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The Constitution as Hard Law.

Michael S. Moore

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On hearing that our topic was the "Constitution as Law," one of my colleagues remarked that he thought "there was a case on that." Yet our topic is not the power of judicial review as established by *Marbury v. Madison*.[1] Rather, our topic is captured by another famous John Marshall opinion, *McCulloch v. Maryland*,[2] in which Marshall proclaimed that "we must never forget that it is a Constitution we are expounding . . . ."[3] The Constitution, in other words, seems different from ordinary law in some important ways, and our goal is to pinpoint and assess those differences.

More specifically, we are invited to focus on one alleged difference between constitutional law and ordinary law. Because this alleged difference is so loosely characterized by the metaphors of "hard" versus "non-hard" law, I shall devote the first part of my remarks to clarifying what should be meant by "hard law." Only after I have clarified our benchmark, hard law, will I address whether constitutional law differs significantly from it.

I

"Hard law" could mean law that is value-free in its derivation and in its application to particular cases—legal positivist theories of law and legal formalist theories of adjudication. Yet if that is the sense of "hard law" that we use in asking whether the Constitution is hard law, the answer is obvious: No, and neither is any other kind of law. So I eschew taking the question in such a way that it invites us, once again, to berate positivist and formalist theories. Not only has that been done before but such a task does not get at the differences that more plausibly may exist between (value-laden) constitutional law and (value-laden) ordinary law.

Suppose we think of "hard law" as that mode of reasoning that is text-based and interpretive ("hermeneutic"), that is, reasoning

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1. 5 U.S. (1 Cranch) 137 (1803).
2. 17 U.S. (4 Wheat.) 316 (1819).
3. *Id.* at 407.

that is constrained because it must justify its outputs as being the correct interpretation of some authoritative text. Psychoanalytic dream interpretation, for example, is hermeneutic because it has a method for discovering the text to dreams—all remembrances count as the manifest content—and because it has an interpretive method—free association, symbolism, and patient recall.[4] The legal reasoning that interests us ("hard law") is a particular kind of hermeneutic reasoning that I shall call normative hermeneutic reasoning.[5] For law is unlike dream interpretation, literary interpretation, and *verstehen*-style social science, in one salient respect: legal interpretations are given to *justify* future actions and decisions. Legal interpretations, like theological interpretations, are to give reasons for action to persons, whereas the interpretations of non-normative hermeneutics do not.

That difference means that in law, as in religion, we need two kinds of normative theories. We need a theory of authority that justifies taking some text to be authoritative for our decisions. Such a theory should tell us why some text gives us what Raz calls "content-independent reasons" for action, that is, reasons whose force as reasons depends on their utterance by one in authority and not on the correctness of their content.[6] Second, we need a theory of interpretation with some real bite to it. The theory must truly exclude from our decision some of the things we would have included in the absence of that authoritative text.

The best example of "hard law" in this hermeneutic sense is statutory law. For with statutes there is a plausible normative theory justifying why judges and citizens should regard these texts as authoritative. Such texts were authored by a body that ought to make the major social choices in our society; this, because that body is democratically elected, institutionally well-suited for such general decisionmaking, and constitutes an effective check on the power of two otherwise not so undangerous branches of government; and this, in turn, because democracy is good, well-designed rule-issuing bodies issue better rules, and absolute and unchecked power is bad.

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4. *See* Moore, *The Nature of Psychoanalytic Explanation*, in 3 PSYCHOANALYSIS AND CONTEMPORARY THOUGHT 459 (1980).

5. For the concept of normative hermeneutic reasoning, see Garet, *Comparative Normative Hermeneutics: Scripture, Literature, Constitution*, 58 S. CAL. L. REV. 35 (1985). Also appreciating the normative hermeneutic nature of theology, as opposed to literary criticism, see Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1 (1984).

6. J. RAZ, THE MORALITY OF FREEDOM 23-109 (1986). Like Raz, when I speak of authority I mean practical authority, not theoretical authority. On broader, non-normative uses of interpretation, see Moore, *The Interpretive Turn in Modern Theory: 'A Turn for the Worse'*, 41 STAN. L. REV. 101 (1989).

