

# LIQUIDATION OF CONSTITUTIONAL MEANING THROUGH USE

PAUL G. REAM†

*All new laws . . . are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications.*

—James Madison<sup>1</sup>

*For a large class of cases—though not for all—in which we employ the word “meaning” it can be defined thus: the meaning of a word is its use in the language.*

—Ludwig Wittgenstein<sup>2</sup>

## ABSTRACT

*In recent years, constitutional scholars have engaged in dialogue over the validity of looking to historical and social practice to determine what the Constitution means. Part of this debate has focused on the idea of “liquidation,” suggested by James Madison in Federalist 37 and other writings as a means by which the text of the Constitution might take on additional meaning after the ink had dried. Constitutional decisionmakers, both on the Supreme Court and in the executive branch, have found recent occasion to consider the importance of past practice when deciding what our founding document means now.*

*This Note clarifies the idea of liquidation and explores what it might offer us as an interpretive tool. To do so, it sets up two lines of inquiry, one historical and the other theoretical. Ultimately, I hope to demonstrate that Madison’s idea of liquidation, revealed through historical evidence, is conceptually quite similar to the way twentieth-*

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1. THE FEDERALIST NO. 37, at 261 (James Madison) (The Floating Press 2011).
2. LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS § 43 (G.E.M. Anscombe trans., Blackwell Publishers 2d ed. 1997) [hereinafter WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS] (emphasis omitted).

*century linguistic philosopher Ludwig Wittgenstein suggests that language—be it constitutional text or modern speech—acquires meaning. Wittgenstein’s suggestion that meaning comes from use illuminates and fills in a theoretical structure behind what Madison meant when writing about liquidation.*

*By using the tools of history and philosophy, this Note combines two interpretive modalities in service of strengthening the legitimacy of scholarly and judicial recognition of the robust role that practice plays in our decisions about what the Constitution means. Examining the Madisonian concept of liquidation through Wittgenstein’s ideas about language provides useful reinforcement to the idea that what we do “can inform our determination of ‘what the law is.’”*

### INTRODUCTION

In *NLRB v. Noel Canning*,<sup>3</sup> the Supreme Court presented perhaps its clearest examination of the role and authority of historical practice in constitutional interpretation. Writing for the majority, Justice Breyer leaned heavily on longstanding executive-branch practice to support the Court’s conclusions about the scope of the Recess Appointments Clause.<sup>4</sup> The Court unanimously concluded that the appointments in question, made by President Obama during a short three-day gap between pro forma sessions of the Senate, fell outside the scope of the President’s powers under the Recess Appointments Clause.<sup>5</sup> However, the fractured reasoning among the Justices revealed a deeper divide over the question of the proper role of practice in determining the meaning of the Constitution’s text.

The majority adopted a broad view of the value of historical practice in constitutional interpretation, suggesting that constitutional constructions, even modern ones, sustained for a significant period of time should carry interpretive weight based simply on use, acceptance, and acquiescence.<sup>6</sup> In contrast, Justice Scalia, concurring only in the judgment, cautioned against assigning independent interpretive value to practice, arguing that only practices “unchallenged since the early

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3. *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014).

4. *See id.* at 2559 (“[I]n interpreting the Clause, we put significant weight upon historical practice.” (emphasis omitted)).

5. *Id.* at 2578.

6. *See id.* at 2560 (“[T]his Court has treated practice as an important interpretive factor even when the nature or longevity of that practice is subject to dispute, and even when that practice began after the founding era.”).

days of the Republic” should aid interpretation, and only when the Constitution’s text is ambiguous.<sup>7</sup>

Not only did the majority point to a long list of precedents to support its view,<sup>8</sup> but it also invoked the rarely cited concept of “liquidation” of constitutional meaning through “a regular course of practice”<sup>9</sup> suggested by James Madison in *Federalist 37* and later writings.<sup>10</sup> Justice Breyer, writing for the majority, assimilated Madison’s idea of liquidation into the Court’s jurisprudence supporting the interpretive value of historical practice and gloss.<sup>11</sup> However, much of the relatively limited academic literature on liquidation situates the concept closer to Justice Scalia’s idea that practice is only useful to the extent it was adopted soon after the Founding as a reflection of an original understanding of how constitutional ambiguities should be “fixed” and resolved.<sup>12</sup> But other scholars take a view closer to that of the Court’s in *Noel Canning*, which suggests that Madison saw practices

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7. *Id.* at 2594 (Scalia, J., concurring).

8. *Id.* at 2560 (majority opinion).

9. Justice Breyer, writing for the majority, noted:

But it is equally true that the longstanding “practice of the government” can inform our determination of “what the law is.” That principle is neither new nor controversial. As James Madison wrote, it “was foreseen at the birth of the Constitution, that difficulties and differences of opinion might occasionally arise in expounding terms & phrases necessarily used in such a charter . . . and that it might require a regular course of practice to liquidate & settle the meaning of some of them.”

*Id.* (citations omitted).

10. See THE FEDERALIST NO. 37 (James Madison), *supra* note 1, at 261 (“All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications.”); see also Letter from James Madison to Spencer Roane (Sept. 2, 1819), *reprinted in* THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 456, 460 (Marvin Meyers ed., 1973) (explaining that difficulties in expounding the terms and phrases of the Constitution “might require a regular course of practice to liquidate & settle the meaning of some of them”).

11. See *Noel Canning*, 134 S. Ct. at 2560 (“And our cases have continually confirmed Madison’s view.”).

12. See, e.g., William Baude, *Rethinking the Federal Eminent Domain Power*, 122 YALE L.J. 1738, 1811 (2013) (“[P]ost-ratification practice can serve to give concrete meaning to a constitutional provision even if it was vague as an original matter.”); Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 535 (2003) [hereinafter Nelson, *Originalism*] (“Although Madison conceded that the words used in the Constitution might well fall out of favor or acquire new shades of meaning in later usage, he was suggesting that their meaning in the Constitution would not change; once that meaning was ‘fixed,’ it should endure.”); Stephen E. Sachs, *The “Unwritten Constitution” and Unwritten Law*, 2013 U. ILL. L. REV. 1797, 1807 (“[W]e may well have to look to early practice to see which questions have already been liquidated, and which were left open for us to decide.”).

as valid constitutional constructions through acceptance over time by the constitutive community.<sup>13</sup>

Of course, constitutional argumentation grounded in practice is not limited to judicial or scholarly endeavors—rather, it is frequently the way governmental actors make and legitimize decisions regarding the constitutionality of their own actions. In particular, executive-branch lawyers in the Office of Legal Counsel (OLC) rely heavily on this type of reasoning, though not without the same debates over scope. OLC has adopted positions reflecting the broader view of accepted practice throughout American history as well as the narrower view of early post-Founding practices as persuasive evidence of constitutional meaning.<sup>14</sup>

Given the current disagreements about whether and to what extent “a regular course of practice” can legitimize constitutional interpretations, this Note attempts to clarify the historical and theoretical content of the Madisonian concept of liquidation. Madison’s letters and writings show that Madison changed his views on what liquidation might entail in the time between writing *Federalist 37* in 1788<sup>15</sup> and his death in 1836. Influenced by the ongoing need to respond to constitutional ambiguity in the early Republic, Madison began to understand the idea of liquidation less as a means of fixing meaning once and for all and more as an ongoing process of discussion, argumentation, and collective judgment among interpretive communities of constitutional decisionmakers.

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13. See, e.g., Curtis A. Bradley & Neil S. Siegel, *After Recess: Historical Practice, Textual Ambiguity, and Constitutional Adverse Possession*, 2014 SUP. CT. REV. 1, 41 (“The idea of fixation through long-standing acceptance of a practice, however, is fully consistent with a historical gloss approach to constitutional interpretation.”).

14. Compare *The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124, 173 (1996) (“We note that the historical lineage of, and long-standing acquiescence of the Presidents in, these legislative agencies and most of their activities are important to our conclusion that those activities are constitutionally permissible . . .”), with *Officers of the United States Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 1, 24–25 (2007) (noting that “[e]arly American practice and precedent . . . strongly support[s] and illuminate[s] [constitutional] understanding” and “reflects an early consensus of . . . constitutionality”).

15. *Federalist 37*, published on January 11, 1788 in the *Daily Advertiser*, was titled “Concerning the Difficulties of the Convention in Devising a Proper Form of Government.” As described below, *infra* Part I.A, one main goal of the editorial was to explain the challenges presented by the indeterminacy of language in the Framers’ attempts to define the contours of the new government. See generally THE FEDERALIST NO. 37 (James Madison), *supra* note 1 (describing several sources for the vagueness in the Constitution’s language).

This historical conclusion invites comparison with late twentieth-century legal theory based on the thinking of linguistic philosopher Ludwig Wittgenstein.<sup>16</sup> This Note argues that a central tenet of Wittgenstein's philosophy of language—that the meaning of a word can only be discerned through description of its use—calls for the same attention to historical practice and argumentation involved in Madison's idea of liquidation when applied to constitutional interpretation. Examining the Madisonian concept of liquidation through Wittgenstein's ideas about language provides useful reinforcement to the idea, suggested by the majority in *Noel Canning*, that what we do “can inform our determination of ‘what the law is.’”<sup>17</sup>

Part I of this Note provides background and context for Madison's discussion of liquidation in *Federalist 37* and reviews the dominant views advanced by scholars on the meaning of liquidation. Parts II and III detail how Madison's evolution in thinking about what liquidation entails parallels a shift in Wittgenstein's philosophical writings from his early suggestion that words have concrete referents to his more famous and groundbreaking notion that meaning is a function of usage. Part II first outlines this representational understanding of meaning in Madison's and Wittgenstein's early works. Part III then provides an explanation of Wittgenstein's later work and examines how Madison's views evolved over the course of the first decades of the Republic to embrace a view of liquidation more closely aligned with the notion that usage and practice could determine meaning, regardless of original intent.

