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# MEANING AND BELIEF IN CONSTITUTIONAL INTERPRETATION

*Andrei Marmor\**

## INTRODUCTION

The distinction between a concept and its different conceptions plays a prominent role in debates about constitutional interpretation. Proponents of a dynamic reading of the Constitution—espousing interpretation of constitutional concepts according to their contemporary understandings—typically rely on the idea that the Constitution entrenches only the general *concepts* it deploys, without authoritatively favoring any particular *conception* of them—specifically, without favoring the particular conception of the relevant concept that the framers of the Constitution may have had in mind. Originalists argue, to the contrary, that fidelity to the Constitution requires an understanding of its provisions according to the particular conception of the abstract concepts prevalent at the time of enactment, and not those we may now favor.

My main purpose in this essay is to put some pressure on the linguistic considerations that are presented in this debate, arguing that they are much more problematic than the proponents of both positions assume. I will try to show that the debate here is actually a moral-political one, mostly about the main rationale of a constitutional regime and the conditions of its legitimacy. It is, primarily, a debate about what constitutions are for, and what makes them legitimate. But I will only get to this moral issue at the end. The main part of the essay will strive to show that the semantic considerations employed in this debate are inconclusive; the way concepts are used in a given context depends on various pragmatic determinants, and those, in turn, depend on the nature of the conversation in question. The moral disagreement is, ultimately, about the kind of conversation that constitutional regimes are taken to establish.

## I. THE SCALIA-DWORKIN DEBATE

The debate about constitutional interpretation between Justice Antonin Scalia and Professor Ronald Dworkin provides a good starting point for our discussion. Scalia is a textualist about statutory interpretation and an

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originalist (of sorts) about constitutional interpretation. Many are puzzled by this combination, which seems contradictory on its face. Textualism urges judges to focus on what the statutory provision *says*, as opposed to what the legislators may have *meant* to say; what the legislators may have intended to say, supposedly learned by consulting the legislative history of the statute under consideration, is regarded by textualism as legally irrelevant, something that should not be brought to bear on the appropriate interpretation of statutory law. But when it comes to constitutional interpretation, we seem to get the opposite view: originalism is the view that constitutional provisions are to be understood as they would have been understood by the Framers of the Constitution and their contemporary audience. Indeed, when you look at Scalia's decisions and opinions on constitutional matters, you often see an essay in legal history, exegetically examining historical clues in order to extract some views about the ways in which constitutional provisions were understood at the time of their enactment. So if legislative history should be irrelevant to statutory interpretation, why is it relevant, indeed central, to constitutional interpretation?

The truth of the matter is that there is less inconsistency here than meets the eye. According to textualism, the main operative factor in statutory interpretation is what the law actually says or asserts. As I have explained in greater detail elsewhere,<sup>1</sup> textualism explicitly endorses, correctly in my mind, an objective conception of the assertive content of an utterance. What the law says is at least partly determined by what a reasonable hearer, knowing all the relevant background, would infer that it says. In other words, textualism can concede the idea that legal interpretation aims to ascertain the communication intentions of the legislature, as long as it is granted that the relevant communication intentions are understood objectively, that is, as they would be grasped by a reasonable hearer. Now, if you add to this the relevant time frame, which is presumed to be the time of enactment, you can begin to see how legislative history might become relevant to constitutional interpretation, or, in fact, to any piece of legislation that is relatively old. The purpose of the historical exegesis is to ascertain what *a reasonable hearer at the time of enactment* would have inferred that the constitutional provision says. Thus, Scalia could claim, with some plausibility, that in both statutory and constitutional interpretation, the task is the same: try to ascertain what the law says, what it actually asserts. In both cases, assertive content is understood objectively, as it would be grasped by a reasonable hearer knowing all the relevant background in the context of the utterance. The only difference is that with old enactments, the relevant context and legislative background is less clear: language itself may have changed over time and therefore some historical context is needed in order to figure out what the old law or

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1. See, e.g., Andrei Marmor, *Textualism in Context* (Univ. of S. Cal. Gould Sch. of Law Legal Studies Research Paper Series, Paper No. 12-13, 2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2112384](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2112384).

constitutional provision would have meant to a reasonable hearer at the time of its enactment.<sup>2</sup>

Dworkin is doubtful, however, that the position here is really consistent, because it trades on an ambiguity between two possible forms of textualism.<sup>3</sup> John Perry has recently proposed a very similar argument, and in what follows I will use his terminology: Perry calls these two views “meaning-textualism” and “conception-textualism,” respectively.<sup>4</sup> The difference between these views concerns the question of whether or not the assertive content of a legal prescription employing a general evaluative concept also includes the particular conceptions associated with the concept.<sup>5</sup>

Perry gives the example of a university’s departmental decision to make “philosophical talent” the main consideration in the department’s hiring policy for the future.<sup>6</sup> Now, let us assume that most, or perhaps even all, the members who voted for this resolution took it for granted that philosophical talent consists in analytical rigor, logical skills, a high level of technical sophistication, etc. According to meaning-textualism, the view that Perry favors, none of these specific conceptions of what philosophical talent consists in form part of the resolution. Thus, for example, if over the years the department’s character changes, and it becomes more skeptical of logic and analytical rigor, future members would be warranted in implementing their own bona fide views about what philosophical talent is, and would rightly consider their new policy as faithfully implementing the resolution to be guided by “philosophical talent.” Conception-textualism, on the other hand, would have us maintain that the resolution to be guided by “philosophical talent” also includes the enactors’ particular conception of what philosophical talent consists in. And this view, according to Perry, makes no sense.<sup>7</sup>

The distinction Perry draws here is exactly the same as the one exemplified by Dworkin with the constitutional question about the Fourteenth Amendment and school segregation. We know with considerable certainty that the framers (very broadly construed, if you will) of the Fourteenth Amendment’s Equal Protection Clause did not think for a moment that racial segregation in schools violates it; we know that their conception of equal protection allowed for the doctrine of “separate but equal” to stand as constitutionally valid. Therefore, if we followed the idea of conception-textualism, we would have to conclude that *Brown v. Board*

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2. To be sure, I am not claiming that in his judicial opinions Scalia actually follows this rationale. Many of his opinions refer to historical evidence that can only be taken as evidence about the Framers’ further intentions, motives, or purposes, and the like.

