
CONSTRUCTING INTERPRETATION

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ABSTRACT

A pervasive theme in contemporary debates about constitutional and statutory interpretation is the distinction between interpretation and construction. According to the distinction, interpreters first interpret the linguistic meaning of the relevant text and then engage in a separate step of construction in which that meaning is applied to particular questions or facts or controversies. The point of the distinction, as commonly defended, is to avoid conflating what some legal text means as a linguistic matter with what the law ought to do with that text in light of the law's goals, principles, and values. The distinction, however, rests on the assumption that the meaning of the language can be determined without reference to those same legal goals, principles, and values. But most of constitutional interpretation involves terms that are either technical—habeas corpus, for example—or entirely constituted by law—due process, for example. When such technical or legally constituted terms are at issue, which they are in most cases, legal goals, values, and principles become a necessary part of the initial stage of interpretation. And thus for the vast majority of cases, the very point of the distinction between interpretation and construction—that legal values and principles only become relevant in the second (construction) stage—appears to collapse.

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INTRODUCTION

An important theme in the contemporary literature on constitutional interpretation is the distinction between interpretation and construction.¹ The distinction has a venerable lineage, dating at least as far back as Francis Lieber's 1839 treatise on legal language² and having a longstanding presence in the theory and practice of the law of contracts.³ In recent years, the distinction has

¹ Among the more prominent modern contributions to developing, applying, explaining, and sometimes criticizing the interpretation-construction distinction are KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* (1999) [hereinafter WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION*]; KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* (1999); Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL'Y 65 (2011); Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1 (2018); Amy Barrett, *Introduction*, 27 CONST. COMMENT. 1 (2010); Tun-Jen Chiang & Lawrence B. Solum, *The Interpretation-Construction Distinction in Patent Law*, 123 YALE L.J. 530 (2013); Laura A. Cisneros, *The Constitutional Interpretation/Construction Distinction: A Useful Fiction*, 27 CONST. COMMENT. 71 (2010); Richard S. Kay, *Construction, Originalist Interpretation and the Complete Constitution*, U. PA. J. CONST. L. ONLINE, Feb. 2017, at 1; Lawrence B. Solum, *Communicative Content and Legal Content*, 89 NOTRE DAME L. REV. 479 (2013) [hereinafter Solum, *Communicative Content*]; Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 NW. U. L. REV. 923 (2009) [hereinafter Solum, *Heller and Originalism*]; Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453 (2013) [hereinafter Solum, *Originalism and Constitutional Construction*]; Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95 (2010) [hereinafter Solum, *The Interpretation-Construction Distinction*]; Lawrence B. Solum, *Themes from Fallon on Constitutional Theory* (Dec. 5, 2018) (unpublished manuscript), <https://ssrn.com/abstract=3374241> [<https://perma.cc/5SDX-BJDX>]; and Symposium, *The Interpretation/Construction Distinction in Constitutional Law: Annual Meeting of the AALS Section on Constitutional Law*, 27 CONST. COMMENT. 1 (2010).

² FRANCIS LIEBER, *LEGAL AND POLITICAL HERMENEUTICS, OR PRINCIPLES OF INTERPRETATION AND CONSTRUCTION IN LAW AND POLITICS, WITH REMARKS ON PRECEDENTS AND AUTHORITIES* 44 (William G. Hammond ed., 3d ed., 1880) (describing situations where interpretation is inconclusive, thus creating the need for construction—"the drawing of conclusions respecting subjects, that lie beyond the direct expression of the text, from elements known from and given in the text").

³ See, e.g., 3 ARTHUR LINTON CORBIN, *CORBIN ON CONTRACTS* § 534 (1960) (explaining that courts move from interpretation to construction when courts "fill[] gaps in the terms of an agreement, with respect to matters that the parties did not have in contemplation and as to which they had no intention to be expressed"); 4 SAMUEL WILLISTON & WALTER H.E. JAEGER, *A TREATISE ON THE LAW OF CONTRACTS* § 602 (3d ed. 1961); E. Allan Farnsworth, "Meaning" in the Law of Contracts, 76 YALE L.J. 939, 946, 959 (1967); Gregory Klass, *Contracts, Constitutions, and Getting the Interpretation-Construction Distinction Right*, 18 GEO. J.L. & PUB. POL'Y 13, 15, 17-34 (2020). See generally Edwin W. Patterson, *The Interpretation and Construction of Contracts*, 64 COLUM. L. REV. 833 (1964) (distinguishing construction from interpretation by finding that the former determines legal consequences

featured prominently in the debates about constitutional originalism, especially the form of originalism that traces its most influential origins to the thinking of the late Justice Antonin Scalia, and it insists that the Constitution must be interpreted according to its original public meaning—the public (or conventional⁴) meaning of the Constitution’s language at the time that such language became part of the document.⁵ But the distinction between interpretation and construction has been resurrected as, inter alia, a partial and internal challenge to some of the premises and implications of some versions of

while the latter determines general meaning from the words of the contract); Keith A. Rowley, *Contract Construction and Interpretation: From the “Four Corners” to Parol Evidence (and Everything in Between)*, 69 MISS. L.J. 73 (1999).

⁴ Conventional meaning need not be public meaning if there are conventions of meaning within a linguistic community smaller than the public at large. But public meaning is necessarily conventional in the sense that the meaning is supplied by the conventions of language in some linguistic community and not by the perceptions of the hearer or the intentions of the speaker. For my own views on conventional meaning—views that predate the contemporary discussions of original public meaning—see Frederick Schauer, *An Essay on Constitutional Language*, 29 UCLA L. REV. 797 (1982) [hereinafter Schauer, *Constitutional Language*].

⁵ See, e.g., *District of Columbia v. Heller*, 554 U.S. 570, 576-77 (2008) (interpreting the Second Amendment by considering the “normal meaning,” and not the “secret or technical meaning[,]” of the text as understood by voters ratifying the Amendment); ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 38, 47 (Amy Gutmann ed., 1997); ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 80-81 (2012). For explanation, elaboration, and critique, see RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 89-117 (rev. ed. 2014) (viewing original-public-meaning originalism as essential to limit lawmakers’ powers); Barnett & Bernick, *supra* note 1, at 9-10 (highlighting Justice Scalia’s admonition to search for original public meaning instead of original intent); Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921, 1922 (2017) (examining Justice Scalia’s views on potential tensions between precedent and original public meaning); Eric Berger, *Originalism’s Pretenses*, 16 U. PA. J. CONST. L. 329, 331 (2013) (critiquing originalism as failing to constrain judges even when the theory employs original public meaning); Stephen M. Griffin, *Justice Scalia: Affirmative or Negative?*, 101 MINN. L. REV. HEADNOTES 52, 55, 59 (2016); Aileen Kavanagh, *Original Intention, Enacted Text, and Constitutional Interpretation*, 47 AM. J. JURIS. 255, 279-83 (2002) (finding contradiction in Justice Scalia’s originalism because it relies on intentions beyond constitutional text); and Lawrence B. Solum, *Cooley’s Constitutional Limitations and Constitutional Originalism*, 18 GEO. J.L. & PUB. POL’Y 49, 52 (2020) [hereinafter Solum, *Cooley’s Constitutional Limitations*] (reviewing Cooley’s nineteenth-century treatise as a potential predecessor to modern originalist thought). In the normal course of things, public meaning changes so gradually that the phrase in the text above—“at the time that such language became part of the document”—would be a tolerable oversimplification of a more complex and extended process. When constitutional amendments involve extended periods of time between congressional approval and final ratification, however, as with the Twenty-Seventh Amendment and potentially with the Equal Rights Amendment, the relevant date for any form of originalism becomes more problematic.

so-called original-public-meaning originalism.⁶ For if interpreting the language of the Constitution leaves open the question of how that language should be applied to particular controversies—how the language should be *construed*—then locating and interpreting the original public meaning of the document also leaves open, contra Justice Scalia, most and possibly all of the questions of constitutional application.⁷

Lawrence Solum⁸ and Keith Whittington,⁹ among others,¹⁰ have developed the distinction between constitutional interpretation and constitutional construction with vigor and sophistication. And not only Justice Scalia (writing with Bryan Garner)¹¹ but also John McGinnis and Michael Rappaport,¹² Andrew

⁶ See James E. Fleming, *The Inclusiveness of the New Originalism*, 82 *FORDHAM L. REV.* 433, 438-41 (2013) (arguing that using original public meaning for constitutional construction renders originalism compatible with a moral reading of the Constitution).

⁷ Although Justice Scalia in fact did object to the distinction between interpretation and construction, see *SCALIA & GARNER*, *supra* note 5, at 15, it would have been conceptually open to him to accept the existence of the distinction but nevertheless object on normative grounds to judges engaging in any process of construction that did not give preeminence to the text as interpreted. In other words, proponents of the interpretation-construction distinction appear committed to the view that how to construe an interpreted document is an open question, but someone—perhaps Justice Scalia—could have insisted that any construction beyond straightforward application of the Constitution as interpreted was, as a normative matter, an illegitimate enterprise.

⁸ Solum, *The Interpretation-Construction Distinction*, *supra* note 1, at 100-08, 116-18.

⁹ WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION*, *supra* note 1, at 3-19 (“Drawing a distinction between interpretation and construction addresses the political dimension of American constitutionalism, while maintaining our ability to analyze our historic experience of a legalistic constitution.”).

¹⁰ In the context of statutory interpretation, see Victoria F. Nourse, *Elementary Statutory Interpretation: Rethinking Legislative Intent and History*, 55 *B.C. L. REV.* 1613, 1618-19 (2014).

¹¹ *SCALIA & GARNER*, *supra* note 5, at 13-17 (arguing that the interpretation-construction distinction came from Francis Lieber’s “false linguistic association” and that the “equivocal nature of *construction*” harmfully diminishes judicial restraint).

¹² John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 *NW. U. L. REV.* 751, 751-52 (2009) [hereinafter McGinnis & Rappaport, *Original Methods Originalism*]; John O. McGinnis & Michael B. Rappaport, *The Constitution and the Language of the Law*, 59 *WM. & MARY L. REV.* 1321, 1411 (2018) [hereinafter McGinnis & Rappaport, *The Constitution and the Language of the Law*] (advocating reliance on “the language of the law” instead of original public meaning); see also John O. McGinnis, Michael B. Rappaport, Ilya Shapiro, Kevin Walsh & Ilan Wurman, *The Legal Turn in Originalism: A Discussion 5* (Univ. of San Diego Sch. of L. Legal Stud. Rsch. Paper Series, Working Paper No. 18-350, 2018), <https://ssrn.com/abstract=3201200> [<https://perma.cc/3HYX-9X6M>] (highlighting originalists’ increasing reliance on legal meaning).

