

CONSTITUTIONAL CONSTRUCTIONS AND CONSTITUTIONAL DECISION RULES: THOUGHTS ON THE CARVING OF IMPLEMENTATION SPACE

*Mitchell N. Berman**

INTRODUCTION

Let's start with the obvious: court-announced constitutional doctrine is frequently not identical to the announcing court's understanding of what the text of the Constitution means. Consider, for example, the doctrine that implements the First Amendment's Free Speech Clause. That Clause is terse: "Congress shall make no law . . . abridging the freedom of speech." But a comprehensive statement of judicial doctrine effectuating that command would tax even the most expert First Amendment scholar. Here's just a first and partial stab:

A law constitutes an impermissible abridgment of the freedom of speech if: it regulates expression on the basis of its content or viewpoint and is not narrowly tailored to achieve a compelling governmental interest, except that content-based regulation of non-misleading speech that proposes a lawful economic transaction is permitted if the regulation directly advances a substantial government interest that could not be advanced equally well by a less speech-restrictive regulation, and except too that content-based regulation of speech is freely permitted if, inter alia, the regulated speech proposes an unlawful economic transaction or a lawful transaction in a misleading way, or if it is sexually explicit and as a whole appeals to the prurient interest, and depicts or describes sexual conduct in a patently offensive way, and lacks serious artistic, political, or scientific value, or if it includes the sexually explicit depiction of children, or if the speech, by its

* Richard Dale Endowed Chair in Law, Professor of Philosophy (by courtesy), the University of Texas at Austin. I presented an early sketch of this paper at the 2010 AALS annual meeting, and am grateful to my fellow panelists and to audience members for helpful discussions on that occasion, to Rick Garnett for inviting me to participate, and to Larry Alexander for his characteristically lucid and productive challenges.

very utterance inflicts injury or tends to incite an immediate breach of the peace; all subject to the caveat that even when speech may permissibly be regulated, if that regulation takes the form of a prior restraint on its issuance, then the regulation is ordinarily presumptively impermissible; and furthermore, a content-neutral regulation of speech is impermissible unless it is narrowly tailored to achieve a significant government interest and leaves open ample alternative channels of communication.

As complicated as is this statement, it captures, at best, only some neighborhoods of constitutional free speech law. I have not yet said anything about those portions of the doctrine that govern defamation, intentional infliction of emotional distress, or invasion of privacy, or limited public fora, or campaign finance expenditures, or the speech of public employees, and so on.

Even with only a pre-reflective untheorized sense of what constitutional meaning is or amounts to, or what are the conceptual bounds of the activity of constitutional interpretation, it seems exceedingly unlikely that, in contributing to the formation of this intricate free-speech doctrine, Supreme Court Justices believed that each building block was a partial statement of what the First Amendment *means*, or that all they were doing in developing and announcing this doctrine falls within the bounds of the activity properly denominated *interpretation*, or that the output itself amounts to *an interpretation* of the First Amendment. In some ways, leading scholars have been drawing attention to just this point for 30-odd years (think of Henry Monaghan's work on "constitutional common law" and Larry Sager's on "underenforced constitutional norms").¹ But Richard Fallon was particularly helpful in focusing attention on it a decade ago when urging that what federal courts do in the process of constitutional adjudication is more felicitously described under the capacious label "constitutional implementation" than as "constitutional interpretation."²

1. See Henry P. Monaghan, *The Supreme Court 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975); Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

2. Richard H. Fallon, Jr., *The Supreme Court 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54 (1997); RICHARD H. FALLON, JR., *IMPLEMENTING THE CONSTITUTION* (2001).

For a constitutional theorist, especially one of a more conceptual orientation, the question raised by this proposed change in perspective and vocabulary—from “interpretation” to “implementation”—is how best to conceptualize what is going on, or what may or should go on, in this implementation space. And by conceptualize, I mean how best to think about and understand any more or less distinct stages of implementation and more or less distinct outputs of the activity. The theorists I have mentioned have all carved the space in two: Monaghan contrasted “*Marbury*-shielded constitutional exegesis” with “constitutional common law”; Sager distinguished “constitutional norms” from “constitutional constructs”; Fallon differentiated “constitutional meaning” from “constitutional doctrine.” In addition, Kim Roosevelt and I, followed now by others, distinguish “constitutional operative propositions” from “constitutional decision rules.”³ All these scholars, then, adhere to what I have called, in previous work, “the two-output thesis”:⁴ each of these frameworks recognizes two conceptually distinct outputs of constitutional adjudication (both of which lie upstream from the application of law or doctrine to fact that is necessary to reach case-specific holdings), one of which is, in a fairly straightforward sense, logically and perhaps normatively prior to the other.

It is against this background that we can consider the distinction between constitutional interpretation and constitutional construction introduced a decade ago by Keith Whittington⁵ and embraced and further developed by such other

3. See, e.g., Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1 (2004); Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649 (2005); KERMIT ROOSEVELT III, *THE MYTH OF JUDICIAL ACTIVISM* (2006). For a small sampling of other scholarship that has made good use of the distinction, including by offering refinements, see David Chang, *Structuring Constitutional Doctrine: Principles, Proof, and the Functions of Judicial Review*, 58 RUTGERS L. REV. 777 (2006); Catherine T. Struve, *Constitutional Decision Rules for Juries*, 37 COLUM. HUM. RTS. L. REV. 659 (2006); Brannon P. Denning, *Reconstructing the Dormant Commerce Clause Doctrine*, 50 WM. & MARY L. REV. 417 (2008); Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361 (2009); Jennifer E. Laurin, *Rights Translation and Remedial Disequilibrium in Constitutional Criminal Procedure*, 110 COLUM. L. REV. 1002 (2010).

4. Mitchell N. Berman, *Aspirational Rights and the Two-Output Thesis*, 119 HARV. L. REV. F. 220 (2006). Admittedly, “two outputs” is a bit of a misnomer, for a more complete taxonomy of conceptually distinct types of rules that emerge from constitutional doctrine would include, at the least, remedial rules, and perhaps others too. See Berman, *supra* note 3, at 12–13. But operative propositions and decision rules are the most salient.

5. KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION* (1999); KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION* (1999) [hereinafter WHITTINGTON,

prominent “new originalists” as Randy Barnett and Larry Solum.⁶ As Solum puts the distinction:

Interpretation is “the activity of determining the linguistic meaning—or semantic content—of a legal text”;

Construction is “the activity of translating the semantic content of a legal text into legal rules, paradigmatically in cases where the meaning of the text is vague.”⁷

Constitutional “pragmatists” like Rick Hills who resist the very enterprise of carving implementation space into conceptually distinct pieces on the grounds that “pragmatically speaking, the meaning of a constitutional provision *is* its implementation,”⁸ naturally reject this particular distinction too. But as another take on the two-output thesis, the distinction strikes me, at least at first blush, as unobjectionable and potentially valuable. I say the distinction is unobjectionable “at first blush” and “potentially” valuable because, all by itself, it is not very informative or helpful. To distinguish activities occurring in implementation space in these terms is not yet, I think, to make clear just how this framework differs from previous conceptualizations of the two distinct types of general normative or propositional outputs of constitutional adjudication.⁹ Sager spoke of “norms” and “constructs.” Is interpretation just the

CONSTITUTIONAL INTERPRETATION]. Of course, the interpretation/construction distinction is familiar from other departments of law too, perhaps contract law most especially. For an application of the distinction to the constitutional context preceding Whittington, see CHESTER JAMES ANTIEAU, *CONSTITUTIONAL CONSTRUCTION* (1982).