3. See ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 119 (1997); see also RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* (1996).

4. John Perry, *Textualism and the Discovery of Rights*, in *PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW* 105, 106 (Andrei Marmor & Scott Soames eds., 2011).

5. *Id.*

6. *Id.* at 108–09.

7. *Id.* at 109.

of *Education*<sup>8</sup> was wrongly decided. And, I take it, nobody would want to say that.<sup>9</sup> Dworkin and Perry share the view that a consistent and plausible textualism would have us read the constitutional provisions in their abstract formulation as enacting only the general concept, not the particular conception of it that may have been shared by the enactors, or indeed, by the population at large, at that time. To take another example, the asserted content of the Eighth Amendment—what this amendment *says* by prohibiting “cruel and unusual” punishment<sup>10</sup>—is, according to Dworkin, to render any punishment that *is* in fact cruel unconstitutional, and not “punishments widely regarded as cruel and unusual at the date of this enactment.”<sup>11</sup>

All of this sounds very sensible. But it would be a mistake to conclude that Dworkin and Perry win the argument by commonsense linguistic considerations, as they seem to suggest. Undoubtedly, they are correct to point out that textualism (in statutory interpretation) and originalism (in constitutional interpretation) make for strange bedfellows. But “meaning-textualism” is not more workable or linguistically compelling than “conception-textualism.”

The distinction between a concept and its conceptions seems fairly compelling at the phenomenological level. Surely it seems right to say that people can have very different and even mutually exclusive conceptions of general evaluative terms. People can talk about the same thing, such as “justice,” while profoundly disagreeing about what justice is, what it requires, etc.<sup>12</sup> Furthermore, we often have a clear sense that such disagreements are reasonable. There is a certain *conceptual tolerance*, as I will call it, that we associate with the concept *versus* conceptions distinction, whereby we assume that rational people can have reasonable disagreements about their favored conception of a given evaluative concept. You can think that justice is all about what people deserve, in some sense, while I can think that desert is a confused idea and justice has nothing to do with it. And yet we have a sense that we are not necessarily talking past each other; that in spite of the fact that we have different and incompatible conceptions of justice, we are disagreeing about the appropriate conception of the same concept.

Notice, however, that the concept versus conceptions distinction, in this form, doesn't apply to just about any general concept we have. It would be strange to say that we can have different and incompatible conceptions of “chairs,” or that we can have mutually incompatible conceptions of “red,”

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8. 349 U.S. 294 (1955).

9. In some lectures and conversations, Scalia has admitted, I am told, that the case of *Brown v. Board of Education* poses a serious challenge for his views on constitutional interpretation.

10. U.S. CONST. amend. VIII.

11. See SCALIA, *supra* note 3, at 120.

12. As far as I can tell, the distinction between concept and conceptions (of justice, actually) was first used, though perhaps not quite introduced by, John Rawls in his *A Theory of Justice*. See JOHN RAWLS, *A THEORY OF JUSTICE* (rev. ed. 1999).

or “redness.” But even in the case of general evaluative concept-words, where the concept versus conceptions distinction seems to be most at home, the distinction begs a question: how can we have very different views about what, say, justice is, while still talking about the same thing? That is, what is *the thing* we are talking about if we understand it very differently? In short, what does it mean “to share a concept of X” when we profoundly disagree about X’s extension, about what “X” designates or stands for?

I will suggest that there are two main answers to this question, one of which is an *externalist* approach, modeled on Hilary Putnam’s theory of natural kind predicates, and another, which we can call *internalism* about conceptions, modeled on W. B. Gallie’s ideas about essentially contested concepts. The next two sections are devoted to explaining these models and some of the problems they give rise to in the present context.

## II. THE EXTERNALIST MODEL: NATURAL KINDS

To share a concept, I will assume here, is tantamount to knowing what the word means in the natural language in question. It is the ability to use the word correctly, if you like. Some philosophers tend to assume that the concept of X is somewhat different from the meaning of the word designating X. Perhaps it is the mental representation or some kind of a mental image of what X, or the thought about it, is. I doubt that this is a helpful way of talking about concepts, but I will not press the issue here.<sup>13</sup> I will assume, however, that people share a concept when they know what the relevant word means in their natural language. To have a concept of X is, or at least requires, if you prefer, to know what “X” means. Meaning, however, is a public feature of language use; words have meanings in virtue of our ability to use them more or less the same way across speakers/hearers and different sentences in which the word appears.

Therefore, we can only use words in a natural language if we share some beliefs about what the word stands for, its extension, with other speakers. Knowing the meaning of a word or how to use it correctly requires speakers to know what, by and large, other speakers believe about the extension of the word. In fact, generally speaking, collectively held beliefs about what a word stands for, what it signifies, are *constitutive* of the word’s meaning. Needless to say, individual speakers can use many words in ordinary conversations without knowing all that there is to know about the extension of the word, and often they don’t need to know the nature of the extension in great detail or very accurately. In most cases, however, including in our use of general categories or kinds, the meaning of the word is presumed to fix the extension (or least the definite extension) of the word, the kind of things or objects the word clearly applies to, if used correctly. Therefore, if you know what a word means you know what it stands for, what its extension is. That is generally the case. However, there is a particular kind

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13. See Andrei Marmor, *Farewell to Conceptual Analysis (in Jurisprudence)*, in *PHILOSOPHICAL FOUNDATIONS OF THE NATURE OF LAW* 407 (Wil Waluchow & Stefan Sciaraffa eds., 2013).

of words, identified by Putnam in the 1970s, where the relation between meaning and extension goes the other way around, namely, in the case of *natural kinds*.<sup>14</sup>

