

Faculty Publications

2013

Resistance to Constitutional Theory: The Supreme Court, Constitutional Change, and the "Pragmatic Moment"

B. Jessie Hill

Case Western University School of Law, jessie.hill@case.edu

Follow this and additional works at: https://scholarlycommons.law.case.edu/faculty_publications

 Part of the [Constitutional Law Commons](#)

Repository Citation

Hill, B. Jessie, "Resistance to Constitutional Theory: The Supreme Court, Constitutional Change, and the "Pragmatic Moment"" (2013). *Faculty Publications*. 142.

https://scholarlycommons.law.case.edu/faculty_publications/142

This Article is brought to you for free and open access by Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

Resistance to Constitutional Theory: The Supreme Court, Constitutional Change, and the “Pragmatic Moment”

B. Jessie Hill*

This Article approaches the law–politics divide from a new angle. Drawing on the insights of literary theory, this Article argues that every act of interpretation, including constitutional interpretation, inevitably draws not only on text but also on context, and that the relevant context extends beyond both the written document and the historical context of its origination. This understanding derives from speech-act theory and from postmodern literary theory. As Paul de Man argues in his seminal essay, The Resistance to Theory, moreover, the act of interpretation always encompasses a “pragmatic moment” that undermines the effort to attain perfect theoretical coherence. Applying this perspective to constitutional interpretation, this Article argues that neither constitutional theory nor politics, on its own, is capable of fully explaining constitutional interpretation and constitutional change.

In illustrating this phenomenon, this Article draws on recent scholarship about the recent evolution of constitutional doctrine in two areas—the Fourteenth Amendment and the religion clauses of the First Amendment—to demonstrate the dialectical interplay among text, principle, and pragmatism in constitutional interpretation and constitutional change. Although the insights regarding the sources of constitutional change in these areas are not new, the original contribution of this Article lies in its reconfiguration of the theoretical understanding of how, and why, this change inevitably occurs.

“The legal machine, it turns out, never works exactly as it was programmed to do. It always produces a little more or a little less than the original, theoretical input.”¹

To say that constitutional law, of late, suffers from a bit of a legitimacy problem is like saying the Incredible Hulk has some anger management issues. In the wake of the decision in *National Federation of Independent*

* Professor of Law, Associate Dean for Faculty Development and Research, and Laura B. Chisolm Distinguished Research Scholar, Case Western Reserve University School of Law. I would like to thank the members of the *Texas Law Review*, and the participants in the symposium on Constitutional Foundations, and in particular Professor Alex Tsesis, who provided invaluable feedback on an earlier draft.

1. PAUL DE MAN, *Promises* (Social Contract), in ALLEGORIES OF READING: FIGURAL LANGUAGE IN ROUSSEAU, NIETZSCHE, RILKE, AND PROUST 246, 271 (1979).

*Business v. Sebelius*² last summer, the Supreme Court's approval rating fell well below 50%, and about three-quarters of Americans polled expressed the view that the Justices decide cases in part based on their personal or political views.³ Though perhaps more popular than Congress and cockroaches,⁴ the Supreme Court's standing with the public appears to have shrunk of late.

Moreover, worries about the Supreme Court's legitimacy occasionally pervade not just popular journalism and legal scholarship, but also the opinions of the Court itself. Facing major decisions with obvious political ramifications, the Justices have sometimes expressed concern about the impact of their decisions on the Court's appearance of impartiality and its claim to apolitical referee status. For example, in *Planned Parenthood v. Casey*,⁵ Justices O'Connor, Kennedy, and Souter, apparently hoping to set to rest once and for all both the legal and public debate over the constitutionality of abortion, essentially argued in their joint opinion that they couldn't overrule *Roe v. Wade*⁶ because, among other reasons, it would look like they were bowing to political pressure.⁷ Chief Justice Roberts's surprising vote to uphold the individual insurance mandate under the Affordable Care Act in *NFIB* may be understood as another version of the same idea: one might suspect that he voted to uphold the individual mandate because he recognized that a five-to-four vote along party lines would,

2. 132 S. Ct. 2566 (2012).

3. Adam Liptak, *Approval Rating for Justices Hits Just 44% in New Poll*, N.Y. TIMES, June 7, 2012, <http://www.nytimes.com/2012/06/08/us/politics/44-percent-of-americans-approve-of-supreme-court-in-new-poll.html?pagewanted=all>.

4. See Press Release, Public Policy Polling, *Congress Less Popular than Cockroaches*, Traffic Jams (Jan. 8, 2013), http://www.publicpolicypolling.com/pdf/2011/PPP_Release_Nat_010813_.pdf (indicating that voters have a "higher opinion" of cockroaches than Congress).

5. 505 U.S. 833 (1992).

6. 410 U.S. 113 (1973).

7. The plurality opinion stated:

The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make. Thus, the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation.

....

... Where, in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe* and those rare, comparable cases, its decision has a dimension that the resolution of the normal case does not carry. It is the dimension present whenever the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.

... [O]nly the most convincing justification under accepted standards of precedent could suffice to demonstrate that a later decision overruling the first was anything but a surrender to political pressure, and an unjustified repudiation of the principle on which the Court staked its authority in the first instance. So to overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question.

Casey, 505 U.S. at 865–67 (plurality opinion).

despite all his insistence that he is a mere umpire calling the balls as he sees 'em,⁸ make the Court look like a purely political animal rather than a legitimate one governed by the rule of law.⁹ The decision was, in other words, no less political simply because it was clever.

Yet, legitimacy is a strange creature. To use a familiar legal trope, it faces, Janus like,¹⁰ in two directions: inward, insofar as “legal” legitimacy requires that judicial decisions adhere to the professional norm of impartial, consistent, and principled decisionmaking; and outward, insofar as “social” legitimacy requires courts, who, after all, exercise real-world coercive power affecting the lives of individual citizens, to reach results that are broadly acceptable to the public at large.¹¹ The two types of legitimacy may thus be in tension with one another, such as when principled doctrinal reasoning leads to a result that would provoke substantial public outrage or resistance.¹² At the same time, as the above examples from *Casey* and *NFIB* suggest, there is not always a straight line to be drawn between public opinion and social legitimacy. Sometimes, greater legitimacy is engendered by bucking public opinion. And, to put a somewhat more cynical spin on the issue, “[s]ometimes . . . what is involved in voting against one’s seeming druthers may be a calculation that the appearance of being ‘principled’ is rhetorically and politically effective. It fools people.”¹³ Indeed, the now-standard script of Supreme Court nomination hearings, in which the nominee compares himself or herself to an umpire or some similar avatar of blind justice, is probably primarily a performance intended to shore up the public’s

8. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of John G. Roberts, Jr., Nominee to be Chief Justice of the United States).

9. See Tonja Jacobi, *Strategy and Tactics in NFIB v. Sebelius* 6, 15–22 (Nw. L. & Econ. Research Paper No. 12-14, 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2133045 (arguing that Roberts’s “driving concern [in *NFIB*] was for the institutional legitimacy of the Court”).

10. *Van Orden v. Perry*, 545 U.S. 677, 683 (2005); *Holder v. Hall*, 512 U.S. 874, 956 (1994) (Ginsburg, J., dissenting). Janus is the god of beginnings and endings who, according to Roman mythology, had two faces that pointed in opposite directions. Samuel A. Rumore, Jr., *Some Thoughts for the Beginning of 2001*, 62 ALA. LAW. 8, 8 (2001).

11. For insightful discussions of the distinction between legal and social legitimacy, see generally Richard H. Fallon Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787 (2005) and Robert C. Post & Neil S. Siegel, *Theorizing the Law/Politics Distinction: Neutral Principles, Affirmative Action, and the Enduring Legacy of Paul Mishkin*, 95 CALIF. L. REV. 1473 (2007). Also on point is Cass R. Sunstein, *If People Would Be Outraged by Their Rulings, Should Judges Care?*, 60 STAN. L. REV. 155 (2007).

12. See, e.g., Post & Siegel, *supra* note 11, at 1474 (arguing this tension is both significant and unavoidable as well as exaggerated); Sunstein, *supra* note 11, at 157–58 (positing that the Supreme Court avoids provoking public outrage that could ensue from a decision on a controversial topic by refusing to rule on it).

13. Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 31, 51–52 (2005). Contra the *NFIB* example, though, Judge Posner argues that such voting against self-interest occurs primarily when the stakes of the decision are low. *Id.* at 50–51.

confidence (and that of the public's democratically elected representatives), rather than a sincere and deeply felt statement of judicial philosophy.

