

## THE INTERPRETATION-CONSTRUCTION DISTINCTION\*

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### INTRODUCTION

The interpretation-construction distinction, which marks the difference between linguistic meaning and legal effect, is much discussed these days.<sup>1</sup> I shall argue that the distinction is both real and fundamental—that it marks a deep difference in two different stages (or moments) in the way that legal and political actors process legal texts. My account of the distinction will not be precisely the same as some others, but I shall argue that it is the correct account and captures the essential insights of its rivals. This Essay aims to mark the distinction clearly.<sup>2</sup>

The basic idea can be explained by distinguishing two different moments or stages that occur when an authoritative

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1. See, e.g., John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751 (2009); Ingrid Wuerth, *An Originalism for Foreign Affairs?*, 53 ST. LOUIS U. L.J. 5, 12–18 (2008); Lee J. Strang, *Originalism and the “Challenge Of Change”*: *Abduced-Principle Originalism and Other Mechanisms by Which Originalism Sufficiently Accommodates Changed Social Conditions*, 60 HASTINGS L.J. 927, 961–62 (2009); Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 63 (2009); Reva B. Siegel, *Heller & Originalism’s Dead Hand—In Theory and Practice*, 56 UCLA L. REV. 1399, 1410–12 (2009).

2. This Essay is related to ideas developed in *Semantic Originalism*, which offers a general theory of constitutional interpretation. See Lawrence B. Solum, *Semantic Originalism* (Ill. Pub Law Research Paper No. 07-24, 2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1120244](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244).

legal text (a constitution, statute, regulation, or rule) is applied or explicated. The first of these moments is interpretation—which I shall stipulate is the process (or activity) that recognizes or discovers the linguistic meaning or semantic content of the legal text. The second moment is construction—which I shall stipulate is the process that gives a text legal effect (either by translating the linguistic meaning into legal doctrine or by applying or implementing the text). I shall then claim that the difference between interpretation and construction is real and fundamental. Although the terminology (the words “interpretation” and “construction” that express the distinction) could vary, legal theorists cannot do without the distinction.

One more preliminary point: the topic of this Essay is narrow and conceptual. This Essay has three goals: (1) to explicate the nature of the interpretation-construction distinction, (2) to argue that this distinction marks a real difference, and (3) to suggest that the distinction is helpful in that it enables legal theorists to clarify the nature of important debates, for example debates about constitutional interpretation. The Essay does not offer any particular theory of interpretation or construction—that it is, it remains agnostic about questions as to how linguistic meaning can be discerned or how legal content ought to be determined. Nor does this theory offer an account of the history and origins of the distinction. Those topics are important, but raising them in this Essay might shift attention away from prior questions about the nature and value of the distinction itself.

Here is the roadmap. In Part II, this Essay shall discuss two preliminary sets of ideas: (1) vagueness and ambiguity, and (2) semantic content and legal content. In Part III, this Essay shall use these preliminary ideas to answer the questions, “What is interpretation?” and “What is construction?” In Part IV, this Essay shall consider some objections to the interpretation-construction distinction. In Part V, this Essay shall develop the argument that the distinction is fundamental and indispensable.

## II. TWO PRELIMINARY SETS OF IDEAS

Before we get to the distinction itself, we need to examine two related distinctions. The first of these is the distinction between vagueness and ambiguity; the second distinction is between semantic content and legal content.

A. VAGUENESS AND AMBIGUITY

When we communicate via language (written or oral), we use words and phrases that can be formed into complex expressions using the rules of syntax and grammar. Sometimes the smallest meaningful unit of expression is a single word; sometimes, whole phrases carry meanings that cannot be decomposed into the meaning of constituent words. But whatever the relevant unit of meaning might be (words, phrases, sentences, or whole utterances), texts can be either vague or ambiguous.

In ordinary speech, the distinction between vagueness and ambiguity is not always observed. The two terms are sometimes used interchangeably, and, when this is the case, they both mark a general lack of what we might call “determinacy” (or “clarity” or “certainty”) of meaning. But the terms “vague” and “ambiguous” also have technical (or more precise) meanings, such that there is a real difference in their meaning.<sup>3</sup>

In the technical sense, ambiguity refers to the multiplicity of sense: a term is ambiguous if it has more than one sense.<sup>4</sup> A classic example is the word “cool.” In one sense “cool” means low temperature, as in “the room was so cool we could see our breath.”<sup>5</sup> In another sense, “cool” means something like hip or stylish,<sup>6</sup> as in “Miles Davis was so cool that every young trumpet player imitated him.”<sup>7</sup> And “cool” has several other senses—

3. For example, the Oxford English Dictionary offers the following definition of “vague”: “Of words, language, etc.: Not precise or exact in meaning.” OXFORD ENGLISH DICTIONARY (2d ed. 1989), available at [http://dictionary.oed.com/cgi/entry/50274390?query\\_type=word&queryword=vague&first=1&max\\_to\\_show=10&sort\\_type=alpha&search\\_id=02Y1-2mHK6d-2502&result\\_place=1](http://dictionary.oed.com/cgi/entry/50274390?query_type=word&queryword=vague&first=1&max_to_show=10&sort_type=alpha&search_id=02Y1-2mHK6d-2502&result_place=1). And it offers the following definition of “ambiguous”: “Doubtful, questionable; indistinct, obscure, not clearly defined.” OXFORD ENGLISH DICTIONARY (2d ed. 1989), available at [http://dictionary.oed.com/cgi/entry/50006932?single=1&query\\_type=word&queryword=ambiguous&first=1&max\\_to\\_show=10](http://dictionary.oed.com/cgi/entry/50006932?single=1&query_type=word&queryword=ambiguous&first=1&max_to_show=10).

4. Thus, the third definition in the Oxford English Dictionary is “Capability of being understood in two or more ways; double or dubious signification, ambiguousness.” OXFORD ENGLISH DICTIONARY (2d ed. 1989), available at [http://dictionary.oed.com/cgi/entry/50006931?single=1&query\\_type=word&queryword=ambiguity&first=1&max\\_to\\_show=10](http://dictionary.oed.com/cgi/entry/50006931?single=1&query_type=word&queryword=ambiguity&first=1&max_to_show=10).

