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Ian Bartrum

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CONSTRUCTING THE CONSTITUTIONAL CANON: THE METONYMIC EVOLUTION OF *FEDERALIST 10*

*Ian Bartrum**

What is the connection between what I have called languages, functions from strings of sounds or marks to sets of possible worlds, semantic systems discussed in complete abstraction from human affairs, and what I have called language, a form of rational, convention-governed human social activity?

David Lewis¹

David Lewis's question about the connection between "semantics" and "language-as-practiced" is, I think, analogous to the question at the center of this discussion, which is: how are we to understand the connection between constitutional *text* and constitutional *meaning*?² Recent and important work by Keith

* Assistant Professor of Law, Drake University Law School. I am grateful to the members of this symposium for their thoughts and contributions to this piece. I also want to thank Akhil Amar, Bruce Ackerman, Philip Bobbitt, Jules Coleman, Robert Fogelin, Heidi Kitrosser, Mark Kende, Timothy Knepper, Anthony Kronman, Sanford Levinson, the members of the Drake Law School Faculty Workshop, and participants in the Drake University Humanities Colloquium for their generous help along the way. Finally, I want to acknowledge Steven Gey, for whom the call for papers that generated this project is named. Though I do not know Professor Gey personally, I know and respect his work—and I am aware that he is beloved by generations of his students—and so I am deeply honored.

1. David Lewis, *Languages and Language*, in 1 DAVID LEWIS: PHILOSOPHICAL PAPERS 163, 166 (1983).

2. I should note at the outset that I do not use the word "meaning" in the strict and narrow sense that Larry Solum intends in his *Semantic Originalism*. See Lawrence Solum, *Semantic Originalism* 2–4 (Illinois Public Law Research Paper No. 07-24, 2008), available at: <http://ssrn.com/abstract=1120244>. While, as Solum notes, this may cause some confusion, I do not think his distinction between "semantic," "applicative," and "teleological," meanings is helpful, largely because I reject the Gricean conception of "speaker's meaning." Meaning is always a shared or collective notion—in the sense that no assertion has meaning apart from how it is understood (Kripke, notwithstanding, there are no private languages)—no matter what a speaker intended. And, while there may be such a thing as "speaker's intent," we cannot hope to get at it without looking to the purposes and applications of an utterance, which is always a constructive enterprise. For these reasons, I also reject the thesis that there are "linguistic facts," in the sense that Solum uses that phrase—at least in the cases of vague language that are of real

Whittington and Lawrence Solum approached this question by positing a fundamental distinction between the processes of “interpretation” and “construction” in our legal practices.³ Put in these terms, the question resounds with echoes of a much older structural debate about the role of the judiciary in constitutional government, and seems to hint that such a distinction, if real, might help us identify the boundaries of legitimate judging. As a dedicated puzzle-solver within Philip Bobbitt’s modal paradigm of constitutional theory and discourse,⁴ however, I cannot take the hint as offered because I do not believe that the legitimacy of a constitutional practice rests upon externally imposed foundational or normative theories—theories that seem to suggest that there could be one *correct* kind of connection between Lewis’s categories of “languages” and “language.” Instead, I believe that legitimacy in constitutional practice arises when we follow certain organic, internally generated argumentative rules closely enough that other practitioners can recognize and comprehend—if not always endorse—our assertions of constitutional meaning. This is not to say that I am insensitive to the attractions—the allure of objectivity and constraint—that normative theories present. Nor do I doubt that the interpretation-construction distinction can be an important part of a precise species of historical arguments about constitutional meaning in a limited class of cases. The point, rather, is that I do not believe that, in general, these kinds of objectivity and precision are definitive or limiting features of *our* argumentative practices—those social processes by which we currently decide upon constitutional meanings. But, I hasten to add, I do not accept that this final assertion relegates me to the

constitutional concern. In all likelihood, my disagreement on these fundamental premises explains why I doubt the ultimate utility of the interpretation-construction distinction.

3. See generally KEITH WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* (1999); Solum, *supra* note 2.

4. The not-so-clever reference is to Thomas Kuhn’s distinction between revolutionary “paradigm shifts” and “normal science” puzzle-solving. See THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 10–12 (3d. ed. 1996). For the paradigm shift, see generally PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* (1982) (outlining a practice-based grammar of constitutional discourse grounded in six modalities of argument). For my attempts at puzzle-solving, see generally Ian Bartrum, *The Constitutional Canon as Argumentative Metonymy*, 18 WM. & MARY BILL RTS. J. 327 (2009) [hereinafter Bartrum, *Constitutional Canon*]; Ian Bartrum, *Metaphors and Modalities: Meditations on Bobbitt’s Theory of the Constitution*, 17 WM. & MARY BILL RTS. J. 157 (2008) [hereinafter Bartrum, *Metaphors and Modalities*]; Ian Bartrum, *The Constitutional Structure of Disestablishment*, 2 N.Y.U. J.L. & LIBERTY 311 (2007).

margins of contemporary theory, where I might commiserate with the legal realists about the vagaries of an unconstrained judiciary. To explain why, I must begin by briefly outlining the Wittgensteinian underpinnings of Bobbitt's modal theory.

One of Ludwig Wittgenstein's fundamental purposes in the *Philosophical Investigations* was to reject the search for a unified account of language's internal logic, which had occupied the bulk of his only published work: the *Tractatus Logico-Philosophicus*.⁵ Rather, the later Wittgenstein suggested that language is not one activity, but a variety of different kinds of activities, each with different rules and purposes.⁶ Across the spectrum of these myriad "language-games," the same word often serves a variety of different—though related—functions, each specific to the particular "game" within which it is employed.⁷ From this it follows that a word's meaning often does not derive from some foundational referent in the world, but, rather, is determined by the use to which it is properly put within a particular language-game.⁸ The *properly* part is critical, for it precludes the impossible suggestion that a word can mean whatever we want to use it to mean, and, instead, grounds the generalized claim that "the meaning of a word is its use" in a more specific account of what it is to understand and follow the rules of a language-game.⁹ Without getting too deeply into Wittgenstein's complex and controverted theory of how we identify, understand, and follow these rules, it is essential to remember that obeying a rule is also a social practice and "[h]ence it is not possible to obey a rule privately."¹⁰ We can only know that we have successfully followed a rule—that we know how to use a word and thus *what it means*—when our usage is understood, or "ratified," by another participant in the particular language-game.¹¹ But, as

5. See LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 11–12 (G.E.M. Anscombe trans., 3d ed. 1958) [hereinafter WITTGENSTEIN, INVESTIGATIONS]. Here Wittgenstein introduces the concept of a varied "multiplicity of language-games" as an objection to "what logicians have said about the structure of language. (Including the author of the *Tractatus Logico-Philosophicus*.)" *Id.* (citing LUDWIG WITTGENSTEIN, TRACTATUS LOGICO-PHILOSOPHICUS (D.F. Pears & B.F. McGuinness trans., 1974)) . For a very helpful introduction to these ideas, see ROBERT J. FOGELIN, WITTGENSTEIN 107–30 (2d ed. 1987); A.C. GRAYLING, WITTGENSTEIN: A VERY SHORT INTRODUCTION 81–89 (1996).

6. WITTGENSTEIN, INVESTIGATIONS, *supra* note 5, at 11–12, 13, 31.

7. *Id.* at 31–35. Wittgenstein famously likened this "relation" to a "family resemblance." *Id.* at 32.

8. *Id.* at 20.

9. *Id.* at 20, 79–81; accord GRAYLING, *supra* note 5, at 86.

10. *Id.* at 81.

11. For a discussion of "ratification" in this context, see PETER WINCH, THE IDEA

elements of a practice, the rules themselves will evolve as contexts and purposes change, and as individual participants leave their impact on the game. It is in something like this way that meanings change over time.¹²

Bobbitt's modal theory thoughtfully applies some of these insights about the nature of language to the contextualized social practice that concerns us here: constitutional law. He has suggested that we should understand the Constitution itself as analogous to a Wittgensteinian language-game—complete with its own internal rules or grammar—and thus the legitimacy of a constitutional assertion depends upon its grounding in the proper forms of argument and usage.¹³ For Bobbitt, six such argumentative forms or modalities—textual, historical, structural, doctrinal, prudential, and ethical—make up the constitutional grammar.¹⁴ To be clear, an assertion of constitutional meaning rooted in one or more of these modalities is *legitimate*, but not necessarily *dispositive*. It is up to the courts, the decision-makers in our practice, to choose among competing assertions at any given moment in time. And even a judicial decision may be only an impermanent resolution of constitutional meaning. After all, an ill-fitting decision—like an inapt word or metaphor in any language-game—may protrude, exposed, into the unforgiving flow of practice, and, if not formally revisited, simply wear away over time.¹⁵ On the contrary, other assertions of meaning—some judicially recognized, and some not—may settle so comfortably into our practice that they become seemingly imperturbable bulwarks of the growing constitutional edifice. And so, in this way, I suggest that we are all, as participants in the constitutional conversation, constantly constructing constitutional meaning—even when we are simply “interpreting” the text. But our construction is not

OF A SOCIAL SCIENCE AND ITS RELATION TO PHILOSOPHY 36–39 (1st ed. 1958).

