CONSTITUTION AS PROMISE

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LAY ABSTRACT: Constitution as Promise investigates the interpretive consequences of conceptualizing constitutions as promises from governments to citizens. It first argues that constitutions satisfy the criteria to be considered promises. It then maintains that the morality of promising is apt for application to constitutional law. In the third and fourth chapters, it considers how one ought to interpret vague promises. Vague promises, it argues, should be interpreted incrementally, on a case-by-case basis. The promisor and the promisee must come to an agreement about what their vague promise requires, as new cases arise. When they cannot agree, promisor and promisee need an adjudicator. Since constitutions are sets of vague promises, they must also be interpreted incrementally, on a case-by-case basis and require adjudication where agreement is impossible. Constitution as Promise concludes that the only available interpretive theory that is sensitive to constitution's nature as vague promise is living constitutionalism. As such, constitutions ought to be interpreted in a living constitutionalist manner.

ABSTRACT: Constitution as Promise contends that constitutions are sets of promises. As such, it argues that they must be interpreted in a living constitutionalist manner.

Chapter One argues that constitutions meet the analytic criteria to be considered promises. It is argued that constitutions are expressions of the intention of a government to bind itself to a set of principles. Absent this expression, citizens lack assurance of the protection of their rights and legal recourse when their rights are violated.

Chapter Two considers the use of promise in contract theory and investigates its viability in constitutional theory. Some theories of contract are skeptical of promise as a basis for contract. The chapter argues that while promise may be an inadequate moral underpinning for the law of contract, it is apt for the law of constitutions.

Chapter Three notes that constitutions are sets of vague promises. Vague promises ought not be interpreted solely in accordance with the intentions of promisors or promisees. Traditional forms of originalism contend that constitutions should be interpreted according to the intentions of their framers. So, constitution as promise rules out traditional forms of originalism.

Chapter Four considers the positive consequences of constitution as promise. It argues that vague promises ought to be interpreted through a negotiation process between promisor and promisee. This negotiation should consider what moral reasoning reveals about the promise's terms, the context in which the promise was uttered, the capacities and competing obligations of the promisor, and the expectations of the promisee. To properly consider these factors, the chapter maintains that the negotiation must occur on a case-by-case basis, incrementally specifying the promise's terms. The chapter then notes the similarities between this negotiation process and the interpretive suggestions of living constitutionalism. It concludes that living constitutionalism is entailed by the promissory nature of constitutions.

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Introduction

Constitutionalism brings with it a variety of philosophical questions. Among these are the following. From where do constitutions derive their authority? What makes a constitution's authority legitimate? How do you identify the norms of a constitution? How do you interpret constitutional norms in particular cases? The answers to these questions are intimately linked. Answers to the questions of constitutional authority and legitimacy are insightful when attempting to answer questions of constitutional identity and interpretation. For example, if constitutions derive their authority from their authors, then their identity and interpretation may depend on the intentions of their authors. Despite the intimate connection between constitutional questions, it is not necessary that they be answered in any particular order. It is not clear that there exists a hierarchy among the constitutional questions with those of authority at the top and those of interpretation at the bottom. Even if there is such a hierarchy, it is unclear still whether the top must be understood before the bottom. Instead of attempting to answer these constitutional questions from the top down, perhaps it would be fruitful to start somewhere in the middle.

Let us assume that a hierarchy exists among constitutional questions. In descending order of rank, we have (1) the justification of constitutionalism, (2) the authority of constitutions, (3) the nature of constitutional norms, (4) the identification of constitutional norms, and (5) the interpretation of constitutional

norms. (5) is surely the most politicized of the bunch. It is a justified politicization, however. The interpretation of landmark constitutional cases has major societal impact. Constitutional interpretation affects who is deemed a person,[1] who can marry whom,[2] if a woman may have an abortion,[3] and if the terminally ill may end their suffering through medically assisted death.[4] It is no wonder that the question of constitutional interpretation receives so much attention. (This is not to say that scholars answer the question of interpretation with a political outcome in mind. I am perhaps naively opposed to such a possibility.) The import of answering the question of interpretation justifies the considerable attention it draws.

The methodologies employed to answer this question, it seems, have followed two paths. The first, what I'll call the *top down approach*, moves from the top of the hierarchy down. The *top down approach* has two variants: one beginning with the question of justification, the other with the question of authority. The *top down (justification) approach* attempts to answer why it is we are justified in having constitutionalism in the first place. The justification of constitutionalism, these theories contend, provides insight for how we ought to interpret constitutions. For example, some argue that constitutions are, by nature, aimed at the maintenance of stability.[5] As a result, constitutions must be interpreted consistently over time,

[1] R. v. Edwards, [1996] 1 S.C.R. 128.
[2] Obergefell v. Hodges, 576 U.S. ___ (2015)
[3] Roe v. Wade, 410 U.S. 113 (1973).
[4] Carter *v.* Canada (Attorney General), 2015 SCC 5, [2015] 1 S.C.R. 331
[5] Richard Kay, "American Constitutionalism," 16-63.

with little to no change – except by amendment. The *top down (authority) approach* argues that the authority of constitutions derives from a certain place and must be interpreted accordingly.[6] For example, constitutions might derive their authority from the uniquely enlightened moral perspective of the authors who wrote them. Thus, we are bound to interpret constitutions in accordance with their authors' intentions.

The second methodology is the *bottom up approach*. The *bottom up approach* deals solely with the nature of interpretation. Scholars who employ this methodology argue that to interpret *just is* to do such and such. For these scholars, answers to the questions at the top of the hierarchy are not necessary for answering questions at the bottom. For example, a proponent of this methodology might argue that the interpretation of any object of interpretation requires recourse to the intentions of that object's author. Whether it is a piece of literature, a painting, a symphony, a road sign, or a constitution, interpretation requires discerning what the author *meant*. Any understanding of authored work beyond authorial intent is an imposition of one's own ideas on that work. The true meaning of a work, however, begins and ends with authorial intent. Regarding constitutions, this means that only a constitution's authors' intent is relevant during interpretation. The meaning of a

[6] Frank Michelman, "Constitutional Authorship," 64-98. Joseph Raz, "On the Authority and Interpretation of Constitutions: Some Preliminaries," 152-193. Jed Rubenfeld, "Legitimacy and Interpretation," 194-234.

constitutional document *just is* the intentions of its framers.[7] Whether that constitutional document deserves assent by a political community is another question. But so long as that document does receive such assent, it ought to be interpreted by authorial intent.

There are two main positive accounts that characterize debates on how we ought to interpret constitutions: originalist and non-originalist. Originalists ground their interpretive theory on facts about constitutions at the time of their creation. These facts can be the intentions of the constitution's framers, the public meaning of the words in a constitutional document at the time of ratification, or the purposes for the which the constitution was enacted. This is not an exhaustive list. However, the unifying claim of originalist theories of interpretation is that interpretation of constitutions ought to be done with facts about the origin of constitutions in mind. Non-originalist theories, characterized in contrast to originalist theories, are those that argue interpretation need not, at least wholly, depend on facts pertaining to the origin of constitutions. Interpretations may consider, say, the community's constitutional morality that has developed since the ratification of the constitution.

Both the *top down approach* and the *bottom up approach* are applied by originalists and non-originalists. While *top down* originalist arguments may contend that the authority of constitutions lies in the moral authority of their

[7] Larry Alexander, "Simple Minded Originalism."

framers, *top down* non-originalists may respond that the authority lies in the democratic will of the people. *Bottom up* non-originalists respond to *bottom up* originalist arguments by arguing that the nature of interpretation *just is* a holistic process that involves more than the discernment of the intentions of a work's author. The methodologies used for answering the question of interpretation do not seem to favour either originalist or non-originalist arguments. That is, neither the *top down approach* nor the *bottom up approach* is uniquely applicable to the aims of originalist or non-originalist arguments. As a result, both camps receive substantial support from a variety of academics.

I am skeptical about both methodologies. I am skeptical because the justification, authority, and interpretation of constitutions cannot be determined without first considering the nature of the norms contained within constitutions. To justify constitutionalism, we need first know what kind of thing constitutionalism is. Is it a set of commands from a superior to an inferior? Or is it a set of commitments that both constitute a government and oblige it to forbear certain actions? To determine the authority of constitutions, we need to ask the same questions. The authority one has over the meaning of a constitution depends on what kind of utterance a constitution is. If it is a set of commands, its meaning is inflexible. If it is a set of commitments, what is owed is of more importance that what was intended. Finally, the nature of interpretation depends on the object of interpretation. When interpreting statements and commands, it is usually fair to

refer to the speaker's intentions. When interpreting commitments, however, speaker's intention is not the sole concern. The recipient of a commitment should not have to hold their breath in hopes that the issuer of a commitment had a subjective intention that was in their interest. Thus, to answer constitutional questions, it seems best that we start snugly at the center of the constitutional hierarchy: with the nature of constitutional norms.

In this project, I will advance and defend the theory of *constitution as promise* – that constitutional norms are promises. I will defend this view by first demonstrating the promissory nature of constitutional norms. This defense will be purely descriptive. That is, I will show that constitutional norms follow the same form as promissory speech acts. I will then demonstrate how constitutional law is normatively parallel to the normativity of promising. I will do so, in part, by contrasting constitutional law with contract law. It is debated among theorists of contract whether contracts are legal promises. I will not intervene on this debate. However, I will argue that where promises prove weak at explaining the nature of contract, it is decidedly strong at explaining the nature of constitutional norms.

Following this argument, I will turn to the question of interpretation. My arguments will be twofold. First, that *constitution as promise* undermines originalist arguments. If constitutions are promises, then the intentions of constitutions' framers are of little importance in judicial review; promissory morality dictates that promissory obligation ought to be interpreted by more than

merely the promisor's intent. Second, that *constitution as promise* supports living constitutionalism. I will argue that promissory morality dictates that vague promises should be interpreted through a negotiation between promisor and promisee that proceeds by incrementally specifying the terms of the promise on a case-by-case basis. Consequently, vague constitutional norms such as the right to equality, the pursuit of happiness, and freedom from cruel and unusual punishment ought to be interpreted through a negotiated, incremental specification of the constitutional communities' understanding of them.

Chapter One: In Which the Promissory Nature of Constitutions is Demonstrated

I now begin my two-part discussion of the promissory nature of constitutional norms. The first part, in this chapter, shall argue that constitutional norms are analytically and descriptively akin to promises. The second part, in the next chapter, shall argue that constitutional morality is normatively parallel to promissory morality.

Thesis

When I say that constitutional norms are promises, I mean the following. Constitutions are promises from a political authority to its subjects. Constitutions are promises that the political authority will construct itself in a predetermined way. That is, whether the political authority will consist of federal, provincial, and municipal governments; whether its powers will be divided between legislative, executive, and judicial branches; how it will raise revenues; to what degree citizens will participate in the creation of its directives, and so on. Constitutions are also promises that the political authority will make law only in accordance with a set of substantive criteria. These can include promises to uphold the right to life, freedom, or any number of substantive values. Put simply, constitutions are promises for how a government will be *constituted* – both in its structure and disposition.

The Importance of "I Promise"

To start our discussion of the promissory nature of constitutional norms, it is imperative that we draw some distinctions about promising. Firstly, in order to make a promise, it is neither necessary nor sufficient that one use the words "I promise."[8] It is not necessary because one can make a promise without saying "I promise." For example, imagine Sally and Hans are discussing Hans upcoming dinner party. Hans is worried many of his friends will not show. So, Sally says "I will come to your dinner party, Hans." Hans, concealing his excitement, replies "Okay." In this scenario, Sally makes a promise to Hans. Sally is obligated to attend Hans' dinner party. If Sally were to miss the party, Hans would be justified in disappointment with Sally. He would be justified not only because he had hoped she would come, but because she promised him that she would. If Sally were to have said "I promise I will come to your dinner party, Hans," it would have made no difference to the status of her statement as a promise.

The words "I promise" are insufficient to render a statement a promise because they are often misused. People regularly "promise" that a statement is true or that they did something in the past. "I promise that the earth is flat!" and "I

[8] For a brief discussion of the necessity and sufficiency of making a promise explicit, see Margaret Gilbert, "Three Dogmas of Promising" in *Promises and Agreements: Philosophical Essays* (Oxford Scholarship Online: May 2011).

promise that I did not steal a cookie!" are statements that, while they use the words "I promise," are not really promises. Instead, "I promise" is used in these sentences to emphatically express one's conviction regarding the truth of their statement. Promises are commitments of the will to securable ends. Thus, one cannot promise that something is true or false.

The unnecessity and insufficiency of the words "I promise" to the making of a promise flows from the distinction between promising and truth-telling. Statements about the past and present are true or false; their truth or falsity is not in the control of the speaker, so they are not promises. Statements about the future can be promises, but only if their content is within the speaker's control. For example, "I promise I will attend your dinner party" is a promise because attending a dinner party is presumably within the capabilities of the speaker's will. "I promise the sun will explode in five to seven billion years" is not a promise because no act of the speaker's will can bear on the explosion of the sun. "I promise" can be used to tell the truth or lie, so it is insufficient for creating a promise. A statement need not be made with the aim of telling the truth or lying (it can be used to make a promise), so "I promise" is unnecessary for the making of a promise.

The reason for this preliminary discussion is to avoid two potential early criticisms of *constitution as promise*. The first is that constitutions are not promises because they don't include explicit promissory language. Constitutions do not begin with the words "Her Majesty hereby promises her noble subjects…" But

since the words "I promise" are unnecessary for a statement to be a promise, we need not worry that constitutions do not bear them. Instead, as I will argue, all that is needed is a legitimately expressed intention to obligate oneself to a future act and the acceptance of the promisee. The second potential criticism is that since constitutional norms are promises, the wrong of their violation is tantamount to the wrong of lying. Such a conclusion might undermine the seriousness of the breach of constitutional norms. As with lying, one might argue, breaching a constitutional norm is often the most expedient course of action to secure a desired outcome. So, governments may breach constitutional norms as they see fit. But broken promises are not lies and the obligation to keep a promise is different in strength and kind from the obligation to tell the truth. Thus, we can avoid the potentially detrimental effects of a theory of constitutional breach as lying. This is not to say that breaking a promise is worse than telling a lie; depending on the circumstance, a lie can do more harm than a broken promise. Rather, it is to say that the conditions for a permissible breach of a promise differ from the conditions for a permissible lie. What counts as a permissible breach of constitutional law – if there is such a case – depends on whether a breach of constitution law is a breach of a promise or a lie. Thus, it is important that a distinction is made between breaking a promise and lying before proceeding with the discussion.

The Conditions and Purpose of the Enactment of Constitutions

That constitutions are sets of promises is evidenced by the conditions under which and the purposes for which they are enacted. Constitutions are, in a sense, a social contract. Constitutions form when, dissatisfied with their current arrangements, humans commit to organize in ways aimed at alleviating this dissatisfaction. This can happen in the vein of enlightenment social contract theories. The state of nature, whether it is a state of war or peace, drives humans to create ordered political arrangements. Humans create these political arrangements by forfeiting some of their autonomy to an authority. Depending on the social contract theorist, the degree of autonomy that is or should be forfeited differs. Nevertheless, an exchange of promises is made. The authority promises its newly civilized subjects that it will govern in accordance with a set of criteria. In return, the newly civilized subjects promise their obedience to the authority *on the condition that those criteria are met*.

Of course, not all constitutions form as an antidote to the state of nature. Many constitutions are enacted following a revolution or as an attempt to improve existing political arrangements. The promissory nature of these constitutions remains. Humans, dissatisfied with their current political arrangements, solicit promises from their superiors to rule in accordance with a more just or orderly set of criteria. An example of the solicitation of constitutional promises is found in the opening lines of the United States' Bill of Rights:

> "The Conventions of a number of the states, having at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added: And as extending the ground of public confidence in the Government, will best ensure the beneficent ends of its institution."[9]

Here the United States' Bill of Rights recognizes that its contents were added to the United States' Constitution due to the *desire* of a number of states to prevent misconstruction and abuse of power. The people of the United States, represented by their state governments, solicited promises from their federal government to ensure a more just political arrangement.

Constitutions that form out of the state of nature and out of previous political arrangements are not different in kind. Both reflect the fundamental promissory nature of constitutional arrangements. Political subjects take a great risk in forfeiting (and continuing to forfeit) their autonomy to a political superior. Political power can be horribly misused. It is thus in the interest of political subjects to solicit promises from their superiors that may help to avoid this misuse. It is also in the interest of political superiors to respond to these solicitations. Orderly

[9] "The Constitution of the United States," The Preamble to the Bill of Rights.

government is made easier when political subjects obey the law because they feel that they should, not just because it would be painful not to do so. Making and keeping promises helps to produce this obedience. It is the hope – at least of political subjects – that the promises made and kept by political superiors correspond with the justification of political arrangements generally.

The promissory model of constitutional norms is descriptively valuable given the commissive nature of constitutional law. Constitutions are by nature future oriented. Constitutional laws commit governments to a future course of action. That future course of action is to govern in accordance with constitutionally specified criteria, procedural or substantive. When those criteria are met, it is reasonable to think of the government as making good on their promises. When those criteria are unmet, it is reasonable to think of the government as violating their promises.

Constitutions as Promissory Speech Acts

The treatment of constitutions as promises certainly has value as a tool for describing the purpose and conditions of constitutional enactments. But to see that constitutions are *analytically* promissory in nature and to make any resulting normative or interpretative claims requires further analysis. In this section, I will consider an influential treatment of what promising *is* by John Searle in his *Speech Acts: An Essay in the Philosophy of Language*. I will maintain that constitutions fit

the criteria to be promises on Searle's account, with a modification to Searle's fourth condition.

Searle outlines a nine-step process for how to make a promise.[10] If one makes an utterance that satisfies these nine conditions, they will have made a promise – not necessarily a good promise, or one they ought *all things considered* to keep, but a promise nonetheless. If Searle is right in his analysis (with the requisite modification to the fourth condition), then we can apply these nine steps to constitutions to see whether they are promises. I will consider these nine steps, in turn, pausing to consider whether they apply to constitutions. The nine steps are as follows.

1. *Normal input and output conditions must obtain.*[11]

   Explanation: Both speaker and hearer of the utterance can communicate and understand each other. They speak the same language and have no barriers to adequate understanding of each other.

   Analysis: There is no good reason to think this condition is not met by constitutions. Constitutions are written in the language practiced by the demographics they preside over. While

[10] John Searle, *Speech Acts: An Essay in the Philosophy of Language*, (Cambridge University Press, 1969) p. 54-71.
[11] Ibid., p. 57.

constitutions may contain legalistic jargon that could confuse legal subjects, they are written sufficiently clearly and under enough public scrutiny that legal subjects could decide whether they accept or reject a constitution's contents.

2. *S expresses the proposition that p in the utterance of T.*[12]

   Explanation: The speaker expresses a proposition through the utterance (or inscription) of a sentence.

   Analysis: Constitutions un-controversially express propositions.

3. *In expressing that p, S predicates a future act A of S.*[13]

   Explanation: Through their utterance, the speaker predicates an action of themself in the future. These future actions need not be precise. One may promise, for example, to "take care" of their aging loved one. What is entailed by "take care" might not be determinate at the time of the promise. However, a future action *of a determinate kind* is predicated by the promisor. While it might be unclear the

[12] Ibid., p. 57.
[13] Ibid., p. 57-8.

extent to which some actions count as "taking care," there are clear instances where the promisor would violate or satisfy their promise.

Analysis: Constitutions are intended and written so that they last into the future; they contain propositions that predicate future actions. The governments who enact constitutions predicate of themselves future actions, whether they will contain the same members or not. Constitutional promises are often imprecise. For example, when constitutions promise to uphold the equality of persons, they do not predicate a determinate future set of actions that track the full extent of the value of equality. Still, they do predicate future action; just action of a broad kind. The imprecision of constitutional promises does not prevent us from analyzing whether they have been kept. I will give the issue of vague promises full treatment in chapters three and four. For now, it will suffice to say that vague content does not disqualify an utterance as a promise.

4. *H would prefer S's doing A to his not doing A, and S believes H would prefer his doing A to his not doing A.*[14]

[14] Ibid., p. 58-9.

Explanation: The hearer of the utterance must prefer that the speaker does as they say they will, and the speaker must believe this.