5. As in the following definition: “Of or at a relatively low temperature; moderately cold, esp. agreeably or refreshingly so (in contrast with heat or cold).” OXFORD ENGLISH DICTIONARY (2d ed. 1989), available at [http://dictionary.oed.com/cgi/entry/50049434?query\\_type=word&queryword=cool&first=1&max\\_to\\_show=10&sort\\_type=alpha&search\\_id=02Y1-pvqbdQ-2524&result\\_place=1](http://dictionary.oed.com/cgi/entry/50049434?query_type=word&queryword=cool&first=1&max_to_show=10&sort_type=alpha&search_id=02Y1-pvqbdQ-2524&result_place=1).

6. For example, the Oxford English Dictionary offers this definition: “Attractively shrewd or clever; sophisticated, stylish, classy; fashionable, up to date; sexually attractive.” *Id.*

7. The utterance in text is actually ambiguous as between the “hip” sense of cool

referring to temperament or self-control, to certain colors, and a lack of enthusiasm (or the presence of skepticism or mild hostility).

The technical sense of vagueness refers to the existence of borderline cases: a term is vague if there are cases where the term might or might not apply.<sup>8</sup> A classic example is the word “tall.” In one sense, “tall” refers to height (of a person or other entity) that is higher (in some way or to some degree) than average. Abraham Lincoln was tall: at almost 6’4” he was certainly tall for an adult male of his time. Napoleon was not tall, although at 5’6” he was of average height for his time. There are persons who are clearly tall and clearly not tall, but there are also borderline cases. For example, in the United States in the twenty-first century, males who are 5’11” or 5’10 ½” are neither clearly tall nor clearly not. Finally, a given word or phrase can be both vague and ambiguous. “Cool” is ambiguous, and, in the temperature sense, it is also vague.

Getting ahead of ourselves for a moment, ambiguities in legal texts can (usually) be resolved by interpretation, but constitutional vagueness always requires construction.

#### B. SEMANTIC CONTENT AND LEGAL CONTENT

The second preliminary distinction that we need to make is between semantic content and legal content. Legal texts<sup>9</sup> that are currently valid in an actual legal system that is currently in force<sup>10</sup> have both kinds of content. The semantic content of a legal text is simply the linguistic meaning of the text. For example, the First Amendment freedom of speech has a

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and a more specific sense that refers to a style of jazz associated with Davis: “Of jazz music: restrained or relaxed in style (opposed to HOT adj. 12h). Also: performing or associated with music of this type.” *Id.* So the sentence in text might be asserting that Davis was very hip, or that his playing was relaxed in style.

8. See Roy Sorensen, Vagueness, *Stanford Encyclopedia of Philosophy* (Aug. 29, 2006) <http://plato.stanford.edu/entries/vagueness/> (“There is wide agreement that a term is vague to the extent that it has borderline cases.”); see also TIMOTHY ENDICOTT, *VAGUENESS IN THE LAW* (2000); ROSANNA KEEFE, *THEORIES OF VAGUENESS* (2000); TIMOTHY WILLIAMSON, *VAGUENESS* (1994); Roy Sorensen, *Vagueness Has No Function in Law*, 7 *LEGAL THEORY* 387 (2001).

9. For the purpose of this paper, the phrase “legal text” is meant to be quite general and to refer, for example, to contracts, wills, trust instruments, patents, rules, regulations, statutes, constitutions, and opinions.

10. Of course, there can be legal texts that are no longer in force and legal systems that no longer exist. And there are proposed legal texts that were never enacted, and hypothetical legal texts that have never been proposed or enacted. In such cases, the obsolescent or unenacted legal texts have no currently operative legal content, although they still have semantic content.

linguistic meaning, associated with the meanings of the constituent words and phrases—“Congress,” “shall make,” “no,” “law,” “abridging,” “the freedom of speech,” and further specified by the conventions of syntax and grammar that allow these words and phrases to be combined into a meaningful whole. This same provision is the source of legal content that is not identical to its semantic content. As examples, consider the following doctrines that are connected to the First Amendment: (1) the prior restraint doctrine, (2) the rules that define the freedom of speech doctrine governing expression via billboards, and (3) the distinction between content-based regulations and content-neutral time, place, and manner restrictions.<sup>11</sup> These three rules are part of the legal content of free-speech doctrine, but these doctrines are not part of the linguistic meaning of the expression “Congress shall make no law abridging the freedom of speech.”<sup>12</sup>

Although I believe this point about the difference (between the linguistic meaning of the text and the legal effect that text is given by free speech doctrine) is obvious, it might be misunderstood. The point that I am making is that the text of the First Amendment says nothing about “billboards,” “prior restraint,” “content,” or “time, place, and manner.” These doctrinal ideas are not found in the linguistic meaning or semantic content of the text. The claim that the semantic content of the First Amendment does not contain this legal content does not (logically or conceptually) imply the further claim that the legal content of these doctrines cannot be derived from an appropriate theory of the purpose of the freedom of speech. Sometimes the word “meaning” is used to refer to the purpose of a legal text, but that sense of the word “meaning” is not the same as linguistic meaning.

One characteristic of semantic content is especially important: the linguistic meaning of a text is a fact about the world. The meaning of written or oral communication is determined by a set of facts: these facts include the characteristics of the utterance itself—*what marks appear in the writing?*—and by facts about linguistic practice—*how is that word used?*—and—*what are the ‘rules’ (or regularities) of syntax and grammar?* The linguistic meaning of an utterance cannot be

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11. For a brief overview of free-speech doctrine, see ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 921–1180 (2006).

12. It might be argued that these doctrines are a necessary implication of the linguistic meaning, but I shall set that possibility aside here.

settled by arguments of morality or political theory.<sup>13</sup> For this reason, it would involve a category mistake to argue directly for a conclusion about the linguistic meaning of an utterance on the basis of a moral premise.

Once again, we can jump ahead: interpretation yields semantic content, whereas construction determines legal content or legal effect.

### III. INTERPRETATION AND CONSTRUCTION

We have now distinguished ambiguity from vagueness and semantic content from legal content; these two preliminary moves set the stage for articulating the distinction between interpretation and construction.

#### A. WHAT IS INTERPRETATION?

The interpretation-construction distinction reentered general legal theory in the context of debates over constitutional practice via the work of what are sometimes called the “New Originalists,” particularly Keith Whittington<sup>14</sup> and Randy Barnett.<sup>15</sup> As I discuss the distinction, I will use constitutional interpretation and construction in an illustrative context, but the distinction itself applies whenever an authoritative legal text is applied or explicated.

