THE CONSTITUTIONAL INTERPRETATION/CONSTRUCTION DISTINCTION: A USEFUL FICTION

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INTRODUCTION

Since the 1990s, theories of constitutional interpretation have experienced a sea change. Some scholars have claimed that the old debate between originalism and nonoriginalism has gone by the wayside and that it is less accurate nowadays to describe the differences between these theories of American constitutional interpretation in terms of originalism and "non" anything.[1] Others have suggested that the differences are better conceived of in terms of variations within the originalism family. For example, Jeffrey Rosen in 1997 exclaimed, "We are all originalists now."[2] More recently, that notion was repeated by some[3] in response to the Supreme Court's decision in *District of Columbia v. Heller*.[4] Even so, not all agree.[5]

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1. *See* Stephen M. Griffin, *Rebooting Originalism*, 2008 U. ILL. L. REV. 1185, 1194 (2008) (noting that since the 1990's the legal academy has generally accepted that the alternative to "originalism" is "not 'non' anything, but rather the conventional, historically grounded, traditions of constitutional interpretation").

2. Jeffrey Rosen, *Originalist Sin: The Achievement of Antonin Scalia, and its Intellectual Incoherence*, NEW REPUBLIC, May 5, 1997, at 26 (book review) ("Most judges and legal scholars who want to remain within the boundaries of respectable constitutional discourse agree that the original meaning of the Constitution and its amendments has some degree of pertinence to the question of what the Constitution means today.").

3. *See, e.g.*, Dave Kopel, *Conservative Activists Key to DC Handgun Decision*, HUMAN EVENTS (June 27, 2008), http://www.humanevents.com/article.php?id=27229 (In *Heller*, "The Scalia majority and Stevens dissent are both argued mostly in terms of original meaning and textualism. Both Scalia and Stevens delve very deeply into 18th and

Ultimately, differences between originalism and nonoriginalism remain.[6] In fact, not only are there a wide range of alternatives to originalism,[7] there are a number of variations

19th century sources on the meaning of words, and the original public understanding of the Second Amendment. At least in terms of the Second Amendment, we are all originalists now."); *see also* Dahlia Lithwick, *The Dark Matter of Our Cherished Document: What You See in the Constitution Isn't What You Get*, SLATE (Nov. 17, 2008, 2:25 PM), http://www.slate.com/id/2204377/ (book review) ("The liberals and conservatives [in *Heller*] took turns trying to outdo one another as 'textualists' and 'originalists' and 'strict constructionists.'").

4. 128 S. Ct. 2783, 2799, 2821–22 (2008) (holding that the Second Amendment conferred an individual right to keep and bear arms and although that right was not unlimited, the District of Columbia's statutory ban on handgun possession in the home and its requirement that all firearms in the household be kept in a manner that prevented their immediate use for self-defense violated the Second Amendment).

5. *See, e.g.,* Jamal Greene, Heller *High Water?: The Future of Originalism*, 3 HARV. L. & POL'Y REV. 325, 326 (2009) (arguing against the "we are all originalists" claim, stating "Not only are we not *all* originalists now, but very few of us are originalists *now*.") (emphasis in original); *see also* Cass Sunstein, *Second Amendment Minimalism:* Heller *as* Griswold*,* 122 HARV. L. REV. 246, 246–48 (2008) (arguing that the most plausible explanation for the Court's decision in *Heller* is rooted in the idea of living constitutionalism, not originalism. Professor Sunstein claims that *Heller* is more closely related to *Griswold v. Connecticut*—where the Court struck down Connecticut's ban on the use of contraceptives by married couples—because both "narrow rulings with strong minimalist features," are best explained as responsive to national consensus and contemporary values "notwithstanding the Court's preoccupation [in *Heller*] with constitutional text and history"). For additional analyses of *Heller* as an example of living constitutionalism, see Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549 (2009); Adam Winkler, Heller*'s Catch-22*, 56 UCLA L. REV. 1551 (2009).

6. Although (as noted above) some have suggested that the alternative to originalism is not "non" anything, for purposes of clarity, this article uses the term "nonoriginalism" or "nonoriginalist" to represent the diversity of alternative approaches to originalism.

7. A full discussion of these alternative approaches to constitutional interpretation is beyond the scope of this article. *But see, e.g*., Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 557 (2009) (arguing that living constitutionalism is harmonious with what he defines as "framework originalism"); Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291 (2007) [hereinafter Balkin, *Original Meaning*]; Jack Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 427 (2007) [hereinafter Balkin, *Constitutional Redemption*] (presenting a "theory of text and principle" which he defines as "redemptive constitutionalism"); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1192–94 (1987); Howard Gillman, *Political Development and the Origins of the Living Constitution* (Digital Commons, Paper 53, 2006), *available at* http://digitalcommons.law.umaryland.edu/schmooze_papers/53; Jack M. Balkin, *Alive and Kicking: Why No One Truly Believes in a Dead Constitution*, SLATE (Aug. 29, 2005, 5:15 PM), http://www.slate.com/id/2125226/ ("We are all living constitutionalists now."). For a theory that holds that extraordinary popular mobilizations have revised the Constitution's commands from time to time see Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737 (2007). For a discussion describing constitutional change through popular mobilization and other varieties of living constitutionalism see Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 CALIF. L. REV. 959, 967–74 (2004).

within originalism itself.[8] New Originalism has emerged as one such variation. One of the fundamental distinctions between Old and New Originalism is that the former tended to focus on the original intentions of the authors of a particular legal text whereas the latter tends to focus on the "original public meaning" of the particular legal text, which is the meaning that the intended audience would have assigned to a given word, phrase, or sentence at the time it was drafted.[9] The full contours of New Originalism as distinguished from Old Originalism are beyond the scope of this paper. Generally speaking, however, New Originalism explains the theory of American constitutional interpretation as something of a dual process: First, one must look to the original public meaning (interpretation) and when that runs out, look to other sources that might reliably fill out the contours of that interpretation (e.g., history and tradition surrounding the text, the structure of the text, court precedent, etc).[10] The second part of this process is what is often referred to as "construction."

