

ORIGINAL METHODS ORIGINALISM: A NEW THEORY OF INTERPRETATION AND THE CASE AGAINST CONSTRUCTION

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INTRODUCTION

In this Article, we defend an interpretive approach that we call “original methods originalism.” Under this approach, the Constitution should be interpreted using the interpretive methods that the constitutional enactors would have deemed applicable to it. Thus, many of the key questions that arise about constitutional interpretation—such as whether intent or text should be its focus, whether legislative history should be considered, and

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whether words should be understood statically or dynamically—are answered based on the content of the interpretive rules in place when the Constitution was enacted.

We believe that original methods originalism provides the most accurate method for determining the original meaning of the Constitution. Indeed, we argue that the premises underlying the two leading approaches to originalism—original intent and original public meaning—lead, if properly understood, to the view that the Constitution should be interpreted based on the enactors' original methods. To find the original intent of the Constitution's enactors, one must look to the interpretive rules that the enactors expected would be employed to understand their words. Similarly, to find what an informed speaker of the language would have understood the Constitution's meaning to be, one must look to the interpretive rules that were customarily applied to such a document. Therefore, under both original intent and original public meaning, the meaning of the Constitution should be interpreted based on the applicable interpretive rules of the time.

While the original methods approach requires that the Constitution be interpreted in accordance with the original interpretive rules, nothing guarantees that those rules were originalist. The rules at the time could conceivably have required that the Constitution be interpreted as a living document. Although we do not engage in a comprehensive review, we nonetheless provide strong evidence that these interpretive rules were essentially originalist. Some of the evidence suggests that the rules sought the original meaning, while other evidence suggests that they sought original intent. While we do not attempt to determine the precise interpretive rules, the evidence indicates that they were originalist in the conventional sense of originalism.

The original methods approach stands in sharp contrast to the theories of constitutional construction. Such theories are a central part of what is sometimes called the "new originalism," but which we believe should more accurately be called "constructionist originalism." The "constructionist originalist" believes that original meaning controls the interpretation of provisions that are not ambiguous or vague, but that constitutional construction provides judges and other political actors with discretion to resolve ambiguities and vague terms based on extraconstitutional considerations. We find no support for constitutional construction, as opposed to constitutional interpretation, at the time of the Framing. Indeed, the constructionists have not supplied evidence that the constitutional enactors contemplated construction. Rather, the evidence suggests that ambiguity and vagueness were resolved by considering evidence of history, structure, purpose, and intent. Whether or not construction has a philosophical justification, the Framers' generation does not appear to have known about it.

So far, we have focused on the positive aspects of the original methods approach—its semantic account of the Constitution's meaning. We also argue, however, that original methods is a normatively desirable approach to

constitutional interpretation. In a series of articles, we have argued that enacting a constitution through a strict supermajoritarian process, like the one that was used in the United States, is likely to produce a beneficial constitution. But for the constitution to have this desirable quality, it must be given the meaning on which its enactors voted. That meaning requires reference to the interpretive rules existing at the time. As a result, the original methods approach is likely to be a desirable method for interpreting the Constitution.

Original methods is also normatively superior to constructionist originalism. Constitutional construction discards valuable information from the beneficial supermajoritarian enactment process regarding how ambiguity and vagueness should be resolved. The enactors would have expected such matters to be interpreted based on the original interpretive rules, but constitutional constructionists substitute extraconstitutional resolutions for those passed through the supermajoritarian process. Moreover, a dichotomy between interpretation and construction that allows extraconstitutional norms undermines the stability of original meaning, because the Constitution would not govern many “constitutional” issues. Constitutional construction also exacerbates agency costs, because it allows interpreters to employ discretion rather than requiring them to follow the guidance furnished by the original constitution-making process.

Part I of this Article distinguishes between positive and normative theories of constitutional interpretation. While we adopt the original methods approach on both a positive and a normative basis, our arguments for the approach differ in these two areas.

Part II argues for original methods as a positive interpretive theory. We first show that the premises of original intent and original meaning both lead to an original legal methods approach. We then strengthen the case for original methods by showing that it is supported by both the constitutional text and early historical practice. This Part ends by arguing both that no one has supplied evidence that anyone at the time of the Framing distinguished construction from interpretation and that original methods provides an alternative way of resolving ambiguous and vague terms.

Part III argues that original methods is a normatively desirable theory of constitutional interpretation. The meaning of the Constitution as discovered by the original methods approach is desirable because it is the meaning that received the endorsement of the supermajoritarian constitution-making process.

Part IV reviews the content of the Constitution’s interpretive rules to show that they were originalist. Although we do not have space for an exhaustive treatment, we show that some of the evidence supports original intent and other evidence supports original meaning. The evidence does not resolve the intent-versus-meaning question, but it does confirm that the interpretive rules were originalist. We also examine William Treanor’s ar-

ticle for this Symposium, concluding that his evidence supports the realist character of the early interpretive rules.

I. INTERPRETIVE THEORIES AND INTERPRETIVE RULES

A. *Positive and Normative Interpretive Theories*

It is important to distinguish between positive and normative theories of constitutional interpretation. A positive theory seeks to understand the meaning of the Constitution without reference to whether that meaning is desirable.¹ Originalist interpretive theories argue that the meaning of the Constitution is fixed as of the time of its enactment.² The two leading positive originalist theories are original intent and original public meaning.³

A normative theory of constitutional interpretation, in contrast, tells us the most desirable way to interpret the Constitution. Originalist normative theories maintain that following the original meaning or intent of the Constitution would be desirable. For example, Randy Barnett contends we should follow originalism because the structure of our Constitution is good enough to generate laws consistent with ideas of justice and following its original meaning flows naturally from the commitment to a written text.⁴ Keith Whittington argues that original intent is justified as a means of enforcing popular sovereignty.⁵ Nonoriginalist normative theories, such as the living constitution view, maintain that it is desirable to change or evolve the Constitution's original meaning over time.⁶

Our positive interpretive approach differs from the leading interpretive theories. Original methods does not attempt to provide a comprehensive positive theory of interpretation. Rather, it insists on a single core idea: that the meaning of language requires reference to the interpretive rules and methods that were deemed applicable to that language at the time it was written. For instance, take the question of whether the Supreme Court's original jurisdiction extends to suits against cabinet ministers. The Constitutional text provides that the Court's original jurisdiction encompasses "all

¹ Professor Larry Solum expresses the difference between positive and normative considerations well: "Semantics is about meaning. 'Normativity' is about the moral or ethical status of reasons for action." See Lawrence B. Solum, *Semantic Originalism* 28 (Ill. Pub. Law Research Paper, No. 07-24, 2008), available at <http://ssrn.com/abstract=1120244>.

² *Id.* at 2-4.

³ For a description of original intent and original meaning, see *infra* Part II.A-B.

⁴ See RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION* 100-113 (2004).

⁵ See KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* 3 (1999).

⁶ See, e.g., ARTHUR SELWYN MILLER, *SOCIAL CHANGES AND FUNDAMENTAL LAW: AMERICA'S EVOLVING CONSTITUTION* 349 (1979) ("The idea of the living Constitution thus is a justification for adaptation of the basic document to fit new social exigencies.").

cases affecting Ambassadors, *other public ministers* and consuls.”⁷ Although the second item in the list might seem to include a cabinet official, the legal interpretive rule *noscitur a sociis* tells lawyers that the definition of an item in a list should generally comport with the meaning of the other listed items.⁸ Hence only foreign officials are subject to original jurisdiction.

Our argument does not attempt to defend originalism in general or a particular version of it as a positive approach. Instead, we assume here that original intent or original meaning—or some combination of the two—is the correct interpretive theory. We argue that either of these approaches, when properly applied, requires using the original interpretive rules. In short, under a positive interpretive approach, both original intent and original meaning lead to reliance on original methods.

Our normative interpretive approach, however, is more comprehensive. We have argued that the original meaning of the Constitution is likely to be beneficial because it was enacted through a strict supermajoritarian process.⁹ But the Constitution will yield the beneficial meaning produced by this supermajoritarian process only if it is given its original meaning, because the enactors would have supported or opposed it based on that meaning.¹⁰ This argument also suggests that the document should be interpreted in accordance with the original interpretive rules. If the enactors read the document using those interpretive rules, then giving effect to the document they approved requires employing those same rules.¹¹ Thus, while the arguments for our positive and normative approaches differ, they are connected by the claim that the enactors would have interpreted the document based on the interpretive rules at the time.

B. Interpretive Rules—Nonlegal and Legal

Much of this Article is devoted to our claim that the relevant interpretive rules that existed at the time of the Constitution’s enactment are necessary to properly interpret that document. While our main arguments for this claim are presented in Parts II and III, a brief discussion of interpretive rules and their relationship to the meaning of the document will be helpful at this point.

⁷ U.S. CONST. art. III, § 2 (emphasis added).

⁸ *Noscitur a sociis* is the maxim that a word is known by its associates. BLACK’S LAW DICTIONARY 1084 (7th ed. 1999).

⁹ See John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 101 NW. U. L. REV. 383, 388 (2007) [hereinafter McGinnis & Rappaport, *A Pragmatic Defense*]; John O. McGinnis & Michael B. Rappaport, *Majority and Supermajority Rule: Three Views of the Capitol*, 85 TEX. L. REV. 1115, 1121 (2007) [hereinafter McGinnis & Rappaport, *Three Views*]; John O. McGinnis & Michael B. Rappaport, *The Condorcet Case for Supermajority Rules*, 16 SUP. CT. ECON. REV. 67, 109 (2008).

¹⁰ McGinnis & Rappaport, *A Pragmatic Defense*, *supra* note 9, at 389–90.

¹¹ *Id.* at 390.

Originalists argue that the Constitution's meaning is fixed as of the time of enactment. Originalists—both of the original intent and original meaning variety—argue that modern interpreters should be guided by the word meanings and rules of grammar that existed when the Constitution was enacted.¹² But word meanings and grammatical rules do not exhaust the historical material relevant to constitutional interpretation. There are also interpretive rules, defined as rules that provide guidance on how to interpret the language in a document. It is our position that originalism requires modern interpreters to follow the original interpretive rules used by the enactors of the Constitution as much as the original word meanings or rules of grammar.

Consider an interpretive rule that was used at the time of the Framing and is still in use today: a reader should avoid interpretations that render words to be redundant or surplusage.¹³ This interpretive rule is not a word meaning or grammatical rule. Instead, it derives from a regularity of language used in formal documents—that when people write carefully about a matter, they tend to eliminate redundancies. Given this regularity, it makes sense for readers of formal documents to prefer interpretations that do not render words redundant. Moreover, the existence of this interpretive rule provides future writers with additional reason to eliminate redundancies in their language.

This interpretive rule, of course, is not absolute. While it provides weight in favor of one interpretation, it can be overridden by other considerations. After all, writers do not single-mindedly pursue the goal of eliminating redundancies. As a result, the correct interpretation may sometimes involve more redundancies than other, inferior interpretations. Nonetheless, redundancies created by an interpretation increase the probability that the interpretation is incorrect.

The antiredundancy interpretive rule has continued to exist since at least the time of the Framing. Imagine instead that the rule had changed over time: it was followed when the Constitution was enacted but had fallen out of use in the last century. Although the rule might no longer be followed, we argue that it would bind modern interpreters as much as do original word meanings and grammatical rules.

There are a wide variety of interpretive rules, and the applicability of each turns on context, such as the subject matter of the writing and the type of document involved. Some interpretive rules apply generally. For instance, the antiredundancy rule appears to apply to all formal documents. Even more generally, the interpretive rule that requires an ambiguous term

¹² See, e.g., Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 556 (1994) (noting that originalists exhaust dictionaries and grammar books before admitting a provision is ambiguous).

¹³ For the antisurplusage rule, see *Kemper v. Hawkins*, 3 Va. 20, 88–89 (1793), and *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 175 (1803).

to be construed in accordance with the subject matter of the communication applies to all forms of communication, including oral and informal language.¹⁴ Other interpretive rules, however, apply only to narrower areas. For example, different types of documents follow different patterns of usage, so that an interpretive rule that applied to a scientific article might not apply to a recipe.

The discipline of law is filled with interpretive rules. Some of these interpretive rules apply inside and outside of the law, such as *ejusdem generis*.¹⁵ Other interpretive rules, however, are more specific to the law, like the rule of lenity.¹⁶ Still other legal interpretive rules will apply to specific documents or areas of law, such as interpretive rules for wills or treaties.¹⁷

It is important to distinguish between legal interpretive rules and the legal meanings of words or provisions. Some words have both an ordinary and a legal meaning. For example, the term “ex post facto law” has an ordinary meaning that covers retroactive laws that are either civil or criminal, whereas its legal meaning covers only retroactive criminal laws.¹⁸ Legal interpretive rules, by contrast, are the rules that govern how to interpret a legal document.

Legal interpretive rules, however, do not necessarily select the legal meaning of a word. The legislative interpretive rule that governs how to interpret a word in a legal document that has both an ordinary and legal meaning generally requires that the meaning be chosen based on context.¹⁹ Thus, the legal interpretive rule will often require the selection of the ordinary meaning rather than the legal meaning of a word in a legal document.

¹⁴ For example, if the term “diamond” is used in a baseball discussion, there is a presumption that it refers to a baseball field rather than a gem.

¹⁵ *Ejusdem generis* is a canon of construction that requires that “when a general word or phrase follows a list of specific persons or things, the general word or phrase will be interpreted to include only persons or things of the same type as those listed.” BLACK’S LAW DICTIONARY 535 (7th ed. 1999).

¹⁶ For the rule of lenity, see *McNally v. United States*, 483 U.S. 350, 359–60 (1987) (“When there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language.”).

¹⁷ See, e.g., *Schlottman v. Hoffman*, 18 So. 893, 895 (Miss. 1895) (“It is a well-settled canon for the construction of wills that the court will take into consideration the attending circumstances of the testator, the quantity and character of his estate, the state of his family, and all facts known to him which may reasonably be supposed to have influenced him in the disposition of his property.”).

¹⁸ The term “ex post facto law” appears to have had this dual meaning in 1787 as well. James Madison had assumed that it covered retroactive civil laws, but John Dickinson examined Blackstone and concluded that it covered only retroactive criminal laws. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 448–49 (Max Farrand ed., 1911). When the Supreme Court addressed the matter in *Calder v. Bull*, the judges used context as well as sources of legal meaning to conclude that the term only covered retroactive criminal laws. See 3 U.S. (3 Dall.) 386, 386 (1798).

¹⁹ See Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231, 234 n.6 (noting that depending on its context, a word can be given a legal rather than ordinary meaning).

Finally, while it is common to view legal interpretive rules as involving subtle or technical matters such as canons of interpretation, these rules actually extend to some of the core issues of interpretation. Most fundamentally, legal interpretive rules can inform the focus of an interpreter's inquiry. The rules can tell interpreters whether to look to meaning or intent, and whether to focus on original or dynamic meanings. Legal interpretive rules also can inform interpreters about what evidence to consider when determining meaning, such as requiring or forbidding the use of legislative history.²⁰

The Constitution is a formal, legal document and therefore interpreters of the Constitution must follow the original interpretive rules applicable to a document of this type. This is not simply a definitional argument. Rather, it is based on the view that the enactors would have considered these interpretive rules to apply to the Constitution.²¹

II. THE POSITIVE THEORY OF INTERPRETATION

This part considers the two leading positive theories of interpretation—original public meaning and original intent—and shows that both, when properly applied, lead to the original methods approach. The original intent approach requires the application of the original interpretive rules, because the enactors likely intended the meaning those rules would generate, and applying those rules is the most accurate way of discerning a single meaning. Original public meaning also leads to original methods because an informed and reasonable speaker of the language would have understood the Constitution as subject to the interpretive rules applicable to such a document.

A. *Original Intent*

The original intent theory is part of a more general and comprehensive theory about language and meaning. The theory holds that the intent of the author of words or language determines the meaning of those words. Applying this theory to the Constitution, Richard Kay argues that judges should apply the rules of the Constitution “in the sense in which those rules were understood by the people who enacted them.”²² Other prominent in-

²⁰ See, e.g., *Garcia v. United States*, 469 U.S. 70, 76 n.3 (1984) (stating that one should resort to legislative history only if the statute is ambiguous).

²¹ For a discussion of evidence supporting this position, see *infra* Part II.C.

