A Constitutional Language Game: An Unlikely Fusion Between Originalism and Wittgenstein

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INTRODUCTION

Debates over judicial philosophies of interpretation are not new, but the recent changes in the makeup of the Supreme Court have thrust these debates even further into the public eye. Debates over originalism in particular are more alive than ever. These debates raise issues that are especially difficult to navigate because they are not exclusively legal in nature—they involve philosophy, linguistics, sociology, and history, requiring judges and professors to step outside their legal wheelhouses. One such example involves the attempts of scholars to argue against originalism by marshalling the philosophical ideas of Ludwig Wittgenstein. These scholars have argued that the nature of language is fundamentally incompatible with originalism as a theory of interpretation.[1] Critics broadly argue that Wittgenstein's arguments against metaphysical philosophy apply similarly to originalism, rendering it nonsensical.[2] More specifically, they argue that Wittgenstein's conception of language illustrates how any attempt to ground the meaning of constitutional language in "an ontologically independent, objective Constitution"[3] leads only to endless confusion and must be transcended by

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1. Daniel S. Goldberg, *I Do Not Think It Means What You Think It Means: How Kripke and Wittgenstein's Analysis on Rule Following Undermines Justice Scalia's Textualism and Originalism*, 54 CLEV. ST. L. REV. 273, 274 (2006); André LeDuc, *The Anti-Foundational Challenge to the Philosophical Premises of the Debate over Originalism*, 119 PENN ST. L. REV. 131, 189 (2014); Dennis Patterson, *Wittgenstein and Constitutional Theory*, 72 TEX. L. REV. 1837, 1837 (1994); Ian C. Bartrum, *Wittgenstein's Poker: Contested Constitutionalism and the Limits of Public Meaning Originalism*, 10 WASH. U. JURIS. REV. 29, 34 (2017).

2. *See generally* Patterson, *supra* note 1.

3. *See* LeDuc, *supra* note 1, at 131.

the recognition that our constitutional practices or modalities alone, none of which can be more preeminent than the others, give meaning to our law-statements.[4] In a similar vein, some critics suggest that Wittgenstein's notion of a "language game" renders impossible any attempt to fix meaning at a particular point in time, thereby undermining modern originalism's emphasis on original public meaning.[5] A few scholars have responded to these arguments, yet these responses have ranged from mere dismissals of Wittgenstein's relevance to firm but unelaborated disagreements.[6]

This Comment argues that these criticisms are not decisive and, in some cases, rest on misunderstandings of Wittgenstein and of originalism. To the broader claim, it asserts that critics err in crudely applying Wittgenstein's critique of metaphysics to originalism, which is importantly dissimilar. It then responds to the related argument disputing originalism's preeminence among our constitutional modalities. It does this by drawing a distinction between the purposes of legal language and other forms of communication—a distinction that is supported by Wittgenstein's philosophy and ignored by the critics. Then, to further support this point and round out the rebuttals, it connects Wittgenstein's conception of a language game to H.L.A. Hart's notion of "social facts,"[7] arguing that the continued preeminence of originalism as a Hartian social fact renders possible the continued playing of one consistent constitutional language game. Before engaging in these arguments, however, this Comment will begin by providing the context for the debate and then explaining the portions of Wittgenstein's philosophy that are relevant to the thesis and to the study of law more broadly.

I. WITTGENSTEIN AND THE CRITICS

Section I.A frames the debate by showing how originalism's shift from "original intent" to "original public meaning" led to Wittgenstein-inspired criticisms; Section I.B will develop the relevant background Wittgensteinian

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4. *Id.*

5. *See* Bartrum, *supra* note 1, at 38.

6. Hanjo Hamann & Friedemann Vogel, *Evidence-Based Jurisprudence Meets Legal Linguistics—Unlikely Blends Made in Germany*, 2017 BYU L. REV. 1473, 1489; *see also* Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243, 1264–65 (2019); Scott A. Boykin, *Original-Intent Originalism: A Reformulation and Defense*, 60 WASHBURN L.J. 245, 249–50 (2021).

7. H.L.A. HART, THE CONCEPT OF LAW 112 (2d ed. 1961).

principles; and Section I.C will present in detail the Wittgensteinian criticisms of originalism.

A. The Context of the Debate

Originalism has responded to many objections over the years, growing and refining itself in the process. The term "originalism" in its most simple form refers to a cluster of related theories about how our laws should be understood.[8] The core tenets uniting these theories are that the "meaning" of legal language is fixed at the moment in which a legal text is enacted and that *that* meaning is legally binding into the future unless the legal text is lawfully changed.[9] This theory contrasts another group of theories that are similarly connected to each other by a different tenet—namely, that the meaning of legal language is *not* controlled by the meaning it had in the past. Rather, the meaning can be interpreted in new ways to better accommodate the changing needs of society, or more simply that the original meaning of enacted legal texts does not control the content of our law. True, most lawsuits do not raise issues that implicate this theoretical disagreement. Many of the most culturally divisive cases, however—the ones that make headlines and inspire protests—often drag these seemingly abstruse theoretical differences into the light.[10]

In the past, originalists commonly viewed a text's "meaning" as consistent with the intent of the legislators or, in the constitutional context, of the Framers who drafted it. Opponents of originalism raised several powerful objections to this theory, and so originalist academics and judges no longer

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8. Lawrence B. Solum, *What Is Originalism? The Evolution of Contemporary Originalist Theory*, *in* THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION 16 (Grant Huscroft & Bradley W. Miller eds., 2011).

9. *Id.* at 1–2.

10. Roper v. Simmons, 543 U.S. 551, 626 (2005) (showcasing disagreement over whether to interpret the Eighth Amendment's phrase "cruel and unusual punishment" as it was originally intended and understood or as it would be understood in 2005); *see also* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 371–74 (2022) (Breyer, J., dissenting) (displaying a disagreement over whether the Fourteenth Amendment's Due Process Clause contains a right to privacy, and thus abortion, that hinges on whether the Amendment is interpreted in accordance with original public meaning or not); Michael Waldman, *Originalism Run Amok at the Supreme Court*, BRENNAN CTR. FOR JUST. (June 28, 2022), https://www.brennancenter.org/our-work/analysis-opinion/originalism-run-amok-supreme-court [https://perma.cc/T9F3-4LC5] (stating that in the wake of the decisions in *Bruen* and *Dobbs*, originalism as a constitutional theory is a "threat to modern life").

commonly advocate for this "intent originalism."[11] The dominant version of contemporary originalism is often called "original public meaning originalism," and it will be what is generally referred to throughout this paper as "originalism." Originalism holds that legal language "means" what it was commonly understood to mean by the relevant political community that adopted that language. In the case of the Constitution, the common understanding of the language of the ratifying public controls. In the words of Justice Scalia:

> The theory of originalism treats a constitution like a statute, and gives it the meaning that its words were understood to bear at the time they were promulgated. You will sometimes hear it described as the theory of original intent. You will never hear me refer to original intent, because as I say I am first of all a textualist, and secondly an originalist. If you are a textualist, you don't care about the intent, and I don't care if the framers of the Constitution had some secret meaning in mind when they adopted its words. I take the words as they were promulgated to the people of the United States, and what is the fairly understood meaning of those words.[12]

Public meaning originalism improves upon intent originalism in several ways. Firstly, it presents a more democratic view of legal language, one that relies on the common understanding of a community rather than the secret intentions of legislators. As others have pointed out, the idea of being able to discern meaning through private intent may make sense in the context of ordinary communication between individuals, but such an approach seems to break down when considered in the context of group promulgation of

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11. The move away from "original intent" is outside the scope of this Comment, but much of it was in response to the influence of Paul Brest's *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 214 (1980), and H. Jefferson Powell's *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 888 (1985), which, respectively, pointed out the difficulties in (1) ascertaining "collective intent" from a group of people such as the Founders and (2) trying to reconcile original intent originalism with the Founders who may not have been originalists themselves in some cases.

12. Antonin Scalia, U.S. Sup. Ct. Just., Judicial Adherence to the Text of Our Basic Law: A Theory of Constitution Interpretation, Speech at the Catholic University of America (Oct. 18, 1996) (transcript available at https://www.proconservative.net/PCVol5Is225ScaliaTheory ConstlInterpretation.shtml [https://perma.cc/M7Y3-8HQH]). The difference between "textualism" and "originalism" is itself an area of debate. *See, e.g.*, ILAN WURMAN, A DEBT AGAINST THE LIVING: AN INTRODUCTION TO ORIGINALISM 129–33 (2017) (arguing that textualism and originalism are functionally equivalent).

legislation.[13] For example, if all fifty-five delegates at the Constitutional Convention had intended different meanings for a specific provision in the Constitution, how could one determine the overall "intent" and, therefore, meaning? This notion that ordinary communication between individuals differs in important ways from legal communication will reemerge in this paper.[14] Moreover, the idea that an individual's private intent can produce linguistic meaning is itself philosophically dubious, but this argument will also be developed in more depth in the following section.[15] While the shift to original public meaning has improved originalism's prospects greatly, it has also sparked several new debates, including the Wittgensteinian one that is the focus of this Comment.[16] The following Section explores the fundamentals of Wittgenstein's philosophy before turning more specifically to the Wittgensteinian critique in Section I.C.