12. I concede that these last two sentences are probably an extrapolation of Wittgenstein's comments, though I think they are justified. For some related thoughts, see FOGELIN, *supra* note 5, at 121–22; Bartrum, *Metaphors and Modalities*, *supra* note 4, at 188–89.

13. I think it is important to emphasize here that Bobbitt sees the relationship between constitutional practices and language practices as *analogous*. He does not contend that constitutional law *is* a language-game, or that it is, in some sense, its own language; rather the claim is that there are important similarities between the ways that we argue about (and thus understand) constitutional meanings and Wittgenstein's usage-based account of linguistic meaning.

14. For a more detailed account, see BOBBITT, *supra* note 4; accord PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* (1991).

15. I take the central holding of *Korematsu v. United States*, 323 U.S. 214 (1944), to be an excellent example of this phenomenon.

unconstrained in a coarse realist sense. Instead, we are guided ex ante by the rules of constitutional grammar, and we are answerable ex post to a faceless and proletarian norm-giver: the practice.¹⁶

From this perspective, I think we must reorient the discussion of interpretation and construction so that we no longer view the distinction linearly, as if it separated an initial analytic or foundational kind of inquiry (interpretation) from a subsequent synthetic or derivational kind of activity (construction). Instead, we should treat both activities—if we assume that they are, in fact, distinct in some interesting way—as interrelated and interdependent aspects of an ongoing effort to overcome the fundamental and inherently problematic relationship between linguistic vagueness and the law.¹⁷ More importantly, I do not believe either activity can actually reveal something a priori or foundational. Professor Solum’s

16. I do not mean to suggest here that we can derive a substantial kind of an “ought” from an “is” by looking to argumentative practice for guidance. See DAVID HUME, A TREATISE OF HUMAN NATURE 302 (David Fate Norton & Mary J. Norton eds., 2000). Rather, the effort is to describe the grammatical rules that allow us to make legitimate *assertions* of the “ought.” I do concede that the idea of deriving ex post normative judgments from the long-term assimilations of practice may seem to blur the line between Hume’s categories, but I do not intend the term “normative” here as an assessment of “ought” in any thick sense. I simply contend that these assimilations establish the norms governing successful communication within the practice as it “is.” In this sense, then, I merely present an instance of Arthur Prior’s functionalist counterexample to Hume’s assertion: “From the premise ‘He is a sea-captain’ the conclusion may validly be inferred that ‘He ought to do whatever a sea-captain ought to do.’” ALASDAIR MACINTYRE, AFTER VIRTUE 57 (2d. ed. 1984); accord Paul Bloomfield, *Prescriptions Are Assertions: An Essay on Moral Syntax*, 35 AM. PHIL. Q. 1, 17 n.14 (1998).

17. My intuition is that some exploration of the venerable and diverse literature within the philosophy of language on the problem of vagueness may be helpful to this debate. See, e.g., Bertrand Russell, *Vagueness*, 1 AUSTRALASIAN J. OF PSYCHOL. & PHIL. 84 (1923) (giving an introductory overview of the problem); TIMOTHY WILLIAMSON, VAGUENESS (1994) (surveying the subject). Consider, for example, David Lewis’s assessment of the complications that the vague kinds of language often used in ordinary conversation can present to the semantic logician:

If Fred is a borderline case of baldness, the sentence “Fred is bald” may have no determinate truth-value. Whether it is true depends on where you draw the line. Relative to some perfectly reasonable ways of drawing a precise boundary between bald and not-bald, the sentence is true. Relative to other delineations, no less reasonable, it is false. Nothing in our use of language makes one of these delineations right and all others wrong. We cannot pick a delineation once and for all (not if we are interested in ordinary language), but must consider the entire range of reasonable delineations.

David Lewis, *Scorekeeping in a Language Game*, in 1 DAVID LEWIS: PHILOSOPHICAL PAPERS 233, 244 (1983). These difficulties are, I think, only compounded when speakers use vague language *deliberately*, which certainly seems to be true of some aspects of constitution framing.

sophisticated argument notwithstanding, in most cases I do not think that an assertion’s “semantic content” can be understood in terms of “linguistic facts”;¹⁸ rather, meaning arises when both a speaker and a hearer identify and follow the applicable language conventions—which are, in turn, constructed through conversation over time. And so, in constitutional discourse, I think it is more accurate to say that today’s “constructions” (and their assimilation over time) will necessarily reshape and reconstitute the conventions—the Wittgensteinian rules—that govern tomorrow’s “interpretation.”¹⁹ This means that the words alone are often not resource enough to ground a definitive act of interpretation; we must also know a great deal about the constructed conventional context in which they were written if we hope to give an authentic account of speaker’s intent.²⁰ And, once we are beyond the words themselves, it seems to me that we are taking the first few steps across the border between interpretation and construction.²¹ In this sense, then, a meaningful act of interpretation is, itself, constructive in ways that tend to undermine the distinction’s utility as a constraint on judges (although, again, the distinction may highlight other interesting features of adjudication).

18. Perhaps the most revealing statement of this position appears in Lawrence Solum’s *A Reader’s Guide To Semantic Originalism and a Reply to Professor Griffin*: “When we disagree about [semantic content] we are disagreeing about linguistic facts. In principle, there is a fact of the matter about what linguistic content is.” Lawrence Solum, *A Reader’s Guide to Semantic Originalism and a Reply to Professor Griffin* 13 (Illinois Public Law Research Paper, Paper No. 08-12, 2008) available at <http://ssrn.com/abstract=1130665>. I simply disagree on this point: quite often language—particularly vague language—does not refer us to some factual content; instead, it asks us to identify and employ certain communicative conventions. Thus, “linguistic rules,” not “linguistic facts,” are generally at the heart of our disagreements over meaning.

19. I take this to be a roughly Quineian kind of point. See W.V.O. Quine, *Two Dogmas of Empiricism*, 60 *PHIL. REV.* 20, 20–31 (1951) (demonstrating analyticity’s question-begging reliance on synonymy).

20. This much I take to be entirely consistent with Grice’s account of meaning—particularly his work on implicature. See H. Paul Grice, *Logic and Conversation*, in 3 *SYNTAX AND SEMANTICS: SPEECH ACTS* 41 (Peter Cole & Jerry Morgan eds., 1975). Here I think Solum would agree. See Solum, *supra* note 18, at 12 (discussing constitutional implicature).

21. I recognize that proponents intend the distinction to separate our efforts to determine “speaker’s intent” (interpretation) from our efforts to create congruous legal rules (construction), and thus would likely argue that any constructive efforts to recover speaker’s intent rightly remain on the “interpretation” side of the divide. I would point out, however, that—in the constitutional context—some of the kinds of things we might consider once we get “beyond the words” include considerations such as “the speaker cannot have meant *X* because that seems to require absurd legal rule *Y*.” This kind of (perhaps inevitable?) argument seems to seriously muddy the interpretation-construction waters seriously.

I suppose that interpretation-construction proponents might argue that we do not need a fully determinative theory of original *textual* meaning to make the distinction a useful part of an originalist theory of *constitutional* meaning—and they could be right. In other words, as long as we can roughly agree on what competent speakers understood constitutional language to mean at the time it was ratified, then we have something relatively foundational on which to construct the legal rules applicable to modern controversies. (In Bobbitt’s terms, we might use historical argument to ground our doctrinalism). The larger point, however, is that our constitutional practices are analogous enough to our language practices that the same contextual variables which complicate theories of textual “interpretation” also complicate (perhaps to an even greater extent) the argumentative practices through which we “construct” legal rules. To be competent, or at least understood, within the practice, we must embed our assertions of constitutional meaning within the argumentative context that we inherit and inhabit—and original intentions are only one part of that larger context. And so, unfortunately, I think something is lost from the project the interpretation-distinction was supposed to help make possible: it can only rarely help define *the* connection between constitutional text and constitutional meaning; for the most part, it just gives us more precise means of deriving a *possible* connection. Ultimately, then, the distinction itself—inasmuch as it helps make up an originalist theory—falls fairly squarely into the “construction” category. It is a tool we can use to help build the doctrine that (at least temporarily) bridges the gap between text and meaning. But it is just one of many that we might add to our practice and its norms—one which may or may not help to make up the context within which we understand future constitutional arguments or assertions.

