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EVALUATING ORIGINALISM: COMMERCE AND EMOLUMENTS

JOHN VLAHOPLUS[†]

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

[†] B.A., Washington & Lee University; J.D., Harvard Law School; D.Phil., Oxford University; Member, New York State Bar. Thanks to Gary Lawson, Robert G. Natelson, Lawrence B. Solum, Seth Barrett Tillman, Phoebe Vlahoplus, and the editors of the *St. John's Law Review*.

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.

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 definitions¹⁷ and etymologies¹⁸ 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

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 investigation³¹—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

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 Britain³⁷ 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

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 king’s 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 cases⁴⁶ 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

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,

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 law⁷⁰ 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 iudicium*, or judicial decisions, as inappropriate for interpreting scripture because:

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

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 devise,”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

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=gWxFAAAcAAJ>).

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

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 proprietates 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 certain 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 interpretation¹⁰⁵ 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

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

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.

vnuiersall 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.

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

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

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 not¹³⁴ and could not¹³⁵ 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

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

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

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

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

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

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

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 sources¹⁸⁸ 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 empirical¹⁹² 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

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” activities²⁰⁰ 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

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

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 commerce²¹⁷ 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

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

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

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

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

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 Enlightenment²⁶⁵ 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

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

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

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

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

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

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>.

emoluments³⁰¹ 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 law³⁰⁴ or original methods³⁰⁵ 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

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.

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

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

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 interpretation³³³ where the relevant provision does not include

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

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.

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

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 gratuitous³⁶³ 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

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

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*

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

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

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,

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

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

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

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

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

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

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

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

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

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:

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 business⁴⁹⁰ 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

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

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

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 war⁵⁰⁶ 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 together⁵⁰⁹

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

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 bidding⁵¹³ 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

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

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

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 enrich 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 Carolina⁵³⁴ 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

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 States⁵³⁹

The statute fined violators the equivalent of approximately forty-five thousand dollars⁵⁴⁰ 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 1806⁵⁴⁴ discussed above⁵⁴⁵ 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

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 States⁵⁴⁷

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

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

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 fact⁵⁶¹ 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

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

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

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

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

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.

marter.”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

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

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 proof⁵⁹⁸ and stipulating default interpretive rules to constrain judicial discretion when founding-era evidence does not

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.

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.