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Evaluating Originalism: Commerce and Emoluments

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EVALUATING ORIGINALISM: COMMERCE AND EMOLUMENTS

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INTRODUCTION

The debates among originalists and between them and their critics have continued unabated since Paul Brest, H. Jefferson Powell, and others rebutted original intent originalism in the 1980s.[1] Critics claim victory, arguing that none of the many originalist theories is conceptually sound,[2] normatively attractive,[3] consistent with the others,[4] or accurate as a description of American constitutional practice.[5] Originalism is merely "a collection of rapidly evolving theories, constantly reshaping themselves in profound ways in response to devastating critiques, and not infrequently splintering further into multiple, mutually exclusive iterations. . . . The very notion of originalism itself has become indeterminate."[6] Originalism is not a jurisprudential doctrine, but rather a political practice designed to achieve specific ends through the dubious claim that its historical authenticity transcends political disputes.[7] Originalists respond

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[1] *See, e.g.*, Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L. J. 239, 243–44 (2009) (ongoing debates among originalists and between them and critics); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 205 (1980); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 885 (1985).

[2] *See, e.g.*, Colby & Smith, *supra* note 1, at 244.

[3] *See, e.g.*, Jonathan T. Molot, *The Rise and Fall of Textualism,* 106 COLUM. L. REV. 1, 2 (asserting that "[t]extualism is . . . normatively unattractive" if it asserts real differences from purposivism).

[4] *See, e.g.*, Colby & Smith, *supra* note 1, at 245–46.

[5] *See, e.g.*, Stephen M. Griffin, *Rebooting Originalism*, 2008 U. ILL. L. REV. 1185, 1195 (2008); Brest, *supra* note 1, at 231–32; Mitchell N. Berman, *Originalism Is Bunk,* 84 N.Y.U. L. REV. 1, 34, 36 (2009).

[6] Colby & Smith, *supra* note 1, at 245–46.

[7] Robert C. Post & Reva B. Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545, 561 (2006).

that competing pluralist theories are indeterminate, arbitrary, unattractive, and mutually inconsistent.[8] They claim victory despite the force of critical attacks, arguing that originalism prevails in practice even though no one has written "a definitive formulation of originalism or a definitive refutation of its critics."[9]

Other scholars argue that the contestants are merely "talking past one another,"[10] emphasizing minor points of difference at the expense of general agreement on fundamental issues.[11] They conclude that we have reached a "strong consensus on the interpretive enterprise" and should now "engage in a more productive dialogue regarding the narrow differences that remain."[12]

This Article suggests that originalist theories share a core focus that meaningfully competes with pluralist theories. The contest is real and appears in centuries of debates within Anglo-American and civil law. The Article locates the Anglo-American origins of originalism in a novel seventeenth-century method of legal interpretation used to achieve a specific political end: to stifle opposition to the union of Scottish and English subjects of King James after his accession to the English crown in 1603. It details the novel method and the competing traditional method of English legal interpretation. It then evaluates originalist interpretations of the Commerce and Emoluments Clauses of the Constitution in light of the two competing methods.

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[8] *See, e.g.*, Christopher R. Green, *"This Constitution": Constitutional Indexicals as a Basis for Textualist Semi-Originalism,* 84 NOTRE DAME L. REV. 1607, 1617 n.21 (2009) (criticizing theories that utilize multiple modes of constitutional discourse as indeterminate or ultimately reliant on the supremacy of the interpreter rather than the Constitution); Colby & Smith, *supra* note 1, at 241 (Justice Scalia: critics cannot agree on anything except that originalism is wrong); Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 617 (1999) ("It takes a theory to beat a theory," and critics of originalism have not agreed on "an appealing and practical alternative").

[9] Barnett, *supra* note 8, at 613.

[10] *See* Molot, *supra* note 3, at 2; *cf.* Berman, *supra* note 5, at 4 (questioning whether "self-professed originalists champion a version of originalism that their critics don't reject, and that the critics challenge a version the proponents don't maintain," but concluding that originalist efforts have failed and have slim prospects for future success).

[11] *See, e.g.*, Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 9 (2015) (noting widespread agreement on ecumenical originalism).

[12] *See* Molot, *supra* note 3, at 2.

Part I provides a brief introduction to the core of originalism and its criticisms of pluralism. Part II sets out the novel seventeenth-century method of interpretation. Part III details the traditional pluralist method of English legal interpretation and its critique of the novel theory. Part IV suggests that the competing English approaches anticipated many of the major points that originalists and their critics debate today. Part V evaluates originalist interpretations of the Commerce Clause. Part VI evaluates originalist interpretations of the Emoluments Clauses in the context of President Trump's business activities, with special attention to Anglo-American legal history proximate to the adoption of the Constitution that characterized the benefits of government contracts as emoluments that threaten public trust and the survival of representative government. Part VII considers the implications of the evaluations for originalism.

This Article concludes that the core of originalism is normative, not descriptive. It continues to face the same challenges that it has throughout history. It has survived for centuries because it is normative, and its proponents are unlikely to yield to theoretical arguments any time soon.

I. ORIGINALISM: A BRIEF INTRODUCTION

"Originalism" is a family of interpretive theories that generally share two features: an acute focus on history and an aversion to allowing judges the discretion to apply personal or contemporary values when interpreting constitutional text.[13]

[13] For a summary of the literature on point, see Colby & Smith, *supra* note 1, at 288 n.225. *See also* Solum, *supra* note 11, at 6–8 (describing originalism as a family of theories, most of which consider legal facts to constrain adjudication); *id.* at 59 (asserting that even if constitutional terms like "equal" have essential moral meanings, some originalists would oppose interpreting them as such); Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 845 (2015) ("Originalism starts by assigning the legal system an *origin*, namely the Founding. That means it accepts the law as it stood at the Founding, regardless of how it got that way."); Colby & Smith, *supra* note 1, at 243, 279; Barnett, *supra* note 8, at 636, 641–42; Green, *supra* note 8, at 1624, 1658, 1662; Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, 103 NW. U. L. REV. 857, 859 (2009) ("[A]nachronistic readings would decisively undermine the Constitution as a written, authoritative, binding, and exclusive document."); *id.* at 878–79 (attacking the technique of identifying an abstract principle in the Constitution, assigning it a specific content based on the interpreter's own discernment, then infusing that content into particular constitutional provisions); Matthew J. Franck, *Re: Anti-Federalist Society*, NAT'L REV. (Aug. 8, 2005, 3:43 PM), https://www.nationalreview.com/bench-memos/re-anti-federalist-society-matthew-j-franck/ (noting that Federalist Society members are "united by little else than a

Originalists use a variety of techniques to tie constitutional interpretation to the past, including textualism,[14] strict construction,[15] rules of grammar,[16] dictionary definitions[17] and etymologies[18] recorded proximate to adoption, and the publicly expressed intent of the drafters or ratifiers.[19] In particular, many originalists argue that the writtenness of constitutional text necessarily ties its interpretation to history.[20]

There are many varieties of originalist theories.[21] Two broad types are conceptual and communicative. Conceptual originalism asserts that legal interpretation consists by definition of determining the historical meaning of legal texts. Judges cannot use discretion to apply personal or contemporary values when interpreting legal text because that simply is not "interpretation."[22] Communicative originalism asserts that legal text is a communication from an author in the past to the current

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rejection of the doctrine of the 'living Constitution' "). Despite some retreat on the goal of restraining judges, the core originalist approach still seeks that effect, for example by insisting that the original meaning is and must be locked in at enactment. *See, e.g.*, Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 106 (2001).

[14] *See, e.g.*, Green, *supra* note 8, at 1612.

[15] *See, e.g.*, Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 386 (2013) (in the 1970s and 1980s).

[16] *See, e.g.*, Solum, *supra* note 11, at 23.

[17] *See, e.g.*, Barnett, *supra* note 8, at 621.

[18] *See, e.g.*, United States v. Lopez, 514 U.S. 549, 586 (1995) (Thomas, J., concurring), *quoted in* Barnett, *supra* note 13, at 101 n.4 and accompanying text.

[19] *See, e.g.*, Whittington, *supra* note 15, at 378.

[20] *See, e.g.*, Barnett, *supra* note 8, at 634 ("Adopting any meaning contrary to the original meaning would be to contradict or change the meaning of the text . . . and thereby to undermine the value of writtenness."); *id.* at 635 ("[A] proper respect for the writtenness of the text means that those committed to this Constitution have no choice but to respect the original meaning of its text . . . ."); Paulsen, *supra* note 13, at 882 ("[T]he specification of the text excludes subjective . . . personal interpretation; it excludes anachronistic readings of the meanings of its words . . . .").

[21] *See, e.g.*, Berman, *supra* note 5, at 14 (describing seventy-two distinct varieties).

[22] *See, e.g.*, Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L. J. 1823, 1834 (1997) ("As . . . addressed to an external audience, the Constitution's meaning is its original public meaning. Other approaches to interpretation are simply wrong."); Paulsen, *supra* note 13, at 863. Conceptual originalism does not necessarily assert that it imposes any normative constraints on judicial discretion. *See, e.g.*, Lawson, *supra*, at 1823–25; Gary Lawson, *Originalism Without Obligation*, 93 B.U. L. REV. 1309, 1313 (2013) (defining originalism as strictly "a theory of *meaning* . . . evaluated by reference to positive criteria of accuracy in discerning communicative signals").

reader.[23] Interpretation consists of, and only of, determining the meaning—that is, the communicative content—of the written text.[24] Depending on the particular theory, the Constitution's author might be the Founders,[25] the framers,[26] the drafters,[27] the ratifiers, [28] or the general public: "We the People of the United States."[29] Also, depending on the particular theory, the communication might consist of the intent of the author, the public meaning of the words that the author chose, or both reflexively, as "the content the author intended to convey to the reader via the audience's recognition of the author's communicative intention."[30]

Communicative originalism asserts that this meaning is an objective social fact discoverable by empirical investigation[31]—a fact about the world that does not depend on the interpreter's own norms or values.[32] This factual meaning has binding normative force that flows from the justification of the particular originalist

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[23] *See, e.g.*, Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269, 272 (2017) ("The authors of a constitutional text are attempting to communicate some content to future readers.").

[24] *See, e.g.*, Whittington, *supra* note 15, at 389 ("The originalist project is committed to uncovering, to the degree possible, the meaning of the rule or principle that those who were authorized to create the Constitution meant to communicate, not to making use of any particular form of constitutional argument.").

[25] *See, e.g.*, Post & Siegel, *supra* note 7, at 548 n.15.

[26] Colby & Smith, *supra* note 1, at 249–50.

[27] *Id.*

[28] *Id.*

[29] *See* Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47, 49 (2006) (citing U.S. CONST. pmbl.).

[30] Solum, *supra* note 23, at 277 (footnote omitted) (emphasis omitted). Gathering these diverse communicative theories into one follows Solum's approach of "[e]cumenical originalism" in lieu of "[s]ectarian originalism" that focuses on the differences among rival theories. *See* Solum, *supra* note 11, at 9.

[31] *See* James C Phillips, Daniel M. Ortner, & Thomas R. Lee, *Corpus Linguistics & Original Public Meaning: A New Tool to Make Originalism More Empirical*, 126 YALE L.J.F. 21, 22 (May 16, 2016).

[32] *See, e.g.*, Barnett, *supra* note 8, at 621 ("objective approach" to find the "original 'objective' meaning"); Griffin, *supra* note 5, at 1189 (new originalism emphasizes objective version of intent); Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 99 (2010) ("[T]he linguistic meaning of a text is a fact about the world."). More recent versions of originalism also claim to find law as an objective fact. *See, e.g.*, John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 763 (2009) ("original methods as a necessary means to determine objective meaning"); Sachs, *supra* note 13, at 833 ("[I]t's still possible that social facts ultimately provide the answer, and that this answer supports the originalist view.").

theory, such as popular sovereignty,[33] the rule of law,[34] or consent of the governed.[35] For example, Randy E. Barnett explains that only "adhering [to] the original meaning of the text" can "provide security for a consistent, stable and faithful exercise of the Constitution's powers."[36]

II. ANGLO-AMERICAN ORIGINS: THE CASE OF THE POST-NATI

The core of originalism appears in Anglo-American jurisprudence as early as the seventeenth century in debates over the status of Scots in England after the union of the crowns of the two kingdoms. In 1603, the English crown descended to James VI of Scotland upon the death of Elizabeth without issue. James styled himself King of Great Britain[37] and sought to merge England and Scotland into one kingdom.[38] The English parliament refused.[39] He then sought to unify all people born in either kingdom after the descent (the *post-nati*), but the English parliament again refused.[40] Proponents of James's position argued that subjects owed allegiance to the king in his natural body, so that no one born in either kingdom after the descent could be an alien in the other.[41] Opponents argued that subjects owed allegiance to the king in his politic body, so that *post-nati* Scots were natural-born subjects of James VI of Scotland but aliens in James I's England.[42] James's interpretation could not be correct because, among other reasons, it would necessarily apply to any dominions the king might acquire by descent throughout the world, even though their peoples might be more estranged from

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[33] *See, e.g.*, Barnett, *supra* note 8, at 613 n.9.

[34] *See, e.g.*, James E. Ryan, *Laying Claim to the Constitution: The Promise of New Textualism*, 97 VA. L. REV. 1523, 1532 (2011).

[35] Colby & Smith, *supra* note 1, at 275.

[36] Barnett, *supra* note 8, at 629.

[37] JOHN SPOTSWOOD, THE HISTORY OF THE CHURCH OF SCOTLAND 486 (London, R. Norton ed. 1668).

[38] *Id.* at 480.

[39] *Id.*

[40] 7 THE WORKS OF FRANCIS BACON 639 (London, James Spedding et al., eds. 1859) (preface) (House of Commons refused).

[41] *See, e.g.*, Case of the Union of the Realm of Scotland with England (1608), 2 How. St. Tr. 559, 570–71 (Lord Coke: allegiance is tied to the king's body natural, not body politic, so the *post-nati* "are not born out of the kings allegiance, and so not aliens, but subjects"); *id.* at 566 (Earl of Northampton on the harmony of the subjects like the parts of the "body natural" under the body's head).

[42] *Id.* at 566–68.

the English than were Scots.[43] Further, it would allow *post-nati* Scots to overrun England, consume its wealth, and disrupt its political system;[44] and it would unify *post-nati* of the different dominions by shared perpetual natural allegiance even though a subsequent descent could easily separate those dominions.[45]

James then arranged the filing of companion cases[46] in 1608 in the Court of King's Bench (*Calvin v. Smith*)[47] and the Court of Chancery (*Calvin v. Bingley*)[48] seeking judicial determinations of the common law. The cases were argued together and came to be known as the *Case of the Post-Nati*, or *Calvin's Case*.[49]

Many of those who propounded James's position in Parliament and in court relied on a radical new way to interpret English law. In an apparent attempt to stifle any further political dispute over the status of *post-nati* Scots, they asserted that opposing arguments were merely political, not legal;[50] that the law precludes judicial discretion and requires specific decisions even if they yield bad results in hard cases;[51] and that any remedy for hard results lies with subsequent legislation.[52] As one argued in language familiar to originalists:

> The judgments so even and so impartial, as they give way to no mans affection, nor impute blame to any man; but to say the law requireth such judgment, is an excuse satisfactory to all men, for

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[43] *See, e.g.*, Case of the Post-Nati of Scotland, *in* 15 THE WORKS OF FRANCIS BACON 189, 218 (James Spedding et al., eds. 1864).

[44] *See id.*; Case of the Union of the Realm of Scotland with England (1608), 2 How. St. Tr. at 564 (Sir Edwyn Sandes).

[45] *See* Case of the Post-Nati, *supra* note 43, at 222–23.

[46] *Id.*

[47] Calvin v. Smith (1608), 2 How. St. Tr. 607, 607 (Lord Coke, identifying defendants as Richard and Nicholas Smith). The State Trials report, while not a standard citation for law reviews, provides the complete set of materials from Parliament, the King's Bench Case, and the Chancery case. An alternative citation to the English Reports is: Calvin v. Smith, 77 Eng. Rep. 377 (K.B. 1608).

[48] This case is not generally cited in standard form. The defendants in the case were John Bingley and Richard Griffin. *See* Lord Ellesmere, Lord Chancellor Ellesmere's Speech in the Exchequer Chamber, in the Case of the Postnati (1608), 2 How. St. Tr. 659, 661 (opinion of Lord Ellesmere in the Chancery case).

[49] *See, e.g.*, 5 THE WORKS OF FRANCIS BACON 106 (Basil Montagu ed. 1826); Polly J. Price, *Natural Law and Birthright Citizenship in* Calvin's Case *(1608)*, 9 YALE J.L. & HUMAN. 73, 81–82 (1997).

[50] Francis Bacon, Speech of Lord Bacon, as Counsel for Calvin, in the Exchequer Chamber (1608), 2 How. St. Tr. at 590.

[51] Case of the Union of the Realm of Scotland with England (1608), 2 How. St. Tr. at 569 (Popham, C.J.).

[52] Bacon, *supra* note 50, at 590.

> the king, and the judges. . . . [I]t were better to live under a certain known law, though hard sometimes in a few cases, then to be subject to the alterable discretion of any judges.[53]

Lord Coke asserted in his report of the decision in *Calvin v. Smith* that "no man ought to take upon him to be wiser than the laws . . . ; neither have judges power to judge according to that which they think to be fit, but that which out of the laws they know to be right and consonant to law."[54] Lord Bacon argued as counsel for Calvin that "[f]or us to speak of the mischiefs, I hold it not fit for this place, lest we should seem to bend the laws to policy, and not take them in their true and natural sense."[55] Only the strict application of certain known law prevents "the rule of justice, by which the people are governed," from being too pliable, weak, and uncertain.[56]

To determine the common law on point, these proponents looked to English history under a succession of rulers from the Romans through King Edgar, King Ethelredus, the Normans, West Saxons, and others.[57] They examined in great detail the definition of "ligeance" and of its subdivisions,[58] the definitions of "[a]lienigena" and its subdivisions,[59] and "de legibus" and the several types of law.[60] They relied on the etymologies of words in legal usage such as "denizen."[61] They parsed legal texts by clause and word.[62] They asserted that no foreign law was necessary or applicable because the laws of England are copious enough to determine cases and because arguments from foreign law would be "foreign, strange, and an alien to the state of the question,

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[53] Case of the Union of the Realm of Scotland with England (1608), 2 How. St. Tr. at 569 (Popham, C.J.).

[54] Calvin v. Smith (1608), 2 How. St. Tr. at 612, 656 (Lord Coke).

[55] Bacon, *supra* note 50, at 606; *see also* Case of the Union of the Realm of Scotland with England (1608), 2 How. St. Tr. at 566 (Earl of Northampton: "Nor . . . can we be measured or guided by inconveniences that may be forecast; because we are confined to a point of law already received and planted, and are to reason and discuss what that law is.").

[56] Ellesmere, *supra* note 48, at 677 (summarizing the view, with which he disagreed).

[57] Case of the Union of the Realm of Scotland with England (1608), 2 How. St. Tr. at 569 (Popham, C.J.); *Calvin*, 2 How. St. Tr. at 643–45, 646, 650 (Lord Coke).

[58] *Calvin*, 2 How. St. Tr. at 613 *et seq.* (Lord Coke).

[59] *Id.* at 636 *et seq*.

[60] *Id.* at 629 *et seq*.

[61] *Id.* at 639.

[62] *Id.* at 618 (breaking down the oath of ligeance into five clauses and examining the specific words in each).

which . . . is only to be decided by the laws of this realm."[63] They concluded that the common law "had continued as a rock without alteration in all the varieties of people that had possessed this land"[64] and prescribed that the *post-nati* were natural born subjects in both kingdoms, not aliens.[65] In particular, Coke insisted that his judgment for Calvin was not an innovation, but merely a "renovation" of earlier decisions.[66]

Lord Bacon took an approach similar to many originalists. He argued that laws should be understood in their natural sense,[67] and that critical words in several specifically relevant statutes should be interpreted according to their common understanding or as mere tropes of speech.[68] He argued that the outcome of the case required nothing more than common knowledge: "It is enough that every man knows, that it is true of these two kingdoms, which a good father said of the churches of Christ: 'si inseparabiles insuperabiles.' "[69]

The repudiation of judicial discretion and consequentialist analysis is notable. English judges had long exercised both when interpreting common and written law[70] and would continue to do so after *Calvin's Case*.[71] Rejection of interpretive discretion and reliance on scripture only—"*sola Scriptura*"—was a dominant doctrine of English Protestant theology.[72] A 1619 sermon, for example, dismissed traditional judicial interpretive techniques of *responsa prudentum*, or the opinions of the wise,[73] and *arbitria judicum*, or judicial decisions, as inappropriate for interpreting scripture because:

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[63] *Id.* at 612.

[64] Case of the Union of the Realm of Scotland with England (1608), 2 How. St. Tr. at 569 (Popham, C.J.).

[65] *Calvin*, 2 How. St. Tr. at 656 (Lord Coke).

[66] *Id.*

[67] Bacon, *supra* note 50, at 606.

[68] *Id.* at 585–86.

[69] *Id.* at 606.

[70] *See, e.g.*, Ellesmere, *supra* note 48, at 674–76.

[71] *See, e.g.*, Leslies v. Grant (1763), 2 Pat. 68, 77 (interpreting a derivative nationality statute narrowly, in part because a broader reading "would let in all sorts of persons into the family rights, Jews, French, &c., without any test or qualification—without any residence" with the result "in terror" that the law "might naturalize one-half of Europe").

[72] *See, e.g.*, Powell, *supra* note 1, at 889.

[73] *See, e.g.*, SAMUEL WARREN, SELECT EXTRACTS FROM BLACKSTONE'S COMMENTARIES, CAREFULLY ADAPTED TO THE USE OF SCHOOLS AND YOUNG PERSONS 36 (London, 1837) ("*responsa prudentum*, or opinions of learned lawyers").

> [T]hese rules may be bent, and are bent oftentimes to serve the wills and pleasures of men. But we must have such a rule as may be without all exception and variation: a rule that must be, as some learned speak in the terms of the Schools, *inobliquabilis & indeviabilis*: a rule that no good man dare, nor no wicked man can bend to his private affection.[74]

Martin Luther propounded this religious doctrine, which relies on the individual's reading of scripture unmediated by the interpretations of ecclesiastical authorities.[75]

The claim that deciding cases according to certain, known laws is an excuse satisfactory to all—including judges and the king—is also notable. The word "excuse" had several uses at the time. One was "[a] plea for release from a duty, obligation, etc."[76] In this sense the novel theory operates to release the judge from any obligation to exercise discretion or to consider values when deciding cases. The law simply is what it is. Another use was "[a] plea in extenuation of an offence."[77] In this sense, the claim that the law simply is the law provides an apology or extenuation of the offense of enforcing bad results in hard cases. If the law provides that anyone born in any of the king's dominions is natural born in all of them, and if this creates bad results, that simply is the law; there is no blame for James or the judges. As Lord Bacon argued in the case, if the result is bad, then the solution is simple: Parliament can enact a statute to change the law.[78] Another use, less flattering to the novelists, was "a (mere) pretext, a subterfuge."[79]

III. THE TRADITIONAL PLURALIST METHOD OF ENGLISH LEGAL INTERPRETATION

Lord Ellesmere reached the same substantive result in his decision in *Smith v. Bingley*, but severely criticized the new interpretive approach, calling its proponents "nouelists"[80] [novelists] for having invented it and "busie questionists" for having questioned the traditional English method of legal

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[74] HUMPH. MUNNING, A PIOUS SERMON, PREACHED BY THAT LATE PAINFULL AND PROFITABLE MINISTER OF GODS WORD 10 (Cambridge, 1641).

[75] ROLAND H. BAINTON, HERE I STAND: A LIFE OF MARTIN LUTHER 117 (1950).

[76] *Excuse*, OXFORD ENGLISH DICTIONARY def. 2.b (2018), https://www.oed.com/view/Entry/65968?rskey=jyW1GG&result=1&isAdvanced=false#eid.

[77] *Id.* at def. 2.a.

[78] Bacon, *supra* note 50, at 590.

[79] OXFORD ENGLISH DICTIONARY, *supra* note 76, at def. 2.