Modification: Searle seems to conflate what standardly occurs in cases of promising with what is necessary for an instance of promising. In most promises, the promisee prefers that the promise be fulfilled. But in some cases, promisees may not prefer that their promise be fulfilled, but nevertheless are the recipient of a promise. For example, I may promise that I will bring soup to my sick and grumpy sister. Her grumpiness leads her to prefer that I leave her alone. She would not hate it if I brought her soup, so she does not tell me not to bring the soup, but she prefers that I let her be. It seems that, despite my sister not preferring my promise, I still have made her a promise. Situations such as this provoke a modification to condition four. I propose instead: *H accepts S's doing A, and S recognizes H accepts S's doing A*. Acceptance replaces preference. Acceptance is important and cannot be removed from the set of conditions. If a promisee neither prefers nor accepts a promise, they have not received a promise; they have been threatened (and so they are a threatee, not a promisee).

Analysis: Here I will consider whether constitutional promises are accepted, not necessarily preferred. If they are preferred, they

are necessarily accepted. If they are accepted, they are not necessarily preferred. One might argue that there is little reason to suggest that political subjects *accept* that the contents of their constitutions be fulfilled. First, we may have no evidence of such an *acceptance*. Second, constitutions might contain clauses that political subjects are decidedly against. For example, constitutions might, as in the case of the Canadian Constitution, transfer power from provincial legislatures to the federal legislature.[15] Citizens might have a legitimate interest in keeping much political power localized to provincial government (to limit bureaucracy, maximize their representation, secure uniquely provincial needs, etc.).

It may well be true that there are constitutional provisions that citizens do not accept. The amendment process may be cumbersome, leaving citizens with no avenue for constitutional change.[16] It would thus seem that citizens sometimes *do not accept* their government's constitutional commitments.

[15] The enactment of Canada's *Constitution Act, 1982* was met with great resistance from some Canadian provinces who were apprehensive of the transfer of power to the federal government. To appease the provinces, Canada's *Charter of Rights and Freedoms* was given a "notwithstanding clause." This clause allowed federal and provincial governments to enact legislation that would have effect *notwithstanding* its violation of Charter provisions.
[16] For a discussion in the Canadian context see Peter W. Hogg, "The Difficulty of Amending the Constitution of Canada," *Osgoode Hall Law Journal* 31, no. 1 (1993): 41-61 and Richard Albert "The Difficulty of Constitutional Amendment in Canada," *Alberta Law Review* 53, no. 1 (2015): 85-102.

If it is true that there are constitutional provisions that are not accepted by their subjects, the project of *constitution as promise* is not lost. For those few provisions that are disdained, we might call them commands rather than promises. The provisions of interest to the project of *constitution as promise* are those which the citizens accept but whose proper interpretation, nevertheless, is uncertain. What I aim to show is that by conceptualizing these accepted provisions as promises, their interpretation according to modern understandings is warranted if not required.

There is still a way that disdained constitutional provisions can be conceived of as *accepted*. Though citizens may not desire that a certain provision exist, they still may desire that, so long as it exists, the provision is enforced. This could be because citizens have an interest in stability and the maintenance of the rule of law. Furthermore, if this provision were not upheld, citizens would expect a form of redress. For example, say Canada's Constitution stated that the protection of natural environments was the domain of the federal government and citizens of the provinces wished to govern these matters themselves. Despite their desire to protect the environment themselves, the provinces might file a grievance against the federal government for failing to adequately protect the

environment. The point of this example is to illustrate that while constitutional provisions might not be preferred to alternative constitutional arrangements, they might be preferred to non-enforcement. While not *preferred*, these provisions are *accepted*. This may vindicate such provisions as still promissory in nature.[17]

We still must address the first worry: that we do not have sufficient evidence of the acceptance of constitutional provisions. I submit that we do have such evidence. Some evidence is provided by the fact that many constitutions are enacted with the consent of their subjects. In constitutions formed out of revolutions, representatives of the people form the constitution. If formed from previous political arrangements, constitutions often are created by representatives democratically supported by the people. In these cases, government representatives, by their assent to constitutions, provide proxy consent for the people that they represent. We might also say that constitutions receive tacit consent. Little pressure is

[17] In fact, according to rights-transfer theories of promising, the recipients of promises (promisees) have an interest in holding the right to others' actions, irrespective of content. For these theorists, a promise transfers a right to a course of action from a promisor to a promisee. This right has content-independent value because people have an interest in holding such rights. For David Owens and Seana Shiffrin, for example, this interest derives from the "authority interest:" humans' interest in having authority over one another. See David Owens, "Does a Promise Transfer a Right?" in *Philosophical Foundations of Contract Law* (Oxford University Press, 2014): 78-95 and Seana Shiffrin, "Promising, Intimate Relationships, and Conventionalism," *The Philosophical Review* 117, no. 4 (2008): 482-524.

exerted by the people to change constitutional provisions, signalling their acceptance of them. Those who tacitly consent may not prefer the constitutional arrangement. But their unwillingness to resist the arrangement might indicate at least an acceptance of it. Finally, constitutional provisions might receive hypothetical consent. Constitutions contain abstract principles like the right to life, liberty, and security. These rights are those which an individual exercising right reason would certainly prefer. Thus, the consent of the people to such principles can be assumed.

To reiterate, the constitutional provisions of interest to this project are those which citizens do prefer. These are the provisions for which interpretive questions are most pressing. Citizens have an interest in the right to life, due process, and freedom of speech. What is of concern is what is entailed by these abstract provisions. Since these sorts of provisions do receive the preference – or at least the acceptance – of their subjects, their promissory nature – at least on Searle's account – is vindicated.

5. *It is not obvious to both S and H that S will do A in the normal course of events.*[18]

   Explanation: Promises are made when a speaker commits themself to an end that will not obviously occur. If it were obvious to both speaker and hearer of a commitment that the committed action would occur, its status as a promise would be trivial.

   Analysis: This condition should be rather uncontroversial. The terms of a constitution would not be laid out explicitly if it were obvious that they would be met. Constitutions are means through which the people can hold their governments accountable. There is no need to have such a means if it is foreseen that the government will never need to be held to account.

6. *S intends to do A.*[19]

   Explanation: In normal instances of promising, the promisor intends to do their promised act. Many promises are insincere, however. Promisors often make promises to manipulate promisees. Since insincere promises are possible, this condition is inessential to *making a promise*. Whether sincere or not, expressing the intention

[18] Searle, p. 59-60.
[19] Ibid., p. 60.

to do an act, and satisfying the rest of the conditions, will bind one to do that act.

Analysis: It could be that constitutions express intentions that are insincere. Nevertheless, this would not make them any less binding than if they were sincere. So, whether governments *intend* to keep their constitutional promises is unimportant to the question of whether promissory morality ought to be applied to constitutional interpretation.

7. *S intends that the utterance T will place him under an obligation to do A.*[20]

Explanation: Searle deems this the "essential condition." A promisor must intend for themself to be placed under an obligation by uttering a promise. Otherwise, they are not making use of the normative practice of promising.

Analysis: One might point out that sinister drafters of constitutions may write constitutions with the intention not of being placed under an obligation, but of placating the masses. A constitution's drafters may be skeptical of the morality of promising

[20] Ibid., p. 60.

– or morality generally; they may make constitutional promises only because they know the masses *think* that it will place them under an obligation. However, the drafters truly do not intend to be obliged. This may be true. But a disdain for promissory morality could not forfeit satisfaction of this condition. All that is relevant is that the promisor intends to participate in the normative parameters of the practice of promising. This point will be highlighted in the next rule.

8. *S intends (i-I) to produce in H the knowledge (k) that the utterance of T is to count as placing S under an obligation to do A. S intends to produce k by means of the recognition of i-I, and he intends i-I to be recognized in virtue of (by means of) H's knowledge of the meaning T.*

   Explanation: Searle's explanation works best here: "The speaker intends to produce a certain illocutionary effect by means of getting the hearer to recognize his intention to produce that effect, and he also intends this recognition to be achieved in virtue of the fact that the meaning of the item he utters conventionally associates it with producing that effect. In this case the speaker assumes that the semantic rules (which determine the meaning) of the expressions uttered are such that the utterance counts as the undertaking of an

obligation. The rules, in short, … enable the intention in the essential condition 7 to be achieved by making the utterance. And the articulation of that achievement, the way the speaker gets the job done, is described in condition 8."[21]

Analysis: What is of importance when making a promise is not the intention to be obligated to one's promise in a robust moral sense. It is instead to recognize the normative force conventionally associated with the meaning of the phrase uttered. So, one could not meet all the requisite semantic and syntactic conditions for saliently uttering a promise but claim that, since they hold the practice of promising in contempt, they did not make a promise.

9. *The semantical rules of the dialect spoken by S and H are such that T is correctly and sincerely uttered if and only if conditions 1-8 obtain.*[22]

Explanation: This condition exists merely to show that the semantic rules of the language spoken make it such that, if conditions 1-8 obtain, a promise is made.

[21] Ibid., 60-61.
[22] Ibid., 61.

> Analysis: One might challenge the sufficiency of the above eight conditions for deeming an utterance a promise and whether constitutions satisfy them. Through my above explanations and analyses, I aimed to dispel these worries. However, if some constitutions fail to satisfy these conditions on the basis of the semantic rules of the dialect in which they are written, then I cannot speak on them. I can only speak to English, but I doubt that other languages are such that their semantic rules deem the above criteria insufficient for making a promise.

Put simply, the conditions for making a promise, under Searle's account, are the following: a speaker, whether through writing or speech, must express their intention to do an act in the future; the listener, whether aurally or by reading, must *accept*[23] that this act be done; the act must not be expected independent of the speakers intention; the speaker must intend, in recognition of the conventionally attributed normativity to their act of speech, to obligate themselves to their intended act; the speaker and listener recognize that each other recognize this obligation. This analysis of the nature of the speech act of promising strongly suggests that constitutions are promises.

[23] Condition four's modification.

There is little reason to doubt Searle's account (with the modification to condition four). It is possibly true that Searle included too many or too few conditions for making a promise. However, it seems he has included the essential criteria such that, if one were to meet them, it is probable that they made a promise. If there are counter examples in which these criteria are met but a promise is not made, I cannot think of them. Constitutions are not peripheral cases of promising. So, we need not go into the minutiae of speech act theory to see whether constitutions are, in fact, promises. An alternative account of how to promise would be unlikely to relinquish constitutions as central cases of promising.

Alternative Accounts

To provide the final underline to our thesis that constitutions can reasonably be understood descriptively and analytically as promises, let us consider the alternative speech acts which could be attributed to constitutional provisions. These alternatives are drawn from Searle's taxonomy in "A Classification of Illocutionary Acts."

Assertives or Representatives: These are speech acts which aim to assert or represent the truth of some matter.[24] Constitutions are not mere statements of fact. Constitutions do not merely say "it is true that the citizens of Canada have x and y

[24] Searle, "A Classification of Illocutionary Acts," in Language and Society 5, no. 2 (April 1976): 10-11.

rights" with no legal implications. In so saying that Canadians have x and y rights, the Canadian Constitution is thought to give legal force to those rights, not merely to state that they exist.

Directives: Directives attempt to get listeners to do something. A directive is a command, a request, an order, etc.[25] Here there is a real possibility for the classification of constitutional norms. Earlier, when discussing the *preference* (or acceptance) condition for promises, I conceded that some constitutional laws may be commands. But how do we know that they are not all commands?

To answer this question, we must answer a further question: commands to whom? Constitutions are not commands to the people since they do not demand any actions from them. Constitutions might be commands to judges; however, this produces an awkward understanding of the judicial review process. It does not seem right to say that constitutions are commands from governments to judges to hold those governments accountable. This is in part because the supremacy of constitutional commands over non-constitutional commands would be difficult to establish. Why should a judge enforce constitutional laws over other laws when the two are in conflict? Insofar as both are commands, there is no way to distinguish the supremacy of one command over the other. One might respond that constitutional laws are explicitly stated to be superior. So, judges are commanded

[25] Ibid., 11.

to follow constitutional law first and foremost. But if governments command that constitutional law be ignored in a particular case – which presumably occurs whenever governments pass law that violates constitutional law – why should judges not obey the unconstitutional law? There must be something in the nature of constitutional law that produces an obligation to adhere to them when they are in conflict with inferior laws. This obligation, I submit, arises from the promissory nature of constitutional norms. Constitutional norms are commitments, commitments are promises, and commitments ought to be fulfilled even when commanded otherwise.

It could be argued here that to rectify the necessity of obedience to constitutional law, whether they are promises or commands, requires a demonstration of the identity between the current adherents to a Constitution and the founders of that Constitution. Just as I should not follow commands of those who hold no authority over me, I should not follow promises made by others. But there is greater difficulty in establishing the continued authority of long dead constitutional authors than there is in establishing the continued promissory relationship between a people and their government. *Constitution as promise* allows us to consider constitutional commitments and the reliance on these commitments as passing through generations. This is because the conditions for dissolution of a promise are more difficult to satisfy than the conditions for dissolution of a command. When one makes a promise, they cannot take it back

upon realizing they would rather not do their promised act. A promisee must release a promisor from their duty for a promissory relationship to dissolve. In contrast, to relinquish one's duty to obey a command, one must only demonstrate that the morally superior option is not to obey it. As promises, then, constitutions and their associated obligations persist unless a new constitutional arrangement is made – with permission of constitutional promisees. As commands, constitutions and their associated obligations persist over time only insofar as they remain the morally best state of affairs. It is thus much easier to defend the persistence of constitutions – assuming that is something we desire to defend – through *constitution as promise* than through constitution as command.

Expressives: Expressives express a speaker's attitudes toward an object.[26] For example, "I thank you for your kindness" is an expressive statement. We need not dwell on this option long. Constitutions are not expressions of attitudes; they do not state thanks, congratulations, or condolences.

Declarations: Declarations are statements which, when said, bring about the change in the world that they purport to make. "It is the defining characteristic of this class that the successful performance of one of its members brings about the correspondence between the propositional content and reality."[27] For example, when a marriage officiant states, "I now pronounce you husband and wife," the

[26] Searle, "A Classification of Illocutionary Acts," 12-13.
[27] Ibid., 13.

bride and groom *become husband and wife*. By so saying, the marriage officiant affects a change in the world. This change is important, because it affects the normative landscape: a change in the rights, duties, and liberties that people have to each other and their government. Not all declarations produce meaningful changes in the normative landscape. Some declarations produce merely symbolic changes. For example, the Canadian Government declared that June 21st of each year is National Aboriginal Day: "His Excellency the Governor General in Council, on the recommendation of the Minister of Indian Affairs and Northern Development, hereby directs that a proclamation do issue *declaring* June 21 of each year as 'National Aboriginal Day.'"[28] This declaration does not make any change to the rights and duties of Canadians; it makes merely a symbolic difference. Nevertheless, it is a declaration.

There is a meaningful sense in which constitutions are declarations. By so saying, constitutions become *law*. Through a signature at the end of a document or some other formal procedure, governments mark constitutions as law. Constitutions exist as law because they were declared to be so by a person or group of persons authorized to make such a declaration. This authorization comes about, perhaps, by a Hartian rule of recognition. The relevant legal actors collectively accept satisfaction of certain criteria as standing for the creation of a law.[29] In the

[28] Proclamation Declaring June 21 of Each Year as National Aboriginal Day, *https://laws-lois.justice.gc.ca/eng/regulations/SI-96-55/page-1.html*, emphasis added.
[29] Hart, *The Concept of Law*, (Oxford University Press, 1997): 115.

enactment of constitutions, the enactors must meet these criteria if the constitution they wish to enact will become law. This process reflects the process in all kinds of declarations. Criteria for the utterance of a declaration are set up through collective recognition. The normative force of that declaration is also set up through this collective recognition. When these criteria are met, a declaration is made. Similarly, the criteria for making a law – the rule of recognition – and its normative force – legal obligation – are set up by the collective recognition of the relevant legal actors. Then, when these criteria are met, law is made. This goes for both statutory law and customary law. As long as the law is made in accordance with the criteria of the rule of recognition, it is law. Insofar as the conditions for all declarations are set up through this process of collective recognition, law is always declared. This is perhaps a capacious definition of declaration; but that is ultimately my point. Constitutional law is declared, but that does not affect its susceptibility to promissory analysis.

Since it is requisite that one *declares* constitutions as law if they are to become law, one might think that constitutions are sets of declarations. In a sense, constitutions are sets of declarations. But they are not declarations in any way that separates them from other kinds of law. All law – at least according to Hart's model (which I accept) – must accord with the rule of recognition to be law. Thus, all law is *declared*. But a declaration can at once be a declaration and another speech act. Governments can issue official thanks, apologies, and condemnations. When a

government thanks a soldier for their valiance in battle, they are issuing a declaration and a thanks. They are issuing a thanks in the plain sense that I may thank you for helping me. But they are also thanking *officially*. A person, say the President, thanks the soldier plainly. But the person, *as the President*, thanks the soldier *officially*. The President *declares* the thanks of their government. This kind of declaration is akin to the declaration of National Aboriginal Day: it does not affect rights or duties, but it is nevertheless a declaration. This dual nature of official speech applies to all government acts. Governmental commands are both commands in a plain and official sense. The same goes for governmental promises. So, the fact that all laws are declarations need not prohibit our analysis of constitutional laws as promises. Constitutional laws are at once declarations – from which they derive their official character – and promises – from which they derive their normative character. While I have offered a rather capacious definition of declaration, the point is the following: all law is trivially declarative, so the suggestion that constitutional laws are declarations does not weaken *constitution as promise*.

One final note on the declarative nature of law. Though I have suggested that all law is trivially declarative, I do not mean that its status as a declaration is unimportant. If law were not declared, it would merely be a series of commands and promises made between institutions in a struggle for power. As declarations, disparate laws are united under a unified legal system. That law is declared suggests

that it is authorized, not imposed. *Constitution as promise* recognizes constitutions not just as promises from a powerful authority to weak inferiors. *Constitution as promise* recognizes that since these promises are declared, they are authorized, unifying the moral and legal realm.

Conclusion

In this chapter, I argued for the promissory nature of constitutional norms. This argument was made on purely descriptive and analytic grounds. That is, I sought to show why conceiving of constitutions as sets of promises has descriptive value and that such a description reflects the conceptual parallel between promises and constitutional norms. I first argued that constitutions are the promises made at the formation of a social contract. Political subjects, seeking assurance that the political arrangements in which they take part will be stable and just, solicit promises from political authorities. Political authorities, seeking the obedience of political subjects, offer promises that they will act in accordance with a set of those subjects' interests. I then argued that constitutions are promissory speech acts on the Searlean model. Along the way, I confronted a number of potential criticisms. Namely, that constitutional laws may not be preferred or accepted, may not be made with the intent of producing obligation, or may not be a commissive speech act. I addressed these criticisms, arguing that we can assume the acceptance and the intent to obligate in constitutional laws that are pertinent to the question of interpretation.

I addressed the possibility that constitutions are directives, assertions, expressions, or declarations, responding that they are more properly understood as promises. In the next chapter, I will argue that constitutional law is amenable to normative analysis on the basis of promissory morality.

Chapter Two: In Which the Promissory Nature of Constitutional Law is Maintained

Constitutional law is not the first branch of law to be analyzed through a promissory lens. Perhaps obviously, contract law is particularly amenable to promissory analysis.[30] Although there is some disagreement over whether contacts are best conceived as exchanges of promises, most theorists follow Charles Fried in thinking that they are. For purposes of this thesis, I will do the same. My objective is not to settle disputes over whether contracts are promissory in nature, but to explore briefly the theory of contract law for possible insights into the nature of constitutions. A second preliminary point I would like to make is this. Although there is widespread disagreement over whether contracts – even if they are in fact promissory in nature – are or ought to be enforced entirely in accordance with the demands of promissory morality, I will assume along with many theorists that, for the most part, this is true. Having said this, cases do seem to arise in which promissory morality fails to provide the required answers in contract law, and something else, what Randy Barnett calls "gap filling or default rules" must be drawn upon. It will be fruitful to consider whether, and to what extent, this is true of constitutions as well. This chapter thus raises two important questions for

[30] See Charles Fried, *Contract as Promise: A Theory of Contractual Obligation*, (Oxford Scholarship Online: 2015).

constitution as promise: despite their promissory nature, are constitutions enforced in accord with promissory morality? and should they be?