B. Wittgenstein

Ludwig Wittgenstein was an Austrian philosopher who died in 1951 in Cambridge, United Kingdom and never wrote about American constitutionalism, nor even about law more generally. Despite this fact, his influence on contemporary western philosophy was and remains so great that many legal scholars attempt to apply his ideas to shed light on issues of constitutional interpretation.[17] For the prestige of his name alone, then, it is worthwhile to explore the implications of his philosophy on constitutional law. But, more importantly, as this Comment will demonstrate, the better one

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13. *See* WURMAN, *supra* note 12, at 30. *See generally* Gary S. Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823 (1997); BRIAN H. BIX, JURISPRUDENCE THEORY AND CONTEXT 165–66 (8th ed. 2019).

14. *See infra* Section II.A.

15. *See infra* Section I.B.

16. Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 65 FORDHAM L. REV. 1249, 1255 (1997); Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 620–21 (1999); *see also* Christopher R. Green, *Originalism and the Sense-Reference Distinction*, 50 ST. LOUIS U. L.J. 555, 560 (2006) (discussing how some of the challenges caused by the shift to original public meaning can be remedied by adopting the famous sense-reference distinction from the philosophy of language).

17. Many of the articles and books cited in this Comment that either reference or directly engage with Wittgenstein demonstrate this. *See, e.g.*, *supra* notes 1, 6; BIX, *supra* note 13; PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 123–24 (1982); Christian Zapf & Eben Moglen, *Linguistic Indeterminacy and the Rule of Law: On the Perils of Misunderstanding Wittgenstein*, 84 GEO. L. J. 485 (1995). But, as will be shown, even where Wittgenstein is not directly cited his influence is evident, making his method relevant to the study of law.

understands Wittgenstein, the better one can navigate many of the thorniest problems in contemporary jurisprudential philosophy.

Wittgenstein's philosophy can be divided into his early and later life. His early philosophy is most clearly developed in the only work ever published in his lifetime: the *Tractatus Logico-Philosophicus*.[18] In it, he shook the philosophical world with his declaration that he believed himself "to have found, on all essential points, the final solution of the problems [of philosophy]."[19] Decades later, he came to believe his declaration was somewhat premature, and he developed a new system of philosophy, most completely expressed in a posthumously published text known as *Philosophische Unterschungen* (*Philosophical Investigations*).[20] While there are enormous differences between Wittgenstein's early and later philosophy, there are also many similarities. Although this Comment will mostly rely on his later work, it will make occasional reference to the *Tractatus* when useful and consistent with the relevant themes.

Wittgenstein, like many of us, was vexed by the endless confusions in philosophy. His work is an audacious attempt to resolve all these problems and paradoxes of philosophy in one fell swoop. He aims to do so by pointing out the limits of our language.[21]

For example, in Plato's *Theaetetus*, Plato asks his interlocutor, "What is knowledge?" and no final answer seems possible.[22] In each attempt to define such a term, one must present new terms, each in need of their own definitions, causing an infinite regression of further analysis.[23] Wittgenstein's project is to show how all such questions are based around a series of errors that we commit as a result of not understanding the nature of our language. His method, which he views as the only correct method of philosophy, is merely to use philosophy as a sort of "therapy" to cure us of our linguistic confusions, thereby restoring us to clarity and common sense.[24]

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18. LUDWIG WITTGENSTEIN, TRACTATUS LOGICO-PHILOSOPHICUS (B.F. McGuinness et al. eds., D.F. Pears & B.F. McGuinness trans., Routledge & Kegan Paul rev. ed. 1974) (1921).

19. *Id.* at 4.

20. *See generally* LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (G.E.M. Anscombe et al. trans., Wiley-Blackwell rev. 4th ed. 2009) (1953).

21. WITTGENSTEIN, *supra* note 18, at 4; *see also* P.M.S. Hacker, *Was He Trying to Whistle It?*, *in* THE NEW WITTGENSTEIN 353, 354 (Alice Crary & Rupert Read eds., 2000).

22. PLATO, THEAETETUS 69 (Benjamin Jowett trans., Infomotions, Inc. 2000) (c. 360 B.C.). Wittgenstein also references this question in his *Blue Book*. LUDWIG WITTGENSTEIN, THE BLUE AND BROWN BOOKS 20 (Harper Torchbooks ed. 1965) (1958).

23. Wittgenstein first discusses this issue near the beginning of his PHILOSOPHICAL INVESTIGATIONS. WITTGENSTEIN, *supra* note 20, §§ 28–30.

24. *Id.* § 109.

The nature of our language, Wittgenstein argues, is that it only "means" anything insofar as it has a use.[25] That use, he further argues, is employed according to certain rules of a language game, a term of art that will be explained in more depth below.[26] That language game has a point.[27] This position is often called "pragmatic" or "anti-representational," because it opposes the more common, traditional "representational" way of viewing language.[28]

According to the representational view, language *represents* reality—and "meaning" is an internal, mental process by which people connect these representational symbols to reality. For example, when a man says, "I love ribeye steaks," the symbols he uses each represent something *out there*, each corresponding to reality. By "love," he *means* some type of act or feeling, and he makes this "meaning" by some internal, psychological act of directed attention from symbol to thing. Wittgenstein argues that this view is incoherent and fails to describe how language actually works.[29]

Firstly, a representationalist view of language appears incapable of dealing with the complexity of language. For example, in the sentence, "This number, 'five,' is a prime number," what does the word "prime" represent? Moreover, what do grammatical connectors such as "is" or "a" represent? A simple, representationalist account does not appear to have good answers. Secondly, such an account struggles to contend with the sheer flexibility and variety of our language.[30] For example, the word "right" may mean a direction, various types of human or legal rights, or something utterly different, such as when we say that something is "right over there." Surveying this complexity, Wittgenstein presents a famous thought experiment to set up his conception of meaning as mere use:

> Now think of the following use of language: I send someone shopping. I give him a slip of paper marked "five red apples". He takes the slip to the shopkeeper, who opens the drawer marked "apples"; then he looks up the word "red" in a chart and finds a colour sample next to it; then he says the series of elementary number-words—I assume that he knows them by heart—up to the

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25. *Id.* § 43.

26. *Id.* §§ 23, 202.

27. *Id.* §§ 562–570. This "point" is an important component of the Wittgensteinian defense of originalism.

28. LeDuc, *supra* note 1, at 189.

29. WITTGENSTEIN, *supra* note 20, § 693 ("And nothing is more wrong-headed than calling meaning a mental activity! Unless, that is, one is setting out to produce confusion.").

30. *Id.* §§ 11–12, 23.

> word "five", and for each number-word he takes an apple of the same colour as the sample out of the drawer. It is in this and similar ways that one operates with words. But how does he know where and how he is to look up the word 'red' and what he is to do with the word 'five'?" Well, I assume that he *acts* as I have described. Explanations come to an end somewhere.But what is the meaning of the word "five"? No such thing was in question here, only how the word "five" is used.[31]

In this brief thought experiment, Wittgenstein asks us to imagine a situation where the question of "meaning" appears moot. All parties to this exchange could be entirely ignorant of any of the theoretical "meanings" of the words "five red apples," and yet the communication is no worse off. This is a simple example, but Wittgenstein argues that all our communications proceed along the same lines, where the "meaning" of words reduces to how we use them. There is, effectively, no extra, *real* meaning behind the curtain of use.

Recognizing that meaning is tantamount to use, we must go out and look at such use to understand language.[32] Once we do this, over and over again, we will "get it," and any Socratic inquiry as to "real meaning" demonstrates only our confusion—that we have become "bewitched" by the form of our language into viewing things representationally.[33]

Even if "use" is the correct way to understand "meaning," the problem of complexity still lurks in the background. There are still very many different uses of our language. To solve this problem, Wittgenstein introduces the concept of the *Sprachspiel*, or "language-game."[34] Although never strictly defined—indeed, any attempt to offer such a "definition" would be philosophically inconsistent—a language game appears to be Wittgenstein's name for any sort of situation or context in which language is put to particular use to achieve certain ends.[35] It could be something simple and mundane, such as the earlier shopkeeper example, or it could be something complex and interesting, like joke-telling or constitutional law.[36] Just like normal games, such as chess or Brazilian jiu-jitsu, these language games come replete with certain rules, and they all share certain family resemblances with

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31. *Id.* § 1.
32. *Id.* §§ 66, 340 ("One cannot guess how a word functions.").
33. *Id.* § 109 ("Philosophy is a struggle against the bewitchment of our understanding by the resources of our language.").
34. *Id.* § 7.
35. *Id.* §§ 7, 19, 23.
36. *Id.* § 23 (providing a non-exhaustive list of language games).

one another, although it is impossible to identify any single common factor that unites them.[37] To play any language game, you must follow the rules. This is how you demonstrate to others that you do, in fact, understand them. For example, if you didn't understand the meaning of hopscotch, you wouldn't hop across the squares in the right way.

If you are not playing in accordance with the rules, you are not speaking the language.[38] These rules are agreed upon, but not necessarily formally. No councils were convened, nor were any polls taken. The rules of a language game arise as a result of contingent facts about the world in which we live—our era, goals, needs, biology, and culture. Wittgenstein writes that "to imagine a language means to imagine a form of life," and that "the word 'language-*game*' is used to emphasize the fact that the *speaking* of language is part of an activity, or of a form of life."[39] For example, in *Investigations*, Wittgenstein presents the following scenario: "Someone says to me, 'Show the children a game.' I teach them gambling with dice, and the other says, 'I didn't mean that sort of game'."[40] Given what is known about the parent-child relationship, it is clear that the word "game" in this context—under the rules of this language game—could not include gambling. No parent would *use* the word in this way.

