

Articles

ORIGINALISM'S MISPLACED FIDELITY: "ORIGINAL" MEANING IS NOT OBJECTIVE

*Tara Smith**

I. INTRODUCTION

Although Originalism has been systematically critiqued and repudiated by a number of scholars in law and philosophy, it has proven an impressively resilient doctrine. It is not hard to understand why. Its basic thesis—that the meaning of the Constitution should be settled by reference to the original understanding of those who enacted it—can seem to embody the very essence of fair play, expressing as straightforward an obligation as the obligation to keep one's word or to abide by the rules of a game one has entered into. Regardless of what various alternative theories of proper interpretive method may propose, it is difficult to stray far from the pure, fair-minded appeal of the Originalist brand of respect for the rule of law. Don't we *have* to be faithful to what the lawmakers were doing? To what they took themselves to be doing? Surely it would be wrong to set that aside and declare: "different times, different rules," without formally changing those rules through the prescribed procedures. To claim to be following written laws while departing from what the writers meant by them would actually eviscerate those laws, "respecting" the law in name only. Originalism insists that the rule of law requires fidelity on the part of those who apply the law to those who make the law. "Unlike the democratic visionaries, the rights theorists, or the natural lawyers," Keith Whittington has observed, "originalists do not look past the Constitution to a larger and prior moral commitment."¹ Rather, Originalism is faithful to the

* Professor, Department of Philosophy, University of Texas at Austin.

1. KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION—TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 44 (1999).

Constitution itself, however commendable or flawed it may be. To the extent that we sincerely seek to *interpret* the law, Originalists contend, their methodology is the only means of doing so.²

In this paper, I wish to examine two recently articulated and very persuasive defenses of a particular, resurgent form of Originalism. The reasons for doing so require a little more background.

II. THREE SCHOOLS OF ORIGINALISM

Originalism, again, is the thesis that the meaning of the Constitution should be settled by reference to the original understanding of those who enacted it.³ Joseph Story, in his widely read *Commentaries on the Constitution*, provides a clear statement of this principle: “the first and fundamental rule in the interpretation of all instruments is, to construe them according to the sense of the terms, and the intention of the parties.”⁴ A few decades later, we see Originalism at work in Justice Roger B. Taney’s majority opinion in *Dred Scott v Sandford*, explaining that the Constitution “speaks not only with the same words, but with the same meaning and intent with which it spoke when it came from the hands of the framers, and was voted on and adopted by the people of the United States.” Correlatively, Taney held that the “duty of the court” is to interpret the Constitution “as we find it, according to its true intent and meaning when it was adopted.”⁵

In more recent years, scholars have heeded the difference between reliance on the original intent behind certain language

2. *Id.* at 218. Whittington distinguishes interpretation from constitutional “construction.” *Id.* at 7–15; see also RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION 118–25 (2004). Originalism’s durability is probably also a reflection of its competition. It takes a theory to beat a theory. Barnett has observed, and the shortcomings of alternatives have often seemed only too apparent. *Id.* at 92. Without a clearly superior replacement, thinkers frequently return to Originalism, attempting to carve out an enhanced and fortified version of it. For a brief discussion of the failings of several non-Originalist theories, see Tara Smith, *Why Originalism Won’t Die: Common Mistakes in Competing Theories of Judicial Interpretation*, 2 DUKE J. CONST. L. & PUB. POL’Y 159, 230–87 (2007).

3. My focus will be on interpretation of the Constitution, although much will apply to statutory and regulatory interpretation, as well.

4. 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, § 400, at 305 (1833). Story’s volume went through several editions and foreign translations throughout the 19th century.

5. *Dred Scott v. Sandford*, 60 U.S. 393, 405 (1856).

and reliance on the language itself.⁶ What a person intends and what he actually says or writes are not always the same thing. Intentions can be much more difficult to ascertain and can vary considerably among different lawmakers. For these reasons, most Originalists have moved away from the Original Intent view, agreeing with Antonin Scalia that “men may intend what they will; but it is only the laws that they enact that bind us.”⁷

While Scalia offers many valid criticisms of the Original Intent school, his own “Textualism,” which contends that laws’ meanings are contained within the words alone, rests upon serious misunderstandings of the nature of meaning. While these have been devastatingly exposed elsewhere, what is of immediate relevance is that the emphatic failings of Scalia’s theory make it tempting to conclude that since even this better form of Originalism ultimately fails, Originalism itself must be a dead letter.⁸ The recent work of Whittington and Randy Barnett, however, makes clear that such a conclusion would be premature. Whittington specifically criticizes Scalia’s naïve

6. Notice that both Story and Taney refer to intent, as have many other Originalists. William Blackstone wrote that “the fairest and the most rational method to interpret the will of the legislator, is by exploring his intentions at the time when the law was made, by signs the most natural and probable.” 1 WILLIAM BLACKSTONE, COMMENTARIES *59. In English common law, the Chief Justice of the King’s Bench in 1611 wrote that words “shall be taken according to the . . . intent of the parties,” as quoted in JAMES A. COLAIACO, FREDERICK DOUGLASS AND THE FOURTH OF JULY 100 (2006). More recently, Robert Bork has written that “a judge is to apply the Constitution according to principles intended by those who ratified the document.” ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 143 (1990).

7. ANTONIN SCALIA, A MATTER OF INTERPRETATION 17 (1997). Barnett credits Lysander Spooner with similar insights. BARNETT, *supra* note 2, at xiii. For more discussion of this difference, see Smith, *supra* note 2. I do not mean to imply that all the figures quoted or who have ever referred to intent in explaining Originalism were aware of this distinction and deliberately chose to adopt Original Intent Originalism. Bork, in particular, explicitly denied that authors’ subjective intentions are what is pertinent. BORK, *supra* note 6, at 144. Once the difference is recognized, however, an Originalist does need to clarify exactly which form he embraces.

8. Among the many damning criticisms of Scalia are Paul Brest, *Interpretation and Interest*, 34 STAN. L. REV. 765, 765–73 (1982) (arguing that judges must interpret the “social” as well as the written text); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 228–38 (1980) (arguing that non-Originalist interpretation better serves constitutional disputes than originalist interpretation.); Ronald Dworkin, *Comment*, in SCALIA, *supra* note 7, at 115–27; Richard A. Epstein, *A Common Lawyer Looks at Constitutional Interpretation*, 72 B.U. L. REV. 699 (1992); David Sosa, *The Unintentional Fallacy*, 86 CAL. L. REV. 919 (1998) (arguing that the plain meaning approach does not apply well to novel circumstances and that language is often underdefined); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 504 (1989) (arguing that “language ‘by itself’ lacks meaning”); Laurence Tribe, *Comment*, in *id.* at 65–94; Posting of Timothy Sandefur to Positive Liberty, <http://www.positiveliberty.com/2005/11/scalias-basic-contradiction-or-words-mean-a-potentially-infinite-number-of-things.html> (Nov. 3, 2005); see also Smith, *supra* note 2.

portrait of language and recognizes that language does not carry meaning apart from intentions, as Scalia maintains. “Written words cannot speak for themselves,” Whittington observes. A text cannot be taken as autonomous; we cannot dismiss intent entirely.⁹

Moreover, a third form of Originalism, the “Original Meaning” or “Public Understanding” school, has recently been gaining a striking measure of academic respect, increasingly embraced not only by those one might expect (conservatives frustrated by the failure of its Intent and Textualist cousins), but by figures from across the ideological spectrum. A number of liberal constitutional theorists in the past several years have, on essentially Originalist grounds, come to interpret the Second Amendment as protecting an individual’s right to bear arms rather than a state’s collective right to arm militias. (Sandy Levinson, Laurence Tribe, and Akhil Amar are among these figures.)¹⁰ John O. McGinnis and Michael B. Rappaport have argued that Originalism is the most sensible interpretive method for legal Pragmatism to endorse.¹¹ Jack Balkin has recently embraced the core Originalist premise in a piece arguing that the right to abortion is based on the original meaning of the constitutional text.¹² Balkin avers that “constitutional interpretation requires fidelity to the original meaning of the Constitution and to the principles that underlie the text”¹³ and he observes that “many different scholars from different political perspectives have embraced the idea that constitutional interpretation should be grounded in the text’s original meaning.”¹⁴

9. WHITTINGTON, *supra* note 1, at 99, 177, 210. For some of the offending Scalia on this, see Antonin Scalia, *Law & Language*, FIRST THINGS, Nov. 2005, at 44 (reviewing STEVEN D. SMITH, *LAW’S QUANDARY* (2004)).

10. Adam Liptak, *A Liberal Case for Gun Rights Helps Sway Federal Judiciary*, N.Y. TIMES, May 7, 2007, at A18 (discussing *Parker v. Dist. of Columbia* 478 F. 3d 370 (D.C. Cir. 2007), among others cases); see Sandy Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989). In different forms, it is sometimes called New Originalism or Progressive Originalism.

11. John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 101 NW. U. L. REV. 383–98 (2007).

12. Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291 (2007).

13. *Id.* at 293.

14. Balkin cites Amar, Dworkin, and Kermit Roosevelt as among those embracing “the idea that constitutional interpretation should be grounded in the text’s original meaning.” *Id.* at 295 & n.8. For further discussion of this phenomenon, see BARNETT, *supra* note 2, at 91–94; James E. Fleming, *Fidelity to our Imperfect Constitution*, 65 FORDHAM L. REV. 1335 (1997); Jack Rakove, *Fidelity Through History (or to It)*, 65 FORDHAM L. REV. 1587 (1997).

This Public Understanding school is generally regarded as a much more viable form of Originalism, largely on the grounds that it offers an objective framework for understanding what the law is.¹⁵ In the words of Barnett, Public Understanding Originalism represents an advance “from subjective to objective meaning.”¹⁶ It “seeks the public or objective meaning that a reasonable listener would place on the words used in the constitutional provision at the time of its enactment.”¹⁷ Those words should be interpreted as a normal speaker of the language would have understood them at that time.¹⁸ Whittington agrees that “the critical originalist directive is that the Constitution should be interpreted according to the understanding made public at the time of the drafting and ratification.”¹⁹ What unites all forms of Originalism is deference to history: It is facts about what was intended, written, or understood in the past that decide the meaning of laws that contemporary judges are to apply. Whereas the Original Intent and Textualist forms of Originalism do not deliver objective meaning, the distinctive strength of Public Understanding Originalism, allegedly, is that it does.²⁰

In this paper, I shall address the two strongest defenses of Public Understanding Originalism that I am aware of. The first, embraced by Whittington, is what I will call the Popular Sovereignty Argument and the second, embraced by Barnett, as well, I will call the Written Constitution Argument. I hope to show that these efforts, while apparently going a further distance toward establishing Originalism than others, nonetheless fail to vindicate it. Indeed, we shall find that on analysis, the Public Understanding school proves every bit as subjectivist as the “living constitution” theories that all Originalists wish to oppose.²¹ My thesis, in essence, is that to the extent that

15. BARNETT, *supra* note 2, at 92, 94.

16. *Id.* at 94.

17. *Id.* at 92.

18. *Id.* at 89.

19. WHITTINGTON, *supra* note 1, at 35.

20. For an explanation of how Textualism collapses into subjectivism, see Smith, *supra* note 2, at 269–80.

21. The type of view that Originalists seek to defeat is reflected in H.L.A. Hart's claim that “a judge must act as a conscientious legislator would by deciding according to his own beliefs and values,” and Kermit Roosevelt's contention that courts must use “doctrine” rather than constitutional meaning and that “doctrine can be legitimate even if it goes beyond the meaning of the constitution.” (Balkin's characterization of Roosevelt as an Originalist, I think, employs rather too loose a standard.) H.L.A. HART, *THE CONCEPT OF LAW* 273 (1994); KERMIT ROOSEVELT, *THE MYTH OF JUDICIAL ACTIVISM* 42, 73 (2006); Bruce Ackerman and John Hart Ely defend theories that are even more paradigmatic of the “living constitution” view. See 1 BRUCE ACKERMAN, *WE*

Originalism does reflect an undeniable truth, that truth concerns a comparatively innocuous claim. Its fidelity is misplaced insofar as it is directed at “original” meaning rather than at the law’s objective meaning. The latter is what the rule of law truly demands. Indeed, as a result of what Public Understanding Originalism takes the original meaning of laws to be, it actually fails to provide an account of how judges are to apply the law—the very thing that it purports to be a theory of. That is, while Originalism plainly advocates a *goal* for legal interpretation (“stick to the original meaning of the Constitution”), it does not offer a method for how to achieve that goal. Yet the central dispute over adjudication concerns how judges are to interpret and apply the law. Despite its admirable aspirations, in short, Originalism does not deliver the objective application of law that the rule of law demands.²²

I shall begin by presenting the two arguments for Public Understanding Originalism and then proceed to critique each, in turn. We will see how Originalism treats words’ original meaning in a way which is at odds with words’ objective meaning.²³

III. THE POPULAR SOVEREIGNTY DEFENSE OF ORIGINALISM

The first argument grounds Originalism in the roots of popular sovereignty. (This is not a novel argument so much as one that is revitalized in Whittington’s presentation, which rests

THE PEOPLE: FOUNDATIONS (1991): 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (1998); JOHN HART ELY, DEMOCRACY AND DISTRUST (1980).

22. One might insist that Originalism does furnish a method, yet insofar as its “method” amounts to mimicry of an earlier understanding, it hardly provides guidance for how judges are to *interpret* the law. Thus it is not clear that that reading of Originalism would be any more charitable. I will sometimes use “Originalism” as a shorthand for Public Understanding Originalism. It should be clear from the context whether I am using the term in its broader or narrower, Public Understanding sense. While occasionally, my phrasing might be thought to suggest that my target is the Original Intent view rather than Public Understanding Originalism, my contention is that, even though the two arguments under scrutiny claim to support a distinct, Public Understanding brand of Originalism, insofar as these arguments actually rely on the intent of the people who (in the case of the Popular Sovereignty Argument) expressed their will in agreeing to the Constitution and/or the intent of the people who (in the case of the Written Constitution Argument) wrote their will down, insofar that is considered the ultimate reason that we are to abide by the Public Understanding, those people’s intent remains pivotal. What really does the work underneath the Popular Sovereignty and Written Constitution arguments, in other words, is the intent of these “sovereign” people and/or the intent behind this written expression of that intent.

23. I will not address every aspect of Whittington’s and Barnett’s argumentation on behalf of Originalism, but will focus exclusively on these two arguments. Also note that Barnett rejects the Popular Sovereignty Argument. (I will comment further on this later.)

on a more sophisticated understanding of language than is found in many earlier advocates who offered broadly similar arguments.)²⁴ This argument contends that the propriety of Originalism lies in its necessity to preserve the democratic character of our government. More specifically, its propriety lies in the fact that the source of our law's authority rests in the consent of the governed—in the fact that the people agreed to the law. People possess the “right to be governed only in accord with their own consent,” Whittington affirms.²⁵ This is why we seek to maintain a government of and by the people.

When we confront the question of legal interpretation, Originalism, Whittington argues, is the method that is uniquely consonant with this. For Originalism is the only means of applying the law that is faithful to what the people, in enacting laws through their representatives, agreed to. Only Originalism faithfully honors the people's authority to *constitute* their government insofar as the Originalist method upholds the people's expressed will concerning the nature and limits of that government.²⁶ Indeed, “Originalism is not an accidental addition to the constitutional framework but a necessary component of the Constitution's own vitality.”²⁷

As Gregory Bassham has put the case, no people can be truly sovereign if its agents are free to defy their commands by re-interpreting those commands in a way that the people never intended.²⁸ Thus, in Whittington's words, “The fundamental basis for the authority of originalism is its capacity to retain a space for the popular sovereign.”²⁹

Any alternative entirely inverts the proper lines of authority. “[M]ethods that authorize judicial activism in disregard of the intentions of the founders implicitly cast the Court itself in the role of the sovereign, authorized to remake constitutional meaning in accord with some preferred

24. Many non-Originalists, of course, such as Bruce Ackerman, John Hart Ely, Cass Sunstein, Jeffrey Rosen, Adrian Vermeule, and Stephen Breyer, also stress service to democracy in their theories of proper judicial methodology.