## I. WHAT DOES LIQUIDATION MEAN?

The drafting and creation of the Constitution cannot be fully understood without understanding Madison.<sup>18</sup> For constitutional interpreters who seek an understanding of original meaning to guide

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16. For a comprehensive review of the application of Wittgenstein's ideas to law, see ANDREW HALPIN, *REASONING WITH LAW* 138–39 (2001). Though Wittgenstein did not write about law directly, many legal theorists have seized upon his writings on indeterminacy and interpretation of language to understand similar indeterminacies in law. In particular, Professor Halpin notes that legal theorists have used Wittgenstein to support “a jurisprudential concern for the truth of legal propositions based on the practice of legal argument.” *Id.* at 139.

17. *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2560 (2014) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

18. JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION*, at xvi (Vintage Books 1997) (1996) (“We simply cannot understand how or why the Constitution took the form it did unless we make sense of Madison.”).

modern-day adjudications, Madison is a central figure in such inquiries.<sup>19</sup> Madison is also an important figure for understanding the concept of liquidation because of his role as a constitutional decisionmaker in Congress and the executive branch. His experience interpreting the Constitution in the early decades of the Republic shaped the evolution of his understanding of liquidation, helping to unite theory and practice.

#### A. *Madison's Concept of Liquidation*

During the ratification period and no less today, the written text of the Constitution has been subject to critiques of its indeterminacy. Anti-Federalists, arguing against the adoption of the document, claimed that the often vague and ambiguous language of the Constitution would lead to interpretations vastly expanding the power of the national government over the states.<sup>20</sup> Madison, writing as Publius, conceded the observation that any written text would suffer from indeterminacy,<sup>21</sup> yet sought to assure his readers that subsequent interpretation of the text would proceed in a manner consistent with the principles and history behind the document. One such assurance can be summarized in the Madisonian concept of liquidation—or the resolution of indeterminacies through practice—a concept first used by Madison in *Federalist 37* and subsequently elaborated in his later writings.<sup>22</sup> Madison wrote, “All new laws, though penned with the

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19. Although the point is tangential to this Note, investigation of Madison's ideas here may alert originalists about “original” understandings of interpretation that are drastically different from their own. See H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 948 (1985) (concluding that “the claim or assumption that modern intentionalism was the original presupposition of American constitutional discourse” is “historically mistaken”).

20. See, e.g., *Cato, V.*, N.Y. J., Nov. 22, 1787, reprinted in *ESSAYS ON THE CONSTITUTION OF THE UNITED STATES, PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE 1787–1788*, at 265, 265–66 (Paul Leicester Ford ed., 1892) (warning that “inexplicitness seems to pervade this whole political fabric” and “certainty in political compacts . . . has ever been held by a wise and free people as essential to their security”). Madison, arguing against the first national bank in 1791, also worried that unbridled interpretive power by the legislature would result in a government by tyranny of the majority. See Richard S. Arnold, *How James Madison Interpreted the Constitution*, 72 N.Y.U. L. REV. 267, 275 (1997) (“If the [expansive] argument based on the Necessary and Proper Clause were accepted, [Madison] thought—and history has largely proved him right—there would be few limits on the national legislative power.”). But Madison later changed his view on the constitutionality of the bank. For further discussion, see *infra* Part III B.1.

21. See THE FEDERALIST NO. 37 (James Madison), *supra* note 1, at 261–62 (“Hence it must happen that however accurately objects may be discriminated in themselves, and however accurately the discrimination may be considered, the definition of them may be rendered inaccurate by the inaccuracy of the terms in which it is delivered.”).

22. For a discussion of Madison's later writings on the idea of liquidation, see *infra* Part III.B.

greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications.”<sup>23</sup>

One of Madison’s political purposes in writing *Federalist 37* was to evoke in his readers a sense of wonder and respect for the newly drafted founding document. As discussed below, there are formidable political, linguistic, and epistemological difficulties in agreeing on a written constitutional text.<sup>24</sup> Madison highlighted in detail the variety of obstacles to agreement on a constitutional text, providing insight into his perceptions of the Convention’s work and later interpretive difficulties to come.

Madison focused in particular on the problem of obscurity and equivocality in law, identifying three primary sources of this obscurity. First, Madison addressed the “obscurity arising from the complexity of objects,”<sup>25</sup> referring to the inherent difficulties of line drawing in legal decisionmaking and highlighting the unresolved and ongoing effort encapsulated in the Anglo-American common law tradition to address this difficulty. Second, Madison reflected on the “imperfection of human faculties”<sup>26</sup> to sharply perceive the boundaries between categories and objects. Here, Madison made reference to the scientific study of nature and humans’ inability to sharply delimit the categories of vegetables and animals—assuming, consistent with Enlightenment thinking, that such categories and boundaries in fact exist in the world.<sup>27</sup> Finally, Madison invoked the limits of the medium of language, noting the “fresh embarrassment” that “no language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many equivocally denoting different ideas.”<sup>28</sup>

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23. THE FEDERALIST NO. 37 (James Madison), *supra* note 1, at 261.

24. *See id.* at 263 (“The real wonder is that so many difficulties should have been surmounted, and surmounted with a unanimity almost as unprecedented as it must have been unexpected. It is impossible for any man of candor to reflect on this circumstance without partaking of the astonishment.”). *But see* Letter from James Madison to Edward Livingston (Apr. 17, 1824), in 9 WRITINGS OF JAMES MADISON 187, 189 (Gaillard Hunt ed., 1910) (“[I]t is fair to keep in mind that the authors [of the Federalist Papers] might be sometimes influenced by the zeal of advocates.”).

25. THE FEDERALIST NO. 37 (James Madison), *supra* note 1, at 261.

26. *Id.*

27. For further discussion of Locke and representational theories of meaning, see *infra* Part II.B.

28. THE FEDERALIST NO. 37 (James Madison), *supra* note 1, at 261.

Madison's uncontroversial point was that the Constitution's meaning could never be ascertained by simply reading the text of the document. His more controversial suggestion, the content of which has received a wide range of interpretation in the literature, was that meaning can be clarified through repeated "discussions and adjudications."<sup>29</sup>

*B. Debate Regarding the Meaning and Scope of Liquidation*

1. *Early Practice.* Several scholars have suggested a view of liquidation encompassing only "initial practice," limited to the discussions and adjudications during the time period immediately following the ratification.<sup>30</sup> According to this argument, liquidation did not suggest a "perpetually evolving meaning," but rather a permanent and immutable "fixing" of meaning.<sup>31</sup> Once the meaning of a constitutional provision had been liquidated, that meaning would be fixed going forward.

Similarly, others have drawn an analogy to the concept of liquidated damages to support the notion that what is "liquidated" is fixed and certain.<sup>32</sup> Although the now-antiquated definition of "liquidated" to mean "clarified" may hold true in both cases,<sup>33</sup> and putting aside the question of whether contract theory can be appropriately applied to the Constitution, the analogy fails in the sense that liquidated damages are agreed upon in advance and written down as part of the memorialization of a contract.<sup>34</sup> In contrast, liquidation in the Madisonian sense is a response to the ambiguities of written text.

2. *Historical Gloss.* "Historical gloss" describes an approach to constitutional interpretation that takes account of longstanding

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29. *Id.*

30. For further discussion of the argument that liquidation only encompasses "initial practice," see *supra* note 12 and accompanying text.

31. Nelson, *Originalism*, *supra* note 12, at 521.

32. See, e.g., Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 13 (2001) [hereinafter Nelson, *Stare Decisis*] ("Madison's idea of 'liquidation' is like modern notions of 'liquidated damages' . . .").

33. See *Liquidate*, OXFORD ENGLISH DICTIONARY 1012 (2d ed. 1989) (defining "liquidate" as "[t]o make clear or plain").

34. See Charles T. McCormick, *Liquidated Damages*, 17 VA. L. REV. 103, 122 (1930) (describing liquidated damages as a "device for settling damages in advance").

government practices to decide questions of separation of powers.<sup>35</sup> This approach is grounded in Justice Frankfurter’s widely cited remark in *Youngstown Sheet & Tube Co. v. Sawyer*<sup>36</sup> that “a systematic, unbroken, executive practice . . . may be treated as a gloss on ‘executive Power’ vested in the President.”<sup>37</sup> Professors Curtis Bradley and Neil Siegel concede the early-practice interpretation of liquidation as the leading one among academics and an arrow in the quill of originalists, but they contextualize Madison’s concept of liquidation to suggest it may more accurately align with modern notions of historical gloss.<sup>38</sup> If liquidation is similar to historical gloss, longstanding acceptance of practice—not fixation based on early post-Founding practice, even if subsequently disregarded—provides evidence of the “discussions and adjudications” Madison describes in *Federalist* 37.<sup>39</sup> Notably, this understanding of the constitutional relevance of historical practices begun after an early post-Founding period seems to best describe the Supreme Court’s reading of liquidation in *Noel Canning*.<sup>40</sup>

Constitutional historian Jack Rakove similarly reads Madison to suggest an “ongoing enterprise of resolving ‘obscure and equivocal’ ambiguities through ‘particular discussions and adjudications’—in a word, interpretation.”<sup>41</sup> Rakove distinguishes this process of resolving ambiguities from that of resolving errors, which can be corrected by the amendment process. The two, he writes, are united by a “want of antecedent experience” that could only be filled by knowledge acquired through practice.<sup>42</sup>

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35. See Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 417–24 (2012) (highlighting the prevalence of the historical-gloss argument).

36. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

37. *Id.* at 610–11 (Frankfurter, J., concurring).

38. Bradley & Siegel, *supra* note 13, at 41.

39. See THE FEDERALIST NO. 37 (James Madison), *supra* note 1, at 261 (stating that “[a]ll new laws” are “obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications”); see also Bradley & Siegel, *supra* note 13, at 32 (“Upon close examination, however, it is not clear that either of the two elements of the [early-practice] approach—looking only to initial practice and decisions, and disallowing a subsequent interpretation that contradicts the one reflected in initial practice—follows from Madison’s statements.”).

40. *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2560 (2014); see Bradley & Siegel, *supra* note 13, at 37 (“The majority in *Noel Canning* seemed to interpret some of Madison’s statements on liquidation as consistent with the historical gloss approach.”).

41. RAKOVE, *supra* note 18, at 159 (emphasis omitted).

42. *Id.*

3. *Common Law Methods of Interpretation.* Others have taken a slightly broader view of the idea of liquidation, suggesting that the concept indicates the Constitution ought to be interpreted in accord with the various methods and modalities of the common law tradition.<sup>43</sup> Thus understood, liquidation stands for the principle of looking to usage in historical practice and judicial precedent as valid evidence of the meaning of constitutional text.<sup>44</sup> Such an interpretation associates the idea of liquidation with a “living constitution” understanding, supported by evidence from Madison’s later writings.<sup>45</sup> This conception of liquidation deeply contrasts with one limited only to early practice.

4. *Irrelevance of Practice in Interpretation.* A less common position is that precedents and historical practice are “simply not conclusive of constitutional questions.”<sup>46</sup> Under this view, because Congress makes interpretations based on political considerations, its decisions should have no weight on a constitutional level.<sup>47</sup> And, some argue, Supreme Court decisions, if unconstitutional when decided, should not carry any authoritative weight in subsequent decisions.<sup>48</sup> This viewpoint leaves little room for any process of liquidation to legitimately construe the meaning of constitutional text, preferring instead to rely upon the more traditional tools of examining text and original intent.

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Scholars are divided on the questions of what Madison meant when writing about liquidation and what liquidation means for

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43. See Powell, *supra* note 19, at 917 (arguing from a historical perspective that many Framers “presented a clear picture of what the Constitution was and how it should be construed . . . that fit easily into the traditional interpretive wisdom of the common law”); David A. Strauss, *Foreword: Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 1, 4–5 (2015) (“[P]rovisions of the text of the Constitution are, to a first approximation, treated in more or less the same way as precedents in a common law system. The effect of constitutional provisions is not fixed at their adoption—or, for that matter, at any other time.”).

44. See Powell, *supra* note 19, at 939 (“Here, too, he was building on a traditional foundation: the common law had regarded usage as valid evidence of the meaning of ancient instruments, and had regarded judicial determinations of that meaning even more highly.”).

45. See DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 124 (2010) (“[I]n Madison’s view, the bank, which had originally been unconstitutional, became constitutional—because of the living Constitution.”).

46. See Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 GEO. L.J. 1113, 1169 (2003) (“[T]he Constitution is not best read by reference to subsequent practice.”).

47. *Id.* at 1171.

48. *Id.* at 1169.

constitutional interpretation. Because Madison proposed the idea of liquidation in response to the epistemological and communicative limits of the Constitution's language, this Note compares Madison's idea of liquidation with Wittgenstein's response to similar questions about the limits of language.

Although Wittgenstein was an Austrian-born and Cambridge-trained philosopher, his work became influential in late twentieth-century American legal and cultural theory.<sup>49</sup> Wittgenstein focused primarily on the task of clarifying our uses of language, suggesting that, instead of distilling across-the-board theories for determining what language means, we should investigate the uses of words to gain a clear understanding of their meanings.<sup>50</sup> This insight was deeply influential for disciplines immersed in questions of interpretation and meaning—linguistic philosophers,<sup>51</sup> cultural and literary critics,<sup>52</sup> and legal scholars seized upon Wittgenstein's approach to language. Writing in 1985, Professor James Boyle notes that legal thought was “slowly assimilating the post-Wittgensteinian view of language.”<sup>53</sup> Wittgenstein's main contribution—untethering words from any notion of essential or core meaning—worked alongside legal realism and deconstruction theory in literary criticism to provide the groundwork for critical legal studies theorists.<sup>54</sup>

Perhaps the single most influential piece of legal scholarship stemming from Wittgenstein's insights is Professor Philip Bobbitt's 1991 book, *Constitutional Interpretation*.<sup>55</sup> In the book, Bobbitt engages in a Wittgensteinian project of investigating the uses and practices of constitutional interpretation and outlines a basic syntax of six

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49. For details of Wittgenstein's life and influence, see generally Anat Biletzki & Anat Matar, *Ludwig Wittgenstein*, STANFORD ENCYCLOPEDIA OF PHIL., <https://plato.stanford.edu/archives/fall2016/entries/wittgenstein> [<https://perma.cc/L9FP-98J2>] (last updated July 22, 2016).

50. For further discussion, see *infra* Part III.A.

51. See generally J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* (1962) (arguing that a word's use exposes its meaning); JOHN R. SEARLE, *EXPRESSION AND MEANING: STUDIES IN THE THEORY OF SPEECH ACTS* (1979) (critiquing parts of Wittgenstein's later theories).

52. See generally JACQUES DERRIDA, *OF GRAMMATOLOGY* (Gayatri Spivak trans., 1976) (adopting a more expansive “deconstructive” view that is similar to later Wittgenstein); STANLEY FISH, *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* (Stanley Fish & Fredric Jameson eds., 1989) (arguing that “interpretive communities” give meaning to text).

53. James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685, 708 (1985).

54. *Id.* at 688.

55. PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* (1991).

modalities of constitutional argument.<sup>56</sup> Bobbitt's book prompted further significant contributions to legal thought based on Wittgenstein's ideas about linguistic meaning.<sup>57</sup>

I argue that Wittgenstein's ideas about linguistic meaning as use look very much like Madison's ideas about the public meaning of the Constitution. Both Madison and Wittgenstein would reject the formulation of a theory based on their views;<sup>58</sup> thus, this Note seeks only to assimilate their thinking based on shared fundamental questions, responses, and use in practice.

In fact, as Part II shows, Madison's personal views about the meaning of words likely tracked those of the empiricist tradition and would sharply contrast with Wittgenstein's later views. However, the experience of governing led Madison to clarify that liquidation of the meaning of the Constitution's text could occur through practice, use, and acquiescence among the people and those exercising sovereign power on their behalf<sup>59</sup>—and not by inquiring into the original intent or original understanding of the text on the presumption that such things in fact exist and need only to be uncovered. Parts II and III go on to highlight a similar transition in Wittgenstein's thinking over the course of his lifetime, from a “scientific,” logical view of the meaning of language to one that looks to usage to determine meaning. Part III concludes that, based on the way Madison described liquidation later in his lifetime, such a description in many ways reflects a Wittgensteinian understanding of how words and phrases acquire meaning.

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56. Dennis Patterson, *Wittgenstein and Constitutional Theory*, 72 TEX. L. REV. 1837, 1842–43 (1994) (“Although Wittgenstein rarely appears explicitly in Bobbitt's work, it has always been clear to philosophically inclined readers that Bobbitt's project is in considerable sympathy with Wittgenstein's.” (footnote omitted)).

57. See generally *Symposium on Philip Bobbitt's Constitutional Interpretation*, 72 TEX. L. REV. 1703 (1994) (discussing Bobbitt's contributions to constitutional interpretation).

58. See WITGENSTEIN, PHILOSOPHICAL INVESTIGATIONS, *supra* note 2, § 109 (“[W]e may not advance any kind of theory. There must not be anything hypothetical in our considerations. We must do away with all *explanation*, and description alone must take its place.”); Arnold, *supra* note 20, at 281 (“[O]ne of the reasons Madison did not publish his notes during his lifetime was that the notes would, or at any rate, *should* be given no authoritative character in resolving issues of constitutional interpretation.”).

59. For further discussion of Madison and interpretive communities, see *infra* notes 127–132 and accompanying text.

## II. REPRESENTATIONAL MEANING: PHILOSOPHICAL FOUNDATIONS OF LIQUIDATION AND EARLY WITTGENSTEIN

A survey of Madison's writings from the Founding through his forty years as a public figure reveals an important evolution in his thinking on how constitutional meaning takes shape. His earlier thinking reflects a theoretical view of textual meaning as "fixed" or "fixable," in the sense that words or phrases in the Constitution possessed a single, inherent meaning that existed beneath the vagueness and imprecision of language.<sup>60</sup> Similarly, Wittgenstein's early writings on language, which he later rejected, adopted this "representational" theory of meaning.<sup>61</sup>

The predominant scholarly reading of liquidation as the process of uncovering original meaning may be correct as to Madison's early thoughts about interpretation, but it is an incomplete account.<sup>62</sup> Some of Madison's later thinking indicates an important shift to a more practical view of meaning, recognized and "liquidated" through use and widespread agreement under Madison's broad conception of precedent.<sup>63</sup> As Part III shows, Wittgenstein's work underwent a similar shift to embrace a "use" theory of meaning.