In general, interpretation recognizes or discovers the linguistic meaning of an authoritative legal text. Contract interpretation yields the linguistic meaning of the contract. Patent interpretation yields the semantic content of the patent

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13. Normative considerations may be relevant to linguistic meaning. For example, if faced with an ambiguous utterance, there may be contexts in which the normatively more attractive meaning is more likely the meaning intended by the speaker. But in cases like this, we do not reach the conclusion that the normatively attractive meaning is the true meaning because it is morally better. Rather, we infer that the author more likely intended the meaning because it was morally attractive. For example, if someone says “I would kill for some ice cream right now,” the utterance is ambiguous as between a literal meaning and a figurative meaning, in which the expression “I would kill” signifies an intense desire and not a prediction about taking the life of another human being. The moral wrongness of killing may be part of the reason for rejecting the morally unattractive literal interpretation, but the role of morality in cases like this is indirect. If we had reason to believe the literal meaning were the actual meaning (for example, if the person making the statement was a psychopath who had killed for ice cream in the past), then the moral wrongness of the literal interpretation might become irrelevant.

14. See KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION* (1999); KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION* (1999).

15. See RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION* (2004).

claims. Statutory interpretation yields the linguistic meaning of statutory texts.

Because my own work on the interpretation-construction distinction occurs mostly in constitutional theory, I will use the text of the United States Constitution as an illustrative example. In the constitutional context, interpretation is the activity that aims at discovery of the linguistic meaning of the various articles and amendments that form the United States Constitution. Constitutional interpretation yields the semantic content of the Constitution. Constitutional theorists may disagree about how this occurs. Original-Intentions Originalists may believe that the semantic content of the Constitution was fixed by the intentions of the Framers or ratifiers. Original-public-meaning Originalists may believe that the linguistic meaning of the Constitution is the meaning that the constitutional text had to the competent speakers of American English at the time the Constitution was framed and ratified. Some Living Constitutionalists may believe that the meaning of the Constitution is fixed by contemporary usage at the time interpretation occurs.<sup>16</sup> In other words, there are various theories of constitutional interpretation—in the sense that the interpretation-construction distinction gives that phrase “constitutional interpretation”—but all of these theories aim at the recovery of the linguistic meaning of the constitutional text.

In practice, interpretation responds to a variety of interpretative problem types—recurring situations in which we are in doubt about the linguistic meaning of the Constitution. For example, some constitutional language may be archaic—the meaning of the phrase “domestic violence” in the United States Constitution (referring to violence, e.g., rebellions or riots originating within the boundaries of a state) is not the same as the use of that phrase in contemporary writing to refer to violence within families, such as spousal abuse.<sup>17</sup> In such cases,

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16. My view, which is not at issue in this paper, has two parts: (1) the linguistic meaning of the Constitution was fixed by linguistic facts at the time each provision of the Constitution was framed and ratified, and (2) the relevant linguistic facts focus on the conventional semantic meanings of the relevant words and phrases and the patterns of usage that can be summarized as so-called “rules” of syntax and grammar. Conventional semantic meanings can be modified in four ways: (1) by the publicly available context of constitutional utterance, (2) by the division of linguistic labor which may create “terms of art,” (3) necessary implications of the semantic content of the text, and (4) constitutional stipulations (or units of meaning created by the Constitution itself). This view is developed and defended in depth in Solum, *supra* note 2.

17. For an illuminating discussion, see Mark S. Stein, *The Domestic Violence Clause in “New Originalist” Theory*, 37 HASTINGS CONST. L.Q. 129 (2009).

Originalists believe that the problem of ascertaining the linguistic meaning of the phrase can be resolved by resorting to linguistic facts: for example, original-public-meaning Originalists believe that the meaning of the phrase “natural born citizen” is determined by patterns of usage during the period when the Constitution of 1789 was drafted and ratified.<sup>18</sup>

Another recurring problem of constitutional interpretation is ambiguity. It is possible that some of the words and phrases used in the Constitution are ambiguous (in the technical sense) because they have more than one linguistic meaning. A text or utterance that is ambiguous can frequently be disambiguated by consideration of the context. An acontextual instance of the word “cool” is ambiguous, but the sentence “the room was so cool that I had to put on my sweater” provides sufficient context to suggest that the relevant sense of “cool” is the temperature sense. Likewise, the phrase “natural born citizens” might be ambiguous as between “citizens whose birth was natural” and “persons who citizenship was ‘natural’ because it resulted from birth rather than artificial ‘naturalization’ by statute.” A resort to context might rule out the former meaning, and thus settle the semantic content of the Constitution as that given by the latter meaning. Characteristically, constitutional ambiguity can be resolved by interpretation that relies on the publicly available context of the constitutional provision at issue to select among the possible senses of the words and phrases of the text.

I say that ambiguity *characteristically* can be resolved by interpretation, because it is not necessarily the case that all ambiguities can be resolved by reference to context. There may be cases where the available evidence about the context of an utterance is insufficient to resolve an ambiguity. Or there may be cases where an ambiguity in a legal text can be recognized as intentional based on the publicly-available context of the utterance, and there is no fact of that matter as to which of multiple senses was the true or correct sense of the utterance. If there are such cases of what we can call “irreducible ambiguity,” then interpretation cannot resolve them.

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18. Lawrence B. Solum, *Originalism and the Natural Born Citizen Clause*, 107 MICH. L. REV. FIRST IMPRESSIONS 22 (2008), available at <http://www.michiganlawreview.org/assets/fi/107/solum.pdf>.



### B. WHAT IS CONSTRUCTION?

Conceptually, construction gives legal effect to the semantic content of a legal text. Construction can occur in a variety of contexts, and there are different modes of construction. One important distinction can be marked by differentiating the contexts in which construction can occur. For example, we can distinguish *judicial* construction from *political* construction and *private* construction. Courts engage in judicial construction when they translate the linguistic meaning of a legal text into doctrine: examples of judicial construction of the First Amendment were discussed above. Judicial construction also occurs when the effect to be given to semantic content of a legal text is constrained or modified by higher-order legal rules. For example, when a will violates the rule against perpetuities, a court may give the will a saving construction—this construction gives the will a legal effect that varies from the semantic content of the text. Yet another example of judicial construction occurs when a court simply translates the semantic content of the text into corresponding legal content, and then applies that content to a particular case—in such cases, the act of construction may go unnoticed since it does no work in determining legal content.<sup>19</sup>

Courts are not the only entities that give effect to legal texts. Consider, for example, the familiar notion of the Constitution outside the courts. Various political institutions implement constitutional provisions that are rarely, if ever, the subject of judicial interpretation. The House and the Senate organized themselves in accord with the text of Article I of the United States Constitution, giving legal effect to the text without the aid of judicial constructions: we can call activities like this “political construction.” Likewise, private persons give legal effect to a variety of authoritative legal texts, including statutes,

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19. One might say that when a legal text is neither ambiguous nor vague, then interpretation does all the work and no construction is required. There is nothing wrong with speaking in this way, but given the definitions of “interpretation” and “construction” that are stipulated in this Essay, construction is always a step in the process of understanding and applying a legal text. The stipulated definition of construction simply is that a legal practice is “construction” if it involves giving legal effect to an authoritative legal text. Legal texts that are neither vague nor ambiguous are given legal effect, and, hence, give rise to “construction” in the stipulated sense. Another way of putting this point is to observe that the semantic content of a legal text that is neither vague nor ambiguous is not the same thing as the legal content of the same text—what we call “semantic content” is a different kind of thing than “legal content”—even when the two kinds of content map directly onto each other. Linguistic meaning is one kind of thing, but legal effect is a different kind of thing.

regulations, and contracts. We can call activities like this “private construction.”

