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Originalism and Constitutional Construction

Lawrence B. Solum
Georgetown University Law Center

ORIGINALISM AND CONSTITUTIONAL CONSTRUCTION

*Lawrence B. Solum**

Constitutional interpretation is the activity that discovers the communicative content or linguistic meaning of the constitutional text. Constitutional construction is the activity that determines the legal effect given the text, including doctrines of constitutional law and decisions of constitutional cases or issues by judges and other officials. The interpretation-construction distinction, frequently invoked by contemporary constitutional theorists and rooted in American legal theory in the nineteenth and twentieth centuries, marks the difference between these two activities.

This Article advances two central claims about constitutional construction. First, constitutional construction is ubiquitous in constitutional practice. The central warrant for this claim is conceptual: because construction is the determination of legal effect, construction always occurs when the constitutional text is applied to a particular legal case or official decision. Although some constitutional theorists may prefer to use different terminology to mark the distinction between interpretation and construction, every constitutional theorist should embrace the distinction itself, and hence should agree that construction in the stipulated sense is ubiquitous. Construction occurs in every constitutional case.

The second claim is more substantive and practical. In some cases, construction can simply translate the plain meaning of the constitutional text into corresponding doctrines of constitutional law—we might call this strict construction. But in other cases, the constitutional text does not provide determinate answers to constitutional questions. For example, the text may be vague or irreducibly ambiguous. We can call this domain of constitutional underdeterminacy the construction zone. The second claim is that the construction zone is ineliminable: the actual text of the U.S. Constitution contains general, abstract, and vague provisions that require constitutional construction that goes beyond the meaning of the text for their application to concrete constitutional cases.

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* John Carroll Research Professor of Law, Georgetown University Law Center. I owe thanks for comments, criticisms, and suggestions to Randy Barnett, Mitchell Berman, Andrew Coan, Thomas Colby, Richard Garnett, Stephen Griffin, Gary Lawson, John McGinnis, Michael Paulsen, Michael Rappaport, Martin Redish, Lori Ringhand, Peter Smith, and the participants at *The New Originalism in Constitutional Law* Symposium held at Fordham University School of Law.

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> "'Interpretation' will be used here in this modern sense to refer to the process by which courts determine the 'meaning' of the language. We are not concerned with overriding legal rules which may render contract language ineffective after it has been interpreted. Nor are we concerned with 'gap filling' by which the absence of contract language is remedied. Our concern is exclusively with contract language and its 'meaning.'"[1]
>
> "In contrast, construction of the contract is the determination of the contract's 'legal operation—its effect upon the action of courts and administrative officials.'"[2]
>
> E. Allan Farnsworth, *"Meaning" in the Law of Contracts*

INTRODUCTION

Writing in 1967, Allan Farnsworth was invoking a then-familiar distinction between *contract* interpretation and construction, but the idea is more general than that. Both courts and legal theorists mark a general distinction between "interpretation" (discovering meaning[3]) and

1. E. Allan Farnsworth, *"Meaning" in the Law of Contracts*, 76 YALE L.J. 939, 940 (1967).

2. *Id.* at 939.

3. Interpretation seeks "meaning" in the linguistic sense; meaning in this sense can most precisely be called "communicative content." The word "meaning" has other senses, including "legal meaning," which refers to legal content. Moreover it is a separate question whether the communicative content of the Constitution is the "original meaning." Because this Article is about the relationship between originalism and constitutional construction, it

"construction" (determining legal effect). Recently, the concept of constitutional construction has come to play an important role in contemporary originalist constitutional theory[4] and elsewhere.[5] The notion of constitutional construction has been especially prominent in recent theorizing about constitutional originalism.

Originalism[6] is a family of constitutional theories united by two core ideas. The first of these ideas (the "Fixation Thesis") is that the original meaning ("communicative content") of the constitutional text is fixed at the time each provision is framed and ratified. The second idea (the "Constraint Principle") is that constitutional actors (e.g. judges, officials, and citizens) ought to be constrained by the original meaning when they engage in constitutional practice (paradigmatically, deciding constitutional cases, but also including constitutional decisionmaking outside the courts by officials and citizens).[7]

The originalist family converges on these two core ideas, but particular versions of originalism differ in many other respects. For example, some originalists focus on the original public meaning of the text, while others believe that original meaning is determined by the original intentions of the Framers or the original methods of constitutional interpretation.[8] The

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(mostly) assumes an originalist account of the communicative content of the Constitution, but a defense of that assumption is a separate topic. I owe thanks to Lori Ringhand for suggesting these clarifications.

4. This Article builds on prior work exploring the distinction. *See* Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95 (2011). For the role of the distinction in contemporary originalism, see *infra* Part I.A.2. For examples of the distinction's use by courts and commentators, see *infra* text accompanying notes 116–25. For a short introduction to the distinction, see Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL'Y 65 (2011).

5. Tun-Jen Chiang & Lawrence B. Solum, *The Interpretation-Construction Distinction in Patent Law*, 123 YALE L.J. (forthcoming December 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2234193.

6. In this Article, I will use the word "originalism" to refer to theories that endorse fixation and constraint. "Nonoriginalist" shall be used to refer to theories that deny one or both of the two theses. "Nonoriginalism" will be distinguished from "living constitutionalism," which shall be used to identify theories that endorse the proposition that the legal content of constitutional doctrine changes over time.

There are at least two distinctive forms of nonoriginalism: "Interpretive Nonoriginalism" is the view that the communicative content of the constitutional text changes over time: someone who held the view that the constitution should be interpreted in light of the contemporary plain meaning of the text would be an Interpretive Nonoriginalist. "Constructive Nonoriginalism" is the view that legal content of constitutional doctrine does not constrain (but may contribute to) the legal content of constitutional doctrine.

7. This view that originalism is a family of theories organized around the Fixation Thesis and the Constraint Principle is widely accepted. *See, e.g.*, Andrew Koppelman, *Originalism, Abortion, and the Thirteenth Amendment*, 112 COLUM. L. REV. 1917, 1918 n.2 (2012); *see also* Jack M. Balkin & David A. Strauss, *Response and Colloquy Concerning the Papers by Jack Balkin and David Strauss*, 92 B.U. L. REV. 1271, 1271 (2012); Thomas B. Colby, *Originalism and the Ratification of the Fourteenth Amendment*, 107 NW. U. L. REV. (forthcoming 2013) (manuscript at 1 n.1); Lee J. Strang, *An Originalist Theory of Precedent: The Privileged Place of Originalist Precedent*, 2010 B.Y.U. L. REV. 1729, 1729 n.1. The core of originalism, the Fixation Thesis, and the Constraint Principle are discussed in greater depth below. *See infra* Part I.A.1.

8. *See infra* Part II.A.2.

phrase "the New Originalism" could be used in a variety of ways,[9] but in this Article it will be used to refer to originalist theories that adhere to the core originalist ideas (fixation and constraint) and two additional notions: (1) the claim that original meaning is a function of the public meaning of the constitutional text, and (2) recognition of a distinction between interpretation and construction.

The interpretation-construction distinction's role in the New Originalism is the focus of this Article. More will be said about the nature of the distinction below,[10] but for now we can mark the difference between interpretation and construction as follows:

- "Constitutional interpretation" is the activity that discerns the communicative content (linguistic meaning) of the constitutional text.
- "Constitutional construction" is the activity that determines the content of constitutional doctrine and the legal effect of the constitutional text.

Thus, the interpretation-construction distinction marks the difference between (1) inquiries into meaning of the constitutional text and (2) the process of deciding which doctrines of constitutional law and what decisions of constitutional cases are associated with (or required by) that meaning.

This Article advances two central claims about constitutional construction. The first claim is that constitutional construction is ubiquitous in constitutional practice. The central warrant for this claim is conceptual: because construction is the determination of legal effect, construction always occurs when the constitutional text is applied to a particular legal case or official decision. Although some constitutional theorists may prefer to use different terminology to mark the distinction between interpretation and construction, every constitutional theorist should embrace the distinction itself,[11] and hence should agree that construction in the stipulated sense is ubiquitous.

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9. The phrase, "the New Originalism," seems to have been popularized by Keith Whittington. *See* Keith Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599 (2004). The history of the phrase is recounted below. *See infra* note 53.

Numerous other scholars have used the phrase the New Originalism. *See* Matthew D. Bunker, *Originalism 2.0 Meets the First Amendment: The "New Originalism," Interpretive Methodology, and Freedom of Expression*, 17 COMM. L. & POL'Y 329 (2012); Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713 (2011); Martin H. Redish & Matthew B. Arnould, *Judicial Review, Constitutional Interpretation, and the Democratic Dilemma: Proposing a "Controlled Activism" Alternative*, 64 FLA. L. REV. 1485, 1507 (2012) (characterizing New Originalism as embracing constitutional construction); Lawrence Rosenthal, *The New Originalism Meets the Fourteenth Amendment: Original Public Meaning and the Problem of Incorporation*, 18 J. CONTEMP. LEGAL ISSUES 361 (2009); Mark Tushnet, Heller *and the New Originalism*, 69 OHIO ST. L.J. 609 (2008); Daniel Hornal, *Why the Demands of Formalism Will Prevent New Originalism from Furthering Conservative Political Goals*, CRIT: CRITICAL LEGAL STUD. J. (Summer 2012), http://thecritui.com/wp-content/uploads/2012/spring2/Hornal_Final2.pdf.

10. *See infra* Part I.A.2.

11. *See infra* Part III.

The second claim is more substantive and practical. In some cases, construction can simply translate the plain meaning of the constitutional text into corresponding doctrines of constitutional law—we might call this "strict construction."[12] But in other cases, the constitutional text does not provide determinate answers to constitutional questions. For example, the text may be vague or irreducibly ambiguous. We can call this domain of constitutional underdeterminacy "the construction zone." The second claim is that the construction zone is ineliminable: the actual text of the U.S. Constitution contains general, abstract, and vague provisions that require constitutional construction for their application to concrete constitutional cases. The second claim is (and should be) more controversial than the first; objections to the existence of the construction zone are considered and answered in this Article.[13]

Part I of this Article situates the idea of constitutional construction in the context of contemporary debates about originalism and among originalists. Part II argues that the interpretation-construction distinction provides conceptual clarity and answers a variety of objections to the distinction itself and the use of the terms "interpretation" and "construction" to express the distinction. Part III advances the claim that construction is ubiquitous; Part IV makes the case for the ineliminability of the construction zone. Part V discusses the relationship between constitutional construction and debates about originalism and living constitutionalism. A conclusion follows.

I. SITUATING CONSTITUTIONAL CONSTRUCTION

We can begin our examination of the idea of constitutional construction by examining the larger theoretical context in which this idea is situated. Let us start by situating originalism in the larger context of constitutional theory.

A. Originalisms: Old and New

Constitutional theory investigates the general and abstract questions at the foundations of constitutional law, addressing a variety of questions. Some of these questions are directly connected to political theory and philosophy, including questions about the democratic legitimacy of constitutional regimes, questions about liberty and equality, and questions about sovereignty and the nature of the state. Other questions are institutional, including questions about separation of powers and federalism and the institutional design of the various branches of government. The focus of originalism is on questions about constitutional interpretation and

12. The idea of translation invoked here is predicated on a distinction between "communicative content" and "legal content." The communicative content of the constitutional text can be translated into corresponding legal content of constitutional doctrine. *See generally* Lawrence B. Solum, *Communicative Content and Legal Content*, 89 NOTRE DAME L. REV. (forthcoming 2013).

13. *See infra* Part IV.

construction. Originalism answers questions like: "How do we discover the meaning of the constitutional text?" and, "How should the meaning of the text affect constitutional practice?"

The word "originalism" appears to have been coined by Paul Brest in an article entitled *The Misconceived Quest for the Original Understanding*.[14] Brest stipulated the following definition:

> By "originalism" I mean the familiar approach to constitutional adjudication that accords binding authority to the text of the Constitution or the intentions of its adopters.[15]

Contemporary originalism is actually a family of constitutional theories, and there may be some disagreement at the margins as to whether a particular theory is properly called "originalist." But more than thirty years after Brest coined the word in 1980, it is possible to identify a core set of ideas that are shared by almost all contemporary originalist thinkers.

1. The Core of Originalism: Fixation and Constraint

Two ideas define the core of contemporary originalism. The first idea is a claim about constitutional interpretation—roughly, that the linguistic meaning of the constitutional text is fixed for each provision at the time that provision was framed and ratified. In other words, the communicative content of the text is determined at the time of its origin—hence, the term "originalism."

We can call this first claim the "Fixation Thesis." So long as we formulate the Fixation Thesis at the right level of generality and abstraction, almost every originalist can and should endorse it. Originalists agree that meaning is fixed when the text is written and adopted, but they may disagree about the precise mechanism by which fixation occurs. "Public Meaning Originalism" names the version of originalist theory holding that the communicative content of the constitutional text is fixed at the time of origin by the conventional semantic meaning of the words and phrases in the context that was shared by the drafters, ratifiers, and citizens. "Original Intentions Originalism" is the view that the intentions of the Framers do the work of fixation. "Original Methods Originalism" names the theory that holds that the methods of legal interpretation that prevailed at the time the text was written fixes original meaning. But all of these members of the originalist family agree on a core idea—meaning is fixed at the time of origin.[16]

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14. Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980) [hereinafter Brest, *The Misconceived Quest*]. Brest reports that he believes he coined the term. E-mail from Paul Brest, Professor Emeritus, Stanford Law School, to author (Dec. 2, 2009, 6:01 PM) (on file with author).

15. Brest, *The Misconceived Quest*, *supra* note 14, at 204.

16. In this Article, we are investigating originalism from the inside, and I simply assume (rather than argue for) the Fixation Thesis. For a defense of the thesis, see Lawrence B. Solum, *Should We Be Originalists?*, *in* ROBERT W. BENNETT & LAWRENCE B. SOLUM, CONSTITUTIONAL ORIGINALISM 36–63 (2011). Antonin Scalia and Bryan Garner express the Fixation Thesis as a semantic canon of construction applicable to legal texts in general. *See*

Originalists agree on a second idea that we can formulate as a principle that guides constitutional practice. The principle addresses the relationship between the meaning of the text and its legal effect. Originalists converge on what we can call the "Constraint Principle": constitutional construction should be constrained by the original meaning of the constitutional text.[17]

The originalist position on this relationship is illuminated by comparison with nonoriginalist[18] views.[19] Almost all constitutional theorists agree that the meaning of the text should make some contribution[20] to constitutional law and practice. For example, Philip Bobbitt has articulated an influential theory of constitutional interpretation and construction that identifies multiple modalities of constitutional argument,[21] including text, history, structure, precedent, "ethos" of the American social order, and prudence.[22] Stephen Griffin calls a variation of this view "pluralism."[23] A pluralist might *agree* that the linguistic meaning of the text (sometimes) contributes to the legal content of constitutional doctrine, but *deny* that the text controls or constrains constitutional practice.[24]

Originalists agree with living constitutionalists like Bobbitt and Griffin that the communicative content of the constitutional text contributes to the content of constitutional doctrine, but characteristically, they contend that "pluralism" does not adequately describe the relationship between the meaning of the text and other factors. Pluralists believe that the text operates at the same level as other methods of constitutional construction.

ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 78 (2012) (formulating the "Fixed-Meaning Canon" as, "Words must be given the meaning they had when the text was adopted").

17. For a defense of the Constraint Principle, see Solum, *supra* note 16. Within the originalist family of theories, the Constraint Principle is justified in different ways. For example, it could be argued that constraint is required by popular sovereignty (democratic legitimacy), by the nature of the constitution as a written text, by rule-of-law concerns, or by institutional concerns about discretionary power of unelected judges. It can also be argued that constraint is required by legal norms—although this leaves open the possibility that the legal norms should be changed. *See generally id.*

18. *See supra* note 6 (defining originalism and nonoriginalism).

19. *See infra* Table 1 (differentiating originalism and nonoriginalism).

20. "Contribution" names a more general class of relationships between the communicative content of the text and the legal content of constitutional doctrine than does "constraint." The text contributes to doctrine so long as it makes some difference. The text constrains doctrine only if it sets limits on what doctrine is valid—possibly subject to limited defeasibility conditions. *See generally* THE LOGIC OF LEGAL REQUIREMENTS: ESSAYS ON DEFEASIBILITY (Jordi Ferrer Beltran & Giovanni Battista Ratti eds., 2012) (collecting essays that discuss the idea of defeasibility in law).

21. The idea that law is a complex argumentative practice is developed by Dennis Patterson. *See* DENNIS PATTERSON, LAW AND TRUTH 128–50 (1996).

22. PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 12–13 (1991).

23. Stephen M. Griffin, *Pluralism in Constitutional Interpretation*, 72 TEX. L. REV. 1753, 1753 (1994) ("Pluralistic theories of constitutional interpretation hold that there are multiple legitimate methods of interpreting the Constitution."); *see also* Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1244–46, 1252–58 (1987) (discussing forms of constitutional argument including text, historical intent, theory, precedent, and value).

24. Bobbitt's modalities and Griffin's pluralism are discussed in more detail below. *See infra* notes 91–98 and accompanying text.

Originalists typically believe that the text operates as a constraint on other methods. At a minimum, constraint requires consistency—at least absent the presence of unusual and carefully cabined defeasibility conditions.[25] The Constraint Principle requires that the content of constitutional doctrine and the resolution of constitutional cases be consistent with the original meaning of the text.

Many originalists go beyond consistency. For example, some originalists may believe that all the rules of constitutional doctrine must be derived from either a specific provision or structural feature of the constitutional text. We might formulate this idea by distinguishing between constitutional constructions that are bound to the text and those that float free of both particular clauses and the constitutional structure. Let us use the terms "text-bound" and "text-free" to distinguish these two sorts of constitutional doctrines.[26]

Some originalists may object to so-called "unenumerated constitutional rights" on the ground that they are text free. Other originalists might defend such rights but only to the extent that they are bound to the constitutional text—for example, such rights might be bound to the Ninth Amendment or the Privileges or Immunities Clause of the Fourteenth Amendment. And it is possible that there are originalists who would defend unenumerated rights on the basis that they are presupposed by the Constitution even though they cannot be bound to any particular clause or to some structural feature of the text. This final group of originalists might require consistency but not textual binding. They would allow for text-free constitutional doctrines, so long as the content of these doctrines is consistent with the text.

Finally, some originalists may believe in a principle of constitutional construction that limits judicially enforceable constitutional doctrine to those rules that are directly supported by the clear meaning of the constitutional text. Their version of the Constraint Principle would require courts to defer to the political branches if the outcome of a case was not required by the clear meaning of text; if the best interpretation of the text results in vagueness or irreducible ambiguity, then the courts should follow a constitutional default rule, for example, a rule that would require courts to abstain from interfering with legislative or executive action.

So originalists agree on the Constraint Principle in the abstract, but they may disagree about the particular form that the Constraint Principle should take. Nonetheless, almost all originalists are likely to agree on the requirement of consistency. Together, the Fixation Thesis and the Constraint Principle form the core of originalism. In this Article, I stipulate

25. *See generally* THE LOGIC OF LEGAL REQUIREMENTS: ESSAYS ON DEFEASIBILITY, *supra* note 20.

26. *See* Lawrence B. Solum, *Originalism and the Unwritten Constitution*, 2013 U. ILL. L. REV. 1935, 1950–53. Requiring that all doctrines of constitutional law be textually bound might entail that are no constitutional backdrops. The idea of a constitutional backdrop is usefully explored in Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813 (2012).

that any theory that endorses these two principles shall be called "originalism," and that any theory that rejects either or both of the two principles will be labeled as "nonoriginalism."[27]

2. Variation and Convergence: What Determines Original Meaning?

A comprehensive history of originalist theorizing has yet to be written.[28] Originalist ideas are found in U.S. Supreme Court cases that predate contemporary debates and the word "originalism." One famous example is Justice George Sutherland's dissent in *Home Building & Loan Ass'n v. Blaisdell*[29]:

> A provision of the Constitution, it is hardly necessary to say, does not admit of two distinctly opposite interpretations. It does not mean one thing at one time and an entirely different thing at another time. If the contract impairment clause, when framed and adopted, meant that the terms of a contract for the payment of money could not be altered *in invitum* by a state statute enacted for the relief of hardly pressed debtors to the end and with the effect of postponing payment or enforcement during and because of an economic or financial emergency, it is but to state the obvious to say that it means the same now.[30]

The conventional story about the contemporary emergence of originalism sometimes begins with writings by Robert Bork,[31] then–Associate Justice William Rehnquist,[32] and Raoul Berger[33] in the 1970s. Originalism rose to prominence in part because of a speech before the American Bar Association delivered in 1985 by then–Attorney General Edwin Meese III.[34] In this early phase, there was substantial emphasis on the original intentions of the Framers; Meese spoke of a "jurisprudence of original intention."[35] We can call these early versions of originalism "Proto-Originalism."[36] One characteristic of Proto-Originalism is that it was only

27. *See supra* note 6 (defining originalism and nonoriginalism).

28. *See generally* Lorianne Updike Toler, J. Carl Cecere & Don Willett, *Pre-'Originalism'*, 36 HARV. J.L. & PUB. POL'Y 277 (2012) (discussing the history of original methods in the courts). An influential account of the history of contemporary originalism is provided in Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113 (2003).

29. 290 U.S. 398, 448–49 (1934) (Sutherland, J., dissenting).

30. *Id.*

31. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

32. William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976).

33. RAOUL BERGER, GOVERNMENT BY JUDICIARY (1977).

34. *See* Edwin Meese III, U.S. Attorney Gen., Speech Before the American Bar Association (July 9, 1985), *in* THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION 1, 1 (Paul G. Cassel ed., 1986); *see also* Lynette Clemetson, *Meese's Influence Looms in Today's Judicial Wars*, N.Y. TIMES, Apr. 17, 2005, at A1; Edwin Meese III, *The Case for Originalism*, HERITAGE FOUND. (June 6, 2005), http://www.heritage.org/research/commentary/2005/06/the-case-for-originalism.

35. Edwin Meese III, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 S. TEX. L. REV. 455, 465–66 (1986).

36. *See generally* Toler et al., *supra* note 28 (discussing Pre-Originalism).

partially theorized. Bork, Rehnquist, and Berger discuss original intentions, but they do not have a theory of original meaning or of the precise role it should play in constitutional practice.

Proto-Originalism was criticized by Brest[37] and others.[38] One key objection focused on the nature of intentions. If one believed that intentions are mental states of individuals, then determining *the* original intention of the Framers may be problematic. Different Framers may have had different intentions with respect to the same provision; some Framers may not have had any clear intention at all. This criticism of originalism prompted a variety of responses. Some originalists defended intentionalism; Richard Kay is a notable example.[39] But many originalists turned in a different direction. An important event occurred in 1986, when Justice Antonin Scalia made an address that urged originalists to "change the label from the Doctrine of Original Intent to the Doctrine of Original Meaning."[40] The version of originalism that we now call "original public meaning originalism" seems to have entered academic debates via the work of Gary Lawson,[41] and appeals to original public meaning also made early appearances in the work of Steven Calabresi and Saikrishna Prakash.[42] Randy Barnett elaborated on their views in his well-known article, *An Originalism for Nonoriginalists*.[43]

On the surface, it might appear that the split between original intentions and original public meaning presaged serious fragmentation of the originalism family of constitutional theories. Other constitutional scholars wrote of the "original understanding of the ratifiers."[44] Recently, John McGinnis and Michael Rappaport have argued for "original methods

37. *See* Brest, *The Misconceived Quest*, *supra* note 14.

38. *See, e.g.*, Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 470 (1981); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

39. Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226 (1988).

40. Antonin Scalia, U.S. Supreme Court Justice, Address by Justice Antonin Scalia Before the Attorney General's Conference on Economic Liberties in Washington, D.C. (June 14, 1986), *in* U.S. DEP'T OF JUSTICE, OFFICE OF LEGAL POL'Y, ORIGINAL MEANING JURISPRUDENCE: A SOURCEBOOK app. C at 101, 106 (1987).

41. *See* Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859, 875 (1992).

42. *See* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power To Execute the Laws*, 104 YALE L.J. 541, 553 (1994).

