



---

1-28-2021

## The Power of Interpretation: Minimizing the Construction Zone

John O. McGinnis

*George C. Dix Professor in Constitutional Law, Northwestern University*

Michael B. Rappaport

*Hugh and Hazel Darling Foundation Professor of Law, University of San Diego*

Follow this and additional works at: <https://scholarship.law.nd.edu/ndlr>



Part of the [Constitutional Law Commons](#), and the [Judges Commons](#)

---

### Recommended Citation

96 Notre Dame L. Rev. 919 (2021)

This Article is brought to you for free and open access by the Notre Dame Law Review at NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized editor of NDLScholarship. For more information, please contact [lawdr@nd.edu](mailto:lawdr@nd.edu).

---

## The Power of Interpretation: Minimizing the Construction Zone

Cover Page Footnote

919

## ARTICLES

---

### THE POWER OF INTERPRETATION: MINIMIZING THE CONSTRUCTION ZONE

*John O. McGinnis\* & Michael B. Rappaport\*\**

*One of the most important conceptual innovations within modern originalism is the distinction between a zone of interpretation and a zone of construction. When constitutional provisions have a determinate meaning, decisions find that meaning occurs within the interpretation zone. But when the original meaning of a constitutional provision is indeterminate, decisions are based on something other than the original meaning and occur within the construction zone.*

*This Article represents the first sustained challenge to the importance of the distinction. It argues that a variety of techniques enhance the power of interpretation to resolve uncertainties and thus greatly reduce the size of the construction zone. These techniques are principally supplied by the language of the law in which the Constitution is written. The language of the law's technical legal terms and legal interpretative rules provide a precision that ordinary language does not. When these techniques are correctly employed, the construction zone ends up being small. Under a small construction zone, issues that cannot be resolved based on the original meaning—principally the application of vague terms—rarely arise and, when they do, they involve only questions of secondary importance.*

*We make our case in three ways. We first offer a conceptual framework for resolving indeterminacy. We show how ambiguity can always be resolved by choosing the better attested meaning—an interpretive direction that existed at the Founding. We also show that many terms that seem vague are in fact ambiguities of related meaning, as for instance when the term property may mean either real property or real property and personal property. These ambiguities can, like other ambiguities, be resolved by following the better attested meaning. We then consider constitutional issues prominently proffered as examples of vagueness or other indeterminacies and show how they can be resolved under our framework. We finally show that modern originalist scholarship interpreting important constitutional provisions makes implicit use of our techniques to find determinate meanings rather than the indeterminacy requiring construction.*

---

© 2021 John O. McGinnis & Michael B. Rappaport. Individuals and nonprofit institutions may reproduce and distribute copies of this Article in any format at or below cost, for educational purposes, so long as each copy identifies the authors, provides a citation to the *Notre Dame Law Review*, and includes this provision in the copyright notice.

\* George C. Dix Professor in Constitutional Law, Northwestern University.

\*\* Hugh and Hazel Darling Foundation Professor of Law, University of San Diego. The authors would like to thank Nelson Lund and Mark Movsesian for comments on earlier drafts and participants in a faculty projects day at Northwestern Law School for helpful comments.

INTRODUCTION ..... 920

I. CONSTRUCTION: ITS RISE AND DISCONTENTS ..... 925

    A. *The Origins and Definition of Construction in Modern Constitutional Theory* ..... 925

    B. *The Utility of Construction and the Construction Zone: An Affirmation and Some Caveats* ..... 930

    C. *The Relation Between Interpretation and the Construction Zone* ..... 932

II. THE LANGUAGE OF THE LAW AS A RESOURCE FOR DETERMINACY ..... 935

III. RESOLVING DIFFERENT CATEGORIES OF LEGAL INDETERMINACY 940

    A. *Ambiguity* ..... 941

    B. *Vagueness* ..... 943

        1. *Distinguishing Vagueness from Ambiguity* ..... 945

        2. *Resolving Vagueness* ..... 946

    C. *Vagueness in the Constitution* ..... 947

    D. *Gaps* ..... 951

    E. *Contradictions* ..... 954

    F. *Ignorance of the Language of the Law* ..... 956

    G. *A Small Construction Zone* ..... 958

IV. THE FRUITS OF MODERN ORIGINALIST SCHOLARSHIP: FINDING DETERMINATE MEANINGS ..... 959

    A. *Structure* ..... 960

    B. *Rights* ..... 965

V. A SMALLER CONSTRUCTION ZONE HAS SUBSTANTIAL ADVANTAGES ..... 967

    A. *Reducing the Importance of Deciding How to Fill the Construction Zone* ..... 968

    B. *Reducing the Construction Zone Creates More Desirable Constitutional Law* ..... 970

CONCLUSION ..... 971

INTRODUCTION

A central debate about the Constitution focuses on how determinate is the meaning of the document. Of course, some provisions have an obvious meaning. Everyone agrees that the requirement that the President be thirty-five years old is clear. But many argue that essential terms, like due process, are indeterminate.<sup>1</sup>

---

1 See, e.g., Erwin Chemerinsky, *The Price of Asking the Wrong Question: An Essay on Constitutional Scholarship and Judicial Review*, 62 TEX. L. REV. 1207, 1243 (1984); Lawrence Rosenthal, *Originalism in Practice*, 87 IND. L.J. 1183, 1210–12 (2012); Peter J. Smith, *How Different Are Originalism and Non-Originalism?*, 62 HASTINGS L.J. 707, 723–24 (2011).

This debate has not been settled by originalism—the view that interpreters of the Constitution should be constrained by the original meaning of the Constitution, which is fixed at the time of its enactment. To the contrary, in recent years the debate has been cast in terms of a key distinction in originalist theory—that between an interpretation zone and a construction zone. Under this distinction, interpretation is the process of determining the original meaning of a provision. When the original meaning is determinate, the content of a provision can be settled entirely by interpretation within the interpretation zone. But when the original meaning of a constitutional provision is indeterminate—when the original meaning runs out—the content of the provision cannot fully be determined by interpretation. Instead, that content must be established in some other manner, such as by considering normative matters. This process of generating content occurs in the construction zone.

Thus, the question of how determinate is the Constitution can now be framed by the question of how large is the construction zone. This debate has significance not only for originalism but for the relation between originalism and what is often seen as its opposite—living constitutionalism. Critics of originalism have observed that if the construction zone is large, there may be little difference between originalism and living constitutionalism.<sup>2</sup> In a Constitution with a large construction zone, most of the important activity in constitutional law will be generated not by interpretation but by other considerations, such as normative views, that are likely to be chosen by those who give effect to the Constitution. By contrast, if the construction zone is small—if the original meaning seldom runs out and when it does run out, it involves only relatively minor matters—then the great bulk of issues will be resolvable by the original meaning without reference to extraconstitutional considerations. Originalism will then provide a stable and empirically ascertainable fundamental law that differs significantly from that of living constitutionalism.