Putnam's theory of natural kind words has convincingly shown us that there are many words in our language that we intend to use, as a matter of collective linguistic intention, that is, in a way that purports to designate some kind of things, whatever their real nature turns out to be. With natural kinds, such as "tiger," "water," or "gold," over time we observe some regularities that we assume are somehow connected; we assume that there are some hidden properties in the nature of things that make them what they are, or make them the kind of things they are. And then this kind or category is designated by a word, whereby we take that word to "rigidly" designate whatever the nature of the kind really is, in a way that is essentially externalist. In other words, the designation of the extension of the word is such that it assumes externalism, namely, it assumes that whether an object is of the relevant kind/predicate or not depends on the constitutive role played by whatever it really is that makes things of that kind, irrespective of widely shared beliefs about the nature of the extension. And this entails that we can know what a natural kind word means, collectively as language users—that is, while entertaining inaccurate and perhaps even fundamentally mistaken theories about its extension. The extension of the word is taken to be determined by the true nature of its constitutive elements, whatever they really are.<sup>15</sup> Since it is probably not the case that any rigid designation (à la Saul Kripke<sup>16</sup>) involves externalism, I will henceforth designate the kind of externalist rigid designation of extension that is involved in natural kinds as "rigid\*."<sup>17</sup>

Admittedly, Putnam has also come to the view that people who use natural kind words in their idiolect must share certain beliefs about the nature of the extension of the word, which he called *stereotypes*:

[S]omeone who knows what 'tiger' means . . . is *required* to know that *stereotypical* tigers are striped. More precisely, there is *one* stereotype of tigers (he may have others) which is required by the linguistic community as such; he is required to have this stereotype, and to know (implicitly) that it is obligatory. The stereotype must include the feature of stripes if his acquisition is to count as successful.<sup>18</sup>

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14. Two clarifications: First, natural kinds are not the only exception to meaning fixing the reference; for example, proper names and pure indexicals also pose exceptions, though in different ways. Second, we should bear in mind that such fixing of reference might be temporal and it can change over time. However, if the use of a given word changes over time to designate different things, then we would say that the meaning of the word changed over time, it now means something else (e.g., in English, "meat" used to mean food, in general; now it means only a subset of food made of animal flesh).

15. See HILARY PUTNAM, *MIND, LANGUAGE AND REALITY* 215–71 (1979).

16. See SAUL KRIPKE, *NAMING AND NECESSITY* (1972).

17. See SCOTT SOAMES, *Knowledge of Manifest Natural Kinds*, in 2 *PHILOSOPHICAL ESSAYS: THE PHILOSOPHICAL SIGNIFICANCE OF LANGUAGE* 189 (2009).

18. See PUTNAM, *supra* note 15, at 250.

I doubt that Putnam is entirely right about this. It is probably true that in most cases, speakers of a natural language are required to know some salient features of a stereotypical token of a type in order to be able to use the type-word in their everyday lives. (And perhaps this is all that Putnam meant to say here.)<sup>19</sup> However, it seems to me more accurate to maintain that stereotype is just a widely shared hypothesis, as it were; it is what seems to us, on the surface, to warrant the assumption that the phenomena have something deeper in common, something that warrants rigid\* designation of its extension. Depending on theories and further knowledge acquired about the hidden nature of the kind, the beliefs we have shared about the stereotypes may persist over time, or they may need to be revised. But, as Putnam himself argued, none of these initial hypotheses is secure from possible revision as more knowledge accumulates about the real nature of the kind, including the possibility that we got the stereotype(s) wrong.<sup>20</sup>

The crucial question for us, however, is how much of this natural kinds model can be extended to cover other types of words or concepts, in particular evaluative terms, like justice, freedom, or equality—the kind of terms we find in constitutional documents. And that depends, you might think, on metaethics. Dworkin, for one, seems to be treating the main concepts of constitutional evaluative terms as if they were moral natural kinds.<sup>21</sup> Perry is also quite explicit that his view about the prohibition of “cruel” punishment in the Eighth Amendment presupposes a kind of realism about moral terms; it assumes that certain things can turn out to be cruel, really cruel, even if people thought otherwise.<sup>22</sup> Granted, on the basis of an externalist or realist metaethics, construal of evaluative terms such as “cruel,” “equal protection,” etc., along the lines of natural kinds is plausible. And then, it seems, we would have the building blocks for the kind of dynamic reading of the Constitution that Dworkin and Perry espouse. We could say that the Constitution prohibits cruel punishments *rigidly\**, namely, whatever is really cruel (viz., according to an externalist version of “is cruel”), which, practically speaking is tantamount to whatever turns out to be cruel upon our best knowledge available at the time of interpretation.

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19. It is quite possible that different types of knowledge are required for using a word more or less correctly under some circumstances, and for what would count as understanding a word as used in a given idiolect. The differences, however, might be just a matter of degree.

20. See PUTNAM, *supra* note 15, at 235. To be sure, I am not suggesting that the meaning of natural kind remains the same even if, over time, there are radical changes in the widely shared theories about the nature of its extension. I don’t think that we have very robust intuitions about this.

21. See RONALD DWORKIN, *JUSTICE IN ROBES* 154–56 (2006); see also David Brink, *Legal Theory, Legal Interpretation, and Judicial Review*, 17 PHIL. & PUB. AFF. 105 (1988). Brink is a realist about moral terms, while Dworkin is not. See Ronald Dworkin, *Objectivity and Truth: You’d Better Believe It*, 25 PHIL. & PUB. AFF. 87 (1996).

22. See Perry, *supra* note 4, at 118.



There are several problems with this suggestion, however. First, even if we grant that, as a metaethical position, the externalist model is plausible, it does not necessarily settle the question about constitutional interpretation we have been discussing here. Truth doesn't always settle the question of how to understand the law, just as truth doesn't always affect the content that parties to a conversation can convey to each other. Suppose, for example, that both A and B assume that John is married to Susan, and in their conversation they refer to Susan as "John's wife." As it happens, the truth is that John and Susan are not legally married. Nevertheless, for all practical purposes, nothing is necessarily amiss in the conversation between A and B; they both refer to the person they want to refer to, they understand each other and the content of the conversation is not necessarily affected by their false presupposition.

