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ORIGINALISM AND HISTORY^{*}

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I. INTRODUCTION

This Article investigates the relationships between originalism and history. At one level, the relationship is obvious: the original meaning of the United States Constitution must be derived from history. At another level, the relationship is complex and problematic: historians and lawyers accuse originalists of “law office history” and originalists accuse historians of “history common room law.” The aim of this essay is to identify the precise roles that historical facts play in originalist approaches to constitutional interpretation and construction and then to assess the contemporary debates about history and originalism. The central claim of the essay is that much of the rhetoric about “law office history” and “history common room law” reflects conceptual confusion. Originalists and historians have different understandings of “meaning” that reflect fundamentally different purposes of constitutional history and contemporary originalist practice.

One important strand of originalism is called “public meaning originalism.” From the viewpoint of public meaning originalists, history plays two important roles in the originalist enterprise. Public meaning originalists aim to recover the public meaning or “communicative content”¹ of the constitutional text. By “communicative content,” I mean to refer to meaning of a text in the linguistic sense—what the text conveyed to its readers. Communicative content is fixed by historical facts in two ways. One way that content is communicated by a text involves the conventional semantic meanings (sometimes misidentified as “definitions”²) of words and phrases as combined by syntax (or rules of grammar and punctuation³). Both conventional semantic meanings and

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¹ Lawrence B. Solum, *Communicative Content and Legal Content*, 89 NOTRE DAME L. REV. 480 (2013).

² Dictionary definitions aim to report patterns of usage, and regularities in these patterns of usage give rise to conventional semantic meanings. The dictionary definition of a word or phrase may not reflect all of the ways in which the word is used, and the author of a dictionary entry may misreport usage. Nonetheless, “definition” is sometimes used as a shorthand way of referring to conventional semantic meaning.

³ Syntax is a function of regularities in usage, but it is somewhat misleading to think of these regularities of usage as “rules” since communication can be accomplished by breaking or bending the rules. “A grammatically incorrect sentence, conveying meaning, breaking rules, example.” The use of the term “syntax” in this theoretical sense is from Charles Morris, *Foundations of the Theory of Signs* (1938), reprinted in CHARLES MORRIS, WRITINGS ON THE GENERAL THEORY OF SIGNS (1971).

syntax are historical linguistic facts—facts about patterns of language at a particular time. Because of the well-known phenomenon of linguistic drift, the meaning of the words used in a text written decades or centuries in the past may be different than their contemporary meanings. Sometimes we use the phrase “literal meaning” to identify the purely semantic meaning of a text. And we all know that literal meaning is not necessarily the same as the meaning actually conveyed by a text to its readers. The gap between semantic content and full communicative content is filled by what we can call “contextual enrichment” (which I will use in place of the phrase “pragmatic enrichment”⁴ that is more common in theoretical linguistics and the philosophy of language). Contextual enrichment is a function of the context in which a text is written and conveyed to its audience. Because such contexts are time bound, their investigation requires the use of historical contextual facts.

In sum, originalism relies on historical facts—both facts about conventional semantic meanings and facts about the context in which texts are written. Historians too are interested in historical facts. Duh! But that interest is different in kind from that of originalists. Originalists seek to recover the original communicative content of the constitutional text. But that is not the primary aim of historians. Of course, history is a large discipline with diverse subfields and competing methodological approaches. So generalizations about history as a discipline must be taken with a grain of salt. Some historians are not interested in the United States Constitution (or other legal texts). Others are interested in the Constitution only indirectly—because of the role that the Constitution plays in a larger narrative. Even historians who focus on constitutional history may not be primarily concerned with investigation of the communicative content of the text. For example, they may be focused on explaining why the text was adopted or what role the text played in the narrative of constitutional history. Much of the heat and light generated by debates about the role of history in originalist constitutional theory stem from a failure to appreciate the fundamental difference between the aims of originalists and the aims of historians. That failure is compounded by the fact that the word “meaning” is frequently employed by originalists and historians in different senses—leading the participants in debates about originalism to believe their arguments clash, when in fact they are ships passing in the night.

So to investigate the relationship between originalism and history, we will need to be very careful about both originalist constitutional theory and the practice of history as a discipline. Part II begins with the role of history in originalist constitutional theory, beginning with a survey of the history of originalism and concluding with step-by-step analysis of the way that historical facts figure into originalist theories of constitutional interpretation and construction. Part III investigates the charge that originalists practice “law office history,” beginning with the history of that phrase and then turning to the diversity of ideas that fly under the banner of this pejorative phrase. Part IV turns to history as an academic discipline, laying out the methodological pluralism that

⁴ In the philosophy of language, “semantics” is contrasted with “pragmatics,” and pragmatics is concerned with the role of context in determining meaning. In law, the term “pragmatics” is strongly associated with “legal pragmatism,” associated with judge and scholar, Richard Posner. In order to avoid confusion, I use “contextual enrichment” as a synonym for “pragmatic enrichment.” The pragmatics-semantics distinction is from Morris, *supra* note 3.

characterizes contemporary historiography and then investigating the subfield of intellectual history with an emphasis on the theory of meaning developed by Quentin Skinner. Part V then turns to the interventions of historians and historically minded political scientists in constitutional practice, using the “Historian’s Brief” in *District of Columbia v. Heller* as an example. Part VI concludes.

Before we dig in, some clarifications. This is an article about the relationship between originalism and history. In this essay, I do not enter into debates about the normative or legal justifications for realism. The issues that are discussed here are relevant to one objection to originalism—the law-office-history objection, but that objection is about the practical possibility of recovering originalism and not about the desirability of originalist constitutional practice. Moreover, many living constitutionalists believe that original meaning is one method (or modality) of constitutional practice. To the extent that living constitutionalists embrace some role for original meaning, the law-office-history charge is an objection to their views, and the arguments presented here can be seen as defenses of a pluralist (or multiple modalities) version of living constitutionalism.

Another clarification: in addition to the debates between originalists and living constitutionalists, there are debates among originalists. Although I will use public-meaning originalism as a focal example of originalist theory, the spirit of this essay is ecumenical and not sectarian. For this reason, I will investigate the role of history for originalists who endorse intentionalist and original methods approaches to constitutional interpretation.

A final clarification: on this occasion, I will not enter into disputes about the original meaning of particular constitutional provisions. Controversies rage about the meaning of the Second Amendment, the Privileges or Immunities Clause of the Fourteenth Amendment, and many other constitutional provisions. My aim here is to clarify the role that historical facts play in these debates, and to identify with clarity and precision the kind of evidence that can establish these facts.

Enough clarification, on to the main enterprise.

II. THE ROLE OF HISTORICAL FACT IN ORIGINALIST THEORY

The first step in elucidating the relationship of history (both historical fact and historian’s methods) to originalism is an investigation of originalism. That investigation can begin with the question, “What is originalism?”

A. What is Originalism?

The term “originalism” has its origins in academic debates about constitutional theory in the late twentieth century.⁵ Paul Brest coined the word “originalism” in 1980 in a law

⁵ The answer to the question, “What is originalism?,” that follows draws on Lawrence B. Solum, *What Is Originalism? The Evolution of Contemporary Originalist Theory* in *THE CHALLENGE OF ORIGINALISM: ESSAYS IN CONSTITUTIONAL THEORY* (Grant Huscroft and Bradley W. Miller eds., Cambridge University Press, 2011) and ROBERT BENNETT & LAWRENCE B. SOLUM, *CONSTITUTIONAL ORIGINALISM* (2011).

review article entitled *The Misconceived Quest for the Original Understanding*.⁶ 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.⁷

So the word, “originalism,” is a term of art. “Originalism” is used in academic and political discourse about constitutional law and theory. Like many technical terms, the meaning of “originalism” is a function of both stipulated definitions (like Brest’s) and patterns of usage among linguistic subcommunities (e.g., constitutional lawyers and constitutional theorists).

Brest’s article did not have much to say about the content of the “familiar approach” and he did not provide a list of the cases or articles to which he was referring. Nonetheless, there were ideas in the jurisprudential air suggested by Brest’s definition. What we might call “Proto-Originalist” ideas appeared in the writings of Robert Bork,⁸ Associate Justice William Rehnquist,⁹ and Raoul Berger¹⁰ in the 1970s. The public prominence of originalism is usually traced to a speech before the American Bar Association delivered in 1985 by then-Attorney General Edwin,¹¹ and he later advocated a “jurisprudence of original intention.”¹² The Proto-Originalists emphasized original intentions, but their writings did not provide a theory of original meaning, nor did they have a clear account of the role that original meaning should play in constitutional practice.

The Proto-Originalist jurisprudence of original intentions was subjected to a sustained academic critique, with Brest’s article as the opening salvo¹³ and key contributions from Jefferson Powell¹⁴ and Ronald Dworkin.¹⁵ Much of the criticism focused on the difficulty of ascertaining *the* original intentions of a document drafted by a multimember constitutional convention and ratified by an even larger group who met in conventions convened in each state. Although there were defenders of intentionalism (notably Richard Kay¹⁶), Justice Scalia urged originalists to “change the label from the Doctrine of

⁶ Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980). 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).

⁷ *Id.* at 204.

⁸ Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

⁹ William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976).

¹⁰ RAOUL BERGER, *GOVERNMENT BY JUDICIARY* (1977).

¹¹ See Edwin Meese III, *Speech Before the American Bar Association* (July 9, 1985), reprinted in *The Great Debate: Interpreting Our Written Constitution* (Paul G. Cassel ed., 1986), online:< <http://www.fed-soc.org/resources/id.49/default.asp>> [Meese, “Speech Before the American Bar Association”]; see also Edwin Meese III, “The Case for Originalism,” The Heritage Foundation (June 6, 2005) online:<<http://www.heritage.org/Press/Commentary/ed060605a.cfm>>; Lynette Clemetson, “Meese’s Influence Looms in Today’s Judicial Wars,” *N.Y. Times*, Apr. 17, 2005, at A1.