25. WHITTINGTON, *supra* note 1, at 155. Strictly, Whittington maintains that it is not consent but “potential consent” that undergirds our constitution. *Id.* at 132 *passim*. While the details of that view are essentially immaterial for our purposes, I will comment further on it in Section 5.

26. *Id.* at 154–55.

27. *Id.* at 152.

28. Gregory Bassham, *It Means What They Said*, 62 REV. POL. 589 (2000) (reviewing WHITTINGTON, *supra* note 1).

29. WHITTINGTON, *supra* note 1, at 154.

conception of the political good.”³⁰ Properly, however, according to Whittington’s line of reasoning, once the sovereign has spoken (through the adoption of a constitution), it is for everyone (judges included) to respect its will. There would be no point in adopting laws if those laws could be changed non-democratically by officials in government who are to be agents of the people, rather than their masters. For judges to alter the meaning of language would clearly deny the people’s right to be *self-governed*. Originalism, in short, is necessary to give effect to the popular will.³¹

We can appreciate the Popular Sovereignty Argument even more fully, I think, if we step back to view its reasoning from a slightly broader perspective. If the Constitution is a text with meaning, as we routinely assume, that meaning was placed there by its authors. The Constitution is a manmade artifact. Consequently, it makes sense to ask what the people who created it were trying to do, in making it. If the Constitution were simply an object found in nature, questions of its animating rationale or the intelligent purposes behind it would not arise. Because the Constitution is a deliberate product of particular men’s thought and action, however—because they wrote *this* Constitution as they did in order to accomplish certain ends—to understand the Constitution and to apply it, we must treat *their* meanings as paramount. To follow any standard other than that would be to defy the people’s authority. It would not respect their authorship of this deliberate, intentional product.

Simply put, since it is not an accident that the Constitution is what it is and says what it says, we must not treat it as if it were by allowing the meanings of its words to be altered by contemporary judges. If we recognize the Constitution as our highest legal authority, then we must abide by what *it* means. And what it means is what it was meant to mean. Its original meaning must stand unless and until it is altered through constitutionally specified procedures.

IV. THE WRITTEN CONSTITUTION DEFENSE OF ORIGINALISM

The other seductive argument for Public Understanding Originalism contends that the Originalist interpretive method is the natural, logical corollary of having a written constitution.

30. *Id.* at 155.

31. *Id.* at 156, 159.

Barnett and Whittington both argue that a written constitution *requires* originalist interpretation.³² As Barnett sees it, “the fact the Constitution was put in writing . . . mandates that its meaning must remain the same until it is properly changed.”³³ By committing our constitution to written words, we make those words our law. By then accepting the Constitution’s sovereignty, we accept that those words constitute our law. When we face questions of properly interpreting and applying the law, accordingly, Originalism provides the only faithful path.³⁴

Part of the reasoning for viewing writtleness as entailing Originalism lies in a simple analogy. Barnett contends that Originalism is motivated on the same grounds that lead to a sort of Originalism in the legal interpretation of contracts.³⁵ When disputes arise concerning the enforcement of contracts, we routinely rely on the public understanding of the contract’s words’ meanings for the simple reason that this is what the parties committed themselves to. (Indeed, this is why virtually all contracts require that any later modifications be made in writing.³⁶) The same should hold in regard to understanding the Constitution, he reasons. The Constitution’s writtleness could no longer provide its benefits if its words could be interpreted in ways that were at odds with their original meanings.³⁷

Observe that this reasoning retains some of the flavor of the Popular Sovereignty Argument. Insisting that we adhere to the public understanding of the time because this is what the people agreed to suggests that that agreement is pivotal. The deeper and more distinctive dimension of the Written Constitution Argument, however, derives from appreciating the deficiencies of an unwritten constitution. The British, famously, have no written constitution. The British constitution is understood as

32. *Id.* at 50 *passim*; BARNETT, *supra* note 2, at 96 *passim*.

33. BARNETT, *supra* note 2, at 96.

34. Barnett cites Madison as holding that we must take the Constitution’s meaning “from the text itself,” “in the sense attached to it by the people.” *Id.* at 98, 99.

35. *Id.* at 100. Barnett does not believe that the Constitution itself is a contract, however.

36. *Id.* at 103, 106.

37. In the case of contracts, Barnett explains, having an agreement written down offers several benefits, such as providing evidence that the transaction did in fact take place; indicating that the contracting parties had the chance to pause and reflect on their actions; encouraging the parties to be deliberate and cautious before making agreements; informing people of the necessary means of effecting certain results (such as transferring title to property or adopting a child). Putting a constitution in writing, Barnett claims, performs many of these same functions. *Id.* at 101.

consisting in and expressed through tradition, the ongoing establishment of custom. Whittington describes it well:

Being unwritten, the British constitution consisted of a tradition of practice, general understandings, and occasional declarations. Theoretically, Parliament was constrained by the need for a connection with these ancient customs, but it was also engaged in a constant creation of custom since every political and legal act became a part of the tradition of practice.³⁸

Whittington also provides an excellent explanation of the significant deficiencies of such a system.³⁹ Because every legal and government act is folded into the tradition of practice that is the constitution, the British constitution could not be distinguished from the acts of government. The relationship between the constitution and the lawmaking Parliament, for instance—in particular, the extent to which lawmakers are constrained by the constitution—is, at best, ambiguous. For the constitution has no identity that is squarely independent of whatever actions government bodies choose to take. The government’s power and the legality of its exercise of its power bleed into one another in a way that allows that power to exceed any firm limits. By leaving the constitution unrestrained by

38. WHITTINGTON, *supra* note 1, at 50. This conception is reflected in Lord Bolingbroke’s well-known 1735 definition of a constitution: “By Constitution we mean, whenever we speak with propriety and exactness, that assemblage of laws, institutions, and customs, derived from certain *fixed* principles of reason . . . that compose the general system, according to which the community hath agreed to be governed.” HENRY ST. JOHN, VISCOUNT BOLINGBROKE, A DISSERTATION UPON PARTIES 108 (1735), *as quoted in* Brad Thompson, The Revolutionary Origins of American Constitutionalism 7 (paper presented at Conference on Objectivity in the Law, University of Texas at Austin, April 2008) (emphasis in original). Thomas Paine advocated a contrasting conception:

“A constitution is not a thing in name only, but in fact. It has not an ideal, but a real existence; and wherever it cannot be produced in a visible form, there is none. A constitution is a thing *antecedent* to a government, and a government is only the creature of a constitution. The constitution of a country is not the act of its government, but of the people constituting a government. . . . A constitution, therefore, is to a government, what the laws made afterwards by that government are to a court of judicature. The court of judicature does not make the laws, neither can it alter them; it only acts in conformity to the laws made: and the government is in like manner governed by the constitution.”

THOMAS PAINE, RIGHTS OF MAN 122–23 (Oxford Univ. Press 1998) (1791), *quoted in* Thompson, *supra*, at 10. While Britain made several significant changes to its government’s structure and powers in 2005 (including the establishment of a Supreme Court and repealing the appellate jurisdiction of the House of Lords), its constitution remains an amalgam of written and unwritten sources. For more on its basic character, see BRIAN Z. TAMANAHA, THE RULE OF LAW 56–58 (2004), and for a good discussion of contrasting historical conceptions of what a constitution is, see Thompson, *supra*.

39. In what follows, I draw heavily from Whittington’s discussion in WHITTINGTON, *supra* note 1, at 50–53.

specific provisions explicitly articulated in language, in other words, the distinction between government activity and legality is attenuated, if not erased. Under such a system, the law is not an independent check on the activities of government; as a consequence, no government activity can be legitimately regarded as clearly off-limits, prohibited by the law. There simply is no settled, distinct law for our governors to answer *to*.

Whittington reports that the Founding Fathers were acutely aware of these defects and deliberately adopted a written constitution in order to guard against the dangers of the unrestrained government that such nebulous legality allows. As long as a nation has an unwritten constitution which is in continual evolution as each new action of any the government's branches reshapes its exact contours, it is impossible to fix what the constitution is. Correspondingly, "it" could offer no firm protections to citizens' rights. Committing to a written constitution, by contrast, with the attendant obligation to uphold it or to alter it through its prescribed process of written amendment, provides an indispensable check against having a law whose perpetual uncertainty makes it impossible to know what the government's powers and what an individual citizen's liberties are.

What this contrast with an unwritten constitution makes clear is that the Written Constitution Argument for Originalism turns, fundamentally, on a recognition of the purpose of government. The purpose of government is to protect individual rights.⁴⁰ The specific purpose of a constitution is derivative: to establish and publicly set forth the fundamental character of the government that is created to carry out that mission (identifying the basic rules and powers by which it will operate). A

40. This is the Lockean view that the Founders essentially embraced, although the documentation of that and the full support of its philosophical validity are subjects for another occasion. In conjunction with the Founders' view of the Constitution as limiting a government's authority to restrict individual rights, see Barnett's extensive documentation, *supra* note 2, at 32–39, as well as James Madison, writing, for instance, that government "is instituted to protect property of every sort" (having writing that "property" encompasses liberty) and that "This being the end of government, that alone is a just government, which impartially secures to every man, whatever is his own," MADISON, PROPERTY (1792), quoted in Timothy Sandefur, *Mine and Thine Distinct: What Kelo Says About Our Path*, 10 CHAP. L. REV 1, 7 (2006), and Madison, writing that "... the sovereignty of the society as vested in & exercisable by the majority, may do anything that could be *rightfully* done by the unanimous concurrence of the members: the reserved rights of individuals (of conscience, for example) in becoming parties to the original compact being beyond the legitimate reach of sovereignty, whenever vested or however viewed." MADISON, SOVEREIGNTY (1835), quoted in Sandefur, *supra*, at 6. I will discuss the purpose of government further in Part V.

constitution cannot serve that purpose, however, if its language is pliable. The people set boundaries on the activities of their agents by naming the powers transferred to those agents and by writing specific rules and limits into law. “The people can constrain their governmental agents,” however, “only by fixing their will in an unchanging text” with unchanging meaning, Whittington contends.⁴¹ The written text is a symbol of intent, he emphasizes.⁴² That intended meaning is embedded in and conveyed through language. If the text of our law is not fixed, however, what is it that people are ratifying? In adopting it, what are they agreeing to?⁴³ “To give the words of the Constitution new meanings over time” would undermine the value of a written constitution.⁴⁴ Thus he concludes that Originalism, insofar as it upholds fidelity to the law’s original meaning, is the only method of constitutional interpretation that is consistent with our constitutional project.⁴⁵

While Barnett would resist any implications of popular sovereignty that may creep into some of Whittington’s statement of this argument, he invokes Lysander Spooner to make essentially the same case. A century earlier, Spooner had written:

We must admit that the Constitution, *of itself, independently of the actual intentions of the people*, expresses some certain fixed, definite, and legal intentions; else the people themselves would express no intention by agreeing to it. The instrument would, in fact, contain nothing that the people *could* agree to. Agreeing to an instrument that had no meaning *of its own*, would only be agreeing to nothing.⁴⁶

Barnett stresses that written constitutions are valuable to the extent that they “lock in” an initially legitimate lawmaking scheme.⁴⁷ Yet, he wonders, how can a meaning be preserved and the governors truly restrained if the written words are malleable and mean only what judges today want them to mean?⁴⁸ Only if government agents “cannot change the scope of their own

41. WHITTINGTON, *supra* note 1, at 56.

42. *Id.* at 59 *passim*, 99.

43. *Id.* at 55.

44. *Id.* at 58.

45. *Id.* at 61.

46. LYSANDER SPOONER, *The Unconstitutionality of Slavery*, reprinted in 4 THE COLLECTED WORKS OF LYSANDER SPOONER 222 (Charles Shively ed., 1971) (rev. ed. 1860), quoted in BARNETT, *supra* note 2, at 105 (emphasis Barnett’s).

47. BARNETT, *supra* note 2, at 88.

48. *Id.*

powers can the rights of the people be in any way assured.”⁴⁹ “Lock-in” is not achieved if the meaning of the writing can be changed without formal amendment. But that is what non-originalist interpretations of legal meaning do. Any interpretive method that permits deviation from the words’ original meaning defeats the point of having a written constitution. Only a fixed text can provide the security of individuals’ rights which is our reason for having a government and constitution in the first place.

While Barnett acknowledges that the meanings of words can change over time, he thinks that we must nonetheless honor the meanings that words had at the time that relevant laws were adopted. For anything other than that would contradict the meaning that the adopters expressed and that *is* our law.⁵⁰ One need not believe that popular will is the source of our government’s authority to believe that if the Constitution is our law, it must mean what it meant on adoption. For the alternative—substituting different meanings for its various provisions—actually rejects the Constitution as the bedrock of our legal system. Countenancing such an interpretive method would “respect” the Constitution in name only. As Barnett summarizes, “constitutional legitimacy depends on what the writing says.”⁵¹

V. CRITIQUE OF THE POPULAR SOVEREIGNTY DEFENSE

Straightforward and compelling as it can seem, the popular sovereignty defense of Originalism is neither historically nor philosophically sound.

One familiar objection to the thesis of popular sovereignty is the charge that the will of the people is a fiction. No such popular endorsement of our government has actually been given. This mythology conveniently overlooks the leagues of people who have been excluded from the “popular will”—those who did not vote in a particular election, for instance, or those

49. *Id.* at 117.

50. *Id.* at 105–06.

51. *Id.* at 116–17. The Popular Sovereignty and Written Constitution Arguments obviously bear affinities, and some of these similarities as well as their differences should emerge more clearly as we proceed to critique each. For now, what is most salient in distinguishing the two is Barnett’s belief that natural rights stand prior to the authority of anyone’s will. Consequently, he reasons, popular sovereignty cannot be the ultimate foundation of government legitimacy.

who did, but favored the minority position. Even more damaging to its sunny scenario are many groups who were not legally permitted to vote at various times, such as blacks, women, or those who fell short of property qualifications. In practice, the point is, the “will of the people” at best reflects the will of some people, but far from all. Consequently, allegiance to popular sovereignty does not provide the safeguard for pure democracy that the Originalists claim.

Whittington forthrightly confronts problems with the actual working of popular sovereignty and he develops an elaborate notion of “potential sovereignty” in order to circumvent them.⁵² While I have doubts about the success of this attempt to differentiate consenting to something and authorizing it and to derive actual sovereignty out of possible future decisions, what is important here is that fiddling with the mechanics of how consent is expressed merely distracts from the central issue.⁵³ For even if the consent of the governed were explicitly and unanimously granted, it could not provide the authority that the Originalists think it does. Neither in fact, nor in the view of the Founders, is anyone’s say-so *by itself* the foundation of government legitimacy. Government power is the power to initiate the use of force against people. As such, its legitimate exercise rests on more than some individuals’ nods of approval. A person’s obligation to respect others’ rights exists independently of his agreeing to respect those rights. Consequently, popular will *per se*—people’s agreement—is not

52. WHITTINGTON, *supra* note 1, at 132 *passim*. The full character of this potential sovereignty is rather complex, but let me quote Whittington at length to try to convey the basic idea:

Unlike tacit consent, . . . potential sovereignty does not assume that such consent exists at all moments to authorize current government actions. More concretely, it does not assume the existence of present agreement as to the content of the sovereign will. Perhaps more clearly, it does not assume the existence of a currently active sovereign. . . . Consensual government does not require the imagination of a current consent; rather, it requires that government receive authorization for its actions. . . . The government was set in motion by consent, but it need not demonstrate our continuing consent in order to remain in motion. . . . [T]he founders initiated the Constitution, which remains valid and binding not by virtue of their right to govern over us but by virtue of the ‘historical accident’ that their text is the most recent expression of consent. . . . We have not vested [the Constitution] with authority. Rather, it is binding . . . in that it represents our potential to govern ourselves.

