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Semantic Originalism, Moral Kinds, and the Meaning of the Constitution

Ash McMurray

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CONTENTS

I. INTRODUCTION

"What does the Constitution mean?" Such is the opening line and central question of Professor Lawrence Solum's article

"Semantic Originalism."[1] His answer: whatever it means, that meaning is dictated by the original public meaning of the constitutional text.[2] Neither his question nor his answer is particularly novel. Rather, what makes Solum's article unique is his justification: original public meaning dictates how we should understand the constitutional text, not because doing so is fair or efficient, but because *that's how written language works*.[3] As such, "Semantic Originalism" purports to offer a theory of how the Constitution communicates to us as a matter of linguistic fact. According to Solum, constitutional communication is possible because the meaning of the Constitution is "fixed"—made stable and determinate—in writing by what ordinary speakers at the time of its writing understood it to mean.[4] Once we determine this "fixed" meaning of the constitutional text, we've discovered the supreme law of the land, or so the argument goes.[5]

But in committing himself so thoroughly to a theory of linguistic fact, Solum upends his own project. The problem lies in the fact that there are multiple, competing viable theories of language. In particular, the linguistic theory of moral realists deeply implicates moral and metaphysical commitments that honest interpreters of the Constitution who hold them are unlikely to part with except on compelling moral grounds. These moral realists argue that the meaning of language is (often) a direct function of the world itself, not just our mutual understanding of it.[6] After all, it doesn't make much sense to talk about what the phrase "tigers are felines" means without reference to actual tigers.[7] Likewise, for moral realists who believe that moral concepts are not

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1. Lawrence B. Solum, *Semantic Originalism* 1 (Univ. of Ill. Coll. of Law, Illinois Public Law and Legal Theory Research Papers Series No. 07-24, 2008), http://papers.ssrn.com/abstract=1120244.

2. *Id.* at 1–2.

3. *Id.* at 30.

4. *Id.* at 2–4.

5. *Id.* at 2.

6. *See, e.g.*, MICHAEL S. MOORE, *The Interpretive Turn in Modern Theory: A Turn for the Worse?*, *in* EDUCATING ONESELF IN PUBLIC: CRITICAL ESSAYS IN JURISPRUDENCE 335, 338–43 (2000) [hereinafter *The Interpretive Turn*]; Michael Moore, *Moral Reality*, 1982 WIS. L. REV. 1061 (1982) [hereinafter *Moral Reality*]; Michael S. Moore, *Moral Reality Revisited*, 90 MICH. L. REV. 2424 (1992) [hereinafter *Moral Reality Revisited*].

7. *See The Interpretive Turn*, *supra* note 6, at 339.

mere social conventions, but objective facts, it doesn't make sense to talk about "persons" or "equal protection" without reference to objective principles of personhood and justice.[8] Under such commitments, these facts about the *world* are what "fix" the meaning of the Constitution wherever it refers to them.

To deal with the moral realist, Solum attempts to sidestep the issue by showing how moral realism fits into his theory of Semantic Originalism—that is, he tries to accommodate the moral realist through a minor revision to his theory.[9] But minor it is not. In doing so, Solum fundamentally alters his theory and the role of "original public meaning" in constitutional interpretation, or so I will attempt to show. To do this, this Comment proceeds as follows: In Part II, I give some brief context and present Semantic Originalism's major premises—the fixation thesis and the clause meaning thesis—by which constitutional meaning is purportedly fixed. Then, in Part III, I discuss moral realism, which entails a causal theory of meaning that is incompatible with the clause meaning thesis of Semantic Originalism. In Part IV, I lay out and reject Solum's attempt to accommodate moral realism. Ultimately, I conclude that his attempt to square Semantic Originalism with moral realism results in a theory that displaces its originalist commitments so far that it might not rightly be called an originalist theory at all. Finally, in Part V, I summarize and conclude.

II. SEMANTIC ORIGINALISM, FIXATION, AND ORDINARY PUBLIC MEANING

A. Semantic Originalism's Place Among Originalist Theories

1. Originalism as a family of theories

"Originalism" refers to a family of related theories of constitutional interpretation and construction.[10] The core premise of

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8. *See Moral Reality Revisited*, *supra* note 6, at 2481.

9. *See infra* Section IV.B.

10. Solum, *supra* note 1, at 11. For an informative discussion regarding the difference between interpretation as "the enterprise of discerning the semantic content of the constitution" and construction as "the activity of further specifying constitutional rules when the original public meaning of the text is vague (or underdeterminate for some other reason)[,]" see *id.* at 18–19. Semantic Originalism is primarily a theory about constitutional

originalism that ties these various theories together is the "fixation thesis."[11] The fixation thesis will be further discussed below,[12] but its basic idea is relatively intuitive: the meaning of the Constitution is "fixed" at the time of its framing and ratification. Or more accurately, the semantic content of a constitutional utterance is fixed at the time of its framing and ratification.[13] Inasmuch as Semantic Originalism affirms the fixation thesis, it fits squarely within the originalist family. Moreover, because the fixation thesis provides the "unifying content" that binds the family of originalist theories together, it "plays a focal role in debates about originalism."[14]

2. Normative and Semantic Originalism

Originalist theories fall into two broad categories: normative and semantic.[15] Normative theories attempt to influence us; that is, they purport to tell us what we *should* believe or how we *ought* to act. As such, normative theories and the arguments supporting them can generally be understood to regard "the moral or ethical status of reasons for action, evaluations of states of affairs, and judgements about human character."[16] A normative linguistic theory, then, aims to tell us how various features of language ought to be understood or used because such an understanding or use is best for ethical or moral reasons. For example, Justice Antonin Scalia, one of the best-known advocates of originalism, argued for a version of originalism on the grounds that to do otherwise "is

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interpretation (i.e., discernment of semantic content), though it has important implications for constitutional construction. My discussion in this Comment is limited to interpretation, though an investigation of the implications of metaphysical and moral realism, or perhaps naturalism in general, will be an important endeavor for anyone who wants to build naturalism into a full constitutional theory.

 11. Solum, *supra* note 1, at 2.

 12. *See infra* Section II.C.1.

 13. This sentence contains technical language (e.g., "semantic content" and "constitutional utterance") that will be further explained below. *See infra* Section II.C.1.

 14. Solum, *supra* note 1, at 11 (emphasis omitted). Solum emphasizes the essential nature of the fixation thesis for originalist theories, stating that, "If the claim that the semantic content of the provisions of the Constitution were fixed at their times of origin were false, then the foundations of originalism would be shaken and all or almost all the members of the family of originalist theories would no longer be viable." *Id.*

 15. For a fuller treatment of this distinction as it relates to Semantic Originalism, see *id.* at 28–30.

 16. *Id.* at 28.

simply incompatible with democratic government—or indeed, even with fair government."[17] To argue in favor of adopting originalism on the grounds that it best comports with the values of democracy and fairness is to argue for it on normative grounds.

Semantic theories, on the other hand, are descriptive and purport to tell us things as they *are*.[18] Specifically, "[a] semantic theory tries to explain what meaning is, and any theory of meaning will have to describe what is and what is not a meaningful expression as well as the systematic relations between words and what they mean."[19] Thus, rather than making claims about what is morally best or most consistent with our ethical values, semantic theories attempt to describe the most *accurate* way to understand linguistic meaning, given the available evidence. So understood, semantic theories can be compared to scientific theories. For example, heliocentrism does not argue that we should accept that the earth orbits the sun because such a belief or practice more appropriately comports with the requirements of justice or fairness or some other ethical claim. Instead, it argues that, as a matter of fact, the earth simply does orbit the sun because such a view comports best to the evidence that we have. Thus, heliocentrism is preferable to geocentrism, because it more accurately describes the way the empirical world is.[20] Similarly, Solum asserts that the heart of a semantic theory lies in the idea that "[m]eanings . . . are facts determined by the evidence."[21] Moreover, because legal texts, such

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17. Antonin Scalia, Assoc. Justice of the U.S. Supreme Court, Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws, Address at Princeton University (Mar. 8–9, 1995), *in* 18 THE TANNER LECTURES ON HUMAN VALUES 77, 92 (1997); *see also* District of Columbia v. Heller, 554 U.S. 570, 576–77 (2008) ("In interpreting this text, we are guided by the principle that '[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.' Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation." (internal citations omitted)).