All of this is perhaps a roundabout way of saying, in a Bobbitt-inspired accent, that constitutional text is not the only—nor often even a particularly helpful or determinative—source of constitutional meaning. On most occasions, indeed, in almost all the controversial cases, the text is barely even a starting point for a much broader argument in which we make assertions of history, structure, doctrine, prudence, and constitutional ethos. And it is this grammar, this evolving body of organically constructed rules and conventions, which establishes the boundaries of reasonable interpretation—not, as the interpretation-construction distinction seems to suggest, some

set of foundational “facts” about speaker’s meaning. Only in the most basic and uncontroversial cases, then, can we usefully describe the practice of connecting constitutional text with constitutional meaning as a two-step process, in which we establish an objective referent and then build out applicable legal rules. Rather, in the cases of most concern, we must both recognize and creatively employ the existing argumentative conventions to establish the boundaries of acceptable interpretation (this, itself, is constructive) and then make our assertions of constitutional meaning (construct legal rules) within the confines of the interpretive framework we have helped build. At every step along the way, then, making a successful assertion of constitutional meaning is much more an *art* than the *science* that the interpretation-construction distinction would suggest.

In the remainder of this Essay I hope to illustrate one particularly powerful way that we can—through our very acts of argument—exert evolutionary pressure on the conventions and grammar that define legitimate constitutional argument. By creatively using, and thus slightly redefining, certain “canonical” constitutional texts, we can give new contours to the conventional context that establishes the boundaries of reasonable interpretive choice. These texts, which seem to resound so powerfully in our constitutional ear that they have hardened into part of the fundamental law, itself, both shape and are shaped by legitimate constitutional argument. In this way, the canon is reminiscent of another of Wittgenstein’s enduring aphorisms, in which he analogizes our knowledge of the world to a river and its banks:

It might be imagined that some propositions, of the form of empirical propositions, were hardened and functioned as channels for such empirical propositions as were not hardened but fluid; and that this relation altered with time, in that fluid propositions became hardened, and hard ones became fluid.²²

Wittgenstein’s metaphor is, I think, a very helpful way to visualize the relationship between the constitutional canon and constitutional practice. Canonical texts help to form the riverbanks through which our everyday arguments and practice must flow like water. But, while a competent constitutional

22. LUDWIG WITTGENSTEIN, ON CERTAINTY 15 (G.E.M. Anscombe & G.H. von Wright eds., Denis Paul & G.E.M. Anscombe trans., 1969).

practitioner must remain within the canonical riverbed when constructing modal arguments, she may in turn—through perhaps subtle alterations in usage—reshape the constitutional geology over time.²³ Importantly, this is not to suggest, as the realist might, that a canonical text can mean whatever one wants it to mean at any particular place and time. The practitioner still must use the text properly: she must follow the rules, and her usages must be understood and ratified within the relevant community, for her to make any legitimate assertion of constitutional meaning. The contention is rather that, as creative individual actors within a much larger creative practice, we can impact and grow the grammatical conventions governing constitutional argument over time, thus changing the ways that canonical texts are appropriately used and understood.

In the longer work from which this Essay derives, I explored, in depth, three examples of canonical (or anticanonical) evolution in our practice.²⁴ There I argued that canonical texts normally function as *metonyms* within the constitutional conversation: that is, we typically invoke them not to refer to their literal terms, but rather as shorthand for a larger set of associated ideas or principles.²⁵ This metonymic conception, I suggest, makes these texts particularly susceptible to the kinds of creative usage that may lead to evolutions in meaning over time. The three examples I chose to explore—Thomas Jefferson’s *Reply to the Danbury Baptists*, *Lochner v. New York*, and the Declaration of Independence—were meant to illustrate three distinct kinds of metonymic evolution, each accomplished within a different sphere of constitutional discourse. Further, I tried to identify each text’s “modal home,” or the argumentative modality within which it most often and comfortably appears. Thus, Jefferson’s letter derives from the historical modality, and is meant to illustrate a process of *decanonization* accomplished within the sphere of judging. *Lochner*, by contrast, emerges from doctrinal argument and exemplifies *canonical refinement* realized in the sphere of legal scholarship. The Declaration of Independence is at home in

23. To return to the reference with which I began, this relationship is not unlike that Thomas Kuhn describes between “paradigms” and “normal science.” See KUHN, *supra* note 4, at 10–12.

24. I explored many of these ideas in Bartrum, *Constitutional Canon*, *supra* note 4, at 311–90; some of the material herein appeared there first.

25. *Id.* at 329.

ethical argument and demonstrates *canonical reformation* within the sphere of constitutional politics.

In this Essay, I explore the argumentative use and evolution of a fourth canonical illustration, James Madison's *Federalist 10*. This text does not seem to fit quite as neatly into my earlier taxonomies, but this, perhaps, makes it all the more interesting as an example. I suggest that *Federalist 10* has *two* modal homes in our practice—both in the historical and structural forms—and that at least part of its metonymic evolution has been to shift slightly from one home to another. As part of this process, the text has undergone two distinct phases of evolution, both occurring within the academic sphere of constitutional discourse. The first phase is one of *canonization* in the work of Charles Beard and his followers.²⁶ The second phase—that of *canonical refinement*—occurred in the second half of last century, beginning with the work of Douglass Adair and concluding with Larry Kramer's more recent revisions.²⁷ In what follows, I trace the broad contours of these evolutions in metonymic meaning through the academic discourse and conclude with a brief examination of the impacts these changes had on constitutional argument, as practiced in the courts. In so doing, I hope to illustrate one of the ways that, over time, our arguments themselves shape the grammatical context that, in turn, defines the limits of reasonable interpretation and argumentation.

HISTORY AND STRUCTURE: *FEDERALIST 10* AND CANONICAL REFINEMENT

James Madison's *Federalist 10* is likely among the first primary texts of constitutional theory the modern American high school student encounters, and, if her experience is anything like my own, it is presented as emblematic of the Founders' structural insight into the moderating virtues of a pluralistic democracy. Framed this way, the text has powerful metonymic resonance in two distinct modalities of constitutional argument. First, it is used to make the *structural* assertion that an extended republic governed by multiple overlapping sovereigns provides

26. CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 156 (Macmillan Co. 1913).

27. DOUGLASS ADAIR, THE INTELLECTUAL ORIGINS OF JEFFERSONIAN DEMOCRACY: REPUBLICANISM, THE CLASS STRUGGLE, AND THE VIRTUOUS FARMER (Mark E. Yellin ed., 2000) [hereinafter ADAIR, INTELLECTUAL ORIGINS]; Douglass Adair, *The Tenth Federalist Revisited*, 8 WM. & MARY Q. 48 (1951) [hereinafter Adair, *Revisited*]; Larry D. Kramer, *Madison's Audience*, 112 HARV. L. REV. 611 (1999).

the best institutional protection against the destructive tendencies of political faction. Second, it is presented as evidence for the *historical* argument that the Framers and ratifiers endorsed this theory in the late 1780s, and that, wherever possible, we should endeavor to promote pluralism as an originalist constitutional maxim. But, in truth, *Federalist 10* has not always stood resolutely for these principles in our practice—indeed, for over a hundred years, the text had virtually no place at all in the discourse—and its future viability, at least as a historical metonym, is now in some doubt. Thus, as with many other canonical texts, *Federalist 10*'s meaning in constitutional argument continues to evolve, and, as it does, so do the boundaries of reasonable constitutional interpretation. I begin my description by attempting to locate Madison's essay in its original historical context.

The story of *Federalist 10* begins in the late months of 1786, as Madison began to make preparations for the momentous convention to be held the following spring in Philadelphia. In the years following the British surrender at Yorktown, America's leading statesmen contemplated the evolving political situation in the states with growing alarm.²⁸ Their concerns were myriad, to be sure, but they fell into three general categories. First, there was a splintering of state political communities into increasingly strident groups or factions—at least partly the product of an empowering revolutionary ethos—which led to an explosion of conventioning, and, in extreme cases, the kind of mobbery that would lead to outbreaks like Shays' Rebellion in western Massachusetts.²⁹ Second, and perhaps more troubling, were emerging abuses of the legislative power itself, as cabals in the state legislature (most notably Rhode Island) began to push through a smothering multitude of so-called “tender” and “paper money” laws intended to dilute the value of outstanding financial obligations.³⁰ Third, there was the problem of interstate rivalry, as the spirit of state power and independence threatened to bloom into the kind of protectionism that might strangle commerce and doom the new American economy to perpetual debt.³¹ It was on the pretext of solving this final problem that

28. For an excellent discussion of this period, see generally GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC: 1776–1787*, at 393–430 (2d ed. 1998).

29. *Id.* at 396–403.

30. *Id.* at 403–08. On Rhode Island, see GEORGE TINDALL & DAVID SHI, *AMERICA: A NARRATIVE HISTORY* 297–98 (4th ed. 1996).