And so on.[7]

We also have a persuasive normative theory that justifies a method of interpretation that has some bite to it. We should interpret statutes (1) by the ordinary meaning of the words that appear within them, (2) as modified by the technical legal meanings introduced by statutory definitions or prior court interpretations, (3) so as to check both ordinary and technical meaning by the purpose a rule of this kind ought to serve in a just society, and (4) so as to check meaning and purpose by an all-things-considered value judgment that acts as a safety-valve against wildly absurd or unjust results. The normative theory that justifies this method of interpretation is the full panoply of rule of law values, not just the three-fold subset of those values I mentioned a moment ago (democracy, institutional appropriateness, and checks and balances—the separation of powers values). The enhancement of liberty by making the law predictable, the substantive fairness of protecting justified reliance on what the law provides, formal equality, and procedural fairness, join the separation of power values to justify the above-sketched theory of interpretation for statutes.[8]

What makes statutory law hard law is not that it is value-free, because it isn't. Both the theory of authority and the theory of interpretation are value-laden. Despite this, the value judgments that they call forth in judges are different from those that judges would make in the absence of applicable statutes. The value judgments made in the application of hard law (statutes) are restricted by the existence of an authoritative text, a restriction not found in ordinary moral reasoning.[9]

Because there are two aspects to law being "hard," there are two kinds of examples of non-hard law: law where there is no authoritative text, and law where there is no theory of interpretation that significantly restrains the application of such a text. Both the common law and a pure natural law view of law (what is morally obligatory is also legally obligatory just because it is morally obligatory) are examples of the first kind. For neither the common law nor the natural law have an authoritative text.[10] If law were as indeterminate in its application as Legal Realists in their more ex-

7. This argument (for the authority of statutory texts) is more fully spelled out in Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 314-15 (1985).

8. This method of interpretation and the justification for it are spelled out at some length in Moore, *supra* note 7.

9. That moral reasoning is like scientific reasoning in that neither is text-based, is argued for in Moore, *Moral Reality*, 1982 WIS. L. REV. 1061.

10. That the common law is textless is argued for in Moore, *Precedent, Induction, and Ethical Generalization*, in PRECEDENT IN LAW 183 (L. Goldstein ed. 1987).

treme moments proclaimed, even statutes would be examples of "non-hard" law of the second kind. For to say that law has only "paper rules," allowing judges to reach any result under them, is to say that the text, although authoritative, does not constrain decisions under it significantly.

The question that this sense of "hard law" poses regarding the Constitution is this: Is constitutional law like statutory law, both because there is a text granted authority over judges by some persuasive normative theory and because there is a theory of interpretation that both has some real bite to it in restraining judges and is itself persuasively justified? Or is constitutional law either textless like natural law and the common law, or so indeterminate in its method of applying its texts as to be functionally textless despite the existence of a written text? I shall consider each of these two possibilities in order.

II

What is the text of our Constitution? The question seems to have a straightforward answer: it is the relatively short document that Hugo Black used to bring out of his pocket on various occasions, the document that consists of a preamble, seven articles, and twenty-six amendments. Let me see if I can now make this question less facile. One way that this question has been clouded is by the scholarly debate about there being an "unwritten constitution" in America.[11] The real constitution, it is sometimes urged, is some higher law; or some contemporary social consensus; or some tradition; or what the Supreme Court has said it is; and so on. The modern impetus for this debate is Douglas's opinion in *Griswold v. Connecticut*,[12] finding a right of privacy in the Constitution but not in the text of any of the written document's articles or amendments. This way of grounding the right of privacy led some scholars to speak of "non-interpretive review," that is, review when there was no text to be interpreted;[13] others called it interpretive review, but enlarged the text being interpreted to include natural law, social consensus, or Supreme Court precedent.[14]

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11. *See, e.g.*, Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975); Moore, *The Written Constitution and Interpretivism*, 12 HARV. J. OF LAW AND PUB. POL. 1501 (1989); Moore, *Do We Have an Unwritten Constitution?* (to appear in S. CAL. L. REV.).

12. 381 U.S. 479 (1965).

13. *See, e.g.*, Grey, *supra* note 11.

14. Compare Grey, *supra* note 5. This kind of debate of course is much older than its more recent incarnation about privacy. The debate of forty years ago, which was about incorporating the specific guarantees of the Bill of Rights into the fourteenth amendment's due process clause, also had this character to it. The way Hugo Black had framed that debate,

Despite the clouding over of the issue in each of these ways, I now want to argue that the simple and obvious answer first given is the right answer. The only authoritative text of the Constitution is what is written in the document itself.

There are two sorts of arguments with which this conclusion might be established. Let me call them first order and second order arguments. The first order arguments are familiar. They take positions on the merits about what are and what are not proper things for the courts to take into account as they decide constitutional cases: for example, "our allegiance is to the document and not to what our predecessors on the bench may have said about it;" or, "each generation is entitled to live under its own basic ideals and thus present social consensus should represent the true Constitution which our judges apply."