In this Article, we offer the first sustained argument that the construction zone is a small one. While many constitutional provisions seem to be indeterminate, we argue that once the Constitution is properly understood as a legal document, these provisions become more determinate. Thus, the key to understanding the relative determinacy of the Constitution is recognizing that it is written in the language of the law. We show how the various indeterminacies that are thought to exist in the Constitution—ambiguity, vagueness, contradictions, and gaps—can often be resolved by considering the legal character of the Constitution.

An example of how the Constitution's legal character can render it more determinate is the term "due process." In ordinary language, due process is often understood to mean the use of fair procedures. Such a definition is

---

2 See, e.g., Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713 (2011).

vague and thus indeterminate. By contrast, as scholars have shown,<sup>3</sup> due process had a legal meaning at the time of the Constitution's enactment that mandated the government to follow the specific procedures required by the common law. This legal meaning yields determinate results far more often than the ordinary language meaning.

Once the mistaken assumption of the ordinary language nature of the Constitution is cast aside and appropriate legal techniques are employed, the Constitution becomes far more determinate than critics (and indeed many proponents) of originalism believe.

The smallness of the construction zone is largely the result of understanding the Constitution as a legal document. First, the Constitution must be understood as a document that is written in the language of the law and is filled with terms that have legal meanings, as the Supreme Court itself has recognized in construing the term "confrontation" in the Confrontation Clause.<sup>4</sup> Such legal meanings are often defined by past law, such as the common law. The terms, which developed to provide the precision that a legal system requires, are much less likely to be indeterminate than terms in ordinary language. The legal meaning of the Constitution is also discerned by applying the legal interpretive rules, such as the rule that ambiguities can be resolved by the purpose or structure of a provision.<sup>5</sup> These rules were an essential part of the Constitution's legal context and help fix a determinate meaning. Understanding the Constitution as written in the language of the law provides a more accurate rendering of the Constitution's original meaning—one that also greatly reduces the indeterminacies of the Constitution. When interpreting the Constitution, we must never forget that it is a legal document we are expounding.

One important reason why the legal terms in the Constitution are often mistakenly thought to be uncertain is the result of ignorance of historical legal meanings. While those learned in the law at the time of the Constitution's ratification would have understood the Constitution's legal meaning, modern interpreters will often be ignorant of these legal meanings and mistake the language as failing to address questions that it actually answers. Researching these issues can reduce this ignorance, supplying the knowledge needed to accurately interpret the Constitution.<sup>6</sup>

What might seem like indeterminacies in the Constitution can also be addressed by resolving uncertainties through appropriate techniques. Ambiguous terms can be addressed as a matter of interpretation, not con-

---

3 See *infra* notes 210–16 and accompanying text (discussing scholars who have developed and applied this understanding in a variety of contexts).

4 See *infra* note 165.

5 See John O. McGinnis & Michael B. Rappaport, *The Constitution and the Language of the Law*, 59 WM. & MARY L. REV. 1321, 1381–83 (2018) [hereinafter McGinnis & Rappaport, *Language of the Law*].

6 See Part IV for examples of how research into the Constitution's legal language resolves ambiguities and dissolves or reduces vagueness in constitutional terms, including a session of the legislature and natural-born citizen.

struction, by using context to determine which meaning of an ambiguous term was employed. We recognize that close cases may exist. But at the time of the Constitution's enactment a legal interpretive rule—what we call the 51–49 rule—required interpreters to choose the better supported interpretation. Thus, even in close cases, ambiguities can be resolved by weighing the evidence.

Contradictions and gaps can be resolved in much the same way as ambiguity. Contradictory provisions can create indeterminate meaning because it is not clear which of the two contradictory provisions should take priority. But contradictions can usually be resolved with the aid of legal interpretive rules, such as the rule requiring interpreters to attempt to reconcile the two provisions.<sup>7</sup> Because the legal interpretive rules help to constitute the meaning of language in legal documents, the resolution of the contradiction using those rules selects one of the legal meanings of the communication in much the same way that those rules resolve ambiguity.

Gaps occur when silence in the Constitution about a matter is believed to create indeterminate meaning. But apparent gaps often turn out to be resolvable because other provisions in the Constitution address an issue.<sup>8</sup> Resolving which of these clauses apply is similar to resolving an ambiguity.

The hardest questions for reaching determinate resolutions of meaning involve vague terms, but even apparently vague terms often turn out to have determinate meanings. Some vague terms may be indeterminate, such as the term “tall,” which does not indicate a clear cutoff between “tall” and “not tall.” But in a legal document many apparently vague terms turn out to have a determinate meaning. First, some terms that are vague in ordinary language, like the term “jury,” turn out to have a determinate meaning when understood in legal language.<sup>9</sup>

Second, other terms that are labelled vague are more correctly classified as a type of ambiguity. Some commentators limit ambiguity to terms with unrelated meanings, like the word “bank,” which can mean a financial institution or the side of a river. But ambiguity can also include terms that have related meanings, such as the term “property,” which sometimes means real property and sometimes means both real and personal property. So long as the term has two meanings that people actually use, it is ambiguous, not vague. And when seemingly vague terms are correctly understood as ambiguous, their meaning can be resolved by the requirement to choose the better

---

7 See *infra* notes 158–62 and accompanying text (showing how to reconcile the apparent contradiction between the applicability of the Recess Appointment Clause to recess appointments of federal judges and the clause guaranteeing tenure to judges during “good behavior”).

8 See *infra* notes 135–40 and accompanying text (showing that while the Constitution is often thought to be silent about the President’s removal power, this power is given either to the President by the vesting of executive power in his office or to Congress by providing legislative authority under the Necessary and Proper Clause to structure removal as incidental to its power to establish federal offices).

9 See *infra* note 112 and accompanying text (showing how the term “jury” should be understood to have the determinate legal meaning of a body with twelve members).

supported interpretation. Finally, some terms may be vague when applied to certain cases, but those cases may not often arise in the legal context and, if they do, may create relatively unimportant borderline cases.<sup>10</sup> They thus do not contribute much indeterminacy to the Constitution. Overall, then, the language of the law provides resources to reduce the construction zone to a small size.