31. RON CHERNOW, *ALEXANDER HAMILTON* 224–27 (2004).

delegates from Virginia and Maryland accepted George Washington's invitation to meet at Mt. Vernon in 1785, out of which caucus emerged an invitation to all thirteen states to send representatives to a larger convention in Annapolis in September of 1786.³² When only five states showed up in Maryland, Alexander Hamilton—a staunch proponent of constitutional reform—seized the opportunity to propose a third convention the following spring in Philadelphia,³³ this time fully empowered “to devise such further provisions as shall appear to them necessary to render the constitution of the Federal Government adequate to the exigencies of the Union.”³⁴

Like Hamilton, Madison hoped to radically overhaul the Articles of Confederation, and he departed Annapolis determined to put together a comprehensive plan for constitutional reform. Earlier that year, with the aid of a “literary cargo” Thomas Jefferson had sent from Paris, he had begun an extensive study of previous attempts at republican government.³⁵ Leaving Annapolis, however, Madison abandoned his historical project—apparently satisfied that the destructive tendencies of political faction had crippled all earlier republican efforts—and undertook an introspective examination of the American system.³⁶ Somewhere in these investigations, most likely amidst the crates from France, it seems that he ran into the political musings of David Hume; in particular the Scotsman's suggestion that it might be possible to establish an extended republic over a large area.³⁷ This, for Madison, was a welcome—

32. TINDALL & SHI, *supra* note 30, at 300. On commerce issues as pretext for more radical designs, see WOOD, *supra* note 28, at 473 (“Both trade conventions of the previous two years, at Mt. Vernon and Annapolis, were but devices to be used in the move to change the central government.”).

33. WOOD, *supra* note 28, at 473.

34. Alexander Hamilton, *Address of the Annapolis Convention: 1786*, in 1 THE WORKS OF ALEXANDER HAMILTON 335, 339 (Henry Cabot Lodge ed., 1904) (emphasis omitted).

35. Kramer, *supra* note 27, at 626. For the fruit of this labor, see James Madison, *Of Ancient & Modern Confederacies*, in 2 THE WRITINGS OF JAMES MADISON 369–90 (G.P. Putnam & Sons, 1900).

36. James Madison, *Vices of the Political System of the United States*, in 2 THE WRITINGS OF JAMES MADISON, *supra* note 35, at 361.

37. It was Douglass Adair—whose contributions to this story unfold below—that first brought attention to Madison's reliance on Hume's work. See Douglass Adair, “*That Politics May Be Reduced to a Science*”: David Hume, James Madison, and the Tenth Federalist, 20 HUNTINGTON'S LIBRARY Q. 343 (1957). But see Edmund S. Morgan, *Safety in Numbers: Madison, Hume, and the Tenth Federalist*, 49 HUNTINGTON'S LIBR. Q. 95 (1986) (questioning Madison's reliance on Hume). For Hume's thoughts on the virtues of an extended republic, see David Hume, *Idea of a Perfect Commonwealth*, in HUME: POLITICAL ESSAYS 221, 221–33 (Knud Haakonsen ed., Cambridge Univ. Press 1994)

though perhaps startling—thought. The accepted wisdom, best expressed by Montesquieu, was that successful democratic governance was possible only over a small, relatively homogeneous republic; and this adage often formed the centerpiece of provincial objections to a strong centralized government.³⁸ For Madison, then, Hume’s suggestion was a paradigm shift, and he gladly undertook an exploration of the possible political *benefits* an extended republic might present.³⁹

Even during his intense study and preparation, Madison continued to work the political wheel in an effort to ensure the success of the upcoming convention.⁴⁰ In particular, he pressed Washington, whom he knew to be sympathetic to the reform effort, to both endorse and attend the meeting.⁴¹ Madison well knew that the General’s immense national prestige would lend badly needed credibility to the endeavor, and would likely assure the attendance of those states that had forgone the Annapolis meeting.⁴² He also kept in constant communication with Jefferson in Paris, advising him of the developments leading up to Philadelphia. He sent his fellow Virginians at least twelve letters in late 1786 and 1787, and, as the anticipated convention drew near, he began to share glimpses of his emerging theory of faction in the extended republic.⁴³ On April 16, 1787—with Washington’s endorsement safely promised—Madison revealed his recent thoughts to the General in arguing that the national government should have authority to veto all state laws:

[A] negative *in all cases whatsoever* on the legislative acts of the States . . . appears to me to absolutely necessary, and to be the least possible encroachment on the State jurisdictions. . . .
[A] happy effect of this prerogative would be its controul on the internal vicissitudes of State policy, and the aggressions of

(1754). Many also see the roots of Madison’s argument in Book VII of Aristotle’s *Politics*. See, e.g., Peter Simpson, *Aristotle’s Regime of the Americans*, in *ARISTOTLE’S POLITICS TODAY* 109, 109–27 (Lenn E. Goodman & Robert B. Talisse eds., 2007); Ralph L. Ketcham, *Notes on James Madison’s Sources for the Tenth Federalist Paper*, 1 *MIDWEST J. POL. SCI.* 20, 21 (1957).

38. See CHARLES DI MONTESQUIEU, *THE SPIRIT OF THE LAWS* BK. VIII 124 (Anne Cohler, et. al eds., Cambridge Univ. Press 1989) (1748) (“It is in the nature of a republic to have only a small territory . . .”).

39. Madison, *supra* note 36, at 366.

40. JOSEPH ELLIS, *AMERICAN CREATION: TRIUMPHS AND TRAGEDIES AT THE FOUNDING OF THE REPUBLIC* 39 (2007).

41. *Id.*

42. *Id.*

43. See Madison, *supra* note 35, at 229–374.

interested majorities on the rights of minorities and of individuals.⁴⁴

Here is the germ of Madison's theoretical addition to Hume's thoughts: the peculiar advantage of an extended republic was the likelihood that an enlarged, and thus diversified, national legislature would temper the dangers of localized faction with the alloy of political pluralism.

Just a month before journeying to Philadelphia, Madison outlined a more complete version of his new theory in notes he prepared in anticipation of the convention. In the final section, entitled "Injustice of the Laws of the States," he further explained his counterintuitive notion:

If an enlargement of the [republican] sphere is found to lessen the insecurity of private rights, it is not because the impulse of common interest or passion is less predominant in this case with the majority; but because a common interest or passion is apt to be felt and the combinations less easy to be formed by a great than by a small number. The Society becomes broken into a greater variety of interests, of pursuits of passion, which check each other, whilst those who may feel a common sentiment have less opportunity of communication and concert. It may be inferred that the inconveniences of popular States contrary to the prevailing Theory, are in proportion not to the extent, but to the narrowness of their limits. . . . As a limited monarchy tempers the evils of an absolute one; so an extensive Republic meliorates the administration of a small Republic.⁴⁵

It was in this way, then, that Madison believed he could turn one of the principal objections to a nationalized republic back against itself: rather than a great problem, enlarging the scope of democratic government was, in fact, a great solution. Through his studies, Madison came to believe that it was faction itself that presented the most fundamental threat to ordered liberty, and thus it was the control of faction that must be government's central purpose.⁴⁶ To this end, he began to put together a proposal that would radically restructure the central government in ways designed to implement his new theory of the extended

44. Letter from James Madison to George Washington (April 16, 1787), *reprinted in* Madison, *supra* note 35, at 344, 346.

45. Madison, *supra* note 36, at 368.

46. *See id.*

republic, a proposal that Edmund Randolph would present in late May to the Philadelphia delegates as the Virginia Plan.⁴⁷

While many of the delegates undoubtedly believed they were assembled solely to address the deficiencies of the existing national government, Madison had come to believe that it was equally important for the convention to devise a plan capable of protecting “republican liberty” from “the abuses of it practiced in some of the states.”⁴⁸ This was precisely what he believed an extended republic could accomplish—self-interested minorities that might succeed in disrupting state government would be drowned in the relative ocean of national politics—and it was for this reason that he saw a national veto over all state laws as imperative.⁴⁹ Indeed, when Randolph and other delegates left the topic of state vicissitudes out of the early discussions, Madison rose to object and took the opportunity to give full voice to his new ideas. According to his own notes, he gave the following account of his recent thoughts:

[Roger Sherman] had admitted that in a very small State, faction & oppression wd. prevail. It was to be inferred then that wherever these prevailed the State was too small. . . . The only remedy is to enlarge the sphere, & thereby divide the community into so great a number of interests & parties, that in the 1st. place a majority will not be likely at the same moment to have a common interest separate from that of the whole or of the minority; and in the 2d. place, that in the case they shd. have such an interest, they may not be apt to unite in the pursuit of it.⁵⁰

This speech marked the debut of Madison’s new theory among his contemporary statesmen, and—as discussed below—it is not at all clear than anyone other than Hamilton fully understood it.⁵¹ What is clear, however, is that the convention would eventually reject his call for an absolute national veto over state laws, which he saw as an essential mechanism of the faction-suppressing extended republic.⁵² Even so, just four months later

47. James Madison, Notes on the Constitutional Convention (May 29, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 17, 20–23 (Max Farrand ed., Yale Univ. Press, 1st ed. 1911).