Id. at 132–33.

53. It is noteworthy that “potential sovereignty” ultimately seems to rely on tacit consent, which Whittington himself emphatically rejects as inadequate to ground government authority.

the ultimate foundation of the government's authority. Let me elaborate.

A. THE FOUNDERS' PREMISES

First, consider the views of the Founders. In order to reach a rational interpretation of what their written language meant and of how it should be applied to later cases, it is mandatory, according to the Originalist's principles, to respect their beliefs about what they were saying, the premises that informed their adoption of these laws. An Originalist must respect the intellectual framework in which these men wrote the Constitution, since that furnishes the background necessary to identify what the original understanding of its specific provisions was.⁵⁴ What is salient to assessing the Popular Sovereignty Argument is the fact that the Founders were not unqualified democrats.⁵⁵ The authors of our constitution were vocal and ardent champions of the doctrine that individuals possess natural rights. And they understood these rights to limit the domain within which the will of the people may rule, since one individual's rights pose a boundary beyond which others' will may not impinge. Whittington's Popular Sovereignty Argument, however, ignores these limitations on the people's sovereignty and blithely reads our "constitutional project" in a way that defies them.

Undoubtedly, the Founding Fathers supported elements of democracy in government. Part of the appeal of the Popular Sovereignty Argument stems from the fact that our legal system does respect the popular will—on certain limited choices. Votes determine details concerning *how* the government will protect citizens' rights, the specific mechanisms through which it functions (issues of personnel and procedure, for instance, such as eligibility requirements for elected office, term limits, and voting age). What is crucial, however, is that it is not for the people to decide *whether* to respect rights. The democratic

54. John Quincy Adams, Abraham Lincoln, and Frederick Douglass are among those who have held that the Declaration of Independence should be used to inform our understanding of the Constitution. See JAMES A. COLAIACO, *supra* note 6, at 41–43.

55. See BARNETT, *supra* note 2, at 32 *passim*; EDWARD CORWIN, *THE HIGHER LAW BACKGROUND OF AMERICAN CONSTITUTIONAL LAW* (1955); SCOTT GERBER, *TO SECURE THESE RIGHTS* (1995); JEROME HUYLER, *LOCKE IN AMERICA: THE MORAL PHILOSOPHY OF THE FOUNDING ERA* (1995); STEPHEN MACEDO, *THE NEW RIGHT V. THE CONSTITUTION* (1987); PAULINE MAIER, *AMERICAN SCRIPTURE* (1997); *THE FRAMERS AND FUNDAMENTAL RIGHTS* (Robert Licht ed., 1992); BENJAMIN F. WRIGHT, *AMERICAN INTERPRETATIONS OF NATURAL LAW* (1962).

elements that the Founders accepted are only a portion of a broader theory of proper government that is fundamentally non-democratic.⁵⁶

Indeed, the Founders explicitly and repeatedly named the dangers of handing the power of government over to unvarnished majority rule. James Madison warned in a letter to Thomas Jefferson that the real danger of oppression arises “not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the Constituents.”⁵⁷ In *Federalist No. 10*, Madison famously cautioned that the rights of the minority are often endangered by a majority animated by a common interest or passion. Madison writes that “pure” democracies “have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security, or the rights of property”⁵⁸

Madison’s view was hardly unusual. Barnett compiles numerous statements from a variety of Founders echoing these reasons for restraining the power of “the people.”⁵⁹ The upshot is that the Founders were not so reckless as to replace the rejected notion of the divine right of kings with a comparable belief in an unlimited right of the masses.⁶⁰ The most basic source of government authority was not, in their view, the will of the people, whatever that will may be. Rather, it is individuals’ inalienable rights, which are held prior to and independent of a majority’s willingness to respect those rights. While the people’s consent may be necessary in authorizing certain activities of a government, this does not entail that the people’s will alone, regardless of its content, is our legitimate sovereign. In the Founders’ view, the purpose of government is to protect

56. Barnett contends that the Founders conceived of the legislature as designed, within an elaborate system of checks and balances, to curb the excesses of other rulers, rather than as an all-powerful ruler itself. BARNETT, *supra* note 2, at 37–38. Jack Rakove defends a similar view in ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 203–43 (1997).

57. Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *quoted in* BARNETT, *supra* note 2, at 32. Jefferson, in a similar spirit, wrote that “What is true of every member of the society individually, is true of them all collectively, since the rights of the whole can be no more than the sum of the rights of individuals.” Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), *quoted in* Sandefur, *supra* note 40, at 7 & n.35.

58. THE FEDERALIST No. 10, at 61 (James Madison) (Jacob E. Cooke ed., 1961).

59. I highly recommend his discussion. See BARNETT, *supra* note 2, at ch. 2 (especially pp. 32–35).

60. *Id.* at 32.

individual rights; it is not to do whatever the people would like it to do. Since no one holds the right to initiate force against another person, no ballot can deliver that right to a government. The mere expression of the desire for such authority, regardless of the number who share that desire, does not create it.⁶¹

It was not only in statements *about* proper government that the Founders expressed their rejection of popular sovereignty. They also built it into the Constitution itself, most conspicuously in the Ninth Amendment and in Article I, which confers the powers of the Congress. The Ninth Amendment's invocation of rights "retained by the people" is Constitutional testimony to the conviction that rights precede and restrain government, rather than the other way around. Indeed, while the Founders did consider it important to secure the people's consent for certain activities of the government, the very idea that consent legitimates certain lawmaking rests on the presumption that individuals possess rights, in virtue of which no one may treat them in certain ways without their consent. If they were not conceived as rightholders, their consent would not be necessary.⁶²

Equally damning to the thesis of popular sovereignty is the Necessary and Proper clause of Article I, Section 8. That clause states that the Congress shall have power "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."⁶³ Notice that this requirement is unintelligible without reference to values: "necessary" and "proper" relative to what? For what end or purpose? The clause itself provides the answer: necessary and proper for executing the powers vested by the Constitution. What is important to recognize here is that in stating that Congress may take those actions that are necessary and proper so as to carry out the

61. Whittington might try to resist this paragraph's characterization of the Popular Sovereignty view, given his belief that an earlier supermajority, by adopting the Constitution, imposes limits on the permissibility of certain later actions that deviate from the Constitution. Yet because, on his view, it is the assertion of this will (in adopting the Constitution) rather than antecedent rights that provides the bedrock foundation for laws' authority, my characterization is, logically, the inescapable implication of his view. While people might have to go through a few legal hoops to effect their will, in other words, what is important is that on his view, nothing *other* than will (so long as it is expressed through the pre-adopted means) carries the authority to veto the people's will.

62. BARNETT, *supra* note 2, at 44.

63. U.S. CONST. art. I, § 8.

powers it has been granted, the clause does not grant Congress additional powers.⁶⁴ Bear in mind that Section 1 of Article I vests Congress only with legislative powers “herein granted,” as Barnett stresses, and not with unlimited powers. Madison aptly observed that to read Congress as having unlimited powers would render “nugatory the enumeration of particular powers.”⁶⁵ Indeed, the Constitutional convention rejected a bill that would have granted more extensive powers to Congress.⁶⁶

What, then, are these granted powers for? To enable the government to achieve its purpose. The rationale for having a government, with its distinctive and extensive powers, logically informs our understanding of which more specific powers any of its branches may possess. This clause, in other words, directly calls for the use of criteria other than the popular will to determine the legitimacy of Congressional action. The requirement of necessity and propriety would be hollow if compliance consisted simply of obedience to whatever “the people” may want. If the will of the people were the true master of what Congress may do, what is “necessary” and “proper” would be as erratic, unpredictable, and unrestrained as the whims of public opinion. In truth, this clause virtually invites judges to consider the larger purpose of government in order to reach decisions about whether certain activities fall within the Congress’s purview.⁶⁷

I do not mean to suggest that Whittington would have judges defy the Ninth Amendment or Article I. Insofar as these are parts of the Constitution, he believes that a judge is bound to

64. BARNETT, *supra* note 2, at 155–56; he also cites several participants at the ratifying conventions saying as much.

65. *Id.* at 153, 160–62 (including an extended passage from Madison on the meaning of the Necessary and Proper clause). The fact that the Necessary and Proper clause was widely considered justiciable (open to legal challenge) also indicates that the people of the time did not regard it as granting unlimited powers. *Id.* at 178, 180; *see also* letter from James Madison to Henry Lee (Jan. 1, 1792) (“If not only the *means* [of government’s actions] but the *objects* are unlimited, the parchment had better be thrown into the fire at once.”), *quoted in* Sandefur, *supra* note 40, at 28 n.157 (emphasis in original).

66. BARNETT, *supra* note 2, at 155.

67. Justice Chase embraced this view quite directly in *Calder v Bull*, 3 U.S. 386 (Dall.) (1798) “The purposes for which men enter into society will determine the nature and terms of the social compact; and as they are the foundations of the legislative power, they will decide what are the proper objects of it. The nature and ends of legislative power will limit the exercise of it.” Further, he writes: “An act of the legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority.” For a similar view, see 3 STORY, *supra* note 4, § 1393, at 268 (1833).

uphold them. Constitutional fidelity may even sometimes require the court's overturning popularly mandated legislation that violates these provisions. Whittington supports the practice of judicial review.⁶⁸ My point, rather, is that the Constitution's inclusion of these provisions makes sense only on the premise of individual rights—the premise that the popular sovereignty thesis, as advocated by Public Understanding Originalists, denies.⁶⁹

B. POPULAR SOVEREIGNTY AS PHILOSOPHICALLY MISGUIDED

Not only is the doctrine of popular sovereignty at odds with the historical facts. It is also philosophically mistaken. Even if the Founders had accepted the idea that the popular will is sovereign, this thesis could not sustain Originalism because *it* cannot be sustained. The will of the people *per se* is not, in truth, the ultimate source of government authority. While this is obviously a large claim whose validation requires a separate treatment of seminal issues in political philosophy, it will be useful for evaluating the Popular Sovereignty defense of Originalism to sketch the basic idea.⁷⁰

Consider the basic nature of government—the tremendous power that government enjoys to force people to act in various ways. Where does that authority (which a legitimate government properly possesses) come from? Surely I, as an individual, do not possess the authority to compel other people to do as I wish. Nor do you. Nor do we, together. Our wanting such an authority would not give it to us, even if we expressed that desire through an eloquent formal statement. Individuals' wills or agreements do not determine the contents of men's rights.

68. He does so on the grounds that it is an exercise in democracy. WHITTINGTON, *supra* note 1, at 159, 168, 207. Note that while few Originalists would expressly reject judicial review all together, the passivity that they sometimes counsel (or practice) may amount to as much. Whittington discusses one such type of "judicial passivism." *Id.* at 168.

69. A further clarification: I am not attributing to Originalism the view that we must adopt Originalism because the Founders did. While some Originalists might employ that argument, Whittington clearly does not. The historical discrepancy that I am pointing out lies in the fact that the Popular Sovereignty Argument ignores the commitment to individual rights that informs the meaning of the Founders' words.

70. The view that I adopt is essentially Lockean. For fuller discussion, see LEONARD PEIKOFF, OBJECTIVISM: THE PHILOSOPHY OF AYN RAND 363–69 (1991); AYN RAND, *The Nature of Government and Man's Rights*, in CAPITALISM: THE UNKNOWN IDEAL (1967); TARA SMITH, MORAL RIGHTS AND POLITICAL FREEDOM (1995) (elaborating on the nature and basis of the rights that the government should protect).

The purpose of government is to protect individuals' rights, which is radically different from the purpose of simply enacting the people's will. Will becomes significant only as a means of respecting rights. As noted above, it is necessary to obtain individuals' consent to certain government activities because those activities encroach on a domain that rightfully belongs to those individuals. To avoid infringing on their rights, government must secure their agreement before engaging in those activities. People's agreement does not create the boundaries of their rights, however. While a person is properly free to decide how to exercise those rights that are genuinely his, it is not an individual's prerogative to decide what his rights themselves are (which would also have the effect of deciding what others' rights are, since one person's rights carry obligations of respect, for others, and those obligations affect the parameters of *their* rights).

For the purpose of properly applying the law, the point is that authorship does not confer authority. Originalists frequently emphasize "the people" as the author of the Constitution in order to argue that the people's meaning is what judges must respect. It is a fatal error, however, to slide from locating *authorship* of the Constitution with the will of the people to viewing the *authority* of the Constitution as constituted by the will of the people. Authorship neither creates nor expands one's authority. The sheer fact of expressing one's will (through authoring the Constitution or anything else) does not bring with it the authority to have one's will obeyed. Because authors are not entitled to assign themselves any authority that they do not antecedently possess, the "will of the people" is binding on others only within circumscribed bounds. While it is certainly true, as the Popular Sovereignty Argument contends, that the people's agents in various branches of government would be wrong to defy the people's wishes, the domain of the rightful exercise of the people's wishes is limited. Agents have no warrant to exceed those limits. Agents must be faithful to their masters' will, in other words, strictly within the legitimate scope of that will.⁷¹

While agency is a perfectly valid relationship that does restrain the actions of the agents, then, we must not lapse into

71. Whittington's previously cited belief in "the people's right to be governed only in accord with their own consent" is valid, correspondingly, only insofar as it refers to the people's consent within the scope of their rightful authority. WHITTINGTON, *supra* note 1, at 155.

assuming that it requires a government's deference to the unqualified will of the people. No one may transfer to agents any authority that he does not himself possess.⁷² If the government's agency were taken to require submissive implementation of *whatever* a majority wants, it would stand at loggerheads with a commitment to individual rights. If "the people" have final say over what the government may do, then the people have a right to infringe on individuals' rights—a contradiction in terms. A right that others may violate is not a genuine right. Rights are moral claims that a person is entitled to assert independently of anyone else's approval. They are possessed in virtue of facts about him (facts about his nature, *qua* human being), rather than in virtue of others' attitudes toward him. That is the concept's point. To say that a person has a right to something is to say that he has the final word on whether and how it is to be used or done; it is a matter under his moral jurisdiction.⁷³ The doctrine of popular sovereignty, however, represents a frontal assault on this by effectively denying anyone's possession of rights. By positing that the wishes of the many may cancel the wishes of the individual, it denies that the rightholder's will is ever supreme. For even as long as a "rightholder" does happen to enjoy the ability to rule a particular issue, he does so only thanks to the indulgence of a majority, who may revoke it at any time. This is a permission, rather than a right.

72. John Locke, for one, was quite explicit about this. See JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 23, at 17, § 135, at 70 (C. B. Macpherson ed., 1980) (1690).