We deploy these resources to consider issues, in each of these categories, as to which scholars have argued that the Constitution's meaning runs out. We contend that the Constitution's meaning probably does not run out in any of these examples. The larger significance of these examples is that they show the power of wielding the legal interpretive rules and knowledge of the language of the law for reducing indeterminacy. The legal interpretive rules provide effective tools for resolving ambiguity and other forms of uncertainty in legal provisions. And knowledge of the language of the law allows us to appreciate the full meaning of terms that developed to allow legal precision. The more we know about a constitutional provision, particularly through its legal meaning and context, the less likely it is to appear indeterminate. To be sure, disagreement on meaning may remain, as is sometimes the case on other legal and factual questions, but disagreement is not necessarily indeterminacy.

Our claims are reinforced by a review of recent scholarship. In articles explicating the meaning of the Constitution, originalist scholars now implicitly follow the program for constitutional interpretation that we here make explicit. Some of that work consists of unpacking terms that can be understood with the help of legal history, thus resolving ambiguity and vagueness. Other scholarship uses legal interpretive rules to fix meaning. It is striking that originalist scholarship now interprets many constitutional provisions that the unlearned might consider vague or ambiguous and finds those provisions have a determinate meaning, suggesting that ignorance rather than indeterminacy is the greatest barrier to constitutional interpretation. This scholarly trend supports our view that the construction zone can be minimized.

This Article proceeds in five Parts. Part I assesses whether the terminology of construction is useful to constitutional theory, concluding that it is beneficial so long as its meaning is accurately understood and not used to imply that the construction zone is large, important, or was recognized in the Founding era.<sup>11</sup>

Part II summarizes our arguments that the Constitution is written in the language of the law. We show that this language has resources to bring deter-

---

10 See *infra* notes 106–07 and accompanying text (giving an example of relatively unimportant borderline vagueness).

11 Our discussion focuses largely on Larry Solum's theory of construction because, like his theory of public meaning in general, it is a powerful and sophisticated explication and defense of the concept. Although he disagrees with original methods, he has seriously and fairly addressed the challenge that our approach poses to construction. While we disagree with some of his claims, his understanding has contributed greatly to making the concept of construction clear and plausible.



minacy to the meaning of constitutional provisions. These resources are of two kinds. The first set are technical legal terms that have more precision than terms in ordinary language. The second are legal interpretive rules that provide directions on how to interpret constitutional provisions.

Part III then discusses the types of indeterminacy that have been emphasized in arguing that the Constitution's meaning runs out. We show that ambiguity can be resolved by selecting the meaning that has the stronger support for it. We offer a similar approach for resolving other asserted categories of indeterminacy, such as gaps and contradictions. We then consider vagueness in the Constitution. We argue that in a legal document like the Constitution, some apparently vague terms actually turn out to be ambiguous, and other terms that are vague in ordinary language turn out not to be vague in legal language.

We also consider examples of these four situations—ambiguity, vagueness, gaps, and contradictions—where leading scholars have argued that constitutional meaning runs out. We show that there is a strong argument in each case for a determinate legal meaning.

Part IV shows many examples of recent scholarship that deploy the Constitution's legal text and legal interpretive rules to discover a thick, precise meaning to terms that have been thought to be vague or ambiguous. The practice of originalism today often belies the importance of the construction zone, showing that additional knowledge of legal terms and practices dissolves indeterminacy.

Part V briefly describes the advantages to originalism of a smaller construction zone. A smaller construction zone makes more of constitutional law depend on originalism and less on nonoriginalism. It also reduces the salience of intractable disagreements on how to fill the construction zone—the same disagreements that afflict nonoriginalism.

## I. CONSTRUCTION: ITS RISE AND DISCONTENTS

### A. *The Origins and Definition of Construction in Modern Constitutional Theory*

Interpretation, understood as the discovery of the original meaning, has always been integral to originalism. Indeed, ever since its modern version was introduced in the 1980s, the essence of originalism has been the proposition that judges and other officials should seek the Constitution's original meaning.<sup>12</sup> Arguments have flared about whether that meaning is fixed by the original intent of the Framers or enactors, or by the publicly understood meaning of the words themselves.<sup>13</sup> But from the beginning of originalism's

---

12 See Keith E. Whittington, *Originalism: A Critical Introduction*, 82 *FORDHAM L. REV.* 375, 388–89 (2013) (noting that originalism is about the authority of interpretation, not about different forms of constitutional argument).

13 Compare Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 *Nw. U. L. REV.* 923, 924–958 (2009) [hereinafter Solum, *Heller and Originalism*] (defending original public meaning), with Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 *Nw. U. L. REV.* 703 (2009) (defending original intent).

revival in the 1980s, originalists have always put the Constitution's meaning at the front and center of their constitutional theory.

Construction, however, appeared as a concept in modern originalist debates only at the turn of the century when originalism had become an object of academic scrutiny.<sup>14</sup> The political scientist Keith Whittington introduced the concept to explain where political creativity could be located in the constitutional regime.<sup>15</sup> He argued that some of the provisions of the Constitution were unclear or had what he called "textual indeterminacies"<sup>16</sup> or "gaps."<sup>17</sup> These constitutional provisions would then be elaborated with reference to something external to the text, such as a "political principle, social interest, or partisan consideration," and not just interpreted with legal methods in such spaces or zones.<sup>18</sup> That elaboration was labelled construction. Whittington argued that construction was proper when it merely filled a gap.<sup>19</sup> For Whittington, construction was largely a political exercise, calling on the creative constitutional statesmanship of the political branches.<sup>20</sup>

Law professors then deployed the concept as a solution to a central problem that others had raised about originalism.<sup>21</sup> Critics had argued that important constitutional provisions were so vague or indeterminate that discovering the historical meaning of the clause did not yield a single norm for answering a concrete case.<sup>22</sup> They contended that even once the original meaning of a phrase like "due process" or "equal protection" is understood, its application may be underdetermined.<sup>23</sup> Thus, some other rule or process is needed to apply it.

Law professors advocating what has come to be known as the new originalism used the concept of construction to suggest a solution by sharply distinguishing between interpretation and construction.<sup>24</sup> Interpretation

14 As discussed below, construction may have been used in other legal contexts, but it is not clear it was ever previously a concept in constitutional law.

15 KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* 1 (1999).

16 *Id.* at 9.

17 See KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* 8 (1999).

18 WHITTINGTON, *supra* note 15, at 6.

19 *Id.*

20 WHITTINGTON, *supra* note 17, at 7.

21 See, e.g., Randy Barnett, *The Gravitational Force of Originalism*, 82 *FORDHAM L. REV.* 411, 419 (2013) ("By adopting the interpretation-construction distinction, the new originalism frankly acknowledges that the text of 'this Constitution' does not provide definitive answers to all cases and controversies that come before Congress or the courts.").