To answer these two questions, in this chapter, I will consider some of the criticisms that have been levied against contract theorists who believe contracts are and ought to be enforced in accord with promissory morality. I will argue that while these criticisms may apply to the law of contracts, they do not apply to constitutional law. Constitutional law, I maintain, is particularly amenable to promissory analysis.

Criticisms of contract as promise typically proceed by pointing out aspects of contract law that diverge from promissory morality. To underline constitutional law's consistency with promissory morality, I will argue that any seeming divergences from promissory morality in constitutional law are the result of conditions built into constitutional promises. In particular, any breach of constitutional law by the government is justified only if it accords with predetermined conditions for breach.

The Purpose of Contract and Constitution

The fundamental question in the philosophy of contract law is the following: why should the government use its coercive power to enforce promises made

between private citizens?[31] Contract law, recognizing the independent[32] moral institution of promising among private citizens, considers whether and how to enforce the promises made by those citizens. The philosophy of constitutional law asks a similar question: why should the judiciary hold the government to account for promises made to its subjects? These two questions diverge in a significant way, however. Contract law does not put legal force behind all promises between people. Instead, contract law enforces only those promises that meet a set of predetermined criteria. The aim of these criteria is to narrow the set of enforceable promises to those that serve the purpose of contract law as a whole. That way, the government will not waste time and resources enforcing promises in which it has no interest. Contrarily, the legality of constitutional promises is assumed. It is not up to the judiciary to deem constitutional law not law and thus unworthy of enforcement.[33] The judiciary must consider the justification of the enforcement of constitutional law only insofar as it informs the scope of its actual enforcement.

The divergence of the questions concerning constitutional law and contract law exists because constitutional law and contract law serve different purposes.

[31] I am not using "promise" here as opposed to "consent" with the intent of covertly assuming contracts are promises. As far as this question is concerned, contract theorists are in agreement that contracts *qua* contracts are promises. The contention that contracts are not promises arises due to the fact that contractual disputes are adjudicated on the basis of principles foreign to promissory morality. So, those opposed to treating contracts as promises are so opposed not because contracts are not, at core, promises. Rather, they are so opposed because contracts are not and perhaps should not, in practice, be guided by the morality of promising.

[32] That is, independent of the existence of a law of contract.

[33] Unless, of course, the constitutional law in question was not enacted under the required conditions.

Constitutional laws *are* promises *to* citizens and contract laws are *about* promises *between* citizens. Contract law is thus abstracted from promissory morality. Unless the aim of contract law is to reflect the demands of promissory morality, the adjudication of contractual promises will diverge from those demands. Constitutional law is not abstracted from promissory morality. As promises, constitutional laws are directly subject to the morality of promising. *Constitution as promise* could only fall victim to the criticisms of contract as promise if the metaconstitutional norms that guide constitutional adjudication mirror the norms of contractual adjudication. But they do not. As I will now show, *constitution as promise* is not victim to the criticisms of contract as promise because the metaconstitutional norms that guide constitutional adjudication reflect promissory morality.

Criticisms of Contract as Promise

The theory of contract as promise is attributed to Charles Fried in his *Contract as Promise*. I will not give a detailed account of his argument here. Generally, Fried argues that contracts are promises. As such, they ought to be analyzed according to promissory morality. Fried defends a Kantian conception of promising in which the morality of promise is grounded in autonomy,

responsibility, and trust.[34] Critics of Fried's work have replied that the norms that guide contract law do not correspond with promissory morality. I will not consider in much detail whether these critics are successful in defeating Fried's theory. Instead, I will consider whether these criticisms may be applied to *constitution as promise*. I will first consider some abstract criticisms put forth by Randy Barnett in "Contract is Not Promise; Contract is Consent." I will then turn to some practice-based criticisms from Seana Shiffrin in "The Divergence of Contract and Promise."

Contract is Not Promise; Contract is Consent

In "Contract is Not Promise; Contract is Consent," Randy Barnett notes some problems with contract as promise. In this section, I will address two of them: the problem of the objective theory of assent and the problem of gap filling. Barnett argues that treating contract as consent can relieve these problems. For Barnett, to consent to contract is "to commit to be legally responsible for non-performance of a promise."[35] Contracts do contain promises, for Barnett, but additionally, promisors consent to give legal effect to their promises. To consider whether Barnett's theory applies to *constitution as promise*, I will show that the two above problems do not apply to *constitution as promise* nor would constitution as consent be a preferable framework.

[34] Fried, *Contract as Promise*, chapter 2.
[35] Randy Barnett, "Contract is Not Promise; Contract is Consent," *Philosophical Foundations of Contract Law,* (Oxford University Press, 2014): 48.

I. The problem of the objective theory of assent.

The problem of the objective theory of assent is that the meaning of contracts must be determined according to objective criteria. Promises, in contrast, depend on the subjective intent of those involved. What is owed from promisor to promisee in ordinary promises depends not on their community's understanding of the words used, but on the subjective meaning understood between them. Contracts, however, derive their meaning from the community's understanding of the words used, not the subjective meanings used by contractors. There is a need for an objective standard of meaning in contractual disputes. Legal systems must rely on relatively stable meanings if they are to serve their purpose. If subjective meaning reigned – as it does in the moral institution of promising – contractors could undermine the security of transactions by claiming they did not intend to use their community's accepted meaning.[36]

Barnett argues that treating contract as consent can address this problem. In contract as consent, contractors agree to the legal remedy that legal officials prescribe for non-performance of a promise. As a result, contractors agree to the legal meaning that legal officials gather from the terms of their contract. Barnett explains that "whether one has consented to a transfer of rights generally depends

[36] Ibid., 45.

not on one's subjective opinion about the meaning of one's freely chosen words or conduct, but on the ordinary meaning that is attached to them."[37] Only if all contractors explicitly agree to an idiosyncratic meaning of their contract's terms can that idiosyncratic meaning be given legal effect.[38]

I do not find this a particularly damning criticism of contract as promise nor of *constitution as promise*. Barnett wrongly assumes a radical subjectivity in the practice of promising. When promisors make a promise to promisees, there is a limit to the level of subjective meaning they can assign to it. If promisors and promisees are speaking different languages, promises cannot be made. Promisors must take responsibility for the meaning of their words *as their community would understand them*. Similarly, promisees have to understand promisors' utterances in accordance with the community's understanding. Absent a special arrangement, promisors and promisees must understand promises according to their community's understanding. A promisor cannot claim they meant "no" when they said "yes," and a promisee cannot claim they understood "yes" when they heard "no." Thus, an objective standard of meaning applies in most instances of promising; consent does not provide a better avenue to objective meaning than promise. When searching for an objective standard for constitutional meaning, then, we should not worry that *constitution as promise* is incapable and that constitution as consent is

[37] Ibid., 51.
[38] Ibid., 52.

preferable. The practice of promising does not permit the reign of subjective intent; it requires some objective criteria be met to ground promissory meaning. As a result, *constitution as promise* demands that constitutional promises be interpreted according to *some* objective criteria.

This response does not show that *constitution as promise* does, in fact, provide an objective theory of constitutional meaning. But it does show that constitutional meaning, under *constitution as promise*, is not reducible to the subjective understandings of promisor or promisee. In later chapters, I will argue that *constitution as promise* does provide guidance for an objective standard of interpretation. For now, however, I will leave this problem aside and consider Barnett's next criticism.

II. The problem of "gap-filling."

Sometimes, the language of a contract runs out: an unforeseen complication arises in a contractual relation and contractors are left unsure of who owes what. Fried addresses this problem in *Contract as Promise*. He argues that the morality of promising cannot deal with all contractual complications;[39] supplementary principles are necessary to "fill the gaps" left by inconclusively worded contracts.

[39] Fried, *Contract as Promise*, Chapter 5.

Fried specifies two broad kinds of gaps we may find in contracts: mistake and frustration or impossibility. A mistake occurs when a contract is made on mistaken beliefs. Frustration or impossibility occurs when the purpose of the contract is frustrated or made impossible. Fried supplies a helpful example in which both gaps occur in the same scenario. Two contracts were made to hire rooms overlooking King Edward VII's coronation procession in 1902. King Edward VII fell sick and the procession was postponed. The first contract was made *after* King Edward VII had fallen sick; it was made on a mistaken belief that the king was healthy. The second contract was made *before* King Edward VII had fallen sick. The purpose of this contract – to watch King Edward VII's procession – was frustrated. Both contractors who hired the rooms were provided relief from their contracts; gaps in their contracts were filled by supplementary principles. The first, because their contract was made on the basis of a mistake. The second, because their contract was frustrated of its essential purpose.[40] Fried argues that it is inevitable, both in the case of contract and promising, that there will be gaps. To fill these gaps, contract law ought to be supplemented with gap-filling principles.[41]

Barnett responds to Fried, arguing that if promise cannot explain an inevitable aspect of contract – gap-filling – then it is not a good practice on which to base the contract law.[42] Contract as promise treats gap-filling as extra-

[40] Ibid., 58.
[41] Ibid., 69-72.
[42] Barnett, "Contract is Not Promise; Contract is Consent," 46.

contractual. As such, some terms of contracts would be imposed on contractors, potentially against their wishes. Barnett notes that the notion of gap-filling rules has been replaced by the notion of default rules. Default rules are rules which apply to contracts, by default, unless contractors contract around them. The notion of default rules, Barnett claims, better tracks a theory of contract as consent than a theory of contract as promise. Contract as consent proposes that, when contractors have failed to anticipate all contractual outcomes (i.e. left gaps in their contracts), they have consented to default rules supplied by judges and the legislature. "Parties who do not contract around these default rules can realistically be said to have objectively manifested their consent to them."[43] Contract as consent makes sense of contract law as enforcing contractual obligation only. Default rules are included in the terms of contracts; so, when judges enforce them, they are enforcing contracts, not extra-contractual principles. This arrangement is presumably preferable because it treats contract law as enforcing contracts, nothing more. It also allows for a broader range of justification of default rules. Default rules need not be justified only as a means to the determination of promissory obligation. They can exist to facilitate public ends too.

The first problem with Barnett's explanation of gap-filling in contract as consent is that it treats all contracts as complete. Contract as consent presents all

[43] Ibid., 53.

contract law as pertaining to the enforcement of contracts; contract law does not impose terms on contractors. Though default rules are not included explicitly in the terms of the original contract, we are justified in assuming contractors consent to their inclusion. It seems that through consent to default rules, contractors insulate their contracts against any contingency. I worry that such an idealized view of contracts commits us to Ronald Dworkin's right answer thesis. Dworkin argued that there is a right answer to every legal question. Hard cases can be resolved if judges rule according to the principle that casts the law in its best moral light. Casting the law in its best moral light means ruling according to the principle that balances fit with legal history and justification of the law's coercion.[44] If they do so, judges will never have to exercise strong discretion. Instead, they will exercise judgement and apply, not create, the law.[45] A parallel to Dworkin's right answer thesis is present in contract as consent. By consenting to default rules, contractors ensure that they will never be subject to judicial discretion, only judicial judgement. The application of default rules is the application of the contract, not an imposition of a judge's policy preferences. So long as contractors can be seen as consenting to judicial determination of their contracts, judges can be seen as giving the right answer to contractual disputes.

[44] Ronald Dworkin, *Law's Empire*, Chapter Six.
[45] Ronald Dworkin, "Hard Cases," in *Harvard Law Review* 88, No. 6 (The Harvard Law Review Association: 1975).

If one accepts Dworkin's right answer thesis wholesale, then they can dismiss this criticism of Barnett. I do not want to mount a full-fledged criticism of Dworkin's comprehensive legal theory merely to communicate my misgivings of Barnett's account of gap-filling. But I do not accept Dworkin's right answer thesis nor Barnett's account of gap-filling because legal principles and default rules can be underdetermined. Though principles and default rules may help to guide judges so that they do not rule according to whim, there is a point at which they no longer provide guidance. In a hard-enough hard case, judicial discretion is necessary. Nevertheless, I am ambivalent as to whether this means judicial discretion is law creation. As H.L.A. Hart writes: "instead of saying that the recurrence of penumbral questions shows us that legal rules are essentially incomplete, and that, when they fail to determine decisions, judges must legislate and so exercise a creative choice between alternatives, we shall say that the social policies which guide the judges' choices are in a sense there for them to discover; the judges are only 'drawing out' of the rule what, if it is properly understood, is 'latent' within it."[46] The inevitable discretion judges will have to exercise when default rules run out is not necessarily an unfair application of their subjective policy preferences. Instead, judges advance law in a way that is consistent with its purposes.

[46] H.L.A Hart, "Positivism and the Separation of Law and Morals," 96.

If one denies Dworkin's right answer thesis, then they can also deny the superiority of consent to promise as the basis of contract. Contracts will inevitably produce gaps. Consent to default rules may allow us to close off some gaps. But default rules cannot anticipate all contractual contingencies. Gaps will remain. Thus, the superiority of consent to promise cannot derive from its potential as a unitary explanation of contract.

Let us consider how this applies to constitutional law. Applying Barnett's framework for contract to constitutions, constitutions would be promises to citizens *plus* consent to be held legally responsible for non-performance of those promises. The government, and perhaps citizens, would consent to a set of default rules that serve to specify vague constitutional provisions.

I am not totally opposed to this conceptualization of constitutional law. It seems right to say that, along with their intention to fulfil constitutional promises, governments intend for the judiciary to enforce those promises. Whether that intention to judicial enforcement is best conceptualized as a promise or consent, I believe, is unimportant. Barnett insists that the intent to be held legally responsible for non-performance of a promise is not a second promise, but consent. However, he defends this claim by defining the intent to be held legally responsible *as consent*. First, Barnett quotes Samuel Williston stating that "[a]nother express statement that you intend to be legally bound. That is not another express promise, but it is a statement that you intend your promise not simply to create the moral

obligation which attaches to every promise, but you intend that it shall create legal obligation." To this quotation, Barnett comments: "[a]lthough not a promise, such a statement would be a manifestation of intention to be legally bound, or what I call 'consent.'" Barnett thus defines away the prospect of the intention to be legally bound as a promise. Nevertheless, whether we call this intention a promise or consent does not affect the normativity of the situation. In both instances, the government intends to be bound by a set of default rules that shape the process of constitutional adjudication. An example of such a default rule might be that legislative bodies do not intend to violate constitutional rights. As a consequence, judges ought to interpret legislation in such a way that it is consistent with constitutional rights, even if that interpretation is unintuitive. If anything, it makes most sense to conceive of this intention as a promise. As consent, it seems the government is passively accepting judges' imposition onto constitutional law. As promise, it seems the government is actively seeking (even creating) the judiciary with the aim of imposing specifications to constitutional law. That is, specifications which render more determinate what the law leaves open or underdetermined. The latter more accurately reflects the constitutional relationship between government and judiciary.

As with the default rules in contracts, the default rules in constitutions do not always determine the full scope of what is owed from promisor to promisee such that there is always a *right answer* to every constitutional case. This is the

case whether we conceptualize the intent to be legally bound as consent or promise. In fact, what is determined by the default rules in constitutions is far broader in scope than in contracts. There is a decent case to be made that, with the supplementation of default rules, all contracts have a right answer. However, given the vague nature of constitutions, the amount of determinacy provided by default rules in constitutional law is far less than in contract law. Discretion is thus essential to constitutional law. So, our conceptualization of *constitution as promise* must include three parts. (1) A promise to uphold a set of rights and to construct government in a predetermined way. (2) A promise (or consent) to abide by default rules and case law where the rights in (1) are underdetermined. (3) A promise (or consent) to abide by judicial specification of the rights in (1) when the default rules and case law run out.

There is an important difference between the operation of default rules in contracts and in constitutions. In contract law, default rules may be used to void terms of a contract. In constitutional law, default rules may only be used to specify the terms of constitutional promises. For example, in the case of King Edward VII's procession, the doctrines of mistake and frustration were sufficient to void the contracts to hire rooms completely. In constitutional law, a default rule could not void a constitutional provision. If anything, it could only do so temporarily. A possible example of a default rule temporarily voiding a constitutional provision is in Canada's *Manitoba Language Rights* case. In this case, constitutional law

guaranteed that all Manitoba laws be published in English and French. If laws were not published in both languages, they were to be of no force and effect. The Manitoba Legislature, for nearly one hundred years, mistakenly published many laws only in English. So, they were invalid. The Supreme Court of Canada ruled, however, that the unilingual Manitoba laws were to be temporarily valid because invalidating them would violate the rule of law.[47] Thus, the rule of law seems to be a default rule that can, at least temporarily, void constitutional provisions. Still, there is a clear difference between the use of default rules in contract law and constitutional law. In the former, they exist to fill gaps in the terms of contracts *and* to modify contracts so that they are consistent with public ends. In the latter, they exist, in virtually all cases, to *specify* the extent of the government's promissory obligations. This difference, I argue, signifies the centrality of promise to constitutional law. Constitutional law bears abstract promises that, when specified, are thought to form the basis for the just exercise of government power. Judges concern, then, is to find what is the true extent of these constitutional promises. Constitutional promises alone are thought to found the basis for a just society and only need supplementation for specification. Contractual promises, in contrast, are not in themselves thought to be just; they require modification to provide just outcomes.

[47] *Re Manitoba Language Rights*, https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/60/index.do.

The Divergence of Contract and Promise

I will now turn to a couple examples of contract law doctrine that evidence a divergence between contract and promise. These doctrines are drawn from Seana Shiffrin's "The Divergence of Contract and Promise." Shiffrin ultimately advocates a correspondence between contract and promise. So, the presentation of these doctrines does not reflect her ill opinion of contract as promise. Still, they are examples where contract law departs from promissory morality. Again, I will maintain that these divergences of contract and promise are not mirrored between constitution and promise.

I. Specific performance and damages.

When contracts are breached, courts usually remedy the breach by the award of damages, not specific performance.[48] According to Shiffrin, this diverges from the morality of promising. The morality of promising requires that promisors do their promised act; they cannot merely pay damages. Contractors, however, can.[49]

The question, applied to constitutional law, is whether constitutional breach can be remedied by mere damages rather than specific performance. Specific performance is certainly the standard in constitutional law – at least pre-breach.

[48] Seana Shiffrin, "The Divergence of Contract and Promise," *Harvard Law Review* 120, no. 708 (2007): 724.
[49] Ibid., 722.

The government is not given the choice to either respect the right to life or to pay out; they must respect the right to life. But, if a breach has been made, specific performance is not always possible. The right to life cannot be retroactively affirmed once it has been breached. The best a government can do is to pay damages and commit never to make such a breach again. Nevertheless, constitutional practice reflects promising, here, better than contract. Specific performance in constitutional law cannot be traded off for damages.

II. Mitigation.

"Contract law requires the promisee to mitigate her damages. It fails to supply relief for those damages she could have avoided through self-help, including seeking another buyer or seller, advertising for a substitute, or finding a replacement. As a general rule, morality does not impose such requirements on disappointed promisees."[50] I cannot go into detail about the degree to which the doctrine of mitigation in contract law diverges from the requirement of mitigation in promissory morality. However, I can note one intuitive difference. There is a lower standard for the motivation of mitigation in contract than in promise. For example, imagine a contract in which Sergio promises to buy ten truckloads of ice cream from Janna. Sergio then breaks his promise to purchase the ice cream

[50] Ibid., 724.

because he miscalculated his funds and cannot afford the ice cream. Janna has a duty to mitigate her damages by seeking another buyer. If instead Sergio broke his promise because he wanted to buy ten truckloads of black licorice from Jenni, then Janna would still have a duty to mitigate her damages. Contract law, given its emphasis on efficient economic outcomes, would likely require mitigation from Janna in both cases. Sergio's reasons for breaking his promise do not affect Janna's duty to mitigate. Now imagine Corey – non-contractually – promises Geoff to pick him up for their movie date. If Corey is running late due to traffic, Geoff may have a duty to mitigate the damage of Corey's broken promise (missing the movie) by taking the bus to the theatre. If instead Corey were running late because he wanted to play video games all night, Geoff does not seem to have a duty to mitigate damages by taking the bus to the theatre. So, in the case of a regular promise, the reason for which the promisor breaks their promise affects the duty to mitigate damages in the promisee. The reason for promissory breach, in contracts, does not affect the duty to mitigate – at least not to the same degree. Therefore, the morality of promise diverges from the morality of contract when it comes to mitigation.