[80] Ellesmere, *supra* note 48, at 677.

interpretation.[81] He criticized arguments from history, definition, etymology, religious theory, and pliability. He then described and defended the traditional, pluralist method of English legal interpretation.

Historical interpretation, he explained, "is alwaies darke, obscure, and vncerten, of what kingdome, countrey, or place soeuer,"[82] agreeing with Livy that "many times errors are involved in things of such an old age"[83] and citing Saint Augustine that the supposed books of Enoch "are scorned because of their great antiquity."[84]

He noted that other judges used as many definitional and etymological interpretations "as wit and art could deuise,"[85] alleging "manie definitions, descriptions, distinctions, differences, diuisions, subdiuisions, allusion of wordes, extension of wordes, construction of wordes; and nothing left vnsearched to finde" the meanings of "*ligeantia*," "*allegiantia*," "*indigenæ*," "*alienigenæ*," and other like words.[86] Ellesmere declined to rely on definitions for legal interpretation. He explained that definition is two-fold: first, the identification of genus and difference; and second, the description or designation of things.[87] As a result, "definition and description are often confounded."[88] Yet he did not privilege definition proper over definition by description. He considered both to be "vncerten and dangerous,"[89] agreeing with Ulpian

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[81] *Id.* at 694; *cf. id.* at 669, 671 ("questionists").

[82] *Id.* at 678 (excepting only "the diuine histories written in the bible").

[83] *Id.* (as translated from "in tanta rerum vetustate multi temporis errores implicantur").

[84] *Id.* (as translated from "libri isti ob nimiam antiquitatem reijciuntur").

[85] *Id.*

[86] *Id.*

[87] *Id.* (as translated from "definitio est duplex: propria, quæ constat ex genere, et differentia: impropria, quæ et descriptio vocatur, et est quælibet rei designatio" (original citation omitted)).

[88] *Id.* at 678–79.

[89] *Id.* at 679; *cf.* IAN MACLEAN, INTERPRETATION AND MEANING IN THE RENAISSANCE: THE CASE OF LAW 109 (1992) (Renaissance view that definition is "dangerous: it is suitable for philosophers, but not for jurists," because "lawyers need rules of thumb" and so "[a]ll definitions in law are normative"). This is not a fault of the law; indeed, "it is the distinguishing feature of the law to give form to future transactions . . . which are . . . indefinite; thus it is not a bad thing, if all cases are not covered by the law; indeed this is an impossible aim, given the fragility of human intellect." MACLEAN, *supra*, at 109 & n.82 (quoting and translating Cagnoli in Commentarii ad Titulum Digest. de Regulis Iuris Antiqui 783 (Lugduni, 1593), https://books.google.com/books?id=gWxFAAAAcAAJ).

that "every definition in civil law is dangerous."[90] Ellesmere dismissed "the many and diuerse distinctions, diuisions, and subdiuisions . . . made in [the] case" because "anything cut in the dust is admixed"[91] and because "a man may wander and misse his way in mists of distinctions."[92]

Ellesmere ridiculed etymological interpretation, calling it "light and deceptive and generally comical"[93] and "a pedant grammarians fault,"[94] noting that "if you examine the examples which some doe bring, you will perceiue how ridiculous and vaine it is."[95] Worse, he asserted that etymologies are traps for the unwary, agreeing with another that they are "word nooses and syllable snares."[96] Ellesmere may have referred to the twelfth century bishop and philosopher John of Salisbury, who:

> In a witty little passage at the expense of lawyers . . . comments on their ability to ensnare the unwary in nooses of words and syllables. He declares that simple-minded folk are lost if they learn not this art of 'syllabizing.' . . . [He] enriched Mediaeval Latin with a new word, a little arrow of sarcasm for the target of the Law: 'to syllabize.'[97]

Etymologies tie words to the past at the expense of evolving usage, and so Ellesmere rejected them, agreeing with Aquinas that "in words, we must look not whence they are derived, but to what meaning they are put."[98] Ellesmere's view on this point apparently prevailed, with most of the other judges rejecting reliance on etymologies and recognizing that judges merely "use them for ornaments" if they happen to be consistent with the judgment in the case.[99] As Coke acknowledged, "oftentimes where the propriety of words is attended to, the true sense is lost."[100]

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[90] Ellesmere, *supra* note 48, at 678 (as translated from "omnis definitio in iure ciuili est periculosa").

[91] *Id.* at 679 (as translated from "confusum est quicquid in puluerum sectum est").

[92] *Id.* (citing Bishop Juel).

[93] *Id.* (as translated from "leuis et fallax, et plerumque ridicula").

[94] *Id.*

[95] *Id.*

[96] *Id.* (as translated from "tendiculæ verborum, et aucupationes syllabarum").

[97] E.K. Rand, *Ioannes Saresberiensis Sillabizat*, 1 SPECULUM 447, 447–48 (1926).

[98] Ellesmere, *supra* note 48, at 679 (translation of phrase "in vocibus videndum, non tàm à quo, quam ad quid sumantur" from EDMUND CAMPION, TEN REASONS 131 (1914)).

[99] Calvin v. Smith (1608), 2 How. St. Tr. 607, 657 (Lord Coke).

[100] *Id.* (translation of phrase "sæpenumero ubi proprietas verborum attenditur, sensus veritatis amittitur" from BLACK'S LAW DICTIONARY 1057 (St. Paul, West Publishing Co. 1891)) (citation omitted).

Ellesmere also rejected using contemporary Protestant theology as a means of legal interpretation, arguing that "what I do not read, I do not credit" may govern divinity, but does not always govern the interpretation of laws.[101] One must distinguish morality from divinity to avoid confounding many things in civil and politic government.[102] And only professional judges with their "depth of reason" should determine the law, "not the light and shallow distempered reasons of common discoursers walking in Powles, or at ordinaries, in their feasting and drinking, drowned with drinke, or blowne away with a whiffe of tobacco."[103]

None of these interpretive methods was sufficient to determine the law, and therefore Ellesmere sought "a more certen rule to iudge by."[104] That was the traditional method, which English judges had used for centuries to determine cases governed by both common and written law. He explained that judges should rely on practical and analogical interpretation[105] and "recur to reason, and to the opinions of the wise."[106] By the traditional rule of reason and responsa prudentum, justice "hath . . . beene duely administred in England, and thereby the kings haue ruled, the people haue beene gouerned, and the kingdome hath flourished for many hundred yeeres; and then no such busie questionists moued any quarrell against it."[107]

The traditional approach did not apply exclusively to interpreting the common law. It also applied to expounding the most important texts of ancient English law, Magna Charta and Charta de Forests;[108] to the three foundational thirteenth-century statutes of Westminster, some of whose provisions remain in force today;[109] and to lesser statutes enacted thereafter, including those

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[101] Ellesmere, *supra* note 48, at 674 (translation of phrase "quod non lego, non credo" from OFFICIAL CALENDAR OF THE CHURCH 260 (Philadelphia, King & Baird, 1849)).

[102] Ellesmere, *supra* note 48, at 674 ("fidem moralem" from "fidem diuinam").

[103] *Id.* at 686.

[104] *Id.* at 678–79.

[105] *Id.* at 679.

[106] *Id.* at 674 (as translated from "recurrere ad rationem, et ad responsa prudentum").

[107] *Id.*

[108] *Id.*; 2 WILLIAM BLACKSTONE, LAW TRACTS iii (Oxford, Clarendon Press 1762) (declaring no transaction in ancient English history more important than the establishment of the Great Charter and the Charter of the Forest).

[109] Ellesmere, *supra* note 48, at 674; Statute of Westminster I, 3 Edw. 1 c. 5 (1275), https://www.legislation.gov.uk/aep/Edw1/3/5/data.pdf (in-force provision guarantees free elections); The Statute of Westminster II (De Donis Conditionalibus), 13 Edw. 1 st. 1 (1285), http://www.legislation.gov.uk/aep/Edw1/13/1 (in-force provision applies to

"of fines, of vses, of willes, and many more."[110] None of Magna Charta, Charta de Forests, and the Statutes of Westminster was written in English; the traditional method applied regardless of the text's language and the passage of centuries from its enactment.

Ellesmere then explained that for the same reason legal interpretation does not follow strict rules of grammar:

> By this rule it is also, that words are taken and construed, sometimes by extension; sometimes by restriction; sometimes by implication; sometimes a disjunctiue for a copulatiue; a copulatiue for a disjunctiue; the present tense for the future; the future for the present; sometimes by equity out of the reach of the wordes; sometime words taken in a contrary sence; sometime figuratiuely, as *continens pro contento [the container for the contents]*,[111] and many other like: and of all these, examples be infinite, as well in the ciuile lawe as common lawe.[112]

Ellesmere's explanation was normative as well as descriptive. He defended the traditional approach, including judicial discretion, as positive law that is necessary to justice:

> Thus *arbitria iudicum [judicial decisions]* and *responsu prudentum [opinions of the wise]* haue beene receiued, allowed and reuerenced in all times as positive lawe; and so it must be still; for, otherwise much mischiefe and great inconuenience will ensue. For new cases happen euery day: no lawe euer was, or euer can be made, that can prouide remedie for all future cases, or comprehend all circumstances of humane actions which iudges are to determine . . . . They must therefore follow *dictamen rationis [the dictate of reason]*; and so giue speedie justice. And in many matters of materiall circumstances they must guide themselues by discretion.[113]

He dismissed the argument that the traditional method of interpretation makes the law too pliable, weak, and uncertain:

> By the same reason it may be said, that all the lawes of all nations are vncerten: for, in the ciuile lawe, which is taken to be the most

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land law); Quia Emptores, 18 Edw. 1 c. 1 (1290), http://www.legislation.gov.uk/aep/Edw1/18/1/contents (Westminster 3: in-force provision applies to land law).

[110] Ellesmere, *supra* note 48, at 674.

[111] *Id.* at 675; *see, e.g.*, 4 SELECT SERMONS AND LETTERS, OF DR. HUGH LATIMER 235 (Philadelphia, Wm. N. Engles, ed., 1842) ("[The] word Church sometimes signifies the congregation, the people that are gathered together: and sometimes it signifies the place where the people come together; *Continens pro contento*, that is to say, 'The thing that containeth, for that which is contained.' ") (1552 sermon).

[112] Ellesmere, *supra* note 48, at 675.

[113] *Id.* at 676.

> vniuersall and generall lawe in the world, they hould the same rule and order in all cases which be out of the direct words of the lawe; and such cases be infinite; for as I saide, new cases spring euery day, as malice and fraude increaseth.[114]

Ellesmere detailed the institutional constraints that make the traditional method of legal interpretation successful. Judges should consult with each other and the Privy Council before deciding cases.[115] And only those who have four important qualities should be allowed to become judges: "[T]here must be grauitie, there must be learning, there must be experience, and there must be authoritie: and if any one of these want, they are not to be allowed to be interpreters of the lawe."[116]

Finally, Ellesmere rejected Coke's and Bacon's characterization of the traditional interpretive approach, saying that "in this I would not be mis-vnderstoode, as though I spake of making of new lawes, or of altering the lawes now standing; I meane not so, but I speake only of interpretation of the lawe in new questions and doubts,"[117] which he recognized were infinite in number because "new cases spring euery day, as malice and fraude increaseth."[118] Similarly, Nathaniel Bacon later criticized the novel approach in *Calvin's Case* for taking law to be limited to its origins and determined by popular understanding:

> [M]any times Laws are said to be many, when as they are but one, branched into many particulars, for the clearing of the peoples understanding, (who usually are not excellent in distinguishing,) and so become as new Plaisters made of an old Salve, for sores that never brake out before.[119]

IV. ANTICIPATING CONTEMPORARY DEBATES

The novelists and Ellesmere anticipated many important matters that originalists and their critics debate today, including (a) the alleged pliability of pluralism and the claim by Randy E.

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[114] *Id.* at 677.

[115] *See id.* at 672, 675.

[116] *Id.* at 686.

[117] *Id.* at 693.

[118] *Id.* at 677. Ellesmere also asserted that the common law evolves with time and that in some cases judges change common law doctrines or disregard them as obsolete. *See, e.g.*, *id.* at 674, 676–78 (Belknappe's case).

[119] NATHANIEL BACON, THE CONTINUATION OF AN HISTORICALL DISCOURSE, OF THE GOVERNMENT OF ENGLAND, UNTIL THE END OF THE REIGN OF QUEEN ELIZABETH. WITH A PREFACE, BEING A VINDICATION OF THE ANCIENT WAY OF PARLIAMENTS IN ENGLAND 76 (London, 1651).

Barnett and others that only adhering to historical meaning can provide "consistent, stable and faithful exercise of the Constitution's powers";[120] (b) Justice Brennan's view that constitutional principles reach far enough to apply to new mischiefs, not only to those that gave them birth;[121] (c) Jack M. Balkin's and Stephen M. Griffin's emphasis on the constraining power of tradition, legal institutions, judicial screening, and professional legal culture;[122] (d) Stephen M. Griffin's assertion that pluralism is the traditional method of legal interpretation and originalism a departure from the status quo;[123] (e) Philip Bobbitt's list of six modes of constitutional interpretation—text, history, structure, doctrine, prudence, and ethics—and Christopher R. Green's criticism that Bobbitt cannot explain "how to choose between them";[124] (f) H. Jefferson Powell's identification of the religious source of originalist interpretive methodologies;[125] (g) Michael Stokes Paulsen's criticism of those who condescend to the public by treating the Constitution's meaning as the private

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[120] Barnett, *supra* note 8, at 629; *see also* Colby & Smith, *supra* note 1, at 279 ("[W]ithout the constraint of constitutional text or history . . . 'the judge has no basis other than his own values upon which to' " decide cases. (quoting Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 10 (1971)); *id.* at 243 (Any other approach inevitably leads to "nihilism and the imposition of the judge's merely personal values on the rest of us." (quoting Robert H. Bork, *Styles in Constitutional Theory*, 26 S. TEX. L.J. 383, 387 (1985)).

[121] William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, Text and Teaching Symposium, Georgetown University 7–8 (Oct. 12, 1985) ("Time works changes, brings into existence new conditions and purposes. Therefore, a principle to be vital must be capable of wider application than the mischief which gave it birth." (quoting Weems v. United States, 217 U.S. 349, 373 (1910))).

[122] *See* Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 551 (2009); Griffin, *supra* note 5, at 1207.

[123] *See* Griffin, *supra* note 5, at 1187, 1195–96 (also noting that pluralism dates back at least to the adoption of the Constitution).

[124] *See, e.g.*, Green, *supra* note 8, at 1617 n.21.

[125] *See* Powell, *supra* note 1, at 885, 888–90. Powell explains that legal reform movements in the American colonies and in interregnum England appealed to this religious approach in order to revise laws to be clearer and more accessible to the public, and that it was one of several conflicting cultural influences on the founding generation's approach to constitutional interpretation. *Id.* at 889–91. The arguments in *Calvin's Case* show that the approach took hold even earlier in English jurisprudence.

province of elitist judges;[126] and (h) a consequence of Stephen E. Sachs's analysis that the only remedy for hard results in constitutional cases is to amend the Constitution.[127]

Ellesmere's challenge to novelists and originalists is even broader than the specific points he makes in his opinion. Ellesmere relied heavily on lessons from civil law practice,[128] and with good reason. Civil lawyers had tried and failed to establish a theory of law like the one that the English novelists propounded. Justinian designed the Corpus Juris Civilis to be a self-sufficient statement of his empire's laws and forbade any commentary on it other than nominal exceptions, such as direct translation from Latin to Greek.[129] He prohibited legal interpretation, characterizing it as a perversion of law that creates confusion throughout the entire legal system:

> We hereby prohibit [jurists] from producing any other interpretations, or rather perversions, of our laws: lest their verbosity should bring dishonour to our laws by its confusion, as was done by the commentators on the Perpetual Edict, who by extracting new senses from one or another part of this well-made edict, reduced it to a multitude of meanings, causing confusion to arise in nearly all Roman decrees.[130]

The penalty for violating the decree was "deportation and confiscation of all property" to prevent verbosity from generating further discord.[131] Justinian recognized that human law cannot be eternal or cover all cases, in part because "nature makes haste to bring forth many new forms," and therefore situations will arise outside of "the web of the law."[132] But he insisted that where obscurities or problems result, the Emperor alone must deal with them because he alone has the authority to make law.[133]

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[126] Paulsen, *supra* note 13, at 875 (footnote omitted).

[127] *See* Sachs, *supra* note 13, at 844 ("[T]o adhere to our current law . . . means recognizing . . . only the future changes that are authorized by our rules of change."); *id.* at 845 ("We typically recognize something as part of 'the text' if it was in the original Constitution or was added by an Article V amendment.").

[128] Ellesmere, *supra* note 48, at 669, 671, 673, 677, 693.

[129] MACLEAN, *supra* note 89, at 50–51.

[130] *Id.* at 52 (Maclean translation).

[131] *Id.* at 51.

[132] *Id.* (Maclean translation).

[133] *Id.*

The problem for Justinian was that his theory of law did not[134] and could not[135] work. It was the butt of satire and an embarrassment to both jurists and historians.[136] It fell before the same theoretical and linguistic challenges that communicative originalism faces, including (a) whether words contain the essence of that which they signify or merely take their meaning from conventional linguistic usage,[137] (b) whether meaning is a discovered fact or is imposed by the adjudicator,[138] (c) whether to seek legislators' actual intentions or to construct those of a fictitious legislator,[139] (d) the collapse of determinate linguistic meaning in the face of context,[140] (e) the impossibility of determining textual clarity as an objective fact,[141] (f) the ambiguity of "ambiguity,"[142] and (g) the inability in practice to distinguish and rely on literal, subjective and objective meanings, and on *mens legislatoris* or *ratio legis*.[143] As Ian Maclean concludes in his

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[134] *See, e.g.*, *id.* at 52.

[135] *See, e.g.*, *id.* at 52–53 (ultimate circularity of specific *leges*).

[136] *See id.* at 52–53.

[137] *See, e.g.*, *id.* at 110–11; *cf. infra* notes 592–599 and accompanying text.

[138] MACLEAN, *supra* note 89, at 135; *cf.* Carissa Byrne Hessick, *Corpus Linguistics and the Criminal Law*, 2017 BYU L. REV. 1503, 1525 (2018) (describing the role of subjective personal judgment in determining meaning of legal texts even in corpus linguistics theories).

[139] MACLEAN, *supra* note 89, at 147; *cf.* Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 358 (2005) (originalism that is "willing to take account of certain kinds of information about the actual purposes and understandings of the specific legislators who comprised the enacting Congress"); Lawson & Seidman, *supra* note 29, at 49 (originalism using a fictitious legislator, "We the People").

[140] MACLEAN, *supra* note 89, at 95–98; *cf. infra* notes 570–576 and accompanying text.

[141] *See* MACLEAN, *supra* note 89, at 89–90; *cf.* Hessick, *supra* note 138, at 1525 (detailing the role of context along with subjective personal judgment in determining meaning of legal texts); William Baude & Ryan D. Doerfler, *The (Not So) Plain Meaning Rule*, 84 U. CHI. L. REV. 539, 541 (2017) (criticizing the plain meaning rule for unjustifiably attempting to transcend debate over intentionalism, textualism, and other theories of statutory meaning).

[142] MACLEAN, *supra* note 89, at 130–31 (whether there are two different meanings that we cannot distinguish, or a single factual meaning that we lack sufficient evidence to determine); *cf.* Solum, *supra* note 23, at 287, 294 (irreducible ambiguity and the resulting need for constitutional construction); McGinnis & Rappaport, *supra* note 32, at 774 (rejecting constitutional construction; interpreters must select the interpretation supported by the stronger evidence and applicable interpretive rules, as a result of which "there is no *legal* ambiguity or vagueness, regardless of whether there is vagueness or ambiguity in the ordinary language").

[143] MACLEAN, *supra* note 89, at 142–47; *see also id.* at 200–01 (noting impasse "in the dual requirement of a logical analysis of the words . . . according to conventional rules of language and a determination of the intention behind their utterance"); *id.* at 201 (explaining that Renaissance English commentators were well aware of these problems and of the fact that "it is logically impossible to distinguish between an

landmark study of legal interpretation in the civil law, "the problems which most preoccupy Renaissance jurists can have a remarkably modern ring to them."[144]

Despite its failure, Justinian's approach remained a lodestar for like-minded polemicists who blamed legal interpretation for political and religious unrest and who championed "a clear, unambiguous code of law as a bulwark against it," asserting that "a lucid, generally recognized set of statutes is clearly preferred to any amount of jurisprudential interpretation."[145] As Johannes Fichard wrote wistfully in 1535, "I only hope that what that otherwise excellent emperor did not manage to bring about . . . would come to pass at some time in this age . . . ."[146] Many originalists continue to hope that it will come to pass in our age.

Ellesmere's opinion shows that pluralism is not only a legitimate method of legal interpretation; it is the traditional Anglo-American method of legal interpretation. Conceptual originalism is inconsistent with Anglo-American legal practice. Moreover, originalism, in all of its forms, is a normative aspiration that harkens back as far as Justinian's failed legal theory.

V. ORIGINALISM AND THE COMMERCE CLAUSE

This Part considers two versions of communicative originalism in the context of the Commerce Clause, which authorizes Congress "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[147] It focuses on the words "to regulate" and "commerce" in several noted originalist interpretations.[148]

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utterance which incorporates a given intention and one which uses the same formulas of language but does not"); *cf.* 3 BENJAMIN FRANKLIN, THE COMPLETE WORKS OF BENJAMIN FRANKLIN 318 (John Bigelow ed., 1887) ("Such is the imperfection of our language, and perhaps of all other languages, that, notwithstanding we are furnished with dictionaries innumerable, we cannot precisely know the import of words, unless we know of what party the man is that uses them.").

[144] MACLEAN, *supra* note 89, at 65.

[145] *See id.* at 55.

[146] *See id.* at 55 n.92 (Maclean translation).

[147] U.S. CONST. art. I, § 8, cl. 3.

[148] Consequently, the analysis does not consider all of the originalists' arguments defending their interpretations.

A. Wooden Communicative Originalism

After Brest, Powell, and others refuted original intent as a theory of constitutional interpretation, originalists turned to seeking the original public meaning of constitutional text. "[W]hat the ratifiers . . . enact[ed] must be taken to be what the public of that time would have understood the words to mean . . . . When lawmakers use words, the law that results is what those words ordinarily mean."[149] The meaning of constitutional text is normally a matter of period common knowledge, following Lord Bacon's approach.[150] Some originalists acknowledge an exception for terms of art, noting that the public would recognize terms of art and defer to experts in that art.[151] The meaning of a legal term of art follows from the understanding of learned lawyers, following Lord Ellesmere's approach.[152]

Original public meaning originalism began with a very limited scope. Interpreters sought objective meanings of words through a "mundane [and] 'wooden' " interpretive method that relied principally on dictionary definitions, etymologies and common meanings.[153] Context played little role.

Lawrence B. Solum provided a relatively narrow version of this theory. He wrote that constitutional interpretation consists of determining or discovering "the semantic content or linguistic meaning of the constitutional text" where that semantic meaning "is a fact about the world."[154] Meaning in constitutional communication is limited to a discrete unit: each clause within the Constitution.[155] An interpreter must consider each in the context

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[149] ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 144 (1990).

[150] *See supra* note 69 and accompanying text.

[151] *See, e.g.*, Lawrence B. Solum, *Originalism and the Natural Born Citizen Clause*, 107 MICH. L. REV. FIRST IMPRESSIONS 22, 25 (2007) (observing that an ordinary citizen reading phrases like "letters of marque and reprisal" in the Constitution would recognize them as technical legal language and defer to the public meaning of the phrases as understood by lawyers and by other citizens who had consulted lawyers about them).

[152] *See supra* note 116 and accompanying text.

[153] *See, e.g.*, Barnett, *supra* note 8, at 621–22 (quoting Gary Lawson, *In Praise of Woodenness*, 11 GEO. MASON U. L. REV. 21, 22 & n.8 (1988)); Barnett, *supra* note 13, at 101, 125.

[154] Lawrence B. Solum, A Reader's Guide to Semantic Originalism and a Reply to Professor Griffin 2–3 (draft of Feb. 18, 2009) (unpublished manuscript) (available at http://papers.ssrn.com/abstract=1130665).