Although political construction and private construction are important, I want to focus on judicial construction of the Constitution for illustrative purposes. When courts engage in constitutional construction, they frequently translate the semantic content of the constitutional text (its linguistic meaning) into the legal content of constitutional doctrine (or rules of constitutional law). For example, construction of the First Amendment of the Constitution by the United States Supreme Court yielded a complex set of legal doctrines—including the examples (doctrines concerning billboards, prior restraints, and “Time, Place, and Manner” restrictions) that were mentioned above. On the surface, it seems obvious that the content of constitutional doctrine is nonidentical with the semantic content of the constitutional text—although one can imagine an argument that the content of the doctrine is somehow a logical implication of the content of the text and obvious facts about the world.

Because interpretation aims at the recovery of linguistic meaning, it is guided by linguistic facts—facts about patterns of usage. Thus, we might say that interpretation is “value neutral,” or only “thinly normative.” The correctness of an interpretation does not depend on our normative theories about what the law should be. But construction is not like interpretation in this regard—the production of legal rules cannot be “value neutral” because we cannot tell whether a construction is correct or incorrect without resort to legal norms. And legal norms, themselves, can only be justified by some kind of normative argument.

For this reason, theories of construction are ultimately normative theories: because constructions go beyond linguistic meaning, the justification for a construction must include premises that go beyond linguistic facts. This point can be illustrated in the context of constitutional construction—although similar points could be made about statutory construction, contract construction, and so forth. Some constitutional theorists may believe that constitutional constructions should be justified on the basis of legal norms, e.g., by the rules of *stare decisis* or on the basis of a legal principle that calls for deference to the political branches when the constitutional text does not require a contrary result. Other constitutional theorists may believe that explicitly nonlegal

normative considerations enter into constitutional construction. For example, Hart's picture of the core and penumbra of legal rules implies that, in borderline cases, judges must exercise discretion, and such discretion could be exercised on the basis of a theory of political morality.<sup>20</sup>

The claim that *theories* of constitutional construction must be normative does not imply that judges who engage in constitutional construction must resort to their own beliefs about morality or politics in particular cases.<sup>21</sup> Consider, for example, a theory of constitutional construction that began with normative premises about the great value of the rule of law and the dangers of politicization of constitutional adjudication. Such a theory might argue that judges should adopt a principle of deference to the political branches in those cases where invalidation of legislative or executive action is not required by legal content that is required by the semantic content of the Constitution. A simpler articulation of that principle might be formulated in terms of H.L.A. Hart's distinction between the core and penumbra: in the core, judges should follow the clear meaning of the constitutional text, but, in the penumbra, they should defer to the political branches.<sup>22</sup> This theory of construction is justified

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20. See H.L.A. HART, *THE CONCEPT OF LAW* 123 (2d ed. 1994).

21. Thus, I believe that John McGinnis and Michael Rappaport are in error when they characterize "construction" as follows:

In the abstract, constructionist originalism requires that judges follow the original meaning, but does not impose any legal requirements as to construction. Because there is no legally required or even accepted method for determining how to resolve questions of construction, judges are likely to determine how to engage in construction based on their own views.

McGinnis & Rappaport, *supra* note 1, at 783. The question as to what legal standards govern "construction" is complex, and a complete treatment is outside the scope of this Essay, but two points can be made on this occasion. First, as "construction" is defined in this Essay, it is clear that there are a variety of conventional legal standards that govern construction. Construction is the activity of giving legal effect to an authoritative text: to say that activity is lawless is tantamount to claiming that the law is radically indeterminate, but that claim is implausible. See Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462 (1987). Second, as a normative matter, those who embrace the interpretation-construction distinction can argue for theories of construction (e.g., for Originalist theories of constitutional construction) that do not allow judges to adopt constructions "based on their own [normative] views." McGinnis & Rappaport, *supra* note 1, at 783. For example, one might argue that constructions must be consistent with the purposes, functions, or goals that motivated adoption of the text, and that judicial construction should be bound by the doctrine of stare decisis. The point made in text is that theories of construction must be justified on normative grounds, e.g., by arguments from legal norms, or by arguments of political morality. When McGinnis and Rappaport argue against construction for normative reasons, they implicitly recognize this point.

22. See Hart, *supra* note 20, at 123. Whether such deference is always possible is questionable. For example, in cases that involve conflicts between the political branches,

on normative grounds—in this case by the value of the rule of law—but it does not authorize judges to use their own beliefs about morality or politics to shape constitutional doctrine in particular cases. This principle of construction would bear strong resemblance to Thayer’s position.<sup>23</sup>

Construction becomes obvious—it grabs our attention—in cases in which the linguistic meaning of a legal text is vague. Once we have determined that the semantic content of the text is vague and that the case to be decided lies in the penumbra of the rule, interpretation cannot resolve the case.<sup>24</sup> Interpretation discerns linguistic meaning, but when a text is vague, then the output of interpretation (the semantic content of the text) is vague. In such cases, we might say that interpretation makes its exit and construction enters the scene. In cases where the text is vague and the resolution of the particular dispute requires the

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the courts might be required to adopt a construction that favors the executive over the legislative branch, or vice versa.

