CONSTRUCTING A NEW AMERICAN CONSTITUTION

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Problems of constitutional interpretation have occupied a prominent part of the scholarly agenda for quite some time, and rightly so. Theories of constitutional interpretation help guide and legitimate the work of the judiciary. They grapple directly with what the courts say they do and with many of the issues that lawyers routinely face. Understanding what should be interpreted, how it should be interpreted, and who has the authority to interpret are all important and basic to the constitutional enterprise.[1]

Interpretation is not all that we do with constitutions, however. Interpretive practice is supplemented through a process of constitutional construction. Constitutional scholarship has given increasing attention to the idea of construction as a feature of the constitutional enterprise that is distinct from interpretation and that is worthy of analysis in its own right.

In this Article, I reintroduce the concept, clarify a couple of features of the idea of constitutional constructions as I understand it, and suggest some possible benefits of constructions as a conceptual tool. The Article proceeds first by discussing what constitutional construction is and how it relates to constitutional interpretation. Part II considers the extent to which courts engage in constitutional constructions. Part III considers whether it is possible to avoid constitutional constructions. The Article concludes by suggesting ways in which the concept can be useful to various scholarly literatures.

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1. *See* Walter F. Murphy, *Who Shall Interpret?: The Quest for an Ultimate Constitutional Interpreter*, 48 REV. POL. 401, 401 (1986).

I. WHAT IS A CONSTITUTIONAL CONSTRUCTION?

Constitutional construction is one mechanism by which constitutional meaning is elaborated. It works alongside constitutional interpretation to elaborate the existing constitutional order. The process of constitutional construction is concerned with fleshing out constitutional principles, practices and rules that are not visible on the face of the constitutional text and that are not readily implicit in the terms of the constitution.

We can imagine a continuum of actions that political actors can take under a Constitution, ranging from policymaking to revolution. At one end of the continuum, political actors can take constitutional forms as a given and make policy decisions under it, filling government offices and exercising government power in (constitutionally) noncontroversial ways. Policymaking seeks to exercise constitutional authority, and its implications for elaborating or altering constitutional meaning are only implicit. At the other end of the spectrum, political actors can engage in revolution and replace the existing constitutional order or document wholesale in favor of a new one. The Articles of Confederation can be displaced in favor of the U.S. Constitution. Less extreme than revolution is creation, which adds new text to a preexisting Constitution. Creation embraces a revisionary authority, but the revisions are partial rather than total. They amend and reform the Constitution, rather than throw it over.[2]

Interpretation and construction are both concerned with elaborating, developing and effectuating the preexisting Constitution. Unlike the mere policymaker, the interpreter or constructor engages the Constitution directly and attempts to address and resolve contested claims about constitutional meaning. But political actors engaged in these tasks do not claim the authority to revise, amend or alter the Constitution. They claim only the lesser authority of attempting to understand and realize the Constitution as they found it.

Construction lies closer along the continuum to the process of creation, however. Construction picks up where interpretation leaves off. Interpretation attempts to divine the meaning of the text.[3] There will be occasions, however, when the Constitution as

2. *See also* KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION 3–5 (1999).

3. For these purposes, I bracket the issue of how best to interpret a constitutional text. One can accept a fairly capacious understanding of the interpretive process and still

written cannot in good faith be said to provide a determinate answer to a given question. This is the realm of construction. The process of interpretation may be able to constrain the available readings of the text and limit the permissible set of political options, but the interpreter may not be able to say that the text demands a specific result. Further judgments, further choices, about how to proceed within those bounds are made through the process of construction. Constitutional meaning is no longer discovered at that point. It is built.

But constitutional constructions are built within the boundaries, or to use Jack Balkin's phrase, within the framework, of the interpreted Constitution.[4] They partake of the process of constitutional creation in the sense that constructions are necessarily creative, but not in the sense that they have the authority to revise the constitutional text or the discoverable meaning of that text. The process of construction takes over when the traditional tools of interpretation exhaust themselves. In order to do so, those who construct constitutional meaning must lean more heavily on external considerations to bring determinacy to what interpretative arguments leave indeterminate. Put differently, constitutional constructions make normative appeals about what the Constitution should be, melding what is known about the Constitution with what is desired.