Second-order arguments are more modest in their aim, for they do not seek to determine the proper ingredients for consideration by judges. Rather, such arguments are "second-order" because they are about the first-order arguments, seeking to allocate such arguments to some debate other than that over the text of the Constitution. Specifically, the second-order argument I wish to make seeks to allocate these familiar first-order arguments to the debate over the theory of interpretation and away from the theory of what is an authoritative constitutional text. Better to debate the role of social consensus, Supreme Court precedent, tradition, natural law, and the like, in the context of how to interpret the Constitution.

My second-order argument is not based on some supposed analytic truth about what constitutions are—that they must be written texts. Constitutions may be unwritten tradition, evolving consensus, precedent, natural law, and the like, and still be constitutions for different societies. My second-order argument is normative (not conceptual) and particular (not universal) in its application to our Constitution. *It* should be seen as the written text.

The argument depends on there being a differential degree of acceptance of the written document over any of its competitors for the honorific title, "U.S. Constitution." The Constitution is—as trite as it now is to say it—our civil religion. From Thomas Paine ("in America the law is king"), through de Tocqueville, to the Bork

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the due process clause by itself was too nebulous to serve as an authoritative text; only by incorporating the more specific guarantees of the Bill of Rights into the clause could one say that there was a text with authority over judges. Even older of course is the question of whether the ninth amendment's unenumerated rights can serve as a unwritten text for judicial review. This debate, like the privacy and incorporation debates, makes it much less obvious that the text of the Constitution is just what is written down in seven articles and twenty-six amendments.

confirmation hearings, Americans have given the Constitution a surprising degree of respect bordering on awe and reverence. And the thing that commands such quasi-religious fervor is the written document. It is this text that is the symbol of our civil religion, not Supreme Court precedent or our own present consensus.

This sociological fact about Americans does not generate, by itself, the normative conclusion that the written document ought to be authoritative for American judges. At most, this fact by itself can generate only the further sociological inference that most judges, like most Americans generally, in fact accept the authority of the written document.[15] But the normative question of whether a judge should grant authority to the written document vis-a-vis other candidates for the Constitution, is not answered by a sociological observation about accepted authority.[16]

So I raise the symbolic nature of the written document as the basis for an explicitly normative argument: since there need to be some symbols to hold a society together, and since we have one that is so well accepted, why tamper with it? The written document serves this unifying, symbolic function well, better than any likely replacement, so we should continue to grant it the honorific title, "U.S. Constitution."

If such an argument is persuasive, then it mandates that the written document be the exclusive text constituting the U.S. Constitution. That does not mean that courts should not look to Supreme Court precedent, social consensus, natural law, and the like; only, that if and when they do so, they are interpreting a preexisting text, not supplementing it, supplanting it, or rewriting it.

Saying this, perhaps surprisingly, does not fully resolve the question of what the text of the U.S. Constitution is. Even restricting ourselves to the written document as the only candidate for an authoritative constitutional text, there are still numerous possibilities as to what we take that document to be. Consider four:

(1) There is first of all what I shall call the syntactic constitution: the written document regarded only as a string of uninterpreted symbols. It is "syntactic" because the string satisfies whatever tests for law our theory of authority might impose. Such

15. As should be evident from the text, I do not regard the question of authority as a question of sociological fact. *See* Simon, *The Authority of the Constitution and Its Meaning: A Preface to a Theory of Constitutional Interpretation*, 58 S. CAL. L. REV. 603 (1985). Rather, for a text to have authority is a normative question settled affirmatively only when one can justify that a text should be so regarded.

16. I put aside the weak normative conclusion that Gerald Postema seeks to derive from the fact of acceptance of authority by judges. Postema, *Coordination and Convention at the Foundations of Law*, 11 J. OF LEG. STUD. 165 (1982).

strings are thus, as logicians might call then, well-formed formulas, that is, formulas that satisfy those rules of formation and transformation that make up the syntax of a language. But as uninterpreted strings these symbols have no meaning; that is supplied by a theory of interpretation.

So taken, the constitution would be authoritative not because of anything that it says—for so taken, it doesn't say anything. Rather, the syntactic constitution would be authoritative only because these uninterpreted symbols were laid down in a way that satisfies the test for authoritative constitutional law.

(2) Second, there is what I shall call the semantic constitution. Here, one consider the written document not only to be laid down in a way that conforms to our rules of legal syntax, but also to be a document whose sentences have ordinary English meaning. The symbols are thus not completely uninterpreted. They are partially interpreted, in the sense that, prima facie, the sense to be assigned them is their sense in ordinary English.