This conception of meaning—that it boils down to use in accordance with rules of a language game commonly practiced and agreed to by the social practices of the community—suggests a degree of flexibility and relativity that might smack of relativism and make a run-of-the-mill originalist start to sweat. But, as will be made clear in Section II.B, this flexibility is mostly exaggerated by the opponents of originalism.

Furthermore, after developing his notion of rule-following, Wittgenstein states that for these language games to function, they cannot be private signs that refer to "what only the speaker can know—to his immediate private sensations,"[41] but rather stand "in need of a justification which everybody

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37. *See id.* § 67 (discussing notion of "family resemblances" and how they unite language games).

38. What it means to follow a rule is a hotly debated issue, which I do not have the time to fully explore here. For further reading regarding this debate, compare SAUL A. KRIPKE, WITTGENSTEIN ON RULES AND PRIVATE LANGUAGE: AN ELEMENTARY EXPOSITION (1982), for a skeptical and relativist view, with G.P. Baker & P.M.S. Hacker, *On Misunderstanding Wittgenstein: Kripke's Private Language Argument*, 58 SYNTHESE 407 (1984), for an argument that Wittgenstein did not view rule-following as a fundamentally arbitrary activity.

39. WITTGENSTEIN, *supra* note 20, §§ 19, 23.

40. *Id.* § 70.

41. *Id.* § 243.

understands."[42] This has come to be known as his argument against the notion of private language. He supports this argument with a vivid thought experiment:

> Suppose that everyone had a box with something in it which we call a "beetle[.]" No one can ever look into anyone else's box, and everyone says he knows what a beetle is only by looking at *his* beetle. Here it would be quite possible for everyone to have something different in his box. One might even imagine such a thing constantly changing. But what if these people's word "beetle" had a use nonetheless? If so, it would not be as the name of a thing. The thing in the box doesn't belong to the language-game at all; not even as a *Something*: for the box might even be empty. No, one can 'divide through' by the thing in the box; it cancels out, whatever it is.
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> That is to say, if we construe the grammar of the expression of sensation on the model of 'object and name[,]' the object drops out of consideration as irrelevant.[43]

Although somewhat cryptic, the thought experiment appears to support his statements about private language. In this situation, a group of box-carrying people can communicate with one another using the word "beetle." For example, A asks B, "What's in your box?," to which B responds, "A beetle, and yours?," to which A then responds, "Ah yes, I too have a beetle—don't you just love them?" Here, A and B communicate freely, and the secret nature of the inside of their boxes does not affect this. This argument coheres with modern originalism's move away from private Framer intent toward public understanding and provides an early example of its compatibility with Wittgensteinian thought.[44]

In concluding this section, it's important to understand the legal implications of Wittgenstein's use-meaning view of language and philosophy more generally. To do so, I will first discuss a recent Supreme Court case that shows the Wittgensteinian method in action.

Summarizing much of what has been said above, Wittgenstein's linguistic method broadly emphasizes the importance of context. Where courts may generally *consider* context when trying to discern the meaning of a word, Wittgenstein teaches that a word has no meaning *at all* without context—that

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42. *Id.* § 261; *see id.* §§ 269–272.

43. *Id.* § 293.

44. *Id.* §§ 271–315 (further exploring justifications for the private language argument by discussing use of the word "pain").

the meaning of the word *is* the context in which it is used. In the recent case of *Biden v. Nebraska*, Justice Barrett wrote a concurrence that was eerily reminiscent of Wittgenstein's above gambling thought experiment.[45] While the content of the concurrence is irrelevant, a minor exposition is necessary to illustrate the Wittgensteinian methodology. In her concurrence, Justice Barrett argues that the "major questions doctrine" should be understood as a purely linguistic canon, which judges merely use "to emphasize the importance of *context* when a court interprets a delegation to an administrative agency" thus making it merely "a tool for discerning—not departing from—the text's most natural interpretation."[46] To support her argument, she analogizes to a communication between a parent and a babysitter.[47] She writes:

> Consider a parent who hires a babysitter to watch her young children over the weekend. As she walks out the door, the parent hands the babysitter her credit card and says: "Make sure the kids have fun." Emboldened, the babysitter takes the kids on a road trip to an amusement park, where they spend two days on rollercoasters and one night in a hotel. Was the babysitter's trip consistent with the parent's instruction? Maybe in a literal sense, because the instruction was open-ended. But was the trip consistent with a *reasonable* understanding of the parent's instruction? Highly doubtful. In the normal course, permission to spend money on fun authorizes a babysitter to take children to the local ice cream parlor or movie theater, not on a multiday excursion to an out-of-town amusement park.[48]

The demand of the major questions doctrine that Congress clearly communicate its delegation is thus justified, according to Justice Barrett, not by any substantive constitutional concerns—e.g., a desire to protect the separation of powers—but by the descriptive fact that Congress *typically* does not use vague language to assign agencies power to make "decisions of vast 'economic and political significance.'"[49] In other words, it is not something that we would expect given what we know about how the Congressional language game is played. Given the stark similarities between the two thought experiments, it is reasonable to suspect that Justice Barrett is an avid student of Wittgenstein. But regardless of the Justice's philosophical tastes, her

45. 600 U.S. 477, 507 (2023) (Barrett, J., concurring).
46. *Id.* at 508.
47. *Id.* at 513.
48. *Id.* at 513–14.
49. *Id.* at 514 (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

analysis is thoroughly Wittgensteinian, and, if the author of this Comment may say so, quite persuasive.[50] This single recent example shows how Wittgenstein's philosophy remains relevant and useful to understanding the Court's more philosophical jurisprudential debates, here by emphasizing the deep relationship between context and meaning.[51]

For most purposes, however, the difference between the Wittgensteinian conception of language and the traditional, representational one almost never matters. In daily life, people go along their merry way *using* language for normal purposes. The babysitter would never think that "game" could mean "high-stakes poker at the gentlemen's club." The trouble only arises when they engage in philosophy—i.e., when they use language to theorize about things that transcend the limits of language. It is *then* when their representational conceptions bewitch them into thinking there is something more to the word "justice" than how they use it in their lives. Just as in the example of the beetle, people *use* the word "justice" in a fine and dandy way without needing any knowledge of its *real* identity. In the *Tractatus*, Wittgenstein referred to this practice as attempting to *say* what can only be *shown*, and he attributed to this perennial error all the problems of philosophy.[52] To cure this ailment, Wittgenstein enters with his therapeutic method of philosophy to straighten things out and show people that their confusions are predicated upon not seeing how such topics transcend the limits of language. The following section will show how the critics try to use this "anti-philosophy" argument to undermine originalism.

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50. *See also* Ilan Wurman, *Importance and Interpretive Questions*, 110 VA. L. REV. (forthcoming 2024) (employing a similar hypothetical to defend a textual version of the major questions doctrine).

51. Developments in the field of "corpus linguistics" further demonstrate this relevance, as the tools of "big data" join forces with the established methods of linguistics to create more reliable inquiries into original public meaning. *See* Thomas R. Lee & Stephen C. Mouritsen, *The Corpus and the Critics*, 88 U. CHI. L. REV. 275, 296–99 (2021); Hamann & Vogel, *supra* note 6, at 1489 (generally noting the connection between Wittgenstein's philosophy and the corpus linguistics movement).

52. *See* WITTGENSTEIN, *supra* note 18, § 4.1212 ("What *can* be shown, cannot be said."). For a deeper discussion of Wittgenstein's show/say distinction and how it represents a continuous element of his philosophy between the early and later years, see Marie McGinn, *Saying and Showing and the Continuity of Wittgenstein's Thought*, 9 HARV. REV. PHIL. 24 (2001).

C. The Wittgensteinian Critics

This Section presents, in more depth, the two main Wittgenstein-inspired arguments that critics use to undermine originalism. Part II will present rebuttals to those arguments.

1. The Basic Wittgensteinian Challenge

Several scholars have invoked Wittgenstein to undermine originalism's philosophical foundations.[53] They all appear to apply Wittgenstein's anti-metaphysics argument against originalism, arguing that originalists are using language representationally, resulting in their asking too much from constitutional language—that they are trying to understand the "real meaning" of constitutional language with reference to the constitution itself when no such real meaning exists.[54] Originalists, like the metaphysical philosophers, are attempting to *say* something that cannot be said, resulting in their being bewitched by the form of their language.[55] In other words, if language derives its meaning from its practical use and not fixed, metaphysical facts (either Framer intention or original public understanding), then can one really say that any provision in the Constitution *really and truly means* anything? Doesn't it all just become relative to arbitrary language choices, allowing judges to make words mean what they want? All of the critics mentioned here appear to rely in large part on this argument.[56]

Philip Bobbitt was one of the first to adopt a Wittgensteinian approach to constitutional interpretation, and he employs this general Wittgensteinian critique.[57] He writes that originalists commit "a fundamental epistemological mistake" by assuming "that law-statements are statements about the world (like the statements of science)" and thereby attempting to appeal to the text

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53. *See, e.g.*, BOBBITT, *supra* note 17, at 123–24; Patterson, *supra* note 1, at 1837.

