
ARTICLES

CONSTITUTIONAL COMMUNICATION

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Scholars advocating various normative and positive theories endorse the notion that the Constitution is communicative of its meaning. However, there has been little discussion as to what “communication” means in the constitutional context. This Article addresses the communication gap by introducing and applying communication-based concepts and models to constitutional theory. There are two results of that integration. First, the account in this Article offers a richer framework and vocabulary for structuring ongoing debates about interpretative theory and constitutional meaning. Second, the addition of communication concepts and norms into the debate about constitutional meaning points toward a new perspective regarding interpretation: constitutional contextualism. This flexible approach contends that the constitutional provision being interpreted, and not a pre-selected universal theory, should dictate the tools that are used to analyze it. Significantly, this approach does not seek to negate the dominant theories of constitutional interpretation. In fact, the insights of various originalist and living constitutionalist theories are essential for selecting or synthesizing which interpretive methods are preferable in specific situations. By adopting a flexible, contextual, communication-based approach to identifying the best constitutional meaning in particular cases, we can end the growing fetishization of global interpretive theories and better adapt to the real-world needs of constitutional readers.

INTRODUCTION

Let us begin with a simple example: a doctor tells a patient in a hospital emergency room “you are not going to die.”¹ The semantic meaning of the promise is ambiguous. The statement could mean that the doctor is either promising eternal life or merely reassuring the patient that her present injury is not likely to be fatal.²

How do we know to reject the first, literal interpretation and recognize that the latter interpretation is the better one? We must consider other elements relevant to communication in the example beyond the text of the statement: sender (doctor), receiver (injured patient), and setting (emergency room). The sentence alone, “you are not going to die,” is simply insufficient to guide our choice of meaning. To illustrate how that same statement might take on

¹ This example was used in a discussion of legal meaning in a recent article by Tun-Jen Chiang and Lawrence Solum. See Tun-Jen Chiang & Lawrence B. Solum, *The Interpretation-Construction Distinction in Patent Law*, 123 YALE L.J. 530, 564-65 (2013) (citing Kristen Osenga, *Cooperative Patent Prosecution: Viewing Patents Through a Pragmatics Lens*, 85 ST. JOHN’S L. REV. 115, 126 (2011)). Because this Article engages substantial portions of Solum’s scholarship and the example nicely parallels another example discussed in Section I.B, I chose to utilize it here.

² *Id.* at 564.

different meanings, consider what is conveyed if we vary the contextual aspects of the communication event in the following ways:

- Sender: spouse, highly intoxicated friend, teacher, minister, young child of Receiver, or mugger.
- Receiver: panicked patient with a paper cut, patient with multiple bullet wounds in the torso and chest, patient with horrific chronic pain hoping to die, uninjured person, someone who just ate foul-tasting food, someone with a spouse on their deathbed, young child of Sender, or angry mob.
- Pretext: Sender repeatedly assures Receiver that Sender is telling truth, Sender denies having any interest in inheriting wealth from Receiver, Sender further states that Sender loves Receiver dearly, or Sender gives the same message every day when Receiver awakens.³
- Subtext: Sender thinks Receiver is a hypochondriac, Sender hopes to inherit significant wealth from Receiver, or Sender seeks compliance by Receiver.
- Intent: Sender does not want Receiver to die, Sender wants Receiver to feel extreme pain but not die, or Sender wants to falsely reassure Receiver.
- Setting: stage at a community theater, Receiver's home, society ravaged by epidemic with escalating death rates, after the zombie apocalypse,⁴ or dark alley.

Thus, if a father tells his terminally ill child "you are not going to die" in order to alleviate the stress of the child, we should doubt the veracity of the statement. If, instead, an armed mugger tells someone in a dark alley "you are not going to die," the mugger might really be communicating that she will kill the victim if the victim does not cooperate (but the victim otherwise will survive the encounter). If a vengeful husband utters the phrase to his wife with grievous injuries in the emergency room as he is thinking of the wealth he will inherit upon her passing, the ambiguity of the phrase is harder to reliably resolve as it is unclear if the husband actually thinks, and is trying to communicate, that his wife will survive her injuries. If a history professor finds the phrase in a correspondence written by a twelve-year old child to her father

³ This would be a possible curative rejoinder to the nightly ritual of the Dread Pirate Roberts in addressing his prisoner Westley in *The Princess Bride* when he would state: "Good night, Westley. Good work. Sleep well. I'll most likely kill you in the morning." THE PRINCESS BRIDE (Act III Communications 1987).

⁴ There has been recent, surprising attention by legal scholars dedicated to the zombie apocalypse. See generally Adam Chodorow, *Death and Taxes and Zombies*, 98 IOWA L. REV. 1207 (2013) (providing the essential legal account of the implications of the zombie apocalypse on estate tax issues); Michael L. Smith, *Prosecuting the Undead: Federal Criminal Law in a World of Zombies*, 61 UCLA L. REV. DISCOURSE 44 (2013) (explaining how federal criminal law actually makes more sense if applied after the zombie apocalypse).

who is at a Revolutionary War field hospital, the phrase is perhaps best interpreted as embodying the hope of the child that her father will not die.

One can play a game of mix-and-match with the choices of communication elements to create an incredible number of different possible meanings and levels of certainty as to those meanings. In each case, though, the text remains the same. The doctor/patient example helps to show how, at least in some cases, linguistic interpretation must fall back on communication elements foreign to strict semantics to avoid making errors in identifying meaning.

Now consider this example proffered by Jean Baudrillard, which adds political context to another simple text.⁵ Baudrillard found five viable meanings when interpreting Enrico Berlinguer's statement that "We mustn't be frightened of seeing the communists seize power in Italy":

1. That there is nothing to fear, since the communists, if they come to power, will change nothing in its fundamental capitalist mechanism.
2. That there isn't any risk of their ever coming to power (for the reason that they don't want to); and even if they do take it up, they will only ever wield it by proxy.
3. That in fact power, genuine power, no longer exists, and hence there is no risk of anybody seizing it or taking it over.
4. But more: I, Berlinguer, am not frightened of seeing the communists seize power in Italy—which might appear evident, but not so evident, since:
5. It can also mean the contrary (no need for psychoanalysis here): *I am frightened of seeing the communists seize power (and with good reason, even for a communist).*⁶

Baudrillard's identified meanings demonstrate how a simple phrase, particularly one that can be placed in a complex political and social setting, can carry multiple viable, sometimes contradictory, meanings. Notably, the first four alternatives proffered by Baudrillard are true to the text, but also draw from ideas related to communication theory. His first interpretation contends that the communists' stated goals are merely *pretext* and, thus, there is no reason to fear they will bring about radical change. The second states that there is no reason for fear because the social *setting* dictates that communists will neither seize power nor otherwise wield it. The third relies on a premise established in other texts (*intertextuality*), that power is an illusion in

⁵ JEAN BAUDRILLARD, *Simulacra and Simulations*, in SELECTED WRITINGS 166, 175 (Mark Poster ed., 1988) (proposing a poststructural cultural explanation for the relationship between symbols, reality, and society). That I have chosen an example from Baudrillard should not be taken as an endorsement of his particular theories or of post-structuralism in general. I have chosen to use his analysis of this one quote simply because it provides a very useful illustration.

⁶ *Id.*

modernity, and establishes that communists are not to be feared because they, like anyone else, cannot seize power. The fourth focuses on the fact that the *sender* of the message, Berlinguer, is a communist, and, thus, has no reason to fear a communist takeover. Only the final interpretation completely supplants textual meaning by adding in contradictory *subtext* contending that someone does not ordinarily proclaim that she is not afraid of something unless she really is. Unlike the first example involving the doctor and patient, there is no clear preferred meaning of the quote because of the contextual factors that problematize interpretation. Berlinguer's statement illustrates the inherent problems with the praxis of interpretation when adding social, cultural, and political variables to even relatively straightforward texts.⁷

Finally, let us turn to more germane instances of constitutional texts which often include more complex language, greater contextual uncertainty, terms of art, and specialized rules associated with legal meaning. Constitutional interpretation is, in essence, an attempt to complete a particularly difficult form of a jigsaw puzzle. Instead of merely opening a box with a set number of pieces, a constitutional puzzle has an unknown quantity of components, excess pieces intermixed with the ones we need, pieces that do not cleanly fit together due to wear-and-tear over time, and some number of missing pieces as well. We have no images of the intended final product to guide us when we endeavor to solve such puzzles. And if we do have a picture in mind of what the completed puzzle should look like, that mental image likely compromises the pretense of objectivity in our assembly of the pieces.

The dominant theories of constitutional interpretation, when universally applied, ask us to work through these complex puzzles by naïvely assuming simplicity of design. For example, some new originalists⁸ require us to start by using one type of puzzle piece, constitutional text as originally understood, to the exclusion of others.⁹ We are to give old textual pieces priority even if they

⁷ The word "praxis" is being used here to mean communicative action, as described by Hannah Arendt. See HANNAH ARENDT, *THE HUMAN CONDITION* 25 (1958).

⁸ Labels for various strains of originalism are plentiful and sometimes confusing. See, e.g., Mitchell N. Berman, *Originalism is Bunk*, 84 N.Y.U. L. REV. 1, 4 (2009) (addressing the "frequent complaints that the originalist label is ambiguous and malleable"); Lawrence B. Solum, *What Is Originalism? The Evolution of Contemporary Originalist Theory*, in *THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION* 12, 12 (Grant Huscroft & Bradley W. Miller eds., 2011). Nonetheless, "new originalism" is normally taken to mean original public meaning originalism. See Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 409 (2013). Consequently, I use "new originalism" as a shorter label for the original public meaning version of originalist interpretation.

⁹ According to these new originalists, interpretation is exclusively concerned with determining the linguistic/semantic content of a text. See KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION* 35 (1999) [hereinafter WHITTINGTON, *CONSTITUTIONAL INTERPRETATION*] ("The critical originalist directive is that the Constitution should be

are faded, do not fit together, or are simply missing. If there is but one textual puzzle piece, we are to assume it gives us all we need to complete the entire puzzle. This strain of new originalism only allows us to use the other, non-textual, pieces at our disposal after we have exhausted attempts to divine a specific type of textual meaning.¹⁰ And then, critics contend, it gives us little to no guidance about how those other pieces might fit together.¹¹ Other theories fare similarly by artificially restricting which puzzle pieces we should use.¹² As a result, our picture is always less complete than it might be using all of the pieces before us. The leading constitutional theories of meaning struggle to interpret even basic texts such as those embodied in the doctor/patient and Enrico Berlinguer examples because of their proscriptions. Nonetheless, despite the inevitable limitations of restricting the use of available evidence, authors of such constitutional theories continue to quixotically believe, with

interpreted according to the understandings made public at the time of the drafting and ratification. The primary source of those understandings is the text of the Constitution itself, including both its wording and structure.”). In contrast, construction is the process of determining meaning once an interpretive process is exhausted. *See* KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION 5 (1999) [hereinafter WHITTINGTON, CONSTITUTIONAL CONSTRUCTION] (“Constructions . . . elucidate the text in the interstices of discoverable, interpretive meaning, where the text is so broad or so underdetermined as to be incapable of faithful but exhaustive reduction to legal rules.”). This serial sequencing of identifying meaning is embodied in the new originalist distinction between interpretation and construction. *See, e.g.,* Lawrence B. Solum, *Communicative Content and Legal Content*, 89 NOTRE DAME L. REV. 479, 483 (2013) [hereinafter Solum, *Communicative Content*] (“[I]t is important to distinguish between two related activities (‘interpretation’ and ‘construction’).”); Lawrence B. Solum, *Semantic Originalism* 1-2 (Ill. Pub. Law and Legal Theory Research Paper Series, Working Paper No. 07-24, 2008), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244 [hereinafter Solum, *Semantic Originalism*] (describing the initial step in a new originalist inquiry as focused exclusively on semantic meaning). Because this Article draws from a variety of disciplines, I use the more universal definition of “interpretation” to describe both means of divining meaning and reject the serial sequencing approach proposed by new originalists. *See infra* Section IV.A.

¹⁰ WHITTINGTON, CONSTITUTIONAL INTERPRETATION, *supra* note 9, at 35.

¹¹ Joel Alicea & Donald L. Drakeman, *The Limits of New Originalism*, 15 U. PA. J. CONST. L. 1161, 1169-70 (2012) (“[T]he methodological challenges to ascertaining clear, objective readings of constitutional texts . . . are not limited [to an] otherwise obscure carriage tax dispute. The same difficulties appear when various other high-profile constitutional issues are raised, including the ever-controversial church-state arena, leading to the question of whether New Originalism may be far more interesting in theory than in practice.” (footnotes omitted)).

¹² *See infra* Section II.B.

apologies to J.R.R. Tolkien, that they have created the “one [theory] to rule them all.”¹³

In contrast, this Article draws from various disciplines regarding communication theory to outline a complete model for interpreting constitutional text.¹⁴ Part I discusses in greater detail the essential relevance of communication research to constitutional interpretation debates. Part II applies modern communication models and theories to illustrate the piecemeal nature of the global use of the dominant theories for identifying constitutional meaning. Part III shows how the insights of communication theory point toward a contextual approach to constitutional interpretation that rejects interpretative fetishes, better resolves particular constitutional disputes, and addresses the shortcomings of proposed global methods.

I. COMMUNICATION AND CONSTITUTIONAL INTERPRETATION

The use of communication concepts is inevitable and desirable in debates about constitutional interpretation. Communication theory reveals much about the contours of modern disputes about constitutional meaning. It helps to identify points of disagreement and commonality among divergent methods by reframing certain elements at issue. Recent research also helps to offer different answers to fundamental questions of constitutional legitimacy such as the counter-majoritarian difficulty. Theories of communication offer both positive and normative insights to core questions in constitutional interpretative debates. And perhaps most significantly, communication theory offers a new lens for resolving fundamental constitutional conflicts.

¹³ J.R.R. TOLKIEN, *THE LORD OF THE RINGS: THE FELLOWSHIP OF THE RING* 285 (Del Rey Books 2012); see also Suzanna Sherry, *Putting the Law Back in Constitutional Law*, 25 CONST. COMMENT. 461, 462 (2009) (lamenting that the pursuit of “grand theories” of constitutional interpretation does little to actually solve the constitutional problems such theories are directed toward addressing); DENNIS PATTERSON, *LAW & TRUTH* 181 (1996) (hoping that scholars will “abandon the effort to identify the ‘true grounds of law’”).

¹⁴ There is, of course, not one singular approach to “communication theory.” Within the last twenty years, some have even wondered whether there is a singular approach within any discipline or field studying communication. See Robert T. Craig, *Communication Theory as a Field*, 9 COMM. THEORY 119, 119-20 (1999) (“There is no canon of general [communication] theory [C]ommunication theory is not yet a coherent field”). Particularly since the publication of Robert Craig’s seminal article on the subject, *id.*, substantial communication theory scholarship has focused on finding areas of commonality among divergent scholars. See James A. Anderson & Geoffrey Baym, *Philosophies and Philosophic Issues in Communication, 1995-2004*, 55 J. COMM. 437, 437-48 (2004) (tracing the theories of different subsets within the field of philosophy of communication). This Article tries to draw exclusively from areas where all, or the large majority of, communication scholars have reached points of convergence, rather than picking and choosing ideas from areas where conflict remains.

Understanding communication is central to the project of constitutional interpretation. The framers communicated about the establishment of government for the new nation with each other, the voting public, and state ratifying conventions. Those parties communicated to future courts, legislatures, executive officers, and the general public about the meaning of the Constitution through the document that was ultimately ratified. Constitutional communication among various branches and levels of government remains an ongoing feature of American civil society. Justices and other judges communicate their resolutions to cases and controversies by applying provisions of the Constitution. And the communication between scholars about such constitutional communication has continued unabated.

Initially, it is worth noting that there is actually little dispute among theorists that the Constitution itself is communicative in nature.¹⁵ John Locke first identified communication as the essential concept for connecting persons in a liberal, pluralistic society in works that would inspire our founding

¹⁵ See, e.g., PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 24 (1991) (explaining how constitutional meaning is transmitted through communication); WHITTINGTON, *CONSTITUTIONAL INTERPRETATION*, *supra* note 9, at 59-60 (“[C]ommunication is directed to an interested political community The Constitution had to be drafted so as to be comprehensible to the public that must give effect and authority to it.”); Larry Alexander, *Originalism, the Why and the What*, 82 *FORDHAM L. REV.* 539, 540 (2013) (“The meaning of the norm that the legislative person or body has chosen and communicated symbolically is the meaning that person or body intends those symbols to communicate. Whether we are talking about a constitutional provision . . . or a judicially promulgated rule, its meaning, for purposes of the legal enterprise, is its authorially intended meaning—in Gricean terms, its speaker’s meaning.”); Jack M. Balkin, *The New Originalism and the Uses of History*, 82 *FORDHAM L. REV.* 641, 641 (2013) (“Interpretation tries to determine the Constitution’s original communicative content”); Randy E. Barnett, *The Misconceived Assumption about Constitutional Assumptions*, 103 *NW. U. L. REV.* 615, 632 (2009) (“When interpreting potential ambiguity [in the Constitution], we must make a choice among alternative connotations of a term to identify the message that the text communicated to the public in context.”); Kent Greenawalt, *Are Mental States Relevant for Statutory and Constitutional Interpretation?*, 85 *CORNELL L. REV.* 1609, 1617-18 n.29 (2000) (“I proceed on the assumption that . . . constitutions are forms of communication.”); Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 *NW. U. L. REV.* 703, 712 (2009) (“Constitutional enactors chose words for the purpose of communicating the meaning that they wished to express.”); Gary Lawson, *Originalism Without Obligation*, 93 *B.U. L. REV.* 1309, 1316-18 (2013) (contending the constitution is a “communicative instrument”); Solum, *Communicative Content*, *supra* note 9, at 486-87 (arguing that the communicative content of constitutional text can be found in semantic meaning interpretation appropriate to the constitutional context); Cass R. Sunstein, *Of Snakes and Butterflies: A Reply*, 106 *COLUM. L. REV.* 2234, 2238-39 (2006) (distinguishing interpretation of constitutional communication from other forms of communication).

generation.¹⁶ However, scholars have generally failed to appreciate the implications of that belief. Consequently, academics and jurists have not articulated or developed adequate theories of communication to properly explicate constitutional meaning. Presently, they either rely wholly on text (assuming that is possible) or borrow, on an inconsistent ad hoc basis, communication concepts to ascribe meaning. I hope to show that current theories of constitutional interpretation, when universally applied, are woefully impoverished as a result of utilizing incomplete models of communication.