This is unobjectionable so far as it goes. It suggests that the break from Old to New Originalism was something of a natural development. Think about it: the originalism that thrived in the 1960s through the mid-1980s concentrated on (at least) two commitments: (1) pushing against the doctrinal developments of the Warren Court and (2) constraining judicial activity by limiting judicial discretion.[11] By the early 1990s, the transition from the Burger Court to the Rehnquist Court made the judicial opinions that old originalists were railing against less frequent,

8. *See, e.g.,* CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 26 (2001) ("Originalism comes in a bewildering variety of colors and flavors."); Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 9–16 (2009) ("[L]iterally thousands of discrete theses can plausibly claim to be originalist"); Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1812 (1996) ("If ever a term muddied as much as it clarified, 'originalism' is it.").

9. For a discussion of original meaning, original intent, and original public meaning see Lawrence B. Solum, District of Columbia v. Heller *and Originalism*, 103 NW. U. L. REV. 923, 926–33 (2009).

10. For more in-depth discussions about the specifics and developments contained in New Originalism, see RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004); KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION (1999) [hereinafter WHITTINGTON, CONSTRUCTION]; KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW (1999) [hereinafter WHITTINGTON, INTERPRETATION]; Balkin, *Constitutional Redemption, supra* note 7; Balkin, *Original Meaning, supra* note 7.

11. *See* Jack M. Balkin, "*Wrong the Day It Was Decided":* Lochner *and Constitutional Historicism,* 85 B.U. L. REV. 677, 690 (2005) ("The old originalism was designed to promote judicial restraint and criticize the judicial innovations of liberal judges in the 1950's, 1960's, and 1970's.").

thereby making these two commitments less necessary.[12] What surfaced afterward and replaced the commitment to subverting "activist" theory (and practice) was a need to develop a positive constitutional doctrine that was (1) based on the text of the Constitution and (2) capable of guiding the actual activities of federal judges. Indeed, as conservatives came to dominate the Supreme Court, originalism needed to provide a workable theoretical foundation to support majority opinions, *i.e.*, create a constructive governing philosophy. To a large extent, I think New Originalism in general, and the constitutional interpretation/construction debate in particular is responding well to that call. However, it is hardly an effort without strife, both internal and external. Even among New Originalists, the debate over where interpretation ends and where construction begins is contested, as is the battle over whether the judiciary plays a dominant role or subservient role in the construction effort.

The source of the conflict, ironically enough, is located in a theoretical position that nearly all New Originalists share—namely, that constitutional interpretation requires some degree of judgment. The interpretation/construction distinction admits that at a certain point interpretation (original public meaning) exhausts itself and can no longer provide the linguistic cues necessary to explain the text or guide our application of it, and that when original public meaning runs out, constitutional meaning must be constructed through the exercise of judgment.

Recent work discussing the distinction displays a range of attitudes with respect to who gets to make the judgment and the form that judgment should take. Some writers have expanded the debate beyond the originally offered definitions for "interpretation" and "construction" and argue that "construction" has little to do with finding textual meaning at all, but rather is related solely to the implementation of policy and constitutional decisions—*i.e.,* a purely political activity. Others have asserted that the distinction between interpretation and construction does not capture a real difference—that the two

12. For an analysis of the Rehnquist Court focusing on its pro-state power federalism opinions, opinions overturning affirmative action programs, and opinions reversing liberal precedents on criminal procedure, see THOMAS M. KECK, THE MOST ACTIVIST SUPREME COURT IN HISTORY: THE ROAD TO MODERN JUDICIAL CONSERVATISM 2 (2004) ("Judicial conservatism born in reaction to the liberal judicial activism of the Warren Court has come to create not judicial restraint but instead its own version of judicial activism.").

activities are so intertwined as to be inseparable, that they are connected phases of a single task. As I will discuss below, I tend to pitch my tent in the second camp and view the line between interpretation and construction as artificial, as it defies all practical attempts to draw it consistently from case to case. No one has developed a formula for predictably discerning between the two activities and it is doubtful that such a formula, if devised and presented, would win more than minority support among constitutional scholars.

Nevertheless, I think the distinction is important, in that it reminds theorists of the dual nature of constitutional interpretation—between what the Constitution means and how the Constitution can be implemented. This is a distinction which should not be overlooked or conflated. Ultimately, the distinction may only prove useful in trying to figure out what the Court *is* doing rather than trying to figure out what the Court *should* do. Still, by incorporating actual judicial activity into the theoretical discussion of American constitutional interpretation, the interpretation/construction distinction appropriately highlights two key areas for further analysis: how to determine what the Constitution means (*i.e.*, document fidelity) and how a particular institutional actor can implement that meaning (*i.e.*, institutional obligation). Against this backdrop, this Article argues that the constitutional interpretation/construction distinction is a fiction, but a useful one in constitutional law.

Part I briefly describes the interpretation/construction distinction as an artificial construct—a fiction.[13] The many commentaries on the subject encompass such a wide range of positions that the distinction, to the extent it truly exists at all, does so in the eye of each individual beholder. In Part II, I argue that the distinction, even if understood as a fiction, is nevertheless relevant because it can be used to bridge the expanse between originalist and nonoriginalist (or, if one prefers, between "strong" and "weak" originalist) theories of American constitutional interpretation. Put another way, the fiction is useful. In Part III then, I turn to the idea of usefulness. Focusing on how the distinction may be relevant, I suggest that maintaining a distinction between interpretation and construction is ultimately positive because it offers a new language system in which to continue a more meaningful debate

13. For a discussion of the use of the word "fiction," see *infra* notes 23–28 and accompanying text.

between different interpretive theories. In other words, the appeal of the distinction is its ability to move constitutional commentary away from ideological entrenchment to a more meaningful discussion about both the process and substance of constitutional adjudication.

I. THE INTERPRETATION/CONSTRUCTION DISTINCTION AS FICTION

In the 1990s, some constitutional theorists began to craft a distinction between constitutional interpretation and constitutional construction, and this work has received renewed interest of late, although even those who claim to see this distinction disagree on exactly what it is. Some frame the distinction as a bright line between two distinct activities. Larry Solum, for example, defines the distinction as follows: "Interpretation is the activity that aims to recover the linguistic meaning (or semantic content) of a legal text. Construction is the activity that aims to produce juridical meaning (or legal content) that is authorized by a legal text."[14] Thus, for Solum, interpretation is a kind of archaeology in which the meaning of the words and phrases of the Constitution is determined through a close reading of the text, which itself is informed by a strong knowledge of the language as it was used at the time of composition. Construction, by contrast, is something altogether different. In Solum's view, construction is what happens when judicial and non-judicial actors take the product of the interpretation enterprise—*i.e.,* the recovered meaning of the text—and then implement that meaning through legal rules that govern everyday social and political life. Note also that, for Solum, judges are intimately involved in the construction effort.