6. The label “new originalism” is from Whittington. See Keith E. Whittington, *The New Originalism*, 2 *GEO. J.L. & PUB. POL’Y* 599 (2004). Its main distinguishing features include an explicit focus on textual meaning as opposed to authorial intentions (insofar as the two might differ), a justificatory basis “grounded more clearly and firmly in an argument about what judges are supposed to be interpreting and what that implies, rather than an argument about how best to limit judicial discretion,” *id.* at 609, and an appreciation of the distinction between interpretation and construction.

7. Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 *Nw. U. L. REV.* 923, 973 (2009).

8. Roderick M. Hills, Jr., *The Pragmatist’s View of Constitutional Implementation and Constitutional Meaning*, 119 *HARV. L. REV. F.* 173, 175 (2006), available at <http://www.harvardlawreview.org/media/pdf/hills.pdf>. Perhaps the most influential statement of the pragmatic view is Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 *COLUM. L. REV.* 857 (1999).

9. This way of structuring the inquiry will strike some readers as misguided from the outset, for on one common reading of Whittington, constitutional construction is constitutional implementation activity engaged in by the nonjudicial branches, and thus that occurs *outside of* adjudication. Perhaps somewhat simplified: constitutional construction : nonjudicial branches :: constitutional interpretation : the judiciary. I believe that was never quite Whittington’s view. In any event, it is surely not his present view nor that of other scholars who have embraced his vocabulary.

name for the process of deriving the norms, with construction being the name for the process that results in, well, the constructs? Fallon spoke of “meaning” and “doctrine.” Plausibly, meaning is the outcome of interpretation. Is doctrine just the outcome of construction?

In order to ascertain whether the interpretation/construction distinction is merely a notational variant of one or more other formulations of the two-output thesis, we need to hear more. In particular, we need to know: (1) what is linguistic meaning or semantic content of the constitutional text; and (2) what are the constraints on the translation of the Constitution’s semantic content into legal rules—that is, what is the nature of such constraints, and what is their content.

The new originalists provide a reasonably clear answer to the first question and at least gesture to or intimate an answer to the second, even if what they say on this score is looser than one might reasonably wish. Somewhat simplified, and elaborated on at greatest length by Solum, the new originalists take the semantic content of a legal text to be Gricean sentence meaning, which entails that the semantic content of any constitutional provision is essentially its original public meaning. Furthermore, legal rules, in their view, may permissibly depart from the semantic content of the Constitution (understood, more or less, as the original public meaning) only in very limited ways. For the most part, the activity of construction is proper when the semantic content is unable to resolve concrete legal disputes—because, paradigmatically, it is too vague or otherwise underdeterminate. And when construction is called for, its proper scope is necessarily and severely restricted—to making a vague norm more precise or to choosing between original meanings that conflict, or the like.¹⁰

10. Solum, I think, is more openly ambivalent than are most other proponents of the interpretation/construction distinction regarding just what should be deemed permissible in what he has felicitously dubbed “the construction zone.” He acknowledges the possibility that an adherent of the interpretation/construction distinction who adopts recognizably originalist views about interpretation might “allow the original meaning to be balanced with a variety of other considerations, including precedent, contemporary social interests and values, and so forth.” But he does not endorse such a view. Moreover, his further observation that, “[c]haracteristically, originalists believe that the role of original meaning should be constraining—that is, that absent exceptional circumstances (or very weighty reasons), constitutional doctrines that contradict or contravene the semantic content of the Constitution (as fixed at the time of origin) are illegitimate,” Lawrence B. Solum, *What is Originalism? The Evolution of Contemporary Originalist Theory* 27 (undated) (unpublished manuscript) (on file with author), might be taken to describe a position with which he has considerable sympathy.

If one adopts the interpretation/construction distinction along the foregoing general lines—interpretation is the activity of determining linguistic meaning, and construction is the activity of translating linguistic meaning into legal rules—and one adopts the new originalist views of linguistic meaning and of the strictures that such linguistic meaning puts on the process of construction or translation (whatever, precisely, those strictures turn out to be), then one has tools of consequence. One armed with this whole package is apt to make different moves in the practice of constitutional implementation, and reach different destinations, than one not so armed. The question, accordingly, is whether one *should* adopt this package of views. Very generally, that is what I mean to explore in this essay.

More precisely, I aim to address three distinct but related questions. First, are the originalist views I have just sketched about linguistic meaning and about the permissible scope of construction true? Second, if originalist views about the linguistic meaning of the constitutional text and the constraints that that meaning imposes on the announcement of law and the generation of legal doctrine are not jointly true, does the interpretation/construction distinction, as glossed by its proponents, still have value? That is, is its utility independent of particular controversial claims about linguistic meaning and the permissible relationship between linguistic meaning and legal doctrine? Third, if the interpretation/construction distinction is not useful when divested of originalist content, are the pragmatists right that the taxonomic project is fundamentally mistaken? That is, do our reasons for finding the interpretation/construction distinction unhelpful or unilluminating tell as well against the more general effort to conceptualize distinct steps or outputs of constitutional implementation?

Before we can profitably assess these questions, however, it will serve us well to gain clarity on a potential ambiguity at the

It has never been entirely clear to me, however, just what this “non-contravention principle” (as we may call it) amounts to. Barnett, for example, insists in a representative passage that constitutional construction must remain “within the bounds established by original meaning,” RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 121 (2004). But the paradigmatic construction translates a standard-like original meaning into more rule-like doctrinal form. And it is a common and generally accepted feature of rules that they will prove over- and under-inclusive relative to the standard to which they correspond or that they serve to enforce or effectuate. It is therefore far from self-evident what determines whether a construction does or does not stay within the bounds established by original meaning.

heart of the interpretation/construction distinction. And before we can resolve that ambiguity, we must specify just what the ambiguity is, and that will take a little effort. Briefly, though, the question goes like this. One who has not already embraced the interpretation/construction distinction might be disposed to subdivide constitutional implementation into three pieces or activities, not two: (1) the activity of determining the semantic content of a legal text; (2) the activity of determining the legal content of a legal text—or of determining “what the law is”; and (3) the activity of translating the text’s legal content into (other) legal rules that are more easily or cheaply administered, that threaten less overdeterrence, or that are, in any other fashion plausibly thought legitimate, better suited to judicial enforcement. While not yet contending that this is a particularly good way to conceptualize implementation space, I believe that some intuitive sense can be made of this three-part distinction. If so, and insofar as we are trying to evaluate the more austere interpretation/construction framework, we need to know how to map this trichotomy onto the dichotomy.

In particular, we need to know how the interpretation/construction distinction might be massaged, revised or reconstrued to accommodate the possibility that what the law is need not be identical to what the (fixed) semantic meaning of a legal text is. Because the most prominent proponents of the interpretation/construction distinction also believe (possibly subject to an exception for judicial precedent) that the legal content of a text just is its semantic content, conceived in originalist fashion, they have not, I believe, said much or perhaps anything about what interpretation, in contradistinction to construction, is intended to cover in the event (counterfactual though they believe it to be) that a text’s legal content and its linguistic content can be non-identical. Their silence on this question notwithstanding, it seems to me that there are only three realistic possibilities.

First, they could steadfastly deny the possible non-identity of linguistic and legal content by insisting that legal interpretation just is the activity of trying to ascertain a legal text’s legal content and its linguistic content, which are one and the same. To take this approach is to concede that the value or utility of the interpretation/construction distinction depends entirely on certain contested views about what the law is, and has no more general conceptual or theoretical value. This is the all-or-nothing strategy.

A second possibility treats interpretation as the central activity and construction as the remainder (that is, everything that isn't interpretation is construction), and sticks with the definition quoted above: interpretation is the activity of trying to discover linguistic content. If, in accord with the possibility we are now entertaining, legal content can be other than linguistic content, then to engage in "interpretation" is not to engage in the activity of "determining what the law is," and it follows that part of what goes on in the space of "construction" is not only doing things with or to existing legal norms, but discovering what those existing legal norms are.