23. JAMES B. THAYER, *THE ORIGIN AND SCOPE OF THE AMERICAN DOCTRINE OF CONSTITUTIONAL LAW* (1893).

24. John McGinnis and Michael Rappaport seem to believe that interpretation can resolve vagueness. They argue as follows:

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

McGinnis & Rappaport, *supra* note 1, at 774. Their argument raises questions about the nature of vagueness that cannot be explored in depth on this occasion. The account of vagueness that I offered differentiates vagueness from ambiguity in precisely the respect in which McGinnis and Rappaport believe that vagueness and ambiguity are alike. I believe that the meaning of “vagueness” requires that vague words or phrases have borderline cases, where the word or phrase neither clearly applies nor clearly does not apply. McGinnis and Rappaport believe that vague expressions can always have a linguistic meaning that draws a bright line and, hence, provides (in theory) a bright line. On this occasion, I would simply observe that this account of vagueness will face difficulties in accounting for a variety of well-known linguistic phenomena. For example, if I were to say “please do not invite any tall men to my birthday party,” the McGinnis and Rappaport account demands that the linguistic meaning of that utterance somehow contain a bright line, i.e., 6’0”, such that every man is either tall or not tall. But this simply does not seem to track the way vague words and phrases work in actual natural languages. As the word “tall” is ordinarily used in English, its linguistic meaning simply does not include a bright line, and interpreting my hypothetical utterance as containing such a bright line would misconstrue its actual meaning.

Of course, there may be some words and phrases that are ambiguous as between vague and nonvague senses. For example, it is possible that, in some contexts of utterance, the word “tall” refers to a technical meaning that does draw a bright line. But the possibility that seeming vagueness can be resolved in this way does not entail the necessity that it can always be so resolved.

court to draw a line, the dispute-resolving work is being done by construction. Construction comes to the fore, and the prior work done by interpretation recedes into the background.

Constitutional construction might also become noticeable in a variety of other contexts. For example, it is at least theoretically possible that a legal text could contain gaps or contradictions. If two provisions of a given text (e.g., a contract, statute, or constitution) have semantic content such that the corresponding legal rules would contradict each other, then construction might resolve the contradiction—perhaps on the basis of an argument from the overall structure of the text, or from the purposes that could be attributed to the relevant provisions. Likewise, if there were a constitutional issue on which the text was silent, then a construction might fill the gap. Similarly, it is theoretically possible that there are some ambiguities that cannot be resolved by interpretation. For example, it could be the case that the available evidence about linguistic usage and context is simply not sufficient to reveal the public meaning of the provision.<sup>25</sup> Or it might be the case that a text was deliberately written in ambiguous language, perhaps because the drafters could not agree on some point and decided to paper over their disagreement with ambiguous language that would kick the can down the road for resolution by subsequent construction. If there were such irreducible ambiguities, then their resolution would require construction.

So far, I have been discussing the situations in which construction is obvious or noticeable. But construction also occurs in situations where it is overlooked or invisible, because interpretation has already done the work. Theoretically, this occurs when doctrine mirrors the semantic content of the text. For example, the Constitution provides: “The Senate of the United States shall be composed of two Senators from each state.” Our constitutional practice on this question is settled—the rule of constitutional law corresponds exactly to the

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25. John McGinnis and Michael Rappaport characterized construction differently—stating that it is the view of constructionists (including the author this Essay) that construction occurs whenever the text is either vague or ambiguous: “Constructionists—theorists who adhere to the distinction between interpretation and construction—believe that interpretation governs situations when the original meaning of a constitutional provision is clear, whereas construction governs situations when the original meaning is ambiguous or vague.” McGinnis & Rappaport, *supra* note 1, at 772. My view is that ambiguities can usually be resolved by interpretation (on the basis of the context of utterance), although it is at least theoretically possible that some ambiguities cannot be so resolved.

linguistic meaning of the written Constitution.<sup>26</sup> In other words, this is a case where the legal content of constitutional doctrine is equivalent to the semantic content of the text.

In other cases, the semantic content of the text constrains but does not fully specify the legal content of constitutional doctrine. Once again, Hart's picture of core and penumbra is helpful: the semantic content determines the core of constitutional doctrine, but other factors determine the shape of doctrines in the penumbra. In both cases, construction is at work, but construction in the core seems as if it is more or less automatic (or even seemingly "mechanical"<sup>27</sup>) and, hence, opaque or invisible. Construction in the penumbra requires resort to some theory or principle that is outside the constitutional text. Hence, construction in the penumbra involves judgment or choice and is obvious or noticeable.

We can call the zone of underdeterminacy in which construction (that goes beyond direct translation of semantic content into legal content) is required for application "the construction zone." The size of the construction zone will vary from text to text. Some legal texts are drafted in language that supplies bright line rules; other texts use general, abstract, and vague language that frequently requires construction that goes beyond mere translation of semantic content into legal content. For example, the United States Constitution contains provisions of both sorts. The provision that specifies that each State shall have two senators can be translated directly into practice: state legislators provide for election of two senators, not less and not more. But other provisions of the constitution may require extensive work in the construction zone: "due process of law," "the executive power of the United States," and "freedom of speech" are framed in abstract, general, and vague language.

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26. There may be possible cases where even the two-senators-per-state rule could not be translated directly into a corresponding rule of constitutional law. For example, if some science-fiction catastrophe resulted in a state with only one citizen, it is possible that the two-senators-per-state-rule would be modified. The existence of such possibilities is perfectly consistent with the idea that the legal content of constitutional doctrine mirrors the semantic content of the text in situations that actually arose and seem likely to arise in the future.

27. The notion that law cannot be mechanical is widely accepted following Roscoe Pound's famous article. See Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908). My claim in text is that construction can *seem* mechanical because the legally correct construction will seem obvious to competent legal practitioners. Whether construction can actually *be* mechanical is a different question, the answer to which would depend on what is meant by "mechanical" in this context.

## IV. OBJECTIONS

These remarks do not provide the occasion for a systematic justification or defense of the interpretation-construction distinction. Nonetheless, I shall say a few words about some of the objections that might be posed.

## A. THE PERSUASIVE DEFINITION OBJECTION

One possible objection would focus on the idea that the interpretation-construction distinction involves a fallacy of persuasive definition. Originalists use the distinction to mark the difference between the Originalist enterprise of determining the linguistic meaning of the Constitution—constitutional interpretation—and the nonoriginalist enterprise of specifying the content of constitutional doctrine where the Constitution is vague (or otherwise underdeterminate)—**constitutional construction**. (??? Error) It might seem that the point of the distinction is to argue that constitutional interpretation must be Originalist by definitional fiat.<sup>28</sup>

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28. Andrew Coan made this argument. See Andrew B. Coan, *The Irrelevance of Writeness in Constitutional Interpretation*, 158 U. PENN. L. REV. 1025, 1077–83 (2010). Here is the core of his statement of the argument:

The first is the claim that interpretation simply is the search for original meaning. As we have seen already, it is difficult to make sense of this claim as a matter of descriptive analysis. It is easy, however, to make sense of it as an instance of persuasive definition. In fact, it tracks the three core features of persuasive definition perfectly.