One overarching shortcoming of existing scholarly theories about constitutional interpretation is that language and communication are treated as interchangeable concepts. Language and communication are related but distinct ideas. Language is the set of signs (vocabulary) and combinations of signs (grammar) that humans use to communicate.¹⁷ Communication is the interaction between persons using a mutually recognized language.¹⁸ Alternatively, communication is language in action. A theory of communication necessarily encompasses a theory of language while adding numerous elements to explain where language alone fails to accurately and reliably convey meaning.

In this Article, I take no general position on the persuasiveness of the particular historical and modern arguments about the nature and meaning of the Constitution. My initial goal, as outlined below, is to offer a positive framework, but not to determine answers applying that framework. To that end, a brief history of modern communication theory is in order to offer a foundation for the model proposed later in this Article.

A. *Basic Constitutional Communication*

In the 1940's, Claude Shannon and Warren Weaver created a basic transmission model of communication which posited that there are five major parts to a communicative event: sender, receiver, message, encoding, and

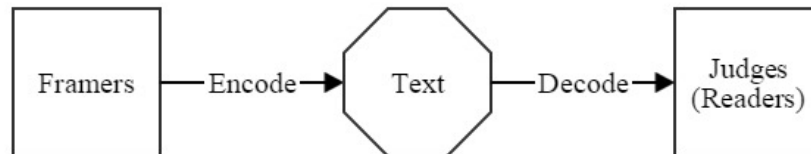
¹⁶ See Gregory Shepherd, *Advances in Communication Theory: A Critical Review*, 1999 J. COMM. 156, 156 (commenting on Locke's invocation of communication philosophies in his sociopolitical theory).

¹⁷ JOHN HARTLEY, COMMUNICATION, CULTURAL AND MEDIA STUDIES 130 (3d ed. 2002) ("Speech—usually taken to refer to the whole body of words (vocabulary) and ways of combining them (grammar) that is used by a nation or people."). The definition described here is intentionally circumscribed to the context of law. A broader definition would include other signifiers such as those in art, architecture, cinema, food, television, etc. *Id.* at 131.

¹⁸ JÜRGEN HABERMAS, ON THE PRAGMATICS OF SOCIAL INTERACTION: PRELIMINARY STUDIES IN THE THEORY OF COMMUNICATIVE ACTION 127 (Barbara Fultner trans., 2002) (describing the interactive nature of communication based upon the use of a mutually-agreeable set of signs).

decoding.¹⁹ In the instances of constitutional communication, those elements correspond most often to: framers, judges (readers), constitutional text, encoding, and decoding as exhibited in Figure 1 below.²⁰

Figure 1: Basic Communication Model Applied to Constitutional Interpretation



At first blush, this basic transmission model appears to capture the process of constitutional interpretation fairly well. Unlike most forms of communication, attempts to wrestle meaning from the Constitution are not transactional or interactive—the communication only flows in a singular direction through time. Without dialogue, communication is far simpler to model. Even though the basic transmission model has long since fallen out of favor among communication researchers,²¹ it at least captures some of the core elements of constitutional interpretation that are worth discussing further.

1. Framers and Judges

The authors and readers of a given text provide the human elements of a communication. In the case of the Constitution, the framers are those who took part in the drafting of a particular constitutional provision that was

¹⁹ See generally CLAUDE SHANNON & WARREN WEAVER, *THE MATHEMATICAL THEORY OF COMMUNICATION* (1949). Shannon and Weaver also included a channel element which was applicable to communication through the telephone system, the particular focus of their research. I have omitted this element here because it is not directly relevant to constitutional communication or most modern communication theory.

²⁰ Although judges represent the constitutional receivers in the above model, they can be easily replaced with other agents such as legislators or the general public. I have chosen to use judges as the primary readers because they alone create and utilize caselaw precedent, a necessary component of a complete constitutional communication model. Indeed, in discussing popular constitutionalism later in the Article, judges are explicitly replaced with the public. See *infra* Section II.B.4.

²¹ See, e.g., JULIA WOOD, *COMMUNICATION MOSAICS: AN INTRODUCTION TO THE FIELD OF COMMUNICATION* 14 (2013) (“Although linear, or transmission, models such as [Shannon and Weaver’s] were useful starting points, they are too simplistic to capture the complexity of human communication.”).

subsequently ratified. They are not a monolithic body, but likely have to be treated as such owing to the fact that they collectively prepared a singular document.²² So, for purposes of constitutional interpretation, the specific identities of particular framers are superseded by our best assessments of their collective identity.

Readers are most commonly judges in the modern American constitutional system (and, as a result, are listed as the specific readers in Figure 1), but can include any person seeking to define portions or the whole of the Constitution. The specific biases or idiosyncrasies that framers and judges might carry are outside of the scope of this general category and are, instead, captured in the concepts included in later communication models. The simple transmission model thus fails to incorporate the psychology, motives, or politics of those involved in coding and decoding constitutional text.

2. Text

Text is the “signifying structure composed of signs and codes which is essential to communication.”²³ In this case, it is the Constitution as written. Notably, the text does not include any written materials accompanying ratification, including but not limited to the Federalist Papers.²⁴ Inclusion of other such sources falls into a category added later—intertextuality.

Notably, under the transmission model, the text itself is not self-defining. For example, one judge might prefer a modern linguistic meaning of the word “cruel” in the Eighth Amendment’s prohibition of cruel and unusual punishment.²⁵ Another reader might fix the meaning of the word as to what he

²² This is a problem endemic to constitutional interpretation and not unique to a communication-based approach.

²³ JAMES WATSON & ANNE HILL, *A DICTIONARY OF COMMUNICATION AND MEDIA STUDIES* 192-93 (3d ed. 1993).

²⁴ See generally THE FEDERALIST NOS. 1-85 (Alexander Hamilton, James Madison & John Jay).

²⁵ This view was taken by self-proclaimed originalist Justice Antonin Scalia, leading some fellow travelers to contend that the Justice’s particular form of originalism was “faint-hearted.” See generally Randy E. Barnett, *Scalia’s Infidelity: A Critique of “Faint-Hearted” Originalism*, 75 U. CIN. L. REV. 7 (2006). Perhaps bowing to that criticism, Justice Scalia renounced his previous assessment of his originalism as faint-hearted. Jennifer Senior, *In Conversation: Antonin Scalia*, N.Y. MAG. (Oct. 6, 2013), <http://nymag.com/news/features/antonin-scalia-2013-10/> [<http://perma.cc/NEV9-VMTF>] (“You’ve described yourself as a fainthearted originalist. But really, how fainthearted? *I described myself as that a long time ago. I repudiate that. So you’re a stouthearted one. I try to be. I try to be an honest originalist! I will take the bitter with the sweet! What I used ‘fainthearted’ in reference to was—Flogging, right? Flogging. And what I would say now is, yes, if a state enacted a law permitting flogging, it is immensely stupid, but it is not unconstitutional. A lot of stuff that’s stupid is not unconstitutional. I gave a talk once where I said they ought to pass out to all federal judges a stamp, and the stamp says—Whack! [Pounds his fist.]—*”

believes to be the public meaning of “cruel” at the time of constitutional ratification.²⁶ In either instance, the text is being interpreted through a decoding process that is relatively simplistic in nature.²⁷

3. Encoding, Decoding, and Noise

Perhaps the term, but not the concept, most foreign to legal scholars in modern communication theory is “noise” (also referred to as “interference” or “obstructions”). Noise, in the semantic sense, concerns confusion between the sender and receiver about the message.²⁸ Noise results in what Umberto Eco calls “aberrant decoding” wherein the receiver understands the message quite differently than the sender.²⁹ Other obstructions beyond linguistics include, but are not limited to, cultural cognition difficulties,³⁰ ambiguity,³¹ vagueness,³² limited information,³³ contradictory signals of meaning,³⁴ and changed circumstances.³⁵

STUPID BUT CONSTITUTIONAL. Whack! [Pounds again.] STUPID BUT CONSTITUTIONAL. Whack! STUPID BUT CONSTITUTIONAL . . . [Laughs.] And then somebody sent me one.” (quoting Justice Antonin Scalia as indicated in italics)).

²⁶ See Barnett, *supra* note 25, at 23 (“[O]riginal public meaning originalism attempts to identify the level of generality in which the Constitution is objectively expressed.”).

²⁷ Richard H. Fallon Jr., *The Meaning of Legal “Meaning” and Its Implications for Theories of Legal Interpretation*, 82 U. CHI. L. REV. 1235, 1240 (2015) (“On the other hand, the champions of competing theories—especially textualism and originalism—sometimes appear to assume that there is a linguistic fact of the matter about what statutory and constitutional provisions mean and to argue that their theories reveal that fact. To be more precise, proponents of such theories sometimes imply that the meaning of a legal text—as of an utterance in ordinary conversation—is necessarily or obviously its literal meaning (in some cases), or its intended meaning (which can be different), or what a reasonable person would have understood it to mean in the context of its promulgation, as framed and limited by its expected applications.”).

²⁸ HARTLEY, *supra* note 17, at 167.

²⁹ Umberto Eco, *Towards a Semiotic Inquiry into the Television Message*, 3 WORKING PAPERS CULTURAL STUD. 103, 105 (1972) (contending that aberrant decoding is the rule, rather than the exception, in the age of mass media with undifferentiated audiences).

³⁰ See, e.g., Bradd Shore, *Twice-Born, Once Conceived: Meaning Construction and Cultural Cognition*, 93 AM. ANTHROPOLOGIST 9, 9-10 (1991) (describing cultural cognition as the product of the objective texts and the subjective process of “meaning construction”).

³¹ See, e.g., Lawrence B. Solum, *The Unity of Interpretation*, 90 B.U. L. REV. 551, 570-71 (2010) (“In this technical sense, ambiguity refers to the multiplicity of meanings; a term is ambiguous if it has more than one sense.”).

³² See, e.g., *id.* (“The technical sense of vagueness refers to the existence of borderline cases; a term is vague if there are cases where the term might or might not apply.”).

³³ See, e.g., DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 18 (2010) (finding three major faults with originalism, the first of which is the near impossibility of uncovering what original understandings were, leaving interpreters to work with limited information).

Noise emerges during the encoding and decoding of meaning.³⁶ For example, in trying to represent an idea for a rights protection, a constitutional drafter might choose which words (signs) best signify the protection sought.³⁷ This is the encoding process, which is necessarily imperfect as language fails to define with precision abstract concepts like rights.³⁸ The encoding is further problematized if the framer is concerned with whether the words chosen will trigger a backlash among any expected audiences. Once the language is coded in the form of a constitutional text, it is decoded by readers. The decoding can identify a meaning of the text separate from the one that was encoded (and/or intended to be encoded).

Obstructions can present varying levels of difficulty for readers. For example, if two people are engaged in a conversation concerning dinner plans at a busy train station, the only obstruction might be background noise from the trains and people at the station. However, if a native Japanese speaker was drafting a technical legal letter to a Spanish-speaking engineer, there could be numerous obstructions. Language difficulties, educational background, and cultural differences stand out most prominently. If the letter was meant to intimidate the engineer into stopping work on a highly lucrative project, the contextual incentives of the engineer might cause her to read the letter with that interest in mind.

In the case of constitutional interpretation, obstructions also come in different forms with varying levels of noise. Jack Balkin introduced one example focused on the meaning of the phrase “domestic violence” in the Constitution³⁹—which could be interpreted as either insurrection or household assault.⁴⁰ Ultimately, that instance of noise is a modest concern that can be

³⁴ See, e.g., Alicea & Drakeman, *supra* note 11, at 1169-70 (referring to the “perfectly good, but contradictory, analyses of the objective meaning of the text” that often results from relying on various sources in the New Originalism style).

³⁵ See, e.g., FRANK B. CROSS, *THE FAILED PROMISE OF ORIGINALISM* 33-35 (2013) (“In many cases, one suspects there was no thought given in original expected applications for modern-day controversies.”).

³⁶ See Hartley, *supra* note 17, at 166 (“Noise refers to the interference that is experienced during the transfer of information between a sender and a receiver.”).

³⁷ William Michael Treanor, *Taking Text Too Seriously: Modern Textualism, Original Meaning, and the Case of Amar’s Bill Of Rights*, 106 MICH. L. REV. 487, 494 (2007) (discussing how textualist and originalist methods of constitutional interpretation presume a high degree of care by the framers in selecting the specific words in the Constitution).

³⁸ *Id.* at 495-96 (analyzing the difficulties in selecting language for abstract constitutional protections).

³⁹ U.S. CONST. art. IV, § 4 (“The United States shall . . . protect each of [the States] against Invasion; and . . . against domestic Violence.”).

⁴⁰ JACK M. BALKIN, *LIVING ORIGINALISM* 37 (2010) (“If we used the contemporary meaning of the guarantee clause rather than its original meaning, the import of the clause would be completely altered . . . simply because linguistic usage had changed.”); see also

addressed solely based upon well-known changes in language. In contrast, the modern and historical gap in linguistic meaning of the phrase “freedom of speech” might be quite large due to substantial social and technological media developments since the ratification of the Constitution.⁴¹

Although communication research does not specifically endorse the distinction between ambiguity and vagueness utilized by some scholars in debates about constitutional interpretation,⁴² those concepts are wholly consistent with the idea of obstructions. Linguistic ambiguity and vagueness are different forms of obstruction that might well dictate different responses by interpreters. “Noise” and “obstructions” are simply terms used to unite vagueness, ambiguity, and other significant obstacles between a reader reaching the same meaning as the sender during an encoding and decoding process.

B. *Shortcomings of Transmission Model*

Many modern legal and political science academics have implicitly incorporated a basic transmission model of communication into their theories

Michael C. Dorf, *The Undead Constitution*, 125 HARV. L. REV. 2011, 2044 (2012) (reviewing BALKIN, *supra* & STRAUSS, *supra* note 33) (discussing Balkin’s example of the changing meaning of the phrase “domestic violence” and characterizing it as an “oddball example[]”).

⁴¹ See *infra* Section III.C (discussing the interpretation of the First Amendment text in the context of the Supreme Court’s decision in *Morse v. Frederick*, 551 U.S. 393 (2007)).

⁴² See, e.g., Solum, *supra* note 31, at 570-71 (“In addition to complexity, there are at least two other sources of uncertainty connected with the linguistic meaning or semantic content of a legal text—vagueness and ambiguity. In ordinary speech, the distinction between vagueness and ambiguity is not always observed. The two terms are sometimes used interchangeably, and when this is the case, they both mark a general lack of what we might call ‘determinacy’ (or ‘clarity’ or ‘certainty’) of meaning. But the terms ‘vague’ and ‘ambiguous’ also have technical (or more precise) senses, such that there is a real difference in their meaning. In this technical sense, ambiguity refers to the multiplicity of meanings; a term is ambiguous if it has more than one sense. A classic example is the word ‘cool.’ In one sense ‘cool’ means ‘low temperature,’ as in, ‘The room was so cool we could see our breath.’ In another sense, ‘cool’ means something like ‘hip’ or ‘stylish,’ as in, ‘Miles Davis was so cool that every young trumpet player imitated him.’ And cool has several other senses, referring to temperament, certain colors, and a lack of enthusiasm (or the presence of skepticism or mild hostility). The technical sense of vagueness refers to the existence of borderline cases; a term is vague if there are cases where the term might or might not apply. A classic example is the word ‘tall.’ In one sense, ‘tall’ refers to height (of a person or other entity) that is higher than average. Abraham Lincoln, who stood at almost 6’4”, was certainly tall for his time. Napoleon was not tall, although at 5’6” he was of average height for his time. There are persons who are clearly tall and clearly not tall, but there are also borderline cases. For example, in the United States in the twenty-first century, males who are 5’11” may be neither clearly tall nor clearly not.” (footnotes omitted)).

of constitutional interpretation. As noted earlier, communication and language are distinct ideas. Communication, by its nature, is inclusive of theories of language, but also recognizes that languages operate within social and political settings. Yet, scholars often treat the concepts as entirely interchangeable and/or fail to acknowledge when they have utilized communication rather than linguistic theories.⁴³

Consider a story derived from the work of the progenitor of modern communication theory, Kenneth Burke, which bears similarities to the doctor/patient exchange at the beginning of this Article:

“Suppose,” Burke suggests, “that some disaster has taken place, and that I am to break the information to a man who will suffer the knowledge of it.” Verbalizing the disaster stylizes it, paradoxically responding to the disaster and bringing it into being for the first time in the sense that the verbalization is a linguistic act that selects one depiction of the disaster from multiple possibilities The verbalization of the disaster is thus a choice of disasters. Whichever one chooses, one stylizes it for the man who will suffer from knowledge of it, as well as for oneself as the bearer of bad news. Even a bare description in the seemingly neutral style of the positivist ideal would still be one stylization with its own effects.⁴⁴

Burke’s view is that the author of a statement about a disaster necessarily chooses among a number of language alternatives, which inevitably creates different shades of meaning. For Burke and other communication scholars, a text should not be interpreted without considering the other elements that can affect the encoded meaning. In some cases, the signs chosen will offer a wide variation in interpreted meaning. In others, the differences will likely be slight. Similar to Burke’s example, the doctor described in the Introduction chooses among different possible statements of prognosis depending upon the situation.

⁴³ See Saul Cornell, *Originalism as Thin Description: An Interdisciplinary Critique*, 84 *FORDHAM L. REV. RES GESTAE* 1, 8-9 (2015) (“The problem with this approach is that individuals do not communicate with lists of linguistic facts. The ratification debate was not a struggle between Federalist and Anti-Federalist dictionaries. The newspaper essays, pamphlets, and convention speeches that constitute the primary body of sources for understanding the public debate over ratification were complex rhetorical constructions shaped by the conventions of post-Revolutionary era political and legal discourse. Semantic originalism’s pursuit of the linguistic facts makes no distinction between different types of texts, rhetorical styles, or the settings in which speech occurs; nor does Solum’s model deal with the divergent interpretive practices that were in place in different speech communities during the Founding era.”). Although Cornell is drawing from different disciplinary roots, the notion of a speech community being separate from a linguistic one is also a core element of modern communication theory.