54. LeDuc, *supra* note 1, at 134.

55. *See* WITTGENSTEIN, *supra* note 18, § 4.1212 (Wittgenstein's first explicit mention of the show/say distinction); *see also* Patterson, *supra* note 1, at 1855 ("[B]y aping the aspirations of natural scientists, legal theorists manage not only to miss the beauty of law, but worse, they make of it a vulgar illusion.").

56. *See* Patterson, *supra* note 1, at 1839; LeDuc, *supra* note 1, at 134–35.

57. BOBBITT, *supra* note 17, at 123. Bobbitt directly cites Wittgenstein only once in his book, but his approach is thoroughly Wittgensteinian, and all the critics who use Wittgenstein to attack originalism begin with Bobbitt. *See generally* Patterson, supra note 1 (characterizing Bobbitt's work as philosophy that is clearly influenced by Wittgenstein). Moreover, the epigraph to *Constitutional Fate* contains a famous quotation from LUDWIG WITTGENSTEIN, PHILOSOPHICAL REMARKS 7 (Rush Rhees ed., Raymond Hargreaves & Roger White trans., Basil Blackwell 1975) (1964). *See* LeDuc, supra note 1, at 134–35.

of the Constitution to find authoritative answers to questions of constitutional law.[58] This mistake becomes clear, he says, when we face the "unavoidable observation that law-statements (such as 'the First Amendment's protection of free speech does not permit government to impose spending limits on the contributions of individuals to their own political campaigns') often do not correspond to any facts asserted in the Constitution[.]"[59] Given the Constitution's silence on such fine, specific issues, originalists are forced to engage in interpretation—to go beyond the mere world facts of the Constitution itself to discern what is really meant by the text. To Bobbitt, this step is tantamount to that of the man who uses language for metaphysical purposes, and he employs a Wittgenstein-style argument to show it.[60]

Bobbitt argues that rather than interpretive lenses like economic theory or original public meaning, it is our existing constitutional practices or arguments—what he called "modalities"[61]—that are themselves the very source of the meaning and legitimation of our law.[62] He presents six such modalities, including historical, textual, structural, ethical, doctrinal, and prudential.[63] These modalities are themselves the accepted standards by which we judge something as true from a constitutional perspective.[64] This means that we never really "interpret" anything—it simply "means" what we collectively *make it mean* through our common usage. Decisions, such as about the meaning of law, can only be legitimate if they are made in conformity to these modalities. This legitimacy is maintained "by playing the rules of the game—by employing the forms of arguments to show the truth of propositions of law."[65]

Importantly for Bobbitt, no single modality—say, for example, the original public meaning of some bit of constitutional language—can "stand on higher ground" than any other.[66] In this way, he doesn't deny completely the value of original public meaning; he only rejects its theoretical supremacy and so its necessarily binding effect.

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58. PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION, at xii (1991).

59. *Id.*

60. *Id.*

61. *Id.* at 11. For example, some practices are simply not among our existing, legitimate modalities, such as nepotism, aesthetic preference, ideas of racial hierarchy, etc. *See* BOBBITT, *supra* note 17, at 6.

62. BOBBITT, *supra* note 17, at 244–46. For example, precedent is a legitimate, binding force on lower courts because we collectively make it binding by following it.

63. BOBBITT, *supra* note 58, at 12–13.

64. *Id.*

65. BOBBITT, *supra* note 17, at 243–44; *see also* Patterson, *supra* note 1, at 1840.

66. BOBBITT, *supra* note 17, at 5–6, 245.

According to Bobbitt, law is merely the complex amalgam of a variety of these modalities, all equally legitimate simply because we use them. Bobbitt writes, "There is no constitutional legal argument outside these modalities."[67] Any attempt to understand and explain law by any other ideology—to explain it by means of moral theory, critical race theory, or economics—is confusing justification for legitimation. Our law is legitimate because it conforms to our chosen modalities, no more and no less. It is *justified* only by appeal to nonlegal, external theories.[68] Dennis Patterson, another Wittgensteinian who comments on Bobbitt's work, explores the implication that Bobbitt's theory has for constitutional interpretation, writing:

> From the left, the center, and the right, the debate is over the proper lens for interpreting the Constitution. If Bobbitt is correct, there is no lens—nothing between the Constitution and our understanding of it. When we understand how the modalities are used to show the truth of propositions of constitutional law, we understand how the Constitution has meaning. We do not grasp the meaning of the Constitution with the modalities; rather, the modalities are the means by which Constitutional propositions are shown to be true or false.[69]

Effectively, Patterson and Bobbitt argue that once we adopt a pragmatic, Wittgensteinian approach to language, the entire debate over how to *interpret* the Constitution collapses into absurdity.[70] By understanding that our law derives its meaning and legitimacy from our legal practices, they argue that "the terms of the debate render it pointless."[71] The "meaning" was never something to be sought out by various theoretical mechanisms of mediation—interpretation, construction, etc.; it was always directly before our eyes in how we already behave. For this reason, to understand Wittgenstein's insights is to understand that attempts to ground constitutional meaning in anything other than our constitutional practices (none of which is preeminent over the others) is foolhardy.

Originalism, they assert, by attempting to explain law by original intent or public understanding over and above other modalities, is an attempt to do just that. Later scholarship has built on Bobbitt's and Patterson's work, further emphasizing this point.[72] For example, André LeDuc writes that originalists

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67. BOBBITT, *supra* note 58, at 22.
68. BOBBITT, *supra* note 17, at 244–46.
69. Patterson, *supra* note 1, at 1842.
70. *Id.*
71. *Id.*
72. LeDuc, *supra* note 1, at 133.

accept "the tacit premise that the Constitution is ontologically independent of our constitutional practice" and that "language represents the world."[73] He further writes:

> The debate over originalism is fundamentally a debate over the originalist claim to have correctly described the Constitution and correctly stated the propositions of constitutional law. The critics of originalism generally claim that the originalist description is inaccurate and that many of the propositions of originalist constitutional law are untrue because they are inconsistent with the real Constitution.[74]

Although not always easy to discern, the critics all advance forms of this argument against originalism: namely, that it relies on a metaphysical, ontologically objectivist pursuit of constitutional meaning—a "real" Constitution. As will be explained below, this argument misapplies Wittgenstein's critique of metaphysics to originalism. Once this misapplication is addressed, the objection loses most of its force.

Beyond this broad Wittgensteinian objection, critics also make a related-but-slightly-different argument using Wittgenstein's conception of a language game to suggest the impossibility of fixing meaning at any point in time, a foundational premise of originalism. This argument will be briefly summarized below before I respond to these criticisms in full.

2. The Impossibility of a Frozen Language Game

One interesting Wittgensteinian objection to originalism will be called the frozen language game argument. Both Bartrum and LeDuc raise versions of this argument.[75] According to proponents of this argument, originalists who believe they have sidestepped Wittgensteinian objections by adopting a public meaning view of language are mistaken.[76] They argue that such originalists pay lip service to a Wittgensteinian approach by recognizing original public meaning, thereby implicitly recognizing the importance of "use-meaning" and the impossibility of private language, but attempt to freeze the language game in the past, which is an illicit move.[77] Bartrum writes:

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73. *Id.*
74. *Id.*
75. Bartrum, *supra* note 1, at 35–43; LeDuc *supra* note 1, at 148–49.
76. Bartrum, *supra* note 1, at 38.
77. *Id.*

> Public meaning originalists seem to suggest that we might take a kind of snapshot of a language game at a particular moment in time, discover the rules that governed play at that moment, and then treat those abstracted rules as something like "facts" that can define practical meanings—at least for an instant in time. This view accepts, in other words, that words get their meaning from rules, not objects, but then claims that we can treat these rules *as though they were objects* that we might discover and study empirically. In this way, we might try to play a language game "as it was played" at some discrete historical moment . . . this approach simply replicates the representational fallacy at a higher level of abstraction. Rules are decidedly *not* facts, not just because they are not objects, but because rules exist as interdependent parts of a lived practice—a form of life—in which they are embedded . . . . In the case of language, it makes no sense to "play a game as it was played" when the worldly circumstances that gave rise to its particular interlocking rule structures have disappeared, so that no one plays it that way anymore. To do so is actually to play a wholly *new* language game, which may or may not have practical value inasmuch as it serves a new form of life with different communicative purposes.[78]

This argument calls into question originalism's ability to do what it sets out to do: understand the language (thereby playing the language game) of the Framers. This criticism proceeds from a strained reading of Wittgenstein and, once originalism is seen as a persistent and fundamental social fact in American culture (which this Comment establishes in Part II), fails to undermine originalism as a conceptually coherent theory of interpretation.

II. A WITTGENSTEINIAN DEFENSE OF ORIGINALISM

Faced with the Wittgensteinian challenge, some scholars have opted to attack Wittgenstein specifically,[79] or the anti-representational framework generally,[80] or simply question the usefulness of his ideas to understanding

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78. *Id.*

79. Steven Winter, *The Constitution of Conscience*, 72 TEX. L. REV. 1805, 1822 (1994) ("In its own way, then, the Wittgensteinian account turns out to be surprisingly reductive.").