48. James Madison, Notes on the Constitutional Convention (June 6, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 47, at 130, 134.

49. Letter from James Madison to George Washington, *supra* note 44, at 346.

50. James Madison, Notes on the Constitutional Convention (June 6, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 47, at 130, 134–36.

51. See generally Kramer, *supra* note 27, at 640–50.

52. *Id.* at 649–54.

Madison would present a more complete version of his theory to the general public in the tenth essay of a series that would come to be known as *The Federalist*.⁵³

The essay was first published in the *New York Daily Advertiser* on November 22 of 1787, and, though it was reprinted in two other New York papers—the *New York Packet* and the *Independent Journal*—over the next two days, Madison’s commentary did not enjoy wide circulation.⁵⁴ Indeed, it appeared in just four other papers, only one outside of New York, over the course of the next year.⁵⁵ And it is perhaps telling that, on the same day that *Federalist 10* was first published, another New York paper prominently featured *Cincinattus IV*, the fourth in a six part series of editorials directed against James Wilson’s influential *State House Yard Speech* of October 6.⁵⁶ As Bernard Bailyn pointed out, it was Wilson’s Philadelphia speech more than the *Federalist* that was “the most famous, to some the most notorious, federalist statement of the time,”⁵⁷ and *Cincinattus* (likely Virginian Richard Henry Lee) was only one of several commentators to author widely publicized responses.⁵⁸ By comparison, the *Federalist* essays garnered relatively little attention—less than a third were originally published outside of New York—and, of those that were, Madison’s tenth paper was not among the most widely reprinted.⁵⁹

Even after ratification, when *The Federalist*, as a whole, began to settle into constitutional argument fairly quickly, Madison’s essay on the enlarged republic was not among those that judges initially turned to for guidance on constitutional questions.⁶⁰ While several early Supreme Court justices (including, notably, John Marshall in *McCulloch v. Maryland*) lauded the papers as definitive accounts of constitutional

53. THE FEDERALIST NO. 10 (James Madison).

54. 19 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 542 (John P. Kaminski, et. al eds., 2003) [hereinafter 19 DOCUMENTARY HISTORY OF RATIFICATION].

55. *Id.* The only out-of-state paper to reprint the essay was the *Pennsylvania Gazette*, which published it on January 2, 1788.

56. *Id.* at 281.

57. BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 328 (2d ed. 1992).

58. See 19 DOCUMENTARY HISTORY OF RATIFICATION, *supra* note 54, at 337–38 (CC: 134) (annotating publication of and response to Wilson’s speech).

59. *Id.* at 540–49 (annotating publications of each of the essays).

60. For a thorough review of the early Court’s use of *The Federalist*, see James G. Wilson, *The Most Sacred Text: The Supreme Court’s Use of The Federalist Papers*, 1985 BYU L. REV. 65.

meaning,⁶¹ *Federalist 10* itself did not make its first appearance in a federal appellate opinion until 1969,⁶² and it would not turn up in a Supreme Court opinion until 1974.⁶³ Nor, perhaps more surprisingly, were early constitutional scholars particularly drawn to Madison's paper. Although many of the 19th century's most influential treatise writers—including William Rawle,⁶⁴ James Kent,⁶⁵ Joseph Story,⁶⁶ George Curtis,⁶⁷ and Thomas Cooley⁶⁸—referenced *The Federalist* repeatedly, only Story gave any space or thought to *Federalist 10*.⁶⁹ In exploring the preamble's appeal to the cause of “domestic tranquility,” Story devoted three short sections (roughly a page and a half of his nearly 780 page opus) to an almost verbatim transcription of Madison's thoughts on faction; although, in fact, he made no attribution or citation to *Federalist 10* itself.⁷⁰ And the law journals, though not nearly as prevalent or important as treatises in the 19th century, tell a similar story: it appears that *Federalist 10* did not make its first appearance in a scholarly article until

61. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 433 (1819) (“No tribute can be paid to [the *Federalist's* authors] which exceeds their merit.”); see also *Calder v. Bull*, 3 U.S. 386, 391 (1789) (deeming “the author of the *Federalist*” superior to both Blackstone and Wooddeson); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 144 (1810) (Johnson, J., concurring and dissenting) (“[T]he letters of Publius . . . are well known to be entitled the highest respect”). At least some of *The Federalist's* initial influence probably arises from its relatively early publication: the first bound volumes came out in 1788, *THE FEDERALIST: A COLLECTION OF ESSAYS WRITTEN IN FAVOR OF THE NEW CONSTITUTION, IN TWO VOLUMES* (J. & A. McLean eds., 1788), while *Elliot's Debates* did not come out until 1836, Madison's notes were not published until 1840, *Hamilton's Works* did not appear until 1851, and Max Farrand's *Records of the Federal Convention* only went to press in 1911. See Wilson, *supra* note 60, at 73.

62. *Haney v. Cnty. Bd. of Educ.*, 410 F.2d 920, 925 (8th Cir. 1969) (citing *Federalist 10* for the proposition that “our forefathers had sufficient vision to ensure that even the many must give way to certain fundamental rights of the few”).

63. *Storer v. Brown*, 415 U.S. 724, 736 (1974) (citing *Federalist 10* as evidence of the Framers' fear that “splintered parties and unrestrained factionalism may do significant damage to the fabric of government”).

64. E.g., WILLIAM RAWLE, *A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 109 n.8 (1825) (opining that the essays “contain the soundest principles of government, expressed in the most eloquent language”).

65. E.g., JAMES KENT, *1 COMMENTARIES ON AMERICAN LAW* 290 (1826) (referencing “the high authority of the *Federalist*”).

66. JOSEPH STORY, *1 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES v-vi* (1833) (calling *The Federalist* “an incomparable commentary of three of the greatest statesmen of their age”).

67. E.g., 1 GEORGE T. CURTIS, *HISTORY OF THE ORIGIN, FORMATION, AND ADOPTION OF THE CONSTITUTION OF THE UNITED STATES* 417 (1854) (ascribing to *The Federalist* a “weight and power which commanded the careful attention of the country”).

68. THOMAS M. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* (1868) (making multiple references).

69. STORY, *supra* note 66, at 158–59.

70. *Id.*

1926.⁷¹ This, perhaps, helps to explain why Madison’s primary antebellum biographers did not find the essay worthy of much note or attention. Neither John Quincy Adams nor William Rives devoted any significant discussion to the specific paper, though Rives did recognize and applaud Madison’s innovative theory of the enlarged republic.⁷² For the first century of American life, then, *Federalist 10* had virtually no place at all in our ongoing arguments about constitutional meaning. That all changed, however, in 1913 with the publication of Charles Beard’s *An Economic Interpretation of the Constitution of the United States*.⁷³

Writing in the midst of Progressive battles with a recalcitrant Court, Beard hoped to “bring back into the mental picture of the Constitution those realistic features of economic conflict, stress, and strain, which my masters had, for some reason, left out of it.”⁷⁴ Though certainly cognizant of the ideological implications of his work, Beard denied any underlying political motivations and claimed only a straightforward sense of historical curiosity: “In [my] stud[ies] I had occasion to read voluminous writings by the Fathers, and I was struck by the emphasis which so many of them placed upon economic interests as forces in politics and in the formulation of laws and constitutions.”⁷⁵ And, in the course of those readings, his mind fastened particularly on *Federalist 10* and Madison’s thoughts on the Constitution’s tendency to control faction.⁷⁶ Indeed, in Madison’s long-forgotten essay, Beard found a “masterly statement of the theory of economic determinism in

71. Forrest R. Black, *The American Constitutional System: An Experiment in Limited Government*, 10 CONST. REV. 35, 37 (1926) (citing *Federalist 10* for the proposition that “the general opinion of the convention . . . [was that government should] secure private rights against majority factions”). My conclusion regarding *Federalist 10*’s absence from earlier articles is based on a search of the HeinOnline law journal database.

72. See JOHN QUINCY ADAMS, *THE LIVES OF JAMES MADISON AND JAMES MONROE* 41 (1851) (referring to Hamilton’s *Federalist 9* and Madison’s *Federalist 10* together, as a “consideration of the utility of the Union as a safeguard against domestic faction and insurrection”); WILLIAM C. RIVES, *2 LIFE AND TIMES OF JAMES MADISON* 488 (1866) (discussing Madison’s theory of the enlarged republic and mentioning that *Federalist 10* “exhibits a power of analysis, and a depth and clearness of abstract reasoning, which have commanded the admiration of every intelligent reader”).

73. BEARD, *supra* note 26.

74. CHARLES A. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* xx (Transaction Publishers 2003) (reprinting the introduction to the 1935 edition).

75. *Id.* at xviii.