18. This is related to the famous "is-ought" distinction insofar as facts on the ground do or don't impact what we ought to do. However, there is likely an implicit psychologically normative move in claiming that a theory is "most accurate."

19. A.P. Martinich, *Introduction*, *in* THE PHILOSOPHY OF LANGUAGE 2 (A.P. Martinich ed., 5th ed. 2008).

20. While this may seem obvious now, it was not always so. It is well known that Copernicus' heliocentric model of the solar system faced heavy resistance and criticism by late medieval and early modern philosophers, generally on normative grounds.

21. Solum, *supra* note 1, at 36. Solum notes:

as constitutions, make up a subset of linguistic expressions, "[t]he question whether a given reading of a legal text preserves its meaning . . . is a factual question."[22]

It is important at this juncture to note that the fact that semantic theories, like scientific theories, are descriptive does not divorce them completely from normative claims. Indeed, there is often an implicit normative element accompanying any descriptive theory: *because* the Earth revolves around the sun, we should *act* accordingly, especially when it comes to charting the course of our next probe to Mars and other projects involving Earth's place in the solar system. Thus, although descriptive theories make normative claims, they differ from normative theories in that descriptive claims do the conceptual heavy lifting; normative claims simply demand that we comport ourselves to reality. Semantic theories are no different—inasmuch as they purport to accurately describe how linguistic meaning works, they too will carry normative implications. As to Semantic Originalism in particular, Solum makes this normative element of his semantic theory explicit: although Semantic Originalism is a "mixed theory" involving a modest normative element, it rests primarily on semantic claims,[23] and "[t]o the extent that Semantic Originalism does make a normative (moral or ethical) claim, it is simply that we have a defeasible obligation to respect the original meaning of the constitution to the extent that it is law."[24] In other words, *because* the supreme law of the land is the semantic meaning of the Constitution, we should act accordingly.

This point is so obvious in a variety of contexts that it is taken for granted. Textbooks about semantics written for students of linguistics do not discuss the normative reasons for and against various theories of semantic meaning. Translators of chemistry texts or product manuals do not (and should not) ask whether they should use the translation that best expresses the semantic content of the original or some other translation that might be preferred on normative grounds. Of course, translations can be altered on normative grounds. For example, in cultures with puritanical sexual mores, the translation of a racy novel might be bowdlerized: a grope might become a touch, intercourse a kiss. The crucial point is that a bowdlerized translation alters and does not preserve semantic content. No normative argument can bestow the property of "accuracy" on a bowdlerized translation. We may prefer that our children read the bowdlerized translation, but this preference does not change the semantic content of the original.

Id.

   22. *Id.*
   23. *Id.* at 30.
   24. *Id.* at 10; *see also id.* at 127–28.

As we have seen, Semantic Originalism by its very name makes two very important claims. First, it is an originalist theory, which means that it affirms the fixation thesis—it insists that the meaning of the Constitution was fixed at the time of its framing and ratification. Second, it is a semantic theory and thus purports to give factual answers about what constitutional provisions mean, given the way language works. However, although semantic theories all share a common purpose, they do not necessarily agree in every respect. One of the most important ways that different originalist semantic theories distinguish themselves is how they answer the question "What fixes the semantic content of a constitutional utterance?" Semantic Originalism's answer is "original public meaning."

3. New Originalism and original public meaning

In semantic originalist theories, "original public meaning" is shorthand for the conventional semantic meaning of a constitutional provision as understood by ordinary but competent speakers at the time of its framing and ratification.[25] The idea that the meaning of constitutional utterances is fixed by "the public meaning of the [constitutional] text that was adopted" is the distinguishing feature of "New Originalism."[26] Or as Solum explains, new originalists and other original public meaning originalists believe that "meaning is fixed by the general pattern of usage at the time of constitutional utterance."[27]

New Originalism's focus on original public meaning contrasts with other originalist semantic theories. For example, early adopters of originalism held a view known as "original intentions originalism," which claims that the semantic content of constitutional utterances is fixed by the subjective intentions of the

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25. *Id.* at 4.
26. Keith E. Whittington, *The New Originalism*, 2 Geo. J.L. & Pub. Pol'y 599, 610 (2004). Whether the original public meaning is understood to be the factual meaning of the Constitution or merely the asserted meaning of its provisions is likely to change depending on the specific approach taken by the particular theory advancing original public meaning originalism. For example, it may depend on whether the justification is semantic or normative. *See supra* Section II.A.2.
27. Solum, *supra* note 1, at 4.

framers.[28] That is, what matters is what Jefferson and Hamilton thought of the meaning of constitutional provisions, inasmuch as it can be ascertained from the constitutional text itself or other sources of evidence, such as the *Federalist Papers*. Because of this, original intentions originalists believe that meaning is fixed not by objective facts about usage, but by the mental states that existed in the minds of the framers when they wrote the Constitution.[29] This view has been heavily criticized throughout its history on numerous grounds, both normative and semantic.[30] A full discussion of these criticisms is unnecessary here, but a unifying theme is the enormous difficulty of attributing a stable, monolithic intentional state to a body of distinct individuals with various intentions, beliefs, and understandings regarding the meaning of constitutional provisions throughout a drafting and ratification process.[31] Suffice it to say that, as a development of originalism, one of the purported virtues of New Originalism—and Semantic Originalism in particular—is that it avoids these difficulties.

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28. *Id.* at 13–14; *see also* RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (2d ed. 1977); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 17 (1971); Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1275, 1317–18 (2006) (advancing an evolution of original intentions originalism called "original understanding" originalism that defines "originalism" as "the theory that the original understanding of those who wrote and ratified various constitutional provisions determines their current meaning"); William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 695 (1976) ("Although the substitution of some other set of values for those which may be derived from the language and intent of the framers is not urged in so many words, that is surely the thrust of the message."); Edwin Meese III, Att'y Gen., Speech Before the American Bar Association (July 9, 1985), *in* THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION (Paul G. Cassell ed., 1986), https://fedsoc.org/commentary/publications/the-great-debate-attorney-general-ed-meese-iii-july-9-1985 (last visited Nov. 19, 2018) ("The text of the document and the original intention of those who framed it would be the judicial standard in giving effect to the Constitution.").

29. *See* Whittington, *supra* note 26, at 599–600 (pointing to the prominence of original intentions originalism in the 1980s, as demonstrated by Senator Sam Ervin's question for Thurgood Marshall at his confirmation hearing: "Is not the role of the Supreme Court simply to ascertain and give effect to the intent of the framers of this Constitution and the people who ratified the Constitution?").

30. *See, e.g.*, Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

31. *See, e.g.*, Brest, *supra* note 30, at 214–22. Solum discusses the "problem of collective intentions" in depth. Solum, *supra* note 1, at 42–49.

Compared to the task of pinning down collective mental states,[32] ascribing a more or less objective common usage of a word or phrase is a straightforward endeavor.

4. The role of Semantic Originalism

New Originalism, however, has drawn new critics.[33] Semantic Originalism, as developed by Solum, is a development within New Originalism intended to respond to these criticisms—or rather, to demonstrate how these criticisms have missed the mark.[34] According to Solum, the problem with recent arguments against New Originalism is that "their criticisms [are] premised on the notion that the debates about the New Originalism are fundamentally *normative* (ethical or moral) and not *semantic* (linguistic or meaning-focused)."[35] That is, they treat New Originalism as a purely *normative* theory. Pure normative originalism can be summed up in a single thesis: "Constitutional practice should be substantially guided by the original public meaning of the text."[36] In response, Solum attempts "to reinterpret the debate from the perspective of the philosophy of language"[37] and thereby show that by missing the semantic component of New Originalism, critics have advanced their arguments ignorant of the fact that they are arguing against the way language and constitutional communication actually work.

Thus, in order to place New Originalism on stronger theoretical grounds, Solum's most important goal is to demonstrate that pure Semantic Originalism is true.[38] Pure Semantic Originalism can also be summarized in a single thesis: "[T]he semantic content of the text of a constitution is (roughly) the original meaning of the text as it

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32. Solum, *supra* note 1, at 14–15.