¹² Edwin Meese III, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 S. TEX. L. REV. 455, 465-66 (1986).

¹³ See Brest, *supra* note 6.

¹⁴ H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

¹⁵ Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 470 (1981).

¹⁶ Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226 (1988).

Original Intent to the Doctrine of Original Meaning.”¹⁷ Scalia’s suggestion was taken up and the resulting theory (“Public Meaning Originalism”) was elaborated by Gary Lawson,¹⁸ followed by Steven Calabresi and Saikrishna Prakash.¹⁹ In the late 1990s, Randy Barnett²⁰ and Keith Whittington²¹ began to build what has come to be called the “New Originalism.”²² It was at this stage that some originalists began to endorse the interpretation-construction distinction, which marks the difference between the discovery of the linguistic meaning of the constitutional text (“interpretation”) and the determination of the legal effect associated with the text (“construction”).²³

New Originalists who accept the interpretation-construction distinction and recognize that the Constitution contains some provisions that are vague (that is, admit of borderline cases) were led to the conclusion that the original meaning of the constitutional text does not determine the answers to all constitutional questions. Thus, some New Originalists posit the existence of a “construction zone”—where the resolution of constitutional disputes will require judges and officials to develop constitutional doctrines and practices on the basis of normative considerations that are not fully determined by the communicative content of the constitutional text.²⁴

Both the interpretation-construction distinction and the construction zone are controversial. John McGinnis and Michael Rappaport have suggested that their version of originalism, which focuses on the original methods of constitutional interpretation, can eliminate (or very substantially reduce) the need for constitutional construction (or eliminate the construction zone).²⁵ Gary Lawson²⁶ and Michael Paulsen²⁷ have argued

¹⁷ Antonin Scalia, *Address Before the Attorney General’s Conference on Economic Liberties in Washington, D.C.* (June 14, 1986), in ORIGINAL MEANING JURISPRUDENCE: A SOURCEBOOK 101 at 106 (U.S. Dep’t of Justice ed., 1987).

¹⁸ See Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859 at 875 (1992).

¹⁹ See Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541 at 553 (1994).

²⁰ Randy E. Barnett, *An Originalism for Nonoriginalists*, 5 LOY. L. REV. 611 (1999).

²¹ KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* (1999); KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* (1999).

²² See, e.g., 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.”); Randy E. Barnett, *An Originalism for Nonoriginalists*, *supra* note 20, at 620; Keith Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL’Y 599 (2004).

²³ For an overview of the interpretation-construction distinction and the role that it plays in contemporary originalism, see Lawrence B. Solum, *Originalism and Constitutional Construction*, FORDHAM L. REV. (forthcoming); see also Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95 (2011); Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL’Y 65 (2011). An early use in contemporary constitutional theory can be found in Robert N. Clinton, *Original Understanding, Legal Realism, and the Interpretation of ‘This Constitution’*, 72 IOWA L. REV. 1177, 1265 (1987). The distinction first became prominent in contemporary debates about originalism in the work of Keith Whittington, Whittington, *Constitutional Interpretation*, *supra* note 21; Whittington, *Constitutional Construction*, *supra supra* note 21, and subsequently in the work of Randy Barnett. See Barnett, *An Originalism for Nonoriginalists*, *supra* note 20; RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION* (2004).

²⁴ See Solum, *The Interpretation-Construction Distinction*, *supra* note 23, at 108;

²⁵ John O. McGinnis & Michael B. Rappaport, *The Abstract Meaning Fallacy*, 2012 U. Ill. L. Rev. 737, 750.

that the construction zone can be contained or eliminated by constitutional default rules: for example, there might be a constitutional default rule that required judges to defer to the political branches when the constitutional text does not provide a clear answer to a constitutional question.²⁸

Having set the stage through this very brief historical survey of originalism, we are now in a position to identify the core commitments that characterize contemporary originalist constitutional theory.

B. The Originalist Family of Constitutional Theories

Contemporary Originalism²⁹ is a family of constitutional theories, united by two core ideas.³⁰ 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.³¹ 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).³²

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

²⁶ See Gary Lawson, *Dead Document Walking*, 92 B.U. L. REV. 1225, 1233 (2012) (stating “I want to dissent from the originalist construction project and declare the Constitution a ‘no-construction zone.’”).

²⁷ See Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for its Own Interpretation?*, 103 Nw. U. L. Rev. 857, 882 (2009) (“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.”).

²⁸ See Solum, *Originalism and Constitutional Construction*, *supra* note 23, at 54-65 (pagination of Draft 55 of August 7, 2013) (discussing Paulsen and Lawson’s default rules approach).

²⁹ 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 for 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.

³⁰ 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); 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); Lee J. Strang, *An Originalist Theory of Precedent: The Privileged Place of Originalist Precedent*, 2010 B.Y.U. L. Rev. 1729, 1729 n. 1 (2010); Thomas B. Colby, *Originalism and the Ratification of the Fourteenth Amendment*, 107 Nw U. L. Rev. __ (forthcoming 2013) (manuscript at page 1 note 1).

³¹ On the Fixation Thesis, see Lawrence B. Solum, *Faith and Fidelity: Originalism and the Possibility of Constitutional Redemption*, 91 TEXAS L. REV. 147, 154 (2012); Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 Nw. U. L. REV. 923, 944-47 (2009)

³² On the Constraint Principle, see Solum, *Faith and Fidelity*, *supra* note 31, at 154-55.

constitutional interpretation. Debates between and among the proponents of various forms of originalism have figured prominently in recent originalist scholarship.³³

Despite their differences, these originalist theories agree that the communicative content of the constitutional text was fixed at the time each provision is framed and ratified. There may be slight differences in the way that different originalists view fixation. “Original intentions originalism” maintains that meaning is fixed by the intentions of the framers of the text: thus, the moment of fixation is the moment the relevant intentions are formed, roughly the moment drafting occurs. Originalists who focus on the understanding of the ratifiers might place the crucial moment at a slightly later time period—the period during which ratification occurs. Original methods originalists focus on meaning the text had given the methods of legal interpretation that prevailed at the time each provision of the constitutional text was framed and ratified. As a practical matter, these differences are likely to be minor: framing and ratification are likely to be proximate in time, separated by a few years at most.³⁴

Originalists also agree on the Constraint Principle—the notion that the communicative content of the constitution should constrain constitutional practice, including decisions by courts and the actions of officials such as the President and institutions such as Congress. Most constitutional theorists would agree that the linguistic meaning of the constitution should make some contribution³⁵ to legal content of constitutional doctrine. For example, Stephen Griffin and Phillip Bobbitt have suggested that constitutional practice includes multiple modalities or a plurality of methods of constitutional argument.³⁶ Bobbitt’s list of modalities includes text, history, structure, precedent, “ethos” of the American social order, and prudence.³⁷ Pluralists can accept that the original meaning of the constitutional text should be considered by judges who decide constitutional cases (and other officials when they engage in constitutional interpretation and construction). Characteristically, originalists argue that the role of original meaning is not simply that of one factor among many; originalists typically believe that original meaning should *constrain* constitutional practice.

But even if originalists agree that original meaning should have a constraining role in constitutional practice, they might disagree on the precise form that constraint should take. We can imagine a spectrum of constraint. At the minimum, originalists can agree that doctrines of constitutional law and decisions in constitutional cases should be consistent with the original meaning. At a maximum, we can imagine a version of the Constraint Principle that requires that every doctrine of constitutional law be derived directly from the constitutional text. Because the maximalist form of the Constraint Principle includes the minimalist form, we might think of constraint as consistency as a

³³ See Lawrence B. Solum, *What is Originalism?*, *supra* note 5 (discussing the varieties of originalism).

³⁴ The Twenty-Seventh Amendment is an exception, having been submitted to the states for ratification in 1789 and achieving ratification in 1992. See generally Richard B. Bernstein, *The Sleeper Wakes: The History and Legacy of the Twenty-Seventh Amendment*, 61 *FORDHAM L. REV.* 61 497 (1992).

³⁵ Mark Greenberg has helpfully discussed the relationship between communicative content and legal content using the notion of *contribution*. See Mark Greenberg, *Legislation as Communication? Legal Interpretation and the Study of Linguistic Communication* in *PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW* 217 (Oxford University Press, 2011).

³⁶ PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 12-13 (1991); Stephen M. Griffin, *Pluralism in Constitutional Interpretation*, 72 *TEX. L. REV.* 1753, 1753 (1994).

³⁷ Bobbitt, *supra* note 36, at 12-13.

least common denominator, the form of constraint upon which all originalists could agree as a floor—the minimum contribution that the communicative content of the text should make to constitutional doctrine.

The view that originalism is a family of theories united by agreement on the core ideas of fixation and constraint has been challenged by Thomas Colby and Peter Smith; they contend, “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.”³⁸ While Colby and Smith are correct to observe that there are significant differences among originalists, they are simply wrong about the extent of disagreement. Contemporary originalism has a core. That core is specified by the Fixation Thesis and the Constraint Principle. The significance of the core to constitutional theory is illuminated by considering the implications of denying fixation or constraint. Whereas originalists contend that the fixed meaning of the constitutional text constrains constitutional practice, nonoriginalists argue that the original meaning of the text either cannot or should not constraint our constitutional practice, although many nonoriginalists may believe that original meaning is a relevant factor. Because nonoriginalists characteristically reject the constraint thesis, they can (at least in theory) accept the legitimacy of constitutional practice that is inconsistent with the original meaning of the constitutional text. Put provocatively, nonoriginalists affirm the legitimacy of amending constructions of the Constitution—the power of judges (or the President or Congress) to nullify constitutional provisions outside the Article V amendment process. To take a simple example, if the original meaning of the Second Amendment created an individual right to possess and carry weapons, a nonoriginalist might believe that the Supreme Court could legitimately nullify this right if there were very strong policy grounds for doing so. The takeaway point of this paragraph is that the core of originalism is important, because it marks a very significant divide between originalists and nonoriginalists.