⁴⁴ ROBERT WESS, *KENNETH BURKE: RHETORIC, SUBJECTIVITY, POSTMODERNISM* 120 (1996) (quoting KENNETH BURKE, *THE PHILOSOPHY OF LITERARY FORM: STUDIES IN SYMBOLIC ACTION* 126-27 (1941)) (internal citation omitted).

In contrast, scholars often assume that a statement has a single, determinate meaning until shown otherwise. Only when ambiguity remains do they consider the external variables relevant in communication theory. To apply Burke's insight to the constitutional context, we might see that the drafting of the Constitution was an act that selected one depiction of the Constitution from multiple possibilities.

Burke's example helps to demonstrate how Shannon and Weaver's transmission model of communication ultimately fails to properly account for the inevitable complexities involved in constitutional interpretative theory. As Gregory Shepherd wrote: "If communication is a simple vehicle that conveys mental activity from person to person, then it requires not theorizing, but engineering."⁴⁵ Among its shortcomings, the simple model assumes a flawed model of determinate meaning, does not recognize the ongoing relationship between the framers and modern persons, and portrays communication as simple information sharing. Each of those flaws, which are directly relevant to the constitutional interpretation context, are reasons why the simple transmission model was replaced by communication researchers with more sophisticated and nuanced perspectives and theories.

1. The (Over)determinacy Problem

The examples from Enrico Berlinguer as well as the doctor/patient interaction highlight a fundamental concern in assumptions of communicated meaning in legal scholarship. The uncertainty of legal meaning is a central problem in modern debates about jurisprudence, judicial decision-making, and the application of constitutional texts to particular facts.⁴⁶ Legal theorists of all types rely on basic assumptions about the universe of possible meanings of text. Typically, scholars, legislators, and judges presume that meaning is either determinate or indeterminate (the binary view)⁴⁷ or meaning exists on a continuum with indeterminacy and determinacy representing the two poles (the continuum view).⁴⁸ All of the leading normative and positive theories

⁴⁵ Shepherd, *supra* note 16, at 157.

⁴⁶ J. Harvie Wilkinson III, *The Rehnquist Court at Twilight: The Lures and Perils of Split-the-Difference Jurisprudence*, 58 STAN. L. REV. 1969, 1995 (2006) ("Few major constitutional debates are clear-cut propositions . . .").

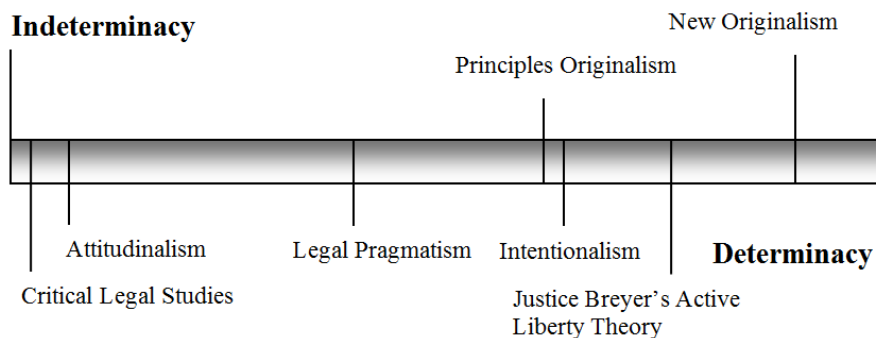
⁴⁷ See, e.g., Michael D. Gilbert, *Judicial Independence and Social Welfare*, 112 MICH. L. REV. 575, 598 (2014) ("[T]he law is either determinate or indeterminate. There are no other possibilities.").

⁴⁸ See, e.g., BENJAMIN H. BARTON, *THE LAWYER-JUDGE BIAS IN THE AMERICAN LEGAL SYSTEM* 266 (2010) ("One continuum considers . . . whether the law is relatively determinate or indeterminate"); Joshua P. Davis, *Legality, Morality, Duality*, 2014 UTAH L. REV. 55, 78 ("[I]n reality determinacy almost certainly forms a continuum."); Michael Krausz, *Intention and Interpretation: Hirsch and Margolis*, in *INTENTION AND INTERPRETATION* 152, 156 (Gary Iseminger ed., 1992) ("Surely, the distinction between determinate and indeterminate

implicitly rely on a view that meaning is determined, indeterminate, or somewhere in between those two concepts.

Different theories of constitutional and legal interpretation aspire to or assume different levels of the average determinacy of meaning. According to a traditional account of adjudication contained in the various theories, these efforts—normative and positive—can be mapped along a continuum with indeterminacy at one end and determinacy at the other according to the contended level of indeterminacy of meaning or outcome. The linear map in Figure 2 is one example of how a few notable positive and normative theories might appear in such a meta-model:

Figure 2: Indeterminacy/Determinacy Continuum



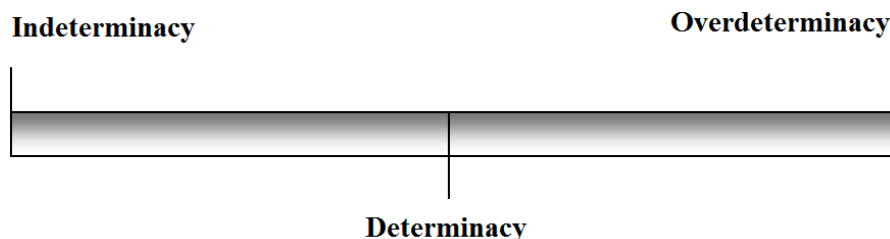
One could legitimately and persuasively argue that the schools of thought in Figure 2 are all in the wrong places. However, the particular arrangement of the theories is not important for this Article's argument. It is simply enough to recognize that conventional legal wisdom is that the indeterminacy-to-

is a matter of degree on a continuum rather than one of two binary terms.”); Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781, 806 (1989) (“[W]e must assume that words vary along a continuum from extremely vague (or otherwise indeterminate) to completely determinate.”); Edward Rubin & Malcolm Feeley, *Creating Legal Doctrine*, 69 S. CAL. L. REV. 1989, 2024 (1996) (“The most plausible account is that legal decisionmaking forms a continuum that extends from relatively determined decisions on the one hand to the highly indeterminate process of doctrinal creation on the other.”); Sherry, *supra* note 13, at 461 (“Law, especially constitutional law, and especially the hard cases that reach the Supreme Court, is neither fully determinate nor fully indeterminate.”); Howard J. Vogel, *The Possibilities of American Constitutional Law in a Fractured World: A Relational Approach to Legal Hermeneutics*, 83 U. DET. MERCY L. REV. 789, 820 (2006) (“Accordingly, all forms of language . . . may be arranged on a continuum according to their degree of indeterminacy.”).

determinacy continuum encapsulates the predominant theories concerning the adjudication of legal meaning.

In contrast, consistent with a communication-based approach, I contend that much of law has multiple viable interpretations of meaning.⁴⁹ Further, constitutional meaning is often determined by selection among or synthesis of multiple, often contradictory, interpretations. Consequently, the existing models, methodologies, and theories concerning the adjudication of constitutional meaning, in many instances, either fail to provide an accurate account of such judicial decision-making or rely on assumptions about judges and legal truth that are unsupportable.⁵⁰ Instead of the conventional continuum view of meaning, we might imagine a new model, illustrated in Figure 3, with poles of indeterminacy (or underdeterminacy) and overdeterminacy and a midpoint of determinacy.

Figure 3: Indeterminacy / Overdeterminacy Continuum



In the model illustrated in Figure 3, complete indeterminacy means that there is no information available to interpret and apply a legal text. Extreme overdeterminacy means that there are a very large number of viable meanings that can be persuasively ascribed to a particular text. Determinacy means there is exactly one, and only one, coherent and cogent interpretation of a legal text. Thus, determinacy rests somewhere between the poles of no meaning and a high number of meanings.

⁴⁹ In the constitutional setting, there is reason to believe that even using limited methods, such as new originalism, there are numerous viable meanings to various constitutional provisions. See Alicea & Drakeman, *supra* note 11, at 1169 n.27 (“[W]e believe that those facts—examined on a case-by-case basis—will show not only that intended meaning and public meaning may differ, but also that equally strong semantic arguments can be employed to lead to different public meanings . . .”).

⁵⁰ See Fallon, *supra* note 27, at 1241 (“Surprisingly or not, claims of meaning in ordinary conversation—especially regarding the kind of directive utterances that most closely resemble legal dictates or stipulations—can have the same diversity of senses as claims of legal meaning. As a result, linguistic analysis and the philosophy of language lack the tools to settle controversies in legally disputable cases.”).

It is worth noting, to avoid confusion, that “overdetermination” is itself overdetermined in meaning. Often, legal scholars use the word to describe something that has many sufficient causes,⁵¹ borrowing from the Freudian conception of the term.⁵² Even when the concept of overdetermination is applied to legal meaning, as it is in this Article, a common usage mirrors the idea of overdetermined causation.⁵³ In such cases, an overdetermined meaning is one that several sources make inevitable. However, in this Article, consistent with a communication-based understanding of the concept, “overdeterminacy”

⁵¹ See, e.g., Kimberley D. Kessler, *The Role of Luck in the Criminal Law*, 142 U. PA. L. REV. 2183, 2198 (1994) (“Jane’s case is an example of causal overdetermination: even if X did not happen, Y would have occurred because of Z.”); Richard W. Wright, *Causation in Tort Law*, 73 CALIF. L. REV. 1735, 1775 (1985) (“These are cases of overdetermined causation: cases in which a factor other than the specified act would have been sufficient to produce the injury in the absence of the specified act, but its effects either (1) were preempted by the more immediately operative effects of the specified act or (2) combined with or duplicated those of the specified act to jointly produce the injury.”).

⁵² Sigmund Freud, *Fragment of an Analysis of a Case of Hysteria (“Dora”)*, in THE FREUD READER 186 n.4 (Peter Gay ed., 1989) (“Here, as in all similar cases, the reader must be prepared to be met not only by one but by several causes—by overdetermination.”).

⁵³ See, e.g., Vivian Grosswald Curran, *Deconstruction, Structuralism, Antisemitism and the Law*, 36 B.C. L. REV. 1, 15 (1994) (“Since, however, the archreader is a hypothetical construct, the attainment of the single, overdetermined meaning derived from structuralist methodology becomes an exercise in futility, with the corollary that literary meaning ultimately is unascertainable and necessarily unverifiable.”); Duncan Kennedy, *A Semiotics of Critique*, 22 CARDOZO L. REV. 1147, 1187 (2001) (“Paranoid structuralism suggests that this same underdetermined order is overdetermined by sinister forces we deny and reproduce through denial.”); Pierre Legrand, *Paradoxically, Derrida: For a Comparative Legal Studies*, 27 CARDOZO L. REV. 631, 669 (2005) (“But what if, no matter how much a legislative text or judicial decision may project an image of completeness or definitiveness or intemporality or self-governance (and irrespective of how much this autonomy may be wanted by lawyers), in fact such a legislative text or judicial decision is always overdetermined, or constituted by the tradition or culture which it inhabits and which inhabits it?”); Jessica M. Silbey, *Judges as Film Critics: New Approaches to Filmic Evidence*, 37 U. MICH. J.L. REFORM 493, 559 (2004) (“So, with regard to *Fusco v. General Motors* and the substantial similarity test, is the court afraid that the film’s meaning is overdetermined—the jury cannot help but see the film as the accident at the center of the trial despite the film’s staged nature—or is the court afraid that the film’s meaning is underdetermined—the court cannot control what the jury sees in the film at all, as ‘no words can capture’ it?”); Robin West, *Taking Moral Argument Seriously*, 74 CHI.-KENT L. REV. 499, 506 (1999) (“In fact, as critical scholars themselves often emphasize, legal conclusions are often depressingly overdetermined even when the texts that conventionally understood should authoritatively compel them are themselves transparently indeterminate.”); Cheryl I. Harris, *Whitewashing Race: Scapegoating Culture*, 94 CALIF. L. REV. 907, 938 (2006) (book review) (“My point is not that there was no violence; rather, the frame of ‘law and order’ overdetermined how we interpreted both the extent and nature of that violence and how we constructed the response (or nonresponse).”).

is intended to mean something quite different. “Overdeterminacy” is the idea that certain words, phrases, and larger texts give rise to multiple, potentially contradictory, viable meanings.⁵⁴

Instead of speaking about how certain legal questions are indeterminate while others are determined, constitutional readers should first approach a question by considering the entire universe of viable meanings. If it so happens that only one is viable (using any criteria), the normal tools associated with the determinism continuum suffice. However, once it is established that there are at least two or more viable interpretations, as those in constitutional litigation regularly contend, the rules of determinacy and indeterminacy are inapplicable and, likely, counterproductive.

While the overdeterminacy thesis, described herein, is only a descriptive account of constitutional adjudication, it has significant normative implications. Chiefly, the tools being deployed in the battles over constitutional meaning are ill-equipped to describe, resolve, or make sense of such disputes. To expect that phrases like “Cruel and Unusual Punishment” or “Due Process” can be reduced to having a singular meaning or none at all ignores both the way language operates and how cases are decided.⁵⁵ Instead, it is essential that scholars and judges develop and improve upon methods and theories related to the selection or synthesis of constitutional meaning to address the numerous situations where determinist and indeterminist accounts simply fail.⁵⁶ For now, it is enough to outline the basics of overdetermined

⁵⁴ See, e.g., Dan M. Kahan, *Signaling or Reciprocating? A Response to Eric Posner's Law and Social Norms*, 36 U. RICH. L. REV. 367, 371 (2002) (“A theory can be said to be overdetermined when it furnishes a menu of opposing behavioral mechanisms that are sufficiently abundant to account for essentially any phenomena as well as its negation.”); Richard K. Sherwin, *A Matter of Voice and Plot: Belief and Suspicion in Legal Storytelling*, 87 MICH. L. REV. 543, 568 n.88 (1988) (“There is a paradox here. It resonates within the overdetermined meaning of the phrase ‘being taken’ (or ‘taken in’) by the other’s words The issue here can be expressed by the query: Where is the other taking me, and do I really want to go? Or, do I even know that I’ve been ‘taken?’ The overdetermination of the word ‘taken,’ therefore, turns upon the cunning aspect of the word—I am both taken by (willingly, if not entirely knowingly), and taken in by (unwillingly and unknowingly), the word’s charming effect upon me.”); Slavoj Žižek, *Ideology Between Fiction and Fantasy*, 16 CARDOZO L. REV. 1511, 1516 (1995) (describing overdetermination as the “coexistence of two incompatible fictions”).

⁵⁵ See John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493, 545 (1997) (recognizing that, based upon an originalist inquiry, there remains substantial ambiguity as to the meaning of “due process” at the time of constitutional and Fourteenth Amendment ratification).

⁵⁶ A charge may be made that the overdeterminacy thesis is just a repackaging or refining of the indeterminacy thesis. See generally Ken Kress, *Legal Indeterminacy*, 77 CALIF. L. REV. 283 (1989) (arguing that indeterminacy in the law is moderate rather than severe and does little to “undermine the law’s legitimacy”); Lawrence B. Solum, *On the Indeterminacy*

meaning as a reason to reject the basic transmission model. Later, in Part III, I will revisit the issue and more fully explore overdetermined meaning in analyzing constitutional conflicts related to the Fourth Amendment, the Ex Post Facto Clause, and the First Amendment.

2. Relational Communication

Another major failing of the transmission model is that it does not recognize that constitutional communication, although not dialogical, is not, as stated by Wilbur Schramm, “something passing from sender to receiver, like a baseball from pitcher to catcher . . . but rather a relationship.”⁵⁷ That is, the legitimacy and underpinnings of the Constitution’s connection to modern America is a

Crisis: Critiquing Critical Dogma, 54 U. CHI. L. REV. 462 (1987) (critiquing the indeterminacy thesis and its viability as a critical framework). At first blush, this objection might seem odd based on the continuum described herein whereby indeterminacy and overdeterminacy are polar opposites. Nonetheless, from a determinist perspective, the two theories share similarities. Both reject the notion of a single “correct” answer to many legal problems. Each theory challenges the formalist methods of interpretation. And both theories contend that judges are afforded wide latitude in applying interpretative methods to reach a predetermined outcome. A full examination of this issue is beyond the scope of this Article, but the objection warrants at least some rebuttal as follows.

There are at least three sets of methodological considerations that arise under the overdeterminacy thesis, but not the indeterminacy thesis (in its various forms). First, while the overdeterminacy thesis rejects many existing modes of interpretation, it still supports the project of interpretation. Indeterminacy as a concept, in contrast, necessitates a breakdown of interpretative methods such that political considerations fill the void. While the overdeterminacy thesis often recognizes that there are not clear interpretative answers to many legal problems, the theory still asserts that most legal questions can be answered through interpretation.

Second, the strong version of the indeterminacy thesis flirts with a relativist idea that law is almost always thoroughly mutable to a particular political view. In contrast, overdeterminacy as a concept necessitates that there is a limited number of interpretative options and among those alternatives, there are better and worse options, as elaborated upon in Part IV *infra*. In this way, the overdeterminacy thesis limits the possible interpretations versus the nearly infinite options embodied by an indeterminist view.

Third, indeterminacy theories focus exclusively on politics and class to explain judicial outcomes. Overdeterminacy opens the explanations to a range of perspectives including modern communication theory, psychology, classical rhetoric, sociology, anthropology, and economics. This is because the overdeterminacy thesis is designed to acknowledge that many judges and other constitutional actors are motivated by and act upon different assumptions from a range of fields. These baseline perspectives of constitutional readers often create the multiple meanings that the overdeterminacy thesis seeks to recognize and, ultimately, resolve.