33. *See, e.g.*, Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291 (2007); Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1 (2009); Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239 (2009); Stephen M. Griffin, *Rebooting Originalism*, 2008 U. ILL. L. REV. 1185 (2008).

34. *See* Solum, *supra* note 1, at 24.

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

36. *Id.* at 30.

37. *Id.* at 26–27.

38. *See id.* at 128 ("At this point, the most important work of 'Semantic Originalism' has been accomplished. . . . Once pure semantic originalism is on the table . . . then a transformation of the debate over originalism become [sic] possible.").

was fixed at the time of framing and ratification."[39] If he is successful,[40] then presumably the stakes will be significantly raised for opponents of New Originalism: anti-originalists will have to demonstrate that normative concerns override the *actual* meaning of the Constitution.

To summarize, Semantic Originalism is a semantic theory of constitutional meaning. First, it is originalist in that it adheres to the fixation thesis, the idea that the meaning of the Constitution was fixed at the time of its framing and ratification. Second, it is a semantic theory with normative implications rather than a normative theory with semantic implications: it purports to direct us to the actual semantic content of the Constitution as a function of the facts and necessary features of language that enable successful communication. Finally, Semantic Originalism is a development of New Originalism because it both claims that the semantic content of constitutional utterances is fixed by ordinary public meaning and seeks to save New Originalism from recent, purely normative criticisms.

B. Semantic Originalism: A Theory of Language and Interpretation

In this Section, I lay out the essential premises of Semantic Originalism in order to demonstrate that they are inconsistent with full-blooded moral realism—the position that moral concepts like *justice* and *fairness*[41] exist and that the words that refer to them are defined by their real qualities rather than our contingent thoughts and feelings about them.[42] In particular, I show that in his attempt to accommodate the moral realist, Solum's semantic commitments ultimately swallow his originalist commitments.[43]

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39. *Id.* at 30.

40. Note that I am assuming the accuracy of Semantic Originalism's theses for the purpose of showing its incompatibility with moral realism. While there may be other concerns with Semantic Originalism—and with the fixation thesis in particular—they are not my concern here.

41. Here and throughout the rest of this Comment, I use italics when I intend to refer to the underlying concept or object to which a word refers, and I use quotation marks when I intend to refer to the word itself; thus, *tiger* denotes the physical feline itself, while "tiger" denotes only the word, not its content.

42. *See infra* Section III.A.

43. *See infra* Part IV.

As discussed, Semantic Originalism advances a theory that purports to help us answer the question "What does the Constitution mean?"[44] For Solum, the "Constitution" that we are concerned with is not the physical document itself, but rather the language of the specific legal provisions contained in the physical document.[45] Moreover, while "meaning" can refer to "implications, consequences, or applications," in the context of Semantic Originalism, it refers to the "linguistic meaning or semantic content" of the written language comprising the Constitution.[46]

To spare us from the imprecision of ordinary language, Solum reformulates the question "What does the Constitution mean?" using technical terms borrowed from philosophy of language.[47]

First, instead of "the Constitution," Solum uses the more precise terms constitutional "utterance" and "utterance token."[48] "Utterances" are "specific events, the intentional acts of speakers at times and places, typically involving language."[49] In short, "an 'utterance' is a 'saying' or 'writing.'"[50] Utterances can be further specified as "utterance tokens" and "utterance types." An utterance token is an utterance "on a particular occasion" and, therefore, is indexed by the time and place of its occurrence.[51] An utterance type can be understood to be the general category to which an expression token belongs; for instance, terms, phrases, and clauses.[52] Or in Solum's

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44. Solum, *supra* note 1, at 1–2.

45. Even this sense of "Constitution" might be considered ambiguous, vague, or underdetermined. *See id.* at 36, 56–57 (discussing constitutional implicature).

46. *Id.* at 2 (italics omitted).

47. *Id.* at 31–38.

48. *Id.* at 34.

49. Kepa Korta & John Perry, *Pragmatics*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Nov. 28, 2006), http://plato.stanford.edu/entries/pragmatics/ (last visited Nov. 15, 2018); *see also* P.F. Strawson, *On Referring*, 59 MIND 320, 327 (1950) (discussing "types").

50. Solum, *supra* note 1, at 34.

51. *Id.* (italics omitted).

52. *See* Linda Wetzel, *Types and Tokens*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Apr. 28, 2006), https://plato.stanford.edu/archives/spr2014/entries /types-tokens/ (last visited Nov. 15, 2018). For example, the sentence "Rose is a rose is a rose" contains three word types—"rose," "is," and "a"—but ten word tokens, one for each particular word that appears in the sentence. *Id.* As Wetzel explains, "Types are generally said to be abstract and unique; tokens are concrete particulars, composed of ink, pixels of light . . . on a computer screen, electronic strings of dots and dashes, smoke signals, hand signals, sound waves, etc." *Id.*

plain terms, "An 'utterance type' is just the string of words considered as something that could be said on more than one particular occasion."[53] A "constitutional utterance," then, is a specific instantiation of constitutional language, such as a clause, indexed to its "time of origin, encompassing the period roughly contemporaneous with the framing (or drafting) and ratification (or formal legal approval) of the particular clause or amendment."[54]

Second, "mean" or "meaning" can be substituted for "semantic content."[55] As discussed, "semantic content" refers to linguistic (or semantic) meaning. Moreover, Solum is careful to specify that his theory is concerned with "sentence" or "expression" meaning: "the conventional semantic meaning of the words and phrases that constitute [an] utterance."[56] Using these terms, Semantic Originalism purports to help us answer the question "What is the semantic content of a Constitutional utterance?" Solum's answer in "the language of high constitutional theory" is this: "The semantic content of [the] Constitution was fixed at the time of utterance by conventional semantic meaning. . . ."[57] Thus, to discover what the Constitution means, we must look to its original public meaning.

C. Fixing Semantic Content: Fixation and Conventional Meaning

Semantic Originalism's "central claim" is that "constitutional law includes rules with content that are fixed by the original public meaning of the text—the conventional semantic meaning of the words and phrases in context."[58] Solum develops this claim through four theses, which are the pillars of his theory. The first

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53. Solum, *supra* note 1, at 34.
54. *Id.* at 4. Solum recognizes that written language is distinct from spoken utterances, but he largely attempts to put controversies regarding their distinct qualities aside. *Id.* at 35. He does seem to argue, however, that his theory of Semantic Originalism is more or less necessary for constitutional communication to be possible across time. This is almost a kind of Kantian "transcendental argument" by which he assumes that constitutional communication of definite semantic content is possible and Semantic Originalism accounts for its possibility. *See id.* at 31–66. Because I intend to address Solum's arguments on his own terms, I have not tried to address the merits of this part of his argument.
55. *Id.* at 2–3.
56. *Id.* at 34–35 (citing PAUL GRICE, STUDIES IN THE WAY OF WORDS 3–143 (1989)).
57. Solum, *supra* note 1, at 173 (italics omitted).
58. *Id.* at 2.

three—the fixation thesis,[59] the clause meaning thesis,[60] and the contribution thesis[61]—are semantic theses. They develop a theory of what determines the semantic content of constitutional utterances and how that content relates to constitutional law. The fourth thesis—the fidelity thesis[62]—is a normative one. It argues that because the semantic content *is* the law of the land, we owe a moral duty to follow it.

The fixation thesis claims that the semantic content of constitutional utterances is fixed at the time of their adoption—the time of framing and ratification.[63] The clause meaning thesis claims that the semantic content of constitutional utterances is given by, or fixed by, the original public meaning of those utterances.[64] The contribution thesis claims that the semantic content of constitutional utterances contributes to the supreme law of the land.[65] The fidelity thesis argues that because the semantic content of constitutional utterances makes up part of the law, it morally obligates us unless there is some other contrary and sufficiently overriding moral consideration.[66] Together, Semantic Originalism can be summed up in a technical slogan: "The semantic content of [the] Constitution was fixed at the time of utterance by conventional semantic meaning, and the conventions of legal practice make that content the supreme law of the land to which officials and citizens owe fidelity as a matter of political morality."[67]

For the purposes of this Comment, only the first two theses—fixation and clause meaning—need be explained in greater detail.