Consider a legal case now: in the curious case of *Nix v. Hedden* the question came up about whether tomatoes are fruit or vegetable.<sup>23</sup> The law imposed a 10 percent duty on importation of vegetables, and exempted fruit from the tariff; the plaintiff, who imported tomatoes, claimed that tomatoes are actually fruit, not vegetable, and hence claimed the exemption. The Court acknowledged that, as a matter of scientific taxonomy, tomatoes are, indeed, fruit and not vegetable. Nevertheless, the Court decided that for the purposes of determining the classification of tomatoes in the context of this law, the ordinary, albeit scientifically mistaken, understanding of people that tomatoes are vegetables is the correct reading of the statute. Didn't the Court realize that the relevant terms here are natural kinds, you might wonder? Well, it did, in a way (though not in these terms, of course); but the Court reasoned, and quite sensibly, I think, that natural kind terms are not necessarily used as such, either in ordinary conversations or in legislation. Legislation is not a scientific theory, aiming to get to the truth of the matter about the real nature of things, so to speak. The law aims to regulate conduct for some particular purposes, and the pragmatics of legal utterances must take this into account. The law often relies on assumptions about how people normally understand certain words or concepts, even if those understandings are far from accurate or scientifically sound.

The *Nix v. Hedden* decision is not out of line with ordinary use of language in other contexts. Rigid\* designation, of the kind Putnam explored in connection with natural kinds, is a tricky matter. In many cases, it depends on conversational purposes and a speaker's intentions. It is quite right that when natural kind words, such as "gold," or "tiger," or "water," are introduced into natural language, the collective intention of language users is to treat these words as natural kinds, rigidly\* designating the extension, whatever it really is. But collective linguistic intention doesn't necessarily trump a speaker's intentions in concrete conversational contexts. Speakers often use words that are normally treated as natural kinds without intending to employ rigid\* designation in the particular context of their utterance. When you order a fruit salad in a restaurant, you

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23. *Nix v. Hedden*, 149 U.S. 304 (1893).

really don't expect to get tomatoes mixed in with the grapes, apples, and oranges; in this context the word "fruit" is not meant as a natural kind (technically speaking, that is), and the waiter would be rather obnoxious if he pretended to have understood you otherwise. In short, whether we use a natural kind word as rigidly\* designating its extension or not often depends on the relevant interests and salient contextual features shared by parties to the conversation.

Dworkin and Perry could claim, however, that in the context of constitutional law, there are good reasons to treat the general moral terms in the Constitution as moral natural kinds. There are two possible arguments to that effect: one, which Dworkin has explicitly made, is linguistic. Dworkin argued that the very use of such general and abstract formulations as "equal protection of the laws" or "cruel and unusual punishment" is itself evidence of the *communication intention* of the Framers to designate rigidly\* whatever is the best understanding of the general moral terms.<sup>24</sup> Had the Framers wanted to avoid rigid\* designation, they would have used much more concrete and specific language, as is normally done in the context of statutory law. So the argument seems to be that in the specific context of enacting a constitution, the use of very general and abstract terms is decisive evidence of the communication intention of the framers, namely, the intention to use the general terms as moral natural kinds.<sup>25</sup>

This argument, however, rests on shaky grounds. First, evidence about a speaker's intention is always defeasible; concrete historical evidence may disprove the hypothesis. Second, the heavy reliance on the actual communication intentions of the Framers is a bit perplexing a position for Dworkin to hold. He has made it abundantly clear that in the context of statutory interpretation he would not regard communication intentions decisive of any interpretative issue—so why make it decisive in constitutional interpretation, where it is, morally speaking, much more problematic?<sup>26</sup> Most important, however, is that Dworkin's main assumption here is far from secure: people often use very general and abstract terms not intending to use them with rigid\* designation, even if the terms are of natural kinds. It all depends on the presuppositions of the particular conversation in question, namely, on what is taken for granted by the speaker and assumed by the speaker to be taken for granted by the relevant audience.

A better argument for the conclusion that general moral terms in the Constitution should be understood on the basis of the natural kinds model is a moral one. It is certainly possible for Dworkin and Perry to argue that, regardless of actual communication intentions, there are moral-political reasons to treat the moral terms in the Constitution as rigidly\* designating whatever is, actually, the right moral extension of the terms in question. I

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24. See DWORKIN, *supra* note 3, at 7–12.

25. See *id.*

26. See ANDREI MARMOR, INTERPRETATION AND LEGAL THEORY 141 (rev. 2d ed. 2005) (elaborating on this critique in greater detail).

will explore this argument in the last section. For now, let me just point out that, even if we think that the moral argument goes through, two additional problems remain.

First, the conclusion that general moral terms in a constitutional document should be understood on the basis of an externalist model ties the view about constitutional interpretation to some version of externalism in metaethics. The view only makes sense if we assume that moral terms rigidly\* designate something that is out there, regardless of our collective, widely shared conceptions of its nature. Perhaps it does not take a full-fledged version of realism in metaethics to make sense of such a view, but some version of externalism about moral concepts is clearly required.<sup>27</sup> The problem is that this may seem like a hefty price tag: do we really want a theory of constitutional interpretation that is tied to a particular metaethics, and one that is not uncontroversial, to put it mildly?

Second, and more important, perhaps, if we construe the relevant evaluative terms along the lines of natural kind predicates, the distinction between concept and conceptions becomes very problematic. If you assume that, say, “cruel” or “cruelty” is like a natural kind, rigidly\* designating a moral kind, as it were, then you must assume that there is a truth of the matter about which conception of cruelty is correct, if any. On this view, competing conceptions of such concepts are akin to competing hypotheses or theories about the true nature of the extension, and therefore, if one of them is true, others, incompatible with it, must be false. But then the kind of conceptual tolerance we assumed about different conceptions of the same concept, far from being explained, is actually explained away; it turns out to be a mistake. Yet again, this is a hefty price tag for a theory of constitutional interpretation. It entails that rational people cannot have a reasonable disagreement about what, say, “equal protection of the laws” requires, any more than they can have a reasonable disagreement about the chemical composition of water.<sup>28</sup> Thus it turns out that the distinction between a concept and its different conceptions, employed by Dworkin and Perry to explain their views about constitutional interpretation, does not provide us with the tools to explain how people can reasonably disagree about their favored conceptions of the concept in question. On the externalist semantic model we explored here, such disagreements are, at least in principle, resolvable. Hence if one conception is true, others, incompatible with it, must be discarded as false.<sup>29</sup> This makes sense as a

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27. Both Perry and Dworkin acknowledge this point to some extent. See DWORKIN, *supra* note 3; Perry, *supra* note 4.