The third possibility, like the second, treats construction as that which isn't interpretation, but it redefines interpretation to make central what the definitions quoted above omit entirely—namely, that legal interpretation is a search for legal content, or for "what the law is," and is *not* the activity of searching merely for (fixed) linguistic content if non-originalist views about what the law is are correct. On this account, just as constitutional implementation can be divided into the two stages of interpretation and construction, constitutional interpretation itself can be further subdivided in two: semantic or linguistic interpretation, and legal interpretation.

Part I elaborates on this critical threshold problem of understanding where in the interpretation/construction framework law resides. It concludes that most proponents of the interpretation/construction distinction likely mean to advance the compound thesis that interpretation is the search for legal content, that legal content is linguistic content, and that linguistic content is fixed. Part II, accordingly, assesses this claim. Naturally, a full-scale critical evaluation is impossible in this short space. That said, it offers a hypothetical designed to pump the intuition that the very restrictive originalist view about the content of constitutional law is mistaken: even putting judicial precedent aside, law is not always the fixed semantic content of a legal text.¹¹

Part III then turns to the second rendering of the interpretation/construction distinction—one in which interpretation is the activity of determining a text's linguistic content even insofar as linguistic content merely contributes to, but does

11. This is uninterestingly true of law that is not even purported to be the interpretation of a legal text, like traditional common law. I am speaking of law that is claimed to have a textual basis.

not determine, what the law is. This Part argues that a two-part divide between linguistic interpretation on the one hand and everything else that goes on in law-discovery and doctrine-making on the other is not useful or illuminating. Lastly, Part IV considers the third possibility—that interpretation is the determination of what the law is, while construction is the activity of creating doctrine adjacent to, distinct from, or supplementary of, what the law is. Pragmatists think such an account nonsensical and therefore urge that we abandon the taxonomic project. Part IV rejects that conclusion. It argues that this conceptualization of implementation space is familiar and useful—it reflects the “decision rules” perspective, for example—at least so long as we foreground interpretation as the activity of determining what the law is and background the activity of determining what a text’s fixed linguistic content is.

In short, I argue: that an originalist view of constitutional implementation that invokes or builds upon the distinction between interpretation and construction is false; that the interpretation/construction distinction as presently formulated (interpretation is the activity of determining *linguistic* meaning) is not likely to be useful when it is divested of its objectionable originalist claims regarding the content of law; and that there is another way to carve judicial implementation of the Constitution into two pieces that *is* illuminating and useful.

I. INTERPRETATION, CONSTRUCTION, AND LAW

“It is emphatically the province and duty of the judicial department,” Chief Justice Marshall declared in *Marbury*, “to say what the law is.”¹² How does a judge (or anybody else, for that matter) determine what the law is? A first pass at an answer might invoke the concept, or at least the language, of “interpretation.” We might say, for instance: that judges must interpret legal texts to determine what the law is; that the point or function or purpose of legal interpretation is to ascertain what the law is; that the law is what authoritative legal texts, properly interpreted, provide or direct. Statements like these could be mistaken or misleading, but they are familiar and seem plausible on their face.

If this is right, then the target of legal interpretation is “legal meaning” or “legal content” or “law.” We should not *start* by

12. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

assuming that the target is “linguistic meaning” or “semantic content” even though it would turn out that way *if* “what the law is” is necessarily identical to the semantic meaning of the relevant legal texts. Now, originalists, or many of them, maintain that it *does* turn out that way. But what if they’re wrong about that? If linguistic meaning and legal meaning come apart, which type of meaning does interpretation target? Of course, we could resolve this question easily enough by distinguishing between linguistic interpretation and legal interpretation. But the interpretation/construction distinction does not adopt that solution; it speaks of interpretation, *simpliciter*. So the question remains: what does interpretation track or target if a text’s legal content or legal effect—its contribution to *the law*—is not its (fixed) linguistic content?

An illustration will make both the question itself, and its importance, clearer. Imagine a photographer or media outlet raising the First Amendment as a defense to prosecution under a federal statute that makes it a crime to publish photos of war dead or their grieving families. Call the case *Jones*.¹³ Assuming away any governing judicial precedent, the reviewing court in *Jones* will ask itself such questions as “does a ban on news photography violate the guarantee of ‘freedom of speech?’” and “what does ‘freedom of speech’ mean?” And in resolving these questions, the court may well engage in the customary modalities of constitutional argument—textual, historical, purposive, ethical, and the like.

Suppose that the court is persuaded that the original public meaning of “freedom of speech,” even understood as a possible legal term of art, was limited to the freedom to engage in activities that employ words for the purpose of communication—namely, speaking and writing. On this view, a ban on the display or publication of photographs cannot constitute a forbidden abridgement of “the freedom of speech,” if that phrase is construed or understood in accordance with its original public meaning. But, let us continue to suppose, the court is not yet persuaded that this narrow original public meaning sets forth the (legal) “meaning” of the First Amendment, or establishes “what the law is.” Instead, the court concludes that the fundamental purposes behind the free speech guarantee extend to cover at least some non-linguistic and non-speech forms of

13. *Cf. Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952) (holding that motion pictures are entitled to First Amendment protection).

communication or expressive activity. Had the framers and ratifiers thought about things like representational art, and had they known about photography, the court believes to a high degree of confidence, they would have wanted to extend constitutional protection against government interference with these things too.¹⁴ Accordingly, the court answers the questions posed above like this (more or less): a ban on news photography does violate the constitutional guarantee of “freedom of speech,” and the constitutional prohibition on abridgements of the freedom of speech means that the government may not restrict people’s natural right to engage in expressive activity unreasonably or arbitrarily.

I am not urging that this would be the “right” or “best” interpretation on the stated facts. I ask you only to assume that the judges involved in *Jones* take themselves to be engaged in “constitutional interpretation,” that they are trying, consistent with *Marbury*, to ascertain “what the law is,” and that part of their answer is that the law is non-identical, in this case, to what the original public meaning of the relevant constitutional provision was.

Now imagine a second law, enacted after *Jones*, that makes it a crime to publish sexually explicit photographs of any foreign dignitary. The law is challenged and, in a case called *Smith*, the Court announces the following doctrine: The distribution or sale, but not the mere possession, of photographic material may be regulated if (a) the material depicts sexually explicit conduct; (b) the sexually explicit depiction does not significantly advance a serious literary, artistic, political, or scientific value or purpose; (c) regulation of the material serves a compelling government interest unrelated to the preservation of existing social mores or protecting viewers of the material from offense; and (d) the government could not achieve its compelling interest in a manner less restrictive of photographic expression.¹⁵

14. Don’t make the mistake of thinking that, if the framers or ratifiers, if polled, would have agreed that the First Amendment should protect non-vocal communicative activities, then the original linguistic meaning of “freedom of speech” must not have been limited to linguistic communication, as I have asked us to assume. A shop owner who posts a sign announcing “no dogs allowed” might agree that her purpose is better served by also excluding, rather than by admitting, your pet tiger. She might even argue that that is how her sign “should be interpreted.” But that wouldn’t entail that the “linguistic meaning” of “dogs” includes tigers, or that the original meaning of the utterance “no dogs allowed” includes a prohibition on tigers.

15. *Cf. Miller v. California*, 413 U.S. 15 (1973) (setting forth the familiar three-part test for obscenity).