73. I say "moral" to distinguish this from legal jurisdiction. While the two often coincide, they do not necessarily, since a nation's laws do not always correctly reflect a person's moral jurisdiction. Black people's moral authority to rule their own lives, for example, was for many years not properly recognized in our legal system. One should not conclude, however, that morality approves of any or every of a person's uses of his rights. What *is* right for a person to do is a distinct question from what he *has* a right to do, even though both fall under morality's authority. Rights govern what a person should be free to do (i.e., free from the coercive interference of others). The overall rightness of a person's action, in contrast, concerns what a person *should* do, the propriety of a person's choices even within his rightful jurisdiction. For further clarification, see SMITH, *supra* note 70, at ch. 1 (especially pp. 21–21). For a similar description of rights as governing individuals' domains of authority rather than actions' overall moral propriety, see H.L.A. Hart, *Are There Any Natural Rights?*, in RIGHTS, 16, 24 (David Lyons, ed., 1979). And on the distinctive, decisive strength of rights, see Ronald Dworkin's (who famously referred to rights as trumps) *Taking Rights Seriously*, in TAKING RIGHTS SERIOUSLY 184–205 (1978); JOEL FEINBERG, *The Nature and Value of Rights*, in RIGHTS, JUSTICE, AND THE BOUNDS OF LIBERTY, 143–55 (1980); PEIKOFF, *supra* note 70, at 351–63; RAND, *supra* note 70, at 321–23; SMITH, *supra* note 70, at 16–21.

C. OBJECTION: A STRAW MAN?

All of this notwithstanding, some might object that I have overstated the doctrine of popular sovereignty and thereby attacked a straw man, failing to refute the salient portion of the Originalist's argument. For even if I am right in rejecting an unqualified form of popular sovereignty that prescribes unconditional deference to the will of the people, since no constitution can enact itself, surely some degree of popular sovereignty must be true. It is people who authorize a particular constitution, after all. And if a more moderate thesis of popular sovereignty stands up, why isn't that enough for the Originalist's argument to succeed?

In fact, however, advocates of the Popular Sovereignty Argument do not embrace a "moderate," qualified commitment to popular sovereignty. Rather, they treat consent as an all-powerful wild card capable of extinguishing individual rights. What is important is not only what the Public Understanding Originalists think of themselves as doing or would like to be doing, but the logical implications of the reasoning for their position. Bear in mind that in the Originalist view, in order to determine law's meaning, we are to look exclusively to how the law's pivotal words were used by a certain group. If we encounter a conflict between what a word means and what the public at time *t* thought it meant, the latter is decisive. As Barnett posits, "If the public at the time of ratification understood the term 'commerce' in the Constitution to include trade, exchange, and navigation, then that is its original meaning."⁷⁴ Nothing more needs to be considered.⁷⁵ Whittington likewise holds that written and enacted legal provisions are meaningless unless the Founders could reach a common understanding of their meaning.⁷⁶ In fact, while it is true that the absence of agreement about meaning could be a sign of a law's employment of invalid and objectively meaningless concepts, it is not proof of it. To treat it as if it is, as Whittington and Barnett both do, is to substitute a group's subjective beliefs about meaning for objective meaning. (This distinction should become clearer later in the paper.)

74. BARNETT, *supra* note 2, at 293.

75. It is noteworthy that while Barnett seeks to distance his position from the popular sovereignty rationale for Originalism, the way that he here construes the meaning of language reveals that he is relying on what amounts to it. I will return to make this clearer later in the paper.

76. WHITTINGTON, *supra* note 1, at 96.

The basis for reading the doctrine of popular sovereignty employed in the Originalist's argument as unqualified, therefore, is that when it is used as a defense of this particular brand of Originalism, it grants the public of a given time the power to dictate what words mean. Such a power is unlimited. It is incapable of being limited, since on such a view, the public would equally dictate the meanings of any words that might be intended to express limitations on that power. I am not contemplating a case in which later people deliberately alter the meanings enacted by earlier people, of course; that is (reasonably) what Originalists seek to avoid. The problem is that the belief that words stand for simply what people choose (rather than for external referents of definite sorts) rests on the premise that words have no objective meaning. If that were the case, however—if meaning were *nothing but* what group A thinks and what group B thinks and what group C thinks—linguistic expression would be incapable of reining in anyone's power. If "the people" get to declare what words mean, they can "authorize" only as much respect for anyone's rights as they choose and thus erase all limits on the rule of their will. When language lacks objective meaning, in other words, it lacks the power to serve as a firm check on the exercise of that will. This is hardly a "moderate" form of popular sovereignty.

To put the point slightly differently: Originalist advocates of the Popular Sovereignty Argument are not simply saying that the will of the people is necessary for government authority. They are claiming that it is sufficient. This is apparent from the conclusion that they draw: that what the will of the people was at a certain time—its content, as expressed in the enacted law—is sufficient ground for concluding that that is what must be obeyed: their words *as they understood them*, no more and no less. No further check on "their" meaning is required. To equate that with the law that contemporary judges must uphold, however, is to treat the people's will as sovereign—unconditionally.⁷⁷

77. Notice that when we speak of the understanding of words' meaning of the people of a particular time, this could be taken to refer either to the actual lists of referents of specific words that these people would have supplied or to the criteria that they would have employed for determining the referents to which the word applied. The first would be, for example, a list of types of speech that people in 1787 thought that the First Amendment encompassed, such as written letters or newspaper articles, but not speech conveyed via radio or telephones or email (since those did not yet exist). The criteria that they would have employed for determining referents, by contrast, would allow for latter-day additions to the legitimate referents of free speech that were not

The problem with the Popular Sovereignty Argument, then, does not arise from the simple claim that the people are sovereign in our system. In one significant sense, they are. The government does derive its just powers from the consent of the governed, as the Declaration of Independence proclaims. It is crucial to understand precisely what this does and does not signify, however. While a government may, legitimately, compel a person even against his will to respect others' rights, it may not compel him to do anything else against his will. Any government action that would, absent the individual's consent, infringe on his rights, requires his consent.⁷⁸ Correspondingly, the "people's authority" is only as extensive as the rights of those people. When popular sovereignty is invoked as a basis for Public Understanding Originalism, however, the only "degree" of popular sovereignty that could conceivably justify its sweeping conclusion is the unqualified degree. A "moderate" popular sovereignty constrained by respect for individuals' rights is too meager to warrant the conclusion that the meaning of the law is dictated by the wishes of the people. Only a much more muscular popular sovereignty could support the notion that the words of a law represent simply what they were taken to refer to by particular men in a particular era. Accordingly, that is the form of popular sovereignty that I have criticized as both historically and philosophically unfounded.

Much of the appeal of the Popular Sovereignty Argument, I think, trades on the fact that the people's consent does play an important role in our political system: consent is necessary for the government's authority to treat people in ways that would otherwise be violations of their rights. Yet the argument neglects what is crucial: the fact that consent is necessary does not mean that it is sufficient to justify *whatever* the people agree to. That is how Public Understanding Originalism treats it, however. To yield to those who enact a law the power to create words' meanings—to freeze the law's meaning to match only their

conceived of in 1787, such as phone and email communication. Throughout, I shall adopt the more plausible reading of the Originalist view and take it to refer to not only the finite lists of particulars that the people of a certain era would have drawn up, but to the criteria that they would have employed for determining inclusion on such lists. The criticisms I press are equally effective against this stronger, "criteria" view. For more on this distinction and on the failings of both versions, see Smith, *supra* note 2.

78. Once a government is established, it must adopt specific means of fulfilling its function, of course, and it does not require an individual's consent to every one of those. All of the government's actions, however, must fall within the range of the powers that the government has been granted.

fallible, incomplete and quite possibly misinformed beliefs about the phenomena named in a law—is, in its effect, to make the people all-powerful, individual rights be damned. It no longer matters what the law says; what rules is what certain people *thought* it says.

A full discussion of the proper domain of popular sovereignty is, again, the subject for a separate, larger discussion. What is immediately significant is that a popular sovereignty rationale for Originalism abandons the commitment to natural rights. We cannot simultaneously respect the “will of the people” as ultimate sovereign and the will of the person, the singular rightholder. If the former enjoys final authority, individual rights are eradicated.

VI. CRITIQUE OF THE WRITTEN CONSTITUTION DEFENSE

The other argument to be reckoned with grounds Originalism in the logic of having a written constitution. The motivation behind this argument is eminently reasonable: to guard against a bait and switch whereby the people enact one law but, due to manipulative “interpretation,” something else is applied by the courts. While such interpretation would be an injustice, we shall see that Originalism is not the right way to combat it. In fact, its employment results in essentially the same thing (albeit, without deliberate trickery).

A. THE RELATIONSHIP BETWEEN THE TWO ARGUMENTS

Before examining the Written Constitution Argument itself, we should clarify the relationship between the two defenses of Originalism so as to forestall a possible objection to Barnett’s adoption of it. Some advocates of the Popular Sovereignty Argument may view the Written Constitution Argument as its completion. For if the will of the people is the sole basis of government authority, then it is imperative that the people express their will by putting it into words. The government has no authority apart from what the people bestow on it and the people confer that authority by writing the Constitution. The written words acquire their paramount significance, therefore, as the only means we have of knowing what the people’s will is. The text is the vehicle by which the only genuine source of government authority sets forth exactly how far that authority extends.

Building on this perspective, one might suppose that, because Barnett has rejected popular sovereignty, he cannot defend Originalism through the Written Constitution Argument. For popular sovereignty may seem to serve as a crucial foundation for that argument. Writtenness *per se*, after all, does not obligate. The sheer fact that I want something does not entitle me to it. Correspondingly, the sheer fact that a person expresses certain wishes in writing does not entail his authority to obligate others to comply with his wishes (as I myself have just argued). An expression of a man's will is authoritative only if that will is antecedently authoritative. In the Written Constitution Argument, then, one might surmise a presupposition that popular sovereignty is what lends the written document its clout: *if* the people's will is paramount, then the written expression of their will must be respected. It is the fact of the people's authority, in other words, coupled with the fact that they have said how they wish to be governed (by writing the Constitution) that compels respect for original meaning. Without the popular sovereignty premise, however, the Written Constitution Argument loses its footing.

In fact, Barnett is not in quite the tight corner that this suggests. While it is true that the expression of a person's will should be respected as authoritative only if that person possesses the relevant authority, the objection assumes that the only possible source of legal authority is popular sovereignty. In fact, it is not. Barnett believes that natural individual rights are the foundation of political authority—rights that may be exercised in ways that thwart the wishes of others. He believes in individual sovereignty, we might say, bounded by the parameters of others' like rights.⁷⁹ On the popular sovereignty view, by contrast, the people's will creates all government authority; no other basis for this authority exists. Thus an advocate of popular sovereignty might well think that the popular sovereignty claim is necessary to undergird the Written Constitution Argument, since he views the popular will as the only place that government authority *could* originate. If one acknowledges alternative sources of this authority, however, the popular sovereignty prop is no longer necessary.

79. Barnett elaborates on this further in RANDY E. BARNETT, *THE STRUCTURE OF LIBERTY* (1998). I discuss the boundaries of individuals' rights and the content of these domains in SMITH, *supra* note 70, especially chapters 6–8.

Barnett's argument, accordingly, runs roughly thus: While the ultimate foundation of political authority rests in certain moral principles that hold prior to a law's being written, for a legal system to rely on the direct invocation of these principles would leave the law unnecessarily and unfairly mysterious. This is why we need laws, clearly articulated and objectively laid out for all to know. Once laws are written, we must abide by their original meaning, since that reflects what the enacted rules are. Regardless of one's view of the ultimate source of legal authority, the rules that that authority imposes must be expressed in order for anyone to know how to respect them. For judges to second-guess these rules and replace them with others would fail to respect the laws' authority. If objective knowability to all is part of what we reasonably seek in laws and if this public accessibility is what writtenness makes possible, then we must respect the laws *as written*—which means, by Barnett's lights, as originally understood. (If some people disagree with the content of a particular law's original meaning, the Constitution provides means of changing that law. Those are the only means, however, of legitimately deviating from the original meaning.) For Barnett, what underwrites the obligation to respect the written law is the fact that that law expresses rules that are within the authors' rightful domain. As long as the laws' authors are articulating rights and powers that they are entitled to control, their words *are* all-important.

The rejection of popular sovereignty need not doom the Written Constitution Argument, then. In fact, the appeal of Barnett to many, I think, lies in the fact that he endorses Originalism without positivism. That is, those who accept the Popular Sovereignty Argument believe that the law's authority is manmade, subject to no further moral conditions. A given law's validity turns completely on whether it was enacted according to procedures specified by the people; it is based on its pedigree rather than its content. Barnett, in contrast, by recognizing natural rights, asserts the significance of moral conditions that are independent of the will of the people. His attempt to marry this commitment to rights with fidelity to the original meaning of the written law may seem just what has long been absent from the debate over proper interpretation.⁸⁰ Unfortunately, however,

80. Dworkin's theory of constitutional interpretation incorporates moral principles but is not particularly originalist. See RONALD DWORKIN, *LAW'S EMPIRE* (1986); RONALD DWORKIN, *JUSTICE IN ROBES* (2006) [hereinafter, DWORKIN, *JUSTICE*]; Dworkin, *supra* note 8.

the Written Constitution Argument involves the same subjectivism that infects positivism.

B. THE OBJECTIVE MEANING OF THE LAW

Recall the central contention of the Written Constitution Argument: the law is an expression of intent. Since a document only has meaning because somebody puts it there, in order to understand its meaning, it makes sense to respect *what* was put there. Both Whittington and Barnett observe that only a fixed text can be ratified into law. Meaning cannot be preserved and the governors cannot be restrained if the written words are malleable. “The fact that the Constitution was put in writing,” Barnett maintains, “mandates that its meaning must remain the same until it is properly changed—or candidly rejected.”⁸¹

While the spirit of this is right, writtenness does not imply what the Originalist thinks it does. It does imply that the law is objective and that the language in which the law is expressed is crucial to discovering its objective meaning. The written character of our Constitution entails Originalism, however, only on a distorted view of why writtenness matters—more specifically, on an erroneous conception of what objective meaning is. For what is pivotal is what a word’s meaning’s “remaining the same” or being “fixed” consists in. The real issue is not originalness, but objectivity.

The basic truth that Originalism fails to appreciate is that the language of the law, like all language (apart from proper names), is conceptual. This will require a modest excursion into the basic nature of concepts. What follows is only a rough sketch.

Words (other than proper names) stand for concepts. Concepts are objective.⁸² A word does not represent merely the subjective experience of a particular speaker. Words do not designate a given person’s finite collection of actual perceptual encounters with, or thoughts concerning, things of a certain kind. “Cats,” for instance, does not refer only to my beliefs about cats. Rather, words refer to things of distinct types. “Cats” stands for

81. BARNETT, *supra* note 2, at 96.

82. While philosophers have sometimes distinguished finer types and “strengths” of objectivity (such as metaphysical, semantic, etc.), I will not need to explore these here to make my basic point. For discussion of some of these finer distinctions, see MATTHEW KRAMER, OBJECTIVITY AND THE RULE OF LAW (2007); Brian Leiter, *Objectivity, Morality and Adjudication*, in OBJECTIVITY IN LAW AND MORALS, 66–98 (Brian Leiter ed., 2001).

cats, those animals in the alley that purr. (Truly, a word is simply a visual-auditory symbol for a concept and it is concepts that refer to things. Thus I will speak primarily of concepts.)

