thesis*, *supra* note 5, at 17.

[54] Barnett appears to differ from Solum on this question, but his argument seems inconsistent. He argues that "[w]hen applying the original meaning of [e.g.,] 'due process of law' today, the original meaning of the text *does not* bind us to accept 19th-century beliefs about [e.g.,] the empirical differences between men and women [as] if they were factually accurate. We are entitled to conclude based on our understanding of these differences that [e.g.] barring married women from practicing law or entering contracts just as their husbands can is arbitrary—that is, not warranted by the facts." Randy E. Barnett, *Originalism and its Discontents,* CLAREMONT REV. OF BOOKS, Fall 2023, at 70-71. Yet it's hard to see how this is compatible with any interpretive theory that holds the *origin* of the legal text to be the source of its meaning, especially given that Barnett also says that "[t]he meaning communicated" by language "is shaped by the *context* of the word's utterance," *id.* at 70, and that "[i]f the historical context surrounding the use of [constitutional] phrases renders their public meaning more specific and constraining than their purely semantic meaning, then *that 'just is' their meaning,*" because they are part of "the original meaning that was communicated to the public by these phrases when they were adopted." *Id.* at 71 (emphasis added). If the "context" communicated by the Fourteenth Amendment when adopted constituted (or "shaped") its meaning, then how could we be entitled to substitute "our understanding" of the differences between men and women for those of the purported Authoritative Meaning Givers whose understanding is authoritative as to the meaning of constitutional terms? For a fuller discussion, using a hypothetical of dolphins and fish instead, see Timothy Sandefur, *Hercules and Narragansett among the Originalists*, 39 REASON PAPERS 18, 18-24 (2018), and Professor Smith's reply in *What Is the Law? A Response to Sandefur,* 39 REASON PAPERS 37, 37-47 (2018).

[55] Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

someone for hunting bears on the theory that bears are "constructive deer" can hardly satisfy that requirement.

Or, to take a more extreme hypothetical, imagine that archivists discover a long-forgotten law (or constitutional provision) that makes it a crime to do some act. Adopted centuries ago, it was somehow lost in the library and left unenforced. Should it be enforced now? The strict Normative Originalist would have to answer yes: we are obligated to implement the laws, or legal theories, that past generations adopted, not for reasons of our own, but for reasons such as "fidelity to the law."[56] But in actuality, our legal system has long done the opposite. In fact, under the theory called "desuetude," a law can be rendered unenforceable even though it has never been repealed, because long disuse makes it unjust to enforce it now.[57] As the West Virginia Supreme Court has put it, when a law has been "open[ly]" and "pervasive[ly]" ignored for a long period of time, and prosecutors have followed a "conspicuous policy of nonenforcement," that law can become unenforceable because its "enforcement would violate due process."[58] Again, the principle is clear: We are not bound to what past generations believed about the law—or even by all of the laws they enacted—merely on account of the fact that they originated those laws. Instead, our legal obligations are the consequence of ethical and political principles that relate to our concerns *today*.

Again, there may be good reasons to abide by our ancestors' understanding of the law. That may even be the best rule in the overwhelming number of cases. But doing so is *not* warranted, as Originalism claims, exclusively by facts relating to the law's *origin*. If it is warranted, it is on account of contemporary normative concerns. And that means Originalism does not stand in a privileged place, as a disinterested account of what the law *just is*. Rather, it is one interpretive method among others, which should be chosen, if at all, for reasons unrelated to considerations of the source of legal meaning.

To summarize: If we're asking which interpretation is more just or fair, or more likely to serve our needs today, then we're no longer prioritizing legal interpretations based on whether they are most loyal to the ideas of the law's originators. That means we are

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[56] Solum, *Semantic Originalism, supra* note 28, at 157.

[57] *See generally* Joel S. Johnson, *Dealing with Dead Crimes*, 111 GEO. L.J. 95 (2022); *Desuetude,* 119 HARV. L. REV. 2209 (2006). Alexander Bickel argued that desuetude had been largely subsumed by the legal theory of void-for-vagueness. *See* THE LEAST DANGEROUS BRANCH 148-54 (1962).