22 See, e.g., David Sosa, *The Unintentional Fallacy*, 86 *CALIF. L. REV.* 919, 920 (1998) (book review).

23 See, e.g., Gordon G. Young, *Justifying Motive Analysis in Judicial Review*, 17 *WM. & MARY BILL RTS. REV.* 191, 218–19 (2008).

24 See, e.g., Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 *FORDHAM L. REV.* 453, 468 (2013) [hereinafter Solum, *Constitutional Construction*] (describing the emergence of the interpretation/construction distinction). We have reservations about the term new originalism, because there are several other new theories of originalism,

was still primary and was possible to the extent that a clear meaning could be found. The original meaning as discovered by interpretation should still constrain judges, setting bounds for what were permissible applications of a provision, even if the exact scope of the provision was sometimes unclear.<sup>25</sup> Determining the original meaning was thus the indispensable first step of constitutional application. It was emphatically not just one of many factors to be considered in reaching constitutional judgements.<sup>26</sup>

But the New Originalists also acknowledged that interpretation has limits, which left the application of some, perhaps many, constitutional provisions “underdeterminate.”<sup>27</sup> Where meaning ran out and underdeterminacy began, construction, not interpretation, would be required.<sup>28</sup> Filling in the space of underdeterminacy—a space that they labelled the “construction zone”—was a wholly distinct enterprise from interpretation.<sup>29</sup> So long as construction did not contradict the meaning of the provision, but merely stayed within the space of underdeterminacy, the New Originalists argued it was consistent with originalism.

Thus, by confining the scope given for interpretation, the new originalism dissolved the problem of vagueness or ambiguity in interpretation. And under the view of construction adopted by the New Originalists, like Larry Solum and Randy Barnett, filling in the construction zone was as much an enterprise for judges as for politicians.<sup>30</sup>

Over time the concept of construction in the new originalism was refined, largely in the work of Larry Solum. For Solum, interpretation uncovers the meaning of the text as conveyed by what he now calls the communicative content.<sup>31</sup> Construction, in contrast, is the legal effect given to the text

---

including our own, that differ from the old theory, but that also differ from the new originalism. Nevertheless, the terminology is used in the literature and we here acquiesce in its use.

25 See, e.g., Andrew Kent, *The New Originalism and the Foreign Affairs Constitution*, 82 *FORDHAM L. REV.* 757, 768 (2013) (asserting that it is a cardinal rule of the “new originalism” that construction can occur only within the bounds set by interpretation).

26 See ROBERT W. BENNETT & LAWRENCE B. SOLUM, *CONSTITUTIONAL ORIGINALISM: A DEBATE* 59–60 (2011) (suggesting that these different factors, often termed “modalities,” could be considered at the stage of interpretation, not construction).

27 See, e.g., Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 *U. CHI. L. REV.* 101, 108 (2001).

28 See Keith E. Whittington, *Constructing a New American Constitution*, 27 *CONST. COMMENT.* 119, 120 (2010) (“Construction picks up where interpretation leaves off.”).

29 See Randy E. Barnett, *Interpretation and Construction*, 34 *HARV. J.L. & PUB. POL’Y* 65, 70 (2011) (recognizing that construction requires a normative theory).

30 See RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 121–30 (2004); Solum, *Constitutional Construction*, *supra* note 24, at 499 (“In some cases, judges may attend only to interpretation (because construction seems obvious and intuitive). In other cases, judges may focus entirely on construction . . . . But in either case, construction occurs.”).

31 Solum, *Constitutional Construction*, *supra* note 24, at 495–96, 499 (outlining what he calls the two-moments model—the moment of interpretation and the moment of construction).

in the course of its application.<sup>32</sup> Judges give effect to the text in the course of every constitutional adjudication.<sup>33</sup> Thus, interpretation and construction occur in every case.

Solum recognizes that interpreters may not distinguish between the acts of interpretation and acts of construction in those cases where the application of provision flows inexorably from its meaning.<sup>34</sup> Everyone understands that the Constitution's requirement of two senators from each state rules out three senators without the need to go through a conscious two-step process of interpretation and construction.<sup>35</sup> But construction occurs nonetheless even without conscious thought about the issue.

But when provisions are so ambiguous or vague that their communicative content runs out, these open interstices are treated as "construction zones"—the space where legal effect of the provision itself cannot be fully determined by its communicative content.<sup>36</sup> Thus, while construction always takes place, the construction zone appears only when the text is indeterminate or underdetermined.<sup>37</sup>

When a provision's communicative content is underdetermined and thus the provision has a construction zone, the question becomes what determines the appropriate rules for filling it.<sup>38</sup> One set of answers is normative: the rules are determined by normative considerations external to the Constitution. Examples of such normative considerations include Randy Barnett's presumption of liberty, which calls for rules within the construction zone to

32 *Id.* at 495–96. Initially, Solum argued that construction occurred only when provisions were ambiguous or vague. Lawrence B. Solum, *Semantic Originalism* 75 (Ill. Pub. L. & Legal Theory Rsch. Papers Series No. 07-24, 2008), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1120244](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244) ("Construction occurs in the zone of constitutional indeterminacy."). But later Solum changed his view, arguing that construction involves giving effect to a legal provision and therefore that, in the course of adjudication, construction always occurs. Solum, *Constitutional Construction*, *supra* note 24, at 495.

33 Barnett, *supra* note 29, at 66 (arguing construction is always necessary in adjudication to translate interpretation into law).

34 Solum, *Constitutional Construction*, *supra* note 24, at 499.

35 U.S. CONST. art. I, § 3, cl. 1.

36 Solum, *Constitutional Construction*, *supra* note 24, at 502.

37 While we focus upon construction that occurs within the construction zone, it should be noted that construction can also occur outside of the construction zone. Suppose that a court construes a provision to have a result that conflicts with the original meaning of the text. It may do this by mistake or because it is following an approach, such as nonoriginalism, that allows such a result. In this case, even if there is a construction zone, the result will fall outside of that zone. Such a result is often called construction or mere construction because it does not conform to the *interpretation* of the original meaning. Instead, the result merely reflects the legal effect that the court gives to the provision, but not the meaning of the provision.