As Ayn Rand explains, "A concept is a mental integration of two or more units possessing the same distinguishing characteristic(s), with their particular measurements omitted."⁸³ When a person forms a concept, he is mentally grouping together distinct existents *as one* on the basis of certain characteristics that distinguish them from other distinct existents. (By "existent," I mean anything that exists, be it a material object, a property, relationship, action, process, state of consciousness, etc.⁸⁴ The watch on my wrist, my being the sister of Maria, my writing this paper and my aging are all existents insofar as each is so. My being 5'9" or the king of France or writing *Chess for Dummies* are not existents. If I harbor delusions to the contrary, those beliefs would be existents. We would call them delusions, however, to indicate that the objects of these beliefs are not existents {since I am not actually 5'9", the King of France, or the author of *Chess for Dummies*}).⁸⁵ A "unit," in turn, "is an existent regarded as a separate member of a group of two or more similar members."⁸⁶ And a definition is "a statement that identifies the nature of the units subsumed under a concept."⁸⁷ It "designates the *essential* distinguishing characteristic(s) and genus" of those units "according to all the relevant knowledge available at that stage of mankind's development,"⁸⁸ and thereby serves "to keep a concept distinct from all others, *to keep it connected to a specific group of existents*."⁸⁹

83. AYN RAND, INTRODUCTION TO OBJECTIVIST EPISTEMOLOGY 13 (Leonard Peikoff and Harry Binswanger eds., 2d ed. 1990).

84. See *Id.* at 5-7; PEIKOFF, *supra* note 70, at 4-5. "Existence" refers to everything that exists, the totality; "existent" refers to any specific thing that can be isolated from other things as a matter of discrete awareness.

85. My aging is obviously not perceptually observable within a single instant, but the process is an object of awareness, mediated by knowledge of other phenomena such as change, decay, and death as well as by perceptual evidence of these other phenomena (e.g., my wrinkled skin, grey hairs, greater tendency to fatigue).

86. RAND, *supra* note 83, at 6.

87. *Id.* at 40.

88. *Id.* at 46 (emphasis in original).

89. Leonard Peikoff, *The Analytic-Synthetic Dichotomy* (1967), reprinted in RAND, INTRODUCTION TO OBJECTIVIST EPISTEMOLOGY 103 (Leonard Peikoff & Harry Binswanger eds., 2d ed. 1990) (emphasis in original). For a thorough discussion of definitions, see Rand's chapter devoted to them: RAND, *supra* note 83, at 40-54. For an account of meaning that is similar in some important respects (though by no means all), see Michael S. Moore, *A Natural Law Theory of Interpretation* 58 S. CAL. L. REV. 277-398 (1985) [hereinafter Moore, *Natural Law*]; Michael S. Moore, *Semantics, Metaphysics*,

All concept-formation is comparative. It is based on the observation: “compared to those things, these are the same.” Units’ individual measurements are “omitted,” as Rand says, so as to allow us to treat the distinct things (each of which continues to exist, of course, in its own measurable particularity) as one. The omission is a deliberately selective attention to certain of the existents’ features, and not others, for the purpose of noticing their comparative similarity. It does not involve any denial of each unit’s actual measurements. (Each cat has countless characteristics, for instance, although we focus on only some of these when setting it off as a cat.)

The crucial aspect of concepts’ objectivity that the Written Constitution Argument misses is the fact that concepts are open-ended. That is, a concept’s referents—the actual instances of that concept, the units that the concept integrates—are not a static set determined by the experience or knowledge of a particular speaker (or set of speakers). The referents are the totality of existents of the kind in question, those that users of the concept have already identified as such as well as those they have not. While you and I both no doubt understand the familiar concepts of “books” and “health,” for example, the words do not refer only to the books or healthy specimens that either of us has actually experienced or contemplated. Rather, a concept “stands for an unlimited number of concretes of a certain kind.”⁹⁰ Whatever possesses the distinguishing features for being a thing of a certain sort *is* a thing of that sort and is encompassed by the concept.⁹¹

and Objectivity in the Law, paper presented at Conference on Objectivity in the Law, University of Texas at Austin, April 4–5, 2008. [hereinafter, Moore, *Semantics*] (especially pp. 8–9), as well as a critique of Moore’s position: Onkar Ghate, *Comments on Michael Moore’s “Semantics, Metaphysics, and Objectivity in the Law,”* presented at Conference on Objectivity in the Law, University of Texas at Austin, April 4–5, 2008.

90. RAND, *supra* note 83, at 10. *See also id.* at 27–28, 65–69, 147, 257–258; PEIKOFF, *supra* note 70, at 78, 103–05; Peikoff, *supra* note 89, at 98–100; Allan Gotthelf, *Ayn Rand on Concepts, Definitions, and Objectivity*, paper presented at Conference on Concepts and Objectivity, University of Pittsburgh, Sept. 2006.

91. The units that are integrated under a concept reflect both a conceptual common denominator and particular distinguishing characteristics within that conceptual common denominator. The units of the concept “table,” for instance, share the conceptual common denominator of shape with material objects that are not tables (chairs, cats, pens, fingers, roses, etc.), but share among themselves the distinguishing characteristic of having the particular shape of a level surface suspended by supports. RAND, *supra* note 83, at 12. It is in virtue of the broader commensurable characteristic of shape that that we can contrast tables’ shapes with the shapes of other material objects. Rand defines the conceptual common denominator as “the characteristics(s) reducible to a unit of measurement, by means of which man differentiates two or more existents from other existents possessing it.” The distinguishing characteristic of a concept, in turn,

To grasp a concept is to grasp that certain things are *of a kind*. Accordingly, it involves adopting a policy of subsuming under that concept any and every future object of that kind.⁹² Rand explains with an analogy:

A concept is not formed by observing every concrete subsumed under it, and does not specify the number of such concretes. A concept is like an arithmetical sequence of *specifically defined units*, going off in both directions, open at both ends and including *all* units of that particular kind. For instance, the concept "man" includes all men who live at present, who have ever lived or will ever live. An arithmetical sequence extends into infinity, without implying that infinity actually exists; such extension means only that whatever number of units does exist, it is to be included in the same sequence. The same principle applies to concepts: the concept 'man' does not (and need not) specify what number of men will ultimately have existed—it specifies only the characteristics of man, and means that any number of entities possessing these characteristics is to be identified as 'men.'⁹³

The term "open-ended" is, admittedly, potentially misleading such that we can appreciate why an Originalist might be wary of it. The term could be thought to suggest that meaning is unspecified and therefore pliable. But that is not what Rand has in mind, as her reference to units being "specifically defined" should make clear. Any distinctive kind has a specific identity, which is named in its definition. This is what preserves objectivity in the application of concepts.

To appreciate the sense in which concepts are open-ended, consider an analogy. If I asked you for a particular arithmetic sequence such as "multiples of four" or "positive prime numbers," while the number of possible correct answers is open-ended in the sense that it is infinite, it is not the case that *any* answer that you supplied would be correct. The answer must be of the right kind—of the designated kind—in order to belong on the list of such numbers. The same holds for concepts: they are open-ended in the number of their referents, but not in their kind. Open-endedness, in other words, does not entail subjectivism.

⁹²represents a specified category of measurement within the 'Conceptual Common Denominator' involved." *Id.* at 15. See also *id.* at 41.

⁹² *Id.* at 257.

⁹³ *Id.* at 17–18 (emphasis in original).

What is most significant for our concerns is that it is this open-ended quality that enables concepts to refer to things in reality rather than simply to the inventory of particular persons' minds concerning those things. It reflects the fact that concepts refer to things "out there," as we sometimes put it—to actual existents in the world around us, rather than to things "in here," in our heads.⁹⁴ As Moore puts it, "Meaning is as rich as the nature of the things referred to" (and not, I would add, only as rich as given individuals' conceptions of those things).⁹⁵ This open-endedness, in turn, allows communication between individuals who naturally have had different experiences.⁹⁶ Although the exact set of cats that you have encountered is no doubt different from the set that I have encountered, when one of us speaks of "cats," we both know what that means because the word designates *anything* that is of that kind. As long as you know the kind, you know what I am talking about when I say that "cats are finicky" or "cats like milk" or "cats are ugly." You may well protest that last claim precisely because you understand (at least implicitly) that my statement refers not only to those cats that I have encountered, but to cats as such. Further, because a concept refers to existents, it includes all the characteristics of the units integrated, not only those characteristics that distinguish things of one kind from things of other kinds.⁹⁷ All of a thing's characteristics are real, after all (those that distinguish cats from dogs as well as those that do not, such as tails, teeth, and paws). Existents are nonetheless classified as they are because some of their characteristics distinguish them from things of other kinds. (Strictly, since every existent is unique, we should say that some of their characteristics distinguish them more dramatically from other things, along a certain axis of measurement {the relevant conceptual common denominator, such as shape in the case of "tables" or animal in the case of "man"}.)⁹⁸

94. A full account would contrast the objective with the intrinsic as well as with the subjective. For Rand's introduction of this trichotomy, see RAND, *supra* note 70, at 21–22; see also PEIKOFF, *supra* note 70, at 142–50; RAND, *supra* note 83, at 52–54; Ayn Rand, *Who is the Final Authority in Ethics?*, in THE VOICE OF REASON 17–22 (Leonard Peikoff, ed., 1989).

95. Moore, *Semantics*, *supra* note 89. In the same vein, he writes that meaning depends on how the world is constituted. Moore, *Natural Law*, *supra* note 89, at 337.

96. This is not to suggest that communication is language's only service. I would argue that the function of concepts is primarily cognitive. See RAND, *supra* note 83, at 69.

97. *Id.* at 27, 65–69, 257–58; PEIKOFF, *supra* note 70, at 102–03; Peikoff, *supra* note 89, at 98–100.

98. See sources cited *supra* note 90.

To be clear, then: the objectivity of concepts rests in the fact that concepts refer to existents rather than to anyone's beliefs about existents. Concepts are about *things*—physical objects, properties, processes, events, relationships, etc.—rather than about anyone's states of consciousness concerning those things.⁹⁹ Bear in mind that much of the purpose of the concept of objectivity is to discriminate between two kinds of claims that human beings make: those that are to be taken as reporting facts and those that are not. The concept of objectivity is based on the recognition that people's thoughts about existents are not necessarily correct and do not dictate the characteristics of those existents. Speaking very roughly, we consider a claim objective when we think that it *really is* about reality, that it accurately reports a fact. What is objective is based on the way things really are.¹⁰⁰

Open-endedness, then, is an essential feature of objectivity. It consists in the fact that, because concepts refer to things in reality—to existents of specific kinds—concepts do not refer only to those existents that a person has himself encountered or imagined (or, that other people to date have encountered or imagined) or to only those characteristics that he is aware of or considers important. Rather, concepts refer to all things of the

99. My formulations throughout this paragraph are a bit loose, intended primarily to highlight those features of objectivity that are most germane to the immediate discussion. A fuller account of objectivity would clarify the relationships among the features that I am discussing here. Notice, for instance, that while concepts can certainly name distinct mental phenomena such as beliefs, emotions, memories, hopes, and so on, my point here is to emphasize the contrast between a belief about *x* or an attitude toward *x* and *x* itself. The crucial contrast is between the idea of *x* (such as my memory of my grandparents' apartment) and the object of that idea (the actual apartment at 1000 Hudson Street). Similarly, a person's fear of heights is distinct from his beliefs about his fear of heights (beliefs about its sources, significance, or consequences, for instance).

100. I couch these claims in the qualifiers "we consider" and "we think," rather than state them directly in terms of what is actually so, in order to reflect human fallibility. That is, despite common ways of speaking of *facts* as objective (or not), strictly, objectivity pertains to human beings' method of reaching conclusions. Objectivity is the deliberate, self-conscious effort, through the conscientious use of logic, to have one's beliefs conform to reality. See PEIKOFF, *supra* note 70, at 116 *passim*. The fact that a person who scrupulously adheres to the objective method may nonetheless reach an incorrect conclusion does not reveal his procedure to have been non-objective. Objectivity is not a guarantee of accuracy. Thus, to put it slightly more carefully, we consider a claim objective when we think that adherence to objective procedures gives us compelling reason to think that the claim accurately reports a fact. For more on this aspect of objectivity, see Tara Smith, "Social" Objectivity and the Objectivity of Value, in SCIENCE, VALUES, AND OBJECTIVITY 143–71 (Peter Machamer & Gereon Walters eds., 2004); Tara Smith, *The Importance of the Subject in Objective Morality: Distinguishing Objective from Intrinsic Value*, 25 SOC. PHIL. & POL'Y 126, 126–48 (2008) [hereinafter Smith, *Objective Morality*].

relevant kind and to all of those things' actual characteristics, including those still to be discovered.¹⁰¹ (For purposes of classifying this animal in my lap as a cat, for instance, it is important to focus on certain of the entity's characteristics and not others, but to acknowledge the concept's open-endedness is, in part, to remind oneself that every cat—each unit of the concept "cat"—is *all* that it is, encompassing those features that set it off as a cat as well as those features that do not.)¹⁰²

C. IMPLICATIONS FOR UNDERSTANDING THE LAW

The lesson for legal interpretation from all of this is as follows. I would readily agree that the fact that our constitution is written, as well as what is written, must constrain contemporary judges. Given the objective character of concepts, however, we must interpret the written law accordingly. The point of writing law is to make the law knowable to all. That purpose could not be achieved if the written words were understood subjectively, as, in effect, a private code that referred only to the contents of particular individuals' heads. Linguistic communication presupposes the objectivity and correlative open-endedness of concepts (the concepts that are represented by our words). To use language is to rely on the fact that words stand for existents, rather than for a given speaker's beliefs about existents. Language is not an exercise in autobiography; a given individual's present personal storehouse of examples of a concept does not exhaust the reference of that concept. (Nor does the storehouse of a group of people, whether in 1787, 2015, or at any other time.) People's understandings of words' meanings naturally play a role in their writing laws, but those understandings are a means to say something about the kinds of actions that will and will not be legally permitted; they are not the *subject* of laws. The method of Originalism, however, treats them as if they were. For it makes the contents of people's beliefs determinative of the meaning of the law. It replaces

101. See RAND, *supra* note 83, at 66. The denial of this would render the subject matter of concepts the state of a person's beliefs about the phenomenon referred to rather than the phenomenon itself. See also Moore, *Semantics*, *supra* note 89, at 13 (writing that speakers of a language do not ordinarily understand either their exemplars or their definitions of a concept "to fix what is in the extension of the word.").

102. For further elaboration on key elements of Rand's theory of concepts and objective meaning, see Gregory Salmieri, "Justification as an Aspect of Conceptualization: How Rand's Theory of Concepts Represents a 'New Approach to Epistemology,'" paper presented at Workshop on Normativity and Justification in Epistemology and Ethics, Harvey Mudd College, Claremont, CA, June 2007.

objective criteria of meaning with the criteria of particular men's thoughts about the referents of their words. (Obviously, it is human beings who assign the words that stand for various concepts; we decide that cats will be designated by the letter string "c-a-t," law will be designated "l-a-w," and so on for every concept that we form. Yet in doing so, we are correlating words with kinds of existents, rather than with contents of minds. The focus is on those distinctive phenomena in reality that are being conceptualized.)

Notice that in applying the law, we do not employ subjective criteria of meaning. Laws do not govern only those people who share the exact same experiences and beliefs as the authors of a law. My misunderstanding of a particular law neither exempts me from the obligation to obey that law nor alters what it is that I must obey. In practice, that is, we routinely recognize that the written law's meaning is objective. Indeed, it is the objective, open-ended character of concepts that enables the law to govern prospectively. The application of a law written in the 18th century to disputes in the 21st rests on the premise that language refers to a greater number of instances than a law's authors may have experienced or imagined. Far from posing a threat to the objectivity of law, as the Originalist fears, the open-endedness of concepts is what allows the law to be applied objectively. For it enables our laws to be anchored in the actual nature of the phenomena named, rather than in the contents of select individuals' thoughts. When the Constitution says "Congress shall make no law . . . abridging the freedom of speech" or when a statute decrees that manufacturers may not emit chemicals of a certain toxicity, the way to determine which actions these laws allow and prohibit is to examine whether a particular action is of the relevant kind. We must examine the chemicals, the purported speech, the would-be abridgement, etc., rather than conduct a survey of people's opinions about those things. Just as a discussion of cats is not a discussion of my beliefs or of your beliefs, but a discussion of *cats*, so a law governing free speech or toxicity concerns those phenomena, rather than particular individuals' beliefs about those phenomena.¹⁰³

103. For good discussion of this difference, see David O. Brink, *Legal Interpretation, Objectivity, and Morality*, in OBJECTIVITY IN LAW AND MORALS 12-65 (Brian Leiter ed., 2001); David O. Brink, *Legal Theory, Legal Interpretation, and Judicial Review*, 17 PHIL. & PUB. AFF., 105, 105-48 (1988); see also Moore, *Natural Law*, *supra* note 89, at 294 (arguing that a change in conventions about when to apply a word (such as "dead") is not a change in its meaning).