²² Richard S. Kay, *Adherence to Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 230 (1988) [hereinafter Kay, *Adherence*]. Kay has repeated and extended his defense of original intention constitutional interpretation in this Symposium. See Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. U. L. REV. 703, [REDACTED] (2009) [hereinafter Kay, *Original Intention*] [WHEN PAGINATION IS AVAILABLE, PINCITE TO THE BEGINNING OF THE ARTICLE, WHERE KAY ADDRESSES JUDGES SPECIFICALLY.].

tentionalists include Larry Alexander, Raoul Berger, Sai Prakash, and Keith Whittington.²³

Defenders of the theory of original intent contrast it with more text-oriented theories. For example, Kay argues that non-intent or text-by-itself theories fail to account for how we think about or treat texts. He argues that readers do not understand texts independently of real or presumed human intentions. “Words are only meaningless marks on paper . . . until we posit an intelligence which selected and arranged them.”²⁴ Rather, meaning is fundamentally connected with a human agent who intended to communicate something.

The theory of original intent has much to be said for it, especially when the author of the language is a single person. An important connection exists between the intent of the speaker and the meaning of his words.²⁵ But whatever the advantages of original intent when there is a single author, it is much more problematic in situations where multiple authors are involved, such as with legislative and constitutional enactments.

The presence of multiple authors creates a serious problem of defining and determining the intent of an utterance. This problem has at least three manifestations. First, and most importantly, it is not clear how to define the collective intent of a group of authors when the individual intentions of each author might differ. It is quite possible that there is simply no joint intent and therefore no meaning to a document. While some have argued that an agreement by a mere majority of the body is sufficient to demonstrate a collective intent,²⁶ this is controversial, because it is not clear why a majority’s views as to a statute decides its meaning. While the majority’s view certainly determines whether a statute is enacted, that does not indicate without more that the majority determines its meaning.²⁷ In any event, even if a majority were adequate to determine meaning, this still leaves the strong possibility that a legislative body might vote for a measure that did not have a single meaning, because a single meaning was shared only by a plurality. Any such measure would presumably be void.

²³ See RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 363 (1977); WHITTINGTON, *supra* note 5, at 110–59; Larry Alexander & Saikrishna Prakash, “*Is that English You’re Speaking?*” *Why Intention Free Interpretation Is an Impossibility*, 41 *SAN DIEGO L. REV.* 967, 974–977 (2004).

²⁴ Kay, *Adherence*, *supra* note 22, at 230.

²⁵ Yet there are challenges even here for original intent. For example, if a person utters words that have the ordinary meaning of *X*, but he intended *Y*, there is a strong case to be made that the meaning of the utterance was *X*, not *Y*. See Alexander & Prakash, *supra* note 23, at 977.

²⁶ See, e.g., Kay, *Original Intention*, *supra* note 22, at 13????.

²⁷ See Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 *CONST. COMMENT.* 47, 64 (2006) (arguing that the majority’s views may determine the authority of a law without determining its meaning). One possibility is that the enactors delegated to a subgroup of people the authority to decide the meaning of the Constitution. See *id.* at 64–65 (discussing this issue). If one is to view the determination of meaning as a delegation, we believe it is best viewed as a delegation to the results of a process in which the applicable interpretive rules are applied.

Second, apart from whether adequate agreement existed, an audience addressed by multiple authors faces serious problems determining what the intent behind the document might have been. In particular, the people for whom the Constitution is written may be misled and subsequent interpreters confused by reliance on intent. Most legislators do not explain their votes, and those who do may be speaking strategically.²⁸

Finally, the problem of determining intent extends beyond interpreters to the legislators themselves. If legislators cannot easily determine the meaning of a provision upon which they are voting, this makes it all the less likely that they will share a common intent with other legislators.

Problems related to the intent of multiple authors or legislators can be addressed, however, through background interpretive rules. The possibility of multiple meanings would be significantly reduced or eliminated if legislators understood that the words of a law would be interpreted in accordance with applicable rules, such as accepted word meanings, grammar, and interpretive rules.

In this situation, the legislators would intend to enact a law that had the meaning determined by these applicable rules. Not only would the background rules promote the enactment of laws with a single meaning, they would also facilitate the determination of that meaning. Both interpreters and legislators could apply these background rules to determine an enactment's meaning.

These background rules are not simply a hypothetical means of addressing the problem of multiple intents. It is our view that the best way to understand the enactment of the Constitution under the original intent view is to assume that the enactors understood that the Constitution would have a meaning based on background rules. The Anglo-American legal tradition has long interpreted laws based on word meaning, grammatical rules, and interpretive rules. Moreover, we are not aware of a single instance where anyone has argued—or even raised the issue—that a formally passed law had no meaning because the requisite common intent was missing. Yet one would expect this argument to be made if the original intent theory without background rules had been employed.

This understanding of original intent strongly suggests that the Constitution should be interpreted in accordance with the interpretive rules that were deemed applicable at the time. These interpretive rules help solve the problem of multiple intents and are therefore necessary for interpreters to consider. Hence, the original intent interpretation requires the application of the original methods approach.

²⁸ See Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 STAN. L. REV. 1833, 1896 (1998) (discussing difficulties with legislative history because of strategic speeches).

B. Original Public Meaning

Theories of original public meaning, in contrast to original intent, interpret the Constitution according to how the words of the document would have been understood by a competent and reasonable speaker of the language at the time of the document's enactment.²⁹ Original public meaning is now the predominant originalist theory, with adherents including Randy Barnett, Gary Lawson, Michael Paulsen, and Larry Solum.³⁰

The original public meaning approach should also employ the original interpretive rules because this approach focuses on the understanding of a competent and reasonable speaker at the time of the Constitution's enactment. Just as such a person recognizes that his understanding of the language depends on conventions for word meaning and grammatical rules, he also recognizes that his understanding depends on widely applied interpretive rules. And just as such a person recognizes that there are specialized word meanings, so he recognizes that specific documents may be subject to specific interpretive rules.

The reader of a legal document knows that such a document is often subject to legal methods that may affect its meaning. While this is true of legal documents, it is not less true of other specialized documents. For example, the reader of a postoperative report would recognize that the interpretive conventions of the medical profession might govern its meaning. Similarly, the reader of the United States Constitution would recognize that its meaning would depend on interpretive rules that were generally deemed applicable to written constitutions of this type.

²⁹ There are various formulations of this view. Most original public meaning theorists rely on a reasonable reader or author. See BARNETT, *supra* note 4, at 92 (“Originalism seeks the public or objective meaning that a reasonable listener would place on the words used in a constitutional provision at the time of its enactment.”); ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 16–17, 37 (1997) (suggesting that originalism looks to the intent a reasonable person would gather from the constitutional text, understood as a brief charter of government); Lawson & Seidman, *supra* note 27, at 74 (requiring that the Constitution be interpreted based on the intentions of a reasonable, intelligent, and knowledgeable person). Other theorists seem to imply a reasonable reader or author. See, e.g., Vasan Kesavan & Michael Stokes Paulsen, *Is West Virginia Unconstitutional?*, 90 CAL. L. REV. 291, 398 (2002) (defining original public meaning as “the meaning the language would have had (both its words and its grammar) to an average, informed speaker and reader of that language at the time of its enactment into law”). While Larry Solum focuses on how the Constitution would “have been understood by a competent speaker of American English at the time it was adopted,” Solum, *supra* note 1, at 51, we believe that he supplies that speaker with additional knowledge of the constitutional context and the division of linguistic labor that makes him behave as both reasonable and knowledgeable in the respects with which we are concerned, see *id.* at 79 n.203.

³⁰ See BARNETT, *supra* note 4, at 92 (discussing the ascendancy of original public meaning); Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1144–45 (2003) (arguing that public meaning originalism corrects for original intent's shortcomings); Lawson & Seidman, *supra* note 27, at 47–48 (arguing that the concept of a reasonable person at the time of the Framing is the measure of constitutional meaning); Solum, *supra* note 1, at 2 (suggesting a “theoretical foundation for original public meaning originalism” (emphasis omitted)).

While some advocates of original public meaning are open to the possibility of treating interpretive rules as part of original public meaning analysis, others oppose it.³¹ It is not clear, however, how a principled original public meaning analysis could exclude the applicable interpretive rules.³² The meaning of a document is not merely a function of the word definitions and grammatical rules, but also of generally accepted rules for interpreting the document. Of course, there may be disagreements about what the applicable rules were and how much evidence is needed to establish them. But if the authors and readers of a document know that certain interpretive rules are generally deemed applicable to that document, and if the authors wrote that document expecting those rules to be used by their readers, then it is hard to understand how one could believe that these rules are not essential for determining the original public meaning.³³

Randy Barnett however, denies that the applicable interpretive rules are needed to determine meaning.³⁴ While Barnett has offered a variety of explanations for the content of original public meaning,³⁵ we do not see how any of his arguments show why interpretive rules, including legal interpretive rules, should be less relevant than other rules like grammar or word meanings. In his book, *Restoring the Lost Constitution*, Professor Barnett analogizes original public meaning theory to the objective theory of contractual interpretation, in which the objective meaning of the words rather than the subjective intent of the parties is relevant.³⁶ Barnett observes, “the Constitution is a written document and it is its writtenness that makes rele-

³¹ Compare Lawson & Seidman, *supra* note 27, at 80 (expressing openness to using interpretive tools), with Randy E. Barnett, *The Misconceived Assumption About Constitutional Assumptions*, 103 NW. U. L. REV. 615, 659 (2009) (opposing their use).

³² Caleb Nelson appears to have an intermediate position on the applicability of interpretive rules to original public meaning analysis. On the one hand, Nelson recognizes the similarity between what he calls interpretive conventions and word meanings and rules of grammar. See Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 549–50 (2003). Moreover, he writes:

Suppose, for instance, that members of the founding generation generally accepted and acted upon the following principle: “Every legal document (or at least every legal document like the Constitution) should be understood to instruct future interpreters to use Approach X unless it explicitly opts out of that approach.” On any plausible version of originalism, the meaning of a Constitution adopted against the background of this convention would be identical to the meaning of a Constitution that explicitly mandated the use of Approach X.

Id. at 551. On the other hand, Nelson appears to believe that certain interpretive rules are not so closely connected to the original meaning to require that they be treated on a par with word meanings. *Id.* at 550 (arguing that an originalist can choose to follow or not to follow certain interpretive conditions applied at the time of the Framing).

³³ For example, if Congress passes a statute, it seems clear that widely accepted canons for interpreting the statute would be part of the meaning that Congress passed. If someone sought to interpret that statute based on different interpretive canons—either because they believed that better policy would result or because their canons were somehow deemed a better way of determining the meaning—that interpretation would not be faithful to the meaning that Congress enacted.

³⁴ Barnett, *supra* note 31, at 659.

³⁵ BARNETT, *supra* note 4, at 89–117; Barnett, *supra* note 31, at 629.

³⁶ BARNETT, *supra* note 4, at 100.

vant contract law theory pertaining to those contracts that are also in writing.³⁷

Professor Barnett's analogy to the objective theory of contract also leads to a focus on original methods as a necessary means to determine objective meaning. Contractual terms often are derived using interpretive methods, including legal methods such as precedents or interpretive rules specific to contract law. It is true, of course, that many contractual terms should be interpreted according to their ordinary meaning, but it is a legal interpretive rule that determines whether a term should receive its ordinary or legal meaning.³⁸

In his paper for this Symposium, Professor Barnett also argues against use of the original interpretive rules on the ground that while the original public meaning of the Constitution is binding, the assumptions underlying the document are not.³⁹ But this argument begs the question of whether the public meaning can be divorced from the interpretive rules. Although the public meaning cannot be divorced from word meanings or grammar rules, Barnett never explains why interpretive rules should be treated differently. It is true that the content of these interpretive rules is disputable, but so is the content of word meanings and grammatical rules.⁴⁰

The binding nature of the applicable interpretive rules can be seen more clearly by contrasting them with a nonbinding assumption that Barnett provides. Barnett argues that even if it was widely assumed when the Constitution was enacted that the southern population would grow faster than the northern population and therefore allow the South's political power to protect slavery, that assumption would not be binding.⁴¹ We agree with Barnett here. Constitutional provisions usually do not make factual assumptions binding. The Constitution establishes rules regarding representation that cannot be read as in any way requiring that southern representation be increased over time. If one asked the enactors whether that assumption

³⁷ *Id.*

³⁸ Indeed, as Mikko Wennberg observes in a comment on Professor Barnett's own contract theory:

[T]he meaning of the terms of contract is determined by law. Of course, most words have meaning independent of their legally defined meaning, but *as the terms of the contract* their meaning depends ultimately on the law. The conventional meaning of some term is its legal meaning only if there is an—explicit or implicit—legal rule according to which contract terms are interpreted according to their conventional meaning. The rules of a contract law determine how the terms are to be interpreted. If the meaning of terms of contract are determined by law, then the conventional meaning of the *contract terms* are determined by *how people expect the terms to be interpreted in courts*. The reasonable meaning is thus not independent of existing law and legal practices.

Mikko Wennberg, *On Barnett's Theory of Default Rules*, 16 CAN. J.L. & JURIS. 147, 153 (2003).

³⁹ Barnett, *supra* note 31, at 659.

⁴⁰ In his book, Barnett also argues in favor of original public meaning on normative grounds, asserting that it is a means of "locking in" the meaning of the Constitution. BARNETT, *supra* note 4, at 103–04. If locking in meaning is the goal, however, then interpretive rules are a far superior means of promoting that goal than the constitutional construction advocated by Barnett—which seems rather to undermine lock-in. See *infra* Part III (discussing normative aspects of constitutional construction).

⁴¹ See Barnett, *supra* note 31, at 630.

was legally binding, we have no doubt they would say no. By contrast, interpretive rules that were regarded as applying to the Constitution are binding. If one asked the enactors whether a legal interpretive rule that was widely accepted as applying to the Constitution—say, perhaps, *ejusdem generis* or the rule of lenity—we have no doubt that the enactors would have regarded it as binding.⁴²

Even Lysander Spooner, an important source for Barnett,⁴³ argues that interpretive rules are needed to determine the meaning of the Constitution. In fact, Spooner agrees with us that the interpretive rules have a comparable status to word meanings in discerning the Constitution's meaning:⁴⁴

Rules of interpretation, then, are as old as the use of words, in prescribing laws, and making contracts. . . . *The people* must always be presumed to understand these rules, and to have framed all their constitutions, contracts, &c., with reference to them, as much as they must be presumed to understand the common meanings of the words they use, and to have framed their constitutions and contracts with reference to them. And why? Because men's contracts and constitutions would be no contracts at all, unless there were some *rules of interpretation* understood, or agreed upon, for determining which was *the legal meaning* of the words employed in forming them.⁴⁵

Thus, Spooner recognizes that interpretive rules properly help determine the meaning of the Constitution.

Spoooner calls the meaning produced by these interpretive rules the legal meaning of the Constitution. While we do not necessarily agree with all the specific rules of interpretation for which he argues, we do agree with Spooner's understanding of the role of interpretive rules in determining original meaning. Lysander Spooner is a type of original methods originalist.

Another Symposium participant, Professor Larry Solum, admits the possibility that original methods might determine the original meaning, because a community could understand interpretative rules, including legal interpretive rules, as contributing to that meaning.⁴⁶ He appears to doubt, however, that the relevant community for the United States Constitution regarded interpretive rules in this way. We believe that the correct application of Professor Solum's theory does require original methods to be used to determine the Constitution's original meaning.

⁴² To be clear, we are not necessarily asserting that *ejusdem generis* or the rule of lenity were widely deemed applicable to the Constitution, although we are inclined to believe that they were. Their applicability would require additional research. The point is that these rules are exactly the type that might have been widely treated as applicable, and, if so, they would have been accepted as binding.

⁴³ See Barnett, *supra* note 31, at 643–47.

⁴⁴ See, e.g., Lysander Spooner, *The Unconstitutionality of Slavery*, 28 PAC. L.J. 1015, 1040 (1997).

⁴⁵ *Id.* at 1040 (emphasis added).

⁴⁶ Solum, *supra* note 1, at 110.

Solum himself acknowledges that one might argue in favor of using legal interpretive rules on the ground that it is the actual linguistic practice of the general public to always defer to meanings derived from legal interpretive rules.⁴⁷ Solum does not appear to accept this argument, questioning whether the actual linguistic practice is to always defer to meanings so derived and demanding a reason to give legal meaning priority over ordinary meaning.⁴⁸ We believe, in contrast, that a competent speaker of the language would know that certain interpretive rules apply to all formal written documents. Moreover, a competent speaker would also believe that legal documents receive—at least for legal purposes—a legal interpretation that employs legal methods.⁴⁹ It is a common, if not universal, reaction for a lay person to read a legal document—whether a contract, a statute, or a constitution—and have the following reaction: “Well, it seems to mean X to me, but I am not a lawyer. To be sure of its meaning, we will need a lawyer to read it.”