Constitutional scholars have attacked the legitimacy problem, along with the related problem of maintaining the strict divide between law and politics, from various angles. Originalists have long argued that hewing closely to constitutional text is the only approach that ensures fidelity to the document itself and the act of interpretation (as opposed to lawmaking) with which the Justices have been charged.¹⁴ They view such fidelity as automatically both legitimate and legitimating, since it is the only approach that remains true to the text that the Framers adopted.¹⁵ Proponents of "living," or progressive, constitutionalism argue, by contrast, that the Court cannot be accepted as legitimate if its opinions do not take account of changing societal circumstances and values.¹⁶ Popular constitutionalists, for their part, argue that we the people should take the Constitution away from the courts altogether, or that "the people themselves," in contrast to unelected and unaccountable judges, should play a central role in interpreting the Constitution.¹⁷ And some "backlash" theorists claim that far from

14. See, e.g., Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862–63 (1989) (arguing that originalism is "more compatible with the nature and purpose of a Constitution in a democratic system" in that it assigns judges the task of determining original meaning and democratically elected officials the task of taking account of changing societal values); see also Andrew B. Coan, *Talking Originalism*, 2009 BYU L. REV. 847, 849, 852, 858–59 (2009) (citing RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (2d ed. 1997); ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 143 (1990); KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* 110–59 (1999); Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 234 (1988) ("[T]he original meaning of the Constitution is the only meaning the People have democratically endorsed.").

15. See Coan, *supra* note 14.

16. See, e.g., STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 5–6 (2005) (arguing that "courts should take greater account of the Constitution's democratic nature when they interpret constitutional and statutory texts").

17. See, e.g., LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 7–8 (2004) ("[I]t was 'the people themselves'—working through and responding to their agents in the government—who were responsible for seeing that [the Constitution] was properly interpreted and implemented. The idea of turning this responsibility over to judges was simply unthinkable."); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 181–82 (1999) ("[Populist constitutional law] treats constitutional law not as something in the hands of lawyers and judges but in the hands of the people themselves."); see also Larry D. Kramer, Lectures, "*The Interest of the Man*": *James Madison, Popular Constitutionalism, and the Theory of Deliberative Democracy*, 41 VAL. U. L. REV. 697, 700 (2006) ("[Popular constitutionalism] does not assume that authoritative legal interpretation can take place only in courts, but rather supposes that an equally valid process of interpretation can be undertaken in the political branches and by the community at large."). Professor Barry Friedman gives a brief, helpful listing of sources both promoting and criticizing popular constitutionalism in BARRY FRIEDMAN, *THE WILL OF THE PEOPLE* 564 n.266 (2009).

performing a settling function, the Supreme Court's intervention in high-stakes political issues only stokes the flames it was intended to quell.¹⁸

When push comes to shove, though, virtually all agree that the Supreme Court should have some role in interpreting the Constitution. A principal point of disagreement centers on how this interpretation should proceed—specifically, on the extent to which the function of law can and should be meaningfully distinct from politics. This issue relates to the problem of determining the extent to which social and cultural facts should influence legal decisionmaking. Moreover, lurking within this debate is concern about change in constitutional meaning over time. If legal interpretation is truly principled, it would appear that it must be insulated against the political pressures of the time, and therefore much change in constitutional meaning—especially change that appears to take into account new political and social circumstances—would prove difficult to explain.¹⁹

Drawing on the insights of literary theory, this Article argues that every act of interpretation, including constitutional interpretation, inevitably draws not only on text but on context, and that the relevant context extends beyond both the written document and the historical context of its origination to contemporary social and cultural facts on the ground. This understanding derives from speech-act theory and from postmodern literary theory.²⁰ As Paul de Man argues in his seminal essay, *The Resistance to Theory*, the act of interpretation always encompasses a “pragmatic moment” that undermines the effort to attain perfect theoretical coherence.²¹ Applying this perspective to constitutional interpretation, this Article argues that neither constitutional theory nor politics, on its own, is capable of fully explaining constitutional interpretation and constitutional change.

18. See, e.g., Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 388–401 (2007) (discussing backlash theories); David Fontana & Donald Braman, *Judicial Backlash or Just Backlash? Evidence from a National Experiment*, 112 COLUM. L. REV. 731, 741 (2012) (describing the argument that the Court's decisions regarding controversial issues creates a backlash against perceived “outside interference” or “judicial activism” (internal quotation marks omitted)).

19. But not impossible. One could believe that a particular constitutional provision was intended or designed to take changing circumstances into account, and thus allowing constitutional meaning to change would still mean hewing closely to original intent or another principled approach, such as subscribing to the view that the Constitution serves certain enduring values but that the content of those values may evolve over time. See, e.g., JACK M. BALKIN, *LIVING ORIGINALISM* 14 (2011) (arguing that the Framers, by choosing to use general and abstract concepts in the Constitution, meant for future generations to interpret and implement them). Alternately, one could support a change in meaning on the basis that the original interpretation of a constitutional provision was simply incorrect.

20. The term “postmodern literary theory” refers to a body of literary, artistic, and philosophical thought that arose in the second half of the twentieth century as a reaction to modernism and is most closely associated with deconstruction, a philosophy primarily developed by the French theorist Jacques Derrida. Kay Torney Souter, *The Products of the Imagination: Psychoanalytic Theory and Postmodern Literary Criticism*, 60 AM. J. PSYCHOANALYSIS 341, 345 (2000).

21. Paul de Man, *The Resistance to Theory*, 63 YALE FRENCH STUD. 3 (1982), reprinted in 33 *THEORY AND HISTORY OF LITERATURE: THE RESISTANCE TO THEORY* 8 (1986).

In illustrating this phenomenon, this Article draws on examples in two areas—the Fourteenth Amendment and the religion clauses of the First Amendment—to demonstrate the dialectical interplay among text, principle, and pragmatism in constitutional interpretation and constitutional change. Of course, others have already argued that law and politics need not always exist in absolute contrast with one another but may instead stand in a dialectical relationship.²² The principal contribution of this Article, however, is to propose a new theoretical underpinning for making sense of the relationship between law and culture, as well as the inherent instability of the law–politics divide.

Part I of this Article describes the law–politics divide and reviews some of the important recent scholarship on that subject. The purported distinction between judging, or interpreting the law, and engaging in political decisionmaking lies at the heart of much of the anxiety over judicial legitimacy, as well as of debates over the merits of originalism as compared to living constitutionalism.²³ As this Article will demonstrate, the distinction between the two, while not meaningless, is nonetheless inherently unstable. Part II begins to make this case by reviewing Paul de Man’s classic essay *The Resistance to Theory*, which elucidates the process of literary interpretation and applies it in general terms to constitutional interpretation. Part III then puts this theory to work through examples drawn from notable constitutional controversies. Finally, Part IV asks why and how this particular perspective makes any difference to our understanding of constitutional interpretation.

I. Law and Politics

In a *Harvard Law Review* Foreword from a few years ago, Judge Richard Posner argued that, as a constitutional court, the Supreme Court is inherently and inevitably a political court.²⁴ In so stating, Judge Posner implicitly and explicitly contrasted politics with “law.”²⁵ Though it is supposed to be “tethered to authoritative texts,” the argument proceeds,²⁶ the Supreme Court is instead profoundly political because of certain structural features—particularly, its responsibility to decide emotional, politically polarizing constitutional issues; the open-ended and broad nature of the constitutional text, which fails to impose any meaningful internal constraints on the Justices; and the lack of external constraints on the Justices’

22. See, e.g., Post & Siegel, *supra* note 18, at 376.

23. I use the term “living constitutionalism” here to refer to all nonoriginalist theories of constitutional interpretation, with the recognition that both originalism and nonoriginalism are heterogeneous schools of thought. The point is to distinguish among constitutional theories on this one dimension, rather than to lump all originalist or nonoriginalist constitutional theories together.

24. Posner, *supra* note 13, at 39–54.

25. *Id.* at 45–46.

26. *Id.* at 40.

decisionmaking.²⁷ For Posner, the political nature of constitutional law is both lamentable and inevitable.²⁸

Others have argued that the encroachment of politics on constitutional law is not completely unavoidable, but that the temptation of results-oriented judging is great, and undermines the legitimacy of the law, all the same. Thus, according to this perspective, “constitutional law defines its integrity precisely in terms of its *independence* from political influence. From the internal perspective of the law, the law–politics distinction is constitutive of legality.”²⁹ The most famous proponent of this view is probably Herbert Wechsler,³⁰ but it continues to resonate in contemporary discourse.³¹

From yet another perspective, originalism may be understood, at least in part, as a response to the problem of law’s legitimacy and the need to keep it distinct from politics. Though the proposition is far from being beyond debate, originalists generally contend that their mode of interpretation is more principled because it is tied to the one meaning that was democratically adopted by the people of the United States, and that, unlike nonoriginalists, they are not free to impose their own values on the texts they decode.³² Thus, for example, Justice Scalia’s famous defense of originalism contends that, because the purpose of the Constitution is “precisely to prevent the law from reflecting certain *changes* in original values that the society adopting the Constitution thinks fundamentally undesirable,” originalism is the best mode of achieving the Constitution’s goals.³³ Indeed, Justice Scalia argues that originalism avoids “aggravat[ing] the principal weakness of the system, for it establishes a historical criterion that is conceptually quite separate from the preferences of the judge himself.”³⁴

In contrast to these various worrying approaches to the law–politics divide, some scholars have embraced the influence of popular attitudes on law as not only structurally inevitable, but also as a positive influence that should be embraced, at least to some degree, rather than suppressed. Proponents of “democratic constitutionalism,” for example, argue that “constitutional meaning bends to the insistence of popular beliefs and yet

27. *Id.* at 39–43.