### A. *Philosophy of Language and Legal Interpretation*

As a threshold matter, it is important to note the degree to which ideas about the meaning of language as a whole and language within a legal context may overlap. Although constitutional interpretation and philosophy of language are distinct practices, the tools offered by philosophers may help chip away at similar inquiries into constitutional meaning.<sup>64</sup> At a broad level, the relationship between meaning and

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60. For further inquiry into the likely theoretical underpinnings of *Federalist 37*, see *infra* Part II.B.

61. For further exploration of Wittgenstein's early writings, see *infra* Part II.C.

62. See, e.g., Nelson, *Originalism*, *supra* note 12, at 529 ("Madison thought that there could be no serious dispute about the relevance of post-enactment interpretations in settling the Constitution's meaning.").

63. See Arnold, *supra* note 20, at 290 (identifying Madison's mention of liquidation in *Federalist 37* as "the germ of the Madisonian concept of precedent"). For further discussion, see *infra* Part III.B.

64. See Joseph Blocher, *Nonsense and the Freedom of Speech: What Meaning Means for the First Amendment*, 63 DUKE L.J. 1423, 1458 (2014) ("[C]raftsmen in adjacent workshops can provide useful guidance."); see also Dennis M. Patterson, *Law's Pragmatism: Law as Practice & Narrative*, 76 VA. L. REV. 937, 973-74 (1990) ("One of the most prevalent metaphors in the later Wittgenstein is the idea that the use of words is comparable to the employment of tools to perform some task.").

language is an inseparable part of the practice of law, which relies on written and spoken language as the “vehicle of ideas”<sup>65</sup> for statutes, opinions, reasoning, and advocacy.<sup>66</sup> John Locke, who wrote extensively on linguistic theory, described language in terms of human sociability and community, which arguably constitute the premise underlying the creation of law as well.<sup>67</sup> Wittgenstein, at least, would seemingly welcome the interdisciplinary application of his ideas, as he considered philosophy to be an activity that required no specialized training or theoretical knowledge.<sup>68</sup>

Further, linguistic philosophy that seeks to clarify the meaning of language within an interpretive community bears significant resemblance to the American experiment in self-government, in which the principle of popular sovereignty broadens the constitutional “interpretive community” so that constitutional words are subject to the same usage, discussion, and need for shared understanding as any other word.<sup>69</sup> Of course, constitutional law requires definitive answers and finality, at least on a short-term and case-by-case basis. However, although the authority to make constitutional decisions is within the hands of a few, the ultimate authority in our system of government is the interpretive community itself, suggesting that inquiry into popular meaning of constitutional terms may be at least theoretically appropriate and that philosophical tools to explain meaning may offer useful guidance.<sup>70</sup>

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65. THE FEDERALIST NO. 37 (James Madison), *supra* note 1, at 262.

66. See Louis E. Wolcher, *How Legal Language Works*, 2 UNBOUND: HARV. J. LEGAL LEFT 91, 95 (2006) (“[T]his article conceives of linguistic rules (including methods for applying legal norms) as products of the history and practices of particular forms of life, and not as timeless and pure Ideas that are suspended somewhere ‘out there’ in the Platonic ether.”).

67. See 3 JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING 402 (Peter H. Nidditch ed., 1975) (describing language as “the great [i]nstrument, and common [t]ye of [s]ociety” to realize our “sociable” nature).

68. See Paul Horwich, *Was Wittgenstein Right?*, N.Y. TIMES: OPINIONATOR (Mar. 3, 2013, 8:00 PM), <http://opinionator.blogs.nytimes.com/2013/03/03/was-wittgenstein-right> [<https://perma.cc/79XV-TGV4>] (“Wittgenstein claims that there are no realms of phenomena whose study is the special business of a philosopher, and about which he or she should devise profound a priori theories and sophisticated supporting arguments.”).

69. For further discussion of the role of community acceptance in constitutional interpretation, see *infra* Part III.B.2.

70. See Paul G. Chevigny, *Philosophy of Language and Free Expression*, 55 N.Y.U. L. REV. 157, 162 (1980) (“If the lesson drawn from the philosophy of language is correct, that the meaning of statements within a system depends on formulating other aspects of the system through dialogue, then every such theory must allow for dialogue concerning its supporting propositions.”).

*B. Madison, Locke, and Representational Meaning*

Drawing a connection between Madison and Wittgenstein may seem odd at first glance, as the theoretical underpinning for Madison's thinking on language and epistemology in *Federalist 37* is quite different from the later works most often associated with Wittgenstein. Madison was, of course, well read in the writings of Locke, and the ideas he presents in *Federalist 37* seem to reflect a Lockean philosophy of language. If our reading of Madison and the concept of liquidation is confined only to a Lockean understanding of constitutional language, an interpretation of liquidation as the fixation of meaning through early practices seems correct.<sup>71</sup> But, if Madison's later indications that meaning can be found through usage square with Wittgenstein's later approach,<sup>72</sup> there is good reason to set aside the theoretical background of *Federalist 37* on the grounds that it is inconsistent with Madison's later thinking and, relatedly, it may be wrong as a matter of what meaning means.

Madison provided this groundwork on indeterminacy in language in *Federalist 37*:

The use of words is to express ideas. Perspicuity, therefore, requires not only that the ideas should be distinctly formed, but that they should be expressed by words distinctly and exclusively appropriated to them. But no language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many equivocally denoting different ideas. Hence it must happen that however accurately objects may be discriminated in themselves, and however accurately the discrimination may be considered, the definition of them may be rendered inaccurate by the inaccuracy of the terms in which it is delivered.<sup>73</sup>

Madison's description of the difficulties with the medium of language for determining meaning echoes Locke's discussion of the problems of language in book III of his *Essay Concerning Human Understanding*.<sup>74</sup>

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71. See Bradley & Siegel, *supra* note 13, at 32 (noting the prevailing academic account of liquidation to suggest evidence of constitutional meaning may be found in "early post-Founding deliberations or decisions").

72. For further discussion of Wittgenstein's later work, see *infra* Part III.A.

73. THE FEDERALIST NO. 37 (James Madison), *supra* note 1, at 261–62.

74. See Jack N. Rakove, *Joe the Ploughman Reads the Constitution, or, the Poverty of Public Meaning Originalism*, 48 SAN DIEGO L. REV. 575, 594 (2011) ("Madison was concisely distilling major elements of John Locke's discussion of language in Book III of the *Essay Concerning Human Understanding*. That radical criticism of the fallibility of language expressed by Locke continued to frame, even dominate, eighteenth-century discussions.").

Given how closely Madison's writing tracks Locke's, it seems reasonable to assume Madison generally agreed with Locke's assessment of language.<sup>75</sup>

Locke's ideas regarding linguistic theory are generally viewed as a representational theory of meaning.<sup>76</sup> Locke, and Madison for that matter, were both writing at a time when the dominant, and perhaps only, linguistic paradigm among Western thinkers simply assumed that words signified ideas and that the purpose of words was to express and uncover the mental object of the speaker.<sup>77</sup> Thus, Locke's and Madison's musings on the limits of language can be read as fears about the inadequacies of language to accurately convey precise underlying objects or ideas.<sup>78</sup> This preoccupation may be similar to Wittgenstein's in his early writings, but the later Wittgenstein makes a point that abandoning the representational model allows us to stop worrying about indeterminacies in language.<sup>79</sup>

Locke suggested that “[w]ords in their primary or immediate [s]ignification, stand for nothing, but the [i]deas in the [m]ind of him that uses them.”<sup>80</sup> Wittgenstein's early writings can be read similarly,<sup>81</sup>

75. Compare THE FEDERALIST NO. 37 (James Madison), *supra* note 1, at 262 (“When the Almighty himself condescends to address mankind in their own language, his meaning, luminous as it must be, is rendered dim and doubtful by the cloudy medium through which it is communicated.”), with LOCKE, *supra* note 67, at 490 (“Nor is it to be wondred, that the Will of GOD, when clothed in words, should be liable to that doubt and uncertainty, which unavoidably attends that sort of Conveyance . . .”).

76. See HANNAH DAWSON, LOCKE, LANGUAGE AND EARLY-MODERN PHILOSOPHY 3 (2007) (“Locke's linguistic theory has been flaunted and attacked as the exemplar of a representational model of language, whereby words stand in a representative relation to ideas and (perhaps, in some ways) to things.”). For further discussion, see *infra* Part II.C.

77. See DAWSON, *supra* note 76, at 2 (writing that, for Locke and his contemporaries, “[i]t was obvious . . . that meaning was primarily private” and that “[t]he entire point of words was to publicise ideas that would otherwise be hidden”).

78. See *id.* at 5 (“[T]he early-modern preoccupation with language originates from deep fears about the corruptible nature of words themselves—about their fragile relation to the concepts and things to which they were supposed to be fixed . . .”).

79. LUDWIG WITTGENSTEIN, THE BIG TYPESCRIPT: TS 213 (C. Grant Luckhardt & Maximilian A.E. Aue eds. & trans., 2005), as reprinted in THE WITTGENSTEIN READER 46, 51 (Anthony Kenny ed., 2d ed. 2006) [hereinafter WITTGENSTEIN, THE BIG TYPESCRIPT] (“The peculiarity of philosophical worry and its resolution might seem to be that it is like the anguish of an ascetic, groaning under the weight of a heavy sphere, until someone gives him relief by saying ‘let it drop’.”).