Coan,¹³ Roderick Hills,¹⁴ and other commentators¹⁵ have challenged the distinction in various ways. In the face of these debates, it is tempting to conclude that there is little more to be said. But the temptation should be resisted, in large part because the existing literature does not address the way in which the distinction between interpretation and construction presupposes a rarely theorized but potentially controversial view about the role of ordinary or conventional meaning in the interpretive task. That view—that the language to be interpreted is to be understood as ordinary or conventional or everyday language—is perhaps plausible for most contracts, much statutory language, and some constitutional language.¹⁶ But for some contracts, much statutory language, and most constitutional language, the view just described is either mistaken or irrelevant. When the words or phrases to be interpreted are technical and not ordinary language,¹⁷ and thus simply cannot be interpreted as ordinary language, the basic point of the distinction between interpretation and construction—the idea that *legal* goals and principles enter into the process at the construction stage—disappears. Moreover, if the rules, principles, and institutions of law *constitute* much of legal language in the same way that the rules of baseball constitute “home run,” then once again the realm of the legal becomes a necessary component of the process of interpretation. Accordingly,

¹³ Andrew B. Coan, *The Irrelevance of Writtenness in Constitutional Interpretation*, 158 U. PA. L. REV. 1025, 1077-83 (2010).

¹⁴ Roderick M. Hills, Jr., *The Pragmatist's View of Constitutional Implementation and Constitutional Meaning*, 119 HARV. L. REV. F. 173, 175 (2006) (challenging existence of the interpretation-construction distinction).

¹⁵ Indeed, more than a century ago James Bradley Thayer maintained that he found Lieber's distinction between interpretation and construction supported by “[n]either the common usage nor practical convenience.” James B. Thayer, *The “Parol Evidence” Rule*, 6 HARV. L. REV. 417, 417 n.2 (1893).

¹⁶ There are ways in which the distinction between interpretation and construction bears an affinity with Mark Greenberg's distinction between “the linguistic meaning of legal texts” and the “content of the law.” See Mark Greenberg, *What Makes a Method of Legal Interpretation Correct? Legal Standards vs. Fundamental Determinants*, 130 HARV. L. REV. F. 105, 105, 107 (2017). Much that I say here is potentially applicable to Greenberg's distinction, but I will leave commentary on Greenberg's important analysis and distinction for other commentators or other occasions.

¹⁷ Frederick Schauer, *Is Law a Technical Language?*, 52 SAN DIEGO L. REV. 501, 511-12 (2015) [hereinafter Schauer, *Is Law a Technical Language?*]. John McGinnis & Michael Rappaport also make much of the presence of technical language in arguing from originalist premises that much of the Constitution was originally understood as technical language. McGinnis & Rappaport, *Original Methods Originalism*, *supra* note 12, at 76. They may or may not be correct as a historical matter, see Solum, *Cooley's Constitutional Limitations*, *supra* note 5, at 57-59 (“[T]he Constitution was drafted on behalf of the people and hence . . . one of its functions was to communicate to the people.”), but my argument here takes place entirely apart from originalist premises of any kind. Nor is my argument limited to constitutional interpretation, whether originalist or otherwise.

the idea that law enters the process only at the construction stage and not earlier breaks down. When law-constituted words and phrases are at issue, the very task of interpretation, even before we get to construction, is pervasively and necessarily dependent on law. As a result, the pervasive presence in legal texts of both technical and law-constituted language undercuts in many legal contexts the importance of the distinction between interpretation and construction. In other words, interpretation itself is often constructed in just the way that the point of the interpretation-construction distinction is committed to denying. Or so I shall argue here.

I. THE DISTINCTION RECAPITULATED

The distinction between interpretation and construction starts with the assumption that the initial step in the application of a legal text to a particular problem or set of facts involves determining the meaning of the seemingly authoritative text. For typical constitutional questions—does the Sixth Amendment’s requirement of confrontation permit the use of hearsay evidence against a defendant in a criminal case?;¹⁸ Is the Second Amendment violated by a state’s ban on automatic assault weapons?;¹⁹ Does Congress have the power under Article I, Section 8 to enact the Affordable Care Act?²⁰—the judge (or the lawyer arguing to a court) commences by attempting to determine what those words, phrases, sentences, and provisions *mean*.

Although the premise that determining the meaning of the relevant language is the first step in applying that language to concrete facts seems obvious, it turns out to be highly controversial. For Ronald Dworkin and other proponents of a more holistic approach to legal interpretation and legal decision-making, the seemingly most salient item of legal text²¹ is but one item to be considered, but

¹⁸ See the line of cases initiated by *Crawford v. Washington*, 541 U.S. 36 (2004), in which Justice Scalia’s majority opinion relied heavily on his understanding of the original public meaning of the Confrontation Clause. *Id.* at 47-50.

¹⁹ *Cf. McDonald v. City of Chicago*, 561 U.S. 742, 750 (2010) (plurality opinion) (holding that the Second Amendment was incorporated by the Fourteenth Amendment and thus is applicable to the states). Note that there is a question, which I shall not address here, as to whether the original public meaning of a Bill of Rights provision applied to the states by virtue of its “incorporation” within the Fourteenth Amendment is the 1791 public meaning or the 1868 public meaning.

²⁰ *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 558, 574 (2012) (upholding constitutionality of the Affordable Care Act but rejecting claim that the Act was a valid exercise of Congress’s commerce power).

²¹ Many legal issues arise in such a way that the facts are encompassed by multiple potentially overlapping and potentially inconsistent legal rules, legal principles, and legal doctrines. As a result, good lawyers attempt not only to show how a particular rule can benefit their clients but also to frame the issue as one involving some rules (or cases) but not others and some doctrinal categories but not others. For an exploration of this problem in the context of potentially competing First Amendment doctrinal categories, see Frederick Schauer, *Not*

one item to be interpreted, and but one component of a larger field that should be interpreted as a (potentially coherent) whole.²² And thus for Dworkin and his allies, interpreters do not simply start with the statutory or constitutional text and move on from that there but rather start more holistically with all of the sources and considerations that count as law in this broader sense. From a Dworkinian holistic perspective, therefore, the distinction between interpretation and construction never even gets off the ground. Dworkinian holism does represent a substantial challenge to traditional accounts of statutory and constitutional interpretation, but that challenge is not my focus here. Rather, let us leave Dworkin for another day and assume, conventionally, that the starting point for an act of statutory or constitutional interpretation is the language of the relevant

Just About License Plates: Walker v Sons of Confederate Veterans, Government Speech, and Doctrinal Overlap in the First Amendment, 2015 SUP. CT. REV. 265, 266. This issue—contestation about what cases, rules, or doctrinal categories are to be interpreted as necessarily preceding the interpretation of agreed-upon items—is also addressed in KIM LANE SCHEPPELE, *LEGAL SECRETS: EQUALITY AND EFFICIENCY IN THE COMMON LAW* 94-105 (1988).

²² RONALD DWORKIN, *LAW'S EMPIRE* 379-99 (1986) [hereinafter DWORKIN, *LAW'S EMPIRE*]. *Law's Empire* is the basic text on the Dworkinian interpretive approach to legal decision-making, and there are additional glosses in RONALD DWORKIN, *JUSTICE IN ROBES* 117-39, 223-40 (2006) (“Proper constitutional interpretation takes both text and practice as its object: [decision-makers] faced with a contemporary constitutional issue must try to construct a coherent, principled, and persuasive interpretation of the text of particular clauses, the structure of the Constitution as a whole, and our history under the Constitution”); and, earlier, in RONALD DWORKIN, *A MATTER OF PRINCIPLE* 33-71 (1985). Dworkin’s basic idea is that what is interpreted—the *field* of interpretation—does not consist entirely or even principally of allegedly authoritative canonical legal texts such as statutes, reported decisions, and constitutional provisions. Rather, the field includes, at the very least, various other political decisions, as well as accepted political and moral principles, such that the judge—or at least the ideal judge (Dworkin’s Hercules)—is engaged in extracting the best interpretation of the entire field and not just of the official texts. On this kind of holistic interpretive and decision-making process, see the thorough and important analysis in AMALIA AMAYA, *THE TAPESTRY OF REASON: AN INQUIRY INTO THE NATURE OF COHERENCE AND ITS ROLE IN LEGAL ARGUMENT* 38-56 (paperback ed. 2017).

Relatedly, there is some historical evidence that in the early years of the common law, an Act of Parliament—a statute—was merely one item to be considered by the common-law judge and, accordingly, had no necessary priority over previous judicial decisions, custom, and the so-called artificial reason of the law. See Gerald J. Postema, *Classical Common Law Jurisprudence (Part I)*, 2 OXFORD U. COMMONWEALTH L.J. 155, 166-67 (2002); Gerald J. Postema, *Classical Common Law Jurisprudence (Part II)*, 3 OXFORD U. COMMONWEALTH L.J. 1, 10 (2003); Mark D. Walters, *St. German on Reason and Parliamentary Sovereignty*, 62 CAMBRIDGE L.J. 335, 352-58 (2003); see also JEFFREY GOLDSWORTHY, *THE SOVEREIGNTY OF PARLIAMENT: HISTORY AND PHILOSOPHY* 3 (1999) (surveying history of parliamentary sovereignty doctrine at a time when increasing judicial activism cast doubt on the doctrine and raised the question of the locus of ultimate decision-making authority).

authoritative legal item—the language of the pertinent section of a statute or provision in the Constitution.²³

The relevant text having been identified, the traditional view is that the act of interpreting that text and then applying that interpretation to the matter at hand is one undifferentiated process, such that the task of interpretation incorporates the task of determining how the relevant language applies to a particular set of facts and a particular legal question. And that is why, traditionally, and principally in the context of writing about statutes, the phrases “statutory interpretation” and “statutory construction” have often been understood to be essentially synonymous.²⁴

²³ The distinction between interpretation and construction is situated within a largely *internal* perspective on legal argument and legal decision-making, in contrast to the external perspective most associated with American Legal Realism and, more recently, to the attitudinal model developed by empirical political scientists. According to the standard Realist picture, the initial step in an apparent act of interpretation is not the consultation of the relevant text or texts but is, instead, the judge’s determination, often based on nonlegal moral, policy, political, or economic grounds, about what the correct result ought to be. See Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the “Hunch” in Judicial Decision*, 14 CORNELL L.Q. 274, 278 (1929). See generally FREDERICK SCHAUER, THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING (2009); Frederick Schauer, *Legal Realism Untamed*, 91 TEX. L. REV. 749 (2013). To the Realists, the relevant texts were brought to bear only after the result was determined, and the text served not to determine or motivate a decision but rather to justify—*rationalize*, as Jerome Frank put it, see JEROME FRANK, LAW & THE MODERN MIND 31-34 (Transaction Publishers 2009) (1930)—a result reached on other grounds. Especially in the context of Supreme Court decision-making, there is much to be said for the Realist account, as the political scientists have long documented—see, for example, and seminally, JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 26 (2002)—and as even Chief Justice Charles Evans Hughes accepted in observing that “[a]t the constitutional level where we work, ninety percent of any decision is emotional. The rational part of us supplies the reasons for supporting our predilections.” WILLIAM O. DOUGLAS, THE COURT YEARS, 1939-1975: THE AUTOBIOGRAPHY OF WILLIAM O. DOUGLAS 8 (1980). But for the purposes of this Article and for the purposes of evaluating the distinction between interpretation and construction, I will set the Realist critique aside and proceed with a largely internal analysis without regard to the extent to which that internal analysis reflects actual judicial practice.