38 *See, e.g.*, Solum, *Semantic Originalism*, *supra* note 32, at 75–79 (considering theories, such as those that would construct by reference to justice, deference to the political branches, or precedent).

be formulated to promote liberty.<sup>39</sup> Another is Jack Balkin's "framework" approach which calls for the Constitution to be built out through a process by which social movements contend with one another to fill in what he considers vague terms, like commerce, equality, and liberty, in a way that is consistent with the text.<sup>40</sup>

It is true that some such normative theories of construction try to integrate the construction zone with the Constitution. Barnett infers a presumption of liberty from the Constitution's purposes and background principles of social contract theory.<sup>41</sup> Barnett and Evan Bernick have recently offered a theory that attempts to make an even closer connection by suggesting that a judge has fiduciary duty to follow "the spirit" of the Constitution when the letter of the text does not determine the result.<sup>42</sup> But their argument remains dependent on a normative claim about the attractiveness of fiduciary duty today.<sup>43</sup> If they argued that their methods for filling in the construction zone followed directly from the communicative content of the Constitution, they would then not be methods of construction, but of discerning the Constitution's original meaning.<sup>44</sup>

Others have suggested an approach building on legal positivism rather than normative considerations. One such positive approach to construction would be to follow precedent, although that approach leaves open how to fill in the construction zone when there is no precedent.<sup>45</sup> Recently, William Baude and Stephen Sachs have offered a fuller positive theory of construction. They argue that construction should follow what they call the "law of

---

39 See BARNETT, *supra* note 30, at 126 ("[V]ague terms should be given the meaning that is most respectful of the rights of all who are affected, and rules of construction most respectful of these rights should be adopted to put general constitutional provisions into legal effect.").

40 See JACK M. BALKIN, *LIVING ORIGINALISM* 11, 133, 321–23 (2011).

41 BARNETT, *supra* note 30, at 125–26.

42 See Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 *Geo. L.J.* 1, 5 (2018) ("Good-faith constitutional construction seeks to implement the Constitution *faithfully* by ascertaining and adhering to the original functions of the constitutional text—its 'spirit.'").

43 *Id.* at 22.

44 We agree with Barnett and Bernick that judges should consider the purpose or spirit of a constitutional provision but disagree with their reasons for doing so. While they view consideration of the spirit as based on a normative argument in the construction zone, we view it as an interpretive rule for discerning the meaning of the Constitution. Thus, the two theories reach the same results as to consideration of the purpose of provisions, but for two different reasons. The two theories, however, do differ as to other matters. Most significantly, our language-of-the-law view holds that all of the relevant legal interpretive rules should be considered when interpreting the Constitution, not merely the purpose of the provision. By contrast, Barnett and Bernick appear to restrict the relevant universe of legal interpretive rules to the purpose rule, even though other legal interpretive rules were employed at the time.

45 See Lawrence B. Solum, *Originalist Methodology*, 84 *U. CHI. L. REV.* 269, 293 (2017).

interpretation,”<sup>46</sup> but what might instead be called the “law of construction” because the authors view it as in part filling in the construction zone. This law, which consists of what we deem interpretive rules, but the authors view as both rules of interpretation and of construction, comes from the legal system of which judges are a part.<sup>47</sup> Thus, under Baude and Sachs’s view, construction does not necessarily depend on thick normative theories, but derives instead from the judicial obligations to follow the law, including the common law.<sup>48</sup>

Before describing our strategy for reducing the construction zone, which would minimize the difficult choices that filling the construction zone requires, we discuss the extent to which the construction zone should be accepted as part of originalist theory.

*B. The Utility of Construction and the Construction Zone: An Affirmation and Some Caveats*

The concepts of construction and the construction zone have become staples of originalist theory, and we agree that they can be useful. The concept of construction allows the clear demarcation of the interpretation of a provision from its legal effects. The concept of the construction zone provides a way of explicating a provision whose meaning is underdetermined by its communicative content. But these terms also carry risks for the unwary. It does not follow from the concept of a construction zone that the construction zone is large or even exists. And neither concept implies that it was in fact accepted by judges and lawyers at the time of the Constitution’s framing.

Within originalist theory, construction represents a stipulation.<sup>49</sup> That is, the terms interpretation and construction are defined to make an analytic distinction that is believed useful to understanding constitutional law. Whether this stipulated definition should be accepted turns on two considerations: (1) whether it captures a useful distinction, and (2) whether it clarifies or confuses issues in constitutional theory.

We accept the analytic utility of a distinction between meaning and the legal effect of a provision. It is common to ask whether the legal effect that a court gives to a provision accords with its proper meaning, and thus it is important to have a distinction between meaning and effect. Moreover, analytically it is helpful to think of interpreting a provision and determining its effect as a two-step approach because separating the steps forces theorists to justify the considerations they bring to interpretation and not to confuse them with considerations that are relevant to deciding legal effect.

For instance, some living constitutional theorists believe that good consequences today should be taken into account in constitutional decisionmak-

---

46 See William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1129 (2017).

47 *Id.*

48 *Id.*

49 Solum, *Constitutional Construction*, *supra* note 24, at 457.

ing.<sup>50</sup> Thus, some favor reading the Equal Protection Clause to apply to voting rights not on the theory that the original meaning of equal protection extended to voting rights—a position hard to square with the original meaning evidence—but on the idea that it would improve democracy.<sup>51</sup> Here such advocates are not making an argument about original meaning but about the appropriate or desirable legal effects of the provision. They are ignoring the meaning in favor of a preferred effect; distinguishing between interpretation and construction helps clarify this important legal move.

But it is important not to confuse the concept of construction with the construction zone. If a provision is clear, the provision requires interpretation and construction, but does not involve the construction zone. For example, the Constitution clearly provides for two senators from each state, so a judge deciding a case concerning the provision interprets it and engages it in construction by giving the provision legal effect. But there is no construction zone in this case, because the meaning of the provision is clear. In other words, according to the stipulated meaning of construction, there can be construction without a construction zone. It is particularly important not to slip from the ubiquity of construction as stipulated to the presence of a construction zone as a matter of fact because, as we discuss below, it is the size and status of the construction zone, not construction itself, that is of enormous practical importance to originalism.

The analytic distinction between interpretation and construction easily leads to historical confusion as well. It does not follow from the stipulated modern definition that the early Supreme Court's use of the term suggests that the Court is using the term in the sense that New Originalists use it. When Chief Justice Marshall used the term “construe,” he could and, we have argued, did use it in the same sense as “to interpret.”<sup>52</sup> “Construction,” as the late Justice Antonin Scalia and Bryan Garner correctly note, can be just the noun form of the word “construe,” which they understand to be a synonym for “interpretation.”<sup>53</sup> And, in fact, New Originalists, such as Solum and Barnett, appear to acknowledge that construction as a concept first emerged a half century after the Framing.<sup>54</sup>

---

50 Stephen E. Gottlieb, *Tears for Tiers on the Rehnquist Court*, 4 U. PA. J. CONST. L. 350, 366 (2002) (arguing that one matter that distinguishes formalism from living constitutionalism is that the latter takes account of a decision's consequences).