Constructions are, by their nature, temporary. An interpretation of a text attempts to capture the true meaning of the text. Any interpretation will be revisable in light of later argument and evidence. Any interpretation is likely to be partial, since it will be motivated by a particular question and controversy, and thus may highlight some features of constitutional meaning while pushing others into the background. Interpretations aim to be accurate extensions of the fixed text. Interpretations should, therefore, be enduring except to the extent to which there is more to be said about them or they can be made more accurate. By contrast, constructions are

make room for a supplementary and distinguishable process of construction. As long as an interpretive approach is capable of recognizing gaps and indeterminacies in constitutional meaning, then it is capable of recognizing the value of constitutional constructions. As a result, I would resist tying the concept of constitutional constructions to any specific controversial claim about what interpretation means or how best to interpret. *Cf.* Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95 (2010).

4. Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549 (2009).

meant to settle indeterminacies to the satisfaction of immediate political interests. Constructions involve judgments and choices about how best to resolve those indeterminacies. Those choices can be revisited without disturbing the constitutional text itself or the discoverable meaning of the constitutional text. If a construction no longer serves the interests or expresses the values of important political actors, then it can and often will be revisited. A successful constitutional construction may span centuries, or merely a political generation. We currently think we know the answer to such basic questions as whether a state has a right to secede from the union or whether the Senate's "advice and consent" function can be exercised entirely through post-negotiation treaty ratification or whether presidents can appropriately veto legislation on policy grounds, but those answers depend on settlements that could, in the right circumstances, be undone. Those constitutional resolutions may be venerable, but they reflect contingent choices made within the constitutional framework not essential requirements of the Constitution itself.

Let me give three illustrative examples of situations in which constructions might play a role in constitutional practice. This set of examples is not intended to be exhaustive, but to clarify what constructions are and how they fit within the continuum of actions that can be taken under a Constitution.[5] In particular, the examples highlight the relationship between interpretation and construction. Constructions occur in the context of textual vagueness, constitutional gaps, and constitutional inspirations.

First, constitutional vagueness occurs when there is uncertainty as to where exactly the boundaries of a constitutional rule, standard or principle might be. Some constitutional rules may have precise boundaries, leaving little uncertainty or vagueness about what is covered by the rule and what is excluded. Others may have indeterminacies at their boundaries. Interpretation may be able to help specify what rule a constitutional provision seeks to convey and identify the core meaning of a term, but the meaning of a term as it might apply in more marginal contexts may be underdetermined.

A number of constitutional provisions and principles are vague to some degree. They have a clear core of meaning, which provides ready answers for many questions about how the

5. *See also* WHITTINGTON, *supra* note 2, at 8–9.

provisions ought to be applied. Interpreters would be capable of recognizing government actions that are permissible and those that are impermissible. But some questions, including some questions of immediate political importance, might fall in between, where it is unclear whether government action is permissible or impermissible. We might, for example, agree with many nineteenth-century commentators in thinking that the Interstate Commerce Clause had clear and determinate meaning about some things. Commercial transactions across state boundaries and the transportation of economic goods across state boundaries were within the core meaning of interstate commerce. They were "paradigm cases" of the rule embodied in the commerce clause.[6] On the other hand, commentators widely agreed that the federal regulation of manufacturing was outside the bounds of the Interstate Commerce Clause. Between these two areas of relative interpretive clarity were areas of relative indeterminacy. Did, for example, the Interstate Commerce Clause by implication disempower the states from interfering with interstate commerce? When did goods pass from the realm of interstate commerce to the realm of intrastate commerce? Once the limits of interpretation are reached, further textual analysis or historical inquiry or structuralist argument may provide grist for the mill but they will not resolve the indeterminacy. Within that zone of construction, choices will have to be made as to how best to realize the constitutional project going forward.