²⁴ See, e.g., HENRY CAMPBELL BLACK, HANDBOOK ON THE CONSTRUCTION AND INTERPRETATION OF THE LAWS 4 (1896) (acknowledging differences between interpretation and construction before noting that “[i]n practice, however, both courts and text-writers are in the habit of using the two terms ‘interpretation’ and ‘construction’ as synonymous or interchangeable”); C.C. Langdell, *The Northern Securities Case and the Sherman Anti-Trust Act*, 16 HARV. L. REV. 539, 551 (1903) (“Congress . . . has used language so clear and explicit as to leave no room for doubt as to [the statute’s] meaning, and as to preclude any extension of its meaning by interpretation or construction.”); Thayer, *supra* note 15, at 417 (observing that nineteenth-century legal theorists made no distinction between construction and interpretation). It is also worth mentioning, even if for no other reason than that it would be a shame not to mention it, that the opening line of an unsigned review of Black’s book in the

We need not pause over the semantic question of what the word “interpretation” means. What is important is that the traditional view takes applying the relevant language to a concrete scenario or question to be a more or less unitary process, while proponents of the interpretation-construction distinction insist, to the contrary, that interpretation and construction are separate processes, regardless of the labels we use to denote the two processes.²⁵ Interpretation, critics of the traditional view say, involves determining the meaning (or linguistic content) of a particular provision,²⁶ as when a judge interprets the word “commerce” in the Commerce Clause to include the transportation of passengers and trade in goods by land, by sea, and by air, or when public and political debate and discussion determine that the phrase “natural born citizen” in the Citizenship Clause includes being born to American citizen parents even if the birth takes place beyond the territorial boundaries of the United States.²⁷

Harvard Law Review begins with the sentence, “There was no vacant niche in legal literature to be filled by this book.” Book Review, 10 HARV. L. REV. 135, 137 (1896) (reviewing CAMPBELL BLACK, *supra*).

²⁵ See Solum, *Originalism and Constitutional Construction*, *supra* note 1, at 483-88 (claiming, contra Scalia and Garner in *Reading Law*, that the interpretation-construction distinction is born out of linguistic confusion and terminology that courts do not actually use).

²⁶ I defer for the time being any questions about the relationship between meaning and so-called legal meaning. For some contemporary commentators (and, arguably, for Lon Fuller, at least as understood in Frederick Schauer, *A Critical Guide to Vehicles in the Park*, 83 N.Y.U. L. REV. 1109, 1123-24 (2008) [hereinafter Schauer, *A Critical Guide*]), more or less all questions about the idea of meaning in legal interpretive contexts can be labeled as questions of legal meaning. See, e.g., Richard H. Fallon Jr., *The Meaning of Legal “Meaning” and Its Implications for Theories of Legal Interpretation*, 82 U. CHI. L. REV. 1235, 1241 (2015). But most of the proponents of the distinction between interpretation and construction, see sources cited *supra* note 1, explicitly or implicitly resist the simple conflation of meaning with legal meaning, insisting that, questions of terms of art and related technical language aside, legal meaning is the concern of construction, while interpretation is largely concerned with the ordinary public meaning of authoritative legal language. See, e.g., Barrett, *supra* note 1, at 1 (referring to this understanding as “[t]he defining characteristic of new originalism”). But see, e.g., McGinnis & Rappaport, *The Constitution and the Language of the Law*, *supra* note 12, at 1411 (praising certain scholarship for “provid[ing] more evidence that the Constitution is best understood as written in the language of the law, not ordinary language”).

²⁷ Michigan Governor George Romney, Arizona Senator John McCain, and Texas Senator Ted Cruz, all of whom were born outside of the territorial United States but to United States citizens living temporarily abroad, faced questions about their eligibility to serve as President. It seems safe, at least for now, to conclude that the American political process, functioning in its role as the ultimate interpreter of constitutional provisions that are almost certainly nonjusticiable, cf. *Powell v. McCormack*, 395 U.S. 486, 518-22 (1969) (explaining political question doctrine, which renders otherwise justiciable disputes nonjusticiable because the question raises separation-of-powers concerns), has interpreted the “natural born” provision of the Citizenship Clause as not requiring physical presence on United States soil at the time

But this determination of the meaning of a provision—interpreting the provision—does not, according to adherents to the interpretation-construction distinction, answer the question about how that meaning should then be applied to particular cases, particular controversies, or particular facts. *That* process is construction, so the argument goes, and construction may involve adding to or subtracting from the linguistic meaning of a provision. Thus, the meaning of the words “another State” in the Eleventh Amendment²⁸ might exclude “same state” as a matter of ordinary linguistic meaning, but whether that meaning should control and thus determine the outcome involves considering a larger array of political, historical, doctrinal, and institutional factors. And that is what the Supreme Court did in deciding that the Eleventh Amendment’s prohibition on federal jurisdiction for suits by a citizen of one state against another state encompassed suits by a citizen against that citizen’s own state.²⁹ Seeing the Court’s decision through the lens of the interpretation-construction distinction entails recognizing that there was an initial determination of meaning, followed by a separate determination of how, if at all, that meaning would apply to the particular question the Court faced.

Consider also the widely discussed New York Court of Appeals decision in *Riggs v. Palmer*,³⁰ holding that a beneficiary under a will who had murdered the testator could not inherit under the terms of the will. Interestingly, both the majority and the dissent in *Riggs* agreed that the text of the New York Statute of Wills *meant* that Elmer Palmer was entitled to inherit despite having been the felonious cause of the testator’s death.³¹ But the majority and dissent parted

of birth. For the opposing view and a thorough background of the issue, see Gabriel J. Chin, *Why Senator John McCain Cannot Be President: Eleven Months and a Hundred Yards Short of Citizenship*, 107 MICH. L. REV. FIRST IMPRESSIONS 1, 2 (2008).

²⁸ U.S. CONST. amend. XI (granting protection to states in federal court against lawsuits “commenced . . . by Citizens of another State”).

²⁹ *Hans v. Louisiana*, 134 U.S. 1, 10 (1890) (admitting that text of Eleventh Amendment does not bar a Louisiana citizen from suing Louisiana but finding “other reason[s] or ground[s]” to avoid an “anomalous result”). The statement in the opinion is consistent with the view that “the eleventh amendment is universally taken *not* to mean what it says.” Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515, 516 (1978); accord Suzanna Sherry, *The Eleventh Amendment and Stare Decisis: Overruling Hans v. Louisiana*, 57 U. CHI. L. REV. 1260, 1272 (1990) (calling *Hans* a “vestigial anomaly” that is “ripe for overruling”).

³⁰ 22 N.E. 188 (N.Y. 1889).

³¹ *See id.* at 189 (“It is quite true that statutes regulating the making, proof, and effect of wills . . . , if literally construed, . . . give this property to the murderer.”); *id.* at 191 (Gray, J., dissenting) (finding that the testator’s estate should go to his murderer under “the rigid rules of law”).

company on what can be understood as the question of construction—how that meaning should then be applied to the particular facts of the particular case.³²

The examples of *Riggs* and Eleventh Amendment adjudication support a broad claim about the ubiquity of construction in the sense that the interpretation-construction distinction understands it. Thus, although Lawrence Solum supports the view that construction in constitutional decision-making is widespread with the importantly correct observation that “the actual text of the U.S. Constitution contains general, abstract, and vague provisions that require constitutional construction for their application to concrete constitutional cases,”³³ his correct conclusion is in fact far too narrow. In reality, there are many instances in which construction, even in Solum’s sense, takes place when the language is neither general, nor abstract, nor vague. *Riggs* is a good example, because although a Dworkinian perspective might consider it a hard case,³⁴ that is so only because what looks like an easy case as a linguistic matter becomes a hard case once we recognize that the straightforward application of the meaning of the relevant legal provision to the matter at hand produces a morally uncomfortable result.³⁵ And, following a suggestion by Dworkin in *Law’s*

³² Ronald Dworkin has made *Riggs* famous for recent generations, and a full appreciation of Dworkin’s broad jurisprudential outlook would suggest that he would consider *Riggs* a hard case. See DWORKIN, *LAW’S EMPIRE*, *supra* note 22, at 15-20; RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 23-30 (1977) [hereinafter DWORKIN, *TAKING RIGHTS SERIOUSLY*]. And that is implicit in his recognition of the plausibility of the arguments for both the majority and the dissent. DWORKIN, *LAW’S EMPIRE*, *supra* note 22, at 18-20. It is true that *Riggs* becomes a hard case if one accepts the Dworkinian view that law does not consist of a rigidly demarcated amalgam of doctrinal, political, and moral principles. *Riggs* is also a hard case in the sense of presenting (as it would for others) a conflict between the legally right and the morally right answers. As a matter of the initial interpretation of the language of the most relevant statute (the New York Statute of Wills) however, *Riggs* was an *easy* case, as both the majority and the dissent recognized and agreed.