Because originalism is a family of theories that converge on the Fixation Thesis and the Constraint Principle, we can approach originalism from two distinct perspectives. “Ecumenical Originalism” seeks the common ground between and among the distinctive versions of originalism. “Sectarian Originalism” develops the case for a particular version of originalism and hence the case against rival views. In this Article, the relationship between originalism and history is explored from an ecumenical perspective—using public meaning originalism as a focal case and then exploring the implications of other versions of originalism, including intentionalism and original methods.

C. Interpretation and Construction

We have already observed that the New Originalism embraces a distinction between “interpretation” and “construction.” Let us stipulate the following definitions to mark the distinction:

³⁸ Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 239 (2009). *But see*, Colby, *Originalism and the Ratification of the Fourteenth Amendment*, *supra* note 30, at manuscript page 1, note 1.

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- “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.³⁹

The distinction between interpretation and construction goes back at least as far as 1839 when it was articulated by Franz Lieber in his *Legal and Political Hermeneutics*.⁴⁰ The distinction appears in twentieth century treatises by Corbin and Williston in treatises on contract law⁴¹ and has been deployed in many judicial decisions.⁴²

Theoretically, the interpretation-construction distinction rests on another important conceptual dichotomy—between “communicative content” and “legal content.”⁴³ The communicative content of a legal text is roughly equivalent to its linguistic meaning—the message conveyed by the text to its intended audience. The legal content produced by a text could be closely related to (or even identical with) the communicative content, but that is not necessarily the case. Consider the example of the Constitution of the Confederate States of America: that legal text has communicative content but there is no associated legal content because the confederate constitution is legally null and void. Or consider the case of the phrase “freedom of speech” in the First Amendment to the United States Constitution; the legal content of freedom of speech includes a variety of doctrinal rules, ranging from the prior restraint doctrine to the “law of billboards.” But it is clear that these doctrinal rules are not contained in the constitutional text. Interpretation aims at recovering the communicative content of a legal text; construction is about legal effect and hence it aims at legal content.

The interpretation-construction distinction is particularly important in cases in which the communicative content of the constitutional text is underdeterminate.⁴⁴ Constitutional underdeterminacy occurs when the text is vague or irreducibly ambiguous and when there are gaps or contradictions in the text. In this context, “vagueness” and “ambiguity” can be distinguished. A word or expression is vague when it admits of borderline cases. The word “tall” is vague when used to refer to human height because there is no bright line cutoff for tallness. This is different than ambiguity: a word or expression is ambiguous

³⁹ These definitions were presented in Solum, *Originalism and Constitutional Construction*, *supra* note 19, at 4 (pagination of Draft 55 of August 7, 2013).

⁴⁰ FRANCIS LIEBER, *LEGAL AND POLITICAL HERMENEUTICS* 43-44, 111 n.2 (Roy M. Mersky & J. Myron Jacobstein eds., Wm. S. Hein & Co. 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. Lieber’s formulation is ambiguous as between two different versions of construction. Lieber might be drawing the distinction between semantic content and contextual enrichment, but he could also be distinguishing between communicative content and legal content.

⁴¹ 4 Williston, *Contracts* §§ 600-02 (3d ed.1961); 3 Corbin, *Contracts* §§ 532-35 (1960 & Supp.1980).

⁴² See *Fausel v. JRJ Enters., Inc.*, 603 N.W.2d 612, 618 (Iowa 1999); *In re XTI Xonix Technologies Inc.*, 156 B.R. 821, 829 n. 6 (D.Ore.1993); *Berg v. Hudesman*, 115 Wash.2d 657, 663, 801 P.2d 222, 226 (1990). For more examples, see Solum, *supra* note 19, at 30-31 (pagination of Draft 55 of August 7, 2013).

⁴³ See Solum, *supra* note 1; Greenberg, *supra* note 35.

⁴⁴ On the notion of “underdeterminacy,” see Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462 (1987).

when it has more than one sense (or semantic meaning). For example, the word “cool” is ambiguous because it has several distinct senses, one related to temperature (the room is cool), another related to temperament (he kept his cool), and yet another sense related to personal style (she was a cool chick). A single word or phrase can be both ambiguous and vague—cool is ambiguous and vague in each of the senses specified in this paragraph.

The constitutional text contains many words and phrases that would be ambiguous if considered acontextually. The word “state” can refer to nation states, to “states of affairs,” or to the several states of the United States: in context, it is clear that the Constitution uses the word state in the last of these three senses. Vagueness is different. Although it is possible that a seemingly “vague” word or expression will become determinate in a particular context, this is not always the case. Even after context is considered, vague terms in the constitution may continue to underdetermine the content of constitutional doctrine and the outcome of constitutional cases. For example, Articles One, Two, and Three of the Constitution use the phrases “legislative power,” “executive power,” and “judicial power.” Although there are clear cases of each kind of power, there are also borderline cases. The Affordable Care Act may be a clear case of legislation, but the President’s executive order suspending the deportation of young undocumented persons who came to the United States as children might be a borderline case⁴⁵—neither clearly executive, nor clearly legislative in nature.⁴⁶

What is sometimes called “open texture” is a special form of vagueness that requires separate consideration. “Open texture” is a technical phrase, introduced by Frederic Waismann⁴⁷ as an extension of Wittgenstein’s idea of “family resemblance.”⁴⁸ Waismann’s notion of open texture was subsequently used by H.L.A. Hart⁴⁹ and from Hart it has become part of the standard vocabulary of legal theory. For the purposes of this essay, I shall stipulate that “open texture” is to be understood as a form of multidimensional vagueness. An open-textured term is vague in more than one dimension. Whereas a term like “tall” is vague in a single dimension (height), a term like “reasonable” has more than one dimension: an action can be reasonable or unreasonable for a variety of reasons (cost too high, insufficient nexus between means and ends, etc.), and each of these reasons can present borderline cases. Of course, the term “reasonable” itself is used in the Fourth Amendment, and the Constitution may contain other open-textured words or phrases, such as “freedom of speech” or “necessary and proper.” For our purposes, open texture in the constitution is important because it creates constitutional underdeterminacy.

⁴⁵ To be clear, I am not asserting that this is a borderline case. To make out that claim, we would need to examine the relevant linguistic and contextual facts.

⁴⁶ For further discussion, see Solum, *Originalism and Constitutional Construction*, *supra* note 19, at 14-19 (pagination of Draft 55 of August 7, 2013).

⁴⁷ Friedrich Waismann, *Verifiability* in LOGIC AND LANGUAGE (Anthony Flex ed. 1968) republication from 19 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY, SUPPLEMENTARY VOLUME (1945).

⁴⁸ See LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 67-77, 108 (4th ed., G.E.M. Anscombe, P.M.S. Hacker, & Joachim Schulte trans., P.M.S. Hacker, & Joachim Schulte eds. 2009) (citations are to numbered remarks and not pages).

⁴⁹ H.L.A. HART, THE CONCEPT OF LAW 124 (2d ed. 1994) (“Whichever device, precedent or legislation, is chosen for the communication of standards of behavior, these, however smoothly they work over the great mass of ordinary cases, will, at some point where their application is in question, prove indeterminate; they will have what has been termed an open texture.”).

The fact of constitutional underdeterminacy creates what we can call “construction zones”—particular fact patterns and general issues of constitutional doctrine where the communicative content of the constitutional text does not answer our constitutional questions. In the construction zone, interpretation runs out and we must resort to constitutional construction. (But we should not be misled by the construction-zone metaphor: construction gives the constitutional legal effect, even those in which the constitutional text itself fully determines the content of constitutional doctrine.)⁵⁰

There is one more important point to be made about the interpretation-construction distinction. Interpretation is an empirical inquiry. The communicative content of a text is determined by historical linguistic facts (facts about conventional semantic meanings and syntax) and by facts about the context in which the text was written. Interpretations are either true or false—although in some cases we may not have sufficient evidence to show that a particular interpretation is true or false. Constructions are justified by normative considerations. This is true even in the cases where the constructions seem compelled by the meaning of the text. Article One of the Constitution provides that each state is represented by two Senators—this is a case where interpretation of the text is easy and hence the construction (legal effect) to be given to the text seems obvious and intuitive. But if we ask why we ought to give the constitutional text the effect that follows naturally from the meaning of the word “two,” our answer must be some normative consideration. For example, we might believe that we are obligated to follow the clear directives of the constitutional text because the United States Constitution was adopted by “We the People” and hence has democratic legitimacy. In the construction zone, we will need some theory of constitutional construction to give legal effect to the underdeterminate constitutional text. That theory might provide a general default rule (resolve underdeterminacy in favor of actions by elected officials) or it might require consideration of first-order normative concerns (resolve underdeterminacy so as to achieve justice).

D. The Role of Historical Facts in Interpretation

With this sketch of contemporary originalism in place, we can turn to consideration of the role of historical facts in originalism. Let’s begin with the public meaning originalism and then proceed to two variations, intentionalism and original methods.