[155] *Id.* at 4, 7.

of the rest of the Constitution but cannot view the Constitution as a whole as a unit of meaning or it will become "one long primal scream."[156]

Context plays no role unless a word or clause's semantic content is ambiguous.[157] In that case, one may appeal to a narrow context: "the whole text, the basic facts about framing and ratification, and so forth."[158] Fundamental to this view is that "[t]he linguistic meaning of a constitutional utterance is not the conclusion of a normative argument—it is a fact determined by conventional semantic meaning and the rules of syntax at the time of utterance."[159]

Randy E. Barnett allowed a somewhat greater role for context, explaining:

> The most common way of doing this is by resorting to dictionaries, and this is a useful starting point. But when interpreting the meaning conveyed by a writing, . . . one must take the context in which a word or phrase appears into account, combined with how these words are used elsewhere in the document and the general purposes for these clauses that can be ascertained from the document itself and from circumstances surrounding its formation.[160]

Nevertheless, Barnett acknowledged that the wooden version of communicative originalism can be very disappointing for many who "expect to see a richly detailed legislative history only to find references to dictionaries, common contemporary meanings, and logical inferences from the structure and general purposes of the text."[161] But so be it: "That is the way the objective approach to contract interpretation proceeds, and that is how the new originalism based on original meaning proceeds as well."[162] Words must be taken in accordance with their "generally accepted meanings that are ascertainable independently of any one of our subjective opinions about that meaning."[163]

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[156] *Id.* at 8–9. This theory of semantic originalism is not entirely wooden. Beyond recognizing a limited role for context, it also accepts that the Constitution may use terms of art, may include meanings by implication, and creates new terms and gives them meaning—for example, "House of Representatives." *Id.* at 4–5.

[157] *Id.* at 2.

[158] *Id.* at 14.

[159] *Id.* at 41.

[160] Barnett, *supra* note 8, at 633–34.

[161] *Id.* at 621.

[162] *Id.*

[163] *Id.* at 633.

Wooden originalism breaks down the term "to regulate commerce" into two parts, the verb "to regulate" and the object "commerce." It relies heavily on dictionary definitions and etymologies to define the two. However, this method quickly breaks down in practice. Consider originalist interpretations of the meaning of "commerce."

Justice Thomas relies on the etymology of "commerce," which he explains is "with merchandise,"[164] and on period dictionary definitions by Johnson, Bailey, and Sheridan.[165] He concludes that at adoption, "commerce" meant "selling, buying, and bartering, as well as transporting for these purposes."[166] Raoul Berger, by contrast, concludes that "commerce" originally meant "the interchange of goods by one State with another."[167]

Problems appear immediately with these two ostensibly objective, factual public meanings. They are incongruous. Justice Thomas's definition includes "transporting," but Berger's does not; nor do the dictionary definitions that Thomas relies on. Does commerce involve only merchandise, consistent with Justice Thomas's etymology, or goods more broadly, according to Berger? Is there a difference between the two, and are there any other objects of commerce? Does "commerce" mean any interchange, or specifically selling, buying, and bartering?

Other period reference works create more issues. Jacob's *Law Dictionary*, the most widely used law dictionary in the early Republic,[168] explains that "trade" and "commerce" are separate but often confounded, with "commerce" properly relating only to trade with foreign states.[169] Under this definition the Constitution's reference to "Commerce with foreign Nations" is redundant, and its reference to "Commerce . . . among the several States" is oxymoronic. Trusler details finer distinctions among types of

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[164] United States v. Lopez, 514 U.S. 549, 586 (1995) (Thomas, J., concurring), *quoted in* Barnett, *supra* note 13, at 101 n.4 and accompanying text.

[165] *See Lopez*, 514 U.S. at 585–86 (Thomas, J., concurring), *quoted in* Barnett, *supra* note 13, at 101 & n.3 and accompanying text.

[166] *Lopez*, 514 U.S. at 585 (1995) (Thomas, J., concurring), *quoted in* Barnett, *supra* note 13, at 101.

[167] *See* Raoul Berger, *Judicial Manipulation of the Commerce Clause*, 74 TEX. L. REV. 695, 703 (1996), *quoted in Barnett*, *supra* note 13, at 103 n.20 and accompanying text.

[168] *See* Gary L. McDowell, *The Politics of Meaning: Law Dictionaries and the Liberal Tradition of Interpretation*, 44 AM. J. LEGAL HIST. 257, 260–61, 261 n.25 (2000).

[169] GILES JACOB, A NEW LAW-DICTIONARY (London, 10th ed. 1782) (unpaginated; quotations within the definition of "Inland Trade").

interchange: "[*T*]*rade*[] seems to imply the manufacturing and vending of merchandise within . . . ; *commerce*, negotiating with other countries"; and "*traffic*," the bartering "with nations[] that have not the use of money."[170] He also distinguishes objects of interchange by the party that deals with them: "Merchants deal in *merchandize*, and manufacturers and shopkeepers in *wares*. *Merchandize* is more the object of commerce; *wares* of trade."[171] Neither Thomas's nor Berger's proposed definition is consistent with the other or with these period reference works.

It is remarkable that originalists propounded the wooden communicative theory in the first place. Founding-era materials undermine any claim that wooden and mundane meanings of English words or grammatical rules for their use existed as facts in the world that could determine the law. John Adams wrote in 1780 that

> to this day, there is no grammar nor dictionary extant, of the English language, which has the least public authority, and it is only very lately, that a tolerable dictionary has been published even by a private person, and there is not yet a passable grammar enterprized by any individual.[172]

The great lexicographer Samuel Johnson found English to be disordered, and the creation of his dictionary to require his own choices without any guiding principles or test of purity.[173] He found English to be

> copious without order, and energetick without rules: wherever I turned my view, there was perplexity to be disentangled, and confusion to be regulated; choice was to be made out of boundless variety, without any established principle of selection; adulterations were to be detected, without a settled test of purity; and modes of expression to be rejected or received, without the suffrages of any writers of classical reputation or acknowledged authority.[174]

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[170] *See* 1 JOHN TRUSLER, THE DIFFERENCE, BETWEEN WORDS, ESTEEMED SYNONYMOUS, IN THE ENGLISH LANGUAGE; AND, THE PROPER CHOICE OF THEM DETERMINED 169–70 (London, 1766).

[171] 1 JOHN TRUSLER, THE DISTINCTION BETWEEN WORDS ESTEEMED SYNONYMOUS IN THE ENGLISH LANGUAGE, POINTED OUT, AND THE PROPER CHOICE OF THEM DETERMINED 153 (London, 3d ed. 1794).

[172] CORRESPONDENCE OF THE LATE PRESIDENT ADAMS 161 (Boston, Everett & Munroe 1809).

[173] 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (London, W. Strahan 1755) (unpaginated; first preface page).

[174] *Id.*

He found the very concepts of definition and explanation of words to be difficult, if not impossible. "To interpret a language by itself is very difficult . . . . When the nature of things is unknown, or the notion unsettled and indefinite, and various in various minds, the words by which such notions are conveyed, or such things denoted, will be ambiguous and perplexed."[175] Johnson had no confidence that etymologies had any bearing on the current meanings of words, and included them only to help understand words' figurative senses.[176] In this, Johnson follows Aquinas, who pointed out that "*lapis* may well be derived from *laesio pedis*, but that does not entail that a piece of iron on which one stubs one's foot is a stone."[177]

It is notable that Adams derided all extant grammars, because Samuel Johnson's dictionary included one. It consisted of seven pages on etymology,[178] four on orthography,[179] two on prosody,[180] and a mere five sentences on syntax.[181] His introduction all but dismisses syntax in English, stating that construction of the language "neither requires nor admits many rules. Wallis therefore has totally omitted it; and Johnson, whose desire of following the writers upon the learned languages made him think a syntax indispensably necessary, has published such petty observations as were better omitted."[182] Unsurprisingly, one strains to find works by originalists that use period grammars to interpret the Constitution, even though many argue that constitutional interpretation should rely on period grammar, in particular on syntax.[183]

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[175] *Id.* (fifth preface page).

[176] *See id.* (sixth preface page).

[177] MACLEAN, *supra* note 89, at 110 (footnote omitted).

[178] JOHNSON, *supra* note 173 (fourth grammar page; describing etymology as "the deduction of one word from another, and the various modifications by which the sense of the same word is diversified; as *horse*, *horses*; I *love*, I *loved*").

[179] *Id.* (first grammar page; describing orthography as "the art of combining letters into syllables, and syllables into words").

[180] *Id.* (eleventh grammar page; describing prosody as "the rules of pronunciation" and "the laws of versification").

[181] *Id.* (eleventh grammar page).

[182] *Id.*

[183] *See, e.g.*, Solum, *supra* note 154, at 41.

B. Sophisticated Communicative Originalism

In response to the problems of wooden communicative originalism,[184] many originalists have expanded their interpretive approaches to give context a more meaningful role. Some delve deeply into records of the Philadelphia convention,[185] the ratification debates,[186] general political, philosophical, economic and legal history,[187] and other sources[188] to determine the meanings of words and phrases in the Constitution. Lawrence B. Solum shifts his theory to acknowledge that semantics and syntax do not fully determine the content of written communication.[189] Instead, the meaning "is almost always partly a function of the context in which the communication occurs."[190] One emerging area of contextual analysis is corpus linguistics, which uses databases of period legal texts, "letters, newspapers, sermons, books, and other materials" to analyze how words and phrases were used in various contexts during specified periods.[191] It shows the interpreter far more period uses of words and phrases than wooden definitions found in dictionaries and treatises. Many argue that it can make originalism empirical[192] and scientific.[193]

Randy E. Barnett offers a sophisticated communicative analysis of the Commerce Clause,[194] seeking "the meaning a reasonable speaker of English would have attached to the words, phrases, sentences, etc." in the clause "at the time the particular provision was adopted."[195] He grapples with two major issues involving "commerce." The first is whether commerce includes

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[184] *See, e.g.*, Phillips, Ortner, & Lee, *supra* note 31, at 22–23 (detailing evidentiary problems, particularly with regard to dictionaries).

[185] *See, e.g.*, Barnett, *supra* note 13, at 126.

[186] *Id.*

[187] *See, e.g.*, Robert G. Natelson & David Kopel, *Commerce in the Commerce Clause: A Response to Jack Balkin*, 109 MICH. L. REV. FIRST IMPRESSIONS 55, 56–58 (2010).

[188] *See* Josh Blackman & James C. Phillips, *Corpus Linguistics and the Second Amendment*, HARV. L. REV. BLOG (Aug. 7, 2018), https://blog.harvardlawreview.org/corpus-linguistics-and-the-second-amendment/.

[189] Solum, *supra* note 23, at 273.

[190] *Id.* at 273.

[191] Blackman & Phillips, *supra* note 188 (corpus linguistics); *see, e.g.*, Phillips, Ortner, & Lee, *supra* note 31 at 24–27 (corpus linguistics).

[192] *See, e.g.*, Phillips, Ortner, & Lee, *supra* note 31, at 23–24.

[193] *See* Clark D. Cunningham & Jesse Egbert, Scientific Methods for Analyzing Original Meaning: Corpus Linguistics and the Emoluments Clauses 1–2, 6 (Feb. 12, 2019) (unpublished manuscript) (available at http://ssrn.com/abstract=3321438).

[194] *See generally* Barnett, *supra* note 13.

[195] *Id.* at 105.

transportation. This is a significant issue for originalists, given the large number of eighteenth-century references to commerce that include shipping, transportation, and navigation.[196] Barnett concludes that the original meaning of "commerce" includes "navigation" because of its "intimate connection to the activity of trading."[197]

The second issue is whether "commerce" differs from "trade," given numerous eighteenth-century uses of the words separately. Barnett concludes that "trade and commerce" was merely a couplet—like " 'full and complete' stop"—that "refers to a single activity that could be, and usually was, called either trade *or* commerce."[198]

Consequently, Barnett concludes that "[c]ommerce" means only "the trade or exchange of goods (including the means of transporting them)."[199] It does not mean "intercourse" broadly, nor does it include all "commercial" activities[200] like agriculture,[201] manufacturing,[202] or insurance.[203]

Barnett's approach differs significantly from wooden applications of syntax to meanings of individual words. First, multi-word phrases can have their own meaning separate from the meanings of their individual words.[204] Second, the meaning of a phrase is not dependent on whether it includes a copulative or a disjunctive: "[T]rade and commerce" has the same meaning as "trade or commerce," "trade" alone, or "commerce" alone. Third, a definition can include multiple items that are facially distinct as long as they are intimately connected, such as trade and transportation. Fourth, context can separate the meanings of words that have the same etymology—"commercial" activities, for example, are not necessarily activities in "commerce" despite their common root and despite the fact that a principal definition of "commercial" is "[e]ngaged in commerce; trading."[205]

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[196] *Id.* at 122, 125.
[197] *Id.* at 125.
[198] *Id.* at 124.
[199] *Id.* at 146.
[200] *Id.* at 119–20.
[201] *Id.* at 136.
[202] *Id.*
[203] *Id.* at 120.
[204] *Cf.* Phillips, Ortner, & Lee, *supra* note 31, at 23 (arguing that period dictionaries defined words, not phrases, whereas corpus linguistics identifies the meaning of phrases).
[205] *Commercial*, OXFORD ENGLISH DICTIONARY, def. 1.a (2019), http://www.oed.com/view/Entry/37081?redirectedFrom=commerical#eid.

How strong is Barnett's argument, and what does it say about originalism? For ordinary words like "commerce," originalists should look to "quotidian" usage in the corpora.[206] Eighteenth-century public uses of "commerce" show a far broader understanding than Barnett's definition, and the extent of popular usage shows that ordinary speakers of English did not use it as a term of art. Eighteenth-century usage included the "commerce of insurance."[207] For example, there was a longstanding debate whether government should prohibit insuring enemy property during wartime. Many opposed any prohibition, arguing that "it would be highly impolitic to lay such a restraint on the commerce of insurance" because it was highly profitable at the enemy's expense.[208] The debate was carried on over many years,[209] and the popular press reported it, including using the term "commerce of insurance."[210] Similarly, a 1686 French edict provided that those who "enter into the partnership and commerce of insurance, shall not be degraded from their nobility" and prohibited all but members of one company "to carry on any commerce of insurance and bottomry in the city of Paris."[211]

Many eighteenth-century uses of "commerce" involve matters other than goods, such as "commerce of land,"[212] "commerce in money,"[213] and "commerce in slaves."[214] Benjamin Franklin characterized payments made to secure enactment of laws as a "Kind of Commerce."[215] Nor was the commerce of transportation

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[206] *Cf.* Phillips, Ortner, & Lee, *supra* note 31, at 24.

[207] THOMAS MORTIMER, THE ELEMENTS OF COMMERCE, POLITICS AND FINANCES, IN THREE TREATISES ON THOSE IMPORTANT SUBJECTS 176 (London, 1772); *cf.* GREAT BRITAIN, REPORTS OF CASES ARGUED AND ADJUDGED IN THE COURT OF KING'S BENCH xiii (London, 1766) (reporter's preface: "Trade and commerce are likewise interested in this publication [of judicial precedents]. How many cases relative to bills of exchange, notes of hand, insurances, charter parties, and stocks, are every day determined.").

[208] MORTIMER, *supra* note 207, at 176.

[209] *See, e.g.*, JOHN WESKETT, A COMPLETE DIGEST OF THE THEORY, LAWS AND PRACTICE OF INSURANCE 197 (Dublin, 1783).

[210] *See Art. V. A Complete Digest of the Theory, Laws, and Practice of Insurance*, 64 MONTHLY REV.; OR, LITERARY J. 205, 206 (1781).

[211] WESKETT, *supra* note 209, at 91 (as translated into English).

[212] HENRY HOME, REMARKABLE DECISIONS OF THE COURT OF SESSION, FROM THE YEAR 1730 TO THE YEAR 1752, at 129 (Edinburgh, 1766).

[213] *Retribution*, 9 ENCYCLOPÆDIA BRITANNICA 6685 (Edinburgh, 1782); 6 GREAT BRITAIN, THE PARLIAMENTARY REGISTER 218 (London, 1782).

[214] 11 THE MODERN PART OF AN UNIVERSAL HISTORY FROM THE EARLIEST ACCOUNTS TO THE PRESENT TIME 200 (London, 1781).

[215] Benjamin Franklin, *Preface to Joseph Galloway's Speech*, NAT'L ARCHIVES (Aug. 11, 1764), https://founders.archives.gov/documents/Franklin/01-11-02-0083.

limited to transporting goods for trade or exchange. The transportation of free persons for profit was also considered trade and commerce.[216]

Finally, a 1789 treatise on the origin of commerce[217] lists a myriad of statutes enacted "relative to trade and commerce."[218] These include statutes encouraging or establishing specific types of agriculture,[219] manufacturing,[220] and fisheries;[221] regulating or taxing life, property and casualty insurance and annuities;[222] regulating employees, their work opportunities, and wages;[223] regulating the operations of a trading company;[224] preventing and

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[216] Pennsylvania Assembly, *Reply to the Governor*, NAT'L ARCHIVES (May 15, 1755), https://founders.archives.gov/documents/Franklin/01-06-02-0018 ("[T]he Bill itself was calculated to lay Restraints upon the Trade carried on by the Importers of [sick] Passengers, &c. and we have, in all our Considerations upon it, endeavoured to make it answer those Purposes, without interfering with the other Branches of our Commerce, not subject to the same fatal Consequences.").

[217] 4 ADAM ANDERSON, AN HISTORICAL AND CHRONOLOGICAL DEDUCTION OF THE ORIGIN OF COMMERCE, FROM THE EARLIEST ACCOUNTS (London, William Combe ed. 1789).

[218] *See id.* at Index ("*Laws* enacted in this year relative to trade and commerce").

[219] *See id.* at 131 ("For further encouraging the growth of silk in America"); *id.* at 167 ("For the better cultivating common arable fields"); *id.* at 261 ("To repeal so much of several acts of Parliament, as prohibit the growth and produce of tobacco in Ireland, and to permit the importation of tobacco of the growth and produce of that kingdom into Great Britain, &c."); *id.* at 539 ("For the further encouraging the growth of coffee and cocoa nuts, in his Majesty's islands and plantations in America").

[220] *See id.* at 167 ("For establishing a plate-glass manufactory"); *id.* at 208 ("For continuing the encouragement of making indigo in the plantations, &c."); *id.* at 261 ("For better encouraging the Irish linen manufactory"); *id.* at 539 ("For the more effectual encouragement of the manufactures of flax and cotton in Great Britain"); *id.* at 605 ("Respecting the manufacture and importation of cordage for shipping").

[221] *See id.* at 188 ("For the encouragement of the fisheries carried on from Great Britain, Ireland, and the British dominions in Europe"); *id.* at 261 ("For the better encouraging the white herring fishery").

[222] *See id.* at 176 ("For better regulating insurances upon lives, and for prohibiting all such insurances, except in cases, where the persons insuring shall have any interest in the life or death of the person insured"); *id.* at 208 ("For registering the grants of life annuities, and for the better protection of infants against such grants"); *id.* at 459 ("For charging duty on persons whose property shall be insured against loss by fire"); *id.* at 605 ("For regulating insurances on ships, goods, &c.").

[223] *See id.* at 167 ("To regulate the wages or prices of journeymen weavers" and "To enable certain persons to work a pestle mill at Tunbridge"); *id.* at 207 ("For settling the hours of labour, and the prices of taking apprentices, in the hat manufactory"); *id.* at 208 ("To allow the callico printers and dyers to employ journeymen who have not served a regular apprenticeship to the said trade").

[224] *See id.* at 167 ("For establishing certain rules and orders for the future management of the affairs of the East India Company"); *id.* at 207 ("For regulating the affairs of the East India Company, as well in Europe as in India, so far as relates to altering the time for the choice of Directors").

punishing fraud in trades,[225] manufacturing,[226] and the payment of employee wages;[227] granting or extending copyrights and patents;[228] preventing fires;[229] encouraging lending against real property;[230] and preventing the pawning of certain goods and the easy redemption of pawns.[231]

Critics quickly pointed out that eighteenth century usage was broader than originalists supposed. Grant Nelson and Robert Pushaw, Jr., for example, argued that James Wilson used "commerce" to refer to all gainful activity including business services like insurance.[232] Barnett responds that Wilson was actually referring to "the objects of commerce," suggesting that he considered "commerce" to refer only to the "items being traded."[233] Yet there are many eighteenth-century uses that call non-goods "object[s] of commerce" or "subject[s] of commerce" including agriculture,[234] land,[235] money,[236] capital stock companies,[237]

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[225] *See id.* at 167 ("For altering the punishment of persons fraudulently marking of plate"); *id.* at 207 ("For preventing frauds in combing wool").

[226] *See id.* at 176 ("To amend an act for the more effectually preventing frauds and abuses by persons employed in the manufacture of hats, woollen, linen, and cotton manufactures"); *id.* at 262 ("To prevent frauds by private distillers").

[227] *See id.* at 262 ("To prevent frauds and abuses in the payment of wages to persons employed in the bone and thread-lace manufactory"); *id.* at 630 ("For the further preventing frauds in the payment of seamen's wages, &c.").

[228] *See id.* at 188 ("To enable the different universities in Great Britain, and the colleges of Eton, Westminster, and Winchester, to hold, in perpetuity, their copy-right in books given or bequeathed to them, for the advancement of learning" and "[t]o enlarge the term of letters patent granted to William Clockworth, for the sole use of a discovery of certain materials for the making of porcelain"); *id.* at 207 ("To enlarge Mr. Hartley's patent, for his invention of iron plates to prevent the fatal consequences of fires" and "[t]o secure to engravers their property in the engraving branch").

[229] *See id.* at 605 ("Respecting party walls, and for the more effectually preventing mischiefs by fire, and for extending the provisions of this act, so far as relates to manufactories of pitch, &c. throughout England").

[230] *See id.* at 167 ("To encourage the subjects of foreign states to lend money upon estates in the West Indies").

[231] *See id.* at 630 ("To prevent the unlawful pawning of goods, and easy redemption of goods pawned, &c.").

[232] Barnett, *supra* note 13, at 120.

[233] *Id.*

[234] 1 MALACHY POSTLETHWAYT, BRITAIN'S COMMERCIAL INTEREST EXPLAINED AND IMPROVED 101, 130, 138 (London, 1757).

[235] JOHN MILLAR, AN HISTORICAL VIEW OF THE ENGLISH GOVERNMENT 202 (London, 1790).

[236] 1 WILLIAM ROBERTSON, THE HISTORY OF THE REIGN OF THE EMPEROR CHARLES V 401 (London, 6th ed. 1787).

[237] THOMAS POWNELL, THE RIGHT, INTEREST, AND DUTY, OF GOVERNMENT 6 (London, 2d ed. 1781).

peerages,[238] and the art of engraving.[239] Land is the "principal subject of commerce,"[240] the "most natural subject of commerce"[241] and "the great object of commerce" in part because it "afford[s] the highest security that can be given for payment of debt."[242] Agriculture is "the first object of commerce."[243]

A British writer explained in 1757, for example, that when "England prohibited the exportation of corn, she did not consider agriculture in the light of commerce, and very frequently suffered scarcity," resulting in high wages for workers; then, "[w]hen England, more sensible of her true interests, began to consider agriculture as an object of commerce, she found it was impossible, by restoring plenty of corn, to lower the high wages the dearness of provisions had occasioned."[244] The government then took land use measures to deal with the wage issue.[245] The writer described agriculture—the productive activity—as an object of commerce, and he noted the range of causes and effects that the government addressed when dealing with that object of commerce, including wages and land use.

"Commerce" clearly had much broader public usage than Barnett's restrictive definition. How then does Barnett conclude that "commerce" had such a narrow public meaning? First, he limits the scope of relevant context. He purports to identify "original meaning" in "the meaning a reasonable speaker of English would have attached to the words, phrases, sentences, etc. at the time the particular provision was adopted,"[246] which he claims is objective because "it looks to the public meaning conveyed by the words used in the Constitution, rather than to the subjective intentions of its framers or ratifiers."[247] Yet he argues that "[t]he most persuasive evidence of original meaning" is limited to "statements made during the drafting and ratification

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[238] SIR DAVID DALRYMPLE, THE ADDITIONAL CASE OF ELISABETH, CLAIMING THE TITLE AND DIGNITY OF COUNTESS OF SUTHERLAND, BY HER GUARDIANS 80 (London, 1770).