28. *See id.* at 76.

29. Post & Siegel, *supra* note 18, at 384.

30. *See, e.g.*, Hebert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 11–12 (1959) (identifying “the deepest problem of our constitutionalism” as finding “criteria that can be framed and tested as an exercise of reason and not merely as an act of willfulness or will”).

31. Regarding the resonance of the view of law as distinct from politics because of its principled nature, see *supra* notes 4–9 and accompanying text.

32. *See, e.g.*, Coan, *supra* note 14, at 852, 857 (acknowledging the defenses of originalism based on democracy and judicial restraint). The criticisms of this assertion are well-known and need not be repeated here. For an overview, see generally *id.*

33. Scalia, *supra* note 14, at 862.

34. *Id.* at 864.

simultaneously retains integrity as law.”³⁵ Professors Robert Post and Reva Siegel argue that the Court cannot avoid public controversy surrounding the sorts of cases it hears, nor can it avoid being influenced by popular understandings of the Constitution; judges, therefore, must acknowledge the conflicting sides in a constitutional debate and “assess the . . . relevant constitutional values,” employing “exquisite sensitivity to context.”³⁶ Similarly, Professors Robert Post and Neil Siegel assert that principled legal reasoning should not be understood to be incompatible with the expression of “fundamental social values,” which they argue is, itself, one purpose of the law.³⁷ Thus, professional legal reasoning is and should be “in dialogue with public values.”³⁸ Finally, in a recent book, Professor Barry Friedman argues that the popular will has always influenced judicial understandings, and vice versa.³⁹ And so far, at least, the sky has not fallen.

This Article is mostly in line with this last line of thought regarding the law–politics divide. It argues that the distinction is neither as important nor as firm as legal-process scholars and originalists seem to suggest. It suggests a different reason for this view, however—one that is based in the nature of language itself, rather than in the structure of our political system or the nature of judging. By the same token, this analysis also suggests that theoretical coherence in the act of interpretation is inevitably undermined by the reality that interpretation must reach beyond the text itself to the messy social and political context in which it exists.

Before moving on to that linguistic explanation, however, it is important to clarify just what is meant by “politics.” The term “politics” can have multiple meanings, and the above-described schools of thought regarding the law–politics divide seem to deploy various ones. In some views, “politics” is synonymous with ideology or, what may amount to the same thing, personal predilection. This seems to be the sense in which Judge Posner uses the term.⁴⁰ Many originalists also seem most concerned about the influence of politics in that sense of the term. Another meaning of “politics,” however, would be public opinion or (to use a more elevated term) public values—with the term “public” perhaps serving as a stand-in for “majority” or “widely shared.” This is the sense in which democratic constitutionalists and their ilk appear to understand the term. Finally, one might use the term “politics” to refer simply to political and cultural reality, or pragmatic

35. Post & Siegel, *supra* note 18, at 376.

36. *See id.* at 425–27 (suggesting that judges need not avoid controversy in order to maintain their proper judicial role).

37. Post & Siegel, *supra* note 11, at 1510.

38. *Id.* at 1510–11.

39. FRIEDMAN, *supra* note 17.

40. *See, e.g.*, Posner, *supra* note 13, at 51 (referring to “conventional ‘left’ and ‘right’ ideologies”); Richard A. Posner, *1997 Oliver Wendell Holmes Lectures: The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637, 1654 (1998) [hereinafter Posner, *Problematics*] (describing political platforms, such as Marxism and Communism, as ideologies).

considerations of the context and impact of judicial decisions. Though this is a less common usage of the term, it also appears to play a role in the democratic constitutionalists' understandings of politics and is often opposed to law in scholarly discourse. It is in this last sense—the most general sense—that I use the term here in arguing that politics inevitably plays a role in interpretation.

II. Resistance to Constitutional Theory

In his seminal essay *The Resistance to Theory*, Paul de Man lays out a metatheoretical argument—a theory about literary theory.⁴¹ In part, the essay is an attempt to understand what, if anything, makes literary theory distinct from other disciplines and practices, such as philosophy, that exert a gravitational pull upon it.⁴² This central dilemma, of course, calls to mind the debate over the uniqueness of legal and constitutional theory, which partakes of other disciplines but seeks to remain independent of them.⁴³ Ultimately, de Man proposes that “[l]iterary theory may now well have become a legitimate concern of philosophy but it cannot be assimilated to it,” because literary theory “contains a necessarily pragmatic moment that certainly weakens it as theory but that adds a subversive element of unpredictability and makes it something of a wild card in the serious game of the theoretical disciplines.”⁴⁴ The subversive unpredictability of literary theory is what de Man calls “resistance,” and that resistance comes not only from outside but also from within the theory itself.⁴⁵ As explained below, de Man’s conclusions apply to, and have significant consequences for, constitutional theory as well.

According to de Man, the rise of literary theory⁴⁶ corresponds to the rise of a certain linguistic self-consciousness in the twentieth century—the newfound focus on language and the meaning and function of signification, which was accompanied by the recognition that there is a difference—a kind of play in the joints—between words and the objects or concepts to which they refer.⁴⁷ This recognition was accompanied by a growing acceptance of the view that language and meaning are functions of convention rather than of some sort of natural or inevitable mechanism.⁴⁸ The conventional view of language, of course, is one of the fundamental postulates of postmodernism; it leads to the conclusion that the relationship between words and the real-

41. de Man, *supra* note 21, at 3.

42. *Id.* at 4–5. So-called continental philosophy has been particularly influential within postmodern literary theory. *Id.* at 7–8.

43. See, e.g., Posner, *Problematics*, *supra* note 40, at 1693–98 (criticizing the view that moral theory should inform legal decisionmaking).

44. de Man, *supra* note 21, at 8.

45. *Id.* at 19.

46. Literary theory is here contrasted with “literary history” and “literary criticism.” *Id.* at 8.

47. *Id.* at 8–10.

48. *Id.*

world objects they refer to is both arbitrary and unstable.⁴⁹ Yet, according to de Man, it is a view that is not always embraced, and it is one that ideologues, in particular, reject: as de Man puts it,

[N]o one in his right mind will try to grow grapes by the luminosity of the word “day,” but it is very difficult not to conceive the pattern of one’s past and future existence as in accordance with temporal and spatial schemes that belong to fictional narratives and not to the world.⁵⁰

In other words, we easily understand in some cases, as with everyday words like “day,” that the word and the object to which it refers are distinct; it is much harder, however, to recognize that our most deeply held beliefs and perceptions of the world do not necessarily reflect a fixed and natural reality. Thus, he continues, “[I]deology is precisely the confusion of linguistic with natural reality, of reference with phenomenalism.”⁵¹

De Man contends, however, that it is the function of literary theory to unmask this very tendency to confuse. Literary theory thus defeats ideology, and ideological attempts to discredit literary theory consequently evidence the critics’ “fear at having their own ideological mystifications exposed by the tool they are trying to discredit.”⁵² Yet, at the same time, literary theory itself encounters resistance—a resistance from within, which de Man suggests is an inevitable, constituent element of the theoretical project itself.⁵³ De Man explains that this “resistance” is a “resistance to the use of language about language,” as well as to “language itself or to the possibility that language contains factors or functions that cannot be reduced to intuition.”⁵⁴

Central to de Man’s argument are a dichotomy and a trichotomy, or *trivium*. The dichotomy is between theory and aesthetics. Theory, of course, means the same thing in the context of literary theory as in constitutional theory: an attempt to construct a closed system with the power to explain substantially all facts or events within a given universe, but which is itself speculative rather than factual.⁵⁵ Aesthetics, by contrast, involves attention to pleasurable, beautiful, or other sensory aspects of language—an embrace of the phenomenological effects of language in the real world.⁵⁶ An aesthetic approach to poetry, for example, might be one that emphasizes the sounds of

49. *Id.* at 10.

50. *Id.* at 11.

51. *Id.*

52. *Id.*

53. *Id.* at 12.

54. *Id.* at 12–13.

55. See Wlad Godzich, *Foreword* to 33 *THEORY AND HISTORY OF LITERATURE: THE RESISTANCE TO THEORY* ix, xiii (1986) (defining theory as “a system of concepts that aims to give a global explanation to an area of knowledge” which is “oppose[d] . . . to praxis by virtue of the fact that it is a form of speculative knowledge”).