Keith Whittington also presents interpretation and construction as two distinct activities, but he divides up the tasks a little differently. His early work drew a sharp line between the two activities and argued that courts were principally responsible for and should be limited to interpretation, while the political

14. Professor Solum articulated this most recent iteration of the interpretation/construction distinction. *See, e.g.,* Solum, *supra* note 9, at 973 (providing an expanded definition of "construction" as "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"); Lawrence Solum, *Graber on the Interpretation-Construction Distinction at the AALS*, LEGAL THEORY BLOG (Jan. 13, 2010, 4:19 AM), http://lsolum.typepad.com/legaltheory/2010/01/graber-on-the-interpretationconstruction-distinction-panel-at-the-aals.html.

branches were principally responsible for and should direct constitutional construction.[15] Whittington's later work eased up on the force of this initial argument. He now acknowledges that courts have a role to play in constitutional construction, but that the supremacy of those judicial constructions are ultimately permitted to exist through the grace of the political branches who use judicial construction as a mechanism for political advantage.[16] For example, if political actors want "cover" on an unpopular issue, they can express their personal view on the issue itself, while maintaining their commitment to enforce the decisions of the Court as the law of the land. The abortion debate is a ready example. As the Court placed abortion on the national agenda amid polarization among the Democratic Party, then-President Jimmy Carter could not take a clear position on the issue without marginalizing part of the Democratic Party. Whittington discusses how President Carter, whose own "conservative and evangelical characteristics appealed to pro-life voters" deferred to the Court when asked in 1980 how he could "support abortion."[17] Nevertheless, Whittington's basic position has not changed. He still places primacy of constitutional construction in the hands of the political branches. Judicial participation in the construction phase should occur only when it serves the interests of the political branches.

Others retain the dual framework, but adjust the line between the two. Mitch Berman expands Solum's definition of "interpretation" to include other modalities, not just semantic or linguistic content that point to "what the law is."[18] Still others argue that a variety of possible interpretation/construction distinctions exist, but that each depends on the nature of the problem being addressed. In a thoughtful and thought-provoking post, Mark Graber conceptualizes various types of

15. *See* WHITTINGTON, CONSTRUCTION, *supra* note 10; WHITTINGTON, INTERPRETATION, *supra* note 10.

16. KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY (2007).

17. *Id*. at 66–68.

18. Mitchell, N. Berman, *Constitutional Constructions and Constitutional Decision Rules: Further Thoughts on the Carving of Implementation Space*, 27 CONST. COMMENT. 39, 45 (2010). For a discussion of these "other modalities" *see* PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1982) [hereinafter BOBBITT, FATE] (discussing a modal theory of the Constitution, which conceives of six valid forms or "modalities" of constitutional argument: historical, textual, doctrinal, structural, prudential, and ethical). *See also* PHILIP C. BOBBITT, CONSTITUTIONAL INTERPRETATION (1991) [hereinafter BOBBITT, INTERPRETATION] (elaborating on the modal theory from Constitutional Fate).

interpretation/construction distinctions formed around various problems. Among other things, Graber posits one can express the interpretation/construction distinction in terms of certainty: interpretation takes place when the meaning of the Constitution is clear or when the interpreter claims to have found an objective "right" answer to what the particular constitutional provision means. On the other hand, construction takes place when the meaning of the particular constitutional provision is contested or the answer is not objectively correct. Another possible distinction is one addressing meaning or methods. In that instance, interpretation describes the activity of looking for the original public meaning of the Constitution while construction describes all other forms of constitutional analysis. Still another distinction between the two can be offered to explain the difference between meaning and implementation: interpretation occurs when we look for the meaning of the Constitution while construction occurs when we "operationalize that meaning into principles of constitutional law."[19]

On the opposite end of the spectrum, are those that do not see a line at all. For example, Rick Hills argues that the two activities cannot easily be separated, "pragmatically speaking, the meaning of a constitutional provision *is* its implementation."[20] Although here Hills frames his comments in terms of "implementation" rather than "construction," the two operate as functional equivalents. Indeed, Hills' work in this area develops and extends Richard Fallon's work focusing on the rules courts develop to "implement" constitutional commands. Fallon defines "implementation" in terms that are strikingly similar to the current understanding of the "construction" prong of the distinction.[21] Fallon's 2001 book took a macro-level perspective to discussing doctrinal developments. In particular, Fallon discussed the Court's necessity of rules-construction based on constitutional meaning to decide particular cases. He argued that the majority of the

19. Mark Graber, The Interpretation/Construction Distinctions, BALKINIZATION BLOG (Jan. 12, 2010, 2:41 PM), http://balkin.blogspot.com/2010/01/much-constitutional-theory-over-past.html.

20. Roderick M. Hills, Jr., *The Pragmatist's View of Constitutional Implementation and Constitutional Meaning*, 119 HARV. L. REV. F. 173, 175 (2006) (emphasis in original).

21. RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 5 (2001) ("The term *implementation* invites recognition that the function of putting the Constitution effectively into practice is a necessarily collaborative one, which often requires compromise and accommodation. It also emphasizes the practical, frequently strategic aspects of the Court's work [including] the formulation of constitutional rules, formulas, and tests.").

time the Court was not choosing between originalist and nonoriginalist theories, but instead was simply applying or adjusting rules from precedent cases to meet new circumstances.[22]

The disagreement over whether and where to draw the line dividing interpretation from construction suggests that the point of distinction between the two cannot be fixed by the unwavering certitude of "fact" but may be shaped instead by the fluid inventiveness of "fiction." Here, I am indebted to and tend to share Lewis H. LaRue's explanation and use of the word "fiction" in his 1995 work *Constitutional Law as Fiction: Narrative in the Rhetoric of Authority*.[23] LaRue states:

> The title of this book, *Constitutional Law as Fiction*, summarizes my thesis, which is that the proud towers of the law are built not on the level bedrock of "fact" but on the perplexed terrain of "fiction," that judicial opinions are filled with "stories" that purport to be "factual" but that instead are "fictional," and furthermore, that these "fictions" could not be eliminated without crippling the legal enterprise.[24]

LaRue's essential claim is that "legal discourse is made of stories that are 'fictional.'"[25] He roots the power of the judicial enterprise in the persuasiveness of the judicial opinion and asserts that "[w]ithout persuasion, law could not be law, and without fiction, there would be no persuasion."[26] Still, he is careful to qualify his use of the metaphor "law as fiction" as descriptive rather than evaluative and as only one alternative way in which to describe the law, acknowledging neither that his

22. *Id*. at 5 ("Especially in formulating tests such as these, the Court does not characteristically engage in historical or moral analysis, nor does it attempt to determine whether particular events in the world come within the semantic meaning of a constitutional norm. Rather, the Court devises and implements strategies for enforcing constitutional values."); *see also id*. at 76–101 (outlining and analyzing "seven kinds of tests that the Court frequently employs in enforcing constitutional guarantees of individual rights").

23. LEWIS H. LARUE, CONSTITUTIONAL LAW AS FICTION: NARRATIVE IN THE RHETORIC OF AUTHORITY (1995). For literature that explores the connection between storytelling and legal argument, see LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW (Peter Brooks & Paul D. Gewirtz eds., 1996). For work applying narrative theory to law, see John B. Mitchell, *Evaluating Brady Error Using Narrative Theory: A Proposal for Reform*, 53 DRAKE L. REV. 599, 608–13 (2005); Eleanor Swift, *Narrative Theory, FRE 803(3), and Criminal Defendants' Post-Crime State of Mind Hearsay*, 38 SETON HALL L. REV. 975, 980 n.17 (2008).

24. LARUE, *supra* note 23, at 8.

25. *Id*.

26. *Id*. at 11.

description is (or should be) the predominant one nor that his description necessarily or logically excludes any other.[27]

The *American Heritage Dictionary* lists, among others, the following definitions for fiction: "1a. An imaginative creation or a pretense that does not represent actuality but has been invented. . . . 2. A lie. . . . 4. *Law* Something untrue that is intentionally represented as true by the narrator."[28] My use of the word is not in any pejorative sense. I do not mean to imply that the use of fiction in the law (whether in a judicial opinion or in an academic article) is driven by malice or the desire to mislead. I think that the idea of fiction is more complex than that. To be sure, any attempt to explain the course of events (e.g., a statement of facts in a brief or a factual recitation in a judicial opinion), opens up the possibility that the factual basis on which those statements or recitals rely are either incomplete or contain ambiguities.[29] What this means then is that a certain amount of the creative, inventive, imaginative process must be used to resolve these ambiguities or fill-in an incomplete record.

Ultimately, debate over the precise contours of constitutional interpretation and constitutional construction leaves us with a distinction that is neither obvious nor identifiable through the application of an accepted and uniform set of rules. One need only ask two of the five theorists discussed above (say, Solum and Graber) to read a Supreme Court opinion and they may be hard-pressed to agree as to the point at which the Court stopped interpreting and started constructing. Thus, as an aid to the practice of judging, the interpretation/construction distinction is largely unhelpful. This is largely because the discourse about the nature of the distinction (however one defines it) is shaped and constrained by normative impulses. This is not a qualitatively good or bad thing; simply a reality.

Let's take the idea of "recovering the linguistic meaning (or semantic content) of a legal text." For purposes of the distinction, the linguistic meaning is the original public meaning

27. *See id.* at 11–12.

28. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (Houghton Mifflin Harcourt 4th ed. 2006).

29. This idea of the unattainable "true/factual" past is not new. *See* JOHN LEWIS GADDIS, THE LANDSCAPE OF HISTORY 3 (2002) ("But the past . . . is something we can never have. For by the time we've become aware of what has happened it's already inaccessible to us: we cannot relive, retrieve, or rerun it as we might some laboratory experiment or computer simulation. We can only *represent* it.").

of the legal text. The focus on original public meaning rather than on original intent is one of the leading characteristics of the "New Originalist" movement.[30] Original intent theory holds that interpretation of a particular legal text is (or should be) consistent with what the author (or ratifier) meant the provision to mean.[31] In other words, original intent theory is primarily concerned with the subjective intent of the person who drafted (or ratified) the particular legal text. Original public meaning attempts to discover what the generation that drafted, ratified, or amended a constitutional provision understood it to mean.[32] While this sounds like something that can be discovered, like excavating an historical artifact, presentism bars full discovery of the original public meaning because present-day ideas and perspectives cannot help but be anachronistically introduced into depictions or interpretations of the past.[33]

30. *See, e.g.,* BARNETT, *supra* note 10, at 87–152; Keith E. Whittington, *The New Originalism*, 2 GEO. J. L. & PUB. POL'Y 599 (2004); Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47 (2006).

31. Edwin Meese, III, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 S. TEX. L. REV. 455, 456 (1986) ("The standard of interpretation applied by the judiciary must focus on the text and the drafter's original intent."); *see also*, *e.g.*, Earl Maltz, *Foreword: The Appeal of Originalism*, 1987 UTAH L. REV. 773, 774 (1987) (calling for "a jurisprudence based on the intent of the drafters"). *But see* WHITTINGTON, INTERPRETATION, *supra* note 10, at 36 (discussing "ratifying intent").

32. *But see* Jack M. Balkin, *Original Meaning*, *supra* note 7, at 295–311 (offering a variation on 'new originalism' that uses a 'text-plus' method to expand the understanding of original public meaning to include the original generation's understanding of the text plus their understanding of the original principle the text was meant to serve); Balkin, *Constitutional Redemption*, *supra* note 7.