1. Fixation thesis

As previously discussed, the fixation thesis is the central claim that binds originalist theories together.[68] The fixation thesis asserts

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59. *Id.* at 2–4, 59–67; *see infra* Section II.C.1.
60. Solum, *supra* note 1, at 5, 58–59; *see infra* Section II.C.2.
61. Solum, *supra* note 1, at 6–8, 134–49.
62. *Id.* at 8–9, 149–60.
63. *Id.* at 2.
64. *Id.* at 5.
65. *Id.* at 6.
66. *Id.* at 8.
67. *Id.* at 173 (italics omitted).
68. *Id.* at 2; *see supra* Section II.A.1.

that the semantic content of the Constitution—specifically as constitutional utterances—was established at the time it was framed and ratified.[69] The thesis can be abstracted to make it clearer: "The semantic content of an utterance[] is fixed at the time of utterance under normal conditions."[70] This adds a historical dimension to interpretation because "[w]ords and phrases mean in context, and the context includes time and place."[71] The fundamental justification[72] of this view is the simple observation of the seemingly uncontroversial linguistic fact[73] that the meanings of words and phrases can—and oftentimes do—change over time.[74] Solum provides two examples to illustrate this phenomenon.

The first example considers the semantic content of the word "deer" in the context of a letter written during the twelfth century.[75]

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69. Because the framing and ratification of the Constitution occurred over the course of time and not all at once, "[t]his period may be extended over many years." Solum, *supra* note 1, at 2 n.3, 59 n.178.

70. *Id.* at 59. For the purposes of this Comment, I simply accept this assertion as true. However, it is unclear whether written language, which is almost always encountered out of its relevant space, time, and history, can fix meaning in the way Solum asserts. The idea that written language provides accessible semantic content fixed in time is further complicated by the fact that texts are never encountered in isolation free from the interpreter's own background and understanding. *See generally* HANS-GEORG GADAMER, TRUTH AND METHOD (Joel Weinsheimer & Donald G. Marshall trans., paperback ed. 2013) (1975).

71. *Id.* at 60. A rather technical way of expressing this claim would be to say that for any utterance x and any time t, if x is uttered at t, then the semantic content of x is fixed at t.

72. There are other justifications for the fixation thesis, as Solum indicates. For example, the fixation of meaning at the time of written utterances (like the Constitution) is often argued for as the function of writing—that is, the purpose of written language just is to fix meaning through time. *Id.* at 3 (citing Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 611–29 (1999); RANDY BARNETT, RESTORING THE LOST CONSTITUTION (2004)).

73. I say "seemingly uncontroversial linguistic fact" because it is not so clear to me that the meaning of a word does or even can change. It seems to me that the "corruption" of a word through deviant uses does not in fact alter the meaning of an already existing word, but rather creates a new word—which has a distinct though perhaps conceptually related meaning—that has the same word token and that replaces the old word in the common vocabulary. Solum's account of the change of meanings of words works only if words are identified solely with their signs, and a sign might acquire new and different senses over time. If a sign gains a new sense and loses an older one, then the meaning of the word has substantially changed. However, if words *qua* words require both a meaning (semantic content) and a sign (word token), then it does not make sense to say that the meaning of a word has changed—there would simply be a new word, albeit with an identical sign. I am grateful to my teacher and friend Dr. David Jensen for helping me to clarify this alternative account of word-meaning change.

74. Solum, *supra* note 1, at 3, 59.

75. *Id.* at 3.

Today, the word "deer" denotes a ruminant mammal in the family Cervidae. During the twelfth century, however, the word "deer" in Middle English referred to "a beast or animal of any kind."[76] The difference in meaning between the two time periods demonstrates how the meaning of a word can substantially change over time. Accordingly, the only way to reliably understand the semantic content of the word "deer" when it appears in an ordinary letter written in the twelfth century is "in the light of the conventional semantic meaning at the time of writing[.]"[77] Moreover, to try to import the twenty-first century meaning of "deer" would be to "make a type of factual error, i.e., a linguistic mistake."[78]

The second example moves us into a constitutional context. Article IV of the Constitution of 1789 uses the phrase "domestic violence."[79] Today, the commonly understood semantic meaning of "domestic violence" is "'intimate partner abuse, battering, or wife-beating,'" understood as "'physical, sexual, psychological, and economic abuse that takes place in the context of an intimate relationship, including marriage.'"[80] According to Solum, so long as this contemporary meaning of "domestic violence" was unknown in the eighteenth century, any attempt to interpret Article IV as including a reference to child or spouse abuse "would simply be a linguistic mistake" akin to the error of interpreting a twelfth-century utterance of "deer" as limited to mammals in the family of Cervidae.[81]

The argument these examples are supposed to illuminate is fairly straightforward: if we are to make any sense of how the

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76. *Id.* (citing SOL STEINMETZ, SEMANTIC ANTICS: HOW AND WHY WORDS CHANGE MEANING 49–50 (Random House 2008)).

77. Solum, *supra* note 1, at 3.

78. *Id.*

79. U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against *domestic Violence*." (italics added)).

80. Solum, *supra* note 1, at 3–4 (internal quotation marks omitted) (quoting HUMAN RIGHTS WATCH, *Glossary*, *in* TRAPPED BY INEQUALITY: BHUTANESE REFUGEE WOMEN IN NEPAL 5, 6 (2003), https://www.hrw.org/reports/2003/nepal0903/nepal0903full.pdf).

81. Solum, *supra* note 1, at 4. Lamentably, Professor Solum gives no indication of what "domestic violence" may have meant in 1787. But inasmuch as my Comment attempts to address Solum's argument on its own terms, it is not necessary to try to find out (even if it might be helpful).

meaning of words change over time, we must accept that while utterance types may change meaning over time, the meaning of utterance tokens—specific instantiations of utterance types—is fixed by historical context. Solum's defense of the fixation thesis does not end here,[82] but there is no need to go into his specific responses to various objections.[83] My argument below implicates the fixation thesis only in part; in fact, it assumes the fixation thesis, or at least a form of it.

The crux of the dispute regarding fixation is that the meaning of certain kinds of utterances is indeed fixed, but fixed by what? Semantic Originalism has built into the fixation thesis an answer: historical context. A full-blooded realist will reject that this assertion is true for all kinds of utterances. Specifically, she will—depending on how far reaching her realist commitments are—reject that it holds for certain entities, such as natural kinds and moral kinds. These "kinds" are entities in the world that "reflect[] the structure of the natural [or moral] world rather than the interests and actions of human beings."[84] The realist will accept a more neutral way of formulating the fixation thesis: She will agree that the semantic content of utterance tokens is *determinate*[85] and *unchanging*, i.e., "fixed." However, she will disagree that the fixation of meaning is simply a function of historical context. According to the realist, the world itself—or our best theory of it—fixes semantic content.

2. Clause meaning thesis

The clause meaning thesis can perhaps be best understood in relation to the fixation thesis. As discussed above,[86] the fixation thesis advances two distinct propositions: (1) the semantic content of utterance tokens—including constitutional utterance tokens—is

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82. For his full defense, see *id.* at 59–67.

83. For example, he responds to objections arguing that the meaning of utterance tokens can change over time, *id.* at 61–64, and that readers can assign new meaning to old texts, *id.* at 64–67.

84. Alexander Bird & Emma Tobin, *Natural Kinds*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Sept. 17, 2008), https://plato.stanford.edu/archives/spr 2018/entries/natural-kinds/ (last visited Nov. 16, 2018).

85. This is not to say that it is necessarily *determinable*.

86. *See supra* Section II.C.1.

fixed (determinate and permanent), and (2) fixation is a function of temporal-historical context.[87] In comparison, the clause meaning thesis is the assertion that the relevant historical context that fixes semantic content is ordinary public meaning, i.e., the conventional meaning of the utterance token understood by ordinary but linguistically proficient speakers at the time of the utterance.[88] In short, the semantic content of a constitutional utterance token is its clause meaning, which is the utterance token's ordinary public meaning.