⁵⁷ Luis Ramiro Beltrán, *A Farewell to Aristotle: ‘Horizontal’ Communication*, in COMMUNICATION FOR SOCIAL CHANGE ANTHOLOGY: HISTORICAL AND CONTEMPORARY READINGS 157, 161 (Alfonso Gumucio-Dagron & Thomas Tufte eds., 2006).

relationship even if communication only comes from the founding generation. The interaction between the framers and today's Americans is a relationship between differing cultures based upon constitutional text and related documents.

One characterization of this relationship, and the problems that it entails, is in what Alexander Bickel labeled the "countermajoritarian difficulty."⁵⁸ The widely debated concern is focused on the inherent tension between a fixed constitution interpreted through judicial review and representative democracy.⁵⁹ The "difficulty" is that a written constitution with judicial review of constitutionality is at odds with continued popular sovereignty, which runs counter to the terms of the Constitution.⁶⁰ The counter-majoritarian difficulty is of particular concern for new originalists who believe in aggressive judicial review of statutes inconsistent with the original public meaning of the Constitution.⁶¹

Among many possible responses to the counter-majoritarian difficulty, consider John Hart Ely's solution: to endorse judicial review when it reinforces policies that undergird democracy.⁶² When minority rights are adversely curtailed by majoritarian action, judicial review can serve a pro-democracy function by blocking the rule of the majority.⁶³ This resolution arguably protects both the sovereignty of the founding generation and the modern public by characterizing them as essentially aligned.

⁵⁸ See ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (2d ed. 1986).

⁵⁹ Gabriel J. Chin & Randy Wagner, *The Tyranny of the Minority: Jim Crow and the Counter-Majoritarian Difficulty*, 43 HARV. C.R.-C.L. L. REV. 65, 67 (2008) ("The countermajoritarian difficulty posits that laws are presumptively legitimate as the fruit of the democratic process and majority will. Judicial interference therefore requires explanation and justification.").

⁶⁰ *Id.* ("The task of constitutional law, John Hart Ely wrote . . . 'has been and remains that of devising a way or ways of protecting minorities from majority tyranny that is not a flagrant contradiction of the principle of majority rule.'" (quoting JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980))).

⁶¹ See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2611 (2015) (Roberts, C.J., dissenting) ("Under the Constitution, judges have the power to say what the law is. The people who ratified the Constitution authorized courts to exercise 'neither force nor will but merely judgment.'" (quoting THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961))).

⁶² See ELY, *supra* note 60, at 8 (postulating that judicial review, when used to further the protections afforded by the Bill of Rights, is an act of the people insofar as the people ratified the Constitution); see also Richard H. Fallon, Jr., *The Core of an Uneasy Case for Judicial Review*, 121 HARV. L. REV. 1693, 1694 (2008) ("[L]egislatures and courts should both be enlisted to protect fundamental rights and, accordingly, that both should have veto powers over legislation that might reasonably be thought to violate such rights.").

⁶³ See Chin & Wagner, *supra* note 59, at 67-69.

The discussion of the counter-majoritarian difficulty by Ely and numerous legal academics illustrates the degree to which the communication between the framers, modern judges, and the public is at the core of constitutional legitimacy.⁶⁴ To protect values such as popular sovereignty across multiple generations, there must be a communicative relationship between the framers and modern readers. Without acknowledgement of the framer-judge relationship, there is not a good reason to give credence to the original meaning, intent, or values of the constitutional framers. The transmission model simply omits the relational aspect of constitutional communication by treating the constitutional relationship as identical in process to interpersonal small talk between two strangers.

This shortcoming of the transmission model is of particular concern to how interpreters address the disenfranchised and voiceless at the time of the Constitution's ratification (e.g., slaves, freed slaves, non-property owners, and women). For example, the relationship between descendants of slaves and the intended meaning of the original constitutional text is woefully undertheorized. While such persons might have obvious concerns related to constitutional provisions about slavery, they might also have very different perspectives about free speech, due process, and the right to keep and bear arms. The basic transmission model and many theories of constitutional interpretation lack the relational element that recognizes that people who were originally disenfranchised might themselves (or via their descendants) have a varied interpretation that was omitted from the historical record due to their oppression.

3. Communication Is Not Mere Information Sharing

The transmission model treats communication as the simple process of information sharing. While it acknowledges some possible difficulties in coding and encoding meaning, it typically understates the implications of those concerns. This is because the transmission model is essentially acontextual and oversimplifies problems of communication. The model presupposes that meaning is separable from social and political setting. In contrast, modern theories recognize that communication is entirely performative within a larger social setting. Robert Wess succinctly states: "The performative is the whole pie, not a mere piece."⁶⁵

⁶⁴ See, e.g., WHITTINGTON, CONSTITUTIONAL INTERPRETATION, *supra* note 9, at 154 ("The judiciary can speak neither for nor to the absent sovereign. As a part of the government, the judiciary is merely an agent of the sovereign, not its representative The judiciary's particular claim to authority can come only from the accuracy of its efforts to interpret the Constitution . . . [which indicates] a special obligation by the courts to interpret the fundamental law . . .").

⁶⁵ Wess, *supra* note 44, at 116.

Saul Cornell recently offered a strong version of this objection directed specifically at new originalists from the intellectual history tradition:

Originalism in this sense is literally an “idiotic” constitutional theory. It treats most Americans in the Founding era as if they were voiceless: empty vessels for holding linguistic and contextual facts. By ignoring human agency, originalists . . . are guilty of succumbing to the enormous condescension of posterity . . . This approach drains politics from one of the most politically contentious moments in American history. To the extent that it was possible to fix the constitutional meaning for any provision of the Constitution (apart from the most trivial constitutional questions), such a process was a function of political and ideological forces, not the neutral philosophical application of a set of universal truths about language.⁶⁶

Communication generally, and constitutional communication specifically, involves an often rigorous process of coding by the sender, and decoding by the receiver. The receiver has to have a similar system of signs in place; thus, the communication event is completed in the receiver’s mind. To the degree that the signs or understanding of signs varies between the sender and receiver, error will be introduced. As numerous examples in this Article illustrate, such communication is prone to various breakdowns that are not recognized within the transmission model.⁶⁷

C. *Other Elements of Communication*

To rectify the numerous shortcomings of Shannon and Weaver’s basic theory of communication, scholars added several other significant elements to the basic transmission model. Only some of the major revisions in modern communication research are applicable to the constitutional context because of the lack of ongoing dialogue between the framers and modern readers. The key portions of modern models of communication, as adapted to the constitutional context, are intent, pretext, subtext, setting (including intertextuality), and precedent.

1. Intent, Pretext, and Subtext

Intent, pretext, and subtext are related concepts concerning the motives and goals of authors. Pretext, as relevant to constitutional interpretation, conceals motives and ideas behind the text that are not reflected within the text.⁶⁸ Pretext often hides an intent less palatable to a receiver than the stated

⁶⁶ Cornell, *supra* note 43, at 9-10 (internal footnotes and quotation marks omitted).

⁶⁷ See *supra* Introduction; see also *infra* Part III.

⁶⁸ JOHN S. NELSON, TROPES OF POLITICS: SCIENCE, THEORY, RHETORIC, ACTION 138 (1998) (relating pretext to the concept of ethos).

motivation of the sender.⁶⁹ As a result, if pretext exists, the text includes at least some element of propaganda obfuscating the sender's real goals.

Subtext is the meaning for constitutional concepts that was not revealed in the explicit text or surrounding debates but nonetheless communicated to at least some receivers.⁷⁰ That the meaning is hidden does not mean it was nefariously submerged. There are many reasons subtext might not be made explicit: inadequacy or imprecision of language, limited foresight of the author, language selected by compromise, cognitive confusion, and poor language choices. Nonetheless, subtext, like pretext, can in many cases be inferred through rigorous analysis of other portions of the same text, as well as other contemporaneous texts such as the Federalist Papers.

Intent is the motive or purpose for a particular decision by constitutional framers. Intent cannot be directly accessed and can only be understood through the examination of the combination of text, subtext, and pretext. If there is substantial pretext surrounding a text, it must be unpacked and separated to better access authorial intent. Conversely, subtext must be revealed insofar as it discloses motives.

The Constitution contains numerous examples of intent, pretext, and subtext. However, that the Constitution is embedded with such communication elements does not necessarily imply that the framers sought to fully obfuscate their true intentions. Rather, subtexual meaning is based on the idea that rhetoric is often used to shape a message.⁷¹ The Federalist Papers, for example, are both a valuable resource for understanding intent of the framers directly and potentially misleading to the degree such documents were prepared as a public relations effort to increase the odds of state ratification.⁷² Insofar as the Papers were used to rally support for ratification, they might indicate situations wherein the framers were downplaying objectionable content in the Constitution while emphasizing those provisions most popular to contemporaneous readers of the Papers.⁷³

Consider a well-worn example where pretext, subtext, and text, in combination, yield a more complex interpretative framework. Charles Beard contends that the Constitution was largely a means for elites to protect their

⁶⁹ *Id.*

⁷⁰ *Id.* at 146 (discussing how subtext can be understood through analyzing the sender, receiver, message, and supplemental context).

⁷¹ NELSON, *supra* note 68, at 146 (discussing how subtext often taps on an underlying mythic structure to persuade audiences).

⁷² William N. Eskridge, Jr., *Legislative History Values*, 66 CHI.-KENT L. REV. 365, 419 (1990) ("Nor can the ideas of the authors [of the Federalist Papers] even be confidently attributed to the authors themselves, for the essays were, after all, propaganda documents, seeking to beat down anti-federalist objections to ratification.").

⁷³ See Dan T. Cohen, *A Rhetoric for Ratification: The Argument of the Federalist and Its Impact on Constitutional Interpretation*, 56 DUKE L.J. 469, 530 (2006).

property interests.⁷⁴ Assuming for purposes of this example that Beard is correct, the intent and subtext of the framers would be protecting property interests. However, because such motives might have been contrary to engendering popular support, pretext was used to disguise the property motives of the elites. Beard essentially contends that the text of the Constitution was chosen not for the reasons widely understood based upon a cursory reading of its text.⁷⁵ One need not agree with Beard's specific arguments to recognize the larger point that the pretext used to garner support of the Constitution need not always reflect intended constitutional meaning. By separating pretext, subtext, and intent, the reader can properly decode the text of a document to determine what weight should be given to linguistic interpretations of particular textual provisions.

Often, the intended receiver(s) of a message determine(s) the subtext, pretext, and intent of a particular message. The framers of the United States Constitution likely had several audiences in mind when they drafted the intended new governing document for the breakaway colonies. Of immediate concern, they wanted to appeal to ratifiers in each of the states.⁷⁶ They also were concerned with white, male, land-holding members of the public who might influence those ratifiers.⁷⁷ It is unclear how much consideration was given to interpretation by the contemporaneous courts.⁷⁸ It is even more

⁷⁴ CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 17 (1913) (arguing that a showing that "substantially all of the merchants, money lenders . . . and their professional associates" supported the Constitution while "substantially all or the major portion of the opposition came from the non-slaveholding farmers and the debtors" would demonstrate that the Constitution was the product of "a group of economic interests which must have expected beneficial results from its adoption").

⁷⁵ *Id.* at 73.

⁷⁶ Erwin Chemerinsky, *The Price of Asking the Wrong Question: An Essay on Constitutional Scholarship and Judicial Review*, 62 TEX. L. REV. 1207, 1241 (1984) ("In short, because 'so many different people in so many different circumstances' are part of ratification, 'one cannot hope to gather a reliable picture of their intentions from any perusal of the legislative history.'" (quoting ELY, *supra* note 60, at 17)); John G. Wofford, *The Blinding Light: The Uses of History in Constitutional Interpretation*, 31 U. CHI. L. REV. 502, 508 (1964) (arguing the imprudence of ignoring the views of the ratifiers "if we are really searching for the states of mind of those responsible for the presence in the Constitution of a particular provision").

⁷⁷ Chemerinsky, *supra* note 76, at 1228 n.145 (1984) ("[I]t should not be forgotten that the Framers, who were all white, land-owning males, were hardly representative of their society, let alone ours.").

⁷⁸ Compare PHILLIP BOBBITT, CONSTITUTIONAL FATE 10 (1982) (arguing that "the adducement of contemporary British canons of statutory interpretation is largely besides the point"), with H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 888 n.15 (1985) ("To whatever extent Professor Bobbitt is making the

ambiguous as to how much thought was given to the interpretations by future generations.⁷⁹ Nonetheless, it is fair to say that the Constitution was communicated with several audiences and goals in mind, even if there is not universal agreement as to the specific audiences targeted and goals sought.

But what, then, is the implication of recognizing different possible receivers of the framers' constitutional message? It depends. If one believes that the framers were primarily focused on political opposition by the white male elite, then we might think that the appeasement of pro-slavery constituencies was mere pretext in conflict with the desires and intentions of the framers.⁸⁰ If, on the other hand, one thinks that the framers were only concerned with their own parochial interests, including slave ownership, then intentions and the text are largely consistent.⁸¹ Similarly, if the framers were primarily focused on avoiding a repetition of problems with the Articles of Confederation, then we might not infer that they intended Article I be read as a statement of enumerated powers.⁸² If, however, they fixated on avoiding becoming like the nation they broke away from, the enumerated powers view of Article I makes far more sense.⁸³ Ultimately, though, reliably identifying the audience(s) for particular messages helps support particular interpretations as superior.

2. Setting and Intertextuality

Setting is the place and time where communication occurs whether at the time of ratification (historical setting) or interpretation (modern setting).⁸⁴ It

historical assertion that late 18th century Americans regarded contemporaneous canons of construction as 'beside the point,' the abundant evidence to the contrary . . . suggests that he is mistaken.”).

⁷⁹ Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 721-31 (2011) (citing Powell, *supra* note 78, at 885-88).

⁸⁰ See Charles A. Lofgren, *The Original Understanding of Original Intent?*, 5 CONST. COMMENT. 77, 77-78, 81-82 (1988) (citing Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 375 n.130 (1981)).

⁸¹ See BEARD, *supra* note 74, at 29.

⁸² See *Hughes v. Oklahoma*, 441 U.S. 322, 325-26 (1979) (stating that the commerce clause “reflected a central concern of the Framers that . . . in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued . . . the States under the Articles of Confederation”); Douglas G. Smith, *An Analysis of Two Federal Structures: The Articles of Confederation and the Constitution*, 34 SAN DIEGO L. REV. 249, 285-88 (1997) (discussing the addition of powers of taxation and regulation of interstate commerce to the enumerated powers of the federal government under the Constitution).

⁸³ Erin M. Freedman, *Why Constitutional Lawyers and Historians Should Take a Fresh Look at the Emergence of the Constitution from the Confederation Period: The Case of the Drafting of the Articles of Confederation*, 60 TENN. L. REV. 783, 810-15 (1993).

⁸⁴ SKY MARSEN, COMMUNICATION STUDIES 38 (2006) (“Setting is the spatiotemporal and physical aspect of the communication interaction.”).

includes a range of ideas including linguistic meaning, social problems, technology, political considerations, and culture. Within a setting, there are also numerous other texts including newspapers, dictionaries, and scholarship which can give insight to the meaning of other texts.

A very basic example of the significance of setting in interpretation is in deixis.⁸⁵ Deixis are those words—such as “this,” “that,” “I,” or “today”—that are defined entirely in relation to the setting in which they are used.⁸⁶ A reader cannot interpret a text’s use of the word “tomorrow” without knowing what today is. Constitutional provisions are not strictly deixis, but they embody some of the same concerns. It is difficult to understand the “privileges and immunities of citizens of the United States”⁸⁷ in the Fourteenth Amendment without a contextual sense of the cultural norms exhibited at the country’s founding or in the modern setting (depending upon what interpretative method is used). Similarly, the phrases “excessive bail” and “unusual punishments”⁸⁸ in the Eighth Amendment are relative in nature and, thus, depend upon accurate knowledge of the historical setting’s non-excessive and usual practices.

Intertextuality, as a component of setting, involves the use of one word or phrase across multiple texts.⁸⁹ Meaning of words or phrases is determined by examining usages in multiple texts. Originalists of all types as well as living constitutionalists heavily rely on intertextuality to interpret constitutional provisions. For example, the critical pieces of evidence to support specific interpretations of constitutional provisions for originalists are other texts that use the same words or phrases as the Constitution that were available at the time of drafting and/or ratification. Those texts might include something as basic as a dictionary, a passage from the Federalist Papers, or a newspaper from the time. Because texts both generate and reflect culture at different times, intertextuality is inextricably connected with the concept of “setting.”

3. Precedent

Precedent is the body of law that has been derived based upon prior interpretations of the Constitution. It neither includes precedential use of certain interpretative methods nor an assessment over whether prior interpretations were “correct” in any sense of the word. In terms of constitutional theory, precedent often plays the metaphorical party-crasher that

⁸⁵ HARTLEY, *supra* note 17, at 61.

⁸⁶ *Id.*

⁸⁷ U.S. CONST. amend. XIV, § 1.

⁸⁸ U.S. CONST. amend. VIII.

⁸⁹ HARTLEY, *supra* note 17, at 126-27 (suggesting it may be useful “to think of intertextuality as a means of understanding the fluid relationship among the media, the text and the audience”).

is not cleanly integrated into global interpretative models.⁹⁰ Indeed, the most strident originalists and living constitutionalists see little reason to adhere to precedents at odds with the general theory espoused.⁹¹ Although allowances for precedent are often made in the various theories, such incorporation often resembles a clumsy afterthought to make the theories more palatable to a legal culture with a strong affinity for *stare decisis*.⁹² In contrast, a communication-based approach actively embraces the value of prior interpretations of the language presently being interpreted.

II. MODELING CONSTITUTIONAL COMMUNICATION

Having identified different components of constitutional interpretation, it is fair to ask what such new labeling accomplishes. After all, there is already a rather elaborate developed language in place to describe the debates about constitutional interpretation. Overall, the communication-derived naming of constitutional interpretation actors and methods serves two separate functions. First, as explored in this Part, the new terminology can more effectively describe and capture the fault lines of modern constitutional debates. At present, the ideological connections of different theories (originalism—conservatism; and living constitutionalism—liberalism) often mask similarities of different constitutional interpretation models.⁹³ Second, as examined in Part III, the redefinition of concepts central to the modern constitutional interpretation debates ultimately point toward a new approach to the enterprise of interpretation. By fully recognizing the implications of when the dominant theories selectively, and often arbitrarily, omit certain fundamental components of communication, the complete communication model supports a different mode of inferring constitutional meaning.