Second, constitutional gaps occur when the constitutional text provides no clear instruction for resolving important constitutional issues. Such "gaps" may be the product either of genuine oversight by constitutional drafters or of delegation to future political decision-makers. While interpretation is ultimately about discovering the meaning implicit in the text that is there, construction is concerned with addressing constitutional subject matter and resolving indeterminacies. If a given Constitution fails to make adequate provision for a given action—or simply leaves some decisions to be made by political actors operating through conventional political means—construction fills the gap. Arguably, the removal power is an instance of such a gap. The U.S. Constitution specifies how executive branch officials are to be appointed, but does not

6. JED RUBENFELD, REVOLUTION BY JUDICIARY 15 (2005). I do not mean to embrace all of Rubenfeld's approach to thinking about the structure of constitutional law, but his language is useful here.

specify how they are to be removed from office, except by impeachment. The First Congress puzzled over several alternatives as to how officers might be removed and how such removals might be constitutionally justified. The statutes creating the Cabinet departments settled on unilateral presidential removal, but there was little agreement in Congress over the rationale behind that settlement.[7] A removal power is a requisite part of the constitutional scheme. Although there are interpretive arguments that can dissolve the apparent constitutional gap in this particular case,[8] the eventual statutory settlement in favor of a unilateral presidential removal power can be readily understood as a relatively successful constitutional construction to resolve a textual indeterminacy in a workable and normatively attractive way. Somewhat differently, the decisions to have individual citizens vote to select presidential electors or to elect members of the U.S. House of Representatives by single-member geographic districts fill out the effective meaning of the U.S. Constitution and the functioning scheme of government. In those cases, the Constitution leaves to state legislative discretion how presidential electors will be chosen and how House members will be elected. In both cases, the "gap" has since been filled in with substantive content, severely limiting legislative discretion. Our working Constitution is one in which citizens choose their electors (and the electors exercise no autonomy) and House members represent single-member districts.

Third, constitutional inspirations occur when political actors take constitutional requirements as their starting points and seek to supplement them. The constitutional text, alongside other documents, can be a source of political inspiration. Its terms and provisions can help support, legitimate, and mobilize demands for reform and action. Political inspiration is not the same thing as interpretation, however, and calls for action may outrun what a careful interpreter would say that the constitutional text can support or require. Construction can supplement what interpretation provides. Constitutional rights provisions are the

7. *See* Keith E. Whittington, *The Separation of Powers at the Founding, in* SEPARATION OF POWERS 11 (Katy J. Harriger ed., 2003).

8. Interpretive claims could be made, for example, that the Constitution positively precludes anyone from removing executive officers through any mechanism other than impeachment or that presidential removal is implicit in the "executive power" of Article II. Likewise, it would be an interpretive claim to contend that Congress had freedom to legislate on this subject via the Necessary And Proper Clause. The specific path that Congress chose to take (unilateral presidential removal) was an act of construction.

easiest example.[9] Rights provisions give rise to a political rhetoric and mobilization aimed at defending and expanding the scope of those rights. Statutes, executive actions and judicial decisions expanding civil rights and liberties build not only on interpretations of what constitutional provisions require but also on ideas about what rights individuals ought to have in contemporary society. Assume arguendo that, properly interpreted, the First Amendment does not protect seditious libel, the Second Amendment does not protect individual gun ownership, that the Eighth Amendment does not prohibit execution by firing squad, or that the Thirteenth Amendment does not apply to "wage slavery" and require rights of collective bargaining. There is nothing that prevents citizens from mobilizing around those more expansive ideas of their rights and government officials from acting to recognize and effectuate those ideas. The knowing lawyer might well say that the Thirteenth Amendment does not mean that labor organizing is entitled to constitutional protection, but the labor activist or legislator might well argue that protections for labor are necessary for realizing the requirements and promise of the Thirteenth Amendment.[10]

II. COURTS AND CONSTRUCTIONS

Who should construct the Constitution? What role do courts play in constructing the Constitution? These are two distinguishable questions about the relationship between courts and constitutional construction. One raises normative issues about whether and under what circumstances courts should engage in constitutional construction. The other raises empirical questions about whether courts have in fact been active players in offering and developing constructions that have shaped our constitutional understandings and practices. I have not spent much time, in those terms, pursuing the descriptive account of how courts have actively constructed constitutional meaning over time. It would not be a difficult task to show that the courts

9. This process can obviously produce more difficult dynamics as well from the perspective of interpretive constitutional fidelity. The debate over Section Five of the Fourteenth Amendment points to exactly these issues.

10. On the latter, see James Gray Pope, *Thirteenth Amendment versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921-1957*, 102 COLUM. L. REV. 1 (2002); REBECCA E. ZIETLOW, ENFORCING EQUALITY 63–94 (2006).

have engaged in what I call the process of construction.[11] The more interesting immediate questions are the normative ones.