56. See de Man, *supra* note 21, at 7–8.

the words and the harmonious effects of particular rhyme and rhythm schemes. An aesthetic reading of the Constitution might involve an appreciation of the elegance of its language—a not wholly ridiculous, but also not apparently useful, undertaking for lawyers to engage in.

At the same time, the concept of aesthetics as deployed by de Man can be understood more broadly, to refer to any focus on the real-world effects of language. This aesthetic approach is opposed to a theoretical reading that understands a text as an instantiation of a particular world view, ideology, or interpretive theory.⁵⁷ Such theoretical readings inevitably attempt to assimilate the text to the overarching explanatory system that claims to comprehend it. The aesthetic approach, by contrast, pretends to no such grand ambition.

Related to the theory–aesthetics dichotomy is the classical *trivium* of logic, grammar, and rhetoric, which represented the sum total of language and linguistics in classical thought.⁵⁸ Classical linguistics established a hierarchy, in which logic, which is related both to philosophy and mathematics, stood at the top.⁵⁹ As de Man explains, this prioritization of logic, as well as its affiliation with mathematics, entails a “continuity between a theory of language, as logic, and the knowledge of the phenomenal world”—a belief that language, as the vehicle of logic, closely reflects the reality of the world around us.⁶⁰

Grammar, in the middle, was the study of language with the aim of understanding how language essentially operationalizes the principles of logic.⁶¹ And rhetoric, the lowest in the hierarchy, was comprised simply of the study of persuasive or figurative language—of literary tropes, which were extensively catalogued in grammatical terms, and their deployment in the service of persuasion.⁶² This hierarchy helps to construct a particular relationship between theory and aesthetics, or reality on the ground.⁶³ There is a correspondence between them, in which theory (logic) is understood to reflect, by virtue of human reason, reality (aesthetics).⁶⁴ But theory, as the product of reason, clearly stands above base reality, which lies constantly in need of analysis and interpretation.

57. *Id.* at 10–11.

58. Christopher Norris, *Law, Deconstruction, and the Resistance to Theory*, 15 J.L. & SOC’Y 166, 177 (1988).

59. *See id.*

60. de Man, *supra* note 21, at 13.

61. Norris, *supra* note 58.

62. *Id.*

63. *See* de Man, *supra* note 21, at 13 (equating, implicitly, the relationship between language, as logic, and knowledge of the phenomenal world, which is accessible through mathematics, with the relationship between theory and aesthetics).

64. *See id.* at 14 (“The continuity between theory and phenomenism is asserted and preserved by the system itself.”).

De Man readopts this classical trio, not as a hierarchy but rather as an exemplar of the inevitable tensions within interpretation.⁶⁵ In postmodern literary theory, which rejects the preeminence of logic and the corresponding notion of a natural or inevitable symmetry between language and reality, the hierarchy is at the very least inverted—the rhetorical aspect of language takes precedence over its logical aspect.⁶⁶ De Man claims that “reading”—which for him means a close reading that is particularly attentive to the multiple possible meanings of a text—partakes of both grammar and rhetoric and is a privileged site of tension between them.⁶⁷ In particular, de Man argues that “the grammatical decoding of a text leaves a residue of indetermination that . . . cannot be[] resolved by grammatical means.”⁶⁸ The resistance to (literary) theory is thus, in essence, a resistance to reading. The resistance to theory—really, a resistance within theory—is thus a resistance to that which ultimately undermines any attempt to systematize the meaning of the text—it is an attentiveness to the uncertainties, the indeterminacies, and the inconvenient moments within the text itself, which assimilate poorly to grand overarching theories, or resist that assimilation altogether. For de Man, these moments are created by “figural” language, which by its very essence opens up multiple and often self-contradictory meanings, all of which may be technically, or “grammatically,” correct.⁶⁹ Yet, the “literary” text is not the only kind of text that presents this dilemma—de Man claims that, while more explicit in literature, the figurative dimension of language—the aspect of language that escapes easy grammatical clarification yielding only one possible correct meaning—“can be revealed in any verbal event when it is read textually.”⁷⁰

De Man ties his theory of reading to speech-act theory. Like postmodern literary theory, speech-act theory has recognized the essentially conventional nature of language and, thus, of meaning.⁷¹ For de Man,

65. *Id.* at 13.

66. STEVEN BEST & DOUGLAS KELLNER, *POSTMODERN THEORY: CRITICAL INTERROGATIONS* 140 (1991) (describing how postmodern theory emphasizes rhetoric over “any systematic or comprehensive theoretical position”).

67. de Man, *supra* note 21, at 15.

68. *Id.*

69. *See id.* at 16 (discussing this problem in the context of interpreting the meaning of the title of Keats’s *The Fall of Hyperion* and noting that “[f]aced with the ineluctable necessity to come to a decision, no grammatical or logical analysis can help us out”).

70. *Id.* at 17. Thus, “once a reader has become aware of the rhetorical dimensions of a text, he will not be amiss in finding textual instances that are irreducible to grammar or to historically determined meaning.” *Id.* at 18.

71. *Id.* at 18–19. As I have explained elsewhere, what I call “meaning” here roughly correlates with “illocutionary force” in the parlance of speech-act theory. *See* B. Jessie Hill, *Putting Religious Symbolism in Context: A Linguistic Critique of the Endorsement Test*, 104 MICH. L. REV. 491, 511–14 (2005). “Illocutionary force” is often defined as the *effect* of language—what language does or what act it performs (asserting, urging, certifying, begging)—rather than what the individual words denote. *See* John Searle, *What is a Speech Act?*, in *THE COMMUNICATION THEORY READER* 263 (Paul Copley ed., 1996).

speech-act theory is correct to recognize the conventional nature of meaning but is wrong to suggest that it is reducible to convention, especially insofar as it aspires to fix and determine, once and for all, the functioning of language by specifying all of the conventional elements that produce a particular kind of meaning (or “illocutionary force”).⁷² But speech-act theory can also be read in light of postmodernism’s understanding of language as inevitably context-bound and of context as boundless.⁷³ A speech-act theory that does not fall prey to the attempt to create a totalizing language system that tames and controls all possible meaning is one that recognizes the dependency of language on context—not just the immediate textual context but also the historical and social context in which it is read.⁷⁴

For de Man, postmodern literary theory, in so far as it engages in *reading*, always reads texts in essentially the same way—as both asserting and performing their own indeterminacy.⁷⁵ Reading thus dramatizes the failure of language to reach the certainty and the reflectiveness of reality to which it appears to aspire—or, put differently, the ability of language to escape any and every attempt to pin it to a single meaning or reference.⁷⁶ As such, these postmodern readings are in fact “theory and not theory at the same time, the universal theory of the impossibility of theory.”⁷⁷

Whatever interest de Man’s argument holds—hopefully as more than a historical artifact—its application to constitutional theory may not be immediately apparent. In this Article, I certainly hope to steer clear of the classical critical legal theory brand of meaning-debunking, itself definitively debunked by Stanley Fish and others.⁷⁸ Rather, I wish to contend that de

72. de Man, *supra* note 21, at 19. De Man refers to classical theorists of speech acts, such as John Searle and J.L. Austin.

73. See, e.g., Amy Adler, *What’s Left?: Hate Speech, Pornography, and the Problem for Artistic Expression*, 84 CALIF. L. REV. 1499, 1541–42 (1996) (“Meaning is context-bound, but context is boundless.” (quoting JONATHAN CULLER, ON DECONSTRUCTION: THEORY AND CRITICISM AFTER STRUCTURALISM 123 (1982) (internal quotation marks omitted))); Hill, *supra* note 71, at 514–16 (“Context, however, is itself an extremely unstable device for discerning meaning. Although meaning is dependent on context, it is usually impossible to fully describe or delimit the relevant context . . .”).

74. Hill, *supra* note 71, at 517–22. An originalist might acknowledge the importance of context but argue that meaning should be dependent only on the context in which it was written. There are, however, several difficulties with this view. One is that historical context is virtually impossible to recapture in full; another is that constitutional language must continue to be applied in new, contemporary contexts and speak to contemporary problems. Few, if any, originalists would go so far as to say that constitutional language means only what it could have meant in the context of late eighteenth-century America. See, e.g., *District of Columbia v. Heller*, 554 U.S. 570, 582 (2008) (Scalia, J.) (rejecting as “bordering on the frivolous” the notion that only those arms available at the founding are encompassed by the Second Amendment’s protections).

75. de Man, *supra* note 21, at 15–19.

76. *Id.*

77. *Id.* at 19.

78. Norris, *supra* note 58, at 173 (citing Stanley Fish, *Dennis Martinez and the Uses of Theory*, 96 YALE L.J. 1773, 1796 n.60 (1987)).

Man's argument has several specific implications for the project of constitutional theory.