What has authority, on this sense of the constitution, is the document as it would be understood by a competent speaker of English who had neither legal training (and thus did not introduce technical legal meanings) nor knowledge of the historical context in which the document was written (and thus lacks any historical clues from which to infer what the framers of the document might have meant by their written words).

(3) Third, there is what I shall call the pragmatic constitution. By "pragmatic," I do not mean "practical," "expedient," and the like. Rather, I mean to invoke the linguists' sense of "pragmatics." Pragmatics is part of a theory of communication, the part that studies how the context of an utterance contributes to the sense the utterance possesses either to its author or to his audience. The pragmatic constitution, accordingly, is the written document interpreted as the authors of it themselves would have understood it or as their original audience understood it (if the latter is different from the former).[17]

(4) Finally, there is what I shall call the implied constitution.

17. So taken, what would have authority as "the constitutional text" would be a more fully interpreted document. Not only would the document possess the meaning assigned it by ordinary English semantics, but also would have the meaning assigned it as a function of the context of its utterance by a particular set of speakers to a particular audience. Even this richer interpretation of the document, however, is far from being complete; for while context may lessen ambiguities and vagueness in language, it does not eliminate these features. A speaker's aims in speaking, as Hart once reminded us, may in fact be fully as indeterminate as the language with which he has chosen to communicate them. H. HART, THE CONCEPT OF LAW 125 (1961).

Any user of language presupposes or implies more than he explicitly asserts. If I assert that the present King of France is bald, I presuppose (as a matter of appropriate utterance, not as a matter of semantics) that there is a King of France.[18] Douglas's example in *Griswold* was, that if the first amendment states that "Congress should make no law . . . abridging the freedom of speech," it presupposes that persons also have a right of association: "while [such right of association] is not expressly included in the first amendment, its existence is necessary in making the express guarantees fully meaningful."[19] Put in linguistics jargon, it would be pragmatically inappropriate in the context of authoritative pronouncement to say, "everyone can speak freely" without at the same time presupposing, "everyone can get together for purposes of speaking freely to one another."

Which of these four constructions of the written document is our Constitution? As before, there are a number of persuasive first-order arguments to the effect that ordinary word meaning is a good thing for courts to consider as they decide constitutional cases, or that the original understanding is not. Indeed, I have made some of these arguments in detail.[20] But in the present context it is a second-order argument that should govern. As a matter of allocating arguments about the role of plain meaning, framers' intent, or pragmatic implication in constitutional law, I think such debates are better had within the theory of interpretation. The only authoritative constitutional text should be the syntactic constitution, the document as a set of as yet uninterpreted marks on paper.

This spare notion of the Constitution keeps all of the competing ingredients in constitutional reasoning in one arena, the theory of interpretation. Framers' intent, for example, should have to compete not only with plain meaning, but also with precedent, evolving social standards, and natural law for pride of place in constitutional law. Since some of these items will surely be in any plausible theory of interpretation, the rest should as well. That way, some such items—notably framers' intent and original understanding—do not get an illegitimate leg up (because already included as part of the text).

The "leg up" for framers' intent, original understanding, or plain meaning would be illegitimate because of a point analogous to that made earlier about what it is that Americans accept as authori-

18. *See generally* L. LINSKY, NAMES AND DESCRIPTIONS (1977); Russell, *On Denoting*, 14 MIND 479 (1905).

19. *Griswold*, 381 U.S. at 483.

20. Moore, *supra* note 7, at 320-21, 352-58; Moore, *Originalist Theories of Constitutional Interpretation*, 73 CORN. L. REV. 364 (1988).

tative text. They accept the document itself as a set of marks. Not that they think it has no meaning; but they accept it as authoritative without knowing in any detail what that meaning is. Indeed, when confronted with pretty standard applications of the Bill of Rights, they may well reject such applications—until they learn that they are discussing part of the sacred text.

If this is right, then the only text whose authority is uncontroversially accepted is the syntactic constitution. By the argument earlier given, widespread acceptance of the syntactic constitution as authoritative justifies a judge in regarding it as authoritative for his decisions. This does not tell the judge what the text means. It tells only what it is that he must now find the meaning of.