Moreover, the reason for the priority of the lawyer’s interpretation of the document is that it is understood to be better than, and to take priority over, the lay person’s. In part, this is because legal interpretive rules govern how to construe the document, and these are only known by those formally endowed with legal knowledge.⁵⁰ This example suggests that the linguistic practice of the community would give priority to legal interpretive rules and the lawyer’s understanding of legal documents like the Constitution.⁵¹

C. *Original Methods: Additional Evidence and Answers*

While both original intent and original public meaning support the original methods approach as a positive interpretive theory for the Constitution, additional evidence also supports original methods. This evidence de-

⁴⁷ *Id.*

⁴⁸ *Id.* at 111.

⁴⁹ Solum also discusses legal meanings as terms of art, analyzing them through the device of a linguistic division of labor. *Id.* at 55, 110. Solum doubts that all terms in the Constitution are legal terms of art. *Id.* We agree with him that there is little reason to believe that all or most constitutional terms are legal terms of art.

⁵⁰ As discussed earlier, these legal interpretive rules differ from legal meanings. In fact, the legal interpretive rules will sometimes choose ordinary meanings over legal meanings. The key point is that it is the legal interpretive rules that decide which meaning is selected.

⁵¹ The principle that legal documents have meanings derived from legal interpretive rules is also supported in part by the revenues generated by lawyers. The added value that lawyers bring to interpretation would be small if legal documents like statutes or contracts simply had an ordinary meaning instead of a meaning derived in part from the application of legal interpretive rules. The decisions of millions of ordinary people each year to consult with lawyers about the meaning of legal documents provides strong evidence that legal interpretive rules and concepts are employed in legal documents. The billions of dollars spent through these visits are not wasted, because it is important that statutory or contractual terms be more precise and less ambiguous than terms of ordinary language. The legal system, no less than the other Western innovations, has been a major source of societal improvement, and the positive meaning of our legal documents is an inextricable part of this culture of improvement.

rives from the Constitution's text and early historical understanding. We also address two complications for our view: the source of the legal interpretive rules and an objection based on the popular nature of the Constitution.

1. *Text and Historical Understanding.*—The text of the Constitution suggests that it is properly interpreted in accordance with the applicable legal interpretive rules. The Constitution defines itself as the “supreme Law of the Land.”⁵² The fact that the Constitution was a legal document was not simply left to implication by the enactors but was set forth explicitly in the Constitution itself.

The Ninth Amendment also provides strong evidence that the enactors believed the Constitution would be understood in light of interpretive rules.⁵³ While there is disagreement about what the Amendment means, everyone agrees that it is primarily about forbidding an interpretive inference from the enumeration of rights to the conclusion that the people do not enjoy other rights.⁵⁴

One understanding of the Ninth Amendment is that it was intended to foreclose an inference that Alexander Hamilton had mentioned in opposing a bill of rights.⁵⁵ Hamilton had noted that if the right to freedom of speech had been listed, even though Congress did not have an enumerated power to regulate speech, an interpreter might still conclude that Congress actually possessed such regulatory power. As Hamilton said, a bill of rights “would contain various exceptions to powers not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do?”⁵⁶ Hamilton is here anticipating that interpreters might employ the antisurplusage interpretive rule to expand Congress's enumerated powers.

Other commentators view the Ninth Amendment as protecting against not merely the enlargement of enumerated powers, but also the retraction of individual rights.⁵⁷ Again, this understanding of the Ninth Amendment assumes that it was designed to address an inference based on interpretive rules. The fear here is that interpreters would assume that a listing of rights

⁵² U.S. CONST. art. VI.

⁵³ U.S. CONST. amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”).

⁵⁴ See Kurt T. Lash, *A Textual-Historical Theory of the Ninth Amendment*, 60 STAN. L. REV. 895, 903 (2008); Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1100 (1990).

⁵⁵ Charles J. Cooper, *Limited Government and Individual Liberty: The Ninth Amendment's Forgotten Lessons*, 4 J.L. & POL. 63, 64 (1987).

⁵⁶ THE FEDERALIST NO. 84, at 537 (Alexander Hamilton) (Henry Cabot Lodge ed., New York, G.P. Putnam's Sons 1888).

⁵⁷ BARNETT, *supra* note 4, at 54–55.

meant that unlisted rights were not protected. This interference might have been based on the rule of *expressio unius est exclusio alterius*.⁵⁸

Thus, the two leading approaches to the Ninth Amendment assume that the Constitution was written with interpretive rules in mind. This clearly shows that the Constitution's original meaning cannot be understood without reference to interpretive rules.

Other parts of the Constitution also assume the existence of interpretive rules. For instance, the Second Amendment provides: "A well regulated Militia, being necessary to security of a free State, the right of the people to keep and bear Arms, shall not be infringed." The provision contains both a prefatory clause and an operative clause, the combination of which could easily be a source of confusion to the interpreter. But the law at the time of the Constitution's enactment had an accepted interpretive canon that clarified the issue. The canon held that a prefatory clause could resolve an ambiguity, but could not otherwise limit or expand the operative clause.⁵⁹ The recent case of *District of Columbia v. Heller*, one of the most important originalist opinions in several generations, turned on this canon.⁶⁰ There, the majority held that the operative clause—the right of the people to keep and bear arms—was unambiguous and therefore could not be limited by the militia preamble. The decision is clearly premised on the view that this interpretive rule was both accepted by the enactors of the Second Amendment and was binding.⁶¹

Early historical understanding also supports the applicability of interpretive rules, including legal interpretive rules, to the Constitution. While there is substantial evidence of early interpreters using legal interpretive rules to determine the meaning of the Constitution,⁶² we discuss here one of the most important and contested issues—the nature of the new union and the proper way to understand the federal government's powers. This was a crucial issue where the opposing sides would have employed their most persuasive arguments.

In contesting the nature of the new union, both advocates of states' rights and nationalists employed legal interpretive rules to reach their preferred conclusions. For instance, eminent lawyers like St. George Tucker

⁵⁸ *Expressio unius est exclusio alterius* means "the expression of one thing is the exclusion of another." BLACK'S LAW DICTIONARY 1635 (7th ed. 1999).

⁵⁹ See, e.g., *Copeman v. Gallant*, 1 P. Wms. 314, 24 Eng. Rep. 404 (1716), cited in *District of Columbia v. Heller*, 128 S. Ct. 2783, 2789 (2008). One reason for the venerable canon is that "the remedy often extends beyond the particular act or mischief which first suggested the necessity of the law." JOEL PRENTISS BISHOP, COMMENTARIES ON THE WRITTEN LAWS AND THEIR INTERPRETATION § 51 (Boston, Little, Brown, & Co. 1882).

⁶⁰ 128 S. Ct. at 2789.

⁶¹ A difficulty for Justice Stevens's dissent is that he cannot rebut this rule. See *id.* at 2822, 2825 (Stevens, J. dissenting). Thus, he can only deploy the prefatory language if he can show that it clarifies an ambiguity in the phrase "the right of the people to keep and bear arms."

⁶² For discussion of some of this evidence, see *infra* notes 63–65, 150 and accompanying text.

and Thomas Jefferson argued that the Constitution was a compact of the sovereign states.⁶³ This characterization of the union allowed them to employ the traditional common law interpretive rule that grants of powers by a sovereign should be narrowly construed. In contrast, the nationalists argued that the Constitution was simply the fundamental law of the government. As John Marshall argued, it involved a delegation of power by the national people to their representatives.⁶⁴ This fundamental law did not receive a strict construction, but instead was to be interpreted neither strictly nor broadly, but reasonably.⁶⁵ What is significant for our discussion, however, is that neither side argued that legal interpretive rules were inappropriate in construing the Constitution. Rather, their disagreement focused only on the proper interpretive rule to apply.⁶⁶

⁶³ See ST. GEORGE TUCKER, *View of the Constitution of the United States*, in 1 BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA ed.'s app. at 151 (Phila., William Young Birch & Abraham Small 1803). For a discussion of the relation of compact theory to strict construction, see Kurt T. Lash, "Tucker's Rule": *St. George Tucker and the Limited Construction of Federal Power*, 47 WM. & MARY L. REV. 1343 (2006), and Thomas Jefferson, Opinion on the Constitutionality of a National Bank (Feb. 15, 1791), in THOMAS JEFFERSON: WRITINGS 416, 421 (Merrill D. Peterson ed., 1984) (interpreting constitutional language in light of the constitutional protection for state's rights). For an excellent discussion of Jefferson's position, see H. Jefferson Powell, *The Political Grammar of Early Constitutional Law*, 71 N.C. L. REV. 949, 956 (1993).

⁶⁴ See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 187–88 (1824).

⁶⁵ 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 411–18 (Boston, Hilliard, Gray, & Co. 1833) (discussing the Marshall-Tucker dispute and siding with Marshall).

⁶⁶ One passage in *The Federalist* might be thought to militate against reliance on legal interpretive rules. Alexander Hamilton states that: "Even if these maxims [of legal interpretation] had a precise technical sense, corresponding with those who employ them on the present occasion which, however, is not the case, they would still be inapplicable to a Constitution of government. In relation to such a subject, the natural and obvious sense of its provisions, apart from any technical rules, is the true criterion of construction." THE FEDERALIST NO. 83, at 496 (Alexander Hamilton) (Clinton Rossiter ed., 2003). We do not read this passage to bar the use of legal rules in constitutional interpretation. First, in the same essay, Hamilton argues that the two maxims can be properly applied to the Constitution. See *id.* at 496–97 (showing how both "a specification of particulars is an exclusion of generals" and "the expression of one thing is the exclusion of another" are properly applied to the Constitution). Second, elsewhere in *The Federalist*, Hamilton himself relies on legal rules in expounding the Constitution. See, e.g., THE FEDERALIST NO. 32 (Alexander Hamilton), *supra*, at 196 (applying "what lawyers call a negative pregnant," involving an interpretive rule that says the negation of one thing is the affirmance of another); THE FEDERALIST NO. 84 (Alexander Hamilton), *supra*, at 513 (applying the antisurplusage rule). Moreover, in his famous opinion on the bank of the United States, Hamilton is even more explicit about the utility of legal rules of construction: "[T]he intention [of the Constitution] is to be sought according to the usual and established rules of construction." Alexander Hamilton, *Opinion On The Constitutionality of an Act To Establish a Bank* (1791), in 8 PAPERS OF ALEXANDER HAMILTON 111 (Harold Syrett ed., 1965).

Given Hamilton's regular embrace of using legal interpretive rules to construe the Constitution, how are we to understand the passage in *The Federalist No. 83*? While it is possible to view Hamilton's claim as being a careless argument made in a rush of enthusiasm against his opponents, we believe that the passage can be construed to be consistent with Hamilton's overall views. When the Constitution was enacted, there was a general view that the Constitution's plain meaning was controlling. By contrast, ambiguous or vague provisions could be resolved with the help of interpretive rules. Thus, Hamil-

2. *The Source of the Legal Interpretive Rules for the Constitution.*— We have argued that the proper positive interpretive approach for the United States Constitution requires reference to the interpretive rules, including the legal interpretive rules, that were applicable to that Constitution. But that raises an important question: Because the Constitution was a new document, what was the source of these legal interpretive rules? While statutes were to be interpreted based on statutory interpretive rules, what interpretive rules applied to the Constitution in a world with limited constitutional experience? This is a complicated issue that cannot be fully answered in the limited space available here. It is possible, however, to provide the outlines of an answer and to suggest how the details could be filled in.

Ultimately, the legal interpretive rules that applied to the United States Constitution are those that people at the time would have regarded as applying to a document like the Constitution.⁶⁷ Examining the particular interpretive rules that early interpreters of the Constitution actually applied provides some evidence of these rules. Other evidence turns on which existing legal documents the enactors thought were most like the federal Constitution. The enactors would have been likely to apply the interpretive rules that were regularly applied to documents like the Constitution. Here we discuss three sets of interpretive rules that are important for the Constitution: rules that applied to all legal documents, rules that applied to state constitutions, and rules that applied to statutes.

First, there is strong evidence that the constitutional enactors would have assumed that the legal interpretive rules that applied to all legal documents would also apply to the Constitution. These rules were applied generally to legal documents, and it is hard to believe that they would not have been applied to the Constitution as well. Second, a strong case can also be made that the enactors would have assumed that many of the legal interpretive rules that applied to state constitutions would be applied to the federal Constitution. As the use of the term “constitution” suggests, the enactors

ton is reasonably read as suggesting that even if hypertechnical rules could alter the plain meaning for some other category of law, they cannot change the plain meaning of the Constitution.

Our reading also accords with the context of the passage. Hamilton here is arguing against the claim that by requiring a jury trial in criminal cases the Constitution abolishes the right to trial by jury in civil cases. THE FEDERALIST NO. 83, *supra*, at 496–98. As Hamilton shows, this is a poor argument, because requiring trials for criminal cases hardly prohibits them for civil cases. Hamilton is clearly concerned to show that these interpretive rules have been misapplied. Thus, Hamilton observes that “rules of legal interpretation are rules of common sense” to show that these legal rules cannot have the absurd application that is being suggested. *Id.* But nowhere does he suggest that properly applied legal rules that have been developed by the common wisdom of courts cannot clarify ambiguous or vague constitutional provisions.

⁶⁷ Under an original intent foundation, the interpretive rules will be those that the enactors actually thought applied to the Constitution. Under an original public meaning foundation, the interpretive rules will be those that an informed observer would have reasonably believed applied to the Constitution.

modeled the federal Constitution on the state constitutions.⁶⁸ While the federal Constitution differed in certain respects from the state constitutions, these differences were often not consequential. One area, however, that yielded important differences involved the increasing legalization of constitutions between 1776 and 1787. Much more than the earlier state constitutions, the enactors modeled the federal Constitution on written legal enactments that were applied judicially, like statutes.⁶⁹

Finally, the enactors assumed the interpretive rules that were applied to statutes would also be a model for constitutional interpretive rules.⁷⁰ Like statutes, the Constitution was the product of deliberation by representatives of the people, and its provisions were written enactments designed to govern until amended or repealed.⁷¹ Of course, the statutory interpretive rules differed from the federal constitutional interpretive rules in certain respects. Chief Justice Marshall articulated one famous distinction: that the Constitution was a concise document, not like a statutory code.⁷² Certainly, statutory interpretive rules that had been employed when interpreting the state constitutions were prime prospects for application to the federal Constitution.

3. *A Legal Document Enacted in the Name of the People.*—One possible argument against the positive version of original methods is that it neglects that the Constitution claims to speak in the name of “We the People,” not “We the Lawyers.” Thus, one might infer from this language that the Constitution’s authors would have used only ordinary interpretive rules and ordinary meanings rather than the legal interpretive rules and legal meanings. This objection is mistaken. First, that the Constitution was writ-

⁶⁸ See, e.g., CHARLES C. THACH, JR., *THE CREATION OF THE PRESIDENCY 1775–1789: A STUDY IN CONSTITUTIONAL HISTORY* 34–35 (1969); Hans A. Linde, *First Things First: Rediscovering the States’ Bills of Rights*, 9 U. BALT. L. REV. 379, 381–82 (1980).

⁶⁹ See Joseph Biancalana, *Originalism and the Commerce Clause*, 71 U. CIN. L. REV. 383, 396 (2003) (showing that the convention ultimately changed the vague federal powers under the Virginia plan to the specific enumeration of federal power). Another example occurred in the federal Bill of Rights, which employed the legally enforceable “shall,” as compared to the Virginia Bill of Rights, which used the more maxim-oriented “ought.” Compare U.S. CONST. amends. I–VIII, with VA. CONST. art. I, §§ 3–4, 10–11.

⁷⁰ See H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 898–900 (1985) (arguing that statutes were an important interpretive model for the Constitution).

⁷¹ Article VI is consistent with this analogy because it provides parallel treatment to the Constitution and statutes: both are “supreme Law of the Land.” See Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 392–93 (1981). In the *Federalist Papers*, Alexander Hamilton also makes express analogy between the interpretation of the Constitution and the legal interpretative rules that have been applied to statutes. THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 56, at 486; cf. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) (resolving constitutional question by “recogniz[ing] certain principles, supposed to have been long and well established”).

⁷² See *McCulloch v. Maryland*, 17 U.S. (3 Wheat.) 316, 415 (1819). We respond to arguments that the Constitution was a political more than a legal document and so not subject to legal interpretive rules below. See *supra* Part II.C.3.

ten in the name of the people does not mean that only ordinary language and ordinary interpretive rules were employed. It is a common occurrence, both today and when the Constitution was written, for a client to have their lawyer draft documents that speak in the client's name.⁷³ That the document is drafted in the client's name does not transform the legal meanings of the document into ordinary meanings. In fact, the client will often benefit from the use of precise and clear legal language that he cannot fully understand.