Some of those who have embraced the interpretation-construction distinction are also comfortable with the courts actively engaging in construction. For Randy Barnett, one of the virtues of the interpretation-construction distinction is that it allows us to recognize that when we reach the boundaries of interpretation the meaning of the text may still be underdetermined and need to be supplemented. With Dworkin, Barnett would call on the courts to construct the Constitution so that it is the "best it can be" so as to enhance its legitimacy and promote liberty.[12] Somewhat differently, Jack Balkin makes no distinction between courts and other institutions that might engage in the process of construction. Every governmental institution—as well as a variety of nongovernmental actors—is equally engaged in the process of creating the "living constitution." Courts may not have the most important role to play in Balkin's theory, but they are equally able to interpret or construct constitutional meaning.[13]

I have been more skeptical about the use of construction by the courts. I initially argued:

> The judiciary should seek to enforce the correct interpretation of the Constitution, but it should also avoid enforcing even venerable constructions. This caution does not require that the judiciary identify constructions per se, only that it keep its eye on interpreting the Constitution while simultaneously bearing in mind the possibility of constitutional indeterminacy. The judiciary should not prop up old constructions that are no longer politically authoritative, and it should avoid stifling the development of new constructions by placing the judicial imprimatur on the old and contributing to its hegemonic status. Constructions claim the fidelity of political actors through their continuing

11. My recent work has been concerned, in part, with examining why courts are so prominent in American constitutionalism given the importance of extrajudicial actors in constitutional constructions. The importance of extrajudicial constitutional action to our system does not mean that there will not also be a lot judicially produced constitutional law. *See* KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY (2007).

12. Randy Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 646 (1999) (quoting RONALD DWORKIN, LAW'S EMPIRE 62 (1986)); *see also* RANDY BARNETT, THE PRESUMPTION OF LIBERTY 118–27 (2004).

13. Balkin, *supra* note 4, at 559.

> political authority, not through judicial enforcement.[14]

My concern was with what Robert Cover characterized as the "jurispathic" quality of courts and the possibility that judiciary would artificially limit the development of new constructions.[15]

Moreover, the authority of the courts to construct constitutional meaning would not necessarily stand on the same footing as their authority to interpret the Constitution. One of the starting points for my earlier explorations of originalism and theories of constitutional interpretation was a concern for justifying the practice of judicial review. I, at least, am satisfied that courts can assert an authority to nullify the actions of other government officials when judges act on behalf of constitutional interpretations.[16] Constructions present a different problem. They are "essentially political."[17] The arguments that justify judicial review on the basis of interpretation are not satisfactory to demonstrate that the courts should also exercise judicial review on the on the basis of constitutional constructions. It is, I believe, a harder case to make out that courts should have the authority to trump the actions of elected officials merely on the basis of constitutional constructions.[18]

Despite such concerns, I have always recognized some role for the courts in engaging in constitutional construction. Most fundamentally, the power of judicial review itself is plausibly understood as a construction of the Constitution. Similarly, the ways in which the courts ought to exercise the power of judicial review are not a matter to be resolved by constitutional interpretation. Standards of deference, methods of constitutional interpretation, and the like are themselves ultimately a matter of constitutional construction. The argument that judges should generally limit themselves to enforcing interpretations, that judges should be originalists, or that judges should adopt a clear mistake rule when exercising judicial review would be a claim about how an indeterminate feature of the constitutional scheme ought to be settled. Judges would not be alone in developing, establishing and maintaining such constructions, but they would necessarily play a central role. Other, more substantively

14. KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION 11 (1999).
15. Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 40 (1983).
16. *See* Whittington, *supra* note 14, at 46–50.
17. WHITTINGTON, *supra* note 14, at 6.
18. *See* Keith E. Whittington, *The Death of the Legalized Constitution and the Specter of Judicial Review, in* THE COURTS AND THE CULTURE WARS (Bradley C. Watson & Gary M. Quinlivan eds., 2002).