We should consider the text of the Constitution as a string of uninterpreted symbols for yet another reason, perhaps the most basic of all. We can approach this reason by asking what it is for us to grant a text authority over our decisions. What is it for religious persons to grant authority to some religious text such as the Bible or the Koran? We have answered this above in terms of content-independent reasons: to grant authority to a text is to think that interpretations of that text create new reasons for action that may compete with and override other reasons we would have considered in the absence of such a text's authority. If we think through the idea of a text giving content-independent reasons we will see that the only text that can be authoritative is an uninterpreted text.

Suppose a devout Christian were to say that the Bible had authority over the decisions he made in his life because it said many wise and true things and because it preached to us to do the good. Such a person does not regard the Bible as authoritative. For notice he himself decides what is wise, true and good, interprets the document to see how it measures up, and finding a correspondence, only then grants it any "authority." Yet the "authority" is illusory, for the text doesn't create a new reason that will now compete with his own moral and epistemological considerations; the text only confirms what he already decided about these matters.

For a text to have authority for a person he must accept it, not because he agrees with what it says, but rather, independently of his agreeing with what it says. In the religious case, he must accept the Bible because it is God's word, whatever that word might mean. In the example of statutes, to grant real authority to them as texts is to accept them because the legislature passed them, not because we know what they mean and agree with them.

Thus, the only sense of "text" that fairly poses our question of authority is text as a string of uninterpreted symbols appearing in a

certain two hundred-year-old document.[21] Is there a persuasive normative argument making this text authoritative for us? Since there is such an argument for statutes, let us first pursue its analogue about the U.S. Constitution.

Let us call this the historical consent theory. According to the theory, we should regard the constitutional convention as a democratically elected legislature in that it represented all of us. Therefore, its output, whatever it means, should be considered as having authority over us. The problem with such a theory, of course, is that the convention wasn't much like a modern legislature. It was neither very representative in its makeup at the time, nor, more importantly, were the persons then present *our* representatives. None of us got to select who would represent us in the framing of this document.

To meet this last objection one might eschew historical consent for an implied (but current) consent theory. Such a theory would urge that we all impliedly consent to the authority of the text by not amending the document, or overturning it entirely. Yet the problem with this theory lies in its ignoring of the obvious: amendments (to say nothing of revolutions) are difficult to bring off, so that not trying hardly manifests consent.

There are also hypothetical consent theories: Structure a choice situation in a fair way and ask what constitution a rational person would consent to; if the document that results is our Constitution, then that text has authority.[22] Yet hypothetical consent theories (unlike actual consent theories) cannot by their nature justify the granting of authority to a constitutional text. For such theories require the rational chooser to know what the text means and choose it only if it corresponds to what he previously believed to be good and just. The Rawlsian veil of ignorance cannot require its chooser to be ignorant of the meaning of the text he is choosing, yet that is just what granting authority to a text requires.[23]

The upshot is that there is no normative theory justifying the Constitution as an authoritative text that is at all analogous to the

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21. I explore in much greater detail what it is to grant a text practical authority over our decisions in Moore, *Law, Authority, and Razian Reasons*, 62 S. CAL. L. REV. (forthcoming, Issue No. 3, March, 1989).

22. J. RAWLS, A THEORY OF JUSTICE (1971).

23. Hypothetical consent theories thus ultimately are but a kind of more straightforwardly substantive theories of authority, such as Larry Simon's. Simon, *supra* note 15. Such theories grant authority to the Constitution only because its clauses by-and-large describe the good and the right. Yet by any useful notion of authority, this is no authority at all; for one antecedently decides what is good or right, and gives the text "authority" only insofar as it gets it right. In which case the text is idle; our pre-existing obligations to do what is good and right are not increased by the existence of the Constitution's text.

normative theory justifying statutes as such a text. Social contact theory does not make the constitutional text authoritative for us in the way democratic theory makes statutory texts authoritative. Nonetheless, as argued above, the constitutional text is the object of America's "civil religion;" it is accepted as authoritative in a way religious texts are accepted by religious persons. That social fact gives the Constitution authority, not because authority is a social fact, but because a well-legitimated document is a good that ought to be preserved.

III

Is there a constraining interpretive method, and a persuasive normative theory justifying it? Here the analogy of constitutional law to statutory law is stronger, for the same method of interpretation that ought to be applied to statutory texts should also be applied to the constitutional text.[24] In each case the interpreter begins with the ordinary meaning of the words, modified by any technical meanings given them by prior court interpretations, and balances both the ordinary and technical legal meaning against the meaning the word should be given so as to maximize both the purpose the rule in question should be seen to serve and the more general aim of justice.