D. OBJECTIONS TO MY CRITIQUE

At this stage, let me pause to consider a few likely objections.

First, it may seem unfair to charge Whittington and Barnett with failing to grasp the conceptual and objective character of law. For the very feature that makes their arguments appealing is their focus on the concept of the people's consent as authorizing the law and on the written expression of that consent as binding. This is, objectively, what the law is, they contend. Barnett, in particular, urges this brand of Originalism as more objective than the others.¹⁰⁴

I certainly would not claim that Whittington and Barnett treat all words in a non-conceptual way. If they did, we could not hold this discussion, as we could not understand their thesis. (This is a significant point, which I will explain more fully in later criticisms.) Certain aspects of Whittington's critique of Textualism, which I have not discussed here, as well as Barnett's defense of the Ninth Amendment's protection of rights that are not explicitly named in the Constitution, definitely suggest a conceptual understanding of language. Whittington even acknowledges that the law is not merely words, but a set of ideas. It is, he says, "the embodied will of the people."¹⁰⁵ The problem is that both authors treat language as conceptual and objective only intermittently, contradicting this to the extent that they endorse a dated public understanding—that historical fact, as opposed to the conceptual truth—as legally decisive.

Consider Barnett. When it comes to applying the Constitution, Barnett treats some words (those of the Ninth Amendment) as calling for thought about the range of referents of the concepts named by those words, yet he treats other words as occasions for unthinking submission. He views the fact that the public understanding of a word in 1787 may have been mistaken in certain respects as no reason for a judge today to think about what the written word means and to apply the law accordingly (potentially applying the concept to a set of concretes that is not identical with those that his 1787 peer would have). On Barnett's view, the judge must defer to his predecessors not because their *thinking* about the concept was

104. BARNETT, *supra* note 2, at 92, 94. While Barnett does not expressly avow the Popular Sovereignty Argument, as indicated earlier, we shall see later that by implication, he is committed to it.

105. WHITTINGTON, *supra* note 1, at 59.

correct, but, essentially, because they spoke first. Barnett's sense of "original meaning" thus locks us into the comparative percepts of particular predecessors: we must slavishly implement whatever actual beliefs they held about concepts' meaning, rather than the concepts' objective meaning.¹⁰⁶

The complete absence of a conceptual, objective understanding of language is starkly revealed in Barnett's discussion of "commerce."¹⁰⁷ Article I, Section 8 of the Constitution gives Congress the power "to regulate Commerce with foreign nations, and among the several states, and with the Indian tribes."¹⁰⁸ To determine the original meaning of this term, Barnett carefully examines its use in a variety of historical sources, including the state ratifying conventions.¹⁰⁹ In South Carolina and Virginia, he finds, the term was sometimes used to encompass shipping and navigation. Barnett offers no objection to those conceptions of commerce. The problem is that that is not what commerce is. Commerce, in essence, is the buying and selling of goods or services.¹¹⁰ Shipping, a means of transportation, is not by its nature a type of trade or commerce. While shipping could itself be a commercial activity and while shipping is frequently used as a means of facilitating trade, it is not a necessary facilitator and it is also used for many non-commercial purposes, such as the transportation of tourists, troops, military equipment, or mail. "Shipping" is a distinct concept, designating an activity that is different in kind from commerce. As such, any inclusion of shipping as among the referents of "commerce" was a mistake. (The same applies to "navigation," which is the science of directing the course of a ship, aircraft, or guided missile.¹¹¹ This, too, is a distinct concept from "commerce.")

106. Rand would characterize Barnett as treating writtenness in a concrete-bound, non-conceptual way. For explanation of the concrete-bound approach, see PEIKOFF, *supra* note 70, at 127.

107. This is a surprising place to find it, given that Barnett discusses commerce in order to criticize what he regards as judicial misapplications of the Commerce Clause.

108. U.S. CONST. art. I, § 8.

109. BARNETT, *supra* note 2, at 282-89 (concerning the ratifying conventions). The discussion of other sources extends much further through his chapter 11.

110. And this meaning is reflected in standard dictionary definitions. See "Commerce," THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, FOURTH EDITION, (2004): "Commerce." *Dictionary.com*. <http://dictionary.reference.com/browse/commerce>. I cite a dictionary not as the criterion of words' meaning, but merely as a reflection of widespread recognition of the meaning of commerce, in this case.

111. "Navigation." *Dictionary.Com*. <http://dictionary.reference.com/browse/navigation>. Similarly, Merriam Webster defines navigation as "the science of getting ships, aircraft, or

In his discussion of “commerce,” Barnett emphasizes the original meaning’s exclusion of agriculture, manufacture, and production, which in later years have often been asserted as falling within the scope of the commerce clause.¹¹² This exclusion was sound, on the Founders’ part, and it is understandable that Barnett would highlight it. Nonetheless, it was a mistake for anyone to have included shipping or navigation in the concept of commerce, and for Barnett to accept that as the meaning of the law to which later generations are bound makes plain that his conception of meaning is fundamentally historical rather than objective. Indeed, he explicitly confirms this in a line that I have already cited: “If the public at the time of ratification understood the term ‘commerce’ in the Constitution to include trade, exchange, and navigation, then that is its original meaning.”¹¹³ Barnett similarly reveals his ultimate subjectivism when he writes: “Originalists no more need to discern the content of actual or real rights than they need to discern activity that is ‘really’ commerce. Instead, they can seek either the original intent of the framers or the original meaning of the text.”¹¹⁴

While interpreters can certainly proceed objectively or non-objectively in their determination of the history of the dominant understanding of a word’s meaning at a particular time, an objective account of history is not the same thing as an objective account of a term’s meaning. The acceptance of “commerce” as meaning trade *and* shipping *and* navigation reveals a failure to understand the distinctive kind of activity that commerce is. More damningly, it reveals a failure, on Barnett’s part, to understand the nature of concepts. Barnett’s implicit theory of meaning makes impossible the objective law that he claims to seek.¹¹⁵

spacecraft from place to place: *especially*: the method of determining position, course, and distance traveled.” “Navigation.” *Merriam Webster’s Online Dictionary*. <http://www.merriam-webster.com/dictionary/navigation>. Again, I cite dictionaries not as the fundamental arbiter or determinant of meaning, but as often reflecting the widespread understandings of terms’ meanings. Obviously, those popular understandings themselves are also fallible.

112. After a series of decisions across several decades that took an expansive view of “commerce” and correlatively of the power that this clause granted to Congress, the court recently began to reverse that trend in *United States v Lopez*, 514 U.S. 549 (1995) and *United States v Morrison*, 529 U.S. 598 (2000). See KERMIT ROOSEVELT III, *THE MYTH OF JUDICIAL ACTIVISM* 171 *passim* (2008).

113. BARNETT, *supra* note 2, at 293.

114. *Id.* at 255.

115. Notice that if the concept of “commerce” included shipping and navigation, we would be hard pressed to identify what it did not include. On what basis should “commerce” not also encompass “investigating crime” or “dancing” or “solving

Whittington, similarly, despite occasional intimations to the contrary, reveals the fundamentally non-conceptual and subjectivist character of his view when he claims that to the extent that the Founders did not share a common understanding of the meaning of certain textual provisions, those provisions are "meaningless."¹¹⁶ His claim is not that the Founders, on occasion, deliberately enacted gibberish. What he has in mind are cases in which individual lawmakers' understandings of terms' meanings failed to correspond; different parties thought that they were agreeing to different things in supporting the same textual provision. (Because the different understandings were unexpressed, the individuals did not realize their disagreement.) In such cases, Whittington believes, we must treat the text as meaningless.

While the possibility of good faith misunderstandings between people arises under any theory of judicial interpretation, Whittington's conclusion reveals that, far from anchoring interpretation in fidelity to the written Constitution's objective meaning, Originalism's required fidelity is to particular beliefs that particular earlier men happened to hold. If differing opinion about words' meaning moots those words despite the fact that the words were enacted into law (and may even have had a clear public understanding at the time), then the words of the Constitution are not respected as the law of the land. What Whittington's ideal judge is actually faithful to is the subjective content of select individuals' minds. Anyone seeking to learn the meaning of a constitutional provision is not to consult the language of the law and ask: what does it say? Rather, he must ascertain which provisions resulted from the lawmakers' agreement over the meaning of their terms and which did not (which will require that he discover the divergences among

crossword puzzles" or "making jello"? Those activities, after all, typically rely on the use of purchased items or services (e.g., guns, forensics equipment, musicians, periodicals, pans). Indeed, why should even that indirect link with commerce be relevant, given that shipping and navigation can be all together independent of commerce? Once terms are accepted as having non-objective meanings, we have no grounds for excluding any alleged referents of concepts. Objective law is thereby rendered impossible.

Separately, I have no objection to the use of technical terms or terms of art in law, as long as the technical meanings of such terms and the contexts in which they are applicable are widely understood by the relevant parties. Similarly, it is not objectionable, in principle, for lawmakers to sometimes stipulate, in drafting and enacting a law, a very particular meaning of a potentially ambiguous term, as long as they are explicit about that special meaning. For the general intelligibility of the law, such cases should be the exception rather than the rule.

116. WHITTINGTON, *supra* note 1, at 96.

lawmakers' beliefs that the lawmakers themselves were not aware of). Only the former (provisions resulting from agreement about their words' meaning) constitute valid law; the latter are "meaningless" and thus inapplicable; they carry no authority. (This is a long way from the "plain meaning" that many Originalists claim to uphold.)

Let us turn, then, to a second, different kind of objection to my critique: concepts such as "cats" are too easy. Perhaps it is true that "cats" designates a definite kind of existent, but surely legal disputes concern far more complex, higher-level concepts. We can inspect a would-be cat to determine its membership in the class of cats in a way that we cannot inspect salient legal concepts. Whether a given action constitutes an "exercise of religion" or a "search" or "commerce," for instance, is not available to perceptual confirmation in the way that whether something is a cat *is*. Thus the objectivity of "cats," even if I am right about such lower-level concepts, does not demonstrate objectivity of the legally contested concepts. The best we can do there is, as the Originalists maintain, defer to the public understanding at the time that a law was written.

I chose "cats" as a deliberately simple example in order to introduce the basic nature of concepts (which Originalists, I think, fail to appreciate). Undoubtedly, our conceptual vocabulary ascends to much more abstract levels and it is the comparatively higher abstractions named in our laws that are the most frequently contested. Some of these pose genuinely hard cases. I do not believe that the proper view of objectivity will *easily* dissolve all disputes. Difficult cases, largely concerning the margins of a concept's scope, will continue to occupy judges. What I *would* maintain, however, is that all valid concepts function in essentially the same way as first-level concepts of the "cats" variety. That is, when we refer to "cats"—or to "animals" or "mammals" or "species" or "living organisms" (which are higher level concepts)—or to concepts which are more abstract in more complex ways, such as "condominium" or "decoy" or "edit" or "admonish" or "responsible" or "anxious"—or to legal staples such as "religion" or "search" or "commerce" or "speech" or "deliberate" or "negligent" or "self-defense"—each of these words means something and not other things. A term that is used to designate particulars that lack a distinctive identity is not a valid concept. For it fails to perform the function of concepts, namely: to integrate, mentally, discrete existents on the basis of their sharing certain characteristics that distinguish

them from still other existents.¹¹⁷ A concept is not simply a juxtaposition of properties;¹¹⁸ its referents must constitute a distinctive type of existent. Words that do not clearly identify a distinctive kind of referent make for vague, ambiguous laws. The reason that we think that the rule of law requires clear, written law is so that the rules of government action can be known to all (and so that people can plan accordingly). That presupposes, however, that words—even words representing highly abstract concepts—have definite meanings; it presupposes that “search” means one kind of thing and not another; that “commerce” designates activities of one kind, not of others. Whistling a happy tune does not qualify.¹¹⁹

Legal disputes arise—understandably—because the exact range of particulars that higher level concepts encompass is not self-evident and can sometimes be difficult to ascertain. This is especially true when we first apply law to areas of human activity that did not previously exist, such as property rights in cyberspace. These disputes do not arise because higher-level concepts lack objective meaning, however. Indeed, if that were the case, even the Originalists’ quest for fidelity to “what the public at time *t* thought words *x*, *y* and *z* meant” would be impossible, since we could have no objective knowledge of what that public understanding was. The concepts “public” and “understanding,” after all, are themselves far more abstract than “cats.” If abstraction were incompatible with objectivity, then any attempt to express an abstraction (the “public understanding,” in this case) would be fated to non-objective interpretation that renders the thesis of Originalism capable of meaning anything—and thus reveal that it actually means nothing. A defender of Originalism, in other words, cannot simultaneously deny the objectivity of higher-level concepts and meaningfully assert his own thesis.

At this stage, one might attempt to press a related objection: the problem is not that “cats” is too simple a concept; the problem is that cats are a natural kind. Dworkin, for instance,

117. See RAND, *supra* note 83, at 12–15, 41, 69, 153.

118. David Harriman, *Induction and Experimental Method*, THE OBJECTIVE STANDARD, Spring 2007, at 106.

119. For more on invalid concepts and on when it is appropriate to form a concept, see RAND, *supra* note 83, at 49, 70–73. She regards the formation of many concepts as optional. An invalid concept, however, represents an attempt “to integrate errors, contradictions or false propositions.” *Id.* at 49. Harriman offers some historical illustrations of invalid concepts, such as “natural motion” and “violent motion” in ancient Greek physics. Harriman, *supra* note 118, at 80, 106.

contends that “analysis of political concepts cannot be shown to be descriptive on the model of scientific investigation into natural kinds. Liberty has no DNA.”¹²⁰ Even if respect for the nature of existents has *some* role in a general explanation of meaning, as I have urged, the objection is that this Randian account is overly realist. Language is actually intersubjective. Words’ meanings depend, at least in part, on people’s practices, on how a community of speakers chooses to use words. There are no “unchanging essences” that fix words’ meanings. Yet my defense of concepts’ objectivity misleadingly excludes the human contribution. Indeed, the reason that the example of a sequence of prime numbers seems to shield against an unruly, non-objective “open-endedness” is that with mathematical terms, human beings stipulate firm, unwavering criteria of concepts’ referents in a way that we do not consecrate the criteria of most other concepts. What is a “prime number” is not open to dispute and does not evolve in the way that whether or not something is a “search” can. My opponent’s larger contention is that objective meaning is not set by the nature of existents; it is set by us, adopting standards that are more rigid in some fields than in others. Thus while my account of the objectivity of concepts such as “cats” may be valid, such natural kinds reflect only one, narrow type of concepts and are hardly representative.