particular constructions may be particularly appropriate to the judiciary, either because of their institutional focus or because of their subject matter. The federal exclusionary rule and the *Miranda* requirements can be understood as efforts at construction, building out the effective requirements of constitutional provisions beyond what the text strictly speaking means. Judicial constructions would encompass some of what Mitch Berman has characterized as "decision rules" or what Dick Fallon has characterized as constitutional "implementation."[19]

It would thus be overstated to think of the interpretation-construction distinction strictly in institutional terms. Constitutional interpretation may put the judiciary on the strongest footing for exercising the power of judicial review and overturning the actions of other government officials, but there are circumstances in which judges like other political actors might engage in constitutional construction. When doing so, they are undertaking a particularly political task, a creative task involving normative choices in a realm of constitutional indeterminacies. Their particular expertise and institutional authority as judges is undoubtedly lessened when operating in the zone of construction than when on the firmer, traditionally legal ground of interpretation. There are occasions when such actions are unavoidable, as when determining how the power of judicial review ought to be exercised, and judicial constructions of the Constitution are unlikely to occur in isolation from the deliberations of other political actors. But there are other occasions when judicial constructions are, in principle, more avoidable.

I have been persuaded over time that there is more room for courts in developing and maintaining constitutional constructions than I initially suggested. I am not inclined to think of every instance of a judicial doctrine or application of a constitutional rule as a "construction" of constitutional meaning, but there certainly is space to recognize some judicial doctrines as efforts at filling in the constitutional framework.[20] Somewhat

19. Mitchell Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1 (2004); *see also* RICHARD H. FALLON JR., IMPLEMENTING THE CONSTITUTION (2001).

20. At one level, the question of labels makes little difference, and whether judicial doctrine as such is usefully labeled as a "constitutional construction" or viewed as parallel to or continuous with other phenomenon of that type is ultimately a matter of analytical pragmatism. My tentative inclination is to view, for example, the three-part *Lemon* test or the stream of commerce doctrine less as constructions than as bureaucratic guidelines. Having construed the meaning of the relevant constitutional provision, the

more problematic but empirically common is the possibility of courts being called upon to implement, extend, and rationalize constitutional constructions that are more widely shared by government officials in the political system generally. As the neo-Dahlian literature has highlighted, the relationship of the courts to the other branches of government is often not strictly countermajoritarian. Instead, the courts often act as partners with other government officials to implement a common constitutional vision, with judges sometimes acting when and where it is politically inconvenient or infeasible for elected officials to do so.[21] In that context, many political actors may welcome the courts stepping in to construct constitutional meaning, resolve indeterminacies, and maintain consensual values in specific cases. The difficulty arises, however, when that process becomes less consensual and power and influence shifts into the courts. So long as judges are acting as faithful agents to provisionally maintain constitutional understandings widely shared by other political actors, then their role in articulating constitutional constructions may not be objectionable. As they become innovators on behalf of constitutional understandings that are not widely shared by other political actors, then the legitimacy of courts engaging in constitutional construction would seem to be limited.

III. AVOIDING CONSTRUCTIONS?[22]

It might be thought that constitutional construction is entirely avoidable, that the constitutional system could operate entirely in the realm of constitutional interpretation. If so, then we might think that constitutional constructions are a choice made by political actors who seek to expand their own influence and discretionary authority. Rather than limiting themselves to

Court in subsequent cases is less concerned with grappling with constitutional meaning than with articulating a set of secondary rules that adequately embody those constitutional understandings and that can be enforced by and against other government officials. Judicial doctrines are one of the routine policy implications that might be expected from the process of engaging in constitutional interpretation and construction.

21. *See* KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY (2007); Howard Gillman, *Courts and the Politics of Partisan Coalitions, in* THE OXFORD HANDBOOK OF LAW AND POLITICS (Keith E. Whittington, R. Daniel Kelemen, & Gregory A. Caldeira eds., 2008); Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35 (1993); Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957).

22. I am grateful to Gary Lawson for raising the issues discussed in this section.

constitutional interpretation, political actors may choose to engage in constitutional construction.