51 On the difficulty of basing a voting rights jurisprudence on the Equal Protection Clause, see Stephen M. Griffin, *Rebooting Originalism*, 2008 U. ILL. L. REV. 1185, 1202–03.

52 We discuss instances in which this modern meaning of construction has been wrongly attributed to the Framers. See JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 144–48 (2013). Richard Kay has cast doubt on whether this distinction was widely recognized even in the later nineteenth and twentieth centuries. See Richard S. Kay, *Construction, Originalist Interpretation and the Complete Constitution*, 19 U. PA. J. CONST. L. ONLINE 1, 5–6 (2017).

53 See ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 13–14 (2012).

54 See, e.g., Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 10 (2015) [hereinafter Solum, *Fixation Thesis*] (recog-

The concept of the construction zone can lead to two kinds of confusion. First, it should not be taken to suggest that jurists at the Founding recognized a construction zone. Indeed, their failure to make this linguistic distinction raises the possibility that those who enacted the Constitution recognized a much richer view of the communicative content of the Constitution than many do today.<sup>55</sup> We argue below in fact that the presence of interpretive rules at the time in fact indicates that they treated texts as having a rich communicative content.<sup>56</sup>

The second kind of confusion derives from an implicit assumption that the construction zone exists or is large. Even if we accept the concept of a construction zone, it does not prove the existence of any such zone, much less imply that it is a large one. It is possible instead that the construction zone is quite small or even empty.

To conclude, the concepts of construction and the construction zone are potentially useful ones within originalist theory. So long as their use does not mask historical or analytic error, there is no reason that these concepts cannot be employed.

### C. *The Relation Between Interpretation and the Construction Zone*

The most important practical implication of the interpretation-construction distinction is the relation between interpretation and the construction zone. These are mutually exclusive concepts. When meaning runs out, interpretation ends, and the construction zone begins. The scope of the construction zone is thus a function of the scope of interpretation. To put it another way, the thicker the meaning of a provision, the smaller the size of the construction zone. Thus, for instance, interpreting the Due Process Clause to mean something like fair procedure would give the Clause a relatively thin meaning. Fairness is a relatively vague term that could be defined in a number of ways. This interpretation would thus potentially lead to a large construction zone. Alternatively, an interpretation of the Clause to mean procedures that had been required at common law would create a relatively thick meaning. Correspondingly, the construction zone for due process would be small or might not even exist.

Some theorists have a thin theory of meaning and a correspondingly broad scope for construction. For example, Jack Balkin has a position called Framework Originalism, which presumptively views the Constitution as a document that generally set politics in motion through the creation of a basic framework but did not much constrain future generations.<sup>57</sup> The framework

---

nizing Franz Lieber as the originator of the interpretation/construction distinction); Barnett & Bernick, *supra* note 42, at 11 (same); see also Kay, *supra* note 52, at 4 (attributing interpretation/construction distinction to Lieber's "idiosyncratic" views).

55 See Kay, *supra* note 52, at 14 (noting that is hard to reconcile the existence of a distinction between interpretation and construction with judicial review as practiced in the early republic).

56 See *infra* Part II.

57 BALKIN, *supra* note 40, at 21–23.



leaves large areas to be filled in by social movements.<sup>58</sup> This conceptualization of the limits to constitutional interpretation would lead to many constitutional provisions that have large construction zones.<sup>59</sup> Balkin self-consciously sees his theory as one combining originalism with living constitutionalism as originalism where living constitutionalism is the beneficial way of filling in the construction zone.<sup>60</sup> But the large size of the construction zone depends on his distinctively thin view of constitutional meaning.

We have a much thicker view of meaning.<sup>61</sup> As we describe in more detail below, the evidence shows that the Constitution is written in the language of the law.<sup>62</sup> This legal context provides many resources, including the legal meaning of words and legal interpretive rules, to dissolve vagueness and resolve ambiguities. Because the meaning of the Constitution is thicker, there is a smaller construction zone. Consequently, we classify many more issues as involving interpretation, not construction, than does Balkin. If the construction zone is small or nonexistent, updating the Constitution is left to the amendment process under Article V.

Other originalists appear to have positions on the thickness of interpretation and the size of the construction zone that lie between Balkin's and ours. Larry Solum does not endorse Framework Originalism,<sup>63</sup> but he rejects the claim that the Constitution is written in the language of the law.<sup>64</sup> Perhaps because his ordinary language view of the Constitution lacks the resources of the language-of-the-law view, he finds examples of ambiguity, vagueness, contradictions, and gaps in the Constitution, which, as we show below, can likely be resolved without construction. Barnett also appears to embrace a middling view. He believes there are substantial areas for construction, at least when the definition of rights is concerned.<sup>65</sup>

---

58 *Id.* at 93–94.

59 *Id.* at 283–84.

60 *Id.* at 282.

61 In this Article, we talk about the meaning of language. Another approach to understanding the constitutional language is provided by the branch of philosophy of language known as pragmatics, which emphasizes the use of language in context. Pragmatic philosophers of language often claim that what is important when interpreting language, such as constitutional language, is not the meaning of the language, but what the authors or document are asserting. See, e.g., 1 SCOTT SOAMES, *Interpreting Legal Texts: What Is, and What Is Not, Special About the Law*, in PHILOSOPHICAL ESSAYS—NATURAL LANGUAGE: WHAT IT MEANS & HOW WE USE IT 408–09 (2009). We have significant sympathy for this approach, but nonetheless continue to discuss the meaning in context because that is the dominant usage within the legal literature. See McGinnis & Rappaport, *Language of the Law*, *supra* note 5.

62 See *infra* notes 83–99 and accompanying text.

63 See, e.g., Lawrence B. Solum, *Faith and Fidelity: Originalism and the Possibility of Constitutional Redemption*, 91 TEX. L. REV. 147, 156–58 (2012) (book review) (situating Framework Originalism in the originalist family without endorsing it).

64 See Lawrence B. Solum, *Communicative Content and Legal Content*, 89 NOTRE DAME L. REV. 479, 497–98, 506 (2013) (arguing that the Constitution should be understood in ordinary language).