28. Of course, disagreements about the chemical composition of water would have been perfectly rational before the discovery that water is composed of H<sub>2</sub>O. But even then, it must have been assumed that opposing views on the issue could not be mutually consistent.

29. Alternatively, one might hold a view that the concept in question refers to the kind of things which are out there, in some realist sense, but its nature is essentially *unknowable*. In that case, disagreements between different conceptions are not, in principle, resolvable. But this would certainly not make the kind of disagreements we have about different conceptions more rational than the natural kind model does.

model for scientific disagreement, not for a moral-political disagreement of the kind we find in constitutional interpretation.

### III. THE INTERNALIST MODEL: ESSENTIALLY CONTESTED CONCEPTS

The idea that rational people can have reasonable disagreements about their favored conception of an evaluative concept gives us a starting point for examining a very different approach, suggested by Gallie's influential article about *essentially contested concepts*.<sup>30</sup> As I hope to show here, this approach is the opposite of the externalist model that we considered above. According to Gallie, there are certain evaluative concepts, such as art, democracy, social justice, "a Christian life" and the like, that exhibit a particularly strong version of what I have called conceptual tolerance.<sup>31</sup> It is a strong version because people tend to hold different conceptions of the contested concept in a way that is *essentially competitive*: on the one hand, people tend to think that their favored conception is superior, yet they also recognize that their conception is legitimately contested by others and in a way that is "not resolvable by argument of any kind."<sup>32</sup> So we are presented here with a competition of conceptions, each favored by some and rejected by others, characterized by seemingly contradictory beliefs; people believe that they got it right and others got it wrong, but they also know that no decisive argument can resolve the controversy. Furthermore, Gallie's main point seems to be that these concepts are such that the competitive conceptions they engender are unavoidable; they are *essentially* contested, and do not just happen to be so in a particular context. Gallie employs a hypothetical sports competition to demonstrate his argument. The contested concept of the game that Gallie constructs exhibits five characteristic features:

- (1) The concept in question must be *appraisive*, in that it stands for some kind of valued achievement.
- (2) The achievement in question must be internally complex.
- (3) The explanation of its worth must refer to the respective contribution of its parts or features.
- (4) The accredited achievement must be of a kind that admits of modifications in light of changing circumstances.
- (5) Each party recognizes that their own understanding of the concept is contested by other parties.<sup>33</sup>

Presumably, these five features are meant to help us see how certain evaluative concepts can be essentially contested, namely, how people can think that their conception is superior to other people's while acknowledging that they have no decisive argument to prove it—at least not

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30. W. B. Gallie, *Essentially Contested Concepts*, 56 PROC. ARISTOTELIAN SOC'Y 167 (1956).

31. *See id.* at 181.

32. *Id.* at 169.

33. *Id.* at 170.

in a way that would render a rejection of their argument irrational on the part of their competitors. Still, there is something rather curious about this. The complexity and interdependence of the various elements that make up the relevant concept are not enough to explain its essentially contested nature. There has to be more to it than that.

Now, we do have one familiar model of evaluative preferences, which enables people to have such preferences while acknowledging that others, who may disagree, do not have to share them. We call it “a matter of taste.” I prefer French wine to the Californian wines, and I think that French wine is generally better, more true to the nature of red wine, as it were, than Californian wine, which, in my view, is too fruity and thus too artificial. But I do not really think that those who pay more money for a Californian wine are stupid or just plain wrong. This is, at least partly, a matter of taste (literally and figuratively, if you will). Generally speaking, we can say that preferences of taste are such that either we think that others do not have to share them with us, that there is no other-regarding “ought” in play here, or else, if there is some ought in play, the overall evaluation is at least partly a matter of some subjective preference and not necessarily a universal requirement applying to others similarly situated. Either way, the realization that the relevant evaluative concept in play is such that at least part of its components or constitutive features are a matter of taste, makes it easy to understand how one’s preferred conception is compatible with a strong form of conceptual tolerance.

Another explanation for the kind of conceptual tolerance that essentially contested concepts exhibit can be due to *incommensurability*: suppose the constitutive elements that make up the evaluative concept are such that they are incommensurable with other elements. To give a schematic example, suppose it is generally believed that concept C, apprasive and all, is partly a matter of scoring high on dimensions *a*, *b*, and *c*. However, it is also the case that *a*, *b*, and *c* are incommensurable. Thus, suppose we have two conceptions of C, C(1) and C(2), such that C(1) scores higher on *a* than C(2) but lower on *b*. If *a* and *b* are incommensurable, then we would have no exact sense of how much higher on *a* C(1) has to score to compensate for a lower score on *b* (and vice versa). And of course, this model can be made more complex with more elements in the overall evaluation, colliding and competing on various fronts. To give a concrete example: consider the differences between living in a big city and living in a small town. Each of these lifestyles has advantages and disadvantages on scores of evaluative dimensions. And, quite plausibly, some of these dimensions are incommensurable; for example, how would you compare lengths of commute time with better theater, or a certain level of pollution with better schools? And this would certainly explain why the choice between living in a big city or a small town is “not resolvable by argument of any kind.”

Now, the problem is that both explanations, taste and incommensurability, give us a sense of why it is difficult to settle an argument about the preference of C(1) over C(2); both explanations give us a sense of how people can adhere to competing conceptions of the same

general evaluative concept. But neither explanation seems to give us an idea of why people would have a particularly strong other-regarding preference for their favored conception. If C(1) and C(2) are incommensurably good (or bad), the rational reaction in the face of disagreement should be one of evaluative indifference, not competition. In short, neither taste-based nor incommensurability-based explanations (or any combination of both) give us the right sort of contestability here.