1. A Focal Example: Public Meaning Originalism

Public meaning originalism holds that the original meaning of the constitutional text is its public meaning. Thus, the communicative content of the text is the content that the text conveyed to the public at the time each provision was framed and ratified. The core idea of public meaning originalism is that the relevant meaning of the constitutional text is the meaning that the text communicated to the American public. Why? A full answer to that question is outside the scope of this essay, but there are at least two reasons that can be stated in simplified form. First, the situation of constitutional communication strongly suggests that the Constitution was directed to the public at large; for example, the Constitution was to be ratified by popular conventions and the case for the

⁵⁰ Solum, *Originalism and Constitutional Construction*, *supra* note 19.

Constitution was made in newspapers and pamphlets circulated to the public at large. The communicative content of the constitution is its public meaning because the constitution was communicated to the public. Second, the normative legitimacy of the constitution may rest (in part or whole) on its content being understood by (or accessible to) “We the People”—that is, by the American public.

As we have already seen, texts (and oral communications) convey meaning in two ways. The semantic content of a text is a function of the conventional semantic meanings of the words and phrases and the syntax or grammar that combines them. That semantic content can be enriched by context. In the discussion that follows, we will finely parse these ideas to identify the precise role that historical facts play in public meaning originalism.

a) Historical Linguistic Facts and Semantic Content

What role do historical facts play in determining semantic content? The naïve answer to this question focuses on dictionary definitions: roughly, the literal meaning of a text is a function of the dictionary definitions of the words and phrases that comprise the text. This answer is naïve because dictionary definitions are merely reports on patterns of usage. The conventional semantic meaning of a word or phrase is a function of the patterns of usage within a linguistic community. Dictionary writers do not have authority to legislate meanings and their reports on meanings may not be accurate.

Meanings change over time: this is the well-known phenomenon of linguistic drift.⁵¹ For this reason, if we want to know the meaning of the phrase “domestic violence”⁵² in the Constitution of 1789, we will need to know how the words or the whole phrase was used in the period up to the time the provision was drafted. The contemporary semantic meaning of the “domestic violence” is “‘intimate partner abuse,’ ‘battering,’ or ‘wife-beating,’” and it is understood to as “physical, sexual, psychological, and economic abuse that takes place in the context of an intimate relationship, including marriage.”⁵³ But if that meaning had been unknown in the late eighteenth century, it would simply be a linguistic mistake to interpret the domestic-violence clause of Article IV of the Constitution of 1789 as referring to spouse or child abuse.⁵⁴

What kinds of historical facts are we looking for? Conventional semantic meanings are a function of patterns of usage. So if we want to know what the phrase “domestic violence” meant in the 1780s, we will want to investigate the way that phrase was used at that time. One source of usage is now inaccessible: we do not have sound recordings that would provide direct evidence of the way the phrase was used in conversations. But we

⁵¹ SOL STEINMETZ, *SEMANTIC ANTICS: HOW AND WHY WORDS CHANGE MEANING* 49-50 (Random House 2008).

⁵² U.S. CONSTITUTION, ART. IV, CL. 4 (“The United States shall guarantee to every state in this union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence.”).

⁵³ Glossary, Human Rights Watch, <http://www.hrw.org/reports/2003/nepal0903/3.htm> (visited March 29, 2008); see Emily J. Sack, *The Domestic Relations Exception, Domestic Violence, and Equal Access to Federal Courts*, 84 WASH. U. L. REV. 1441 (2006).

⁵⁴ I owe this example to Jack Balkin. See Lawrence B. Solum, *Blogging from APSA: The New Originalism*, September 3, 2007, <http://lsolum.typepad.com/legaltheory/2007/09/blogging-from-a.html> (live blogging at the meeting of the American Political Science Association and describing Balkin’s presentation); JACK M. BALKIN, *LIVING ORIGINALISM* 37 (2011).

do have many texts from this period and some written records of oral communication. Because conventional semantic meanings are fixed by patterns of usage within a community that shares a common natural language, the best evidence of such patterns of usage would be provided by examination of the entire corpus of texts from the relevant period. In practice, this is either extraordinarily difficult or impossible. The next best alternative would be to focus on searchable databases that contain large numbers of texts from the relevant period. For example, one could search for all the occurrences of “domestic violence” and the individual words “domestic” and “violence” and for variations of these words (such as “violent”). One could then identify candidate semantic meanings of the phrase, and check these candidates against the occurrences. This method of determining semantic meanings is called “corpus linguistics” and is employed by scholars in the discipline of linguistics.

The advantage of the method of corpus linguistics is that it gets directly and systematically at patterns of usage, and it is those patterns that determine conventional semantic meaning. Another approach might be called the method of immersion. One might read many texts for a relevant period—some of which will contain the relevant phrase and some of which will not. By immersion in the texts of the period, one might acquire an intuitive sense of the conventional semantic meaning of the relevant phrase. This method lacks the systematic rigor of corpus linguistics, but it might nonetheless work. Even less rigorous would be an approach that focused on a very small number of texts that are connected to the Constitution—for example, the records of the Philadelphia Convention, the ratification debates, and the Federalist and Antifederalist Papers. Again this method might provide sufficient evidence to infer conventional semantic meanings. Finally, dictionaries from the relevant period may also provide evidence of usage.

Semantic content is determined both by conventional semantic meanings and by syntax. Syntax (including grammar and punctuation) is also determined by patterns of usage. As with conventional semantic meanings, syntax is subject to drift (“syntactic drift”). Practices of punctuation and grammatical forms change over time. Recovering the semantic content of the constitutional text requires an understanding of the syntax of the period during which each provision of the constitution was framed and ratified. Again, the best evidence of the relevant syntactic patterns would be provided by systematic examination of large databases, but the method of immersion or examination of a few selected sources might suffice to recover the relevant grammatical forms and punctuation rules.

b) Historical Contextual Facts and Contextual Enrichment

The full communicative content of a text is not necessarily equivalent to its literal meaning (semantic content). Context (or more technically “contextual enrichment”) frequently plays a role in the production of meaning. A full account of the mechanisms by which context enriches content is beyond the scope of this essay, but they include contextual disambiguation, implicature,⁵⁵ presupposition,⁵⁶ and implicature.⁵⁷ On this

⁵⁵ See Wayne Davis, *Implicature*, STAN. ENCYC. PHIL. (last revised 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).

occasion, I will discuss contextual disambiguation and implicature to illustrate the role of context.

The acontextual meaning of a text (or oral communication) may be ambiguous. Consider this sentence: “Jack removed his pants by the bank.” Considered acontextually, the word “bank” is ambiguous; it might refer to a branch of the Chase Manhattan Bank or to the bank of the Potomac River. The ambiguity may disappear once more context is provided. For example, consider the following contexts in which sentence about Jack might occur:

- Context One: “Jack and Jill walked down to the Potomac. Jack removed his pants by the bank. Jill watched as Jack began to swim to the Virginia side of the river.”
- Context Two: “The gang approached their target from the alley late at night. To foil the security cameras, they changed into one-piece bunny costumes. Jack removed his pants by the bank. As he pulled on the bunny suit, the ridiculousness of the situation prompted a loud guffaw.”

Call this phenomenon “contextual disambiguation.” The word bank and the sentence in which it occurs are ambiguous absent a context, but once sufficient context is supplied, the meaning becomes clear. The constitution is filled with words, phrases, and even whole clauses that would be ambiguous out of context. “Senate” could refer to the Roman Senate. “Bear arms” could refer to ursine appendages. “Judicial power” could refer to the physical strength of judges. The examples are silly, but their very ridiculousness makes it clear that contextual disambiguation does much of the work of producing communicative content.

Context works in another important way, giving rise to the phenomenon that Paul Grice called “implicature.” The classical example is a letter of recommendation (e.g., by a law professor for a student seeking legal employment) that says only the following: “I recommend Richard to you. He attended every class session and was never tardy.” The literal meaning of the letter is just what it says, but the implicature is devastatingly negative.⁵⁸ 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.”⁵⁹ The literal meaning of the text forbids a construction (e.g., from enumeration we can infer the list of enumerated rights is exclusive), but this may create an implicature, that the people do in fact retain other rights.

Contextual disambiguation and implicature are examples of the more general phenomenon of contextual enrichment that produces communicative content. Put more plainly, the original meaning of the constitutional text is produced by both the literal meaning of the words and phrases *and* the context in which they were written. Part of the context of particular constitutional clauses is whole text; this notion has been captured by

⁵⁶ See Goldsworthy, *supra* note 55, at 698-699 (“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.”).

⁵⁷ See Kent Bach, *Conversational Implicature*, 9 MIND & LANGUAGE 124, 126 (1994).

⁵⁸ But in a different context, this letter might be positive. For example, suppose the letter were written in response to the following: “Can you tell us about Richard’s reliability? It is critically important that the person hired for this job be on-time, 100% of the time.” Given that context, there is no negative implicature—even though the literal meaning (semantic content) is the same.

⁵⁹ U.S. CONST. Amend. 9.

Akhil Amar in his idea of intratextualism.⁶⁰ But constitutional communication occurs in a larger context—each constitutional provision was written at a particular time and place in circumstances that are potentially relevant to its meaning.

From the point of view of public meaning originalism, the relevant context of constitutional communication is what we can call the “publicly available context.” Because the constitution was intended to communicate to the public at large over an extended period of time, the authors of the text could not rely on contextual enrichments that depend on nonpublic aspects of their communicative situation. Most obviously, the members of the Philadelphia Convention could not assume that the public would interpret particular provisions of the Constitution of 1789 in light of its secret drafting history.⁶¹ A similar limitation applies to readers of the constitutional text. A plantation owner in South Carolina could not reasonably believe that the meaning of the constitutional text was altered by a private conversation he had with his neighbor. Contextual enrichment only occurs when the authors and readers of a text have a shared context—and in the case of the Constitution of the United States, that shared context is thin, because the anticipated audience for the text was diverse in background and dispersed in space and time. Because the publicly available context of constitutional communication is thin, the authors of the constitutional text had good reason to rely on conventional semantic meanings and intratextual disambiguation insofar as possible.