³³ Solum, *Originalism and Constitutional Construction*, *supra* note 1, at 458; see also *Fay v. New York*, 332 U.S. 261, 282 (1947) (referring to the “majestic generalities” of the Fourteenth Amendment); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943) (describing the “majestic generalities” of the Bill of Rights).

³⁴ See *supra* note 32. Dworkin explicitly talks about “hard cases” on the page immediately preceding his first discussion of *Riggs*, the obvious implication being that Dworkin considers *Riggs* just such an example of a hard case. DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 32, at 22.

³⁵ So too does a case become hard when the linguistic meaning of the operative statute produces a result at odds with the intent of the enacting legislature, as in the recent and amusing case of *Yates v. United States*, 135 S. Ct. 1074 (2015). In *Yates*, the “tangible object” language of the relevant statute (the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1519) linguistically encompassed the undersized red grouper that Mr. Yates had unlawfully caught and kept (and then threw back into the Gulf of Mexico in order to thwart a prosecution), even though the statute was plainly intended, as the 5-4 majority concluded, to deal with financial fraud and not with violations of federal fishing regulations. *Yates*, 135 S. Ct. at 1079.

*Empire*³⁶ and an earlier one by Duncan Kennedy in “Legal Formality,”³⁷ as long as an outcome and an opinion departing from the meaning of the text, as interpreted, is permissible in some cases, then *every* case entails an inquiry, even if *sub silentio*, into whether this is one of the cases in which meaning should not control the outcome.³⁸

I want to reformulate and emphasize the claim in the previous paragraph. Under one view, which we might label the limited-construction view, the domain of (and thus the opportunities for) construction is dependent on some form of linguistic indeterminacy in the interpreted text. The text might be vague or ambiguous, or a previously clear text might have become vague in the face of some unexpected application—the phenomenon of “open texture,” in the strict sense³⁹—and then, but only then, construction becomes necessary. But under a

³⁶ DWORKIN, *LAW’S EMPIRE*, *supra* note 22, at 266 (advocating the same approach to easy and hard cases because “easy cases are, for law as integrity, only special cases of hard ones”).

³⁷ Duncan Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351, 354 (1973) (conceding that “rules are at least sometimes perfectly clearly applicable to particular situations” but asserting that “*even under these most favorable conditions* the judge cannot legitimately conceive of himself as [only] a rule applier”).

³⁸ Under the Kennedy/Dworkin view, if a countertextual conclusion is possible in one case out of one hundred (the numbers are mine), then in all one hundred out of the one hundred cases the question is open whether this is the one case in which the text will not control. Conceptually this is true, but whether this understanding accurately captures the phenomenology and psychology of legal decision-making is a different question. *See* FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* 167-206 (1991) [hereinafter *SCHAUER, PLAYING BY THE RULES*].

³⁹ The (mis)uses of legions of American law professors notwithstanding, “open texture” is not a fancy synonym for vagueness. Rather, as the term was created (using the German word *Porosität*) and understood by the Austrian and then Oxford philosopher Friedrich Waismann, open texture is not vagueness but is instead the ineliminable possibility of vagueness for even the most precise (nonvague) of terms. Friedrich Waismann, *Verifiability*, 19 PROC. ARISTOTELIAN SOC’Y 119, 123 (Supp. 1945) (“Vagueness can be remedied by giving more accurate rules, open texture cannot. An alternative way of stating this would be to say that definitions of open terms are *always* corrigible or emendable.”). Open texture is thus, according to Waismann, a feature of language in general and not a feature of particular words in a language. We might say, loosely, that open texture manifests itself when what we previously had believed to be a maximally precise term confronts an unexpected application and thus becomes vague on that occasion. But to be faithful to the origins of the phrase, we ought not say that open texture is the same thing as vagueness. Indeed, we might say that intentional vagueness is a potential cure for open texture in some contexts because intentional vagueness incorporates at the outset the flexibility and discretion that unexpected vaguenesses—the product of open texture—may leave unremediable. *See* Frederick Schauer, *On the Open Texture of Law*, 87 GRAZER PHILOSOPHISCHE STUDIEN 197, 199 (2013); *see also* Frederick Schauer, *Friedrich Waismann and the Distinctive Logic of Legal Language*, in FRIEDRICH WAISMANN: THE OPEN TEXTURE OF ANALYTIC PHILOSOPHY 261, 268 (Dejan

different view, call it the robust construction view, even the clearest text as interpreted is still only the first step in the process of application (construction), and even the linguistically clear application of a linguistically clear text remains subject to being set aside if that application would result in an unusually bad outcome.⁴⁰

As a contingent empirical matter, the robust construction view appears to be a largely accurate description of modern American legal and judicial practice. Dworkin was mistaken in assuming that the majority opinion in *Riggs* was representative of the routine operation of American law because in the normal course of things the ordinary indications of statutory language will often (perhaps even usually) prevail even against nonstatutory arguments from principle or policy inclining in the opposite direction.⁴¹ But the comparative strength of those ordinary indications are presumptive and not absolute, and it is a long-entrenched feature of the American legal environment that most instances of clear statutory and constitutional language remain at the mercy of especially strong considerations of morality or policy.⁴²

Makovec & Stewart Shapiro eds., 2019) (connecting the question of open texture with questions about technical language).

⁴⁰ An especially important precedent here is *United States v. Kirby*, 74 U.S. (7 Wall.) 482 (1869), holding that “[a]ll laws should receive a sensible construction,” literal interpretations that “lead to injustice, oppression, or . . . absurd consequence[s]” should be avoided, and the “reason of the law . . . should prevail over its letter.” *Id.* at 486-87. In itself, *Kirby* is unremarkable and is merely one of many cases over many years holding that reason, purpose, common sense, and much else may at times dominate opposing considerations of linguistic meaning. *See, e.g.*, *Church of the Holy Trinity v. United States*, 143 U.S. 457, 460 (1892). But *Kirby* is interesting because it was argued in the same year (1868) that the Fourteenth Amendment was ratified and was decided the year after. At the very least, therefore, *Kirby* provides some support for the view that the defeasibility of constitutional language was already in place at the time that the Fourteenth Amendment’s language became part of the Constitution and therefore that, even from an originalist perspective, taking the Fourteenth Amendment’s language as conclusive requires additional premises that are not part of the constitutional language.

⁴¹ For arguments and examples supporting this conclusion, even in the context of facts quite similar to those in *Riggs*, see Frederick Schauer, *The Limited Domain of the Law*, 90 VA. L. REV. 1909, 1937-38 (2004).

⁴² *See* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 7 (1982) (advocating for a legal doctrine that would “restor[e] to courts their common law function of seeing to it that the law is kept up to date” with majoritarian policy concerns). Although Calabresi’s argument for the power of courts to update even the clearest of obsolete statutes is more normative than descriptive, the fact that making such an argument was not an impediment to Calabresi’s nomination and confirmation as a Second Circuit judge is a telling piece of evidence in favor of (descriptively) the nonformality of American legal and judicial culture. *See generally* P.S. ATIYAH & R.S. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW (1987); MELVIN ARON EISENBERG, THE NATURE OF THE COMMON LAW 33 (1988)

It should now be clear why the distinction between interpretation and construction is often resisted by original-public-meaning originalists and why the distinction is arguably a weapon against that and other forms of so-called textualism.⁴³ For the hard-core textualist, whether of the original-public-meaning variety or of the contemporary-public-meaning variety,⁴⁴ the linguistic

(making clear, contra Dworkin, that considerations of policy as well as those of principle loom large in American adjudication).

⁴³ It is not at all clear that the word “textualism” is especially helpful, insofar as the word seems to include, depending on the commentator, original-public-meaning originalism, contemporary-public-meaning textualism, original-intent originalism, and much more. Indeed, even to the extent that it is meant to exclude some (or all) forms of living constitutionalism, “textualism” may not even exclude all of those, with the possible exception of those approaches that more straightforwardly acknowledge that the text may not do much work in most contested constitutional cases. See David A. Strauss, *Foreword: Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 1, 4-8, 12-13 (2015). Judge Richard Posner has, in conference remarks, taken an even stronger antitextual position. See Josh Blackman, *Judge Posner on Judging, Birthright Citizenship, and Precedent*, JOSH BLACKMAN’S BLOG (Nov. 6, 2015), <http://joshblackman.com/blog/2015/11/06/judge-posner-on-judging-birthright-citizenship-and-precedent> [https://perma.cc/K5SE-FYC5] (“What would the framers of the [Fourth Amendment] have thought about [n]ational security surveillance of people’s emails[?] That is a meaningless question.” (emphasis omitted)).

⁴⁴ I refer here *not* to contemporaneous public meaning, in the sense of contemporaneous with enactment, nor to references to “contemporary public meaning” that really mean “contemporaneous.” Rather, I am referring to a form of textualism or public-meaning interpretation that is based on the public meaning of the relevant language at the time that it is being interpreted—i.e., now. In the context of statutory interpretation, that form of interpretation is so ubiquitous that it is rarely highlighted or discussed, largely because most instances of statutory interpretation involve the interpretation (and construction) of statutory language enacted comparatively recently and thus whose ordinary meaning has not changed between the time of enactment and time of contested application. See, e.g., *Yates v. United States*, 135 S. Ct. 1074, 1077 (2015) (interpreting in 2015 a provision of the Sarbanes-Oxley Act, which Congress passed in 2002). In the context of constitutional interpretation, however, a contemporary-public-meaning approach would be embarrassed by some forms of constitutional language, the public meanings of which have changed dramatically over time, such as, perhaps, the “Republican Form of Government” Clause. See U.S. CONST. art. IV, § 4. It is not clear, however, that these embarrassments, and embarrassments they are, are less frequent and consequential than those that might be the product of other interpretive approaches. Still, it is worth noting that a plausible approach to constitutional interpretation is one that looks at the public meaning of the language now, such an approach being suggested, albeit in theoretically underdeveloped ways, by multiple commentators. See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 1 (1980) (“[T]he Constitution proceeds by briefly indicating certain fundamental principles whose specific implications for each age must be determined in contemporary context.”); CASS R. SUNSTEIN, *A CONSTITUTION OF MANY MINDS: WHY THE FOUNDING DOCUMENT DOESN’T MEAN WHAT IT MEANT BEFORE* 6-9 (2009) (proposing that the wisdom of a modern crowd’s constitutional interpretation may “bear on constitutional law”); Hillel Y. Levin, *Contemporary Meaning and*

meaning of the relevant provision supplies the answer to the question posed by some set of facts. But if the meaning of the provision does not answer the question of application—and this is the basic and important insight of the interpretation-construction distinction—then locating the meaning of the provision does not tell a judge what to do. In other words, and contra the hard-core textualists, distinguishing interpretation from construction makes clear that locating the meaning of a provision, whether that be the original meaning or the contemporary meaning,⁴⁵ still leaves much work to be done and much opportunity for some or many extratextual considerations to play a role.