In order to get the right kind of contestability, we probably need to take Gallie's game/sports analogy more seriously: we get a competition when a winner has to be declared. More broadly, we can say that when a decision has to be reached, collectively, institutionally, or authoritatively, about which conception gets implemented in a given context or, at least, which one is somehow declared the winner, then we are likely to get the kind of strong contestability that Gallie had in mind. Indeed, all the examples that Gallie mentions have this element: in matters of justice we need to make collective, often authoritative decisions; indifference or abstention of judgment is often not an option, practically speaking.<sup>34</sup> Similarly, about questions regarding the nature of democracy, what counts as "truly" democratic and the like, decisions are often practically needed.<sup>35</sup> Art may seem like an example where declaring a winner is not quite required, but that is not accurate.<sup>36</sup> For various practical purposes, such as public recognition, financial support, market price, etc., various collectives and institutions do need to declare winners and losers.

Does this mean that competition between conceptions exists where it really should not be present? Is it Gallie's suggestion here that essentially contested concepts exhibit a kind of cognitive overreach? Undoubtedly, there are cases in which the practical need, or perceived need, to declare a winner generates distortions, pushing people to believe that their conception of an essentially contested concept is superior to other people's, while the simple truth might be that their conception is nothing more than a complex subjective preference (at least in part). How much we want to generalize this diagnostic explanation is, of course, a very complex issue that lies at the heart of some of the most contentious theories in metaethics and related philosophical debates. I will not pursue this question here. Instead, I want to explore some of the linguistic background further, getting us back to the question we started with.

#### IV. SUPERPOLYSEMY AND THE PRAGMATICS OF CONCEPTIONS

Remember that we started with a puzzle about the relations between meaning and beliefs. The question we were interested in concerns the possibility of sharing the meaning of a general concept-word while disagreeing, sometimes profoundly, about what the word stands for, about the essential characteristics of its extension. The externalist model gave us

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34. *Cf. id.* at 181–87.

35. *See id.* at 183.

36. *See id.* at 181–82.

one plausible account of how convergence in meaning is compatible with disagreements about the extension of the word. Gallie's theory about essentially contested concepts gave us an internalist account; it purports to explain the disagreements about the extension of a concept-word in terms of the internal complexities of the constitutive elements of the relevant concept, and the speakers' subjective judgments or preferences about the relations between them. The important point to realize is that both models work at the general semantic level; they tell us something about the ways we normally think about relations between meaning and the extension of different types of words/concepts. In concrete contexts of speech, however, pragmatic factors may yield different results.

We have already seen that natural kind words can be used by speakers in a particular context of speech without intending to refer to the extension of the word rigidly\*. But now we should see that this is just an example of a much more general phenomenon: the intended reference or extension of words used in a given conversation is often sensitive to context and other pragmatic determinants of linguistic communication. A good example is the general phenomenon of polysemy, whereby the same nonambiguous word would be used to designate different extensions, depending on the context of the expression and shared presuppositions, or background knowledge, about the world. Consider, for example, the intended extension of a word like "open" in:

- \_\_ open door \_\_
- \_\_ open view \_\_
- \_\_ open minded \_\_
- \_\_ open field \_\_

Or, think about the extension of "man" in:

- "Marriage is a contract between a man and a woman."
- "You are a man now (no longer a child)."
- "Socrates is a man, therefore mortal."
- "Jo finally behaved like a man."

This sensitivity to context of expressions in designating extension is ubiquitous, and applies to evaluative terms as well—often much more so. The kind of evaluative concept-words we have in the constitutional context may well be called *superpolysemy*. These are the kind of evaluative concept-words that can be used to refer to different kinds of concerns, often only vaguely related to each other, and hugely dependent on context of expression. Consider, for example, the concept of fairness. Suppose somebody utters the expression:

"It is not fair that X . . . ."

Now consider the following options for X:

- (a) My daughter saying, ". . . you bought my sister a new shirt but not me."

- (b) The president saying, “. . . the most wealthy people in the country pay such low rates of income tax.”
- (c) The inmate in prison saying, “. . . I got convicted, because I didn’t do it.”
- (d) My wife saying, “. . . we planned this trip for so long and now the weather is going to ruin it.”

Clearly the words “not fair” stand for rather different kinds of concern here. In (a) there is some notion of equal treatment in play; in (b) there is some notion of redistribution in play; in (c) it is a concern about truth and deserts; and in (d) it is about bad luck. Of course, under normal conditions, we can easily discern these differences of intended extension and they pose no particular problems in ordinary conversation. Problems arise when the intended extension depends on more complex beliefs and presuppositions that are not quite as transparent in the conversational situation in play. Then, if we try to clarify the relevant presuppositions, we may sometimes discover that we have been talking past each other. At other times, of course, we may reach bedrock upon realizing that we simply disagree about fundamental questions of value.

Here is another example, closer to the constitutional context: many people believe that there is too much cruelty involved in some of the penal practices currently prevalent in the United States. Such people have serious reservations about the excessive cruelty of exceedingly long prison terms, often in harsh conditions, inflicted on offenders, and many think that capital punishment is cruel and unjustified. Now compare the reference of “cruel” in these two cases: excessive prison terms and capital punishment. Upon reflection, it should be clear that speakers use the word “cruel” to refer to different kinds of concerns. Long prison terms are cruel (if they are), in a fairly standard sense of the word, namely, one designating the infliction of too much harm or suffering that is not necessary under the circumstances. But if you ask people whether this is also their main concern about capital punishment, my guess is that most people would say it is not. The moral objection to capital punishment does not consist in the concern that the act of killing inflicts too much suffering on the condemned. The moral concerns pertain to other aspects of capital punishment, such as the irreversibility of it, which is extremely troubling given the possibility of error in conviction; its racially biased application; the concern that the state should not be in the business of taking away human life; and so on. In short, cruelty about capital punishment refers to something quite different from cruelty about long prison terms. Think about it this way: in response to concerns about harsh and long prison terms, it makes sense to retort: “they deserve it”—it would be a relevant (albeit probably misguided) reaction. But in response to the main concerns about capital punishment, “they deserve it” is the wrong kind of response. Many of those who object to capital punishment would not deny that heinous murderers may deserve to die; what they are concerned about is the risk of error, racism, the role of



the state in making it the case that this kind of desert is implemented, and similar considerations.<sup>37</sup>

In short, general evaluative concepts are typically *superpolysemous*; such concept-words have a very wide semantic range, and they tend to designate different types of concerns, depending on context, background assumptions, the speaker's intention, etc. Elsewhere I elaborated on some of the interpretative challenges generated by polysemy in the context of statutory interpretation.<sup>38</sup> But now, if you think about constitutional documents, you can see that polysemy is a major concern, and not only because it plagues general evaluative terms of the kind deployed in constitutional documents. The main problem in the constitutional case is the essentially thin conversational context: constitutions do not form part of an ordinary conversation between parties sharing a great deal of background contextual knowledge. After all, the main purpose of constitutions is to regulate conduct on a large scale, in very general terms, for generations to come. It is not anything like an intimate conversation between parties situated in a particular context. In other words, the conversational context of constitutional provisions is inevitably very thin.