Public meaning originalism thus implies a particular approach to the role of historical facts in determining the contribution of contextual enrichment to the communicative content of the constitutional text. The best and most direct use of historical facts to establish contextual enrichment would proceed as follows:

- First, establish that the relevant context was publicly available—that is, demonstrate that the relevant constitutional authors would have known that the public at large would have had access to knowledge of the relevant circumstances.
- Second, identify the particular mechanism by which contextual enrichment occurs. Typically, the second step will be to identify the form of enrichment, e.g., contextual disambiguation, implicature, impicture, or presupposition.
- Third, provide evidence that the contextual enrichment successfully conveyed the relevant communicative content. Typically, the third step will involve evidence that that constitutional provision at issue was understood to have the content added by the relevant context.

Of course, this three-step process is an idealization, and it assumes that the evidence identified by the first and third steps is available. In practice, we may need to make inferences from the available evidence. For example, we may be able to show that the context was publicly available and explain the mechanism of contextual enrichment, but lack direct evidence that uptake occurred—perhaps because there was no occasion for application of the relevant constitutional provision.

It is important to distinguish the role that context plays in public meaning originalism from the other roles that context could play in constitutional interpretation and

⁶⁰ See Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1998); see also Lawrence B. Solum, *Originalism and the Unwritten Constitution*, 2013 U. ILL. L. REV. 1935 (2013).

⁶¹ Vasana Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L. J. 1113 (2003).

construction. For example, we sometimes use the word “contextual” to refer to arguments about the purpose or function of a legal provision. Thus, it might be argued that “in context” the First Amendment freedom of speech serves the function of facilitating democratic self-governance; then, it might be argued that courts should adopt a construction of the first amendment that serves that function. There is nothing wrong with using the words “context” and “contextual” to describe this argument, but it is not an argument about the public meaning of the constitutional text—that is, it is not an originalist use of “context.”

2. *Variation One: Intentionalism*

“Intentionalism” or “original intentions originalism” is the view that the original meaning of the constitutional text is a function of the intentions of the framers (or ratifiers). The most sophisticated contemporary versions of intentionalism focus on the communicative intentions of the authors. Thus, the relevant question is, “What content did the author of this provision intend to communicate by writing this text?” Notice that communicative intentions are distinct from purposes and expectations. Authors write texts for purposes, but the purpose for which a text is written is not the same thing as the meaning of the text. For example, a junior faculty member might write an article about the doctrine of promissory estoppel in order to get tenure, but the communicative content of the article is not “Give me tenure!” Likewise, communicative content is not identical to expectations about applications or “original expected applications.”⁶² For example, a faculty member who writes “Please do not disturb!” on a piece of paper might anticipate that the sign will result in an annoying colleague seeing the sign and walking away, but the meaning of the sign is clearly more general. If the colleague does not come in that day, but the sign results in a student deciding not to knock, the student has not misunderstood!

The conventional wisdom is that intentionalists seek to recover the mental states of the authors of the constitutional text and that such mental states are historical facts. Of course, we lack direct access to such mental states—they are not directly observable even when we are in the presence of a speaker engaged in oral communication. Unlike the constitutional text, which still exists and portions of which are located in the National Archive, the mental states of the framers are nowhere to be found. To recover the intentions of the framers, we need to make inferences from their words and deeds in light of the context in which they acted. But what we are trying to recover is their communicative intentions—the content they intended to convey through the words they wrote. In normal circumstances, the best evidence of the communicative intentions of the author of a written text is the contextually disambiguated conventional semantic meaning of the words and phrases that comprise the text. When you write a text that will be read by many people in many places over an extended period of time, the best way to get your meaning across is to use language precisely and clearly, relying only on those aspects of the context in which you wrote that you believe your readers will share. That is, under

⁶² The phrase “original applications” or “original expected applications” seems to originate with Jack Balkin, *See* Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 293 (2007), but the idea was introduced earlier by Mark Greenberg and Harry Litman. Mark D. Greenberg & Harry Litman, *The Meaning of Original Meaning*, 86 GEO. L.J. 569 (1998).

normal circumstances, the communicative intentions of the author of a legal text will converge with the public meaning of the text. For this reason, intentionalists are interested in the same historical facts as public meaning originalists and for very similar reasons.

There are, however, exceptions. Communication can misfire. For example, the authors of the constitutional text could be mistaken about the public meaning of the words they used. Consider a simple thought experiment: suppose that the authors of Article One believed that the word “commerce” referred to exchange of goods for value and that it was a synonym for “trade,” but they were mistaken in the belief, and in fact the word “commerce” had a much more general conventional semantic meaning like “social interaction.” This would be a case of misfired communication—the understandings of readers and authors would diverge. Now suppose that we discovered a letter from James Wilson to Gouverneur Morris (and that the word “commerce” appeared in the Constitution as a result of their drafting in the Committees of Style and Detail). The letter explicitly discusses the choice of the word “commerce” and provides conclusive evidence that the authors intended the idiosyncratic trade-in-goods meaning and not the standard social-interaction meaning. Intentionalists will take the position that the idiosyncratic meaning is the true or correct meaning; public meaning originalists will disagree. The thought experiment illustrates the ways in which intentionalists and public meaning theorists can differ about the role of historical fact in determining public meaning.

3. Variation Two: Original Methods

Original methods originalists believe that the original meaning of the constitutional text is the meaning that the text had (or would have had) given the correct application of the methods of constitutional interpretation at the time the text was written. On the surface, original methods may appear to diverge substantially from both public meaning originalism and intentionalism, but in practice this divergence may not be great. If one of the original methods of interpretation looks to the “plain meaning” of the constitutional text, then there will be a wide range of cases in which public meaning originalism, intentionalism, and original methods originalism converge. And as a consequence, the role of historical facts in original methods originalism will substantially overlap with the role these facts play in public meaning originalism and intentionalism.

Nonetheless, there are likely to be differences. For example, the original methods of constitutional interpretation will emphasize technical legal meanings—even when they diverge from the public understanding of the constitutional text. Of course, these technical meanings may be accessible to the public—in the sense that ordinary citizens could ask a lawyer what the constitutional text meant, but for original methods originalists, the technical legal meaning prevails, even if the public never became aware that the “plain meaning” of the text was significantly different. Likewise, if the framers had erroneous beliefs about the technical legal meaning of the language they used, that meaning and not their communicative intentions should be determinative.

Because of these differences, original methods originalists will be particularly interested in historical facts concerning the legal methods of interpretation that prevailed at the time the constitution was adopted. In particular, original methods originalists will be concerned with cases interpreting legal texts, including state constitutional caselaw,

state statutory interpretation cases, and perhaps cases interpreting other legal documents such as contracts, trusts, and wills.

E. The Role of Historical Facts in Construction

The interpretation-construction distinction tracks the distinction between communicative content and legal content. Both distinctions are controversial among originalists, but in the discussion that follows, I will assume that the original meaning of the text may underdetermine the outcome of some constitutional disputes. That assumption raises the question whether historical facts play any distinctive role in originalist constitutional practice in the construction zone.

1. The Role of Normativity in Constitutional Construction

Constitutional interpretation involves factual investigation. The question, “What is the communicative content of the constitutional text?” is essentially a positive (not normative) inquiry. Constitutional construction is different. The question as to what legal effect should be given to a text is essentially normative (in the broad sense of the term “normative”). One kind of norm that governs legal effect is itself legal. For example, we might believe that the courts are legally obligated to conform their decisions to the constraint principle, and hence that amending constructions of the constitutional text are legally incorrect. But legal practice might also be guided by moral norms, either because the legal norms are underdeterminate or because there are good moral reasons to change legal norms. But whether the relevant norms are legal or moral, construction is essentially normative.

This point can be misunderstood. The claim that construction is essentially normative might be misinterpreted as the claim that judges should resort to their own moral beliefs when they interpret the constitution. That is not the claim. Construction is normative because it guides action. This becomes clear once we consider the range of approaches to constitutional construction. The Constraint Principle, which requires constitutional construction to conform to the original meaning of the constitutional text, must be given some normative justification, but it does not license judges to adopt rules of constitutional law that mirror their moral beliefs—quite the contrary, it requires judges to decide in accord with the original meaning, even when they believe that it is not morally optimal or desirable. Even in the construction zone, where the text underdetermines constitutional doctrine or the outcome of constitutional disputes, the normativity of construction does not imply that judges should rely on their own moral beliefs. For example, one possible rule of constitutional construction would require judges to defer to democratic institutions when the constitutional text is underdeterminate—we might call this a constitutional default rule. The normativity of construction requires that the default rule be given a normative justification—showing that the rule is required either by legal norms or by moral norms. But this kind of normativity does not imply that judges should impose their own moral beliefs in the construction zone.

2. The Originalist View of the Relationship Between Construction and Interpretation

Originalists differ on the relationship between constitutional interpretation and constitutional construction, but almost all originalists endorse some version of the constraint principle. That is, originalists believe that constitutional construction should be constrained by the original meaning of the constitutional text.