[239] 10 JAMES ANDERSON, THE BEE 299 (Edinburgh, Mundell & Son 1792).

[240] HENRY HOME, ESSAYS UPON SEVERAL SUBJECTS CONCERNING BRITISH ANTIQUITIES 157–58 (Edinburgh, 3d ed. 1763).

[241] HOME, *supra* note 212, at 130.

[242] HENRY HOME, HISTORICAL LAW-TRACTS 145 (Edinburgh, 2d ed. 1761).

[243] JOHN ARBUTHNOT, AN INQUIRY INTO THE CONNECTION BETWEEN THE PRESENT PRICE OF PROVISIONS, AND THE SIZE OF FARMS 35 (London, 1773).

[244] POSTLETHWAYT, *supra* note 234, at 138.

[245] *See id.* at 138–39.

[246] Barnett, *supra* note 13, at 105.

[247] *Id.*

of the Constitution as well as dictionary definitions and *The Federalist Papers*"[248] because "usage outside the context of drafting and ratification may mislead us as to what the particular words of a particular measure meant at the time of its enactment. Far from providing useful 'context,' such historical evidence may instead cloud what was otherwise a fairly clear meaning."[249]

This is simply a retreat to seeking the original intent of the drafters or ratifiers, which Brest and Powell have already refuted. It also evades the question of how to determine the original public meaning of words in the Constitution. Restricting context hides ambiguity and unclarity that exist in public usage. In addition, *The Federalist Papers* were partisan arguments written by only a few men. James Madison later cautioned against relying on them too much because, owing to human nature, they were sometimes works of zealous advocacy.[250]

Barnett concludes that "commerce" includes "navigation" because of its intimate connection to trading. Others might equally conclude that "commerce" includes insurance, agriculture, manufacturing, and other productive activities because of their intimate connection to trade and interchange, or because many founding-era ordinary and legal public uses of "commerce" include such activities. This prevents the identification of an original public meaning as a non-normative fact about the world.

Barnett's ultimate defense of his definition of "commerce" is telling:

> I am not disputing here that "commerce" had a broad as well as a narrow meaning, or that many . . . strongly favored a national government powerful enough to govern all "gainful activities." I only dispute, on the basis of the evidence of usage presented here and the clash of interests that existed in the country at the time, that a government of so unlimited a power was adopted in 1789.[251]

Barnett reasons backwards. He relies on the political compromise that he believes was struck to determine the public meaning of constitutional text, rather than using the public

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[248] *Id.* at 146.

[249] *Id.* at 107.

[250] James Madison, *Letter from James Madison to Edward Livingston*, NAT'L ARCHIVES (Apr. 17, 1824), https://founders.archives.gov/documents/Madison/04-03-02-0291, *cited in* Powell, *supra* note 1, at 936 n.262.

[251] Barnett, *supra* note 13, at 131 (footnote omitted).

meaning of the text to determine what compromise was struck. His definition is ultimately normative. The meaning he ascribes to "commerce" is his own subjective opinion.

Barnett takes a similarly normative approach to determining the original public meaning of "to regulate." He argues that the verb "to regulate" means only "to make regular"—that is, to tell people how to do something if they choose to do it.[252] The verb does not include the power to command activity.[253] Nor does it include the power to prohibit any activity.[254] Barnett cites Johnson's dictionary definition of "to regulate" as "1. To adjust by rule or method . . . . 2. To direct,"[255] which is distinct from Johnson's definition of "to prohibit," which is "1. To forbid; to interdict by authority . . . . 2. To debar; to hinder."[256] Barnett states that Johnson does not define either "in terms of the other; each seems quite distinct."[257] Barnett concludes that "[t]he power to regulate is, in essence, the power to say, 'if you want to do something, here is how you must do it.' "[258]

Yet the very definition of "to regulate" that Barnett cites includes "to direct," which would authorize the government to direct persons to engage in commerce. Johnson defines "[t]o [d]irect" to include "[t]o prescribe certain measure" and "[t]o order; to command."[259] His definition of "[t]o prescribe" includes "to order" and "[t]o influence arbitrarily."[260]

In addition, the most common founding-era uses of regulating commerce in America involved restrictions or prohibitions.[261] Pre-adoption English and British legal uses also contradict Barnett. Statutes for the "regulation" of activities included

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[252] *Id.* at 139.

[253] Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate Is Unconstitutional*, 5 N.Y.U. J.L. & LIBERTY 581, 582–83 (2010).

[254] Barnett, *supra* note 13, at 139.

[255] *Id.* (quoting SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1785)).

[256] *Id.* (quoting SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1785)).

[257] *Id.* at 140.

[258] *Id.* at 139.

[259] *See* JOHNSON, *supra* note 173; *see also* Robert G. Natelson, *To "Regulate" Commerce Means More than To "Make It Regular"*, TENTH AMEND. CTR. (Dec. 27, 2011), https://tenthamendmentcenter.com/2011/12/27/to-regulate-commerce-means-more-than-to-make-it-regular/ (describing similar definitions in multiple period dictionaries).

[260] 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (London, 1755).

[261] *See* Natelson, *supra* note 259.

prohibitions, such as an act for the regulation of insurance that prohibited certain types of insurance and virtually all types of reinsurance;[262] "[a]n Act to regulate [b]uying and [s]elling of [h]ay and [s]traw" that prohibited many such transactions;[263] and an act regulating a trade that prohibited most persons from practicing the trade.[264] As a jurist and central figure in the Scottish Enlightenment[265] noted in 1777, "[i]t is the privilege of every state to regulate matters within its own territory. The legislature may, in particular, prohibit certain goods to be imported, whether by natives or by foreigners."[266]

It is clear that public usage of "to regulate" included "to prohibit." So Barnett turns to circumstantial and purposive arguments to argue that "to regulate" does not include the power to prohibit commerce "among the several States" even though it does include the power to prohibit commerce "with foreign Nations" and "with the Indian Tribes." He appeals to "circumstantial textual evidence"[267] and to purported "known purposes of the founders,"[268] which differed for regulating commerce among the three jurisdictions, "as is well known."[269]

Barnett does not objectively justify his reliance on purposes of the founders rather than of the ratifiers or of the American public. Nor does he objectively justify his preference for some "well known" purposes over others. He acknowledges that evidence of purposes could be a reversion to original intent originalism, but argues that "evidence of publicly known purposes helps to shape the original public meaning of words and phrases."[270] Given the many conflicting purposes involved in the creation and adoption of

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[262] *See* An Act to Regulate Insurance on Ships Belonging to the Subjects of Great Britain, and on Merchandizes or Effects Laden Thereon, 19 Geo. 2 c. 37, §§ 1, 4 (1746).

[263] *See* An Act to Regulate the Buying and Selling of Hay and Straw, etc., 36 Geo. 3 c. 38, § 8 (1796).

[264] *See* An Act for Regulating the Trade of Silk-Throwing, 13 & 14 Car. 2 c. 15, § 2 (1662).

[265] *See* Gordon Graham, *Henry Home, Lord Kames (1696–1782)*, INST. FOR THE STUDY OF SCOTTISH PHILOSOPHY, http://www.scottishphilosophy.org/philosophers/henry-home/ (last visited Oct. 18, 2019).

[266] HENRY HOME, ELUCIDATIONS RESPECTING THE COMMON AND STATUTE LAW OF SCOTLAND 149 (Edinburgh, 1777).

[267] *See* Barnett, *supra* note 13, at 144.

[268] *See id.* at 144 n.207.

[269] *See id.* at 145 (outlining different purposes for granting Congress the power to regulate trade with foreign nations than among the states, "as is well known"); *id.* at 146 (detailing purported different purposes of the power to regulate commerce with foreign nations than among the states).

[270] *See id.* at 146 n.213.

the Constitution, including the purpose of strengthening the federal government relative to the Articles of Confederation, only a reversion to original intent or the interpreter's own normative judgment can justify one purposive interpretation of the commerce power over another. Barnett's interpretive approach is surprisingly similar to a target of Michael Stokes Paulsen's criticism: identifying an abstract principle in the Constitution, assigning it a specific content based on the interpreter's own discernment, then infusing that content into particular constitutional provisions.[271]

Barnett's interpretation assigns two contrary, original public meanings to the same verb with respect to different direct objects in the same constitutional clause. He severs the meaning of the words from the plain syntax of the clause; his discernment of purposes, not the linguistic meaning of the word, controls.[272] He follows Ellesmere, who notes that words are often construed "in a contrary sense."[273]

Barnett apparently recognizes this issue for his proposed original public meaning of "to regulate." He responds that words can be ambiguous, noting contracts cases in which two different counterparties mean different things by the same word, such as each referring to a different ship with the same name "Peerless."[274] However, the Commerce Clause has only one putative collective author. Barnett's analogy cannot apply to the objective meaning of a single verb that a single author applies to three direct objects in the same clause. He ultimately retreats to original intended purpose to interpret the clause: "[W]hen a group of people agrees to use one word to connote, depending on the circumstances, two different meanings, they *have* objectively manifested their intentions, albeit in an awkward manner that makes the objective meaning of their words sometimes difficult to discern."[275] Barnett's interpretation cannot follow from an ordinary English speaker's understanding of the meaning of "to regulate." It can

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[271] *See* Paulsen, *supra* note 13, at 878–79.

[272] *Cf.* Natelson, *supra* note 259 ("[I]n the Commerce Clause the verb 'regulate' has three objects, not just one: interstate, foreign, and Indian commerce. Under Founding-Era (as well as modern) rules of interpretation you should read 'regulate' the same way for all three.").

[273] *See supra* note 112 and accompanying text.

[274] *See* Barnett, *supra* note 13, at 144 n.207 (citing Raffles v. Wichelhaus, 2 Hurl. & C. 906, 159 Eng.Rep. 375 (Ex. 1864)).

[275] *Id.* at 145 n.207.

only reflect a retreat to original intent or a construction by a scholar applying legal interpretive techniques to a verb that is not a term of art.

Barnett's ultimate defense of his interpretation of "to regulate" in the context of directing individuals to engage in commerce is also normative. He acknowledges that the Constitution allows the federal government to commandeer individuals.[276] But he argues that the power is limited: "The very few mandates that are imposed on the people pertain to their fundamental duties as citizens of the United States, such as the duty to defend the country or to pay for its operation."[277] The claim that some duties are fundamental and allow commandeering but others are not is purely normative. Barnett exercises his own normative judgment about the duties of citizens to determine the meaning of a constitutional term rather than using the meaning of the term to determine the individual's duties. The Preamble specifies both "promot[ing] the general Welfare" and "provid[ing] for the common defence" as purposes for which "We the People . . . do ordain and establish this Constitution for the United States of America."[278] Directing individuals to engage in commerce, such as purchasing health insurance, to promote the general welfare is no different in this context from directing them to pay taxes to promote the general welfare or to serve in the armed forces to provide for the common defense.

Originalist interpretations of the Emoluments Clauses demonstrate the same reliance on their authors' own normative judgments, as Part VI shows.

VI. ORIGINALISM AND THE EMOLUMENTS CLAUSES

This Part evaluates communicative originalism in the context of litigation over the application of the Constitution's Emoluments Clauses to President Trump's business activities with federal agencies and state and foreign governments. The Constitution contains three Emoluments Clauses:

> No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such

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[276] Barnett, *supra* note 253, at 582–83.
[277] *Id.*
[278] U.S. CONST. pmbl.

> time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.[279] [the first of these clauses, the "Congressional Emoluments Clause"]
>
> No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.[280] [the "Foreign Emoluments Clause"]
>
> The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.[281] [the "Domestic Emoluments Clause"]

A. Wooden Communicative Originalism

Many of the arguments in litigation over the Emoluments Clauses follow the wooden early version of communicative originalism. President Trump cites period dictionaries to assert that "emolument" means a "profit arising from an office or employ" and therefore cannot apply to business transactions.[282] In particular, he notes that the Oxford English Dictionary lists his proposed definition first and that it "lists each definition in the order it appeared in the English language to 'illustrate the word's development over time.' "[283] He also argues that the definition properly follows from the etymology of "emolument," which derives from the labor of earning a payment or profit for grinding corn.[284]

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[279] *Id.* art. I, § 6, cl. 2.

[280] *Id.* art. I, § 9, cl. 8.

[281] *Id.* art. II, § 1, cl. 7.

[282] Memorandum of Law in Support of Defendant's Motion to Dismiss at 28, Citizens for Responsibility and Ethics in Wash. v. Trump, 276 F. Supp. 3d 174 (S.D.N.Y. 2017) (No. 17 Civ. 458 (RA)).

[283] Defendant's Reply in Support of His Motion to Dismiss at 21, Citizens for Responsibility and Ethics in Wash. v. Trump, 276 F. Supp. 3d 174 (S.D.N.Y. 2017) (No. 17 Civ. 458 (GBD)).

[284] *Id.*

Critics cite definitions from a broader group of English language dictionaries from 1604 to 1806 to argue that "emoluments" means any profit, gain or advantage.[285] They conclude that the Emoluments Clauses forbid the President to receive any profit, gain, or advantage from federal, state or foreign governments, including any direct or indirect profits from those governments patronizing the Trump International Hotel in Washington, D.C.[286] Critics provide a statistical analysis of each usage in the dictionaries, ranging from 92.5% using "profit" and 82.5% using "advantage" to only 7.5% using "employ" or "office."[287] They show further that every dictionary definition used one or more of "profit," "advantage," "gain," or "benefit," and that over 92% of them exclusively defined "emolument" in those terms.[288] Therefore, they conclude that the public meaning of "emolument" at adoption was broad: any "profit" or "gain."[289] "[W]hen a narrower meaning was intended, it was accompanied by [restrictive] language" such as "of the offices" or "annexed to their offices."[290]

Critics also attack the dictionaries that the President relies on. First, they argue that there is little, if any, evidence that those dictionaries "were owned, possessed, or used by the founders, let alone had any impact on them or on those who debated and ratified the Constitution."[291] "By contrast, all of the dictionaries that the founding generation did possess and use regularly define 'emolument' in the broad manner favoring the plaintiffs: 'profit,' 'advantage,' or 'benefit.' "[292] Second, "Trusler's volume is not a standard dictionary, but rather a thesaurus, which presumes that

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[285] Brief of Amicus Curiae by Certain Legal Historians on Behalf of Plaintiffs at 25, Citizens for Responsibility and Ethics in Wash. v. Trump, 276 F. Supp. 3d 174 (S.D.N.Y. 2017) (No. 17 Civ. 458 (GBD)) [hereinafter "Legal Historians"].

[286] Plaintiffs' Memorandum in Opposition to Defendant's Motion to Dismiss at 6, 32, 52, Citizens for Responsibility and Ethics in Wash. v. Trump, 276 F. Supp. 3d 174 (S.D.N.Y. 2017) (No. 17 Civ. 458 (GBD)).

[287] John Mikhail, The Definition of "Emolument" in English Language and Legal Dictionaries, 1523–1806, A-5 (Aug. 4, 2017) (unpublished manuscript) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2995693).

[288] *Id.* at 8.

[289] *See* Plaintiffs' Memorandum in Opposition to Defendant's Motion to Dismiss, *supra* note 286, at 35.

[290] *Id.* at 36 (quoting John Mikhail, *A Note on the Original Meaning of "Emolument"*, BALKANIZATION (Jan. 18, 2017), https://balkin.blogspot.com/2017/01/a-note-on-original-meaning-of-emolument.html (listing examples from the Federalist Papers)).

[291] Legal Historians, *supra* note 285, at 2.

[292] *Id.* at 3.

'gain,' 'profit,' and 'emolument' are synonyms; moreover, its explanation of 'emolument' was copied directly from a French thesaurus, hence it is not even reliably grounded in English usage."[293] Third, "emolument" cannot be a term of art with the President's asserted narrow meaning because it was not a defined term in the most significant common law dictionaries from 1523 to 1792; they merely use the word in other definitions.[294]

The President retorts that period lexicographers may have copied each other's definitions.[295] Moreover, they did not and could not systematically discern all meanings of words.[296] Finally, their dictionaries "were generally more prescriptive about how language should be used, rather than descriptive of how it was actually used at the time."[297]

Ellesmere's attack on the novel interpretive method demonstrates the futility of the wooden originalist approach. Period dictionaries include a wide range of inconsistent definitions, none of which can provide a non-normative original public meaning of the term "emoluments" in the Constitution. Indeed, by asserting that lexicographers did not and could not discern all meanings of words, the President undercuts the case for adopting his dictionary-based narrow meaning of "emoluments."

Etymologies are even less useful. The President relies on one reference work that provides a narrow definition tied to labor in an office or employ.[298] However, another etymological dictionary defines "emolument" as "profit gotten properly by grist, or whatever is ground at the mill: hence used to signify any advantage, or gain."[299] Indeed, the phrase "to bring grist to the (one's) mill" has been used since 1583 to mean "to bring business to one's hands; to be a source of profit or advantage."[300] One important use in the founding-era context of debates over public trust was the exact opposite of the President's interpretation: emoluments for doing no work at all, including gratuitous

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[293] *Id.*

[294] *Id.* at 4.

[295] Def.'s Reply Mot. Dismiss, *supra* note 283, at 20.

[296] *Id.*

[297] *Id.* (emphasis omitted).

[298] *Id.* at 21.

[299] *Emoluments*, ENGLISH ETYMOLOGY; OR A DERIVATIVE DICTIONARY OF THE ENGLISH LANGUAGE IN TWO ALPHABETS (London, George William Lemon ed., 1783).

[300] *Grist*, OXFORD ENGLISH DICTIONARY, def. 2.c (2019), https://www.oed.com/view/Entry/81626?rskey=TYrzeD&result=2#eid.

emoluments[301] and emoluments for no-show jobs.[302] Etymologies are vain and comical ornaments for judicial opinions and traps for the unwary. They cannot provide constitutional meanings.

The litigation over the Emoluments Clauses demonstrates that wooden communicative originalism has not overcome the challenges that original intent originalism faced. One cannot determine a factual meaning by counting dictionary votes any more than "intention-votes."[303] Dictionaries, thesauruses, and other reference works cannot capture all meanings of words. The choice of a particular word does not necessarily communicate its original etymological meaning, and the order in which a usage appeared cannot determine the word's communicative content at a time when other uses have arisen.

There is no way to determine as a matter of fact whether to charge adopters with the meaning of the words that they choose, regardless of whether they have read all extant dictionaries, or instead to charge their audience with knowing the definitions in the dictionaries that the adopters actually read. And in the latter case, it is not possible to determine as a matter of fact how to determine a single meaning if different adopters have read different dictionaries. Dictionary definitions are facts. The text of the Constitution is a fact. But the communicative content of constitutional text is not a fact.

B. Sophisticated Communicative Originalism

Seth Barrett Tillman, Robert G. Natelson, and two teams of linguistics scholars have offered sophisticated originalist interpretations of the Emoluments Clauses. This Part considers their interpretations and provides counterarguments. It suggests that their approaches cannot determine a non-normative public meaning of the Clauses and further that they are better understood as part of the latest evolution of originalism: original law[304] or original methods[305] originalism. Stephen Sachs explains that this newer version of originalism

> isn't just about recovering the meaning of ancient texts, a project for philologists and historians. Instead, it's about determining the content of our law, today, in part by recovering Founding-era

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[301] *See* THE GENUINE LETTERS OF JUNIUS xv (London, 1771).
[302] 27 GREAT BRITAIN, THE PARLIAMENTARY REGISTER 618 (London, 1790).
[303] Brest, *supra* note 1, at 212–13.
[304] *See* Sachs, *supra* note 13, at 858, 875–76.
[305] *See, e.g.*, McGinnis & Rappaport, *supra* note 32, at 751.

> doctrine. That means learning some history, but it also means exercising legal judgment, the kind we hire lawyers for. . . . [O]riginalism is just ordinary lawyer's work.[306]

1. Seth Barrett Tillman's Approach

Tillman writes that "our task is to understand what the American public thought the meaning of" relevant text "was between 1787 and 1790, the time period during which the original thirteen states ratified the Constitution."[307] We should find roughly contemporaneous evidence to determine the "probable or likely public understanding of disputed constitutional text."[308] Tillman surveys the evidence and proposes narrow constitutional meanings for "emoluments" generally and for offices "under" the United States within the Foreign Emoluments Clause specifically.

a. Office Under

Tillman asserts that the Foreign Emoluments Clause does not apply to an elected office like the presidency because it is not an "Office of Profit or Trust under" the United States.[309] He argues that the term is a legal term of art taken from the British "Office under the Crown," which did not reach elected positions.[310] If he is correct, then the president is exempt from the Foreign Emoluments Clause but remains subject to the Domestic Emoluments Clause.

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[306] Sachs, *supra* note 13, at 821–22 (emphasis omitted); *see also id.* at 821 ("To find out the law that the Constitution made, the relevant way to read the document's text would be according to the rules of the time, legal and otherwise, for turning enacted text into law. If that version needs a label, we could call it 'original-*law* originalism': the view that the Constitution should be read according to its *original legal content*, whatever that might have been."); *cf.* McGinnis & Rappaport, *supra* note 32, at 752 ("[W]e argue that the premises underlying the two leading approaches to originalism—original intent and original public meaning—lead, if properly understood, to the view that the Constitution should be interpreted based on the enactors' original methods."). *But see, e.g.*, Whittington, *supra* note 15, at 389 ("The originalist project is committed to uncovering, to the degree possible, the meaning of the rule or principle that those who were authorized to create the Constitution meant to communicate, not to making use of any particular form of constitutional argument.").

[307] Seth Barrett Tillman, *The Original Public Meaning of the Foreign Emoluments Clause: A Reply to Professor Zephyr Teachout*, 107 NW. U. L. REV. COLLOQUY 180, 205 (2013).

[308] *Id.* at 186 (footnote omitted).

[309] Brief for Scholar Seth Barrett Tillman as *Amicus Curiae* in Support of the Defendant at 13, Citizens for Responsibility & Ethics in Wash. v. Trump, 276 F. Supp. 3d 174 (S.D.N.Y 2017) (No. 17 Civ. 458(RA)) (quoting U.S. CONST., art. I, § 9, cl. 8).

[310] *Id.* at 20.

Zephyr Teachout identifies many public uses indicating that the public understood "office under" to reach elected positions.[311] Tillman responds that they are not probative because they either predate the use of the term of art in the drafting of the Constitution or post-date it so greatly that they reflect the loss of understanding of the original meaning of such a precise term.[312]

There is some public usage supporting Tillman's view that the term did not reach the president. In 1790, the former Superintendent of the Finances of the United States described that position as "the most important office under the government,"[313] which implies that he did not consider the presidency to be an office under the United States. After Thomas Jefferson's election, an anonymous author called the Secretary of State "the highest office under the government,"[314] stated that newly-appointed Secretary of State James Madison "found all the offices under the general government exclusively in the possession of federalists and tories,"[315] and argued that President Jefferson's election "audibly declared, that a change was absolutely necessary, not merely in the high elective offices of the government, but also of those in its disposal."[316]

However, other period uses included elected offices. The Continental Congress entertained a motion in 1785 to disqualify any member of Congress "from being elected by the United States in Congress assembled, to any office of trust or profit, under the said states."[317] And George Mason considered the president to be subject to the Foreign Emoluments Clause.[318]

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[311] *See* Zephyr Teachout, *Gifts, Offices, and Corruption*, 107 NW. U. L. REV. COLLOQUY 30, 42–44, 46 & n.67 (2012).

[312] *See, e.g.*, Tillman, *supra* note 307, at 190–91; Seth Barrett Tillman, Either/Or: Professors Zephyr Rain Teachout and Akhil Reed Amar – Contradictions and Suggested Reconciliation 108 (Jan. 12, 2012) (unpublished manuscript) (available at https://ssrn.com/abstract=1970909).

[313] 2 UNITED STATES, THE JOURNAL OF THE SENATE 23 (Martin P. Claussen ed., Michael Glazier, Inc. 1977) (1790).