It is sometimes thought that constitutional interpretation must be different from ordinary legal interpretation, and that in particular ordinary meaning cannot play the constraining role in constitutional interpretation that it can play in statutory interpretation. The reason for this difference, it is further thought, lies in the different natures of the texts being interpreted. The language of the constitutional text is thought to be much more open-ended than the language of typical statutes (recognizing that sometimes statutes approach the open-endedness of the grand constitutional phrases, as in sections 1 and 2 of the Sherman Act).

If we press those who believe in the difference, they seem to have five distinct attributes in mind. The language of the Constitution compares unfavorably to typical statutory language in that it is: more general, more vague, more open-textured, more ambiguous, and/or more value-laden. For each of these reasons, it is thought, the ordinary meaning of constitutional language cannot be plain enough to constrain judges significantly in their interpretation of that language.

Yet none of these five alleged attributes of the constitutional

24. I so argue in Moore, *supra* note 7.

text justify this conclusion. Let us consider each separately. Generality in the sense here pertinent has to do with the size of the set of things referred to by some predicate; larger set, more general predicate.[25] "Animal" is more general than "horse," "color" is more general than "red," because the set referred to by the first of each pair of terms includes the set of things referred to by the second, and more besides. So construed, generality is not incompatible with precision. Just because a set is large does not mean that the borders of the set are fuzzy. For example, the set of things described by the predicate, "is a prime number," is very large (infinite), yet the borders of such a set are not fuzzy. Moreover, where we do have fuzzy-bordered sets, the fuzziness is not necessarily proportional to the size; the set of colored things is no fuzzier than is the set of red things.

"Generality" in this context is usually a misnomer, for what the proponents of the "constitutional language-is-different" thesis actually believe is that constitutional language is vague ("general" serving as proxy for "vague").[26] And the constitutional clauses we most care about are, as a class, more vague than are the clauses of typical statutes. Does this greater vagueness mean that the constitutional interpreter runs out of meaning sooner than the interpreter of a typical statute? That depends on what one thinks meaning is.

The most popular theories of meaning for words and sentences in a natural language such as English, are what I have elsewhere called conventionalist theories.[27] On these theories of meaning the meaning of "death," for example, is given by some linguistic convention, which convention is abstracted from the usage patterns of native speakers of English. Such convention may specify a definition—a set of synonymous descriptions—or it may specify a standard example of someone who is "paradigmatically" dead. In either case, to run out of conventions is to run out of meaning. Since vagueness is a conventional feature of language use—a word is vague when competent native speakers don't know what to say—greater vagueness means a greater number of items for which there is no governing linguistic convention, and hence, no guidance by such convention (meaning).

Yet meaning, both in linguistics and in constitutional law, is better conceived as nonconventional.[28] The meaning of "death," for example, is not given by the conventions that govern standard

25. For the relevant meaning of "general," see Moore, *supra* note 10, at 192.

26. On vagueness, and its distinctness from generality, see Moore, *The Semantics of Judging*, 54 S. CAL. L. REV. 151, 193-200 (1981).

27. Moore, *supra* note 7.

28. *Id.*

usage of the word by native speakers of English. Rather, the meaning of "death" is given by the nature of the kind of event that death really is. Such nature is a matter of theory—partly scientific, partly moral—not a matter of convention. This being so, the degree of vagueness of language used in some text is irrelevant to the guidance provided to an interpreter by that text's ordinary meaning. To run into the vague penumbra of some word's application is only to run into the area where linguistic convention has run out. It is not to be in an area where there can exist no determinate, correct answer by virtue of meaning alone. Someone may be really dead (or really alive) even if conventional definitions or examples of "death" don't resolve the matter.

The grand clauses of the Constitution, such as "cruel and unusual punishment," "unreasonable search and seizure," or "equal protection of the law," are vague; they possess greater vagueness than do most statutes. Yet if the meaning of "equal protection of the laws" is given by the nature of the thing referred to—equality—and not by the conventions derived from the standard usage of the word, "equality," then the vagueness of the phrase cuts no ice as an argument for indeterminacy in the phrase's correct interpretation. If one is skeptical of the determinacy of such phrases, it cannot be because they are vague; rather, such skepticism must proceed from a deeper skepticism about there being anything (equality) whose nature can guide meaning.

Before coming to that skepticism, let me briefly consider two characteristics of language often confused with vagueness, namely, open texture and ambiguity. Before H.L.A. Hart turned the phrase "open-texture" into a virtual synonym for "vagueness" in the literature of legal theory,[29] it named not vagueness but what Friedrick Waismann called the possibility of vagueness.[30] Waismann's idea was this: beyond the ordinary fuzziness of language that one recognizes as vagueness, there exists an ineliminable possibility that we won't know what to say when confronted with wildly novel situations. "Cat" is vague insofar as we don't know where to draw the line between kittens and cats. Yet "cat" is also open textured because we also would not know whether to apply the word to a creature that looks and acts just like a cat except that it literally disappears into thin air every so often.