[58] Comm. on Legal Ethics of the W. Va. State Bar v. Printz, 416 S.E.2d 720, 726-27 (W. Va. 1992).

therefore no longer engaged in Originalism. Remarkably, however—and perhaps confusingly—some Originalist scholars have recently taken just that step, arguing that the original understanding of the law should be preferred, *not* because the law's origin is the source either of its meaning or of our obligation to obey it, but because following that understanding serves contemporary values. This argument subtly abandons Originalism's basic premises.[59] My term for that step is "stone soup."

B. Stone Soup Originalism

According to the classic children's tale, stone soup was invented by a poor soldier who happened into a village, and, having neither food nor money, begged the townspeople for something to eat. When they refused, he devised a plan: He claimed to have a magic rock that could make soup by itself—all he needed was some water and a pot to boil it in. One intrigued villager was willing to lend him a pot of water, and he placed the stone in it and set it on a fire. As the water began to boil, the soldier casually mentioned that stone soup is better with a little onion in it—and another villager was willing to give him an onion. Then he recalled that carrots make stone soup even better . . . and so on. Eventually, the soldier threw the stone away and enjoyed a robust stew.[60]

A similar thing happens when Originalists transition from their initial semantic arguments about language, or their normative assertion that we are bound to follow our ancestors' beliefs due to loyalty or reverence for them, and offer instead normative arguments about morality and justice for people today. A striking example of this phenomenon is Randy Barnett and Evan Bernick's book *The Original Meaning of the Fourteenth Amendment*. A superb work of scholarship in many respects, the version of Originalism it offers turns out not to be Originalism at all, but a hearty stew with the stone of Originalism quietly (and rightly) tossed aside.

Barnett and Bernick call themselves Originalists but deny that the Constitution's meaning consists of a list of "expected applications."[61] They also argue that "one need not read individual

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[59] In fact, the Ninth Circuit Court of Appeals did precisely that in a case asking whether the word "fish" in a treaty with an Indian tribe included "whales." The court's answer was yes—not because the word fish means whales (although the court engaged in extensive linguistic analysis), but because of normative rules, such as "courts are reluctant to conclude that a tribe has forfeited previously held rights." Makah Indian Tribe v. Quileute Indian Tribe, 873 F.3d 1157, 1166 (9th Cir. 2017).

[60] The earliest published version of the story dates to 1720. *See* William Rubel, *Origin of the Stone Soup Folktale,* STONE SOUP, Sept. 2015, [https://perma.cc/3UMP-M44B].

[61] BARNETT & BERNICK, *supra* note 42, at 165.

minds or posit shared neurological events" to understand the law.[62] Instead, they contend that we should approach interpreting the Constitution the way an archaeologist might try to figure out the purpose of some ancient device excavated from Greek or Roman ruins. We can "determine the meaning or purpose of artifacts," they write, without knowing what their creators intended; we do so "by examining [an object] and figuring out" how it works.[63] In other words, while history plays a role in our effort to understand a constitutional provision, it's not the determining factor.[64]

In pursuing that task, they argue, "today's constitutional decision-makers should focus on the 'known historical problems' that the Constitution's designers were trying to solve," not on arcane legal theories, little-known historical events, or other abstruse matters. They believe this "*for normative rather than ontological reasons*—an artifact may have a purpose that is entirely unknown to anyone but the designer(s), but recourse to obscure purposes would undermine the rule of law, *which requires that the law be accessible to those who are required to follow it*."[65]