[314] THE REPUBLICAN CRISIS 9 (Alexandria, 1812).

[315] *Id.* at 10.

[316] *Id.*

[317] 28 UNITED STATES, JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 388 (John C. Fitzpatrick ed., U.S. Gov't. Printing Office 1933) (1785).

[318] *See* 3 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 484 (Philadelphia, J.B. Lippincott Co. 1891).

Tillman acknowledges that state law usage of "office under" "seems akin to the Constitution's,"[319] and that usage included election to offices under a state. St. George Tucker referred to both election to "any office" and election to "any office under the state" in his famous 1803 American edition of *Blackstone's Commentaries*.[320] In addition, the 1819 Maine Constitution referred to "every person elected . . . to any . . . office under this State."[321]

Popular usage also included elected offices. Accounts of the Connecticut charter published by order of Congress referred to both persons "elected to any office in the government" and persons "elected to any office under Government."[322] The Pennsylvania governorship was an elected position,[323] and a 1789 news article described a proposal to forbid the governor to "hold any other office under this State."[324] A 1790 article referred to the governor as holding an office under the state constitution,[325] and in the same year James Wilson, a founder and sitting United States Supreme Court Justice, described the governor as holding an office under Pennsylvania.[326] A 1793 New York article refers even more

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[319] Tillman, *supra* note 312, at 63. He acknowledges that state law authorities are not uniform, so they provide only some authority for his interpretation. *Id.* at 64.

[320] *See* 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA, pt. 1, app. at 184 (Philadelphia, William Young Birch & Abraham Small, 1803) (describing a Virginia statute as requiring five years of residence "before any naturalized foreigner is capable of being elected to any office under the state"); *id.* at pt. 2, 375 (describing the Virginia statute as requiring five years residence "before any naturalized foreigner can be elected or appointed to any office, legislative, executive, or judiciary"). The actual statute utilizes the latter language. *See* Act of Oct. 11, 1786, *reprinted in* 12 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619, at 262 (William Waller Hening ed., Richmond, Va., J & G. Cochran 1823) ("[T]hey shall not be capable of election or appointment to any office, legislative, executive, or judiciary, until an actual residence in the state of five years . . . .").

[321] ME. CONST. art. 9, § 1 (1819).

[322] THE CONSTITUTIONS OF THE SEVERAL INDEPENDENT STATES OF AMERICA 51 (London, J. Stockdale 1782) ("elected to any office in the government"); THE CONSTITUTIONS OF THE SEVERAL INDEPENDENT STATES OF AMERICA 135 (London, J. Stockdale 1783) ("elected to any office under Government").

[323] PA. CONST. of 1790, art. II, § 2, *reprinted in* 12 SAMUEL HAZARD, PENNSYLVANIA ARCHIVES 15 (Philadelphia, Joseph Severns & Co. 1856).

[324] *See* GAZETTE OF THE UNITED STATES (New York), Dec. 26, 1789, at 294 (proposal in an earlier draft of the 1790 state constitution).

[325] *See* GAZETTE OF THE UNITED STATES (New York), Sept. 22, 1790, at 603.

[326] 3 JAMES WILSON, THE WORKS OF THE HONOURABLE JAMES WILSON, L.L.D. 341–42 (Philadelphia, 1804) (speech in a 1790 Pennsylvania convention opposing the incompatibility proposal).

generally to persons "elected to any office under the government of the state or of the United States."[327] In addition, a 1797 New York newspaper article described an elected senator as holding "an important office under the government of this state."[328]

Other uses imply that elected executive offices are offices under state and federal governments. Maryland's 1776 Constitution provided that no person

> holding any office under the united states, or any of them, or a minister or preacher of the gospel of any denomination, or any person employed in the regular land service, or marine, of this or the united states, shall have a seat in the general assembly, or the council of this state.[329]

Given the breadth of the disqualifications, it would be fanciful to interpret "office under the united states, or any of them" to allow holders of elected executive offices of other domestic governments to sit in the Maryland general assembly or council.[330] Moreover, usage in the First Congress suggests that elected executive offices are offices for purposes of every constitutional provision. Representative Sedgwick described the vice president as "an officer by the constitution,"[331] and James Madison advised that "[w]e are to consider his appointment as part of the constitution."[332]

Madison's use of "appointment" for the elected position of vice president counsels against drawing fine distinctions between elected and appointed offices in public meaning constitutional interpretation[333] where the relevant provision does not include

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[327] THE DIARY; OR, LOUDON'S REGISTER (New York), Mar. 28, 1793, at 2.

[328] OTSEGO HERALD (Cooperstown, N.Y.), Jan. 12, 1797, at 2.

[329] MD. CONST. § 37 (1776), *reprinted in* THE CONSTITUTIONS OF THE SEVERAL INDEPENDENT STATES OF AMERICA 111 (London, J. Stockdale 1782).

[330] Tillman notes that Charles Carroll sat in both the Maryland and federal Senates from 1789 to 1792. Tillman, *supra* note 307, at 199. This precedent suggests that "office under" did not include elected legislative positions. But it is inapposite to elected executive offices.

[331] 6 MATHEW CAREY, THE AMERICAN MUSEUM 19 (Philadelphia, 1789) [hereinafter MUSEUM].

[332] 1 THOMAS HART BENTON, ABRIDGMENT OF THE DEBATES OF CONGRESS, FROM 1789 TO 1856, at 121 (New York, D. Appleton & Co. 1860) (debate of July 16, 1789).

[333] *Cf.* JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 317, at 388 (motion to disqualify any member of Congress "from being elected by the United States in Congress assembled, to any office of trust or profit, under the said states"); Gen. Ct. Mass. Res. 109, *in* ACTS AND LAWS OF THE COMMONWEALTH OF MASSACHUSETTS 379 (Boston, Adams & Nourse 1783) (original proposal was to prohibit members from being "appointed to any office, under the States").

either word.[334] In 1789, the New York legislature referred to George Washington's "election to" and "appointment to" the presidency in the same sentence.[335] The governor and council of North Carolina wrote to President Washington that his "appointment to the first office in the union" would no doubt accelerate the state's ratification of the Constitution.[336] And an 1801 New York article defended officeholders of the Clinton family against charges of oligarchy by pointing out that they held elected offices under the state constitution.[337]

Finally, Tillman provides no evidence that anyone in "the American public"[338] believed that "office under" was a term of art for whose meaning they should defer to lawyers. He does not cite a single public use in which anyone—Founder, drafter, ratifier, or other—links the constitutional term and the British legal term. This contrasts with the Constitution's term "natural born," for example, which has numerous founding-era uses linked to British uses of the term.[339]

How does Tillman conclude that "office under" incorporates the British term of art despite significant contrary public usage and the absence of public usage linking them? This Article suggests that he exercises legal judgment to determine founding-era doctrine—his originalism, like Sachs's, "is just ordinary lawyer's work."[340]

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[334] *Cf.* U.S. CONST. art. I, § 6, cl. 2 ("appointed to any civil Office").

[335] MUSEUM, *supra* note 331, at 103.

[336] *Id.* at 23.

[337] *See* AM. CITIZEN AND GEN. ADVERTISER (New York), Aug. 21, 1801, at 2 ("[T]here is not *a single one in the whole* who holds an office under the state constitution by *appointment*. George Clinton, esq., is elected governor, and DeWitt Clinton, esq. is a senator, also by election.").

[338] *See* Tillman, *supra* note 307, at 205 (arguing that the goal is to determine "what the American public thought the meaning of" relevant text was at the time of the Constitution's adoption).

[339] *See, e.g.*, U.S. CONST. art. II, § 1, cl. 5 (presidential qualifications); John Adams, *Draft Articles to Supplement the Preliminary Anglo-American Peace Treaty*, NAT'L ARCHIVES (ca. Apr. 27, 1783) (art. 1), https://founders.archives.gov/documents/Adams/06-14-02-0278 (1783 proposal to grant British subjects all of the rights "of natural born Citizens" of the United States in exchange for Britain granting U.S. citizens all of the rights of "natural born Subjects" of the crown); Virginia House of Delegates, *Bill for the Naturalization of Foreigners*, NAT'L ARCHIVES (OCT. 14, 1776), https://founders.archives.gov/documents/Jefferson/01-01-02-0223 (Jefferson substituting "natural born citizens" for "natural born Subjects" in 1776 draft legislation).

[340] *See supra* note 306 and accompanying text.

Tillman acknowledges "that historical context matters," but he insists that "legal context is . . . a very substantial element" of it.[341] He rejects the interpretation of Framers who believed, in a related dispute, that a member of Congress holds an "office" because they did not provide "a clear reasoned basis for their views."[342] In determining the meanings of "office" and "office under," he relies on usual legal sources and analyses like Supreme Court precedents;[343] textual differences between the Constitution and other legal documents, including the Articles of Confederation;[344] textual differences between alternative proposals for the same constitutional provision;[345] settled drafting conventions;[346] intratextual uniformity;[347] incongruity of results from applying an interpretation to other constitutional provisions that use the same term;[348] period treatises;[349] deference to statutes enacted by the First Congress;[350] and practices of federal officials shortly after the adoption of the Constitution.[351]

In the related constitutional dispute, Tillman ultimately refers to "the fact (or, better, the legal conclusion) that members of Congress" do not hold an "office."[352] He reaches a legal conclusion; he does not prove a fact about the meaning of the word. The strength of his argument regarding "office under" relies on legal analysis, not on any evidence that the American public thought that the Constitution incorporates a British term of art that excludes elected offices. His argument would not suffer at all if the British term and practice never existed. Tillman inclines toward Ellesmere's reliance on a legal interpreter's learning and depth of reason over Bacon's appeal to common understanding.

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[341] Seth Barrett Tillman, *The Foreign Emoluments Clause—Where the Bodies Are Buried: "Idiosyncratic" Legal Positions*, 59 S. TEX. L. REV. 237, 247 (2017).

[342] Tillman, *supra* note 307, at 194.

[343] *See, e.g.*, *id.* at 198; Tillman, *supra* note 312, at 59 n.103.

[344] *See* Tillman, *supra* note 307, at 195–96.

[345] *See id.* at 205.

[346] *See id.* at 196.

[347] *See* Tillman, *supra* note 312, at 52.

[348] *See, e.g.*, Tillman, *supra* note 341, at 244, 265.

[349] *See id.* at 269–70.

[350] *See* Tillman, *supra* note 312, at 59 & n.103 (interpreting "office under" to include elected offices would make a statute enacted in the First Congress unconstitutional based on the Federalist 60 and a 1969 Supreme Court decision).

[351] *See* Tillman, *supra* note 307, at 187–88, 199–200.

[352] Tillman, *supra* note 312, at 48 (emphasis omitted).

b. Definition of Emoluments

Tillman asserts that "emolument" meant only "the lawfully authorized compensation that flows from holding an office or employment."[353] Consequently, the Foreign Emoluments Clause, for example, precludes "U.S. officers from taking emoluments associated with *foreign* government positions, *foreign* government offices, and *foreign* government employments (e.g., civil service positions)."[354] Tillman relies on three principal grounds to assert this narrow public meaning of the word. The first is the Supreme Court's 1850 statement in *Hoyt v. United States* that the word emoluments "embrac[es] every species of compensation or pecuniary profit derived from a discharge of the duties of the office."[355] The second is that "emoluments" must be limited to the lawfully authorized compensation from holding office or employment because unlawful payments, such as those that might be routed through business transactions, are something completely different—bribes. More specifically, "bribes are illegal, and are an enumerated ground for impeachment under Article II, Section 4. Emoluments are lawfully authorized . . . . The two are mutually exclusive and governed by different constitutional provisions."[356] The third is that the narrow definition must be correct because the broad definition of any profit, gain, or advantage would prevent a covered official from receiving any benefit in states or foreign countries such as marriage, divorce, and judicial enforcement of personal rights.[357]

Tillman's definition is superficially unsatisfactory. The Foreign Emoluments Clause specifically forbids accepting foreign offices.[358] There is no reason to forbid accepting the compensation of foreign offices when the clause prohibits accepting the offices in the first place; nor is there any reason to forbid accepting the compensation of foreign government employment when the clause

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[353] Brief for Tillman, *supra* note 309, at 5 (footnote omitted).

[354] *Id.* at 6.

[355] 51 U.S. 109, 135 (1850), *quoted in* Brief for Tillman, *supra* note 309, at 5.

[356] Brief for Tillman, *supra* note 309, at 7 (emphasis omitted).

[357] *See* Seth Barrett Tillman, *Part VI: DC & MD v Trump—Can the President of the United States get Married or Divorced?*, NEW REFORM CLUB (Mar. 20, 2019, 6:34 AM), http://reformclub.blogspot.com/2019/03/part-vi-dc-md-v-trumpcan-president-of.html.

[358] *See* U.S. CONST. art. I, § 9, cl. 8 ("[N]o Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any . . . Office . . . from any King, Prince, or foreign State.").

could simply prohibit accepting employment as it does offices.[359] Moreover, Tillman's definition creates an unjustified distinction between employees and "independent" contractors. It forbids holding a military procurement job in another government's civil service,[360] for example, but allows holding a contract to procure the same weaponry for the same government (as well as holding employment with that same contractor).

In fact, period usage of "emoluments"—including legal usage—is far broader than Tillman's definition and supports interpreting the Domestic and Foreign Emoluments Clauses to include business transactions with governments.

i. Broader Public, Governmental, and Legal Usage

Founding-era uses of "emolument(s)" included unlawful,[361] unwarrantable,[362] and gratuitous[363] benefits of individuals as well as benefits of non-natural persons that do not hold office or employment such as "[t]he church of England,"[364] the Bank of England,[365] and "the united States in congress assembled."[366] In the context of government, gratuitous emoluments were

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[359] *See* Victoria Nourse, *Reclaiming the Constitutional Text from Originalism: The Case of Executive Power*, 106 CAL. L. REV. 1, 29 (2018); *cf., e.g.*, MD. CONST. § 37 (1776), *reprinted in* THE CONSTITUTIONS OF THE SEVERAL INDEPENDENT STATES OF AMERICA 111 (London, J. Stockdale 1782) (forbidding jointly holding specified positions).

[360] *See* Brief for Tillman, *supra* note 309, at 6 (prohibition applies to civil service jobs as well as government offices).

[361] *See infra* note 403 and accompanying text.

[362] *See infra* note 415 and accompanying text; GREAT BRITAIN, *supra* note 302, at 329 ("unwarrantable emoluments" taken by troops posted too far away to be controlled).

[363] *See supra* note 301 and accompanying text. "Emoluments" included gratuities provided by more than just one's employer. *See* 3 GREAT BRITAIN, REPORT RELATIVE TO THE MANNER OF PASSING THE ACCOUNTS OF THE CUSTOMS, IN THE OFFICE OF THE AUDITORS OF THE IMPREST 247 (1785) ("His other Emoluments are customary Gratuities from the Company . . . and from the Passengers upon their Baggage being discharged by Sufferance, and from the Officers for their Clearing Stores . . . .").

[364] *See* GREAT BRITAIN, *supra* note 302, at 154.

[365] *See* An Act for Establishing an Agreement with the Governor and Company of the Bank of England, for Advancing the Sum of Three Millions Towards the Supply for the Service of the Year One Thousand Eight Hundred, 39 & 40 Geo. 3 c. 28, § 13 (1800).

[366] *See* An Act to Vest the United States, in Congress Assembled, with Full Power to Regulate Trade, and to Enter into Treaties of Commerce, 5 Acts of New Hampshire 105 (June 23, 1785), *reprinted in* 21 EARLY STATE PAPERS OF NEW HAMPSHIRE 871 (Albert Stillman Batchellor ed., Concord, N.H. 1892) (providing that "all the fees profits and emoluments, arising from such regulations of Trade and Treaties of Commerce shall be appropriated to the sole use of discharging the public debt").

particularly subject to abuse.[367] Other uses unrelated to labor in an employment relationship included emoluments of trade and commerce,[368] the carrying business,[369] markets,[370] paper money loans,[371] conquests,[372] battle,[373] trades,[374] labor generally,[375] inventions,[376] publications,[377] theatrical performances,[378] and property including land,[379] vineyards,[380] wharves,[381] and buildings.[382] In discussing the proposed Foreign Emoluments Clause, George Mason pointed out that it would "be difficult to know whether [the president] receives emoluments from foreign powers or not."[383] That would not have been difficult in the

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[367] *See* 1 GREAT BRITAIN, THE REPORTS OF THE COMMISSIONERS APPOINTED TO EXAMINE, TAKE, AND STATE THE PUBLIC ACCOUNTS OF THE KINGDOM 111 (London, 1783) ("The remaining Head is that of Gratuities; a Species of Emolument very liable to Abuse . . . The Public Voice unites with that of Individuals, in demanding a Suppression of a Species of Emolument so easily perverted to Purposes injurious to the Interest of both.").

[368] 15 THE COLONIAL RECORDS OF THE STATE OF GEORGIA 550 (1907) (Journal of the Commons House, May 1780).

[369] 3 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 345 (Philadelphia, 2d ed., 1836) (James Madison in the Virginia ratifying convention).

[370] 4 CALENDAR OF TREASURY BOOKS AND PAPERS 509 (1901) (Dec. 3, 1741: farmers' market).

[371] Pennsylvania Assembly Committee, *Report on the Governor's Instructions*, NAT'L ARCHIVES (Sept. 23, 1756), https://founders.archives.gov/documents/Franklin/01-06-02-0234.

[372] THE RIGHT HON. EARL T—MPLE, AN ANSWER TO A LETTER TO THE RIGHT HONOURABLE THE EARL OF B*** 27 (London, 1761).

[373] John Thomas, *Letter from Major General John Thomas to George Washington*, NAT'L ARCHIVES (May 8, 1776), https://founders.archives.gov/documents/Washington/03-04-02-0193.

[374] 3 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 276–77 (Dublin, 1776).

[375] THOMAS CLARKSON, AN ESSAY ON THE SLAVERY AND COMMERCE OF THE HUMAN SPECIES 75 (Philadelphia, 3d ed. 1787).

[376] JAMES RUMSEY, A SHORT TREATISE ON THE APPLICATION OF STEAM 1035 note (Philadelphia, 1788).

[377] 1 THE COMPANION TO THE PLAY-HOUSE (London, 1764) (within entry for "The Mistakes").

[378] *Id.* (within entry for "Love-a-la-Mode").

[379] *See* Act of Oct. 10, 1785, *reprinted in* 12 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619, at 262 (William Waller Hening ed., Richmond, Va., G. Cochran 1823) [hereinafter Compact].

[380] 10 ENCYCLOPAEDIA BRITANNICA 8726 (Edinburgh, 2d ed., 1783).

[381] *See* Compact, *supra* note 379, art. 1, § 7.

[382] *See* 2 SUFFOLK DEEDS 41 (Boston, Rockwell & Churchill 1883) (1654 indenture).

[383] ELLIOT, *supra* note 318, at 484.

founding era if "emoluments" meant only lawful payments that the president received for personal employment by the foreign governments.

In the context of government, business contracts and their benefits were emoluments that people recognized were subject to abuse and threatened the survival of representative government. Benjamin Franklin noted a taxpayer's objection to wasteful government spending on "Pensions, Salaries, Perquisites, Contracts and other Emoluments," presumably because the recipients belonged to a different political party.[384] George Washington lamented the harm that the "Emolument of the Contractors" caused to the American army.[385] As early as 1771, British reformers criticized the grant of "places, pensions, contracts, and other emoluments" to members of the House of Commons,[386] recognized that those conflicted recipients could not "do their duty to the people,"[387] and proposed legislation to require "that any member who receives a place, pension, contract, lottery ticket or any other emolument whatsoever, from the crown, or enjoys profit from any such place, pension, &c., shall not only vacate his seat, but be absolutely ineligible during his continuance under such undue influence."[388]

More ominously, John Adams warned in 1788 that emoluments such as government contracts could lead to the republic's downfall in his famous *A Defence of the Constitutions of*

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[384] *See* Benjamin Franklin, *From Benjamin Franklin to Mary Stevenson*, NAT'L ARCHIVES (Sept. 2, 1769), https://founders.archives.gov/documents/Franklin/01-16-02-0110.

[385] *See* George Washington, *From George Washington to Robert Morris*, NAT'L ARCHIVES (June 16, 1782), https://founders.archives.gov/documents/Washington/99-01-02-08703 (contractors' tenacious defense of their contractual emoluments responsible for "the present deplorable state of the Magazines and the dangerous consequences which may flow from it"); *cf.* George Washington, *From George Washington to James McHenry*, NAT'L ARCHIVES (Dec. 13, 1798), https://founders.archives.gov/documents/Hamilton/01-22-02-0184 (contractors' primary focus on their own profit tends to lead them to supply inferior materials at the wrong location in the wrong quantities and thereby "to defeat the best concerted military plans").

[386] *An Historical Essay on the English Constitution*, 41 THE GENTLEMAN'S AND LONDON MAGAZINE: OR, MONTHLY CHRONOLOGER, 399, 685 (Dublin, 1771).

[387] *Reports from the Supporters of the Bill of Rights*, 41 THE GENTLEMAN'S AND LONDON MAGAZINE: OR, MONTHLY CHRONOLOGER, 491, 491 (Dublin, 1771).

[388] *Id.* at 492. State lotteries were a major source of revenue for the government and were widely criticized as socially harmful. *See, e.g.*, James Raven, *The Abolition of the English State Lotteries*, 34 HIST. J. 371, 371–73 (1991); ANON., LONDON: A SATIRE 23 (London, J. Stockdale 1787).

Government of the United States of America.[389] The majority might "bestow all offices, contracts, privileges in commerce, and other emoluments" on their supporters "and throw every vexation and disappointment in the way of" their opponents until they controlled the entire government.[390] "The press, that great barrier and bulwark of the rights of mankind," would no longer be free.[391] If its writers and printers accepted the hire that the majority offered, they would become "vehicles of calumny against the minority, and of panegyric and empirical applauses of the leaders of the majority."[392] If not, they would be denounced and ruined.[393] "In one word, the whole system of affairs, and every conceivable motive of hope and fear, will be employed to promote the private interests of a few, and their obsequious majority: and there is no remedy but in arms."[394] Adams's *Defence* was well known in the United States.[395] His message was so powerful that Representative Livingston read that section of the *Defence* aloud in the House of Representatives as an example of "how a Government, organized like ours, may come to destruction" when opposing the Adams administration's Sedition Act,[396] and Joseph Story quoted it in his *Commentaries*.[397] Adams's warning resonates today.[398]

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[389] 3 JOHN ADAMS, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA 284–85 (London, J. Stockdale 1788).

[390] *Id.* at 284.

[391] *Id.* at 285.

[392] *Id.*

[393] *Id.*

[394] *Id.*

[395] *See, e.g.*, *The Right Constitution of a Commonwealth Examined*, GAZETTE OF THE UNITED STATES (New York), July 22, 1789, at 116 (referencing this portion of the *Defence*).

[396] 2 UNITED STATES, THE DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES 2154–55 (Washington, Gales & Seaton 1851) (debates in July 1798); *cf.* 4 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 557 (Washington, 2d ed. 1836) (remarks in support of the Virginia Resolutions of 1798, insinuating that Federalists were "distributing emolument among devoted partizans . . . and deluding the people with professions of republicanism").

[397] 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 31–32 (Boston, Hilliard, Gray, & Co. 1833).

[398] *See, e.g.*, Ken Klippenstein, *$300M Puerto Rico Recovery Contract Awarded to Tiny Utility Company Linked to Major Trump Donor*, DAILY BEAST (Oct. 24, 2017), https://www.thedailybeast.com/dollar300m-puerto-rico-recovery-contract-awarded-to-tiny-utility-company-linked-to-major-trump-donor; Sean Illing, *How Fox News Evolved into a Propaganda Operation*, VOX (Mar. 22, 2019), https://www.vox.com/2019/3/22/18275835/fox-news-trump-propaganda-tom-rosenstiel; Mark Follman,

Even in Tillman's preferred legal context, authorities included broad characterizations of business receipts as emoluments, including emoluments of trading stocks,[399] and of owning a ship,[400] school,[401] or intellectual property.[402] More specifically, the Emoluments Clauses limit the receipt of emoluments, so the most apposite period authorities are ones that also limited their receipt. Those authorities also used "emoluments" broadly.