80. Objections to a pragmatist approach to truth have historically taken the form of Samuel Johnson's objection to Berkeley's theory of idealism—namely, when Johnson kicked a stone and claimed, "I refute it *thus*." Douglas Lane Patey, *Johnson's Refutation of Berkeley: Kicking the Stone Again*, 47 J. HIST. IDEAS 139, 139 (1986). For more developed critiques of pragmatism, see

law.[81] Others have used some Wittgensteinian principles to support originalism without engaging with the arguments of the Wittgensteinian critics of originalism.[82]

For example, Hamann and Vogel cite Wittgenstein as a general influence on the movement toward a more data-driven form of originalism, saying, "it . . . speaks to legal realist audiences: 'The interpreter is not only allowed to—but even asked to—look at reality when making up the rule.'"[83] Similarly, Solum briefly references Wittgenstein's notion that games are united by "family resemblances" to argue that we ought to conceive of "originalism" as a cluster of related theories, each of which bears a "family resemblance" to the other rather than being united by a single, shared quality.[84] Boykin also uses Wittgenstein to support the notion that "intent" ought to factor into interpretation.[85] He writes:

> Understanding the meaning of words and phrases alone is insufficient to interpret a legal instrument, such as the Constitution. We must also use intent to interpret the instrument. One central claim of Wittgenstein's philosophy of language is that communication is a purposive activity in which we engage with others so that meaning is a part of doing; hence, we can regard communication as a "language game." When we use language, we intend to express what is in our minds. If we are not using language in this way, we are literally not saying anything.[86]

These examples involve a cursory use of Wittgenstein to support the originalist project in different ways, but none of them engages deeply with the Wittgensteinian opposition. Indeed, some of the Wittgensteinian critics have noted a conspicuous silence on the part of originalists with respect to

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Ronald Dworkin, *Objectivity and Truth: You'd Better Believe It*, 25 PHIL. & PUB. AFFS. 87 (1996); ROBERT W. BENNET & LAWRENCE B. SOLUM, CONSTITUTIONAL ORIGINALISM: A DEBATE 6 (2011).

81. Bruce A. Markell, *Bewitched by Language: Wittgenstein and the Practice of Law*, 32 PEPP. L. REV. 801, 805 (2005) ("In most cases, I find the use of Wittgenstein to be either irrelevant to the matter discussed, or superfluous—bordering on the gratuitous or the theanthropic."); *see also* Goldberg *supra* note 1, at 294–95. *See generally* Ahilan T. Arulanantham, *Breaking the Rules?: Wittgenstein and Legal Realism*, 107 YALE L.J. 1853 (1998).

82. Hamann & Vogel, *supra* note 6, at 1490.

83. *Id.*

84. Solum, *supra* note 6, at 1264.

85. Boykin, *supra* note 6, at 248. It's worth mentioning that Boykin's use of Wittgenstein to defend the importance of private intent in interpretation is questionable.

86. *Id.*

their challenge.[87] This Comment breaks that silence, arguing that Wittgensteinian principles can be usefully employed in the service of understanding constitutional law, that they support originalism, and that the Wittgenstein-wielding opponents of originalism fail to undermine it.[88]

A. Rebuttal to the Foundational Argument

This Section presents a three-pronged rebuttal to the Wittgensteinian critique of originalism. It asserts that critics (1) commit a category error by misapplying Wittgenstein's metaphysical critique to originalism, and (2) fail to account for the unique nature of law that suggests originalism's preeminence as a modality, (3) which is further demonstrated by social facts of American culture.

1. Critics misapply Wittgenstein's critique of metaphysics to originalism.

As mentioned earlier, Wittgenstein's project was a bold attack on the traditional attempts of philosophers to use language to access metaphysical truths about the world—things like the existence of God, or the nature of morals or beauty.[89] When critics apply Wittgenstein's critique of philosophy to originalism, they take an analogy too far and make a mistake about what originalism is.

Originalists do not depend, as LeDuc argues, on some "ontologically independent, objective Constitution."[90] Nor do they, as Bobbitt similarly claims, make an "epistemological mistake" by treating law-statements as statements about the natural world, simply because answers are not always immediately clear from the constitutional text.[91] The critics seem to be

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87. LeDuc, *supra* note 1, at 205 n.419 ("Bobbitt's works are not addressed, for example, by any of the leading originalists such as Bork, Justice Scalia, and Randy Barnet.").

88. As a disclaimer, it should be noted that Wittgenstein cannot be strictly "applied" as a philosophical system. It may be antithetical to his whole project to try. Furthermore, I make no pretensions at having solved all of the problems related to reading Wittgenstein. All attempts to read Wittgenstein should be made with humility, and this Comment will not be the exception.

89. WITTGENSTEIN, *supra* note 18, at 3–4 ("[T]he aim of the book is to draw a limit to thought, or rather not to thought, but to the expression of thoughts: for, in order to be able to draw a limit to thought we should have to find both sides of the limit thinkable (i.e. we should have to be able to think what cannot be thought). It will therefore only be in language that the limit can be drawn, and what lies on the other side of the limit will simply be nonsense.").

90. LeDuc, *supra* note 1, at 131.

91. *See generally* BOBBITT, *supra* note 58.

analogizing originalist questions to traditional philosophical questions. When originalists ask, "What is the meaning of 'Commerce?,'" they are not asking the same sort of question that a metaethicist asks when he asks, "What is the *real* meaning of 'Good?'" In the former, an originalist is seeking an empirical fact: he wants to know what the original public understanding of the word "commerce" was in 1789 America when the word was penned. No more and no less. The philosopher, on the other hand, is not asking an empirical question; he is asking a *metaphysical* question about the properties of the concept of "Good."[92] The former sorts of questions are decisively *not* covered under the Wittgensteinian critique of philosophy. As Wittgenstein writes near the end of the *Tractatus*:

> The correct method in philosophy would really be the following: to say nothing except what can be said, *i.e.* the propositions of natural science—i.e. something that has nothing to do with philosophy—and then, whenever someone else wanted to say something metaphysical, to demonstrate to him that he had failed to give a meaning to certain signs in his propositions. Although it would not be satisfying to the other person—he would not have the feeling that we were teaching him philosophy—this method would be the only strictly correct one.[93]

Critics want to extend Wittgenstein's anti-metaphysics arguments to originalism, but they simply do not apply. Law is not philosophy, and originalists are not metaphysicians. Originalists *are* engaging in empirical inquiries, at least to start.[94] *These* critics develop an improper analogy, and as it falls so does the bulk of the Wittgensteinian case against originalism. With this cleared up, the Wittgensteinian critique loses much of its force. Even if originalism doesn't completely depend on this representational, metaphysical view of language, the critics still have some Wittgensteinian objections to originalism. They can still maintain that on a pragmatic, Wittgensteinian view of language, our Constitution's "meaning" can only be determined by our practices, and that attempts to reduce it only to original public meaning defy this fundamental Wittgensteinian truth because no practice is inherently more important than any other. Below, this argument is rejected, using Wittgenstein to argue that law is a unique language game that can be

92. The above-discussed developments in the field of corpus linguistics further support the empirical (rather than metaphysical) nature of the originalist project. *See generally supra* note 51 and accompanying text.

93. WITTGENSTEIN, *supra* note 18, §§ 6.53–.531.

94. Of course, faced with irreducible ambiguity, originalists will then employ other modalities that may not be empirical in nature. *See infra* note 157 and accompanying text.

constructed in better or worse ways according to certain rules, that original public meaning is such a way, and moreover that it is the foundational rule upon which our legal language game operates.

2. The Wittgensteinian analysis changes in the legal context, suggesting originalism's preeminent status as a constitutional modality.

First, critics omit that Wittgenstein—in all of his later philosophical writings—almost never mentions language usage in a legal context.[95] His examples center around regular, everyday usage, which he uses to demonstrate the limits of language in achieving the objective purposes of the metaphysical philosophers and the necessity of seeing how our language is given meaning only by how we use it according to cooperative, communal rule-following according to the rules of language games.

But a law is very different from other, mundane uses of language.[96] Considering this difference, and the fact that the rules of the language game exist to facilitate communication, one should expect the rules of the corresponding *legal language game* to be different.

As discussed above, laws are communicative tools with unique goals and consequences. Furthermore, a written constitution is a communicative document with certain inherent values.[97] Given this difference—and the generally difficult nature of Wittgenstein's philosophy—the Wittgensteinian critics of originalism must do more to show that the portions of Wittgenstein that they use are applicable to the legal context, which, as argued below,

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95. *See* WITTGENSTEIN, *supra* note 20, § 262. *But see* LUDWIG WITTGENSTEIN, ON CERTAINTY §§ 8, 335, 441, 500, 604 (G.E.M. Anscombe & G.H. von Wright eds., Denis Paul & G.E.M. Anscombe trans., Basil Blackwell 1969). Here, Wittgenstein references language use in the context of courts of law five times in five separate propositions. *Id.*

96. Goldberg notes this difference but uses it to argue against originalism. *See generally* Goldberg, *supra* note 1.

97. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176–77 (1803) ("The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? . . . Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void. This theory is essentially attached to a written constitution, and is consequently to be considered, by this court, as one of the fundamental principles of our society."); *see also* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 100–09 (2004). *But see* WURMAN, *supra* note 12, at 26–27; DAVID A. STRAUSS, THE LIVING CONSTITUTION 107 (2010).

Wittgenstein saw as distinct. This Comment suggests that given the nature of American law and society, there is plenty of room to read Wittgenstein in a manner friendly to originalism.