80. LOCKE, *supra* note 67, at 405 (emphasis omitted).

81. See Gregory S. Kavka, *Wittgensteinian Political Theory*, 26 STAN. L. REV. 1455, 1457 (1974) (book review) (explaining that Wittgenstein, in his first published work, *Tractatus Logico-Philosophicus*, “contends that the function of language is to model or picture the world”).

but his radically altered later views would suggest that words stand only for the way they are perceived or used in a “language-game.”<sup>82</sup>

Locke expressed a deep cynicism about obscurity in language and the possibility for perspicuity of words.<sup>83</sup> However, Locke’s preoccupation proved to be focused on the problem of bad interpretations of meaning arising from obscurity, not from the possibility that a single true meaning did not exist.<sup>84</sup> His critiques of the inadequacy of language to provide fixed meaning were insightful, yet they led to a doubling down on efforts by linguists and philosophers of language to seek fixity rather than wholesale abandonment of that ideal (as Wittgenstein might be read to have done).<sup>85</sup> Such efforts to “fix” language were likely part of the backdrop of repeated references to “fixing” by the Framers. For example, a contemporaneous publication of the French Academy expressed a desire to “no longer . . . depend on the caprice and the tyranny of Usage” if language could reach a “glorious point of immutability.”<sup>86</sup> Likewise, essayist Jonathan Swift hoped to “fix[] our Language for ever,”<sup>87</sup> and lexicographer Samuel Johnson undertook an effort to “fix the English language” by codifying it in his dictionary.<sup>88</sup>

Though Madison seems to have conceded the infeasibility of fixing language,<sup>89</sup> there are some indications in his writings that he thought

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82. See Wolcher, *supra* note 66, at 105 (noting that, under Wittgenstein’s later view, “it is obvious that the definition or interpretation ‘X’ means ‘Y’ would do us no good unless we already understood, in a pre-interpretive sort of way, how to use the sign ‘Y’”). For further discussion, see *infra* Part III.A.

83. DAWSON, *supra* note 76, at 214–15 (“The comparison of words with Christ’s *flesh* is shocking, indicating the depth of Locke’s cynicism about perspicuous words. They cannot be simply peeled away to reveal one true meaning beneath. They are integral to meaning. Or even, they are all we have.”).

84. See *id.* at 216 (“[Locke’s] concerns about endlessly re-interpretable words should be considered more in the context of an attack on *bad* interpreters.”).

85. See Jack Rakove, *Tone Deaf to the Past: More Qualms About Public Meaning Originalism*, 84 *FORDHAM L. REV.* 969, 976 (2015) (describing “Locke’s assault on the stability of linguistic meaning” as “radical” and suggesting it “inspired an eighteenth-century reaction that attempted to provide language with a degree of fixity”).

86. Nelson, *Originalism*, *supra* note 12, at 530–31 (quoting D. McClaren Robertson, *A HISTORY OF THE FRENCH ACADEMY* 240 (1910)).

87. *Id.* at 532 (quoting JONATHAN SWIFT, *A PROPOSAL FOR CORRECTING, IMPROVING, AND ASCERTAINING THE ENGLISH TONGUE* 31 (1712) (emphasis omitted)).

88. *Id.* at 533 (quoting SAMUEL JOHNSON, *THE PLAN OF A DICTIONARY OF THE ENGLISH LANGUAGE* 11 (1747)).

89. Letter from James Madison to Converse Sherman (Mar. 10, 1826), *reprinted in* 3 *LETTERS AND OTHER WRITINGS OF JAMES MADISON* 518, 519 (J.B. Lippincott ed., 1865) (“All

the idea of fixation ought to apply to the meaning of words in the Constitution.<sup>90</sup> Madison often made arguments about how the Constitution should be interpreted by making reference to the meaning of words and phrases at the time of the Founding.<sup>91</sup> However, ample evidence from Madison's discussions of interpretation suggests more nuance to this position.<sup>92</sup> Reading Madison to normatively endorse fixation of meaning fails to separate what his personal opinions and theoretical preferences were as opposed to his intimate perspective, from the presidency and public office, on how public meaning was legitimately taking shape in practice during the first decades of government under the Constitution.<sup>93</sup>

### C. *Early Wittgenstein*

Throughout his writings, Wittgenstein sought to address how the limits of language clouded and complicated the philosophical search for meaning.<sup>94</sup> For Wittgenstein, "all philosophical problems [were] ultimately problems of language."<sup>95</sup> Though he would change his approach to addressing these problems, Wittgenstein's concern focused on the difficulties presented by the logical positivist attempt to find meaning based on the relationship between words and objects in the world. His first attempt to address such problems in *Tractatus Logico-Philosophicus* sought to do so on logical positivist terms and concluded that language describing nonverifiable states of affairs was

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languages . . . are liable to changes . . . some of them inseparable from the nature of man and [sic] the progress of society.").

90. Nelson, *Originalism*, *supra* note 12, at 536 ("Other letters from Madison reflect the same view: 'The change which the meaning of words inadvertently undergoes' is a source of 'misconstructions of the Constitutional text,' . . ." (quoting Letter from James Madison to N.P. Trist (Mar. 2, 1827), in 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON, *supra* note 89, at 565, 565)).

91. *But see* Arnold, *supra* note 20, at 278 (speculating that Madison, while making arguments about interpretation in Congress, may have been "simply using the arguments he thought best suited to his position of the moment").

92. For further discussion of Madison's letters and writings on constitutional interpretation, see *infra* Part III.B.

93. See Powell, *supra* note 19, at 935 (explaining that Madison "would have been quick to distinguish his personal opinions from the public meaning of the Constitution").

94. See LUDWIG WITTGENSTEIN, TRACTATUS LOGICO-PHILOSOPHICUS (C.K. Ogden ed. & trans., 1922), as reprinted in THE WITTGENSTEIN READER, *supra* note 79, at 1, 23 [hereinafter WITTGENSTEIN, TRACTATUS LOGICO-PHILOSOPHICUS] ("*The limits of my language mean the limits of my world.*").

95. Patterson, *supra* note 64, at 938.

simply nonsense.<sup>96</sup> Madison, like Wittgenstein, worried about the problems of indeterminacy in language, noting that “meaning . . . is rendered dim and doubtful by the cloudy medium through which it is communicated.”<sup>97</sup> Ultimately, both sought to clarify and bring “perspicuity” to understanding meaning obscured by the limits of language.<sup>98</sup>

Wittgenstein’s work spans the doctrinal gap between two very different schools of thought among analytical philosophers about the meaning of language. The first is reflected in Wittgenstein’s early works and constitutes what has been called a “representational”<sup>99</sup> or “copy”<sup>100</sup> theory of meaning. This approach, perhaps most notably advanced by philosopher Bertrand Russell and other logical positivists, attempts to locate meaning in the relationship between language and things in the world, similar to Locke’s empiricist understanding of language.<sup>101</sup>

For these thinkers, logic was a “reflexion” of the world<sup>102</sup>—nature itself was inherently logical, and human thinkers needed only to refine their practices and capabilities of reasoning to uncover its perfect structure. Language, then, was the medium through which logical analysis took place, and statements were meaningful only as far as they referred to the physical world or some possibly verifiable state of affairs.<sup>103</sup> Under this view, “sense,” or the way we understand or

96. See WITTGENSTEIN, TRACTATUS LOGICO-PHILOSOPHICUS, *supra* note 94, at 1 (“The limit can, therefore, only be drawn in language and what lies on the other side of the limit will be simply nonsense.”).

97. THE FEDERALIST NO. 37 (James Madison), *supra* note 1, at 262.

98. Compare *id.* at 261 (“[T]he medium through which the conceptions of men are conveyed . . . adds a fresh embarrassment. The use of words is to express ideas. Perspicuity, therefore, requires not only that the ideas should be distinctly formed, but . . . expressed by words distinctly and exclusively appropriate to them.”), with WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS, *supra* note 2, § 122 (“A main source of our failure to understand is that we do not command a clear view of the use of our words.—Our grammar is lacking in this sort of perspicuity. . . . The concept of a perspicuous representation is of fundamental significance for us.”).

99. Blocher, *supra* note 64, at 1458.

100. Chevigny, *supra* note 70, at 163.

101. See, e.g., Bertrand Russell, *Knowledge by Acquaintance and Knowledge by Description*, 11 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY 108 (1911), as reprinted in BERTRAND RUSSELL, MYSTICISM AND LOGIC AND OTHER ESSAYS 209 (1918) (“I say that I am acquainted with an object when I have a direct cognitive relation to that object, i.e. when I am directly aware of the object itself.”).

102. See WITTGENSTEIN, TRACTATUS LOGICO-PHILOSOPHICUS, *supra* note 94, at 25 (“Logic is not a theory but a reflexion of the world.”).

103. See *id.* at 12 (“Propositions can be true or false only by being pictures of the reality.”).

connect a statement to its meaning, only obtains through some referent in the world, and any statement not analytically or empirically verifiable is nonsensical.<sup>104</sup>

Part III describes the significant shift in linguistic philosophy during the first part of the twentieth century from a “representational” meaning approach to a “use” meaning approach, much of which can be captured in an examination of the differences between the early and later work of Wittgenstein. Becoming familiar with Wittgenstein’s progression of thinking about the meaning of language may reveal similarities to Madison’s changing views about the meaning of constitutional language over the course of his lifetime.