A 1789 statute, the "Treasury Act," forbade Treasury Department officers to take "any emolument or gain for negotiating or transacting any business in the said department, other than what shall be allowed by law."[403] The word "emolument" encompassed receipts from all sources and unauthorized receipts. The statute used two qualifiers to refer to the lawfully authorized compensation of the employment relationship: "allowed by law" and "for negotiating or transacting any business in the said department."[404] A 1795 statute establishing the position of Purveyor of Public Supplies contained a similar provision.[405]

A 1796 statute authorized the president to appoint agents to trade on behalf of the United States and forbade the agents, their clerks, and their employees to "take, or apply to his or their own use, any emolument or gain for negotiating or transacting any business or trade, during their agency or employment, other than is provided by this act."[406] The word "emolument" encompassed business and trade receipts of both persons who had a legal relationship with the United States—the appointed agents—and

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Trump Continues Stirring Dangerous Hatred of the Media, MOTHER JONES (Mar. 10, 2019), https://www.motherjones.com/politics/2019/03/trump-continues-dangerous-attacks-on-media-fake-news-threats/ (denouncing the opposing press as "the true Enemy of the People").

[399] *See* Morris v. Langdale, 2 Bos. & Pul. 284, 284–85, 126 Eng. Rep. 1284 (C.P. 1800).

[400] *See* Grigg v. Stoker, Forrest, 4, 5, 145 Eng. Rep. 1095, 1095 (Ex. 1800).

[401] *See* Glazebrook v. Woodrow, 8 T. R. 366, 368, 101 Eng. Rep. 1436, 1438 (K.B 1799).

[402] *See* Millar v. Taylor, 4 Burr. 2303, 2358, 98 Eng. Rep. 201, 231 (K.B. 1769).

[403] An Act to Establish the Treasury Department, ch. 12, § 8, 1 Stat. 65, 67 (1789). For a more detailed analysis of this statute, see *infra* notes 539–541 and accompanying text.

[404] *Id.*

[405] *See* An Act to Establish the Office of Purveyor of Public Supplies, ch. 27, § 2, 2 Stat. 419, 419 (1795).

[406] An Act for Establishing Trading Houses with the Indian Tribes, ch. 13, §§ 2–3, 1 Stat. 452, 452 (1796).

those who had none—their clerks and employees.[407] The statute required the qualifying clauses "for negotiating or transacting any business or trade" to tailor the word's scope to receipts from specified transactions and "other than is provided by this act" to restrict its scope to lawfully authorized receipts.[408] An 1806 statute contained similar provisions.[409]

All of these statutes imposed duties of good faith and used qualifiers to narrow the broad scope of the word "emoluments." The text of the Emoluments Clauses demonstrates the effect of qualifiers. The Congressional Emoluments Clause applies to an "Office . . . the Emoluments whereof shall have been encreased."[410] The qualifier "whereof" is necessary to restrict the broad meaning of "emoluments" to those of the office. The Domestic and Foreign Emoluments Clauses do not contain any such qualifier, so respect for the text requires them to apply more expansively. Tillman acknowledges that prepositions like "of" have meaning in constitutional interpretation.[411] Similarly, he argues that "office" alone has a broader constitutional meaning than "office under" because "modifying phrases like *under the United States* work a limitation on what would otherwise be the more expansive category, *office*, unmodified."[412]

Other authorities prohibited or voided the receipt of emoluments in the more expansive sense of the word and generally imposed duties of good faith. A 1779 Virginia statute recognized that many tax collectors had misapplied tax revenues for "private purposes in speculative bargains for the emolument of themselves or their friends" to the detriment of the public, and in response imposed forfeitures on any who did so in the future.[413]

A 1780 Virginia statute required certain officials to swear an oath that "I will not, directly or indirectly, by myself, or any person or persons whatsoever, dispose or make use of such [public] money,

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[407] *See id.*

[408] *Id.*

[409] *See* An Act for Establishing Trading Houses with the Indian Tribes, ch. 48, § 6, 1 Stat. 402, 403 (1806) (including a qualifier "excepting for or on account of the United States," demonstrating that the word "emolument" encompassed receipts for non-employees such as the United States itself).

[410] *See* U.S. CONST. art. 1, § 6, cl. 2.

[411] *See* Tillman, *supra* note 312, at 54.

[412] *See id.* at 76 (footnote omitted).

[413] An Act to Prevent the Misapplication of the Money Collected for Taxes, ch. 38, § 1 (1779), *reprinted in* 10 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619, at 199 (William Waller Hening ed., Richmond, Va., G. Cochran 1822).

or any part thereof, for my own emolument, or the emolument of any other person, for private purposes, other than my legal commission . . . ."[414]

A 1755 British statute recognized the distress suffered by retired veterans who received their pensions in arrears and consequently had to borrow in advance from lenders who imposed "terms many times oppressive and usurious, to the extreme detriment of" the pensioners "and to the unwarrantable emoluments of" the lenders.[415] Parliament voided all of the pensioners' existing and future assignments, contracts, and security for monies to become due,[416] and accelerated payment of their pensions.[417]

A 1797 British statute limited the types of businesses that could hold licenses to sell liquor and provided that "any license which shall be granted to any person . . . having any interest, emolument, or profit in or out of any other trade or business . . . shall be, and the same is hereby declared null and void" and imposed penalties on those whose licenses were so voided.[418]

Finally, British reformers succeeded in enacting a standalone statute in 1782 specifically forbidding the receipt of the emoluments of government contracts in order to prevent conflicts of interest and ensure the survival of representative government.[419] These authorities demonstrate that period legal restrictions used "emoluments" broadly.

ii. Conflicts of Interest

Tillman asserts an unnecessary dichotomy between bribery and lawful employment compensation. Emoluments create issues other than bribery, including issues of good faith involved in the

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[414] An Act to Empower the High Sheriffs to Proceed in a Summary Way Against their Deputies, and for Other Purposes, ch. 11 § 4 (1780), *reprinted in* 10 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619, at 256 (William Waller Hening ed., Richmond, Va., G. Cochran 1822).

[415] An Act for the Relief of the Out-Pensioners of the Royal Hospital at Chelsea, 28 Geo. 2 c. 1, pmbl. (1755).

[416] *See id.* at § 1.

[417] *See id.* at § 2.

[418] An Act for Regulating the Issuing of Licenses for the Sale of Wine, Ale, Beer, Cider, and Spirituous Liquors by Retail, and for Preventing the Immoderate Use of Spirituous Liquors, 37 Geo. 3 c. 45, § 7 (1797).

[419] *See infra* Section VI.B.2.b; *infra* note 511 and accompanying text (prohibition required to prevent the ruin of Britain and to secure its constitution in the future).

statutes from 1755 to 1806 described above.[420] In particular, the 1782 reform statute discussed in Section VI.B.2.b below prohibited emoluments from honest business transactions with government, even though they were not bribes, because they create conflicts of interest that threaten public trust and the survival of representative government.

iii. Purposive Interpretation

Tillman also asserts an unnecessary dichotomy between the critics' broad definition and his narrow one, as Randy E. Barnett does between broad and narrow meanings of "commerce." There is no objective reason to require an interpreter to choose between two historical proper definitions or to require judges to create their own proper definitions and defend them in all conceivable contexts.

The authorities described above used "emoluments" broadly to prevent conflicts of interest and ensure public trust. *Hoyt* analyzed acts of Congress involving specific types of compensation for a particular government official.[421] The Court determined the reach of the term "emoluments" based on "the obvious import of it in these acts."[422] The opinion did not provide an exclusive definition of the term, but instead explained the use to which particular statutes put it.

Another nineteenth-century decision, *Queen v. Postmaster-General*,[423] interpreted the term even more narrowly than *Hoyt* based on statutory purpose. Expense reimbursements were generally considered to be emoluments.[424] One statute at issue in *Hoyt* imposed a cap on "the annual emoluments of any collector of the customs, after deducting therefrom the expenditures incident to his office."[425] Congress used "emoluments" broadly and expressly allowed collectors to deduct expenses from their emoluments before applying the cap. The statute at issue in

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[420] *See supra* notes 403–409, 413–418 and accompanying text.

[421] Legal Historians, *supra* note 285, at 20 n.72.

[422] Hoyt v. United States, 51 U.S. 109, 135 (1850).

[423] 47 L.J.R. 435 (Eng. Q.B. 1878) (Bramwell, L.J.).

[424] Robert G. Natelson, *The Original Meaning of "Emoluments" in the Constitution*, 52 GA. L. REV. 1, 15 (2017) (noting the term was generally included in definition 1 unless implicitly excluded by separate enumeration in certain variants); *id*. at 15–16 (noting that definition 2 generally includes all items in definition 1).

[425] An Act to Amend "An Act to Establish the Compensations of the Officers Employed in the Collection of the Duties on Imports and Tonnage; and for Other Purposes", ch. 37, § 3, 2 Stat. 316 (1802) (setting the compensation of customs officers).

Postmaster-General granted terminated officers an annuity equal to a proportion of "the annual Emolument derived by him from his Office" as "Compensation for the Loss of his Office."[426] This statute did not expressly provide for deducting reimbursed expenses. A terminated officer sought to include his travel expense allowance in calculating his annuity, but the Court refused, interpreting "emoluments" more narrowly based on the purpose of the statute.[427] As one judge opined:

> I must say that the case is a very plain one. The object of the statute was to indemnify a man from the loss of the emoluments he derived from the office; I can use no other words. The next question is, what is an emolument? . . . Surely you would first deduct what he had to expend for travelling.[428]

Aquinas reminds us that we must consider the meaning to which words are put.[429] Statutes used a broad meaning of "emoluments" when preventing conflicts of interest and ensuring public trust. The statutes involved in *Hoyt* used a narrower meaning to calculate the statutorily authorized compensation of a particular officer while in office. And the statute at issue in *Postmaster-General* used the term even more narrowly to calculate statutorily authorized compensation for the loss of an office. There were many period uses of "emoluments," and the interpretive issue is the meaning to which the Constitution puts the word. This is one of purpose, not linguistics.

2. Robert G. Natelson's Approach

a. Emoluments

Robert G. Natelson provides an even more elaborate exposition of the original meaning of "emolument." He surveys eighteenth-century usage including etymology,[430] dictionary definitions,[431] and a variety of what he characterizes as "official,"[432] as opposed to "general,"[433] uses of the word prior to the final

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[426] *See* Telegraph Act, 31 & 32 Vict. c. 110, § 8(7) (1868).

[427] *Postmaster-General*, 47 L.J.R. at 435.

[428] *Id.* (allowing the officer to include only the excess of his fixed expense allowance over his actual travel expenses).

[429] *See supra* note 98 and accompanying text.

[430] Natelson, *supra* note 424, at 18 n.68.

[431] *Id.* (citing multiple period dictionaries).

[432] *Id.* at 10; *cf. id.* at 19 ("My impression from the foregoing survey is that in official discourse (as opposed to general discourse), Definition No. 1 was the most common use and Definition No. 4 the least.").

[433] *Id.* at 18.

ratification of the Constitution. He focuses on "official British and American founding-era discourse"[434] generally, and "British parliamentary and American legislative records" specifically.[435]

He determines that the word had four possible definitions in official usage at adoption: (1) "fringe benefits of financial value by reason of public employment," (2) "all compensation of financial value by reason of public employment," (3) "proceeds of financial value from gainful activity," and (4) "all benefits or advantages."[436]

Using only materials from before May 29, 1790—the day the thirteenth state ratified the Constitution—to avoid anachronism,[437] Natelson analogizes to prior state laws and constitutions,[438] the Articles of Confederation,[439] and American and British political reform statutes because Americans and Britons "were part of the same linguistic and social community" in 1787.[440] He uses rules of legal construction, purposive interpretation, and the rule of reason in considering the four potential definitions.[441] He considers the practical consequences of the four potential definitions for what he calls the five "top-tier value[s]" that "the constitution-makers" shared and used to make the Constitution: public trust (anti-corruption), "republican government (including citizen control), effective government, the natural rights of individuals, and decentralization (federalism and local and individual autonomy)."[442]

He notes that the Constitution's five top-tier values sometimes conflicted and argues that, when they did, the constitution-makers balanced and compromised them rather than elevating a single value over the others.[443] He examines the

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[434] *Id.* at 10.

[435] *Id.* at 12.

[436] *Id.* at 13–19. Natelson acknowledges that each had variants, illustrating "how inexact the word could be." *Id.* at 13. One might argue that Natelson confounds definition with designation—that his four "definitions" and their variants merely represent a few of the many gains, advantages or profits that writers of the period describe as emoluments. *See infra* notes 363–382 and accompanying text for the large variety of uses, including "official" uses in statutes and legislative histories.

[437] *See* Natelson, *supra* note 424, at 10–11.

[438] *See id.* at 24.

[439] *See id.* at 26.

[440] *Id.* at 19.

[441] *See id.* at 54 ("rules of legal construction, the historical events that necessitated the Clause, the lack of historical events suggesting a broader interpretation, and the fact that it was literally impossible to apply the fourth definition to any office holder who served abroad").

[442] *Id.* at 8–9 (footnote omitted).

[443] *See id.* at 9.

practical consequences of each potential definition for minimizing corruption,[444] attracting capable people from the private sector to government service,[445] and minimizing the size of the federal government.[446]

In particular, Natelson examines these values in the context of the eighteenth-century British reform movement. He claims that the reform movement focused on emoluments received by reason of public service. "Reformers sought to save public money by trimming" perquisites of public office and to "make the government fairer and more effective by shifting compensation away from" perquisites to salaries.[447] He asserts that complaints about financial proceeds from gainful activities "do not appear" in the reform movement,[448] that the reforms were not radical but instead were moderate, with other values tempering the reform fervor,[449] and that there were "no historical incidents that would have induced the founders to apply a construction that included honest business transactions or other" emoluments from gainful activities.[450]

Natelson asserts that the founding generation would have reasoned that the top-tier value of effective government requires the services of people who "have proven their mettle in the private sector" and who will find government service attractive.[451] "A wealthy merchant might be an asset to Congress even if his attention was occasionally diverted from federal affairs to his own private concerns."[452] Such people will need assurances that government service will not ruin them by forbidding them to benefit from government transactions.[453] For example, "everyone knew that tobacco growers were likely future candidates for the

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[444] *See id.* at 46.

[445] *See id.* at 47–49.

[446] *See id.*

[447] *Id.* at 27.

[448] *See id. But see, e.g.*, *infra* notes 487–489 and accompanying text (the reform movement deliberately targeted financial proceeds from honest business transactions with government).

[449] *See* Natelson, *supra* note 424, at 23–24. *But see, e.g.*, *infra* notes 484–486 and accompanying text (reform of business transactions with government was radical and recognized as such at the time).

[450] Natelson, *supra* note 424, at 53. *But see, e.g.*, *infra* notes 505–509 and accompanying text (a primary historical incident was the British prosecution of war against America).

[451] Natelson, *supra* note 424, at 31.

[452] *Id.* at 32. *But see, e.g.*, *infra* notes 508–511 and accompanying text (the issue is conflict of interest, not inattention).

[453] *See* Natelson, *supra* note 424, at 32, 49.

presidency," and forbidding the president to transact with state governments would require tobacco growers to sell their land or leave it fallow because several important states required tobacco transactions to be conducted through state warehouses.[454]

Ultimately, Natelson argues that the written Constitution resulted from this process of balance and compromise,[455] that "the final document crystalized the results,"[456] and that "[i]t is unfaithful to the Constitution for us to re-balance what the framers and ratifiers have already adjusted."[457] He utilizes a process of elimination to consider the four potential definitions and concludes that the Constitution crystalized a narrow definition of emoluments: "compensation with financial value received by reason of public office, including salary and fringe benefits. Proceeds from unrelated market transactions were outside the scope of the term."[458] Natelson's use of "crystalize" is noteworthy. It is often used figuratively to mean "[t]o cause to become concrete or fixed; to make clear and defined."[459] Natelson's position is like that of the 1608 novelists: we have a "certain known law" that we must enforce without being subject to the "alterable discretion of any judges."[460]

Natelson's approach is generally pluralist. It uses many of the interpretive methods that Ellesmere identifies: historical, definitional, etymological, analogical, and practical. It identifies a broad scope for context. It is not restricted to American law, but relies heavily on foreign law. In order to determine the meaning of constitutional terms, the interpreter must consider British social, political, and legal history, including specific British statutes. Notably, by focusing on "official" uses of "emoluments" and a full range of legal analysis, he follows Tillman in departing from reliance on the ordinary public meaning of the word. The

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[454] *See id.* at 49. *But see, e.g.*, *infra* notes 514–516 and accompanying text (the reform movement considered but rejected an exception that would have allowed the sale of produce of a member's own estates).

[455] *See* Natelson, *supra* note 424, at 9.

[456] *Id.*

[457] *Id.*

[458] *Id.* at 55.

[459] *Crystallize*, OXFORD ENGLISH DICTIONARY, def. 3.a (2019), https://www.oed.com/view/Entry/45399?redirectedFrom=crystallize#eid.

[460] Case of the Union of the Realm of Scotland with England (1608), 2 How. St. Tr. at 569 (Popham, C.J.).

sources that Natelson relies on and the analyses that he conducts are unlikely to be the grounds for how the American public determined the meaning of "emoluments."

Natelson's approach requires the identification and balancing of values that the Constitution does not enumerate or rank. It requires the interpreter to identify and balance contending fundamental principles considered in drafting and ratifying the Constitution, including natural rights and federalism. It relies on the rule of reason in considering the potential consequences of a given definition for the five top-tier values.

This approach is consistent with coherence theories of interpretation like that of Ronald M. Dworkin.[461] An interpretation should fit with the relevant legal materials and provide a justification of them in a theory of political morality.[462] This creates a strong role for political morality in legal interpretation. As a result, Natelson ultimately reasons backwards like Barnett. The objective public meaning of the constitutional text does not reveal the balance that the constitution-makers struck. Rather, the balance that Natelson believes they struck reveals the meaning of the text. Natelson's approach, like Barnett's, is similar to a target of Michael Stokes Paulsen's criticism of pluralism: identifying an abstract principle in the Constitution, assigning it a specific content based on the interpreter's own discernment, then infusing that content into particular constitutional provisions.[463]

It is the opposite of Tillman's approach, however. Tillman requires one to "first tease out the precise metes and bounds of" a clause before determining the significance of any principle underlying it.[464] Natelson appeals to underlying principles to tease out the metes and bounds of the word "emoluments." This reflects the recurring issue in linguistic analysis of whether it is possible to determine textual clarity as an independent fact without knowing the speaker's purpose.[465]

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[461] *Cf.* Kenneth J. Kress, *Legal Reasoning and Coherence Theories: Dworkin's Rights Thesis, Retroactivity, and the Linear Order of Decisions*, 72 CAL. L. REV. 369, 370 (1984).

[462] *See, e.g.*, RONALD DWORKIN, LAW'S EMPIRE 246–47 (1986); Ronald Dworkin, *"Natural" Law Revisited*, 34 U. FLA. L. REV. 165, 171 (1982); John C. Vlahoplus, *Understanding Dworkin*, 1 GEO. MASON INDEP. L. REV. 153, 210–11 (1993).

[463] *See* Paulsen, *supra* note 13, at 878–79.

[464] Tillman, *supra* note 312, at 28.

[465] *See supra* notes 141–143 and accompanying text.

Natelson's approach diverges from Dworkin's in two features, which reflect the core of originalism: an acute focus on history, limiting consideration to materials from before May 29, 1790, and a prohibition on interpreters using their own normative judgment to identify and balance top-tier values. Natelson purports to objectively identify founding-era values and the balance that the constitution-makers struck.

Natelson's approach is superficially unappealing. There is no reason for the Foreign Emoluments Clause to forbid accepting the compensation of foreign offices when the clause prohibits accepting the offices in the first place.[466] Natelson's approach also falls short on fit and the balancing of the purported top-tier values. The top-tier value of saving the federal government money does not justify the Foreign Emoluments Clause. The Foreign Emoluments Clause can only save foreign governments money. The prohibition on states providing emoluments to the president in the Domestic Emoluments Clause violates the top-tier value of decentralization/federalism. Each state should be allowed to determine how to spend its budget.[467] Only the public trust value justifies both of these prohibitions. Only assigning the public trust value great weight justifies it outweighing the top-tier value of decentralization/federalism in the Domestic Emoluments Clause.

In addition, Natelson arbitrarily limits the interpreter to considering four definitions and using a process of elimination to choose among them. As discussed above, there are many broader official period uses of the word, including legal uses prohibiting or voiding the receipt of emoluments interpreted broadly.[468] There is no need to limit a proposed constitutional definition of "emoluments" to a single source of benefits. Just as Barnett concludes that "commerce" includes navigation and transportation, so too might "emoluments" include both compensation of an office and benefits derived from business

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[466] *See* U.S. CONST., art. I, § 9, cl. 8 ("[N]o Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any . . . Office . . . from any King, Prince, or foreign State.").

[467] Natelson notes that on balancing grounds the Congressional Emoluments Clause does not forbid members of Congress to hold state offices. *See* Natelson, *supra* note 424, at 35–36. This respects decentralization and federalism. A general prohibition on the president receiving emoluments from the states, however, can only be justified on public trust grounds; otherwise the Constitution would allow each state to determine whether it wanted to provide emoluments to the president, just as it allows each state to determine whether members of Congress can hold state office.

[468] *See supra* notes 403–409, 413–419 and accompanying text.

transactions with government while in office—the specific target of emoluments litigation against President Trump. The Anglo-American reform movement targeted the emoluments of even honest business contracts with the government because they created a conflict of interest and threatened public trust and the survival of representative government.[469] Crucially, the reform movement targeted them because they caused Britain to protract the war against the United States, impeding all efforts at peace.[470]

b. Emoluments and the Reform Movement

The reform movement's lessons are the opposite of those that Natelson draws, specifically as they relate to business transactions with government. Three principal reform examples are the 1782 British Contractor's Act, the 1789 Treasury Act, and the 1808 American Public Contracts Act.

In 1782, after many years of reform agitation,[471] Parliament passed "An Act for restraining any Person concerned in any Contract, Commission, or Agreement made for the Publick Service from being elected or sitting and voting as a Member of the House of Commons" (the "Contractor's Act").[472] The prohibition was "exceedingly popular" with the public because of their "general odium" toward elected representatives who had business contracts with the government.[473] Section 1 of the act disqualified anyone who enjoyed any "emolument arising from" a government contract from sitting or voting in the House of Commons.[474] Section 2 voided the seat of any member who violated the act,[475] and Section 9 disqualified violators from ever receiving any "emolument" from government contracts in the future.[476]

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[469] *See infra* notes 504–512, 389–394 and accompanying text.

[470] *See infra* note 505 and accompanying text.

[471] *See, e.g.*, *supra* notes 386–388 (1771 complaints and proposals).

[472] 22 Geo. 3 c. 45 (1782).

[473] *See* JOHN HUTTON, THE ANNUAL REGISTER, OR A VIEW OF THE HISTORY, POLITICS, AND LITERATURE FOR THE YEAR 1778, at 176 (London, J. Dodsley eds., 4th ed. 1800).

[474] 22 Geo. 3 c. 45, § 1 (1782).

[475] *See id.* at § 2.

[476] *See id.* at § 9.