How might this work? We might imagine constitutional constructions are avoidable in two types of circumstances. The first possibility is that a Constitution might be written such that its terms are entirely clear, complete and determinate. A sufficiently clear and comprehensive constitutional document would render constitutional construction unnecessary. All constitutional issues could be addressed by reference to interpretation of the text. In practice, no text will have that degree of clarity or comprehensiveness. There will always be points of indeterminacy or new constitutional practices, institutions or principles that will be developed beyond what is specified in the text. The U.S. Constitution may seem to create more room for construction because of its inclusion of abstract phrases and its relative difficulty of amendment, but even a constitutional document that emphasized specific rules and that was easy to amend would be supplemented by a host of statutes, decisions, and practices that would create a working constitutional system. In practice, every Constitution is a "framework," not a "skyscraper."[23]

The second possibility is that constitutional constructions are precluded by baseline assumptions. If the constitutional system had a sufficient set of default assumptions in place, then any constitutional indeterminacies might be resolvable. Two familiar default rules might be mentioned. The clear mistake rule indicates that judges should defer to legislatures and uphold a law unless its unconstitutionality is very clear. The principle of strict construction of enumerated powers indicates that Congress should have to be able to positively demonstrate that it possesses a power under the Constitution in order to exercise it, otherwise the power is retained by the states. It might well be possible in the case of all constitutional controversies to identify a default rule that would indicate which side should prevail in the case of interpretive indeterminacy. Rather than constructing a new substantive answer in a constitutional controversy, we might think the appropriate response is to recur to the default rule and do nothing more than interpret the Constitution.

There are at least three responses to this concern about default rules and whether they render constitutional constructions unnecessary. First, we should recall that the zone

23. Balkin, *supra* note 4, at 550.

of construction is properly delimited by constitutional interpretation. Constructions cannot be used to alter, revise or amend the constitutional text, properly interpreted. If one concern about the interpretation-constructions distinction is that it becomes a vehicle for exploiting constitutional indeterminacies in order to expand judicial power or the scope of federal authority, then this misconstrues the role of construction vis-à-vis interpretation. If interpretation determines that the production of goods is outside the scope of the Interstate Commerce Clause, for example, then construction cannot alter that conclusion and expand federal regulatory authority. The idea of construction does not authorize government officials to contradict the constitutional text and its understood meaning. The idea of construction describes how political actors work within and around that constitutional skeleton.

Second, for the most part default rules are themselves best understood as constructions. The Constitution provides relatively little guidance for most default rules that we might want to develop. A faithful interpreter would be hard-pressed to discover a determinate set of default assumptions embedded in the Constitution. Nonetheless, default rules are an appropriate constitutional subject, and there is a ready set of constitutional materials that can be used to construct arguments about what kinds of default rules would be most suitable and desirable for a country such as ours. Should judges adopt a "clear mistake rule" and work with a default that laws are constitutional? Should judges adopt a "presumption of liberty" and work with a default that laws are constitutionally dubious and require justification? Is a strict construction of enumerated powers which assumes that national powers that cannot be specifically justified are reserved exclusively to the states best in keeping with our federal system? Or is a broad construction of national powers that assumes that federal power is constitutional unless it conflicts with specific prohibitions or cannot be grounded in any reasonable reading of a grant of power more appropriate to the national union? It would certainly be possible to choose among these, and other, default rules, and as a result hem a given political decision-maker in. Once the default rule is in the place, the decision-maker knows what to do when she encounters constitutional indeterminacy. She knows that policymaking discretion should now pass from actor *X* to actor *Y*. When in doubt, the court should uphold the law (or strike it down); federal power should be disfavored (or favored); etc. Putting the default rules in place,

however, is not a mechanical or a purely interpretive task. The default rules are themselves (properly) part of what political actors have struggled over and rearranged over time. They have been constructed and reconstructed. Once in place, they can be interpreted and applied, but the development of the default rules is a task for constitutional construction.