### III. “USE” MEANING: LATER WITTGENSTEIN AND LIQUIDATION IN PRACTICE

After a long hiatus from scholarly pursuits, Wittgenstein returned to academia and radically changed his views, suggesting that efforts to unite thought, language, and the world in one logical form clouded understanding by creating “the mental mist which seems to enshroud our ordinary use of language.”<sup>105</sup> Seeking clarity, Wittgenstein pursued philosophical questions by providing a descriptive account of the use of language, giving rise to the second general school of thought in modern philosophy of language, often termed a “use”<sup>106</sup> or “discourse”<sup>107</sup> theory of meaning. This shift in Wittgenstein’s thinking likely resulted from his years spent teaching young children after leaving academia following the publication of his early ideas in the *Tractatus*. Wittgenstein may have realized that logical rigor and one-to-one representational meaning were ineffective tools for teaching children the meaning of words—rather, the effective way for children

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104. As articulated by logical positivist A.J. Ayer, the “verification principle” asserts that “every empirical hypothesis must be relevant to some actual, or possible, experience, so that a statement which is not relevant to any experience is not an empirical hypothesis, and accordingly has no factual content.” ALFRED JULES AYER, *LANGUAGE, TRUTH AND LOGIC* 41 (Dover Publications 1952).

105. LUDWIG WITTGENSTEIN, *THE BLUE AND BROWN BOOKS* 17–18 (Barnes & Noble 1969); see also RAY MONK, *HOW TO READ WITTGENSTEIN* 64 (2005) (including the “presupposition that there was a single ‘logical form’ shared by thought, language and the world, which a philosopher might uncover and reveal” among the “errors that characterize philosophy” identified by Wittgenstein in his later writings).

106. Blocher, *supra* note 64, at 1467–68.

107. Chevigny, *supra* note 70, at 164.

(and adults) to truly understand the meaning of a word was to point to experience and examples.<sup>108</sup>

### A. *Meaning as “Use”*

Wittgenstein’s later works played a large role in the development of “use” theory, often termed the “linguistic turn” of analytic philosophy during the twentieth century.<sup>109</sup> Wittgenstein’s later thought rejected the view that for language to be meaningful it must conform to the requirements of pure logic.<sup>110</sup> His conclusion from writing the *Tractatus* was, essentially, that very few things could be discussed or spoken about if language were to only present “a picture of the world.”<sup>111</sup> Lamenting his earlier inaccurate representation of the way language actually works, Wittgenstein radically shifted his epistemological views from a conception of knowledge based on connecting words with objects to knowledge as a product of understanding and clarifying language’s uses.<sup>112</sup> “For a large class of cases—though not for all—in which we employ the word ‘meaning,’” he wrote, “it can be defined thus: the meaning of a word is its use in the language.”<sup>113</sup> Clarification of meaning—what Wittgenstein termed “a perspicuous representation”<sup>114</sup>—could be achieved by investigating the use of language within the multiple and overlapping language-games

108. See Spencer Robins, *Wittgenstein, Schoolteacher*, PARIS REVIEW (Mar. 5, 2015), <https://www.theparisreview.org/blog/2015/03/05/wittgenstein-schoolteacher> [<https://perma.cc/VM5Z-MGHQ>] (theorizing that Wittgenstein’s experience with school children informed his later theories).

109. See generally AUBREY NEAL, *HOW SKEPTICS DO ETHICS: A BRIEF HISTORY OF THE LATE MODERN LINGUISTIC TURN* (2007) (chronicling the development of the linguistic turn in philosophy).

110. See LUDWIG WITTGENSTEIN, *PHILOSOPHICAL GRAMMAR* (R. Rhees ed., Anthony Kenney trans., 1969), as reprinted in *THE WITTGENSTEIN READER*, *supra* note 79, at 31, 37 (“I too thought that logical analysis had to bring to light what was hidden (as chemical and physical analysis does).”).

111. WITTGENSTEIN, *TRACTATUS LOGICO-PHILOSOPHICUS*, *supra* note 94, at 5; *see id.* at 30 (“Whereof one cannot speak, thereof one must be silent.”).

112. See Owen M. Fiss, *Conventionalism*, 58 S. CAL. L. REV. 177, 177 (1985) (describing Wittgenstein’s view that “we understand a concept not when we grasp some fact, but when we can successfully use that concept within a language game or a defined context”); Dennis Patterson, *Conscience and the Constitution*, 93 COLUM. L. REV. 270, 303–04 (1993) (book review) (“The central tenet of Wittgenstein’s writing after 1929 is that knowledge is not achieved by the individual subject’s grasp of a connection between word and object. Rather, knowledge turns out to be the grasp of the topography of a word’s uses in activities into which language is woven.”).

113. WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS*, *supra* note 2, § 43 (emphasis omitted).

114. *Id.* § 122.

we play.<sup>115</sup> One of Wittgenstein's key shifts between his early and late work was the recognition that a word is used in accordance with a game, rather than according to a single rule.<sup>116</sup>

Wittgenstein's views regarding meaning as use have been echoed and expanded by philosophers<sup>117</sup> and modern philosophes<sup>118</sup> alike, and legal scholarship has devoted substantial attention to this theory of meaning.<sup>119</sup>

### B. Liquidation Through Use

Madison's idea of liquidation, though not mixed on the same philosophical palette as Wittgenstein's later thinking, turns out in practice to paint a similar picture of constitutional meaning as use in the ongoing activity of constitutional interpretation. Madison's later writings offer us descriptive insight into how constitutional interpretation was taking place decades after the Founding. Observing that it compares well to some of Wittgenstein's ideas about the meaning of language may assure us that the Constitution's meaning indeed can only be examined through use and that our efforts to do so are productive.

1. *Madison, Constitutional Meaning, and the National Bank.* Our clearest insight into Madison's embrace of constitutional constructions not contemplated or intended at the time of ratification, but

115. See *id.* § 7 (describing language-games as “consisting of language and the actions into which it is woven”); *id.* § 23 (“Here the term ‘language-game’ is meant to bring into prominence the fact that the *speaking* of language is part of an activity, or of a form of life.”).

116. See HALPIN, *supra* note 16, at 126 (“The fact that the overall use of a word is in accordance with a game rather than in accordance with a single rule is one way of capturing the departure in Wittgenstein's *Investigations* from his *Tractatus*.”).

117. See generally J.L. AUSTIN, *The Meaning of a Word*, in PHILOSOPHICAL PAPERS 55 (J.O. Urmson & G.J. Warnock eds., 3d ed. 1979) (arguing against the possibility of articulating a simple meaning of a word); H.L.A. HART, *THE CONCEPT OF LAW* (2d ed. 1994) (1961) (applying linguistic philosophy to law).

118. See generally BOBBITT, *supra* note 55 (elaborating a Wittgensteinian model of interpretive conventions in constitutional law); FISH, *supra* note 52 (developing a theory of interpretation focused on context and practice).

119. See generally J.M. Balkin & Sanford Levinson, *Constitutional Grammar*, 72 TEX. L. REV. 1771 (1994) (critiquing Bobbitt's grammatical study of constitutional law); Ian Bartrum, *The Constitutional Canon as Argumentative Metonymy*, 18 WM. & MARY BILL RTS. J. 327 (2009) (building on Wittgenstein's theory of usage to identify the function of metonyms in constitutional argumentation); Fiss, *supra* note 112 (emphasizing practice and context in developing an interpretive theory of conventionalism); Patterson, *supra* note 56, at 1855 (suggesting, perhaps paradoxically, that “[o]ne cannot ‘apply’ Wittgenstein to the law, for there is—literally—nothing to apply”).

legitimated by use and practice, can be found in his public statements and letters concerning the constitutionality of the bank of the United States.<sup>120</sup> The bank issue was one on which Madison's personal opinion of the Constitution's meaning was at odds with widespread agreement on the bank's constitutionality.<sup>121</sup> Thus, in 1815, Madison as President faced a decisive juncture when presented with the opportunity to veto Congress's act establishing a second national bank, having opposed the establishment of the first bank on constitutional grounds as a congressman in 1791.<sup>122</sup> Sacrificing his private opinion to public considerations,<sup>123</sup> Madison signed the bill for the second bank, citing "repeated recognitions under varied circumstances of the validity of such an institution in the acts of the legislative, executive, and judicial branches of the Government, accompanied by indications, in different modes, of a concurrence of the general will of the nation."<sup>124</sup>

2. *Community Acceptance and Popular Sovereignty.* Madison grounded his reasoning in traditional common law interpretive conventions, affirming the concept of legitimacy through precedent in the courts and expanding that notion to precedents created by a "course of practice."<sup>125</sup> This notion of meaning through practice (or

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120. See Bradley & Siegel, *supra* note 13, at 35 ("Another example commonly cited as evidence of Madison's embrace of the liquidation idea is his shift in public position concerning the constitutionality of the national bank.").

121. See Letter from James Madison to C.E. Haynes (Feb. 25, 1831), in 9 WRITINGS OF JAMES MADISON, *supra* note 24, at 442, 442–43 ("[M]y abstract opinion of the text of the Constitution is not changed, and the assent was given in pursuance of my early and unchanged opinion, that . . . a course of authoritative expositions . . . was an evidence of the public will necessarily overruling individual opinions.").

122. Bradley & Siegel, *supra* note 13, at 35–36; see also Letter from James Madison to C.E. Haynes, *supra* note 121, at 442 ("I had originally opposed [the bank] as unauthorized by the Constitution . . .").

123. Letter from James Madison to Marquis de LaFayette (Nov. 1826), in 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON, *supra* note 89, at 538, 542. Compare *id.* (stating Madison's idea of putting aside personal theories in a search for public meaning), with WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS, *supra* note 2, § 258 ("One would like to say: whatever is going to seem right to me is right. And that only means that here we can't talk about 'right'.").