Now, this is certainly true, but the italicized words also represent an abandonment of Originalism, which holds that the meaning and/or obligatory force of the law flow from its origin. In the place of that idea, Barnett and Bernick have come to offer an argument that we discern the "purposes" of legal "artifacts" *not* by reference to their designers' understanding, but by recourse to other factors that can help us determine those artifacts' *objective* purposes—and that we should even *disregard* the "obscure" purposes of the law's originators in order to better serve *our own* values. Moreover, they conclude from this that any time the Constitution's meaning is in dispute—which is in practically every constitutional lawsuit—judges must resort to "construction," which they define (quoting Francis Leiber) as "'the drawing of conclusions respecting subjects that lie beyond the direct expression of the text, from elements known from and given in the text—conclusions that are within the *spirit*, though not within the *letter* of the text.'"[66] By "spirit," Barnett and Bernick mean "the ends,

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[62] *Id.* at 13.

[63] Thus, for example, researchers were able to figure out the purpose of the Antikythera Mechanism—a mechanical calculator dating to the second century BC, which was discovered in 1902—without any evidence about its creators' purposes or thought processes. *See* EVAGGELOS G. VALLIANATOS, THE ANTIKYTHERA MECHANISM (2021).

[64] BARNETT & BERNICK, *supra* note 42, at 13.

[65] *Id.* at 390 n.62 (emphasis altered).

[66] *Id.* at 7.

purposes, goals, or objects that the Constitution was adopted to accomplish."[67]

What kind of Originalism is this? It's certainly not *Semantic* Originalism, because that theory is concerned with interpreting the law's *words* by figuring out what meaning those words were given by their originators. Ends, purposes, goals, and objects are not words, however, and do not have meaning the way words do. Nor is this *Normative* Originalism, because Barnett and Bernick are not claiming that we are obligated to follow the purposes of the Constitution's framers as a consequence of anything relating to the Constitution's origin. Instead, they contend that we should follow those purposes because doing so will lead to better results in today's world. This becomes clear when they write that "the moral legitimacy of a particular government" requires "that the civil rights it protects in its positive law adequately secures [sic] the inalienable preexisting rights of the people. To the extent that a government effectively secures these rights, it is morally legitimate."[68] This is true—but by prioritizing concerns with justice over any consideration of the *origin* of the law, Barnett and Bernick are offering a stone soup version of Originalism. By the time they make this assertion on page 199 of their book, the premise that the origin of the law determines its meaning (Semantic Originalism[69]) or its obligatory power (Normative Originalism[70]) has been quietly discarded and replaced with an argument that the standard of value in legal interpretation is "moral legitimacy," *not* the understandings of our ancestors.

Solum took a similar step in a 2015 article responding to Originalism's critics, in which he appeared to retreat from the Conventional theory of concepts that Semantic Originalism employs, and to adopt the Realist (or objective) theory of concepts, instead.[71] Recall that the Conventionalist theory holds that words mean only what their originators agree upon (e.g., "death" means (1) cessation

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[67] *Id.* at 9.

[68] *Id.* at 199.

[69] *Cf. id.* at 6 ("One should thus take 'public meaning' to denote 'the meaning that most actual people attributed to the text when it was ratified into law.'").

[70] Although Barnett and Bernick contend that "an oath to support the Constitution creates a morally binding promise 'to adopt an interpretive theory tethered to the Constitution's text and history,'" Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1, 24 (2018) (quoting Richard M. Re, *Promising the Constitution*, 110 NW. U. L. REV. 299, 324 (2016)), they do not appear to endorse Normative Originalism, at least in any strong form. Barnett has endorsed the more modest thesis that "[a]dhering to the original meaning of the written Constitution . . . is simply *one aspect* of a constitutional structure that either is or is not capable of producing and enforcing laws that are binding in conscience." Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 654 (1999) (emphasis added).