If we are not already wedded to a particular conceptual framework, we might reasonably suppose—pre-theoretically, if need be—that *Jones* and *Smith* centrally involve different types of judicial activity. Outside observers and the judges themselves might say that the court in *Jones* was trying to interpret the First Amendment; that there is a meaningful sense in which the First Amendment protected photography against government censorship even before *Jones* was decided; that *Jones* was declarative of the law. *Smith*, we might say, was different, for it is much harder to swallow that the four-part *Smith* test preexisted that decision much as, in Michelangelo’s estimation, his *David* already existed in the block of marble from which he carved it. The rule that emerged from *Smith* was, it would seem, created or constructed in a way that the rule that emerged from *Jones* was not. Significantly, this is not merely a post hoc judgment, for the winning briefs in the two cases are likely to read very differently. Whereas the *Jones* defendants argued, we can reasonably imagine, that “the First Amendment, properly interpreted, protects photography from state censorship,” no party or amicus in *Smith* would have argued similarly that the Constitution, “properly interpreted,” provides that a ban on the distribution sexually explicit is constitutionally permissible if or only if the four conditions stated above are satisfied. Had any brief proposed the test that the *Smith* Court ended up announcing, or some close variant thereof, its arguments would have been couched in terms of what the court should *do*, and not in terms of what the law, rightly understood, already *was*.

If this is roughly correct as a description of how the judges and many (but not all) observers would understand what has happened in these two cases, we can provisionally identify three different activities within, and three different outputs of, constitutional adjudication: (1) a judicial determination regarding what the original public meaning of the Free Speech Clause was; (2) a judicial determination regarding what the Free Speech Clause “does,” or “means” or “provides” or “covers,” or regarding what its legal effect is, or what the law is; and (3) a judicial crafting or formulation of a test or doctrine to implement or administer the First Amendment—which is to say, to administer the First Amendment’s “command” or its legal meaning. In order to assess the interpretation/construction framework, we need to specify how it accommodates this tripartite picture of constitutional implementation.

On one reading of the relevant literature, what the law is at a given moment of time—say, the moment at which a case is submitted to a judge for decision—is a function of both interpretation *and* construction. As Solum observes: “All or almost all originalists agree that the original meaning of the Constitution should make a substantial contribution to the content of constitutional doctrine.”¹⁶ If we read “constitutional doctrine” as roughly synonymous with “constitutional law,” then we might reasonably conclude that originalists do not, or need not, reduce constitutional law to the semantic content of the constitutional text.

Of course, constitutional law is not reducible to the semantic content of the constitutional text in one important respect. Judicial decisions (especially decisions by the U.S. Supreme Court) can announce, set forth, or make law that is supreme over other sources of law and thus is fairly described as “constitutional law” even when their decisions announce norms, under the aegis of the Constitution, that are inconsistent with the text’s semantic content, conceived in an originalist vein or otherwise. And while originalists famously disagree amongst themselves regarding the permissibility of continued judicial adherence to judicial precedents that depart from original meaning, few or none deny that the nonoriginalist judicial decision is not constitutional law. But let’s put the issue of judicial precedents aside, not because it is unimportant but because it introduces extraordinary complexity.

The reading of construction that I am floating right now seems to allow for the possibility that, even if there is no judicial precedent on point, our supreme law—the law that we conventionally classify as “constitutional”—might not be a function of semantic content alone. Factors or considerations such as “contemporary social interests and values” might also contribute (in some fashion as yet unspecified) to the content of the law—contribute, that is, to what the law is even before the courts say anything about it. On this view, a judge might interpret a constitutional provision to determine that its original public meaning was *M*, and then might somehow mix or combine that meaning with, or (better) weigh or balance that meaning against, contemporary values or understandings in an activity denominated “construction” to determine that the law is *N*.¹⁷

16. Solum, *supra* note 10, at 27.

17. Compare Randy Barnett’s observation that “for those nonoriginalists for whom

That is one reading of how construction can work. But it is not, I think, the more likely reading. On a second reading, construction refers to an activity that judges perform on the law to make it work better (by their lights) in adjudicating cases. Again assume away any intervening judicial precedent, and suppose that the semantic meaning of some provision P is *M*. On the new originalist construal of semantic meaning of a legal text, that means that the original public meaning of P was *M*. Maybe *M* is too vague to provide much guidance in the resolution of disputes. Suppose P is the Equal Protection Clause, and *M* was “the states must treat likes alike absent very good reason.” A correct interpretation would conclude that that’s the law: the law is (to a first approximation) that a state statute or regulation that purports to treat persons differently on grounds that are not supported by very good reason is legally void. But a new originalist might acknowledge that that legal norm is insufficiently precise or determinate to serve rule of law values: citizens and governmental actors will have difficulty predicting how it will apply in individual cases, thus inviting frequent litigation, which litigation will be resolved in non-uniform ways, and so forth. So she might permit courts to craft implementing rules in the exercise of constitutional construction. The tiers of scrutiny might, accordingly, be perfectly permissible constitutional doctrine. But this doctrine refines, augments, or supplements what the law was or is.

Note that while the first reading of the interpretation/construction distinction (pursuant to which construction can be a second step in law-determination) accepts our provisional characterization of *Jones* as determining what the law is, this second reading rejects that characterization. It maintains that steps (2) and (3) presented above both occur downstream from law-determination. The law, on this account, just is what the original public meaning of the Free Speech Clause was. And whether steps (2) and (3) are kosher is a normative, not a

original meaning provides a starting point or ‘modality’ of constitution interpretation, it nevertheless remains important to get that original meaning correct before moving on to other modalities or to ‘translate’ original meaning into today’s application.” Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1, 4 (2006). I doubt that most nonoriginalists would speak of translating original meaning into today’s “application”—indeed, I confess not to being entirely sure just what idea Barnett means to attribute here to nonoriginalists. Most nonoriginalists, I suspect, would describe themselves as consulting other argumentative modalities in an effort to determine what the constitution means or provides, or what the law is.

conceptual, question; the answers depend upon judgments about what it is legitimate or permissible for judges to do as a matter of political morality. We never engage in construction to determine what the law is; construction concerns only “what we might want to do or have done with” the law.¹⁸

By and large, I believe that contemporary proponents of the interpretation/construction distinction—theorists who are, after all, self-described originalists—adopt this latter position. That is, when they define constitutional interpretation as the “process of discovering the meaning of the constitutional text,”¹⁹ the “meaning” they have in mind is, all at once, legal, linguistic, and fixed. (Take this claim about how most advocates of the distinction would respond to the choice I’m presenting them with a grain of salt. Nothing in this essay depends upon whether this empirical generalization or prediction is accurate.) The next Part argues against this view by buttressing the judgment that the content of the law is determined by more than its semantic meaning if semantic meaning is some form of original meaning, that is, if the legal meaning is fixed. In Part III I pursue the possibility of construing the interpretation/construction distinction in the first way. That is, I ask whether this particular conceptualization of constitutional implementation is useful if we allow that some of what judges do in the process of determining what the law is falls on the construction side of the divide.

II. LAW AND ORIGINAL MEANING

We are assuming now that *interpretation* is the activity of trying to determine, from legal sources, what the law is, and also that—putting aside complexities created by a long history of judicial precedents that surely themselves contribute, in diverse ways, to the content of constitutional law—constitutional law just is the original public meaning of the constitutional text. I have elsewhere argued at length that the originalists’ varied arguments for this proposition are unpersuasive or worse.²⁰ I do not wish merely to repeat myself and, in any event, lack space for a full-blown argument. So I will not attempt to provide here

18. Whittington, *supra* note 6, at 611. The sentence from which I am quoting reads: “Although originalism may indicate how the constitutional text should be interpreted, it does not exhaust what we might want to do and have done with that text.” I believe that the use I am making of this passage is faithful to Whittington’s intent, but am not certain.