Although he rarely mentions legal language, he does make a few passing references that help illuminate this issue. In the second part of the *Philosophical Investigations*, he wrote, "In a law-court, for instance, the question might be raised how someone meant a word. And this can be inferred from certain facts—It is a question of *intention*."[98]

Here, in Wittgenstein's only reference to legal language in the *Investigations*, he suggests that legal language has its own method of getting at the meaning of language, its own language game, namely, by "inferring from facts" and appealing to "intention." This quotation, along with several others from his later writings, supports the general point that Wittgenstein viewed legal language as having a unique set of goals and rules.[99] Wittgenstein elsewhere broaches the topic of the purpose of language games, suggesting that certain rules may be better or worse according to the purpose of the game itself. He writes:

> Language is an instrument. Its concepts are instruments. Now perhaps one thinks that it can make no *great* difference *which* concepts we employ. As, after all, it is possible to do physics in feet and inches as well as in metres and centimetres; the difference is merely one of convenience. But even this is not true if, for instance, *calculations in some system of measurement demand more time and trouble than it is possible for us to give them*.[100]

So, according to Wittgenstein, features of the world—its limitations and our objectives—make some rules better than others. We *can* adopt a universal system of measurement using the unit of measurement of cupcakes, but this would "demand more time [or] trouble than we can afford."[101] Given the unique consequences and objectives of the law—specifically constitutional law—it should have very different rules from an apple transaction.

Furthermore, the outcomes of choosing to follow different rule sets would be much graver than mere inconvenience. For example, if a legal culture existed in which equity was not part of an accepted constitutional modality,

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98. WITTGENSTEIN, *supra* note 20, § xi, at 225.

99. *See id.* §§ 562–565 (discussing how language games, just like normal games such as chess, have certain objectives which are served better or worse by certain rules); *see also id.* § 577 (using the word "suitable" to describe various language conventions in the field of psychology).

100. *Id.* § 569 (second emphasis added).

101. *Id.*

this would *not* mean that the culture could not *communicate*, but it would mean that they would probably fail as a society or be forced to make a change.[102] For Wittgenstein, then, it appears that some rules suit certain purposes better than others. Bobbitt's claim, then, that no modality can "stand on higher ground" than any other puzzles me.[103] Bobbitt admits that original public meaning *is* an accepted constitutional modality, but states that it cannot trump the others.[104] He argues that it is—and *must be*—on equal footing with all the others, since the originalist "modality" is merely one of several "stylized moves" within a game.[105] Common sense and Wittgenstein would appear to deny the necessity of this principle of rule equity.[106] But showing that Wittgenstein supports the *possibility* of one modality's preeminence over the others is not enough for this Comment's argument to succeed. It must also be demonstrated that originalism *is indeed* a preeminent modality.

In the following Section it is argued more forcefully that originalism—the use of original public meaning as a grounding source of meaning—is not only *a* legitimate modality; it is the preeminent modality of American constitutional law.[107]

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102. This runs contrary to Kripke's misreading of Wittgenstein's concept of rule-following, where he argued that Wittgenstein's point was that no facts determine what counts as following a rule—rendering it purely relative and skeptical—and one's application of a rule "is an unjustified stab in the dark. [One applies] the rule blindly." Goldberg, *supra* note 1, at 287 (adopting this reading).

103. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 69 (2012) (stating that the related ordinary meaning canon is the "most fundamental semantic rule of interpretation").

104. *See* BOBBITT, *supra* note 17, at 6–8.

105. *See id.* at 23–24.

106. Goldberg argues that even if skeptical, Kripke's reading of Wittgenstein is wrong: the difference between law-language and the regular communicative language with which Wittgenstein concerned himself lies in the fact that "law is a reflective activity." Goldberg, *supra* note 1, at 296–97. From this, Goldberg argues that where for normal language it might not make sense to question a widespread, well-integrated rule, such questioning is in the very nature of the law. *Id.* I lean on my textual support from Wittgenstein.

107. Originalists may well argue that originalism is a preeminent form of law abroad as well—or that it should be. For an interesting discussion about the role of originalism in other countries, see Yvonne Tew, *Originalism at Home and Abroad*, 52 COLUM. J. TRANSNAT'L L. 780 (2014) (arguing that originalism, contrary to popular thought, is prevalent abroad and has a nuanced story).

3. Originalism's preeminence is supported by American social facts.

Simply put, it is a descriptive fact of our jurisprudence that we privilege originalism as a modality of constitutional law. First, American constitutional law is built around a written text—the 1789 Constitution of the United States of America.[108] This was a unique political development, and it created certain first-order rules to govern the nation—rules against murder and tax evasion—as well as second-order rules to administer those first-order rules and handle problems generated by them.[109] Chief among these second-order rules is what H.L.A. Hart refers to as "the rule of recognition."[110] A rule of recognition is a rule that determines the validity of all the other rules.[111] According to Hart, this rule is the crucial first step in creating a legal *system* as opposed to a disconnected amalgamation of dos and don'ts.[112] Since all other legal rules derive their validity from the rule of recognition, it is hierarchically *supreme*.[113] Importantly, while other rules in the legal system derive their validity from the rule of recognition, the rule of recognition itself cannot be subjected to tests of validity. Its existence is determined by our social practices.[114]

For example, in England, Hart claims that the rule of recognition is that whatever the Queen enacts *is* law—and anything that cannot accord with it is not.[115] In the United States, our rule of recognition happens to be the Constitution of 1789 as it was originally understood by the public. Many scholars and judges have commented on the importance of this fact to our legal system, including the quip that "Americans don't think we're living in a Fifth Republic, the way the French do, but rather in the same Republic we started with. This intuition is the core of originalism[.]"[116]

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108. *See* U.S. CONST.

109. Hart lists the problems of uncertainty, static quality, and inefficiency. HART, *supra* note 7, at 92–93.

110. *Id.* at 94.

111. *Id.* at 95.

112. *Id.*

113. *Id.* at 105. As will be reiterated here and elsewhere, "supreme" is not to be confused with unlimited. Originalists should not expect originalism to solve all interpretation problems.

114. *Id.* at 109–10.

115. *Id.* at 107.

116. Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 820 (2015).

This tradition of fidelity to and identification with the original understanding of a written text was universally observed by the Founders,[117] and as will be demonstrated, continues to this day to dominate modern jurisprudence, not only among self-proclaimed originalists but also among those who claim *not* to be originalist. For example, in the realm of contracts or statutory interpretation, judges from across the ideological spectrum know to begin with the text.[118] Even those judges who ignore the text, choosing to engage in pure judicial activism, often *act* as if they were paying the text its due respect.[119] One does not find judges admitting to textual clarity and yet denying the authority of the text regardless. This *acting*, this Comment suggests, is because the precepts of originalism—that clear original public meaning of legal texts is a legally binding and controlling force—was, is, and for the foreseeable future will continue to be, in Wittgensteinian terms, "fused into the foundations"[120] of our practice of constitutional law.[121] Sometimes, it may come with explicit recognition—as when Justice Kagan said, "we're all textualists now,"[122] but sometimes it may merely reveal itself implicitly through practice.[123] In either case, this Comment argues, in Wittgensteinian (and Hartian) terms, that the rules of the language game (or the social facts) of American constitutional law give originalism a privileged position that "stands on higher ground" than other modalities. Once this is recognized, very little is left of Wittgenstein's ideas to use against originalism.

Supporting this Wittgensteinian (and Hartian) argument that contextual facts about our government and society suggest that originalism is our law

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117. Some scholars dispute this point, often citing H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985). Other scholars have addressed this misreading of the Powell article. *See, e.g.*, WURMAN, *supra* note 12, at 16.

118. SCALIA & GARNER, *supra* note 103, at 56; *see also* United States v. Great N. Ry., 287 U.S. 144, 154 (1932) ("[W]e have not traveled, in our search for the meaning of the lawmakers, beyond the borders of the statute."); Lawson, *supra* note 13, at 1823 (1997) (providing extensive examples of courts engaging in originalism for the purposes of contracts).

119. Michael J. Gerhardt, *A Tale of Two Textualists: A Critical Comparison of Justices Black and Scalia*, 74 B.U. L. REV. 25, 55–56 (1994).

120. WITTGENSTEIN, *supra* note 95, § 558.

121. CHARLES A. MILLER, THE SUPREME COURT AND THE USES OF HISTORY 181 (1969) (stating that Americans have an "almost religious adoration of the Framers").

122. Harvard L. Sch., *The 2015 Scalia Lecture: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE, at 08:28 (Nov. 25, 2015), https://www.youtube.com/watch?v=dpEtszFT0Tg [https://perma.cc/K4AW-WA5Z].