First, interpretation is a vague term that is commonly applied to a wide variety of quite different activities. It certainly can and often does refer to the search for a document's original meaning, as originalists would have it. But, as discussed earlier, it is also commonly used to describe a wide range of practices that have little or nothing to do with the search for original meaning. What these varied activities have in common, if anything, is unclear but not particularly important for present purposes. The important point is that the term interpretation is used flexibly and expansively with no clear line distinguishing its literal and metaphorical uses. For this reason, it is relatively easy for a narrow definition of interpretation, emphasizing one easily recognizable subset of interpretive practice, to pass as merely clarificatory or descriptive--perhaps even to its proponents. Where the precise bounds of a term are unclear, it is more difficult to detect when they have been moved or crossed.

Second, interpretation has strong positive associations in the context of constitutional decisionmaking, especially constitutional decisionmaking by judges. Indeed the idea that judges should interpret, rather than make or change, the Constitution is so closely and instinctively associated with core values of our legal system as to be practically axiomatic. This makes the term "interpretation" a valuable prize indeed in normative constitutional discourse. If originalists can appropriate it for themselves, they will have succeeded in placing their theoretical opponents in a very tight rhetorical spot. Who, in the contemporary American legal culture, wants to argue that judges in constitutional cases should do something other than interpret the Constitution? Perhaps a few contrarian (or tone-deaf) academics, but certainly no one else.

That argument is mistaken. From the point of view of legal theory, the terminology is arbitrary. For example, we could redescribe the distinction using alternative terminology: we might distinguish between “constructive interpretation” and “linguistic interpretation” or between “interpretation in the semantic sense” and “interpretation in the applicative sense.” The important point is that there is a real difference between the activity that this Essay calls “interpretation,” and the activity that this Essay calls “construction.” That is, there is a real difference between linguistic meaning and legal effect, and between semantic content and legal content. That real difference would remain if the vocabulary were changed.

One more point here. Originalists did not invent the interpretation-construction distinction. It has a long pedigree in legal usage—the distinction appears in contract law, the law of trusts and wills, patent law, and in constitutional law, as well. The distinction can be traced back at least as far as Franz Lieber’s 1839 text, *Legal and Political Hermeneutics*.<sup>29</sup> And distinguished scholars in a variety of doctrinal fields discussed it.<sup>30</sup> For the distinction to be an example of the persuasive definition fallacy, in the sense specified by C.L. Stevenson,<sup>31</sup> there must have been an attempt to covertly substitute a stipulated definition for ordinary usage, but that has not happened in the case of this distinction. The distinction arose before contemporary debates about Originalism in constitutional theory and plain meaning in statutory interpretation. The point of the interpretation-construction distinction is to clarify debates, not to assume their conclusions.

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*Id.* at 1081–82. I believe that Coan’s argument is both uncharitable and flatly mistaken as applied to the major originalist theorists who embraced the interpretation-construction distinction. Whatever the merits of the argument as addressed to others, it is clear that it has no force as applied to the explication of the interpretation-construction distinction in this essay.

29. FRANCIS LIEBER, *LEGAL AND POLITICAL HERMENEUTICS* 55–82 (Roy M. Mersky & J. Myron Jacobstein eds., Wm. S. Hein & Co. 1970) (1839), available at [http://books.google.com/books?id=\\_wwAAAAAYAAJ&dq=lieber+interpretation+construction&source=gbs\\_navlinks\\_s](http://books.google.com/books?id=_wwAAAAAYAAJ&dq=lieber+interpretation+construction&source=gbs_navlinks_s).

30. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 200 (1981); 3 ARTHUR L. CORBIN, *CORBIN ON CONTRACTS* § 534, at 7–15 (1960); 2 E. ALLAN FARNSWORTH, *FARNSWORTH ON CONTRACTS* § 7.7, at 255–56 (2d ed. 1998); Edwin W. Patterson, *The Interpretation and Construction of Contracts*, 64 COLUM. L. REV. 833 (1964); Keith A. Rowley, *Contract Construction and Interpretation: From the “Four Corners” to Parol Evidence (and Everything in Between)*, 69 MISS. L.J. 73 (1999); Richard F. Storrow, *Judicial Discretion and the Disappearing Distinction Between Will Interpretation and Construction*, 56 CASE W. RES. L. REV. 65 (2005);

31. C.L. Stevenson, *Persuasive Definitions*, 47 MIND 331 (1938).



### B. THE REDUCTION OF LINGUISTIC MEANING TO LEGAL EFFECT

A second response to the interpretation-construction distinction might claim that the semantic meaning of legal texts, in general (and the Constitution, in particular), simply is the legal meaning of the associated doctrines. In other words, it might be argued that linguistic meaning (semantic content) can be *reduced* to legal effect (legal content). Although one can imagine heroic efforts to redeem this claim, it is surely implausible on its face. For example, we can talk about a divergence between the rules of constitutional law and the linguistic meaning of the constitutional text, but such talk would be mistaken and even absurd if it were a conceptual truth that the legal content simply *is* the semantic content.<sup>32</sup> Similarly, we can investigate the linguistic meaning of a legal text that is no longer in force, or that was never enacted, but if the claim that semantic and legal content are identical were true, such investigations would be senseless<sup>33</sup>—the equivalent of an attempt to investigate the nature of phlogiston.<sup>34</sup>

This point is an important one, and it can be illustrated clearly by a familiar example. Take the case of a will that may violate the rule against perpetuities. When a lawyer or judge is analyzing the will, the first step is interpretation: what is the linguistic meaning of the text? If the will does (as a matter of linguistic fact) contain a provision that would create perpetuity, the next step requires construction—determining the legal effect of the will. In some cases, the will may be given a saving construction (or reformation).<sup>35</sup> The second step is construction: what legal effect shall be given to the will? In answer to this question, the court can substitute a provision that matches the semantic content of the will as closely as possible without

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32. Notice that the assertion that the semantic content is identical to the legal content is not the same as the assertion that the semantic content determines (or even wholly determines) legal content. There may be cases in which the semantic content of a legal text wholly determines the legal content of the legal doctrine associated with the text (and, hence, the legal effects of the text), but, in such cases, the linguistic meaning and the legal effect are two distinct entities.