While contract law might diverge from promissory morality when it comes to mitigation, constitutional law does not make such a divergence. Constitutional law does not expect that citizens go far out of their way to ensure the government does not violate their rights. It is the burden of the government to avoid rights violations and very little, if any, of this burden falls upon citizens. The government

cannot, for example, demand that citizens move to cities with low rates of police brutality to mitigate the potential damages to their right to life. Thus, mitigation of damages in constitutional promises tracks the morality of promise better than the divergent morality of contract.

The Breach of Constitutional Promises

The preceding sections have discussed criticisms of contract as promise which all follow a similar form. While critics of contract as promise admit that contracts are, at base, an exchange of promises, there are many non-promissory principles that are imposed upon contracts. This suggests that the morality that guides contractual adjudication diverges from promissory morality significantly. Many of these principles that are imposed on contracts concern the justified breach of a contract. What justifies a breach of contract does not seem to mirror what justifies a breach of a promise. Promises cannot be breached because they were made on mistake, nor because the promisor wishes to pay off the promisee. But contracts can. In this section, I will investigate what it is that justifies promissory breach. From this investigation, I will maintain that justified constitutional breach tracks justified promissory breach.

There are many instances where breaking a promise is morally justified. If a promise is patently immoral, or a far greater good will come from breaking a promise, then breaking a promise is justified. However, internal to a promise,

breach is only justified if authorized *by the promise*. A promissory obligation is only relinquished – absent the consent of the promisee – if the promise itself provides cases in which the promise dissolves. For example, if I say to my mother, "I promise to bake Swedish drömmar cookies with you this Sunday, provided it does not rain," then I am only relieved of my obligation to bake Swedish drömmar cookies with my mother on Sunday *if it rains*. I might be morally justified in missing baking with my mother if a cataclysmic event occurs Sunday morning. But I will still have broken a promise.

This example relies on a potentially controversial account of promising. Implicit in this example is the idea that, regardless of circumstances, unless a promise has been permissibly rescinded, promissory obligation remains. All things considered, one may not have to fulfil this promissory obligation, but it does not go away simply because of countervailing circumstances. This view is echoed in Margaret Gilbert's *Rights and Demands* through what she calls *the inevitability problem* or *the inevitability point*: "the promisor's obligation is an inevitable consequence of any promise that is still *in force*."[51] I will discuss Gilbert's views – which I do not accept wholesale – in further detail next chapter. For now, I do want to note that I accept *the inevitability point* with an important modification. A promissory reason – not necessarily an obligation – *is* an inevitable consequence of

[51] Margaret Gilbert, *Rights and Demands*, 135. Emphasis original.

any promise that is still *in force*. However, I argue that a promissory reason *is not* an inevitable consequence of the utterance of a promise. There is a moral threshold that must be met in order for the utterance of a promise to produce a promissory reason. In this point, I follow Joseph Raz in his essay "Is There a Reason to Keep a Promise?" Raz argues that promises only produce reasons for action if they promote the value that comes with the power to promise. Promises are valuable for their help in planning, coordination, and controlling one's own life. So, promises that categorically undermine planning, coordination, and control of one's life do not produce promissory reasons.[52]

I support this modification of *the inevitability point* because it provides a helpful framework for considering when we ought to fulfil our promises. Promises that meet the minimum moral threshold produce *pro tanto* obligations. They can be defeated. But when they are defeated, they are still reasons for action. Fulfilling one's promises is valuable independent of those promises' content. Even when one has a good reason to break a promise, they can cause unfortunate negative consequences. Promisees can be harmed by broken promises, even when they do not *deserve* fulfilment of those promises. Conceiving of promises as producing reasons so long as they are in force and consequently as being "broken" even when they should be helps to illuminate the competing forces at play in promissory

[52] Joseph Raz, "Is There a Reason to Keep a Promise?" in *Philosophical Foundations of Contract Law*, 61-3.

deliberation. To conceive of promises as dissipating when good reasons against their performance arise is to ignore the consequences that the justified breach of promises might have.

There are two ways we might be justified in breaking a promise. First, it might be the morally superior option to break a promise. Second, a promise might have explicit terms that outline when it can be broken – such as in the case of baking with my mother. Only the latter, however, can form the basis of justified breach of promise in the law. The former would be in conflict with the rule of law. The rule of law maintains that government action must be authorized by law. So, if a promise is made law, the government can only breach that promise if it has laid out the terms for its breach *in the law*. As a matter of morality, the government might be justified in breaking immoral promises. But as a matter of law, they are not authorized to do so unless the law says so. If the government were to say, "we are not keeping promise x because promise x is a bad promise," they would be acting extra-legally. The only *legal* way for the government to justify promissory breach, then, is by stipulating the terms of promissory breach in the law. The government could do so in a broad way to allow for promissory breach in unanticipated circumstances. For example, the government might say "the following promises may be broken when their breach is morally justified." Still, if they did so, they would be stipulating the conditions for promissory breach *in the law*. The only way

a branch of law can track the morality of promise – consistent with the rule of law – is to specify the justified conditions of breach of legal promises.

Constitutional morality tracks the above discussion of promissory morality. A constitutional right may only be infringed in ways specified *by constitutions*. One example of a constitution stipulating its justified breach is found in the Canadian Charter of Rights and Freedoms. Section 1 states: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[53] Here, the Canadian Charter of Rights and Freedoms stipulates the conditions under which the Canadian government may justifiably breach its constitutional promises.[54] These conditions being when such a breach is "demonstrably justified in a free and democratic society." It is not by some extra-constitutional doctrine that Canadian constitutional promises are subject to limits. Nor is it that when judges deem the constitutional promises immoral that they are subject to limits. Canadian constitutional practice thus reflects the morality of

[53] *Canadian Charter of Rights and Freedoms*, section 1.
[54] Similar stipulations are found in European constitutions. I do not quote them above because I do not speak their original languages. However from English translations, it seems the German Constitution at Article 18 and 19 (http://www.servat.unibe.ch/icl/gm00000_.html), the Slovenian Constitution at Article 15 (https://www.us-rs.si/media/constitution.pdf), and the Hungarian Constitution at Article 1, Section 3 (https://www.constituteproject.org/constitution/Hungary_2011.pdf) all bear stipulations for the justifiable limitation of constitutional rights. I am sure there are more constitutions with such stipulations. But an exhaustive list in not necessary to communicate that constitutions reflect the morality of promissory breach.

promising. If a breach of a constitutional promise is to be justified, it must be justified by terms laid out in the constitution.

The stipulated terms upon which constitutional promises may be breached need not be included in the written constitutions. Many constitutions are unwritten and those that are written have unwritten companions. For example, the above section of the *Canadian Charter of Rights and Freedoms* is further specified by unwritten constitutional law. Judges use the *Oakes Test* to determine when a limit to a constitutional right is demonstrably justified in a free and democratic society. The *Oakes Test* requires that the law infringing a constitutional right must have a "pressing and substantial" goal that is proportionate – that is, rationally connected, minimally impairing, and proportionate in effects – to the severity of the infringement.

As mentioned, part of the nexus of promises that make up constitutions are promises from the government to abide by the specifications of constitutional provisions made by judges through case law, default rules, and, if necessary, discretion. The nature of case law and discretion is to change. So, the stipulated conditions of constitutional breach may change with time too. This change is authorized by the initial promise to abide by judicial specification of constitution provisions, however. We can think of unwritten specifications of constitutional rights as addendums to initial constitution promises; they are not extra-promissory or extra-constitutional principles *imposed* on the constitutional law.

At this point, I do not want to dwell on interpretive questions. An originalist might suggest now that constitutional promises receive their full scope – including stipulated exceptions – at their inception. Next chapter, I will argue that originalism is incompatible with *constitution as promise*. To avoid clogging this section with further discussion of interpretive matters, I will conclude with the following. Constitutional morality mirrors promissory morality because it only justifies promissory breach if the conditions of that breach are stipulated in the promise. These stipulations can come from a number of sources and need not be fixed at the inception of constitutions.

The Problem of Promising and The Problem of Constitutionalism

A final reason we might think constitutional law reflects the normativity of promising is that constitutional law and promising face a similar problem. In the problem of promising, we ask why it is that through the expression of an intention that one can create an obligation. In other words, why follow today an intention I made yesterday? In constitutional law, we ask a similar question: why follow today commitments made by governments many years ago? To answer these questions, both theories need to posit a content-independent value that grounds an obligation to either obey a past promise or old constitution. I am not going to attempt to solve these problems here. Next chapter, I will treat these problems fully. I mention

these problems here to highlight how promissory constitutions are. Constitutions reflect the morality of promise both in their application and in their shortcomings.

Conclusion

There are numerous principles and doctrines that guide the contract law which may diverge from promissory morality. Whether these principles and doctrines succeed in defeating contract as promise, I cannot say. I can say, however, that these principles and doctrines do not apply to constitutional law in a way that problematizes *constitution as promise*. Promissory morality makes sense of what is owed in the constitutional relationship. Promisors owe performance of their promise, first and foremost. Payment for a broken promise is only an option *after* a promise has been broken; it is not an option to extinguish a promise before it has been fulfilled.[55] Similarly, constitutional laws ought to be enforced, first and foremost, not traded off for payment of damages. Furthermore, constitutional morality reflects promissory morality given the conditions for breach of constitutional rights. Constitutional rights may only be breached in a manner stipulated *by constitutions*. This necessity is not reflected in contract law. Contracts may be breached in manners specified externally to their terms. Thus, constitutional law seems to reflect the morality of promise far better than does

[55] Absent a special arrangement with the promisee.

contract law. Finally, constitutional law faces similar problems as does promising. Both constitutions and promises must possess a content-independent value to ground the necessity of their obedience across time.

This chapter has sought to some ways that constitutional practice and theory reflects promissory practice and theory. Given these similarities, constitutions seem more than descriptively parallel to promises; constitutional morality reflects promissory morality. In the next chapter, I will begin to discuss the interpretive consequences of the constitutional law's promissory nature.

Chapter Three: The Consequences of *Constitution as Promise* - Part I

The last two chapters examined whether there is descriptive value in analyzing constitutions as promises. The first chapter demonstrated that constitutions are, in fact, promises while the second maintained that constitutional morality closely mirrors promissory morality. In this chapter and the following, I shift focus to the consequences of the conclusions reached in Chapter One and Chapter Two. The basic question I will answer in the coming chapters is the following: if constitutions are promises, what conclusions can we draw about constitutional interpretation?

In this chapter, I will consider a negative answer to this question. That is, I will consider what constitutional interpretation *cannot* be, if constitutions are promises. I will first distinguish vague constitutional promises from definite constitutional promises, since it is the former that are of interest to the question of interpretation. I will then argue that the vagueness of some constitutional promises does not jeopardize their status as promises; vague constitutional promises still produce promissory obligation. Furthermore, this vagueness can be preferable to total precision and does not make knowledge of what is owed inaccessible. I then argue that, as vague promises, constitutional provisions ought not be interpreted in an originalist manner.

Definite and Vague Constitutional Provisions

There are two broad kinds of constitutional provision: definite and vague. Definite provisions have a specific character. Upon reading a definite constitutional provision, one could not be mistaken as to what is required. For example, take Section 17 of the *Constitution Act, 1867* in Canada: "There shall be One Parliament for Canada, consisting of the Queen, an Upper House styled the Senate, and the House of Commons."[56] This provision is definite. There is no room to consider whether, say, a "House of Cards" could be included in the One Parliament for Canada. Vague provisions, in contrast, have a general character. What vague provisions require is not immediately apparent upon reading them. For example, take Section 8 of the *Canadian Charter of Rights and Freedoms*: "Everyone has the right to be secure against unreasonable search or seizure."[57] This provision is vague since what counts as "unreasonable" search or seizure is not apparent in its wording.

Definite constitutional provisions – though they are still promises – are not of great interest to the question of interpretation. Since their terms are definite, what is owed from promisor to promisee is usually clear. In the above example, the government owes Canadians a Parliament consisting of the Queen, a Senate, and a House of Commons. There is little room for interpretation. Under the right pressures, definite constitutional provisions may require interpretation. For

[56] *Constitution Act, 1867*, section 17.
[57] *Canadian Charter of Rights and Freedoms*, section 8.

example, one might question the necessary and sufficient conditions for a government body to qualify as a "Senate." Nevertheless, definite provisions are not of central interest to *constitution as promise*. Vague constitutional provisions require interpretation in nearly all cases; definite constitutional provisions rarely do. Thus, I will not consider definite constitutional provisions in the question of interpretation. It will suffice to consider only the interpretation of vague constitutional provisions. The interpretive conclusions drawn about vague constitutional provisions here will apply to definite constitutional provisions in the rare cases in which they require interpretation.

Vague constitutional provisions are vague promises. Given their vagueness, they require interpretation if they are to have force in specific cases. Despite this need for interpretation, vague constitutional provisions are still promises. To show why vague constitutional provisions are promises, we must consider the conditions that ground promissory obligation and whether they apply to vague promises.

Vague Promises

To ground promissory obligation, theorists of promising must posit a value that is attained by the keeping of promises and that is spurned by the breaking of promises. Theorists of promising have proposed a number of potential grounds of this value. Broadly, these theorists fall into three categories: conventionalist,

expectationalist, and interpersonal.[58] In this section, I will not discuss the merits of these positions. Rather, I want to show that, regardless of the position one takes on the ground of promissory obligation (unless one denies promissory obligation altogether), vague promises do produce promissory obligation. To do so, I will discuss the views of prominent theorists from the above three categories, in turn.

In the interest of consistency and providing an accurate analogue to vague constitutional promises, I will use the same example of a vague promise across all theories considered in the ensuing analysis. The example is as follows. I promise to my mother: "I will always care for your health." My mother and I have somewhat divergent understandings of what counts as caring for one's health. At various times while my mother ages, the divergence of our understanding of caring for one's health widens and thins. Nevertheless, I never wish to be released from my promise, and my mother never wishes to release me. This example accurately reflects the level of vagueness in constitutional promises. Provisions like "the right to liberty" and "freedom from cruel and unusual treatment or punishment" are equally as vague as "caring for one's health." Governments, despite understanding constitutional promises potentially differently from their subjects, do not express a desire to release themselves from these promises. Citizens too wish not to forfeit their right to the government's fulfilment of constitutional promises. Given the

[58] This taxonomy is borrowed from Habib, Allen, "Promises", *The Stanford Encyclopedia of Philosophy* (Spring 2018 Edition), Edward N. Zalta (ed.), https://plato.stanford.edu/archives/spr2018/entries/promises/.

analogue in vagueness between my promise to my mother and constitutional promises, I will assume that when promissory obligation is demonstrated in the former, it can be inferred in the latter.

Conventionalist Accounts: John Rawls

Perhaps the most famous conventionalist account of promising is advanced by John Rawls. Beginning with his "Two Concepts of Rules" and later *Theory of Justice*, Rawls develops the practice view of promising. Rawls explains that there are two ways to think about rules: the summary view and the practice view. The summary view presents rules as a general tool for dealing with certain kinds of situations.[59] For example, the rule to *only use the express line at the grocery store when carrying 16 items or less* is a general tool to maintain civility in the hostile jungle of grocery shopping. When this general tool becomes useless – say, when all regular lines are full and the express line cashier can take you – it is permissible for you to break the rule.[60] The practice view, on the other hand, views rules as constitutive of the practice at hand.[61] One cannot engage in the practice if they do not follow the rule. For example, one cannot play baseball without following the rules. You can hit a ball with a stick and slide into a bag, but unless you follow the

[59] John Rawls, "Two Concepts of Rules," 19.
[60] Ibid., 23-4.
[61] Ibid., 24.

rules,[62] you are not playing baseball.[63] Rawls considers this second kind of rule as the rule at play in the practice of promising. It is constitutive of the act of promising that one becomes obligated to obey their promises.[64] This does not mean people cannot disobey their promises at times. But the deliberation on whether to obey is not one of whether a general rule is helpful in a particular case. Rather, it is a deliberation of whether the practice of promising ought to be upheld in this particular case. Since promising is a valuable social practice that allows individuals to form bonds of trust, we have a *pro tanto* obligation to uphold it by keeping our promises. Any promissory breach undermines the practice of promising. So, if we want to break a promise, the good that comes from the breach must be greater than the damage done to the practice of promising.[65]

Rawls' conventional theory does not exclude vague promises. Vague promises still draw on the practice of promising. Promisors intend to oblige themselves to a future action and promisees trust that the action will occur. Though it may not be clear precisely what is required of a vague promise, it is still sensible to believe that promisor and promisee see themselves as engaged in the practice of promising. If the promisor were to perform no action of the vague sort predicated by their promise, they will have damaged the practice of promising.

[62] This includes enforcement of rule breaches.
[63] Ibid., 25.
[64] Ibid., 30-1.
[65] John Rawls, *A Theory of Justice*, 344-347.

On Rawls' account, I am obligated to fulfil the promise to care for my mother's health. It might not be clear what that entails. But I surely will have damaged the practice of promising if I fail to care for her. Of course, this is because my promise is sufficiently precise to guide my action to some degree. There are actions I can do that are conclusively in conflict with my promise. If I do not take my mother to medical appointments, for instance, I am clearly breaking my promise. I can damage the practice of promising because it is clear – at least in some cases – when I am breaking my promise. If instead I said to my mother "I promise to do something for you," and there was no contextual meaning of "something," then my promise would be so vague as to make it impossible to determine whether I have kept or broken it. Vagueness exists along a spectrum. Promises that are vague can still produce promissory obligation, on Rawls' account; they just need to be specific enough that we can determine, in some cases, when the promise is being broken.

Expectational Accounts: Thomas Scanlon

As an alternative to the practice view, Thomas Scanlon presents the expectational account of promising. Scanlon's' view is that when we break a promise, we violate the principle of fidelity. Scanlon constructs the principle of fidelity – *Principle F* – as follows:

> *Principle F: If (1) A voluntarily and intentionally leads B to expect that A will do x (unless B consents to A's not doing x); (2) A knows that B wants to be assured of this; (3) A acts with the aim of providing this assurance, and has good reason to believe that he or she has done so; (4) B knows that A has the beliefs and intentions just described; (5) A intends for B to know this, and knows that B does know it; and (6) B knows that A has this knowledge and intent; then, in the absence of some special justification, A must do x unless B consents to x's not being done.*[66]

When a promisor makes a promise, they assure the promisee of some course of action. The promisee then relies on the assurance provided by the promisor. In so relying, the promisee bears a risk of harm. If the promisor breaks their promise, the promisee will be harmed by relying on the promisor's assurance.

On Scanlon's expectational account, vague promises are obligatory. So long as a vague promise is sufficiently specific to produce reliance in the promisee, it produces an obligation. By sufficiently specific to produce reliance, I mean specific enough that there are certain determinate actions that the promisee would be justified in expecting. In the case of my promise to my mother, I produce this kind of reliance. My mother relies on me generally to "care for her health." She has a set of specific expectations that she deems are within the scope of "caring for one's health." She might be wrong or unjustified in having some of these expectations. But some expectations are certain consequences of my promise. As mentioned, failing to take my mother to her medical appointments is contrary to the

[66] Thomas Scanlon, *Promises and Practices*, 208.

core settled meaning of "caring for one's health." If anything, she is justified in having the expectation that I take her to her medical appointments. Since my mother is justified in relying on me to do *some* actions as a consequence of my promise, my promise produces promissory obligation. Therefore, vagueness does not nullify promissory obligation on expectational accounts.