The basic argument for clause meaning flows from the necessary conditions for the possibility of successful constitutional communication.[89] According to Semantic Originalism, "conventional semantic meaning provides the *only* satisfactory account" of this possibility.[90] By contrast, original intentions originalism fails on these grounds. Original intentions originalism asserts that the semantic content of constitutional utterance tokens is given by the internal mental states of the framers at the time of the Constitution's drafting and ratification.[91] However, this poses a significant problem: the Constitution was drafted and ratified by a multitude of different individuals in a variety of times and places. Because of this, "[t]he intentional mental states of the multitude with respect to a given constitutional provision (their purposes, hopes, fears, expectations, and so forth) will themselves be multitudinous and inaccessible."[92] This fact has two consequences. First, a multitudinous body of intentional states cannot provide a consistent "non-contradictory and not radically ambiguous" semantic content.[93]

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87. Note that Solum does not divide the fixation thesis into two distinct claims. I have divided it this way for conceptual clarity. I think that Solum's decision to present the fixation thesis as one claim is motivated by objections that Semantic Originalism is not "technically" originalism. By arguing that the fixation thesis as he has presented it reflects the core content of Originalism, he is able to claim that Semantic Originalism is at home within the Originalist family. However, I believe that this has potentially introduced some conceptual confusion.

88. *See* Solum, *supra* note 1, at 5. As such, Solum explains that clause meaning is the "semantic and pragmatic equivalent" to Original Public Meaning Originalism (New Originalism), but they are distinguishable because clause meaning extricates original public meaning from the normative claims of New Originalism. *Id.* at 50–51.

89. *See id.* at 5.

90. *Id.* (emphasis added).

91. *Id.* at 4.

92. *Id.* at 5.

93. *Id.*

Second, the inconsistent and ambiguous nature of a multitudinous conglomerate of intentional states is epistemically inaccessible to legal practitioners who are expected and required to engage in constitutional interpretation.[94] As a result, if semantic content is given by the framers' intentions, then genuine constitutional communication is impossible.

How then is successful constitutional communication possible? Solum proposes that the possibility lies in "the fact that the framers and ratifiers could rely on the accessibility of the public meaning . . . of the words, phrases, and clauses that constitute the Constitution."[95] In other words, original public meaning makes constitutional communication possible. This view purportedly has the added benefit that such public meanings are not only stable over time but also recoverable if lost.[96] If this is true, then clause meaning understood as original public meaning is both consistent and epistemically accessible, thereby avoiding the problems that plague original intentions originalism.

Solum's defense of the clause meaning thesis expands on these arguments and adds a layer of sophistication, positing four important modifications.[97]

First, the domain of contextual facts that may be considered when determining the conventional semantic meaning of a constitutional utterance is limited to those facts that were publicly available, or the "publicly available context."[98] Contextual facts were publicly available only if they were of a nature such that the framers would have reasonably believed that they were common knowledge to practitioners of constitutional law.[99] Solum explains that "[t]he precise contours of the public context can only be defined by careful inquiry, but one element is indisputable: the publicly available context of each individual clause includes the

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94. *Id.* Because of this epistemic inaccessibility, Justice Scalia argued that it is immoral to interpret the Constitution according to the intentions of the framers and compared doing so to Roman Emperor Nero's alleged practice of entrapping his citizens by publishing laws on pillars so high that they could not see them. Scalia, *supra* note 17, at 92.

95. Solum, *supra* note 1, at 5.

96. *Id.*

97. *See id.* at 50–58.

98. *Id.* at 52–54.

99. *Id.*

whole constitutional text."[100] Moreover, "the publicly available context may include facts about the general point or purpose of [a constitutional] provision (as opposed to 'the intention of the author') and those facts may resolve ambiguities."[101]

Second, legal terms of art can be accommodated via acceptance of a "division of linguistic labor."[102] Terms of art risk violating the premise of original public meaning because by definition a term of art has a specialized meaning that falls outside what an ordinary speaker of the language would know.[103] However, because ordinary speakers would presumably recognize that terms of art have special meanings, ordinary speakers can assume and accept that the special meaning is publicly available to members of the relevant linguistic community that utilizes the term.[104] This kind of linguistic deference legitimizes terms of art within the theory of clause meaning.

Third, the Constitution may have implicit but publicly accessible meanings that go beyond the precise semantic content of the text.[105] This is also known as "constitutional implicature."[106] Solum gives the example of *McCulloch v. Maryland*,[107] in which Justice Marshall argues that the power to establish post offices and postal roads implies the power to transport and deliver the mail.[108] The purpose of this modification is not to assert that there are in fact any instances of genuine implicit meaning, but rather to assert that if such instances do exist, then they "are part of the meaning of the Constitution and they should be understood as within the 'theory of clause meaning[.]'"[109]

100. *Id.*
101. *Id.* Solum recognizes that his account is incomplete and that "[a] full account of clause meaning would include a theory of the criteria for inclusion in the set of facts that constitute the publicly available context of constitutional utterance[,]" but he brackets the issue as important for actual construction and interpretation of the Constitution, not for advancing public context as a modification to clause meaning. *Id.*
102. *Id.* at 54–56.
103. *Id.* at 54.
104. *Id.* at 55.
105. *Id.* at 56–57.
106. *Id.* at 56.
107. McCulloch v. Maryland, 17 U.S. (1 Wheat.) 316 (1819).
108. Solum, *supra* note 1, at 56–57 (citing *McCulloch*, 17 U.S. (1 Wheat.) at 417).
109. Solum, *supra* note 1, at 57.

Finally, the constitutional text contains words and phrases that did not exist prior to its drafting and ratification.[110] These are called "constitutional stipulations."[111] As Solum points out, "Senate" and "House of Representatives" do not predate the Constitution, but rather "[t]he Constitution brought these institutions into being and named them."[112] The semantic content of constitutional stipulations is therefore fixed by the conventional semantic meaning "as of the moments of drafting or ratification."[113]

Together, the fixation thesis and the clause meaning thesis with Solum's modifications can be summarized as the following:

> Semantic Originalism is the view that the meaning (semantic content and illocutionary force of the Constitution) is the *clause meaning* of the Constitution at the time of adoption and ratification to the relevant audience, given the division of linguistic labor and the publicly available context, plus any additional content and force that results from necessary constitutional implicature or stipulated meanings.[114]

For the sake of conceptual clarity, I think this summation should be rephrased as two slightly modified premises. Semantic Originalism is a theory of constitutional interpretation that holds (1) the semantic content of an utterance is fixed (determinate and stable), and (2) the semantic content is, or is defined by, the conventional semantic meaning of the utterance at the time it was uttered. At this point, Semantic Originalism has been explained in sufficient detail to proceed to the next stage of this Comment: a discussion of moral realism and its semantic implications. Put simply, the full-blooded moral realist will accept premise (1) but reject premise (2).

III. MORAL REALISM AND MEANING

In its present form, Semantic Originalism is a theory that has its roots in the philosophical tradition of viewing language and

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110. *Id*. at 57–58.
111. *Id*. at 57.
112. *Id*.
113. *Id*.
114. *Id*. at 58.

meaning as fundamentally *conventional*. That is, it views meaning as a function of the way language is *used*.[115] Such a view of language was given much force in the analytic tradition of philosophy by the later works of Ludwig Wittgenstein.[116] Accordingly, discerning meaning is largely an investigative process in which one looks at particular instances of language use—or as Wittgenstein would say, "[D]on't think, but look!"[117] However, the claim that meaning is conventional usage runs counter to another view with an equally distinguished pedigree: the causal theory of reference. Briefly, the causal theory of reference claims that the semantic content of a certain class of terms—such as "water," "tiger," and possibly "justice"—is fixed, not by mental states or conventional use, but by a causal connection to the entities to which they refer. This is the view that, as Hilary Putnam put it, "[M]eaning[] just ain't in the head!"[118] For full-blooded moral realists, these relevant entities include *moral* entities, or *moral* facts.

A. What Is Moral Realism?

Moral realism in its robust form is the view that there are moral facts—that "moral terms refer to real properties in the world."[119] This means that "hard-core" moral realists believe that claims such as "Napalming babies is bad" and "Buying and selling each other is depraved" purportedly report facts in much the same way the

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115. *See id.* at 51 ("[T]he relevant question in the recognition or discovery[] of clause meaning is, 'How would the Constitution of 1789 have been understood by a competent speaker of American English at the time it was adopted?'").