65 See Barnett, *supra* note 29, at 67–68.

As these disagreements show, much of the dispute about the construction zone is empirical, whether the disagreement cuts across constitutional provisions or focuses on a specific provision.<sup>66</sup> For instance, the crosscutting question of whether the Constitution is written in the language of the law is at least in part an empirical one. It must be decided on the basis of evidence, including about the nature of the Constitution's language. Similarly, the more specific question of what the Due Process Clause means is for most originalist scholars empirical, dependent on claims about what the history shows about the communicative content of the clause.<sup>67</sup>

Our strategy in this Article is to build the case conceptually and empirically that the construction zone is smaller than it is even for those, like Solum and Barnett, who appear to believe it to be of moderate size. We do so in three ways. First, we show that there are many methods available in the language of the law for reducing the size of the construction zone. Second, we show that the examples of vagueness, gaps, and contradictions that moderate constructionists, like Solum, have offered can likely be resolved. Third, we show that much of modern originalist scholarship fixes the meaning of provisions that might be thought by the uninitiated to be indeterminate. It certainly appears that the more scholars consider context, the thicker the meaning they find.

By showing how we and other scholars make use of the substantial legal context of constitutional provisions, we also demonstrate the substantial tools

---

66 Not all questions about originalism are empirical. Whether to follow originalism is itself a normative question. Other questions may be conceptual, such as the question of whether original intent or public meaning is the appropriate object of interpretation. Even here, however, this conceptual question may depend on issues capable of empirical resolution: we have suggested for instance, that as an empirical matter those who enacted the Constitution intended to follow the original interpretive rules, rules that themselves did not follow substantive intent. *See generally* John O. McGinnis & Michael B. Rappaport, *Unifying Original Intent and Original Public Meaning*, 113 *Nw. U. L. REV.* 1371 (2019). But once it is determined that the communicative content is the proper object of interpretation, determining that communicative content is for most originalists an empirical question.

67 To be sure, for a few self-identified originalists, even the question of the content of communicative content is normative. Jack Balkin, for instance, expressly says that part of his interpretive theory is normative, because even the question of the nature of interpretation is in part necessarily normative. *See* Jack M. Balkin, *Nine Perspectives on Living Originalism*, 2012 *ILL. L. REV.* 815, 862–63; *id.* at 828 (“Inevitably, then, we face a choice in the present about what aspects of cultural meaning should constitute ‘original meaning’ for purposes of constitutional interpretation. There is no natural and value-free way to make this selection.”). In this Article, we will focus on the empirical claims of originalists. The overwhelming majority of originalists do not make normative claims about the object of interpretation. Instead, interpretation is generally the search for a fact or set of facts—the communicative content of a constitutional provision at the time it was fixed. *See* Solum, *Fixation Thesis*, *supra* note 54, at 12 (“Interpretation is an empirical inquiry. The communicative content of a text is determined by linguistic facts . . .”). Moreover, we have disputed Balkin’s normative arguments elsewhere. *See* John O. McGinnis & Michael B. Rappaport, *The Abstract Meaning Fallacy*, 2012 *U. ILL. L. REV.* 737.

with which modern originalists approach interpretation. Scholars using originalist methods recognize that the meaning of provisions may often become clearer when understanding the provision in the context of legal history. They also use interpretive rules to conclude that one meaning of a provision is better than another.<sup>68</sup>

Reducing the size of the construction zone in this way does not require a mechanical jurisprudence. Individual word meanings are sometimes contestable, but interpreters weigh the evidence and choose the more supported view. Similarly, sometimes there is disagreement about which interpretive rules were applicable. But, again, weighing the evidence allows one to choose the better attested view. These are mainly empirical judgments within the ordinary process of interpretation. They simply require a better understanding of the full context of the communicative content of a provision.

## II. THE LANGUAGE OF THE LAW AS A RESOURCE FOR DETERMINACY

How much uncertainty a writing creates is a function in part of the choices made by its authors. Authors who desire to keep uncertainty to a minimum can write a document that displays far less uncertainty than authors who do not share that objective. Thus, the authors' choices can minimize vagueness and uncertainty.

---

68 Larry Solum describes original methods originalism in a way that we believe risks confusion about our version of the theory. He describes original methods as holding that the "original meaning of the constitutional text is the meaning produced by application of the original methods of constitutional interpretation and construction to the text." Lawrence B. Solum, *Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record*, 2017 BYU L. REV. 1621, 1627. As an account of our approach, this description is misleading. First, it suggests that the original methods that original methods originalism relies upon include rules of construction. But that is not our position. The original methods we rely upon, which we call interpretive rules, are rules of interpretation that guide the process of determining the original meaning.

Second, it suggests that we believe rules of construction lead to original meaning. Again, that is not our position. We believe that rules of construction, by definition, do not influence the original meaning, but determine how to decide cases where the original meaning has run out. Third, this description of original methods may suggest that our theory adopts rules of construction for resolving issues within the construction zone. But our work on original methods has never offered a theory of how to undertake construction. While we acknowledge the possibility of a small construction zone, we do not discuss how construction within that zone should be conducted. Original methods has solely been devoted to the question of how to determine the original meaning, not how to decide matters within the construction zone.

Solum's description of original methods might be defended on the grounds that he is offering an account of original methods that is framed in terms of his own categories, since he has a much narrower account of interpretive rules and a much broader account of construction rules. Or Solum might be offering his own account of original methods. Both of these approaches are perfectly acceptable. But in the interests of avoiding confusion, we believe it is important to emphasize that his characterization of the theory conflicts with our understanding of original methods.

The language in which a document is written shapes the amount of uncertainty it creates. If the Constitution is written in the language of the law, then it will create far less uncertainty than if it is written in ordinary language. The language of the law is the language that lawyers normally use when writing legal documents and communicating about the law.<sup>69</sup> It is a technical language that is designed in part for precision and clarity.<sup>70</sup> Thus, it resolves indeterminacies that ordinary language does not.

The language of the law contains two principal methods by which it reduces the uncertainty often exhibited by ordinary language. First, it uses an extensive vocabulary of legal terms that have meanings that are often far clearer and more precise than ordinary language.<sup>71</sup> Some examples help illustrate the point. Above we discussed how the language of the law can render the term “due process” more determinate. Another constitutional term with a legal meaning that is far more determinate than its ordinary meaning is the term “session.” As we discuss in more detail below,<sup>72</sup> a question has arisen involving the timing of bills passed by the two legislative Houses. If a bill is passed in one house and then a significant period of time elapses before the bill is approved in the other house, does the bill have to be repassed by the first house before it can become a law? Based on the legal meaning of the term “session,” legal scholars have argued that the first bill’s passage remains effective only until the session of the Congress has ended.<sup>73</sup> Once the session ends, the bill is no longer valid and must be repassed by the first house. In other words, when the Constitution used the term “session” to describe the periods in which the Congress would sit, it incorporated traditional legal rules that governed legislative activity during a session.