The act had only one purpose: "securing the freedom and independence of Parliament."[477] An Albany newspaper reported in 1782 that the act would "purify the popular representation in Parliament."[478] The act targeted conflicts of interest, not vote trading or bribes.[479] As David Hartley, M.P. wrote, "[t]he greatness and dignity of this kingdom require that the constitution of its Parliament should be not only *uncorrupt*, but *unsuspected*."[480] The act applied to honest contracts,[481] contracts for the sale of produce of a member's own estates,[482] and contracts for the exercise of a member's own profession.[483]

The act easily passed the House of Commons but initially faced stiff opposition in the House of Lords. Opponents recognized that the act was radical. One characterized the bill's supporters as "mad from virtue" and insisted that the House of Lords had a "duty to check and resist that delirium of virtue, that rage and tempest of liberty, and bring them back to coolness and sobriety."[484] Another asserted that proponents "were violently bent on purifying" the House of Commons.[485] One of the Secretaries of State was himself almost delirious in opposition:

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[477] *Id.* at pmbl. At least one opponent of the Contractor's Act recognized that it did nothing to save the government money. *See, e.g.*, 21 GREAT BRITAIN, THE PARLIAMENTARY HISTORY OF ENGLAND 436–37 (London, Lord Chancellor ed. 1814) (1780) ("[W]hat is the benefit to be derived to the state? None at all. The object of œconomy is abandoned in the instant it is declared to be the only one; for it does not pretend to put an end to corrupt contracts, because they may continue to be made as formerly, but only to prevent the supposed influence arising from it in the other House . . . ."). The British reform movement did seek to make government more economical. However, Parliament enacted separate legislation to pursue that goal while also further securing the independence of Parliament. *See, e.g.*, An Act for Enabling his Majesty to Discharge the Debt Contracted upon his Civil List Revenues; and for Preventing the Same from Being in Arrear for the Future, by Regulating the Mode of Payments out of the Said Revenues, and by Suppressing or Regulating Certain Offices Therein Mentioned, Which are now Paid out of the Revenues of the Civil List, 22 Geo. 3 c. 82, pmbl. (1782) ("for introducing a better . . . œconomy . . . and for the better security of the liberty and independency of Parliament"); Archibald S. Foord, *The Waning of 'The Influence of the Crown'*, 62 ENG. HIST. REV. 484, 491 (1947); Natelson, *supra* note 424, at 16 n.55 (describing subsequent legislation).

[478] NEW-YORK GAZETTEER, OR, NORTHERN INTELLIGENCER (Albany, N.Y.), Oct. 28, 1782, at 1 (explanation by the Right Hon. Charles J. Fox, M.P.).

[479] *See infra* notes 504–516 and accompanying text.

[480] DAVID HARTLEY, TWO LETTERS FROM D. HARTLEY, ESQ. M.P. ADDRESSED TO THE COMMITTEE OF THE COUNTY OF YORK 6 (London, J. Almon 1780).

[481] *See infra* note 487 and accompanying text.

[482] *See infra* note 488 and accompanying text.

[483] *See infra* note 499 and accompanying text.

[484] GREAT BRITAIN, *supra* note 477, at 417 (the Earl of Hillsborough).

[485] *Id.* at 1390 (Colonel Onslow).

> A *phrenzy of virtue*, he said, began to shew itself in the House of Commons. The people *had run mad*, and the infection was gaining upon their representatives. It would therefore be the duty of the Lords to interfere in their controuling capacity, *to stand in the gap*, as he expressed himself, and to prevent the other branch of the Legislature from adopting a reformation that was only grounded on the visionary complaints of an over pampered people.[486]

Opponents recognized that the act reached honest and fair contracts,[487] forbade sales of the produce of one's own estates,[488] and would either drive successful merchants out of service in the House of Commons or cause them to give up their government contracts and become economically dependent on the government administration.[489] Opponents made many of the same arguments as Tillman, Natelson, and President Trump, including that government service should be made attractive to those who are successful in business[490] and that the proposal was unnecessary because other laws already policed impropriety in government contracting.[491]

The opponents' arguments are remarkably contemporary. Lord Viscount Stormont argued that it was cruel and unjust "to exclude merchants of great property, merely because they happened to be engaged, fairly and openly, with government: for unless proof was brought to the contrary, their Lordships must

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[486] THOMAS LEWIS O'BEIRNE, A SHORT HISTORY OF THE LAST SESSION OF PARLIAMENT, WITH REMARKS 79 (London, J. Almon & J. Debrett eds., 1780). This may have been the Earl of Hillsborough, who was a Secretary of State at the time. *See Hill, Wills, 1st Earl of Hillsborough [I] (1718–93), of North Aston, Oxon.*, HIST. OF PARLIAMENT ONLINE, http://www.historyofparliamentonline.org/volume/1754-1790/member/hill-wills-1718-93 (last visited Oct. 20, 2019).

[487] *See, e.g.*, 14 GREAT BRITAIN, THE PARLIAMENTARY REGISTER 218 (1802) (Lord Viscount Stormont, 1779).

[488] *See, e.g.*, GREAT BRITAIN, *supra* note 477, at 1391 (Sir P.J. Clerke).

[489] *See, e.g.*, GREAT BRITAIN, *supra* note 487, at 219 (Lord Viscount Stormont); GREAT BRITAIN, *supra* note 477, at 1390 (Colonel Onslow).

[490] *See, e.g.*, *id.* at 1392 (Sir P.J. Clerke) ("He wished to see merchants in that House: he considered them as the most respectable men, when they came there independent, with the virtuous intention of guarding the commercial welfare of the kingdom."); *id.* at 1390 (Colonel Onslow) (merchants were "one of the fittest descriptions of people to sit in" the Commons); *cf.* GREAT BRITAIN, *supra* note 487, at 225 (Earl Bathurst) ("none but men of property and character were at all fitted for" the trust of government contracts); *supra* notes 451–454 and accompanying text (Natelson argument).

[491] *See, e.g.*, 5 ADAM ANDERSON, ANDERSON'S HISTORICAL AND CHRONOLOGICAL DEDUCTION OF THE ORIGIN OF COMMERCE, FROM THE EARLIEST ACCOUNTS 392 (Dublin, William Coombe 1790); GREAT BRITAIN, *supra* note 487, at 219; *supra* note 356 and accompanying text (Tillman argument).

suppose that the contracts were fair and beneficial."[492] He argued against laying "a general stigma, disgrace, and punishment" on contractors without proof of their guilt,[493] noting that if any contract were "proved, at any time, to be founded in fraud and imposition, the laws had already provided proper punishment for public as well as private delinquency."[494] He hoped that the House of Lords "would never give into the popular prejudice, that because men enjoyed places of emolument and profit under government, they were not left at liberty to act agreeable to their own consciences but were rendered dependant on administration."[495] He acknowledged that an earlier Parliament had prohibited tax gatherers from sitting in the House of Commons but opposed extending that precedent because of the special circumstances of that group: "[T]hey were in general needy men, and consequently more liable to corruption."[496]

The Earl of Hillsborough opposed the bill as unjust for presuming that Members of Parliament would put their own interests ahead of the nation's.[497] "Could their lordships imagine that men of the first families and fortune in the country could be so blind to the true interests of their families, and so insensible of character, as to prefer the paltry consideration of a temporary emolument to the welfare of their country?"[498]

Similarly, the Lord Chancellor attacked the proposal as prejudiced for assuming that members would favor their own interests over the nation's, as overbroad, and as unjust for indiscriminately denying members of the House of Commons the right to honestly earn emoluments that the general public was entitled to earn:

> It would, besides, be an act of pre-judgment . . . . [T]he remedy proposed was a general one, of constant, fixed, and extensive operation; not pointed to this or that particular abuse, but a general pretended reform . . . . Consider the matter again, in respect of actual inconvenience; how pregnant with evil would the present measure, if adopted, prove? And still more so, how full of injustice? Here is a man . . . of considerable fortune, and

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[492] GREAT BRITAIN, *supra* note 487, at 218.

[493] *Id.* at 219.

[494] ANDERSON, *supra* note 491, at 392; *see also* GREAT BRITAIN, *supra* note 487, at 219.

[495] GREAT BRITAIN, *supra* note 487, at 219.

[496] *Id.* at 218.

[497] GREAT BRITAIN, *supra* note 477, at 417.

[498] *Id.* at 418.

> engaged in great mercantile concerns; this man happens likewise to be a member of the other House, and of course is in a situation of a distinguished nature, because he is presumed to be acting for the good of his country, and a sound presumption, till the contrary be proved. But what says this Bill, but that the man . . . must be . . . excluded from deriving from an honest and fair pursuit and exercise of his profession, those emoluments every person in the kingdom is intitled to, who does not stand in the same predicament with himself. Such is the absurd idea the Bill proceeds on, that the person thus engaged in the active service of his country, is forbidden the advantages which, if not engaged in that service, he might partake of in common with others.[499]

Opponents argued in part from socio-economic prejudices. Colonel Onslow asserted that merchants were "one of the fittest descriptions of people to sit in" the Commons and that "he had rather at any time sit down with a gentleman than with his footman. If the Bill passed, all the respectable and wealthy men would stay out of parliament, and they would send their servants and dependents to that House."[500] He urged that those who wanted to purify parliament should start by expelling those members who were elected solely because of their oratory and who had combined together in gangs with a lawyer at their head, creating mischief and impeding government operations.[501]

Despite all of these objections, the Lords ultimately deferred to the people. Proponents' arguments in favor of the act are remarkably contemporary as well. The Earl of Shelburne characterized the opponents' view cynically: "A noble earl had said, that men would argue with themselves: 'What, shall I be base enough for the paltry consideration of a little dirty emolument, to give up the interest of my country for my own?' "[502] Shelburne insisted that the contractor would reason quite differently: "What, shall I be silly enough to give up my own interest, and the interest of my family and posterity for the empty and nonsensical motives of public spirit, honour, and integrity?"[503] Shelburne insisted that "Contracts were indisputably a great temptation, and therefore he wished to put them out of the

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[499] *Id.* at 436 (Lord Chancellor).
[500] *Id.* at 1390.
[501] *Id.* at 1390–91.
[502] *Id.* at 425.
[503] *Id.*

way of members of parliament. For, notwithstanding the declaration . . . that men of honour were superior to all influence from contracts, human nature spoke a different language."[504]

The conflict of interest inherent in government contracts drove contractors in Parliament to support the war against the United States. The Right Honourable Charles J. Fox explained that British "ministers found it necessary to protract the war, to avoid every tendency to pacification, because they knew that the American war was necessary to their continuance in power."[505] Members of parliament who benefitted from "the emoluments of contracts" accepted the ministers' "monstrous and incredible" assertions about the war[506] and supported its continuation. A leading minister had no doubt told "his friends, that their payment, like his own bread, depended on the American war."[507]

As Lord Shelburne further described the contractor's argument to himself:

> Shall I vote for the conclusion of the present war when I am making my fortune by its continuance? My vote, were I so inclined, cannot do any great good. I could not gain the question for my country. Why, then, should I be so inattentive to myself as to overlook the present opportunity?[508]

The proposal offered both parliamentary independence and the means for ending the American war. As David Hartley, M.P. wrote:

> Pensions, Places, exorbitant emoluments, sinecures, contracts, and all such instruments of corruption for the purpose of establishing a ministerial influence in Parliament, are abominations at all times, but the greatest of all our evils *now* is the continuation of the American war. The restoration of peace with America, and of independence to Parliament, may go hand in hand together . . . .[509]

The Contractor's Act did not target bribery, dishonest contracts, or classic trading of votes for benefits. It targeted simple conflict of interest.[510] As Hartley wrote in 1780 supporting

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[504] *Id.* at 425–26.

[505] 3 GREAT BRITAIN, THE PARLIAMENTARY REGISTER 436 (London, J. Debrett 1793) (1781).

[506] *Id.*

[507] *Id.*

[508] GREAT BRITAIN, *supra* note 477, at 425.

[509] HARTLEY, *supra* note 480, at 20.

[510] This underlying purpose should resonate with Natelson. He notes its application to the Impeachment Clause, under which "high misdemeanors encompass

the proposal: "[N]o other remedy under Heaven, can rescue this unhappy country from *immediate ruin*, or re-establish its future constitution in security, but a FREE and INDEPENDENT PARLIAMENT. The greatness and dignity of this kingdom require that the constitution of its Parliament should be not only *uncorrupt*, but *unsuspected*."[511] Parliament recognized that government contracts created a conflict of interest even though they did not guarantee a profit, as the American press reported.[512]

The risk that the conflict of interest posed was so great that Parliament considered but rejected proposals to exempt contracts awarded through public bidding[513] and contracts for the sale of produce of a member's own estates.[514] The latter proposal would have enabled "Gentlemen to sell the growth of their own estates; and thereby confining the disqualification to those middle men, between the growers and manufacturers on the one part, and the consumers on the other, who contract for the supply of materials."[515] Some supported that proposed exemption because "it would be exceedingly hard that such Gentlemen should be deprived of the opportunity of serving the Public."[516] Despite the concern for those gentlemen, Parliament rejected the proposed exemption.

The Contractor's Act was as radical as opponents characterized it. It applied to anyone who received, in whole or in part, any "emolument arising from" any government contract, agreement, or commission for or on account of the public service, whether directly, indirectly, in trust or on his behalf.[517] It covered contracts in effect at enactment and those that devolved upon the member by descent, limitation or marriage, or as an

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breaches of the duties of loyalty, good faith, and care." Robert G. Natelson, *Impeachment: The Constitution's Fiduciary Meaning of "High . . . Misdemeanors"*, 19 FED. SOC. REV. 68, 72 (2018).

[511] HARTLEY, *supra* note 480, at 6.

[512] ROYAL AMERICAN GAZETTE (New York), July 23, 1782, at 2.

[513] *See, e.g.*, GREAT BRITAIN, *supra* note 477, at 417 (proposal in failed earlier draft bill to exempt contracts awarded by public bidding).

[514] ROYAL AMERICAN GAZETTE (New York), July 23, 1782, at 2; *see also* 14 TOWN AND COUNTRY MAGAZINE 477–78 (London, A. Hamilton 1782).

[515] ROYAL AMERICAN GAZETTE (New York), July 23, 1782, at 2; *see also* 14 TOWN AND COUNTRY MAGAZINE 477–78 (London, A. Hamilton 1782).

[516] ROYAL AMERICAN GAZETTE (New York), July 23, 1782, at 2; *see also* 14 TOWN AND COUNTRY MAGAZINE 477 (London, A. Hamilton 1782).

[517] An Act for Restraining any Person Concerned in Any Contract, Commission or Agreement Made for the Publick Service from Being Elected or Sitting and Voting as a Member of the House of Commons, 22 Geo. 3 c. 45, § 1 (1782).

administrator, devisee, executor, or legatee.[518] The act required every government contract to contain an express condition forbidding the admission of any member of the House of Commons to it or to any of its benefits.[519] It provided only one exception, where a member benefitted indirectly through certain companies and the contract was made "for the general benefit of such incorporation or company."[520]

The act's remedial provisions were draconian. They voided the seat of any member who violated the act.[521] They penalized violators the equivalent of one hundred thousand dollars per day of improperly sitting in Parliament, plus costs,[522] and disqualified violators from ever receiving any "emolument" of a government contract in the future.[523] They fined the government's signatory the equivalent of one hundred thousand dollars plus costs.[524] Finally, the act created a private right of action with monetary bounties and no standing requirement in order to enforce its provisions.[525]

Eighteenth-century appeals to the public trust principle were broad. As one noted British economist wrote in 1772, people are "apt to be blinded" by self-interest and willing to sacrifice the public good to their own benefit; therefore "in all questions that come before" legislatures, "it is absolutely necessary" that "no member should have any private advantage or emolument, to get or to lose, by his being for or against either side of the question."[526]

The solicitude that critics of the Contractor's Act showed to members of the House of Commons demonstrates that elected representatives pose a special risk. As another mid-century

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[518] *Id.* at §§ 4–6. The act allowed grace periods for members to renounce the benefits of such contracts. *Id.*

[519] *Id.* at § 10.

[520] *Id.* at § 3 (incorporated trading companies and other companies with more than ten members).

[521] *Id.* at §§ 1–2.

[522] *See id.* at § 9 (five hundred pounds per day plus costs). The current value of five hundred pounds is approximately one hundred thousand dollars. *See* BANK OF ENGLAND, *Inflation Calculator*, https://www.bankofengland.co.uk/monetary-policy/inflation/inflation-calculator (last visited Oct. 20, 2019) (£500 inflation adjusted from 1782 to 2018 equals £82,895.52); BANK OF ENGLAND, *Daily Spot Exchange Rates Against Sterling*, https://www.bankofengland.co.uk/boeapps/database/Rates.asp?TD=17&TM=Oct&TY=2019&into=GBP&rateview=D (last visited Oct. 20, 2019) (spot exchange rate $1.2062 per £1.00).

[523] 22 Geo. 3 c. 45, § 9 (1782).

[524] *See id*. at § 10 (five hundred pounds plus costs).

[525] *See id.* at §§ 9–10.

[526] MORTIMER, *supra* note 207, at 316.

author observed, abuses by monarchs are easily seen, but those by elected representatives are not; people are generally deluded by the supposition that their elected representatives will act for the common good.[527]

The British proposal had the potential to profoundly affect the prosecution of the war against the United States. Americans followed it closely. The press reported the bill's purpose and progress.[528] John Adams received updates from Europe on its progress, the effects of a change in the British administration on the likelihood of enactment, and even the positions of individual members of the House of Lords on the bill.[529] A prominent 1786 history of the war noted the importance of the Contractor's Act and the debates on it.[530]

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[527] *See* JOHN SHEBBEARE, A SECOND LETTER TO THE PEOPLE OF ENGLAND ON FOREIGN SUBSIDIES, SUBSIDIARY ARMIES, AND THEIR CONSEQUENCES TO THIS NATION 14–15 (London, J. Scott 1755); *cf. id.* at 15 (attacking laws that "violate the Constitution, create Inequality in the Course of distributive Justice, pillage the many to inrich the few, . . . sacrifice the public Good to private Emoluments, and *English* Property to Foreign Interest"). Similarly, opponents of the Alien and Sedition Acts insinuated in 1798 that Federalists were closeted monarchists "distributing emolument among devoted partizans . . . and deluding the people with professions of republicanism." ELLIOT, *supra* note 396, at 557.

[528] *See, e.g.*, *Contractors Bill*, ROYAL AMERICAN GAZETTE (New York), July 23, 1782, at 1; *Contractors Bill*, ROYAL GAZETTE (New York), Aug. 21, 1782, at 1; *Continuation of the Contractors Bill from our Last*, ROYAL GAZETTE (New York), Aug. 24, 1782, at 1; *The Speech of the Right Hon Charls James Fox, at a General Meeting of the Electors of Westminster*, THE NEW-YORK GAZETTEER, OR, NORTHERN INTELLIGENCER (Albany, N.Y.), Oct. 28, 1782, at 1.

[529] *See, e.g.*, Edmund Jenings, *To John Adams from Edmund Jenings*, NAT'L ARCHIVES (Apr. 24, 1780), https://founders.archives.gov/documents/Adams/06-09-02-0127 (discussing Contractor's Bill and enclosing newspaper report of the debates in the House of Lords); Edmund Jenings, *To John Adams from Edmund Jenings*, NAT'L ARCHIVES (Mar. 31, 1782), https://founders.archives.gov/documents/Adams/06-12-02-0233 (discussing likelihood of enactment under new British administration); Edmund Jenings, *To John Adams from Edmund Jenings*, NAT'L ARCHIVES (May 16, 1782), https://founders.archives.gov/documents/Adams/06-13-02-0022 (discussing positions of several members of the House of Lords on the bill).

[530] *See* 3 JOHN ANDREWS, HISTORY OF THE WAR WITH AMERICA, FRANCE, SPAIN, AND HOLLAND; COMMENCING IN 1775 AND ENDING IN 1783, at 392–94 (London, John Fielding 1786). For American awareness of Andrews's work generally, see François Soulés, *To Thomas Jefferson from François Soulés*, NAT'L ARCHIVES (Sept. 11, 1786) https://founders.archives.gov/documents/Jefferson/01-10-02-0249 (questions regarding other parts of Andrews's *History*), Thomas Jefferson, *II. Answers to Soulés' Queries*, NAT'L ARCHIVES (Sept. 13–18, 1786), https://founders.archives.gov/documents/Jefferson/01-10-02-0257-0003; Abigail Adams, *Letter from Abigail Adams to Mary Smith Cranch*, NAT'L ARCHIVES (Sept. 12, 1786), https://founders.archives.gov/documents/Adams/04-07-02-0127 (advising that she had sent a copy of Andrews's *History* to Cranch).

Other Americans and British were well aware of the connection between conflicts of interest and the ravages of war. An American loyalist was accused in 1779 of lengthening the Revolutionary war for his own emolument.[531] The 1776 constitutions of Delaware,[532] Maryland,[533] and North Carolina[534] forbade military contractors to hold important governmental positions. A British critic charged members of Parliament around 1780 with betraying the people by making "private contracts for themselves" like "human pelicans, who feed upon the breast which nourished them into being . . . . War is produced and encouraged for the support of private emolument. Thus,—for personal contracts, social lives and treasures are sacrificed."[535] And in 1792, Alexander Hamilton noted suspicions of villainous "prostitution and corruption in office" and "of the horrid depravity of promoting wars and the shedding of human blood for the sake of sharing collusively in the emoluments of lucrative contracts."[536]

It is profoundly disturbing even to suggest that the Domestic Emoluments Clause allows the commander in chief to receive the emoluments of military contracts, honest or not, when prosecuting wars that shed the blood of armed forces and civilians throughout the world.

Americans were also well aware of the more general threat that conflicts of interest from business transactions posed. A Pennsylvanian advocated legislation in 1787 forbidding the county treasurer to operate a mercantile business while in office to stop him from trading with the government and using "public monies for his own particular emolument . . . like a prostituted judge sitting arbitrarily in his own cause."[537] He argued that nothing

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[531] *See* Letter to the Editor from A.B., ROYAL GAZETTE (New York), Dec. 4, 1779, at 3 (disputing the claim).

[532] *See* DEL. CONST., art. 18 (1776), *reprinted in* THE CONSTITUTIONS OF THE SEVERAL INDEPENDENT STATES OF AMERICA 227 (London, 2d ed. 1783) (excluded from both Houses of Assembly).

[533] *See* MD. CONST., § 37 (1776), *reprinted in* THE CONSTITUTIONS OF THE SEVERAL INDEPENDENT STATES OF AMERICA 267 (London, 2d ed. 1783) (excluded from General Assembly and State Council).

[534] *See* N.C. CONST., art. 27 (1776), *reprinted in* THE CONSTITUTIONS OF THE SEVERAL INDEPENDENT STATES OF AMERICA 307 (London, 2d ed. 1783) (excluded from Senate, House of Commons, and Council of State).

[535] ANON., *supra* note 388, at 29.

[536] *See* Alexander Hamilton, *The Vindication No. I*, NAT'L ARCHIVES (May–Aug. 1792) https://founders.archives.gov/documents/Hamilton/01-11-02-0376 (denying those suspicions in the case of the American government).

[537] Manlius, *Letter to Messieurs Hall and Sellers*, PENNSYLVANIA GAZETTE (June 20, 1787).

seems more incompatible with our government than to allow the holder of an office "to subvert and apply it to the abhorrent purposes of *self-interest* and *private gratification*."[538]

Two years later, Congress imposed just such a broad prohibition in the Treasury Act, demonstrating an even more radical desire to eliminate conflicts of interest from honest business activities than Parliament's. The act provided broadly:

> That no person appointed to any office instituted by this act, shall directly or indirectly be concerned or interested in carrying on the business of trade or commerce, or be owner in whole or in part of any sea-vessel, or purchase by himself, or another in trust for him, any public lands or other public property, or be concerned in the purchase or disposal of any public securities of any State, or of the United States . . . .[539]

The statute fined violators the equivalent of approximately forty-five thousand dollars[540] and gave half as a bounty to those whose information led to a conviction.[541] The public provisions and trading statutes of 1795,[542] 1796,[543] and 1806[544] discussed above[545] included similar provisions, although they post-date Natelson's 1790 cutoff. In addition to imposing duties of good faith, these statutes represent early exercises of the power to prohibit commerce, including domestic commerce.

A final example from 1808 rounds out the reform movement, although it also post-dates Natelson's cutoff. The Congressional Emoluments Clause does not forbid members of Congress to benefit from contracts with the federal government. Congress and President Jefferson remedied that omission in 1808 with "An Act

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[538] *See id.*

[539] *See* An Act to Establish the Treasury Department, ch. 12, § 8, 1 Stat. 65, 67 (1789).

[540] *See id.* (three thousand dollar fine); Morgan Friedman, *The Inflation Calculator*, WESTEGG.COM, https://westegg.com/inflation/ (last visited Oct. 21, 2019) (calculating from 1800 to 2018, the earliest and latest dates available).