43. Randy E. Barnett, *An Originalism for Nonoriginalists*, 5 LOY. L. REV. 611 (1999).

44. *See* Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 375 n.130 (1981) ("Although the intention of the ratifiers, not the Framers, is in principle decisive, the difficulties of ascertaining the intent of the ratifiers leaves little choice but to accept the intent of the Framers as a fair reflection of it."); John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1374 (1997) ("To the extent that history matters, it is the original understanding of the ratifiers that we should seek to enforce."); *see also* Kurt T. Lash, *Of Inkblots and Originalism: Historical Ambiguity and the Case of the Ninth Amendment*, 31 HARV. J.L. & PUB. POL'Y 467, 467–68 (2008) ("Today the more sophisticated forms of originalism seek the meaning of the text as it was likely understood by those who added the provision to the Constitution.").

originalism"—which emphasizes the methods of legal interpretation that prevailed at the time the text was written.[45]

These variations within originalism have prompted Thomas Colby and Peter Smith to argue that "originalism is not a single, coherent, unified theory of constitutional interpretation, but is rather a disparate collection of distinct constitutional theories that share little more than a misleading reliance on a common label."[46] We have already seen that this charge does not accurately reflect the current state of play among theorists who self-identify as originalists; almost all such theorists converge on the Fixation Thesis and the Constraint Principle—although they may not use these particular phrases. Fixation and constraint provide a core content to originalism that meaningfully distinguishes originalism from rival theories; hence, the charge of "misleading reliance on a common label" is demonstrably false. But even if this charge were true, it would not be a substantive objection to the best theory labeled as originalist or, for that matter, to any version of originalism.

Although originalists do not agree all the way down, the originalist disagreement about the role of Framers' intentions versus ratifiers' understandings versus public meaning versus original methods should not obscure substantial agreement among originalists at a more practical level. Under normal circumstances, the intentions of the Framers will be reflected in the public meaning of the constitutional text: as competent speakers and writers of the natural language English, the Framers are likely to have understood that the best way to convey their intentions would be to state them clearly in language that would be grasped by the officials and citizens to whom the constitutional text was addressed. For the same reason, the original understandings of the ratifiers are likely to converge with both public meaning and original intentions. Similarly, the original methods of constitutional interpretation are likely to give pride of place to public meaning, although we will not investigate the evidence for that conclusion on this occasion. So as a practical matter, originalists are likely to agree on midlevel principles of constitutional interpretation even if they disagree about the theoretical grounds upon which those principles rest.

There is one more topic that may divide originalists. The meaning of the constitutional text is, in part, a function of the conventional semantic meanings of the words and phrases as combined by syntax and grammar. This aspect of meaning is sometimes called "literal meaning"—the meaning that we get from the words alone (without reference to context). Using a slightly different vocabulary, we can call this aspect of meaning "semantic content." But the meaning of the text is also a function of the context of constitutional communication. This stems from a very general fact about

45. John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 751 (2009).

46. Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 239 (2009). *But see*, Colby, *supra* note 7 (manuscript at 1 n.1) (accepting fixation and constraint as ideas upon which all or almost all originalists agree).

linguistic communication. Much of the work of communication is done by context. We make a plan to have lunch on Monday; when the day comes around, I send you a short email: "Let's meet at Wise Guys at noon." You understand the email to communicate many things that are not explicitly said. You take it that I mean "noon, today" and not any other day. You understand that I mean what could be explicitly said as "meet for lunch" and not for some other purpose. This additional content is not stated explicitly, but is nonetheless communicated because you know that the email was composed in the context of our previous plan and that Wise Guys is a restaurant that serves pizza and is open for lunch. We can call the contribution that context makes to communicative content "contextual enrichment."[47]

Contextual enrichment is pervasive in constitutional communication. Consider for example the Appointments Clause. Here is the full text of the clause:

> [The President] shall nominate, and, by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.[48]

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47. By "contextual enrichment," I mean to refer to the same phenomena that are sometimes called "pragmatic enrichment" in the philosophy of language. *See generally* François Recanti, *Pragmatic Enrichment*, *in* ROUTLEDGE COMPANION TO PHILOSOPHY OF LANGUAGE 67 (Gillian Russell & Delia Graff Fera eds., 2012). For the purposes of legal theory (and especially constitutional theory), the phrase "pragmatic enrichment" would not communicate well. The distinction between pragmatics and semantics is unfamiliar to most academic lawyers, and the word "pragmatic" is associated with legal pragmatism. *See, e.g.*, Richard A. Posner, *Legal Pragmatism Defended*, 71 U. CHI. L. REV. 683 (2004). For a valuable discussion of the role of communicative enrichment, see generally Hrafn Asgeirsson, *Textualism, Pragmatic Enrichment, and Objective Communicative Content* (Monash Univ. Faculty of Law Legal Studies Research Paper No. 2012/21, 2012), *available at* http://ssrn.com/abstract=2142266.

Because communicative content includes both semantic content and the contextual enrichment of that content, criticisms of the interpretation-construction distinction that align context with construction are misplaced if directed against the account of the distinction developed here. *See* Jessie Hill, *Resistance to Constitutional Theory: The Supreme Court, Constitutional Change, and the "Pragmatic Moment,"* 91 TEX. L. REV. 1815, 1831–32 (2013). Hill argues, "Choices always must be made among possible meanings, as meaning does not exist without context. All interpretation is also construction." *Id.* at 1832. To the extent that Hill refers to the contribution that context makes to communicative content, the substance of her point is correct, but her understanding of "construction" is then identical with the understanding of "interpretation" advanced here. If by "context" she means to refer to normative considerations, then her point is not correct, because it is possible to discern linguistic meaning without giving a text legal effect. Of course, when judges decide cases on the basis of a constitutional provision, they also give that provision legal effect and therefore, consider "context"—if context simply means normative considerations of some kind. *See infra* Part I.C (discussing the role of normative considerations in construction).

48. U.S. CONST. art. II, § 2, cl. 2.

The text does not specify that the "Heads of Departments" in question must be the heads of departments of the national government (such as the State Department) nor that the "Courts of Law" must be Article III courts, but these scope limitations may be implied from the context of utterance; this conclusion is so obvious and sensible that it is extraordinarily unlikely that Congress would ever consider vesting an appointment in the head of a department of a business or foreign nation, or in the "Courts of Law" of Canada.

Likewise, the Ninth Amendment says, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[49] The literal meaning of the text forbids a construction (e.g., from enumeration we can infer the list of enumerated rights is exclusive), but nonetheless the text (read contextually) suggests that the people do in fact retain other rights.[50]

Contextual enrichment is a complex topic, and these remarks are merely suggestive. One feature of contextual enrichment bears special emphasis, however. Contextual enrichment can be cancelled by explicit statement. So if the Appointments Clause contained an addendum, "The courts of law shall include all courts and shall not be limited to the courts established under this Constitution," the addendum would cancel the implied scope limitation. Many of the canons of interpretation work this way: for example, Justice Scalia and Bryan Garner identify a "presumption against retroactivity" that operates with respect to statutes, but the presumption is rebutted if the semantic content of the statute is explicitly retroactive.[51]

Originalists are likely to agree that the meaning of the Constitution is at least partially determined by contextual enrichment, but it is possible that they will disagree about the precise role that contextual enrichment plays. For example, public meaning originalists may believe that the relevant context must be accessible to the public at the time each constitutional provision is proposed for ratification: we might call this "the publicly available context of constitutional communication." But original intentions originalists might believe that the relevant context (for determining communicative content) includes everything that is part of the authorial process (the Framing); in the case of the original Constitution, this would include various events that occurred at the Philadelphia Convention. Public meaning originalists would not accept the events of the convention as part of the relevant context, because the convention was held in secret and records did not become available until decades after the Constitution of 1789 was ratified.[52]

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49. U.S. CONST. amend. IX.

50. *See infra* Part IV.C.3.c.iii.

51. *See* SCALIA & GARNER, *supra* note 16, at 261–62 ("Since the presumption is a canon of interpretation and not a rule of constitutional law, a statute can explicitly or by clear implication be made retroactive.").

52. For a valuable discussion of the relationship between implicature (a form of contextual enrichment) and constitutional interpretation, see Ryan C. Williams, *The Ninth Amendment As a Rule of Construction*, 111 COLUM. L. REV. 498, 543–44 (2011). For a

In sum, the family of originalist theories has a core specified by the Fixation Thesis and the Constraint Principle. Originalists may disagree at a deep theoretical level about the mechanisms of fixation, but they are likely to converge on the relevance of the public meaning of the text to the practical task of determining that meaning. Originalists may disagree about the strength of the Constraint Principle, but they agree (at a minimum) that constitutional constructions must be consistent with the original meaning of the constitutional text.

3. The New Originalism and the Emergence of Constitutional Construction

The phrase "the New Originalism"[53] is used to describe the work of several theorists, especially Randy Barnett[54] and Keith Whittington,[55] and it is strongly associated with two ideas. The first of these is the turn to public meaning—although that turn (by Scalia, Lawson, Calabresi, and Prakash) predates the widespread use of the appellation "New."[56] The second idea is constitutional construction (and the interpretation-construction distinction)—the topic of this Article.[57] In 1999, Whittington brought the notion of constitutional construction into contemporary constitutional theory in two influential books, *Constitutional Interpretation*[58] and *Constitutional Construction*.[59] Barnett deployed Whittington's distinction in his influential essay, *An Originalism for Nonoriginalists*, also published

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discussion of the role of nonpublic constitutional history, see generally Kesavan & Paulsen, *supra* note 28.

53. The first occurrence of the phrase "New Originalism" in the Westlaw JLR database is by Evan Nadel. *See* Evan S. Nadel, *The Amended Federal Rule of Civil Procedure 11 on Appeal: Reconsidering* Cooter & Gell v. Hartmarx Corporation, 1996 ANN. SURV. AM. L. 665, 691 n.191 ("An example of the "textualism" to which I refer is the "New Originalism" theory often associated with Justice Scalia."). Nadel cited William Eskridge, *The New Textualism*, 37 UCLA L. REV. 621, 650–56 (1990), which discusses Scalia but does not use the terms "originalist" or "originalism." Randy Barnett (without citing Nadel) used the phrase again in 1999. *See* Barnett, *supra* note 43, at 620. Barnett's use of the phrase was repeated by others. *See* Paul E. Salamanca, *Choice Programs and Market-Based Separationism*, 50 BUFF. L. REV. 817, 931 n.320 (2002). Keith Whittington used the phrase in a conference paper entitled "The New Originalism" in 2002. *See* Michael Kent Curtis, *Judicial Review and Populism*, 38 WAKE FOREST L. REV. 313, 318 n.23 (2003) (citing Keith E. Whittington, Professor, Princeton Univ., The New Originalism (June 8, 2002), *available at* http://www.aals.org/profdev/constitutional/whittington.pdf). Whittington's remarks were later published. *See* Whittington, *supra* note 9.

54. *See* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION (2004).

55. *See* KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING (1999) [hereinafter WHITTINGTON, CONSTITUTIONAL CONSTRUCTION]; KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW (1999) [hereinafter WHITTINGTON, CONSTITUTIONAL INTERPRETATION].

56. *See supra* notes 40–42 and accompanying text.

57. An early use of the interpretation-construction distinction is found in Robert N. Clinton, *Original Understanding, Legal Realism, and the Interpretation of 'This Constitution,'* 72 IOWA L. REV. 1177, 1265 (1987).

58. WHITTINGTON, CONSTITUTIONAL INTERPRETATION, *supra* note 55.

59. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION, *supra* note 55.

in 1999.[60] Barnett and Whittington's work in turn influenced Jack Balkin through his influential 2006 and 2007 essays, *Abortion and Original Meaning*[61] and *Original Meaning and Constitutional Redemption*,[62] and his book, *Living Originalism*,[63] which explicitly adopts the idea of constitutional construction.[64] My own essay, *The Interpretation-Construction Distinction*, explored the theoretical foundations of the distinction in the broader context of general legal theory.[65]

The interpretation-construction distinction itself predates its role in New Originalist constitutional theorizing. For example, the interpretation-construction distinction was used by both Samuel Williston and Arthur Corbin to mark the difference between discovering the meaning of a contract ("contract interpretation") and the determination of a contract's legal effect ("contract construction"),[66] and the distinction continues to play a role in contract law scholarship.[67] But the distinction itself is older, dating back at least to 1839 when Franz Lieber published his *Legal and Political Hermeneutics*.[68]

Because the interpretation-construction distinction is a technical distinction in legal theory, the meaning assigned to "interpretation" as opposed to "construction" is a function of technical usage and stipulation. The words "interpretation" and "construction" are used here to mark the real difference between two different activities. We can use the phrase "constitutional practice" to designate the whole cluster of activities that judges, officials, and citizens perform when they act on the basis of constitutional norms. We can then use the term "interpretation" to refer to the activity of discovering the linguistic meaning or communicative content of the constitutional text. The term "construction" then can be used to refer to the activity of determining the legal effect given to the text.

In some cases, giving the text legal effect might be unmediated; we read the text and put it into effect. But in other cases, the legal effect of the text is mediated by doctrines of constitutional law. The text of the First

60. *See* Barnett, *supra* note 43.

61. Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291 (2007).

62. Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427 (2007).

63. JACK M. BALKIN, LIVING ORIGINALISM (2011).

64. *Id*. at 23.

65. Solum, *supra* note 4.

66. *See* 3 ARTHUR L. CORBIN, CORBIN ON CONTRACTS §§ 532–35 (1960 & Supp. 1980); 4 SAMUEL WILLISTON, CONTRACTS §§ 600–02 (3d ed. 1961).

67. *See* Edwin W. Patterson, *The Interpretation and Construction of Contracts*, 64 COLUM. L. REV. 833 (1964); Keith A. Rowley, *Contract Construction and Interpretation: From the "Four Corners" to Parol Evidence (and Everything in Between)*, 69 MISS. L.J. 73 (1999).

68. FRANCIS LIEBER, LEGAL AND POLITICAL HERMENEUTICS 43–44, 111 n.2 (Roy M. Mersky & J. Myron Jacobstein eds., 1970) (1839). Lieber's definition of construction is related to the definition offered here: "Construction is the drawing of conclusions respecting subjects, that lie beyond the direct expression of the text, from elements known and given in the text—conclusions which are in the spirit, though not within the letter of the text." *Id.* at 44. For cases using the distinction, see *infra* notes 116–24 and accompanying text.

Amendment includes the phrase "freedom of speech" but constitutional decisions are mediated by a plethora of constitutional doctrines, including, for example, rules against prior restraints, rules governing public forums, and a complex doctrine governing obscenity. When courts devise these doctrines as part of the process of determining the legal effect of the "freedom of speech," they are engaging in constitutional construction—in the sense stipulated here.

B. The Construction Zone

Given our stipulated definitions of "interpretation" and "construction," it follows that every time we engage in constitutional practice, we are engaged in both interpretation and construction. But in some cases, the activity of constitutional construction does not call attention to itself. The legal effect of the text seems to flow automatically from its communicative content. The constitutional text specifies that each state shall have two Senators. Everyone understands that "state" refers to each of the fifty states, that "two" refers to the whole number two, and that "Senate" refers to a particular political institution, the U.S. Senate, which holds formal meetings in the U.S. Capitol building. Once we grasp the communicative content of the text, the legal effect follows directly. States hold elections for two and only two Senators—normally on a staggered basis as specified by Article I. The Senate seats two and only two Senators per state. Unlike the Free Speech Clause of the First Amendment, implementation of the Two Senators Clause does not require a large and complex body of constitutional doctrine. Direct application of clear meaning involves construction, but the process of construction proceeds automatically because the meaning of the text is clear, and the legal effects that follow from that meaning are not subject to serious challenge.

Construction becomes the focus of explicit attention when the meaning of the constitutional text is unclear, or the implications of that meaning are contested.[69] Consider first a variety of ways in which communicative content of the constitutional text might be uncertain (or underdeterminate)—in particular, irreducible ambiguity, vagueness, gaps, and contradictions.

A text is ambiguous if it can have more than one meaning. For example, the word "cool" may be ambiguous—as between senses that refer to temperature, style, and temperament. Thus, if the heat is not working on a cold day, we might say, "It is rather cool here." And if we admire someone's personal style, we might say of her, "She is a cool chick." Or if someone holds his anger in check in the face of provocation, we might say of him, "He kept his cool." When communication succeeds, ambiguities are resolved by consideration of the context in which the communication occurs. Thus, the prior uses of "cool" in this paragraph are disambiguated by context. Let us use the term "reduce" to express the idea that ambiguity

69. This point about the phenomenology or psychology of legal practice is elaborated below. *See infra* Part IV.B.

can be liquidated by context. Usually, clarity about sense is provided by context and hence surface-level ambiguity is reduced to unambiguous communicative content. But it is sometimes the case that ambiguity is irreducible—uncertainty about the meaning of the text remains, even after we consider context. For example, if legislators are unable to agree on a particular point they might use deliberately ambiguous language—kicking the can down the road for judicial resolution of the contested issue.

Now, consider vagueness. The words "ambiguity" and "vagueness" are sometimes used interchangeably, but I am now referring to "vagueness" in the technical (or more precise) sense in which it refers to expressions that have borderline cases. Thus, the word "tall" can be used with respect to persons: Danny DeVito (the actor) is short, but Hasheem Thabeet (the NBA player) is tall. In the context of assessing the height of adult males in the United States, there are men who are neither clearly tall nor clearly not tall. If the average American adult male is 5'9.5" in height, is a 5'11" man tall? There is no bright line, hence there are borderline cases, and therefore the word "tall" is vague in this context.

The text of the Constitution contains provisions that appear to be vague. For example, Articles I, II, and III of the Constitution assign "legislative power" to Congress, "executive power" to the president, and "judicial power" to the Supreme Court and such lower courts as Congress shall establish. Some actions seem to clearly fit in one and only one of these categories. Resolving tort or contract disputes between individuals is a clear case of an exercise of judicial power. But other cases seem uncertain: President Barack Obama's directive regarding the deportation of undocumented persons who came to the United States as children might be classified as an exercise of legislative power, but it might also be seen as an executive action pursuant to discretionary executive power over the prosecutorial function. If President Obama's action were truly a borderline case, that fact would reveal that that the constitutional categories of legislative, executive, and judicial power are vague.[70]

Next, consider contradiction. One hopes that legal texts do not contain contradictory provisions, but the drafters of legal texts (including the Framers of the Constitution) are imperfect humans, and hence it is possible for them to write a text that, if followed, would require inconsistent outcomes in the same case. It is possible that the text of the U.S. Constitution is perfectly consistent, but at least some readers believe that there are contradictions. For example, a panel of the Ninth Circuit (later reversed en banc) concluded that there was a "tension" or inconsistency between the Good Behavior Clause of Article III, which is understood to confer life tenure on federal judges, and the Recess Appointments Clause of Article II, which allows the president to make temporary appointments to various offices without explicit exclusion of federal judgeships.[71] Suppose

70. This idea is elaborated in Figure 7, *infra*.

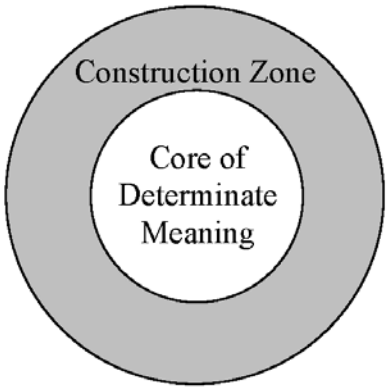
71. United States v. Woodley, 726 F.2d 1328, 1329 (1983) ("We are thus called upon to address the inherent tension between the so-called recess appointment clause, which on its

that these two provisions are actually in contradiction; it would then follow that we could not determine their constitutional effect by simply applying the clear meaning of the text. Construction would be required, creating either an exception to the life tenure rule for recess appointments or a limitation on the recess appointments power, excluding federal judges.

Finally, consider gaps. As I am using the term "gap," it refers to a situation in which the constitutional text requires the existence of a rule of constitutional law but does not provide the content of that rule (or explicitly delegate the task of providing content to some constitutional institution or actor). Whittington has suggested that the absence of a constitutional provision regarding the removal of federal officers may be a constitutional gap; presidents either have a unilateral power of removal or they do not, but the constitutional text simply does not address the question.[72]

Irreducible ambiguity, vagueness, contradictions, and gaps create constitutional questions that cannot be resolved simply by giving direct effect to the rule of constitutional law that directly corresponds to the communicative content of the constitutional text. Such cases are underdetermined by the meaning of the text—they are in the construction zone.

FIGURE 1: THE CONSTRUCTION ZONE



face applies to vacancies in any government office, and section 1 of article III which provides that only judges with article III protection may exercise the judicial power of the United States. We are required to decide, in other words, whether the recess appointment power of the President applies to vacancies in the judicial as well as the executive branch of government.").

72. Keith E. Whittington, *Constructing a New American Constitution*, 27 CONST. COMMENT. 119, 123–24 (2010) ("Arguably, the removal power is an instance of such a gap. The U.S. Constitution specifies how executive branch officials are to be appointed, but does not specify how they are to be removed from office, except by impeachment. The First Congress puzzled over several alternatives as to how officers might be removed and how such removals might be constitutionally justified. The statutes creating the Cabinet departments settled on unilateral presidential removal, but there was little agreement in Congress over the rationale behind that settlement. A removal power is a requisite part of the constitutional scheme.").

The construction zone consists of constitutional cases or issues that cannot be resolved by the direct translation of the constitutional text into rules of constitutional law that determine their outcome. The necessity for constitutional construction becomes obvious in the construction zone; giving legal effect to the meaning of the text underdetermines its legal effect. But this leaves important questions open: How substantial is the construction zone? In other words, is the construction zone empty, sparsely populated, or densely backed with issues and cases?

Some originalists may believe that the Constitution's text fully determines the content of constitutional doctrine; they deny the existence of the construction zone. Other originalists may believe that the Constitution is internally consistent, gapless, and unambiguous—leaving only a relatively minor zone of constitutional underdetermination created by residual vagueness. And a final group of originalists may believe that many of the most important provisions of the Constitution (e.g., the power allocating provisions of the first three Articles and the major individual rights provisions) are substantially vague, resulting in a large and pervasive construction zone.[73]

C. A Note on the Role of Normativity in the Construction Zone

Constitutional interpretation is essentially a factually driven enterprise. The communicative content of the text is determined by facts about conventional semantic meanings and syntax, on the one hand, and facts about the relevant context of constitutional communication on the other. Constitutional construction is not driven by facts in the same way. Rather, construction is essentially driven by normative concerns. There may be disagreements about what kinds of norms are relevant and whether those norms should be considered on particular issues in particular cases, or whether the relevant norms operate systemically. Moreover, some theories of constitutional construction may be driven by considerations of political morality, whereas other theories may look to norms that are internal to legal practice. The abstract fact that construction is essentially normative does not entail any particular account of the norms that ought to govern the practice of construction.

The range of normative possibilities can be illustrated by considering two different theories of constitutional construction. Both of these theories are originalist in the sense that they both accept the Fixation Thesis and the Constraint Principle. Let us stipulate that both theories accept the existence of a substantial construction zone—operating with respect to vague constitutional provisions like "freedom of speech" and the power grants in the first three Articles. We will call the two theories the "Moral Readings Theory" of constitutional construction and the "Originalist Thayerian

73. The questions whether the construction zone exists and whether it is substantial are addressed below. *See infra* Part IV.

Theory"[74] of constitutional construction (or "Originalist Thayerianism"). As presented here, these are "toy" theories—not fully developed versions. They are chosen to represent polar opposite possibilities, and not to represent the mainstream of originalism generally or the New Originalism in particular.

The Moral Readings Theory contends that the resolution of constitutional issues in the construction zone should be guided directly by considerations of political morality. For example, if the phrase "equal protection of the laws" is vague, we should directly consider our views about the value of equality—adopting the construction of the Equal Protection Clause that coheres with the morally best theory of equality.[75] The Moral Readings theory fills the construction zone with content directly selected on the basis of political morality.

The Originalist Thayerian Theory contends that the judicial resolution of constitutional issues in the construction zone should avoid any direct reliance on judges' first-order views about political morality.[76] Originalist Thayerians believe that outside the construction zone, judges should give legal effect to the clear meaning of the constitutional text. But when the meaning of the text is unclear or uncertain, then judges should defer to decisions made by the political branches. Thus, in a case where the requirements of equal protection are unclear (because of vagueness, for example), judges should refrain from declaring legislative or executive action unconstitutional. Originalist Thayerians rely on normative considerations as the basis for this rule of construction. They believe that judicial invalidation of democratically enacted legislation is only legitimate when the meaning of the Constitution is clear; otherwise, the value of democratic legitimacy requires judges to defer to the political branches. Normative considerations are operating here, but only indirectly via the justification for the Thayerian principle of deference.

The Moral Readings Theory and Originalist Thayerianism are illustrative, but there are many other possible views about constitutional construction in cases of underdeterminacy. One might apply a presumption of liberty or adopt a common law method of construction that gives great weight to precedents and background principles developed by common law courts. For our purposes on this occasion, the important point is that there are several possible approaches to the construction zone that are consistent with the core commitments of originalism to fixation and constraint.