Interpersonal Accounts: Margaret Gilbert

In Margaret Gilbert's *Rights and Demands*, she presents an interpersonal account of promising. Gilbert argues that the ground of promissory obligation is a non-moral principle of joint commitment. Gilbert explains that any theory of promising must deal with *the inevitability problem*. The inevitability problem states that "the promisor's obligation is an inevitable consequence of any promise that is still *in force*."[67] That is, unless a promisee has released a promisor from their promise, a promise is obligatory. Since any promise that is still *in force* is obligatory, even promises in which new circumstances have made fulfilment challenging are obligatory. Furthermore, immoral promises are obligatory. Though when all things are considered, one may not have to fulfil an immoral promise or a promise that is impracticable; it is intuitive that if one breaks a promise – whether immoral or impracticable – then one has shirked an obligation. To

[67] Margaret Gilbert, *Rights and Demands*, 135. Emphasis original.

explain these two cases, Gilbert gives the examples INVITATION and MALEVOLENCE. In INVITATION, Alan promises Bea to come to her house for dinner that evening. On his way, Alan comes across an accident victim whom he can save if he skips Bea's dinner. Although Alan morally ought to help the victim, in doing so, he would break a promise. Alan would be justified in breaking his promise to Bea, but he would still break a promise. Gilbert argues that a promise and its obligation do not disappear merely because countervailing considerations arise.[68] The same goes for immoral promises. In MALEVOLENCE, Cam promises Donna to kill Evan. Cam should not kill Evan, despite the promise. But if he were not to kill Evan, Cam would be breaking a promise and thus an obligation.[69]

In order to resolve the *inevitability problem*, Gilbert seeks a ground of promissory obligation that can explain all instances of promising as obligatory. The ground must be non-morally obligatory since it applies to all instances of promising, regardless of content. The ground for this non-moral obligation, Gilbert argues, is joint commitment. In a joint commitment, individuals commit themselves to pursue a joint end. By making a joint commitment, individuals are obligated to do their part in fulfilling the commitment. This obligation is just a bare fact about joint commitments. Gilbert explains that in making a joint commitment, individuals form a plural subject. This plural subject has an intention to do the end

[68] Ibid., 136-137.
[69] Ibid., 140-141.

of its commitment through its members' actions. This intention grounds an obligation to fulfil the commitment in the members. The obligation is non-moral because it exists in virtue of the joint commitment, not in virtue of the ends at which the joint commitment aims.[70]

So, with promises grounded in joint commitments, they are non-morally obligatory. Promises form content-independent obligations – obligations that arise from the mere fact of making a joint commitment. As non-moral obligations, promises can solve the inevitability problem. Both INVITATION and MALEVOLENCE have promissory obligations because a joint commitment was made. The promissory non-moral obligation is not the only consideration, however. The immorality of the promise can outweigh the obligation to fulfil it. These opposing obligations can exist simultaneously because they are of a different kind. Gilbert's account can also make sense of morally inert and deathbed promises. In both cases, a joint commitment is made; so, a promissory obligation exists.

As with the previously discussed accounts of promising, Gilbert's account can make sense of promissory obligation in vague promises, so long as those promises have clear instances in which they are breached and clear instances in which they are fulfilled. In making a vague promise, promisor and promisee can still form a joint commitment toward a future end. The precise contours of that

[70] Ibid., 169-175.

future end may be indeterminate. But on the determinate contours of that future end, promisor and promisee are committed. My mother and I are jointly committed to the end of her health. My obligations in pursuit of this joint end, though vague, still exist. At the very least, the determinate portion of my promise is obligatory. Thus, Gilbert's account does not disqualify vague promises from producing obligation.

Do Vague Promises Entail Only Core Settled Meaning?

The above discussion might suggest that promisors are bound only to the courses of action covered by the core settled meaning of the terms in which their vague promises are expressed. In my promise to my mother, I would be bound only those things which I, my mother, and our community agree are certain instances of "caring for one's health." Translated to constitutional promises, the government would only owe protection from what are certain instances of, for example, "cruel and unusual punishment." This would pose a problem for *constitution as promise*. If vague promises only obligated promisors to conduct covered by the core settled meaning of their terms, then promising would not be a helpful paradigm in which to analyze constitutional provisions. Constitutional provisions require interpretation when core settled meaning runs out. So, if *constitution as promise* is to help with interpretation, it must explain what promissory morality demands of vague promises beyond conduct covered by core settled meaning.

In the next chapter, I will argue that vague promises commit promisors to more than what is covered by core settled meaning. Instead, they commit promisors to a process of negotiation with the promisee on what scope they should give to their promise. The discussion of vague promises here has served to show that they, at minimum, obligate promisors to the conduct covered by their core settled meaning. The vagueness or indeterminacy of a promise does not nullify its obligation.

Constitution as promise entails more than the interpretation of constitutional promises according to core settled meaning. Unfortunately, I must put off the defence of this point until the next chapter. Still, it is important to maintain now that vague promises do produce promissory obligation.

The Value of Vagueness

The above discussion of vague promises might suggest that vague promises, despite producing promissory obligation, are not preferable. One might argue that promises are meant to guide action and so when they are vague, they frustrate their basic function. But vagueness is not an unfortunate aspect of some promises. Vagueness is a valuable and often an intentional aspect of promise making. Vagueness is valuable in promising because it allows the promisor to commit themselves to action of a general kind. If promises are too specific, their general

purpose cannot always be attained. In this section, I will consider some arguments from Timothy Endicott on the value of vagueness in law. I will maintain that the value vagueness provides in law is also present in promising. As a result, the vagueness of some constitutional promises is also valuable.

The Guidance of Action

A core function of the law is to guide action. Legal subjects should be able to read the law and then know how they ought to modify their behaviour so that they are in compliance with it. If law cannot guide action this way, it is defective. To avoid the charge that vague law is defective, then, we must consider whether vague law can guide action and whether it is good at doing so.

Timothy Endicott argues in "The Value of Vagueness" that vague law does guide action and is preferable to precise law, in some cases. For Endicott, the standards for action that law provides can be arbitrary. This arbitrariness is not a direct consequence of precision or vagueness. Both vague and precise law can contain arbitrary norms. Endicott provides some helpful examples of arbitrarily vague and arbitrarily precise laws. An arbitrarily vague law would be one that allows citizens to vote only "when they are mature."[71] This law would provide no guidance for how to determine maturity and would likely result in corruption among

[71] Timothy Endicott, "The Value of Vagueness," in *Philosophical Foundations of Language in Law*, (Oxford University Press, 2011): 22.

those with the discretion to determine maturity. The law's stance on what counts as "mature" would be subject to the arbitrary whims of judges or election officials. A precise voting age – though arbitrary to some extent itself – would be preferable. An arbitrarily precise law would be one that imposes limits on the time used in criminal proceedings. Such precision would prove defective when major cases arise that require extended periods of deliberation.[72] Endicott explains that "[t]he challenge for law-makers is to determine whether, in a given scheme of regulation, the arbitrariness resulting from precision is worse than the arbitrariness resulting from the application of a vague standard."[73] Since law's purpose is to guide action, law-makers must make law that guides action in the least arbitrary manner. Avoiding arbitrariness does not always favour precise law.

A parallel to the value of vagueness in law plays out in the practice of promising. Promisors make promises with the intent of guiding their future actions. Presumably, promisors want to make promises that are the least arbitrary. Depending on the purpose of the promise, the level of vagueness will determine the arbitrariness. For example, say I intend to promise to pick my friend up from work tomorrow. I could make my promise vague and state: "I will pick you up from work tomorrow." Or, I could make my promise precise and state: "I will pick you up from work tomorrow at 4:13 in a red Ferrari with 15 000 miles on the odometer."

[72] Ibid., 23.
[73] Ibid., 23.

The latter promise would be absurd. If I show up with 15 001 miles on the odometer, I will have broken my promise. If we make our promises too precise, we run the risk of many promissory breaches. Now, the former promise is also not preferable. I could pick my friend up at 4:13, or 5:00, or 8:00. In all cases, I will have satisfied my promise. The purpose of my promise is to assure my friend that I will pick them up from work at a reasonable time. So, I should construct my promise with a moderate degree of precision. I should promise to pick my friend up in a specific timeframe, but I should not specify which vehicle I am driving. For example, I might promise not merely to pick him up, or to pick him up at 4:13 in a red Ferrari with 15 000 miles on the odometer, but to pick him up between 4:30 and 4:45. Or I might promise to pick him up "sometime around 4:30, depending on traffic." That way, satisfaction of my promise is possible, and its purpose is not frustrated by arbitrary vagueness or precision.

For promises to serve their action-guiding function, they need to balance vagueness with precision. Both vagueness and precision can needlessly complicate the purpose of a promise. So, to avoid the worries of vague promises, we cannot suppose that only precise ones are obligatory. Bogging down promises with unnecessary specificity makes them difficult to satisfy and unable to meet their purpose. Furthermore, requiring complete specificity in promising would chill its practice. Promisors might avoid making promises if they know they must promise with exact precision. Promisees, on the other hand, might avoid accepting promises

if they are too precise. Vagueness in promising provides promisees with a degree of assurance that the promisor will fulfil the promised content *to some extent.* In the example where I promise to pick my friend up from work, they are more likely to accept it if it is vague. My friend's main concern is that they be picked up from work at a reasonable time. If I make an absurdly specific promise to them, they risk my failing to meet their main concern.

The practice of promising is not weakened by the presence of vague promises. Nor is the law weakened by the presence of vague laws. Vagueness serves a valuable role in both practices. Thus, we should not worry that constitutional promises are vague, simply because they are vague. Their vagueness can valuably protect against arbitrariness in law's action-guiding function. However, the purpose of this chapter is not to investigate whether particular constitutional promises contain the right level of vagueness. Rather, it is to show the interpretive conclusions that follow from the fact that constitutions are vague promises. This section has shown that we should not worry that constitutions are vague promises, simply because they are vague; vague constitutional promises are still obligatory and whether they are preferable will depend on whether their vagueness admits of more or less arbitrariness than a precise alternative. I now turn to the main question of this chapter: if constitutions are vague promises, what constraints are there on constitutional interpretation?

The Interpretation of Vague Promises

Promises require a unique form of interpretation, one different from the form appropriate in many other types of speech act. When one makes a command, it is fair to say that their understanding of the command's meaning *is* the command's meaning. For instance, when the commanding officer of a battalion commands her subordinates to change into "winter dress," her subordinates must interpret that command according to her understanding (i.e. the battalion's designated winter uniform). Her subordinates cannot interpret this command according to their own understanding (perhaps as adopting elegant formal attire fit for a winter's day). It is in the nature of commands that they be interpreted according to speaker's meaning. Promises are different. Since promises are an act of communication that requires the *acceptance* of the hearer, there must be some common ground between speaker and hearer for that promise to have effect. A promisee cannot properly accept a promise if they understand that promise differently from the promisor. This opens up an array of difficulties in promissory interpretation. However, one thing is clear: promises ought not, by default, be interpreted in accordance with the promisor's intent.

To explore promissory interpretation further, let us first look at the interpretation of definite promises. In a definite promise, the meaning is clear given the exactness of the words used. For example, if I say to my cousin: "I promise to give you $14 tomorrow at noon" there seems to be little room, if any, for

misunderstanding. What is required of me is nearly exact. But say there was a misunderstanding. Imagine I intended to *give* my cousin $14 in the sense that I would let him hold it, but not keep it. My intention was that the $14 be a loan, not a gift. My cousin, on the other hand, understood my promise as meaning I will give him $14 *to keep* – i.e., as a gift. How would we resolve this promissory dispute? All else being equal, it may be that my cousin deserves to keep the $14. But why? It depends on the context in which my promise was made. As written above, there is no context to suggest that I intended that the $14 be a loan. So, it seems my cousin deserves to keep the $14. They chose the most reasonable understanding of the words I used; "I promise to give you $14 tomorrow at noon" is most reasonably understood as a promise to relinquish possession of $14 to another person, in the context provided. If, instead, my cousin had said to me "I need to buy some $14 kombucha and I just wish someone would lend me $14" prior to my promise, then it would be most reasonable to understand my promise as an intention to loan $14. Therefore, the most reasonable interpretation of my promise will depend on the context in which it is uttered.

This example illustrates that promisors do not have complete authority over the meaning of their promises. Instead, a standard of reasonableness that takes into account the context of utterance is required to ensure that promisors do not abuse the practice of promising. Of course, reasonableness admits of degrees. In the second context of my promise to my cousin, it would be *reasonable* for him to

consider the $14 a gift. It would not be *most reasonable*, however. The context indicates that the $14 should be a loan. My cousin solicited a loan, so when I offer him money, it is *most reasonable* to assume that money is a loan. At minimum, promisors and promisees must take a *reasonable* understanding of promises. This minimal standard prohibits any *unreasonable* understandings – whether from promisor or promisee – as being authoritative over promissory meaning. The *most reasonable* understanding of a promise will depend on a number of contextual considerations. It is this *most reasonable* understanding, I contend, that dictates promissory meaning and obligation. But, again, I put the defense of this point off until next chapter. For now, I maintain that it is reasonableness, not authority, that dictates promissory meaning.

Promisors should not be able to bait-and-switch promisees by making a promise with a clear meaning to their community but a covert meaning to themselves. Similarly, promisees should not understand the words of a promise in ways that stray radically from their community's understanding. When promisors make promises with the intention of committing themselves to the plain meaning of the words they use (and in a context that does not contradict this plain meaning), promisees cannot complain that they did not understand the promise according to the plain meaning. Both promisor and promisee have a responsibility to understand the meaning of their promise in an uncontroversial, community-accepted way. Promisors and promisees must be attentive to both the community's semantic

meaning of the words used in a promise as well as the context in which those words are uttered. Responsible attribution of meaning to promises requires both semantic and pragmatic considerations. Otherwise, the practice of promising cannot get off the ground. Therefore, the meaning of a promise is not reducible to what either the promisor or the promisee says it is.

One might point out that the standard of reasonableness for promissory meaning is helpful only in the case of definite promises. Definite promises are worded so exactly that, in a typical context, there is no need for interpretation at all. Of course, they will say, it is absurd to ascribe an alternative meaning to a definite promise. Promisor's intention (or perhaps promisee's intention) will matter, however, in the case of vague promises, where there is no clear *most reasonable* interpretation. No context, they will claim, can aid in finding a reasonable understanding of vague promises. So, their interpretation must default to either promisor's intent or promisee's understanding. To dispel this worry, let us consider whether vague promises require deference to speaker or hearer's intent.

Let us use the example from earlier where I promise my mother to "care for her health." At the time of the utterance of this promise, I intended to take her to medical appointments and pick up her medications from the pharmacy. However, I did not have a complete list of what I intended to do in my mind at the time of utterance. If I did, and promised only the items on that list, I would succumb to Endicott's worry that, through an insistence on precision, I would make an arbitrary

promise. So, I left my promise vague. My mother interpreted my promise as including organizing a transition to assisted living, delivering her groceries, daily walks together, and me staying up to date on nutritional science so I can draft healthy, affordable, local, ethical meal plans for her. She did not have a full list in mind of what she thought I owed her, but her general idea of what my promise entailed was stronger than mine. As time passed, what I thought I owed her changed. I came to terms with delivering groceries; but I remained opposed to the rest of her list. Now, she and I are in a dispute about what I owe to her.

It is not clear precisely what I owe to my mother. It is unlikely that there is some objective method for determining precisely what is owed in such promises. Though we cannot know what I owe my mother with precision, we can rule out some interpretive methods.

First, we can rule out interpreting the meaning of my promise solely in accordance with my intentions. To do so would be unfairly siding with the promisor. When I promise my mother to care for her health, I trigger a number of changes in the world. Importantly, I trigger an expectation in my mother that I will carry out a set of actions in which she has a great interest. If I fail to meet her expectations, I will harm her. She may forgo some actions in service of her health on the assumption that I will take care of them for her. Now, this is not to say that I must meet all of her expectations. She may be unjustified in expecting certain actions of me. But I cannot just carry out the actions I intended irrespective of the

expectations they may have produced in her. As the promisor, I do not have full authority over the meaning of my promise. Promising is not like commanding. The promisor must take responsibility for the community understanding of their promise, the context in which it is uttered, and the expectations it produces. At minimum, this means I am responsible for acting in accordance with the core settled meaning of "care for one's health." Beyond that minimum, what I owe her may be unclear; but that unclarity can be resolved somewhat through a consideration of my mother's expectations. Or, what I owe her may be indeterminate; I might invoke a concept in my promise that operates in so many dimensions – that is, it applies in varying degrees in multiple contexts – that it cannot produce a complete list of demands of me.[74] In any case, it is not my intentions alone that will determine what I owe my mother.

Second, we can rule out interpreting the meaning of my promise solely in accordance with my mother's understanding. To do so would be unfairly siding with the promisee. There are expectations which are reasonable for a promisee to have. In the case of my mother, it is reasonable for her to expect that I deliver her groceries – at least from time to time. However, her expectation that I draft her a

[74] Here I am thinking of what Hrafn Asgeirsson calls "incommensurate multidimensionality." Asgeirsson argues in "On the Instrumental Value of Vagueness in the Law" *Ethics* 125 (January 2015) that it is incommensurate multidimensionality and not vagueness itself that produces the supposed issues associated with vagueness. Terms that exhibit incommensurate multidimensionality have multiple dimensions of fit that are incommensurable. "Health" may be such a term as it operates in many contexts in varying degrees – none of which can be measured against each other.

comprehensive meal plan is unreasonable. It is not within the core settled meaning of "caring for one's health" and it is beyond the scope of what could reasonably be attributed to my commitment. The promisee must form reasonable expectations based on the community's understanding of their promise. The promisor should not be obliged to undergo extra actions simply because the promisee expects them. So, it is not the promisee's understanding alone that can determine promissory meaning.

In this section, we have seen that it is not up to the promisor or promisee to determine the range of vague promises. We are thus left with a big question: how does one determine the range of a vague promise? Next chapter, I will attempt to answer this question. For now, however, I will conclude that promissory morality does not permit the interpretation of vague promises solely according to promisor's intent or promisee's understanding. Though this is an intermediate conclusion, we can see that it has important consequences for constitutional interpretation.

Promissory Interpretation and Originalism

The term "originalism" refers to a broad category of theories of constitutional interpretation which base their interpretive method on a constitution's founding moment. One sub-category of originalism – which I'll refer to as "intentionalism" – contends that constitutions ought to be interpreted according to the intentions of their authors. Another sub-category – public meaning

originalism – holds that constitutions ought to be interpreted according to the public's understanding at the time of enactment. Both of these theories, I argue, are inconsistent with the proper interpretation of promises. Let us consider them both, in turn.

Intentionalism

Intentionalism is defended in a number of ways. For some, it is in the nature of interpretation to search for authorial intent. Whether one is interpreting a play, speech, painting, or constitution, the task is to search for the author's intended meaning. One proponent of this view is Larry Alexander. In his "Simple-Minded Originalism," Alexander argues that any interpretation that does not follow authorial intent is ascribing an arbitrary hypothetical author to the object of interpretation.[75] There are infinite meanings we can ascribe to constitutions. The only sensible one, however, is the author's intended meaning. If a piece of paper were to miraculously receive English writing by the blowing of wind and dirt, we would not say that writing has *meaning*. Any meaning we did ascribe to that paper would be arbitrary. Alexander explains that this is because meaning requires

[75] Larry Alexander, *Simple-Minded Originalism*, (San Diego, Social Science Research Network Electronic Paper Collection, 2008), 2.

authorship. A constitution cannot have meaning unless it is authored. So, we must interpret constitutions according to their author's intent.[76]

Another defense of intentionalism is grounded in the political goods secured by a stable interpretation. Defenders of this view argue that it is in the nature of constitutions to be stable and unchanging. Constitutions are meant to enforce our commitments in times where we might wish to shirk them. So, constitutions must be interpreted in such a way that they are unchanging. The only stable and authoritative option is to interpret according to authorial intent. Authorial intent is stable because it does not change and authoritative because the authors of constitutions have the authority to dictate the meaning of constitutions.[77]

Intentionalism is inconsistent with promissory morality. Intentionalism argues that in the interpretation of constitutional promises, we ought to side with the promisor (the author(s)). As mentioned, this is unfair to the promisee, may harm the promisee, and chills the practice of promising. The first brand of intentionalism fails because it is not *in the nature of promissory interpretation* to interpret according to promisor's intent – both in definite and vague promises. The second brand of intentionalism also fails. It is not *in the nature of a promise* to be stable across time. Perhaps this is the case for definite promises, but it is not the case for vague promises. As time passes, the intentions and expectations produced

[76] For another example of this kind of defense of intentionalism, see Walter Michaels, "A Defense of Old Originalism," in *Western New England Law Review* 31, no. 1 (2009).
[77] See Richard Kay, "American Constitutionalism."

by vague promises change. As a result, what is owed changes too. Any changes to what is owed must balance the interests of promisor and promisee. In the case with my mother, it is both unclear what I owe her and whether what I owe her is locked in from the moment of my promise. As my mother and I advance in our knowledge of health, our understanding of what is owed changes. Now, intentionalists might point out that this marks a divergence between promises and constitutions. Constitutions are supposed to be stable; promises may not be. But even if we grant that constitutional promises ought to be stably interpreted, the standard for their stable interpretation should not be promisor's intent. Promisors do not have authority over promisees; they do not dictate the meaning of their promises. If anything, promisees have authority over promisors.[78] Thus, intentionalism is inconsistent with the promissory nature of constitutions. As promises, constitutions ought to be interpreted such that the interests of the promisor are not privileged over the interests of the promisee.