33. Historians and legal scholars have both discussed the difficulties of presentism and questioned the ability to make legitimate connections between the past and present, *see, e.g.,* LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM 181–84 (1996); MICHAEL KAMMEN, SELVAGES AND BIASES: THE FABRIC OF HISTORY IN AMERICAN CULTURE 116–17 (1987) (observing that in the mid-twentieth century professional historians shifted their focus from a search for a "usable past" to the "'pastness of the past,' which means to accept the past on its own terms rather than to transmogrify it into our own contemporary frame of reference"); PETER NOVICK, THAT NOBLE DREAM: THE "OBJECTIVITY QUESTION" AND THE AMERICAN HISTORICAL PROFESSION 12, 99 (1988); Stuart Banner, *Legal History and Legal Scholarship*, 76 WASH. U. L.Q. 37, 37 (1998) ("History, or at least history written according to the conventions of late twentieth century professional historians, with an emphasis on the ways in which the past differed from the present—history as an account of the pastness of the past, as the standard expression goes—enormously complicates the task of legal argument."); Jack M. Balkin & Sanford Levinson, *Law and the Humanities: An Uneasy Relationship*, 18 YALE J.L. & HUMAN. 155, 176 (2006); Jonathan D. Martin, Note, *Historians at the Gate: Accommodating Expert Historical Testimony in Federal Courts*, 78 N.Y.U. L. REV. 1518, 1526 (2003) (Originalist history fails "to understand the past on its own terms and maintain a respect for its integrity") (quoting Richard B. Bernstein, *Charting the Bicentennial*, 87 COLUM. L. REV. 1565, 1568 (1987)); .

Aside from distorting original public meaning with present-day values and perceptions and selectively using the historical evidence at their disposal, those who employ history as an aid to constitutional interpretation also impose presentist teleology on the history of the United States Constitution itself. Indeed, there is the tendency to approach the history of the Constitution as one of linear progress. The history of the Constitution is typically articulated as one of steady progress toward a more desirable democratic order. And this progression typically presents itself as a continuous development from past to present, with each step bringing us closer to the dream of civil rights and liberties first expressed by our Founding Fathers.[34] Among the various fictions surrounding the Constitution, this one may be the most pervasive and accepted, as well as the most difficult to reconcile with the actual historical record. I suggest, then, that a singular "true" original public meaning cannot be entirely based on historical fact, because although we may know something about the types of reasons and types of understandings some of the original generation may have held about a particular constitutional provision, it is impossible to gather evidence from all or even most of the people who comprised the original generation. Aside from the fact that such evidence is limited to the view of elite actors, we still need to be mindful of problems with verifying the motives underlying the evidence that we can gather, such as diaries, notes, letters, minutes, etc.[35] Because of the inability to find and compile everything they need to tell their story, historians typically fill in gaps in evidence; as LaRue notes, people "build bridges between facts to interpret human conduct."[36] In this regard, the search for "original public meaning"—no less than the search for "original intent"—is likely to yield an incomplete and/or flawed understanding of the text.

34. *See*, STEPHEN M. GRIFFIN, AMERICAN CONSTITUTIONALISM: FROM THEORY TO POLITICS, 166 (1996). For a discussion of how this reading of the present into the past colors constitutional argument *see generally*, DAVID HACKETT FISHER, HISTORIANS' FALLACIES: TOWARD A LOGIC OF HISTORICAL THOUGHT (1970); G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE: 1815–1835 (1991); Saul Cornell, *Moving Beyond the Canon of Traditional Constitutional History: Anti-Federalists, the Bill of Rights, and the Promise of Post-Modern Historiography*, 12 LAW AND HIST. REV. 1 (1994).

35. *See, e.g.,* Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113 (2003) (discussing the controversy over whether it is proper to use historical evidence from notes of the Constitutional Convention to interpret the original meaning of constitutional provisions).

36. LARUE, *supra* note 23, at 20.

For these reasons, any "discovery" of original public meaning can at best be an interpretation composed of various pieces of evidence, *i.e.*, a narrative construction. This narrative construction is not necessarily a bad thing, so long as we recognize that gap-filling and selectively emphasizing certain facts is part of the process. Therefore, discourse on any of the various definitions of "interpretation" and "construction," whether stated as broadly theoretical or intensely empirical, sooner or later slips into a fictional narrative mode. The point of identifying the distinction as a fiction is not to destroy it, but to consider how this fictive distinction may still be relevant.

II. THE UTILITY OF THE INTERPRETATION/CONSTRUCTION FICTION

For some time now, the debate over originalist versus nonoriginalist constitutional interpretative methodology has been so polarized that audiences of both camps find it hard to take a fresh position or to reach those on one or the other side. The interpretation/construction distinction, however, offers a means of escaping this entrenchment while still preserving the essence of the fundamental argument. What the distinction creates is a safer, less hostile forum, as well as a new vocabulary, for a dialogue among two combatants—originalists and nonoriginalists—who otherwise talk past each other.

How does the interpretation/construction distinction offer a means of escaping this entrenchment if it preserves the essence of the fundamental argument; wouldn't the distinction just set up the same old arguments in new language? Fair questions. In short, the strength of the distinction is in its ability to shift the focus of the debate about the constitutional issue from people: originalists/nonoriginalists, to activities: interpretation/ construction. This allows evaluation of and debate on the merits of the offered justification for what the original public meaning is (for a particular issue) and whether or not the construction to accommodate modern circumstance is an acceptable extrapolation of that original public meaning. It focuses on process and justification rather than on retreat into political ideology: (i.e., "That opinion was written by a conservative justice and as a political liberal, I'm against it.").

In the safer space created by the interpretation/construction debate—and with the shared vocabulary of that debate, the impasse between originalists and nonoriginalists can be

transcended and the discussion edged forward. The new, less-charged environment allows the methodological camps to talk *to* not *at* each other. Rather than each camp becoming more cemented into familiar points of disagreement, the distinction can be used to frame a critical process that unfolds pursuant to a mutually accepted sequence of tasks. It begins with a close analysis of the text, followed by extended historical-contextual research, and then culminates in the legal application of the particular constitutional provision that best suits the constitutional principle being served and protected in light of contemporary circumstances. The distinction then can be used to explain how federal courts can maintain alternative constitutional constructions that are nevertheless valid and binding.