Second, the ratification process itself belies the view that the Constitution used only ordinary language. As with other legal documents, the people decided whether to ratify the Constitution based on an explanation of its meaning by those with legal knowledge. Pamphleteers of all kinds wrote lengthy explications of the Constitution precisely so that the people could be informed.⁷⁴ It is not too much to say that they translated the condensed, sometimes technical language of the legal document into familiar language more easily accessible to the electorate as a whole. Moreover, the people did not vote directly on the Constitution, just as they did not vote directly on the passage of statutes. They instead relied on their representatives—who were more likely to be either schooled in legal understanding or able to consult more learned colleagues.

To be sure, we recognize that some people employ the Constitution as a statement of political principles or as a document of political aspiration. We agree that one might interpret the Constitution as a political document without using legal interpretive rules. Our argument for the application of legal interpretive rules is confined to its positive, enforceable meaning. Our claim about enforceable meaning is a direct corollary of a fundamental premise of judicial review itself. As Chief Justice John Marshall in *Marbury* and Alexander Hamilton in *The Federalist* both recognize,⁷⁵ judicial review is premised on the idea that the Constitution is law and must be applied in a specific case. Thus, it would be inconsistent with the premises of judicial review to eschew the legal nature of the Constitution by enforcing a nonlegal interpretation of the document.

An expansion of this objection would argue that ordinary meaning rather than a meaning derived from original methods better preserves constitutional legitimacy because the Constitution draws its legitimacy from a popular and not lawyerly consensus. While this is a normative claim rather than a positive one, we address it here for convenience. First, it is easy to exaggerate the extent to which the meaning derived from original methods

⁷³ See Lawson & Seidman, *supra* note 27, at 59, 71–72 (making this argument and also arguing that “We the People” are the legal authors of the Constitution, not the actual authors).

⁷⁴ See John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1375 (1997) (discussing the importance of pamphlets in expounding the Constitution during the ratification process).

⁷⁵ See *Marbury*, 5 U.S. (1 Cranch) at 176; THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 56, at 487.

differs from the ordinary meaning of the Constitution. Legal interpretive rules often require that the ordinary meaning of the language be employed. Legal interpretive rules also use many of the same techniques as ordinary language rules for resolving ambiguity and vagueness.

Thus, the ordinary constitutional language would usually give the public a general sense of the constitutional meaning under the legal interpretive rules. While the legal interpretive rules may be necessary to determine the details of a clause, the general meaning of the clause will often be transparent to the public. For example, any reader understands that the enactors designed the language of the Eighth Amendment to prohibit some very bad punishments. This understanding is communicated to the public even if lawyers are needed to assess precisely its scope and limits. Therefore, the meaning of the Constitution as derived from original methods will be continuous with the ordinary meaning of the document.⁷⁶

Finally, rejecting original methods for fear of distancing constitutional law from the people is a romantic delusion. Like a mechanical clock constructed during the period, the Constitution was a complex mechanism of government, and lawyers, like clockmakers, had a comparative advantage in understanding the details of how that constitutional mechanism worked. Ignoring the operations of that mechanism would distort its operation. It is better to use the expertise of lawyers to allow the constitutional clock to run on time, while allowing those with legal knowledge to explain its operation to the public at large.⁷⁷

D. *Interpretation Versus Construction*

Original methods also casts doubt on distinctions between interpretation and construction as part of the positive theory of constitutional meaning. Constructionists—theorists who adhere to the distinction between interpretation and construction—believe that interpretation governs situations when the original meaning of a constitutional provision is clear, whereas construction governs situations when the original meaning is ambiguous or vague.⁷⁸ In the latter situation, constructionists believe that

⁷⁶ The objection discussed in the text does not merely overstate the degree to which legal meaning is hard for nonlawyers to understand. It also exaggerates the transparency of ordinary meaning. Interpreting the ordinary meaning of a formal document is often quite difficult.

⁷⁷ In arguing for judicial review, Alexander Hamilton also called attention to lawyers' specialized knowledge. THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 56, at 490.

⁷⁸ We identify as constructionists Randy Barnett, Larry Solum, and Keith Whittington. See BARNETT, *supra* note 4, at 118–31; KEITH WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 3–9 (1999) (viewing construction as a political process that fills in “textual indeterminacies”); Solum, *supra* note 1, at 67–89. While Balkin does not call himself a new originalist or an advocate of construction, we read his position as broadly consistent with this approach. Balkin understands the Constitution’s meaning as consisting only of “text and principle,” Jack M. Balkin, *Original Meaning and Abortion*, 24 CONST. COMMENT. 291, 293 (2007), and he rejects the Framers’ expected applications as relevant to constitutional meaning. *Id.* at 295. As a result, he empha-

the original meaning runs out and therefore the judge (or other official) must decide the matter based on nonoriginalist considerations. While constructionists seem to believe these situations where the original meaning runs out are relatively common, they disagree on the proper method for resolving these cases.⁷⁹ This is to be expected, because these cases are resolved through normative standards rather than legal methods.

We have two objections to construction as a positive matter. First, we believe there is a more plausible alternative to construction when constitutional language appears ambiguous or vague. The alternative is to choose the most probable interpretation available with the aid of interpretive rules—norms internal to the enterprise of originalism. Second, advocates of construction have not provided evidence that anyone embraced construction at the time of the Constitution's enactment, and we have been able to find none. To the contrary, the evidence that we have found suggests that interpreters believed that ambiguity and vagueness could be resolved through the applicable interpretive rules, and thus through originalist methods.

1. The Interpretive Rules Addressing Ambiguity and Vagueness.—The constructionist view identifies certain situations—such as those involving ambiguity and vagueness—as ones where the original meaning runs out. We disagree with this claim that originalism cannot address ambiguity and vagueness. We here argue that the original interpretive rules under the Constitution provide an alternative method for resolving ambiguity and vagueness that does not rely on extraconstitutional norms.

To understand how the original interpretive rules could resolve ambiguity and vagueness, one must examine the definitions of ambiguity and vagueness. The theory of construction itself is ambiguous about what constitutes ambiguity and vagueness. One possible meaning of ambiguity is limited to the case where two proposed meanings are absolutely in equipoise. Another meaning of ambiguity could encompass situations where there are two reasonable interpretations but the interpreter believes there is stronger evidence for one over the other.

If the definition of ambiguity is limited to the situation of equipoise, then ambiguities should not occur very often—because exact equipoise

sizes that the meaning of the Constitution is often abstract, *id.* at 304, and leaves to interpreters significant discretion as to how to give it meaning. We believe this process is accurately described as a form of construction. According to Balkin, judges must give constructions to the Constitution both to translate these abstract phrases into doctrine, *id.* at 299, 308, and to find the concrete application of the abstract meaning that coincides with that given by contemporary social movements, *id.* at 302.

⁷⁹ See, e.g., BARNETT, *supra* note 4, at 118–131 (construction based on theory of justice); WHITTINGTON, *supra* note 78, at 3–9 (1999) (viewing construction as a political process that fills in “textual indeterminacies”); Balkin, *supra* note 78, at 301–302 (arguing that the results of successful social movements should determine the application of constitutional provisions). While Larry Solum has not to our knowledge endorsed a particular normative approach in print, in conversation he has suggested that precedent and practice should be primary factors in effecting constructions.

seems very unlikely—and therefore would not be very important. By contrast, if ambiguity encompasses the second kind of situation, there is a strong argument that there is no real ambiguity. Instead, one might conclude that the language should be understood according to the more probable meaning.

A similar ambiguity exists with respect to vagueness. Vagueness might be limited to situations where it is equally likely whether or not a term extends to a proposed application. By contrast, vagueness might be defined to encompass situations in which there are plausible arguments that a term both extends and does not extend to an application, even though the evidence for one of the positions is stronger. As with the definition of ambiguity, the equally likely definition seems unlikely to occur often and the plausible definition seems weak, since it might not be regarded as real vagueness.

This analysis of the ambiguities involving ambiguity and vagueness is important for two reasons. First, constructionists need to specify which of these views they hold and then present an argument for their position. Unless they adopt the wider definitions of ambiguity and vagueness, construction may have very little area to operate.

Second, and more importantly for our purposes here, the narrow view points the way towards an alternative method for resolving ambiguity and vagueness. Under the original interpretive rules, we believe that interpreters were required to select the interpretation of ambiguous and vague terms that had the stronger evidence in its favor.⁸⁰ When the interpretation of language was unclear, the interpreter would consider the relevant originalist evidence—evidence based on text, structure, history, and intent—and select the interpretation that was supported more strongly by the evidence.

Thus, whatever the resolution of ambiguity and vagueness within the theory of construction as an abstract matter, original legal methods theorists would insist that their treatment is a function of the applicable legal interpretive rules. If interpretive rules tell the interpreter to select the most likely possibility, then there is no *legal* ambiguity or vagueness, regardless of whether there is vagueness or ambiguity in the ordinary language. In fact,

⁸⁰ Lysander Spooner appeared to use something like this method as well: “In the case of single words and phrases that are ambiguous [as opposed to entire laws], all the rules applicable to ambiguous words and phrases must be exhausted in vain, before resort can be had to evidence exterior to the law” Spooner, *supra* note 44, at 1060. By “exterior to law,” Spooner means normative reasoning by matters outside the document, such as reference to what we might term “legislative history.” Spooner goes on to apply legal rules to find the correct meaning of the document: “For example; to settle the meaning of an ambiguous word or phrase, we must, before going out of the instrument, refer to all the other parts of the instrument itself, to its preamble, . . . to ‘the general system of the laws’ authorized and established by it. And the ambiguous word or phrase must be construed in conformity with these, if possible” *Id.* at 1060–61. Even when resort must be had to external evidence of meaning such as legislative history, his focus, like ours, is on obtaining the meaning that is most probable: “And it is only when all these sources of light have failed to suggest a just, reasonable, and consistent meaning, that we can go out of the instrument to find the probable meaning.” *Id.* at 1061.

there is a strong argument that the applicable interpretive rules at the time of the Framing generally required interpreters to select the more likely interpretation, unless two interpretations were equally plausible.

Even in cases where two interpretations are equally plausible, other interpretive rules may resolve the matter. There is evidence that, in the early republic, when two interpretations were equally plausible, judges were required to assume the constitutionality of the legislation.⁸¹ In other words, an interpretative tie would favor the constitutionality of the legislation. Thus, this interpretive rule resolving ties, in conjunction with the other interpretive rules directing judges to select the interpretation supported by stronger evidence, may greatly reduce legal ambiguity and vagueness in constitutional interpretation.⁸² That may explain why no cases of construction have been found in the early republic.

In any event, rational enactors would likely have embraced some method to resolve ambiguity and vagueness.⁸³ Without such a method, subse-

⁸¹ One example of such a rule may be Thayer's rule of clear mistake, which requires the Judiciary to defer to the Legislature and uphold legislation unless the statute clearly contravenes the Constitution. See James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893). In deciding whether a rule like Thayer's is correct as an original method, the analysis should be based on history rather than policy. Thayer's was based on both. Compare *id.* at 135, with *id.* at 140–41. Philip Hamburger has recently advanced a powerful historical case for a rule of deference similar in some respects to Thayer's, suggesting that at the time of the Framing, judges were to follow a law unless it created a "manifest contradiction" with a higher law. PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 309–16 (2008). According to Hamburger, this longstanding judicial rule was rooted in the degree of certainty that conscience demands before putting aside an obligation. *Id.* at 209. Significantly, this rule is a "measure of confidence" in a judge's conclusion that a statute violates the Constitution. *Id.* at 314. It does not suggest that contradiction has to be based on plain meaning or manifest intent.

It may be that Thayer's rule and Hamburger's rule would require deference to the Legislature even in cases where the Judiciary's interpretation was somewhat more plausible than the Legislature's. The difference in the quantum of evidence required, however, makes no difference to our overall analysis. So long as some quantum of evidence equal to or greater than preponderance is required, there will be few, if any, ties in the course of judicial review.

⁸² To be sure, this kind of evidentiary rule applies only to the Judiciary. Because the Legislature is the institution to which the rule directs deference, the rule is of no help to the Legislature itself in interpreting the Constitution. Nevertheless, we do not believe that the Legislature is likely to face many cases of interpretive equipoise. The substantive considerations that provide factors to interpret ambiguous or vague provisions are many—purpose, structure, and historical context to name a few—and it seems unlikely that two interpretations of a provision would remain equally plausible after giving each factor its due weight. In any event, this view would leave the few instances of construction entirely to the political branches. This conclusion would comport analytically with that of constructionists like Whittington, see *infra* note 117 and accompanying text, who see construction as largely the province of the Legislature.

⁸³ To the reply that construction permits interpreters to choose only within a range not forbidden by the public meaning, we refer back to our discussion above. See *supra* notes 80–82 and accompanying text. If construction is not to be an unimportant theory, it must permit the choice of the less well-founded interpretations among a range of reasonable interpretations. The power to choose less well-founded interpretations and make them constitutional law binding on other actors is one which rational Framers of the Constitution are unlikely to have chosen.

quent interpreters would enjoy enormous discretion, even when one interpretation resolving the ambiguity or vagueness in question was the better one. Such discretion through the power of construction is particularly lemmatic because it would allow subsequent interpreters to choose conditions that would override legislation without surmounting the substantial hurdles of the Article V amendment process. No one has shown that the Constitution expressly or implicitly delegated such authority to judges or indeed any other political actors.

Construction is also in fundamental tension with the judicial function in constitutional law because it permits judges to declare binding obligations even though no law guides them. It is true that judges at the time of the Framing enjoyed certain common law powers, but these powers were subject to overruling by a legislature that sat on a regular basis and legislated by majority vote. The power of constitutional construction is cabined by no such force.

2. *The Lack of Evidence for Construction.*—Given the anomalous nature of construction from the perspective of both Article V and the judicial function, to show that construction was part of positive law, its advocates need to provide strong evidence from the Constitution itself or from the legal methods at the time that construction was employed. One would expect that such evidence would be available at the time of the Framing, if construction existed, because the Constitution as well as statutes and state constitutions were ambiguous and vague with respect to important issues. But in the absence of such evidence, constructionism remains an ahistorical originalism—one that does not reflect the original methods of the enactors and thus cannot capture their positive meaning.

William Blackstone, the leading legal theorist before the enactment of the Constitution, did not recognize any power of construction or a process resembling it. To the contrary, he appeared to believe that interpretive rules were adequate to resolve ambiguity and vagueness. In his discussion of interpretation, Blackstone listed a variety of rules for interpreting laws when the words were unclear, including reference to context, subject matter, effect, and the reason and spirit of the law.⁸⁴ This discussion strongly suggests that construction was not part of traditional interpretation. Not only does Blackstone fail to mention construction, but his discussion of the variety of interpretive rules gives the impression that they are all that is needed to resolve interpretive questions. This would be true, however, only if the interpreter is required to select the interpretation that has the greater degree of support.

Justice Story has the most comprehensive discussion of legal interpretive rules in the early republic. If there had been any serious discussion of construction or a similar process in this era, he would surely have recorded

⁸⁴ 1 WILLIAM BLACKSTONE, COMMENTARIES *61.

it. But like Blackstone, Story does not recognize the existence of any such process.⁸⁵ This absence is all the more striking because, as the advocates of construction themselves argue, the Constitution certainly contains unclear language that was in dispute in the early republic.⁸⁶ Yet we know of no instances where protagonists in those early disputes suggested that ambiguous or vague language could not be resolved using interpretive rules. Additionally, we find no instance where someone argued that the Constitution's language ran out and had to be settled by looking outside its original meaning.⁸⁷ It seems scarcely conceivable that a recognized dichotomy as fundamental as the difference between interpretation and construction would not have been at least mentioned and most probably substantially discussed.

Certainly, the evidence offered by the advocates of constitutional construction does not begin to show that such a concept existed at the Framing. Professor Solum quotes a passage from *Gibbons v. Ogden* where Chief Justice John Marshall argues against "strict construction" of the Constitution.⁸⁸ But there is no evidence that Marshall was using the term "construction" here to mean a method of deciding cases other than by reference to original meaning as informed by interpretive rules. Nor is there any indication that Marshall was implicitly contrasting construction with interpretation. To the contrary, in *Gibbons*, Marshall rejected one interpretive rule proffered as a means of discerning the Constitution's original meaning in favor of other interpretive rules that were "well settled."⁸⁹ Thus, far from acting as support for a theory of construction, this passage is consistent with Marshall's search for both the original meaning of the Constitution and the correct interpretive rules to aid him in this search.