76. *Id.*

politics.”⁷⁷ In his argument, *Federalist 10* spoke primarily to the dangers of class struggle and was fundamental and compelling evidence—the proverbial smoking gun—of the Framers’ devotion to propertied interests:

Different degrees and kinds of property inevitably exist in modern society; party doctrines and “principles” originate in the sentiments and views of which the possession of various kinds of property creates in the minds of its possessors; class and group divisions based on property lie at the basis of modern government; and politics and constitutional law are inevitably a reflex of these contending interests. Those who are inclined to repudiate the hypothesis of economic determinism as a European importation must, therefore, revise their views, on learning that one of the earliest, and certainly one of the clearest, statements of it came from a profound student of politics who sat in the Convention that framed our fundamental law.⁷⁸

Beard went on to present Madison’s essay as the paradigmatic expression of the economic interests underlying the entire constitutional endeavor.⁷⁹

As a historical study, Beard’s work generally suffers from what David Hackett Fischer has labeled the “furtive fallacy”: the conviction that secret—or at least undeclared—motives lurk behind the decisions and events that populate the surface of the historical record.⁸⁰ Given his belief that the Framers rarely made their economic motivations an explicit part of ratification rhetoric, Beard seized on particular language in *Federalist 10* identifying economic class as the “chief cause” of political faction—the primary evil the Constitution aimed to suppress.⁸¹ He quoted Madison selectively—though not entirely unfairly—to this effect:

[T]he most common and most durable source of factions has been the various and unequal distribution of property. Those who hold and those who are without property have ever formed distinct interests in society. Those who are creditors, and those who are debtors, fall under a like discrimination. A

77. BEARD, *supra* note 26, at 15.

78. *Id.* at 15–16.

79. *Id.* at 156–59.

80. DAVID HACKETT FISCHER, *HISTORIANS’ FALLACIES: TOWARDS A LOGIC OF HISTORICAL THOUGHT* 76 (1970). We might also fairly accuse Beard of committing what Fisher labeled the “fallacy of tunnel history,” the tendency to divide historical events into simplified and self-contained causal strands. *Id.* at 142.

81. BEARD, *supra* note 26, at 156.

landed interest, a manufacturing interest, a mercantile interest, a moneyed interest, with many lesser interests grow up of necessity in civilized nations, and divide them into different classes actuated by different sentiments and views.⁸²

For Beard, Madison's essay expressly revealed the Framers' hope that an enlarged republic with a strong central government would better allow wealthier, propertied Americans to divide and conquer their economic inferiors. When in doubt, then, we should understand the constitutional text and structure as intended to protect wealth against coalesced class politics: "[The remedy] lies in making it difficult for enough contending interests to fuse into a majority, and in balancing one over against another. The machinery for doing this is created by the new Constitution and by the Union."⁸³ To Progressives, then, Beard's argument used *Federalist 10* as a call to radically restructure the Constitution.

The book was immediately controversial and inspired vigorous criticism in high places. In the preface to his 1935 edition, Beard recalls his swift condemnation by "conservative Republicans, including ex-President Taft" and a summons to explain himself to the New York Bar Association, which he declined.⁸⁴ But he also had a devoted and influential following, and among scholars no one carried the torch more eagerly than Vernon Louis Parrington, whose three-volume *Main Currents in American Thought*⁸⁵—which posited an enduring divide between Hamiltonian elitists and Jeffersonian republicans at the center of American political life—one scholar would later call the "Summa Theologica of Progressive history."⁸⁶ Parrington likened Beard's work to "a discovery that struck home like a submarine torpedo—the discovery that the drift toward plutocracy was not a drift away from the spirit of the Constitution, but an inevitable unfolding of its premises; . . . [the Constitution] was, in fact, a carefully formulated expression of eighteenth century property consciousness."⁸⁷ Like Beard, Parrington found the true nature of these premises described in *The Federalist's* "remarkable tenth number, which compresses within a few pages pretty much

82. *Id.* at 156–57, (quoting FEDERALIST NO. 10 (James Madison)).

83. *Id.* at 158.

84. BEARD, *supra* note 74, at xx.

85. V.L. PARRINGTON, 1–3 MAIN CURRENTS IN AMERICAN THOUGHT (1927).

86. Charles Crowe, *The Emergence of Progressive History*, 27 J. HIST. IDEAS 109, 121 (1966).

87. 3 PARRINGTON, *supra* note 85, at 410.

the whole Federalist theory of political science . . .”⁸⁸ The effect of Beard’s and Parrington’s argumentative usage of Madison, combined with the growing movement towards Progressive history, was to recover *Federalist 10* from relative obscurity and elevate it to a place among those canonical texts that must inform our arguments about constitutional meaning.⁸⁹ Indeed, discussion of Madison’s theory of faction appeared in more than a hundred scholarly articles between 1913 and 1950,⁹⁰ as well as in numerous Progressive histories,⁹¹ and in several notable efforts to respond to Beard’s interpretation.⁹²

It was Beard’s use of *Federalist 10* which both canonized the essay and established its initial metonymic meaning in constitutional discourse. As a symbol, Madison’s paper now stood for the Framers’ intention to create a constitutional structure that would protect private property from populist redistribution efforts. And, as Garry Wills observed, even those scholars who disagreed with the overall economic interpretation of the Constitution seemed to concede that Beard had interpreted *Federalist 10* correctly: “[Neutral scholars] might not agree with Beard’s politics; but they often felt he had got *Madison’s* politics right.”⁹³ As such, *Federalist 10* emerged as a powerful metonymic tool in at least two modalities of academic constitutional argument.⁹⁴ In *structural* argument, the essay stood for the proposition that the constitutional architecture protects wealth and the laissez-faire economy against potentially tyrannous proletarian majorities. In *historical* argument, *Federalist 10* was symbolic of the Framers’ intention to craft a Constitution that embodied these principles of economic determinism. At this point, *Federalist 10* did not make its way

88. 1 PARRINGTON, *supra* note 85, at 286.

89. See Adair, *Revisited*, *supra* note 27, at 48 (“[A]fter Beard’s book appeared the *Tenth Federalist* became the essay most often quoted to explain the philosophy of the founding fathers, and thus the ‘ultimate meaning’ of the United States Constitution itself.”); GARRY WILLS, *EXPLAINING AMERICA: THE FEDERALIST xv* (1981) (“Beard first put *Federalist 10* in the center of constitutional debate, where it has remained ever since.”).

90. This conclusion is based on a search of JSTOR’s “history,” “law,” “philosophy,” and “political science” databases, as well as HeinOnline’s law journal database.

91. See Crowe, *supra* note 86, at 123–25 (surveying Progressive scholars).

92. See Wilson, *supra* note 60, at 106–11 (surveying responses to Beard, most notably those by Charles Warren, Walter Crosskey, Robert Brown, and Forrest McDonald).

93. WILLS, *supra* note 89, at xx.

94. I explore only the structural and historical modalities here, but there is certainly an argument that *Federalist 10* so understood was also symbolic of the American free market *ethos*.

from the academy into the courtroom—indeed, given the metonymic meanings Beard attached to the essay, it is difficult to imagine a circumstance in which it would have come up at the bar—but it did take up a prominent position in the canon of academic argument, where it remained influential and largely undisturbed until Douglass Adair began to reexamine *The Federalist* in the 1940s and early 1950s.

Adair, who staunchly opposed Beard’s ideas about economic determinism,⁹⁵ began by writing a series of articles in the *William & Mary Quarterly* exploring the historical controversy over the authorship of certain essays in *The Federalist*.⁹⁶ In 1951, however, he focused his attention squarely on *Federalist 10* in an effort to recapture a more nuanced (and perhaps more sophisticated) understanding of Madison’s argument.⁹⁷ It is instructive that, writing nearly forty years later, Adair could claim (on well-researched grounds) that Beard’s interpretation “still governs to a remarkable degree the contemporary view of *Federalist 10*, Madison, and the Constitution.”⁹⁸ Adair then waded straight into battle with that interpretation, however, which he characterized as the view “that Madison’s *Federalist* theory expounded the doctrine that theories are unimportant in politics.”⁹⁹ In other words, according to Adair, Beard saw *Federalist 10* as compelling evidence that “political theory played [no] consequential role in creating the Constitution; speculation there was in plenty in the Convention, but it was land and debt speculation, not speculative thought”¹⁰⁰—and, in this way, the Framers had forsaken the Enlightened democratic principles of 1776.¹⁰¹

Adair’s response—which took him another six years to fully formulate—was to recover and present much of the historical context described above: Madison’s extensive and troubled study of ancient democracies, his reliance on David Hume’s work in

95. Adair’s doctoral dissertation, which remained unpublished—though widely read—for many years, is entitled *The Intellectual Origins of Jeffersonian Democracy*, and, as such, was a direct reply to Beard’s work entitled *The Economic Origins of Jeffersonian Democracy*. Compare ADAIR, *INTELLECTUAL ORIGINS*, *supra* note 27, with BEARD, *supra* note 26.