I would agree that concepts are “intersubjective” in the trivial sense acknowledged earlier that human beings assign the words by which we refer to various concepts, tacitly agreeing that “c-a-t” will mean cat, “l-a-w” will mean law, and so on. More significantly, we also determine which concepts to form. We can only do so effectively, however, to the extent that we heed existents’ actual natures and identify their fundamental similarities and differences with one another. This is the inescapable fact that drives the “realism” of my portrait of concepts. It is crucial not to confuse this realism with what Rand calls “intrinsicism,” however.¹²¹ The idea that some kinds are “natural” encourages the belief that knowledge of these “natural kind” concepts is passive and that certain things’ intrinsic nature (cat-ness, tiger-ness, gold-ness, etc.) is simply revealed to attentive observers. Rand emphatically rejects this. The realism in her account of concept formation does not consist of the passive receipt of existents’ imprint of their “intrinsic” character

120. DWORKIN, *supra* note 80, at 153; *see also id.* at 10–11, 152–54, 224.

121. RAND, *supra* note 83, at 52–64; *see also id.* at 46–47; sources cited *supra* note 94.

on us. (Indeed, given the views that the term “realism” is often used to characterize, it is arguable whether that is an apt label for her position.) In Rand’s view, essence is epistemological rather than metaphysical.¹²² Knowing a thing’s essence—knowing what kind of thing it is—requires thoughtful activity on the part of human observers. This is true not only of higher-level or “non-natural” concepts, but of all concepts. For even the “perceptual confirmation” of something’s being a cat is not wholly perceptual. It also depends on human judgments about which features of the specimen being considered to regard as indicative of membership in that class.

Consider: Why don’t we call zebras “tigers,” given that zebras are also striped, four-legged mammals? Why group tigers together as one kind, excluding zebras, rather than join tigers and zebras in the same kind? On what basis should we regard those characteristics that are shared by tigers that are not also shared by zebras as a more appropriate basis for conceptual classification than those characteristics of tigers that are held in common with zebras? The answers to such questions cannot be found through observation alone. Touching an animal more carefully, looking at it more closely, or employing any of the five senses unaided by active thought cannot resolve these questions.

Nothing wears its fundamentality on its sleeve. Distinct phenomena (be they entities, events, properties, relationships, etc.) do not announce to us: “and here’s what’s most important about me” or “here’s the kind of thing I am.” When we seek to establish whether a particular existent is fundamentally similar to certain other existents in a specific respect (is this a possum or a raccoon? gold or fool’s gold? liberal or conservative? deliberate or accidental?), it is human beings who must identify what the fundamental distinguishing characteristics are.

In order to form any concept—to identify anything as *of a kind*, be it natural or artificial, simple and seemingly obvious or complex and abstract—a person must use his mind to judge particular existents’ salient similarities and differences from other existents. He must integrate concretes into a concept by essentials, identifying their conceptual common denominator and distinguishing characteristics. While he must heed existents’ actual, independent natures in order to form concepts effectively, because no categories of classification are found readymade in nature, it is for human beings to identify what the

122. RAND, *supra* note 83, at 52.

salient characteristics are.¹²³ What is “salient” will depend, in part, on the purpose of the classification.¹²⁴

The point is that the objectivity of concepts does not entail their “given-ness.” No concepts’ meanings are simply revealed to us. Consequently, the charge that Rand’s account of meaning is “too realist” relies on an erroneous impression of what her view is.¹²⁵

What all of this brings us back to is the fact that even the concepts of our law that are frequently debated in court can be objective. This is not to say that all of our laws or all of the concepts used therein are in fact objective, but my critique of various laws’ actual objectivity is an issue for another day. The point, rather, is that the concepts that are properly used in a legal system are as capable of having objective meaning as any other concepts.¹²⁶

Admittedly, higher-level concepts are more demanding of us insofar as knowledge of their objective meaning requires

123. The less controversial a classification is, the less we notice the human activity that it relies on. Long-entrenched classifications that can sometimes seem as if they are products of merely passive observations have not been altered or much debated because they were well-formed in the first place and because one rarely encounters difficult-to-classify borderline instances of those concepts.

124. The purposes of a biologist’s taxonomic classification are different from those of a person contemplating the acquisition of a pet or of a search or seeing-eye animal, for instance, which are different from the purposes of specific medical research. Thus we cross-list members of differing animal species in additional conceptual divisions, such as wild or tame, predator or prey, carnivore or herbivore. Similarly, we classify human beings into many cross-cutting classes, such as by age, gender, profession, nationality, marital status, and political affiliation. Yet for no purpose are the appropriate criteria simply given. Indeed, even the identification of biological species is subject to political pressures. *See Hail Linnaeus*, THE ECONOMIST, May 19, 2007, at 13.

125. In contrasting her view of concepts with the major historical alternatives, Rand characterizes concepts as “neither revealed nor invented, but as produced by man’s consciousness in accordance with the facts of reality, as mental integrations of factual data computed by man—as the products of a cognitive method of classification whose processes must be performed by man, but whose content is dictated by reality.” RAND, *supra* note 83, at 54. For further differentiation of the objective from the intrinsic, see PEIKOFF, *supra* note 70, at 142–46; Peikoff, *supra* note 89, at 101–03; Smith, *Objective Morality*, *supra* note 100; Darryl Wright, *Evaluative Concepts and Objective Values: Rand on Moral Objectivity*, 25 SOC. PHIL. & POL’Y 149, 149–81 (2008); Darryl Wright, *Evaluative Concepts and Objective Values* 8, paper presented at Conference on Concepts and Objectivity, University of Pittsburgh, September 2007. For a defense of the idea that similarity (as opposed to sameness) relationships are the basis of species concepts, see Jason Rheins, *Similarity and Species Concepts*, in 8 CARVING NATURE AT ITS JOINTS—TOPICS IN CONTEMPORARY PHILOSOPHY (J. Campbell, J. O’Rourke, & M. Slater eds., forthcoming).

126. I discuss the basic nature of objective law in Tara Smith, *Objective Law*, in AYN RAND: A COMPANION TO HER WORKS AND THOUGHT (Allan Gotthelf & Gregory Salmieri eds., forthcoming 2010).

understanding all of the subordinate concepts that they integrate, which demands accuracy in the identification of those units' conceptual common denominators and distinguishing characteristics. The units of a higher-level concept can be many not only in number, but also in kind (integrating concepts of entities, actions, states of consciousness, relationships, etc., such as in the concepts "prize," "persevere," "contract," and "property"). The subordinate concepts may also vary in the level of *their* abstractness. This complexity is no bar to such higher-level concepts' objectivity, however. What it signifies is simply that knowledge of a concept's objective meaning requires (though is not exhausted by) knowledge of its constituent elements. We have no reason to assume that this is beyond us.¹²⁷

Consider the example of a search, the subject of the Fourth Amendment. The concept of a "search" is a higher-level integration of at least three different kinds of things: an activity, a manner, and a purpose. According to the dictionary, to search is "to make a thorough examination of; look over carefully in order to find something; explore."¹²⁸ We speak of "searching" to refer to a person's inspecting in a careful, thorough, and persistent way so as to find certain materials or to learn certain information. The fact that the answer to questions of whether certain police activity constitutes a search is not always obvious does not entail that no answer exists or that every answer is equally correct. Indeed, if we could not distinguish true from false answers about the referents of "search," the Fourth Amendment ought to be repealed as hollow, useless Constitutional clutter that only wastes the court's resources. In fact, much as people might disagree with the court's application of the concept in a particular case, they disagree precisely because they believe that the court has *misunderstood* the actual meaning of "search"—the objective meaning of the term.¹²⁹ Difficult questions at the periphery of a concept's range of referents do not reveal the concept's lack of objective meaning. Nor do we ordinarily treat them as if they do.

127. Indeed, the standard of living in the contemporary West shatters that suggestion. If people did not understand the sophisticated abstractions that many people today do, they would not have been able to produce the array of goods and services that they have.

128. "Search." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, FOURTH EDITION (2004): "Search." *Dictionary.com*: <http://dictionary.reference.com/browse/search>.

129. Thus the disagreements about the Court's decision in *Kyllo v United States*, 533 U.S. 27 (2001) (involving the use of thermal imaging technology).

“Evidence.” to take another legal example, is also a relatively abstract concept. The admissibility, in court, of evidence as opposed to hearsay depends on recognizing the difference between the two, which, in turn, depends on understanding the objective meaning of each. If they had no objective meanings, there could be no recognizable difference between them that could be enforced in court; the court’s practice of treating someone’s say-so about a conversation differently from a tape recording of that conversation would be a charade that contributes nothing to the justice of the court’s resolution of the case. Here again, the fact that people might argue with a judge’s rulings on whether particular submissions constitute admissible evidence or inadmissible hearsay does not refute the distinction. On the contrary, the intensity of such arguments testifies to the presumed legitimacy of the distinction and correspondingly, to the presumed objectivity of the two concepts on which that distinction depends.

In answer to the charge of offering unrepresentative examples, then, my claim is that all concepts function, in principle, in the same manner as “cats.” Whether reflecting lower or higher levels of abstraction, allegedly natural or not, legally controversial or part of one’s taken-for-granted routine, all concepts must be objective in order to be valid. And the law must be expressed in objective terms in order to have a specific, coherent meaning and thus be able to properly do its job.

To be thorough, I should also comment more directly on the objection to my example of prime numbers. The gist of that objection, recall, was that prime numbers are given an immutable, unequivocal meaning by human beings that most other concepts lack; thus they are not a sound basis for defending the open-endedness of concepts from worries about subjectivism.

Leaving aside much more fundamental arguments about the justification of mathematical concepts, it suffices to observe here that the understanding of valid concepts of any kind is fixed *at a given time*. This means that at that time, the concept is thought to refer to a certain sort of thing and not others. Bear in mind that on Rand’s view, a concept is not to be equated with its definition. Further, a definition is not a statement of the criteria of membership in the class of things conceptualized.¹³⁰ When we

130. See PEIKOFF, *supra* note 70, at 101–05; RAND, *supra* note 83, at 235–38; Moore, *Natural Law*, *supra* note 89, at 294, 337–38.

are concerned with the criteria of class membership (as in the objection to my prime number example), notice that such criteria will not be equally precise in all areas, as all conceptual integrations do not require the same level of precision. How fine-grained the standard of class membership should be depends largely on the function of a particular concept. Its function will depend in part on what other concepts in close proximity have already "carved up" wider groups of concretes. It makes sense to distinguish frogs from toads on finer grounds than those on which we distinguish frogs from turtles, for instance. It makes sense to distinguish vegans from vegetarians by more precise criteria than those that we use to distinguish vegetarians from meat-eaters. Thus the greater specificity of the criteria for being a prime number than that of the criteria used for many other concepts is itself no indication of greater objectivity.

Further, insofar as a *definition* of a concept (which, again, is not the equivalent of the criteria of class membership) reflects the present state of human knowledge about the fundamental distinguishing characteristics of the units of that concept, what remains true of all concepts is that at a given time, that concept will be understood to encompass certain existents and to exclude others. The definition of a concept need not be specified in a way that precludes the possibility of encountering difficult-to-classify borderline cases or of later revision (as the definition of a prime number seems to) in order to be objective. The fact that definitions of certain concepts are more likely than others to be refined in the future simply reflects the fact that definitions reflect the state of human knowledge, which is naturally limited at any given time, fallible at all times, and capable of future growth. As human beings learn more about the referents of a concept, we may eventually alter the definition of the concept to reflect a more accurate grasp of its units' essential distinguishing characteristic.¹³¹ This does not reveal that such concepts lack identity or objective meaning, however, for it does not mean that they fail to pick out a distinctive kind of existent. The upshot is that my prime number example does deliver its intended point: any objective concept specifies a definite, distinctive *kind* of

131. Moore's discussion of death is a good example. See Moore, *Natural Law*, *supra* note 89, at 294, 308–09. Rand discusses the contextual character of definitions, illustrating with the example of the advance in human beings' understanding of the concept "man." See RAND, *supra* note 83, at 43–47.

existent, thereby excluding other existents. The number of referents that might be of that kind, however, *is* open-ended.

I suspect that this objection to the prime number example is fueled by an intrinsicist image of concepts of the sort implied by the assertion of “natural” kinds. For on that view, the definition of a concept *should* preclude the possibility of encountering any borderline cases and of any later revisions of that definition. That is, if readymade metaphysical essences inhere in every existent, such that “objective” knowledge consists simply in the immediate apprehension of such eternal verities, then a person either knows a concept or he doesn’t; the required revelation either has or has not taken place. Learning *more* about an essence is out of the question. On Rand’s view, in contrast, objectivity is a function of man’s identification of the similarities and differences among the existents that he observes. As his knowledge of the existents grows, his knowledge of the relationships among them grows and his understanding of concepts correspondingly may change. (I stress: his understanding, not the concepts’ referents.) Man’s identification of a group of things’ fundamental distinguishing characteristics is always, inevitably, relative to his present state of knowledge.¹³²

E. THE ORIGINALISTS’ EQUIVOCATION OVER “FIXED” MEANING

Let’s return, then, to the central thrust of the Written Constitution Argument: what is it that the people are ratifying, if the text of the law isn’t fixed? In adopting a particular written formulation of a law, what are those people agreeing to, if not that original written meaning?¹³³

This is certainly a reasonable question. The Originalists’ answer is sloppy, however. For it equivocates between two senses of “fixed,” conflating distinct possibilities: an interpreter

132. See RAND, *supra* note 83, at 46–47. In “Why Originalism Won’t Die,” I characterized objective meaning in what I now think is a potentially misleading way. By recommending that judges proceed according to “the objective criteria” for identifying the meaning of a concept rather than the law’s authors’ (or a previous generation’s) criteria, one might assume that I was equating objective criteria with objective meaning. This would be a mistake. My aim in that portion of the essay was to contrast the subjectivism of Originalism with objectivity of meaning, but it is important to appreciate that the criteria that one employs for applying a concept are reflections of the present state of knowledge of a concept’s referents rather than direct reflections of the referents themselves. See Smith, *supra* note 2, at 193–97. On Rand’s view, as I have been emphasizing here, the meaning of a concept is its referents. See RAND, *supra* note 83, at 235–38.

133. See BARNETT, *supra* note 2, at 88, 117; WHITTINGTON, *supra* note 1, at 55–56.

swapping the concept named in a law for a different concept, and an interpreter respecting the concept named while refining its list of referents. A judge may not do the former. For example, if a law concerning the financial industry refers to “banks,” he may not treat the word as he would when reading environmental legislation that uses “banks” to refer to coastal lands, such as the Outer Banks of North Carolina. Those uses of “banks” name distinct concepts. Yet it is natural to do the latter, that is, to refine the catalog of particulars that a concept refers to (as when we add to or subtract from our lists of particulars that qualify under the concepts “speech” or “toxic” or “endangered,” for instance). In fact, a judge must do that if laws are to be objective and if we are not to revert to mind-reading. The concept being interpreted is “fixed” by the language of the law. That is, the kind of referents is fixed, but the exact list of referents that the concept encompasses is not.¹³⁴

Admittedly, this can get tricky because we sometimes revise our definitions of concepts as well as our lists of their referents. A revised definition does not constitute a change in concepts, however. For a concept is not interchangeable with its definition (as I noted above). A definition is our most accurate possible statement of the essential nature of the units subsumed under a concept *relative to* all currently available knowledge.¹³⁵ But our present understanding of a concept does not determine the nature of the things identified by that concept. It is crucial to recognize that our understanding of a concept is not the subject matter of that concept; it is not the concept’s referent. A word refers to a kind of existent, not to beliefs about a kind of existent. Thus it would be a mistake to interpret language as if it did. Yet that is what the Originalist method does, by enshrining the actual, incomplete and imperfect understanding of concepts that were held by particular men at the time of enactment as constituting words’ meaning. Originalism elevates subjective beliefs over objective meaning.