124. James Madison, U.S. President, Veto Message on the National Bank, Address to the Senate of the United States (Jan. 30, 1815), <http://millercenter.org/president/madison/speeches/speech-3626> [<https://perma.cc/N6WJ-QYK6>]. Madison's veto cited here was on other grounds; he later signed into law a bill creating the bank. See 29 ANNALS OF CONG. 280–81 (1816) (describing the Senate vote approving the new bill); *id.* at 1344 (describing the House vote approving the new bill).

125. See Letter from James Madison to Charles J. Ingersoll (June 25, 1831), in 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 183, 184 (J.B. Lippincott ed., 1865) ("The case in question has its true analogy in the obligation arising from judicial expositions of the law on

use) is recognizably Wittgensteinian on its face.<sup>126</sup> Another important concept that connects Madison's ideas to Wittgenstein's is the legitimation of use through agreement and concurrence by the constitutive interpretive community.<sup>127</sup> Madison's explanation of the legitimacy of interpreting the Constitution to allow the creation of a national bank roughly tracks how Wittgenstein suggests the rules of language come into being—through community acceptance.

Precedents “formed on due discussion and consideration,” Madison explained, are regarded with “authoritative force in settling the meaning of a law” because “an exposition of the law publicly made, and repeatedly confirmed by the constituted authority, carries with it . . . the sanction of those who, having made the law through their legislative organ, appear . . . to have determined its meaning through their judiciary organ.”<sup>128</sup> Analogizing again to the common law tradition, Madison further clarified that “in fact and in common understanding” a “course of practice” was necessarily understood as “a legal rule of interpreting a law” and, similarly, as “a constitutional rule of interpreting a Constitution.”<sup>129</sup> Madison's explanation is just that: it purports to accurately describe how the Constitution acquires meaning legitimately.<sup>130</sup> Clearing away the “mental mist”<sup>131</sup> of individual efforts to truly “know” the meaning of the Constitution and how it should be interpreted, Madison acknowledges that his explanation of the rule

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succeeding judges; the Constitution being a law to the legislator, as the law is a rule of decision to the judge.”).

126. See WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS, *supra* note 2, § 43 (“For a large class of cases—though not for all—in which we employ the word ‘meaning’ it can be defined thus: the meaning of a word is its use in the language.” (emphasis omitted)).

127. See Letter from James Madison to Charles J. Ingersoll, *supra* note 125, at 184 (discussing the legitimacy of precedents that carry the approval of the public, mediated through democratic institutions); see also WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS, *supra* note 2, § 23 (“Here the term ‘language-game’ is meant to bring into prominence the fact that the *speaking* of language is part of an activity, or of a form of life.”). Several scholars have attributed the idea of an “interpretive community” to Wittgenstein via his discussion of “form[s] of life.” See, e.g., STANLEY FISH, IS THERE A TEXT IN THIS CLASS?: THE AUTHORITY OF INTERPRETIVE COMMUNITIES 303–04 (1980).

128. Letter from James Madison to Charles J. Ingersoll, *supra* note 125, at 184.

129. *Id.* at 185.

130. See WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS, *supra* note 2, § 116 (“What we do is to bring words back from their metaphysical to their [normal] use.” (emphasis omitted)). *But see* Sachs, *supra* note 12, at 1825 (arguing that political legitimacy is different from legal validity).

131. Wittgenstein, in his later works, referenced the “mental mist” created by representational theories of linguistic interpretation. For further discussion, see *supra* note 105 and accompanying text.

“will force itself on the practical judgment of the most ardent theorist.”<sup>132</sup>

Madison’s thinking on the bank issue helps us reframe what the concept of liquidation entails. At bottom, it is grounded in the political power of “we the people” to determine the political meaning of our founding document.<sup>133</sup> In Wittgensteinian terms, the relevant group to reference when determining the use of a word or phrase is composed of the other people within a particular language-game, who are all following the same implicitly accepted rules for making meaningful statements to each other.<sup>134</sup> Understanding liquidation as a “constitutional rule of interpreting a Constitution”<sup>135</sup> within the language-game of the practice of constitutional law identifies it as a legitimate tool for making arguments about meaning.<sup>136</sup>

As a separate matter, the idea of fixing the meaning of language<sup>137</sup> holds little water if modern descriptions of meaning in analytic philosophy are correct. Wittgenstein and other ordinary-language philosophers suggest that use and activity can make sense of language, rather than the pursuit of some concrete thing or idea to which it refers.<sup>138</sup> If Madison offers us several different conceptions of what liquidation of meaning entails, we should find the one that squares with how we actually understand language to be most persuasive. And if Madison’s account of constitutional interpretation is read as premised on Locke’s philosophy of language, and Locke’s philosophy of language is a deficient description of the way language acquires

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132. Letter from James Madison to Charles J. Ingersoll, *supra* note 125, at 185.

133. For further discussion of the legitimacy of precedents publicly approved through democratic institutions, see *supra* note 128 and accompanying text.

134. An examination of the rules of grammar by a student of a foreign language may offer a helpful comparison. The common classroom process of learning a non-native language presents the idea of language in what Wittgenstein would consider a misleading way. The “rules” of grammar (for example, logical progressions of verb conjugations) have no meaningful theoretical background—they are simply an attempt to capture what speakers do to be understood by each other. Thus, students may be frustrated when confronted with an irregular verb conjugation for which no logical explanation exists. Native speakers, or those learning by immersion, become familiar with the particular rules of grammar simply through a “regular course of practice.”

135. See Letter from James Madison to Charles J. Ingersoll, *supra* note 125, at 185.

136. Cf. BOBBITT, *supra* note 55, at 12–22 (outlining a system of six modalities of legitimate constitutional argumentation). Within Bobbitt’s framework, we might situate liquidation among the “modalities” of constitutional argument—likely some combination of the doctrinal and historical modalities that Bobbitt identifies.

137. For further discussion of fixation and representational meaning, see *supra* Part II.B.

138. For background on Wittgenstein’s meaning-as-use ideas, see *supra* Part III.A.

meaning under a Wittgensteinian view, then Madison's account is deficient in its ability to aid us in the search for constitutional meaning.

*C. Limitations and Continuing Problems*

Of course, important differences distinguish Wittgensteinian use-meaning from Madisonian use-meaning. First, Madison's idea of "the requisite evidence of the national judgment and intention"<sup>139</sup> depends on significant degrees of attenuation from public opinion or public usage as we might conceive it today. Madison preserves the relevance and legitimacy of the public as an interpretive community through the basic political theory of the American Republic,<sup>140</sup> so that "construction[s] by the public or its agents" are similarly valid.<sup>141</sup> Thus, the "series of particular discussions and adjudications"<sup>142</sup> that help determine meaning look quite different from the activities we might look to in determining language use. Query whether in practice the "course of authoritative, deliberate, and continued decisions"<sup>143</sup> by the public's agents interpreting the Constitution in the legislature or judiciary truly reflects what the public thinks.<sup>144</sup> But as a matter of theory, liquidation through judicial and government practice characterized by "solemnities and repetitions" can be considered "sufficient to imply a concurrence of the judgment & the will of those, who having granted the power, have the ultimate right to explain the grant."<sup>145</sup>

Second, Madison's concept of liquidation through practice involves an important element of settlement based on the binding authority of decisions and declarations made by the Supreme Court

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139. Letter from James Madison to Charles J. Ingersoll, *supra* note 125, at 186.

140. THE FEDERALIST NO. 39, at 276 (James Madison) (The Floating Press 2011) ("[W]e may define a republic to be . . . a government which derives all its powers directly or indirectly from the great body of the people . . .").

141. Letter from James Madison to Charles J. Ingersoll, *supra* note 125, at 185.

142. THE FEDERALIST NO. 37 (James Madison), *supra* note 1, at 261.

143. Letter from James Madison to N.P. Trist (Dec. 1831), in 9 WRITINGS OF JAMES MADISON, *supra* note 24, at 471, 477.

144. See, e.g., Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSP. ON POL. 564, 577 (2014) ("[O]ur analyses suggest that majorities of the American public actually have little influence over the policies our government adopts.").

145. Letter from James Madison to Spencer Roane (May 6, 1821), in THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON, *supra* note 10, at 462, 466.

and other constitutional decisionmakers.<sup>146</sup> The legal system depends on the principles of authority and finality, or at least the perception of these qualities, which Wittgenstein might identify as serious barriers to true philosophical understanding.

Legal systems and the requirement of finality of legal decisions, much like the human-created rigor of logic, are soothing yet paralyzing constructs that can cause serious confusion when we use ordinary language to describe what goes on within those systems.<sup>147</sup> By identifying our need for clarity through written rules, Wittgenstein offers a reminder that it is the human “instinct . . . to observe certain rules in their dealings with one another”—in a word, use—that truly makes up the “constitution of a society” rather than the written rules themselves.<sup>148</sup>

Understood this way, the ideas of “settlement” and “fixation” arguably belie a more fluid, though still constrained, concept that harmonizes the need for authoritative decisions in concrete cases with the broad reminder that such decisions may be more accurate indicators of constitutional meaning if other adjudications and discussions return similar conclusions. Wittgenstein would reject the idea that meaning could be settled once and for all, but if settlement simply denotes “general agreement,” then Madison’s idea of settlement may not be so different from Wittgenstein’s account of how the rules of various language-games may be identified.<sup>149</sup>

Madison’s embrace of common law interpretive principles and the role of precedent provides the most persuasive evidence that his idea of “settlement” is more like “general agreement” than “written in stone.”<sup>150</sup> As many scholars have noted, our constitutional system is, in

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146. See Letter from James Madison to Spencer Roane, *supra* note 10, at 460 (explaining that difficulties in expounding the terms and phrases of the Constitution “might require a regular course of practice to liquidate & settle the meaning of some of them”).