Additionally, the distinction can be used to explain and, depending on the circumstances, justify or criticize the manner in which those judicial constitutional constructions create informal constitutional change. Keep in mind that just because originalists and nonoriginalists may (at least to some degree) accept a similar analytical process based on the interpretation/construction distinction, this does not mean that the outcome of the analysis will always be the same. Acknowledging that the distinction, while providing a common process, is a fiction allows us to accept that any one interpretation being offered is just that, "an" interpretation (which alone is no vice) and not "the" interpretation (which tends either to hyper-polarize the debate or terminate it altogether). We can be skeptical, we can recognize what the interpreter has done—constructed a fiction to support his or her interpretation—and we can ask if there might be better interpretations that could be offered, but we would be wrong to argue that there is an interpretive method that does not rely to some extent on the mechanics and devices of fiction. To take such a position would be tantamount to claiming omniscience on all matters related to American social history, economic development, political evolution, and linguistic change—a tall order.

The interpretation/construction distinction creates a safe haven—a middle ground—between originalism and nonoriginalism where constitutional debate and criticism can hover between wholly originalist and wholly nonoriginalist theories. Moreover, the tension between originalism and nonoriginalism, as captured in the slightly tamer debate over

interpretation and construction, is fundamentally necessary to our constitutional system and the law courts that give sustenance to that system. In their pure forms (i.e., strong, hard, or extreme), neither originalism nor nonoriginalism provides a functional model for judges or, for that matter, non-judicial actors in the political arena. The one creates absurd results when confronted with distinctly modern constitutional problems, while the other results in a kind of constitutional drift, where the actual text of the underlying document loses its governing power and becomes a mere museum piece without force of law.

The reality is that originalism cannot wholly survive without accepting a certain degree of nonoriginalism, and vice-versa. Consider a discussion between Justice Scalia and Justice Breyer that took place on an episode of "America and the Courts" on C-SPAN.[37] The Justices traded their views on the interpretation of the Constitution in a changing society. The discussion turned, inevitably, to the constitutional interpretive methodologies that each used to inform how they reached decisions. Justice Scalia advocated textualism and originalism while Justice Breyer advocated a nonoriginalist approach, which considered the plain meaning of the text, but also included other modalities of interpretation such as historical practice, structure of the Constitution, etc.[38] In discussing his judicial philosophy, Justice Breyer explained that he believed that ambiguous constitutional provisions (like the Equal Protection Clause, freedom of speech, or cruel and unusual punishment) represent standards of conduct. And that instead of enacting specific conditions, the eighteenth century drafters of the Constitution enacted values. The difficult question for judges, he continued, becomes not only where you draw the line today but how to do this in a way that has objective appeal. For Breyer, he said this meant looking at the principle and basic value underlying the ambiguous constitutional provision and testing that value against modern circumstances.

Justice Scalia attempted to offer a different position. He claimed that although the equal protection of the laws could not be expanded to include things like same-sex marriage, a judge or

37. On an episode of "America and the Courts" aired on C-SPAN on October 31, 2009, Justices Stephen Breyer and Antonin Scalia spoke about their judicial philosophies and their views on the interpretation of the Constitution at the University of Arizona School of Law.

38. *See* BOBBITT, INTERPRETATION, *supra* note 18, at 12–13; BOBBITT, FATE, *supra* note 18.

justice did have to calculate the trajectory of the original provisions when talking about new phenomenon. The moderator then asked Justice Scalia about his analysis in one of those trajectory cases: *Kyllo v. United States*.[39] *Kyllo* was a Fourth Amendment case that dealt with whether the use of thermal technology from *outside* a residence to measure elevated temperatures *inside* the residence (a sign pointing to the probability that marijuana was growing within the house) was an unreasonable search. The majority opinion, written by Justice Scalia, held that the use of thermal imaging was a search within the meaning of the Fourth Amendment which required a warrant. The moderator asked Justice Scalia to explain how he arrived at his decision.

Scalia's explanation of his analytical process was rather interesting. Justice Scalia said that he arrived at his decision by regarding what the Framers would have thought about a technique that essentially intrudes into the house without the consent of the homeowner to find out what is going on inside. He claimed that he started with the plain meaning of the text of the Amendment. When the moderator pointed out that the plain meaning of the text did not address thermal technology (and could not have done so, given that it was drafted in 1791), Scalia elaborated. Justice Scalia said that he looked at what type of searches and seizures were unlawful at the time, which led him to conclude that the underlying value protected by the Fourth Amendment was freedom from unreasonable intrusion in the home. Next, he considered where the new thermal technology fell within that context. Given that the new technology was similar in kind to the concrete intrusions the Fourth Amendment prohibited and served the underlying value of protecting against home intrusion, the Court disapproved of its use without a warrant. This prompted Justice Breyer to point out that in terms of interpretive methodology he and Justice Scalia were talking about the same thing: finding a value, principle, purpose, and then applying modern day circumstances, to which Justice Scalia responded by retreating to safer territory and repeating a familiar slogan of extreme originalism—that a Justice should be constrained by the interpretation of the original meaning of the text.

This colloquy between Justice Scalia and Justice Breyer illustrates a couple of important points about the distinction

39. Kyllo v. United States, 533 U.S. 27 (2001).

between interpretation and construction. First, it shows that when judges are asked to explain how they actually work their way through real-life constitutional issues, they tend to focus more on process, not theoretical purity, resulting in a less-heated and more candid dialogue that does not immediately put the other party into a hyper-defensive mode. Second, it shows that the process of judging, at least in the constitutional law context, almost always requires a hybrid approach, lest the issue being litigated become lost in a parlor game among ideologues. What you can start to appreciate in *Kyllo* is that the disagreement in judicial philosophy is essentially one of degree not kind; that while the difference is in the degrees of how much weight a judge/justice places on the original conditions contained in the text and how much weight she places on the underlying value, the *process* is quite similar. Indeed, what one calls "looking for what the Framers did" the other can call "looking for the values." What the distinction's vocabulary permits is for these two judicial decisionmakers to effectively agree on the process by which a particular constitutional case is adjudicated while preserving their right to disagree on the ultimate outcome of the litigation—we have contained the tempest and yet benefitted from the storm.