Professor Barnett relies on a passage from a speech by James Madison in which Madison argued that the Constitution's enumerated powers for the federal government do not include the power to establish a national bank.⁹⁰

⁸⁵ See STORY, *supra* note 65, at 382–442.

⁸⁶ See, e.g., BARNETT, *supra* note 4, at 118–21.

⁸⁷ There are cases where early courts might be interpreted as either relying on natural law or fundamental rights to reach decisions. The proper way to characterize these cases is not always obvious, with some commentators construing many of the cases as involving general constitutional law in diversity cases, see Jason Mazzone, *The Bill of Rights in the Early State Courts*, 92 MINN. L. REV. 1, 59–64 (2007), others viewing them as natural law deemed applicable to the Constitution through either the Ninth Amendment or some other way, see BARNETT, *supra* note 4, at 235, and still others viewing them as fundamental principles derived from the Anglo-American tradition. See John F. Hart, *Human Law, Higher Law, and Property Rights: Judicial Review in the Federal Courts, 1789–1835*, 45 SAN DIEGO L. REV. 823 (2008). But even if natural law or fundamental rights applied, they would not represent an example of construction where the original meaning ran out. Instead, these principles would apply either because they were incorporated by the positive law or because they were deemed to be higher law that applied irrespective of the positive law.

⁸⁸ Solum, *supra* note 1, at 68.

⁸⁹ See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 187–88 (1824).

⁹⁰ BARNETT, *supra* note 4, at 158–59.

At one point Madison stated: “In admitting or rejecting a constructive authority, not only the degree of its incidentality to an express authority is to be regarded, but the degree of its importance also; since on this will depend the probability or improbability of its being left to construction.”⁹¹ It is true that Madison, like Marshall, used the term “construction.” There is no suggestion, however, that Madison used it the sense that Barnett uses it—as a term for a different, more discretionary process than legal interpretation.

Indeed, Madison used the term construction to distinguish between express and implied authorities in the Constitution. The gravamen of Madison’s speech on the unconstitutionality of the national bank is that the Constitution does not expressly authorize the establishment of a bank and the power to establish one is too large to be left to implication. Authorities of limited scope can be granted by implication, but large powers must be expressly granted. Thus, according to Madison, one cannot “construe” this power’s existence from the express authorities, such as the authority to tax or spend or regulate commerce among the several states.⁹² In short, only an incidental power of relatively small importance can be left to implication, or as he calls it, “construction.” Madison was therefore discussing the difference between express and implied authority, not the difference between interpretation and construction.

Professor Barnett also relies on Thomas Jefferson as support for construction, offering this quote: “When an instrument admits of two constructions, the one safe, the other dangerous, the one precise, the other indefinite, I prefer that which is safe & precise. I had rather ask an enlargement of power from the nation; when it is found necessary, than to assume by a construction which would make our powers boundless.”⁹³ Barnett seems to be making two claims here: that Jefferson’s use of the term “construction” signals he is engaged in a distinct enterprise from interpretation, and that this enterprise focuses on extraconstitutional or normative values rather than original meaning or intent. We disagree with both claims.

To see that Jefferson is engaged in the task of interpreting the original intent of the Constitution, it is useful to consider the language both prior to and subsequent to the words Barnett quotes. Jefferson is here discussing whether the constitutional language authorizing Congress to admit new states allows it to do so from new territory or only from the existing territory of the United States at the time of its formation. He writes, “But when I consider that the limits of the US are precisely fixed by the treaty of 1783, that the Constitution expressly declares itself to be made for the US, I cannot help believing the *intention* was to permit Congress to admit into the

⁹¹ 6 THE WRITINGS OF JAMES MADISON 27 (Gaillard Hunt ed., 1906).

⁹² *Id.*

⁹³ BARNETT, *supra* note 4, at 125.

Union new States” only if “formed out of” existing territory.⁹⁴ Clearly, this language indicates that Jefferson is seeking to determine the intent of the enactors of the Constitution. This is interpretation, not construction.

Jefferson’s discussion of intention then follows with the language that Barnett quotes. Why would he use that language if he is concerned with intention? The sentences immediately following this language provide the answer. Jefferson is attempting to resolve an ambiguity in the Constitution’s language. In resolving the ambiguity, Jefferson considers the purpose and character of the Constitution—namely, that it is a constraint on government power. Jefferson writes, “I had rather ask an enlargement of power from the nation [through a constitutional amendment], where it is found necessary, than to assume it by a construction which would make our powers boundless. Our peculiar security is in possession of a written Constitution. Let us not make it a blank paper by construction.”⁹⁵ Thus, the language from Jefferson that Barnett quotes is not really concerned with normative values, but instead with the character of the Constitution and its ability to resolve ambiguity in a way that furthers the intention of the enactors.

This interpretation of Jefferson’s argument here is reinforced by his use of the term “construction” in his famous opinion on the bank of the United States. There he argued that the phrase “to provide for the general welfare” was not a freestanding power, but was part of the power to lay taxes.⁹⁶ Jefferson’s reasoning for this conclusion was based on a rule of what he calls “construction”: “It is an established rule of construction where a phrase will bear either of two meanings, to give it that which will allow some meaning to the other parts of the instrument, and not that which would render all the others useless.”⁹⁷ This rule of construction is similar to the one Jefferson uses with regard to the power to admit states—in both cases, ambiguity is resolved in favor of the narrower interpretation in order to preserve the structure or character of the Constitution. And in both cases, it is clear that Jefferson’s task of construction is to determine the intent or meaning of the Constitution rather than to pursue extraconstitutional or normative values. Far from being an instance of what Barnett understands as construction, Jefferson’s approach provides an example of original methods at work.

Finally, Keith Whittington offers as his sole example of constitutional construction from the early republic the contending views of what consti-

⁹⁴ Letter from Thomas Jefferson to Wilson Cary Nicholas (Sept. 7, 1803), in 8 THE WRITINGS OF THOMAS JEFFERSON 247–48 (Paul Leicester Ford ed., New York, G.P. Putnam’s Sons 1899) (emphasis added).

⁹⁵ *Id.*

⁹⁶ Thomas Jefferson, Opinion on the Constitutionality of a National Bank (Feb. 15, 1791), in 5 THE WRITINGS OF THOMAS JEFFERSON, supra note 94, at 284, 286.

⁹⁷ *Id.*

tuted a “high crime and misdemeanor” during the impeachment trial of Justice Samuel Chase.⁹⁸ Chase argued that only a violation of positive law constituted “a high crime and misdemeanor.”⁹⁹ The more radical Republicans maintained that the term included all political offenses, including egregiously wrong opinions of the Constitution.¹⁰⁰ The more moderate Republicans contended that “a high crime and misdemeanor” did not have to be a crime, but could include violations of the duties of an office—such as the judicial office.¹⁰¹

We do not believe these debates reveal evidence of construction. First, Whittington does not show that any of the participants in these debates thought they were exercising discretion to fill in an ambiguous or vague term. To the contrary, all argued as if they were interpreting the Constitution as determinate law. It is true that they appealed to constitutional principles in addition to textual arguments,¹⁰² but constitutional principles that are actually written into the Constitution (such as the separation of powers) or that are implied by constitutional provisions (such as the long-term character of the Constitution) are in accord with the original interpretive rules for determining the meaning of ambiguous and vague terms. Moreover, even if one regarded this discussion as departing from legal interpretation, it would not be surprising if the methodology of some of the participants was not pristine or careful. The context here was a bare-knuckled political fight in the Senate, one where all the participants were advocates rather than judges engaged in careful deliberation.

To be fair, it is not clear to us that Whittington even argues for construction in either the positive or normative sense that we dispute. As a political scientist, he may be taking an external view of constitutional interpretation—that is, describing how in fact officials actually determine the Constitution’s meaning. It is certainly possible that officials have resolved important constitutional issues through extraconstitutional considerations. But how the Constitution has been applied over time does not answer the question of how the enactors understood it or how it should be interpreted. In this Article, we are concerned with how the Constitution should be interpreted, not with how the Constitution has in fact been interpreted over time.

III. THE NORMATIVE THEORY OF INTERPRETATION

We have argued above that original methods originalism is the proper positive interpretive approach to the Constitution. Here we show that origi-

⁹⁸ See WHITTINGTON, *supra* note 78, at 20–72.

⁹⁹ See *id.* at 27–28.

¹⁰⁰ See *id.* at 31–32.

¹⁰¹ See *id.* at 38.

¹⁰² See *id.* at 68 (“[B]oth sides turned to external political principles to supplement what was discoverable in the text [of the Constitution] itself.”).

nal methods is also the normatively desirable way of interpreting the Constitution.

We begin by discussing our general theory of why the Constitution is desirable.¹⁰³ Under our theory, the Constitution is desirable because it was enacted mainly through a supermajoritarian process that produces beneficial constitutions.¹⁰⁴ To ensure that the Constitution has this desirable quality, it is necessary to follow its original meaning, because it was that meaning that passed through the supermajoritarian process.¹⁰⁵

After laying out the reasons for the Constitution's desirability, we discuss the specific advantages of the original methods approach, contrasting it again with theories of originalist constructionism. Original methods uses the interpretive rules that the enactors would have regarded as applicable to the Constitution to resolve ambiguity and vagueness.¹⁰⁶ As a result, its resolutions of ambiguity and vagueness can be seen as having gone through the beneficial supermajoritarian process. Following these resolutions also reduces the discretion of subsequent interpreters as compared to originalist constructionism. This reduction in discretion and the consequent reduction in agency costs are beneficial because subsequent interpreters, whether judges or legislators, do not create constitutional meaning through a process as beneficial as the supermajoritarian process that created the original constitutional provisions.

A. *The Supermajority Theory of the Constitution*

In a series of papers, we have propounded a theory of why relatively stringent supermajority rules make a desirable constitution.¹⁰⁷ Applying this theory to the United States Constitution, we have argued that it implies that the original meaning of the Constitution is desirable and that original methods is, as a normative matter, the best interpretive approach to the Consti-

¹⁰³ For a fuller discussion, see McGinnis & Rappaport, *A Pragmatic Defense*, *supra* note 9.

¹⁰⁴ *Id.* at 386–87.

¹⁰⁵ *Id.* at 389–90.

¹⁰⁶ We often speak in this Article of the enactors of the Constitution, as when we say that the correct interpretive rules are those that the enactors would have deemed applicable to the Constitution. But here we do not specifically address who the enactors were or how their views should be determined. In our view, the enactors might refer to the ratification conventions; to the drafting convention and the ratification conventions; or most broadly, to the drafting convention, the ratification conventions, and the people of the United States who voted on who should serve in the ratification conventions. This last definition would include the entire political nation. Similarly, we do not decide whether one should determine what the enactors thought by looking for subjective evidence (such as statements of their thoughts) or objective evidence (such as what a reasonable enactor would have thought). While these are analytically interesting issues, we very much doubt that they will often make much difference in determining the content of the interpretive rules. Interpretive rules emerge from the background of a largely common legal system, and thus there is likely to be a strong convergence of these various interpretive methodologies.

¹⁰⁷ For citation to those papers, see *supra* note 9.

tution.¹⁰⁸ Our argument proceeds in five steps. First, in common with most theorists of the Constitution, we believe that entrenched constitutional provisions that are desirable should take priority over ordinary legislation. Such entrenchments operate to establish a beneficial framework of accountable government through features like the separation of powers and individual rights. Second, desirable entrenchments should have bipartisan and consensus support and protect minority rights. Supermajority rule rather than majority rule generates these kinds of entrenchments, because supermajority rule requires consensus and militates against partisanship. Supermajority rule also creates a veil of ignorance that encourages legislators and citizens to consider the public interest and protect minority rights.¹⁰⁹

Third, appropriate supermajority rules have generally governed the passage of the Constitution and its amendments.¹¹⁰ The amendment process is patently supermajoritarian: two-thirds of members of Congress and then three-quarters of state legislatures must approve an amendment.¹¹¹ But the ratification of the original Constitution was supermajoritarian as well: nine of the original thirteen colonies had to ratify the document before the Constitution came into effect.¹¹² Fourth, the desirability of the Constitution requires that judges interpret the document based only on its original meaning because the enactors used only that meaning in deciding whether to adopt the Constitution and its amendments.¹¹³ It is the enactors' meaning, not that of a contemporary philosopher or judge, that obtained the supermajoritarian consensus which makes the Constitution beneficial.

The fifth and final step of our argument is the most relevant to our discussion of original methods. We argue that the original meaning of the Constitution—including its ambiguous and vague terms—must be determined based on the original interpretive rules. The reason for this is straightforward. The enactors would have decided whether to vote for the Constitution based on the meaning it would have had under the original interpretive rules.¹¹⁴ Thus, if the Constitution is to have the meaning that passed through the supermajoritarian process that gave it a presumption of

¹⁰⁸ See John O. McGinnis & Michael B. Rappaport, *The Desirable Constitution and the Case for Originalism* (Northwestern Univ. Sch. of Law Pub. Law and Legal Theory Research Paper, No. 08-05, 2008), available at <http://ssrn.com/abstract=1109247>.

¹⁰⁹ *Id.* at 11.

¹¹⁰ *Id.* at 7–17. While there is one significant way in which those supermajority rules were not appropriate—the exclusion of African Americans and women from participating in the selection of constitutional drafters and ratifiers—this defect has rightly been removed and the worst results from the exclusion have been corrected. *Id.* at 39, 43. We then show that attempting to correct the Constitution through the Judiciary or other processes outside of amendments in order to make the Constitution look more like it would had these groups been included has more costs than benefits. *Id.* at 41–44.

¹¹¹ U.S. CONST. art. V.

¹¹² U.S. CONST. art. VII.

¹¹³ See McGinnis & Rappaport, *supra* note 108, at 17–18.

¹¹⁴ *Id.* at 17.

beneficence, those interpretive rules must be employed. Severing the Constitution's meaning from these rules gives effect to a different Constitution than the one originally enacted.

Thus, we believe that the normative argument for originalism also requires that the original interpretive rules be employed. In the next section, we argue that applying these interpretive rules to resolve ambiguity and vagueness would be normatively superior to constitutional construction, with particular reference to the views of Randy Barnett and Jack Balkin.

*B. Original Legal Methods Versus Constitutional Constructionism:
The Normative Perspective*

Interpretive methods for the Constitution raise important normative issues, because the manner of interpreting a constitution is such a central part of the process of giving it meaning. We argue here that the original methods approach is superior from a normative perspective to the constructionist originalist approach for two basic reasons. First, the original methods approach uses the interpretive rules that were deemed applicable to the Constitution by the constitutional enactors. Because the enactors expected these interpretive rules to be applied, the meaning they produce is realistically described as having gone through the beneficial supermajoritarian process for constitution-making. Thus, the results that the original methods produce, including their resolution of ambiguity and vagueness, are likely to be more desirable than the results produced by other interpretive methods.

Second, because these interpretive rules are fixed at the time of the Constitution, they are easier to discover than interpretive methods that are not predetermined. An interpreter following a predetermined rule does not pick a rule that produces a policy result that he desires. Instead, he applies the preexisting interpretive rules. As a result, original methods reduces the agency costs of subsequent interpreters and helps to impose a consistent approach to constitutional interpretation.

Constructionist originalism operates differently. While there are different versions of constructionist originalism, here we first address constructionist originalism in the abstract and then discuss two versions of the theory. In the abstract, constructionist originalism requires that judges follow the original meaning, but does not impose any legal requirements as to construction. Because there is no legally required or even accepted method for determining how to resolve questions of construction, judges are likely to determine how to engage in construction based on their own views. There are two problems with this aspect of construction that correspond to the two advantages of the original methods approach.

First, judicial discretion to resolve matters of construction is less likely to produce good results compared to the supermajoritarian constitution-

making process.¹¹⁵ To begin, the Supreme Court is less likely to generate norms that represent a national consensus than the constitutional amendment process is. Justices are few in number and thus are unlikely to have the knowledge that comes from a process that represents a wide variety of people. The Justices are also not very representative of the nation as a whole because they are chosen from a pool of elite, upper-middle-class lawyers.¹¹⁶ Finally, the Justices are relatively insulated from the ebb and flow of information in the continental republic because they live physically in Washington, D.C.—a unique city devoted to governance—and because they work mentally in a cocoon spun by the bench and the bar.¹¹⁷

The second problem with constructionist originalism is that it is likely to reach inconsistent and ad hoc results. Because there is no accepted method for construction, some judges will choose one way to resolve constructions, whereas others will choose another way. Moreover, some judges may not commit to one way of resolving constructions, but instead may use different methods in different cases. As a result, the construction process is likely to be less consistent and coherent than resolving ambiguity and vagueness by reference to the applicable interpretive rules. Because it is less consistent or principled, construction will reduce the legitimacy of courts. Because it is less coherent, construction will make for a less understandable and integrated Constitution.