Expectations in Statutory Interpretation, 2012 U. ILL. L. REV. 1103, 1115 (suggesting that judges “should look to, and sometimes defer to, the way in which the contemporary public understands the law”); Schauer, *Constitutional Language*, *supra* note 4, at 805 (arguing that a focus only “on the results that the drafters specifically had in mind” fails to respect the various dimensions on which language can act); Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 430 (1985) (discussing the role of language in framing constitutional questions without any reference to original public meaning). Obviously, an interpretive method that focuses on contemporary public meaning rejects what Solum refers to as the “fixation thesis,” the idea that meaning is fixed upon first use. *See, e.g.*, Solum, *Heller and Originalism*, *supra* note 1, at 944 (“[O]riginalism assumes that the meaning of a given constitutional provision is fixed at the time the provision was framed and ratified. Let us call this assumption the *fixation thesis*.”). Whether rejecting the fixation thesis is a virtue or a vice—a feature or a bug—implicates the largest questions of just what a constitution is and just what a constitution is designed to do. Without digging too deeply here into that huge question, it is nevertheless worth noting that one potential virtue of a constitutional interpretive approach that relies heavily on contemporary public meaning—contemporary-public-meaning textualism—is that it recognizes the importance of constraint by enacted and authoritative language in ways that the most robust forms of living constitutionalism do not, while at the same time recognizing the potential problems of an excess constraint by the past, including the past’s problems and the past’s solutions to its (and our current) problems.

⁴⁵ Or, for that matter, even the meaning as determined by the intentions of those who drafted, approved, or ratified the pertinent language. Original-intent originalism has been superseded in many contemporary debates (although prominently not in recent debates about the meaning of the Impeachment Clause) by original-public-meaning originalism, but the insight behind the interpretation-construction distinction would apply to both. By original-intent originalism, I mean theories such as, for example, RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 402-10 (2d ed. 1997) (defending original-intent originalism against charges of “antiquarian historicism” and “freez[ing]” the Constitution’s meaning (quoting LEONARD LEVY, *JUDGMENTS: ESSAYS ON AMERICAN CONSTITUTIONAL HISTORY* 17 (1972))); Larry Alexander, *Simple-Minded Originalism*, in *THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION* 87, 87 (Grant Huscroft & Bradley W. Miller eds., 2011); Larry Alexander, *Telepathic Law*, 27 *CONST. COMMENT.* 139, 139 (2010); and Richard Ekins, *Objects of Interpretation*, 32 *CONST. COMMENT.* 1, 8 (2017) (rejecting “original public meaning” as an “intelligible alternative to intended meaning”). But for the view that original-intent originalism and original-public-meaning originalism are more similar than their proponents admit and that both suffer from the same flaws, see Mitchell N. Berman, *Originalism Is Bunk*,

II. WHAT'S RIGHT ABOUT THE INTERPRETATION-CONSTRUCTION DISTINCTION

In what is by now a tiredly familiar example,⁴⁶ let us start by considering Lon Fuller's approach, in his side of the debate with H.L.A. Hart,⁴⁷ to the interpretation of the "no vehicles in the park" rule⁴⁸ as applied to Fuller's hypothetical example of the proposed war memorial statue incorporating a fully functioning military truck.⁴⁹ Fuller thought it obvious that the statue/vehicle should not be prohibited by the "no vehicles in the park" rule, but he also thought that Hart's mistake was in understanding the language of the rule without reference to the language's purpose and without attention to the language's application on this particular occasion.⁵⁰ Thus, although he was not entirely clear on the point, Fuller believed that the word "vehicle" in this context did not include an application so at odds with common sense and so at odds with the clear (to him) absurdity of using the rule to produce such a ridiculous result.⁵¹

In making this argument, Fuller appears to have been guilty of precisely the interpretive crime that the interpretation-construction distinction is designed to prevent. Assuming for the sake of argument that it would have been a poor outcome for the relevant officials to have excluded the memorial on the authority of the "no vehicles in the park" rule,⁵² Fuller appears to have believed that a good outcome would have been produced, and the poor outcome avoided, were

84 N.Y.U. L. REV. 1, 93 (2009) (concluding that both types of originalists agree that a provision's original character ought to have "priority over any other consideration").

⁴⁶ For those not already tired, see generally Schauer, *A Critical Guide*, *supra* note 26.

⁴⁷ Lon L. Fuller, *Positivism and Fidelity to Law – a Reply to Professor Hart*, 71 HARV. L. REV. 630, 662-64 (1958) (responding to H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958)).

⁴⁸ Hart, *supra* note 47, at 608-15; *see also* H.L.A. HART, *THE CONCEPT OF LAW* 124-54 (3d ed. 2012) (grappling once again with the example of a rule "prohibiting the use of vehicles in the park" while exploring the "open texture of law").

⁴⁹ Fuller, *supra* note 47, at 661-69.

⁵⁰ *Id.* at 668-69.

⁵¹ *Id.* at 663 (arguing that a truck memorial does not necessarily fall outside the "core" of a statutory rule despite Hart's insistence on categorizing (and distinguishing) statutory interpretations into those within the statute's "core" and those in its "penumbra").

⁵² Not everyone would accept that conclusion. *See, e.g.*, John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2454 (2003) (criticizing the "dubious constitutional grounds" of the rule that absurd outcomes should be avoided and suggesting alternatives); Frederick Schauer, *The Practice and Problems of Plain Meaning: A Response to Aleinikoff and Shaw*, 45 VAND. L. REV. 715, 729-34 (1992) (weighing pros and cons of the absurdity doctrine in light of *United States v. Locke*, 471 U.S. 84 (1985)); *cf.* Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 544 (1988) [hereinafter Schauer, *Formalism*] (offering a qualified defense of formalism even when it produces suboptimal outcomes on particular occasions).

the words of the rule to be interpreted so as to produce this result.⁵³ In reaching this conclusion, however, Fuller seems to have taken the position that the meaning of the relevant words is dependent on the outcome that would be produced by attributing that meaning to those words. The poor outcome produced by understanding the war memorial as a vehicle would be avoided by understanding the language of the rule in such a way that the poor outcome is no longer encompassed by the rule and its meaning. And for Fuller and others, this view seems supported by the (unsupportable) premise that the meaning of a word, phrase, or sentence depends almost entirely on the particular context in which the word, phrase, or sentence is being used on a particular occasion.⁵⁴

Proponents of the distinction between interpretation and construction[interpretation-construction distinction ?] might well have understood Fuller's position as one of their targets. There are certainly some good reasons for (and a few against) treating the "no vehicles in the park" rule as defeasible,⁵⁵ but that conclusion is a legal and not a linguistic one. The linguistic meaning of the sign excludes the memorial, but whether the memorial actually does get excluded is a function of determining whether the linguistic meaning controls in this instance. We should *interpret* the sign as literally or facially excluding the memorial, but when we *construe* that interpretation—when we apply the rule as interpreted to particular facts and controversies—we discover that the legal system, or at least the twentieth- and twenty-first-century American legal system, has ample resources to allow a judge or other decision maker so inclined to avoid the plainly suboptimal result.⁵⁶ Fuller's mistake, it

⁵³ Fuller, *supra* note 47, at 661-69 (pointing out as Hart's theory's "most obvious defect" that it attempts to determine the meaning of individual words without regard to context or result).

⁵⁴ Fuller makes clear his sympathies with this form of radical contextualism. *See id.* at 663 ("Even in the case of statutes, we commonly have to assign meaning, not to a single word, but to a sentence, a paragraph, or a whole page or more of text."); *see also* James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685, 708-13 (1985) (summarizing the popular "post-Wittgensteinian view of language" as rejecting the idea that words have "essences" or "core meanings" outside of context or actual communication). For my own summaries of the relevant philosophy of language showing why such a view of language is incoherent, see Schauer, *Formalism*, *supra* note 52, at 525 n.56. *See also* SCHAUER, *PLAYING BY THE RULES*, *supra* note 38, at 53-76 (asserting the existence of "semantic autonomy," which is "the way in which language carries something by itself, independent of those who use it on particular occasions").

⁵⁵ *See* sources cited *supra* note 52. On the defeasibility of rules in general, see LUÍS DUARTE D'ALMEIDA, *ALLOWING FOR EXCEPTIONS: A THEORY OF DEFENCES AND DEFEASIBILITY IN LAW* 23-32 (2015); THE LOGIC OF LEGAL REQUIREMENTS: ESSAYS ON DEFEASIBILITY 6 (Jordi Ferrer Beltrán & Giovanni Battista Ratti eds., 2012); and Frederick Schauer, *Rules, Defeasibility, and the Psychology of Exceptions*, in *EXCEPTIONS IN INTERNATIONAL LAW* 55, 59 (Lorand Bartels & Federica Paddeu eds., 2020).

⁵⁶ *See supra* note 42 and accompanying text.

appears, is in failing to recognize that reaching this conclusion is a two-step process and thus in assuming that the route to a desirable result can be found by redefining words in light of the best result to be achieved on a particular occasion.

Fuller's position is, for Fuller, not surprising. He was, after all, highly interested in legal fictions,⁵⁷ and thus he viewed with at least some sympathy the longstanding judicial practice⁵⁸ of redefining (or misapplying) words having ordinary meanings in order to produce a desirable result. In perhaps the most famous historical example, *Mostyn v. Fabrigas*,⁵⁹ Lord Mansfield defined the Island of Minorca as being in London (which it is not) for the purpose of allowing jurisdiction in a case in which a grave injustice was in need of a remedy that could only be granted to a London-based claimant. Similarly, it is said, almost certainly apocryphally, that during the British food shortage in the early years of the Second World War, a senior government minister, himself a Magdalen College (Oxford) graduate, defined the beloved deer that grazed on the Magdalen grounds as vegetables in order to prevent them from being requisitioned to be slaughtered for food.⁶⁰

But if we think that it is occasionally useful to be able to recognize that deer are not vegetables, that Minorca is not in London, and that vehicles that are used for memorials are still vehicles, then we should be wary of methods so focused on the particular context of application that they ignore the way in which language serves as a means of communication precisely by virtue of its ability to convey content in at least a partly acontextual way. We tolerate legal fictions because (or when) we sympathize with the results they produce, but distinguishing what language means from what results we want to produce valuably distinguishes the very question of meaning from the very different question of all-in application. If an extremely popular President during a time of grave national crisis wished, with enormous public and political support, to run for a third term, there might (and there might not) be good reasons—and even good legal reasons—to accept the candidacy, but defining the word “two” in the Twenty-Second Amendment⁶¹ to mean “three” seems a confusing way to get there. It is the virtue of the distinction between interpretation and construction that it helps us to understand this and thus to avoid the negative consequences

⁵⁷ See generally LON L. FULLER, *LEGAL FICTIONS* (1967); Kenneth Campbell, *Fuller on Legal Fictions*, 2 *LAW & PHIL.* 339 (1983).