First, de Man's point that language inevitably tends to take on a life of its own and thereby to resist any attempt at fitting all meaning within a neat, totalizing theory would seem to apply to legal language as well as literary. For this protean quality of language is at least in part a feature of language's inevitable dependence on context and the underlying change within that (social, historical, political) context. The failure of theory to make sense of language is particularly apparent with respect to originalist theories, which are obviously undermined by the understanding that language takes on new meanings in light of changed circumstances. Any theory that claims to assimilate the text entirely to it, de Man suggests, is refusing to really "read" that text.⁷⁹

It is important to recognize, however, that de Man is not here making a general claim that meaning is always indeterminate and unknowable, nor is that a claim I wish to make here. He does argue, however, that the meaning of texts—including legal texts—cannot be specified in any transcendent or permanent way. There is no meaning, whether based on the text alone or on the framers' intent, that can answer questions about how the text should apply in new and unanticipated circumstances.⁸⁰ Thus, the ways in which any constitutional theory is constantly questioned and ultimately undermined by the changing social context in which the constitutional text must be read and applied is precisely the "resistance" to and within theory to which de Man refers.

This resistance is, moreover, on the view of postmodern speech-act theorists, inherent in the dependency of all speech acts on context.⁸¹ The context dependency of meaning may seem intuitive, of course, but it also derives from the recognition that language is conventional. Although one might argue that words have definitions that can be found in an objective way—for example by looking in a dictionary, *utterances* (sentences or speech acts) can only have meaning in a particular context. Thus, the phrase "I do" means very little standing on its own, typed on a page; it carries great significance, both legal and cultural, if it is said in the context of a marriage ceremony in which all of the relevant formalities have been met; and it is surely decipherable but carries decidedly less weight if it is spoken in a play, in front of an actor who is dressed as, and to everyone's understanding is merely pretending to be, a justice of the peace.⁸² This context dependency is

79. For examples of this phenomenon, see *infra* Part III. "Reading," for de Man, means close reading, with special attention to the multiple meanings and potential for indeterminacy within a text. de Man, *supra* note 21, at 24.

80. See DE MAN, *supra* note 1, at 270–71; Norris, *supra* note 58, at 175–76.

81. CULLER, *supra* note 73, at 123–24; Hill, *supra* note 71, at 515.

82. *But see* LEMONY SNICKET, A SERIES OF UNFORTUNATE EVENTS NO. 1: THE BAD BEGINNING 133–44 (1999) (narrating the story of a mischievous count who tries to steal an orphan's fortune by staging a play in which the orphan plays the part of the count's bride-to-be and,

generalizable, of course, and it stretches beyond the example of certain formalities being required in order for a speech act to have legal force.⁸³

Yet context is both impossible to specify completely and always changing.⁸⁴ As Jonathan Culler puts it, “Meaning is context-bound, but context is boundless.”⁸⁵ Context is boundless in the sense that it can always be further specified, as any lawyer knows. The exercise of distinguishing disfavorable precedent is often nothing more than the act of highlighting an element of the factual context in the prior case that may have escaped notice or seemed unimportant at the time but that is infused with significance for the later case.⁸⁶ And no matter how carefully one tries to delimit the context—to specify the rules under which a certain expression means a certain thing—a new context can always be created that evades the rules one creates.⁸⁷ Jonathan Culler gives the example of a sign in an airport informing passengers that all remarks about bombs will be taken seriously: what meaning would we impute, he asks, if a passenger approached an airport worker and asked, “If I were to remark that I had a bomb in my shoe, you would have to take it seriously, wouldn’t you?”⁸⁸ Could the problem be solved by specifying that remarks about remarks about bombs must be taken seriously? And so on, and so on, in an infinite regress?⁸⁹

Importantly, part of the unmanageable and illimitable context is the cultural and political context, which has particular importance for constitutional interpretation. Thus, the constantly changing context of politics, culture, and facts on the ground—what de Man might call the aesthetic—is inevitably bound up with the act of interpretation, just as it also, equally inevitably, escapes the totalizing attempts of theory. This context is the “pragmatic moment” that is essential to constitutional interpretation but weakens constitutional theory.⁹⁰

unbeknownst to her, the woman playing the justice of the peace is an actual justice who performs an actual, valid marriage ceremony on stage). I employ the “I do” example in Hill, *supra* note 71, at 512.

83. Sometimes the context even includes that which is *not* written. For example, Akhil Amar notes that Chief Justice John Marshall, in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 353–56 (1819), drew on the use of the word “necessary” in other contexts, including outside the Constitution itself, to demonstrate that, if the Framers had meant to give Congress only those powers *explicitly* delegated in the Constitution, it would have said so. See Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 800 (1999). According to Amar, “Marshall is contrasting the actual wording of the Constitution not merely with what it could have said . . . or with what another clause of the Constitution does say Rather, he is contrasting the text of the Constitution with what its predecessor document said.” *Id.*

84. Hill, *supra* note 71, at 515–16.

85. CULLER, *supra* note 73, at 123.

86. Hill, *supra* note 71, at 515–16.

87. *Id.*

88. CULLER, *supra* note 73, at 124–25 (internal quotation marks omitted).

89. See *id.* at 125.

90. Professor Stanley Fish makes a similar point in arguing that the practice of judging and theories of legal interpretation are entirely distinct and, indeed, have nothing to do with one another.

At this point an originalist or textualist might raise an objection to my insistence that the *present*, ever-changing political and cultural context is the context in which the *Constitution* must be interpreted. Originalists, after all, believe that the “original public meaning” of a term is the relevant one.⁹¹ And what are originalism and its cousin textualism, if not themselves dreams of a return to a strict form of reading? This might appear to suggest that the problem posed for interpretation by the ever-changing context of the present is thus solved by an original-public-meaning approach according to originalists.

But this objection misses the mark in several respects. First, the reading that originalists espouse is not a de Manian reading—rather, it is a sort of prelapsarian reading, a perfect reading that itself resembles theory in its attempt to achieve one true and coherent past truth. But any text can only be read in the present, not in the past; the influence of context thus pervades interpretation whether the interpreter wishes it to or not.⁹² Indeed, to think that one’s reconstruction of a past context is the same as *actually discovering* what an utterance meant to some “original public” bears a striking resemblance to the exercise of trying to grow grapes by the luminosity of the word “day.”⁹³ Or, as Professor Jamal Greene puts it, “At no point in our constitutional history did any democratically responsible institution determine and embody within a text the notion that state and local actors should be bound by Justice Scalia’s considered view of the eighteenth-century meaning of the Bill of Rights.”⁹⁴ While originalists may be partly correct in claiming that the goal of interpretation is to discover the original intent behind an utterance, they deny that there is a difference between this reconstruction of original intent and the actual intent itself.

Moreover, as I have explained elsewhere, the very nature of meaning as convention driven implies that it must also be capable of repetition: an utterance can only function as meaningful if it can be repeated in different

They are different practices with different goals. See Fish, *supra* note 78, at 1785–87 (claiming that judging does not involve adherence to an “underlying set of rules and principles” but should instead strive for pragmatic coherence in decisionmaking).

91. Or at least, this is what the “new originalists” think. See, e.g., Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL’Y 65, 69 (2011) [hereinafter Barnett, *Interpretation and Construction*] (“[O]riginalism is a method of constitutional interpretation that identifies the meaning of the text as its public meaning at the time of its enactment.”); Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 627–29 (1999) (“The public meaning of the words of the Constitution . . . could be gleaned from a number of sources, including the records of the convention, but where those intentions differed from the public understanding, it is the public meaning that should prevail.”). See generally Mark Tushnet, *Heller and the New Originalism*, 69 OHIO ST. L.J. 609, 610–11 (2008).

92. Cf. J.M. Balkin & Sanford Levinson, *Interpreting Law and Music: Performance Notes on “The Banjo Serenader” and “The Lying Crowd of Jews.”* 20 CARDOZO L. REV. 1513, 1518–19 (1999) (describing legal interpretation as a performance in which interpretive choices must be made and audiences persuaded anew each time).