We now turn from constructionist originalism in the abstract to two specific versions of the theory—those of Randy Barnett and Jack Balkin. While Barnett argues that constructions should be resolved with a particular theory of justice, Balkin maintains that constructions should be effected by the actions of successful social movements.

Barnett argues that the original meaning of the Constitution should be followed, but that the original meaning does not fully resolve many questions. As a result, there will be many possible constructions of the Constitution that are not inconsistent with the original meaning.¹¹⁸ Barnett argues

¹¹⁵ Supreme Court decisionmaking also does not have other desirable characteristics of the super-majoritarian amendment process. For example, while constitutional amendments are enacted behind a limited veil of ignorance—because it is hard to know the effects of these amendments in future circumstances—Supreme Court decisions can simply be distinguished so as not to apply in ways the Justices do not desire.

¹¹⁶ It might be objected that lawyers on whom people relied in the constitution-making process were also elites. This is true, to some extent, but it is a matter of degree. The hundreds of representatives to state ratifying conventions are to be sure more elite than ordinary citizens, but more diverse and less elite than the nine Justices on the Court.

¹¹⁷ Keith Whittington's theory of constitutional construction focuses more on construction by the political branches than by the Judiciary and thus is not subject to this objection. But even construction through ordinary politics does not provide the kind of deliberation that makes for entrenchments of sufficient beneficence that they should be enforced against subsequent majorities. For the reasons that majoritarian processes are not sufficient to make good constitutional entrenchments, see McGinnis & Rappaport, *Three Views*, *supra* note 9, at 1173–82 (2007).

¹¹⁸ BARNETT, *supra* note 4, at 118–21.

that interpreters should select constructions of the Constitution based on a libertarian theory of constitutional legitimacy.

Barnett believes this approach furthers the legitimacy of the Constitution. And given his libertarian views, it is not surprising that he would believe that this libertarian construction of the Constitution would be attractive. But it is not clear how the application of these extraconstitutional constructions can be justified to those who do not accept libertarian principles.

One way to develop this point is to view constructionist originalism as a combination of law and political morality. Under constructionist originalism, a portion of constitutional decisionmaking is decided by the original meaning and a portion is decided by construction or political morality. Our question, then, is why that mixed approach is more attractive than one that bases the constitution entirely on original meaning.

If someone were to propose that constitutional decisionmaking be based entirely on political morality, originalists, including Barnett, would reject this approach. Originalists would argue that, under this approach, there would not be agreement on the content of constitutional law, and the government would not be subject to lock-in or fixed constitutional constraints. But if basing constitutional decisionmaking entirely on political morality is defective, then why is basing it partially on political morality not also defective for the same reasons? And why would it not be better to base constitutional decisionmaking entirely on the original meaning that the original methods generate? In short, if originalism views a constitution that imposes fixed, legal constraints on the government as normatively attractive, then originalism should reject watering down that constraint through extraconstitutional construction.

Jack Balkin also has a prominent theory of constitutional construction. He gives pride of place to social movements in making important constructions. Social movements, however, can constitute less than a majority of the population and may thus be even worse than majorities at obtaining the information to resolve ambiguities and vagueness in a manner that leads to consensus and good entrenchments. Moreover, only the products of social movements approved by the Supreme Court would ever become part of the Constitution, and judicial choice has the problems we identified above. Balkin's process for resolving ambiguity and vagueness therefore will have a particular elite bias, and in fact, nonoriginalist interpretation throughout Supreme Court history has reflected the views of elites.

Thus, original methods originalism stands in stark contrast to the various versions of constructionist originalism. We legitimate the Constitution through its supermajoritarian constitution-making process and thus take pains to retain the full benefits provided by that beneficial process, including its resolution of ambiguity and vagueness. In contrast, constructionist originalism uses other methods to resolve ambiguity and vagueness. Barnett uses a particular version of justice, and Balkin uses social movements.

Because they do not use the original supermajoritarian process to resolve ambiguity and vagueness, constructionist originalists leave much of the beneficial information from this process on the table. Furthermore, because they lose that information, they leave it to subsequent interpreters to resolve ambiguities and vagueness based on information the interpreters themselves generate. As a result, constructionist originalists lose most of the advantages of originalism: the advantage of reaching presumptively good results endorsed by the beneficial constitution-making process, and the advantage of reaching those results through a rule-like process that preserves the legitimacy of the judicial process.

IV. TOWARD THE CONTENT OF THE ORIGINAL INTERPRETIVE RULES

In this Part, we briefly discuss the content of the original methods for interpreting the United States Constitution. We do not have space to provide a comprehensive account of the original interpretive rules. Our purposes are much more limited. First, we illustrate the type of inquiry needed to establish the original interpretive rules. The approach we employ here focuses on the interpretive rules used at the time of the Constitution's enactment. Second, we show that the original methods were broadly originalist in the modern sense of the term. Nothing guarantees that the original methods were originalist in this sense, and if they were nonoriginalist, the proper interpretation of the Constitution would not be originalist. We present some evidence showing the original interpretive methods were intentionalist and some evidence showing they were textualist. But we find no strong evidence that the rules were dynamic or otherwise nonoriginalist. Thus, while we do not here argue for a particular type of originalism, we do believe some form of originalism—whether intentionalist, textualist, or some combination of the two—is the correct approach.

Finally, we use Dean William Treanor's Symposium piece to confirm our conclusions.¹¹⁹ Treanor argues that the interpretive rules used for constitutions around the time that the United States Constitution was enacted were antitextualist. While we agree with Treanor that the approach was not woodenly textualist, we believe that the interpretive rules were more textualist than Treanor admits. In any event, they generally conformed to some type of originalism.

A. *Discovering the Original Methods*

One can derive the interpretive rules of the enactors in two possible ways. First, one can derive the rules from the text of the Constitution, ei-

¹¹⁹ William Michael Treanor, *Against Textualism*, 103 NW. U. L. REV. 985, [redacted] (2009).

ther directly or by implication.¹²⁰ For example, one might conclude that the Constitution incorporated the interpretive rules that were then deemed appropriate for a constitution of the sort enacted at the federal level.¹²¹ Second, if the constitutional text does not indicate the correct interpretive rules, one can look to the interpretive rules that the enactors would have deemed applicable to it. Discovering these rules requires an examination of the interpretive rules at time of the Constitution's enactment. In this Article, we focus on the second method, looking to the interpretive rules that would have been deemed applicable when the Constitution was enacted.

Discovering the content of the original methods is crucial for determining how to interpret the Constitution. First, the original methods indicate whether interpreters should look to the text, intent, or some combination when construing the Constitution. While other theorists have argued for a particular approach based on policy or philosophical considerations, we maintain that the correct approach turns on the methods that the enactors would have deemed appropriate to a Constitution.¹²² Even if a particular interpretive theory could be shown to be the best philosophical account of meaning, that account would not show that this particular theory should be employed. If that philosophical approach was not followed by the enactors, then employing it to interpret the Constitution will produce a different meaning than the one the enactors expected.

Second, the original methods also determine whether the Constitution should be interpreted in the manner that originalism, as conventionally understood, requires. While the original methods approach is an originalist interpretive theory—because it requires that one look to the *original* methods—it will only require that judges interpret the Constitution based on original meanings if that is what the original methods required. If, for some reason, the enactors had deemed dynamic constitutional interpretation applicable to the Constitution, then the original methods approach would require that this type of interpretation be followed. But we argue here that, whatever the precise content of the interpretive methods, they were originalist rather than dynamic or policy oriented.

¹²⁰ See Saikrishna Prakash, *The Constitution as Suicide Pact*, 79 NOTRE DAME L. REV. 1299, 1312 (2004).

¹²¹ See Michael B. Rappaport, *A Textual and Historical Derivation of the Constitutional Interpretive Rules* (unpublished manuscript, on file with authors).

¹²² Like any group, the enactors may sometimes have disagreed about the applicable interpretive rules. We believe that in the case of a disagreement, subsequent interpreters should embrace the rule favored by a plurality of the enactors. Once there is an ambiguity in text approved by a supermajority, there is no choice but to use an interpretive rule. While it is best to use rules that were as widely agreed upon as possible, if no rule has the support of a supermajority or majority, it is acceptable to use a rule that had the support of a plurality. Because an interpretive rule is needed, the one supported by a plurality has more support than any other.

B. The Content of Original Methods Originalism in our Constitution

This section briefly discusses the original methods for the United States Constitution. This is a vast subject and we cannot comprehensively address it here. Our main goal is to suggest that the original methods were within the family of what is today conventionally understood as originalism. Thus, we argue that the interpretive rules that would have been deemed applicable to the Constitution conformed to original meaning originalism, original intent originalism, or something in between. These rules do not encompass dynamic interpretation or living constitutionalism.

To determine what interpretive rules the enactors intended, we consider various pieces of evidence. First, we examine the interpretive rules used to interpret analogous written laws at the time. These written laws include not only state constitutions, but also statutes, since statutes were both familiar to the enactors and similar in character to the Constitution. Second, we consider not merely American, but also English practices, because the American practice often regarded the prior English practice as setting forth the proper rule. Finally, we also examine the practice that developed soon after the Constitution was enacted as further evidence of what the applicable interpretive rules were thought to be.

Based on our review of the different types of evidence, we suggest that all of these roads likely lead to Rome. In other words, the bulk of the evidence points to some form of originalism. In both the statutory and constitutional areas, there is some evidence that interpretation was primarily textualist and some evidence that it was intentionalist.¹²³ Whether or not the evidence supporting textualism is stronger than that supporting intentionalism, the key point is that there is little or no evidence supporting dynamic interpretation or living constitutionalism.

1. Statutory Interpretation.—Both intentionalism and textualism in statutory interpretation have evidentiary support. The traditional view, as stated in Blackstone, was that interpreters should look to the intent of the framers of a statute. As Blackstone states, “[The] fairest and most rational method to interpret the will of the legislator, is by exploring his intentions at the time when the law was made, by signs the most natural and probable.”¹²⁴ Blackstone here clearly indicates that it is the original intentions—“the intentions at the time the law was made”—that are relevant.

In listing the methods of determining the legislator’s intent, Blackstone gives pride of place to text, mentioning first that interpreters should look to the “usual and most known” meaning of the words of a statute. While Blackstone’s intentionalism thus has a textualist component, he also autho-

¹²³ There is not necessarily a sharp distinction between these two forms of originalism, given that a text is naturally understood in light of the purposes of its drafters. See Monaghan, *supra* note 71, at 375.

¹²⁴ 1 BLACKSTONE, *supra* note 84, at *60 (emphasis omitted).

rizes interpreters, especially when the words are “dubious,” to look to other considerations, such as context, subject matter, and effect.¹²⁵ Most importantly, Blackstone states that judges should look to the reason and spirit of the law—“the cause which moved the legislator to enact” the law.¹²⁶ Under this last approach, judges can depart from the language of a statute if they believe it is necessary to further a legislature’s intent.¹²⁷ Thus, Blackstone’s approach is broadly consonant with original intent originalism.

Scholars have shown that this intentionalist approach to statutory interpretation was widely followed in England and America in the years leading up to the Constitution.¹²⁸ For instance, in 1736, the treatise writer Mathew Bacon declared: “Such a Construction ought to be put upon a Statute as may best answer the Intention which the Makers of it had in View Every Thing which is within the Intention of the Makers of a Statute is, although it be not within the Letter thereof, as much within the Statute as that which is within the Letter.”¹²⁹

Support for intentionalism was present on this side of the Atlantic as well, and right up to the Framing of the Constitution. No less an authority than James Wilson declared: “The first and governing maxim in the interpretation of a statute is . . . to discover the meaning of those . . . who made it.”¹³⁰ He was echoing the sentiments of a treatise well known to the colonists, Thomas Rutherford’s *Institutes of Natural Law*, which stated: “The end, which interpretation aims at, is to find out what was the intention of

¹²⁵ *Id.* at *61.

¹²⁶ *Id.*

¹²⁷ William N. Eskridge, Jr., *All About Words: Early Understandings of the “Judicial Power” in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990 (2001) [hereinafter Eskridge, *All About Words*]. While Eskridge argues against an originalist/textualist conception in favor of an equity of the statute approach, he does not present evidence in favor of a dynamic conception of statutory interpretation, at least not one where the statute is updated through the application of evolving principles in the manner of the living Constitution. *Id.* at 999, 1003–04. For example, the instance of a statutory interpretation that Eskridge explicitly describes as “dynamic” simply involves the Judiciary’s refusal to interpret a recent statute to reach a result so inequitable that it cannot believe the Legislature would have intended it. *Id.* at 1018 n.126, 1023. We understand this court’s action as having chosen a static intentionalist approach in preference to a textualist one, not as having adopted an approach that interprets language based on changing values or circumstances over time, which is how Eskridge presents the dynamic approach in other scholarship. See William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987).

¹²⁸ See, e.g., Raoul Berger, *Activist Indifference to Facts*, 61 TENN. L. REV. 9 (1993) [hereinafter Berger, *Activist Indifference*]; Raoul Berger, *Some Reflections on Interpretivism*, 55 GEO WASH. L. REV. 1 (1986) [hereinafter Berger, *Some Reflections*].

¹²⁹ 4 MATTHEW BACON, A NEW ABRIDGEMENT OF THE LAWS OF ENGLAND 647–48 (3d ed. London 1768), quoted in Berger, *Some Reflections*, *supra* note 128, at 3 n.18.

¹³⁰ See James Wilson, *Of the Study of the Law in the United States*, in 1 THE WORKS OF JAMES WILSON 69, 75 (Robert G. McCloskey ed., Belknap Press 1967) (1804), cited in Berger, *Activist Indifference*, *supra* note 128, at 10–11.

the writer; to clear up the meaning of his words.”¹³¹ Thus, Blackstone’s view of the salience of intent was by no means isolated or confined to England.¹³²

There is also, however, evidence of a more textualist approach to statutory interpretation in England. First, some of the evidence suggesting an intentionalist approach is actually ambiguous, because references to intent could mean the intent expressed in the text rather than the intent of the author.¹³³ Moreover, in the years leading up to the Constitution, statutory interpretation came to place greater emphasis on the text of the statute. This occurred first in eighteenth-century England and then in the United States, culminating in the Marshall Court.¹³⁴

This increasing emphasis on statutory text was due in part to the emergence of a stricter separation of legislative and judicial powers. As legisla-

¹³¹ THOMAS RUTHERFORTH, *INSTITUTES OF NATURAL LAW* 405 (2d Am. ed., Baltimore, William & Joseph Neal 1832), cited in Berger, *Activist Indifference*, *supra* note 128, at 10.

¹³² While we view this intentionalist approach to statutory interpretation as genuine, some commentators have claimed that the method is not really intentionalist, but rather an attempt to impose equitable principles on statutes. See Eskridge, *All About Words*, *supra* note 127, at 1001–02; John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 34–36 (2001). We disagree with this view, because we see reference to equity as essentially an effort to discern intent rather than seeing reference to intent as essentially a way of imposing equitable principles. First, the traditional approach generally described its task as determining the intent of the legislature, and justified departures from the text on that basis, not on the basis of equity. See 1 BLACKSTONE, *supra* note 84, at 59*–62; 2 THE WORKS OF JAMES WILSON, *supra* note 130, at 478. Second, the operation of intentionalism at the time was naturally dependent on references to principles. In a world where there was no recorded legislative history and where statutes were not carefully drafted, departing from statutory text that seemed questionable in favor of widely held principles was a reasonable method for discerning the legislature’s intent. When legislative history did arise concerning the United States Constitution, this history was in fact consulted by some interpreters as a means of discerning the enactors’ intent. See Robert N. Clinton, *Original Understanding, Legal Realism, and the Interpretation of “This Constitution”*, 72 IOWA L. REV. 1177, 1197–1220 (1987). Third, other aspects of the traditional statutory interpretive approach are also consistent with a jurisprudence of intentionalism, but not with one of equitable principles. For example, when the legislature had indicated in the text that it had considered an issue, the court was supposed to apply the textual resolution, even if it deemed it unreasonable, thereby giving effect to the legislature’s expressed intent. See 1 BLACKSTONE, *supra* note 84, at *91 (“[T]here is no court that has the power to defeat the intent of the legislature, when couched in such evident and express words, as leave no doubt whether it was the intent of the legislature or no.”).