⁹⁰ See, e.g., Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 22 CONST. COMMENT. 257, 258-59 (2005) (addressing criticisms that new originalism effectively ignores precedents).

⁹¹ Berman, *supra* note 8, at 34-35 (analyzing how Justice Scalia viewed the use precedent when it runs contrary to originalist interpretation, and characterizing originalism and *stare decisis* as an “unhappy marriage”).

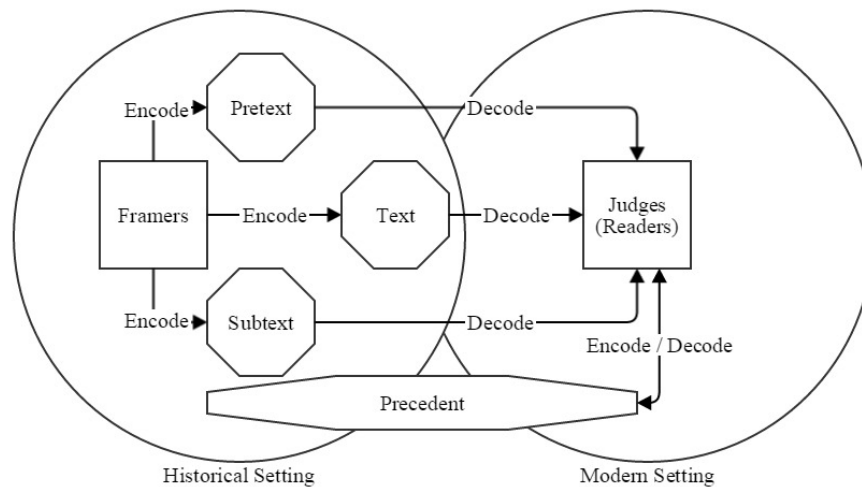
⁹² See James E. Ryan, *Does It Take a Theory? Originalism, Active Liberty, and Minimalism*, 58 STAN. L. REV. 1623, 1631 (2006) (discussing Justice Scalia’s integration of precedent into his view of originalism as one of exception-making).

⁹³ See Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 246 (2009) (“[O]riginalists’ understanding of the relationship among originalism’s current meaning, its original meaning, and its underlying principles is similar to living constitutionalists’ understanding of the relationship among the Constitution’s current meaning, its original meaning, and its underlying principles.”).

A. *Complete Constitutional Communication Model*

Rather than starting with the incomplete models implicitly used by the major constitutional theories, it is more informative to begin with the whole picture. Figure 4 below outlines a complete constitutional communication model which includes framers, historical setting, modern setting, pretext, subtext, constitutional text, constitutional readers (judges), precedent, coding, and decoding.

Figure 4: Complete Constitutional Communication Model



Whereas the basic transmission model included the sender, receiver, message, encoding, and decoding, the complete model incorporates numerous contextual, interpretative, and methodological factors. The complete model shows that the framers produced three separate forms of communication (text, pretext, and subtext) in a particular social and political setting. Those three components of the framers' communication are then decoded by modern readers, primarily judges within our existing social and political environment. The judges also integrate judge-made precedent that previously interpreted constitutional provisions in a wide multitude of social and political settings. In doing so, judges encode new precedent for future judges to interpret in different cases. In contrast, the leading theories of constitutional interpretation leave out significant components of constitutional communication.

B. *Communication Models of Select Constitutional Interpretation Theories*

The state of modern debates about constitutional interpretation is perhaps best represented by Jack Balkin's seeming betrayal of living constitutionalism

in favor of new originalism.⁹⁴ Balkin, who had previously been one of the most outspoken advocates of the view that constitutional meaning evolves over time, appeared to reverse course and join the other side.⁹⁵ Yet, the Balkin-as-traitor story did not properly describe Balkin's championing of original meaning originalism. In reality, he contended that living constitutionalism and original meaning originalism, when properly understood, are wholly compatible.⁹⁶ The synthesizing approach of Balkin epitomizes the ongoing battles about how best to understand the Constitution. That numerous strains of originalism and living constitutionalism have emerged demonstrates that the binary understanding of the normative battle is inadequate.

Although the discussion among scholars about constitutional interpretation has become highly fluid, it is helpful to try to locate some of the various theories and key players advocating those theories at this particular moment in time. Among the significant voices in the normative debate, new originalists such as Lawrence Solum,⁹⁷ Randy Barnett,⁹⁸ and Keith Whittington⁹⁹ have advanced a specific form of originalism which places linguistic meaning during the time of a constitutional provision's enactment at the forefront of interpretation. In contrast, Larry Alexander and others have defended intentionalist originalism (intentionalism) that maintains that the intent of the Framers should control the adjudication of meaning.¹⁰⁰ Michael Rappaport and John McGinnis have advanced yet another theory of originalism which emphasizes the original methods of interpretation (methods originalism).¹⁰¹

⁹⁴ Ethan J. Leib, *The Perpetual Anxiety of Living Constitutionalism*, 24 CONST. COMMENT. 353, 353 (2007) (arguing that Professor Balkin "has forsaken" living constitutionalists by adhering to the new originalism).

⁹⁵ *Id.*

⁹⁶ Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. L. REV. 549, 549 (2009) ("Original meaning originalism and living constitutionalism are compatible positions.").

⁹⁷ See Solum, *Semantic Originalism*, *supra* note 9, at 2 ("The central claim of Semantic Originalism is that constitutional law includes rules with content that are fixed by the original public meaning of the text—the conventional semantic meaning of the words and phrases in context.").

⁹⁸ See Barnett, *supra* note 25, at 23 (critiquing Justice Scalia's "faint-hearted" originalism and arguing that "a fearless commitment to originalism might avoid rather than reach the horrible results that causes even so fearless a jurist of originalism to become faint of heart").

⁹⁹ See Whittington, *supra* note 8, at 377 ("At its most basic, originalism argues that the discoverable public meaning of the Constitution at the time of its initial adoption should be regarded as authoritative for purposes of later constitutional interpretation.").

¹⁰⁰ See Alexander, *supra* note 15, at 539 ("[T]he truth about interpretation [is] that its aim is to understand what an author or authors intended to communicate").

¹⁰¹ See John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751,

Jack Balkin has, according to some,¹⁰² invaded originalist space by arguing that the original underlying principles of the Constitution are the touchstone for determining meaning (principles originalism).¹⁰³

Outside of the civil war among originalists, Justice Stephen Breyer posited a version of living constitutionalism in his book *Active Liberty*¹⁰⁴ (Breyer's constitutionalism). Larry Kramer¹⁰⁵ and Mark Tushnet¹⁰⁶ have advanced a theory that locates the site of constitutional interpretation with the people and their representatives (popular constitutionalism). There are numerous other variations of theories under the broad umbrella of living constitutionalism, but those listed above are sufficient to illustrate how assumptions about communication explain the differences among the interpretative approaches.

1. New Originalism

It is helpful to start applying the model of constitutional communication to new originalism because it has already received substantial attention in this Article.¹⁰⁷ New originalism largely adopts the basic transmission model, but also adds certain elements from the historical setting as well. These elements of setting are primarily other texts which use language identical or similar to words, sentences, and phrases in the Constitution's text. Figure 5 illustrates the streamlined model of communication used by new originalists.

751 (2009) ("Under this approach, the Constitution should be interpreted using the interpretive methods that the constitutional enactors would have deemed applicable to it.").

¹⁰² Leib, *supra* note 94, at 353-54 (describing "Balkin's new constitutional theory" as "a lefty originalism").

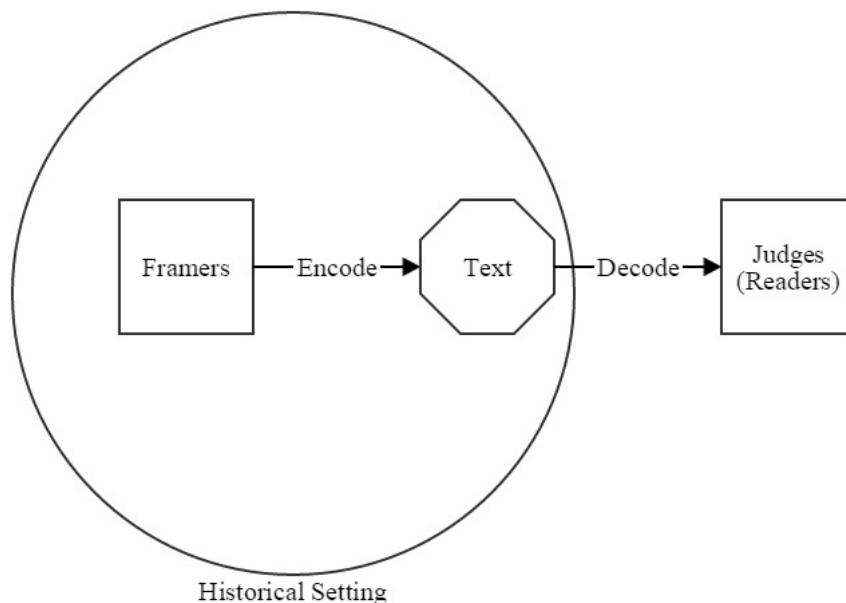
¹⁰³ See BALKIN, *supra* note 40, at 43-44 (distinguishing between those constitutional provisions he deems as rules and those which are standards or principles and arguing that "where the original meaning of the text offers us a standard or principle, we should not necessarily be bound by how the people who adopted the text would have applied it").

¹⁰⁴ See STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 6 (2005) (arguing that "the Constitution's democratic objective" is "a source of judicial authority" to interpret legal text to "yield a better law" that will "help a community of individuals democratically find practical solutions to important contemporary social problems").

¹⁰⁵ See LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 8 (2004) ("[T]he original conception of constitutionalism . . . assigned ordinary citizens a central and pivotal role in implementing their Constitution . . . [and] [f]inal interpretive authority rested with 'the people themselves'").

¹⁰⁶ See Mark V. Tushnet, *Popular Constitutionalism as Political Law*, 81 CHI.-KENT L. REV. 991, 991 (2006) (analyzing critiques of KRAMER, *supra* note 105, and arguing that his proposition "that constitutional law is a distinctive or special kind of law" is correct).

¹⁰⁷ See *supra* Section I.C.2 (discussing the use of The Federalist Papers, dictionaries, and other resources to interpret the Constitution).

Figure 5: New Originalism Constitutional Communication Model

New originalists believe that constitutional text is king.¹⁰⁸ Although they recognize that some ambiguity can arise during decoding and encoding, there is a strong assumption of determinate meaning of textual provisions.¹⁰⁹ The historical setting is incorporated insofar as such contextual factors shine light on textual meaning at the time of ratification.¹¹⁰ If semantic analysis of constitutional text fails, new originalists turn to a process of construction that resembles a conventional living constitutionalist approach.¹¹¹ Nonetheless, for core constitutional questions, the simple model of communication exhibited in Figure 5 is used.

One arguably problematic omission from the depiction of new originalism is the ratifiers of the constitutional text.¹¹² Indeed, it is the focus on the ratifiers

¹⁰⁸ Whittington, *supra* note 8, at 379 (“The first point of substantial agreement among modern originalists is an emphasis on original meaning of the constitutional text.”).

¹⁰⁹ *See id.* at 405.

¹¹⁰ *See supra* Section I.C.2 (discussing the use of The Federalist Papers, dictionaries and other resources to interpret the Constitution).

¹¹¹ *See* Colby & Smith, *supra* note 93, at 265 (discussing the changing meaning of originalism and its similarity to living constitutionalism).

¹¹² *See* Chemerinsky, *supra* note 76, at 1241 (discussing the difficulty of determining the intentions of the ratifiers).

that was the basis for being concerned with historical understandings of the Constitution.¹¹³ The omission should only be taken as one of form and not substance. The ratifiers are incorporated in the decoding process of the modern readers of the constitutional text. When a reader applying new originalism interprets text of a constitutional provision, she is concerned with the ratifiers' understanding of that provision insofar as it reflects the public interpretation.

2. Intentionalism

Intentionalist theories focus on the purposes and goals of the framers in drafting the Constitution.¹¹⁴ In a sense, intentionalists hope to find what communication scholar Kenneth Burke calls the "Constitution-behind-the-Constitution."¹¹⁵ Although theories based solely upon authorial intentionalism are highly controversial in communication studies,¹¹⁶ they continue to receive support among a segment of constitutional scholars.¹¹⁷ Figure 6 below illustrates the elements of the complete constitutional communication model that are included in an intentionalist mode of interpretation.

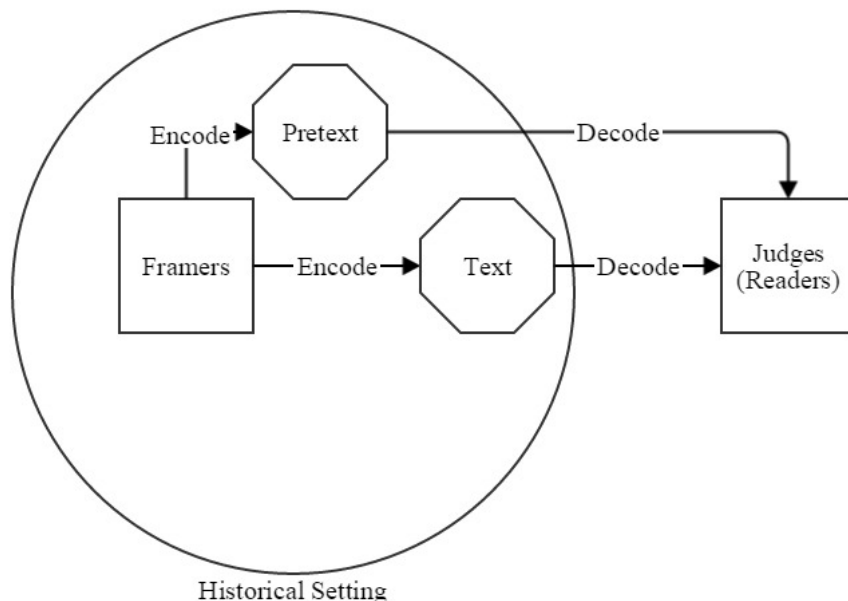
¹¹³ Berman, *supra* note 8, at 9 ("[C]riticism of intent-based interpretive theories, along with recognition that it was by virtue of ratification that the Constitution became law, pushed many in the growing originalist camp away from the framers in favor of the ratifiers—and thus away from 'intentions' and toward 'understandings.'").

¹¹⁴ *Cf.* RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 402-03 (2d ed. 1977) (stating that any claims to the effect that the Framers intended to have future generations rewrite the Constitution are "opposed to historical fact" as "[t]he sole and exclusive vehicle of change the Framers provided was the amendment process").

¹¹⁵ KENNETH BURKE, A GRAMMAR OF MOTIVES 362-63 (1945).

¹¹⁶ HARTLEY, *supra* note 17, at 13-14 (describing authorial intentionalism as "dishonest" because it "imput[es] to the author meanings that are necessarily the creation" of the reader).

¹¹⁷ *See, e.g.,* Kay, *supra* note 15, at 719-20 ("But, unlike intended meaning, there is no 'fact of the matter'—no 'real' public meaning. Public meaning is, quite explicitly, an artificial construct.").

Figure 6: Intentionalism Constitutional Communication Model

Notably, intentionalists implicitly add pretext to their model of interpretation but would not identify it as such. Documents such as the Federalist Papers, which might have a secondary function of spreading propaganda, are generally taken at face value by intentionalists.¹¹⁸ Thus, under such an approach, the decoding of pretext is different than it is under the contextualist approach using the complete constitutional communication model. Decoding of pretext is entirely literal by intentionalists and assumes complete honesty, accuracy, and clarity by the constitutional framers.

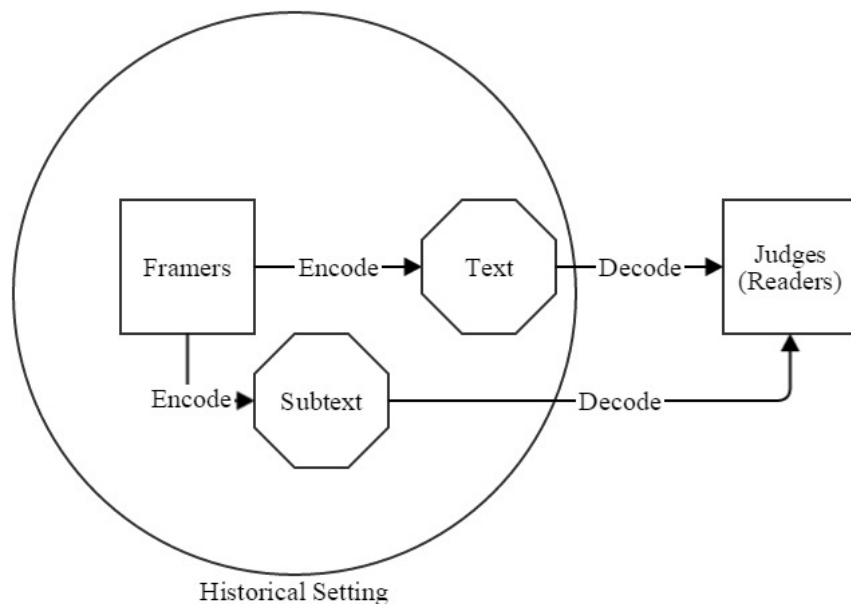
3. Principles Originalism

Jack Balkin's principles originalism comes closest, among the leading debated theories, to using the complete constitutional model. What Balkin characterizes as underlying principles might be characterized by a communication researcher as subtext. He also offers a richer account of encoding and decoding as a reason to prefer principles over isolated textual

¹¹⁸ John F. Manning, *Textualism and the Role of The Federalist in Constitutional Adjudication*, 66 GEO. WASH. L. REV. 1337, 1341-42 (1998) (acknowledging the argument that sources such as the Federalist Papers are useful "presumably because a reasonable legislator would have consulted them to determine the meaning of the law for which he or she was voting").

provisions. However, as an originalist, Balkin's integration of precedent is incomplete, at least until moving to constitutional construction analysis.