Public Meaning Originalism

Perhaps the most famous defense of public meaning originalism is advanced by former U.S. Supreme Court Justice Antonin Scalia. Scalia argues that when interpreting constitutions, we do not look for "subjective legislative intent."

[78] See David Owens, "Does a Promise Transfer a Right?" in *Philosophical Foundations of Contract Law* (Oxford University Press, 2014): 78-95.

Instead, we look for "the intent that a reasonable person would gather from the text of the law."[79] This reasonable person is fixed in time. It is not the reasonable person at the time of interpretation that dictates constitutional meaning. Rather, it is the reasonable person at the time of constitutional enactment. Scalia argues that this public meaning version of originalism is preferable to intentionalism because it is more democratic. Scalia writes: "It is simply incompatible with democratic government, or indeed with fair government, to have the meaning of the law determined by what the lawgiver meant, rather than what the lawgiver promulgated."[80] Constitutional law is law by the people and for the people; so, it is the people's understanding at the time of a constitution's enactment that dictates its meaning.[81]

Scalia's democratic argument against intentionalism reflects the promissory nature of constitutions. Constitutions are given to the people much as promises are given to promisees; they are not commands for which authorial intent is the sole determinant of meaning; they must consider the people's role in their enactment.

[79] Antonin Scalia, *A Matter of Interpretation*, 17.
[80] Ibid., 29-30.
[81] For a deeper discussion of Scalia's views see John Perry, "Textualism and the Discovery of Rights," in *Philosophical Foundations of Language in Law*, (Oxford University Press, 2011). Perry argues that it is more sensible to adopt "meaning textualism" than "conception textualism." Meaning textualism ascribes the public meaning at the time of enactment to legal documents. However, it does not look for the particular views of enactors on, say, what actions count as cruel and unusual punishment. The specific cases which will fall under a constitutional provision are up to interpretation. Conception textualism, on the other hand, looks for what the enactors believed were the specific instances that fall under a constitutional provision. This method, Perry argues, is a futile endeavour.

Constitutions are *received* by the people in much the same way as promises are *accepted* by promisees. Scalia goes too far, however. Scalia gives full weight to the promisee's understanding of constitutional promises. Though promisee's understanding is of great concern to promissory interpretation, it is not the only relevant consideration. A promisee can be unjustified in having certain expectations about the scope of promises they have received. Thus, in the interpretation of constitutional promises, we cannot rely solely on the people's (the promisee's) understanding. Furthermore, Scalia is wrong to fix promisee's understanding at one moment. As the example of my promise to my mother illustrates, the promissory relationship created by vague promises can change over time. Promisor's intentions and promisee's expectations change as they consider the meaning of a vague promise. Just as it is wrong to submit the promisor to the promisee's subjective understanding of a promise, it is wrong to subject promisee to their first understanding of a promise.

The Persistence of Constitutional Promises Over Time

There is an important disanalogy between my promise to my mother and constitutional promises. In my promise to my mother, only two individuals are involved and so, when one or both of us inevitably pass away, so too does our promissory relationship. In constitutional promises, government representatives make promises to a citizenry that remain long after those representatives and

citizenry have died; successive governments exist in promissory relationships with successive citizenries. How is it that constitutional promises are passed from one generation to the next? If constitutional promises are passed on in this way, how does their passing on affect their interpretation?

These questions are iterations of other important questions that have been asked in constitutional scholarship. It has been asked: why should we follow a constitution today that was made hundreds of years in the past? Why should we interpret constitutions according to the intentions of their authors who are long dead? These are good questions and some intriguing answers have been given. Some answers to these questions have contended that the "people" who wrote or received constitutions, in the past, are the same "people" who, today, live under them. There is an identity between the governments who enact constitutions and the governments who later abide by them; an identity between citizens who once relied on constitutions and citizens who still rely on them. For instance, Jed Rubenfeld has argued that the only way a "people" can be self-governed is if they, as a collective, live according to a set of written commitments. To be free, "we must give our lives, in two words, a text."[82] So, for Rubenfeld, "the people" are a collective, temporally extended entity. Despite the deaths of government officials

[82] Jed Rubenfeld, "Legitimacy and Interpretation," in *Constitutionalism: Philosophical Foundations* ed. Larry Alexander (Cambridge: Cambridge University Press: 2001), 194-234.

and citizens, "the people" live on through the written commitments in their shared constitution.

We could look at constitutional promises in a way akin to Rubenfeld. Constitutional promises are made from one collective entity to another. Both entities are temporally extended, so the deaths of individuals that constitute them do not lead to their non-existence. In this conceptualization, constitutional promises would be made from a country's government to its citizens and would persist until they are amended, relinquished, or until the country's dissolution. For example, "The Luxembourgian Government" would promise "The Luxembourgian People" a constitution. That promise would persist until Luxembourg ceased to exist (or, of course, the constitution was amended or repealed). "The Luxembourgian Government" and "The Luxembourgian People" remain the same, despite changing membership.

Conceptualizing constitutional promises as between collective, temporally extended entities ignores the many ways in which a country can change. The values and cultural practices of a country can change dramatically over time. The more a country changes, the more difficult it is to say that the "people" occupying it today are the same "people" as those who occupied it hundreds of years ago. In any case, one would only need to mobilize such a conceptualization if they sought to defend originalism. Originalists must explain why the understandings of the past are binding today. One way to do so is to construct an identity between past and

present. But as I have shown above, *constitution as promise* rejects (at least the "old" form of) originalism. *Constitution as promise* is happy with the understandings of promises changing over time and rejects original understandings of promises *because they are original*. So, it need not show an identity between original promisors and promisees and contemporary promisors and promisees. It need only show continuity between them. Thus, I will offer an alternate explanation of the continuity of constitutional promises.

Constitutional promises are *inherited* by succeeding generations. When a new government is elected, they reaffirm their commitment to the constitutional promises that were in effect during the previous government's tenure. New generations of citizens are then able to reaffirm their acceptance of these promises. The continued practice of constitutional law signifies to the people and the government that they are joined in a promissory relationship.

This alternative explanation of the continuity of constitutional promises has a couple of benefits. First, it does not rely on the dubious metaphysics of grounding the existence of a collective entity and its promissory relationships over time. The vast literature on the ontology of social entities need not be explored to establish that constitutional promises are still in force today, as they were in the past. Instead, it relies on the recognition of the features of a promissory relationship obtaining in the present. Second, it explains the organic evolution of promissory obligation over time. As new generations take up the promises of their predecessors, they imbue

these promises with new intentions, expectations, and understandings. They can thus understand their promises as relationships in which they take part. They are not subject to the will of the long dead.

The New Originalism

This chapter has not considered an exhaustive list of interpretive constitutional theories. The originalist theories discussed place special emphasis on founding moments to guide constitutional interpretation. There are "new" originalist theories, however, that broaden the scope of originalism. These theories invite some "innovation" or "construction" into the interpretive process. An example of a "new" intentionalism is found in Aileen Kavanaugh's "Original Intention, Enacted Text, and Constitutional Interpretation."[83] Kavanaugh argues that while authorial intent ought to guide interpretation, it does not exhaustively determine the interpretive process. Unexpressed intentions – that is, intentions not apparent in the text itself – cannot be brought to bear on interpretation. Thus, when deciding a constitutional case, a judge's job is not to figure out what framer x or y would have decided. Authorial intent only matters to Kavanaugh insofar as it is present in the constitutional text. Where authorial intent runs out, interpretation begins.

[83] Aileen Kavanaugh, "Original Intention, Enacted Text, and Constitutional Interpretation," in *The American Journal of Jurisprudence* 47, no. 1 (2002).

"New" originalisms that allow for interpretation to fit changing circumstances map better onto promissory morality than their "old" counterparts. To what extent they do map onto promissory morality and to what extent they differ from living constitutionalism will be discussed in the next chapter. For now, however, we can conclude that "old" originalism is incompatible with *constitution as promise*. Emphasizing founding moments alone in constitutional interpretation is tantamount to the wrong of interpreting vague promises solely according to promisor's or promisee's understanding.

Conclusion

So, where does this leave us? This chapter has looked at the negative consequences of *constitution as promise*. The general conclusion is as follows: constitutional promises cannot be interpreted solely according to the subjective understandings of promisors *or* promisees *at any time*. It is unfair to side solely with one party to a promise because promises are a joint venture. There is no clear-cut authority relationship as there exists in the case of commands. Both promisor and promisee are subjected to standards of reasonableness in their understanding of vague promises. Neither party to a promise is *by default* granted authority over a vague promise's meaning. Thus, we must look for an alternative standard of interpretation that does not rely on the subjective understandings of promisor or promisee.

Though vague promises are difficult to interpret, they are still obligatory. On conventionalist, expectationalist, and interpersonal accounts of promising, vague promises are still obligatory. Moreover, they are oftentimes preferable to precise promises because their vague language allows them to non-arbitrarily guide action.

In the next chapter, I will discuss some potential positive interpretive consequences of *constitution as promise* and conclude with some observations about the relationship between *constitution as promise* and the inclusive-exclusive legal positivism debate.

Chapter Four: The Consequences of *Constitution as Promise* – Part II

In this chapter, I argue that *constitution as promise* suggests a living constitutionalist approach to constitutional interpretation. I first propose a theory of the interpretation of vague promises – particularly the kinds of vague promises found in constitutions. This theory claims that the interpretation of vague promises requires a negotiation between promisor and promisee about what their promise demands. This negotiation, I argue, should proceed on a case-by-case basis, incrementally specifying the shape that promisor and promisee give to their promise. This case-by-case consideration of promissory meaning should consider what moral reasoning and scientific research say about the meaning of the promise, which actions the promisor can reasonably perform, and how the demands of the promise could be pursued compatibly with the demands of other promises and duties in which promisor and promisee may be engaged. Furthermore, I argue that the values of assurance and humility ground a need to interpret vague promises in accordance with a doctrine of precedent. That is, they should be interpreted, when possible, in a manner consistent with how they have been in the past. Applied to constitutional promises, this theory closely mirrors the suggestions of living constitutionalism. As such, I argue that *constitution as promise* entails living constitutionalism. I conclude by considering some possible counter arguments. First, that the "new" originalism might also be entailed by *constitution as promise*.

I answer this claim by arguing that new originalism is incompatible with the forward-looking nature of *constitution as promise*. Second, that *constitution as promise* entails natural law. To this claim, I argue that *constitution as promise* is most compatible with an inclusive positivist view of the nature of law. *Constitution as promise* contends that moral reasoning can, but not necessarily does, determine the norms of a legal system.

Some Preliminaries

In the following sections, I will be discussing vague promises. Vague promises are promises to do – or refrain from doing – something, X, the nature of which is vague or underdetermined. X can be a variety of different things: it could be compliance with a principle (e.g. that one should tell the truth), protection of a value (e.g. freedom, equality), attainment of a goal (e.g. health, happiness), or to achieve a state of affairs (e.g. to be as strong as possible). What makes a promise vague is the fact that its X term is vague or underdetermined. For example, take a promise to "uphold the value of free speech." The meaning of "free speech" is vague, and so the promise is vague. In a vague promise, it is not clear from the plain meaning of X at the time of utterance what the promisor owes. Since the X term of a vague promise can be a number of different kinds of ends and listing them repeatedly would be tiresome, I will use the word "term"

hereon to refer to any of the possible kinds of ends a promise might secure. I will use phrases such as "the demands of the *terms* of the promise" and "the meaning of a promise's *terms*." When I do so, "terms" could mean a principle, value, goal, or state of affairs.

The Problem

Last chapter, we saw that vague promises ought not be interpreted solely according to the intentions of promisors nor the understandings of promisees. We saw also that the seemingly intractable job of interpreting vague promises does not suggest that their core settled meaning is their whole meaning. So, what does the interpretation of vague promises require? To answer this question, we should get clear on what kind of vague promises we are dealing with. The vague promises that we see present in constitutional law are of a unique sort. First, they invoke abstract terms the complete demands of which we do not know and maybe cannot know. We may know some of the demands of terms such as freedom and equality, but much of what they demand is still unknown. Moreover, we do not know whether these terms provide determinate answers in all of the cases in which they may apply; they may be underdetermined. It may be that freedom is equally well-served by two or more courses of action. Second, constitutional promises are meant to exist in perpetuity. Until constitutional laws are repealed or amended, they remain in force. Third, they come as a collection. Constitutional promises are not

discrete; they must be interpreted such that they are consistent with one another. It may not be possible to uphold the full extent of, say, freedom while also upholding the full extent of equality. So, constitutional promises must be interpreted such that each of their demands is pursued maximally and none are unjustifiably minimized for the sake of others. The combination of these features makes for a uniquely difficult interpretive situation. As time goes on, new circumstances might suggest that one or many of a government's constitutional promises are not being fulfilled and/or balanced with one another. As such, reinterpretation will often be necessary. If we are to make any pronouncements about what promissory morality says about constitutional interpretation, then, we must consider what promissory morality has to say about the unique kind of vague promises we find in constitutions.

How to Interpret Vague Promises

Let us consider this problem in the abstract. How should we interpret a promise that is (1) to fulfil the demands of some vague terms, (2) intended to exist in perpetuity, and (3) that comes as a collection with other, sometimes incompatible, duties, some of which are promissory in nature and others are not? One possible answer we might give is that such a promise should be interpreted according to the true meaning of the vague terms it contains. This would mean that whatever the vague terms, in truth, demand, the promisor must do. Since the demands of the vague terms are uncertain, what is owed will depend on the best

available knowledge of those terms at the time of interpretation. What the best available knowledge is depends on the kind of term in question. If the term is concerned with something like "equality," then the best available knowledge will depend upon moral reasoning about the meaning of "equality." If the term concerns something like "health," then the best available knowledge will depend, to a large extent, upon the current state of scientific research. Since health is an evaluative term, scientific research cannot fully determine its demands. One must first determine what conception of health they are after. Is one concerned with longevity, vitality, contentment, etc.? This conception must be determined if scientific research is to guide one on the journey to "the true demands of health."

For a concrete example, let us return to my promise to my mother that I will "care for her health." To satisfy criterion (3), let us say that I have also promised to "keep her finances in order" and to "teach her to paint like Dalí."[84] The above proposed solution would maintain that I owe my mother the true demands of health. By "the true demands of health," I mean everything that is humanly possible to further the condition of my mother's health. This would mean that whenever I gain knowledge about what health demands, I must alter my actions and provide my mother with what is required by the new, more correct conception of health. There are, of course, a number of problems with this solution. First, it assumes that

[84] I cannot paint like a 3rd grade student, let alone Dalí.

health – or any other kind of vague term – has a set of determinate demands which I can ascertain. To an extent, this assumption is true. Knowledge of health is ever-expanding and access to this knowledge has become increasingly available. Some of health's true demands are knowable. But what health demands in some cases may be underdetermined. At some point, what best pursues health may require a judgement between two options neither of which is better or worse than, or equal to, the other. For instance, one medical decision might promote quality of life while another promotes quantity of life. "Health" is ambivalent as between the two options. If I am faced with such a decision for my mother, the "true demands of health" will not provide me any guidance. There must be some other basis on which I make the decision.

Second, the solution does not take into account my capacities as a care-provider. Since I am merely a student, it is not feasible for me to provide someone with the true demands of health. Promissory morality surely does not require that promisors provide promisees with the true demands of the terms they invoke in their promises, regardless of the practical limitations on their performance of them. What I owe my mother must be a level of health that is practically feasible given my social and financial situation.

Third, the solution ignores the interpersonal nature of the promissory relationship. Promises give rise to relationships between people characterized by expectations, needs, vulnerabilities, and trust. As such, it is of central concern that

promises serve the unique interests of those involved. The primary interest being served is that of the promisee. So, if the promisee does not expect the true demands of the terms the promisor invoked in their promise, the promisor need not pursue them. The promisor need not get lost in pursuit of an ideal that the promisee, in truth, does not desire. If my mother does not believe that my promise demands that I provide her the true demands of health, then I need not provide her the true demands of health. As seen in the previous condition, it is also important that the interests of the promisor are considered. So, even if my mother *did* expect that I provide her with the true demands of health, that does not mean I must provide her with them. The promisor and promisee must come to an agreement about the scope of their promise that is considerate of both the promisor's capacities and the promisee's expectations. Promisor and promisee should *make promises their own*. That is, they should find a meaning of their promise that serves the shared purpose they ascribe to it. In legal terms, promissory interpretation cannot be purely textualist. It is not a search for the true meaning of the terms used in a promise. Promissory interpretation must be, in part, purposive. It is a search for the meaning of the words in a promise that best pursues the shared purpose that promisor and promisee ascribe to it. The purpose of my promise to my mother is to secure for her a reasonable level of health, consistent with my abilities and competing obligations. As such, my mother and I should form expectations about what my promise requires, not on the basis of what, in truth, the terms in my promise mean,

but rather on the basis of what duties can reasonably be ascribed to me given the unique interpersonal relationship that underlies the promise.

Fourth, the solution does not provide guidance for how to balance my promise to care for my mother's health with the other promises I have made to her. In most if not all cases, the promise to care for my mother's health will be paramount. However, there are conceivably instances where it would be better if I were to organize my mother's finances than if I were to care for her health. Perhaps at one point I could advance her financial position better than I could her health. If I am bound to provide the true demands of health, it seems that I can never fulfil the demands of my other promises if fulfilling them means not maximizing my mother's health. When one makes a collection of vague promises that are not blatantly at odds with one another, what they owe should be the course of action that reasonably balances the requirements of all of the promises in the collection.

Fifth, the solution does not consider the non-promissory obligations I might have that compete with the demands of my promise. This problem is similar to the third insofar as it is a limitation on my ability, as a promisor, to provide my mother with the true demands of health. It is different, however, because it is a moral limitation, not a practical limitation. If I had a child, I would have an obligation to care for them that, in some cases, would supersede my obligation to care for my mother. If my mother is cognizant of my obligation to my child, she ought to adjust her expectations of what I owe her accordingly. She should not expect that I

provide her with the true demands of health if doing so means neglecting my child. In general, what is owed in vague promises should consider the competing obligations a promisor might have or might acquire. A promisor's competing obligations will make it so that they should not fulfil the true demands of their vague promises. So, vague promises should be interpreted such that they allow for promisors to fulfil competing obligations of higher importance.

The previous point might spark some criticism. One who takes Margaret Gilbert's view of promises will argue that a promissory obligation does not change merely because there exists a competing obligation. If I promise to attend a dinner at 7:00 and I come across an accident victim on the way – whom I can help but in doing so will miss the dinner – then I still have an obligation to attend the dinner. All things considered, I should help the accident victim, but I still will have broken a promise.[85] What this means for the previous point is that promissory obligation is not affected by the presence of competing obligations. So, competing obligations should not be of any importance to the interpretation of vague promises.

In response to Gilbert's criticism, I argue that while her point may apply to definite promises, it does not apply to vague promises. The meaning of a definite promise does not change because of competing obligations. But the meaning of a vague promise can do so. As we have seen, vague promises do not produce a

[85] Margaret Gilbert, *Rights and Demands*, 135.

locked-in meaning from their inception. Rather, their meaning is determined over time. So, with vague promises we are more at liberty to allow considerations that affect what they mean than is the case with definite promises. This is not to say that all competing obligations need to be factored into the interpretation of vague promises. It may be that only those competing obligations of which the promisee is aware are relevant to the interpretive process. For example, since my mom knows I have a child, she should consider it in her understanding of my promise. But since she does not know that I am on a baseball team, she need not consider it in the understanding of my promise.[86] It is not important that we explore exactly how this condition should apply to the interpretation of vague promises. Instead, we can note that competing obligations are of some importance in the determination of the meaning of vague promises since they affect what ultimately can or should be performed.