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74. Originalist Thayerianism is so named because of its affinity to James Thayer's approach to judicial review. Thayer's classic text is JAMES B. THAYER, THE ORIGIN AND SCOPE OF THE AMERICAN DOCTRINE OF CONSTITUTIONAL LAW (1893).

75. *See generally* James E. Fleming, *Living Originalism and Living Constitutionalism As Moral Readings of the American Constitution*, 92 B.U. L. REV. 1171 (2012). Fleming does not describe himself as an originalist.

76. The Originalist Thayerian Theory is related to and inspired by the views of Gary Lawson and Michael Paulsen. *See infra* Part IV.C. Lawson and Paulsen both believe that default rules resolving cases in the construction zone follow from the meaning of the constitutional text. That argument is addressed below in Part IV.C.3.

D. A New Originalist Lexicon

At this point, our abbreviated investigation of originalism and the interpretation-construction distinction is complete. We can summarize the discussion so far in the form of a New Originalist Lexicon—a brief recapitulation of the key concepts.

- Originalism: A family of constitutional theories that agree on the Fixation Thesis and the Constraint Principle.
- The Fixation Thesis: The claim that the communicative content of the constitutional text is fixed at the time each provision is framed and ratified.
- The Constraint Principle: The claim that the legal content of constitutional doctrine should be constrained by the communicative content of the constitutional text.
- Semantic Content: The conventional semantic meaning of the words and phrases ordered by syntax and grammar.
- Contextual Enrichment: The addition to or modification of the semantic content of a text or utterance made by the context in which the text was written or the utterance was said.
- Communicative Content: The contextually enriched semantic content of a text or utterance—also referred to as "linguistic meaning" or "meaning."
- New Originalism: Constitutional theories that are members of the originalist family (accepting the Fixation Thesis and the Constraint Principle) and that additionally affirm the public meaning thesis and the interpretation-construction distinction.
- Public Meaning Thesis: The claim that the communicative content of the constitutional text is determined by the semantic meaning of the text as enriched by the publicly available context of constitutional communication.
- Interpretation-Construction Distinction: The distinction between interpretation (discovery of meaning) and construction (determination of legal effect).
- Constitutional Interpretation: An activity that is part of constitutional practice and aims at the recovery of the communicative content of the constitutional text.
- Constitutional Construction: An activity that is part of constitutional practice and aims at the determination of the legal content of constitutional doctrine and/or the legal effect to be given to the constitutional text.
- Legal Content: The legal norms that attach to an authoritative legal text; in the case of the Constitution, constitutional doctrine articulated by courts, or constitutional norms implicitly or explicitly articulated by nonjudicial constitutional actors.
- Constitutional Practice: Actions taken on the basis of constitutional interpretation and construction, including constitutional adjudication in

the courts, and actions by nonjudicial officials that are guided by constitutional norms.

- Construction Zone: The set of constitutional issues and cases for which the communicative content of the constitutional text underdetermines legal effect, e.g., the legal content of constitutional doctrine and the resolution of constitutional cases.

With this summary in place, we can now turn to some preliminary objections to the interpretation-construction distinction itself.

II. A NOTE ON TERMINOLOGY AND CONCEPTUAL CLARITY

At this point, we need to consider five preliminary objections to the interpretation-construction distinction. A sense of these objections is conveyed by the following questions:

- Why should we care about the interpretation-construction distinction? Are these just labels for familiar features of constitutional practice?
- Aren't "interpretation" and "construction" synonyms? Isn't it misleading and semantically incorrect to use them to mark the distinction between meaning and effect?
- Doesn't the use of the term "interpretation" for the discovery of linguistic meaning load the dice in favor of originalism? Shouldn't living constitutionalists be able to describe their method of constitutional practice as "interpretation"?
- Is there really a difference between meaning and legal effect? In legal practice, aren't the two synonymous?
- Doesn't the interpretation-construction distinction obscure other important conceptual distinctions, including the distinction between constitutional "interpretation" and constitutional "implementation"?

Before we deal with these questions, I should make one important observation. The use of the terms "interpretation" and "construction" to mark the distinction between meaning and effect is not itself important. We could use a different vocabulary. For example, we might say "linguistic interpretation" and "constructive interpretation." Or we might differentiate "finding meaning" from "determining legal effect." Whatever vocabulary we use, we are marking a theoretical distinction that is not fully reflected in common usage. This means that we must rely on stipulated definitions or patterns of usage among communities of specialists—in this case constitutional scholars and other legal theorists. In this Article, I have stipulated definitions of "interpretation" and "construction" and argued that these stipulated definitions capture the underlying conceptual point of the interpretation-construction distinction that has been employed by a variety of contemporary originalists.[77] Moreover, my stipulated definitions are consistent with a pattern of usage by courts and legal scholars, as noted

77. *See supra* notes 54–61 and accompanying text.

above[78] and more fully elaborated below.[79] Towards the end of this Part, I will argue that "interpretation" and "construction" are the best words to use to express the interpretation-construction distinction,[80] but that argument is about clarity and consistency and not theoretical substance.

A. The Cash Value of Conceptual Clarity

The first objection is that the distinction between interpretation and construction is arid or unproductive; call this the "Aridity Objection." Someone who made this objection might concede that we can distinguish between the meaning of the constitutional text and its legal effect, but deny that there is any payoff or point to doing this. The issue raised by the objection is certainly important; the interpretation-construction distinction is only worth marking if there is some payoff. We can begin by examining a version of the Aridity Objection based on ideas drawn from American legal realism. (Before proceeding, I note that I will not address the argument that the interpretation-construction is undermined by the radical indeterminacy of law in general or constitutional law in particular—some brief remarks can be found in the accompanying footnote.[81])

Here is one version of the Aridity Objection. Realists emphasize importance of the "law in action" as distinguished from the "law in the books"—the phrasing is from Roscoe Pound's famous article.[82] This realist insight is related to Justice Oliver Wendell Holmes's famous observation about the bad man:

> You can see very plainly that a bad man has as much reason as a good one for wishing to avoid an encounter with the public force, and therefore you can see the practical importance of the distinction between morality and law. A man who cares nothing for an ethical rule which is believed and practised by his neighbors is likely nevertheless to care a good deal to avoid being made to pay money, and will want to keep out of jail if he can.[83]

And:

> If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his

78. *See supra* notes 66–68 and accompanying text.

79. *See infra* notes 116–25 and accompanying text.

80. *See infra* Part II.F.2.

81. The objection might be stated as follows. The meaning of the constitutional text is radically indeterminate, because any conceivable legal effect can be argued to be consistent with (or required by) that meaning: therefore, "interpretation" cannot do any work in constitutional practice, and hence it cannot be meaningfully distinguished from "construction." In my view, this objection fails because it is based on a slide from the fact of constitutional underdeterminacy (embraced by proponents of the interpretation-construction distinction) to the unwarranted claim that the law is radically indeterminate (the strong indeterminacy thesis). *See generally* Lawrence B. Solum, *On the Indeterminacy Thesis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462 (1987).

82. Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 32–33 (1910).

83. Oliver Wendell Holmes Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

> reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.[84]

Holmes's bad man cares about "the law in action," but has no use for the "the law in the books" except insofar as it provides a useful guide to what the legal system will actually do.[85]

A realist critic of the interpretation-construction distinction might argue that the point of the bad-man thought experiment is that the law in action is the only thing that matters. The law on the books is simply irrelevant. Thus, a realist might argue that we should collapse the interpretation-construction distinction. There may be a conceptual difference between the linguistic meaning of the constitutional text and the legal effect of constitutional doctrine, but only the latter can matter. Hence, the realist critic might argue that construction swallows interpretation, and thus that the distinction between interpretation and construction has no cash value[86] or real world payoff.

But this criticism would be fundamentally confused. Our hypothetical realist critic relies on Pound's distinction between the law on the books and the law and action. But at this point, I am sure that readers will recognize that Pound's distinction is simply a variation on the interpretation-construction distinction. Interpretation is the discovery of the meaning of "the law in the books." Construction is the determination of "the law in action." Thus, a variation of the interpretation-construction distinction is one of the foundational ideas of American legal realism—although the realists may not have used this vocabulary.

Moreover, the interpretation-construction distinction can be an important tool in normative criticism of the law. If we collapse the distinction, then there is no difference between the meaning of the constitutional text and the legal effect given to the text by judges in the form of intermediate doctrines of constitutional law and decisions in constitutional cases. This conflation of meaning and effect makes it impossible to criticize a judicial decision on the ground that it is inconsistent with the text—such an argument makes no sense unless the communicative content of the text is distinct from the legal effect that it produces.

Moreover, collapsing meaning and effect reduces the transparency of legal decisionmaking. In the context of contract law, Farnsworth observed that courts "often ignore [the interpretation-construction distinction] by characterizing the process of construction as that of 'interpretation' in order to obscure the extent of their control over private agreement."[87] A similar point could be made about constitutional law; collapsing the interpretation-

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84. *Id.*

85. For the connection between Holmes and Pound, see Albert W. Alschuler, *The Descending Trail: Holmes'* Path of the Law *One Hundred Years Later*, 49 FLA. L. REV. 353, 368 (1997); Sanford Levinson, *National Loyalty, Communalism, and the Professional Identity of Lawyers*, 7 YALE J.L. & HUMAN. 49, 56–57 (1995).

86. *See* WILLIAM JAMES, PRAGMATISM 200 (1907) ("What, in short, is the truth's cash-value in experiential terms?").

87. E. ALLAN FARNSWORTH, CONTRACTS § 7.7, at 478 (1982).

construction distinction obscures judicial decisions that control the legal effect given to the constitutional text.

This point about the critical force of the interpretation-construction distinction suggests that some legal advocates might have a practical reason for conflating meaning and effect and hence for resisting the interpretation-construction distinction. If you were arguing for a result that is inconsistent with the meaning (communicative content) of the text, it would be convenient if your theory of "interpretation" did not require you to confront that meaning directly. This is especially likely to be the case if amendment of the text through the procedures specified in Article V is not politically feasible, as is frequently the case. If one can argue that departing from the meaning of the text is actually just "interpretation," then one does not have to explicitly advocate a judicial power to override or amend the Constitution. Because such a power is likely to be criticized on the ground that it is illegitimate, a savvy advocate will attempt to couch the argument for judicial revision of the Constitution as an argument for "interpretation." Erasing the interpretation-construction distinction opens the door for this strategy, which relies on obscurity of expression to avoid transparency.

This does not mean that revitalization of the interpretation-construction distinction shuts the door on constitutional change, but it does mean that it changes the terms of debate. Those who advocate constitutional change could proceed in many different ways. One possibility is suggested by Michael Seidman's recent work. In his book, *Constitutional Disobedience*, Seidman explicitly argues that we should no longer treat the Constitution as binding law.[88] Another possibility is suggested by Sanford Levinson, who argues for thoroughgoing constitutional reform by amendment.[89] And there are other alternatives. The Supreme Court might explicitly adopt a radically Thayerian approach to constitutional construction—abstaining from almost all constitutional cases and leaving the real work of constitutional interpretation and construction to the political branches and popular will. Mark Tushnet made a version of this suggestion in his book, *Taking the Constitution Away from the Courts*.[90] A less radical suggestion would be for the courts to become more transparent about the relationship of constitutional doctrine to the constitutional text, openly embracing the power to adopt amendment constructions of the Constitution. One might imagine that nominees for the Supreme Court would eschew declarations that they are just umpires, calling balls and strikes, or disingenuously suggesting that we are all originalists now. Instead, they might clearly state that they believe they have the power to make decisions that are inconsistent with the meaning of the text.

88. MICHAEL SEIDMAN, CONSTITUTIONAL DISOBEDIENCE (2013).

89. SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) (2008); *see also* SANFORD LEVINSON, FRAMED: AMERICA'S 51 CONSTITUTIONS AND THE CRISIS OF GOVERNANCE (2012).

90. MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (2000).

Of course, it is likely that all of these options will be controversial. Many academics, judges, lawyers, officials, and ordinary citizens will defend the Constitution and the role of the judiciary against criticisms like those offered by Seidman, Levinson, and Tushnet. It is not clear that a nominee who openly embraced judicial power to amend the Constitution could be confirmed under almost any realistic political scenario. The division of opinion about constitutional fundamentals means that a more honest debate about the relationship between the constitutional text and the power of the judiciary could go in any number of directions. But such a debate would at least have the virtue of transparency and, hence, openness to democratic politics and serious academic criticism.

This line of response to the realist critique of the interpretation-construction distinction focuses on the big questions about judicial power and the authority of the text. But the value of distinction can also be defended on narrower and more modest grounds. The interpretation-construction distinction brings conceptual clarity to constitutional practice. When we blur the distinction between meaning and desired effect, we are at risk of conceptual confusion and motivated reasoning. For example, we might allow our beliefs about the desirability of certain legal effects to influence our judgments about the linguistic meaning of the text. The slide from meaning to effect is easy if we call both activities "interpretation." Linguistic meaning is determined by linguistic facts and facts about the context of communication. It is simply a conceptual error to believe that our normative beliefs about what a text should mean can determine what the text actually does mean.

The danger of conceptual confusion that arises from collapsing the interpretation-construction distinction is illustrated by the influential approach to constitutional interpretation and construction articulated by Philip Bobbitt[91] and Stephen Griffin.[92] The gist of this approach is that there are multiple modalities or a plurality of methods for establishing the truth or validity of a constitutional doctrine or decision. If we collapse the interpretation-construction distinction, then each of the modalities (or methods) seems to bear on "interpretation" and hence becomes "meaning" in the sense of communicative content. But once we have the interpretation-construction distinction, we can see that some of Bobbitt's modalities and Griffin's methods are actually inputs to constitutional construction, while others can be seen as relevant to construction via their contribution to interpretation. These abstract points will be clarified if we examine their application to Bobbitt's theory in greater depth.

We can begin with Bobbitt's enumeration of six modalities. They are:

- *historical* (relying on the intentions of the framers and ratifiers of the Constitution);

91. *See* BOBBITT, *supra* note 22.
92. *See* Griffin, *supra* note 23.

- *textual* (looking to the meaning of the words of the Constitution alone, as they would be interpreted by the average contemporary "man on the street");
- *structural* (inferring rules from the relationships that the Constitution mandates among the structures it sets up);
- *doctrinal* (applying rules generated by precedent);
- *ethical* (deriving rules from those moral commitments of the American ethos that are reflected in the Constitution); and
- *prudential* (seeking to balance the costs and benefits of a particular rule).[93]

Before we proceed further, we should note Bobbitt's use of the word "modality"[94]—a word borrowed from philosophy where it expresses the manner in which a statement or proposition's truth holds.[95] In a footnote, I discuss the implications of Bobbitt's theoretical move,[96] but for our purposes we can view the modalities as argument types (or methods) following Bobbitt's earlier work[97] and Griffin's idea of a plurality of methods.[98] Thus, each modality is an argument type or interpretive method. The six modalities are all on a level plane. We can represent this picture graphically as follows:

93. BOBBITT, *supra* note 22, at 12–13 (emphasis added) (paragraph structure altered and bullets added).

94. *Id.* at 11–12.

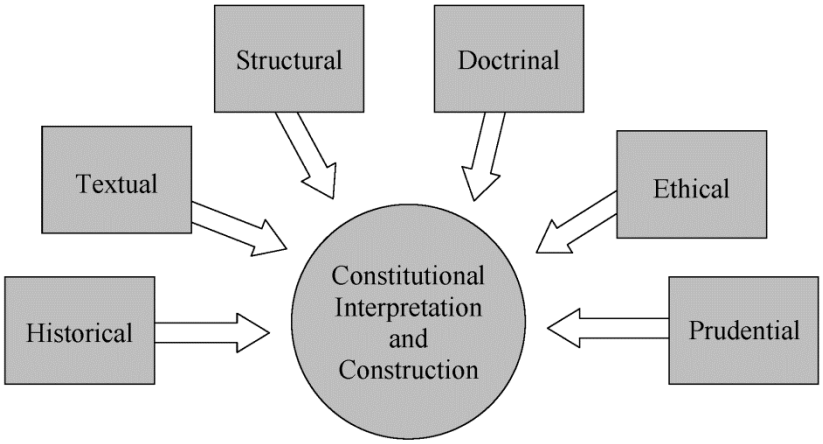
95. Anand Vaidya, *The Epistemology of Modality*, STAN. ENCYCLOPEDIA PHIL. (Dec. 5, 2007), http://plato.stanford.edu/entries/modality-epistemology/.

96. Viewing Bobbitt's theory as involving modality or truthmaking renders his theory peculiar. The central instances of modality in philosophy are necessity and possibility. We can understand what it means for a proposition to be necessarily true: such a proposition is true in all possible worlds. Likewise, a proposition is possibly true if it is true in at least one possible world. But what does it even mean to say that a proposition of constitutional law is "textually true" or "prudentially true"? The philosophical modalities are related to one another: if a proposition is necessarily true, then it follows as a matter of logic that it is possibly true, and so forth, but one cannot add up the philosophical modalities to produce "overall" truth—as one might weigh prudential and ethical arguments. Bobbitt's text makes it clear that he is using modality in the philosophical sense, but his explanation of the modalities is short, and it is not clear that he has a coherent theory of the modal nature of the categories of argument that he lays out.

97. PHILIP BOBBITT, CONSTITUTIONAL FATE (1982).

98. *See* Griffin, *supra* note 23.

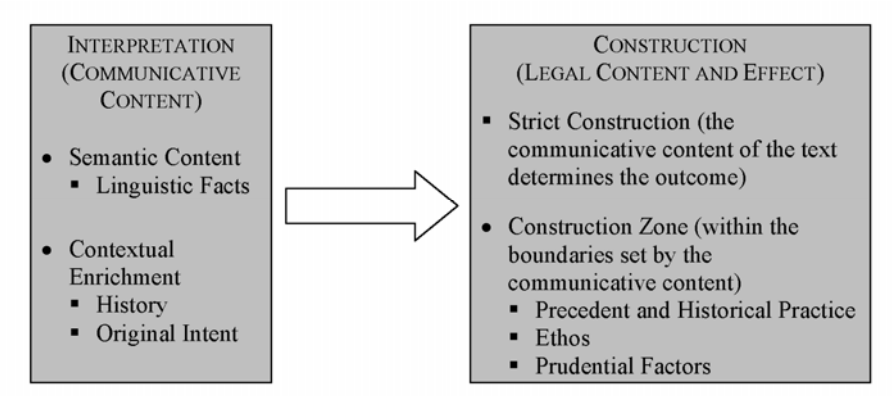
FIGURE 2: MULTIPLE MODALITIES MODEL



The Multiple Modalities Model collapses the interpretation-construction distinction. The inevitable result is conceptual confusion. Historical evidence relevant to the communicative content of the text is put at the same level as prudential concerns. There is no hierarchy or ordering of the roles played by each of the modalities. Worst of all, this model suggests that the prudential and ethical modalities are somehow relevant to the determination of constitutional meaning in the linguistic sense—a substantial conceptual error.

Now, consider an alternative picture that takes the interpretation-construction distinction into account. Three of the modalities (historical, textual, and structural) are directly relevant to the discovery of communicative content (and hence interpretation). And communicative content itself is relevant to the determination of legal effect (construction). The other three modalities (doctrinal, ethical, and prudential) are directly relevant to construction, but do not bear directly on interpretation.

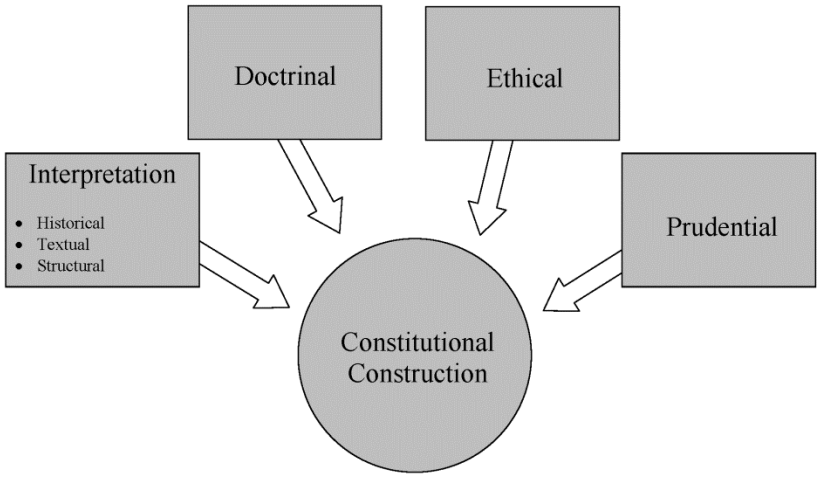
FIGURE 3: TWO MOMENTS MODEL (FOR MULTIPLE MODALITIES)



By distinguishing between interpretation and construction, we are able to distinguish the conceptual difference between the roles played by the modalities. This particular version of the model is based on Public Meaning Originalism and a theory of construction that allows for the consideration of precedent, ethos, and prudential factors. A different version of the model could substitute for the Thayerian Originalist principle of deference as the method that applies in the construction zone. But as long as we retain the basic shape of the Two Moments Model we can avoid the conceptual confusion produced by the conflation of interpretation and construction.

Bobbitt or Griffin might respond to this criticism by adopting a variation on the Multiple Modalities Model. They could accept the interpretation-construction distinction, but maintain that interpretation is just one of several modalities. Their modified picture might look something like this:

FIGURE 4: MODIFIED MULTIPLE MODALITIES MODEL



This modified version of the model preserves the living-constitutionalist[99] idea that doctrine, ethos, or prudential concerns can trump the communicative content of the constitutional text, but it avoids the conceptual confusion that results from conflating the interpretation-construction distinction.[100]

99. By "Living Constitutionalism," I mean to refer to views holding that the legal content of constitutional doctrine changes over time. *See generally* Lawrence B. Solum, *Faith and Fidelity: Originalism and the Possibility of Constitutional Redemption*, 91 TEX. L. REV. 147, 154–62 (elucidating the nature and history of living constitutionalism); *see also infra* Table 1 (defining living constitutionalism).

100. The modified version of the Multiple Modalities Model presented in Figure 4 is too simple. For example, history can be relevant as a source of contextual enrichment and hence of communicative content, but historical practice might also be relevant to constitutional

The interpretation-construction distinction provides another form of cash value by opening the door to recognition of the construction zone. And that recognition can improve originalist practice. Originalists may be tempted to argue that the original meaning of the constitutional text provides an answer to every constitutional question. Once they understand the distinction between interpretation and construction, originalists become open to the possibility that the linguistic meaning of the constitutional text may sometimes underdetermine the outcome of constitutional cases. That realization then can serve as a check against the tendency to see bright lines where the meaning of the text is vague. Of course, the recognition of vagueness does not entail the conclusion that judges are licensed to bring political morality to bear directly in constitutional decisionmaking: the possibility of default rules requiring deference to democratic decisionmaking demonstrates that vagueness does not entail discretion. But the case for a deferential approach to constitutional construction can only be made clearly and honestly if we recognize the existence of the construction zone.[101]

In sum, there are good reasons to believe that the interpretation-construction distinction has cash value. That value is delivered via conceptual clarity, but the ultimate payoff is increased transparency and diminished confusion in constitutional argument and deliberation. The realist critique of the interpretation-construction distinction is both internally inconsistent and misguided, as evidenced by the fact that the realist distinction between the law in the books and the law in action depends on the distinction between meaning and effect and, thus, presupposes the interpretation-construction distinction.

B. The Garner-Scalia Objection: Interpretation and Construction Are Synonymous

The interpretation-construction distinction has also come under fire from an altogether different angle. Garner and Scalia object to the distinction on grounds articulated in their book, *Reading Law: The Interpretation of Legal Texts*.[102] I will quote their objection with some minor omissions:

> Modern nontextualism is based in part on an equivocal use of the word *construction*, which is the noun corresponding to *construe*. When construing a statute, one engages in *statutory construction*, which has long been used interchangeably with the phrase *statutory interpretation*. When one is construing a constitutional text one is engaged in *constitutional construction* or again, *constitutional interpretation*. When construing a contract, one is likewise engaged in *contractual*

construction. A more comprehensive version would take this and other complexities into account.

101. For discussion of deference as a principle of constitutional construction, see *infra* Part IV.C.

102. *See* SCALIA & GARNER, *supra* note 16.