Originalists may disagree about the proper approach to the construction zone. There are at least three approaches to constitutional construction that can be characterized as originalist in spirit. In summary form, they are:

- *Default Rules of Deference to Democratic Institutions.* Some originalists may believe that the proper approach to underdeterminacy is for courts to defer to decisions made by democratic institutions. Thus, if the constitution is vague, open textured, or irreducibly ambiguous, courts should not invalidate actions by a democratically elected official or the agent of such an official.⁶³
- *Original Methods of Constitutional Construction.* Original methods originalism is presented as a theory of interpretation—that is, as a theory of the meaning of the constitutional text. But it might also be adopted as a theory of constitutional construction—that is, cases in the construction zone might be resolved on the basis of the methods of construction that prevailed at the time the constitution was framed and ratified.
- *Original Purposes or Principles.* A third originalist approach might look to the purposes for which a constitutional provision was adopted. When a provision is vague, open-textured, or irreducibly ambiguous, courts could adopt the construction that best serves the original purpose.

What role would historical facts play given these originalist methods of constitutional construction?

3. The Role of Historical Fact in Potentially Originalist Methods of Constitutional Construction

We can consider each of the originalist methods of construction.

a) Default Rules of Deference to Democratic Institutions

Default rules of deference do not rely on historical facts to flesh out the content of constitutional doctrine—except to the extent that history is relevant to the identification of the default rule. Once the default rules are in place, constitutional decisionmaking in the construction zone is relatively simple. If the meaning of the constitution does not determine the outcome of the dispute, then defer.

⁶³ Of course, a fully developed default rule will need to handle conflicts between branches and between the national and state governments. A simple rule version might be: If the constitutional text underdetermines the outcome of a dispute, decide in accord with the following default rule: (1) defer to democratic institutions, (2) in the event of a conflict between the national government and state governments, defer to the states [or defer to the national government], and 3) in the even of a conflict between Congress and the President, defer to Congress [or the President].

b) Original Methods of Constitutional Construction

By contrast, determination of the original methods of constitutional construction may require extensive reliance on historical facts concerning judicial practices. How did colonial courts handle cases in which the text of a state constitution or statute did not determine the outcome of the dispute? The relevant evidence would be found in cases and perhaps also in secondary sources—such as treatises or practice manuals.

c) Original Purposes and Principles

Finally, consider the role of historical fact in the determination of original purposes or principles. This approach to constitutional construction is structurally similar to some early forms of original intentions originalism. The difficulty with original purposes is that some provisions of the constitution might have been framed or ratified for different purposes by different actors. This leads to the famous “summing problem”—one of Brest’s objections to original methods originalism. On this occasion, I will not attempt to answer this objection (or to show that the objection is valid). Assuming that the determination of original purposes is possible, then the relevant historical facts will concern the purposes that framers and/or ratifiers had when they wrote or voted for particular constitutional provisions. The best evidence of such purposes will be statements by the individuals that make their purposes explicit. In the absence of such statements, the relevant purposes will need to be inferred indirectly—from the provision itself, from its drafting history, or from evidence about the more general normative commitments or political objectives of the particular individuals or of the groups to which they belonged.

F. Summary

In sum, the primary role of historical fact for originalists is in the determination of the communicative content of the constitutional text. Almost all originalists can agree that the plain meaning of the text is highly relevant to original meaning. Plain meaning is best understood as the contextually disambiguated conventional semantic meaning of the text. Conventional semantic meanings are determined by patterns of usage, and direct evidence of such usage is provided by systematic and rigorous investigation—the method of corpus linguistics. But the full communicative content of a text may go beyond the plain meaning and require an investigation of the publicly available context of constitutional communication. For intentionalists, these historical facts will be supplemented by evidence concerning the communicative intentions of the framers (or ratifiers). For public meaning originalists, historical facts concerning the practices of legal interpretation at the time of the framing will be key.

III. LAW OFFICE HISTORY

Up to this point, we have been investigating the role of history from the perspective of originalist constitutional theory. But there is another story to be told about originalism and history—a story that is both critical and skeptical about the possibility of recovering

the original meaning of the constitutional text. That story frequently invokes the well-known trope of “law office history”⁶⁴ or “history lite.”⁶⁵

A. The History of “Law Office History”

The first occurrence of the phrase “law office history” in the Westlaw JLR (“Journals and Law Reviews”) database occurs in a footnote, where Sanford Levinson⁶⁶ quotes an earlier article by Gerhardt Casper,⁶⁷ which in turn quotes Alfred Kelly from a 1965 law review article, defining “law office history” as “the selection of data favorable to the position being advanced without regard to or concern for contradictory data or proper evaluation of the relevance of the data proffered.”⁶⁸ Although the term is now used to characterize the use of history by law professors, lawyers, and judges, “‘Law Office History’ was coined by Kelly to describe the opposing briefs by noted historians, submitted in the second round of the Brown appeals, that examined the circumstances surrounding the adoption of the fourteenth amendment.”⁶⁹ Alfred Kelly was a law professor; those he criticized were well-credentialed historians.

From the point of view of originalist, theory “cherry picking” (the selective use of evidence out of context) is not a way to determine original meaning, whether the picking is done by lawyers or historians. Original meaning should be determined by considering all of the relevant evidence—not just some—and that evidence should be considered in context.

A slightly different version of the “law office history” complaint was offered by Stephen Siegel: “[O]riginalism is impossible because history is too nuanced and ambiguous to give determinate answers to today’s constitutional controversies.”⁷⁰ Mark Tushnet made a more elaborate version of this argument in his *magnum opus*, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*. Although Tushnet uses the label “interpretivism,” the contemporary version of his target is surely

⁶⁴ Saul Cornell has written, “In essence, the “new” originalism is really nothing more than the old law-office history under a new guise.” Saul Cornell, *The Original Meaning of Original Understanding*, 67 MD. L. REV. 150, 150 (2007). Historians are hardly uniform in this charge. For example, Laura Kalman writes, “It seems both bizarre and unfortunate that the law professors would become dismissive of originalism just as historians are coming to appreciate its importance for legal discourse.” Laura Kalman, *Border Patrol: Reflections on the Turn to History in Legal Scholarship*, 66 FORDHAM L. REV. 87, 122-23 (1997).

⁶⁵ Martin S. Flaherty, *History “Lite” in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 525-26 (1995).

⁶⁶ Sanford Levinson, *New Perspectives on the Reconstruction Court*, 26 STAN. L. REV. 461, 484 n. 108 (1974).

⁶⁷ Casper, *Jones v. Mayer: Clio, Bemused and Confused Muse*, 1968 SUP. CT. REV. 89, 100.

⁶⁸ Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 122 n. 13.

⁶⁹ Wallace D. Loh, *In Quest of Brown’s Promise: Social Research and Social Values in School Desegregation*, *Book Review of Trial and Error: The Detroit School Segregation Case by Eleanor Wolf*. Detroit: Wayne State University Press, 1981. Pp., 58 WASH. L. REV. 129, 174 (1982).

⁷⁰ Stephen A. Siegel, Review of Jack Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution*, *Law and History Review* Vol. 17, No. 2, Summer 1999, http://www.historycooperative.org/journals/lhr/17.2/br_10.html.

originalism.⁷¹ Tushnet begins with what he calls “the standard criticism of ‘law office’ history,” citing Kelly,⁷² but he then the observes

Though some lawyers surely deploy the kind of history thus criticized, interpretivism need not rest on that sort of bad history. But the difficulty goes deeper. Interpretivist history requires both definite answers (because it is part of a legal system in which judgment is awarded to one side or the other) and clear answers (because it seeks to constrain judges and thereby to avoid judicial tyranny). The universal experience of historians, however, belies the interpretivists' expectations. Where the interpretivist seeks clarity and definiteness, the historian finds ambiguity. I have already mentioned the interpretivist view of the history of the first amendment. But if we were able to sit down for a talk with Thomas Jefferson about civil liberties, a good historian will tell us, we would hear an apparently confused blend of assertions: libertarian theory, opposition to the enactment of sedition laws, the use of sedition laws once in office, and so on. Jefferson's “intent” on the issue of free speech is nothing more than this complex set of responses.⁷³

Assume *arguendo* that Tushnet is right about Jefferson and his general views about “freedom of speech” were confused and contradictory. Assume further, *pace* the actual history, that Jefferson (rather than various members of the First Congress who participated in the editing Madison’s draft) had been the author of the First Amendment. The original meaning of the “freedom of speech” is not equivalent to the general views of the author about freedom of expression. From the perspective of public meaning originalism, such views are barely relevant to the determination of the communicative content of the text, although they might provide some evidence relevant to the conventional semantic meaning of the words and their context. Original methods originalists seek the technical legal meaning of the phrase; again, the author’s general views about the topic are barely relevant. Even for an intentionalist, the precise question to be asked concerns the communicative intentions of the author. It is simply a conceptual mistake to assert that communicative intentions are “nothing more than [the] complex set of responses”⁷⁴ of an author to general topic that the text addresses.

Of course, Tushnet’s 1983 article was not aimed at contemporary originalism, but his point is reflected in contemporary criticisms of originalism. Originalism aims at determining the communicative content of the text. If the semantic content is ambiguous, originalists will ask whether contextual disambiguation eliminates the ambiguity. But unlike the “interpretivism” that Tushnet critiques, the New Originalism does not require constitutional determinacy and recognizes the existence of construction zones. Moreover, the charge that originalist “law office history” continues to rely on the kind of evidence that Tushnet adduces, evidence that framers, ratifiers, and the general public disagreed about the purposes of constitutional texts and the grand issues the texts address.

⁷¹ Tushnet takes his definition of interpretivism from John Hart Ely. See Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 Harv. L. Rev. 781, 782 & n. (1983); JOHN HART ELY, *DEMOCRACY AND DISTRUST* 1 (1980).