To fully appreciate the sense of the distinction between swapping one concept for another and respecting a single concept while revising its list of referents, consider a simple example. Imagine that people in 1800 had the concept “frogs” and used it to refer to the same type of things that we use “frogs”

134. See BRINK, *supra* note 103; Christopher R. Green, *Originalism and the Sense-Reference Distinction*, 50 ST. LOUIS U. L.J. 555 (2006).

135. Recall Rand’s definition of definitions. *see supra* text accompanying note 87.

for today, although they had a very incomplete understanding of the nature of frogs, by contemporary standards. Now suppose that we, today, could speak to those people and fill them in on all that we have subsequently learned, pointing out many properties of frogs that they were not aware of. It is possible that if we informed them that frogs had certain features, they would respond: “no, that’s not what we meant, that’s not what we were referring to; you have misunderstood our concept of ‘frogs.’” It is equally possible, however, that if we had made certain different observations, pointing out some other facts that we have since learned about frogs, they would say: “Wow, we hadn’t realized that; how fascinating,” offering no denial that that *is* the thing that they were referring to (despite being informed of their comparative ignorance and even of errors concerning particular features of frogs). The point is simple: not *any* departure from the exact concretes in their minds (or even from the exact criteria that they used) constitutes a failure to use that same concept. Fidelity to the law allows for growth in knowledge about things that are already known incompletely and imperfectly. Not all deviations from the precise list of referents or from the criteria of a concept’s meaning that the people of the time would have supplied constitute treachery against that law. (When whales were re-classified as mammals, we weren’t changing the subject.)¹³⁶

What is important for objective legal interpretation, then, is that judges respect the *concepts* that lawmakers were expressing in the written law. The sense in which the original understanding of words is relevant is simply that we must ask, in effect: “What language were they speaking? How were these words used, in the relevant context, at that time? What concepts did they stand for?” (Had “bank,” for instance, already acquired both its financial and physiographic meanings? Did “saloon” still mean

136. Others have recognized the distinction between swapping concepts and respecting the same concept while revising its list of referents, though they have not always characterized the basic distinction in the exact same way. Dworkin, for instance, distinguishes concepts from conceptions and semantic Originalism from expectations Originalism. See DWORKIN, *supra* note 73, at 134–36; Dworkin, *Comment*, in SCALIA, *supra* note 7 at 115, 120. Dworkin writes that “It is a fallacy to infer from the fact that the semantic intentions of historical statements inevitably fix what the document they made *says* that keeping faith with what they said means enforcing the document as they hoped or expected or assumed it would be enforced.” DWORKIN, *JUSTICE*, *supra* note 80, at 123–24 (emphasis in original); see also *id.* at 29–30. Dworkin does not identify the misguided notion of objectivity operative in Originalism, however. See also HART, *supra* note 21, at 246 (distinguishing the meaning of a concept from the criteria of its application).

“salon”?¹³⁷ Had “gay” yet acquired the meaning “homosexual”?¹³⁸ Judges’ responsibility is to discover which concept was referred to by the words in the law and to then use the objective meaning of that concept in applying that law to contemporary disputes. It is possible, of course, that a concept will sometimes be incorrectly understood by judges and erroneously thought to encompass units which it truly does not, or to not encompass certain units that it does, in fact. This does not entail that applying concepts objectively is the inappropriate interpretive method, however. The possibility of misapplication arises under any theory. An Originalist judge can, by an Originalist’s standards, mistake what the original public understanding was at a given time just as much as a non-Originalist judge can err in employing his method of interpretation. We do not, because people sometimes use words incorrectly, renounce the use of language or surrender the distinction between proper and improper application of concepts. Indeed, we rely on that distinction in order to identify mistakes. (It is because we could never guarantee against the possibility of human misjudgment that we should seek highly intelligent, conceptually skilled thinkers for the court—people who are good at objectively assessing proposed concretizations of the abstractions that our law consists of.)

Originalists are undoubtedly right, then, that we may not interpret the law in a way that alters its words’ original meaning. That is not what we are doing, however, when we recognize that a law encompasses certain concretes that are different from those envisioned by the public at the time of the law’s enactment (just as we would not be defying the First Amendment if we took its prohibition of the establishment of religion to encompass Mormonism, even though that religion was not developed until the 19th century, or its protection of speech to encompass email). A word’s “original meaning” cannot be equated with the finite, time-bound set of concrete referents or criteria for identifying referents that Originalists insist. Barnett’s “lock-in” is appropriate only to the extent that it offers fidelity to the

137. “Saloon.” *Online Etymology Dictionary*, from *Dictionary.com*: <http://dictionary.reference.com/browse/saloon>.

138. Literally, of course, we must first know whether the relevant language is English or German, for instance, but further, we must know whether an American form of English or a British form is being used. As quick examples of the difference: for the British, “boot” refers to the trunk of an automobile and “lift” to an elevator, though these are not standard American uses of those words. Thanks to Dave Odden for reminding me of this sort of difference.

concepts written into law. The insistence on adherence to the *original* public understanding, however—understood as Originalists understand that, as the frozen set of beliefs of a particular set of people—shackles us to the wrong set of constraints. Originalism locates the law’s meaning in people’s beliefs about the things they spoke of, rather than in the nature of those things. Objectivity in law is anchored in the latter.¹³⁹ (To be clear: while some Originalists might *like* to be open to respecting room for the sort of growth and correction of understanding that I have been discussing in this section, the conception of words’ meaning that is logically entailed by the Popular Sovereignty and Written Constitution Arguments commits them to a more restrictive notion of meaning that is at odds with it. If others who support Originalism through arguments other than these two wish to accept the open-ended nature of meaning that I have sketched, they do so by veering away from *original* meaning—in the sense that Originalists typically use that term—being the salient feature of their view.)

F. THE FLAW IN THE CONTRACT ANALOGY

In light of all this, we can now appreciate the defect in the contract analogy employed on behalf of the Written Constitution Argument. Recall the thrust of that argument: just as we determine exactly what contracting parties agreed to on the basis of the public understanding of their written words’ meaning, so when it comes to interpreting a law, we must adhere to the public understanding of the time the law was enacted because *this* is what those people agreed to.

What this reasoning neglects is the fact that contracts are respected as legally binding only when they concern exchanges of things that fall within the rightful domains of the contracting parties. Contracts are not valid when they are agreements to exchange things that the law does not recognize the parties as having the authority to exchange. Even if I am a mentally competent adult with full legal standing to enter into contracts, I cannot trade things that are not mine. I cannot, for example,

139. Indeed, the Originalists’ desired “lock-in” sounds eerily reminiscent of Scalia’s assertion that the “whole purpose” of a constitution is “to prevent change.” SCALIA, *supra* note 7, at 40. This evades the crucial difference between judges changing what the law is (or acting as if the law were something other than what it is) and judges applying the existing law in a way that reflects a changed understanding of its full meaning and implications. The latter, I have been contending, is legitimate so long as that changed understanding falls within the bounds of the objective meaning of the relevant concepts in the relevant law.

commit my boss's son to repair my sister's car for \$100 (from her) without obtaining each of their authorization of this arrangement. In contract law, we do not treat individuals as enjoying a free hand to agree to *whatever* they like. We ask not only "what did they agree to?" but also "what did they have the right to agree to?" The aspect of this that is salient to interpreting the Constitution is that we do not treat individuals as holding the right to use words in whatever peculiar fashion they might like. 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. They may not alter words' meaning by fiat, declaring: "the word x means 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. The legal authorities would have no objective means of resolving disputes about what obligations each party had, in fact, assumed. Even if the two parties adopted a private code that assigned peculiar meanings to words (a code in which "corn" means "toes," "cook" means "compose a symphony," and "red" means "July 14," for instance), the need for external intelligibility remains. That code would have to be spelled out in terms whose meaning was accessible to the third parties asked to enforce it. Parties to a contract, in short, must abide by the objective meaning of words.

The same is true when it comes to constitutional interpretation. For the contention that the written character of the Constitution entails Originalism seeks to have language used in an equally subjective way as those who would ask to be accountable only to their personal understandings of the meanings of the terms in their contracts. If contemporary interpreters of law are to treat its words as referring only to the inevitably limited, fallible understandings of the people alive when it was enacted, we render objective law impossible.

VII. PUBLIC UNDERSTANDING ORIGINALISM'S FATAL CONTRADICTION

The best way to ensure the rule of law, according to the Originalists under discussion, is to apply the original public understanding of the language of our law. The Originalist method assumes that, because words lack objective meaning, we must, instead of seeking that, seek to discover the historical fact

of what the understanding of particular words was at the time of law's enactment. The arguments for Public Understanding Originalism examined here, however, depend on the denial of that very premise (the premise that objective meaning is impossible). To see this, I begin with the more obvious inconsistency.¹⁴⁰

The possibility of an “original meaning” of the law that we, today, could either uphold or betray depends on words’ having objective and univocal meanings. If they did not, there would be no object of agreement for an earlier generation’s will or words to converge around and that could later be pointed to as *the* meaning of the public of that time.¹⁴¹ It is significant that, according 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. Nor does it provide reason to suppose that people today are not entitled to do the same. This inconsistency reflects the deeper fracture at the spine of Originalism.

The conclusion of Public Understanding Originalism contradicts the reasoning offered on its behalf. What the Popular Sovereignty Argument and Written Constitution Argument actually show is that Originalism depends on higher-level concepts which are understood to be objective—the very thing that Originalism’s method denies. That is, Originalism as a method (the conclusion of these two arguments) gives the

140. Originalists often speak as if original meaning and objective meaning are one and the same, of course, as in a previously cited passage from Barnett (claiming that Public Understanding Originalism “seeks the public or objective meaning that a reasonable listener would place on the words used.” BARNETT, *supra* note 2, at 92). This is indicative of their failure to grasp what objectivity actually is.

141. I alluded to this earlier, *see supra* text accompanying note 105 and page 41. Also note that this realization is implicit in the passage from Spooner quoted by Barnett, though that message seems to have been lost on Barnett. *See supra* text accompanying notes 46–49.

subjective beliefs of the public at time *t* the power to dictate the meaning of words. Yet the *reasoning* for that method relies on the tacit presupposition that the Constitution expresses a meaning that is independent of anyone's beliefs about its meaning. For *that* meaning is what the public at some earlier date allegedly understood and that meaning is what was expressed through the enacted written words.

To put the point slightly differently: The conclusion that Public Understanding Originalism is the proper method of interpretation assumes that no objective meaning is possible. (If it were, we could investigate that. Instead, Originalists hold that reference to a historical belief is the best we can do.) At the same time, the arguments in support of that conclusion assume that objective meaning *is* possible, since that is what "the will of the people" and "the meaning of the written words" refer to. If the premises of these two arguments are true, in other words, they show that the conclusion of the arguments is false. Meaning cannot be both objective and non-objective. For the premises to be true, meaning must be objective. Yet if meaning is objective, then the conclusion—the propriety of the Originalist method (which denies the possibility of objective meaning)—is false.¹⁴²

VIII. CONCLUSION

Public Understanding Originalism is widely regarded, even by its critics, as the strongest form of Originalism because it is the most objective. My claim is that this is exactly what it is not, given its understanding of "original meaning," which interprets law's language to reflect only the actual, inevitably limited conceptions of words' meanings held by the public at a particular date. If we take the meaning of law's words to be merely what certain people's words meant *to them*—those individuals' *conceptions*, no more and no less—we revert to the mind-reading games and variability that sank the Original Intent school.

Although Public Understanding Originalism aspires to an objective reading of our law, because Originalism does not understand the nature of objectivity, it collapses into the very subjectivism that it seeks to oppose. While Barnett seeks to distance himself from the more transparent subjectivism of the Popular Sovereignty rationale for Originalism, his preferred

142. This contradiction became much clearer to me thanks to discussion with Greg Salmieri.

Written Constitution Argument carries equally subjectivist implications. For the conclusion of that argument, the purported propriety of Public Understanding Originalism, in practice treats the people as sovereign. The original understanding (*as* advocates of the Written Constitution Argument interpret it) simply represents the will of the people of an earlier era. It is the enshrinement of majority will, cosmetically enhanced by the halo of history. The fact that it is historical lends an aura of legitimacy to its claim on us. Yet it is merely a glorified populism, underneath. The will of the people holds no more authority over the individual when it is draped in words that are treated as code for particular historical individuals' conceptions of words' meanings (as in the Written Constitution Argument) than it does when stripped bare (as in the Popular Sovereignty Argument). What all Originalists fail to appreciate is that the popular understanding of certain words, however accurately we come to understand what that understanding actually was at a given date, remains a fact fundamentally about consciousnesses, rather than about reality. Consequently, it cannot sustain the objective rule of law.

The Originalists' desire for an interpretive methodology that respects a stable constitution as the anchor of our law is unimpeachable. Equally worthy is the Public Understanding school's desire to overcome the subjectivism that cripples other forms of Originalism as well as, from the other flank, the "living constitutionalists" (at least, on certain undisciplined versions of what that refers to). Because the unqualified will of the people is not the ultimate source of our government's authority and because written words do not mean simply what the people of a certain era think they mean, however, the two defenses of Public Understanding Originalism considered here, initially so persuasive, fail. What is crucial to understanding the objective meaning of law is an appreciation of the conceptual nature of language and of the objective, open-ended nature of concepts. The Public Understanding school, unfortunately, chains us to the closed conceptions of words' meanings that have been held by particular individuals. It attempts to reduce what is fundamentally a conceptual question (about the meaning of words) into a historical one (what did earlier people believe?). By reducing the judge's task from interpretation to imitation, Originalism, in practice, replaces its coveted rule of law with the rule of men—earlier men.

Some might suspect that I have rejected Originalism only to embrace what sounds like simply another form of it (at least by implication, insofar as I have suggested my preferred view here). This would be a mistake. I reject Originalism entirely for the central reason that its thrust focuses on a secondary issue. History does have a role in proper legal interpretation; discerning the original meaning is significant insofar as we need to identify and respect the concepts that were expressed in the written law. Fidelity to that, however, hardly provides a method for judges to follow in applying the law. It will not be adequate guidance to remind judges who must decide contemporary controversies: “avoid anachronistic readings of words.” The conceptual character of language and the correlative need for judges to engage in rational thought about its meaning cannot be evaded.

In truth, all Originalists chase a misguided solution. For the salient choice that a judge confronts when interpreting the law is not a question of time: then or now? “their” meaning, in the past, or “ours” today? The choice is between objective and non-objective understandings of concepts. Only with a fuller, accurate grasp of *what* we are interpreting—of the objective meaning of language—can we articulate a proper method of how to interpret. This paper’s exploration of some of the misguided epistemological presuppositions of Public Understanding Originalism is offered as a step in that direction.¹⁴³

143. Discussions with many people have helped my work on this paper. I particularly thank the editor, Dale Carpenter, and Greg Salmieri and Onkar Ghate for numerous insights. I am also grateful to the other participants in the Anthem Workshop on Judicial Interpretation held at the University of Texas in April 2007 (Adam Mossoff, Amy Peikoff, Larry Salzman, Tom Bowden, Darryl Wright, Dana Berliner, Eric Daniels, Matt Bateman, Debi Ghate, Rebecca Knapp), as well as to Larry Alexander, Dave Odden, Richard Bronaugh, students in my graduate seminar on Judicial Interpretation in Fall 2007, and to audiences at the Political Theory Project at Brown University, the Philosophy Department at Arizona State University, and the Federalist Society at the University of Houston, as well as to the Anthem Foundation for Objectivist Scholarship.