> *construction*—though the usual phrase is *contractual interpretation*. So far, so good.[103]
>
> Oddly enough, though, the noun *construction* answers both to *construe* (meaning "to interpret") and to *construct* (meaning to build). . . .
>
> . . . .[104]
>
> As it happens, nontextualists have latched onto the duality of construction. From the germ of an idea in the theoretical works of Franz Lieber, scholars have elaborated a supposed distinction between *interpretation* and *construction* . . . .[105] Thus is born, out of false linguistic association, a whole new field of legal inquiry.[106]
>
> But the equivocal nature of *construction* has positively done harm in the work of constitutional theorists. [Balkin], for example, has recently written [*Living Originalism*][107] largely premised on the distinction. . . .[108] Even some textualists [citing Lawrence Solum] have embraced the distinction so as to contrast the legitimacy of constitutional interpretation with the relative illegitimacy of so-called constitutional construction.[109]
>
> But this supposed distinction between *interpretation* and *construction* has never reflected the courts' actual usage. . . .[110]

This passage makes two distinct points: first, an argument that the interpretation-construction distinction rests on linguistic confusion, and second, an argument that the terminology used to express the distinction is not consistent with judicial usage.

The argument that the interpretation-construction distinction either originates with or rests on linguistic confusion ("born out of false linguistic association") is simply mistaken as a matter of fact. First and foremost, proponents of the interpretation-construction distinction have clearly and unequivocally stated that the terminology itself is technical. When used by legal theorists to express the distinction, "interpretation" and "construction" are terms of art with a long history of usage.[111] Moreover, those who use

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103. *Id.* at 13.

104. The omitted paragraph deals with the use of the verb "construction" in expressions like "constructing a statute". I agree that this usage is nonstandard, but that point has no bearing on the interpretation-construction distinction itself.

105. The omitted passage and accompanying note refers selectively to the academic literature, citing WHITTINGTON, CONSTITUTIONAL INTERPRETATION, *supra* note 55, Barnett, *supra* note 54, and Jamal Greene, *On the Origins of Originalism*, 88 TEX. L. REV. 1, 10 (2009).

106. SCALIA & GARNER, *supra* note 16, at 15.

107. BALKIN, *supra* note 63.

108. The omitted passage provides quotations from *id*.

109. SCALIA & GARNER, *supra* note 16, at 16–17.

110. *Id.* at 15. The omitted passage quotes from sources supporting the proposition that interpretation and construction are synonymous. Footnote fifty also cites McGinnis & Rappaport, *supra* note 45, with the following parenthetical: "noting that the distinction between interpretation and construction is conceptually and historically unfounded." SCALIA & GARNER, *supra* note 16, at 15 n.50.

111. Solum, *supra* note 4, at 95 ("One more caveat: although the distinction between 'interpretation' and 'construction' is indispensible, those particular words are being used in a technical sense. A different vocabulary could be used to denote the distinction.").

the distinction are frequently careful to acknowledge the fact that the particular words used to express the distinction are unimportant. For example, in an article titled *The Interpretation-Construction Distinction*, published in *Constitutional Commentary* in 2010 (two years before the publication of Garner and Scalia's book), I wrote, "[T]he difference between interpretation and construction is real and fundamental. Although the terminology (the words 'interpretation' and 'construction' that express the distinction) could vary, legal theorists cannot do without the distinction."[112]

So it is clear that the use of the word "construction" to describe the process of determining the legal effect of the text is not a product of linguistic confusion. Indeed, so far as I am aware, no contemporary theorist who uses the interpretation-construction distinction has ever confused the word "construe" with the word "construct," although it is true that "construction" is sometimes used in a metaphorical sense.[113] I do this myself when I discuss "the construction zone." Metaphor and linguistic confusion are two different phenomena.

Second, the argument that the distinction arose from linguistic confusion commits the genetic fallacy. Suppose that Scalia and Garner had been right, and that a linguistic mistake had been the causal mechanism by which the interpretation-construction distinction came into being. That fact would not establish that the distinction between the communicative content of the constitutional text and legal effect given to the text by constitutional doctrine does not exist. The psychological mechanism that gave rise to the distinction is simply irrelevant to its correctness or truth; to argue otherwise is simply a classic version of the genetic fallacy (the claim that the causal or psychological origin of a claim is relevant to its truth).[114]

Garner and Scalia's second argument is "this supposed distinction between *interpretation* and *construction* has *never* reflected the courts' actual usage."[115] Again, their claim is simply incorrect. There are, in fact, a variety of reported cases that do employ the interpretation-construction distinction. Consider the following passages from judicial opinions (in reverse chronological order). Each passage unambiguously relies upon the distinction between interpretation (as the discovery of meaning) and construction (as the determination of legal effect). Each passage is "actual usage" by a court:

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112. *Id.* at 96; *see also id.* at 103 n.19 (explicitly noting that the definitions of "interpretation" and "construction" are stipulated).

113. Garner and Scalia note metaphorical uses by Jack Balkin, who contrasts "Framework Originalism" with "Skyscraper Originalism." *See* SCALIA & GARNER, *supra* note 16, at 16–17.

114. *Genetic Fallacy*, *in* THE OXFORD COMPANION TO PHILOSOPHY (Ted Honderich ed., new ed. 2005).

115. SCALIA & GARNER, *supra* note 16, at 35 (emphasis added to "never").

- "Contract interpretation 'is a process for determining the meaning of words in a contract,' whereas construction 'is a process of determining the legal effect of such words.'"[116]
- "Interpretation and construction of written instruments are not the same. A rule of construction is one which either governs the effect of an ascertained intention, or points out what the court should do in the absence of express or implied intention, while a rule of interpretation is one which governs the ascertainment of the meaning of the maker of the instrument."[117]
- "Before examining the specific issues raised herein an overview of the problems of interpretation of contracts is necessary. We use the word 'interpretation' in the sense described by Corbin and the Restatement and distinguish it from 'construction.' Corbin states: 'Interpretation is the process whereby one person gives a meaning to the symbols of expression used by another person.' The Restatement definition is: 'Interpretation of a promise or agreement or a term thereof is the ascertainment of its meaning.'"[118]
- "Interpretation, the meaning of insurance policy words, is an issue for the court unless it depends on extrinsic evidence or on a choice among reasonable inferences from extrinsic evidence. Construction, the legal effect of a policy, is always a matter of law to be decided by the court."[119]
- "The rule is essentially one of legal effect, of 'construction' rather than 'interpretation,' since 'it can scarcely be said to be designed to ascertain the meanings attached by the parties.'"[120]
- "Interpretation involves ascertaining the meaning of contractual words; construction refers to deciding their legal effect. Interpretation is reviewed as a legal issue unless it depended at the trial level on extrinsic evidence. Construction is always reviewed as a law issue."[121]
- "When the question is one of 'construction' as distinguished from 'interpretation' of the contract, the issue is one of law."[122]
- "In the law of contracts (conventional obligations) a proper distinction exists between the 'interpretation' of written instruments and their 'construction.' 'Interpretation' refers to the process of determining the meaning of the words used; that process is traditionally thought to

116. Fausel v. JRJ Enters., Inc., 603 N.W.2d 612, 618 (Iowa 1999).

117. Hostmann v. First Interstate Bank of Ore. (*In re* XTI Xonix Techs. Inc.), 156 B.R. 821, 829 n.6 (Bankr. D. Ore. 1993) (citing *In re* Union Trust Co., 151 N.Y.S. 246, 249 (1915)).

118. Berg v. Hudesman, 801 P.2d 222, 226 (Wash. 1990) (en banc) (quoting 3 CORBIN, *supra* note 66, § 532, at 2, and RESTATEMENT (SECOND) OF CONTRACTS § 200 (1981)).

119. Grinnell Mut. Reinsurance Co. v. Voeltz, 431 N.W.2d 783, 785 (Iowa 1988) (citing Lonnie's Const. Co. v. Fireman's Fund Ins. Co. 227 N.W.2d 207, 210 (Iowa 1975)).

120. Joyner v. Adams, 361 S.E.2d 902, 905 (N.C. Ct. App. 1987) (quoting FARNSWORTH, *supra* note 87, § 7.11, at 500).

121. Allen v. Highway Equip. Co., 239 N.W.2d 135, 139 (Iowa 1976).

122. Ram Const. Co. v. Am. States Ins. Co., 749 F.2d 1049, 1053 (3d Cir. 1984).

> be a function of the jury. On the other hand, the process of determining the legal effect of the words used—once we know their meaning—is properly labeled 'construction'; it is peculiarly a function of the court."[123]

- "Consequently [the will's] meaning and her knowledge in respect to it are, in my opinion, relevant and admissible circumstances to throw light upon the interpretation of her will. The construction or legal effect which New York law will attribute to the interpreted will is not under consideration at the moment."[124]

Not all courts distinguish between interpretation and construction, but the distinction is common in American case law. As the quoted examples of actual usage by courts reflect, the distinction has been recognized by secondary authorities such as the *Restatement (Second) of Contracts*,[125] Arthur Corbin, Allan Farnsworth, John Wigmore, and Samuel Williston—these are not eccentric or obscure authorities. Garner and Scalia cite no primary authority, relying instead solely on secondary authorities William Like, H.T. Tiffany, and Robert J. Martineau[126] for the demonstrably false proposition that the interpretation-construction distinction "*never* reflected the courts' actual usage."[127]

Consider a final observation about Garner and Scalia's critique of the interpretation-construction distinction. The motivation for the critique is their objection to the idea that judges make law (rather than apply it).[128] To that motivation, they implicitly add an assumption about constitutional construction: they assume that construction must involve judicial discretion exercised on the basis of the judge's beliefs about political morality (or policy and principle). But that assumption is not entailed by the interpretation-construction distinction. Garner and Scalia could adopt the distinction, but reject the notion that it creates room for judicial lawmaking in one of at least three ways.

First, they could deny the existence of the construction zone—they could argue for a theory of strict construction and attempt to show that the communicative content of the constitutional text provides sufficient resources to resolve every possible constitutional controversy. In other words, they could deny the existence of irreducible ambiguity, vagueness, gaps, and contradictions.

Second, Scalia and Garner could adopt some version of Originalist Thayerianism—adopting a theory of construction that calls for deference to the political branches for cases within the construction zone. Of course, they could also adopt a mixed strategy, arguing that the construction zone is

123. Williams v. Humble Oil & Ref. Co., 432 F.2d 165, 179 (5th Cir. 1970).

124. Chase Nat. Bank v. Chi. Title & Trust Co., 299 N.Y.S. 926, 937–38 (1934) (citing 5 JOHN HENRY WIGMORE, EVIDENCE § 2464 (2d ed. 1923)).

125. *See* RESTATEMENT (SECOND) CONTRACTS § 200 cmt. c & reporter's note (1981).

126. *See* SCALIA & GARNER, *supra* note 15, at 15 nn.50–51.

127. *Id.* at 15 (emphasis added).

128. So far as I can tell, they do not say this explicitly, but it seems implicit in their discussion. *See id.* at 9–15.

relatively small and then calling for deference in the residual zone of constitutional underdeterminacy.

Third, Scalia and Garner might allow for judicial decision in the construction zone that honors the Constraint Principle and resolves vagueness and irreducible ambiguity in ways that serve the purposes of particular constitutional provisions and the overall constitutional structure: of course, Scalia and Garner would limit the purposes to those fairly derived from text and history, and would exclude purposes warranted only by the moral and political beliefs of judges.

Any one of these three alternatives has a real payoff for Scalia and Garner, because they clearly should object to the conflation of interpretation and construction. That conflation is what allows nontextualists to argue that moral and prudential concerns are relevant to constitutional interpretation and hence to the "meaning" of the Constitution.[129] Scalia and Garner have good reason to resist that kind of conflation and hence good reason to adopt the interpretation-construction distinction—even if they prefer to use different vocabulary. There are, however, good and sufficient reasons (explored below[130]) to use the words "interpretation" and "construction" to describe the distinction; to the extent Scalia and Garner are persuaded by these reasons, they should withdraw both their substantive and their terminological objections to the interpretation-construction distinction.

C. The Persuasive-Definition Objection

Andrew Coan has argued that the interpretation-construction distinction commits the fallacy of persuasive definition.[131] I have responded to this objection elsewhere,[132] so I will be brief. The gist of the objection is that originalists are secretly using a stipulated definition (interpretation is the discovery of communicative content) to claim the rhetorical high ground: the word "interpretation" has positive associations (and "construction" presumably does not). This objection would have some force if Coan's description were accurate—but it simply is not. First, originalists acknowledge that other terminology could be used to express the distinction, as I have done in this Article. Second, the interpretation-construction distinction is not some ruse, invented by originalists to deceive naïve citizens; it has a long history of use by courts and respected commentators.[133] Third, even were this objection true, it would only justify

129. *See supra* notes 54–63 and accompanying text (discussing multiple modalities and plural methods of constitutional analysis).

130. *See infra* Part II.F.2.

131. *See* Andrew B. Coan, *The Irrelevance of Writtenness in Constitutional Interpretation*, 158 U. PA. L. REV. 1025, 1077–83 (2010).

132. *See* Solum, *supra* note 4, at 109–10.

133. *See supra* notes 1–2, 66–68, 116–24 and accompanying text; *see also* Joseph M. Perillo, *UNIDROIT Principles of International Commercial Contracts: The Black Letter Text and a Review*, 63 FORDHAM L. REV. 281, 295 (1994) ("Legal theorists have long

a revision in terminology, not an abandonment of the fundamental conceptual and practical difference which the words "interpretation" and "construction" are used to mark. Moreover, there are good reasons to prefer the words "interpretation" and "construction" as we shall soon see.

D. The Reduction of Meaning to Effect

Consider another objection to the interpretation-construction distinction. That distinction rests on an underlying set of distinctions about communicative content (meaning), legal content (doctrine), and legal effect (decision). One might argue that the meaning of a legal text *just is* the legal effect that the text produces. For example, Roderick Hills writes, "pragmatically speaking, the meaning of a constitutional provision *is* its implementation."[134] If so, then construction swallows interpretation and the interpretation-construction distinction collapses. Again, I have answered this objection elsewhere, so I will be brief.[135]

The gist of the objection is based on the idea that legal texts do not have communicative content other than the effect they produce. This objection is related to the legal realist version of the Aridity Objection considered earlier.[136] The bad man doesn't care about the meaning of the text; he cares only about the law in action. That might be true, but the fact that bad men don't care about communicative content doesn't demonstrate that it does not exist. Indeed, realist demonstrations that the law in action systematically differs from the law on the books *assume* that the law on the books has communicative content from which the law in action can differ. Moreover, legal practice in a variety of context only makes sense if we assume that communicative content exists. So contract law has mandatory rules, which cannot be overridden by the communicative content of a contract, and default rules, that can be overridden. The mandatory rules give the contract a different legal effect than it would have had if the communicative content controlled, and the default rules add legal content that isn't present in the communicative content of the agreement.[137]

Another way of demonstrating that interpretation and construction are not identical is by assuming two different perspectives on the distinction. The first perspective is that of a judge—who must give the legal text legal effect. From the judge's perspective, it might be thought that

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distinguished between the interpretation of language (meaning) and its legal effect (construction).").

134. Roderick M. Hills, Jr., *The Pragmatist's View of Constitutional Implementation and Constitutional Meaning*, 119 HARV. L. REV. 173, 175 (2006).

135. Solum, *supra* note 4, at 111–14.

136. *See supra* Part II.A.

137. There is a large body of literature on default and mandatory rules in contract law. *See, e.g.*, Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989); Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821 (1992); Lawrence B. Solum, *The Boundaries of Legal Discourse and the Debate Over Default Rules in Contract Law*, 3 S. CAL. INTERDISC. L.J. 311 (1993); Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703 (1999).

communicative content is only important insofar as it affects what the judge does—in other words, meaning only matters insofar as it produces legal effects. The second perspective is that of the author of the legal text—the drafter of a contract, statute, or constitutional provision. Authors of legal texts care about the communicative content of their writings. From their perspective, it matters whether the judge acts in accord with the communicative content of the writing, or disregards it. In many cases, authors of legal texts have purposes that will be frustrated if the communicative content is ignored. From their perspective, the meaning of a text is not necessarily identical with its implementation. For the authors of legal texts, this is a pragmatic concern and not a matter of theoretical nicety.

In sum, communicative content does not collapse into legal content—and likewise the meaning of the constitutional text is not the same thing as the set of effects that the text produces.

E. Alternative Distinctions and Terminology

The interpretation-construction distinction carves the conceptual space of constitutional practice at the joint between meaning (communicative content) and legal effect (including doctrinal content and adjudication). The terminology used to express the distinction, the terms "interpretation" and "construction," could be used to express alternative carvings of conceptual space. Supporters of the interpretation-construction distinction need not quarrel with these alternatives. The claim that the interpretation-construction distinction illuminates both constitutional practice and debates about originalism and living constitutionalism is not inconsistent with claims that other conceptual distinctions illuminate constitutional theory in different ways. Communicative content can be distinguished from legal content, implementing rules, and the decision of particular cases—and we might slice things even more finely, differentiating the semantic and pragmatic components of communicative content and distinguishing various levels of constitutional doctrine from adjudicative rules, and so forth.

Nonetheless, advocates of alternative distinctions may object to the interpretation-construction distinction. Mitchell Berman accepts the conceptual distinction between communicative content and legal content: "Let's start with the obvious: court-announced constitutional doctrine is frequently not identical to the announcing court's understanding of what the text of the Constitution means."[138] But Berman endorses neither the interpretation-construction distinction nor the terminology used to express it, emphasizing instead the distinction between "constitutional operative

138. Mitchell N. Berman, *Constitutional Constructions and Constitutional Decision Rules: Thoughts on the Carving of Implementation Space*, 27 CONST. COMMENT. 39, 39 (2010).

propositions" and "constitutional decision rules."[139] Similar points could be made about alternative distinctions, including Richard Fallon's distinction between "constitutional interpretation" and "constitutional implementation."[140]

Berman also advances an affirmative argument for using the term "interpretation" to refer to the determination of legal content. The core of his argument appears in the following passage:

> We might say, for instance: that judges must interpret legal texts to determine what the law is; that the point or function or purpose of legal interpretation is to ascertain what the law is; that the law is what authoritative legal texts, properly interpreted, provide or direct. Statements like these could be mistaken or misleading, but they are familiar and seem plausible on their face.
>
> If this is right, then the target of legal interpretation is "legal meaning" or "legal content" or "law." We should not *start* by assuming that the target is "linguistic meaning" or "semantic content" even though it would turn out that way *if* "what the law is" is necessarily identical to the semantic meaning of the relevant legal texts.[141]

Berman's argument could be understood in various ways. For example, he might be understood as making the following argument:

> Step One: The term "interpretation" (in constitutional contexts) is commonly understood to refer to the determination of the legal content associated with a given legal text.
>
> Step Two: Using the term "interpretation" to refer to the determination of linguistic meaning (communicative content) would therefore be misleading unless linguistic meaning is the sole determinate of legal content.
>
> Step Three: The contention that linguistic meaning is the sole determinate of legal content is contested and therefore cannot be assumed by definition in discussions of constitutional theory.
>
> Conclusion: Therefore, the term "interpretation" should not be used to refer to the determination of linguistic meaning in discussions of constitutional theory.

If this reconstruction captures Berman's point, then his argument is similar in structure to the persuasive-definition objection, discussed above.[142] This is certainly an argument against using the word "interpretation" to refer to the discovery of linguistic meaning without any

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139. *Id.* at 41; Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1 (2004).

140. *See* Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54 (1997) (implicitly distinguishing "constitutional interpretation" from "constitutional implementation"); *see also* Berman, *supra* note 137, at 40 (glossing Fallon as distinguishing "constitutional interpretation" from "constitutional implementation").

141. Berman, *supra* note 138, at 47–48.

142. *See supra* Part II.C.

explanation, but contemporary originalists are not guilty of deploying the interpretation-construction distinction without explanation. Indeed, this Article is itself evidence that proponents of the interpretation-construction distinction go to great lengths to make the use of the term "interpretation" fully transparent.

Moreover, the interpretation-construction distinction (however expressed) is necessary to avoid the conflation of communicative content and legal content. Unless we draw the distinction between the activity of discovering communicative content and the activity of determining legal content, we will be unable to avoid conflating the two. This point is explained above[143] and summarized below.[144]

In addition, drawing the interpretation-construction distinction does not smuggle in the controversial notion that "linguistic meaning is the sole determinate of legal content" (as contended in Step Three of the reconstructed argument). The interpretation-construction distinction itself is neutral with respect to this claim. When the distinction is combined with the further claim that the constitution creates substantial construction zones, the distinction forms part of a view that explicitly denies that communicative content is the sole determinant of legal content.

Finally, there are reasons to believe that using "interpretation" as the term for the discovery of linguistic meaning is consistent with both general and legal usage. One common meaning of the word "interpret" links it explicitly to meaning and its clarification.[145] As discussed extensively above, there is a long history of legal usage of the term "interpretation" in the same sense as specified by the contemporary interpretation-construction distinction in constitutional theory.[146] For this reason, the use of "interpretation" as the activity that refers to legal content can also be misleading. Indeed, outside of the legal academy the use of the word "interpretation" to mean something other than the determination of meaning might itself be seen as a sort of verbal trickery—allowing judges to smuggle their views about contested moral and political questions into the "meaning" of the constitutional text.

F. Summarizing the Affirmative Case for the Interpretation-Construction Distinction

The interpretation-construction distinction is an old one, with deep historical roots in American jurisprudence. And the distinction has come to play an important role in contemporary constitutional theory. But the distinction is still resisted, both substantively and on terminological grounds. In light of the objections and answers that we have just

143. *See supra* Part II.A.

144. *See infra* Part II.F.1.

145. 7 OXFORD ENGLISH DICTIONARY 1131 (J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1989) ("[Interpret: t]o expound the meaning of (something abstruse or mysterious); to render (words, writings, an author, etc.) clear or explicit; to elucidate; to explain. Formerly, also, To translate (now only contextually, as included in the general sense).").

146. *See supra* Part II.B.

considered, what is the affirmative case for the distinction and the vocabulary in which it is expressed?

1. The Distinction Is Essential for Conceptual Clarity

The interpretation-construction distinction is essential for conceptual clarity in legal theory generally and constitutional theory in particular. The alternative to drawing the distinction is to conflate communicative content and legal effect. That conflation obscures real and important differences between the discovery of linguistic meaning and the determination of legal effect. The linguistic meaning of the constitutional text is determined by linguistic facts and facts about the context of constitutional communication. In other words, the discovery of communicative content is a factual inquiry. The legal effect given to the constitutional text is determined by officials (especially judges) and institutions (especially courts). This activity is essentially norm guided, although there may be a difference of opinion on whether the relevant norms are legal or moral in character.

If we collapse the distinction between interpretation and construction, then we lack the conceptual apparatus to distinguish the respective roles of facts and norms in the enterprise. On the one hand, we are at risk of a grave conceptual error—using normative considerations to determine linguistic meaning. Put more plainly, conflating communicative content and legal content can lead us to believe that the text's linguistic meaning is what we want it to be. On the other hand, we are at risk of an equally serious mistake—assuming that there is an a priori and necessary connection between the communicative content of the text and its legal effect. Put more plainly, collapsing the interpretation-construction distinction might lead some legal theorists to conclude that the communicative content automatically determines legal effect in a way that is immune to arguments about legal norms or political morality.

Drawing the interpretation-construction distinction allows us to avoid these confusions. It clearly distinguishes communicative content and legal effect. This clear distinction allows us to theorize about the determination of linguistic meaning as a distinct step in legal practice. And it allows us to address squarely the question as to what legal effect that meaning should be given. Constitutional theory simply cannot do without the interpretation-construction distinction.

2. The Words "Interpretation" and "Construction" Best Express the Distinction

Even if the interpretation-construction distinction is necessary for clarity, it does not follow that we need to use the words "interpretation" and "construction" as the labels for these two distinct activities. We could use other terms, perhaps "linguistic interpretation" and "legal construction" or "communicative-content interpretation" and "legal-content interpretation." The distinction itself is essential, but the vocabulary is not—so long as clarity and precision are preserved.

Nonetheless, a strong case can be made for the use of the words "interpretation" and "construction" as labels for the concepts for which they stand. Consider first the fact that these words have long been used to express the distinction—stretching back to the nineteenth century, continuing through the twentieth century (in usage by courts and legal scholars), and extending through the twenty-first century (in usage in contemporary constitutional theory and increasingly in other fields as well).

If there were a well-established alternative vocabulary, then that vocabulary might be preferable. But there is no such well-established alternative. This means that it would become even more difficult to establish a working vocabulary for theorizing about the interpretation-construction distinction if those terms were to be abandoned. As it stands now, invocation of the interpretation-construction distinction has become a fairly standard move. Once the distinction is invoked, readers and listeners are likely to understand that the terms are being used in a technical sense. Any residual uncertainty can easily be dispelled by an explanation of the distinction.