⁵⁸ See J.H. BAKER, *THE LAW'S TWO BODIES: SOME EVIDENTIAL PROBLEMS IN ENGLISH LEGAL HISTORY* 54-55 (2001) (arguing that the purpose of legal fictions is to allow the operation of the law to change without having to alter the rules).

⁵⁹ (1774) 98 Eng. Rep. 1021, 1032; 1 Cowp. 160, 181 (KB).

⁶⁰ See Frederick Schauer, *Legal Fictions Revisited*, in *LEGAL FICTIONS IN THEORY AND PRACTICE* 113, 122 n.14 (Maksymilian Del Mar & William Twining eds., 2015).

⁶¹ U.S. CONST. amend. XXII (limiting the presidency to two terms).

of a too-easy willingness to redefine words (and phrases) to meet the needs of the moment.

III. AND WHAT IS NOT

The previous Part yielded the conclusion that what lies at the heart of the distinction between interpretation and construction is the idea that the meaning of language can (and must) be divorced from the implications, and especially the normative implications, of that language on a particular occasion.⁶² In the context of law, the distinction between interpretation and construction builds on and reinforces this conclusion. Thus, the meaning of language within law must be distinguished from what the law ought to do with that language on a particular occasion, with the former being interpretation and latter being construction. This distinction and the insight behind it is important and largely correct insofar as law communicates to its addressees—judges, lawyers, officials, and the public at large—but once we turn to the technical language of the law—the language that one finds in law but rarely elsewhere—the issues become more problematic.

It is not surprising that most of the origins of the distinction between interpretation and construction can be located in the law of contracts.⁶³ Nor is it surprising that the distinction between interpretation and construction abuts some of the reasons for, and considerations about, the parol evidence rule.⁶⁴ If one of the basic purposes of a written contract is to allow the parties to reduce an agreement to authoritative (at least as between the parties) language, then much of the point of a contract would be lost were those parties to be subject to an externally imposed—or unilaterally asserted—understanding of what they have done that differs from what the parties themselves thought they had done. And thus, at least part of the rationale for the parol evidence rule is as a way of facilitating the authoritativeness and rigidity of a written agreement between contracting parties.⁶⁵

But although the parol evidence rule serves these goals by excluding extrinsic evidence to modify the meaning of the terms in a written contract, there is nonetheless a well-known exception to the rule for technical (trade usage)

⁶² See, e.g., HERMAN CAPPELEN & ERNIE LEPORÉ, *INSENSITIVE SEMANTICS: A DEFENSE OF SEMANTIC MINIMALISM AND SPEECH ACT PLURALISM* 32 (2005); ROBYN CARSTON, *THOUGHTS AND UTTERANCES: THE PRAGMATICS OF EXPLICIT COMMUNICATIONS* 72 (2002); John R. Searle, *Literal Meaning*, 13 *ERKENNTNIS* 207, 207 (1978).

⁶³ See LIEBER, *supra* note 2, at 115 n.4, 152, 299-302; *supra* note 3.

⁶⁴ See PETER M. TIERSMA, *PARCHMENT, PAPER, PIXELS: LAW AND THE TECHNOLOGIES OF COMMUNICATION* 120 (2010).

⁶⁵ See, e.g., *N. Am. Sav. Bank v. Resol. Tr. Corp.*, 65 F.3d 111, 114 (8th Cir. 1995); *Kropa v. Cabot Oil & Gas Corp.*, 716 F. Supp. 2d 375, 379 (M.D. Pa. 2010); *Arasimowicz v. Bestfoods, Inc.*, No. 99-cv-08977, 2000 WL 1810096, at *3 (S.D.N.Y. Nov. 27, 2000); *In re Haines*, 528 B.R. 912, 922 (Bankr. W.D. Mo. 2015), *aff'd sub nom.* *Strauss v. Haines*, No. 5:15-cv-06059, 2015 WL 5136367 (W.D. Mo. Sept. 1, 2015).

meanings known to the parties and well entrenched within the domain in which they are operating.⁶⁶ For example, the language “one thousand” rabbits in a contract might within the rabbit trade mean 1,200 and not 1,000 rabbits,⁶⁷ and extrinsic evidence is permitted to show that “one thousand” rabbits actually means 1,200 for dealers in rabbits. Similarly, and to use another numerical example, if it is understood in the shingle trade that “one thousand” shingles is a designation for the size of a bundle of shingles and not of the actual number of shingles in the bundle, then it might turn out—and be open to proof by extrinsic evidence—that putting “four thousand shingles” in the contract meant 2,500 shingles by count.⁶⁸ As these cases exemplify, the law of the parol evidence rule has long recognized that certain trades, professions, and domains employ specialized or technical terms, the meanings of which are known to the participants in those domains and are domain dependent.

This possibility of specialized or technical meaning,⁶⁹ however, traditionally cabined off in contract law as the above-described narrow and rare exception to the parol evidence rule, puts considerable pressure on the distinction between interpretation and construction when carried over to the context of statutory and constitutional interpretation. If technical meaning enables 1,200 rabbits to count as 1,000, it is only knowing something about the rabbit trade that enables us to reach that conclusion. But just as someone needs to know something about the rabbit trade in order to understand the meaning of 1,200 within that trade, so too does a person need to know something about law in order to understand the meaning—in order to *interpret*—individual words such as “interrogatory,” “bailment,” “interpleader,” and “detainer,” as well as phrases such as “letters rogatory,” “habeas corpus,” “covenants running with the land,” and “Letters of Marque and Reprisal.”

The existence of technical legal language creates a problem for the distinction between interpretation and construction. After all, one of the basic goals of the distinction between interpretation and construction is facilitating the ability to distinguish between linguistic meaning and legal purposes, and accordingly to ensure that consideration of the law, with all of its principles and aims, is

⁶⁶ See 5 WILLISTON & JAEGER, *supra* note 3, § 654, at 60 (arguing that usage and collateral parol agreements are governed by the same principle but that usage may be more effective); Lisa Bernstein, *Custom in the Courts*, 110 NW. U. L. REV. 63, 71 n.29 (2015) (collecting sources where trade usage is discussed).

⁶⁷ *Smith v. Wilson* (1832) 110 Eng. Rep. 266, 266; 3 B. & Ad. 728, 728-29 (KB) (holding parol evidence admissible to demonstrate customary usage in the rabbit trade).

⁶⁸ *Soutier v. Kellerman*, 18 Mo. 509, 511-12 (1853).

⁶⁹ The problem of technical language in general has long been a particular worry of philosophers of language working in, around, and against the ordinary language tradition. See Charles E. Caton, *Introduction to PHILOSOPHY AND ORDINARY LANGUAGE*, at v, v (Charles E. Caton ed., 1963); Friedrich Waismann, *Language Strata*, in 2 LOGIC AND LANGUAGE 11 (Antony Flew ed., 1953).

distinguished from consideration of meaning.⁷⁰ But if we cannot determine what the language—the words—means at the interpretation stage without bringing law into the picture, then one point of the distinction—isolating legal considerations and distinguishing those considerations from linguistic ones—appears to collapse.⁷¹ In fact, this argument from technical language is at the core of John McGinnis and Michael Rappaport’s own challenge to the interpretation-construction distinction.⁷² McGinnis and Rappaport are operating, however, within an originalist framework, and argue that the language of the Constitution should be understood as pervasively technical because that is how it was so understood at the time of its ratification.⁷³ But McGinnis and Rappaport’s claims about the import of the Constitution being written in technical language are independent of their claims that *all* of the language of the Constitution is technical and also independent of their claims that that conclusion can be derived from an originalist analysis based on originalist premises. For even if McGinnis and Rappaport’s claims apply only to some of the language of the Constitution, and even if those claims derive from the facial meaning of the language—both now and then⁷⁴—their conclusion that technical language may undercut the interpretation-construction distinction remains

⁷⁰ Just to be clear about the nature of the claim, the problem is not that technical terms—*bowsprit*, or *defibrillator*, or *megahertz*—might appear in a statute or other source of law. It is that *legal* technical terms require recourse to law for their interpretation, and it is the legal nature of legal technical terms that is the source of the problem.

⁷¹ For my own earlier, briefer, and far less well-developed hints to the same effect, some of which might not stand up to the closer analysis I offer here, see generally Frederick Schauer, *Is Law a Technical Language?*, *supra* note 17; Frederick Schauer, *On the Relationship Between Legal and Ordinary Language*, in *SPEAKING OF LANGUAGE AND LAW: CONVERSATIONS ON THE WORK OF PETER TIERSMA* 35, 36-37 (Lawrence M. Solan, Janet Ainsworth & Roger W. Shuy eds., 2015).

⁷² McGinnis & Rappaport, *Original Methods Originalism*, *supra* note 12, at 788-93 (arguing that the Constitution should be interpreted using the methods the Framers would have applied to it).

⁷³ *Id.* Fallon argues, principally in the context of statutory and not constitutional interpretation, that interpretation does and should incorporate, to oversimplify, the goals of the legal system. Richard H. Fallon, Jr., *The Statutory Interpretation Muddle*, 114 *Nw. U. L. REV.* 269, 330 (2019). This is not the place to discuss Fallon’s important claim in detail, but one way of interpreting that claim is as positing that all legal language is both technical and constitutive, as I use those ideas here. But for reasons I set out briefly below in the Conclusion, I resist, both descriptively and normatively, the idea that legal language necessarily speaks primarily to legal interpreters—principally judges—rather than to those whose behavior legal language seeks to regulate.