In determining the applicable interpretive rules for the Constitution, one would naturally consider the traditional statutory interpretation approach along with the other interpretive rules discussed here. But if one somehow believed that the traditional statutory interpretation approach was the sole approach applicable to the Constitution, that would still constitute a type of originalism. Applying that approach to the Constitution, an interpreter would give effect to the original meaning of the text, unless he concluded, based on values at the time, that it did not reflect the enactors’ intent. It might be argued, however, that the traditional statutory interpretation approach should be applied differently to a document that had legislative history. If such history provided evidence of intent, then the traditional approach might consider that as well as the values of the enactors’ generation.

¹³³ See Powell, *supra* note 70, at 895. Powell also shows that some writers believed that the meaning of statutes referred to as the King’s “intent” was ascertained only by the text of the law. *Id.*

¹³⁴ See Manning, *supra* note 132, at 52–54, 85–102.

tive power was separated from judicial power, the significant discretion that the traditional intentionalist theory appeared to provide to judges seemed inconsistent with a constrained judicial role.¹³⁵ Thus, in England, following the increased separation of powers that came in the wake of the Glorious Revolution, judicial departures from the text of a statute began to decline.¹³⁶ Similarly, in America—with the enactment of the Constitution and its separation of legislative from judicial power at the federal level—the federal courts significantly increased their reliance on text.¹³⁷ Because people reading the Constitution would see that it separates legislative from judicial power, they would recognize that the interpretive rules appropriately applied to the Constitution would more likely be those textualist rules associated with the separation of powers.

While there is evidence both for intentionalism and textualism, the interpretive rules may also combine these two different approaches. For example, Philip Hamburger has written: “Common lawyers ended up with a two tier approach” to interpretation.¹³⁸ One tier reflected “an initial presumption that the intent could be discerned from the words.”¹³⁹ The other tier reflected “a recognition that when the words remained unclear it was necessary to inquire more broadly about the act’s intent.”¹⁴⁰

2. *Constitutional Interpretation.*—The evidence concerning constitutional interpretation is also primarily originalist, with some support for textualism and some support for intentionalism. For example, Alexander Hamilton, in his bank opinion, argued for interpretation of the words of the Constitution in their “obvious and popular sense.” He rejected evidence

¹³⁵ Another reason for the growth of reliance on text is that legislatures appeared to engage in more careful drafting and therefore the text of a statute was seen as better reflecting a legislature’s intent. See PETER BENSON MAXWELL, *ON THE INTERPRETATION OF STATUTES* 230 (London, William Maxwell & Son 1875); Manning, *supra* note 132, at 54.

¹³⁶ See WILLIAM D. POPKIN, *STATUTES IN COURT: THE HISTORY AND THEORY OF STATUTORY INTERPRETATION* 19 (1999); Manning, *supra* note 132, at 52–54.

¹³⁷ See Manning, *supra* note 132, at 85–102.

¹³⁸ HAMBURGER, *supra* note 81, at 54.

¹³⁹ *Id.*

¹⁴⁰ *Id.* In this Article we do not have space to determine the amount of evidence needed to establish the interpretive rules that are binding today. If the interpretive rules derive from a constitutional provision, the evidence required is not likely to differ from that needed to establish any constitutional norm as a matter of original meaning. But in this Article, we have assumed that the interpretive rules apply because the enactors would have used them to determine the Constitution’s meaning. Determining the amount of evidence needed to establish these rules may be more complicated. One issue that would bear on the question is whether there is an alternative to the interpretive rule available. For example, one might wonder whether the rule of lenity applies to the Constitution’s criminal provisions. Because the ordinary interpretive rules would apply in the absence of the rule of lenity, one might require strong evidence to apply the rule of lenity instead of (or in addition to) those rules. By contrast, there may be questions that are more basic, such as whether one looks primarily to text or intent. In this situation, there is no default rule and therefore one might simply select the interpretive rule that has the stronger support.

from the Philadelphia Convention, because the “intention of the framers . . . is to be sought for in the instrument itself, according to the usual and established rules of construction.”¹⁴¹ Similarly, Chief Justice Marshall wrote of the Constitution (and statutes): “[A]lthough the spirit of an instrument, especially of a constitution, is to be respected not less than its letter, yet the spirit is to be collected chiefly from its words. It would be dangerous in the extreme, to infer from extrinsic circumstances, that a case for which the words of an instrument expressly provide, shall be exempted from its operation.”¹⁴² Indeed, the constitutional opinions of the Marshall Court largely articulated an original meaning approach.¹⁴³ Finally, while Jefferson Powell’s famous work attacked original intent originalism on historical grounds, his evidence largely comports with original meaning originalism.¹⁴⁴

There is also evidence of intentionalist interpretation of the Constitution—evidence for considering the intent of the ratifiers and drafters. The strongest evidence is for considering the ratifiers’ intent, those who were said to actually enact the Constitution into law.¹⁴⁵ Robert Clinton has gathered evidence that numerous members of Congress and others in the early republic, including James Madison, used material from state ratifying conventions to support constitutional interpretations.¹⁴⁶ But there is also evidence for considering drafter intent. Again, Clinton reports many examples of high officials using either their own recollections of the Constitutional Convention or the actual journals of the convention to support their positions on a question of constitutional interpretation.¹⁴⁷ For instance, several

¹⁴¹ See Hamilton, *supra* note 66, at 111. James Madison also endorsed looking principally to the original textualist meaning of the Constitution, writing: “I entirely concur in the propriety of resorting to the sense in which the Constitution was accepted and ratified by the nation. In that sense alone it is the legitimate Constitution. And if that be not the guide in expounding it, there can be no security for a consistent and stable . . . exercise of its powers.” Letter from James Madison to Henry Lee (June 25, 1824), in 9 THE WRITINGS OF JAMES MADISON, *supra* note 91, at 192. For another example of textualist interpretation, see Letter from Gouverneur Morris to Timothy Pickering (Dec. 22, 1814), *quoted in* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 420 (Max Farrand ed., rev. ed. 1966).

¹⁴² *Sturges v. Crowninshield*, 17 U.S. (3 Wheat.) 122 (1819).

¹⁴³ See CHRISTOPHER WOLFE, *THE RISE OF MODERN JUDICIAL REVIEW: FROM JUDICIAL INTERPRETATION TO JUDGE MADE LAW* 41–63 (1994).

¹⁴⁴ See Powell, *supra* note 70; see also BARNETT, *supra* note 4, at 96–100; Clinton, *supra* note 132, at 1186–1220; Charles Lofgren, *The Original Understanding of Original Intent?*, 5 CONST. COMMENT. 77 (1988). The arguments for textualism also relied in part on the fact that the Constitution was drafted carefully to express the intent of the body. See Letter from Gouverneur Morris to Timothy Pickering, *supra* note 141 (“Having rejected redundant and equivocal terms, I believed [the Constitution] to be as clear as our language would permit[, with one exception.]”); see also Clinton, *supra* note 132, at 1190 (“[T]he framers at Philadelphia . . . picked words quite carefully to convey precisely what they meant, no more and no less. Debates over the connotations of constitutional terms reflected a desire to avoid both imprecision and linguistic redundancy.”).

¹⁴⁵ See 5 ANNALS OF CONG. 776 (1796).

¹⁴⁶ See Clinton, *supra* note 132, at 1186–1220.

¹⁴⁷ See *id.*

references to the Philadelphia Convention were made in congressional debates concerning the power of the national government to assume state debts and incorporate a bank.¹⁴⁸ Indeed, President Washington, in perhaps the most important example of use of the records of the Constitutional Convention, employed the journals of the convention in the debate over the Jay Treaty in order to show that a treaty had the force of law without action by the House.¹⁴⁹

To conclude, our brief discussion suggests substantial evidence both from the statutory and constitutional context that the enactors believed originalist interpretive rules governed the Constitution. While the evidence is conflicting as to whether original intent or original meaning provides the proper interpretive method, the key point is that there is little or no evidence to support a living constitution interpretation. Consequently, it is safe to conclude that the original methods approach to constitutional interpretation argues for some form of originalism.¹⁵⁰

C. Treanor's Historical Work on Interpretive Rules

Additional light can be shed on the interpretive rules governing the Constitution by examining Dean William Treanor's research on early

¹⁴⁸ See 2 ANNALS OF CONG. 1409–10 (1790) (statement of Elbridge Gerry); *id.* at 1945 (remarks of James Madison).

¹⁴⁹ See 5 ANNALS OF CONG. 761 (1796), *cited in* Clinton, *supra* note 132, at 1203.

¹⁵⁰ We recognize that some have contested our basic claim that the Constitution was a legal document and thus subject to legal interpretive rules. For instance, according to Larry Kramer, the Constitution was a “special form of popular law, law made by the people to bind their governors, and so subject to rules and considerations that made it qualitatively different from . . . statutory or common law.” Larry D. Kramer, *Foreword: We The Court*, 115 HARV. L. REV. 4, 10 (2001). For criticism of Kramer's claims, see Gerald Leonard, *Iredell Reclaimed: Farewell to Snowiss's History of Judicial Review*, 81 CHI. KENT L. REV. 867 (2006); Saikrishna Prakash & John Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887, 904, 906–14 (2003). While we do not have space here to rebut conclusively these contentions, we believe they do not undermine our argument that the enforceable meaning of the constitution was a legal one, subject to legal methods of interpretation.

Before the Constitution, during its ratification, and in the early days of its consideration, interpreters relied on legal interpretive methods to construe constitutions throughout the United States. Before the enactment of the Constitution, Dean Treanor has shown that the rich traditions of statutory interpretation in the English-speaking world were deployed in interpreting state constitutions. See William Michael Treanor, *Judicial Review Before Marbury*, 58 STAN. L. REV. 455 (2005). In the debate over the Constitution, important proponents and opponents assumed it was subject to legal interpretive rules. See Powell, *supra* note 70, at 908–912. For instance, the famous Anti-Federalist Brutus complained that the judges would use legal construction to interpret the Constitution inconsistently from its plain meaning and so consolidate powers not granted in the federal government. Essays of Brutus No. 12, *reprinted in* THE COMPLETE ANTI-FEDERALIST 424–25 (Herbert Storing ed., 1981). In the *Federalist Papers*, Hamilton responded to these arguments not by denying that judges would construe the Constitution according to rules of legal interpretation, but that they would do so reasonably. See THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 56, at 486–88. After the ratification of the Constitution, participants in debates in the First Congress regularly referred to interpretive rules in debating such issues as presidential power over cabinet departments. See Nelson, *supra* note 32, at 573–74.

American constitutional cases.¹⁵¹ Happily, Treanor's Symposium contribution is brief enough to allow us to critically examine a leading scholar's contrary view of the interpretive rules. While we agree with Treanor that the interpretive rules from this period are an important guide towards determining the Constitution's original meaning, we disagree with his characterization of those rules in two ways.

First, Treanor argues that the interpretive rules at the time of the Constitution's enactment were largely antitextualist.¹⁵² We understand textualism in Treanor's discussion to be essentially the same as public meaning originalism. Even understood in those terms, his claim does not necessarily contradict our view, because we merely argue that the original interpretive rules required some form of originalism, which could be original intent originalism. Nonetheless, we disagree with his argument that the original interpretive rules were antitextualist. While Treanor is certainly correct that the cases from this period do not reveal a superstrict textualism that relies only on meanings expressly stated in the text without reference to history, intent, or purpose, that is not the only, or in our view, the proper, textualist approach. Rather, the better view of textualism recognizes that the meaning of legal terms is often informed by historical understandings incorporated into the text, and that textual ambiguities are fairly resolved by resort to constitutional structure, purpose, or intent. With this understanding of textualism, we argue that the interpretive rules employed in the cases that Treanor discusses are largely compatible with textualism.

Second, Treanor argues that the interpretive rules for constitutions at the time of the Framing involved differential levels of scrutiny, depending on the nature of the case.¹⁵³ When cases involved entities that had not participated in the legislative process—either judges or juries in a state or state decisions that impacted other states or federal power—the courts would act aggressively to review the constitutionality of the law. When those circumstances were not involved, courts were largely deferential. While we do not have the space to fully address his argument, we are doubtful of Treanor's claims in this area, and raise some questions about them.

We begin with Treanor's argument that the interpretive rules depended on the nature of the case. We then discuss Treanor's claims about the antitextualist character of interpretive rules. Examining the three cases that Treanor offers as evidence, we conclude that these cases are in fact consistent with textualism.

1. Differential Scrutiny.—We are skeptical of Treanor's claim that the interpretive rules for constitutions at the time of the Framing required

¹⁵¹ See Treanor, *supra* note 119; Treanor, *supra* note 150.

¹⁵² Treanor, *supra* note 119, at ____ [cite to the very beginning of the section labeled "Early Judicial Constitutional Interpretation"].

¹⁵³ *Id.* at ____ [cite to paragraph beginning "If one seeks to interpret the Constitution as We the People adopted it"].

the courts to aggressively protect entities not involved in the legislative process, such as judges and juries, but to defer to legislatures in other circumstances.¹⁵⁴ Treanor derives this conclusion from his review of thirty-eight decisions that assessed the constitutionality of statutes prior to *Marbury*. But there are three problems with his argument.

First, Treanor does not present evidence that anyone enunciated such a principle of differential judicial review. An interpretive rule that was followed would have to have been known, and there is no direct evidence that anyone was aware of this alleged rule.

Second, our limited review uncovers statements of interpretive rules that contradict Treanor's approach. In an opinion by Judge Spencer Roane in *Kamper v. Hawkins*, which Treanor himself characterizes as a widely-known case by an illustrious judge, Roane writes that in cases where "the constitutional powers [of judges] are encroached upon" or their interests are affected, judges should "require clear evidence before they decide" in favor of the interests of the Judiciary.¹⁵⁵ In other cases, including a "controversy . . . between" the Legislature and the people, the court should not be deferential, but should decide the case as a proper, disinterested decisionmaker.¹⁵⁶ Thus, Roane suggests deference where judges are involved but no deference in other circumstances, something close to the opposite of Treanor's approach.

Third, it is dangerous to infer an interpretive rule from a group of cases that do not articulate the rule. To begin, some of Treanor's classifications seem questionable. For example, Treanor treats the court's decision in *Holmes v. Watson*¹⁵⁷ as aggressively moving beyond the text of the state constitution when it held that the jury trial protection provision required a jury of twelve persons.¹⁵⁸ But there is a strong argument that the court was simply applying the traditional meaning of jury in its decision. Moreover, even if the court did act aggressively in this case, it might have done so for a different reason than Treanor suggests. In *Holmes*, it is entirely possible that the court acted aggressively (assuming it did) not because juries were not part of the legislative process, but instead because there was at that time a long and highly valued tradition in favor of jury decisionmaking in Anglo-American law.¹⁵⁹

¹⁵⁴ *Id.*; Treanor, *supra* note 150, at 517.

¹⁵⁵ *Kamper v. Hawkins*, 3 Va. (1 Va. Cas.) 20, 39 (1793) (Roane, J.). Roane also says that in these types of cases, judges should "distrust their own judgment if the matter is doubtful." *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *State v. Parkhurst*, 9 N.J.L. 427, app. 444 (N.J. 1802) (discussing the *Holmes* case, for which there was no written opinion).

¹⁵⁸ See Treanor, *supra* note 150, at 474–75.

¹⁵⁹ Treanor has analyzed more cases in a previous article. See *id.* at 475, 515–17, 539. While we do not have space to analyze all of these cases, we do not read most of the cases Treanor adduces to be inconsistent with originalism. As we discuss here, we believe that consulting background principles to understand the text of a statute is consistent with originalism, as is reliance on a constitutional structure

2. *Kamper v. Hawkins*.—We now consider the three cases identified by Treanor as employing an antitextualist interpretive approach, beginning with *Kamper v. Hawkins*. In *Kamper*, the Virginia legislature did not follow the appointment method and other conditions specified in the Virginia Constitution when creating a district court.¹⁶⁰ Under its constitution, the Virginia legislature was given the power to appoint, by joint ballot of the two houses, the judges of the Supreme Court of Appeals, the General Court, the Chancery Court, and the Admiralty Court.¹⁶¹ These judges, who were to be commissioned by the Governor, were to continue in office during good behavior. The district court judges created by the legislature, however, were not appointed by joint ballot, did not enjoy good behavior tenure, and were not commissioned by the governor. The constitutional question, then, was whether the legislature could establish courts through different appointment methods and with different tenure protections than those specified in the state constitution. While the Virginia Constitution did not expressly prohibit the creation of these courts, it could certainly be read as having done so implicitly.