[541] *See* An Act to Establish the Treasury Department, ch. 12, § 8, 1 Stat. 65, 67 (1789).

[542] *See* An Act to Establish the Office of Purveyor of Public Supplies, ch. 27, § 2, 2 Stat. 419 (1795).

[543] *See* An Act for Establishing Trading Houses with the Indian Tribes, ch. 13, §§ 1, 3, 1 Stat. 452 (1796). The interaction of these two sections of the act could be interpreted only to prohibit trading with the Indian tribes for one's own account.

[544] *See* An Act for Establishing Trading Houses with the Indian Tribes, ch. 48, §§ 2, 5, 6, 1 Stat. 402 (1806).

[545] *See supra* notes 405–409 and accompanying text.

concerning public contracts" (the "Public Contracts Act").[546] The main text broadly mirrors that of the British Contractor's Act. It provides in part:

> That from and after the passage of this act, no member of Congress shall, directly or indirectly, himself, or by any other person whatsoever, in trust for him, or for his use or benefit, or on his account, undertake, execute, hold or enjoy, in the whole or in part, any contract or agreement hereafter to be made or entered into with any officer of the United States, in their behalf, or with any person authorized to make contracts on the part of the United States . . . .[547]

The Public Contracts Act was also radical. It voided any contract that violated its terms.[548] It made violations high misdemeanors for the member of Congress and the federal officer who made the contract, with a fine equivalent to approximately forty-five thousand dollars.[549]

Also similar to the Contractor's Act, it provides "[t]hat in every such contract or agreement to be made or entered into, or accepted as aforesaid, there shall be inserted an express condition that no member of Congress shall be admitted to any share or part of such contract or agreement, or to any benefit to arise thereupon."[550] This statute, as amended, remains in force today.[551] Thus, one can draw a direct line from the prohibitions in the Contractor's Act through the Emoluments Clauses and the Public Contracts Act to the provision in the federal lease for the Trump International

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[546] An Act Concerning Public Contracts, ch. 48, 1 Stat. 484 (1808). For a general description of the act, its legislative history and continuing impact, see Patricia H. Wittie, *Origins and History of Competition Requirements in Federal Government Contracting: There's Nothing New Under the Sun* 5–6, REED SMITH, https://www.reedsmith.com/-/media/files/perspectives/2003/02/origins-and-history-of-competition-requirements-in/files/origins-and-history-of-competition-requirements-in/fileattachment/wittiepaper.pdf (last visited Oct. 21, 2019).

[547] An Act Concerning Public Contracts, ch. 48, § 1, 1 Stat. 484 (1808). The act had two limited exceptions, for certain bills of exchange and for contracts with corporations that were made for the general benefit of the corporation. *See id.* at § 2.

[548] *Id.* at § 1.

[549] *Id.* (members of Congress, with a $3,000 fine); *id.* at § 4 (federal officer, with a $3,000 fine); Friedman, *supra* note 540 ($3,000 in 1808 worth approximately forty-seven thousand dollars in 2018).

[550] *See* An Act Concerning Public Contracts, ch. 48, § 3, 1 Stat. 484 (1808).

[551] *See* 18 U.S.C. § 431 (2018).

Hotel that no "elected official of the Government . . . shall be admitted to share any part of this Lease, or any benefit that may arise therefrom."[552]

Unsurprisingly, the debates over the Public Contracts Act were similar to those over the British Contractor's Act. Representative Holland opposed the proposal, "saying it disfranchised members of Congress of the right of making public contracts, and enjoying the benefit of them, in common with other citizens."[553] Representative Rowan considered the proposal to be "an unconstitutional, needless, and ineffectual restraint on the liberty of the citizen."[554] Representative Alston invited proponents to "lay aside their phrenzy in purifying the House," arguing that the proposal served no purpose.[555] "He wished gentlemen would give up this parade about purifying the House—this noise about fraud and corruption."[556]

On the other hand, Representative Troup supported the proposal because "in the event of war, a majority of this House might be composed of contractors under Executive influence, whose interest it might be to perpetuate the war, and the evils of whose conduct might not be corrected without a resort to first principles."[557] Representative Clay urged enactment, saying that "he would purge the House of Executive influence by positive law, otherwise, they might see the time when contracts would be offered to members to destroy their independence and engage them in the indiscriminate support of a corrupt Administration."[558] Directly addressing British practice, Representative Troup argued that if the proposal were not enacted, "the time is not far distant when this House will become, what the British House of Commons

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[552] *See* Jessica Taylor & Peter Overby, *Federal Watchdog Finds Government Ignored Emoluments Clause with Trump Hotel*, NPR (Jan. 16, 2019), https://www.npr.org/2019/01/16/685977471/federal-watchdog-finds-government-ignored-emoluments-clause-with-trump-hotel.

[553] 18 UNITED STATES, THE DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES 1618 (Washington, Gales & Seaton 1852) (debate on Feb. 16, 1808).

[554] *Id.* at 1716.

[555] *Id.* For references to "phrenzy" and "purifying" the House of Commons in the debates over the Contractor's Act, *see supra* notes 485–486 and accompanying text.

[556] UNITED STATES, *supra* note 553, at 1716.

[557] *Id.* For the British enactment of the Contractor's Act to stop the same practice during the American war, *see supra* notes 506–509 and accompanying text.

[558] UNITED STATES, *supra* note 553, at 1717.

are, a corrupt, servile, dependent, and contemptible body. We had better have no Legislature, than one composed of contractors, placemen, and pensioners."[559]

Natelson's work calls to mind the Protestant critique of religious interpretation. Exposition beyond the text is a process of human invention that "a discreet Man may do well," but the result is "his scripture, not the Holy Ghost's."[560] There certainly were period uses of "emoluments" that involved setting the compensation of officeholders. But period authorities that limited or prohibited the receipt of emoluments functioned broadly to reach benefits of business transactions in order to enforce a strong principle of good faith in the use of public funds and in the exercise of governmental powers.

Moreover, Natelson may not have consciously used his own norms to identify and balance the five values, but the result certainly reflects a political morality weighted toward private enterprise that is inconsistent with the British and American reform movements. Whether it is possible to apply a pluralist method of legal interpretation to determine law as a social fact[561] without reference to one's own norms is questionable. Whether that method would accurately describe founding-era Anglo-American legal practice is also questionable.

3. Corpus Linguistics Approaches

Clark D. Cunningham and Jesse Egbert conducted a corpus linguistics analysis of "emolument" by applying big data techniques to the nearly one hundred thousand texts in the *Corpus of Founding Era American English* ("COFEA").[562] They considered every text in which "emolument" appeared, analyzed them using three different methods, and concluded that there was no evidence that emolument had a narrow meaning limited to profits from an

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[559] *Id.* at 1618. For a brief discussion of ministerial influence through placemen and Parliament's failed attempt to exclude them by the Act of Settlement, see Foord, *supra* note 477, at 497–99.

[560] JOHN SELDEN, TABLE-TALK: BEING THE DISCOURSES OF JOHN SELDEN, ESQ. 112 (London, Israel Gollancz M.A. ed., 1689), *cited by* Powell, *supra* note 1, at 889–90 (citing 1699 edition).

[561] *Cf.* Sachs, *supra* note 13, at 833 ("[I]t's still possible that social facts ultimately provide the answer, and that this answer supports the originalist view.").

[562] *See* Cunningham & Egbert, *supra* note 193, at 1.

office or employ.[563] Rather, "emoluments" was consistently used with a broad and inclusive meaning that was narrowed as required in context by modifiers such as "private" or "official."[564]

James Cleith Phillips and Sara White conducted another corpus linguistics analysis using a subset of three of the COFEA corpora.[565] They concluded "that the Congressional and Presidential Emoluments Clauses would have *most likely* been understood to contain a narrow, office or public-employment sense of 'emolument.' But the Foreign Emoluments Clause is more ambiguous given the modifying language 'of any kind whatever' attached to it."[566]

Corpus linguistics cannot be scientific if two sets of researchers come to diametrically opposite conclusions from analyzing the same three corpora;[567] one finding no evidence of the narrow meaning in any of the Emoluments Clauses, and the other finding that two of the Clauses most likely have the narrow meaning and that the third might have it as well. Indeed, both teams acknowledge that they relied on qualitative analyses.[568] Phillips and White further explain that "the heart of corpus linguistic analysis—what in our view is the aspect of the methodology that provides the most valuable information—is the most qualitative and is really no different than reading a sample of cases one has found from a computerized search of a legal database."[569] Corpus linguistic analysis of the Constitution is just ordinary lawyer's work. It cannot determine a historically

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[563] *See id.* at 2.

[564] *See id.* at 2, 9–14.

[565] *See* James Cleith Phillips & Sara White, *The Meaning of the Three Emoluments Clauses in the U.S. Constitution: A Corpus Linguistic Analysis of American English From 1760–1799*, 59 S. TEX. L. REV. 181, 203 (2017) (examining the Evans Early American Imprint Series, Founders Online, and Hein Online); Cunningham & Egbert, *supra* note 193, at 6 (noting that COFEA consists of six sources, including Evans, Founders Online, and Hein Online).

[566] *See* Phillips & White, *supra* note 565, at 233–34.

[567] The scientific method requires that different teams can obtain a given measurement with a given precision using the same experimental setup (replicability) or a different experimental setup (reproducibility). *See* Hans E. Plesser, *Reproducibility vs. Replicability: A Brief History of a Confused Terminology*, FRONTIERS IN NEUROINFORMATICS (Jan. 18, 2018), https://www.frontiersin.org/articles/10.3389/fninf.2017.00076/full.

[568] *See* Phillips & White, *supra* note 565, at 233; Cunningham & Egbert, *supra* note 193, at 8.

[569] *See* Phillips & White, *supra* note 565, at 233.

authentic and objective semantic constitutional meaning communicated from the past. The two teams' interpretations are their own subjective opinions.

VII. IMPLICATIONS FOR ORIGINALISM

A. Implications of Context

The shift from dictionary definitions to broader context and eighteenth-century corpora only increases the possible meanings of constitutional text. Context shows multiple inconsistent public meanings, as corpus linguistics confirms.[570] One cannot determine an original public meaning by any objective factual standard like counting usage votes, any more than one can do so by counting dictionary votes or intention votes.

Context might suggest multiple meanings for a single word in the same constitutional clause, as Barnett asserts of "regulate" within the Commerce Clause;[571] a single meaning for a multiple word term, as Tillman asserts of "office under" in the Domestic Emoluments Clause;[572] and the same meaning for different words and different multiple word terms, as Barnett asserts of "trade," "commerce," "trade and commerce," and "trade or commerce."[573] Context can blunt seemingly comprehensive descriptions of a term's reach, as in *Hoyt*. Context can also explain an absence of recorded public usage. Things might be so well known that they do not require any reference in context. Other things might be too well known even to set out. Samuel Johnson explained that "such is the fate of hapless lexicography, that not only darkness, but light, impedes and distresses it; things may be not only too little, but too much known, to be happily illustrated."[574] Uses are facts in the world. Constitutional meanings are not. There are multiple original public meanings of the constitutional terms discussed

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[570] *Cf.* Blackman & Phillips, *supra* note 188 (applying corpus linguistics to the Second Amendment "leads to potentially uncomfortable criticisms for" prior original public meaning opinions, although the authors do not reach a conclusion on the result corpus linguistics might generate).

[571] *See supra* notes 267–272 and accompanying text.

[572] *See supra* note 309 and accompanying text.

[573] *See supra* note 198 and accompanying text.

[574] JOHNSON, *supra* note 173 (fifth preface page).

above, and none can emerge objectively from the corpus of eighteenth-century usage as a factual, communicated constitutional meaning.[575]

This is particularly true when context includes competing principles of political morality. Where interpretation depends on identifying and balancing underlying constitutional principles and characterizing some duties as fundamental, meaning cannot exist as a historical fact. Where context includes (1) the deal one thinks that the drafters and ratifiers struck, and (2) a judgment about which duties are actually fundamental, there cannot be a non-normative original public meaning of constitutional text. The interpreter must choose. As Benjamin Franklin recognized, "[s]uch is the imperfection of our language, and perhaps of all other languages, that, notwithstanding we are furnished with dictionaries innumerable, we cannot precisely know the import of words, unless we know of what party the man is that uses them."[576] By choosing and balancing underlying principles and fundamental duties, the interpreter determines of what party the Constitution is and thereby what it means.

B. Pre-interpretive Commitments

Tillman includes general British law as relevant context for interpreting the Constitution. Natelson goes further and includes specific British statutes as relevant. The Constitution is not an independent charter,[577] but rather part of a long Anglo-American legal tradition. This is a normative pre-interpretive assumption. The Supreme Court has held that known legal terms used in the Constitution take their common law meanings,[578] but that rule is not in the Constitution. It is a post-ratification interpretation that originalists can dispute like any other Supreme Court interpretation.[579]

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[575] *Cf.* Lawrence M. Solan, *Can Corpus Linguistics Help Make Originalism Scientific?*, 126 YALE L.J. F. 57, 57 (May 27, 2016).

[576] FRANKLIN, *supra* note 143, at 318.

[577] *See* U.S. CONST. art. VI, cl. 2 ("This Constitution . . . shall be the supreme Law of the Land").

[578] *See, e.g.*, Minor v. Happersett, 88 U.S. (21 Wall.) 162, 167–68 (1874); United States v. Wong Kim Ark, 169 U.S. 649, 654 (1898).

[579] *See, e.g.*, BARNETT, *supra* note 13, at 137 (disputing early Supreme Court interpretation of reach of "commerce").

Moreover, Tillman's and Natelson's approaches require taking a pre-interpretive position on the extent of America's separation from Britain.[580] Was the American Revolution truly a revolution, or merely a continuation of the English and British systems except as specifically changed by express constitutional terms? Did Americans rebel to create a new government, or merely separate in order to guarantee the rights of English that they believed they deserved, including the right not to pay taxes without representation? How are we to determine whether to rely on general American usage for words like "office" and "under" rather than British legal usage? Should we use legal or ordinary dictionaries? Which usage governs when words like "emoluments" exist in the popular as well as legal press, particularly where the same variety of usage appears in both?

Is the analogy to British law relevant where the U.S. system differs from the British system? The Constitution uses the English legal term "natural born," for example, and some deny that the constitutional definition mirrors the English one because the United States threw off a monarchical government and established a different, republican form of government.[581] Britain did not have a separately elected executive branch. Might this make British law irrelevant to executive offices described in the Constitution? Ellesmere rejected reliance on Plato and Aristotle in judging *Calvin's Case* because they lived in a popular state and were enemies of monarchies.[582] Consequently, their opinions "are no canons to give lawes to kinges and kingdomes, no more than sir Thomas Moores Vtopia, or such pamphlets as wee haue at euerie

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[580] *See, e.g.*, Michael D. Ramsey, *Beyond the Text: Justice Scalia's Originalism in Practice*, 92 NOTRE DAME L. REV. 1945, 1952 *et seq.* (2017); *id.* at 1957 ("His reliance [on background English law] . . . assumes a linguistic and conceptual continuity between the framing and the English-law background (something not obvious in a revolutionary context)."). Natelson's position reflects significant historical research. *See, e.g.*, Robert G. Natelson, *The Founders' Hermeneutic: The Real Original Understanding of Original Intent*, 68 OHIO ST. L.J. 1239, 1246–49 (2007).

[581] *See, e.g.*, United States v. Wong Kim Ark, 169 U.S. 649, 709 (1898) (Fuller, C.J., dissenting) ("Manifestly, when the sovereignty of the crown was thrown off, and an independent government established, every rule of the common law, and every statute of England obtaining in the Colonies, in derogation of the principles on which the new government was founded, was abrogated."); Thomas H. Lee, *"Natural Born Citizen"*, 67 AM. U. L. REV. 327, 389–92 (2017) (definition of "natural born Citizen" is a combination of English law and natural law in part because of the change from a monarchical to a republican form of government).

[582] ELLESMERE, *supra* note 48, at 692.

marte."[583] Should canons of English or British monarchical government provide any more meaning to the Constitution than Moore's *Utopia*?

If the use of "office under" imports the British meaning of the term, does it also import the same roles, powers, and obligations of British offices? If usage in the Contractor's Act exports a meaning of "emoluments," does it also export substantive provisions such as private rights of action? Does it export an exception for indirect benefits of government contracts received in limited cases through investments in private companies? Or does the Foreign Emoluments Clause's prohibition of emoluments "of any kind whatever" and the Domestic Emoluments Clause's prohibition of "any other" emoluments block the importation of that exception?

These are only a few of the pre- or meta-interpretive choices that ground constitutional interpretation and undermine communicative originalism's claim to non-normative historical authenticity. Others include: (1) whether the Constitution created a federal government of the people or a compact among several sovereign states;[584] (2) whether the enumerated congressional powers are exclusive or can be supplemented;[585] (3) whether the scope of "commerce" is limited to a specific meaning or structurally empowers Congress to create solutions to national problems that the states do not address;[586] (4) what are the scopes and relative priorities of legislative and executive powers;[587] (5) what is the scope and constitutionality of judicial review;[588] (6) what principles underlie the Constitution, and which of those are top-tier;[589] (7) which obligations of citizenship are fundamental;[590] and (8) how to resolve doubtful cases.[591]

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[583] *Id.*

[584] *See* D. A. Jeremy Telman, *All That Is Liquidated Melts Into Air: Five Meta-Interpretive Issues*, 24 BARRY L. REV. 1, 5 (2019).

[585] *Id.*

[586] *Id.*

[587] *Id.*

[588] *Id.*

[589] *See, e.g.*, Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 342 (2009).

[590] *See supra* note 277 and accompanying text.

[591] *See, e.g.*, Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 487–88 (2013) (strict construction, deference to political branches, purposive construction, and structural construction); James Madison, *From James Madison to Edward Coles*, NAT'L ARCHIVES (May 23, 1823), https://founders.archives.gov/documents/Madison/04-03-02-0055 ("I am no friend to forced or strained constructions of a Constitution for enlarging power . . . . But where the object is

C. Essentialism Versus Conventionalism

Originalists face the same recurring conflict between essentialist and conventionalist approaches to linguistic meaning as Renaissance jurists. Both approaches are problematic for legal interpretation.[592] One holds that words "contain in some sense the essence of what they designate," possessing a "communicative function" that causes people "to attribute *substantiae* to them."[593] This presumes a scientific certainty for the meanings of words that is both dangerous for legal interpretation and inconsistent with actual legal practice.[594] The other approach holds that words' meanings are entirely conventional, which "threatens to unhitch [words] from their attachments to the real world, and puts in jeopardy . . . the possibility of acceding to *proprietas verborum* [propriety of words]."[595]

Was insurance "commerce" in the eighteenth century because authors *called* it commerce? Or did authors call insurance commerce because it *was* commerce? If the first author to call insurance "commerce" happened to write in the nineteenth century, would we conclude that insurance became commerce then, so that the Commerce Clause does not reach it? Or would we conclude that insurance actually was commerce all along, so that Congress's power reaches it?

Many would conclude the latter. One eighteenth-century author, for example, explained insurance not to change its definition, but rather to cast new light on the subject; he dedicated the work to a prominent authority to appeal to his judgment of what "the science of insurance" actually was, not to ask for the arbitrary imposition of the author's views on the nation:

> Your superior Skill in the Commerce of your Country, fixes every Essay of this sort under your Dominion.—For though your *high Station* gives you a *Power*, you derive from your *Abilities* an *Authority* much greater, over these Subjects. A Work, therefore, which pretends to bring new Light upon *Objects* of *Trade*, and to rectify the *Course* of *Business*, is justly to pay its Homage to You; And it is from your Decision upon it, that the World will be

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indisputably, the public Good, and *certainly* within the policy of the Constitutional provision, a less strict rule of interpretation must be admitted.").

[592] MACLEAN, *supra* note 89, at 110–11.

[593] *Id.*

[594] *See, e.g.*, *id.* at 107-09.

[595] *Id.* at 111.

> instructed to form their Sentiments.—For so just is the public Deference, that it would unanimously have constituted YOU the *Judge*, if you had not condescended to be the *Patron* . . . .[596]

One can conclude that the Emoluments Clauses reach honest contracts with governments without having to rely on essentialism, conventionalism, proper definitions from the founding era, or definitions by designation of a myriad of founding-era uses. Even if the Contractor's Act and debates surrounding it occurred after the adoption of the Constitution, an interpreter could reasonably conclude that the Clauses reach honest business transactions with government. As Aquinas counsels, we must determine the meaning to which words are put. The Emoluments Clauses forbid "emoluments" under a public trust principle that is strong enough to reach those transactions and to outweigh the top-tier value of decentralization/federalism.

As many point out, for "concepts such as 'abridging the freedom of speech,' which we are likely to encounter in the constitutional context, it is unclear whether the original meaning ought to be interpreted thickly to include specific examples of the concept or thinly to define only the concept itself."[597] This is as true of superficially non-normative concepts like commerce and emoluments as of normative concepts like freedom of speech, equal protection, and due process. Originalists might specify their choice of breadth of relevant context, fundamental principles, deals that they believe were struck, and the like. But these choices are arbitrary and anachronistic, imposed upon the text and public usage by the interpreter. They cannot determine a non-normative historical fact about the communicated meaning of the text from which even prima facie constitutional rights or obligations can derive.

D. Burden of Proof and Default Rules

Some argue that one can determine the original public meaning of constitutional text by setting an appropriately low burden of proof[598] and stipulating default interpretive rules to constrain judicial discretion when founding-era evidence does not

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[596] MORRIS CORBYN, AN ESSAY TOWARDS ILLUSTRATING THE SCIENCE OF INSURANCE iv (London, 1747).

[597] *See, e.g.*, Solan, *supra* note 575, at 57.

[598] *See, e.g.*, Lawson & Seidman, *supra* note 29, at 54 n.23 (the only normative element of legal interpretation is "the standard of proof that one employs").

meet that threshold.[599] But one cannot find something that does not exist by lowering the burden of proof, and adopting any default interpretive rule is a normative decision. One could stipulate a method of interpretation that references historical sources, such as stipulating that meaning is determined word-by-word, without combining any words into phrases, with each word's meaning taken from the greatest number of consistent dictionary definitions found in print in 1789. That would yield a historically restricted interpretation, but it would not determine as a matter of fact the original public meaning of the Constitution's text, nor would it identify even prima facie normative constitutional rights and obligations. Stipulated definitions, whatever they are, or the burden of proof, or default rules used to determine their results, are not original public meanings communicated to us from the past. They are merely stipulations. A stipulated method might function to restrict judicial discretion—although it might not—but that is a normative objective that must be justified independently of any historical facts.

CONCLUSION

Originalism is a family of legal theories that share a core focus on history and an aversion to allowing judges the discretion to apply contemporary or personal values when interpreting the Constitution. American originalism first asked what the founders, drafters, or ratifiers intended. In the face of criticism, it evolved to ask how the American public understood the Constitution's words. This Article shows that public understandings of terms in the Commerce Clause were broad, reaching commercial activities like insurance, agriculture and manufacturing, and both prohibiting and commanding those activities. It also shows that public understandings of terms in the Emoluments Clauses reached elected officials and the benefits of business transactions with governments. Anglo-American legal history proximate to the adoption of the Constitution is consistent with a broad interpretation of the Emoluments Clauses to prevent conflicts of interest, ensure the independence of elected officials, and secure the survival of representative government.

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[599] *See, e.g.*, Tillman, *supra* note 312, at 54–55 (describing without subscribing to the approach).

The originalist interpretations of the Commerce and Emoluments Clauses discussed above do not identify non-normative, historically accurate communicated meanings from the past to the contemporary interpreter. They ultimately rely on normative judgments. Communicative originalism continues to face the same challenges that Renaissance civil lawyers and the English novelists faced.

In light of continuing criticism, originalism is evolving yet again to ask what we should make of the Constitution by applying traditional methods of legal analysis to constitutional text, history, and political morality. The latest evolution of originalism forthrightly embraces legal methodology as the correct way to interpret the Constitution. Whether this iteration will be any more successful than its predecessors remains to be seen. If it is not, then another will likely take its place. Originalism is ultimately a normative aspiration embraced by many who hope, like Fichard, that Emperor Justinian's ideal of a self-sufficient and historically-determined legal system will yet come to pass.