93. See *supra* text accompanying notes 50–51.

94. Jamal Greene, *Fourteenth Amendment Originalism*, 71 MD. L. REV. 978, 988 (2012).

contexts and still be comprehensible.⁹⁵ Yet each repetition also opens up the possibility of the utterance's meaning being changed:

If language is conventional, it must function according to a set of learnable, and thus reproducible, rules. The functionality of language depends, in other words, on its ability to be repeated—on the ability of certain speech acts to be replicated in a variety of contexts. This ability to be repeated, or “iterability,” also means that any linguistic utterance is capable of being cut off from both its original context and its speaker's intent to be reproduced in a context that may change or undermine its prior meaning. Indeed, no speech act could function at all if this were not the case—that is, if it were not both conventional and iterable. The conventionality and iterability of speech acts ensure that the speech act can be recognized, understood, and reproduced by different speakers and listeners, but they also ensure that language can be used in ways that may not have been originally intended.⁹⁶

The context dependency of language, which gives rise to its iterability, is thus the element that creates the possibility that any purportedly fixed, intentional meaning can always be undermined. In addition, it throws into question the originalist notion of a distinction between “interpretation” and “construction.” As Professor Randy Barnett explains it, “*Interpretation* is the activity of identifying the semantic meaning of a particular use of language in context. *Construction* is the activity of applying that meaning to particular factual circumstances.”⁹⁷ But as Barnett himself acknowledged, meaning must be specified “in context”; words do not have any meaning—and certainly not a fixed meaning—without a context.⁹⁸ Even assuming one could agree with originalists that the era of enactment is the relevant historical context, moreover, it must be acknowledged that determining the boundaries of the relevant context is itself an interpretive choice. One must make decisions about whether the context of the word “necessary” in the Necessary and Proper Clause includes only the words of the Clause itself, the entire Constitution (which includes the same word in Article II, Section 3 and the synonym “needful” in Article IV, Section 3), or all contemporary uses of the word.⁹⁹ Moreover, one might reasonably question how, precisely, to delineate the historical time period that one can consider in determining “contemporary” uses and whether meaning can really be pinpointed to a particular moment in time. For example, is the *Slaughter-House*¹⁰⁰ Court's interpretation of the Fourteenth Amendment, discussed below, sufficiently

95. B. Jessie Hill, *Of Christmas Trees and Corpus Christi: Ceremonial Deism and Change in Meaning Over Time*, 59 DUKE L.J. 705, 738–39 (2010).

96. *Id.* at 738 (footnote omitted).

97. Barnett, *Interpretation and Construction*, *supra* note 91, at 66.

98. *See id.* at 67–68.

99. Amar, *supra* note 83, at 755–58 (discussing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819)).

100. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873).

contemporaneous to deserve equal weight with the Amendment's framers' own views? At each turn a choice must be made to enforce linguistic clarity against the inevitable tendency of meaning to multiply once a word is committed to paper. Choices always must be made among possible meanings, as meaning does not exist without context. All interpretation is also construction.

Finally, the very structure of a constitution itself suggests that an attempt merely to construct past meaning is wrongheaded. As de Man argues in an essay on Jean-Jacques Rousseau's *Social Contract*, a social contract "never refers to a situation that exists in the present, but signals toward a hypothetical future All laws are future-oriented and prospective; their illocutionary mode is that of the *promise*."¹⁰¹ Those promises are understood to have been made at some past time, but their legitimacy must be verified and accepted in the present, at the moment of the state's application of coercive force.¹⁰² This would seem to be the understanding on which any social contract—and thus any constitution—must be based. Therefore, "when the Law speaks in the name of the people, it is in the name of the people of today and not of the past'. The definition of this 'people of today' is impossible, however, for the eternal present of the contract can never apply as such to any particular present."¹⁰³

III. Examples

What follows are examples of how the language of the Constitution, read closely, escapes any attempt to fix it, and of how provisional meaning can be reached only by means of considering the broader social and political context. Of course, de Man's point about language, as I have described it, is sufficiently general that it would have to apply to all language and a true demonstration, rather than an illustration, of it would have to be considerably more exhaustive than what I offer here. But given the limitations of time and space, I offer instead two brief examples to show how one might connect de Man's theory to constitutional interpretation and the failures of constitutional theory, particularly originalism.

A. *The Fourteenth Amendment's Citizenship Clause*

Could there be a clearer example of original intent than the Fourteenth Amendment's intended overruling of *Dred Scott v. Sandford*'s¹⁰⁴ holding that African-Americans are not "citizens" of the United States?¹⁰⁵ Even the conservative *Slaughter-House* Court recognized that this was the inevitable

101. DE MAN, *supra* note 1, at 273; *see also* Norris, *supra* note 58, at 174–76, 180 (discussing the same passage in relation to legal interpretation).

102. *See* DE MAN, *supra* note 1, at 273.

103. *Id.* (internal citation omitted).

104. 60 U.S. (19 How.) 393 (1857).

105. U.S. CONST. amend. XIV; *Scott*, 60 U.S. at 422–23.

import of that provision.¹⁰⁶ Yet the history of the Fourteenth Amendment's Citizenship Clause, from *Dred Scott* to the *Civil Rights Cases*,¹⁰⁷ is a prime example of how language and intent are often in tension, and of how even the clearest of texts may fail to enact its framers' intentions.

Dred Scott, of course, is the original sin of originalism and a founding member of the "anticanon."¹⁰⁸ In that opinion, Chief Justice Taney infamously held that blacks were not "citizens" within the meaning of Article III for purposes of diversity jurisdiction and therefore could not invoke the jurisdiction of the federal court.¹⁰⁹ Taney concluded that Scott was not a citizen—a member of the political community entitled to the "privileges and immunities" possessed by other citizens—not simply because of his status as a slave (which made him "property" rather than a person), but because of his race and ancestry.¹¹⁰ In reaching this conclusion, Taney began with the following proposition: "The words 'people of the United States' and 'citizens' are synonymous terms, and mean the same thing"—namely, the sovereign people, the political community, and the individuals who govern and are governed.¹¹¹ As evidence of this proposition, Taney pointed to the intentions of the Framers as contained in the Preamble to the Constitution, noting that:

It declares that it is formed by the *people* of the United States; that is to say, by those who were members of the different political communities in the several States; and its great object is declared to be to secure the blessings of liberty to themselves and their posterity. It speaks in general terms of the *people* of the United States, and of *citizens* of the several States, when it is providing for the exercise of the powers granted or the privileges secured to the citizen. It does not define what description of persons are intended to be included under these terms, or who shall be regarded as a citizen and one of the

106. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 73 (1873) (noting the Fourteenth Amendment "declares that persons may be citizens of the United States without regard to their citizenship of a particular State, and it overturns the *Dred Scott* decision by making *all persons* born within the United States and subject to its jurisdiction citizens of the United States").

107. 109 U.S. 3 (1883).

108. See Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 380, 406–08 (2011) (identifying *Dred Scott* as part of the American anticanon and referring to Chief Justice Taney's originalism as "bad originalism").

109. *Scott*, 60 U.S. at 427. Specifically, Taney formulated the question as follows:

Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guaranteed by that instrument to the citizen? One of which rights is the privilege of suing in a court of the United States in the cases specified in the Constitution.

Id. at 403.

110. *Id.* at 403, 408, 422–23.

111. *Id.* at 404.

people. It uses them as terms so well understood, that no further description or definition was necessary.¹¹²

Thus, according to Taney, African-Americans were not a part of the people nor were they citizens, based on an understanding that was not made explicit because it was too clear to explain. Taney further listed, in excruciating detail, all of the reasons why the Framers could not possibly have imagined including African-Americans within this category when they drafted Article III and the Privileges and Immunities Clause of Article IV.¹¹³ Taney applied originalism with a vengeance, privileging original intent over reasonable claims about the meaning of the text on its face.¹¹⁴

It was, of course, against this backdrop and that of the subsequent Civil War that the Fourteenth Amendment declared, “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”¹¹⁵ No longer could African-Americans be denied national citizenship on the theory embraced by *Dred Scott*, since the Fourteenth Amendment grounded citizenship in the irresistible biological fact of being born in the United States.

Yet, famously, it took only a few years for the Supreme Court to void that language of much of its power by defining the “privileges and immunities” that attached to that citizenship—guaranteed in the Fourteenth Amendment’s next clause¹¹⁶—as referring only to those rights that individuals possessed by virtue of their relationship to the federal government.¹¹⁷ Those rights included such relatively insignificant powers as the right to travel to the national capital to petition or conduct business with the federal government; to claim protection of the federal government while on the high seas; and “free access to its seaports, through which all operations of foreign commerce are conducted, to the subtreasuries, land offices, and courts of justice in the several States.”¹¹⁸ To say that the *Slaughter-House* Court literally nullified the meaning of the Citizenship Clause would hardly be an exaggeration, since, as pointed out by the dissent, all of those rights were already protected by the Constitution’s Supremacy

112. *Id.* at 410–11.

113. *Id.* at 406–09, 411–26.

114. *Id.* at 410 (“The general words above quoted would seem to embrace the whole human family, and if they were used in a similar instrument at this day would be so understood. But it is too clear for dispute, that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration . . .”).

115. U.S. CONST. amend. XIV, § 1.

116. *Id.* cl. 2 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . .”).

117. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79 (1873).