Third, default rules are most relevant when thinking about certain contexts in which constitutional controversies arise. In particular, default rules are helpful for dispute resolution and for maintaining clean lines of institutional responsibility. If a comprehensive set of default rules were to be put in a place within a constitutional system, they might reduce the need for constitutional construction to deal with indeterminacies on a case-by-case basis, but they would not make constructions entirely unnecessary. Default rules are unlikely to eliminate all indeterminacy. They require further refinement and development themselves. That is, once agreement has been reached on the big issues, further work must often still be done constructing meaning on the margins of the initial settlement and resolving remaining indeterminacies. The case of enumerated powers provides an example. The old-school Jeffersonians agreed among themselves on the importance of strict construction and on the basic principles of enumerated powers. They accepted a default rule that when in doubt about congressional powers, make the assumption that Congress did not have the authority to act and that the power was instead reserved to the states. They soon disagreed among themselves, however, about where sufficient doubt about congressional power crept in. The margins of congressional power still needed to be defined. Presidents Jefferson, Madison, and Monroe all disagreed among themselves over the precise formulation for thinking about the problem of federal authority over internal improvements. Within the broad contours of strict constructionist thinking, the detailed balancing of the needs of state and nation, the competing conceptions of state sovereignty and their demands, and the calculus of threats posed to the constitutional design and social welfare could lead to different conclusions about what specific rules should guide policymakers in the case of internal improvements.[24] Strict constructionism structures and guides constitutional argument and decisionmaking. Such default rules do not avoid the need for

24. *See* HOWARD GILLMAN, MARK A. GRABER, & KEITH E. WHITTINGTON, AMERICAN CONSTITUTIONALISM (forthcoming).

further constitutional deliberation and decisionmaking. They concentrate and narrow the scope of those deliberations.

Once we know, whether by default rule or otherwise, that a given institutional actor has authority over a set of policy decisions, there is still an open question as to how that authority ought to be exercised. In many cases, how that authority should be exercised is strictly a policy matter and takes place below the level of constitutional discourse. In other cases, however, constitutional constructions come into play to further constrain the discretion of political actors. Constitutional constructions may provide substantive content or sets of principled considerations that delimit (or free up) how power is to be exercised. Conceptualizing constructions simply as a system of default rules does not adequately account for or allow political actors to avoid making decisions about whether to create a tradition of a two-term presidency, whether organized political parties should be regarded as legitimate, whether a two-party system should be fostered, whether to regard the protective tariff as constitutionally illegitimate, or whether literacy tests for voting should be regarded as permissible. Default rules may tell some government officials to keep out of the way as some decisions are being made, but they do not tell political actors how those decisions ought to be made. But constitutional constructions often are concerned with identifying appropriate outcomes.

Constitutional assumptions and default rules can reduce the effort that government officials need to make when they encounter particular controversies and uncertainties. In particular, default rules might be recommended to minimize the extent to which judges actively engage in rendering new constitutional constructions when faced with indeterminate constitutional meaning. Nonetheless, the idea of constitutional constructions is not rendered irrelevant by the possibility of default rules. Default rules may alter how political actors exercise their responsibilities, but they do not avoid the need for supplementing the interpretive process in order to have a fully functioning constitutional system.

IV. WHAT CAN CONSTRUCTIONS DO FOR YOU?

The interpretation-construction distinction is an academic distinction. More particularly, the concept of a constitutional construction is an analytical category. The claim is not that this is

a familiar distinction or that "construction" (used in this way) is a familiar idea within American constitutional discourse. Political actors engage in the process of construing constitutional meaning and creating institutions and practices to accomplish their objectives. They do not necessarily conceptualize what they do as operating in these terms. The value of recognizing constitutional constructions is not in better replicating the language of American constitutional practice. The value of recognizing the concept (whether under the label "construction" or something else) is that it helps the external observer better understand how American constitutionalism works. With better analytical and empirical understanding, better normative theorizing can follow. But as with any conceptual tool, the question is whether this one is helpful for performing tasks that we might be interested in.

The interpretation-construction distinction has particular utility for originalist normative theory.[25] Originalism has faced a number of traditional criticisms, and the concept of construction helps to build a more compelling response to some of those criticisms. Originalism is often accused of being overly rigid, of being unable to account for constitutional development, and of being unable to grapple with indeterminacy in constitutional meaning. Subsuming originalist arguments about constitutional interpretation and judicial review within a broader constitutional theory that incorporates constitutional constructions alleviates those concerns. Originalism qua originalism may provide an adequate account of how the Constitution ought to be interpreted and how courts ought to exercise the power of judicial review, but it may not describe the complete operation of the constitutional order. Originalists may benefit from recognizing more explicitly that constitutional meaning is sometimes indeterminate and that there are limits as to what answers constitutional interpretation can provide. The question then becomes what should political actors do when constitutional interpretation runs out and constitutional construction takes over. While some originalists might embrace