And just as originalism needs a solid dose of nonoriginalism to be relevant, nonoriginalism would lapse into a kind of rule-less relativism if it did not accept the basic originalist premise that the text of the Constitution is the necessary starting point for a legitimate constitutional analysis. Indeed, in the late 1980s, David Hoy and Larry Solum argued effectively that maintaining the debate about constitutional interpretation based on a hard line distinction between originalism and nonoriginalism was ultimately unhelpful because any legitimate theory of American constitutional interpretation had to take into account the actual words and phrases of the Constitution, as well as the context in which those words and phrases were written.[40] In other words, originalist interpretation is not the mere anachronistic practice of applying 220 year-old language to modern problems. It is, on the contrary, a necessary act in understanding what the Constitution says and means and how it should be applied. Originalism helps to maintain the constitutional text as a fixed point of navigation, allowing judicial and non-judicial actors to

40. *See* David Couzens Hoy, *A Hermeneutical Critique of the Originalism/ Nonoriginalism Distinction*, 15 N. KY. L. REV. 479 (1988); Lawrence B. Solum, *Originalism as Transformative Politics*, 63 TUL. L. REV. 1599 (1989).

negotiate their way through the difficult, often unpredictable waters of American civil life.

Nonoriginalism if unalloyed with originalism diminishes to the point of disappearance the role of the Constitution's text.[41] But however well-intentioned, a constitutional analysis unconstrained by the text of the document leads to "constitutional drift."[42] We forget what the words of the Constitution actually say and instead rely on myths that dangerously rephrase the text itself. Some of this happens already. For example, many people believe the Constitution expressly establishes a separation between church and state. Imagine their surprise when confronted with the actual text of the Free Exercise Clause and the Establishment Clause.[43] While a separation of church and state can be inferred from these two provisions of the First Amendment, one is certainly not spelled out with absolute clarity. Institutional convention and public expectation require that constitutional debates stay within arm's reach of the text. Without some concrete tether to the text, constitutional debate drifts away from the text into constitutional "folk lore."[44] Without some level of connection to

41. This strong form of nonoriginalism was labeled "noninterpretivism." *See* Thomas C. Grey, *Do We Have an Unwritten Constitution?* 27 STAN. L. REV. 703, 706 (1975). In his article, Grey characterized the two predominant forms of constitutional interpretive methodology at the time as "interpretive," which sees text and original intent as constraints on judges, and "noninterpretive," which sees the court as having an "additional role as the expounder of basic national ideals of individual liberty and fair treatment, even when the content of these ideals is not expressed as a matter of positive law in the written Constitution." The noninterpretivist school accepted the view that contemporary understandings could supplement and even supersede the original meaning of the Constitution's text. For literature representative of the interpretivist school arguing that constitutional law is not only what can be drawn from the text, but is also about enforcing values drawn from somewhere other than the document, see Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980); Paul Brest, Comment, *Who Decides?,* 58 S. CAL. L. REV. 661 (1985); Ira C. Lupu, *Constitutional Theory and the Search for a Workable Premise*, 8 U. DAYTON L. REV. 579, 583 (1983).

42. The noninterpretivism debate, as originally constructed thirty years ago, is in essence over today. Indeed, by 1984, Thomas Grey replaced the term "interpretivist" with "textualist" noting that his original nomenclature was misleading because "noninterprevists" did in fact interpret the law. The use of the term "textualist" Grey claimed highlighted the central feature of the relevant disagreement between the two camps—the role of the written text in constitutional interpretation. Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 1 (1984).

43. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.").

44. Few, if any, constitutional theorists deny the binding character of the constitutional text itself. And while disagreement remains on how much emphasis to place on the text versus other sources, few place exclusive reliance on extratextual sources of constitutional justification.

or consideration of the text, the distance between the Constitution as *law* and the Constitution as *politics* becomes too great and the tether snaps.

The interpretation/construction distinction, however, accepts a fair amount of hybridizing or mixing of originalist and nonoriginalist methods. Indeed, it insists on it as a necessary aspect of both judicial and political action. By focusing on the actual practice of constitutional application, the interpretation/ construction framework allows for discussion of meaningful differences, some quite nuanced between originalists and nonoriginalists (or, if you prefer, among the various strains of originalism—"weak" to "strong"), without the conversation devolving into a pitched and endless theoretical battle. In so doing, the distinction replaces a taxonomy that has outlived its usefulness.

III. THE INTERPRETATION/CONSTRUCTION FICTION PROVIDES A NEW FORUM AND A NEW LANGUAGE FOR CONSTITUTIONAL DEBATE

As alluded to above, the distinction between interpretation and construction, despite being fictional, adds a practical component to the debate between originalism and nonoriginalism, and as a result, moves the discussion out of one focused on pure theory to one that includes a discussion about judicial activity. The distinction sets up something of a two-step process: the first step argues for a particular original public meaning and the second step implements that original public meaning by constructing a judicial rule that can be applied to the case at hand (and likely future cases) in a way that both serves the current need of the litigants and avoids anachronism.

So why is that useful? It's useful because the entire enterprise of constitutional interpretation can now take into account the actual practice of constitutional application, not just the theories constitutional scholars expound in law review articles. It embraces the "is" side of the law, not just the "ought to" side. When discussing the legitimacy or, more accurately, the correctness of a judicial application of a constitutional provision, we should at some point consider what the judge/justice actually does. What we learn from evaluating judicial activity tells us something important about how the constitutional provision is being interpreted. By considering the practical realities of judicial activity, we frame the debate in a more meaningful

structure because it does not limit the discussion to what one thinks the law "ought" to be.

On a more general level, theoretical debates, when infused with a bit of practical reality, tend to be more grounded and, ultimately, productive. This is probably the greatest benefit generated by the interpretation/construction distinction. It removes the entire discussion of constitutional application out of the rarified air of abstract theory to a place where mutual understanding, based on shared experiences, might be reached. Although a debate in a completely philosophical and conceptual realm is interesting, there is little chance that a purely abstract debate will produce significant movement one way or the other. It is this possibility of movement—this hope for pushing the debate forward to points of greater refinement—that gives the debate over interpretation and construction its freshness and importance. I think that's what we may mean when we talk about the distinction allowing us to transform but preserve the debate in a way that permits us to continue to spin off benefits. Indeed, the chances of spin-off benefits resulting from a continued purely conceptual discussion are slim.