The most significant objection to the language expressing the interpretation-construction distinction is the familiar usage of "interpretation" and "construction" as synonyms that refer to the whole process of discovering linguistic meaning, determining associated legal content, and devising implementing rules, and then applying the resulting norms to particular cases. There is nothing intrinsically wrong with using either "interpretation" or "construction" in this way, but that way of talking invites the conceptual confusion that the interpretation-construction distinction dispels. Moreover, this alternative usage is itself not uniform. For example, some theorists seem to want to reserve the term "interpretation" for the determination of legal content, which they distinguish from both implementing rules and application.[147] And it seems clear that "interpretation" is frequently used in the sense specified by the interpretation-construction distinction—even by theorists who do not self-consciously adopt the vocabulary expressing distinction.

Devising a technical vocabulary always requires compromise. One can choose neologisms—they purchase singularity of meaning at the price of obscurity, or one can use familiar terms with stipulated technical senses. The latter approach has been adopted for more than a century with respect to the interpretation-construction distinction. On balance, this seems to be the best way to proceed, not because it is perfect, but because all of the alternatives seem worse. As a practical matter it may simply be too late to switch terminological horses; the interpretation-construction distinction left the starting gate long ago.

147. *See* Berman, *supra* note 139; Fallon, *supra* note 140.

* * *

With these preliminary objections out of the way, we can consider the two central claims advanced by this Article. The first claim, addressed in Part III, is that construction is ubiquitous—constitutional practitioners always engage in constitutional construction when they apply the constitutional text to particular cases or problems. The second claim, addressed in Part IV, is that the construction zone is ineliminable; there is no convincing argument that any plausible approach to constitutional interpretation will eliminate the underdetermination of constitutional practice by squeezing more communicative content from the constitutional text.

III. THE CASE FOR THE UBIQUITY OF CONSTRUCTION

Construction is ubiquitous—it occurs whenever the constitutional text is given legal effect. The core warrant for this claim is conceptual: the meaning of "constitutional construction" in the cases and as stipulated by theorists is the activity of giving legal effect to the constitutional text. This conceptual warrant can be clarified in two ways: first, by giving a simple model (or rational reconstruction) of the process of constitutional construction, and second, by discussing the phenomenology of interpretation and construction.

The process of constitutional interpretation and construction can be rationally reconstructed as two moments or steps in constitutional deliberation:[148] call this "the two moments model of interpretation and construction" (or "the Two Moments Model" for short). The Two Moments Model is a rational reconstruction: the model does not purport to capture a uniform and invariant procedure actually followed by constitutional actors. In the real world, constitutional deliberation can be messy—the judge may intuitively grasp the correct outcome without any conscious deliberation at all. The Two Moments Model has interpretation before construction, but real judges might begin with construction, move back to interpretation, and then revise the construction—or do both more or less simultaneously.

We can present the Two Moments Model as follows:

> Constitutional deliberation proceeds in two distinct moments (or steps):
>
> Step One: Interpretation: The deliberator parses the constitutional text and considers the relevant context, yielding a belief about the communicative content of the text.

148. Corbin suggested a version of the Two Moments Model when he stated, "The interpretation of communications is necessary as a preliminary to the determination of their legal operation or total lack of legal operation." 3 CORBIN, *supra* note 66, § 534, at 11. James Ryan suggests a version of the Two Moments Model (in the context of "new textualism"), although he doesn't use "interpretation" and "construction" to name the steps. *See* James E. Ryan, *Laying Claim to the Constitution: The Promise of New Textualism*, 97 VA. L. REV. 1523, 1544–45 (2011).

> Step Two: Construction: The deliberator translates the communicative content of the constitutional text into the legal content of constitutional doctrine and applies that content to a constitutional choice situation (or case) thereby making a constitutional decision (or engaging in constitutional action).

(The model is also diagrammed above.[149]) The Two Moments Model represents the conceptual point that every constitutional decision or action involves interpretation and construction. But because it is a rational reconstruction, the psychology or phenomenology of constitutional practice may be quite different. How can we account for the possibility that judges and officials who engage in constitutional practice might report that they do not experience interpretation and construction as two distinct moments, or that they sometimes do not do construction at all?

Before we turn to the phenomenology of constitutional deliberation, one preliminary point must be made. Constitutional actors who are unfamiliar with the vocabulary and substance of the interpretation-construction distinction cannot be expected to engage in reliable reporting of their own deliberative processes in the technical vocabulary used in this Article. Our exploration of the phenomenology of judging will utilize the device of two theoretically informed judges, Athena and Minerva, who are able to articulate their deliberations using the theoretical lexicon stipulated here.

Imagine that Athena is presented with a constitutional issue in a case of first impression—indeed, the very rare case in which a court is called upon to interpret a provision of the Constitution that has not been interpreted by any prior court. Let us imagine that Athena is presented with a case precipitated by an incident involving what appears to be a chemical weapon. The U.S. Army forms part of the response, and the local commander requisitions a private home in the safe area adjacent to the zone contaminated by the incident: the home is used as a command center and, because the incident is serious, some personnel take naps in the home rather than returning to their base at night. No statute authorizes this action, but Congress did pass a general statute authorizing the "use of force" in connection with the September 11 attacks on the World Trade Center and the Pentagon. The homeowner sues, and argues that this action violates the Third Amendment:

> No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.[150]

Athena must decide whether the requisitioning of the home violates the prohibition against quartering soldiers. Athena decides that it does, and makes the following report:

> When I thought about this case, I immediately saw that the action violated the Constitution and I issued the requested temporary restraining order by

149. *See supra* Figure 3.
150. U.S. CONST. amend. III.

> signing the papers prepared by the clerk. The meaning of the constitutional text was clear to me, so I did what was required. I didn't engage in any separate mental process of constitutional construction.

Athena's report is about the phenomenology of judging: she reports her mental processes, which she experienced as involving interpretation (she grasped the meaning of the text), but not construction (she just issued the order). Technically, the action of signing the order counts as construction—it gives the Third Amendment legal effect, but there was no experience of deliberation about this construction. Athena had no conscious thought about alternative formulations of Third Amendment doctrines, such as a test for "quartering," or "peace," or "prescribed by law." Nonetheless, Athena did implicitly adopt a construction of the Third Amendment: her decision presupposes a doctrine of constitutional law that corresponds to her understanding of the text—a strict construction of the Third Amendment. The implicit presupposition was not part of her conscious experience: the phenomenology does not track the rational reconstruction. And, of course, she also engaged in "interpretation" as well; Athena had an understanding of the communicative content of the Third Amendment.

Let us suppose that the United States appeals Athena's decision to issue a temporary restraining order (TRO) to a motions panel of one of the U.S. Courts of Appeals. The motions panel includes Minerva. The government argues that the TRO should be vacated because the Army's action was constitutional on two alternative theories: First, if this is a time of peace, then the action was not "quartering" because the soldiers were not assigned to the home as a residence, and napping was only an occasional activity. Second, if this was a time of war, then the quartering was authorized by law. Minerva reads the briefs, deliberates, and after consultation with her colleagues, the panel reverses the TRO. Minerva reports her deliberation as follows:

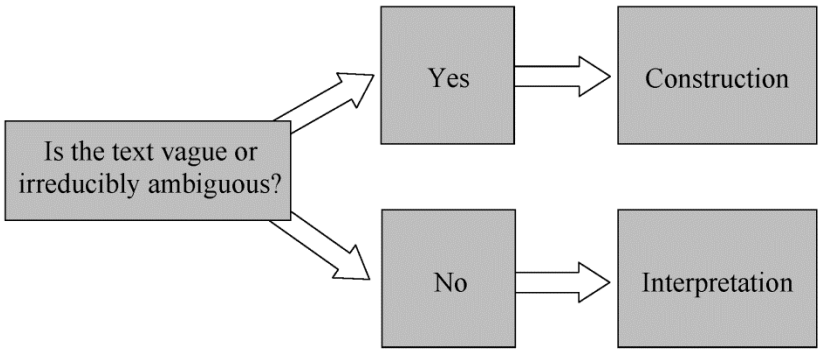
> I saw that the case hinged on "quartering," because if there was no "quartering," then there was no violation, whether it was time of war or time of peace. As a motions panel judge, I had to act quickly—there wasn't time to do extensive historical research, but looking at dictionary definitions from the time and also some of the historical evidence of the usage of the word "quartering," I realized that this was not an easy case. The house was not used for lodging; it was a command center. But soldiers did sleep in the house. This was a classic borderline case. I decided that we needed to adopt some rule that resolved the vagueness of the word "quartering" and settled on a legal rule that quartering occurs only when soldiers regularly sleep in the house—not when they take irregular naps, but regularly sleep elsewhere. My colleagues agreed. Once we had a rule, the rest was easy, and we issued the order reversing the TRO.

Minerva reports deliberations that accord with the Two Moment Model. She first attempts to determine the communicative content of the Third Amendment. This leads her to realize that "quartering" is the key term. She focuses on the semantics of quartering, and concludes that the word

"quartering" is vague in this context. This completes the interpretive moment. She then devises a rule of constitutional doctrine—a construction—and then applies that rule—another construction. In Minerva's case, the phenomenology tracks the rational reconstruction.

The phenomenology of these two cases might suggest a misleading picture of the relationship between interpretation and construction, which we might call the "Alternative Methods Model." We might represent that picture as follows:

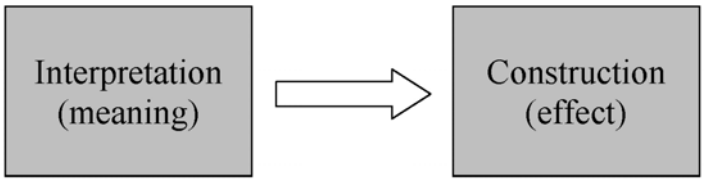
FIGURE 5: ALTERNATIVE METHODS MODEL



This model captures the fact that Athena and Minerva have different experiences of the decisionmaking process, but it is nonetheless inaccurate as a representation of the relationship between interpretation and construction. Athena is unaware of the role that construction plays in her decision, but only because the construction she adopts is intuitively obvious, and hence not the object of conscious deliberation.

The Two Moments Model is a rational reconstruction, but it better captures the conceptual relationship between interpretation and construction. A more detailed version of the model was presented above,[151] but the point of the model can be presented simply:

FIGURE 6: TWO MOMENTS MODEL (SIMPLIFIED VERSION)



151. *See supra* Figure 3.

In some cases, judges may attend only to interpretation (because construction seems obvious and intuitive). In other cases, judges may focus entirely on construction; this is especially likely when an area of constitutional law involves a provision that is highly vague and abstract, or when case law provides a thick and complex body of constitutional doctrines. In the former cases, construction may be tacit and unconscious, while in the latter cases, interpretation may be invisible.

But in either case, construction occurs. Ultimately, that is because constitutional construction is ubiquitous in constitutional practice. It occurs whenever the Constitution is given legal effect.

IV. THE CASE FOR THE INELIMINABILITY OF THE CONSTRUCTION ZONE

Because the constitutional text underdetermines legal effect, it creates a construction zone—a set of possible circumstances where the full communicative content of the constitutional text is consistent with more than one course of action. The warrant for this claim is factual; to show the ineliminability of the construction zone, we need to examine the linguistic meaning of particular constitutional provisions and the circumstances to which these provisions might be applied. We can begin with a general statement of the case for the existence and significance of the construction zone, and then proceed to a consideration of two important objections.[152]

A. The Affirmative Case for the Existence of the Construction Zone

Construction is everywhere, but from that fact it does not follow that the communicative content of the constitutional text underdetermines the legal content of constitutional doctrine. Recall that we are using the phrase "construction zone" to designate the set of possible cases in which the meaning of the text does not provide a determinate result. Cases may fall into the construction zone for several reasons; we have identified four:

- Irreducible ambiguity
- Vagueness
- Gaps
- Contradictions

For now, we shall focus on the possibility that the Constitution contains provisions that are vague, and therefore admit of borderline cases.

For most of the discussion that follows, I will assume that vagueness is not just a problem of knowledge. That is, I will be assuming that vagueness remains even with "perfect information" about linguistic facts and the state of the world. In a footnote,[153] I briefly explore what implications the

152. Keith Whittington has provided valuable discussion of the issues addressed in this section from a slightly different angle. *See* Whittington, *supra* note 72, at 121–34. Many of the arguments made here are anticipated by Whittington.

153. Roy Sorensen, the prominent philosopher of language, has argued that all vagueness is epistemic. ROY SORENSEN, VAGUENESS AND CONTRADICTION (2001). Putting aside

possibility that vagueness is epistemic all the way down could have for the construction zone. But the epistemic theory of vagueness, as applied to legal rules, would result in the counterintuitive implication that all legal rules are actually razor-edged and precise bright line rules. In part because of this counterintuitive implication of the epistemic theory of vagueness, we will now set it aside.

We also need to distinguish between vagueness and generality. Consider the following sequence of words and phrases:

- Institutions
- Political institutions
- American political institutions
- The Congress of the United States

The set of institutions is more general than the set of political institutions, which in turn is more general than the set of American political institutions, which is more general than the Congress of the United States, which is a particular institution and not a general category at all.[154]

A term can be quite general but not particularly vague. The set of things that come in twos is vast. But when the Constitution employs the very general and abstract term "two" in the provision that affords two Senators to each state, it does not thereby create vagueness. Luckily, Senators come only in whole units; we never need to ask the question whether Senator Charles Schumer counts as only one Senator or whether his presence is so large that he should count as two. But some general terms are also vague, so when the constitutional text employs a vague, abstract, and general term, it may create a substantial set of borderline cases.

We can illustrate these ideas by considering the three power-granting provisions of the Constitution, contained at the beginning of the first three Articles.

---

ambiguity, gaps, and contradictions, Sorenson's suggestion would entail that every constitutional provision actually provides a bright-line rule that decides every possible case. But the fact that the bright line exists in theory does not entail that we can know where the bright line is located; the rule might remain vague for practical purposes because of our inability to know the exact location of the line it draws: for this reason, the existence of a construction zone is consistent with the thesis that vagueness is epistemic in nature. For practical purposes, epistemic vagueness creates a construction zone, since a line that courts cannot discover cannot operate directly to resolve disputes.

154. The distinction between the general and the particular and the idea that generality has degrees should be distinguished from the related distinction between the abstract and the concrete. *See generally* Gideon Rosen, *Abstract Objects*, STAN. ENCYCLOPEDIA PHIL. (Mar. 6, 2012), http://plato.stanford.edu/entries/abstract-objects/ ("Thus it is universally acknowledged that numbers and the other objects of pure mathematics are abstract (if they exist), whereas rocks and trees and human beings are concrete. Some clear cases of abstracta are classes, propositions, concepts, the letter 'A,' and Dante's *Inferno*. Some clear cases of concreta are stars, protons, electromagnetic fields, the chalk tokens of the letter 'A' written on a certain blackboard, and James Joyce's copy of Dante's *Inferno*.").

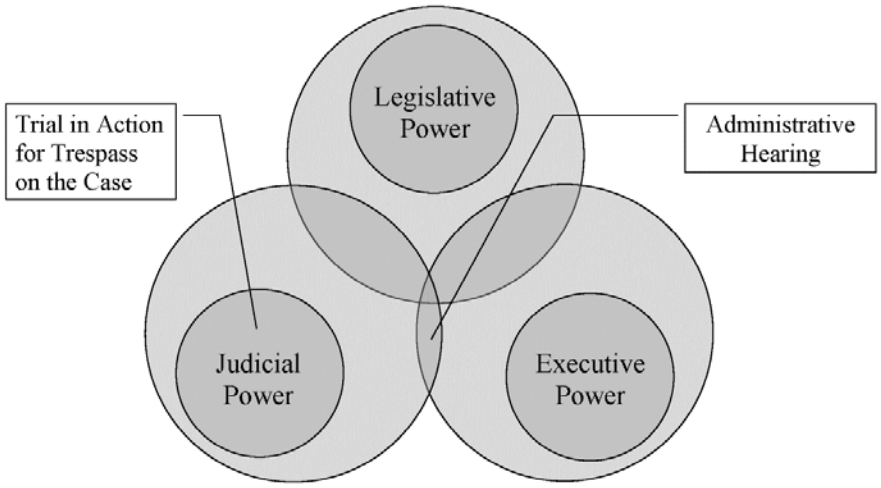
- Article I, Section One: "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."[155]
- Article II, Section One, Clause One: "The executive Power shall be vested in a President of the United States of America."[156]
- Article III, Section One: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[157]

The phrases "legislative powers," "executive power," and "judicial power" are general and vague. Much of the generality of "legislative powers" is reduced by the specification in Clause Eight of Article I, which enumerates powers at a much less general level: the power to establish postal roads is more particular (or less general) than "legislative power." But neither Article II nor Article III provides an exhaustive enumeration of powers. I will not provide the argument here, but it is at least plausible to believe that the constitutional scheme requires that we sort powers into the three categories. Congress may not exercise executive or judicial powers (except insofar as the Senate participates in appointment of executive officers by advice and consent and ratifies treaties). The federal courts may not exercise executive or legislative power, and the president may not exercise judicial or legislative powers (except through the veto). Nothing important hangs on the correctness of this structural argument, which is introduced here solely for purposes of illustration.

The three categories of power, at least on the surface, appear to be vague. There may be core instances of judicial power (trial of an action of trespass on the case), but other actions might be on the borderline between judicial and executive power (conducting an administrative hearing in a dispute between the government and a contractor over payments), or engaging in oversight of an executive agency. Let us assume that each of the three categories has a core of determinate meaning and a penumbra of borderline cases. The resulting picture might look something like this:

155. U.S. CONST. art. I, § 1.
156. U.S. CONST. art. II, § 1, cl. 1.
157. U.S. CONST. art. III, § 1.

FIGURE 7: LEGISLATIVE, EXECUTIVE, AND JUDICIAL POWER



Something like this picture seems to be assumed by Justice Robert Jackson's well-known concurring opinion in the *Steel Seizure*[158] case, *Youngstown Sheet & Tube Co. v. Sawyer*: "When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain."[159] Justice Jackson's twilight zone is simply the set of borderline cases between executive and judicial authority—the area that we are calling "the construction zone."

The Constitution employs a variety of words and phrases that seem to be vague. Here are some:

- "Freedom of speech"
- "Free exercise of religion"
- "Due process of law"
- "Cruel and unusual punishment"
- "Privileges or immunities of citizens of the United States"

And there are many others. So, at least on the surface, it appears that several provisions of the Constitution create construction zones—where the communicative content of the constitutional text is vague and hence underdetermines at least some of the constitutional cases that might arise.

Some originalists are worried about vagueness. If one were attracted to originalism because one was opposed to unconstrained judicial discretion in constitutional cases, then the notion of a construction zone in which judicial decisions were unconstrained, and hence potential sites for the operation of

158. Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

159. *Id.* at 637.

judicial discretion, would be worrisome. And indeed, many originalists are resistant to both the interpretation-construction distinction and recognition of the existence of a construction zone. They may acknowledge the existence of surface level vagueness but observe that appearances can be deceiving. In the discussion that follows, we shall consider a variety of arguments against the existence and substantiality of the construction zone.

B. McGinnis and Rappaport's Argument: Original Methods Eliminate the Construction Zone

One prominent argument against constitutional vagueness and irreducible constitutional ambiguity is that made by John McGinnis and Michael Rappaport in their article, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*,[160] and, subsequently, in *The Abstract Meaning Fallacy*.[161] Their argument is complex and subtle, so I cannot do it full justice here. Nonetheless, I hope that we can glean the gist of their argument. Here is their statement of the core idea:

> Everyday language can be a slippery thing with ambiguous and vague meanings. One important contribution of law is to create mechanisms to pin down meaning. This enterprise helps generate more certainty and reduces the discretion of political officials, including judges, so that citizens can rely on norms around which to build their lives. One of these mechanisms is to use legal meanings that have grown up around language that might otherwise seem abstract, general, or opaque to the ordinary reader. Another is to resort to methods of legal interpretation which the law has developed to resolve ambiguity and vagueness. Constitutional provisions are generally not created ex nihilo, but rather against the background of a complex and reticulated legal tradition which provides more information about their meaning than could be gleaned from a naïve reading of the text.[162]

McGinnis and Rappaport make two distinct points in this passage. The first point concerns "legal meanings," or what I will call "terms of art." The second point is about the original methods of constitutional interpretation. Consider each point in turn.

McGinnis and Rappaport correctly observe that legal texts can employ terms (or phrases) of art. The general idea of a term of art was expressed by William Blackstone: terms of art "must be taken according to the acceptation of the learned in each art, trade, and science."[163] The philosopher Hilary Putnam explains this phenomenon via the idea of a

160. *See* McGinnis & Rappaport, *supra* note 45.

161. John O. McGinnis & Michael B. Rappaport, *The Abstract Meaning Fallacy*, 2012 U. ILL. L. REV. 737. McGinnis and Rappaport may have used "abstract" for the concept that is sometimes called "generality." *See supra* note 154 (discussing the difference between the general/particular distinction and the abstract/concrete distinction).

162. *Id.* at 750.

163. 1 WILLIAM BLACKSTONE, COMMENTARIES *59–61.

division of linguistic labor.[164] Terms of art have conventional semantic meanings in a linguistic subcommunity. For example, the phrase "letters of marque and reprisal"[165] might not have been familiar to the ordinary citizen or common human at the time the Constitution was drafted, ratified, and put into effect, but it might be that the linguistic subcommunity of seamen and admiralty lawyers had a very precise understanding of this phrase.[166]

How can the use of a term of art eliminate vagueness? Consider the phrase "due process of law": on the surface, that phrase seems vague or open textured. Some procedures are in the core of due process—a jury trial governed by the rules of evidence. Other procedures may be at the borderline—an after-the-fact hearing before an administrative tribunal. But suppose that "due process of law" was a term of art that was understood by the linguistic subcommunity of persons learned in the law to refer to relatively specific features of the system of procedure provided by common law and equity in the late eighteenth century. If there were no hearings by administrative tribunals in 1791, then that procedure would not be "due process of law." Likewise, it might be the case that the seemingly vague phrase "freedom of speech" was a phrase of art, understood by lawyers to refer to a specific rule—perhaps the rule against prior restraints. Of course, terms of art can themselves be vague. Thus, it might turn out that the eighteenth-century lawyers' understanding of "due process of law" or "freedom of speech" admitted of borderline cases and hence was vague. Indeed, it is possible that a term that would not be vague in its ordinary meaning is vague for some linguistic subcommunity. When a word or phrase has both an ordinary meaning and a technical meaning, there is no guarantee the meaning of the term of art is more precise than the conventional semantic meaning of the same word or phrase.

McGinnis and Rappaport have identified a strategy that has the potential to reduce vagueness, but the proof must be in the pudding. The technical meaning strategy must be applied case by case to each constitutional provision where the ordinary meaning is vague. This would be a large undertaking—one that McGinnis and Rappaport have hardly begun, much less completed.

McGinnis and Rappaport's second strategy is rooted in their distinctive approach to originalist constitutional theory—Original Methods Originalism. The basic idea is that the original meaning of the constitutional text is the meaning yielded by the methods of interpretation employed by lawyers and judges at the time each provision was framed and

164. The idea of a division of linguistic labor is usually attributed to Hilary Putnam. *See* Hilary Putnam, *The Meaning of 'Meaning,' in* 2 PHILOSOPHICAL PAPERS: MIND, LANGUAGE AND REALITY (1985); *see also* Mark Greenberg, *Incomplete Understanding, Deference, and the Content of Thought* (UCLA Sch. of Law Pub. Law & Legal Theory Research Paper Series, Research Paper No. 07-30, 2007), *available at* http://ssrn.com/abstract=1030144; Robert Ware, *The Division of Linguistic Labor and Speaker Competence*, 34 PHIL. STUD. 37 (1978).

165. U.S. CONST. art. I, § 8.

166. Lawrence B. Solum, District of Columbia v. Heller *and Originalism*, 103 NW. U. L. REV. 923, 968 (2009).

ratified. In the case of the Constitution of 1789 and the first ten amendments, the relevant methods would be those employed by late eighteenth century legal practice. McGinnis and Rappaport assume that such methods will eliminate and reduce ambiguity and vagueness, and perhaps they are right. But this conclusion cannot be guaranteed a priori, because it is at least possible that the original methods of interpretation do not precisify communicative content. Original Methods Originalism is at an early stage of development; McGinnis and Rappaport have not yet produced a catalog of original methods corresponding to the period in which each provision of the Constitution was framed and ratified. Indeed, there is no work that provides a comprehensive history of legal interpretation in the United States.[167]

Nonetheless, there are reasons to doubt that the original methods of interpretation will always yield precisification. Consider a sample of early cases, with particular attention to the italicized passages:

- *Board v. Cronk*, 1822: "It is true, that in construing a recent statute, ambiguously or obscurely drawn, courts will go a great way to give it that construction which will best effect the manifest intent of the legislature, and be most *conducive to the public good and the public convenience*; but where a statute has already received its construction, and where the practice under it has been uniform for fifty years and more, and so become the settled law of the land, it would be going a great way for a court to give it a new construction under the pretence of making it better."[168]
- *Greenhow v. Buck*, 1816: "Where the words of a Statute are ambiguous, *the general intent must be considered*. The general intent of the Legislature, in this case, was *to establish equality*. *Injustice must be done, if the Act is to be construed*, as Mr. Leigh contends. The question then is, are the words so plain as to be capable of no other construction, than that leading to this injustice?"[169]
- *Braxton v. Winslow*, 1791: "It is a rule of construction, that where a statute is ambiguously worded, Courts will be governed by *arguments drawn from inconvenience*: and will pursue the *equity of the case* arising under the statute."[170]

"Conducive to the public good," "public convenience," "general intent," "equality," "injustice," "inconvenience," and "equity of the case"—it is not clear that considerations of these factors will lead to precisification. Indeed, these words and phrases seem to be paradigms of terms with borderline cases, and, moreover, they are terms that invite consideration of principle and policy.