Figure 7: Principles Originalism Constitutional Communication Model



Indeed, the depiction of Balkin's principles originalism in Figure 7 might unfairly omit both pretext and the modern setting. Nonetheless, I ultimately excluded those two portions of the complete communication model because Balkin focuses on the underlying principles embodied in constitutional subtext and prioritizes original principles over issues particular to the modern world (relegating modern setting issues to constitutional construction).¹¹⁹

4. Popular Constitutionalism

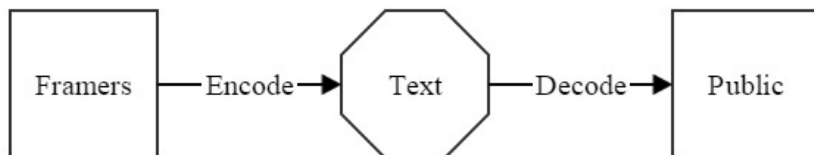
Popular constitutionalism, in many ways, represents a return to the basic transmission model proffered by Shannon and Weaver. The major reform in that view is that popular constitutionalism identifies the public as the constitutional readers instead of judges.¹²⁰ It is possible that the public might consider some of the communication concepts omitted from Figure 8, such as

¹¹⁹ Balkin, *supra* note 15, at 646 ("The American Constitution is 'living' in the sense that the participants engage in constitutional construction in order to meet the problems of their time, creating new constructions that may supplement, displace, or reinterpret older ones.").

¹²⁰ See Tushnet, *supra* note 106, at 994 ("People perform constitutional law as political law through (some of) their mobilizations in politics.").

subtext and pretext, but the theory of popular constitutionalism does not require them to do so. As a result, the only essential portion of the public's interpretation is based upon their collective understanding of the text of the Constitution.

Figure 8: Popular Constitutionalism Constitutional Communication Model



III. CONSTITUTIONAL CONTEXTUALISM

Having hopefully established that communication theory is inevitable and desirable to constitutional interpretation in Parts I and II, I now turn to demonstrating the practical effects of integrating communication research into modern debates of constitutional meaning. To appreciate the difficulties in the praxis of interpretation, it is essential to recognize the particular issues related to constitutional interpretation.

The pragmatic necessities of interpretation of founding era documents, including the Constitution, are essentially an attempt at crude time travel. Whether those texts are given substantial weight (as in originalist theories) or little value (as in living constitutionalist theories) the constitutional reader must venture through time to uncover meaning. Historians in particular have targeted originalists as overlooking the complexities of interpreting historical documents.¹²¹ However, such a criticism likely applies to any simplified theory of interpretation as applied to historical documents. If communication theory is to add value to legal debates of constitutional meaning, it must also confront this basic reality.

Constitutional scholars should recognize that interpreters in modern communication theory act as selectors or synthesizers of meaning from competing constitutional aspirations. Kenneth Burke contended that “where the attempt to carry out the wishes of a Constitution in specific legal cases involves a conflict between Constitutional wishes, what is really mandatory

¹²¹ See Cornell, *supra* note 43, at 2 (“[O]riginalism lacked a rigorous empirical method for analyzing what texts meant in the past.”); Stephen M. Feldman, *Constitutional Interpretation and History: New Originalism or Eclecticism?*, 28 *BYU J. PUB. L.* 283, 285-29 (2014) (discussing some of the criticisms made by historians against originalist methods).

upon the Court is a *new act*.”¹²² An event such as a Supreme Court decision does not exist in a vacuum—the act itself requires a sense of the identities of those involved and the particulars of the situation described.¹²³ The selective use of communication elements beyond the scope of a stated theory creates the impression of successful interpretation while the underlying theory has actually failed on its own terms.

The process of selection is inherent in language. Burke’s concept of “terministic screens” is particularly helpful in analyzing the selective nature of interpretation.¹²⁴ Burke contends that such screens are embedded in how each person views the world.¹²⁵ The effect of them is that we come to prefer certain interpretations over others.¹²⁶ As a result of terministic screens, certain cognitive obstructions are inevitable in a project of interpretation.

Using all of the concepts from communication theory, however, allows us to effectively describe and minimize the effects of terministic screens that have led to a strong preference for global rules, methods, and theories for interpretation. The process will never be perfect, but we will better be able to use the interpretative tools available to us. The constitutional contextualist model includes all of the elements in the complete communication model described in Section II.A.

At its core, constitutional contextualism means that the text being interpreted dictates the tools used for interpretation. The better the evidence is in support of a particular interpretive tool, the stronger the case is for using that tool. Methods and insights from other disciplines such as history, psychology, and political science are welcome. If the interpretative tools yield contradictory meanings, the constitutional reader must either synthesize or select the competing meanings. When selecting among multiple contradictory overdetermined meanings, the strength of the underlying evidence (and not a predetermined favored theory) should determine which interpretation is used.

This basic description of constitutional contextualism raises an obvious question: how do we evaluate concepts like “better” or “stronger” in regards to interpretation? As with much of the discussion of the method proposed here, the answer is best demonstrated through contextual praxis. Only by exploring

¹²² BURKE, *supra* note 115, at 376.

¹²³ Cf. Richard Rorty, *Freud, Morality, and Hermeneutics*, 12 *NEW LITERARY HIST.* 177, 178-80 (1980) (describing the psychological impact on an individual’s understanding of a literary text as being dependent on the audience and societal factors influencing the audience).

¹²⁴ See generally KENNETH BURKE, *Terministic Screens*, in *LANGUAGE AS SYMBOLIC ACTION: ESSAYS ON LIFE, LITERATURE, AND METHOD* 44 (1966).

¹²⁵ *Id.* at 44-45.

¹²⁶ *Id.*

particular constitutional disputes can we elucidate particular constitutional interpretative tools of evaluation.¹²⁷

To that end, I offer below a basic defense of a contextual, communication-based approach to constitutional interpretation. Constitutional contextualism offers three major advantages over dominant theories of interpretation: allowing for parallel interpretation, ending fetishization of universalist theories, and offering a more effective means of resolving constitutional conflicts. It is helpful to consider how well any new interpretative model or theory would operate in real, and not just hypothetical, scenarios in order to evaluate its relative worth. Too often, in constitutional debates of meaning, this process is omitted as interpretative battles are fought at a high-level of abstraction.¹²⁸ To further explore how a complete constitutional communication approach differs from existing theories and models of constitutional interpretation in regards to the advantages I posit for a contextual approach, I explore three areas of cases related to the constitutional text of the Fourth Amendment, the Ex Post Facto Clause, and the First Amendment's guarantee of Free Speech.

A. *Parallel Interpretation*

Many modern legal interpretative theories typically treat interpretation and construction as a serial project.¹²⁹ The use of the analytical philosophy tradition by new originalists is particularly noteworthy in that selecting the basic principles of language deflects the constitutional conversation to those

¹²⁷ There are some similarities between this approach to constitutional interpretation and the theory of interpretative eclecticism proposed by Richard Fallon. *See* Fallon, *supra* note 27, at 1243 (“In my view, a due appreciation of the nature of the interpretive challenge reveals the hubris of proposals to commit in advance to categorical selections or exclusions among otherwise plausible referents for claims of legal meaning. As I explain, interpretive eclecticism, which need not be lawless, permits better responses to the complexities that a probing of the concept of legal meaning reveals.”). As a result, many of his defenses of his eclectic method also apply to the constitutional contextual approach described herein. *Id.* at 1297-307. As our approaches were developed independently and without any knowledge of the other project, the coincidences and similarities are purely incidental. It is nonetheless interesting that drawing from different disciplinary backgrounds, we have reached many of the same conclusions.

¹²⁸ *See* Lawrence Rosenthal, *Originalism in Practice*, 87 *IND. L.J.* 1183, 1186-88 (2012) (“Whatever its theoretical merit, originalism deserves recognition as a genuinely distinctive and useful approach to constitutional adjudication only if, in practice, it provides a genuinely originalist vehicle for deciding real cases . . . nonoriginalists would decide . . . otherwise.”).

¹²⁹ *See* Frederick Schauer, *Is Law a Technical Language?*, 52 *SAN DIEGO L. REV.* 501, 502-03 (2015).

starting points rather than the particulars of the constitutional dispute.¹³⁰ As discussed in Section II.B.1, new originalism is perhaps best known for imbuing a serial sequence into the search for constitutional meaning by placing interpretation (as defined by new originalists) before construction.¹³¹

Using a serial approach, an interpreter must complete one stage of the process before moving to the next. Again, the work of Lawrence Solum provides a good point of access for illustrating the preference among many for serial, and not parallel, interpretative methods. Solum criticizes Ronald Dworkin's "interpretive slide" wherein the following occurs: the interpreter (1) identifies an ambiguity; (2) moves to a discussion of a principle or policy; and (3) utilizes the purpose as the sole basis for construction of legal rules.¹³² The Dworkin model is serial in nature with each step building upon the previous one.

Solum, in line with other new originalists, proposes that the process should occur in a different way.¹³³ Instead of mixing the construction and interpretation stages, Solum believes that the best interpretative method is for the interpreter to separate two processes: (1) interpretation of the meaning of a legal text based upon its semantic meaning; and (2) discussion of policy and purpose considerations (construction).¹³⁴ Solum raises the possibility that this serial process might even be iterative as part of "rational reconstruction."¹³⁵ Solum's work provides an excellent critique of the Dworkin methodology as not being true to the terms by which is described. Notably, though, it shares the trait of serial sequencing with Dworkin, even though it does not specifically endorse a temporal ordering to the process.

A contextual approach, in contrast, treats interpretation as a project that occurs in parallel. Instead of sequencing semantic meaning and constitutional construction, both methods are applied at once. In fact, there may be multiple semantic interpretations and multiple policy-based constructions to consider. Even more broadly, other methodologies from other disciplines can also be

¹³⁰ Saul Cornell takes particular issue with how Lawrence Solum has used Gricean theories of language in the constitutional context to justify new originalism. Cornell, *supra* note 43, at 4-5 ("Rather than solve the problems traditional intentionalist versions of originalism faced, Solum has simply smuggled many of these problems through the back door and camouflaged them under a new philosophically inflected discourse.").

¹³¹ See *supra* note 9 and accompanying text (explaining how new originalists look to the semantic/linguist meaning of the Constitution before allowing further attempts at what they term as construction).

¹³² Solum, *supra* note 31, at 565-66.

¹³³ See Solum, *Semantic Originalism*, *supra* note 9, at 173.

¹³⁴ *Id.* at 67-88 ("Constitutional construction begins when the meaning discovered by constitutional interpretation runs out.").

¹³⁵ Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 *FORDHAM L. REV.* 453, 495-97 (2013) (describing rational reconstruction as part of the "Two Moments Model").

considered in parallel. Legal and non-legal examples throughout this Article demonstrate how treating interpretation as an exercise in parallel differs from the serial methods espoused by others.

The advantage to proceeding in parallel is simply one of accuracy. In individual cases, text (or whatever communication element is used first) will often give an underdetermined result. Yet, a serial sequence necessitates that the second step only be engaged if there is an absence of evidence at the first stage.¹³⁶ By comparing relevant communication concept evidence at the beginning, we can ensure that limited textual evidence does not point to an erroneous conclusion because of the dearth of documentation as to the meaning of that text.

Consider the Ex Post Facto Clause of the Constitution. The Ex Post Facto Clause has several advantages as an exemplar in exploring constitutional interpretation. First, there are no complicated issues of later incorporation through the Fourteenth Amendment to apply to state governments which can overly-complicate discussions of constitutional meaning. The two Ex Post Facto clauses limit the actions of both the federal and state governments such that later incorporation was not necessary.¹³⁷ Second, the Clause can readily be sourced to the framers at the Constitutional Convention with substantial documentation because it is part of the text of the Constitution itself (and not the Amendments).¹³⁸ Third, the prohibition on retroactive punishment embodied in the Ex Post Facto Clause was one of the earliest applications of constitutional text to particular facts in *Calder v. Bull*.¹³⁹ Thus, we might expect a tighter nexus of original meaning based upon founding generation

¹³⁶ Of course, a softer version of the serial process could be used where there was some threshold for adequate evidence at the first stage. However, this soft process would essentially repeat the shortcoming identified by Solum in Dworkin's interpretative slide. See Solum, *supra* note 31, at 565-66. Further, it might, in essence, have to fall back on a parallel interpretative structure to ensure the adequacy threshold is met.

¹³⁷ U.S. CONST. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed."); *id.* art. I, § 10, cl. 1 ("No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.").

¹³⁸ Cf. Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 578-80 (2003) (discussing reports of James Madison claiming that the technical definition of ex post facto laws (as only pertaining to criminal law) was the definition accepted by the Constitutional Convention).

¹³⁹ 3 U.S. (3 Dall.) 386, 390 (1798) (ruling that the Ex Post Facto Clause applied only to "1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender").

adjudication. Fourth, the decision in *Calder* still serves as the backbone of modern Ex Post Facto Clause doctrine, providing relative continuity in interpretation.¹⁴⁰ Fifth, and perhaps most importantly, the modern debates about the Ex Post Facto Clause have not been overwhelmed with the ideological and partisan feuding that have shaped interpretation of other constitutional protections.

Despite those advantages related to interpretation, as Caleb Nelson contends, the original meaning of “ex post facto Law” remains in dispute, particularly concerning whether the phrase should be understood as only applying to criminal cases (or as restricting government conduct in civil matters as well).¹⁴¹ Assuming original meaning is to be the lodestar of constitutional meaning, the phrase presents a particular problem in that the original public meaning varies from the expert legal opinions of the day.¹⁴² The textual meaning appears underdetermined in recent applications to cases where a criminal defendant completed some of the prohibited conduct before and after the enactment of the statute violated.¹⁴³

The constitutional debate about the meaning of the Ex Post Facto Clause provides a germane illustration of why the inclusion of a communication-based approach is preferable. The relevant portion of the constitutional text states that “No . . . ex post facto Law shall be passed.”¹⁴⁴ Despite the relative paucity of Supreme Court opinions interpreting the provision as compared to many other rights protections in the Constitution, numerous defensible interpretations of constitutional meaning have emerged. Consider the following possibilities discussed by courts and scholars:

1. As exemplified by the decision in the founding-generation decision in *Calder v. Bull*, the Clause only restricts government actions that are

¹⁴⁰ See, e.g., *Peugh v. United States*, 133 S. Ct. 2072, 2077-78 (2013); *id.* at 2088-89 (Thomas, J., dissenting). Both Justice Sotomayor’s majority opinion and Justice Thomas’s dissent begin by quoting the holding and test of *Calder*.

¹⁴¹ See Nelson, *supra* note 138, at 578 (discussing how Blackstone arguably used “ex post facto law” to only refer to criminal laws).

¹⁴² See *id.* (“At the time of the framing, the meaning of this prohibition arguably depended on whether one read the key phrase as a lawyer or as a layperson. To the lay public, any law that operated retrospectively could be described as an ‘ex post facto Law.’”).

¹⁴³ This view is espoused in a large number of modern cases and exhibits the problem that one commenter referred to as a “straddle crime.” See J. Richard Broughton, *On Straddle Crimes and the Ex Post Facto Clauses*, 18 GEO. MASON L. REV. 719, 725 (2011) (“Yet, if the first *Calder* category refers to any affirmative action on the part of the defendant that is done and later made the element of a crime—and then punished as part of that criminal law—then it seems that the ex post facto bar is plainly implicated by straddle offenses, especially those that are not properly understood as ‘continuing offenses.’”).

¹⁴⁴ U.S. CONST. art. I, § 9, cl. 3.

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- punitive, and not regulatory, in nature because of the original *legal* meaning of the constitutional language.¹⁴⁵
2. The Court's opinion in *Calder v. Bull* was simply incorrect as a matter of history and original *public* meaning because the Clause applies to civil regulation as well as criminal punishment.¹⁴⁶
 3. The Ex Post Facto Clause should be broadly understood when legislatures are acting in a vindictive fashion against a vulnerable population because the political and social setting at ratification was focused on the Clause preventing such abuses.¹⁴⁷
 4. In the modern world, ex post facto laws should only be restricted if a person lacks any notice on how to comport her conduct with the law.¹⁴⁸

It is difficult to say that any of the above four statements is at odds with the constitutional text. The first two focus on competing original meanings of the Clause. The last two are both purposive and/or principle-based interpretations that each emphasize one of two historical justifications of the Clause. Yet, despite focusing on the intent behind the Ex Post Facto Clause, and not the text itself, those purposive interpretations do not contradict the text (although they might narrow its application).

The analysis of the Ex Post Facto Clause illustrates the shortcomings of following a serial process using a purely textual, intentionalist, or principles-based approach. Only by looking at all of the possibilities at once can we

¹⁴⁵ See Nelson, *supra* note 138, at 578 (“Among lawyers, [the Ex Post Facto Clause] sometimes was a term of art that referred only to penal or criminal laws; Blackstone arguably used the phrase in this way, and at least two state constitutions followed his lead.” (internal citation omitted)).

¹⁴⁶ *Id.* (“To the lay public, any law that operated retrospectively could be described as an ‘ex post facto Law.’” (internal quotations omitted)).

¹⁴⁷ THE FEDERALIST NO. 84, at 533 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1972) (“The subjecting of men to punishment for things which, when they were done, were breaches of no law, and the practice of arbitrary imprisonments, have been, in all ages, the favorite and most formidable instruments of tyranny.”).

¹⁴⁸ See *United States v. Dixon*, 551 F.3d 578, 585 (7th Cir. 2008) (“Laws increasing the punishment for repeating an offense (or punishing the continuation of conduct begun before the law was passed) . . . do not violate the ex post facto clause because even if the law was passed after the defendant committed his first offense and increases the punishment for a repeat offense, the defendant can avoid the increased punishment by not repeating . . . the offense.”), *overruled on other grounds by*, *Carr v. United States*, 560 U.S. 438, 458 (2010). In *Dixon*, Judge Richard Posner found no ex post facto violation in a sex offender registration case by focusing exclusively on the purpose of fair notice with nary a mention of vindictive legislation. *Id.*

effectively discern the best interpretation.¹⁴⁹ Rather than omit discussion of the stated purposes of the Clause (as new originalists would at the interpretation stage) or the text itself (as intentionalists would except insofar as the text indicates intent), a parallel method evaluates how the text and purposes interrelate. The example also shows the need to recognize the very-real problem of overdetermined meaning in constitutional provisions. As a result, global theories applied serially necessarily omit relevant evidence of meaning or artificially sequence them. Instead, a communication-based approach recognizes the conflict at hand and includes all of the historical and modern facts relevant to more accurately identify meaning in the Ex Post Facto Clause.