116. *See* LUDWIG WITTGENSTEIN, THE BLUE AND BROWN BOOKS 4 (1958) ("[I]f we had to name anything which is the life of the sign, we should have to say that it was its *use*."); LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 20 (G.E.M. Anscombe trans., 1953) [hereinafter PHILOSOPHICAL INVESTIGATIONS] ("For a *large* class of cases—though not for all—in which we employ the word 'meaning' it can be defined thus: the meaning of a word is its use in the language."). For a helpful summary of Wittgenstein's views on language, see Anat Biletzki & Anat Matar, *Ludwig Wittgenstein*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Nov. 8, 2002), https://plato.stanford.edu/archives/fall2016/entries /wittgenstein/ (last visited Nov. 19, 2018).

117. PHILOSOPHICAL INVESTIGATIONS, *supra* note 116, at 31.

118. 2 HILARY PUTNAM, *The Meaning of 'Meaning,' in* MIND, LANGUAGE AND REALITY: PHILOSOPHICAL PAPERS 227 (1975) (italics omitted).

119. Jaegwon Kim, *Moral Kinds and Natural Kinds: What's the Difference—for a Naturalist?*, 8 PHIL. ISSUES 293, 293 (1997); *Moral Reality*, *supra* note 6 (defending moral realism against its major objections); *Moral Reality Revisited*, *supra* note 6 (advancing a positive argument in favor of moral realism, particularly in relation to legal institutions).

claim "Malcolm has red hair" reports a fact.[120] These claims are true so long as they correspond to the facts as they are—if they "get the facts right."[121] So just as "Malcolm has red hair" is true if and only if it corresponds to the factual existence of someone named "Malcolm" whose hair is red, the claim "Napalming babies is bad" is true if and only if it corresponds to the factual existence of moral properties—here "badness"—that reflect it.[122] Like empirical facts, moral facts are objective. That is, they exist, and claims about them are true or false, independent of our opinions, feelings, and attitudes about them. If this picture of morality and moral claims appeals to you, then you are likely a moral realist.[123]

As described, hard-core moral realism is a theory that bears upon metaphysics, truth, and language. Moral realism implies a form of metaphysical realism. Metaphysics is the philosophical investigation of "what there is" or what exists.[124] The domain of entities that exist is called an "ontology." Thus, a metaphysical realist is a person who believes that there are such things as cats, trees, and rocks. This means that she is ontologically committed to the existence of such entities—she is committed to an ontology that

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120. Geoff Sayre-McCord, *Moral Realism*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Oct. 3, 2005), https://plato.stanford.edu/archives/spr2015/entries/moral-realism/ (last visited Nov. 19, 2018). The first two examples are taken from Arthur Allen Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229, 1249 (1979); *see also Moral Reality*, *supra* note 66; *Moral Reality Revisited*, *supra* note 6.

121. Sayre-McCord, *supra* note 120.

122. Note that relevant moral properties may vary according to the moral theory to which one subscribes—napalming babies may reflect the moral property of badness because it violates divine command, because it violates the Categorical Imperative, or because it works to the detriment of some objective utilitarian conception of the Good.

123. Although belief in moral realism is thought to be naïve or passé in some disciplines and academic communities, some form of moral realism—whether it be the robust kind described here or a weaker version of it—is still well received by many philosophers. *See, e.g.*, PAUL A. BOGHOSSIAN, FEAR OF KNOWLEDGE: AGAINST RELATIVISM AND CONSTRUCTIVISM (2007).

124. *See* Willard V. Quine, *On What There Is*, 2 R. METAPHYSICS 21 (1948). This description of metaphysics is, of course, abbreviated and inadequate. Unfortunately, metaphysics as a discipline resists simple definition because the nature of its questions has substantially changed over the course of its history. Ancient and medieval metaphysics investigated concepts including "being as such," "first causes," and "substance." In contrast, contemporary metaphysics investigates concepts such as modality, space and time, and causation as it relates to freedom and determinism. For a more detailed accounting of metaphysics' questions and historical development, see Peter van Inwagen & Meghan Sullivan, *Metaphysics*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Sept. 10, 2007), https://plato.stanford.edu/entries/metaphysics/ (last visited Nov. 19, 2018).

includes cats, trees, and rocks.[125] The metaphysical realist also believes that at least some of the entities within her ontology, such as cats, exist objectively,[126] though she may admit that some entities—like imaginary numbers, unicorns, and square circles—exist only subjectively. Thus, she believes that cats exist and that they would continue to exist independent of any observer's subjective thoughts or opinions about them.[127] A full-blooded moral realist believes that moral entities exist; therefore, moral entities—like "goodness," "wrongness," "justice," and "evil"—make up at least part of a moral realist's metaphysical ontology.[128] Thus, the moral realist believes that "evil" exists regardless of her or anyone else's beliefs about it or the individuals or acts that embody it. Another way to say this is that the moral realist is a metaphysical realist about the class of moral entities.

Due to its commitment to the existence of moral entities, a fully developed theory of moral realism includes theories of truth and meaning, which is important for our purposes because of their apparent conflict with the claims of Semantic Originalism. Michael S. Moore, in his book *Educating Oneself in Public: Critical Essays in Jurisprudence*,[129] formulates five aspects of a broad account of metaphysical realism that apply to the full-blooded moral realist, two of which are important to my argument here.[130] First, as has been discussed, a realist will have an ontology that maintains that moral facts exist and that they are objective.[131] And second, the hard-core moral realist will hold a causal theory of meaning.[132] It is

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125. Alexander Miller, *Realism*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., July 8, 2002), https://plato.stanford.edu/entries/realism/ (last visited Nov. 19, 2018).

126. *Id.*

127. *Id.*

128. Not all moral realists are full-blooded ones. Take, for example, quasi-moral realists. *See, e.g.*, SIMON BLACKBURN, ESSAYS IN QUASI-REALISM (1993).

129. MICHAEL S. MOORE, EDUCATING ONESELF IN PUBLIC: CRITICAL ESSAYS IN JURIS-PRUDENCE (2000).

130. *See The Interpretive Turn, supra* note 6, at 338.

131. *See id.* at 342.

132. *Id.* at 343. The other three aspects are (1) she will hold a correspondence theory of truth, "according to which the meaning of 'is true' is given by the correspondence of some sentence *s* to some mind and convention-independent state of affairs[]"; (2) the full-blooded moral realist will adhere to a classical theory of logic, which includes the law of non-

this second aspect of metaphysical and moral realism that flies in the face of Semantic Originalism.

B. Fixing Semantic Content: Natural Kinds and Moral Kinds

1. What is a causal theory of meaning?

The causal theory of meaning as developed by Saul Kripke and Hilary Putnam "aim[s] to explain meaning in terms of the relations between expressions and the objects and properties they represent[,]" like the relationship between the word "tiger" and actual flesh-and-blood tigers existing in the natural world.[133] In other words, a causal theory of meaning purports to explain the causal connection between word signs and their meanings. For a metaphysical realist, such a theory has three basic claims. First, terms like "water," "tigers," and "polio" refer to natural kinds.[134] Thus, natural kind terms purportedly refer to real—typically physical—entities that make up the "furniture of the universe."[135] Second, the fact that a natural kind exists *causes* us to assign a name to it.[136] For instance, because the periodical element *gold* (Au) exists, we give it the common name "gold." And third, the meaning (semantic content) of natural kind terms like "gold" is given by the nature and identifying properties of the kind, in this case the essential properties of *gold*.[137] In other words, according to the realist's theory, real entities in the world *cause* the meaning of their respective terms.

One of the most well-known and illustrative arguments in favor of causal meaning of natural kinds is Hilary Putnam's "Twin Earth"

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contradiction and the law of excluded middle; and (3) the moral realist will adhere to a truth-conditional theory of the meaning of sentences. *Id.* at 342–43.

133. Jeff Speaks, *Theories of Meaning*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Jan. 26, 2010), https://plato.stanford.edu/entries/meaning/#CauOri (last visited Nov. 19, 2018); *see also* SAUL A. KRIPKE, NAMING AND NECESSITY (1980); SAUL A. KRIPKE, *A Puzzle About Belief*, *in* MEANING AND USE (A. Margalit ed., 1979); PUTNAM, *supra* note 118.