96. Douglass Adair, *The Authorship of the Disputed Federalist Papers: Part I*, 1 WM. & MARY Q. 97 (1944); Douglass Adair, *The Authorship of the Disputed Federalist Papers: Part II*, 1 WM. & MARY Q. 235 (1944).

97. Adair, *Revisited*, *supra* note 27, at 48.

98. *Id.*

99. *Id.* at 49.

100. *Id.* at 62.

101. *See id.* at 48 n.1.

political theory, and the sudden revelation of the enlarged republic.¹⁰² Adair argued that, “by tracing the development of Madison’s theory as he thought it out in the spring of 1787,” he could demonstrate two points conclusively: (1) the Virginian never subscribed to the “naïve doctrine” regarding the irrelevance of political theory that Beard had suggested; and (2) Madison’s ideas, “as abstract speculative thought played a significant role in the writing and ratification of the United States Constitution.”¹⁰³ In particular, Adair pointed to the discovery of Hume—whose work “must have electrified Madison as he read [it]”—as evidence that a great deal of considered political theory lay behind the ideas expressed in *Federalist 10*.¹⁰⁴ Further, Madison never suggested that the dominant economic faction would inevitably control government: indeed, the same checks that hinder other factions would seem to operate with equal force upon propertied interests.¹⁰⁵ Adair thus used *Federalist 10* to make his initial argument that Madison had far loftier considerations than personal realty and the suppression of class struggle in mind in 1789. But, perhaps owing to his untimely death in 1968, Adair never seems to have completed his second argument about the impact of Madison’s theory on the Constitution’s framing and ratification, leaving that discussion to “a later issue” of the *William & Mary Quarterly*, which (to my knowledge) never appeared.¹⁰⁶ But, regardless of this failing, Adair’s work in the 1950s went a long way toward rehabilitating Madison’s essay as a richer and more complex symbol of constitutional meaning.

Indeed, between 1951 and 1990, Adair’s work on *Federalist 10* was cited in more than a hundred scholarly articles, and his interpretation of Madison’s theory appeared in numerous books on history and law.¹⁰⁷ Notable examples include Garry Wills’s *Explaining America: The Federalist*—the dedication of which is “To the memory of Douglass Adair, who saw it first”¹⁰⁸—and Martin Diamond’s essays *Democracy and The Federalist: A*

102. For much of this discussion, see Adair’s follow-up piece on *Federalist 10*. Adair, *supra* note 37.

103. Adair, *Revisited*, *supra* note 27, at 49–50.

104. Adair, *Politics*, *supra* note 37, at 351.

105. *Id.*

106. Adair, *Revisited*, *supra* note 27, at 67.

107. This conclusion is based on a search of JSTOR’s, Hein-On-Line’s, and Westlaw’s databases for the relevant period.

108. WILLS, *supra* note 89.

*Reconsideration of the Framers' Intent*¹⁰⁹ and *Ethics and Politics: The American Way*.¹¹⁰ And, from the ripples Adair stirred, Gordon Wood would fashion a crashing wave in his 1969 opus, *The Creation of the American Republic*.¹¹¹ Wood's thoroughly researched account of the diverse intellectual spirits that guided the Founders in the time between independence and ratification presented a theory of *Federalist 10*—deeply indebted to Adair¹¹²—rooted in a complex and sophisticated understanding of historical and contemporary political philosophy.¹¹³ Wood's book, as a whole, was profoundly influential and would eventually bring about the end of Beard's theoretical hold on constitutional historiography.¹¹⁴ Further, his Adairian usage of *Federalist 10* helped to embed the “democratic theory” account of the enlarged republic more firmly in the canonical riverbank.

Thirty years later, Jack Rakove would take up Adair's stated, but unsupported, second thesis by using *Federalist 10* to argue that Madison's theory of the enlarged republic was broadly influential at the time of the founding.¹¹⁵ According to Rakove, the theory was central to Madison's arguments in favor of proportional representation, and was a decisive factor in the Convention's decision to vote down the New Jersey Plan.¹¹⁶ The thought (which, concededly, did not carry the day) was that a larger democratic electorate—stripped of jurisdictional malapportionments—would provide the best protection for important minority rights. That Madison, with his considerable wisdom and influence, thus viewed proportional representation as “the groundwork” upon which the constitutional framework would rest was persuasive evidence that the theory of the enlarged republic was central to the Framers' understanding of the Constitution.¹¹⁷ But, even before Rakove fleshed out this final argument, a refined, Adairian version of the *Federalist 10*

109. Martin Diamond, *Democracy and The Federalist: A Reconsideration of the Framers' Intent*, 53 AM. POL. SCI. REV. 52 (1959).

110. Martin Diamond, *Ethics and Politics: The American Way*, in THE MORAL FOUNDATIONS OF THE AMERICAN REPUBLIC 75 (R. Horowitz ed., 1986).

111. WOOD, *supra* note 28.

112. *See id.* at 505 n.51 (citing Adair's work and noting that “[m]uch of the recent interest in Madison has been stimulated or anticipated by the work of Douglass Adair”).

113. *Id.* at 504–05.

114. *See* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 349 n.19 (1991) (“Just as Beard's *Economic Interpretation* controlled the historical vision of the first half of the century, Wood's *Creation* has dominated the last generation.”).

115. Jack N. Rakove, *The Great Compromise: Ideas, Interests, and the Politics of Constitution Making*, 44 WM. & MARY Q. 424, 434–44 (1987).

116. *See id.* at 434, 442.

117. *Id.* at 429.

metonym settled into place: as a *structural* symbol, *Federalist 10* stood for the idea that the architecture of an enlarged confederation works to protect important minority rights from an overbearing majority; and, as a *historical* symbol, the essay suggests that the Framers' designed the federal government with this theory of large-scale democracy squarely in mind.¹¹⁸ But, while this remains perhaps the predominant shape of the metonym as it is used in constitutional discourse today, in just the last decade, Larry Kramer began to chip away at the historical aspects of *Federalist 10's* metonymic meaning.

In a 1999 article entitled *Madison's Audience*, Kramer questioned the influence that the theory of the enlarged republic exerted at the Constitutional Convention, or during the ratification debates.¹¹⁹ On the first count, Kramer argued that it is unclear whether any member of the Convention (besides Hamilton) had any real idea what Madison was talking about when he presented his thoughts on faction.¹²⁰ Other than his own notes and a brief acknowledgement by Hamilton, none of the other surviving accounts indicate any comprehension of Madison's theory as he presented it on June 6th, or later on June 18th.¹²¹ Nor is there evidence that any delegate rose to support or object to the speech.¹²² Moreover, Kramer pointed out that the one structural mechanism Madison felt his theory most demanded—the federal veto over all state laws—failed to make its way into the Constitution, as drafted.¹²³ From the contemporaneous record, then, it appeared to Kramer that Madison's thoughts on faction had little influence on his fellow Framers. As to the ratification debates, the evidence seems to suggest that *Federalist 10* itself had relatively little impact on public opinion. Kramer notes that, in general, “the *Federalist Paper's* circulation was far too small to influence the debate,” and, even though two other commentators published similar thoughts, “theirs were isolated voices, and neither writer achieved widespread recognition or significant influence in the ensuing debate.”¹²⁴ In fact, far more probative to Kramer was the general silence regarding Madison's revelation: “[I]n all the

118. For another take on *Federalist 10's* evolution through this period of scholarship, see ACKERMAN, *supra* note 114, at 221–29.

119. Kramer, *supra* note 27.

120. *Id.* at 637–48.

121. *Id.* at 645 n.141, 646.

122. *Id.* at 642.

123. *Id.* at 649–53.

124. *Id.* at 665, 666.

torrent of pamphlets and essays and articles that streamed from the presses—enough to fill many volumes—there are only the *Federalist Papers* and these two other essayists to suggest that Madison’s theory of the extended republic was part of the debate at all.¹²⁵ In Kramer’s view, then, *Federalist 10* may have continuing value in structural argument, but its place in the historical canon is, at best, tenuous.

In just the eleven years since its publication, Kramer’s article has made an appearance in nearly one hundred articles and almost as many books,¹²⁶ including such notable works as Akhil Reed Amar’s *America’s Constitution: A Biography*,¹²⁷ and Barry Friedman’s *The Will of the People*.¹²⁸ Thus, we see that the processes of canonical evolution are constantly in motion. Once canonized, a text becomes a powerful argumentative tool, which we then struggle to harness to our particular causes. Indeed, precisely because a canonical text gives such profound guidance to the flow or shape of legitimate constitutional argument, the skilled practitioner must always account for the text’s impact on her arguments—even when she may not be able to marshal the metonym in her favor. It is this constant practice of distinction and analogy that I termed *canonical refinement*, and I hope that *Federalist 10*’s history in academic argument well illustrates the phenomenon. The essay, which lingered in obscurity for over a century, entered the canon with Beard’s 1913 historiographical bombshell, where it was used to symbolize a founding commitment to the protection of private property; this metonymic meaning remained largely in place for the next forty years, until Douglass Adair revisited the essay and used it to illustrate Madison’s commitment to democratic theory; and, in just the last decade, we have seen Larry Kramer refine the metonym even further. But, while I contend that the academic sphere of constitutional argument stands on its own and is every bit as significant and important as the advocative and judicial spheres, in the context of this particular Essay, I would be remiss if I did not make some attempt to account for the impact that these academic refinements have had on decisions rendered by the Supreme Court.