[71] *See* Solum, *Fixation Thesis, supra* note 5.

of heartbeat, (2) cessation of breathing, (3) loss of consciousness), whereas the Realist theory holds that concepts encompass actual things in the real world, including features that we may not yet know, and that when asked what a word such as "death" or "deer" means, the proper answer is, *actual death* and *actual deer*, including aspects of these things that we may only discover later. In his 2015 article, Solum asserted that Originalism is compatible with the latter, because all Originalists seek to prove is that when a word points at reality, we follow the reality the word points to, and not necessarily at the understanding of that word held by the word's originators.[72] This means that if we were to interpret the word "deer" in an antique law as referring to Cervinae instead of to all beasts—even though the people who wrote that law thought the word referred to the latter—we would *still be practicing Originalism*, because we are still employing the word "deer," which is the word the law's originators used. As Solum phrases it, once a constitutional term "becomes associated with the corresponding [concept], the meaning of the phrase is fixed," and consequently, even if our definition of the concept is improved over time, the concept "would [remain] the [same concept] to which the constitutional word or phrase was associated at the time the relevant provision was framed and ratified."[73]

Solum considers this a minor concession, but it actually represents the total abandonment of Originalism and the substitution of a genuinely objective theory, instead. Originalism holds that words get their meaning from their originators' understandings. To concede that a word's meaning is instead "associated" with a *concept*—that is, with reality—and that when in doubt we follow the *concept* rather than the understanding of any Authoritative Meaning Giver, means that the word is *not* given its meaning by *any* shared understanding held by the text's originators. That is to say, origin no longer plays any role—and that overthrows Originalism's theory of meaning entirely. As attorney Ash McMurray puts it:

> [A] modification to Semantic Originalism to "absorb" [an objective theory of how words mean things] . . . cannot rightly be understood as a minor alteration. . . . The claim that the meaning of the Constitution is fixed at the time of its adoption by the conventional understanding of its provisions must now be modified to become a much more modest claim: that the meaning of the Constitution is fixed

[72] *Id.* at 17–18, 63.

[73] *Id.* at 58.

> by linguistic facts [that is, by the actual meaning of the concepts used], *whatever they are*.[74]

While it's a welcome development that Originalists are approaching a more objective theory of legal meaning, it should not escape our notice that in doing so, they quietly abandon Originalism's basic premises—that the *origin* of the law generates either its meaning or its obligatory force—and substitute a theory in which an origin plays no significant part.

C. A Word on the "Type-Meaning Fallacy"

In recent writings, Solum has eschewed the terms "Semantic Originalism" and "Normative Originalism," and instead argued that Originalism is based in part on the "Fixation Thesis," which holds that "the communicative content of the constitutional text is fixed at the time each provision is framed and ratified."[75] This, again, is a semantic claim—and it fails not only for the reasons given above, but for an additional reason, too. Solum appears to mean that a legal term is "fixed" the moment it is understood by the audience.[76] After all, that's the only time a meeting of the minds can occur with respect to a word's meaning.

But the time between a law's writing and its being understood can be quite far apart. The Twenty-Seventh Amendment was written in 1789 but not ratified until 1992. Presumably the "communication" occurred in 1992, because that was when the "hearer" understood it. But if it's proper to view things this way, then when does "communication" occur with respect to the Constitution generally? It was originally communicated in the 1780s, but that generation of hearers are now dead. In another sense, however, the communication occurs *every* day—because the Constitution "communicates" to new citizens every day. Even assuming constitutional "meaning" is created by a meeting of the minds, that meeting must occur at every instant, not just the 1780s; otherwise, the Constitution would have no live meaning at all.

Solum anticipates this objection but dismisses it, in part because in his view it commits what he calls the "Type-Meaning Fallacy."[77] This occurs, he says, when someone says something like the following: "If the words in this old document were used today, they

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[74] Ash McMurray, *Semantic Originalism, Moral Kinds, and the Meaning of the Constitution*, 2018 B.Y.U. LAW REV. 695, 725 (emphasis added).

[75] Lawrence B. Solum, *The Public Meaning Thesis: An Originalist Theory of Constitutional Meaning*, 101 B.U. L. REV. 1953, 1959 (2021).

[76] Solum, *Fixation Thesis, supra* note 5, at 25.