⁷⁴ See *supra* note 44 and accompanying text.

standing because their conclusion still challenges the basic point of the distinction: distinguishing questions of meaning from questions of law.⁷⁵

But the argument from technical language may not ultimately succeed, at least when it is understood as McGinnis and Rappaport understand it, as being about all technical legal language. Against an unqualified argument from technical language,⁷⁶ there is the response that nothing about the technical nature of language, constitutional or otherwise, prohibits distinguishing between what that language means when understood technically and in context and how it should be applied to particular facts and particular controversies.⁷⁷ We need some attention to context to understand, for example, that when someone refers to “gift,” she is referring to a present, as the word means in English, and not to poison, as the word means in German; to understand whether someone who talks about her vessels is talking about her pots or instead about her boats; and to understand whether someone who says he is going to the bank is going to a financial institution or instead to the side of the river. And thus, so the argument goes, we need some attention to the context of utterance in order, at the outset, to determine matters such as whether, when a legal instrument refers to a “party,” we should define that word according to the ordinary meanings we find in places like Webster’s dictionary or to the technical meanings we find in the Federal Rules of Civil Procedure.⁷⁸

Once we have identified the language in context as being technical, however, the basic insight of the interpretation-construction distinction still holds, or so the argument continues. Suppose that a defendant answers a federal complaint twenty-three days after service, that answer being two days late according to Rule 12 of the Federal Rules of Civil Procedure.⁷⁹ The defendant then seeks to justify the tardiness by claiming illness. Now it is true that determining what a complaint is, determining what an answer is, and determining how twenty-one days are calculated all require reference to legal rules and to an understanding of the technical definitions of those terms. But the answers to those questions, admittedly technical, still produce an interpretation that is linguistically and temporally prior, so my reconstructed version of the argument proceeds to the

⁷⁵ In some ways my argument here is the mirror image of that in William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1128-32 (2017). Baude and Sachs are focused on the way in which construction necessarily involves interpretation. My argument here is that interpretation (sometimes) involves construction.

⁷⁶ And thus against some of my own earlier and almost offhand suggestions. *See supra* note 71.

⁷⁷ *See* Solum, *Communicative Content*, *supra* note 1, at 486-507 (distinguishing semantics from pragmatics and developing the argument that meaning can and must be meaning in context); Solum, *Originalism and Constitutional Construction*, *supra* note 1, at 519-20 (discussing contextual enrichment).

⁷⁸ *See* Solum, *Communicative Content*, *supra* note 1, at 486-507.

⁷⁹ FED. R. CIV. P. 12(a)(1)(A)(i).

further question of whether there are some other rules or principles that would excuse the late answer.⁸⁰ In other words, the presence of technical language in law remains compatible with an initial step in which the decision maker first interprets the language, recognizing its context and its technical dimensions, and then construes the so-interpreted legal item by applying the interpreted language to the matter at hand.⁸¹

The foregoing account, however, presupposes that the legal dimension of a technical legal meaning supplies the legal context and thus the technical legal meaning for a particular term. This account, however, does not suggest that all of legal language—all of the language used in and by law—incorporates law's full array of rules, principles, and goals. The language used in and by law may include characteristically legal terms not typically found or used elsewhere, but there is no reason to suppose that words like "two" or "vehicle" could or should, contra Fuller,⁸² contain legal ideas and legal goals. Indeed, the interpretation-construction distinction rests solidly on this conclusion, insofar as it is premised on the idea that for most of the language of the law, it is possible to engage in an act of interpretation—locating the meaning or locating the semantic content—without recourse to law's values, goals, purposes, premises, and institutions. But although the conclusion that ordinary nontechnical terms when used in law still retain the core of their nontechnical meaning seems correct, it also seems correct to conclude that the legal meaning of distinctively legal terms can, should, or even must include the full scope of what law is and what law is designed to do. If this contrast between ordinary language used in law and technical legal language used in law is correct, and the issue implicates closely

⁸⁰ Lurking around this issue is the interesting question often described in terms of the individuation of laws. We are accustomed to thinking of legal codes, or law in general, as consisting, in part, of a multitude of separate rules. But thinking in this way was, for Jeremy Bentham, and is, for Joseph Raz, a potentially confusing shorthand. See JOSEPH RAZ, *THE CONCEPT OF A LEGAL SYSTEM* 70-92, 109-16, 216-28 (1970) (arguing that an adequate explanation of the structure of the legal system depends on understanding of individuation); M.H. James, *Bentham on the Individuation of Laws*, 24 N. IR. LEGAL Q. 357, 365 (1973). For them, and for others, legal rules must be understood (interpreted? construed?) in conjunction with a vast number of other applicable legal rules. Under this view, it is not that persons injured by the negligence of others have a cause of action against the party causing the injury but rather that they have that cause of action only if brought within a certain time, only if brought in a court with proper subject-matter jurisdiction, only if brought in a court with personal jurisdiction over the defendant, and so on and on and on. In the broadest sense, the concern about individuation is in considerable tension with the distinction between interpretation and construction precisely because recognition of the problem of individuation seeks to combine that which the interpretation-constriction distinction attempts to keep apart.

⁸¹ See Solum, *Originalism and Constitutional Construction*, *supra* note 1, at 494; see also Solum, *The Interpretation-Construction Distinction*, *supra* note 1, at 106 n.24.

⁸² See *supra* notes 47-57 and accompanying text.

the question of the individuation of laws⁸³—what counts as *a* law—then it turns out that the meaning (or linguistic content) of any distinctively legal term incorporates all of the devices that under the interpretation-construction distinction would fall under the heading of construction. If, for example, “habeas corpus” has no nonlegal and nontechnical meaning,⁸⁴ then the meaning of “habeas corpus,” according to the present argument, necessarily includes not only what habeas corpus just is but also all of the circumstances in which legal doctrine would permit the suspension of habeas corpus, would deny the applicability of habeas corpus principles, and so on. Accordingly, if we need law to define and interpret “habeas corpus” in a way that we do not need law to define “vehicle,” “two,” “shingle,” “rabbit,” or “one thousand,” then only by arbitrary stipulation, so the argument continues, can we say that only some of law can be used to interpret a legal term, while leaving other aspects of law relegated to the process of construction. In sum, however sensible the distinction between interpretation and construction may be, when what is to be interpreted is ordinary nontechnical language, the line between interpretation and construction appears arbitrary and flexible if the procedures and principles of law can almost as easily be located on one side of the interpretation-construction divide as on the other.

This challenge to the interpretation-construction distinction becomes even stronger when applied to those legal terms that designate institutions, transactions, or relationships that are themselves constituted—and not just regulated—by law. Just as there can be no “home runs” without baseball and no “checkmates” without chess,⁸⁵ so too can there be no corporations or trusts, for example, without the legal rules and legal institutions that create the very

⁸³ See *supra* note 80.

⁸⁴ Alas, the modern world of television, featuring criminal law and criminal procedure as it so often does, may make “habeas corpus” a poor example.

⁸⁵ John Searle presented the most prominent distinction between constitutive and regulative rules. See JOHN R. SEARLE, *SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE* 33-42 (1969) (distinguishing between “regulative rules,” which “regulate antecedently or independently existing forms of behavior” such as etiquette rules, and “constitutive rules,” which “do not merely regulate, [but] create or define new forms of behavior,” such as the rules of football or chess). The distinction is analyzed, applied, and embellished in, *inter alia*, Guido Boella & Leendert van der Torre, *Regulative and Constitutive Norms in Normative Multiagent Systems*, 2004 *PROC. PRINCIPLES KNOWLEDGE REPRESENTATION & REASONING* 255, 255; Christopher Cherry, *Regulative Rules and Constitutive Rules*, 23 *PHIL. Q.* 301, 313-15 (1973) (criticizing Searle’s distinction between and formulation of constitutive and regulative rules); and Dick W.P. Ruiter, *A Basic Classification of Legal Institutions*, 10 *RATIO JURIS* 357, 359-61 (1997) (differentiating legal and nonlegal institutional facts in that the former “underl[y] a category of *institutional facts*,” whereas the latter “underl[y] a category of *institutions*”).

possibility of there being such things.⁸⁶ And thus, when we seek to interpret the language that creates a legal institution—the trial of impeachments, for example⁸⁷—it may be impossible to interpret the language that refers to that institution without taking into account all of the other institutions, rules, values, and goals that are simply part of what the institution is and how and why it was created. And to the extent that that is so, and thus to the extent that interpreting constitutive legal language necessitates recourse to the law-soaked purposes of the constituted institutions, once again the justifications for distinguishing interpretation from construction largely evaporate. In other words, interpreting constitutive legal language necessitates incorporating at the interpretation stage the very considerations that the interpretation-construction distinction seeks to put on the other, construction side of the interpretation-construction line.

Let us assume, however, that the above argument fails, as it arguably does when some legal technical terms—“Letters of Marque and Reprisal”⁸⁸ or “Congress,”⁸⁹ for example—do have a moderately clear referent that can be determined without getting into the questions of when and how letters of marque and reprisal are to be granted, enforced, withdrawn, and the like, or without becoming involved with questions about congressional procedure, elections, and so on. For words and phrases such as “Letters of Marque and Reprisal,” “Congress,” and maybe even “try” in the Impeachment Trial Clause of Article I,⁹⁰ the basic insight of the interpretation-construction distinction may hold even in the face of having to use some of law—but not all of law, and only a thin slice of legal considerations—to interpret their meaning.

But now let us turn to those terms that are intrinsically evaluative, such as “unreasonable” as it appears in the Fourth Amendment,⁹¹ “cruel” and “unusual” as they appear in the Eighth Amendment,⁹² and “speedy” as it is used in the Sixth Amendment.⁹³ Slightly less obvious, but still in the same category, would be the “necessary and proper” clause in Article I,⁹⁴ the requirement of “Full Faith and

⁸⁶ The central feature of Hart’s inaugural lecture theorizes the constitutive nature of legal language and is largely compatible with Searle’s claims about constitutive language. See generally H.L.A. HART, *Definition and Theory in Jurisprudence*, in *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 21 (1983).

⁸⁷ See *Nixon v. United States*, 506 U.S. 224, 229 (1993) (considering whether the Impeachment Clause allowed the Senate to delegate hearing factual testimony to a smaller group of Senators).

⁸⁸ U.S. CONST. art. I, § 8, cl. 11; *id.* § 10, cl. 1.