125. *Id.* at 667.

126. This conclusion is based on a search of databases on Westlaw and JSTOR.

127. AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 43 n.95 (2006).

128. BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* 404 n.9 (2009).

It should come as no surprise that *Federalist 10* did not appear in any Supreme Court opinion written before 1913; as I argued above, the essay had virtually no place in constitutional argument—much less in the canon—before Charles Beard dusted it off for his economic interpretation. And, on a moment's reflection, it is relatively easy to understand why the metonym—as Beard canonized it—still did not appear in the Court's opinions over the next half century. In Beard's usage, *Federalist 10* symbolized the Framers' betrayal of the basic American ideals announced in 1776, and was thus a call for constitutional reformation. In short, while Beard's argument provided grist for the academic mill, his was not the kind of symbolic meaning the Court was likely to employ. But after Adair's refinements—which refashioned the text as symbolic of a profound and innovative American democratic theory—began to take hold, we do see the courts begin to take up and use Madison's essay in argument.¹²⁹ In fact, it was for just these Adairian meanings that the 8th Circuit first invoked *Federalist 10* in 1969. Faced with a challenge to racially segregated schools in Arkansas, the Court cited Madison's essay as compelling evidence that “‘equal protection’ [does not] depend upon the majority vote . . . our forefathers had sufficient vision to ensure that even the many must give way to certain fundamental rights of the few” in interpreting the text of the Fourteenth Amendment.¹³⁰ Just five years later, the Supreme Court itself would call *Federalist 10* into argumentative service in deciding whether a California law that required independent candidates for political office to disavow party affiliation for a year before an election ran afoul of the First and Fourteenth Amendments.¹³¹ In interpreting the scope of the constitutional language, the Court used Adair's version of *Federalist 10* to argue that “splintered parties and unrestrained factionalism may do significant damage to the fabric of government,” of which concern justified the state's regulation of political candidates.¹³²

Since 1969, *Federalist 10* appeared in fifty-six lower federal court cases and in sixteen Supreme Court opinions, including some of the most notable and important decisions handed down

129. For an excellent overview of these cases, see J. Christopher Jennings, *Madison's New Audience: The Supreme Court and the Tenth Federalist Visited*, 82 B.U. L. REV. 817 (2002).

130. *Haney v. Cnty. Bd. of Educ.*, 410 F.2d 920, 925 (8th Cir. 1969).

131. *Storer v. Brown*, 415 U.S. 724, 728–29 (1974).

132. *Id.* at 736.

over that time.¹³³ Half of the Supreme Court citations came in opinions addressing election law, ballot access, or political speech questions, where the essay has been used metonymically to suggest that the “Madisonian democratic tradition” is at least “partly predicated on the expectation that voters will pursue their individual good through the political process, and that the summation of these individual pursuits will further the collective welfare.”¹³⁴ But *Federalist 10* also appeared in opinions interpreting the Equal Protection Clause,¹³⁵ the Free Exercise Clause,¹³⁶ the Takings Clause,¹³⁷ and the Republican Guaranty Clause.¹³⁸ And, right on cue, *Federalist 10* made an appearance in the most publicized and controversial opinion the Court rendered this term—*Citizens United v. Federal Election Commission*¹³⁹—as Justice Kennedy used it in his argument for overruling *Austin v. Michigan Chamber of Commerce’s* interpretation of the Free Speech Clause.¹⁴⁰ In each of these contexts, the argumentative use roughly corresponds to the metonymic meanings—both structural and historical—that Adair began to recover and refine in 1951, which suggests that the meanings attached to *Federalist 10* within the academic sphere gave real shape to the conventional context within which the courts must interpret constitutional text. But, of course, the Court’s usage will, itself, refine the essay’s meaning in our argument over time. As with Wittgenstein’s river of uncertainty, then, the canon shapes the practice, but the practice, in turn, reshapes the canon. And all of this is evidence that—at least in the majority of controversial cases—bridging the gap between constitutional text and constitutional meaning is best understood as a perpetual and complex feedback loop between interpretation and construction, rather than the straightforward linear process the distinction, as posited, seems to imply.

133. Notable cases include *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469, 523 (1989); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1072 n.7 (1992) (Stevens, J., dissenting); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 251 (1995) (Stevens, J., dissenting); *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 907 (2010).

134. *Brown v. Hartlage*, 456 U.S. 45, 56 & n.7. (1982).

135. *Croson*, 488 U.S. at 523 (Scalia, J., concurring); *Adarand Constructors, Inc.*, 515 U.S. at 251 (Stevens, J., dissenting).

136. *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 452 (1988).

137. *Lucas*, 505 U.S. at 1072 n.7 (Stevens, J., dissenting).

138. *Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 285 (1984).

139. 130 S. Ct. 876, 907 (2010).

140. *Austin v. Mich. Chamber of Commerce*, 494 U.S. 692 (1990). Indeed, Justice Kennedy makes almost the same use of *Federalist 10* as he did in his dissent in *Austin. Id.* at 710 (Kennedy, J., dissenting).

CONCLUSION

Within our current practice, constitutional meaning often arises from argument and argumentative conventions, not from linguistic facts contained or described in the text. And the more we argue, the more our argument affects and alters the conventional context that makes this meaning possible. While I analogized this process to Wittgenstein's metaphor of a river and its banks, it is also something like the observer effect described in Heisenberg's famous uncertainty principle: the ways that we use canonical texts will change those texts' meaning over time, and these changes will ultimately partially redefine the boundaries of reasonable interpretation. Because I view meaning in these terms, and not in the Gricean terms that seem to underlie the interpretation-construction distinction, I am led to doubt the distinction's utility as part of a larger normative theory of constitutional adjudication. Rather than separating an initial analytic kind of inquiry (discovering linguistic facts that make up semantic content) from a subsequent synthetic activity (fashioning legal rules consistent with that content), I contend that, at most, the distinction describes two different synthetic processes. The first process finds us making assertions (within the appropriate modal forms) about the intentions or principles underlying constitutional text; the second process asks us to make modal arguments about the legal rules that should follow from these intentions.

Understood this way, the line between interpretation and construction threatens to get very blurry indeed, and I suggest that it might be more helpful to understand the distinction as simply delineating different modalities of constitutional argument. Interpretation might correspond roughly to assertions made in the historical, textual, and structural modalities, while construction might match up with the doctrinal, prudential, and ethical modalities—and, in difficult cases, we will likely need to employ modalities on both sides of the divide. The advantage of viewing the problem this way is that it allows us to understand constitutional meaning as a product of the accepted conventions of argument, rather than as if it were a hidden treasure we could uncover if we had the right map. This, in turn, allows us to turn away from map-making and, instead, ask what I think are the right kinds of questions for constitutional scholarship: How do our arguments affect the constitutional grammar over time? What processes or techniques have historically brought about changes in our argumentative conventions and, thus,

constitutional meaning? These questions are best answered by description, and my hope is that such descriptions will help future practitioners understand the kinds of creative argument that changed the game in the past. One powerful technique of this kind involves efforts to refine the metonymic meaning of the canonical texts we use in our modal arguments, and this is the process I described relating to *Federalist 10*.

I chose to examine *Federalist 10* in this piece for two reasons. First, it is evidence of the impact the academy can have on the constitutional conversation. Second, because the essay is most often used in the historical and structural modalities, its metonymic evolution illustrates the effect that constructive processes can have on the forms of argument that we might associate with interpretation. This, I suggest, helps to demonstrate that our efforts to discover “semantic content” often depend on constructed conventions and meanings. Other illustrations might be more dramatic—compare, for example, *Brown v. Board of Education*’s metonymic meaning in 1970 with the symbolic *Brown* that featured prominently in the most recent affirmative action opinions¹⁴¹—but *Brown* seems more at home in the ethical modality, which better corresponds to the construction side of the distinction. As such, it does not seem to illustrate the constructed elements of the interpretive process quite as well. I can only hope that the story of *Federalist 10* was both illustrative and instructive in this regard. And, in the end, I hope that it helped to make my larger point that it is the *practice*—not facts about the text, or any particular theory—that ultimately gives rise to constitutional meanings.

141. See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 747–48 (2007) (“Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin. The school districts in these cases have not carried the heavy burden of demonstrating that we should allow this once again.”).