[77] *See id.* at 63-64.

would mean something different than what they meant when they were originally published; that proves that meanings change over time." According to Solum, this is fallacious because the *meaning* of the initial document did not change. Originalists don't deny that language *conventions* change, he says—only that *meaning* does not. So the fact that the same words used in today's context would mean something different than they previously did does not disprove the Originalist claim that the original document's meaning remains fixed.

The source of this fallacy, Solum contends, lies in confusing expression "tokens" with expression "types." Tokens refer to particular instantiations of a communication—that is, specific, concrete words[78]—whereas types are the abstractions to which the words can refer.[79] So the word "speech" is a token, but "freedom of speech" is a type.[80] Because a token is an historical fact—the particular utterance is a concrete phenomenon—it is vested with meaning through its origin. And thus the person who makes the assertion noted above commits the "Type-Meaning Fallacy" by confusing the meaning of the *type*—which is subject to historical evolution—with the meaning of the *token*, which is not, because the token's meaning is vested by its origin. In other words, the fallacy lies in mistaking "the meaning of a nonexistent constitutional text that hypothetically was written today" for "the meaning of the actual Constitution," which is "the copy of the Constitution that is preserved in the National Archives."[81]

Solum identifies a fallacy here, but note what his move does to the fixation thesis. Solum retreats from an argument about what *the Constitution* means into an argument about what *the specific copy (token) of the Constitution on display at the National Archives* means.[82] This is quite clear; he asserts that "the Fixation Thesis is a claim about particular *tokens* of the constitutional text,"[83] and is concerned only

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[78] *Id.* at 36 ("Tokens are particular individuals.")

[79] *Id.* at 27 ("The concrete particular is a token; the general and abstract sort to which the concrete particulars belong is a type."). The "token" / "type" distinction originated with philosopher Charles Peirce. It is noteworthy that Peirce, contrary to Solum, appears to have believed laws are *types*, and *not* tokens. *Nomenclature and Divisions of Triadic Relations, as Far as They Are Determined, in* 2 THE ESSENTIAL PEIRCE: SELECTED PHILOSOPHICAL WRITINGS 289, 291 (1998) ("a *Legisign* is a law that is a sign. This law is usually established by men. . . . It is not a single object, but a general type which, it has been agreed, shall be significant.").

[80] *See* Solum, *Fixation Thesis, supra* note 5, at 38.

[81] *Id.* at 64.

[82] *Id.* at 65.

[83] *Id.* at 42 (emphasis added).

with "expression *tokens*, not expression *types*."[84] But if that's true, then the fixation thesis is trivial, because *the token is not the law*. Nobody ever ratified any specific copy of the Constitution (least of all the one under glass at the National Archives, which was created for ceremonial purposes). Instead, published copies were made and circulated to the ratification conventions—some with typographical differences and errors—as well as being printed in newspapers nationwide during the ratification debates. More importantly, in those conventions, delegates never debated whether to ratify any *particular copy* or "token" of the Constitution—certainly not the one on display in Washington, D.C., which virtually none of them ever saw. Rather, they debated whether to ratify "the Constitution"—that is, the complicated abstraction that each copy articulates—in other words, the ideas, principles, promises—the "types"—each copy embodied.[85] Solum says that "'freedom of speech,' 'due process of law,' and 'judicial power' are expression types"[86]—but the ratification conventions ratified freedom of speech, due process of law, and judicial power. They never even considered ratifying the specific ink shapes on one particular piece of paper. The Constitution they ratified is the type, not the token.

What's more, even now, virtually no "token" of the Constitution has ever been "communicated" to Americans *at all*, because most Americans have never even seen the "token" of the Constitution to which Solum is referring. If it's true that "expression *type* can and does have meanings that change with circumstances of utterance,"[87] and that Originalism's fixation thesis applies exclusively to tokens, not to types, then—given that no *token* is the law, but only the *type* is—the fixation thesis is inapplicable to the law, and the Originalist is bound to concede that the Constitution—that is, the abstraction communicated by all the many printed copies of the Constitution in

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[84] *Id.* at 40 (emphasis added).