Of course, this abbreviated discussion is hardly sufficient to establish that the original methods of constitutional interpretation and construction are

167. *See* William S. Blatt, *The History of Statutory Interpretation: A Study in Form and Substance*, 6 CARDOZO L. REV. 799, 799 (1985).

168. Board v. Cronk, 6 N.J.L. 119, 120 (1822) (emphasis added).

169. Greenhow v. Buck, 19 Va. (5 Munf.) 263, 272 (1816) (emphasis added).

170. Braxton v. Winslow, 1 Va. (1 Wash.) 31, 32 (1791) (emphasis added).

insufficient to precisify vague or ambiguous constitutional language: in order to establish that conclusion, we would need to reconstruct the original method for a particular period and then demonstrate that there are cases of constitutional vagueness or ambiguity that the method does not precisify. Likewise, for McGinnis and Rappaport to demonstrate that the original methods eliminate the construction zone, they would need to produce the original methods and then demonstrate that they do, in fact, resolve ambiguity and vagueness for each and every provision of the Constitution governed by that method.

McGinnis and Rappaport acknowledge the possibility that vagueness or ambiguity might remain after the original methods of constitutional interpretation are applied:

> It is theoretically possible that the interpretive rules may not resolve every uncertainty, especially uncertainty resulting from vagueness. We have argued that such uncertainties are unlikely if the interpretive rules require interpreters to choose the meaning that is more likely, even if other meanings are possible. But if there is a remaining uncertainty, then one might be in a situation involving construction, where the original meaning does not provide an answer.[171]

To be sure, McGinnis and Rappaport have only conceded that this is a theoretical possibility, but the force of this concession is nonetheless important, because it explicitly recognizes that the existence and size of the construction zone is an empirical question to be resolved by inquiry into the content of the original methods and their effect on particular provisions of the Constitution. I believe that it is fair to conclude that there is (at least) substantial uncertainty about the best answer to this question—assuming that historical inquiry yields a single and determinate original method for each of the relevant historical periods.[172]

Consider another issue raised by McGinnis and Rappaport's remarks quoted above.[173] They formulate the question as if it were, "Is there any need for constitutional construction at all?" and answer that construction may be unnecessary. That articulation assumes the Alternative Methods Model, presented in Figure 5, above.[174] Given the conception of constitutional construction offered here, the substance of their claim is not that there is no construction, because construction always occurs when the

171. *Id.* at 752 n.54.

172. I believe that McGinnis and Rappaport's theory implies that the relevant "original method" is the method in force at the time each provision of the Constitution is framed and ratified. Thus, for the Bill of Rights and the Constitution of 1789, the relevant method is that which prevailed in the eighteenth century, but for the Reconstruction Amendments, the relevant original methods would be those that prevailed in the mid-nineteenth century. They might be the same, but there are reasons to believe they are not. *See* Blatt, *supra* note 167. It is possible that McGinnis and Rappaport would argue that the original methods are frozen in time as of 1789, but then their argument cannot be that the drafters and ratifiers would have understood the amendments in that way—unless it can be shown that they had explicitly or implicitly adopted a frozen version of Original Methods Originalism.

173. *See supra* note 171 and accompanying text.

174. *See supra* Figure 5.

Constitution simply *is* the determination of legal effect. Rather, their real point is about the construction zone. Their reconstructed position is that the construction zone may not exist at all, but that it is theoretically possible that there is some small set of cases where the original methods of interpretation and construction are insufficient to precisify or disambiguate some provisions of the Constitution.

In addition, there is a conceptual difficulty with McGinnis and Rappaport's position. They present their theory as a theory of constitutional "interpretation" and not one of "construction"—in the sense those terms are used here and in the cases cited above.[175] We might think of the original methods as a set of "canons" (rules, standards, or principles[176]) that govern constitutional practice. The original methods might be comprised of canons of interpretation, canons of construction, or a mixed set of canons of construction and interpretation. Because we don't have a list of the canons associated with the original methods, it is not clear exactly how each of them should be categorized. But if we consider modern canons (by way of analogy) it is clear that we find both kinds. Some of the modern canons are rules of thumb—they help us to identify salient patterns in statutory language and enable us to discern communicative content.[177] Other modern canons are substantive—they determine the legal effect (and not the linguistic meaning) of the text.[178]

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175. *See supra* notes 116–24 and accompanying text.

176. *See* Lawrence B. Solum, *Legal Theory Lexicon 026: Rules, Standards, and Principles*, LEGAL THEORY LEXICON, http://lsolum.typepad.com/legal_theory_lexicon/2004/03/legal_theory_le_3.html (last updated Aug. 18, 2013).

177. James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 12 (2005) ("Language canons consist of predictive guidelines as to what the legislature likely meant based on its choice of certain words rather than others, or its grammatical configuration of those words in a given sentence, or the relationship between those words and text found in other parts of the same statute or in similar statutes. These canons do not purport to convey a judge's own policy preferences, but rather to give effect to "ordinary" or "common" meaning of the language enacted by the legislature, which in turn is understood to promote the actual or constructive intent of the legislature that enacted such language."). This description of "language canons" strongly suggests that they are canons of "interpretation" in the sense in which interpretation is distinguished from construction.

178. *See, e.g.*, Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 109–10 (2010) ("Federal courts have long employed substantive canons of construction to interpret federal statutes. Some substantive canons express a rule of thumb for choosing between equally plausible interpretations of ambiguous text. The rule of lenity is often described this way: it directs that courts interpret ambiguous penal statutes in favor of the defendant. Other canons are more aggressive, permitting a court to forgo a statute's most natural interpretation in favor of a less plausible one more protective of a particular value. For example, a court will strain the text of a statute to avoid deciding a serious constitutional question, and absent a clear statement, it will not interpret an otherwise unqualified statute to subject either the federal government or the states to suit. While courts and commentators sometimes seek to rationalize these and other substantive canons as proxies for congressional intent, it is generally recognized that substantive canons advance policies independent of those expressed in the statute."). Barrett uses the words "construction" and "interpretation" interchangeably, but her description of substantive canons makes it clear that they control legal effect and do not seek meaning.

Scalia and Garner's recent classification of the canons marks the distinction between principles that apply to all texts and those that apply to governmental actions.[179] Most (or all) of the canons that they label "semantic," "syntactical," and "contextual" are actually canons of interpretation, as is evident from the following examples:

- "Words are to be understood in their ordinary, everyday meanings—unless the context indicates that they bear a technical sense."[180]
- "*And* joins a conjunctive list, *or* a disjunctive list—but with negatives, plurals, and various specific wordings there are nuances."[181]

These canons of interpretation summarize linguistic facts. The word "and" is used for conjunctive lists; the word "or" is used for disjunctive lists. The canon is a rule of thumb that identifies a common linguistic practice.

The canons of interpretation can be contrasted with other canons that determine the legal effect—canons of construction.[182] Examples from Scalia and Garner include the following:

- "A statute should be interpreted in a way that avoids placing its constitutionality in doubt."[183]
- "The legislature cannot derogate from its own authority or the authority of its successors."[184]

These canons of construction report rules of law. A legislature is not legally empowered to alienate its authority, even if it tries to do so through unambiguous language. In this case, the tipoff is the word "cannot," which in this context signals legal effect not communicative content.

The original methods of constitutional interpretation are likely to include both canons of interpretation and canons of construction, but this poses a serious problem for McGinnis and Rapport's attempt to eliminate (or all but eliminate) the construction zone. The existence of canons of construction is evidence *for the existence of the construction zone*. Thus, in each of the early cases discussed above, the most natural explanation for the language used in the opinions is that the court was engaged in constitutional construction. Recall the key operative terms:

- "Conducive to the public good"
- "Public convenience"
- "General intent"
- "Equality"

179. SCALIA & GARNER, *supra* note 16, at x–xvii.
180. *Id.* at 69.
181. *Id.* at 116.
182. Abbe Gluck has recently explored the idea that some canons of "interpretation" (in the broad sense that includes both interpretation and construction) operate as rules of law. *See* Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation:* Erie *for the Age of Statutes*, 54 WM. & MARY L. REV. 753 (2013).
183. SCALIA & GARNER, *supra* note 16, at 247.
184. *Id.* at 278.

- "Injustice"
- "Inconvenience"
- "Equity of the case"

This is the language of determining legal effect (not meaning) and hence of construction.

McGinnis and Rappaport have an ingenious argument that the original methods all go to linguistic meaning or communicative content. Here is their statement of the argument:

> Originalists—both of the original intent and original meaning variety—argue that modern interpreters should be guided by the word meanings and rules of grammar that existed when the Constitution was enacted. But word meanings and grammatical rules do not exhaust the historical material relevant to constitutional interpretation. There are also interpretive rules, defined as rules that provide guidance on how to interpret the language in a document. It is our position that originalism requires modern interpreters to follow the original interpretive rules used by the enactors of the Constitution as much as the original word meanings or rules of grammar.[185]

This argument is clever—McGinnis and Rappaport argue that canons of interpretation and construction constitute a legal grammar and syntax, and hence that they determine the communicative content of the constitutional text.

Moreover, they may be right about some interpretive rules. Consider the following example from Scalia and Garner: "In the absence of a contrary indication, the masculine includes the feminine (and vice versa) and the singular includes the plural (and vice versa)."[186]

If such a rule were part of the publicly available context of constitutional communication, and if the Constitution used language governed by the rule, then the communicative content of the Constitution would be the content yielded by application of the rule to the text—and not the conventional semantic meaning that the same words would have in contexts in which the rule was not common knowledge of authors and readers. Theoretically, this would be contextual enrichment; the canons of interpretation are part of the context of communication and hence can enhance the semantic content of the text.

The Constitution of 1789 employs "he" in several places, for example: "No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen."[187] Suppose that general linguistic practice was not to use "he" to mean "he or she," but that there was a gender canon, such that use of "he" in legal documents was understood to mean "he or she." It would

185. McGinnis & Rappaport, *supra* note 45, at 756.
186. SCALIA & GARNER, *supra* note 16, at 129.
187. U.S. CONST. art. I, § 2.

then follow that the use of "he" does not limit the effect of the clause quoted above to males. (All of this is hypothetical; it is quite possible that general linguistic practice would interpret "he" as he or she in 1789.)

The fact that some of the original methods operate like rules of syntax and grammar does not entail that all of them work this way. Substantive canons are canons of construction—they determine legal effect and not linguistic meaning.

So McGinnis and Rappaport's claim that canons of interpretation and construction function like rules of grammar and syntax is correct as applied to *some* of the canons, but not *all*. Some canons are legal rules of construction—they determine legal effect. To the extent that the original methods include canons of construction, the original methods are methods of construction. Because we currently lack a fully developed set of original methods, it is difficult to judge the extent to which the set includes canons of construction, but we have good reason to believe that at least some of the original methods involve construction. Moreover, to the extent that these methods resolve irreducible ambiguity or vagueness by considering factors like "conducive to the public good," "public convenience," "general intent," "equality," "injustice," "inconvenience," and "equity of the case," the original methods will yield constructions and not interpretations.

There is a further problem with the claim that the original methods of constitutional interpretation and construction liquidate any surface problems of ambiguity, vagueness, gaps, or contradiction. The theory assumes that the authors of the relevant constitutional texts were aware of the original methods and hence that they could deploy the original methods to create communicative content. But this is an empirical hypothesis; let us call this claim the "knowledge of original methods hypothesis" or the "Knowledge Hypothesis" for short. It is not clear that the Knowledge Hypothesis will be vindicated by empirical investigation. This question has been studied in the contemporary context and the results are not promising for the Knowledge Hypothesis. In a recent study by Abbe Gluck and Lisa Bressman, the results suggest that congressional staffers have, at best, imperfect knowledge of the canons of statutory interpretation and construction.[188]

The circumstances of constitutional communication seem, at least on the surface, to be less favorable than the circumstances of contemporary legislation for the confirmation of the Knowledge Hypothesis. First, with respect to the Constitution of 1789, it is not clear that the content of the original methods were settled. Although there were state constitutions, it is not clear that the methods of constitutional interpretation at the state level were clear and fixed. Methods of statutory interpretation also existed, but it is not clear whether the content of these methods was unitary, clear, and

188. Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901 (2013). The relevance of Gluck and Bressman's work was suggested by John Ohlendorf.

fixed.[189] Second, the mechanisms for transmission of the original methods to the Framers may have been primitive by contemporary standards. Case reports may not have been universally available, and secondary materials were limited in scope. Third, whereas the contemporary Congress has a large professional staff, many members of which have legal training and experience, the original Constitution was drafted a mixed group with varied knowledge of the law and without anything like a professional research staff.

One way to conceptualize the question whether the original methods of interpretation and construction determine the communicative content of the Constitution is to conduct a thought experiment. Consider the possible world in which the original Constitution contained an additional provision:[190]

> Article VIII: When interpreting this Constitution, citizens, officials, and judges shall give its provisions that meaning its provisions would now have after application of the currently prevailing methods of legal interpretation and construction in the United States. Words and phrases shall be given their legal meaning, even when that meaning is different than their ordinary meaning.

Original Methods Originalism advances the claim that the Constitution contains an implicit Article VIII. Even if the original methods could produce a fully determinate set of constitutional doctrines, it is hardly clear that the Constitution does contain the implicit equivalent of Article VIII. If it does not, then Original Methods Originalism does not provide a comprehensive theory of the communicative content of the Constitution.

C. The Lawson-Paulsen Argument That Constitutional Default Rules Can Eliminate the Necessity of Construction

We have already considered the possibility that originalists might adopt a principle of deference to democratic decisionmaking. The basic idea is simple: if the constitutional text underdetermines the result in a particular case, then judges should defer to legislatures and executive officials. The idea of a Thayerian approach to constitutional construction was introduced above in the form of the Originalist Thayerian Theory.[191] The earlier discussion focused on a simplified view for the purpose of illustration. We are now investigating a more fully developed version of Originalist

189. Bernadette Meyler's work is suggestive in this regard. She writes, "Common law originalism regards the strands of eighteenth-century common law not as providing determinate answers that fix the meaning of particular constitutional clauses but instead as supplying the terms of a debate about certain concepts, framing questions for judges but refusing to settle them definitively." Bernadette Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV. 551, 551–58 (2006). Meyler is writing about the common law, but it is at least possible that the situation regarding eighteenth-century methods of interpretation is similar.

190. This thought experiment was suggested by Gary Lawson. Lawson himself introduced a slightly different thought experiment using the "Article VIII" device in a recent article. *See* Gary Lawson, *Dead Document Walking*, 92 B.U. L. REV. 1225, 1234 (2012).

191. *See supra* Part I.C.

Thayerianism, which can be understood in two very different ways: (1) as an interpretation of the constitutional text, or (2) as a principle of construction that applies when the text underdetermines constitutional doctrine or outcomes. Viewed as a principle of construction, Originalist Thayerianism is entirely consistent with the existence of the construction zone. But if the constitution itself requires deference in cases that would (otherwise) be underdetermined by the meaning of the text, then the full meaning of the text eliminates the construction zone.

No contemporary constitutional theorist explicitly advocates that Originalist Thayerianism eliminates the need for constitutional construction, but Gary Lawson and Michael Paulsen have argued that constitutional interpretation yields constitutional default rules and that these rules can eliminate the need to resort to constitutional construction. I will use Lawson and Paulsen's arguments as the basis for my own sketch of a version of Originalist Thayerianism. In the discussion that follows, I will offer some arguments against the actual positions offered by Lawson and Paulsen, but the primary purpose of my arguments here is to illustrate the difficulty of avoiding constitutional construction on the basis of default rules in general, and a default rule of deference to democratic institutions in particular. To the extent that neither Lawson nor Paulsen embraces Originalist Thayerianism as described here, this discussion does not directly apply to their views.

Lawson and Paulsen have distinct theories—although there are important resemblances between them. Consider Lawson first.

1. Lawson's Proposal for Transforming Epistemological Uncertainty into Adjudicative Certainty

Gary Lawson argues against the need for constitutional construction. His argument begins with the premise that uncertainty about the application of a vague or ambiguous constitutional provision is epistemic in nature. (Epistemic uncertainty is uncertainty about what we know.[192]) Thus, he writes: "In adjudication, one does not need epistemological certainty in order to achieve adjudicative determinacy. One only needs the appropriate standards of proof and burdens of proof that, together, determine who wins and loses when the epistemological answer is 'beats me.'"[193] Lawson is right. Burdens of production and persuasion (or less precisely, "burdens of proof") can provide a mechanism for translating epistemic uncertainty into certain decision. He then proposes that in the absence of certainty, constitutional cases should be decided so as to defer to democratic decisionmaking:

> I want to dissent from the originalist construction project and declare the Constitution a "no-construction zone." In adjudicative theory, one

192. For an extended discussion of the role of epistemic uncertainty in interpretation and construction, see Heidi Kitrosser, Interpretive Modesty (2013) (unpublished manuscript) (on file with author).

193. Lawson, *supra* note 190, at 1233.

> does not need construction to deal with interpretative uncertainty because there is an interpretative answer to interpretative uncertainty in adjudication.
>
> . . . .
>
> In the event that there is any uncertainty about what this Constitution means in any specific application, resolve the uncertainty against the existence of federal power and in favor of the existence of state power. In other words, presume that state laws and acts are constitutional unless something in this Constitution convinces you otherwise and presume that federal laws and acts are unconstitutional unless something in this Constitution convinces you otherwise.[194]

We can think of Lawson's strategy in terms of constitutional default rules that govern constitutional questions unless the meaning of the constitutional text clearly requires some other action.[195]

Lawson characterizes his default rules as "interpretive," but he is not using the word "interpretation" (and its variants) in the sense specified by the interpretation-construction distinction as it is presented here and used in the American case law.[196] Lawson's default rules do not determine the communicative content (or meaning) of the text; instead, they are rules of law that give the text legal effect when the meaning *is* uncertain—as Lawson says, these are rules for the determination of legal effect. In other words, Lawson's default rules are best viewed as rules of construction. Nonetheless, Lawson may believe that his default rules are contained in the communicative content of the constitutional text; the case against the claim that Originalist Thayerianism as a constitutional interpretation is explored in greater depth below.[197]

Lawson has articulated a distinction between "interpretation" and "adjudication,"[198] but his distinction is actually a version of the interpretation-construction distinction. In a more recent paper, Lawson articulates the distinction this way:

> Originalism-as-interpretation is a theory of *meaning*; originalism-as-adjudication is a theory of *action*. Theories of meaning are evaluated by reference to positive criteria of accuracy in discerning communicative signals; theories of action are evaluated by reference to normative criteria of justice.[199]

Translating Lawson's point into the terminology of the interpretation-construction distinction, Lawson's "originalism-as-interpretation" corresponds precisely to "interpretation" as that term is used here. Lawson's "originalism-as-adjudication" is closely related to "construction,"

194. *Id.* at 1233–34.
195. On the idea of a default rule, see Solum, *supra* note 137.
196. *See supra* notes 116–24 and accompanying text.
197. *See infra* Part IV.C.3.
198. *See* Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823, 1823 (1997).
199. *See* Gary Lawson, *Originalism Without Obligation*, 93 B.U. L. REV. 1309, 1313 (2013).

although construction includes constitutional practice outside the courts, including constitutional construction by nonjudicial officials and citizens. But Lawson's larger point is exactly right: originalist interpretation is a theory of communicative content (meaning) and originalist construction is a theory of action (legal effect). So, Lawson does not want argue that the Constitution is a "no adjudication zone." And his articulated views embrace the substance of the interpretation-construction distinction although he articulates this substance in a different vocabulary.

Lawson's discussion of construction assumes the Alternative Methods Model[200] of the interpretation-construction distinction, but that model captures only an accidental psychological or phenomenological feature of interpretation and construction. Once we reconstruct his position in terms of the Two Moments Model,[201] it becomes clear that Lawson's conclusion is not that the Constitution is a "no construction zone." Quite the opposite, he has demonstrated the existence of the construction zone and proposed a method for constitutional construction ("standards of proof and burdens of proof") that eliminate judicial discretion and judicial decision on the basis of principle or policy. Thus, we might restate his position as, "The constitutional construction zone should be a no discretion zone."

One final caveat concerning Lawson. The above discussion is based on my reconstruction of Lawson's complex, sophisticated, and nuanced views. The main point of the discussion is to make it clear that Lawson's position is consistent with the interpretation-construction distinction, but I have not attempted to provide a full statement of Lawson's own views about constitutional interpretation.

2. Paulsen's Argument That the Constitution Prescribes Its Own Rules of Interpretation

Michael Paulsen has offered a slightly different case for a version of Originalist Thayerianism in his article entitled, *Does the Constitution Prescribe Rules for Its Own Interpretation?*[202] But before we consider his argument, it should be observed that Paulsen believes that some constitutional provisions do require construction, as evidenced by the following passage:

> Constitutional provisions do not "stand for" abstract principles; they "stand for" what they say. Sometimes the words state bright-line rules, like the thirty-five years of age requirement. Sometimes they state standards that may call for judgment by some relevant decisionmaker, as with "unreasonable" searches or "cruel and unusual" punishment or "excessive" fines.[203]

200. *See supra* Figure 5.
201. *See supra* Figure 3.
202. Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, 103 NW. U. L. REV. 857 (2009).
203. *Id.* at 881.

If Paulsen is correct about the meaning of these provisions, then he has made the case for the existence of the construction zone—at least with respect to three constitutional provisions.

But with respect to other constitutional provisions, Paulsen argues for a version of what I call Originalist Thayerianism. Here is his statement of the argument:

> What should one do with such an unspecific text? Robert Bork's famous reply was that the interpreter should treat such a provision as one would an inkblot. A somewhat improved answer might be that the Constitution's text itself suggests, as a practical matter, a default rule of interpretation where the constitutional text is unspecific: popular republican self-government. The more specific a text (like the thirty-five-year-old requirement), the more it will limit democratic choice with respect to the rule specified. The more unspecific a text, the more room it leaves for democratic choice, in accordance with the structures of government the Constitution creates at the federal level and mostly leaves alone at the state level. If the Constitution's text supplies no rule or standard governing the issue in question, the issue defaults to some other source of law or the designated authority of some decisionmaker who otherwise possesses policy discretion with respect to that issue. Where the document's broad or unspecific language admits of a range of possible actions, consistent with the language, government action falling within that range is not unconstitutional.[204]

On the surface, it appears that Paulsen has eliminated the construction zone (outside of the cases in which the text itself mandates construction).

Not so fast. The core of Paulsen's argument is that "the Constitution's text itself suggests . . . a default rule of . . . popular republican self-government." The word "suggests" is revealing: Paulsen does not argue that the default rule is explicitly stated by the text. There is nothing about default rules in the text, and the only appearance of the word "republican" is in Article IV: "The United States shall guarantee to every State in this Union a Republican Form of Government."[205] The default rule that Paulsen proposes is not stated in the Guarantee Clause—nor does this default rule appear via contextual enrichment of the semantic content of that clause. For these reasons, it seems dubious that Paulsen could establish that his default rule is an interpretation of the constitutional text. This does not mean that the default rule is unconnected to the text: for example, Paulsen can argue that the normative commitments reflected in the text support his Thayerian default rule.