From the previous paragraphs, we can see that an interpretive methodology for the vague promises in which we are interested must account for (i) the underdetermination of abstract terms, (ii) the capacity of the promisor to undergo the actions covered by their promised terms, (iii) the interpersonal nature of promises, (iv) the need for the satisfaction of all promises in a collection, and (v) the competing obligations a promisor might have. To account for these five factors,

[86] I neither have a child nor play on a baseball team.

I argue that promisor and promisee must negotiate a settlement of what is owed on a case-by-case basis. This negotiation must consider what the promisor and promisee's best use of moral reasoning and/or scientific research says about the meaning of the vague terms contained in their promise. At the same time, promisor and promisee must consider the purpose for which their promissory relationship exists. Promissory relationships are particularized moral relationships; they exist to pursue an end that is in the unique interest of the parties involved. So, promisor and promisee should negotiate a particularized understanding of the meaning of their promise that reflects their unique interests. In short, promisor and promisee are in search of what their promise means *for them*, not for all. The negotiation must also consider the capacities of the promisor and the other promises at play. This negotiation must occur on a case-by-case basis because, as the vagueness of the promise suggests, it is not known ahead of time what, in truth, the vague terms that are present in the promise demand, nor is it known ahead of time what, in practice, the promisor could reasonably perform. Case-by-case reasoning ensures that promisor and promisee take a humble approach to the interpretation of their promises by only interpreting them when necessary. Furthermore, the case-by-case method allows for the incremental determination of the promise's meaning. As each case is decided, the meaning of the promise becomes less and less vague. In a sense, the interpretation of vague promises follows a doctrine of precedent. When promisor and promisee agree that a case does or does not fall under their promise,

it is secured as a determinate example of the scope of the promise. Promisor and promisee have a duty, then, to treat "like cases alike." What grounds this duty is the value of assurance. Both promisor and promisee rely on the fact that their promise will be interpreted in the future as it was in the past. Sudden changes to promissory meaning can frustrate this reliance and harm the promisor or promisee. Now, these promissory precedents are not unchangeable. The duty to treat "like cases alike" is a *pro tanto* duty; it can be overturned under the right circumstances. One such circumstance will be that new knowledge conclusively shows that the precedential case was interpreted incorrectly. Thus, there is the capacity for promissory meaning to evolve with changing moral or scientific understandings. But this evolution is restrained by a doctrine of precedent grounded in the reliance promisors and promisees give to past promissory meanings.

A number of concerns might arise about how this negotiation process will play out in reality. Promisors and promisees might disagree at any stage in the negotiation process. They will disagree about what moral reasoning or scientific research says about the terms invoked in their promise; they will disagree about what the promisor is capable of providing; they will disagree about what purpose their promise pursues; they will disagree about what is a proper balance of the terms contained in the collection of promises between them; they will disagree about which non-promissory obligations deserve consideration; and they will disagree about which terms are underdetermined and which actions should be taken when

they are. This disagreement is certainly problematic. In the case of everyday promises, it is unlikely that all disagreements will be resolved. One can only hope that they can negotiate in good faith and, in most cases, come to reasonable conclusions about what their promise means. But for those who wish to resolve disagreements, a third-party adjudicator is necessary. Intractable disagreements require an adjudicator. Luckily, the law has anticipated this need and employs adjudicators: judges. For promises between private citizens, a contract can be made to ensure an adjudicator is present in the case of disagreement on a promise's meaning. For constitutional promises, judges are on standby in case there is a disagreement between the government and citizens on constitutional meaning.

This interpretive method is consistent with the nature of vague promises. Vague promises represent commitments to bind oneself to what, in truth, is reasonably required by the promise's terms, given the aforementioned constraints on the promisor's performance. When I promise to "care for my mother's health," I mean to provide for her what, in truth, are reasonable demands of "health," consistent with the various practical and normative constraints on my actions. Whether I know the full demands of health is unimportant. The actions I undertake in service of my promise should be properly characterized as *in pursuit of health*. If I am insistent that my original conception of health is the one that I must follow, it is because I believe that original conception is the *correct conception*. I do not believe that I am bound only to my original conception *because it is my original*

conception. If I did, I would be mistakenly assuming that the promisor's understanding authoritatively determines the meaning of promises. Similarly, my mother might insist on her understanding of my promise because she thinks it is the correct conception. But she cannot insist that we use her understanding *because it is her understanding*. The promisee's understanding does not authoritatively determine promissory meaning. Vague promises do rely, to some extent, on the particularized understandings of promisor and/or promisee. As we have seen, the meaning of a vague promise is a meaning that should reflect the unique relationship between promisor and promisee. Vague promises are not open-ended commitments to bind oneself to any and all things that their terms might capture.

From the previous paragraph we can see that there in a tension embedded in vague promises. On one hand, they represent a commitment to what, in truth, is reasonably demanded by their terms – given the requisite limitations. On the other hand, they represent an effort to find a particularized understanding of their terms that allows the promisor and promisee to ascribe their own meaning to their relationship. This tension is reconcilable. Though promisor and promisee recognize the importance of a particularized understanding of their promise, they also recognize that, given its vagueness, it is subject to legitimate change over time. As such, promisor and promisee must remain in dialogue about what, in truth, is a reasonable, particularized understanding of their promise.

Put simply, vague promises are an indeterminate agreement between promisor and promisee. To make this agreement determinate, promisor and promisee must negotiate a shared understanding of it. But only some considerations are valid inputs to this negotiation process. These inputs are moral reasoning, scientific research, the promise's purpose, the promisor's competing obligations and practical considerations. Even the earnest use of these inputs might lead to underdetermined cases. That is, moral reasoning, scientific research, the promise's purpose, the promisor's competing obligations, and practical considerations might not suggest one promissory meaning over another. In such a case, a choice must be made. It is simply a moral tragedy when promisor and promisee cannot agree on that choice. To avoid these tragedies, we need judges.

To see how this interpretive method might play out concretely, let us consider the promise to my mother again. In this scenario, I will explain the understandings of my mother and me at various points in time (labelled *T1, T2, T3, etc.*) and how we might deal with conflicts.

T1: I have made my promise to my mother to "care for her health." I have also standing promises to "keep her finances in order" and to "teach her to paint like Dalí." My mother understands the first promise as meaning I must take her to medical appointments, cook her healthy meals, and teach her yoga. I understand this as merely requiring that I take her to medical appointments. We negotiate. My mother realizes that, as a student, it is too much to ask of me to teach her yoga and

to teach her to paint like Dalí. I realize that healthy eating is an important aspect of health, so I agree to cook her healthy meals. So, we agree that my promise is to take her to medical appointments and cook her healthy meals.

T2: The "healthy" meals I had been cooking my mother consisted of nachos, burgers, and sweet rolls. While reading some articles on nutrition science, my mother realizes that foods high in saturated fat are not healthy. She tells me that I have to start cooking proper healthy food for her. I disagree. I maintain that nachos, burgers, and sweet rolls provide vigour, strength, and joy. I am plainly wrong. The best available scientific research shows that nachos, burgers, and sweet rolls are not part of a healthy diet. I should start cooking my mom healthy food; my promise demands it. We have agreed that cooking her healthy food is required by my promise and I am not cooking her healthy food. Still, I remain opposed to her conception of healthy food. We need an adjudicator. So, we call up my sister. My sister, upon consulting the nutritional research and hearing my mother's and my arguments, decides that I owe my mother healthier meals. As an example of a healthy meal, my sister says I should make salmon, asparagus, carrots, and mashed potatoes.

T3: My mother continues to research nutritional science. She learns that anthocyanins, polyphenols, and flavonoids have many preventative benefits. She claims that my promise demands that I cook her meals that contain these chemicals. To do so, I have to greatly increase grocery expenditures. Doing so, we realize, is

not compatible with keeping her finances in order. Furthermore, I have come to rely on a tradition of cooking her basic, yet healthy meals like those suggested by my sister. Adding an assortment of rare fruits and vegetables breaks with this tradition. So, we settle that meals will remain mostly the same, but I will add blueberries to the grocery list when they are on sale.

T4: Both my mother and I learn that, without exercise, one cannot live healthily. So, we agree that I should enroll my mother in an exercise class. We disagree, however, on which class that should be. I maintain that she should lift weights to increase her bone strength. She maintains that she should do swimming classes for her cardiovascular health. She only has time and money for one class. Health does not demand that she take one class over the other. An equally strong case can be made for her attending either class. We have reached a point at which the demands of "health" are underdetermined. Since we cannot agree on how to proceed, we must defer to an adjudicator. My sister is called up and sides with my mother on the grounds that, when cases are underdetermined and my mother and I disagree, she should side with my mother.

My sister's decision to side with my mother in underdetermined cases might be controversial. But there is good reason for her to do so. Promises are primarily aimed at serving the interests of the promisee. So, it is reasonable to say that, when one is faced with two incommensurate interpretations of a promise's meaning, it is best to side with the interpretation favoured by the promisee. Since my promise to

my mother concerns matters of *her* health, it seems right that I – or an adjudicator – should adopt *her* understanding of health when competing understandings prove no better.

We can see this sort of siding with the promisee in constitutional law. Constitutional rights – and constitutional law generally – exist primarily to serve the interests of citizens (the promisees). When constitutional law is underdetermined, we see judges siding in favour of the interests of the promisee. One example of this justified favouritism is found in Canada's *Oakes Test*. *The Oakes Test* is a test that was devised by the Supreme Court of Canada to determine whether the infringement of a right in the Canadian Charter of Rights and Freedoms is warranted. Section one of the Charter states: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[87] *The Oakes Test* determines whether a limitation of a Charter right is "demonstrably justified in a free and democratic society." The conditions of *The Oakes Test* are that the law infringing a charter right must have an objective that is "pressing and substantial" and the infringement must be "rationally connected to that objective," minimally impair the right in question, and be proportionate to its objective.[88] *The Oakes Test* makes it so that when it is

[87] Canadian Charter of Rights and Freedoms, section 1.
[88] R. *v.* Oakes, [1986] 1 S.C.R. 103

underdetermined whether a rights infringement is permissible under section one of the Charter, judges will decide in such a way that protects citizens as much as possible. Thus, at least in Canada, the underdetermination of the meaning of a constitutional promise is treated as grounds for siding with the understanding of the promisee.

The treatment of "freedom of religion" by the Supreme Court of Canada highlights their belief that when the meaning of a constitutional promise is underdetermined, the promisee (the citizen) deserves the benefit of the doubt. In *R v. Big M Drug Mart Ltd.*, the Supreme Court of Canada maintained that the interpretation of freedom of religion "should be a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter's* protection."[89] In *Multani v. Commission scolaire Marguerite-Bourgeoys*, the Supreme Court of Canada had to determine whether prohibiting Gurbaj Singh from wearing a kirpan (a religious symbol worn by Sikh people that resembles a dagger) in school violated his freedom of religion. Though the court recognizes the capacity for the kirpan to be used as a weapon, they ruled that "[i]n order to demonstrate an infringement of his freedom of religion, Gurbaj Singh does not have to establish that the kirpan is not a weapon. He need only show that his personal and subjective belief in the religious significance of the

[89] R. *v.* Big M Drug Mart Ltd., [1985] 1 S.C.R. 295. Par. 117.

kirpan is sincere."[90] In these two cases, the Supreme Court of Canada aims at a broad construal of the freedom of religion. It is a construal that sets a low bar for a citizen to demonstrate that their freedom of religion has been violated. These cases serve as evidence that when the meaning of a constitutional promise is unclear or underdetermined, preference is given to the promisee.

This set of cases does not exhaustively show the many ways in which the promise between my mother and I might play out. It does show what occurs in the core cases of concern. The true meaning of my promise's terms *informs* the negotiation of what my promise demands of me. But it is not "the truth," and nothing but the truth, that we are after. Rather, we are after a shared understanding of my promise that is informed by new scientific knowledge, that treats like cases alike, and that considers my capacities as a care provider. When we cannot come to a shared understanding, we defer to an adjudicator and treat that adjudicator's decisions as binding on our future conduct. Through this process, it is hoped, we can incrementally do away with the vagueness surrounding what I owe.

The Necessity of Negotiation

[90] Multani *v.* Commission scolaire Marguerite-Bourgeoys, [2006] 1 S.C.R. 256, 2006 SCC 6. Par. 37.

I have so far provided an account of promissory interpretation that begins to address the worries that come with vague promises. I wish to argue, however, that an interpretive account of this kind is *necessary* given the nature of vague promises. The precise features of my interpretive account are perhaps unnecessary products of the nature of vague promises. There are general features, though, that I argue must be present in a theory of the interpretation of vague promises. These features are (1) an acknowledgement that what the promisor owes depends upon considerations beyond the promisor's or the promisee's understandings of their promise, (2) an acknowledgement of the need for agreement between promisor and promisee on their promise's meaning, and (3) an acknowledgement that, where agreement is not possible, an adjudicator is needed for authoritative settlement of their promise's meaning.[91] Together, these features make it necessary that promisor and promisee negotiate an understanding of their promise as time goes on. What are valid inputs to this negotiation process might vary between interpretive theories. But, necessarily, promisor and promisee must negotiate the meaning of their promise in light of changing circumstances.

It is important that the meaning of a promise is settled – at least on a case-by-case basis. The promisor must know, in a given circumstance, what they must do to satisfy their promissory obligation. The promisee, similarly, must know, in a

[91] (3) is necessary only if promisor and promisee wish to sustain their promise. Deep disagreement might lead promisor and promisee to disband their promise altogether.

given circumstance, what to expect from the promisor. So, as cases that might be covered by the terms of a promise arise, it is important that promisor and promisee come to a settlement about what is required. The importance of settlement grounds the need for agreement between promisor and promisee. As a result, promissory meaning cannot be wholly dependent on considerations outside of the promisor's or promisee's understandings. The importance of settlement also grounds the need for an adjudicator to authoritatively settle the meaning of a promise when disagreement between promisor and promisee is irreconcilable. In a sense, an adjudicator forces a point of agreement between promisor and promisee. Though it is important that promisor and promisee agree on the meaning of their promise, agreement is insufficient to settle promissory meaning. Promisor and promisee cannot agree for just any reason; they must agree for the *right* reasons. If I were to malevolently manipulate my mother into agreeing with my incorrect conception of health, then it would be wrong to say that my conception is the conception that should be in use in the interpretation of my promise. If my mother and I agree about what my promise should mean, then that meaning *is* the meaning of my promise *only if* we came to that agreement through an honest process of negotiation. What counts as "honest negotiation" is up for debate. Certainly, honest negotiation does not include manipulation. I have argued that it must include consideration of the promisor's capacities, conflicting obligations, moral reasoning, scientific research, etc. Others might disagree. But it is clear that honest negotiation is required. All

of this is to say that the aforementioned three conditions are individually necessary, but not individually sufficient, for an adequate theory of the interpretation of vague promises.

Constitution as Promise and Living Constitutionalism

If vague promises ought to be interpreted in a modest, incremental way, what does this suggest for the interpretation of constitutional promises? I argue that it suggests a living constitutionalist approach. To see that this is so, I believe it is best to explore a debate about the value of constitutional charters or bills of rights between Jeremy Waldron and Wil Waluchow. In this debate, Waldron argues that entrenched charters undermine democracy. Waluchow responds to Waldron, arguing that if we view charters (and constitutions generally) as *living trees*, then we can avoid Waldron's worries. Though their debate seems to address a question distinct from the realm of interpretation – a question of whether charters are *valuable* – they illuminate an important distinction in how one might view constitutional promises. Waldron takes a position which, I will argue, incorrectly treats vague constitutional promises as forming mostly fixed obligations at the outset of their utterance. Waluchow, on the other hand, correctly treats vague constitutional promises as they should be treated: modest commitments to abstract

terms[92] the demands of which we could only learn through a humble, case-by-case consideration of what is owed. Living constitutionalism, then, is sensitive to the nature of constitutions as vague promises. If the above analysis of vague promises is correct, then living constitutionalism is entailed by constitutions' promissory nature. *Constitution as promise* then provides a new defense of living constitutionalism. Defenses of living constitutionalism such as Waluchow's and others' have been normative; they have shown that we should view constitutions as living trees and that judges should interpret them accordingly. *Constitution as promise* provides descriptive-explanatory support to these arguments; it shows that living constitutionalism is most compatible with constitutions' promissory nature.

Waldron's Critique of Charters

Waldron's distaste for entrenched, written charters derives, in part, from the fact that there is deep disagreement about which rights ought to be present in them and what protection of those rights should look like in practice. Since we cannot agree on which rights are fundamental and what those rights look like, Waldron asks, why should we bind ourselves and future generations to a set of terms which are more difficult to change than other sorts of law? Waldron argues that we should not do so. It is undemocratic to bind citizens to a set of terms which they cannot

[92] Recall that by "terms" I mean the abstract object of the vague promise. The terms of a promise could be conformity with a principle, value, course of action etc.

agree are fundamental.[93] It is especially undemocratic to do so when the alteration of these terms requires going beyond regular democratic channels.[94] If a citizen wished to participate in the determination of the terms present in their community's constitutional commitments, they would have to rally far more support than they would to change regular laws. For a matter as important as a community's core commitments, this inaccessibility is unacceptable. Even if the community could agree on which terms ought to be present in constitutions, says Waldron, we would still have disagreement about how these terms should be conceived. And if the community agreed on the conception of their terms, they would still be bound to the conception judges have given them; judges are authorized to interpret constitutions, not the people (or the people through their democratically elected representatives).[95] Finally, if all this disagreement were not a problem, there would still be an issue in having the commitments of past generations bind the actions of future generations. It is undemocratic for today's population to be bound to the commitments of past generations.[96] Put simply, Waldron argues that across people and across time there is too much disagreement about constitutional terms to justify the existence of entrenched written charters.

[93] Jeremy Waldron, "A Right-Based Critique of Constitutional Rights," 276-280.
[94] Ibid., 280-284.
[95] Ibid., 280-284.
[96] Ibid., 284-286.

Waldron's argument is a critique of traditional views of charters as akin to Ulysses' mast in Homer's *Odyssey*. Ulysses undertakes a sailing journey in which he knows he will be tempted by sirens. To avoid their temptation, he orders his shipmates to fill their ears with wax and to tie him to the mast. That way, when the sirens sing their tempting song, the shipmates cannot hear it and Ulysses cannot act on it. The traditional view of Charters, according to Waldron, sees charters as Ulysses' mast: fixed points of agreement and pre-commitment that ensure we do not stray from our deepest values in times where we might be tempted to do so.[97] Waldron rejects this view of charters. To Waldron, people disagree so deeply about charter terms that they could not possibly be said to be binding themselves to a fixed mast. People are not *binding themselves* to a mast of their own agreements and pre-commitments. Rather, they are *being bound* to a mast of the pre-commitments of a subset of the population – past or present – and to the interpretations of these pre-commitments by a group of elite judges. The Ulysses metaphor, argues Waldron, is plainly a wrong (and even idiotic) characterization of charters.[98]

Waluchow's Living Tree Conception of Charters

[97] Jeremy Waldron, "Precommitment and Disagreement." 276.
[98] Ibid., 281-283.

Wil Waluchow responds to Waldron, arguing that his characterization of the Ulysses metaphor and the depth of disagreement about charter terms is incorrect. Waluchow explains that if we view charters as living trees, we see that they represent *modest* pre-commitment and humility about the terms they invoke. The people are in modest agreement that the rights contained within charters are rights that we ought to protect. But they disagree about the extension of these rights.[99] Charters commit the people – not to a specific conception of the rights they contain – but to a process of determining the scope of these rights on a case-by-case basis. So, for Waluchow, charters are like Ulysses being tied to the mast. But the mast is not a *fixed* point of agreement and pre-commitment; it is a *modest* and *flexible* point of agreement and pre-commitment. Like a living tree, it has roots in the firm recognition of certain terms as having central importance to the community. From these roots, these terms take shape, branching out to cover a variety of cases, many of which could not have been anticipated when the tree was planted.[100] The many ways the tree branches out constrains how it may grow in the future. If a branch has grown in one direction, it cannot – without great effort – turn back. Thus, over time, the fixity of the agreements and pre-commitments increases.

[99] Wil Waluchow, "Constitutions as Living Trees: An Idiot Defends," 302-305.
[100] Ibid., 305-306.