147. Wittgenstein even suggests that the human need to “lay down . . . rule[s]” and obey them is much like the temporary paralysis caused in chickens when watching a line drawn in chalk on the ground before them. WITTGENSTEIN, *THE BIG TYPESCRIPT*, *supra* note 79, at 51.

148. *Id.* at 50.

149. See Balkin & Levinson, *supra* note 119, at 1773 (noting, in the context of a discussion of Wittgenstein and legal language, that even “the grammarian must make interpretive judgments about existing practices and about the popular consensus—or, failing this, the nature of the enlightened consensus—concerning proper usage”).

150. See Bradley & Siegel, *supra* note 13, at 41 (countering the assertion that liquidation occurred only through early post-Founding decisions by pointing out that Madison, and the Supreme Court’s reading of Madison in *Noel Canning*, “suggest that meaning would become fixed only if later generations continued to accept the early interpretation”).

practice, a common law system—one that adapts and changes, but through the limits of precedents and practices reinforced by acceptance over time.<sup>151</sup> Wittgenstein might suggest that the rules of grammar, or of any language-game, evolve in much the same way.<sup>152</sup> At the heart of both thinkers' descriptions is the idea that individual opinions about meaning are transcended by general agreement on what makes sense.<sup>153</sup> Subsequent scholarly efforts have expounded this notion extensively to explain how usage becomes meaningful in constitutional discourse, grounded in the common law tradition endorsed by Madison,<sup>154</sup> or engaged in a more direct Wittgensteinian effort to declare that this is simply what we do.<sup>155</sup>

Finally, a political conception of meaning as use has a moral dimension that is not present in Wittgenstein's description of language. As noted above, there may be significant discrepancies between the theory and practice of use-meaning legitimated by popular sovereignty.<sup>156</sup> Beyond that, there exist important questions of who makes up the relevant political interpretive community, the extent of

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151. See, e.g., BOBBITT, *supra* note 55, at 5 (noting that the ways in which Americans interpret the Constitution “have taken the forms of common law argument”); STRAUSS, *supra* note 45, at 3 (“Our constitutional system . . . has become a common law system, one in which precedent and past practices are . . . as important as the written U.S. Constitution itself.”); Powell, *supra* note 19, at 887 (noting among the Framers a “willingness to interpret the constitutional text in accordance with the common law principles that had been used to construe statutes”).

152. Wittgenstein would be careful to clarify that we often conflate what is possible with what is permitted or comprehensible within a language-game. We are capable of making a statement with any syntax imaginable, but we can only be understood—that is, play the same language-game—by following the accepted rules of grammar. See LUDWIG WITGENSTEIN, REMARKS ON THE FOUNDATIONS OF MATHEMATICS (G.H. von Wright, R. Rhees & G.E.M. Anscombe eds., 1956), as reprinted in THE WITGENSTEIN READER, *supra* note 79, at 216, 218 (“[S]omebody may reply like a rational person and yet not be playing our game.”). Similarly, we can make any arguments about constitutional meaning, but only those that follow certain accepted rules will be considered intelligible or legitimate.

153. Compare Letter from James Madison to Reynolds Chapman (Jan. 6, 1831), reprinted in 9 WRITINGS OF JAMES MADISON, *supra* note 24, at 429, 434 (identifying “a continued course of practical sanctions” as “an authority sufficient to overrule individual constructions”), with WITGENSTEIN, PHILOSOPHICAL INVESTIGATIONS, *supra* note 2, §§ 241–42 (noting that, in determining the rules about which moves make sense (that is, grammar), “there must be agreement not only in definitions but also (queer as this may sound) in judgments,” and this “is agreement not in opinions but in form of life”).

154. See, e.g., Strauss, *supra* note 43, at 4–5 (arguing that provisions of the Constitution function like precedents in a common law system).

155. See, e.g., BOBBITT, *supra* note 55, at 12–22 (offering six modalities of constitutional argument as a constitutional “grammar” and framework for analyzing the legitimacy of interpretations).

156. For further discussion of discrepancies between the theory and practice of use-meaning legitimated by popular sovereignty, see *supra* notes 139–145 and accompanying text.

imbalances in political power within that community that may influence whether it sanctions a use or practice, and the overlap or lack thereof between who has interpretive power and who is governed.

Further, grounding the legitimacy of meaning in community acceptance may fail to account for the importance of considering the moral relevance of those outside the interpretive community.<sup>157</sup> However, the concept of liquidation does not necessarily preclude such a moral claim. If, through the appropriate channels of “adjudications and discussions” and “a regular course of practice,” the public comes to think of constitutional terms in light of their import for those outside the political community,<sup>158</sup> then those terms will legitimately reflect that meaning.

### CONCLUSION

If Madison’s concept of liquidation is indeed comparable to a Wittgensteinian idea of meaning as use, what does that mean for constitutional interpretation? In practice, it means that the various ways in which indeterminacies and disagreements about the meaning of the Constitution are discussed are potentially valid interpretations, if they can gain public acceptance through use and practice by the government and judiciary. To take the example of the question presented in *Noel Canning*, it means resolving the ambiguity of the words in the Recess Appointments Clause by observing how they have been used over time.

Although the Supreme Court’s reference to liquidation in *Noel Canning* directly suggests that longstanding executive-branch practice can clarify the meaning of constitutional text, similar forms of argument are valid elsewhere in constitutional law, particularly in First Amendment and Eighth Amendment decisions.<sup>159</sup> But, in death

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157. See Kavka, *supra* note 81, at 1470 (“The problem which is not mentioned, and which may be overlooked if we ignore the moral aspect of political decision, is the problem of the ‘they,’ the people who are not in the decisionmaking community—foreigners and the domestic powerless. Morality requires that the decisionmakers not ignore these people . . .”).

158. See MARTHA C. NUSSBAUM, *FOR LOVE OF COUNTRY?* 7 (Joshua Cohen ed., 1996) (encouraging Americans to create a cosmopolitan constitutive community that “recognize[s] humanity wherever it occurs” and treats “the community of human argument and aspiration” as “the source of our moral obligations”).

159. See, e.g., *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1819 (2014) (“[T]he Establishment Clause must be interpreted ‘by reference to historical practices and understandings.’” (quoting *Cty. of Allegheny v. ACLU*, 492 U.S. 573, 670 (1989) (Kennedy, J., concurring in part and dissenting in part))); *Furman v. Georgia*, 408 U.S. 238, 278–79 (1972) (Brennan, J., concurring)

penalty and discrimination cases in particular, it is important to keep in mind that looking to historical and ongoing practice is helpful only to the extent it provides “requisite evidence of the national judgment and intention”<sup>160</sup> and should not carry normative weight, especially where current usage differs from past practices.<sup>161</sup>

A Wittgensteinian understanding of liquidation is also an important reminder to be careful with our language when discussing what the Constitution means. Arguments about how the document ought to be interpreted are different from clear descriptions of what the practices of the government, Supreme Court, and public show about what the Constitution actually means. As Wittgenstein said of his own conclusions about meaning, “the difficulty—I might say—is not that of finding the solution but rather that of recognizing as the solution something that looks as if it were only a preliminary to it.”<sup>162</sup>

Thus, an argument that suggests we ought to look only to early practices to determine constitutional meaning accurately describes meaning only if that is in fact how we (the public and its agents) use the constitutional text in current practice. The concept of liquidation can serve as a reminder that law, and constitutional law in particular, is an ongoing, creative activity we engage in, rather than a scientific effort to discover some truth about the natural world.<sup>163</sup>

Reading Madison through the lens of Wittgenstein helps us understand the “living” nature of the liquidation concept,<sup>164</sup> responsive to the inevitability of changes in usage but appropriately grounded in American political theory. On the other hand, reading Wittgenstein with Madison in mind imbues his work with a democratic aura and reminds us that the core of legal inquiry is not scientific in nature but

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(“[T]he judicial task is to review the history of a challenged punishment and to examine society’s present practices with respect to its use.”).

160. Letter from James Madison to Charles J. Ingersoll, *supra* note 125, at 186.

161. *See Cty. of Allegheny*, 492 U.S. at 630 (“Historical acceptance of a practice does not in itself validate that practice under the Establishment Clause if the practice violates the values protected by that Clause, just as historical acceptance of racial or gender based discrimination does not immunize such practices from scrutiny under the Fourteenth Amendment.”).

162. LUDWIG WITTGENSTEIN, ZETTEL (G.E.M. Anscombe & G.H. von Wright eds., G.E.M. Anscombe trans., 1967), as reprinted in THE WITTGENSTEIN READER, *supra* note 79, at 99, 119.

163. *Cf. Patterson*, *supra* note 64, at 983 (“Law is more like painting than archaeology; it is more a process of creation than pure discovery.”).

164. *See STRAUSS*, *supra* note 45, at 125 (citing Madison’s “extraordinary foresight for his contributions to the written Constitution” and characterizing him as “equally visionary about the living Constitution”).

one of analogy and common sense.<sup>165</sup> By seeing these connections, we may come one step closer to a perspicuous representation of constitutional meaning.

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165. See MONK, *supra* note 105, at 66–67 (articulating Wittgenstein’s view of understanding that is rooted in looking for connections in the world and cannot be reduced to scientific formulas).