B. *Ending Interpretive Fetishes*

One of the central tenets of universal constitutional theories has been: determinacy or bust.¹⁵⁰ A common belief is that a theory only “works” if it offers a determinate solution in every, or nearly every, constitutional case.¹⁵¹ Not only is this often an impossible goal given the vagaries of language and interpretation through history, it is also inconsistent with the nature of communication. Adopting one rule to govern all cases will always run into instances where the rule is a poor fit. A contextual approach that prioritizes methods and evidence based upon the constitutional problem addressed is far more likely to meet the goal of finding the most determinate meaning.

The idea of a universal method has essentially grown to the fetishization of interpretive techniques. The desire of judges and scholars has often been to create a singular, universal theory of interpretation to govern all possible constitutional disputes.¹⁵² This fetishization puts theoretical purity above fidelity, cogency, and coherence.

Consider this example from new originalist Randy Barnett to illustrate the danger of such fetishes. In discussing his libertarian political views, which he believes are consistent with a new originalist view of the Constitution, Barnett gave a window into his thought process that helps to illustrate the danger of interpretative method-lock. Barnett wrote that:

Libertarian first principles can be analogized to having a cheat sheet of answers to a multiple choice test. Although you might know the right answer—which is certainly useful—you won’t know exactly *why* the

¹⁴⁹ For now I put aside the question of how synthesis or selection should occur. Although a clear defense of such a process is needed to support a contextual approach, such a defense requires far more explication than is possible in this Article.

¹⁵⁰ See Sherry, *supra* note 13, at 462.

¹⁵¹ See Ryan, *supra* note 92, at 1623-25.

¹⁵² See, e.g., *id.* (“The justification for [originalism] . . . appears, at first glance, as simple and sensible as the methodology itself: applying the text as originally understood is the only method by which courts can claim to be applying the law.”).

answer is right, which is needed to truly understand the subject being tested. And without such an understanding, one cannot explain the ‘right answer’ to others and why it is right.¹⁵³

Originalism and libertarianism, for Barnett, act as the metaphorical hammers that only see nails. Regardless of the specific constitutional question, a new originalist view is the answer. This effectively rigs the interpretative process by excluding contraindicating evidence.

Instead of starting the constitutional discussion as an original meaning originalist, a principles originalist, an intentionalist, a popular constitutionalist, or some living constitutionalist, scholars should focus on whether such theories are even relevant to the particular question at hand. If there is little or no evidence for meaning based upon a reader’s preferred universal theory, why use it? Communication theory ultimately points toward an approach like contextual constitutionalism, which places meaning before theory.

Consider how the Supreme Court sometimes avoids, and at other times embraces, fetishizing theories of interpretative methods depending on the nature of the text being reviewed. In the case of *Morse v. Frederick*,¹⁵⁴ the Supreme Court addressed three separate texts: (1) a banner with the words “BONG HiTS 4 JESUS”; (2) “Congress shall make no law . . . abridging the freedom of speech”; and (3) prior relevant Court opinions.¹⁵⁵ Notably, the interpretative techniques of the Court varied for each text.

Morse arose out of an incident in 2002 when Alaska’s Juneau-Douglas High School allowed its students and teachers to leave school early to watch the torch for the 2002 Winter Olympics pass by an area adjacent to the school.¹⁵⁶ As the torch was nearly in front of a group of students, they unfurled their infamous fourteen-foot “BONG HiTS 4 JESUS” banner.¹⁵⁷ The students exposed the banner just as television cameras were focused upon them, allowing the message to be seen by viewers at home.¹⁵⁸ Upon seeing the banner from across the street, Principal Deborah Morse crossed the road and told the students to take down their sign.¹⁵⁹ One of the students holding the banner, Joseph Frederick, refused to comply with Principal Morse’s

¹⁵³ Randy Barnett, *Don’t Let Judges Tear Up Mortgage Contracts*, THE VOLOKH CONSPIRACY (Feb. 13, 2009, 8:49 AM), http://volokh.com/archives/archive_2009_02_08-2009_02_14.shtml#1234536544 [<http://perma.cc/57F7-ZSDN>].

¹⁵⁴ 551 U.S. 393 (2007).

¹⁵⁵ *See id.* at 397, 410.

¹⁵⁶ *Id.* at 397.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 398.

directive.¹⁶⁰ As a result, Principal Morse confiscated the banner and suspended Frederick from school for ten days.¹⁶¹

After pursuing administrative appeals, Frederick filed an action under 42 U.S.C. § 1983, alleging that Principal Morse and the school board violated Frederick's First Amendment right to free speech.¹⁶² The district court granted summary judgment for the defendants, finding that they had qualified immunity and had not infringed upon Frederick's rights.¹⁶³ The Ninth Circuit vacated the judgment of the district court and held that although Frederick advocated drug use during a school event, the defendants failed to show that Frederick's speech was so disruptive as to be unprotected under the First Amendment.¹⁶⁴

The defendants filed for a writ of certiorari with the United States Supreme Court.¹⁶⁵ The Court granted certiorari on two questions: whether Frederick's banner was protected under the First Amendment and, if so, whether Frederick's right was so clearly established such that the actions of the defendants made them liable for damages to Frederick.¹⁶⁶

Chief Justice Roberts authored the majority opinion of the Court and held for Principal Morse and the other petitioners.¹⁶⁷ The Court held that, "schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use . . . [and] the school officials in this case did not violate the First Amendment by confiscating the pro-drug banner and suspending the student responsible for it."¹⁶⁸ The doctrinal result of the majority opinion is the seeming creation of a drug-speech exception to the First Amendment in school-related environments.¹⁶⁹

Justice Roberts began his textual analysis with the *sui generis* text at issue (the banner) by considering a likely reader's response to the sign.¹⁷⁰ He wrote: "The message on Frederick's banner is cryptic. It is no doubt offensive to

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.* at 399.

¹⁶³ *Id.*

¹⁶⁴ *Frederick v. Morse*, 439 F.3d 1114, 1123 (9th Cir. 2006).

¹⁶⁵ *See Morse*, 551 U.S. at 400.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 396-97.

¹⁶⁸ *Id.* at 397.

¹⁶⁹ *See, e.g.*, Brannon P. Denning & Molly C. Taylor, *Morse v. Frederick and the Regulation of Student Cyberspeech*, 35 HASTINGS CONST. L.Q. 835, 859 (2008) (highlighting "the Court's apparent creation of a categorical 'advocacy of drug use' exception to the First Amendment for public school students").

¹⁷⁰ *Morse*, 551 U.S. at 401 ("As Morse later explained in a declaration, when she saw the sign, she thought that 'the reference to a bong hit would be widely understood by high school students'").

some, perhaps amusing to others. To still others, it probably means nothing at all.”¹⁷¹ He also discussed other possible meanings supported by Frederick and the dissenting Justices: “The best Frederick can come up with is that the banner is ‘meaningless and funny.’ The dissent similarly refers to the sign’s message as ‘curious,’ ‘ambiguous,’ ‘nonsense,’ ‘ridiculous,’ ‘obscure,’ ‘silly,’ ‘quixotic,’ and ‘stupid.’”¹⁷²

The language of Justice Roberts’s initial foray into understanding the sign signaled an embracing of overdetermined meaning. He recognized that the phrase on a banner is open to a limited range of possibilities under modern America’s linguistic norms.

So, how did Justice Roberts reduce the possible meanings to a singular, determined outcome? His recognition of more than one viable, coherent interpretation means that the next logical step in his analysis was selection between or synthesis of the two possible interpretations. Unfortunately, the Chief Justice fixated on one four-letter word: “BONG” to the exclusion of other contextual and communicative elements. As a result, the Chief Justice’s analysis in selecting his preferred interpretation is largely nonsensical: “Gibberish is surely a possible interpretation of the words on the banner, but it is not the only one, and dismissing the banner as meaningless ignores its undeniable reference to illegal drugs.”¹⁷³ This passage represents one of the more baffling leaps in logic in modern Supreme Court opinions. There is surely nothing about a “reference to illegal drugs” that prevents a message from being “ambiguous,” “meaningless,” or “obscure.” One could even argue that a sign with a drug reference is more likely to be “ridiculous” or “silly.” The forced disjunctive between mentioning “illegal drugs” and “meaningless[ness]” is unsupported and, ultimately, unsupportable. Thus, overdetermined meaning became a singular determined meaning based upon a highly questionable sleight-of-hand in reasoning by the Chief Justice.

Further, the presence of words concerning illegal drugs does not necessitate that the message on the banner is actually advocating use of those drugs. Indeed, any First-Amendment-protected message against using marijuana would likely include words referencing drug use. A similarly-protected message advocating drug legalization, but not use, would contain such a reference. Nonetheless, Justice Roberts was convinced that any reasonable reader would conclude the banner contained a pro-drug-use message:

At least two interpretations of the words on the banner demonstrate that the sign advocated the use of illegal drugs. First, the phrase could be interpreted as an imperative: “[Take] bong hits . . .” Alternatively, the

¹⁷¹ *Id.*

¹⁷² *Id.* at 402 (internal cross-reference omitted) (quoting *Frederick v. Morse*, 439 F.3d 1114, 1116 (9th Cir. 2007)).

¹⁷³ *Id.*

phrase could be viewed as celebrating drug use—“bong hits [are a good thing],” or “[we take] bong hits”—and we discern no meaningful distinction between celebrating illegal drug use in the midst of fellow students and outright advocacy or promotion. The pro-drug interpretation of the banner gains further plausibility given the paucity of alternative meanings the banner might bear.”¹⁷⁴

Notably, even in his imperfect resolution to analyzing the banner, Justice Roberts still allowed for two viable interpretations. However, perhaps finding himself in the uncertain territory of overdetermined meaning, Justice Roberts reverted to a highly simplistic form of textual analysis to categorically rule out the dissent’s contention that Frederick’s purpose in displaying the banner is relevant for interpretation:

The pro-drug interpretation of the banner gains further plausibility given the paucity of alternative meanings the banner might bear. The best Frederick can come up with is that the banner is “meaningless and funny.” . . . The dissent mentions Frederick’s “credible and uncontradicted explanation for the message—he just wanted to get on television.” But that is a description of Frederick’s motive for displaying the banner; it is not an interpretation of what the banner says. The way Frederick was going to fulfill his ambition of appearing on television was by unfurling a pro-drug banner at a school event, in the presence of teachers and fellow students¹⁷⁵

In distinguishing intent from text, the Chief Justice contended that intent is simply irrelevant to a reader’s interpretation. Nonetheless, in the next paragraph, Justice Roberts attacked any notion that the banner had a political or religious message by noting only that Frederick did not intend such a meaning.¹⁷⁶ Thus, the majority opinion started with a textualist approach hinging on a reader’s response to the sign, specifically rejecting intentionalism in discounting Frederick’s stated meaning of the text, but ultimately utilized intentionalism to argue against the dissent’s position that a political or religious interpretation is viable. In other words, Frederick’s intent was only relevant when it supported the contention of the majority opinion.

One might wonder what happened to the other half of the banner’s message: “4 JESUS.” Justice Roberts simply took for granted that the key words for his interpretation were the first two and all but forgot about how the words might mean something very different in context of the entire sentence—what has

¹⁷⁴ *Id.* (citing *Guiles v. Marineau*, 461 F.3d 320, 328 (2d Cir. 2006)).

¹⁷⁵ *Id.* (internal cross-reference omitted).

¹⁷⁶ *Id.* at 403 (“But not even Frederick argues that the banner conveys any sort of political or religious message. Contrary to the dissent’s suggestion, this is plainly not a case about political debate over the criminalization of drug use or possession.” (internal cross-reference omitted)).

been referred to as “sentence meaning.”¹⁷⁷ After the recitation of the facts, the word “Jesus” did not reappear in the majority opinion. The only reference to the latter two words in the sign comes when Justice Roberts dismissed any religious interpretation of the sign.¹⁷⁸ Since he did so based entirely on Frederick’s intent of meaninglessness,¹⁷⁹ there is no serious discussion of a potential religious meaning of the banner. One might imagine the opinion would have read quite differently if the majority had put its primary emphasis on “4 JESUS.” Instead of purely being just a free speech case, the opinion might have had to consider free exercise of religion as well. Further, the alleged disruptive effects of the banner would have been considered in an entirely distinct manner, as the religious message would take on a different legal significance.

The various omissions by the Chief Justice also offer insight into his interpretive techniques used in analyzing the banner. The setting of the parade was inconsequential in the majority opinion even though the event was what drove Frederick to help create and display the sign. The subtext of the message, which may have been religious in nature, was similarly irrelevant to his opinion. Incorporating a greater textual, contextual, or subtextual analysis of the sign could have yielded more viable meanings than the possibilities mentioned by Justice Roberts.

The text of the First Amendment never appears in the majority opinion but nonetheless is interpreted as part of the Court’s opinion. Instead, Justice Roberts turned directly to a discussion of prior cases that had interpreted the Amendment.¹⁸⁰ There is no focus on the original semantic meaning of the guarantee of free speech. This is a common procedure for the Court in addressing areas of law for which there have been numerous prior opinions.¹⁸¹ Thus, unlike the message on the banner, the First Amendment is not remotely *sui generis* to the Court. Instead, the Court relied on prior opinions as proxies

¹⁷⁷ Lawrence B. Solum, *Constitutional Texting*, 44 *SAN DIEGO L. REV.* 123, 124 (2007).

¹⁷⁸ *Morse*, 551 U.S. at 403.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 403-08 (citing *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266, 273 (1988); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 680, 683 (1986); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 504-06, 513-14 (1969)).

¹⁸¹ *See, e.g., McDonald v. City of Chicago*, 130 S. Ct. 3020, 3023 (2010) (proposing to analyze the incorporation of the Second Amendment by examining previous cases because the Court’s “decision in *Heller* points unmistakably to the answer”); *Gonzales v. Raich*, 545 U.S. 1, 15-16 (2005) (“As charted in considerable detail in *United States v. Lopez*, our understanding of the reach of the Commerce Clause, as well as Congress’ assertion of authority thereunder, has evolved over time.”); *Griswold v. Connecticut*, 381 U.S. 479, 481-82 (1965) (“Coming to the merits, we are met with a wide range of questions that implicate the Due Process Clause of the Fourteenth Amendment. Overtones of some arguments suggest that *Lochner v. New York* should be our guide.”).

for the meaning of the First Amendment. Nonetheless, the difference in approach is notable because the varying interpretations offered in the *Morse* case stem not directly from the text of the Constitution, but rather the text of prior court opinions.

Because the relevant prior opinions are quite lengthy, they are subject to an array of interpretations. Indeed, as is normally the case, the majority, concurring, and dissenting opinions all cited some of the cases in support of their arguments. Yet, in every instance, it was simply presumed that the specific Justice's view of the prior opinion was the "correct" one. Little was done beyond simple textual analysis of small excerpts of the cited opinions.

Justice Roberts ultimately decided that the guarantee of free speech was shaped by a particular location—in this case, a school.¹⁸² In such space, the contours of the free speech right are different. Yet, strangely, the banner in question was not even displayed upon school property.¹⁸³ In order for school policy and prior Supreme Court opinions to be relevant, the Court had to decide if Frederick was actually at "school." A lay observer might think that a school simply includes the insides of the walls of the physical structure. Such an observer might even be willing to extend the definition of "school" to include all school grounds. All nine of the Justices, as well as every prior court who reviewed the case, on the other hand, took "school" to mean much more. As Justice Roberts explained:

At the outset, we reject Frederick's argument that this is not a school speech case—as has every other authority to address the question. The event occurred during normal school hours. It was sanctioned by Principal Morse "as an approved social event or class trip," and the school district's rules expressly provide that pupils in "approved social events and class trips are subject to district rules for student conduct." Teachers and administrators were interspersed among the students and charged with supervising them. The high school band and cheerleaders performed. Frederick, standing among other JDHS students across the street from the school, directed his banner toward the school, making it plainly visible to most students. Under these circumstances, we agree with the superintendent that Frederick cannot "stand in the midst of his fellow students, during school hours, at a school-sanctioned activity and claim he is not at school."¹⁸⁴

Justice Roberts's interpretative method started with an appeal to authority of all those who have examined the issue. It also implied some reference to the conventional wisdom of what "school" entailed. Because the discussion was

¹⁸² *Morse*, 551 U.S. at 401.

¹⁸³ *Id.* ("When [Frederick] arrived, he joined his friends (all but one of whom were JDHS students) across the street from the school to watch the event.").

¹⁸⁴ *Id.* at 400-01 (citations omitted).

brief, the specifics of Justice Roberts's methods are difficult to discern. However, it does appear that there was no consideration of the intentions of those who wrote the school policy, whether prior Court opinions imagined application to this context, lay definitions of "school" that might provide semantic meaning of the word, and considerations of the policy effects of construing "school" so broadly.

Further, in building upon prior precedent, Justice Roberts reasoned through the issue for what *Morse* is best known for: drug-use speech. The opinion in *Morse* is perhaps most easily criticized for the new drug-use speech exception that has seemingly been placed in the First Amendment by the majority opinion. Perhaps because Justice Roberts knew he was on shaky ground, the passages pertaining to the unique nature of pro-drug speech in high-school-related settings are unclear in regards to the foundation for such an exception. Like his interpretation of "school," the methods used to identify the apparent drug-use-speech exception are missing from the opinion.

Ultimately, the Chief Justice replicated the process implicitly endorsed by constitutional scholars: when one's approach reaches a dead end, arbitrarily incorporate communication concepts to resolve them. Rather than continuing this random dabbling into communication theory, theorists should jump in with both feet. There is simply nothing to support these half-measures that simply place communication-based Band-Aids over the leaky holes in modern global constitutional theories. Communication theory offers us the tools to analyze not just the banner, but also the Constitutional text and prior opinions. A contextual approach to interpretation also allows us to interpret each of those texts with flexible methods based upon a sound foundation instead of the shifting sands underlying the Chief Justice's specious reasoning in *Morse*.