Now, you might think that the thin conversational background of constitutional enactments vindicates Dworkin's position; it shows that understanding general constitutional provisions in all but their most abstract terms is inevitable because we lack the kind of conversational background—and other pragmatic determinates of communicated content—that we would normally have in an ordinary conversation. In other words, we can reinterpret Dworkin's argument to say that the mistake of originalism is precisely that it deals with constitutional enactment as if it were an ordinary conversation, where we can construe the intended extension of words used by relying on normal pragmatic determinants, whereas, in fact, there are no such pragmatic factors in play. Though this line of thought is in the right direction, it is still rather precarious. Originalists could reply that nothing is said entirely out of context. Even if the conversational context of constitutional enactments is relatively thin, some context is surely there, and sometimes, at least, it is essential for understanding what the Constitution says.

Consider, for example, the formulation in the Eighth Amendment of the prohibition on inflicting "cruel and unusual" punishment. This is an ambiguous expression: does it mean that a form of punishment would be unconstitutional only if it is both cruel *and* unusual, or if it is either cruel *or*

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37. I can see an objection to the example: one might argue that people couch their objection to capital punishment in terms of cruelty only because of the language of the Eighth Amendment, and not because they think that cruelty is really an issue here. Well, yes, it is quite possible that this is the case now in the United States, but I would venture to guess that cruelty had been an issue with capital punishment in European countries at the times when those countries debated the issue and decided to abolish capital punishment. But not much hangs on this; other, similar examples are abundant.

38. Andrei Marmor, *Varieties of Vagueness in the Law* (Univ. of S. Cal. Gould Sch. of Law Legal Studies Research Paper Series, Paper No. 12-8, 2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2039076](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2039076).

unusual? This type of ambiguity is typically pragmatic. Logicians would tell you that “P & Q” is true if and only if P is true and Q is true, and false if either one is false. But now suppose you see a sign on the entrance to a store saying, “No dogs and cats allowed”—surely, the sign is not meant to keep out only those patrons who happen to have both a dog and a cat, but also those who have either one. The opposite is true of a sign saying: “No drinking and driving”—it is not meant to suggest that either drinking or driving is prohibited, only the combination of the two. This familiar type of scope ambiguity is normally resolved by contextual or background knowledge of the parties to the conversation. One cannot infer the right conclusion from the meaning of the expression alone. So there is something about context we must know in order to interpret the “cruel and unusual” punishment prohibition; the semantics of conjunction would not give us the answer.

To be sure, I am not trying to defend originalism in this Article. I think that Dworkin’s position is much more plausible from a moral point of view. But in order to get to it, we need a moral-political argument, not a linguistic one. The way we think about the linguistic framework of constitutional documents depends on the moral-political framework, not the other way around. Let me explain what I mean here.

#### V. THE MORAL DEBATE AND THE NATURE OF THE CONVERSATION

Constitutions are, by their very nature, *precommitment* devices. When a legal system adopts a constitution, especially one that is fairly “rigid” (as the U.S. Constitution certainly is), the legal system basically precommits to certain principles of governance and certain moral-political principles that are deliberately made difficult to change by the ordinary democratic process of legislation. Like Ulysses who ties himself to the mast and, crucially, orders his subordinates to ignore his future orders, in order to prevent the possibility of succumbing to irresistible temptation in the future, constitutions tie the nation to the mast, striving to make it difficult to succumb to some future temptations. The question of what makes this precommitment device legitimate, especially in the face of its essentially antidemocratic (or at least antimajoritarian) element, is the central question about the legitimacy of constitutionalism. Neither Dworkin nor Scalia purport to provide us with an elaborate answer to this question, but it is clear that they have very different views about it, and that they understand the precommitment aspect of constitutionalism very differently.

According to Scalia, the whole point of entrenching certain moral-political principles in a rigid constitutional document is to freeze those principles in time, as it were. It is, after all, the whole point of a constitutional regime to predetermine certain issues, controversial as they may become, and freeze a certain resolution to those issues in time, for generations to come. Not a total freeze, of course; constitutions provide for their own amendment process and can be changed accordingly. But the amendments are not easy to accomplish, and precisely because their whole point is to function as a countermajoritarian element in the legal system,

making it difficult to change by the ordinary democratic processes. Therefore, Scalia concludes, it is incumbent on interpreters of the Constitution to defer to an “original” understanding of its content, because this is the whole point of the precommitment to constitutional constraints. If we don’t like those ideas then we need to amend the Constitution. Allowing judges to adapt the Constitution to current moral-political conceptions, and thus circumventing the burdensome amendment process, would be tantamount to subverting the very idea of constitutionalism as an anti-majoritarian precommitment device. This, I submit, is quite simply the main idea behind originalism in constitutional interpretation.<sup>39</sup>

Those, like Dworkin, who favor a much more dynamic version of constitutional interpretation, obviously disagree; they see the precommitment element of a constitutional regime as much more limited. Why is that? Presumably, because there is something deeply problematic about the very idea of an intergenerational precommitment of the kind imposed on us by rigid constitutions. It is far from obvious that any one generation should have the moral authority to bind future generations to its conceptions of the just and the good. But, to some extent, this is precisely what constitutions do, and inevitably so. They bind future generations to the past, making certain decisions about morality and politics much more difficult to accomplish than would normally be allowed by an ordinary democratic process. This intergenerational authority is morally problematic, to say the least, and its legitimacy is far from evident. And, of course, the more we regard constitutional content as tied to its original understanding, the more acute the problem of legitimacy becomes. Therefore, allowing the Supreme Court to adapt the content of the Constitution to current understandings of its main moral-political principles is a means of mitigating the intergenerational concern.