Thus, to say that constitutional language is more open-textured than the language of statutes would be to say that there are greater unforeseen possibilities for vagueness in constitutional law. I don't

29. H. HART, *supra* note 17, at 121-32.
30. Moore, *supra* note 26, at 200-02.

know whether this claim is true or not, but notice that even if it were true such a claim is as irrelevant to the comparative determinacy of constitutional language as is the analogous point about vagueness. For open-texture, like vagueness, is a conventional feature of language use; it is also premised on the assumption that to run out of conventions is to run out of meaning. This is just the premise that we should reject. So what if most competent speakers of English would not know what to say of Waismann's hypothesized, disappearing cat-like object? It either is or isn't a cat, which we would resolve by applying the best theory we have as to the nature of the natural kind of thing that is the species, cat.

Comparatively greater ambiguity of the constitutional text, unlike vagueness and open-texture, would make a difference in the determinacy of meaning of that text. For unlike vagueness or open-texture, ambiguity has to do with distinct senses existing for a word. The word "bore" in the sentence, "our mothers bore us," is ambiguous between the sense, "socially stifling," and the sense, "carrier of fetuses." As such, ambiguity of text does present a problem for determinate guidance of an interpreter of that text; for such an interpreter does run out of meaning (in the sense of having too many possibilities) if the word before him is ambiguous. Even if the meaning of a word is given by the nature of the thing referred to by that word, and not by convention, if there are two or more distinct kinds of things referred to by that word, the interpreter faces a choice that meaning alone cannot resolve.

But what reason is there to think that the Constitution's language is more ambiguous than the language of typical statutes? There is nothing ambiguous about due process of law or establishment of religion, vague as these clauses might be. Often those who tout the ambiguity of the Constitution's great clauses usually would be better served to frame their point in terms of vagueness, not ambiguity.[31]

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31. Consider John Marshall's discussion of the purported ambiguity of "necessary" in the "necessary and proper clause":

> The word "*necessary*," is considered . . . as limiting the right to pass laws for the execution of the granted powers, to such as are indispensable . . . .
>
> Is it true, that this is the sense in which the word "necessary" is always used? Does it always import an absolute physical necessity . . . . Such is the character of human language, that no word conveys to the mind, in all situations, one single definite idea . . . . A thing may be necessary, very necessary, absolutely or indispensably necessary. To no mind would the same idea be conveyed, by these several phrases. . . . This word, then, like others, is used in various senses. . . .

17 U.S. (4 Wheat.) at 414-15.

Marshall's point is better put as a complaint about the vagueness of "necessary": *How* necessary must a power be to be constitutionally necessary to the exercise of some expressly granted power? The relevant sense of "necessary" in the clause is not in doubt, for Marshall

The fifth and last alleged difference is that the Constitution's text uses value-laden words whereas most statutes do not. Giving persons the process that is *due* them, giving them *equal* protection of the laws, protecting them from *cruel* punishments, *unreasonable* searches and seizures, and abridgments of their *freedom* of speech, all seem to be ways of expressing evaluations. For some, that seems to mean that the meaning of the words used in such clauses cannot significantly constrain a judicial interpreter of those words.

This view of the indeterminate (and thus nonconstraining) nature of evaluative discourse is based on a skepticism about values against which little can be said here.[32] One brief point is perhaps sufficient. Notice that evaluative usage of a word constitutes no basis whatsoever for inferring that it lacks determinate meaning. Take "murderer." The word is often used to express negative evaluations of another person or another person's actions, as in, "you're a murderer!" The conventional illocutionary force of the word may even be that of expressing such disapproval. Yet that the word can be used with such force, and even typically used with such force, in no way persuades anyone that the word lacks reference (namely, to a class of persons who have intentionally killed).[33]

As we have just seen, the alleged difference in the determinacy of meaning between the Constitution and ordinary statutes is usually made as a possibility claim: the ordinary meaning of the Constitution's language *cannot* provide as much guidance. Sometimes, however, a normative claim is being made: the ordinary meaning of the Constitution's language *should not* be given the same constraining role that it has in statutory interpretation. In Marshall's reminder that "it is a *Constitution* we are expounding," presumably some such normative point was lurking.