19. WHITTINGTON, CONSTITUTIONAL INTERPRETATION, *supra* note 5, at 5.

20. Mitchell N. Berman, *Originalism is Bunk*, 84 N.Y.U. L. REV. 1 (2009).

anything close to a decisive refutation of this thesis. Instead, I offer a story that might suggest, at least to the uncommitted, that the reduction of the legal meaning or legal content to fixed semantic content is not tenable.

Suppose that tomorrow we discover, or conclude, that the word *protection* had a significant role to play in the original public meaning of the Constitution's Equal Protection Clause. Suppose, in other words, that the original public meaning of the constitutional dictate that "no state shall deny to any person the equal protection of the laws" was, to a first approximation, that no state shall unreasonably or unfairly discriminate in the provision of the protection that the law furnishes individual people, and that "protection" here means things like police and fire services and judicial rules and procedures for vindicating rights.²¹

Of course, now-existing judge-made or judge-announced constitutional doctrine provides that discrimination in any sort of governmental activity—including in the provision of constitutionally gratuitous benefits—can violate the Equal Protection Clause. Whether a particular discrimination in the provision of benefits will be held to violate the constitutional guarantee of equal protection will depend upon the outcome of an analysis demanded by the appropriate tier of judicial scrutiny—as a rule of thumb, a discrimination on the basis of race or gender is exceedingly likely to be held unconstitutional; discrimination on most other bases is likely to survive. The critical point, however, is that discrimination in the provision of benefits will be held a denial of the constitutional guarantee of "equal protection" if that discrimination is adjudged unequal. This would not be so under what we are imagining was the original meaning of that Clause, pursuant to which state action amounts to a denial of equal protection only if two conditions are satisfied: the state action is unequal *and* involves protection. Simply put, "protection" as a significant idea has fallen out of present-day understanding of the constitutional equality command.

Here's one question that might be asked of this state of affairs: is it or is it not a correct statement of the law today that discrimination in the provision of benefits may violate the

21. John Harrison has put forth a view about the original meaning of the Clause along these lines, see John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 *YALE L.J.* 1385, 1433–51 (1992), though nothing in my argument depends upon his claims being historically accurate.

Fourteenth Amendment?²² One might be tempted to guess that originalists and nonoriginalists answer this question differently—that originalists say that it is not the law, while nonoriginalists say that it is. But, as I have already suggested, this answer is almost certainly mistaken. While originalists famously disagree about whether judges have a legal or constitutional or moral duty to overrule precedents that, viewed through an originalist lens, are incorrect,²³ they generally agree that, unless and until the judiciary does overrule a mistaken precedent, that precedent sets forth the law.

So let us change the hypothetical just this bit. Assume that there have been no Supreme Court precedents holding that the Equal Protection Clause has any application to supposed inequalities not involving discrimination in the provision of protection. But assume that this aspect of our actual world remains true: “protection” as a significant idea has nonetheless fallen out of present-day understanding of the constitutional equality command. Notwithstanding no Supreme Court holdings on point, nobody believes that the Equal Protection Clause is limited to prohibiting unequal protections. Indeed, there have been no Supreme Court holdings on point precisely because of this widespread understanding. Whenever a legislator, state or national, proposes legislation that would unfairly discriminate in the provision of benefits, an overwhelming majority of participants to the debate—citizens and elected officials alike—object that it would be unconstitutional. And the defenders of the legislation invariably respond by arguing that the discrimination would not be unfair or unreasonable, and never by denying that the Equal Protection Clause would prohibit the legislation if the discrimination were unfair or unreasonable.

Let us go further. Assume that state courts, when enforcing state equality provisions with language similar to the federal Equal Protection Clause routinely interpret the state provisions to apply to the provision of benefits, universally and unequivocally rejecting the rare suggestion that the federal guarantee is concerned only with unequal *protection*. And this: dicta in several Supreme Court decisions makes clear the

22. Put aside the possibility, also urged by Harrison, *see id.*, that the original public meaning of the Privileges and Immunities Clause was such as to prohibit many of the inequalities that existing doctrine locates within, or attributes to, the Equal Protection Clause.

23. For citations to some of the literature, along with comments on the difficulty that a negative answer creates for originalists, see Berman, *supra* note 20, at 33–37.

Justices' view that the Clause is not limited to legislation that involves "protection." For example, in cases denying plaintiffs standing to challenge some legislation, Justices have conveyed, gratuitously but without contradiction, the broader understanding of the constitutional command. And finally this: some many years ago, in response to the suggestion by a historian that the original public meaning of the Equal Protection Clause was limited to "protection," and thus does not prohibit even the grossest inequalities in the provision of benefits, a campaign began to amend the Constitution to add an equality provision that would explicitly have broader scope. But this campaign went nowhere in the face of near-universal agreement that it was unnecessary.

Given all these facts, what is the law? Does the law prohibit inequalities that do not involve the provision of services and procedures fairly denominated "protection"? It seems to me that originalists are committed to answering that question in the negative: the law is just what some fixed original feature of the Constitution (paradigmatically, its original public meaning) provides, and the widespread understanding that the Constitution offers broader protection against unequal state action is nothing other than a mistake.²⁴ It is a mistake not only about what the original meaning was, but also, and more to the present point, a mistake about what the law is.

This answer strikes me as rather plainly wrong, resting on a sterile and bizarrely asocial conception of what law is. In dismissing as immaterial what members of a socio-legal system (a system not reducible, mind you, to what happens in court) take to be the law and how their understanding is causally efficacious for them, it treats municipal law as not meaningfully different from scientific law. But municipal law *is* different. As Brian Bix has emphasized, "legal discourse purports to describe a practice and a product that is, by most accounts, a social fact that has little or no existence outside the actions and intentions of its participants."²⁵ Therefore, under a more accurate

24. This is painting a little broadly. I suppose that an originalist might answer that the law does prohibit inequalities that do not involve protection, but that such law is not "constitutional." This will not be an easy position to maintain, and it might generate conclusions at odds with some of the originalist's other commitments, including commitments (about the only legitimate limitations on legislative action) that help motivate his or her originalism in the first place. But I cannot adequately explore here how this argumentative line might be developed. I am happy to offer this route as an olive branch to my originalist opponents.

25. Brian H. Bix, *Global Error and Legal Truth*, 29 OXFORD J. LEGAL STUD. 535,

conception, as Gerald Postema said of the classical common law understanding, “law in its fundament [is] not so much ‘made’ or ‘posited’—something ‘laid down’ by will or nature—but rather something ‘taken up,’ that is, used by judges and others in . . . practical deliberation.”²⁶

As intimated above, I will not try to develop decisive arguments to persuade you of this conclusion if what strikes me as rather clear strikes you rather differently. Let me, however, offer one variation on the story.

Turn attention away from a hypothetical presentation of our polity and legal culture to some ancient civilization. Call it Etrusca. Suppose that the Etruscans had legal texts, but little adjudication, for the citizens generally agreed on what their legal obligations are and also preferred to resolve what disagreements remained informally—informally but, necessarily, in the shadow of formal legal resolution. An authoritative Etruscan legal text, authored in 800 B.C.E., contained provision P. For roughly 500 years, starting around 700 B.C.E., ordinary Etruscans and members of the legislative and executive branches overwhelmingly understood P to mean M. That is, they understood the law to be M in virtue of P. So too did judges (perhaps if only in their unofficial capacities), though they had

538 (2009). From this premise, Bix argues, correctly in my view, against the claim that a longstanding consensus in a community regarding what the law is can be mistaken. As he puts it, “long-term consensus is itself ‘truth-making’ for parts of law the way that it is for (most parts of) language.” *Id.* at 540. But Bix also allows, tentatively, that claims of global legal error regarding the interpretation of authoritative texts, like the U.S. Constitution, could possibly be correct. *Id.* at 543. Bix is certainly right that there could be global error about such things as what the original public meaning of a constitutional provision was or what various historical persons intended for it to accomplish, or the like. Insofar as he is claiming that everyone in a society could be mistaken about the *legal* interpretation of legal texts, I am not certain that he is right. (It might be supposed that, on certain facts, the Hartian account of law would support Bix’s view here. If the Rule of Recognition provides, say, that the law is the original public meaning of certain texts, and if the original public meaning of a text, thus picked out, were Q, but everybody believed that the law, derived from the text, were P, it might seem to follow that everybody is mistaken. But this is not obviously so. It might be said, in response to such an assumed case, either that the fact of this stable and global misunderstanding establishes that our account of the Rule of Recognition in the society must be revised, or: so much the worse for the Hartian account of law.)