33. If the semantic content of an inoperative legal text were equivalent to the legal effect or legal content, then the inoperative text would have no meaning (since, by definition, inoperative legal texts have no legal effect). This would lead to some very odd consequences. For example, proposed legislation is not legally operative and, therefore, would have no linguistic meaning.

34. CHARLES SINGER, *A SHORT HISTORY OF SCIENTIFIC IDEAS TO 1900*, at 281 (1959).

35. See *Hochberg v. Proctor*, 805 N.E.2d 979, 984 (2004).

violating the rule against perpetuities. The claim that the linguistic meaning of a legal text just *is* its legal meaning requires that we see cases like this in a very odd and counterintuitive way. If the linguistic meaning of the will were the legal meaning, then there would be no perpetuities problem and no need for a saving construction. But our understanding of cases like this is that the linguistic meaning of the text *did* create a perpetuities problem, and that the saving construction was not part of that linguistic meaning, but was, instead, something that the court did *to* the will. The theory that semantic content and legal content are identical does not save the appearances, because it suggests that ordinary ways of talking about legal texts are radically mistaken.

John McGinnis and Michael Rappaport proposed an ingenuous version of the reduction argument. They argue that the linguistic meaning of the Constitution is determined by both general linguistic facts (conventional semantic meanings and regularities of syntax and grammar) *and* by legal facts (the canons of interpretation and construction that exist at the time a given provision is framed and ratified). Here is their statement of the argument:

Originalists argue that the Constitution's meaning is fixed as of the time of enactment. Originalists—both of the original intent and original meaning variety—argue that modern interpreters should be guided by the word meanings and rules of grammar that existed when the Constitution was enacted. But word meanings and grammatical rules do not exhaust the historical material relevant to constitutional interpretation. There are also interpretive rules, defined as rules that provide guidance on how to interpret the language in a document. It is our position that Originalism requires modern interpreters to follow the original interpretive rules used by the enactors of the Constitution as much as the original word meanings or rules of grammar.<sup>36</sup>

This version of the argument does not commit the logical mistake of conflating semantic content and legal content. Instead, it argues that legal rules of interpretation and construction are, themselves, a special kind of linguistic fact that operates causally to create a perfect correspondence between linguistic meanings and legal effects.

A full answer to this objection is outside the scope of this Essay, but, given the importance of the point to the viability of

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36. McGinnis & Rappaport, *supra* note 1, at 756.

the interpretation-construction distinction, a brief discussion is appropriate.

The relationship between the canons of interpretation and construction that are applied to legal texts and the legal meaning of those texts is complex. My discussion of that relationship begins by applying the interpretation-construction distinction to the canons themselves. This enables us to see that canons (or rules, or principles) of construction can actually be sorted into two kinds—canons of *interpretation* and canons of *construction*.

Canons of *interpretation* are rules of thumb—they point judges and other legal actors to facts about the way language works and to reliable procedures for making inferences about linguistic meaning. For example, as a rule of thumb, when we are faced with two possible readings of a text, and one reading makes part of the text superfluous, we can infer that the reading that would result in each and every provision *adding* meaning is more likely to be the correct reading.<sup>37</sup> But this is only a rule of thumb that summarize a general linguistic regularity (intuitively grasped by competent users of the language).<sup>38</sup> There could be evidence that suggests that the redundancy was intentional—for emphasis, or to guard against misinterpretation.

Canons of *construction* operate differently. A canon of construction guides the process by which linguistic meaning is translated into legal effect. The so-called “substantive” canons are clear examples of canons of construction. For example, the avoidance canon tells judges to construe statutory language so as to avoid constitutional issues.<sup>39</sup> The point of this canon is not linguistic accuracy. Rather, the avoidance canon makes a difference precisely in those cases in which the ordinary linguistic meaning of a statute would create a constitutional issue.

Consider now the relationship between the two different kinds of canons and the argument that methods of interpretation are analogous to rules of grammar and syntax. It is clear that

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37. See *Wash. Mkt. Co. v. Hoffman*, 101 U.S. 112 (1879) (“It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word.”); *Lutheran Day Care v. Snohomish Cnty.*, 829 P.2d 746, 751–52 (1992) (“Statutes should not be interpreted in such a manner as to render any portion meaningless, superfluous or questionable.”).

38. Cf. *Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 245 (2008) (Breyer, J., dissenting) (observing that some canons of interpretation “simply crystallize what English speakers already know”).

39. See generally William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831 (2001).

canons of *interpretation* are not constitutive of meaning—they are mere rules of thumb. But the linguistic regularities that we call “rules” of syntax and grammar are constitutive: these linguistic regularities enable individual words and phrases to combine in complex ways. It would be a conceptual mistake to conflate the distinction between these two different roles.

What about canons of *construction*? Do they function in a way that is relevantly similar to the rules of grammar and syntax in the production of the linguistic meaning of legal texts? Once we attend to the actual way these canons function, it becomes apparent that they do not. The substantive canons, such as the avoidance canon, are parasitic on the interpretation-construction distinction. They assume that linguistic meaning is distinction from legal effect: they operate as general rules or principles that operate on semantic content to produce legal content. Thus, the existence of canons of *construction* actually is evidence that counts in favor of the existence of the interpretation-construction distinction.

For this reason, McGinnis and Rappaport’s argument does not establish that linguistic meaning reduces to legal meaning (as determined by original methods), or that semantic content is identical to legal content (again, as determined by original methods). But the fact that their argument does not establish reduction in general does not imply that legal conventions governing interpretation *never* operate to determine linguistic meaning. One can easily imagine examples where the linguistic meaning of an utterance would be, in part, determined by a specialized legal convention that might be called a canon of interpretation or construction. Such examples are most plausible in cases where the authoritative legal text is addressed to a specialized audience of legal practitioners (e.g., the more technical provisions of the Internal Revenue Code). But the fact that legal conventions *sometimes can* determine linguistic meaning does not imply that they *always must* play this role.