123. HART, *supra* note 7, at 116 ("Individual courts of the system though they may, on occasion, deviate from these rules must, in general, be critically concerned with such deviations as lapses from standards, which are essentially common or public. This is not merely a matter of the efficiency or health of the legal system, but is logically a necessary condition of our ability to speak of the existence of a single legal system.").

are two comparable arguments developed by Stephen Sachs and William Baude.[124]

In his paper, *Originalism as a Theory of Legal Change*, Stephen Sachs makes a very similar argument—albeit not in Wittgensteinian terms—when he says that "the Founders' law *has not* been superseded—that the 'original' law, whatever it was, is still law for us today. We may have changed it over time, but only because the law itself provided for means of change."[125] Sachs argues that even when individual courts appear to reach non-originalist conclusions—say, for example, during the era of the Warren Court[126]—a detailed observation of their actions still bespeaks a commitment to the "higher-order" principles of originalism.[127] Chiefly among these principles, he argues, is the fundamental rule of legal change—namely, that our legal system had an origin at which point all previous legal questions became irrelevant[128] and all future changes to the law must be carried out in accordance with the fundamental law as it existed at the time of origin. In Wittgensteinian words, a move within the language game is permitted if it proceeds according to rules that were valid as of the Founding unless lawfully changed, with "lawful change" being defined as a change made under a rule of change that was valid at the Founding—i.e., the Article V amendment vehicle.[129]

William Baude makes a similar argument for what he calls "inclusive originalism."[130] According to Baude, a thorough inspection of our social and legal practices points to originalism as our law.[131] This originalism, however, allows for other commonly used modalities—like precedent, policy, construction, and presumptions—provided "all other modalities . . . trace their pedigree to the original meaning."[132] Baude justifies his position by exploring "higher-order" social practices—like general attribution of

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124. *See generally* William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349 (2015) (outlining these two arguments); Sachs, *supra* note 116.

125. *See* Sachs, *supra* note 116, at 838–39.

126. *See generally* Alex Tobin, *The Warren Court and Living Constitutionalism*, 10 IND. J.L. & SOC. EQUAL. 221 (2022).

127. Sachs, *supra* note 116, at 874.

128. For example, we do not question whether it was "legal" to propose the Constitution during a convention at which the purpose was to amend the Articles of Confederation.

129. U.S. CONST. amend. V.

130. Baude, *supra* note 124, at 2363.

131. *Id.* at 2365.

132. *Id.* at 2363.

authority to the Framers and a written Constitution—as well as "lower-order" practices, including the decisions of the Supreme Court.[133]

Importantly, Baude emphasizes that Supreme Court *justifications* rather than *outcomes* provide the key to determining what our law is. Once we examine how courts justify their decisions, it becomes clear that originalism has not only never been refuted by courts, but even the most purportedly anti-originalist cases seem to point toward originalism.[134]

Most often, as Baude points out, the most supposedly anti-originalist cases—like *NLRB v. Noel Canning*,[135] *Home Building & Loan Ass'n v. Blaisdell*,[136] or *Brown v. Board of Education*[137]—begin with Justices walking through originalist steps to first establish ambiguity and the need to move beyond original meaning.[138] To take one example in more depth, in *Noel Canning*, the majority (Breyer) and the concurrence (Scalia) disagreed profusely regarding how to understand the Recess Appointments Clause of the Constitution.[139] The majority argued that the text was ambiguous and that other factors, such as constitutional practice, could "liquidate [and] settle the meaning,"[140] provided they did not contradict the Constitution. The concurrence maintained that the majority's view was unmoored from the text and inconsistent with the original public meaning.[141] Baude observes, however, that in the midst of this disagreement, both sides appear to tacitly accept the foundational premise that the text, if unambiguous, controls.[142] Even if the outcomes of some of these cases can be characterized as inconsistent with originalism, the justifications often display strong commitments to originalism.[143]

Following this Baude-Sachs view, then, the Reagan-era originalist movement led by Scalia did not "restore" originalism to an America that was

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133. *Id.* at 2365.

134. *Id.* at 2371–73.

135. 573 U.S. 513, 513 (2014).

136. 290 U.S. 398, 447 (1934) (using the economic emergency of the Great Depression to justify apparent repudiation of the Contract Clause).

137. 349 U.S. 294 (1955).

138. Baude, *supra* note 124, at 2372–86.

139. 573 U.S. at 513–15, 570.

140. *Id.* at 525 (quoting Letter from James Madison to Spencer Roane (Sept. 2, 1819), *in* 8 THE WRITINGS OF JAMES MADISON 447, 450 (Gaillard Hunt ed., 1908)); Baude, *supra* note 124, at 2373.

141. *Noel Canning*, 573 U.S. at 570.

142. Baude, *supra* note 124, at 2373–74.

143. *Id.* at 2371.

without it,[144] but rather it made explicit the commitments that judges already implicitly adopted, and it aimed to make judicial decisions more consistent with these principles. Other scholars have made similar observations, noting that the characterization of originalism as a novel movement in response to the non-originalist Warren Court belies the more fundamental reality that the spirit of originalism has never been abandoned, even when some of the conclusions reached by courts are inconsistent with the higher order practices.[145]

For example, Frank B. Cross performed a study wherein he counted the number of Justice votes for opinions, concurrences, and dissents that cited to "originalist" sources, such as *The Federalist Papers*, *Elliot's Debates*, Madison's notes on the Constitutional Convention, and other historical, "originalist" documents.[146] His findings revealed that in the years between 1953 and 1969, "[o]verall uses of originalism grew considerably during the Warren Court era."[147] Indeed, he claims the uses nearly doubled.[148]

Critics of the so-called anti-originalist Warren Court argue that the Court used such sources disingenuously, merely employing them as rhetorical flourish to support decisions that they reached through wholly non-originalist means.[149] Others have suggested that the Court was simply bad at history or linguistic analysis.[150] These arguments have merit, but they are not the subject of this Comment. This Comment argues that even when a court, for example, the Warren Court, engages in judicial activism cloaked in rhetorical

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144. Although, this is a popular opinion amongst scholars. James E. Fleming, *Fidelity to Our Imperfect Constitution*, 65 FORDHAM L. REV. 1335, 1347 (1997).

145. Frank B. Cross, *Originalism—The Forgotten Years*, 28 CONST. COMMENT. 37, 44 (2012).

146. *Id.* at 43.

147. *Id.*

148. *Id.*

149. Robert M. Howard & Jeffrey A. Segal, *An Original Look at Originalism*, 36 LAW & SOC'Y REV. 113, 118 (2002). Indeed, these arguments are leveled against originalism writ large—even by Cross. *See, e.g.*, Joshua Zeitz, *The Supreme Court's Faux 'Originalism,'* POLITICO (June 26, 2022, 7:00 AM), https://www.politico.com/news/magazine/2022/06/26/conservative-supreme-court-gun-control-00042417 [https://perma.cc/V7ND-P9KJ] (arguing that originalist judges on the Supreme Court have a poor grasp of history).

150. Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119. Indeed, this concern is raised by opponents of originalism in general. *See* GREGORY BASSHAM, ORIGINAL INTENT AND THE CONSTITUTION: A PHILOSOPHICAL STUDY 97 (1992) (contending that judges "routinely botch history when they set their hands to it"). And there are many good responses to it. *See* WURMAN, *supra* note 12, at 99–107 (defending judges as historians as possible and, arguably, necessary); *see also* Ilan Wurman, *Law Historians' Fallacies*, 91 N.D. L. REV. 161 (2015).

originalism or does bad work as historians or linguists,[151] the fact that they *do this at all* demonstrates the fundamental commitment of American constitutional law to what Sachs would call higher-order originalist principles—or what Wittgenstein would refer to as a "way of life" that informs the rules of the language game. Only by trying to understand the "internal perspective" of a faithful participant in the system—by learning the social facts of how such participants generally *justify* their legal arguments—can we fully understand the law.[152] This is so regardless of whether some of the conclusions appear on the surface to gainsay the principles of originalism. As the adage goes, "hypocrisy is the homage that vice pays to virtue."[153]

To summarize, even if courts sometimes only pay lip service to originalism, the act of paying lip service signals something deeper about the language game of American Constitutional law—that originalism is "fused into the foundations" of it and holds a position on higher ground than other modalities, contrary to the claims of the critics. As long as originalist practice holds a privileged position among our available modalities, then we are originalists, regardless of the occasional failures to conform to our values or whatever other familial differences may occur between different versions of the theory.

That originalism is not an interpretive panacea should not surprise. Few if any proponents of originalism would assert that being non-originalist is logically impossible—like a square circle. It is believed to be a conceptually coherent account of how language works, and furthermore, that it *is* American law. But most originalists should recognize that one could reject this as it is said that other nations do.[154]

Furthermore, it is uncontroversial for originalists that originalism cannot always reach conclusive answers to difficult questions of interpretation.[155] Opponents raise arguments from vagueness, ambiguity, and the limit of the

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151. Indeed, the problem of motivated reasoning is real. As some have remarked, it is hard to find an originalist who believes that the original public meaning is different from their individual policy choices. *See, e.g.*, Waldman, *supra* note 10. This is not totally true. *Id.* (listing several cases in which originalism led to outcomes that did not square with policy preferences of originalist judges). Insofar as this criticism exposes the imperfection of originalist methodology, many of the practical suggestions in Part II of this paper will address these concerns.

152. Sachs, *supra* note 116, at 844.

153. FRANCOIS DUC DE LA ROCHEFOUCAULD, REFLECTIONS; OR SENTENCES AND MORAL MAXIMS § 218 (J.W. Willis Bund et al. trans., London, Sampson Low, Marston & Co. 1898) (1678).

154. *See generally* Tew, *supra* note 107.