Paulsen's default rule is actually a rule of constitutional construction. When the constitutional text is "unspecific" (e.g., vague or irreducibly ambiguous), we apply a default rule of construction that determines the legal effect of the vague language. The meaning is vague, but the legal effect is made specific via the default rule. Paulsen's argument does not eliminate the construction zone. For Paulsen, the work of constitutional

204. *Id.* at 881–82.
205. U.S. CONST. art. IV, § 4.

construction is done by a normative principle (deference to democratic decisions). One last clarification is important: even if Paulsen's default rule is not part of the meaning of the constitutional text, it might be that it is supported by our understanding of constitutional purposes or values, and hence it could be a "constitutional principle" in that sense. As with Lawson, Paulsen seems to believe that his principle of deference is required by the constitutional text: this possibility is considered immediately below.[206]

One final observation about both Paulsen's and Lawson's arguments: they both rely on the notion of a default rule (of deference to democratic institutions). But default rules are paradigm cases of rules of construction. The whole idea of a default rule is to determine legal effect when the meaning of the text runs out. The passages from Farnsworth that serve as the epigraph for this Article provide a particularly clear demonstration of exactly this point.[207]

3. Is Originalist Thayerianism Required by Interpretation of the Constitutional Text?

Both Lawson and Paulsen believe that their constitutional default rules are required by the constitutional text itself and hence do not accept the characterization of their methods for resolving constitutional underdeterminacy as methods of constitutional construction. This subsection addresses the question whether public meaning originalism can embrace this claim. The answer developed here is no—a principle of deference to the political branches in cases involving constitutional underdeterminacy cannot be derived from the text. The argument supporting this position will proceed in stages, beginning with the explicit semantic content of the constitutional text.

a. Thayerian Deference Is Not Explicitly Required by the Semantic Content of the Constitutional Text

The semantic content of the constitutional text does not contain an explicit principle of deference to the political branches in cases where the constitutional text is vague, irreducibly ambiguous, or underdeterminate for some other reason. The warrant for this conclusion is obvious: there is no deference clause in the text. There are constitutional provisions that govern constitutional construction—for example, the Ninth Amendment provides, "The enumeration of certain rights in this constitution shall not be construed to deny or disparage others retained by the people." But there is no clause that says, "This Constitution shall not be construed to invalidate state or federal laws or acts unless the text clearly requires that result," or "This Constitution shall be construed to require deference to Congress, the president, and the executives and legislatures of the several states in any

206. *See infra* Part IV.C.3.
207. *See supra* notes 1–2 and accompanying text.

case in which its provisions do not clearly require invalidation of their actions."

Of course, the fact that the Constitution's semantic content does not explicitly include a "principle of Thayerian deference" clause does not settle the question whether the full communicative content of the Constitution includes a principle of deference. That principle might arise from implication or some form of contextual enrichment.[208] In the discussion that follows, I am distinguishing between "implication," by which I mean logical implication, on the one hand, and "implicature,"[209] "impliciture,"[210] and "presupposition"[211] (forms of contextual enrichment), on the other.[212] Consider each of these possibilities in turn.

b. Thayerian Deference Is Not Logically Implied by the Constitutional Text

If Thayerian deference were logically implied by the constitutional text, then it would be possible to produce a valid deductive syllogism with premises derived from the semantic content of the text. No such syllogism is available. Indeed, it is difficult to imagine how one would even begin building such a syllogism, since neither the concept of deference nor the concept of underdetermination (or equivalents of these ideas) appears anywhere in the text. But if these concepts do not appear in the semantic content of the text, then how can the text provide premises that will yield a conclusion with these concepts? Of course, the immediately prior sentence was a rhetorical question, reflecting the difficulty of proving a negative. But the burden of persuasion on this issue rests with those who assert that Thayerian deference is a logical implication of the constitutional text, and the burden is heavy because it can only be met with a valid logical deduction from the semantic content of the text.

There is a logical argument *about* the text that leads to a conclusion about Thayerian deference. Informally, that argument begins with the idea that in

208. *See supra* Part II.A.2.

209. *See* Wayne Davis, *Implicature*, STAN. ENCYCLOPEDIA PHIL. (Sept. 22, 2010), http://plato.stanford.edu/entries/implicature/; *see also* Jeffrey Goldsworthy, *Constitutional Cultures, Democracy, and Unwritten Principles*, 2012 U. ILL. L. REV. 683, 698; Andrei A. Marmor, *Can the Law Imply More Than It Says? On Some Pragmatic Aspects of Strategic Speech*, *in* PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW 83 (Andrei A. Marmor & Scott Soames eds., 2011).

210. *See* Kent Bach, *Conversational Impliciture*, 9 MIND & LANGUAGE 124–62 (1994).

211. I mean "presupposition" in the pragmatic sense. Sometimes "presupposition" is used in a semantic sense to refer to what I call implication. Christopher Potts describes presupposition as follows: "The presuppositions of an utterance are the pieces of information that the speaker assumes (or acts as if she assumes) in order for her utterance to be meaningful in the current context." Christopher Potts, *Presupposition and Implicature*, *in* THE HANDBOOK OF CONTEMPORARY SEMANTIC THEORY (2d ed. forthcoming) (manuscript at 2), *available at* http://www.stanford.edu/~cgpotts/manuscripts/potts-blackwellsemantics.pdf; *see also* Goldsworthy, *supra* note 209, at 698–99 ("Presuppositions, or tacit assumptions, are not deliberately communicated by implication. Instead, they are taken for granted: they are so obvious that they do not need to be mentioned or (sometimes) even consciously taken into account.").

212. *See supra* note 47 and accompanying text.

cases of constitutional underdetermination, the text does not logically entail the unconstitutionality of statutes or acts that fall within the zone of underdetermination. This follows from the meaning of "underdetermination"; a provision of the constitution is underdeterminate with respect to the constitutionality of a statute or act if, and only if, the content of the provision neither clearly validates nor clearly invalidates the statute or act. Precisely because of this logical consequence of constitutional underdeterminacy, it would be fallacious to argue that in the construction zone, courts are logically required to find any statute not clearly constitutional *to be unconstitutional*. But an argument that courts must find that any statute that is in the construction zone *is constitutional* would suffer from the same logical fallacy. It follows from the very meaning of underdeterminacy that neither result is logically required. Put another way, the point of this paragraph is that any argument that deference is required in cases of constitutional underdeterminacy conflates a determinate "no" with an underdeterminate "maybe."[213]

Of course, the advocates of a principle of Thayerian deference are not arguing for the conclusion that cases of constitutional underdeterminacy are actually cases of determinate constitutionality. Indeed, stated in this way, it is apparent that such argument would involve a logical contradiction—the same provision would be both underdeterminate and determinate. Instead, they are arguing that underdeterminacy requires deference. But this clarification regarding the nature of their conclusion makes the difficulty of their task clear: the concept of deference is not found in the text, and the advocates of Thayerian deference have yet to make a plausible argument that deference is logically entailed by anything that can be found in the semantic content of the text.

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213. Gary Lawson suggests that constitutional burdens of persuasion are logically implied by the constitutional text. *See* Lawson, *supra* note 190, at 1235. Full consideration of his argument is beyond the scope of this Article. Lawson argues, "The proposition that he who asserts must prove is a basic principle of rational thinking, not a normative theory of governance." *Id.* Let us call the default rule that results from this argument the "asserter-must-prove rule."

There are two difficulties with this position. First, the burden of proof consists of both the burden of production and the burden of persuasion. For example, the extent of federal power under the Commerce Clause might arise in an action by the federal government to enjoin a conflicting state law. Suppose that the Commerce Clause is vague, and therefore under the asserter-must-prove rule, the Commerce Clause would not extend to the area in the construction zone. But the same issue might arise if a state brought suit to enjoin the federal statute. Now the state has the burden of production, and the asserter-must-prove rule would require a court to find that federal power did exist within the construction zone. Of course, Lawson's own default rule does not operate this way, but it is precisely for that reason that Lawson's default rule cannot be shown to be logically entailed by the constitutional text and "a basic principle of rational thinking."

Second, and perhaps more importantly, unless vagueness is epistemic, *see supra* note 153, the argument that burdens of production and persuasion are appropriate tools for the resolution of vagueness commits a category mistake. If the text is nonepistemically vague, burdens of proof are beside the point. A full discussion of the question whether vagueness is epistemic is outside the scope of this Article, but on the surface the claim that every seemingly vague legal text actually provides a precise bright-line rule is implausible.

Lawson and Paulsen may believe that they have demonstrated that their default rules are logically implied by the text. The following passage from Paulsen is suggestive: "If the Constitution's text supplies no rule or standard governing the issue in question, the issue defaults to some other source of law or the designated authority of some decisionmaker who otherwise possesses policy discretion with respect to that issue."[214] Paulsen's argument rests on the assumption that the constitutional text "supplies *no* rule or standard governing the issue in question." That assumption holds when the constitutional text is silent with respect to the issue, but that is not the case when the text is vague, irreducibly ambiguous, or underdeterminate in some other way. In those cases, the text does speak to the issue, but does not (by itself) determine the result. In Paulsen's own terms, it is not the case that there is "*no* rule or standard." There is a rule or standard, the application of which requires further construction. So Paulsen's argument fails at the first step. But even if this step in Paulsen's argument worked, there is another problem. The conclusion that "the issue defaults to some other source of law" does not logically follow from the absence of a rule or standard. This default rule is not a logical consequence of the fact that a given provision is underdeterminate—some additional premise would be required and no such premise is found in the text itself.

At this point, some readers may object that my discussion of "implication" has been too narrow, focusing solely on logical implication and excluding arguments based on informal inferences from text and context. This narrow focus has resulted in arguments that may strike these readers as "logic chopping"—the identification of formal logical flaws at the expense of a more holistic understanding of how texts can mean more than they say. On the one hand, such objections are well taken: in the next section we will consider a contextualist approach to communicative content that explicitly allows for inferences that fall far short of logical deduction. But on the other hand, these objections are misplaced: the point of this subsection is simply that Thayerian deference cannot be derived as a matter of logical implication from the text—no more than that, but also no less.

c. Thayerian Deference Does Not Result from Contextual Enrichment of the Semantic Content of the Text

Thayerian deference is not explicit in the text, nor is it logically implied by the text. That leaves one final possible interpretive move: one could argue that a principle of Thayerian deference arises from contextual enrichment of the text, by implicature, impliciture, or presupposition. Let us put the technical differences between these forms of contextual enrichment to the side. The basic idea of contextual enrichment is that given the publicly available context of constitutional communication, the text conveys communicative content that is unstated, because, for example, the meaningfulness or sensibility of the text assumes the additional content.

214. Paulsen, *supra* note 202, at 882.

There are a variety of reasons for rejecting the claim that Thayerian deference is part of the full communicative content of the constitutional text, once contextual enrichment is taken into account. The discussion that follows provides some of these reasons.

i. The Baselines Problem: The Presumption Could Run in Multiple Ways

The first and most fundamental difficulty for the claim that Thayerian deference was communicated via contextual enrichment concerns baselines. There are multiple possible baselines that could supply the presumption that operates when the constitutional text is underdeterminate. Consider the following possibilities:

- *Presumption of constitutionality*: Presume that statutes or executive actions are valid when the constitutional text is vague, irreducibly ambiguous, or otherwise underdeterminate: defer to democratically elected officials or their agents.
- *Presumption of liberty*: Presume that the actions of individuals are lawful when the constitutional text is vague, irreducibly ambiguous, or otherwise underdeterminate: defer to individual liberty.
- *Presumption of judicial authority*: Presume that the judicial officials are empowered to engage in constitutional constructions with respect to the legal content of the Constitution when the constitutional text is vague, irreducibly ambiguous, or otherwise underdeterminate: do not defer.

Of course, there are other possibilities, including combinations of the three principles listed above, with different domains of application for each. Each of these presumptions is consistent with constitutional underdeterminacy. Each assumes a different baseline (democratic decisionmaking, liberty, or judicial authority).

The defender of Originalist Thayerianism might try to argue that something about the publicly available context of constitutional communication would have implicitly communicated the presumption of constitutionality. So far as I am aware, no one has attempted to supply this argument, and it seems clear that any such attempt will face a substantial difficulty: the argument must show that, for constitutional communication, the Framers of each provision would have been able to rely on an audience who would have grasped the unstated presumption based on the publicly available context. Because multiple baselines are consistent with the text, this seems extraordinarily unlikely.

Consider the alternatives to the Originalist Thayerian account of baselines that were advanced by St. George Tucker in his 1803 version of *Blackstone's Commentaries*:

> All the powers of the federal government being either expressly enumerated, or necessary and proper to the execution of some enumerated power; and it being one of the rules of construction which sound reason has adopted; that, as exception strengthens the force of a law in cases not excepted, so enumeration weakens it, in cases not enumerated; it follows,

> as a regular consequence, that *every power which concerns the right of the citizen*, must be construed strictly, where it may operate to infringe or impair his liberty; and liberally, and for his benefit, where it may operate to his security and happiness, the avowed object of the constitution: and, in like manner, *every power which has been carved out of the states*, who, at the time of entering into the confederacy, were in full possession of all the rights of sovereignty, is *in like manner* to be construed strictly, wherever a different construction might derogate from the *rights and powers, which by the latter of these articles*, are expressly acknowledged to be reserved to them respectively.[215]

This passage strongly suggests that the context of constitutional communication did not convey an unambiguous implicit message that courts are to defer when the text is not clear—indeed, Tucker's reading is to the contrary. And this passage illustrates the more general difficulty for Originalist Thayerians: a presumption of constitutionality is only one of several possible alternative understandings of the relevant baseline.

Of course, arguments of political morality can be advanced for each of the competing baselines. One could argue (1) for the presumption of constitutionality on the basis of popular sovereignty, (2) for the presumption of liberty based on a classical liberal (or contractarian) theory of justice, or (3) for the presumption of judicial authority based on an argument for the institutional competence of the courts. But these are normative arguments about the best construction and not linguistic arguments about communicative content. Putting this point just a bit differently, the presumption of constitutionality posited by Originalist Thayerianism requires a normative justification, and this fact strongly suggests that a principle of Thayerian deference is a construction and not an interpretation of the constitutional text.

ii. The Problem of Underdeterminate Deference: Constitutional Conflict Between and Among Legislators and Executives

There is a second problem with any attempt to argue that there are no construction zones because Thayerian deference was implicitly communicated by the constitutional text: deference to democratic institutions produces indeterminate results when the constitutional question at issue involves a clash between two or more institutions that are democratically constituted.

This problem is clearest with respect to the separation of powers. Both the president and Congress are democratically elected. The Constitution confers executive power on the president and enumerated legislative powers on the Congress, but these categories are almost certainly vague at the edges: a presidential command denominated as an "executive order" might

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215. 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA 307–08 n.D (Augustus M. Kelley ed., 1969) (1803) (emphasis added); *see also* Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1, 69–76 (2006) (discussing this passage from Tucker).

be neither clearly executive nor clearly legislative in nature.[216] When Congress and the president clash in the penumbral zone between the cores of their respective powers, the judicial branch cannot defer to both—it must pick one or the other.

Similar problems can occur when a case involving Congress's enumerated powers involves a direct conflict between the federal legislature and the legislatures of one or more of the several states. The courts may be required to determine a federalism case involving the penumbra of Congress's power. If the courts defer to Congress, then they will override the democratically elected state legislature, but if the courts defer to the states, then the courts will override Congress.

These cases demonstrate that the principle of deference to democratic institutions is itself underdeterminate, and hence that this principle cannot always be applied without constitutional construction. But if this is the case, then it follows that with respect to federalism and separation of powers, there are substantial construction zones—even if the communicative content of the constitutional text included a principle of democratic deference.

iii. The Ninth Amendment Problem: The Semantic Content of the Ninth Amendment Is Inconsistent with the Argument That Context Requires Global Thayerian Deference

There is a third problem with the attempt to derive Thayerian deference from the communicative content of the constitutional text. We have already seen that a principle of deference to democratic institutions is underdeterminate when applied to a conflict between democratic institutions (at the federal level or between the federal and state governments). But there is another equally serious problem with applying a principle of deference in cases involving clashes between democratic institutions and individuals. The Ninth Amendment provides, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[217] As discussed above,[218] the Ninth Amendment arguably creates an implicature to the effect that there are retained rights.[219] One way of understanding Originalist Thayerianism as applied to individual rights cases is that it denies enforcement to rights outside the undisputed core of the enumerated rights. But, understood in this way, this principle of deference seems to use enumeration as a premise for a construction that disparages retained rights on the basis of enumeration—the very kind of construction that the Ninth Amendment forbids. Even if one believes that the rights implicated by the Ninth Amendment should not be judicially enforced, it is difficult to deny

216. *See supra* Part IV.A.
217. U.S. CONST. amend. IX.
218. *See supra* Part II.A.2; *see also* Williams, *supra* note 52.
219. *See* Randy E. Barnett, *The Misconceived Assumption About Constitutional Assumptions*, 103 NW. U. L. REV. 615, 622–23 (2009).

that Originalist Thayerianism cannot be defended as a constitutional interpretation if it is in tension with the explicit and implicit content of the Ninth Amendment. Of course, that would leave the door open to Thayerian deference as a principle of constitutional construction—the final point in this Part.

4. Qualification: Thayerian Deference As Construction Could Survive the Case Against Thayerian Deference As Interpretation

Having rehearsed a slew of arguments against Originalist Thayerianism as an interpretation of the explicit or implicit content of the constitutional text, I want to emphasize the limit of these arguments. I have not argued against a principle of deference on the basis of a constitutional construction—but I have not endorsed such a principle either. For the purposes of this Article, the Originalist Thayerianism is confronted because it has been argued that a principle of deference or a presumption of constitutionality eliminates the need for construction or the existence of the construction zone. The point of the arguments here is that Originalist Thayerianism is best understood as a distinctive approach *to* constitutional construction and a way of proceeding *in* the construction zone.

* * *

After this lengthy discussion of Originalist Thayerianism, it may be wise to pull back from the trees and look at the forest. The general point of this subsection is to argue that there is a construction zone and there are good reasons to believe it is substantial. The Constitution contains a variety of provisions that are both general and vague, thus creating underdeterminacy. That fact does not entail the conclusion that individual judges have discretion to make decisions based on their own views of political morality. Work in the construction zone can be done by canons of construction or default rules that constrain judicial discretion. Or it could be done by direct resort to principle and policy. And there are many other alternatives: construction guided by original methods, common law methods of construction, construction guided by the functions of each constitutional provision, and so forth. Disagreements about the best approach to constitutional construction are important, and one of the most significant payoffs of the interpretation-construction distinction is that it enables us to precisely understand such disputes.

D. The Contestability of the Claim That the Construction Zone Is Ineliminable

Constitutional construction is ubiquitous. Given that "construction" refers to the process of determining legal effect, this claim is true because officials act in ways that give the Constitution legal effect. No one should contest this claim—once they understand what it means. The existence of the construction zone, on the other hand, is contestable. We have examined two different strategies for minimizing or eliminating the construction zone.

Original Methods Originalism argues that the original methods of constitutional construction provide determinate content to constitutional provisions that, on their surface, seem vague or underdeterminate in some other way. Originalist Thayerianism argues that the constitutional text contains an unstated default rule of deference to democratic institutions. I have argued here that neither strategy is likely to succeed, but my arguments, like those of the proponents of these theories, rely on a variety of contestable empirical claims. For this reason, there is no knockdown argument for the proposition that the construction zone is ineliminable. Instead, we have examined a series of considerations that make the ineliminability claim plausible and well supported and a variety of arguments that suggest that Original Methods Originalism and Originalist Thayerianism are unlikely to succeed if they are viewed as theories of constitutional interpretation. That leaves open the possibility that these theories might be recast as prescriptions for constitutional construction. In that form, both Original Methods Originalism and Originalist Thayerianism are more plausible. The ultimate question whether these theories should be affirmed as theories of constitutional construction depends on normative issues—the resolution of which is beyond the scope of this Article.

V. THE RELATIONSHIP OF CONSTITUTIONAL CONSTRUCTION TO ORIGINALISM

The two central claims of this Article are that construction is ubiquitous[220] and that the construction zone is ineliminable.[221] If those claims are true, what are the implications for originalism? Can originalist constitutional theory embrace the existence of the construction zone and remain true to its core principles? Or does the New Originalism become a form of living constitutionalism?

Thomas Colby has raised these questions in a thoughtful way in his lucid article, *The Sacrifice of the New Originalism*.[222] He offers a helpful distinction between "constraint" and "restraint":

> [A]lthough originalism in its New incarnation no longer emphasizes judicial restraint—in the sense of deference to legislative majorities—it continues to a substantial degree to emphasize judicial constraint—in the sense of promising to narrow the discretion of judges. New Originalists believe that the courts should sometimes be quite active in preserving (or restoring) the original constitutional meaning, but they do not believe that the courts are unconstrained in that activism. They are constrained by their obligation to remain faithful to the original meaning.[223]

Let us adopt and refine Colby's distinction, stipulating the following definitions:

220. *See supra* Part III.
221. *See supra* Part IV.
222. Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713 (2011).
223. *Id.* at 751.

- "Constitutional constraint" is a function of (1) the version of the Constraint Principle that governs constitutional practice, and (2) the extent to which the communicative content of the constitutional text determines (or underdetermines) legal effect. "Constitutional freedom" is the stipulated antonym.
- "Judicial restraint" occurs when judges do not exercise the power of judicial review to invalidate actions taken by the political branches (executive and judicial officials). "Judicial engagement" is the stipulated antonym.[224]

Given these stipulated definitions, we can say a bit more about the nature of both constraint and restraint. Constitutional constraint is a complex scalar (a matter of degree along more than one dimension). Perfect constitutional constraint exists if the constitutional text (a) fully determines all constitutional effects, and (b) officials are bound by the version of the Constraint Principle that completes correspondence between the communicative content of the constitutional text and the legal content of constitutional doctrine. Perfect constitutional freedom would exist if (a) officials completely rejected the principle of constitutional restraint, or (b) the communicative content of the constitutional text were radically indeterminate, or (c) both (a) and (b) were true. There are a variety of intermediate possibilities, corresponding to different configurations of underdeterminacy and various versions of the Constraint Principle. Constitutional constraint is a function of both interpretation and construction.

Judicial restraint is also a complex scalar. At one extreme would be a principle of total judicial deference—judges would never exercise the power of judicial review. More restraint would be provided by Thayerian Originalism, which requires judges to defer to the political branches unless the communicative content of the constitutional text clearly requires otherwise. Rational basis review provides another mechanism of deference—judges defer to the political branches so long as there is a rational basis for the political actor to believe that their action complies with the judicially determined meaning of the constitutional text. Strong judicial engagement would require judges to exercise the power of judicial review whenever a judge believed that the constitutional construction corresponding to the best interpretation of the text invalidates action by a political official or institution. Again, there are many other variations. Judicial restraint is a function of constitutional construction.

In other words, both constitutional constraint and judicial restraint are matters of degree and both have a complex structure. The theoretical space (the possible combinations of various views of constraint and restraint) is

224. "Judicial activism" is an alternative to judicial engagement, but usage of the phrase judicial activism varies and has been disputed. *See* Lawrence B. Solum, *Legal Theory Lexicon 035: Strict Construction and Judicial Activism*, LEGAL THEORY LEXICON, http://lsolum.typepad.com/legal_theory_lexicon/2004/05/legal_theory_le_3.html (last updated June 18, 2012). *See generally* Keenan D. Kmiec, *The Origin and Current Meanings of "Judicial Activism,"* 92 CALIF. L. REV. 1441 (2004).

therefore large and multidimensional. Originalism narrows the range of possibilities in two ways. First, the Fixation Thesis narrows the range of underdeterminacy of meaning. Living constitutionalists might be free to pick and choose between various "meanings" that morph to conform to changing circumstances and values: this creates a kind of irreducible meta-ambiguity. But originalists are committed to the view that the only relevant meanings are fixed by linguistic facts at the time each provision of the Constitution is framed and ratified. Second, the Constraint Principle (in any plausible version) limits the range of possible constructions to those that are consistent with the constitutional text (at a minimum) or to constructions that are required by the text (at a maximum). Nonoriginalists can reject the Constraint Principle; for example the Multiple Modalities Model (depicted above)[225] allows for constitutional constructions that are inconsistent with the communicative content of the text, although living constitutionalists may try to characterize their results as consistent with what they *call* the "meaning": the crucial conceptual point is that nonoriginalists who conflate interpretation with construction use "meaning" in a way that conflates communicative content with legal content and legal effect.

Originalists differ among themselves about both constraint and restraint. Consider constitutional constraint. Some originalists believe that the construction zone is both real and substantial: I have argued for that position in this Article. But other originalists believe that the construction zone is small or nonexistent: McGinnis and Rappaport argue that the original methods of constitutional interpretation and construction reduce or eliminate constitutional underdeterminacy.[226] And there is a similar range of opinion with respect to constraint. The family of originalist theories includes a variety of views about constitutional construction, ranging from Originalist Thayerianism (or the default rule of deference) reconstructed on the basis of work by Lawson[227] and Paulsen[228] to Balkin's Living Originalism.[229]

These differences suggest questions about the role of "originalism" as the name of a coherent family of theories. What is the utility of the label "originalist" given this divergence? Can contemporary originalism be distinguished from its rival, living constitutionalism? Is the New Originalism really originalist at all?