In any event, I do not understand Bix to be defending the proposition that, in cases like my hypothetical, all the law subjects (and all living lawmakers) would in fact be in error about what the law is. He is mooted a theoretical possibility, not maintaining that this would be the more probable conclusion, and I believe that the logic of his general position strongly suggests that it would not be. (I am grateful to Bix for helpful exchanges about his views.)

26. Gerald J. Postema, *Classical Common Law Jurisprudence (Part I)*, 2 OXFORD U. COMMONWEALTH L.J. 155, 166 (2002).

no occasion to so rule. Imagine that a modern-day historian determines, to the satisfaction of all historians of the period, that the original public meaning of P was *N*, not *M*. Was the law in Etrusca from 700-200 B.C.E. *M* or *N*? Could it possibly be that the law was *N* even though not a soul alive at the time believed the law to be *N* or acted in accordance with such a belief? If not, it seems to follow that it is not the case that the legal content or legal meaning of a text—the law that is associated with it, or that it (partially) determines—is necessarily the original semantic content of the text.

III. INTERPRETATION—LINGUISTIC, NOT LEGAL

If a robust originalist take on the interpretation/construction distinction is not viable, let us now consider the first possible clarification of the interpretation/construction distinction floated in Part I. That construal, recall, sticks to the idea that interpretation is the determination of a text's linguistic content while allowing that linguistic content and legal content—what the law is—might differ. On this view, once the judge has determined the (fixed) linguistic meaning of a constitutional provision, she leaves interpretation and enters the realm of construction even if, as will sometimes be the case, she hasn't yet determined what the law is. This picture consists of the following three steps:

1. *constitutional interpretation*—the activity of determining the Constitution's (fixed) linguistic meaning;
2. *law-determining constitutional construction*—the activity of determining, based on the Constitution's linguistic meaning and other considerations, what the law is; and
3. *doctrine-creating constitutional construction*—the activity of formulating legal tests or rules designed to better administer the constitutional law (as determined, perhaps implicitly, at step 2).

We might ask whether this account presents a “true” or “accurate” picture of constitutional implementation. But I'd ask a different question—namely, whether this picture is useful or illuminating. That, I think, is the better standard for adjudging proffered conceptualizations of most phenomena, including of constitutional adjudication. And the answer, I think, is no.

To see why, it is helpful to measure this conceptualization against an alternative account. And the most common alternative account, sometimes dubbed “pluralist”²⁷ or “eclectic,”²⁸ views constitutional law as the output of constitutional interpretation, and constitutional interpretation as the practice-constrained application of the (Bobbittian) modalities of constitutional argument: original meaning of the text, framers’ and ratifiers’ purposes, historical practice, judicial precedent, structural implications, consequences, justice, and the like.²⁹ Nobody denies that fixed linguistic meaning is an important consideration in the determination of the Constitution’s legal meaning. What many do deny, though, is that it has uniquely privileged status. And if it does not, then it is misleading or distracting to assign a particular label—and the label “interpretation” at that!—to what is only one among the several arguments or considerations that, in appropriate cases, contribute to the Constitution’s legal meaning. To be sure, we might want a special word for the inquiry into fixed semantic meaning if fixed semantic meaning firmly constrained legal meaning. But the equal protection hypothetical is intended to demonstrate that that is not so.³⁰

Judges should inquire into many things en route to a determination of what is the Constitution’s legal effect, content, or significance—or what the Constitution, as law, has to say about a particular dispute or problem. Because one of the many things they should inquire into—often, a very important thing—is the original meaning of some portion of the constitutional text, it is not mistaken to say that there exists an “activity of determining the Constitution’s (fixed) linguistic meaning.” But there also exist the “activities,” say, of determining the purposes that some portion of the text, or the text viewed as an integrated whole, was meant to accomplish, and of determining what has

27. See, e.g., Stephen M. Griffin, *Pluralism in Constitutional Interpretation*, 72 TEX. L. REV. 1753 (1994).

28. See, e.g., Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765 (1997).

29. The modalities mentioned in the text are familiar but go beyond those that Bobbitt himself articulated. See PHILIP C. BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* (1982); *CONSTITUTIONAL INTERPRETATION* (1991).

30. Elsewhere, I have discussed another case in which many observers will agree that fixed semantic meaning need not constrain legal meaning, or what the law is. See Mitchell N. Berman, *Reflective Equilibrium and Constitutional Method: Lessons from John McCain and the Natural Born Citizen Clause* (Univ. of Tex. Law, Pub. Law Research Paper No. 157, 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1458108.

been the post-enactment understanding of the constitutional command. If this is so—and I grant that I have invoked a widespread understanding that it is so rather than having advanced an argument designed to persuade the skeptics³¹—then there is no good reason to affix a special name to the first activity, let alone to favor it with the title “interpretation.”

IV. CONSTRUCTING CONSTITUTIONAL DECISION RULES

The upshot of the analysis in Part III was to question the utility of the interpretation/construction distinction when cashed out as a division between the activities of, on the one hand, discovering semantic meaning and, on the other, doing everything else involved in determining and refining the law and constructing implementing legal doctrine. Does it follow that the conceptual enterprise is misguided?

Before concluding that it is, we should consider an alternative construal of the interpretation/construction distinction that its present proponents seem not to favor, but that emerges naturally enough from our previous discussion. If we distinguish the (fixed) semantic or linguistic meaning or content of a legal text from its (possibly dynamic) legal meaning,³² effect or significance, we might conclude that legal interpretation is the effort to determine the latter, not the former—insofar as the two differ in a particular case. This allows us to maintain a two-part distinction where judges interpret what the law is and also make doctrines to administer, enforce, or implement the law. Moreover, we might wish to assign the label “construction” to the latter set of activities. If we do, we are left with the rudiments of an interpretation/construction distinction that, when fleshed out in a particular way, is, I think, both illuminating and helpful—although not the one that originalists (“new” or otherwise) have in mind. I will say a little about that

31. For somewhat more argument in support of my general view of law is an argumentative practice and of legal norms as *constituted* by the actual legal reasoning of participants acting in accordance with practice-constrained norms of argumentation, see Mitchell N. Berman, *Constitutional Theory and the Rule of Recognition: Toward a Fourth Theory of Law*, in *THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION* 269–94 (Matthew D. Adler & Kenneth Einar Himma eds., 2009).

32. Notice that I have consistently treated linguistic content and semantic meaning as necessarily fixed. Perhaps someone will want to distinguish linguistic content from legal content while allowing that the former can change, even without reauthorings (and, therefore, that so too can the latter). This does not strike me as a promising line of argument, but I’ll withhold further comment until I see it sketched out.

alternative conception of the interpretation/construction distinction in this final Part. But we may be better positioned to understand that alternative conception—the “decision rules” model—after we first consider the pragmatists’ objection.