134. *See, e.g.*, *The Interpretive Turn*, *supra* note 6, at 343.

135. *Id.* at 335.

136. *See id.* at 343.

137. *See id.* Again, I will generally use quotation marks—e.g., "gold"—to refer to natural or other kind terms, and italics—e.g., *gold*—to refer to the entity to which the natural or other kind term refers. *See also supra* note 41.

thought experiment.[138] Putnam presents the hypothetical scenario that in 1750 there was a remote planet, Twin Earth.[139] Twin Earth is, for all intents and purposes, identical to real Earth (our Earth) in every way except one: whereas water on real earth is composed of H_2O molecules, water on Twin Earth is composed of a different substance, the chemical compound XYZ.[140] Despite this difference in molecular structure, all other observable properties of Earth water and Twin Earth water are exactly the same: they look, taste, feel, and sound the same.[141] Moreover, both people on Earth and their counterparts on Twin Earth use the term "water" to refer to Earth water ("$water_E$") and Twin Earth water ("$water_{TE}$"), respectively. In other words, a casual observer from either world would never know the difference between $water_E$ and $water_{TE}$.[142] In fact, because no one on Earth or Twin Earth knew the molecular structure of $water_E$ or $water_{TE}$, it would be impossible for anyone at the time to distinguish them.

Putnam then posits a "typical Earthian English speaker" named $Oscar_1$ and his Twin Earth counterpart, $Oscar_2$.[143] Both Oscars are exact duplicates: they share the same physical and mental states and properties—right down to their inner monologues—including those having to do with water.[144] But, Putnam claims, the extension of "water" on Earth as H_2O was no different in 1750 than in 1950, just as the extension of "water" on Twin Earth as XYZ was no different in 1750 than in 1950.[145] Therefore, if $Oscar_1$ had pointed to a sample of $water_{TE}$ and said, "That is water," he would have made a mistake—a semantic error.[146]

2. Causal meaning and moral kinds

Because a full-blooded moral realist is ontologically committed to moral facts as real entities, she will similarly hold to a causal

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138.   PUTNAM, *supra* note 118, at 224; *see also* Joe Lau & Max Deutsch, *Externalism About Mental Content*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Oct. 21, 2002), https://plato.stanford.edu/entries/content-externalism/ (last visited Nov. 19, 2018).
139.   PUTNAM, *supra* note 118, at 224.
140.   *Id.*
141.   *Id.*
142.   *Id.*
143.   *Id.*
144.   *Id.*
145.   *Id.*
146.   *Id.*

meaning theory for terms that denote moral entities. Thus, the moral realist adheres to the following claims that parallel those of the metaphysical realist: (1) words like "goodness," "justice," and "equality" refer to the moral kinds of *goodness*, *justice*, and *equality*; (2) the fact that moral kinds exist causes us to give them common names; and (3) the semantic content of moral kind terms is given by the essential properties of its corresponding kind—e.g., the meaning of "justice" is fixed by the nature of *justice*, the entity to which it refers. Therefore, according to hard-core moral realism, the semantic content of moral kind terms is fixed and given not by historical context and conventional usage of the term—as Semantic Originalism argues—but by the nature of the moral object, a real entity making up part of the world.

IV. SEMANTIC ORIGINALISM V. MORAL REALISM AND CAUSAL MEANING THEORY

A. The Tension Squarely Stated

Solum recognizes the potential problem posed to Semantic Originalism by moral realism and its implicit commitment to the causal theory of meaning:

> [The Constitution] does include several words and phrases that could be understood as having moral content, for example, "freedom of speech," "cruel and unusual punishment," and "equal protection of the laws." . . .
>
> If the constitution employs moral kind terms, then moral reality and not semantic conventions fixes their meaning given conventions that attach a word or phrase to the kind. *Conventions do the attaching of the word to the moral kind, but moral reality and not the convention fixes the nature of the kind*.[147]

Thus, what is at stake is the central role of the clause meaning thesis. In broad terms, the basic narrative of Semantic Originalism can be summarized in two propositions: (1) the clause meaning of the constitutional text is the law *as a matter of linguistic fact*;[148] therefore (2) we are morally obligated to follow the clause meaning

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147. Solum, *supra* note 1, at 94–95 (italics added).
148. *See id.* at 173.

of the constitutional text in legal practice.[149] If, however, the meaning of the constitutional text is largely determined by natural or moral kinds (and perhaps even legal kinds), then premise (1) fails because the clause meaning is not the law as a matter of linguistic fact, and therefore premise (2) would no longer follow.

What makes this consequence potentially distressing to the Semantic Originalist is that contemporary legal practice—both interpretation and construction—may effectively ignore the original public meaning of the constitutional text wherever the text instantiates moral kinds. Just as our understanding of the nature of gold is determined by our best scientific theory of the elements, our understanding of the nature of "freedom of speech," "cruel and unusual punishment," and "equal protection under the law" will have to be determined by our best moral theories. Solum suggests that "person" is a natural kind term,[150] but the question of "What constitutes a person?" is one that is deeply embedded in some of our fiercest moral debates. "Person" appears throughout the constitutional text, so the implications of understanding "person" as a moral kind appear to have potentially dramatic consequences for constitutional practice in contemporary legal debates.

B. The Compatibility of Clause Meaning and Natural/Moral Kinds

Surprisingly, Solum's primary response is not that meta-physical and moral realism are wrong, nor that natural and moral kinds do not exist, nor that the causal theory of meaning is deficient—indeed, he does not criticize any aspect of these theories except to acknowledge that they might seem "radical" on first blush.[151] Instead, he argues that apparent conflict is not genuine; it is a complication, but one that can be solved by a modification to the theory, much like the modification of constitutional implicature or constitutional stipulations.[152]

To demonstrate the compatibility of clause meaning and natural kinds, Solum presents a thought experiment involving a hypothetical gradual shift in meaning of the constitutional term

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149. *See id.*
150. *Id.* at 94.
151. *Id.*
152. *Id.*

"speech."[153] "Speech" can plausibly be understood to be a natural kind term referring to "oral human communication defined in terms of naturally occurring human capacities to produce sounds and linguistic capacities that are inherent to the human species."[154] Solum invites us to imagine that, over the course of time, "speech" gradually comes to be used to refer to the lyrics of rap music.[155] After even more time, and more deviant uses, "speech" loses its old meaning and now refers only to the beat of rap music.[156] According to Solum, the role of conventional use—clause meaning—is readily apparent: although the semantic content of the First Amendment would remain the same, referring to the natural kind, conventional use has given the word "speech" new meaning.[157] Inasmuch as this is true, both theories of meaning are correct, both are compatible, and "the relationship is a function of [the] complex set of conventions that constitute the natural language English."[158]

The problem with Solum's example is that it does not really save Semantic Originalism *qua* Semantic Originalism—the robust theory of clause meaning as the true meaning of the Constitution as a matter of linguistic fact. The clause meaning thesis holds that the semantic content of the Constitution is fixed, or given, by its ordinary public meaning at the time of its adoption. Thus, the clause meaning thesis is true only if original public meaning—and not something else—fixes the semantic content of a constitutional provision. In Solum's example, however, the semantic content is not fixed by the original public meaning of "speech." Rather, it is fixed by the natural kind *speech*. Moreover, "speech" in its new sense, *beat*, seems not to be referring to a conventional meaning but instead to a new natural kind: *the beat of rap music* and its essential properties, whatever those are. In turn, Semantic Originalism—or more specifically clause meaning—merely assists us in identifying which natural kind we should look to.