In addition to transcending purely abstract philosophical debates the distinction may be useful in abandoning what one scholar has called "constitutional clichés."[45] In his article, Professor Barnett discusses the demise of constitutional catch phrases such as "judicial activism, judicial restraint, strict construction, Framer's intent, and dead hand of the past," among others, into constitutional clichés.[46] He states that while these phrases may have meant something at one time, they are now largely "devoid of substance" and "should be abandoned even in casual conversation."[47] His central claim is that these clichés "[allow] commentators to avoid substantive constitutional argument in favor of a process-based analysis that can be easily leveled in the absence of any expertise on the issue raised by a particular case . . . . [And] they enable commentators to criticize the Court or particular decisions without actually having to know much about the Constitution itself."[48] The advantage of the interpretation/construction distinction is that it requires analysis of both process and substance. An analysis of both aspects of the distinction: the substantive "what" of

45. Randy E. Barnett, *Constitutional Clichés*, 36 CAP. U. L. REV. 493 (2008).
46. *Id*. at 493.
47. *Id*.
48. *Id*.

interpretation and the procedural "how" of construction requires that critiques of judicial decisions tackle more than the proper role of the judiciary and deal in some way with the mechanics of the legal reasoning in the decision itself.

Finally, by transforming but preserving the debate, we ward against the hegemony of one American constitutional interpretative theory. Although, as some have suggested, the major differences in American constitutional theory in terms of "originalism" and "nonoriginalism," may be shrinking it is not gone and the schism between the two is part of the American culture of political debate and has largely defined the historically extended tradition of constitutional argument in this country. In a certain sense, this tradition of argument and debate provide a means through which the American political community can address, protect, and reassess changing political and social priorities.

Ironically, this culture of law through argument and debate is something that unites Americans as a political community, so long as the conflict does not become too polarizing. American writer E. L. Doctorow made this point in an essay he wrote in 1987, the bicentennial of the Philadelphia convention that framed the U.S. Constitution:

> [T]he great genius of the convention of 1787 . . . was its community of discourse. The law it designed found character from the means of its designing. Something arose from its deliberations, however, contentious, and that was the empowering act of composition given to people who know what words mean and how they must be valued. Nobody told anybody else to live it or leave it; nobody told anybody else to go back where they came from; nobody suggested disagreement was disloyalty; and nobody pulled a gun. Ideas, difficult ideas, were articulated with language and disputed with language and took their final fate, to be passed or rejected, as language. . . . This is what we cherish and honor, a document that gives us the means by which we may fearlessly argue ourselves into clarity as a free and unified people.[49]

So, the interpretation/construction distinction fosters the discourse about the theoretical differences between originalism and alternatives that accepts the idea of a common starting ground (original public meaning and historical context) yet still

49. E. L. Doctorow, *A Citizen Reads the Constitution*, THE NATION, Feb. 21, 1987, at 208–17, *reprinted in* E. L. DOCTOROW, JACK LONDON, HEMINGWAY, AND THE CONSTITUTION: SELECTED ESSAYS, 1977–1992, at 117–38 (1993).

permits proponents of each to argue as to a particular point of departure. Ultimately, this framework advances and encourages our political culture of argument, permitting discussions and disagreements about the theory of American constitutional interpretation to continue to spin off benefits.

CONCLUSION

The academic debate about constitutional interpretation can sometimes get trapped in the inaccessible areas of concept and abstraction. It is a valuable exercise then to remind oneself what the point of the discussion is all about. Ultimately, the Constitution is a document that not only secures personal liberty, but is also intended to sustain a workable government indefinitely. The question that we must keep at the forefront of any academic debate is this: How should a society committed to the idea of democratic constitutionalism best organize and understand itself? And the answer(s) to this question cannot be solely theoretical. They must be practical too. For these answers will define the role the Constitution will play in contemporary American life.

What the interpretation/construction distinction provides is a better forum for continuing the theoretical debate between originalism and nonoriginalism, between text and context, between those who view the looming presence of the Founding Fathers as a necessary preventative against constitutional entropy and those who consider those same Founding Fathers elitists whose "dead hands" should no longer control the outcome of modern civil problems. While there is no agreement as to how one locates the line that separates interpretation from construction, the distinction between the two activities, however fictional, provides an argumentative space that seems to yield positive results in terms of constitutional understanding. This is likely because the distinction forces those on both sides of the debate to adopt a new (and largely shared) vocabulary, a different mode of conversing. That is, the interpretation/construction distinction provides an alternative to the terminology of the old framework, permitting scholars the opportunity to conduct a more meaningful discussion about constitutional interpretation and implementation. It also directs our attention to one of the dominant sources of constitutional development—judicial activity—while exposing the tensions which exist between that activity and the more political modes of constitutional development and application. The distinction also

preserves the excellent work and hard-fought battles that have brought constitutional theory to its present state. It edges the starting point of the debate forward by recognizing that among the family of interpretive theories they all share certain methodological characteristics as well as a common claim to legitimacy.

Finally, the distinction embraces the idea of law as a culture of argument—something that is deeply rooted in the American political psyche. Indeed, our true national pastime may not be baseball, but arguing over what is and is not "constitutional."[50] This, I think, is a good thing, as it keeps us in touch with the text of the Constitution as much as it keeps us in touch with each other. Americans may loathe politics to the point of not wanting to vote in national and local elections, but they are not apathetic when it comes to the Constitution. There is, I think, a healthy distrust among most Americans for those who insist on theoretical certitude or ideological purity. This explains, in my opinion, why the debate over interpretation and construction feels like an advance. It assumes the character of diplomacy and negotiation, where the objective is first to identify common ground and then to bargain hard on the remaining points of disagreement.

Ultimately, the current debate over the interpretation/ construction distinction is healthy and useful, even if the line between the two tasks is fictive and indiscernible in any practical sense. By bringing the issue of constitutional meaning down from the high clouds of theory (originalism versus nonoriginalism) onto the firmer ground of judicial practice (interpretation versus construction), we have at last begun to focus on the Constitution as it governs and shapes real political life in the United States.

50. Alexis de Tocqueville himself commented on the American preoccupation with all things legal: "There is hardly a political question in the United States which does not sooner or later turn into a judicial one." ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 248 (J.P. Mayer ed., George Lawrence trans., Doubleday 1969) (1835).