Let us explore further what Waluchow's living tree constitutionalism means for the nature of charters and how they ought to be interpreted. Charter terms are modest points of agreement and pre-commitment. This means that their scope is to a very large extent indeterminate when they are first created.[101] The plain meaning of Charter terms will clearly prohibit a determinate set of actions. But this set is relatively small. When new cases arise that seem to fall under a charter term, government and citizen make their arguments for which understanding is best. Judges are then tasked with determining which argument (or neither) best fits the conception of the term given in past cases. If new moral and/or scientific knowledge suggests that past conceptions are inadequate, judges may have to exercise their discretion as to which conception should be in force. Judges may also need to exercise discretion when past cases suggest no best answer to a legal question. As time passes and more cases are decided under a given charter term, that term increases in specificity.[102] As a result, there is a reduction in the ambiguity of what that charter term requires, and the commitments of the community become more solid. For Waluchow, judges are in search of what he calls "the community's constitutional morality." The community's constitutional morality is the set of true moral commitments held by a constitutional community, evidenced by their actions. So, judges are not in search of what, as a matter of moral truth, a constitutional

[101] Ibid., 299-302.
[102] Wil Waluchow, *A Common Law Theory of Judicial Review: The Living Tree*, 203-208.

provision demands. Rather, they are in search of the fundamental commitments of the community in their jurisdiction. In other words, they are in search, not of the true meaning of terms, but of the terms and understanding to which the community is truly committed.[103]

Since the demands of charter terms are determined on a case-by-case basis, constitutional law is receptive to the changing understandings of the people. Thus, Waluchow avoids Waldron's democratic criticisms. At the same time, the increasing specificity of charter terms allows Waluchow's theory to serve the constitutional value of stability. Waluchow's theory cannot be explained in full here. It is sufficient to say, however, that his approach to constitutional interpretation is one that seeks to balance the need for stability and flexibility through restrained development as moral understandings of a constitutional community change over time.

If we view the Waldron-Waluchow debate through the lens of *constitution as promise*, we gain insight into the source of their disagreement. Waldron rightly identifies that traditional views of Charters treat constitutional promises as definite: they are meant to establish "fixed points of agreement and pre-commitment." This means that, at their utterance, what they demand is supposed to be fixed. There are some definite constitutional promises. For example, definite constitutional

[103] Ibid., 224-230.

promises will be those that set term limits for prime ministers and presidents. But, as has been discussed, it is vague constitutional promises and not definite constitutional promises that are of concern to the question of interpretation. These are the promises that guarantee the right to life, liberty, and security, for example. Waldron recognizes that constitutional promises are not definite; they are vague – and people disagree greatly about what vague promises require. But Waldron draws the wrong conclusion from the fact that constitutional promises are not definite. He argues that they fail to live up to their aspiration as fixed points of agreement and pre-commitment. Since charters fail to live up to their aspirations, says Waldron, we should reject entrenched, written charters. Waldron's mistake, then, is to conclude that since charters cannot be fixed points of agreement and pre-commitment, we have good reason to reject them altogether. What he should have concluded, instead, was that as vague promises, charters invite an interpretive methodology that, through its receptiveness to changing circumstances and its pursuit of agreement, is decidedly democratic.

To be clear, it is not that Waldron misunderstands the nature of vague promises. In fact, when discussing vague law in his "Vagueness and the Guidance of Action", Waldron advocates for an interpretive method that complements the method I have proposed for vague promises. Waldron explains that open-ended standards in the law invoke people's capacity for practical deliberation in structured

and unstructured ways.[104] So, for Waldron, the vagueness of a law is an invitation to deliberate about what actions the law's vague terms might cover. In vague promises, I argue that the vagueness of a promise's content is an invitation for promisor and promisee to deliberate about what the vague content might cover. Waldron's mistake, then, is not in his evaluation of the demands of vague law. Rather it is in his failure to identify charters as opportunities for a constitutional community to engage in structured and unstructured practical deliberation about what conduct is covered by their fundamental, though vague, commitments.

Waluchow does not make the same mistake. He recognizes that charters are sets of vague commitments to abstract terms the full extension of which we cannot know at the time of their enactment. Rather than committing us to a fixed set of determinate actions, Waluchow argues that charters commit us to a very limited number of determinate actions, together with an incremental consideration of what the charter's abstract ideals mean to us. Government and citizen must negotiate, with the mediation and adjudication of judges, the contours and requirements of their promissory relationship. Waluchow does not view the vagueness of constitutional commitments and the disagreement they produce as evidence that charters fail to live up to their aspiration of fixity. Instead, he views this vagueness as evidence that charters aspire to a balance of fixity and flexibility.

[104] Waldron, Jeremy. 2011. "Vagueness and the Guidance of Action," 8.

Charters aspire to fixity through a firm commitment to the abstract values and principles enumerated within them; they aspire to flexibility through an ongoing effort to determine the precise demands of these values and principles; and they aspire again to fixity through a commitment to precedent. Thus, the Ulysses metaphor is preserved.

There is good reason to think that Waluchow supports *constitution as promise.* In his *A Common Law Theory of Judicial Review: The Living Tree*, Waluchow writes: "Charters represent a potent, publicly accessible means for helping to establish the identity of the community and for solidifying its *promise* to each of its members – especially its minority members – that their rights count in fundamental ways."[105] There is a notable distinction between Waluchow's claim about constitutional promises here and the similar claims I have defended. Waluchow considers constitutional promises to be *from the community to each of its members*. I have said that constitutional promises are *from the government to the citizens.* This distinction is collapsible if we recognize the government as a representative of the community; constitutional promises are promises from the community, *via the government*, to each of its members. So, Waluchow's view is significantly compatible with the view of constitutions I have sought to defend. Constitutions contain promises that are, on one hand, publicly accessible to signal

[105] Wil Waluchow, *A Common Law Theory of Judicial Review: The Living Tree*, 246. Emphasis added.

the community's commitment to its fundamental values and principles. On the other hand, in their vagueness, these promises signal a humility about the true extension of the values and principles they contain. There is a firmness to these commitments, given their status as supreme law. But this firmness manifests as an ongoing effort to give shape to these commitments. It does not, however, manifest as a fixed commitment to rigidly apply the outdated conceptions of constitutions' framers.

From this discussion of Waldron's and Waluchow's views of charters, we can see that *constitution as promise* is strongly in line with living constitutionalism. *Constitution as promise* views constitutions as living trees. Constitutions are promises to fulfil the demands of a set of vague terms. These promises form the roots of the tree. Constitutions are also promises to determine the scope of the demands of these vague terms through case-by-case consideration. This gives rise to the growth of the tree. Incrementally, the demands of constitutional promises can change. This change is restrained, however, by the need to make the interpretation of constitutional promises consistent with past interpretations.

Why Not the New Originalism?

Originalism comes in many forms. There is the "old" variety, which includes intentionalism and public meaning originalism. There are "new" versions of originalism, however, that place less emphasis on founding moments. These

new versions of originalism are quite varied in their approaches and justifications. So, I cannot give them full treatment here. Still, I will note some features found in accounts of new originalism so that we can investigate to what extent they are compatible with *constitution as promise*.

New originalists often emphasize the compatibility of originalism and living constitutionalism.[106] Some new originalists make a distinction between *constitutional interpretation* and *constitutional construction*. The former might involve a search for original understandings or public meanings. The latter, however, is a process of *constructing* a meaning of constitutional provisions when interpretation is impossible.[107] New originalists also recognize the legitimacy of precedent as a source of constitutional meaning. That is, when a precedent departs from original understandings, new originalists will often recognize that precedent's legitimacy. A different approach to broadening originalism has been advanced by Bruce Ackerman. Ackerman argues that, at least in the United States, the constitution has had multiple original moments. The American Constitution has undergone significant transformations at various points in its history without formal amendment. One such moment was during the Great Depression and the following New Deal era. These significant moments in United States history mark, for Ackerman, new original constitutional moments. So, fidelity to original

[106] See Jack Balkin, *Living Originalism*.
[107] See Randy Barnett, "An Originalism for Non-Originalists" and Keith Whittington "The New Originalism."

understandings involves interpretation according to the understanding at the time of the most recent transformation, not according only to the understandings at founding moments.[108]

Even living constitutionalists have stressed the parallels between the new originalism and living constitutionalism. For example, in Wil Waluchow's "The Living Tree," he argues that living constitutionalism – at least as practiced in Canada – is in line with many of the suggestions of new originalism. An originalism that restricts "original meaning to abstract meanings and intentions and allows for a healthy degree of adaptation and evolution via the process contemporary originalists call *constitutional construction*"[109] so closely echoes the practice of living constitutionalism that perhaps the distinction between the two should be forgotten.

So, why do I state that *constitution as promise* is compatible with living constitutionalism and not the new originalism? If it is true that there is no clear distinction between living constitutionalism and the new originalism, then *constitution as promise* is surely compatible with the new originalism. However, I am skeptical that the similarity between the positions runs deep. The new originalism still places emphasis on original moments. It recognizes the necessity of adaptability to changing circumstances. Still, it places a considerable amount of

[108] Bruce Ackerman, *We The People*, Chapter Six.
[109] Waluchow, "The Living Tree," 16.

importance on original moments. It does so for a number of reasons. Mainly, these reasons rely on the authority of original understandings. Living constitutionalism also emphasizes original moments. In the spirit of humility, living constitutionalism insists on fidelity to precedent and/or original understandings. Since we do not know the full moral extent of constitutional principles, we ought to evolve our application of them slowly. We must respect the wisdom of the past and eschew the hubris of the present. It is the difference in justification that makes living constitutionalism more closely compatible with *constitution as promise* than new originalism. *Constitution as promise* is essentially forward-looking. Vague promises suggest an ongoing effort between promisor and promisee to discover what their promise means, for them, and to adhere to its demands. Any restraint in this search is due to the implicit humility all vague promises possess. This restraint is not due, however, to a fidelity to one's original understanding of what their promise meant. If one realizes that their original understanding of their promise was wrong, they owe it little, if any, consideration. Originalism, whether new or old, suggests deference to original understandings *because* they are original. It is in this regard that originalism, of any sort, is incompatible with *constitution as promise*.

A final reason we might consider *constitution as promise* more compatible with living constitutionalism than new originalism is that constitutional promises are reissued with each new government that takes power. As we saw last chapter,

it is preferable to think of constitutional promises as being reissued with each passing generation rather than as in force across generations. That way, we do not have to explain how the promissory relationship between government and citizen today is the same as the promissory relationship between government and citizen hundreds of years ago. If constitutional promises are reissued in the way I have proposed, then there seems to be no reason to defer to original understandings. A reissued constitutional promise is between living governments and living citizens. The citizens do not have a right against a constitution's founders to the performance of constitutional promises; they have a right against the current government. So, the negotiation of constitutional promises' meaning should not involve the constitution's founders who are, in effect, no longer the promisor. Now, it is still the case that when current governments reissue constitutional promises they reissue the history of interpretations of those promises. Constitutional promises are not reissued in the sense that they start from scratch. So, it is possible that, in bringing along constitutional promises' interpretive histories that one brings an emphasis on original understandings. But doing so is not because the constitution's founders are still relevant members of the negotiation process. Rather, it is that present negotiators, for whatever reason, still value those founders' input.

Does Constitution as Promise Entail a Particular View of the Nature of Law?

I want to turn briefly to some criticisms that one might pose against *constitution as promise*. One might ask: if constitutional promises bind us to a process that requires, to some extent, the use of moral reasoning, does this mean that the law *is*, in part, what is moral? *Constitution as promise* suggests that – in some cases – what the law is depends on moral argument. The meaning of constitutional promises is not determined purely by source-based criteria. What the constitutional law *is* depends on what, as a matter of promissory morality, constitutional promises demand of governments. Certainly, this is a highly moralized theory. But we need not worry that constitutional law will depend on armchair moral reasoning. Constitutional promises must be rendered consistent with one another and with precedent. Furthermore, they must be made equally applicable to all people. So, the meaning of constitutional promises will not depend wholly on moral reasoning. Instead, their meaning will depend greatly on existent legal sources.

Legal systems need not have constitutions bearing abstract moral promises. So, it is not a necessity that the norms that are part of a legal system depend upon moral reasoning. If a legal system does contain abstract moral promises, then *constitution as promise* suggests that some measure of moral reasoning will be required to determine the norms of that system. If it does not, then *constitution as promise* is compatible with the law being wholly source-based. Moral reasoning is not necessary to interpret promises with dry, amoral conditions. *Constitution as*

promise then seems to support an inclusive positivist view of the law. What the law is *can* depend on moral reasoning; but it need not.

It is possible that exclusive positivism is compatible with *constitution as promise*. In cases where a constitution contains abstract moral promises, exclusive positivists will still maintain that the validity of a law is wholly source-based. Exclusive positivists like Joseph Raz argue that moral constitutional provisions ground a "directed power" in judges to invalidate laws.[110] For exclusive positivists, a law is valid until a judge exercises their directed power to invalidate it. A law's incompatibility with a moral constitutional provision is insufficient to deem it invalid; it must be invalidated by an authorized legal source. In short, a law is only invalid once it is treated that way by judges. For inclusive positivists, a law's incompatibility with a moral constitutional provision is sufficient to deem it invalid. A judge need not declare a law invalid for it to be so; judges discover that laws are invalid, they do not make them invalid. Though inclusive and exclusive positivists disagree about *when* a law becomes invalid, they can still agree on what grounds a law *should* become invalid. Inclusive and exclusive positivists can share in an interpretive theory; they can both support *constitution as promise*. An exclusive positivist will argue that when the interpretive methodology of *constitution as promise* shows that a law *legally ought* to be invalid, that law remains valid until

[110] Joseph Raz, "The Inner Logic of the Law" in Ethics in the Public Domain: Essays in the Morality of Law and Politics, rev. ed. (Oxford Clarendon Press, 1996), 1996), 242.

that it is invalidated by a judge or other legal official. An inclusive positivist will argue that when the interpretive methodology of *constitution as promise* shows that a law *legally ought* to be invalid, it *is*, in fact, invalid. *Constitution as promise*, then, does not seem to intervene significantly on the inclusive-exclusive positivist debate.

Though *constitution as promise* is compatible with exclusive positivism, I maintain that it is most compatible with inclusive positivism. I cannot advance a full-scale defense this claim here. I will note, however, one reason we should reject the exclusive positivist understanding of *constitution as promise*: inclusive positivism makes better sense of the extension of a promises terms to fit new circumstances. It will often happen that promisor and promisee realize, with confidence, that an unanticipated circumstance is covered by the terms of their promise. Following this realization, promisor and promisee will apply their promise to circumstances that they had not in the past. There are, it seems, three ways to conceptualize this occurrence. First, as the creation of a new promise. Second, as the modification of the terms of the promise. Third, as the correct application of an unchanged promise. As mentioned, on the inclusive positivist view, judges – at least for the most part – *discover* that a law is invalid. Applied to promises, promisor and promisee discover that their promise requires something other than they had thought. So, an inclusive positivist view would conceptualize the situation in the third way. On the exclusive positivist view, the status of a law's

validity does not change until official action is taken. The corollary of this view is that official action affects a change in the law. Extending the scope of a promise, on an exclusive positivist view, then, involves a change to the promise. So, an exclusive positivist view would conceptualize the situation in the first or second way.

There is good reason to think that the third way is the correct way to conceptualize an extension of the scope of a promise's terms. In my promise to my mother, when I realize that "care for one's health" involves new actions that I had not originally anticipated, I do not think I have to create a new promise or modify my existing promise in order to oblige myself to these new actions. For example, if my mother has a history of gall bladder trouble and I learn that cheeseburgers are too high in fat for those with a history of gall bladder trouble, then I realize that my promise demands I not give her cheeseburgers. I am not creating a new promise which incorporates the conditions that I not give her cheeseburgers nor am I changing the terms of my promise. Rather, I am discovering that my promise prohibited cheeseburgers all along. The same seems to be the case for constitutional promises. When new circumstances reveal that an action is clearly prohibited by the terms of a constitutional promise, it seems that prohibition of that action is required by the terms of the promise. To prohibit the action is to apply the promise as it is, not to create a new promise.

As mentioned, there will be many cases where the scope of a constitutional promise is underdetermined. In these cases, the views of inclusive and exclusive positivists are closely aligned. A constitutional promise could be underdetermined because the terms contained in it are equally served by two or more potential legal decisions. Or, it could be because the scope of those terms, when considered in tandem with the demands of precedent and compatibility of constitutional promises, does not provide a determinate legal answer. There is sometimes no "right answer" to what constitutional promises require. In such cases, judges must exercise discretion. When they do so, judges will create or change constitutional promises – and thus the law. But the mere extension of a promise's application to new criteria does not necessarily entail promise – or law – creation. When we understand constitutions as promises, we see that when moral reasoning is used, under the right parameters, to extend the law to cover a new case, we are not necessarily creating law. Often, it can reasonably be said that we are merely applying it. *Constitution as promise* recognizes that, when judges must exercise discretion, they are, in effect, creating law. However, it does not treat all expansions of the scope of constitutional promises as law creation. Where moral reasoning yields a clear "right answer" as to what a constitutional promise requires – even if this "right answer" is a new answer – judges are *applying* law. Where moral reasoning yields no clear "right answer" but an answer must nevertheless be given, judges are

creating law. Therefore, in the *constitution as promise* framework, moral reasoning is sometimes, but not always necessary to determine the norms of a legal system.

Conclusion

This chapter has sought to show that living constitutionalism is the interpretive theory most compatible with the promissory nature of constitutional charters of rights. It has argued that this is so because vague promises are commitments to engage in a case-by-case negotiation between promisor and promisee on the meaning of the terms of their promises. As vague promises, then, constitutions must also be interpreted case-by-case, incrementally determining the scope of a community's constitutional commitments.

I have noted that there may be varied accounts of what are valid inputs into this negotiation process. In my view, promisor and promisee must use moral reasoning, scientific research, a consideration of the promisor's capacities and purpose for making the promise, and a consideration of the compatibility of the many promises to which the promisor is bound. Others might contend that more or fewer inputs are required. It is important that such work is done. The promissory nature of constitutions puts judges in a difficult place. Since promissory meaning is not fixed and constitutional principles are often underdetermined, judges will often need to exercise discretion in determining the scope of constitutional promises. To be sure that they are doing so well, we need normative theories about

what are the valid inputs to judicial reasoning (or promissory interpretation). I suspect that, as a matter of law, what are valid inputs will differ from jurisdiction to jurisdiction. That is, the valid inputs of judicial reasoning may be determined by constitutional conventions. What these inputs *should* be, however, is open for exploration. It is not clear to what degree these inputs are determined by promissory morality. It is an issue for another time.

Conclusion and Next Steps

This project's aims have been twofold: (1) to establish the promissory nature of constitutions and (2) to determine what, as a result, we ought to do about constitutional interpretation. First, I argued that constitutions are promises from a political superior to a political inferior. I defended this claim on the grounds that a promissory model of constitutions its descriptively and analytically justified. Thinking of constitutions as promises helps to explain the constitutional relationship between government and citizen and the mediating/adjudicating role of judges. Furthermore, constitutions are expressed in utterances that meet the analytic criteria to be a promise on a Searlean account. Second, I argued that the morality that governs constitutionalism is the same morality that governs promising. To defend this claim, I looked to the philosophy of contract law in which there are disputes about the promissory nature of contracts. I concluded that, while contracts may not be promises, constitutions surely are. Finally, I addressed the interpretive consequences of the promissory nature of constitutions. The first consequence was a negative one: that constitutions ought not be interpreted solely in accordance with the intentions of their framers or the understandings of their first recipients. The second consequence was a positive one: that constitutions ought to be interpreted in a living constitutionalist manner. Constitutions are vague promises. As vague promises, they ought to be interpreted in a way that balances the interests of both promisor and promisee. To do so, I have argued that their

interpretation must proceed on a case-by-case basis, through negotiation between promisor and promisee. Where negotiation fails, an adjudicator is necessary.

I have left much to be completed in this interpretive theory. What is needed is a theory that provides concrete parameters for the proper negotiation of promissory obligation. For now, *constitution as promise* serves as a defense of a methodology of constitutional interpretation. It is valuable, I submit, because it shows that it is in the nature of constitutions as promises to be interpreted in a living constitutionalist manner. Rather than arguing, as other interpretive theories do, that authority or justification or the nature of interpretation indicate the supremacy of one interpretive methodology, this theory begins with the nature of constitutional norms. As such, its conclusion is one of necessity, not desirability.

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