[85] This meshes well with the common law view, prevalent at the American founding, that "the law" is an abstraction, of which judicial opinions are merely *evidence*. *See, e.g.*, 1 W. BLACKSTONE, COMMENTARIES *69 ("[J]udicial decisions are the principal and most authoritative *evidence* that can be given of the existence of such a custom as shall form a part of the common law.") (emphasis added); 1 E. COKE, INSTITUTES *254 ("cases are the best proof of what the law is"); Swift v. Tyson, 41 U.S. (16 Pet.) 1, 18 (1842) ("[I]t will hardly be contended that the decisions of Courts constitute laws. They are, at most, only evidence of what the laws are; and are not of themselves laws.").

[86] Solum, *Fixation Thesis, supra* note 5, at 38.

[87] *Id.* at 36.

existence[88]—can and does have meanings that change with circumstances of utterance.

VI. IT'S TIME FOR OBJECTIVE MEANING

It was like
A new knowledge of reality.
—Wallace Stevens[89]

A. Originalism in the Courts

Originalism's theoretical weaknesses have not deterred the U.S. Supreme Court, which has dramatically embraced that theory, notwithstanding the dissents of a few justices. One need only consider such cases as *Kennedy v. Bremerton School District*,[90] *Dobbs v. Jackson Women's Health Organization*,[91] or *New York Rifle and Pistol Association v. Bruen*,[92] to see that Originalism is not actually objective in practice.

All these cases involved the Fourteenth Amendment, which prohibits states from depriving people of "liberty" except through "due process of law." That phrase, among other things, requires that states have sufficient rational justification for taking away someone's liberty or property—as opposed to depriving people of their rights for some arbitrary or irrational reason.[93] The first step in any such case is for the Court to determine whether the right at issue falls within the "liberty" the Constitution protects. Over the years, the justices have devised two ways to answer that question, which we can call, respectively, the *conceptual* and *historical* methods. The conceptual method asks whether the right in question is "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if [it] were sacrificed."[94] The historical method asks

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[88] This is quite clearly what Solum says. A *token* is any particular utterance; a *type* is the species to which that token belongs, so that a second utterance of "the very same words" is a different *token* of the same *type*. *Id.* at 37; *cf. id.* at 39 n.104. Thus all tokens of the form "We, the People of the United States…" are united by a *type*, and it's certainly the *type*, not any particular *token*, that was ratified and became the law of the land.

[89] Wallace Stevens, NOT IDEAS ABOUT THE THING BUT THE THING ITSELF (1954), *reprinted in* WALLACE STEVENS: COLLECTED POETRY & PROSE 451 (1997).

[90] 597 U.S. 507 (2022).

[91] 597 U.S. 215 (2022).

[92] 597 U.S. 1 (2022).

[93] TIMOTHY SANDEFUR, THE CONSCIENCE OF THE CONSTITUTION 71-120 (2014).

[94] Palko v. State of Connecticut, 302 U.S. 319, 325-26 (1937).

whether the right in question is "deeply rooted in this Nation's history and tradition."[95]

Note how these formulations neatly parallel the "concept" versus "list" dichotomy in our time-travel thought experiment: Either the Constitution's protection of "liberty" should be interpreted in *conceptual* terms—anchored in the reality of what the word "liberty" objectively refers to—or it should be interpreted in *historical* terms, rooted in the beliefs of past generations, as proven by evidence of historical practices.