The pragmatist objection to carving the realm of constitutional implementation into conceptually distinguishable components has been forcefully expressed by Rick Hills. As I read him, Hills is advancing two interwoven but distinct complaints. First, to cleave constitutional “meaning” (or some similar such thing) from implementing doctrine is to multiply categories without point or profit. “Pragmatically speaking,” he insists, “the meaning of a constitutional provision *is* its implementation. To talk of some ‘pure’ constitutional principle independent of how some institution—the courts, the Congress, the President, the mob, law professors, and so forth—implements that value is to talk in empty metaphysical abstractions.”³³ Or, as Daryl Levinson had argued some years earlier, “[r]ights are dependent on remedies not just for their application to the real world, but for their scope, shape, and very existence.”³⁴ Worse, to mark something like a meaning/doctrine distinction is not merely pointless but false and possibly harmful. The classificatory or taxonomic impulse, says Hills, is committed to the existence of a “Snark of ‘pure’ noninstrumental constitutional value,” yet such a thing, he thinks, does not exist.³⁵ It is simply wrong to suggest, as proponents of a two-output thesis do, “that instrumental concerns should . . . be downgraded to mere matters of implementation as if they could be quarantined in a subconstitutional category and thus avoid infecting the rest of their doctrine with their contingency.”³⁶ Rather, as Levinson had put it, “constitutional rights are inevitably shaped by, and incorporate, remedial concerns. Constitutional adjudication is functional not just at the level of remedies, but all the way up.”³⁷

I believe that Hills and Levinson are right in (at least) one absolutely crucial respect: the determination of the Constitution’s legal meaning or content does not properly occur in a fashion that rules out of bounds considerations fairly described as prudential, instrumental, functional, or forward-

33. Hills, *supra* note 8, at 175.

34. Levinson, *supra* note 8, at 858.

35. Hills, *supra* note 8, at 174.

36. *Id.* at 182.

37. Levinson, *supra* note 8, at 873.

looking. I am pluralist or eclectic about “interpretation.” But I believe that the two conclusions the pragmatists draw from this premise are both false. First, it does not follow that all ways of conceptualizing divisions within implementation space are necessarily useless. Whether a particular carving has any cash value for us depends upon the nature of the carving and the features or functions of the component pieces. Second, it is not constitutive of a division between one stage or output of constitutional implementation and a second (whether the dyads are termed “interpretation” and “construction,” or “meaning” and “implementing doctrine,” or something else) that one of the two be relegated to a realm of pure value or principle, or be otherwise cordoned off from contingency. Interpretation and construction *could* be made of much the same stuff.

My responses to the pragmatists’ two objections are couched thus far in modal terms. I have asserted that it is *possible* for a two-output theory to avoid the errors on which the pragmatists focus. But I can say more. I believe that my preferred carving of implementation space—between judicial determinations of the Constitution’s legal meaning or effect (determinations that I term “constitutional operative propositions”) and judicial directives regarding the standards or tests courts are to employ in determining whether a given constitutional operative proposition is satisfied (directives that I term “constitutional decision rules”)—does in fact avoid those errors. In short, even if law is determined in ways favored by most theorists who lean “pragmatic” or “nonoriginalist,” it is nonetheless of pragmatic value to recognize that courts build conceptually separate norms, tests, frameworks—in a word, doctrine—to implement pragmatically determined law.

Take an actual case, *Atwater v. City of Lago Vista*.³⁸ The case arose after a police officer in Lago Vista, Texas stopped a woman, Gail Atwater, for driving without having fastened her seatbelt or those of her two young children. Although Officer Bart Turek could have simply issued Atwater a citation, he arrested and handcuffed her and transported her to the police station. Atwater sued the officer, the police chief, and the city, arguing that the arrest was an unreasonable seizure within the meaning of the Fourth Amendment.

38. 532 U.S. 318 (2001). The following discussion draws heavily from Berman, *supra* note 3, at 108–13.

Four Justices would have upheld Atwater's claim, reasoning that a custodial arrest is a seizure; that the Fourth Amendment proscribes "unreasonable seizures"; that whether a given seizure is reasonable depends entirely upon the particulars of the situation; and that this particular seizure was patently unreasonable because legitimate state interests could have been served just as well by the simple issuance of a citation.³⁹ Five justices disagreed, holding in an opinion by Justice Souter that the arrest did not violate Atwater's Fourth Amendment rights. The majority did not say that the officer's actions were reasonable. In fact, it intimated that they were not: "Atwater's claim to live free of pointless indignity and confinement clearly outweighs anything the City can raise against it specific to her case."⁴⁰ But this was not the sort of inquiry the majority wanted adjudications of Fourth Amendment cases to turn on, for

a responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations of government need, lest every discretionary judgment in the field be converted into an occasion for constitutional review. Often enough, the Fourth Amendment has to be applied on the spur (and in the heat) of the moment, and the object in implementing its command of reasonableness is to draw standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest or search is made. Courts attempting to strike a reasonable Fourth Amendment balance thus credit the government's side with an essential interest in readily administrable rules.⁴¹

In short, the majority wanted a rule not a standard. And the rule it announced was this: "If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender."⁴²

There are at least two ways to make sense of or explain this doctrine. We could simply say that that's the rule or the law, and be done with it: it is *per se* reasonable within the meaning of the Fourth Amendment for a police officer to arrest anyone who commits any criminal offense under any circumstances, so long as the offense occurs in the officer's presence. Alternatively, we

39. 532 U.S. at 369–71 (O'Connor, J., dissenting).

40. *Id.* at 347.

41. *Id.* (internal citation omitted).

42. *Id.* at 354.

could interpret (!) the decision as having done two things, not one. First, the *Atwater* majority, like the dissent, interpreted the Fourth Amendment to provide that a seizure is unconstitutional if unreasonable, an inescapably all-things-considered judgment.⁴³ This would be the “constitutional operative proposition.” Second, it crafted a directive—a “constitutional decision rule”—that courts should conclusively presume a full custodial arrest to be reasonable if they conclude (by a preponderance of the evidence) that the officer had probable cause to suppose that the arrestee had committed any offense in his presence. This characterization of the doctrine can explain how *Atwater* lost, even though not a single member of the Court seemed to doubt that *she* had been subjected to an unreasonable seizure.

I do not care at this juncture to argue that the latter is necessarily the better way to reconstruct or reverse engineer or conceptualize this particular doctrine. The point of this example is only to illustrate the operative proposition/decision rule distinction in action and to show how, contrary to the pragmatist worry, this particular way to taxonomize implementation space is not an exercise in empty or arid conceptualism. Rather, there are at least three respects in which the distinction could be consequentially meaningful as applied to this single case.

First, this carving of the decision has different expressive significance from the one-output reading and might therefore spur different responses by nonjudicial actors. Citizens, legislatures, and police departments might develop different views about appropriate police behavior, and might produce different sorts of regulatory review mechanisms, if they understand the Supreme Court to have affirmed that arrests do run afoul of a constitutional command unless reasonable all-things-considered, and to have opted to underenforce this particular mandate for institution-specific reasons. Second, the decision-rule characterization is likely to open up more space for congressional involvement in the shaping of constitutional doctrine. Suppose that Congress disagreed with the Court’s predictive judgment about how much well-intentioned police

43. The Court had previously said precisely this, in rulings that *Atwater* did not purport to overrule. See, e.g., *Illinois v. Rodriguez*, 497 U.S. 177, 185–86 (1990) (“[I]n order to satisfy the ‘reasonableness’ requirement of the Fourth Amendment, what is generally demanded of the many factual determinations that must regularly be made by agents of the government . . . is not that they always be correct, but that they always be reasonable. . . . Whether the basis for [arrest] authority exists is the sort of recurring factual question to which law enforcement officials must be expected to apply their judgment; and all the Fourth Amendment requires is that they answer it reasonably.”).

behavior the *ad hoc*, totality of the circumstances approach to Fourth Amendment reasonableness would chill, or with the Court's evaluative judgment about how much litigation on the matter was excessive. Because one might reasonably conclude that Congress's judgments on these questions should trump those of the Court, it is plausible to suppose that announcing the *Atwater* doctrine as a decision rule employing a conclusive presumption would be a particularly effective (though not essential) way to signal where and how Congress could intervene if it so chose. Third and relatedly, characterizing the doctrine as a decision rule that implements an operative proposition of different content might make it easier for the Court to itself revisit the doctrine if appropriate. When balancing the costs of over-detering police from engaging in reasonable arrests against those of under-detering them from engaging in unreasonable ones, the Court expressly observed "a dearth of horrors demanding redress."⁴⁴ But what if the Court substantially underestimated the incidence of unreasonable warrantless misdemeanor arrests? Or what if the Court was right at the time of its opinion, but facts changed? No doubt the Court could revise the doctrine in light of experience regardless of how the doctrine were classified. But it is plausible to suppose that the competing demands of stability and flexibility might find more effective reconciliation in the development of stare decisis practices that allow decision rules to be modified or abandoned somewhat more readily than operative propositions.