### C. THE IRRELEVANCE OF SEMANTIC CONTENT OBJECTION

A third response to the interpretation-construction distinction might employ the method of confession and avoidance: yes, there is a distinction between the linguistic meaning of the constitutional text and constitutional doctrine, but the linguistic meaning is simply irrelevant, as far as the law is concerned. Once again, we can imagine heroic efforts to make good on this claim. For example, it might be argued that the

linguistic meaning of the text is radically indeterminate: if this were the case, then all the work of shaping constitutional doctrine would be done by construction. It is far from clear that claims of the radical indeterminacy of language are even plausible, much less correct.<sup>40</sup>

A more modest version of the irrelevance criticism might claim that, even when the language of legal texts is neither vague nor ambiguous, legal doctrine may depart from the language. There are situations in which this seems to be the case. The First Amendment says “Congress shall make no law,” but this provision applies to executive and judicial action. Much needs to be said about such cases, but, on this occasion, I will offer only one observation. Neither the existence of such examples in some cases, nor the theoretical possibility that all provisions might be construed to create doctrines that are inconsistent with the text, implies the irrelevance of the interpretation-construction distinction. It seems obvious that the linguistic meaning of the text is (at the very least) an important consideration in the development of constitutional doctrine. So long as the semantic content of legal texts contributes (in some nontrivial way) to legal content, thereby making a difference to the legal effect of the texts, the distinction between interpretation and construction is at least relevant to legal practice.

#### V. THE INDISPENSABILITY OF THE INTERPRETATION-CONSTRUCTION DISTINCTION

Although the main point of this short Essay is simply to explicate the interpretation-construction distinction, I also want to say a few words about the distinction’s importance or value. In particular, I want to advance the strong claim that the distinction is indispensable—that legal theory cannot do without this claim. Of course, when I say “indispensable,” I mean to use that term in its normative sense: if we try to do legal theory without the distinction between semantic content and legal content, our theories will be defective—they will not capture the real structure of the processes by which authoritative legal texts are explicated and applied. One more caveat: although the distinction between “interpretation” and “construction” is indispensable, those particular words are being used in a

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40. Solum, *supra* note 21 (discussing the claim that law is radically indeterminate).

technical sense. A different vocabulary could be used to describe the distinction.

Why do I believe that the interpretation-construction distinction is something that legal theorists must acknowledge? Another way of framing the question might be this: what is the payoff of the interpretation-construction distinction? The answer to this question focuses on conceptual clarity: without the interpretation-construction distinction, our thinking about law will necessarily be confused. To see why this is the case, we can return to constitutional theory—and the debate between Originalists and Living Constitutionalists.<sup>41</sup>

Originalists assert that the meaning of the Constitution is the original public meaning of the text: in the case of the Constitution of 1789, that means that the meaning of the text is a function of the conventional semantic meaning of the words, phrases, and patterns of usage (rules of syntax and grammar) that prevailed at the time these provisions of the Constitution were framed and ratified. Living constitutionalists understand themselves to be disagreeing with Originalists. They argue that the meaning of the Constitution must and should adapt to changing circumstances and values. As we all know, this debate has been going on for quite some time, and it seems to have resulted in what we might call “dialectical impasse”—with each side absolutely certain that the other side is making a huge mistake (perhaps the product of stupidity, ingenuousness, or bad faith).

But once we have the interpretation-construction distinction at hand, it turns out that some of the apparent disagreement between Originalism and Living Constitutionalism dissolves, and that the remainder is reconfigured. The core of Originalism is a theory of constitutional interpretation: Originalists claim that the linguistic meaning of the constitution is fixed by linguistic facts at the time that each constitutional provision is framed and ratified. Most Originalists also affirm a partial theory of constitutional construction: they claim that the legal content of constitutional doctrine should be constrained by the linguistic content of the text. To simplify for purposes of exposition, Originalists believe that the legal content of constitutional doctrine must be consistent with the semantic content of the constitutional text—

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41. This discussion adapts remarks in *Semantic Originalism*. See Solum, *supra* note 2.

although there may be special circumstances in which inconsistencies are allowed.

Living constitutionalism, on the other hand, is primarily a theory of constitutional construction. Living constitutionalists believe that the legal content of constitutional doctrine must change with changing circumstances and values. Although there may be Living Constitutionalists who believe that that the commitment to change in constitutional doctrine requires them to deny that the linguistic content of the Constitution is fixed, that belief is obviously false. Even if the linguistic meaning of the Constitution is fixed (as originalists recognize), the content of constitutional doctrine can grow and change over time (as it obviously does). One reason for this phenomenon is the fact of constitutional underdeterminacy: many constitutional provisions are general, abstract, and vague. “Legislative power” and “freedom of speech” are examples. When a legal provision is vague, then semantic content underdetermines legal content. Thus, a variety of specific rules regarding prior restraints could be consistent with the linguistic meaning of the First Amendment, and these specific rules could change over time.

Once the interpretation-construction distinction is recognized, it becomes apparent that some (and perhaps even many) aspects of the debate between Originalists and Living Constitutionalists are the product of conceptual confusion. In fact, some forms of living constitutionalism may actually be compatible with some forms of originalism. If Living Constitutionalists are willing to live within what we can call “the construction zone”—the zone of indeterminacy created by the general, abstract, and vague provisions of the Constitution—they can embrace the notion that the linguistic meaning of the constitutional text was fixed at the time of framing and ratification. If Originalists are willing to accept that constitutional doctrine should and must change over time *within the limits imposed by the original meaning of the text*, then they can accept a constrained version of Living Constitutionalism.

I said that some forms of living constitutionalism might be consistent with some forms of originalism. Other forms of these two theories may be inconsistent. For example, if some Living Constitutionalists believe that the linguistic meaning of the text does not, in any way, constrain the content of legal doctrine, then those Living Constitutionalists wholly reject originalism. Likewise, if some Originalists believe (in my opinion, mistakenly) that there are no vague provisions in the

Constitution, then those Originalists might wholly reject living constitutionalism.

For our purposes, the point is that the true shape of the debate between Originalists and Living Constitutionalists only comes into view when we acknowledge the interpretation-construction distinction and the related distinctions between vagueness and ambiguity, and between semantic content and legal content. A similar point might be made about contemporary debates about statutory interpretation and construction. Advocates of “plain meaning” are concerned with interpretation—with the notion that the linguistic meaning of a statute should constrain the range of acceptable constructions. Advocates of “purposivism” or “dynamic interpretation” are focused on construction: their position could be reformulated as the claim that the construction of statutes should be guided by purposes, and the further notion that some normative justified constructions may override the linguistic meaning of the statutory text, in some range of circumstances.

#### CONCLUSION

I hope to have accomplished two tasks. The first and most important of these is simply to explicate the interpretation-construction distinction—to say what that distinction is. The second task is to give a sense of the importance of the distinction—to say something about the role it must and should play in legal theory. Of course, this leaves many important questions of legal practice unanswered. In particular, I did not tackle the question, “when should construction override the linguistic meaning of an authoritative legal text?” But I hope that I demonstrated that the question is clearer and more perspicuous if it is asked in that way.