Kennedy, *Dobbs*, and *Bruen* firmly embraced the historical approach.[96] A constitutional term, the Court said, "is fixed according to its historical understanding,"[97] and should be interpreted by reference to "historical practices," not philosophical considerations.[98] Judges should therefore "ascertain the original scope of [a constitutional] right based on its historical meaning,"[99] not on an "abstract and ahistorical" analysis.[100] The Court acknowledged that "'historical analysis can be difficult,'" but declared that it is "more legitimate, and more administrable, than asking judges to 'make difficult empirical judgments' about 'the costs and benefits of [challenged laws].'"[101]

Perhaps more strikingly, the justices also recharacterized the conceptual approach as being *synonymous* with the historical approach: When asking whether something is "implicit in the concept of ordered liberty," wrote Justice Alito in *Dobbs*, we don't ask whether the principle of freedom can exist without that thing, but instead engage in "historical inquiries . . . because the term 'liberty' alone provides little guidance. 'Liberty' is a capacious term. . . . [W]hen the Court has ignored . . . 'the teachings of history,' it has fallen into . . . freewheeling judicial policymaking."[102] We are therefore left with *only* the historical method.

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[95] Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977).

[96] Evan Bernick, *Vindicating Cassandra: A Comment on Dobbs v. Jackson Women's Health Organization,* 2021 CATO SUP. CT. REV. 227 (2022), argues that *Dobbs* is not true originalism, but he appears to make the same stone soup move addressed above. In his view, *Dobbs* errs by construing the nature of the right at issue too narrowly, because the proper focus ought to have been on male/female discrimination, and laws prohibiting abortion are discriminatory in this manner. *See id.* at 260-63. But he gives no reason *rooted in the origin of the constitutional language* why that should be the focus.

[97] *Bruen*, 597 U.S. at 28.

[98] *Kennedy*, 597 U.S. at 535 (quoting *Town of Greece, N.Y. v. Galloway*, 572 U.S. 565, 566 (2014)).

[99] *Bruen*, 597 U.S. at 18.

[100] *Kennedy*, 597 U.S. at 534.

[101] *Bruen*, 597 U.S. at 23, 25 (quoting *McDonald v. Chicago*, 561 U.S. 742, 803-04 (2010)).

[102] *Dobbs*, 597 U.S. at 239-40 (quoting *Moore*, 431 U.S. at 503).

Obviously, history could be helpful as part of any conceptual analysis of what liberty means. But these cases made clear that this was not the Court's intent. Instead, they hold that only if a right can be found in the actual practices of past ages can it be regarded as part of the liberty protected by the Constitution. In other words, they implemented precisely the "expected applications" theory—i.e., the "list" approach—considered in our earlier time-travel hypothetical. By reducing the question of "what is liberty" to a hunt for proof that our ancestors placed the *specific* activity in question on their definitive list of liberties, the Court stepped down from the *conceptual* level of analysis to the *perceptual*—or worse, to a hunt for the subjective beliefs of our ancestors, because the fact that they placed something on the "list" is taken to be the definition of the word "liberty." Such subjectivism effectively replaces "liberty" with an arbitrary catalogue of historically specified *privileges*, which owe their legitimacy not to any principle of ethical or political philosophy, but solely to the fact that our ancestors thought we should be free to do those specific things.

It thus comes as little surprise that the Court felt it necessary to back away from the extreme "historical" approach shortly afterward in *United States v. Rahimi*.[103] There, Chief Justice Roberts insisted that *Bruen* did *not* require judges to seek out "precise[] [historical] match[es]" to adjudicate the meaning of constitutional terms, but that instead judges should seek to understand "the principles underlying" those terms.[104] Rather than asking whether the law at issue in a case is "a 'dead ringer' or a 'historical twin'" of an older statute, courts should "ascertain whether [it] is 'relevantly similar' to laws that our tradition is understood to permit."[105] While it remains to be seen just how much this licenses courts to engage in conceptual analysis, as opposed to historical archaeology, Justice Barrett at least appears to hold that the tools judges are to use in this task are at hand are the ordinary processes of common law reasoning. Courts, she wrote, should seek "a principle, not a mold . . . . Pulling principle from precedent, whether case law or history, is a standard feature of legal reasoning, and reasonable minds sometimes disagree about how broad or narrow the controlling principle should be."[106] That's true—but it's not an Originalism of either the Semantic or Normative varieties.