Putnam makes essentially the same point in his Twin Earth argument:

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153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.*

Note that there is no problem about the extension of the term 'water'. The word simply has two different meanings (as we say): in the sense in which it is used on Twin Earth, the sense of water$_{TE}$, what *we* call 'water' simply isn't water; while in the sense in which it is used on Earth, the sense of water$_E$, what the Twin Earthians call 'water' simply isn't water. The extension of 'water' in the sense of water$_E$ is the set of all wholes consisting of H$_2$O molecules, or something like that; the extension of water in the sense of water$_{TE}$ is the set of all wholes consisting of *X Y Z* molecules, or something like that.[159]

Thus, continuing Putnam's example, if we were to compare written texts from Earth and Twin Earth discussing "water," the clause meaning would be helpful only as a means to identify whether we should understand "water" to refer to water$_E$ or water$_{TE}$: the ordinary public meaning of "water" on Earth would pick out water$_E$, while on Twin Earth it would pick out water$_{TE}$. But the semantic content—or as Putnam says, the "extension"—of "water" in either instance is determined by the referred to natural kind (either *H$_2$O* or *XYZ*). Likewise, returning to Solum's example, if we were to compare the constitutional text to a text from Solum's hypothetical future, clause meaning would be helpful only to identify which natural kind, *speech* or *beat*, we should look to in order to provide relevant semantic content.

If this is correct, then the only work that conventional meaning appears to be doing is to help disambiguate which sense of a word is being used; or rather, which natural kind fills the word's semantic content. This is to assign a completely different role to original public meaning. And it is one that displaces the central role of clause meaning as the essential provider of semantic content. Solum's accommodation has placed natural kinds and causal meaning center stage in the theatre of interpretation and has reassigned original public meaning's role from lead to usher.

C. The "Essential Thrust" of Semantic Originalism

A better example that Solum gives involves the term "freedom of speech."[160] It is possible that "freedom of speech" is ambiguous.

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159.   PUTNAM, *supra* note 118, at 224.
160.   Solum, *supra* note 1, at 95 n.274.

It may be a moral kind term, but it might have also been the case that the original public meaning referred to "a different entity": "the conception of freedom of speech embodied in legal practice."[161] This second sense would be a meaning given by the conventions of legal practice. Bracketing the question of legal kinds,[162] Solum's basic argument is that even if we accept that natural and moral kinds fix the meaning of the constitutional text, they do not *exhaust* the meaning of the Constitution because there are still provisions whose meaning will be conventionally defined.[163] So long as this is true, then the clause meaning thesis and Semantic Originalism still hold true.

The reason, then, that Solum does not see natural and moral kinds to be threatening to Semantic Originalism is that the implications of a causal theory of meaning are in line with Semantic Originalism's ultimate goal: "The essential thrust of the view argued for [Semantic Originalism] requires only that the Constitution have semantic content that is not indeterminate."[164] A causal semantic theory of natural and moral kinds is one that claims that meanings are determinate because natural and moral reality never "run out." Thus, "there is always a 'fact of the matter' regarding the correct application of a natural kind term."[165]

If this is truly all that Semantic Originalism is after—interpretation governed by determinate linguistic facts, *whatever those facts may turn out to be*—then he is correct, and a causal semantic theory of natural and moral (and legal) kinds poses no threat. So long as something—*anything*—is doing the hard labor of meaning fixation, causal meaning and clause meaning and all other theories of determinate meaning coexist peacefully in the grand work of defining the constitutional text. But the scope and depth of Solum's arguments speak to a purpose much more ambitious than that modest claim. The premises of Semantic Originalism purport, not to stand like a fair attendant to ensure that semantic theories

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161. *Id.* at 95 n.274.

162. It may turn out that the survival of Semantic Originalism, and of the clause meaning thesis in particular, depends on its ability to resist increasingly realist commitments to causal entities.

163. *See* Solum, *supra* note 1, at 94.

164. *Id.*

165. *Id.* Michael Moore calls this the "'right answer' thesis." *The Interpretive Turn*, *supra* note 6, at 338–39.

meet the minimum height requirements to ride the grand train of constitutional interpretation, but to demonstrate what the relevant linguistic facts really *are*. That is, Solum wrote his comprehensive 173-page article to convince us that clause meaning really is the supreme law of the land embodied in the constitutional text. As such, Semantic Originalism is no less than original public meaning originalism's claim to the throne by the immutable right of linguistic fact. Because of this, to accommodate moral kinds by accepting that Semantic Originalism or the clause meaning thesis is one—not even first—among equals in the way that Solum suggests is, it seems to me, to essentially give up the game.

A modification to Semantic Originalism to "absorb"[166] natural and moral kinds into the clause meaning thesis cannot rightly be understood as a minor alteration. The other modifications to the clause meaning thesis—publicly available constitutional context, division of linguistic labor, constitutional implicature, and constitutional stipulation—are all acceptable amendments to the clause meaning thesis because none of them displaces clause meaning as the ultimate source of semantic content. Even constitutional implicature, according to which the Constitution may have legitimate semantic content that is not found within the text itself, still appears to depend on some form of discerning semantic content via conventional meaning. However, an amendment to account for natural and moral kinds does not help to refine the application of clause meaning—it *overrides* it. 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 by linguistic facts, whatever they are. And once the conceptual space for alternative means of fixing meaning is opened up, the role of clause meaning logically diminishes as our best linguistic theories present more ways to fix the semantic content of language. The clause meaning thesis will always be on the run, so to speak.

The picture of a Semantic Originalism that accommodates a causal theory of meaning then looks substantially different. It might be portrayed along the lines of these modified theses:

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166. Solum, *supra* note 1, at 95.

(1) The semantic meaning of constitutional provisions is fixed by linguistic facts;
(2) The original public meaning of constitutional provisions is a clue to determining what those linguistic facts are;
(3) The semantic meaning of the Constitution given by those linguistic facts contributes to the law;
(4) Because the semantic meaning of the Constitution is the supreme law of the land, we are obligated by them barring contrary moral factors.

Notice that theses (3) and (4) are equivalents to the contribution thesis and the fidelity thesis, but theses (1) and (2) are substantially different from their counterparts. Thesis (1), like the fixation thesis, claims that the semantic meaning of constitutional provisions is fixed by linguistic facts, but it leaves open what those facts are, so it can accommodate a variety of different linguistic theories. One can imagine that these facts will be filled with assertions about the properties of various kinds of terms: the semantic content of natural kind and moral kind terms is causal and determined by the nature of those kinds, the semantic content of conventional kinds is determined by the conventions at the time of utterance, and so on. Thesis (2) is a substantial modification to the clause meaning thesis—it maintains an important role for original public meaning, but that role is not the fixation of semantic meaning. Its role is limited to that of a tool to help determine the relevant linguistic facts.

Thus, Semantic Originalism can be squared with moral realism only by removing from Semantic Originalism its most characteristic feature—that the semantic meaning of the constitutional text is the ordinary public meaning of its provisions at the time it was drafted and ratified, and that we are bound by this recovered meaning. The upshot of this new version of Semantic Originalism is not that it demonstrates that the current version of Semantic Originalism is false, but rather that Semantic Originalism has its conceptual priorities misplaced. In other words, clause meaning is not eliminated, it has just been removed from its pedestal. Room must be made for the complex conventions of natural language and the variety of ways it achieves fixed semantic meaning.

V. CONCLUSION

The topic of this Comment sits at the intersection of legal theory, philosophy of language, metaethics, and metaphysics. I take this to be an inescapable result of a few nearly incontestable facts. First, constitutional law is the supreme law of the land and cannot be ignored. Second, law is given in legal texts, which are a subset of all texts, which is itself a subset of language, so a deficient understanding of what language is and how it works will necessarily lead to a deficiency in our legal practice and, likely, in the legislation of new laws. Third, law is inherently normative, and normativity falls in the domain of ethics and metaethics. And finally, we all live in a world together and our understanding of anything is going to be dictated in no small part by that world and what we believe that world to consist of.

The essential premise at the heart of Semantic Originalism is the claim that, as a theory of interpretation, it gets to the heart of constitutional law as a matter of linguistic fact. That is, to disagree with Semantic Originalism is to disagree with an understanding of what the constitutional text literally means. The meaning of the text, according to Semantic Originalism, is its ordinary public meaning at the time of its adoption. However, inasmuch as the Constitution makes use of moral terms like "person" or "equal protection," and insofar as one is committed to moral facts and values as independent and objective entities, Semantic Originalism fails to adequately account for the actual meaning of those terms. And an attempt to modify Semantic Originalism to account for the existence of objective moral reality fundamentally displaces original public meaning as the governing principle of constitutional interpretation and construction.

Ash McMurray[*]

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[*]   J.D., April 2018, J. Reuben Clark Law School, Brigham Young University.