⁷² Mark V. Tushnet, *supra* note 71, 793 & n. 34 (1983).

⁷³ *Id.* at 793-94.

⁷⁴ *Id.* at 794.

Of course! Who would think otherwise? But this kind of “ambiguity” is not ambiguity of communicative content.

B. The Adversary System and Cherry Picking

The cherry-picking version of the law office history objection is related to the adversary system. When lawyers use history in their briefs, they do so in the context of an adversary system that obliges them to make the best case for their client and subjects them to highly-constraining word limits; for example, merits briefs are limited to 15,000 words and there are many elements to a brief, of which the review of the historical evidence of original meaning can only constitute a part.⁷⁵ It is not surprising that adversarial briefs focus on the arguments and evidence that support the client’s position. Nor is it surprising that length-constrained briefs do not present the full context of the evidence they possess. The assumption of the adversary system is that adversarial presentation of evidence and legal arguments is part of a process that leads to legally correct results (enough of the time, usually, or perhaps more frequently than would an inquisitorial system. But adversary briefs are only part of the process. Appellate adjudication is not a moot court; judges are not voting for the better brief. Judges have an obligation to read the primary sources upon which the advocates rely (or delegate such reading to their law clerks). Moreover, the whole process can and should include a review of the scholarly literature, which can include both scholarship by academic lawyers and professional historians.

Most tellingly, the cherry-picking version of the law-office-history objection proves far too much. Lawyers cherry pick quotes from contemporary cases, from statutes and regulations, and from scholarly treatises. Appellate lawyers cherry pick the trial record when they argue that the evidence supports their position on a factual question. And judges writing opinions sometimes present a one-sided version of the facts or the law, because the function of the opinion is to explain their reasoning and not to recapitulate the more balanced process by which they reached the outcome. If the cherry-picking argument is sufficient to defeat originalism as the basis for judicial decisionmaking, then it also shows that judges should not rely on trial records, precedent, statutes, regulations, or treatises. Indeed, it seems to suggest that judges in should not base their decisions on facts or law.

Nonetheless, originalists should embrace a more nuanced implication of the cherry-picking objection. The adversary process is not the ideal context for originalist research. Originalists, more than anyone, are concerned with getting the original meaning right. And in some cases, that will require extensive investigation of historical fact. Such investigation is most likely to lead to the truth if it is done systematically and rigorously, whether by academic lawyers or constitutional historians. My own preference would be for research that is motivated by the search for truth by scholars who are detached from constitutional partisanship, but no one is immune from the dangers of motivated reasoning and bias. The best we can hope for is that scholars strive to present the results of their research fairly with full disclosure of evidence that is contrary to their conclusions. The marketplace of academic ideas is no guarantee of convergence on the

⁷⁵ Rules of the Supreme Court, Rule 33 ().

truth, but it may be the best that we can do. In this regard, the discipline of history is in no better shape than is law.

C. The Role of Context

Yet another version of the law-office-history objection focuses on the role of context. Originalism is flawed because originalists fail to play sufficient attention to context when they make claims about original meaning. Properly understood, originalist theory requires that context be taken into account, but not just any context. The context that is relevant to original meaning can be identified by a theory of contextual enrichment. Much of what is relevant context from the perspective of historians who aim for an illuminating narrative may be of marginal (or no) relevance to the communicative content of the constitutional text. Sophisticated originalists embrace the idea that context is crucially important, and every originalist should do so.

D. Disciplinary Lines and Methodology Training

Yet another version of the law-office-history objection focuses on disciplinary boundaries and methodological training. For example, Saul Cornell writes, “Without a mastery of the elementary techniques of historical research, and without some grounding in the relevant historiography of early American history, the new originalism will continue to be little more than a rebranded version of the old law office history.”⁷⁶ More generally, it is sometimes suggested that originalism is flawed because it lacks the methodological sophistication to recover the true *historical* meaning of the constitutional text. The next move is the suggestion that academic historians do have the necessary tools to recover historical meaning, but that this does not yield an original meaning that can be applied to contemporary cases—this a variant of the objection by Tushnet discussed above.⁷⁷ Another version of this criticism focuses on “context”: the claim is that the historical meaning of the constitution is contextual, and that radical differences in context between the time of framing and the time of application have the consequence that the historical meaning of a given provision may simply not apply.⁷⁸

But what is historical meaning (or historians meaning)? It cannot be the case that the meaning of legal texts is whatever historians (or political scientists or legal academics who do history) think the texts mean. It could be that the meaning is the meaning determined by correct application of historical method, but then a theory of historical method is required, and it will be the content of that method that will determine meaning. It will not do to say that the historical method is immersion in the archives—that provides no criteria of correctness or account of what one does while immersed.

⁷⁶ Saul Cornell, *Heller, New Originalism, and Law-Office History: ‘Meet the New Boss, Same as the Old Boss’*, 56 UCLA L. REV. 1095, 1124-25 (2009).

⁷⁷ See *supra* text accompany notes 71-74.

⁷⁸ For a discussion of the role of context in determining communicative content, see *supra* Part II.D.1.b) and Part III.C.

IV. HISTORIOGRAPHY AND HISTORY AS AN ACADEMIC DISCIPLINE

Is there a distinctive theory of meaning that is implicit in the “historical method”? It seems likely that historians use different methods for different problems and disagree among themselves. My own sense after discussions with historians and political scientists is that Quentin Skinner’s article, *Meaning and Understanding in the History of Ideas*⁷⁹ is viewed as an important and perhaps canonical text within the subfield of intellectual history.⁸⁰

To the extent that historians might claim that Skinner’s work grounds the correct approach for determination of the communicative content of legal texts, the conceptual foundations of their claim would be shaky. Skinner’s article aims at producing a theory of the meaning of historical texts based on ideas from the philosophy of language. So far as I can tell there are two inconsistent strands of thought in Skinner’s account of historical meaning, which we might call the *Wittgensteinian strand*⁸¹ and the *Gricean strand*. The two strands yield inconsistent theories of meaning, and neither strand does the work that some followers of Skinner seem to assume.

The *Wittgensteinian strand* in Skinner is transparent in the following passage: “The appropriate, and famous formula—famous to philosophers, at least—is rather that we should study not the meanings of words, but their use.” The famous formula is then attributed in a footnote to Ludwig Wittgenstein. It is true that Wittgenstein is associated with notion that meaning is use, or as he put it, “Words are deeds.”⁸² The idea is that the meaning of an expression is the use to which it is put. Wittgenstein was on to something, but it wasn’t a theory of communicative content. Words are used to accomplish deeds, but the deeds are not the meaning of the words in the relevant sense of meaning. We can extend Wittgenstein’s observation about words to texts. Put crudely, texts can be used to accomplish deeds. Locke’s *Second Treatise* could be part of Lord Shaftesbury’s political program. Hobbes *Leviathan* could be restoration ideology. Rawls’s *A Theory of Justice* could be an apology for the Great Society. There is nothing wrong with calling the political purposes of these historical texts their “meaning” so long as we are clear that this is not their meaning in the sense of communicative content.

When Skinner says “we should study not the meanings for words, but their use” he may have sound practical advice for historians of ideas whose practical interest is not the content of the *Second Treatise*, *Leviathan*, or *A Theory of Justice*, but the connection of these texts to other historical events. But this would not be sound advice to anyone who is seeking the communicative content of the texts. Were they to follow Skinner’s advice, they would be “put off the scent” of linguistic meaning—they would be chasing after something very different, purposes or motives.

What I call the *Gricean strand* is illustrated in the following two passages from Skinner:

⁷⁹ Quentin Skinner, *Meaning and Understanding in the History of Ideas*, 8 HISTORY AND THEORY 3 (1969).

⁸⁰ Cf. Mark A. Graber, *Foreword: Making Sense Of An Eighteenth-Century Constitution In A Twenty-First-Century World*, 67 MD. L. REV. 1, 1 (2007); Paul Brest, *The Misconceived Quest for the Original Understanding*, in Jack N. Rakove, ed., INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT 227-62 (1990).

⁸¹ *Id.* at 37.

⁸² Ludwig Wittgenstein, Culture and Value 46e (Peter Winch trans. 1980) (*Worte sind Taten.*” *Id.* at 46.)

The understanding of texts, I have sought to insist, presupposes the grasp both of what they were intended to mean, and how this meaning was intended to be taken. It follows from this that to understand a text must be to understand both the intention to be understood, and the intention that this intention should be understood, which the text itself as an intended act of communication must at least have embodied.⁸³

And the second passage:

The essential question . . . in studying any given text, is what its author, in writing at the time he did write for the audience he intended to address, could in practice have been intending to communicate by the utterance of this given utterance. It follows that the essential aim, in any attempt to understand the utterances themselves, must be to recover this complex intention on the part of the author.⁸⁴

There are no footnotes to these passages. In prior passages, Skinner relies heavily on Austin's account of illocutionary acts, but the parallelism between Skinner's theory of text meaning and Grice's theory of speaker's meaning is unmistakable. And in a recent interview, Skinner says, "I should add that, rightly or wrongly I regarded Paul Grice's theory of meaning as an appendix to Austin, treating Grice's analysis of communicative intentions as a further analysis, in effect, of Austin's pivotal notion of an illocutionary act."⁸⁵

Skinner was deeply confused about the implications of Wittgenstein and Grice for the meaning of historical texts. The *Wittgensteinian strand* of his account of textual meaning is inconsistent (if viewed as a theory of semantic meaning) with the *Gricean strand*: the notion that meaning is use is not equivalent to the idea that speech acts have illocutionary content. This conclusion is apparent from Skinner's own arguments. Skinner's very crude paraphrase of Grice on speaker's meaning does not support the claim that the meaning of a text is its use: instead it leads to the very different and inconsistent claim that the meaning of a text is the meaning that the author intended the audience to grasp based on the audience's recognition of the speaker's intention. If this theory gives the correct account of legal communication, then the meaning of legal texts would be their author's communicative intentions. This is intentionalism, the most sophisticated version of original intentions originalism. In other words, Skinner's *Gricean strand* is predicated on the same theoretical foundations as an important form of originalism. Of course, Skinner would not endorse this implication of his theory, because Skinner failed to grasp the implications of Grice's account of speaker's meaning for the recognition or discovery of communicative content.