In thinking through why a freer, less constrained mode of interpretation might be justified for constitutional interpretation, we first must recall the values served by a constraining theory of interpretation for statutes. These are the rule of law values. Due defer-

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or anyone else. There are different senses of the word "necessary"—logically necessary, analytically necessary, causally necessary, or, to divide a controversial pie differently, epistemically necessary, semantically necessary, and metaphysically necessary; but Marshall does not think the linguistic context of "necessary" in the necessary and proper clause leaves each of these senses equally viable. The relevant sense is "causally necessary," and the problem is the vagueness of that sense because the word's meaning does not seem to determine how much of this kind of necessity there must be.

32. But a lot can be said elsewhere. *See* Moore, *supra* note 9.

33. It is thus not an independent ground for suspecting constitutional language of indeterminate guidance, that it expresses evaluations. Lots of words can be used to express evaluations and yet describe the world with great precision. So this last alleged difference, when taken to be a point about the supposed vacuity of evaluative discourse, depends on one of the preceding four points. And with their collapse falls away this last point as well.

ence to the democratic legislature, enhancement of predictability and hence of liberty, the furthering of substantive fairness by the protection of citizen reliance, and procedural fairness, are all served by an interpretive method for statutes that gives considerable weight to the ordinary meanings of English words and sentences.[34] In addition, equality, liberty, substantive fairness, and efficiency are served by giving weight to the technical meanings for statutory words added by prior courts' interpretations.[35]

These values are also served, but not to the same extent, by giving weight to ordinary meaning and precedent in interpreting the Constitution. To begin with, there is no analogue to the value of giving due deference to a democratically elected legislature; for the constitutional convention lacked those features possessed by legislatures that justify deference. Second, the liberty, substantive fairness, and procedural fairness values are less fully served by using ordinary meaning in constitutional interpretation to the extent that the language of the Constitution is more vague than the language of typical statutes. For although *meaning* is not indeterminate when language is vague, *knowledge* of that meaning is less available to ordinary speakers when the language is vague. It is knowability, not existence, of determinate meanings that enhance liberty and both kinds of fairness.

Thus, prima facie, a constitutional interpreter should give somewhat less weight to the constraints of ordinary or technical legal meaning than he does in statutory interpretation. Correspondingly, he should also give more weight to the less formal ingredients in a proper interpretive method, namely, the ingredients of purpose and the safety valve, all-things-considered judgment of justice. For the Constitution deals with matters of the greatest public importance, and getting it right thus looms larger in comparison to the rule of law virtues than is the case with most statutes.

For both of these reasons, there is some truth to Marshall's normative injunction that we should interpret the Constitution in a somewhat less constrained way than we should interpret an analogously worded statute. Even so, the difference is one of degree only, for the rule-of-law values are maximized by constrained interpretation of the Constitution too, and such values are not moral lightweights on anyone's theory of morality.

Our topic reminds me in many ways of certain similar issues in other fields. Psychiatrists for many decades have been debating

34. More fully spelled out in Moore, *supra* note 7, at 320-21.

35. *Id.* at 371.

whether the stuff that they treat, mental illness, is really an illness.[36] International lawyers for as long have debated whether the stuff with which they deal, international law, is really law. Constitutional lawyers seem to be afflicted with like doubts about the subject matter of their field.

Orthodox constitutional lawyers exhibit the need for reassurance given by an affirmative answer to such questions, also shared by orthodox psychiatrists and international lawyers: Mental illnesses are real illnesses, international law is law, and yes, constitutional law is law, too—and not just law, but *hard* law at that, the central stuff that gives the word "law" its meaning. Not being a constitutional lawyer, I do not share the understandable need for professional legitimization. But I do share the answer: Constitutional law is "hard law" in the two dimensions of hardness that I have identified: (1) there is a text and a plausible normative theory justifying why that text is authoritative; and (2) there is a constraining interpretive method and a plausible normative theory justifying use of that method in constitutional adjudication. There are some differences of degree, but they are only that; they do not make the Constitution anything other than what it itself describes itself as: "the supreme law of the land." Marshall, incidentally, could not have thought differently than this, despite his famous language in *McCulloch*. After all, it was only because the Constitution was fundamentally like ordinary law that judicial review could be justified.[37]

36. *Compare*, T. SZASZ, THE MYTH OF MENTAL ILLNESS (1961), *with* M. MOORE, LAW AND PSYCHIATRY: RETHINKING THE RELATIONSHIP ch. 4. (1984).

37. As Marshall himself argued in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).