⁸⁹ U.S. CONST. art. I (vesting legislative powers in Congress of the United States and laying out its makeup, procedures, and limits of lawmaking authority).

⁹⁰ U.S. CONST. art. I, § 3, cl. 6.

⁹¹ U.S. CONST. amend. IV.

⁹² U.S. CONST. amend. VIII.

⁹³ U.S. CONST. amend. VI.

⁹⁴ U.S. CONST. art. I, § 8, cl. 18.

Credit” in Article IV,⁹⁵ and the mandate of “just compensation” in the Fifth Amendment.⁹⁶ When we confront such language, we enter the realm of what philosophers often refer to as “thick descriptions”—descriptive statements that presuppose criteria of evaluation and which then implicitly apply those criteria.⁹⁷ When we say that Sean is “rude” or that Leslie is “brave,” we make statements that appear superficially to be in descriptive form but which presuppose and apply evaluative and not flatly descriptive standards of behavior for what counts as rudeness and what satisfies some criteria of bravery.

So too with “cruel,” “unusual,” “unreasonable,” “speedy,” “full,” “just,” and “necessary.” We simply cannot interpret “cruel” in the interpretation-construction sense of interpretation without having criteria for cruelty in the background, and we cannot locate or apply those criteria without considering the evils that the Eighth Amendment is there to combat and without considering all of the associated constitutional principles, doctrines, and theories that inform the process of constitutional application. Just as it is infelicitous to say that a person has good manners but is rude, so too is it infelicitous to say that some form of punishment is cruel and unusual but constitutional. That being the case, the ability to identify and define constitutional cruelty and then, in a conceptually separate step, apply that interpretation to a particular act, is essentially impossible.

Even more for evaluative terms, therefore, than for the constitutive terms that may be located in constitutions or other legal documents, and even more than for the full range of technical language in the Constitution or other legal document, the promise of the interpretation-construction distinction goes largely unfulfilled. If we understand that promise as one of offering the conceptual clarity⁹⁸ that comes from separating questions of linguistic meaning from questions of law, and especially from normative questions of law, then the frequency with which questions of law, and especially normative questions of law, are essential to the determination of linguistic meaning renders the fundamental insight of the interpretation-construction distinction unfortunately inapplicable to a large swath of constitutional language.

⁹⁵ U.S. CONST. art. IV, § 1.

⁹⁶ U.S. CONST. amend. V.

⁹⁷ See Philippa Foot, *Moral Arguments*, 67 MIND 502, 510 (1958); see also *Thick Ethical Concepts*, STAN. ENCYCLOPEDIA OF PHIL. (Sept. 21, 2016), <https://plato.stanford.edu/entries/thick-ethical-concepts/> [<https://perma.cc/WF2X-MX6U>] (“Philippa Foot argues that thick terms such as *rude* undermine the *is-ought* gap: calling something rude is evaluative because it expresses condemnation in the same kind of way as *bad* and *wrong* do, but this evaluation can be derived from a non-evaluative description.”).

⁹⁸ See Solum, *Originalism and Constitutional Construction*, *supra* note 1, at 476-82 (arguing that collapsing the interpretation-construction distinction creates confusion by conflating the meaning of the Constitution with the judicial power to change it).

As discussed above,⁹⁹ one of the intended or unintended consequences of recognizing the distinction between interpretation and construction is in challenging those who would maintain that locating the original (or even contemporary) public meaning of the Constitution's language is sufficient to answer the kinds of questions routinely posed in constitutional discourse and constitutional litigation. There are, to be sure, plausible arguments for treating the product of the interpretive enterprise as sufficient to answer the questions that are raised by constitutional construction,¹⁰⁰ but these arguments are and must be normative and not linguistic ones; and they are arguments that must meet normative arguments the other way, some of which may well accept the descriptive conclusions of an interpretive exercise while insisting that strong normative considerations pull in the opposite direction.

Full recognition of the import of technical language in the Constitution, although challenging some of the foundations of the distinction between interpretation and construction, turns out also to present an additional challenge to some of the common arguments in favor of taking original public meaning as dispositive. As Andrew Coan has argued,¹⁰¹ the mere fact of a constitution or other legal instrument being written tells us little about what results follow from its interpretation or construction. But the implications of that argument are even stronger to the extent that a written legal instrument contains characteristically legal technical terms. When that is the case, an additional layer of choice is added about how those technical terms are to be defined and about what domain should be consulted in order to find those definitions. None of these tasks is impossible, but all of them involve choices, and the injection of technical, constitutive, and evaluative terminology into the equation only makes more complex but more obvious just what choices are involved.

CONCLUSION

Jeremy Bentham would have applauded those who insist on distinguishing interpretation from construction. As the proponent of detailed and publicly accessible constitutions and codification in general¹⁰² and as the vehement

⁹⁹ See *supra* text accompanying notes 4-5.

¹⁰⁰ Indeed, this conclusion is implicit in the entire originalist program. See *supra* notes 3-5 and accompanying text (noting connection between the interpretation-construction distinction and constitutional originalism).

¹⁰¹ Coan, *supra* note 13, at 1028.

¹⁰² See generally JEREMY BENTHAM, *Constitutional Code*, in 9 THE WORKS OF JEREMY BENTHAM 1 (John Bowring ed., 1843); Dean Alfange, Jr., *Jeremy Bentham and the Codification of Law*, 55 CORNELL L. REV. 58, 68 (1969) ("To lessen the power of the grasping breed who made up 'Judge & Co.,' to add certainty—the grand utility of the law—to the legal system by promoting the cognoscibility and accessibility of legal rules, and thereby to advance the principle of security by preventing the disappointment of settled expectations, Bentham insisted on the necessity of a code of laws.").

opponent of legal fictions,¹⁰³ judicial discretion,¹⁰⁴ the common law,¹⁰⁵ William Blackstone,¹⁰⁶ and pretty much everything else, Bentham devoted much of his life and his not inconsiderable capacity for outrage to trying to close the gap between the lawmaker and the citizen. For him, the idea of law being written in a technical language was an idea further conducive to increasing the obscurity of law and thus to increasing the need for lawyers and judges—Judge & Co.—all of whom Bentham believed took that need as a way of engaging in a conspiracy to increase the power of judges and the income of lawyers.¹⁰⁷

Were he to have been confronted with the distinction between interpretation and construction, Bentham would likely have agreed with the basic idea behind the distinction but mainly, he would have thought, as a way of purging from the law any opportunities for judicial construction. By contrast, insofar as the distinction between interpretation and construction emphasizes construction, it serves as a valuable and enduring reminder of how much of American constitutional law remains, for better or for worse, susceptible to judicial power.

The distinction between interpretation and construction, however, hinges for its even broader significance on the possibility of construction-free interpretation. Without that possibility, the distinction is pointless. Consequently, the significance of the distinction is dependent on the ability of interpreters to engage in interpretation according to the conventions of linguistic usage without considering the decisional implications of that meaning while doing so. But to the extent that a legal document contains language that is technical, constitutive, or evaluative, this possibility of separating the tasks of

¹⁰³ For Bentham's vitriolic opposition to legal fictions, see, for example, JEREMY BENTHAM, *A FRAGMENT ON GOVERNMENT* 51-56 (J.H. Burns & H.L.A. Hart eds., Cambridge Univ. Press 1988) (1776) ("The indestructible prerogatives of mankind have no need to be supported upon the sandy foundation of a fiction.").

¹⁰⁴ That Bentham viewed judicial discretion with contempt is the conventional wisdom, but for a more subtle analysis, see GERALD J. POSTEMA, *BENTHAM AND THE COMMON LAW TRADITION* 340-41 (2d ed. 2019) (arguing that Bentham accepted judicial discretion in procedural and evidentiary law so long as it was applied according to the judge's "utilitarian judgment").

¹⁰⁵ JEREMY BENTHAM, *Truth Versus Ashhurst or; Law as It Is, Contrasted with What It Is Said to Be*, in 5 *THE WORKS OF JEREMY BENTHAM*, *supra* note 102, at 230, 233 ("The lies and nonsense the law is stuffed with, form so thick a mist, that a plain man, nay, even a man of sense and learning, who is not in the trade, can see neither through nor into it . . .").

¹⁰⁶ *Id.* at 236 ("Which then, do you think is the sort of law, which the whole host of lawyers, from Coke himself down to Blackstone, have been trumpeting in preference? That very sort of bastard law I have been describing to you . . .").

¹⁰⁷ See JEREMY BENTHAM, *Scotch Reform*, in *THE WORKS OF JEREMY BENTHAM*, *supra* note 102, at 1; JEREMY BENTHAM, *Introductory View of the Rationale of Evidence*, in 6 *THE WORKS OF JEREMY BENTHAM*, *supra* note 102, at 2, 22-23 (lamenting the irrationality of the pleading system, which, he claimed, allowed wealthier clients to get results they wanted through clever lawyering despite the evidence).

interpretation and of construction is weakened to the point of collapse. Evaluating the importance of the distinction between interpretation and construction is therefore a useful reminder that the Constitution we have is a far cry from the Constitution that Jeremy Bentham would have preferred, and, indeed, urged the United States to have.¹⁰⁸ Even to the present day, many would wish for a far more constraining constitution, one in which construction would rarely be either necessary or permissible.¹⁰⁹ The distinction between interpretation and construction has more limitations than its proponents often acknowledge, especially when it confronts the varieties of technical legal language, but the distinction is real and is a reminder that, in the American constitutional culture, ordinary linguistic meaning can take us and the judges only so far. For some commentators and some judges, this is an unfortunate state of affairs, and one they would wish were otherwise. But wishing won't make it so.

¹⁰⁸ See D.P. Crook, *The United States in Bentham's Thought*, 10 AUSTRALIAN J. POL. & HIST. 196, 196 (1964) (noting that Bentham offered his services to James Madison in an attempt to assist with the codification of law and construction of the Constitution); H.L.A. Hart, *Bentham and the United States of America*, 19 J.L. & ECON. 547, 563-65 (1976) (noting Bentham's unhappiness with the American acceptance of the uncodified common law and creation of the unnecessary "second Chamber" in the Senate); Steven J. Macias, *Utilitarian Constitutionalism: A Comparison of Bentham & Madison*, 11 N.Y.U. J.L. & LIBERTY 1028, 1080-84 (2018) (summarizing correspondence between Bentham and James Madison where Bentham encouraged the President to fully codify American law).

¹⁰⁹ See sources cited *supra* note 3.