You might say that we don't need the operative proposition/decision rule distinction to achieve any of these ends, and you'd be right. But whether this conceptualization produces real-world effects that competing conceptualizations *could not* is the wrong standard for assessment. Pragmatically speaking, the question is closer to whether there is a realistic probability that some things in the world would go differently if our conceptual toolbox allows us to distinguish judicial statements about what courts take the Constitution to permit, authorize or prohibit—what courts interpret the law to be—from judge-made rules regarding how courts will adjudicate claims of conformity and non-conformity with what the Constitution permits, authorizes, or prohibits. It seems plain that the answer to that question is "yes."

44. *Atwater*, 532 U.S. at 353.

What, now, about the pragmatists' second objection—that a two-part conceptualization along the foregoing lines implies (mistakenly) that interpretation is all about pure principles or values or original meanings or, in any event, nothing messy, instrumental or contingent? Conceivably, our analysis of *Atwater* lends support to that concern. That, however, would be the wrong lesson to draw.

Happily, I can substantiate this claim much more quickly, with just one example. Six years ago, in *Vieth v. Jubelirer*,⁴⁵ all members of the Court agreed that the Constitution prohibits excessive partisanship in redistricting. But the Court fragmented when it came to deciding what to do about it. A four-Justice plurality, concluding that it was impossible to craft a judicially manageable standard, would have held that claims of excessive partisanship in redistricting raise a nonjusticiable political question; four others would have embraced three different tests; Justice Kennedy couldn't come up with a test he thought appropriate and workable, but also refused yet to conclude, with the plurality, that the effort should be abandoned. I have argued elsewhere that the Court should have recognized that only the decision rule, not the operative proposition, need be "judicially manageable," and I offered some suggestions regarding what sensible decision rules might look like.⁴⁶ For instance, I proposed that courts should conclude that a redistricting was excessively partisan, in violation of the Constitution, if (but not "only if") undertaken mid-decade by a single-party-controlled state government unless narrowly tailored to achieve a compelling interest.

Maybe this would be a wise decision rule, maybe not. My present point is only that there is no reason to believe that the operative proposition I am attributing to *Vieth* (and that I am disposed to endorse)—that excessive partisanship in redistricting is unconstitutional—must be reached in a manner blind to messy, contingent facts about partisan politics in contemporary America. I meant to signal that such facts may properly bear on an operative proposition—that operative propositions need not be reduced to "'pure' noninstrumental constitutional value"⁴⁷—by labeling them *propositions* rather than *principles*. And my

45. 541 U.S. 267 (2004).

46. See Mitchell N. Berman, *Managing Gerrymandering*, 83 TEX. L. REV. 781 (2005). For a similar conclusion, see Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274 (2006).

47. Hills, *supra* note 8, at 174.

strong suspicion is that practical contingencies did in fact influence the conclusions of at least some members of the Court that excessive partisanship in redistricting is unconstitutional. (Really, how could they *not* have?) Surely the Justices didn't all rely on the original meaning of some portion of constitutional text given that most haven't even located where in the Constitution this command resides.

Here, to summarize, is one way to flesh out the interpretation/construction distinction: Interpretation is the determination, by means of a raft of argumentative modalities, of the Constitution's "operative propositions"—what the Constitution "means," or what its legal significance or effect is. Construction is the crafting of a variety of rules designed particularly for use in constitutional *adjudication*, chief among them being "decision rules" that direct courts in determining whether to hold that a challenged action is or is not constitutional. This particular way to carve implementation space is rooted in the single idea that sometimes the judiciary will want to say something like "the law is X, but courts will strike down a challenged provision even if Y (or will uphold the provision so long as Z)"—or that even when the judiciary doesn't want to put things that way, the rest of us might have good reason to understand what it has said in such terms. Perhaps this is not, at the end of the day, a good conceptualization of implementation space because, say, it is insufficiently faithful to existing practice or is less useful than are competing conceptualizations. But it is not a sound objection to this framework that it commits us to an anti-pragmatic view of interpretation. It does no such thing. Very likely, the prevailing articulation of the interpretation/construction distinction helps nourish that misunderstanding by emphasizing that these are different "activities." We might do better by foregrounding that implementation can yield different types of outputs, distinguishable by reference to the functions they serve, and not necessarily by the argumentative considerations upon which they rely.

CONCLUSION

Constitutional theorists have been carving the space of constitutional implementation for generations now. In recent years, several talented and industrious theorists have coalesced in support of one particular carving: a carving that distinguishes the interpretation of the Constitution's "linguistic content" or

“semantic meaning” from the construction of legal doctrine designed to apply that meaning. Proponents of this conceptualization have been motivated, by and large, by the beliefs (a) that (putting judicial precedent aside) what the law is just is the semantic meaning of a legal text and that this meaning is fixed at the text’s issuance, and (b) that judges’ proper role in constitutional adjudication is not limited to determining what the law is.

I have argued that this package—the “new originalist” package—is unappealing because the core originalist claim that the Constitution’s legal content, meaning, significance or effect is fixed is mistaken. But even I’m right about that, that does not yet establish that the interpretation/construction distinction is valueless. Perhaps the new originalists’ conceptualization of implementation space is still useful even if we reject their objectionable claim that the Constitution’s legal meaning is fixed.

If the (fixed) semantic or linguistic meaning or content of some portion of the Constitution is not always identical to its (possibly dynamic) legal meaning, effect or significance, then we might distinguish between “linguistic” interpretation—the attempt to determine the former—and “legal” interpretation—the attempt to determine the latter. And we might then ask which of these two types of interpretation is captured, in the proposed two-part distinction between interpretation and construction, by interpretation, *simpliciter*. Much contemporary discussion of the interpretation/construction distinction suggests to me that interpretation is thought always and necessarily to be the attempt to determine fixed semantic or linguistic meaning. Construed in that fashion, the interpretation/construction distinction is not, I think, perspicuous.

But what if, at the fork in the road, we pursue the other path, distinguishing between the determination of what the Constitution means in the sense of what the law is (“interpretation”) and the making of rules particularly designed for applying or enforcing that meaning or law in the crucible of adjudication (“construction”)? That take on the interpretation/construction distinction seems pretty sensible to me. Some of the rules for adjudication will be rules that tell courts what to do once they have determined that a constitutional violation has occurred. These will be constructed “remedial rules.” Much more of the constructed adjudicatory doctrine, however, will direct courts how to determine whether

2010] *CARVING OF IMPLEMENTATION SPACE* 69

there has been a violation in the first place. These rules are constitutional decision rules. Whether we choose to say that they are produced as an exercise in “constitutional construction” is, I think, a matter of little importance.