Thus, to the extent that historians believe that Skinner's theory of the meaning of texts is inconsistent with original intentions originalism, they are twice wrong. Skinner's *Wittgensteinian strand* does not clash with any theory of semantic meaning, because it has nothing to say about semantic content. His *Gricean strand* not only does not

⁸³ *Id.* at 48.

⁸⁴ *Id.* at 49.

⁸⁵ *Quentin Skinner on Encountering the Past*, page 48, http://www.jyu.fi/yhtfil/redescriptions/Yearbook%202002/Skinner_Interview_2002.pdf. See generally K. R. Minogue, *Method in Intellectual History: Quentin Skinner's Foundations*, 56 *PHILOSOPHY* 533-552 (Oct. 1981).

undermine the quest for the original meaning, it suggests that historians ought to join the Old Originalist team—reinforcing the aging lineup of Meese and Bork.

The true relationship between the *Wittgensteinian strand* and the *Gricean strand* is that meaning is being used in two different senses. Skinner was under the mistaken impression that the senses were the same, perhaps because he wrongly believed that illocutionary force is identical to use.⁸⁶ Once we clear up this misunderstanding, it becomes clear that Skinner has no coherent theory of communicative content.

A very important qualification is in order. I have used the phrase “historian’s meaning” and the word “historian” without sensitivity to important differences in the various theories of historiography embraced by different historian and political scientists. Some historians may reject Skinner, and others may have a more sophisticated understanding of Grice and Wittgenstein than is evidenced in Skinner’s writing. Most historians are simply uninterested in either the philosophy of language or originalism—at least from a professional point of view.

V. HISTORY COMMON ROOM LAW

Recall that Kelly’s influential use of the phrase “law office history” was actually directed at a brief drafted by distinguished historians. This suggests that there may be a phenomenon that is complimentary to law-office history, which we might call, “history common room law.” What happens when historians enter the realm of legal argument about original meaning? Of course, the answer to this question is, it depends on the historian. Many historians have extensive legal training, and their arguments may reflect a sophisticated understanding of historical methods, contemporary originalist theory, and law. If there are misunderstandings and mistakes, they are more likely to be committed by historians without legal training.

Consider the so-called “Historians Brief”⁸⁷ in *District of Columbia v. Heller*; the principle author was Jack Rakove, the distinguished constitutional historian.⁸⁸ Let me lay my cards on the table: in my opinion, the brief does not even attempt to determine the original meaning of the constitutional text. It says nothing about the conventional semantic meaning, nor does it make any arguments about contextual enrichment. It displays a lack of serious knowledge of or engagement with contemporary originalist theory. Most of the claims it makes are simply irrelevant to original meaning. Redeeming this claim in a reasonable number of pages is difficult, because I am

⁸⁶ This conclusion becomes apparent once we examine what “illocutionary forces” utterances actually can have. Austin, for example, notes that an utterance can make promise, issue a command, make an assertion, proffer an offer, and so forth. Historical texts studied by historians of ideas make assertions—the illocutionary force of the text essentially includes the semantic content of that which is asserted. Legal texts make laws (roughly equivalent to issuing commands): the illocutionary force of a constitutional provision essentially includes the semantic content of the provision itself. The illocutionary force of a promise is not the purpose the promise was intended to serve or the “use” of the promise in that sense. Likewise, the illocutionary force of a constitutional provision is not the contextualized purpose of the provision.

⁸⁷ *Brief of Amici Curiae Jack N. Rakove, Saul Cornell, David T. Konig, William J. Novak, Lois G. Schworer Et Al. In Support Of Petitioners, District of Columbia v. Heller* [hereinafter, *Historian’s Brief*].

⁸⁸ See Q&A: Jack Rakove on Heller and History, New York Times Blog, <http://topics.blogs.nytimes.com/2008/06/26/qa-jack-rakove-on-heller-and-history/> (June 26, 2008).

attempting to prove a negative—and the only way for a reader to confirm my claim is to read the brief.

Nonetheless, the claim that the brief fails to engage with original meaning can be made plausible. One clue to the content of the brief is provided by the argument headings. Here they are:

- Even after the parliamentary Bill of Rights of 1689 allowed certain classes of Protestant subjects to keep arms, British constitutional doctrine and practice subjected the limited right therein recognized to extensive legal regulation and limitation.
- The first American bills of rights made no mention of a private right to keep arms.
- By proposing to transfer authority over the militia from the states to Congress, the Constitution radically challenged conventional republican thinking about the nature of the militia.
- Anti-Federalist objections to the Militia Clause preponderantly evoked the traditional fear of standing armies and its corollary endorsement of the value of the militia.
- Explicit Anti-Federalist references to a private right to arms were conspicuously few in number and failed to generate political support.
- James Madison’s original draft of the Second Amendment does not support an individual rights interpretation.
- The final revisions of the Second Amendment reflected the Federalists’ determination to preserve congressional authority over the organization of the militia.
- The Second Amendment is best understood as an affirmation of federalism values, which helps to explain why the “insurrectionist” theory of its origins is fallacious.
- A historically-grounded analysis of what was actually debated in 1787 through 1789 can only conclude that the status of the militia was always what was in dispute, and not the private rights of individuals.

The headings are accurate representation of the arguments in the brief. The brief discusses motives, purposes, issues, goals, and debates—but mostly ignores the text.

Another way to make this point results from searching the brief for references to the text. Tellingly, the brief never quotes the full text of the Second Amendment. What about the key phrases, “right to bear arms” and “a well-regulated militia being necessary to the defense of a free state”? The brief never discusses the latter phrase, although it does quote uses of the phrase “a well-regulated militia” as that phrase was used in other texts. As to “the right to bear arms,” the brief uses this phrase as follows:

- Page 5, the brief discusses the right to bear arms in English Bill of Rights of 1689.
- Page 11, the brief notes that none of the state constitutional provisions explicitly provided an individual right to bear arms.
- Page 23, the brief quotes an amendment proposed by antifederalist delegates to the Pennsylvania ratification convention that uses the phrase “right to bear arms” and then uses the phrase to express a possible (but in the view of the brief incorrect) argument for a private right.

- Pages 26 and 27, the brief uses to characterize what James Madison was not discussing in a speech.

Other than the appearance of the phrase in article titles, that's it. Swear to God. There is no other discussion of the phrase. There is no attempt anywhere in the brief to offer an account of what the phrase means. No discussion of the conventional semantic meaning of the words. No discussion of the syntax. No attempt to argue for contextual disambiguation of the phrases. In other words, the brief fails to say anything about the original meaning (communicative content) of the text of the Second Amendment. Nothing. Nada. Nullo. Zilch. Zip. Zero. I am not exaggerating.

VI. CONCLUSION

One final point. Suppose that the law-office-history objection to originalism were on the mark. Suppose that lawyers, judges, and legal scholars are hopeless cherry pickers. Suppose that a full consideration of context creates radical ambiguity that renders legal texts incapable of providing determinate answers to contemporary legal questions. Suppose that gleaning the meaning of legal texts is beyond the competence of lawyers who lack the methodological training provided by graduate programs in history. Suppose that all of those things were true. How then do judges, lawyers, and legal scholars read contemporary legal texts—judicial opinions, statutes, regulations, and rules of procedure? The legislative histories of texts are cherry picked. The full context of those texts will reveal a variety of conflicting purposes, goals, and beliefs.

The central arguments that are made against originalism seem to apply with equal force to the interpretation of contemporary texts. They certainly apply to Supreme Court decisions and statutes that are older than many constitutional provisions. Of course, there are those who believe that all law, contemporary and ancient, is radically indeterminate. But if you do not agree, then you have good reasons to doubt many of the arguments against originalism that are couched in terms of history—because neither history nor historiography is really doing the work in these arguments.

Let me end on an optimistic note. I believe that progress in constitutional theory is possible. Originalists may not come to agreement on a single version of originalism, but they may find common ground on fixation and constraint. Originalists and living constitutionalists may not be able to agree that originalism provides the best theory of constitutional interpretation and construction, but we might be able to agree that original meaning is relevant to constitutional practice. Historians and legal scholars may not agree on a single approach to constitutional history, but they might come to recognize that they have different methods suited to different projects, each valuable in their own way. Historians and originalists might even learn from each other.

In that optimistic spirit, let me suggest some lessons that originalists can learn from historians. Cherry picking in legal briefs is inevitable, but it has no role to play in serious originalist scholarship. Most serious originalists know this already, but there may be exceptions, especially among less experienced originalist scholars. The methods that are relevant to originalist research may not be taught in graduate history programs, but to a large extent they are not taught in law schools either. Originalists need to think about best practices and methodological training in a systematic way. When they do, they are likely to learn from other disciplines, including history, linguistics, and the philosophy of language. Context makes a crucial contribution to original meaning; this is something

that almost every originalist already knows. The more we know about contest, the more confident we can be about original meaning. Historians know this takes time—lots of time. Originalists should thoroughly internalize that lesson.