Before addressing these questions, we might observe that they are not questions about the substance of constitutionalist theory. Rather than disputing labels and terminology, we might address the merits of the claims made by originalists and living constitutionalists. We could ask whether the Fixation Thesis is true or whether the Constraint Principle is warranted. We could engage in substantive discussion about the possible vagueness or ambiguity of particular constitutional provisions. We could investigate the

225. *See supra* Figure 2.
226. *See supra* Part IV.B.
227. *See supra* Part IV.C.1.
228. *See supra* Part IV.C.2.
229. *See* BALKIN, *supra* note 63.

merits of various versions of the Constraint Principle. We could examine the rationales of competing views about the justifications for different accounts of judicial restraint and engagement. And we could apply the results of these investigations to particular constitutional controversies. That is, we can do the work of constitutional theory. That enterprise seems more likely to produce valuable contributions to constitutional practice and to our understanding of the relationships between constitutional theory, jurisprudence, political philosophy, and other disciplines, than the alternative—disputing about the meaning of the words and phrases "originalism," "nonoriginalism," and "living constitutionalism."

Colby's *The Sacrifice of the New Originalism* is wonderfully illuminating, but one might question his characterization of theoretical progress as "sacrifice." It is true that New Originalists characteristically argue for the existence of a significant construction zone; this entails that New Originalists believe that constitutional constraint is less than perfect. But the central theoretical contributions of the New Originalism, the turn to public meaning and the recognition of the interpretation-construction distinction do not end debates about constitutional constraint and judicial restraint. Instead, these moves have resulted in a vigorous exchange among originalists about various mechanisms of constraint and restraint. Thus, McGinnis and Rappaport have provoked a discussion of the relationship between public meaning and original methods of interpretation and construction. Lawson and Paulsen have suggested approaches to constitutional construction that can reconcile the existence of the construction zone with a restrained conception of the judicial role. These moves clarify and advance debates in constitutional theory. One might characterize this dynamic as an achievement of the New Originalism and not a sacrifice.

A different sort of concern is expressed by critics of the New Originalism who object to the use of the term "originalism" to refer to the views of theorists like Whittington, Barnett, and Balkin. A recent example is provided by *Judicial Review, Constitutional Interpretation, and the Democratic Dilemma: Proposing a "Controlled Activism" Alternative* by Martin Redish and Matthew Arnould.[230] They write:

> Recall that originalism grew out of an understandable desire to cabin the interpretive discretion of unrepresentative, unaccountable judges who, under the guise of "interpreting" the counter-majoritarian Constitution, were all too often trumping the democratic process by superimposing their own social policy choices on the majoritarian political process. The means for restraining modern judicial review contemplated by originalist theory was to confine the interpretive options open to modern judges to the understandings of those alive at the time of the framing and ratification of the relevant constitutional provision. Yet, contrary to this asserted goal, the originalist construction school openly concedes the widespread impossibility of successfully performing the archaeological

230. Redish & Arnould, *supra* note 9, at 1511.

> and translational task that is the sine qua non of true originalist analysis. It replaces it with an indeterminate mode of "construction" that permits the very results that originalism was designed to avoid—namely, the unrestrained judicial trumping of democratically authorized decision making and the implementation of textual understandings of which those alive at the time of ratification would have been totally unaware. This may well be an appropriate means of constitutional construction for those of us who have long categorically rejected the entire originalist endeavor as hopeless and often manipulative. But it is surely Orwellian to describe this theory as "originalist" in any *meaningful* sense of that term.[231]

This argument simply fails to take into account both the complex history of originalism and the current literature. There is a widely used sense of the term "originalist" that meaningfully includes both Old and New Originalisms and that embraces both the champions and opponents of existence of a construction zone.[232] Almost every version of originalist constitutional theory incorporates the Fixation Thesis and the Constraint Principle: originalism is *meaningfully* used to refer to the family of originalist theories that embrace these two ideas.

Redish and Arnould's assertion that originalism grew out of desire for constitutional constraint and judicial restraint[233] may well be correct, but this does not entail their assumption that constraint and restraint are constitutive of originalism itself. Rather, their argument is based on a serious conceptual error, conflating the *motivation fo*r a theory with the *content of* the theory. Sometimes, general legal theories have consequences that are entirely congenial to those who first developed the theories, but (unsurprisingly) general theories can be a mixed bag, achieving only part of the ambitions of those who got the theories off the ground.

The legitimacy of using the term "originalism" to label a theoretical position must be assessed with reference to an account of the content of originalism. The interpretation-construction distinction is consistent with that content, as originalism was first defined by Brest, as it developed into Public Meaning Originalism in the 1980s, and as it has evolved into the New Originalism.[234] Recall that originalism was a term introduced by Paul Brest and defined by him to refer to "the familiar approach to constitutional adjudication that accords binding authority to the text of the Constitution or the intentions of its adopters"[235]—a definition that is fully consistent with the understanding of originalism as a family of constitutional theories that embraces the Fixation Thesis and the Constraint Principle. The move to public meaning began in the mid-1980s, shortly after originalism entered the constitutional vocabulary. The focus on public meanings led directly to

231. *Id.* at 1509 (emphasis added).

232. Characterizing "originalism" in terms of the Fixation Thesis and Constraint Principle is not idiosyncratic. *See supra* note 7 (collecting uses of the distinction in contemporary constitutional theory).

233. For discussion of constitutional constraint and judicial restraint, see *supra* notes 222–21 and accompanying text.

234. For the relevant history, see *supra* Part I.A.

235. Brest, *The Misconceived Quest*, *supra* note 14, at 204.

appreciation that the original meaning of some constitutional provisions was vague (or underdeterminate in some other way), and that appreciation led directly to the interpretation-construction distinction and the associated idea of a construction zone. These are developments within originalist theory.

Moreover, the interpretation-construction distinction is consistent with every version of originalism, because acceptance of the distinction follows from recognition of the difference between meaning and effect—something that every originalist can and should embrace. Redish and Arnould's assumption that construction is inherently indeterminate (and hence that it entails "unrestrained judicial trumping of democratically authorized decision making") is simply false; for example, Originalist Thayerianism is a theory of constitutional construction that explicitly rejects these assumptions. Moreover, it is far from evident that the Constraint Principle is toothless, even with respect to broad and abstract provisions like the Commerce Clause; at least on some originalist accounts, the original meaning of interstate commerce would require a substantial revision of current doctrine.[236] The use of the uncharitable epithet "Orwellian"[237] seems especially inappropriate, given that New Originalists who argue for the existence of a substantial construction zone have been remarkably candid about the implications of this move.[238]

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236. *See generally* Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001).

237. I take it that the normative significance of the term "Orwellian" is clear. The reference is to George Orwell's novel, *Nineteen Eighty-Four*, with its fictitious language "Newspeak" and the Newspeak word "doublethink." Here is the famous passage:

> The keyword here is blackwhite. Like so many Newspeak words, this word has two mutually contradictory meanings. Applied to an opponent, it means the habit of impudently claiming that black is white, in contradiction of the plain facts. Applied to a Party member, it means a loyal willingness to say that black is white when Party discipline demands this. But it means also the ability to *believe* that black is white, and more, to know that black is white, and to forget that one has ever believed the contrary. This demands a continuous alteration of the past, made possible by the system of thought which really embraces all the rest, and which is known in Newspeak as doublethink . . . . Doublethink means the power of holding two contradictory beliefs in one's mind simultaneously, and accepting both of them.

GEORGE ORWELL, NINETEEN EIGHTY-FOUR 218–20 (1949). "Orwellian" implies manipulation and deception—charges that should not be lightly made in academic discourse and that are completely unwarranted in the case of originalist theorizing about the interpretation-construction distinction.

238. Thomas Colby's analysis of an argument similar to Arnould and Redish's "Orwellianism" charge is helpful:

> One might be tempted to speculate that what is really going on here is not that originalism has fundamentally changed, but rather, that several former nonoriginalists have jumped on the originalism bandwagon and have attempted to co-opt the "originalist" label for their own decidedly nonoriginalist purposes. In other words, perhaps the New Originalism has not so much replaced the Old Originalism as it has cynically stolen its limelight. But that is not so. It is true that a few of the most vocal self-identified New Originalists have pushed the theory further in the direction of admitted flexibility than most other self-proclaimed originalists would be comfortable acknowledging. But it is also true that (almost)

Finally, Redish and Arnould are simply mistaken when they assert, "the originalist construction school openly concedes the widespread impossibility of successfully performing the archaeological and translational task that is the sine qua non of true originalist analysis."[239] New Originalists do not contend that interpretation (understood as the discovery of communicative content) can accurately be characterized as subject to "widespread impossibility." Quite the opposite, they insist that the discovery of original meaning is always possible in theory and with respect to many or most of the provisions of the Constitution, not only possible but actually accomplished in fact. Many New Originalists believe that there are some provisions for which confidence about original meaning will require additional research.

As I understand the position of the New Originalists (and I count myself as among them), most of the provisions of the Constitution are structural and have clear original meanings: the detailed plan for the national government including the various rules constituting the Congress, presidency, and the judicial branch have discernable original meanings and much of that plan is substantially determinate. Many of the vague provisions (including important individual rights provisions) create construction zones, but this is because the discernable original meaning underdetermines some constitutional questions.

Some originalists may believe that there are a few provisions of the constitution where the original meaning is highly contestable (and perhaps where the available evidence is not fully adequate to resolve the controversies clearly); the Privileges or Immunities Clause of the Fourteenth Amendment might be such a provision.[240] But so far as I know, there is no originalist who believes that this phenomenon is "widespread" or that recovery of original meaning in general is "impossible." Redish and Arnould provide no examples of New Originalists embracing their notion of "widespread impossibility" and the paragraph in which this assertion appears does not include a single citation.[241] Their earlier discussion of what they call "originalist construction"[242] does include citations to my work[243] and to Keith Whittington.[244] But none of the cited passages or

> no one is an Old Originalist anymore. It is now nearly impossible to find an originalist who has not explicitly or implicitly endorsed at least some of the theoretical moves discussed in Part I of this Article.

Colby, *supra* note 222, at 748.

239. Redish & Arnould, *supra* note 9, at 1509.

240. For an example of originalist controversy over the meaning of the Privileges or Immunities Clause, compare BARNETT, *supra* note 54, at 60–68, with Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part I: "Privileges and Immunities" As an Antebellum Term of Art*, 98 GEO. L.J. 1241 (2010), and Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part II: John Bingham and the Second Draft of the Fourteenth Amendment*, 99 GEO. L.J. 329 (2011). Even with respect to this very difficult text, originalists like Lash and Barnett both believe that the original meaning can be recovered.

241. Redish & Arnould, *supra* note 9, at 1509.

242. *Id*. at 1507–09.

243. *Id.* at 1507–08 nn.89–93.

pages includes the "widespread impossibility" thesis that Redish and Arnould attribute to New Originalists. In my own case, I am fairly sure that I have never advanced such a thesis.

Redish and Arnould seem to have conflated the New Originalist contention that there are significant constructions zones or *underdeterminacy* with the radically different thesis that the constitutional text is profoundly *indeterminate*. Many New Originalists do believe that there are significant constitutional provisions for which the discoverable original meaning is vague, and that this vagueness creates a construction zone. But characterizing this position as equivalent to the "widespread impossibility" thesis is simply not accurate.

Peter Smith advances a related argument in *How Different Are Originalism and Non-originalism?*[245] Smith argues that the New Originalism and its embrace of constitutional construction collapses or blurs the distinction between originalism and nonoriginalism. The claim is peculiar, since one would ordinarily think that the use of negative prefix "non" would distinguish originalism and nonoriginalism into two mutually exclusive categories. The key to this mystery is found in Smith's definition of nonoriginalism.

> For present purposes, however, I use Mitchell Berman's description of non-originalism as the "thesis that facts that occur after ratification or amendment can properly bear—constitutively, not just evidentially—on how courts should interpret the Constitution . . . ." Notwithstanding the caricature of non-originalism that many originalists have offered, most non-originalists—or at least most scholars or judges who do not readily identify as originalists—believe that the original meaning is highly relevant and often dispositive. Few, if any, non-originalists would claim, for example, that a thirty-year-old person is eligible to be President, or that the Republican Form of Government Clause could plausibly be read to guarantee the modern Republican Party a constitutional monopoly on power at the state level. In other words, most non-originalists treat the original meaning as the starting point for any interpretive inquiry, but are willing to look elsewhere—to history, precedent, structure, and policy, to name a few of Phillip [sic] Bobbitt's famous modalities of constitutional argument to construct constitutional meaning when the text is vague or indeterminate.
>
> If this is a fair description of non-originalism, then if nothing else it should be clear that new originalism is not very different from non-originalism in practice. For both, the original meaning generally provides the starting point for any act of constitutional interpretation, but because of the level of generality at which much of the constitutional text is expressed, it rarely alone provides the conclusion. For both, the types of constitutional questions that are most likely to be litigated—those for which the relevant constitutional text is capacious and abstract—require tools of judicial decisionmaking beyond mere reference to the original

244. *Id.* at 1508 n.94.

245. Peter J. Smith, *How Different Are Originalism and Non-originalism?*, 62 HASTINGS L.J. 707, 722–24 (2011).

> meaning of the text. And for both, the abstractness of the constitutional text and the indeterminacy inherent in the process of construction mean that there can be no perfectly predictable template for constitutional decisionmaking and thus, that there is a range of plausible and defensible results.[246]

To the extent that Smith relies on Berman's conception of the line between originalism and nonoriginalism, his argument is problematic.

The full context of the definition that Smith quotes from Berman is as follows:

> It follows, of course, that Originalism's opponents need merely deny that courts *must* interpret the Constitution in accordance with its original meaning, even when that meaning is discoverable. Such a position is commonly called, seemingly interchangeably, both "non-originalism" and "living constitutionalism." For reasons set out in the margin, however, the terms are best viewed as nonidentical. The former is more apt and is the one I will adopt. Non-originalism, in other words, is the thesis that facts that occur after ratification or amendment can properly bear—constitutively, not just evidentially—on how courts should interpret the Constitution (even when the original meaning is sufficiently clear). It does *not* hold that original meaning, when discoverable, should be *irrelevant* to judicial interpretation, or even that its relevance should be slight. Non-originalism is simply the denial of strong originalism; it is not the denial of all forms of originalism.[247]

Berman defines nonoriginalism as consistent with some forms of originalism. It simply follows as a matter of definition from Berman's stipulation that any form of originalism not categorized by Berman as "strong" is also a form of nonoriginalism, but it is surely confusing to create a category of "nonoriginalist originalism."

What then is "strong originalism"? Here is Berman's explanation:

> Strong originalism, as I will use the term, comprises two distinct subsets. Probably the most immediately recognizable originalist thesis holds that, whatever may be put forth as the proper focus of interpretive inquiry (framers' intent, ratifiers' understanding, or public meaning), that object should be the sole interpretive target or touchstone. Call this subtype of strong originalism "exclusive originalism." It can be distinguished from a sibling view that is a shade less strong—viz., that interpreters must accord original meaning (or intent or understanding) lexical priority when interpreting the Constitution but may search for other forms of meaning (contemporary meaning, best meaning, etc.) when the original meaning cannot be ascertained with sufficient confidence. Call this marginally more modest variant of strong originalism "lexical originalism."[248]

Berman's definitions do not take into account the interpretation-construction distinction, nor do they track theoretical discussions in

246. *Id.* at 722–24 (citing Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 24 (2009)).

247. Berman, *supra* note 246, at 24.

248. *Id.* at 10.

contemporary originalist scholarship. We can, however, reconstruct Berman's definitions in light of the distinction between construction and interpretation.

If Berman means that "strong originalism" is the view that original meaning (e.g., original public meaning, original intent, etc.) is the only object of interpretation in the sense specified by the interpretation-construction distinction, then "strong originalism" names all the members of the originalist family that accept the interpretation-construction distinction and the Fixation Thesis. Interpretation just is the activity that discovers "meaning" in the sense of communicative content; the Fixation Thesis is the claim that the communicative content of the constitutional text is fixed at the time each provision is framed and ratified—this is what the term "original" in "original meaning" represents. If nonoriginalism denies this, then it truly is different from almost every form of originalism.

But if Berman means that "strong originalism" is the view that original meaning is the only object of construction (again, in the sense of "construction" specified by the interpretation-construction distinction), then his claim would be nonsensical—since the stipulated definition of "construction" is that it is the activity of determining legal effect and not meaning ("communicative content"). We could repair Berman's definition in the following manner. Berman could define "strong originalism" as the view that constitutional construction should be solely determined by original meaning. Of course, that view would only be sensible if the communicative content of the constitutional text were sufficient to fully determine each and every constitutional controversy. That is, this definition excludes any version of originalism that recognizes the existence of the construction zone. We can clarify the relationship among contemporary constitutional theories further, by defining "living constitutionalism" as the view that legal effect is not fixed at the time each provision of the Constitution is framed and ratified.

The resulting picture is depicted in Table 1, which relies on the distinction between "constraint" and "restraint" that is stipulated above.[249]

249. *See supra* notes 222–20 and accompanying text.

TABLE 1: ORIGINALISM AND LIVING CONSTITUTIONALISM

<table>
<tr><td colspan="3">Originalism (affirms the Fixation Thesis and the Constraint Principle)</td><td>Nonoriginalism (rejects either the Fixation Thesis or the Constraint Principle, or both)</td></tr>
<tr><td colspan="2">Dead Constitutionalism (rejects that judicially enforceable constitutional doctrine changes over time)</td><td colspan="2">Living Constitutionalism (accepts that judicially enforceable constitutional doctrine changes over time)</td></tr>
<tr><td>Communicative content fully determines legal effect. (Complete constraint)</td><td colspan="2">Communicative content constrains (but underdetermines) legal effect.</td><td>Communicative content is relevant to legal effect, but does not operate as a hard constraint.</td></tr>
<tr><td rowspan="2">Original Methods Originalism (McGinnis & Rappaport)</td><td>Incomplete constraint and complete restraint</td><td>Incomplete constraint and restraint</td><td rowspan="2">Multiple Modalities (Bobbitt)

Law As Integrity (Dworkin)</td></tr>
<tr><td>Originalist Thayerianism (Lawson, Paulsen[†])</td><td>Living Originalsim (Balkin)

Public Meaning Originalism (Barnett)

New Textualism (Ryan[‡])</td></tr>
<tr><td>Berman's "Strong Originalism"</td><td colspan="3">Berman's "Nonoriginalism"</td></tr>
</table>

[†] For the purposes of this table, I understand Lawson and Paulsen's versions of Originalist Thayerianism as advocating principles of constitutional construction. If they are understood as arguing that a principle of deference is required by interpretation of the text, then they should be classified with McGinnis and Rappaport (for the purposes of this simplified picture).

[‡] Ryan endorses the "primacy" of the text, but does not explicitly endorse the fixation thesis. *See* Ryan, *supra* note 148, at 1552.

> Berman's categories "strong originalism" and "nonoriginalism" obscure the real issues that divide contemporary constitutional theories of interpretation and construction. In a real sense, there are four active schools of thought:
>
> - Originalists who believe that the original meaning of the text is sufficient to decide every possible constitutional controversy. McGinnis and Rappaport adopt this position provisionally, although they allow for the theoretical possibility that there is a residual construction zone. These theorists reject living constitutionalism.
> - Originalists who believe that the original meaning of the text underdetermines some constitutional issues, but adopt a theory of construction that creates judicial restraint in the resulting construction zone. Originalist Thayerianism understood as a reconstruction of views advanced by Lawson and Paulsen falls into this category, although Paulsen seems to accept a subcategory of cases in which the text itself requires judicial engagement. These theorists reject living constitutionalism as a judicial practice, although they might accept changing constitutional constructions adopted by the political branches.
> - Originalists who believe that the original meaning of the text underdetermines some constitutional issues, and adopt a theory of constitutional construction that allows for judicially enforceable constitutional doctrines to change over time. Balkin's theory, the method of text and principle or Living Originalism is the clearest example of such a theory. Randy Barnett's Original Public Meaning Originalism may be a second example. These theorists accept living constitutionalism as a judicial practice and also accept changing constitutional constructions adopted by the political branches. James Ryan, who labels his theory New Textualism[250] and does not embrace originalism as a label, also seems to fall into this group.
> - Nonoriginalists who believe that the contemporary and original meaning of the constitutional text is one of several factors that are relevant to constitutional construction, but who reject the idea that the content of constitutional doctrine and the decision of constitutional cases must always be consistent with the original meaning of the constitutional text. Bobbitt's Multiple Modalities view is the clearest example of this kind of theory. These theorists fully embrace living constitutionalism by courts and other political institutions.[251]

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250. *See* Ryan, *supra* note 148, at 1552–53.

251. Some living constitutionalists may object to the final category. They might argue that almost all constitutional theorists accept the constraining force of the text when it is clear. But we need to be cautious here. Consider the example of the two-senators-per-state rule. One might accept that rule because the text is clear and because the prudential need for constitutional settlement supports application of the clear text to the apportionment of the Senate—given the structure of the Constitution there is no good alternative to the rule. That attitude towards constraint then gives way in the case of nonstructural provisions. In the case of the Equal Protection Clause, for example, moral considerations might trump original meaning—even if it could be shown that the original meaning of the clause could not support the contemporary reading that the clause requires legislation to conform to a general

Of course, this typology simplifies the landscape of constitutional theory—as it is intended to do. Nonetheless, it illuminates the real stakes in contemporary debates among constitutional theorists. Much of the action in debates among contemporary originalists concerns the three positions represented by (1) McGinnis and Rappaport, (2) Lawson and Paulsen, and (3) Balkin and Barnett—the real stakes in these debates concern constraint and restraint. The lines in debates among living constitutionalists are between those who accept the constraining force of the original meaning of the text (e.g., Balkin) and those who believe that original meaning is only one factor, to be balanced against others in constitutional construction (e.g., Bobbitt). Debates between originalists and nonoriginalists likewise focus the arguments for and against the Constraint Principle.

The picture in Table 1 is oversimplified because these alignments may shift depending on the nature of the constitutional issue at stake—some progressive constitutionalists may believe in Thayerianism when it comes to questions of national legislative power, separation of powers, checks and balances, and economic rights (*Lochner v. New York*[252]), but endorse judicial engagement for noneconomic individual liberties and equality rights: these are hybrid views, adopting different theories of constitutional construction for different issues. But in the context of examining the relationship between originalist constitutional theory and constitutional construction, the real point is that the interpretation construction distinction and the related idea of the construction zone enable us to see both the simplified picture and the complexities.

CONCLUSION

Constitutional theory cannot do without the interpretation-construction distinction. It is difficult to understand what is at stake in contemporary debates about originalism and living constitutionalism without clearly distinguishing between the communicative content of the constitutional text, on the one hand, and the legal content of constitutional doctrine and constitutional decisions, on the other hand. Once we have the interpretation-construction distinction in place, we can discuss the question whether there is a substantial construction zone. And it is only if we recognize the existence of the construction zone, that we can clearly pose the question as to what should be done about the fact of constitutional underdetermination.

This Article has argued for two claims: (1) that constitutional construction is ubiquitous and (2) that the construction zone is ineliminable. Once the nature of the constitutional construction is understood, every constitutionalist theorist should accept that it is inevitable. Constitutional construction just is the process by which we give effect to the constitutional

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principle of equality of persons. From the fact that the Multiple Modalities approach sometimes supports compliance with the text, it does not follow that this approach adopts the Constraint Principle.

252. Lochner v. New York, 198 U.S. 45 (1905).

text and no constitutional theorist should deny that we do, in fact, devise constitutional doctrines and decide constitutional cases. On the first claim then, the aim of this Article is to end the dispute over substance, although terminological differences may remain.

On the second claim, things are more complicated. The existence and substantiality of the construction zone is subject to dispute. We have seen that there are powerful arguments for the conclusion that the communicative content of the constitutional text underdetermines the legal content of constitutional doctrine and the decision of constitutional cases. Some issues seem relatively settled; no one should dispute the claim that the language of some constitutional provisions seems vague or open textured and hence that there is (at least) a pro tanto reason for affirming the existence of the construction zone. Nonetheless, the case for a substantial construction zone depends in part on the results of both originalist theorizing and originalist investigation of particular provisions of the Constitution—and this theorizing and these investigations are still underway. On the second claim then, the aim of this Article is to move the debate forward by providing a detailed defense against claims that the construction zone does not exist. Until, and unless, additional arguments are forthcoming, the case for the ineliminability of the construction zone stands.

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One conclusion does seem clear. The idea of constitutional construction is essential to progress in constitutional theory.