25. The interpretation-construction distinction is often associated with and viewed as characteristic of "the new originalism." It should be emphasized, however, that the interpretation-construction distinction is separable from other features of recent originalist theorizing. There is nothing about the idea of constitutional constructions, for example, that implies a commitment to a semantic meaning approach to originalist constitutional interpretation, even if some individual scholars happen to have embraced both arguments. On the new originalism, see also Keith E. Whittington, *The New Originalism*, 2 GEO. J. L. & PUB. POL. 599 (2004).

an active role for the courts in at least some circumstances in constructing constitutional meaning in the interstices of the originalist text, others might demur. Either way, constructions provide a bridge between the fixed meaning of the interpreted text of the originalist Constitution and the ongoing development of constitutional practices, values and rules. Without a notion of constitutional construction, originalists are tempted to deny or paper over constitutional gaps or indeterminacies and to minimize the importance of constitutional developments that do not fit the originalist framework. Neither tendency is helpful or necessary.

Making analytical space for constitutional constructions is useful for constitutional theorists of a variety of persuasions. Originalists have been particularly concerned with (vexed by?) the tension between a fixed constitutional text and political change and between the interpretive difficulties associated with our constitutional text and the desire for answers to our contemporary political problems. The idea of constructions offers a vocabulary and a toolkit for addressing some of those concerns. Constitutional theory writ large has other concerns, but the idea of constructions may be useful in addressing some of those as well. Constitutional theory does not have a rich vocabulary for discussing what political actors do when they engage in constitutional argumentation or take action in the name of constitutional commitments. Often, any activity having to do with the Constitution is simply called "interpretation." Regardless of how one understands interpretation (that is, regardless of whether one accepts originalism as either a conceptual or normative theory), such a broad category strips the term of its analytical utility and obscures the diversity of ways in which political actors relate to the Constitution. Likewise, to the extent that the idea of interpretation is connected to normative theories and used to help legitimate the actions of judges, such arguments become more attenuated as the notion of interpretation is loosened. The idea of constructions can help distinguish the various ways in which political actors engage with the Constitution and provide the starting point for developing distinctive arguments for justifying those various activities. There is nothing about the idea of constructions that settles the issue of whether judges, for example, should engage in them. Distinguishing between interpretation and construction does focus attention on such important normative questions as whether (and under what

circumstances) judicial judgments should trump legislative judgments when constitutional meaning is indeterminate or about how constitutional gaps are to be filled.

Opening the field of constitutional constructions also holds some promise for shaping the agenda of empirical inquiry into constitutional politics and political development more broadly. Constitutional construction is not the only form of constitutional politics, but recognizing the importance of constructive activity offers a variety of opportunities for expanding the scholarly agenda and improving our understanding of the dynamics of constitutional development. A concern with constitutional interpretation focuses attention on textual analysis, modalities of argument, and standards of evidence. An interest in constitutional construction calls our attention to the process by which new ideas come to the fore, practices are stabilized, and institutions are put into place. Although both interpretation and construction can occur throughout the political arena, interpretive arguments tend to center around the courts. Recognizing constitutional constructions potentially decenters the scholarly agenda so as to take greater account of the range of activity occurring throughout the political sphere by a range of actors. Constructions also highlight the process of political and constitutional development over time. The constitutional choices and debates of today are made within the context of the practices, institutions, and ideals that had been built up over prior debates and decisions. The study of constitutional constructions focuses our attention not only on arguments over what the Constitution means but also over how the constitutional system works, not only over how the Constitution is interpreted but also over how political actors struggle over the authority to interpret and what the consequences of past constitutional controversies might be for the shape of current ones.

The idea of constitutional constructions can play a role within normative constitutional theory, but the starting point is to better capture a distinction within constitutional argumentation and practice. The ideal of interpretation does not adequately represent what judges or political actors often do in regard to the Constitution. The effort of discovering what the text says is ultimately distinguishable from making choices about what to do when the text is silent. Much of our working Constitution consists of the choices that we have made in the interstices of the interpretable Constitution. Constitutional

constructions have supplied rules, practices, and institutions that we have found satisfying, even when constitutional interpretation had little to offer. They are how we live with a written Constitution.