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[103] 602 U.S. 680 (2024).

[104] *Id.* at 692.

[105] *Id.*

[106] *Id.* at 739-40 (Barrett, J., concurring).

B. Ridding Ourselves of "He Said, She Said" Law

Professor Smith has aptly called Originalism "he-said, she-said" law," which is concerned

> not [with] what is said and its actual meaning, but the beliefs of the figures saying it. . . . Originalism honors what earlier lawmakers did in a way that glorifies the sheer fact of their having said it. Consider: according to Originalism, what validates those specific laws that our predecessors adopted? The fact that they spoke first. But this grants unjustified authority to the *saying*.[107]

That last point shows why Originalism is just another subjective theory of law—one that says the law means whatever our ancestors thought it meant, by the sheer fact of their having thought so, without regard to their reasons, good, bad, or indifferent. Various efforts to refine Originalism end up either doubling down on this subjectivism—as with the "conceptions about concepts" theory—or by subtly abandoning Originalism for a better "stone soup" theory in which origin plays little or no role.

After all of this, however, the reader might still ask, "What *does* bind us to the law *at all*?" Surely one of the principal attractions of Originalism is that it purports to offer us a reason why we are today bound by the pronouncements of yesterday. Whatever else law is, it's a legacy of the past, and we sense that we're obliged to follow *it*, rather than our own personal opinions. Why?

The answer is simple. We are indeed bound—but for normative reasons of our own, not reasons of language, or any kind obligation imposed on us by generations long dead. Ideals such as the protection of liberty, the separation of powers, the legitimacy of democratic law-making, fairness to individuals, efficient administration, equal justice before the law, and the like all warrant a judge participating in a legal system that is regular, predictable, and complies with all the other virtues we call "the rule of law."[108] That's sufficient to establish that a judge should follow the Constitution and the principles rationally and logically derivable from it, rather than imposing her own personal opinions, either through clever artifice or by asserting that all law is subjective anyway, and therefore she might as well do whatever she likes.[109] Stare decisis and other

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[107] Tara Smith, *Originalism, Vintage or Nouveau: "He Said, She Said" Law*, 82 FORDHAM L. REV. 619, 621 (2013) (emphasis added).

[108] Moore, *Natural Law Theory*, *supra* note 18 at 314-20.

[109] *See* Michael L. Smith, *The Present Public Meaning Approach to Constitutional Interpretation*, 89 TENN. L. REV. 885 (2022).

considerations of past opinion play an important role in following the Constitution, but this does not entail either Semantic or Normative Originalism.[110]

The choice is not, as Originalists would have it, between adhering to the beliefs of our ancestors on one hand, and a free-for-all in which judges impose their whims, on the other. Instead, the choice is between an objective jurisprudence that seeks to figure out what the law *actually is*, and a jurisprudence that disregards that question in favor of subjective inquiries into the personal attitudes of past generations. The choice, in brief, is between the "rule of men"—including long-dead ones—and the rule of *law*.

VII. CONCLUSION

Semantic Originalism is based on a false premise: that words mean what some Authoritative Meaning Giver says they mean. In fact, words are concepts that point to actual things in the world (including abstractions, such as murder). Because words are not given their meaning by their origin, Originalists can salvage their arguments only by appealing to theories of meaning in which origin plays no role. Normative Originalism, meanwhile, is implausible because obligation and other normative concerns must rely on present day concerns. Originalism purports to be objective, but in fact gives us only varieties of subjectivism. A preferable alternative is to concern ourselves with the tools of conceptual analysis that give us a truly objective understanding of concepts, and to do this for reasons relevant to people today.

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[110] *See, e.g.*, Re, *supra* note 71, at 324 ("Text and history are . . . morally essential components of legal reasoning for those who wish to speak either as or with oath-bound officials. Happily, that conclusion lines up well with actual constitutional practice. Even those who deplore textualism and originalism nonetheless orient their claims in and around the historical document.")