Treanor argues that opinions in the case by the two most famous judges involved, Spencer Roane and St. George Tucker, were antitextualist. Beginning with Roane, Treanor argues that he acknowledged that the statute was not “expressly repugnant to the [c]onstitution,” but invalidated it because it was “by a plain and natural construction, in opposition to the fundamental principles thereof.”¹⁶² Treanor also emphasizes that Roane invalidated the provision because it was against the “spirit” of the constitution.¹⁶³

We disagree with Treanor’s reading and characterization of Roane’s opinion. First, the conclusion that Roane reaches is fully compatible with originalist textualism. The Virginia Constitution establishes procedures for appointing judges with certain powers. To allow the legislature to depart from those limitations would permit circumvention of these provisions. It is hard to understand why the constitution would have included these provisions if the legislature could simply ignore them.

Roane’s opinion is consistent with this analysis. He emphasizes the differences between the constitutional appointment method and the method used by the legislature, and infers that the “[c]onstitution intended” the former method to be employed. Roane also shows that the legislature’s appointment method creates courts that do not serve under good behavior,

established in the text. Even reference to policy reasons may actually be references to the intent behind constitutional provisions, and thus a kind of originalism. An additional difficulty with relating many of these opinions to a standard for interpretive rules is that their reasoning is cryptic and unreflective.

¹⁶⁰ 3 Va. (1 Va. Cas.) 20.

¹⁶¹ VA. CONST. art. XI (1776).

¹⁶² Treanor, *supra* note 150, at 515 (quoting *Kamper*, 3 Va. (1 Va. Cas.) at 35–36 (Roane, J.)).

¹⁶³ *Id.*

which conflicts with another constitutional provision requiring the separation of legislative and judicial power. Thus, in modern terms, Roane uses the purposes of the appointment provisions as well as other constitutional provisions to resolve an ambiguity—a method entirely compatible with textualism.

It is true that Roane says that while the statute was not “expressly repugnant to the [c]onstitution,” it was “by plain and natural construction, in opposition to the fundamental principles thereof.”¹⁶⁴ But those statements, when properly understood, are perfectly innocent. Roane is correct that the statute was not “expressly repugnant to the [c]onstitution,” because the constitution was ambiguous. To resolve that ambiguity, Roane looked to the fundamental principles of the constitution embedded in the constitution’s text.¹⁶⁵ Thus, Treanor’s suggestion that Roane feels free to depart from the written document in order to invoke his own legal principles is mistaken. Rather, Roane is looking to an ambiguous constitutional text and drawing the quite plausible inference that it was intended to be exclusive.¹⁶⁶

It is also true that Roane refers to the spirit of the constitution, but this statement again is innocent when understood correctly. Roane’s reference to the spirit, as contrasted with the letter, of the Virginia Constitution follows a common usage at the time. The reference to “the Letter” captured the process of reading a clause according to its explicit text. The reference to “the Spirit” captured the process of reading a clause or a document according to its implicit intent or purpose. Thus, interpreting an ambiguous provision to accord with its spirit is consistent with textualism.¹⁶⁷ It is only when the spirit takes priority over the text that one raises questions under textualism.¹⁶⁸

With this analysis in mind, we can now look at Roane’s statement of his methodology for confirmation of our conclusion. Roane writes:

[T]he judiciary may and ought to adjudge a law unconstitutional and void, if it be plainly repugnant to the letter of the Constitution, or the fundamental prin-

¹⁶⁴ *Id.*

¹⁶⁵ *Kemper*, 3 Va. (1 Va. Cas.) at 41–42 (Roane, J.). The main exception to this approach is that Roane also looks to background principles that people would be assumed to have accepted, such as “no man a judge in his own case.” *Id.* at 41.

¹⁶⁶ This unwillingness on Roane’s part to impose his own principles is confirmed by the next portion of his opinion, which discusses whether the offices of chancery judge and general court judge can be united in the same person. Roane tentatively concludes “that however inconvenient and unwise,” *id.* at 44, it might be to unite these offices in a single person, there was no “constitutional impediment” to doing so, *id.* at 45. Moreover, Roane writes that the uniting did not conflict with “any express provision in, or fundamental principle of, the constitution.” *Id.* at 44–45. But, again, the fundamental principle he had in mind was the one, expressly stated in the constitution, that the legislative and judicial powers shall not be united in a single person.

¹⁶⁷ See John F. Manning, *What Divides Textualists from Purposivists*, 106 COLUM. L. REV. 70, 85 (2006).

¹⁶⁸ See, e.g., *Holy Trinity Church v. United States*, 143 U.S. 457 (1892).

ciples thereof. By fundamental principles I understand, those great principles growing out of the Constitution, by the aid of which, *in dubious cases*, the Constitution may be explained and preserved inviolate; those landmarks, which it may be necessary to resort to, on account of the impossibility to foresee or provide for cases within the spirit, but without the letter of the Constitution.¹⁶⁹

Thus, Roane is stating that fundamental principles stated in or implicit in the Virginia Constitution can be used to interpret ambiguous provisions to further the intent of the constitution.

Tucker's opinion in *Kemper*, on which Treanor also relies, confirms both this view of "spirit" and the originalist-textualist approach to interpretation. Tucker also held the provision unconstitutional, mentioning "the text of the [c]onstitution and the spirit of our government."¹⁷⁰ Yet Tucker's opinion conforms to textualism. Tucker argues that the legislative appointment statute established courts that do not have good behavior tenure and therefore are subject to the legislature's control and influence. He finds these courts inconsistent with what he calls a fundamental principle of the constitution—a principle established in the constitution itself, the separation of powers.¹⁷¹ Unlike Roane, Tucker also argues that the district courts may violate the constitution by combining the powers of different courts in a single judge.¹⁷² Although we do not discuss his argument in detail, Tucker meticulously examines the constitutional text to draw inferences to support his conclusion.

Finally, it should be noted that the other judges in this case, Nelson, Henry, and Tyler, all offered opinions that were generally textualist in nature.¹⁷³ They read the constitutional provision as providing the exclusive means to make the judicial appointments at issue. Thus, the five opinions in *Kemper* provide powerful evidence of originalist textualism at the time of the Framing.

3. *Van Horne's Lessee v. Dorrance*.—In *Van Horne's Lessee v. Dorrance*, a Pennsylvania statute divested land from certain Pennsylvania claimants in favor of certain Connecticut claimants.¹⁷⁴ It then relegated the Pennsylvania claimants for compensation to such land as a commission appointed by the legislature deemed equivalent. The question was whether this statute violated the Pennsylvania Constitution, which provided that "all men . . . have certain natural, inherent and inalienable rights, amongst

¹⁶⁹ *Kemper*, 3 Va. (1 Va. Cas.) at 40 (emphasis added).

¹⁷⁰ *Id.* at 68 (Tucker, J.).

¹⁷¹ *Id.* at 87 (citing to two provisions of the Virginia Constitution which require the separation of powers).

¹⁷² *Id.* at 88–89.

¹⁷³ *Id.* at 22 (Nelson, J.); *id.* at 45 (Henry, J.), *id.* at 56 (Tyler, J.).

¹⁷⁴ 2 U.S. (2 Dall.) 304 (C.C.D. Pa. 1795).

which . . . acquiring, possessing and protecting property.”¹⁷⁵ Justice Paterson concluded that the statute violated both the “text and spirit” of the constitution.¹⁷⁶

Treanor argues again that this opinion shows the unimportance of text in early constitutional interpretation.¹⁷⁷ He contends that the text is doing very little work in the opinion because Paterson discusses natural law and social contract principles. Instead, Treanor believes that this discussion of what he regards as freestanding principles involves the spirit of the constitution.

Once again, we disagree with Treanor’s reading of the opinion’s methodology. Paterson’s opinion is construing a constitutional provision that is clearly intended to incorporate a principle of property rights based on natural law and social contract. Thus, to properly understand the constitutional text, Paterson must refer to natural law and social contract concepts. Paterson’s methodology here is similar to one that would be used when a written law provision employs a common law concept. A judge interpreting the written law properly considers the common law concept, not because common law applies, but because the written law enacts the common law concept. Similarly, when the people place a natural law principle into a constitution, textualism requires referring to the concepts that that principle employs.

Of course, Treanor is correct that this methodology may require the judge to spend most of his time looking at materials outside of the constitution. But that does not mean he is not being an originalist textualist. One can imagine a wooden textualism that refused to look outside a constitution, but that textualism would be flawed, because it would not be faithful to the actual meaning of the text.

Paterson’s claims that the Pennsylvania statute violated both the letter and spirit of the Pennsylvania Constitution is also consistent with textualism. Paterson here is not suggesting that the statute violated both the constitutional text and freestanding principles. Rather, he is stating that the statute violated not only the text, but also the intent underlying that text—the reasons why the text was placed in the state’s constitution in the first place. Transferring property from one person to another without assuring adequate compensation was exactly the kind of measure that the right to property provision was inserted to protect against.¹⁷⁸

Thus, *Van Horne’s Lessee* does not suggest a rejection of originalist textualism by the Framers. Rather, when properly understood, it is consistent with that approach.

¹⁷⁵ PA. DECLARATION OF RIGHTS art. I (1776).

¹⁷⁶ *Van Horne’s Lessee*, 2 U.S. (2 Dall.) at 315.

¹⁷⁷ See Treanor, *supra* note 119, at TBD.

¹⁷⁸ Patterson was trying to give full effect to the text by requiring the equivalent of modern strict scrutiny for schemes that encroached on property rights, whose protection was textually mandated.

4. *Hylton v. United States*.—*Hylton v. United States* concerned the constitutionality of a carriage tax that Congress had levied on individuals with carriages.¹⁷⁹ If the tax were a “direct tax,” Article I, Section 9’s requirement that direct taxes be apportioned among the states in proportion to their population would have applied. The tax would then have been unconstitutional, because the tax was not apportioned but instead was applied uniformly across the states.

Treanor argues that *Hylton* was another antitextualist decision. Of the three opinions in *Hylton*, he writes, “two were strongly nontextual.”¹⁸⁰ He maintains that these opinions were based on arguments of policy and intention rather than relying on text. Once again we disagree with Treanor’s characterization of the case. Two of three opinions, both Chase’s and Paterson’s, made classic textualist arguments. It is true that these opinions also employed arguments of intent and policy, but these arguments can often be properly used to clarify ambiguous text. While the third opinion by Justice Iredell did not make core textualist arguments, he may have intended to incorporate their opinions because he appeared to endorse them.¹⁸¹ In any event, given the uncertainty in the meaning of direct taxes, Iredell’s arguments of structure and purpose are at least consistent with textualism.

We should acknowledge that we believe the opinions in *Hylton* were the weakest from a textualist perspective of the three cases Treanor discusses. For our purposes, however, we need not insist that they were properly textualist, since we argue here merely that the interpretive rules were originalist—which can be either textualist or intentionalist. But we do believe that *Hylton* is far more textualist than Treanor concedes.

The opinion by Justice Chase actually began with a textual argument. He asked whether the Constitution exhaustively divides the taxes Congress is permitted to levy into two classes: one class of “direct” taxes that must be apportioned under Article I, Section 9, and another class of duties, imposts, and excises that must be uniform throughout the United States under Article I, Section 8. In short, Chase asked whether there was a dichotomy between direct taxes and indirect taxes. Chase argued that no such dichotomy existed, because in such a case the Constitution would have read differently: “Congress shall have power to lay and collect direct taxes, and duties, imposts and excises; the first shall be laid according to the census; and the last three shall be uniform throughout the United States.”¹⁸²

This is a classic kind of textual argument, contrasting what the Constitution says with how it would have been written if a different meaning were intended. Moreover, the result of this argument does substantial work in Chase’s opinion. Because he believed that the Constitution permitted a

¹⁷⁹ 3 U.S. (3 Dall.) 171 (1796).

¹⁸⁰ Treanor, *supra* note 119, at TBD.

¹⁸¹ *Hylton*, 3 U.S. (3 Dall.) at 181.

¹⁸² *Id.* at 173–74 (Chase, J.) (emphasis omitted).

third category of tax—both “direct and indirect,” as he described it—Chase had greater freedom to place the carriage tax within a category of tax that is not apportioned.¹⁸³

Chase goes on to argue that the carriage tax should not be classified as a direct tax if apportioning it would involve “very great inequality and injustice.”¹⁸⁴ Treanor appears to view this as a policy argument, but it might instead be an argument based on purpose. If the Constitution draws a distinction between apportioned direct taxes and uniform indirect taxes, but the distinction is unclear, it is by no means irrelevant to ask whether a tax can be feasibly or equitably apportioned. The enactors can be reasonably assumed not to have required extremely problematic taxes. Of course, this argument only has limited weight, because the enactors might have required direct taxes as a means of discouraging certain taxes. But the fact that the purpose argument had limited weight does not mean it is a policy argument inconsistent with textualism.

Justice Paterson’s opinion also employed a textual argument. As Treanor concedes, Paterson quoted from Adam Smith’s *The Wealth of Nations*, which had been published approximately a decade before the Constitution, to show how the terms “direct tax” and “indirect tax” were used.¹⁸⁵ Treanor criticizes Paterson here for ignoring another possible meaning of these terms.¹⁸⁶ We do not believe, however, that the possibility Paterson could have made a more comprehensive or even better textual argument takes away from the fact that his argument was a classic effort to discover the meaning of the text by looking at how a concept was understood at the time the Constitution was drafted.

Paterson also offered an argument from intent, claiming that the apportionment requirement for direct taxes had been included as part of a compromise between the North and South.¹⁸⁷ While intentionalist evidence is not really consistent with textualism, except perhaps to resolve an ambiguity (which did exist here), Paterson’s argument is certainly consistent with originalism as it is more broadly understood.

The final opinion of Justice Iredell also employed inferences that are consistent with textualism. Like Chase, Iredell made the argument that the Constitution should not be presumed to have required apportionment of taxes that could not be feasibly apportioned.¹⁸⁸ But Iredell also used the structure of the Constitution to clarify the uncertainty about the scope of the apportionment requirement. Viewing the apportionment requirement as operating on states rather than individuals—because the amount of the tax was

¹⁸³ *Id.* at 174.

¹⁸⁴ *Id.*

¹⁸⁵ *See id.* at 180 (Paterson, J.).

¹⁸⁶ Treanor, *supra* note 119, at **TBD**.

¹⁸⁷ *Hylton*, 3 U.S. (3 Dall.) at 177.

¹⁸⁸ *Id.* at 181–182 (Iredell, J.).

based on the state's population—Iredell narrowly construed the requirement on the ground that the Constitution generally applied to individuals and had largely dispensed with the Articles of Confederation's principle of operating on states.¹⁸⁹

Overall, the decisions in *Hylton* do not represent a high point for the Court from the perspective of persuasiveness, textualism, or originalism. Still, the opinions make many textualist moves, and even more moves that are consistent with originalism. Certainly none of the opinions resemble living constitutionalism in an attempt to update or infuse the Constitution with values that cannot be found in the text or intent of the enactors. That the opinions are not entirely persuasive does not mean they are nonoriginalist or even nontextualist.

CONCLUSION

In this Article, we have argued in favor of original methods of interpretation as a key to understanding originalism. While the gloss of original methods may seem new, it reconciles the established versions of originalism—original public meaning and original intent—both conceptually and practically. At the conceptual level, we have shown that the internal logic of both original intent and original public meaning leads to the need to take account of the interpretive rules, including legal interpretive rules, that the enactors would have deemed applicable to the Constitution. At the practical level, we have suggested that the original methods applied to the Constitution may have blended elements of original public meaning and original intent, but that the original methods were within what is now understood as the family of originalism. We acknowledge, however, that our understanding of the original interpretive rules is not complete, and we leave substantial room for further research. Nothing in the historical record we have seen, however, suggests that the original methods included living constitutionalism or other principles permitting interpreters to update the Constitution to reflect changing values.

Our theory also reconciles the positive and normative theories of constitutional interpretation. In our view, original methods is the best positive interpretive theory of the Constitution because it captures the actual meaning the enactors ascribed to our founding legal document. Original methods is also the best normative interpretive theory because it discovers the desirable meaning of the Constitution. The desirability of the Constitution depends on it having received a consensus at the time of its enactment. And the meaning of that consensus is best determined by reference to the interpretive methods that the enactors would have employed. Hence, original methods both discerns the actual meaning of the Constitution and the desirable meaning that passed through the supermajoritarian process.

¹⁸⁹ *Id.* at 181.