C. *Resolving Constitutional Conflicts*

One of the great difficulties in constitutional theory arises when two constitutional meanings, ideas, or values are in opposition to each other. The Constitution does not provide guidance on the relationship between different, competing constitutional provisions. As the Constitution embodied an aspiration towards a better system of government, the discordance between two constitutional concepts represents what Kenneth Burke called the framers' and ratifiers' competing goals or "wishes" that point in different directions.¹⁸⁵

For example, in the debate over whether a federal law restricting the right to have an abortion is unconstitutional, numerous constitutional rights might be at issue and in conflict with each other.¹⁸⁶ In favor of the right to choose are

¹⁸⁵ See BURKE, *supra* note 115, at 378.

¹⁸⁶ This example is discussed in further detail by Robert Wess in his analysis of Kenneth Burke's view of constitutional interpretation. See WESS, *supra* note 65, at 144-45 ("We cannot construct a world in which the two principles can always be honored. The act

substantive due process and/or the potential mother's Ninth Amendment rights, Tenth Amendment limitations on the scope of federal power to regulate abortion, and the rights of doctors to treat patients. In support of the federal law, there are potential substantive due process and related constitutional rights that might adhere to the unborn fetus, and Commerce Clause or other Article I powers to justify federal intrusion.

To resolve such a dispute, the different rights are often hierarchized (either generally or in the specific context of the case).¹⁸⁷ In *Roe v. Wade*,¹⁸⁸ the Supreme Court placed the potential mother's right to choose as a matter of substantive due process above the rights of the unborn child early in the pregnancy, but flipped the relationship in the third trimester, giving the unborn child's rights a higher status (with exceptions for the potential mother's health). The role of federalism and federal jurisdiction would have to be integrated into any constitutional decision as well. The Court might ask whether federalism is more important than substantive due process in a general or specific sense.

Communication theory focuses on the values of cogency and coherence to determine the better meaning when faced with conflict. Those values, and not a rigid methods theory, point toward the answer. In some instances, this will mean that synthesis of multiple interpretations, rather than selection, should be preferred.¹⁸⁹ In other cases, one constitutional value should be sacrificed for another. But the end result will be greater respect for the fidelity of the constitutional project as a whole rather than contradiction and tension that have plagued areas of law like the Fourth Amendment discussed earlier.

Consider the Fourth Amendment to the Constitution. It provides that:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.¹⁹⁰

There has been an ongoing debate among the Supreme Court Justices, as well as legal scholars, about how the two clauses of the Fourth Amendment (the Unreasonableness and Warrant Clauses) should be interpreted in combination

hierarchizing the principles is necessarily partial, its constructive power falling short of God's.').

¹⁸⁷ *Id.* at 20-21 (discussing the term "hierarchized" as used by Kenneth Burke to indicate a choice between values that involves elevating the status of one; a concept distinguished from more common uses of hierarchy, which carry significant baggage about ideology and social order).

¹⁸⁸ 410 U.S. 113 (1973).

¹⁸⁹ BURKE, *supra* note 115, at 349.

¹⁹⁰ U.S. CONST. amend. IV.

with each other (and whether they should be separated at all).¹⁹¹ The Warrant Clause states that: “and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”¹⁹² The Unreasonableness Clause provides that: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.”¹⁹³ As Justice Clarence Thomas wrote in his dissenting opinion in *Groh v. Ramirez*,¹⁹⁴ “[t]he precise relationship between the Amendment’s Warrant Clause and Unreasonableness Clause is unclear As a result, the Court has vacillated between imposing a categorical warrant requirement and applying a general reasonableness standard.”¹⁹⁵

These are just a few of the possible meanings that have been attributed by Supreme Court Justices to the Amendment on the issue of the two clauses:

1. A search or seizure without a warrant based upon probable cause is “*per se unreasonable*,” with limited exceptions.¹⁹⁶ Thus, the two clauses are consistent when read together.¹⁹⁷ (Warrant Preference Interpretation);
2. Although a warrant should be preferred, the absence of a warrant does not establish unreasonableness of a search or seizure, which is the real

¹⁹¹ See, e.g., Cynthia Lee, *Reasonableness with Teeth: The Future of Fourth Amendment Reasonableness Analysis*, 81 MISS. L.J. 1133, 1137 (2012).

¹⁹² U.S. CONST. amend. IV, cl. 2.

¹⁹³ *Id.* amend. IV, cl. 1.

¹⁹⁴ 540 U.S. 551 (2004).

¹⁹⁵ *Id.* at 571-72 (Thomas, J., dissenting); see also, Orin S. Kerr, *Balancing Versus the Warrant Requirement: A Few Thoughts on Maryland v. King*, SCOTUSBLOG (Feb. 18, 2013), <http://www.scotusblog.com/2013/02/balancing-versus-the-warrant-requirement-a-few-thoughts-on-maryland-v-king/> [<https://perma.cc/PT5T-74ZV>] (describing the growing importance of the Unreasonableness Clause and the possibility that it essentially subsumes the Warrant Clause).

¹⁹⁶ *Thompson v. Louisiana*, 469 U.S. 17, 19-20 (1984) (“In a long line of cases, this Court has stressed that ‘searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well delineated exceptions.’” (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967))).

¹⁹⁷ *Id.*; see also, Lee, *supra* note 191, at 1138 (“[P]roponents of the warrant preference view read the two clauses in the Fourth Amendment as interconnected and related [T]he warrant preference view employs a conjunctive theory that links the two clauses in the Fourth Amendment together such that a search is considered reasonable if it was conducted pursuant to a warrant or an exception to the warrant requirement applied.” (citing Morgan Cloud, *Searching Through History; Searching for History*, 63 U. CHI. L. REV. 1707, 1721-22 (1996))).

- “mandate of the Fourth Amendment.”¹⁹⁸ (Unreasonableness Preference Interpretation);
3. The Warrant Clause was designed to restrict the British practice of using general warrants to oppress colonists.¹⁹⁹ As a result, the Warrant Clause does not restrict ordinary searches and seizures in the modern United States.²⁰⁰ (Irrelevance of the Warrant Clause Interpretation); and
 4. “Probable cause” should be the standard for searches and seizures, but the Unreasonableness Clause limits applications of that requirement when police act in good faith.²⁰¹ (Good Faith Interpretation);

¹⁹⁸ *United States v. Rabinowitz*, 339 U.S. 56, 65 (1950) (“A rule of thumb requiring that a search warrant always be procured whenever practicable may be appealing from the vantage point of easy administration. But we cannot agree that this requirement should be crystallized into a *sine qua non* to the reasonableness of a search It is appropriate to note that the Constitution does not say that the right of the people to be secure in their persons should not be violated without a search warrant if it is practicable for the officers to procure one. The mandate of the Fourth Amendment is that the people shall be secure against *unreasonable* searches.”).

¹⁹⁹ *Payton v. New York*, 445 U.S. 573, 604-08 (1980) (White, J., dissenting). (“[T]he common law of searches and seizures, as evolved in England, as transported to the Colonies, and as developed among the States, is highly relevant to the present scope of the Fourth Amendment Today’s decision virtually ignores these centuries of common law development, and distorts the historical meaning of the Fourth Amendment At the time that Amendment was adopted, the constable possessed broad inherent powers to arrest. The limitations on those powers derived not from a warrant ‘requirement,’ but from the generally ministerial nature of the constable’s office at common law. Far from restricting the constable’s arrest power, the institution of the warrant was used to expand that authority by giving the constable delegated powers of a superior officer such as a justice of the peace. Hence, at the time of the Bill of Rights, the warrant functioned as a powerful tool of law enforcement rather than as a protection for the rights of criminal suspects.”). Notably, Justice White believed that the use of warrants, while not restricted by the Warrants Clause, was constrained by common law principles in place at the time of constitutional ratification. *See id.*

²⁰⁰ *Id.* at 620 (“Our cases establish that the ultimate test under the Fourth Amendment is one of ‘reasonableness.’ I cannot join the Court in declaring unreasonable a practice which has been thought entirely reasonable by so many for so long. It would be far preferable to adopt a clear and simple rule: after knocking and announcing their presence, police may enter the home to make a daytime arrest without a warrant when there is probable cause to believe that the person to be arrested committed a felony and is present in the house. This rule would best comport with the common-law background, with the traditional practice in the States, and with the history and policies of the Fourth Amendment.” (internal citations omitted)).

²⁰¹ *Heien v. North Carolina*, 135 S. Ct. 530, 539 (2014) (holding that police officer’s reasonable, good-faith mistake meant there was no Fourth Amendment right violated (and not that good faith merely abrogated the exclusionary rule remedy)); *United States v. Leon*,

Each of the interpretations proffered above attempts to be true to the confusing, comma-filled text of the Fourth Amendment. However, each alternative meaning also draws from other sources to determine the communicative content of the Fourth Amendment. A common defense of the Warrant Preference Interpretation focuses on the intent of the framers to protect citizens from arbitrary abuses by the government.²⁰² Indeed, that goal was well-documented during the founding generation.²⁰³ By focusing on the identified purpose of the Fourth Amendment, the Warrant Preference Interpretation interprets the relevant constitutional text in accordance with the intent of the framers.

In contrast, the Unreasonableness Preference Interpretation contends that the textual emphasis on unreasonableness, and not warrants, indicates that it is the lodestar for the Fourth Amendment and that the Warrant Clause is subsidiary to it.²⁰⁴ Those proffering this view focus on the word “and” in the Amendment

468 U.S. 897, 923-24 (1984) (“[W]e leave untouched the probable-cause standard and the various requirements for a valid warrant The good-faith exception for searches conducted pursuant to warrants is not intended to signal our unwillingness strictly to enforce the requirements of the Fourth Amendment, and we do not believe that it will have this effect. As we have already suggested, the good faith exception, turning as it does on objective reasonableness, should not be difficult to apply in practice.”).

The good faith exception is typically understood as an exception to the application of the exclusionary rule, and not the right protected by the Fourth Amendment. *Id.* at 906 (“Whether the exclusionary sanction is appropriately imposed in a particular case, our decisions make clear, is ‘an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct.’” (quoting *Illinois v. Gates*, 462 U.S. 213, 223 (1983))). This is surely an accurate description of how the *Leon* rule is applied. However, as the above quote included from Justice Byron White’s majority opinion indicates, part of the Court’s justification for the good faith exception was based upon an interpretation on what constitutes an “unreasonable search.” As a result, for purposes of analyzing the varied meanings ascribed to the Fourth Amendment, I have isolated the textualist component of the Court’s opinion for discussion as an alternative interpretation.

²⁰² Lee, *supra* note 191, at 1138 (“Proponents of the warrant preference view also look to history to support their interpretation of the Fourth Amendment. They point out that the framers were primarily interested in protecting citizens against ‘arbitrary deprivations of privacy, property, and liberty.’” (quoting James J. Tomkovicz, *California v. Acevedo: The Walls Close in on the Warrant Requirement*, 29 AM. CRIM. L. REV. 1103, 1134 (1992))).

²⁰³ Orin Kerr, *The Curious History of Fourth Amendment Searches*, 2012 SUP. CT. REV. 67, 70-76 (discussing various documentations of the motives beyond the Fourth Amendment’s limitations on searches including the ratification debates, contemporaneous state constitutions, and stated concerns about the abuses of power by British authorities).

²⁰⁴ *United States v. Rabinowitz*, 339 U.S. 56, 65-66 (1950) (“[I]t becomes apparent that such searches turn upon the reasonableness under all the circumstances . . .”).

to provide textual basis for their claim.²⁰⁵ As such, under the view, the Warrant Clause provides a preference for warrants to be issued, but does not establish a per se rule or requirement for them. Although some defend the Unreasonableness Preference Interpretation wholly on textualist grounds,²⁰⁶ the Court has often appealed to pragmatic concerns of balancing policing interests in the modern world.²⁰⁷

The Irrelevance of the Warrant Clause Interpretation largely views the Warrant Clause as superfluous to issues related to modern day search and seizure practices. Like advocates for the Unreasonableness Preference Interpretation, those favoring the Irrelevance of the Warrant Clause Interpretation identify the Fourth Amendment as creating two different limits on government conduct.²⁰⁸ However, the Irrelevance of the Warrant Clause Interpretation has a narrower view of the role of the Warrant Clause. Relying on historical setting related to British abuses of American colonists, this interpretation contends that the Warrant Clause serves no modern function because general warrants are no longer issued.²⁰⁹ Justice Byron White defended this interpretation by relying on historical contextual evidence, but, in contrast to the previous interpretations, instead concluded that the framers were not attempting to curtail widespread law enforcement practices allowed under common law at the time.²¹⁰

The Good Faith Interpretation views the word “unreasonable” as serving a different function than the previous three interpretations. Under this view, a

²⁰⁵ See, e.g., Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 759 (1994) (calling for return to the text of the Fourth Amendment which indicates the separate nature of the Warrant and Unreasonableness Clauses); see also Ricardo J. Bascuas, *Fourth Amendment Lessons from the Highway and the Subway: A Principled Approach to Suspicionless Searches*, 38 RUTGERS L.J. 719, 725 (2007); Lee, *supra* note 191, at 1139.

²⁰⁶ See, e.g., Amar, *supra* note 205, at 759-61.

²⁰⁷ See, e.g., *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006) (“[B]ecause the ultimate touchstone of the Fourth Amendment is ‘reasonableness,’ the warrant requirement is subject to certain exceptions. We have held, for example, that law enforcement officers may make a warrantless entry onto private property to fight a fire and investigate its cause, to prevent the imminent destruction of evidence, or to engage in ‘hot pursuit’ of a fleeing suspect” (internal citations omitted)); see also Lee, *supra* note 191, at 1140.

²⁰⁸ See, e.g., *Payton v. New York*, 445 U.S. 573, 604 (1980) (White, J., dissenting) (“Today’s decision virtually ignores these centuries of common-law development, and distorts the historical meaning of the Fourth Amendment, by proclaiming for the first time a rigid warrant requirement for all nonexigent home arrest entries.”).

²⁰⁹ *Id.* at 608-10 (“In fact, it was the abusive use of the warrant power, rather than any excessive zeal in the discharge of peace officers’ inherent authority, that precipitated the Fourth Amendment.”).

²¹⁰ *Id.* at 609 (“Given the colonists’ high regard for the common law, it is indeed unlikely that the Framers of the Fourth Amendment intended to derogate from the constable’s inherent common law authority.”).

search or seizure without probable cause can be reconciled with the Fourth Amendment if the police executing the search or seizure act in good faith.²¹¹ Textually, this view is supported by applying the objective unreasonableness test to the viewpoint of the officer effecting the search.²¹² As with the Unreasonable Preference Interpretation, the Good Faith Interpretation appeals to historical and modern policing considerations to justify its application.²¹³

The discussion of the Fourth Amendment clauses above again highlights how communication theory can add substantial value to constitutional discourse. It gives us the means to differentiate the varied interpretations of the constitutional text. A contextualist approach, by accommodating situations of overdetermined meaning, points to the possibility of resolving the conflicting interpretations. Indeed, by embracing overdetermined meaning, a contextual approach assumes what is the norm of constitutional litigation, conflict and disagreement, instead of the presumption of determinacy embedded in universal theories of interpretation.²¹⁴

CONCLUSION

Constitutional theorists commonly use basic transmission or other incomplete models that omit many of the most significant aspects of communication. They often assume that the text of the Constitution has been effectively transmitted like the radio wave through text, such that ambiguity has been limited and meaning has been determined. To provide a complete and functional account of the praxis of constitutional decision-making, communication models must move beyond the author, text, and reader in the

²¹¹ The facts of *United States v. Leon*, 468 U.S. 897 (1984), which first offered a textual basis for the Good Faith Interpretation were limited to searches with facially valid warrants with minor defects. Orin Kerr, *Good Faith, New Law, and the Scope of the Exclusionary Rule*, 99 GEO. L.J. 1077, 1084 (2011) (“A quick tour of the major cases on the good faith exception shows how the deterrence inquiry has been applied to institutional actors beyond the officer on the street.”). However, since that time, the *Leon* doctrine has been expanded to police, and not just magistrate, mistakes as long as the police executing the search were acting in good faith. *See, e.g.*, *Herring v. United States*, 555 U.S. 135, 137 (2009) (allowing evidence to be admitted from a search incident to arrest when the arrest was based upon a defective arrest warrant).

²¹² *Leon*, 468 U.S. at 919 (“[T]he Fourth Amendment . . . cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity.”).

²¹³ *Id.* at 922 (“We conclude that the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion.”).

²¹⁴ In this Article, which is focused on modeling and theorizing constitutional interpretation, I do not resolve the specific constitutional conflicts discussed in Part III. Such resolution is beyond the scope of this Article and would likely distract from the method’s defense if the reader disagreed with the specific resolutions proposed.

transmission model to include the concepts of pretext, subtext, setting (modern and historical), and obstructive noise.

There are likely countless objections to the communication-based approach I have offered in this Article. I have attempted to anticipate and address many of them. Nonetheless, some are beyond the scope of this initial piece outlining a novel approach to constitutional interpretation. Ultimately, we should be thankful that constitutional communication is far simpler than even basic interpersonal communication, which is interactive and multi-directional. Indeed, many controversial communication elements are fixed or have little variation in the constitutional setting: medium (text of the Constitution); senders (framers and/or ratifiers); readers (judges, legislators, executive branch members, and the public); intratextual consistency (to other portions of the Constitution); and intertextual connections (to the Federalist Papers, other contemporary documents, and prior Supreme Court precedents). As daunting as constitutional interpretative theory often is, it is much easier than the struggles of other communication researchers who attempt to make sense of human interaction in virtually infinite settings.

At a minimum, I hope this Article offers a better lens for understanding some essential elements of constitutional disputes (interpretative or otherwise). We need to better connect interpretative theory to the praxis of constitutional law so that the methods and approaches offered are consistent with the way that the public, judges, legislators, and others actually communicate. Failing to adequately do so virtually ensures that interpretation and law will continue to be supplanted by ideology.