I won’t pretend to have made any philosophical news here; these fundamental problems about the legitimacy of a rigid constitutional regime are well known and their implications well understood. The suggestion I make here concerns the ways in which we should think about the linguistic considerations that bear on this debate. What I have tried to show is that the protagonists in the debate got the direction wrong here. They conduct the argument as if the linguistic considerations about the concept versus conceptions distinction can be utilized to support their moral-political views about the rationale of a constitutional regime and its moral legitimacy. But, in fact, it is exactly the other way around. The moral-political views about the rationale of a rigid constitutional regime are the ones that should inform

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39. See SCALIA, *supra* note 3. This main rationale needs many further refinements and adaptations, of course. For example, even if we are totally committed to an original understanding of a constitutional provision, borderline cases of vague terms might not be contextually determined, and judicial precisification of such vague terms may be needed. Even the most dogmatic version of originalism must allow for some judicial innovation in the face of changing circumstances and relatively thin contextual information. I am told by constitutional lawyers that this is now called “construction,” as opposed to “interpretation.” In their terminology, originalism concedes, as it must, that some constitutional construction is necessary. Well, quite a bit, I would say.

the ways in which we think about what kind of speech act constitutional documents are, and the kind of conversation that constitutions establish.

Why so? If you think that the intergenerational precommitment embodied in a rigid constitutional framework is legitimate, as originalists clearly do, then you would be quite right to regard the constitutional document as an ordinary speech act, whereby the Framers of the Constitution purport to communicate some definite legal content, and it is our task to try to figure out what that content is. In other words, according to the moral-political view shared by originalists, it makes sense to think about the Constitution as a legislative speech act in a conversation between Framers and subjects, just as we think about ordinary legislation as a conversation in which the legislature says something and we try to understand what the legislature actually said (and perhaps also what it implicated or presupposed, etc.). In other words, the more you agree with the precommitment rationale of constitutionalism, the more you would be inclined to think about the constitutional document as a product of an ordinary speech act that purports to communicate certain contents that we need to ascertain, akin to ways in which we think about ordinary legislation. And vice versa, of course. The more doubtful you are, morally speaking, about the precommitment rationale of a constitutional regime, and in particular, the more concerned you are about the intergenerational authority of a rigid constitution, the less you would be inclined to think about the Constitution as a legislative speech act. The general constitutional provisions containing abstract moral-political principles, according to this view, might be seen as a kind of vague and general framework, setting the language in which moral-political concerns need to be phrased, but leaving the content of the relevant expressions free for us to shape as we deem right at any given time. Thus, the real debate here is about the nature of the conversation that our constitutional regime establishes, which depends on our views about the rationale of constitutionalism: what constitutions are for and what makes them legitimate.

An objection needs to be answered before we conclude the discussion: the nature of the conversation, one might think, is typically determined by the speaker. What kind of conversation one engages in is not usually an open question, and typically not one for the hearer to determine. It is normally the speaker who gets to set the terms of the conversation, as it were. Whether something has been said as a straightforward proposition, or in jest, or ironically, or fictitiously, are matters that depend on the speaker's intention. If that is correct, one might resist the idea that there is room for a moral-political debate about the nature of the conversation that constitutions establish; one might think that we are forced to side with the originalists and maintain that it is up to the Framers and their communicative intent to set the terms of the relevant type of conversation in question here.

This objection can be answered without too many difficulties. Though it is generally true that the speaker gets to determine the nature of the conversation, it is not always the case. In some cases, the nature of the conversation is partly determined by the hearer, not the speaker. A clear

example, though perhaps not very close to our concerns here, is a typical conversation between patient and psychologist, whereby the patient tells a story, from a certain autobiographical perspective, and the psychologist registers something else, not so much the content conveyed but the reasons or hidden motives for conveying it, the kind of things the content conveyed tells about the patient and his or her problems, etc. A session with a psychologist (or a conversation with a friend who wants to be your psychologist on that occasion) is one clear example where the speaker does not get to determine the kind of conversation that actually takes place.

Another example, and much closer to our concerns, happens when authors speak to multiple audiences, situated in different contexts and often spanning different times and places. The main example, of course, is literature and other similar forms of art. It is a very familiar point that the ways in which we understand literature is partly a matter of aesthetic and artistic judgment exercised by the readers, irrespective, at least to some extent, of the intentions of the authors. In other words, it is part of our very conception of literature that the speaker/author does not necessarily get to determine, as it were, what exactly is the nature of the conversation she conducts with her readers. What kind of conversation takes place between authors and readers in the case of literature is an open question, never entirely determined by the relevant authors. In this respect, constitutional law is much closer to literature than one might have thought. In both cases, the nature of the conversation is partly up to the readers, not the authors, to determine. And in both cases, different ways of understanding the nature of the conversation reflect different evaluative views about the nature of the enterprise and the kind of values we find in it.

If this argument looks like the kind of argument Dworkin himself should have made, the impression is not mistaken. I have long argued that one of Dworkin's best insights about the nature of interpretation concerns the ways in which evaluative views about the nature of the genre, or the relevant enterprise, necessarily inform any particular interpretative views within it. Without having some views about the main values we find in the genre to which the object we strive to interpret belongs, it is almost impossible to say anything about what would count as an acceptable interpretation. You cannot begin to offer an interpretation of a novel if you have no views about what makes novels good and worthy of our appreciation. Similarly, I don't see how one can have any theories about constitutional interpretation that are not responsive to one's moral-political theory about the rationale of constitutionalism and the moral legitimacy of judicial review. Had Dworkin followed his own line of thought here, there would have been no need on his part to rely on the kind of linguistic and historical considerations that his arguments about constitutional interpretation deployed over the years. One can only surmise that Dworkin wanted to defeat the originalists on their own turf. But that doesn't work, and it only obscures the true nature of the debate, which is, as Dworkin should have been the first to note, essentially a moral-political debate about what constitutions are for and what makes them legitimate to begin with.