118. *Id.*

Clause, and thus the Fourteenth Amendment was not even needed to guarantee them.¹¹⁹

The *Slaughter-House* Court achieved its feat by means of a clever intratextual argument, which demonstrates just how susceptible the text is to escaping whatever original intentions it may have embodied. The phrase “privileges or immunities” in the Fourteenth Amendment seems intentionally chosen to mirror the “privileges and immunities” language of Article IV. That language, of course, had already been interpreted to refer to “fundamental” rights,¹²⁰ so it seemed natural to assume that those were the rights that Congress meant to encompass within national citizenship and extend to America’s newest citizens. Yet, the language’s verbatim repetition¹²¹ is precisely what opened it up to the opposite reading—a reading that assumed national citizenship, and its attendant privileges and immunities, must be *distinct* from state citizenship.¹²² This one textual move, in one fell swoop, emptied the Citizenship Clause of virtually all of its content. Similarly, the Court acknowledged the Fourteenth Amendment’s dual citizenship language, which proclaimed “[a]ll persons born or naturalized in the United States” to be “citizens of the United States *and* of the State wherein they reside,” and promptly turned it on its head.¹²³ While it may be true, as the Court asserted, that Congress thereby created a category of national citizenship that was independent of state citizenship and to which all U.S.-born or -naturalized individuals were entitled, the Court again exploited this distinction to minimize the content of national citizenship, rather than to endow it with robust meaning, as the framers had likely intended.¹²⁴

The *Slaughter-House Cases* thus place into bold relief the inherent ability of language to escape its original context and take on new meanings. Even identical language within the same document may not always be interpreted in the same way; the repetition itself can suggest either that the meaning should be understood consistently *or* precisely the opposite—that the use in two different contexts was intended to produce two different and even contrasting meanings. Of course, one possibility is that the historical context of *Slaughter-House* resulted in this arguably unwarranted

119. *Id.* at 96 (Field, J., dissenting); *see generally* JOHN HART ELY, *DEMOCRACY AND DISTRUST* 22–23 (1980).

120. *Slaughter-House*, 83 U.S. at 75–76 (citing *Corfield v. Coryell*, 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823) (No. 3,230)).

121. Well, almost verbatim. Article IV refers to “privileges *and* immunities,” U.S. CONST. art. I, § 2 (emphasis added), while the Fourteenth Amendment, since it is phrased as a prohibition, states that no state can deprive a citizen of the “privileges *or* immunities” of citizenship, U.S. CONST. amend. XIV, § 1 (emphasis added).

122. *Slaughter-House*, 83 U.S. at 74–78.

123. *Id.* at 73–74; U.S. CONST. amend. XIV (emphasis added).

124. *Slaughter-House*, 83 U.S. at 74, 79; *see, e.g.*, Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1332 (1952).

interpretation. The waning enthusiasm for Reconstruction even in the North, economic depression, and the labor unrest of the early 1870s no doubt influenced the majority's view of the meaning of the Reconstruction Amendments and of the privileges and immunities to which all U.S. citizens are entitled.¹²⁵ Moreover, the immediate factual context of the case—a suit brought not by blacks to vindicate their civil rights but by Southern whites to vindicate economic rights—likely influenced the probusiness Court to cabin the meaning of the Amendment's provisions.¹²⁶

The Court's opinion in *Slaughter-House* thus demonstrates that language possesses an ineluctable capacity to escape both theory and intent, as de Man argued. The terms of the Citizenship Clause of the Fourteenth Amendment were undoubtedly aimed at granting a meaningful equality, accompanied by substantive rights, to African-Americans. Yet, in *Slaughter-House* the language presented itself in a new and frightening context—both in the sense that the suit was brought by white litigants seeking economic equality, and in the sense that the failures and tensions of Reconstruction had become manifest. Indeed, it is, first, the very potential for using the Fourteenth Amendment to protect a broader swath of the population, including whites clamoring for economic protection, which demonstrates this quality of language. While the notion that the rights proclaimed by the Civil War Amendments might extend beyond blacks to all members of society might not have been entirely foreign to the Amendment's framers,¹²⁷ its presentation here may well have been unanticipated. The combination of “the free labor ideology of the time,”¹²⁸ which led the butchers to present their case in terms of a fundamental right to exercise one's trade, and increasing concern about claims of the have-nots to economic citizenship, might have made the country look very different in 1872 than it had in 1868.

Whether such historical factors completely explain the Court's decision or not, the fact remains that the inherent openness of language, due to its dependency on both context and iterability, make the *Slaughter-House* Court's reading possible. The use of the words “privileges and immunities,” which was likely intended to incorporate guarantees of fundamental rights already identified under Article IV, Section 1 against the states, as well as the use of the term “citizenship” to confer both state citizenship and national

125. See, e.g., ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 524–31 (1988) (explaining how the depression, labor movement, and electoral realignment of 1874 “strongly affected prevailing attitudes toward Reconstruction”); see also FRIEDMAN, *supra* note 16, at 146–49 (noting the almost universally positive reception of the decision in the *Slaughter-House Cases*).

126. FONER, *supra* note 125, at 529–30.

127. See, e.g., ELY, *supra* note 119, at 23–24 (“Abolitionist concerns had broadened over time . . . from a narrow focus on the rights of blacks to a broader occupation with the civil rights and liberties of everyone. The various clauses of the Fourteenth Amendment reflect that development.”).

128. Patrick Cronin, *The Historical Origins of the Conflict Between Copyright and the First Amendment*, 35 COLUM. J.L. & ARTS 221, 245 (2012).

citizenship on African-Americans, was instead used to demonstrate that there must be some distinction between national and state citizenship, enabling the majority to minimize the content of the former.¹²⁹

Though this familiar example of constitutional interpretation has often been understood as a willful misreading, it is in the de Manian sense simply an illustration of reading itself.¹³⁰ The framers' language escapes not only the original intent of those framers but also any theory of reading. Neither originalism nor any other attempt to fix the meaning of constitutional text is of much use in the face of the malleability of language and its ability to take on new meanings in varying contexts. Or, put differently, it is impossible to accept that any constitutional theory provides definitive answers to interpretive difficulties unless one simply refuses to read. To see certainty anywhere in the constitutional text is simply to refuse to read it.

B. The Meaning of the Religion Clauses

The First Amendment to the Constitution proclaims that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." ¹³¹ Since the Supreme Court and lower courts began enforcing the religion clauses in the first half of the twentieth century, debates have swirled around issues such as what it means to "establish" religion and when a law can be said to "prohibit" the exercise of religion.¹³² The term "establishment of religion," and its changing shape over the decades, has arguably been an important undercurrent in the shifting doctrinal landscape.

The word "religion" is notoriously difficult to define, and the Supreme Court has largely dodged responsibility for attaching a definitive meaning to the term in the constitutional context.¹³³ But setting aside philosophical debates about what does and does not constitute a belief system that can properly be characterized as a "religion," the term in its constitutional dimension unquestionably has, and has long had, a significant cultural and

129. *Slaughter-House*, 83 U.S. at 74–78.

130. I emphasize here that this example is merely an illustration, and not a definitive proof, of de Man's theory. A meaningful attempt to demonstrate the truth of the theory on empirical rather than conceptual grounds would require an exhaustive study of constitutional interpretation, certainly one beyond the scope of this Article.

131. U.S. CONST. amend. I.

132. See, e.g., *McCreary Cnty., Ky. v. ACLU*, 545 U.S. 844, 874–75 (2005) ("The First Amendment contains no textual definition of 'establishment,' and the term is certainly not self-defining . . . There is no simple answer, for more than one reason."); *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 n.21 (1947) (collecting cases elaborating on the meaning and scope of the religion clauses).

133. See *Welsh v. United States*, 398 U.S. 333, 335 (1970) (avoiding constitutional questions by declining to articulate a definition of religion for purposes of constitutional claims); *United States v. Seeger*, 380 U.S. 163, 188 (1965) (Douglas, J., concurring) (suggesting that the Court construed the term "Supreme Being" in the conscientious objector statute broadly so as to avoid constitutional issues (internal quotation marks omitted)).

political dimension. Regardless of what religion means in a technical sense, the language and practices that appear religious, as opposed to merely cultural, have changed over time and in doing so have reflected cultural and political realities on the ground.

*Abington School District v. Schempp*¹³⁴ is one example. In that challenge to the then-common practice of reading Bible verses, without commentary, in the public schools, one of the principal arguments in the case was that the Bible was not a sectarian document and that the reading of verses did not constitute a form of religious instruction—at most, it was merely “moral” education.¹³⁵ Of course, as many commentators have observed, the practice of Bible reading may not have seemed particularly religious, or certainly not sectarian, to many Protestants at the time.¹³⁶ The schools, which had, after all, originated as places of Christian learning, retained a sort of pan-Protestant character well into the twentieth century.¹³⁷ The practice of reading unadorned verses from the King James Bible was seen as an accommodation of the various Protestant denominations that were represented in the school, but it was of course deeply alienating to Catholics and Jews, in particular, whose numbers were significant and growing.¹³⁸ The Bible reading was experienced as a sectarian act by members of those groups, because the Jewish religion does not recognize the New Testament and Catholics use a different version of the Bible—the Douay.¹³⁹

It would be hard to come up with a clearer example of a situation where the changing social context—here, the increased religious diversity in American society—changed the understanding of a particular constitutional concept. The Bible reading could be recognized as a sectarian religious practice, and therefore an unconstitutional establishment of religion, only in a culture where it was no longer accepted as universal. Of course, religious diversity did not suddenly arise in the twentieth century in the United States, and indeed fierce battles were fought over sectarian religious practices in the nineteenth century as well.¹⁴⁰ But until roughly the era of *Schempp* and its predecessor, *Engel v. Vitale*,¹⁴¹ it would be fair to suggest that, for most

134. 374 U.S. 203 (1963).