155. Peter J. Smith, *How Different Are Originalism and Non-Originalism?*, 62 HASTINGS L.J. 707, 717 (2011).

historical record that on occasion demonstrate this.[156] But this for most originalists should not be a problem. Originalism only stands for the proposition that we *begin* with original public meaning and are bound by it if we discover it, regardless of policy preferences or other modalities.[157] When we cannot reach a suitable level of confidence, however it is defined, we may employ other tools or modalities. But, contrary to the Wittgensteinian objections of Bobbitt and Patterson, original public meaning is the privileged modality, which licenses us to call ourselves originalists and Wittgensteinians.[158] Even with the foundational Wittgensteinian objections answered, there remains one final Wittgensteinian argument to address: the frozen language argument. This argument effectively does not raise the anti-metaphysics argument or even dispute the preeminent hierarchical status of originalism among our practices. It raises a charge of impossibility, arguing that originalist work is impossible precisely due to the nature of language games. The following section is my rebuttal to that argument, which argues that critics misunderstand Wittgenstein's notion of "agreement" and thereby create an absurd and unworkable theory.

B. Rebuttal to the Frozen Language Argument

This Wittgensteinian argument seeks to undermine originalism's conceptual coherence by calling into question whether meaning can be preserved over time under a Wittgensteinian account. Bartrum offers this argument that while forceful, is not decisive.[159] In responding to this argument, this Comment will rely on the Hartian principles expounded earlier.

Bartum argues that since the rules of our language games are embedded in our form of life, they are not fixed facts in the way an originalist needs.[160]

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156. In his article, Bartrum raises several arguments from vagueness and ambiguity that pose legitimate challenges to originalism's ability to solve some problems. These challenges, however, do not undermine originalism as a starting point. *See* Bartrum, *supra* note 1, at 43–51.

157. Lawrence B. Solum, *Semantic Originalism* 19 (Ill. Pub. L. & Leg. Theory Rsch. Paper Series, No. 07–24, 2008) ("[O]riginal-meaning originalist[s] explicitly embrace the idea that [when] the original public meaning of the text 'runs out[,]' application of the linguistic meaning of the constitutional text to a particular dispute must be guided by something other than original meaning.").

158. Baude, *supra* note 124, at 2353. Advocates for this conception of originalism call it "coherent middle position" wherein other methods of interpretive analysis are permitted but with "originalism at the top of the hierarchy". *Id.*

159. *See* Bartrum, *supra* note 1, at 38.

160. *Id.*

He states, "[T]he rules of language games—and thus the meaning of words—are always changing *as our forms of life change*, and so the competent player must play along alertly in order to remain fluent."[161]

This raises the question: how do our "forms of life" change? At what point can we be said to be playing a new game with new rules for use? At what point are we no longer playing the game of American Constitutional Law? Neither Bartrum nor the other proponents of this argument say. Although not made explicit in their arguments, their position likely rests on a common but important misreading of Wittgenstein.[162]

According to Wittgenstein, for communication to occur, there must be a certain agreement: What is true or false is what human beings *say*, and it is in their language that human beings agree. *This is agreement not in opinions, but rather in form of life*.[163] Elsewhere, he writes, "our talk gets its meaning from the rest of our proceedings."[164] Wittgenstein here is not asserting a crude relativism—that truth and falsehood are determined by what people *say that truth and falsehood are*. He states that what "true" or "false" means is determined by what people *say*, by the function of their massively complex linguistic system predicated upon contingent facts about their lives—their needs, habits, actions, customs, and circumstances.[165]

Important for our purposes is understanding that for Wittgenstein, agreement as to the rules of the language game is not something that can be

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161. *Id.* at 36 (emphasis added).

162. *See, e.g.*, Brian Bix, *The Application (and Mis-Application) of Wittgenstein's Rule-Following Considerations to Legal Theory*, 3 CAN. J.L. & JURIS. 107, 108 n.10 ("It is very hard to find a Wittgenstein scholar who is in substantial agreement with Kripke's reading."). Kripke explained the notion of rule indeterminacy as he perceived it from the Investigations. *See also* Zapf & Moglen, *supra* note 17; Constantin Fasolt, *History, Law, and Justice: Empirical Method and Conceptual Confusion in the History of Law*, 5 U.C. IRVINE L. REV. 413, 426 (2015) ("Many readers of Wittgenstein believe that this, or some version of it, is the conclusion at which Wittgenstein did in fact arrive. They regard him as a skeptic and relativist. But Wittgenstein bluntly rebuts his imaginary interlocutor. He does so by drawing attention to the difference between saying something and speaking a language."). Indeed, Goldberg, in his paper, appears to adopt Kripke's skeptical reading precisely because it would avoid this sort of Constitutional Law language game argument. *See generally* Goldberg, *supra* note 1; SAUL A. KRIPKE, WITTGENSTEIN ON RULES AND PRIVATE LANGUAGE (1982).

163. WITTGENSTEIN, *supra* note 20, § 241; *see also* WITTGENSTEIN, *supra* note 95, § 229.

164. WITTGENSTEIN, *supra* note 95, § 229.

165. In this sense, Wittgenstein's observation closely resembles Hart's "rule of recognition"—the rule that functions as the authoritative reference point from which other rules derive their validity. He explains that, where other legal rules are valid insofar as they comply with the rule of recognition, the rule of recognition itself "exists only as a complex, but normally concordant, practice of the courts, officials, and private persons in identifying the law by reference to certain criteria. Its existence is a matter of fact." HART, *supra* note 7, at 110.

done and undone willy-nilly. It is not mere verbal agreement; it is a deeper, fundamental agreement in how we as a community live our lives and view the world. While constitutional meaning on this account may not ultimately be a fixed fortress as some originalists may desire, neither is it a wispy tumbleweed. More important for our purposes, it is certainly not something that can be decided by judicial fiat.

Bartrum seems to suggest that forms of life are more wishy-washy than Wittgenstein would accept.[166] Certainly, Bartum cannot mean that a *single* change in the context or culture in which a language game is played would prevent communication and therefore justifies recognizing a new game with new rules. It's hard to imagine what this would even look like, and it would insult the name of Wittgenstein to suggest that he proposed such an idea. If Puerto Rico ratified a state constitution today, but tomorrow a viral tweet convinced a significant number of Arizonans that the earth was flat, has the culture changed enough to declare a new language game? Of course not. Assuming Bartrum's conception of language game-change is true, how would it affect criminal or contract law? Would a criminal still be able to understand the language of a year-old statute under which he was being prosecuted and therefore no longer be bound by it? Would a party to a contract be free to reject terms written a decade prior? These absurd implications of Bartrum's argument would render unworkable his theory of legal interpretation.

What remains, then, is not a disagreement about Wittgensteinian principles but a problem of line-drawing where we must analyze our own culture, history, and practices to determine what it is that we are doing when we do American constitutional law. As mentioned above, strong reasons support the contention that this language game is fundamentally originalist.

This, however, leads to an awkward conclusion. If our originalism is based around contingent social facts, then a significant change in such facts—a cultural change of Kuhnian[167] proportions—could render our system non-originalist, perhaps forcing us to conceive of it as a new legal system altogether. Upon deeper reflection, this should not surprise. In fact, much of the originalist advocacy assumes this possibility—that if our practices stray too much for too long, our system itself can no longer be called originalist. But, as Hart says, "[t]he stage at which it is right to say in such cases that the

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166. Patterson also appears to miss this distinction, writing, "[W]hatever our practices turn out to be, it is we who decide their form and content." Patterson, *supra* note 1, at 1854.

167. *See generally* THOMAS KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (Princeton Univ. Press 2010) (1962).

legal system has finally ceased to exist is a thing not susceptible of any exact determination."[168] Throughout our nation's history, we have not reached this point, and such a change could not be effected by mere *judicial words*—no, it would require a seismic shift in how we live our lives, probably something close to full-scale revolution.

III. CONCLUSION

Critics attempting to wield the name of Wittgenstein against originalism merely swing at the wind. As shown throughout this Comment, Wittgensteinian principles such as use-meaning and the impossibility of private language cohere with original public meaning originalism. Contrary to the claims of the critics, Wittgenstein's approach to language doesn't fundamentally undercut originalism. In fact, it strengthens originalism. First, this Comment has shown that Wittgenstein's broad critique of metaphysics is inapplicable to originalism because originalism aims at empirical rather than metaphysical knowledge. Second, this Comment has shown that Bobbitt's requirement of equality between modalities does not emanate necessarily from Wittgensteinian thought. Indeed, Wittgenstein seems to suggest that certain rules and practices (Bobbitt's modalities) can be made superior or inferior based on contingent facts in the world and the goals of the relevant language game. The fact that the United States functionally *does* adopt originalism as a preeminent modality provides just the support needed to show this. Lastly, this Comment has shown that contrary to Bartrum's claims, Wittgenstein's notion of a language game does not suggest that modern Americans cannot understand the language of the Founders in a way that prevents us from "playing" the language game of the past.

Given all this, originalism and Wittgenstein are not so incompatible as they first appeared. Wittgenstein, supported by the ideas of Hart, Baude, and Sachs, forces originalists to recognize that if enough indicates that we are no longer originalist in practice—if we are no longer playing that language game in the most basic sense—then the uses of language formerly contrary to the rules might no longer be. This, however, is not something that can be changed lightly, and we who believe in America can only hope it appears nowhere on the horizon.

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168. HART, *supra* note 7, at 118, 120–21. Hart gives one example from English history to demonstrate an instance of a true change in a legal system: the shift from colonial/commonwealth rule to independent rule—even without revolution or bloodshed—and even when the structure of the system and the primary rules have all largely been preserved. *Id.*