135. STEPHEN D. SOLOMON, *ELLERY'S PROTEST: HOW ONE YOUNG MAN DEFIED TRADITION & SPARKED THE BATTLE OVER SCHOOL PRAYER* 163–66, 185–87 (2007).

136. *See, e.g., id.* at 130–31 (citing RICHARD B. DIERENFIELD, *RELIGION IN AMERICAN PUBLIC SCHOOLS* 50–51 (1962)) (suggesting that Bible reading was “often part of a broader devotional service, typically short in duration and held at the beginning of the day”); John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 309–10 (2001) (observing a growing public secularism, including among Protestants).

137. *See, e.g.,* SOLOMON, *supra* note 135, at 99–101, 108.

138. *Id.* at 113–14; *see also* Jeffries & Ryan, *supra* note 136, at 279.

139. SOLOMON, *supra* note 135, at 63.

140. *Id.* at 115–31; Jeffries & Ryan, *supra* note 136, at 299–305.

141. 370 U.S. 421 (1962).

Americans, Bible reading simply faded into the background political and social culture.¹⁴²

To take an even more contemporary example, consider the constitutional conundrum of so-called “ceremonial deism”—official religious references that are so familiar and deeply rooted in American tradition that they are often considered to be more patriotic than sectarian in nature.¹⁴³ Common examples include the national motto “In God We Trust,” the words “under God” in the Pledge of Allegiance, and swearing “so help me God” for judicial and other official proceedings.¹⁴⁴ It seems reasonable to think that the only thing standing between invalidation of such practices under *Schempp* and the currently prevailing assumption that such phrases are generally constitutional¹⁴⁵ is the background religious culture against which they are read. As at least one commentator has pointed out, if the name “Allah” were substituted for “God,” it would be hard to see these phrases as similarly innocuous, nonsectarian, and nonreligious.¹⁴⁶ If the United States came to be dominated by citizens of nonmonotheistic religions, it seems difficult to imagine that these words would still be read as fundamentally nonreligious, their historical pedigree notwithstanding.

At the same time, the inevitable openness of what constitutes an “establishment of religion” has opened up the term to attacks from the opposite direction, creating the possibility of claims that driving religious speech and practice out of the public square has established a “religion” of secularism.¹⁴⁷ Though still quite tenuous under Establishment Clause doctrine, it is easy to see how this understanding of religion could arise from a context in which a Christian majority experiences the sudden absence of its discourse from the public square, seemingly replaced by an equally comprehensive doctrine.¹⁴⁸ The term “religion” is thus capable of expansion

142. See, e.g., Jeffries & Ryan, *supra* note 136, at 299 (asserting that public education in America was, from the beginning, “religious but nonsectarian”).

143. See, e.g., Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083, 2094–95 (1996) (defining ceremonial deism).

144. See *id.* at 2091–92 (giving examples of ceremonial deism).

145. See, e.g., *id.* at 2091–94 (describing numerous Supreme Court opinions in which the Justices have assumed, without deciding, that various types of ceremonial deism were constitutional).

146. See *id.* at 2084–85.

147. See, e.g., *McGinley v. Houston*, 361 F.3d 1328, 1330–31, 1333 (11th Cir. 2004) (*per curiam*) (affirming the dismissal of a suit asserting that the Alabama Supreme Court’s removal of the Ten Commandments from a state building unconstitutionally established a religion of “nontheistic beliefs[.]”); *Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 519, 524 (9th Cir. 1994) (affirming the dismissal of a suit claiming that evolutionism is a “religious belief system” that public school teachers cannot be required to teach).

148. Cf. Frederick Mark Gedicks, *Public Life and Hostility to Religion*, 78 VA. L. REV. 671, 672–74 (1992) (discussing the “strongly felt perception” that religious viewpoints are systematically marginalized relative to secular ones in American public life and asserting that “many religious people clearly feel excluded and alienated from public life”).

to the point where it can mean both belief in a Supreme Being and the absence of all such belief.

This brief illustration of the difficulties associated with defining “religion” and religious “establishment” tracks the theory outlined in Part II in two ways. First, and most basically, it shows that we cannot really make sense of the term “establishment of religion”—at least not as a term with legal force and meaning—without drawing on the broader religious, political, and cultural context. Indeed, “religion” itself is a word that is undeniably infused with cultural significance—it is a fact of cultural and social life. And it seems beyond dispute that, with respect to the religion clauses, the changing cultural context has changed the understanding of those terms. (This is not to say that their meaning is, or ever was, uncontested, of course. It is precisely a feature of meaning’s context dependency that meaning is highly unstable.) Second, the possibility of changing meanings undermines the possibility of theoretical coherence. Though an originalist might argue that practices such as ceremonial deism do not constitute “religious” practices or an “establishment of religion” according to the original understanding of those terms, it is exceedingly difficult to see the relevance of that conclusion today, in light of the religious diversity that exists in the United States. To assert that invocations of God would not have been controversial or would not have struck the Framers as religious tells us very little about what is religious or sectarian when the Constitution is read in the contemporary context. Any attempt to explain the acceptability of such religious references in the eighteenth century must be able to acknowledge the radically different religious landscape of today’s society and explain why the acceptability of such references in the eighteenth century is relevant today.

IV. Implications

The problem of reading and the concomitant failure of constitutional theory ultimately create a dilemma that reading itself cannot get us out of. What, then, can be done? As stated earlier, this Article is sympathetic to the view that, since the mutual influence and interaction of law and politics is inevitable, the only option is simply to embrace it. The inherent instability of language should make judges suspicious of the value of any constitutional theory but keenly attentive to the need to *read* the text. Though reading does not lead to certainty, it perhaps leads to an interpretive openness that is valuable in making sense of an enduring document in an ever-changing society.

To the extent that this conception of constitutional theory appears to undermine its strength and validity, I would like to suggest that this should not necessarily be a source of anxiety, as it has apparently been for at least some courts and commentators alike.¹⁴⁹ If politics, in the broad sense of public affairs or “facts on the ground,” inevitably helps to shape meaning, then there is no reason to bemoan or attempt to avoid this state of affairs. This perspective implies that recognition of the social context in which interpretation occurs is not only *not* illegitimate; it is necessary and desirable, even if it does not always lead judges to reach results that may be considered desirable from the perspective of all observers. Indeed, the theory of meaning presented here clearly eschews the possibility of single, correct legal answers.

This perspective also implies that judges should not be constitutional theorists.¹⁵⁰ They should, above all, be close readers of texts. For this reason, they are trained to read and interpret legal documents. Moreover, though inevitably influenced by their own personal backgrounds and the culture that surrounds them, they are at least somewhat constrained by the text at hand. In no sense does postmodern theory deny the reality of such a constraint. Indeed, judges’ ability to independently investigate the case at hand is intentionally limited (especially for appellate judges)—they lack the staff and the wide-ranging subpoena power of legislatures. Their primary tools are access to mounds of precedent and the assistance of recently minted law graduates, themselves purportedly expert readers. It is, thus, both an assertion of judicial supremacy and a limitation on that branch to say, simply, that “it is emphatically the province and duty of the judicial department to say what the law is.”¹⁵¹

It is true, of course, that this understanding of the judge’s role with respect to reading privileges that reading over those of other constitutional actors—democratically elected officials as well as the people themselves. In my understanding here, judges are, like literary critics, a species of expert readers, and they do occupy a special position with respect to the interpretive undertaking. Their readings are influenced by the social and political context that they inhabit, as well as their personal biases. At the same time, they are in some measure constrained by text and precedent and indoctrinated with the view that law must consist of something other than raw preference.

149. See *supra* text accompanying notes 2–9.

150. Judge Richard Posner makes the argument that judges should not engage in moral theory but instead should be pragmatists in *Problematics*, *supra* note 40, at 1645.

151. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Indeed, the notion that the judiciary’s duty is “to say what the law is” seems itself to partake of two possible meanings of the word “say”—one descriptive, one performative. Does the judiciary “say” what the law is as if it is just reading some unseen script that is determinate and fixed, but only revealed upon careful study (like one might “say” the Pledge of Allegiance)? Or does it “say” what the law is by imposing its “say-so”—that is, by declaring or effectuating what the law is (as one might say, or pronounce, the meaning of a particular constitutional provision)?

Though no reader is an ideal or perfect reader—such a creature hardly seems possible—there need not be elitism in simply asserting that judges are uniquely well-trained readers of particular kinds of texts.

Reading is, after all, a skill—just ask any literary critic.