By contrast, if the Constitution used the ordinary meaning of the term “session,” it would not be clear whether passage of a bill by one house in a prior session would still be effective when the second house passes the same bill. Thus, language that would have a clear meaning if given its legal meaning would have an unclear meaning if given its ordinary meaning.

The second method by which the language of the law reduces uncertainty is its use of a variety of legal interpretive rules.<sup>74</sup> Training in the law typically involves learning distinctive legal interpretive rules employed by lawyers when interpreting legal documents. The law contains various types of legal interpretive rules. Some legal interpretive rules are more formal versions of rules often applicable in ordinary language, like the rule against sur-

---

69 See, e.g., JAMES BOYD WHITE, *THE LEGAL IMAGINATION* 6–7 (abr. 1985) (1973).

70 See, e.g., PETER M. TIERSMA, *LEGAL LANGUAGE* 3 (1999).

71 *Id.* at 108; see also Heikki E.S. Mattila, *Legal Vocabulary*, in *THE OXFORD HANDBOOK OF LANGUAGE AND LAW* 27, 31 (Peter M. Tiersma & Lawrence M. Solan eds., 2012).

72 See *infra* notes 181–87 and accompanying text.

73 See, e.g., Saikrishna Bangalore Prakash, *Of Synchronicity and Supreme Law*, 132 *HARV. L. REV.* 1220 (2019).

74 We have previously provided a framework for determining what interpretive legal rules were to be applied to the Constitution. See McGinnis & Rappaport, *Unifying Original Intent and Original Public Meaning*, *supra* note 66, at 1395–1401.

plusage, which applies more strongly in formal legal documents.<sup>75</sup> Others are rules peculiar to law that help interpret particular kinds of provisions. An example is the rule of lenity, which applies only to criminal provisions.<sup>76</sup> A third kind are rules indicating the object of interpretation, such as those rules directing interpreters to inquire into the original public meaning or the original intent.<sup>77</sup>

Several of the legal interpretive rules may be important in reducing the uncertainty of constitutional language. First, uncertainties are reduced by the rule that indeterminacies in the language of a document can be eliminated by reference to the purpose of a provision and the structure of the document.<sup>78</sup> Second, uncertainties are reduced by the rule, which may have existed at the time of the Constitution's enactment, that requires interpreters to choose a clear or judicially manageable interpretation over an unclear or judiciary unmanageable one.<sup>79</sup> Third, uncertainties can be reduced by the rule that directs interpreters to look to the history of an institution to understand how it operated.<sup>80</sup> Thus, a provision relating to a jury, which might

75 See SCALIA & GARNER, *supra* note 53, at 174.

76 See, e.g., Jim Chen, *Law as a Species of Language Acquisition*, 73 WASH. U. L.Q. 1263, 1299 (1995).

77 McGinnis & Rappaport, *Unifying Original Intent and Original Public Meaning*, *supra* note 66 at 1409–18 (showing that reference to substantive intent was not an interpretive rule at the time of the Framing).

78 See 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 405, at 387 (Boston, Hilliard, Gray & Co. 1833) (“Where the words admit of two senses, each of which is conformable to common usage, that sense is to be adopted, which . . . best harmonizes with the nature and objects, the scope and design of the instrument.”).

79 For an example of the use of such an interpretive rule in the early republic, see James Madison, Veto Message (Mar. 3, 1817), in 8 THE WRITINGS OF JAMES MADISON 386, 386–87 (Gaillard Hunt ed., 1908) (“To refer the power in question to the clause ‘to provide for common defense and general welfare’ would be contrary to the established and consistent rules of interpretation, as rendering the special and careful enumeration of powers which follow the clause nugatory and improper. Such a view of the Constitution would have the effect of giving to Congress a general power of legislation instead of the defined and limited one hitherto understood to belong to them, the terms ‘common defense and general welfare’ . . . . *Such a view of the Constitution, finally, would have the effect of excluding the judicial authority of the United States from its participation in guarding the boundary between the legislative powers of the General and the State Governments, inasmuch as questions relating to the general welfare, being questions of policy and expediency, are unsusceptible of judicial cognizance and decision.*” (emphasis added)); see also Ruth Sullivan, *Some Problems with the Shared Meaning Rule as Formulated in R v Daoust and The Law of Bilingual Interpretation*, 42 OTTAWA L. REV. 71, 90 (2010) (discussing the rule that the clear meaning is to be preferred to ambiguous meaning as a rational expression of the legislature’s will).

80 An example of this principle is the practice of interpreting terms according to their common-law meaning. See SCALIA & GARNER, *supra* note 53, at 320 (describing this “age-old principle”).

have been vague in ordinary language, is assigned a specific meaning based on how that institution functioned over time.<sup>81</sup>

Finally, the 51–49 rule—the rule that directs the interpreter to choose the better interpretation of a provision, even if it is only slightly better—is a key to reducing uncertainty. First, this rule explains how close cases can be resolved. Since the rule requires the interpreter to choose a particular interpretation, it eliminates the claim that the original meaning necessarily runs out in close cases. Second, resolving such close cases is significant because a large number of these cases may arise under the Constitution. In the next Part we provide evidence of the existence of this salient rule at the time of the Constitution.<sup>82</sup>

While we have addressed various questions about the language of the law in other articles,<sup>83</sup> here we briefly review the evidence that the Constitution is written in the language of the law rather than in ordinary language. The evidence begins with the Constitution’s self-declaration: the Supremacy Clause proclaims that the Constitution is law and therefore suggests that the Constitution, like other laws, is written in the language of the law.<sup>84</sup>

But even more important is the pervasiveness of legal terms in the Constitution. In our review of the Constitution, we found over a hundred uses of terms with a legal meaning. Some of them, like Bill of Attainder, have an unambiguous legal meaning.<sup>85</sup> Others, like “recess,” have a legal meaning as well as an ordinary meaning.<sup>86</sup> Moreover, this list understates the number of terms with legal meanings because a large number of terms might, upon investigation, turn out to have had legal meanings at the time of the Consti-

81 See William Michael Treanor, *Judicial Review Before Marbury*, 58 STAN. L. REV. 455, 474–75 (2005) (describing how the decision of *Holmes v. Watson* about the size of the jury turned on the legal practice of requiring twelve men).

82 See *infra* notes 101–04 and accompanying text.

83 See McGinnis & Rappaport, *Language of the Law*, *supra* note 5. One significant question is how to conceptualize the legal interpretive rules within the language of the law. We have offered two ways of understanding the legal interpretive rules. The first treats such rules as part of the technical language that is the language of the law. Under this view, that language includes word meanings (semantics), grammar (syntax), and interpretive rules. *Id.* at 1334–46. The second way of understanding the legal interpretive rules is through a pragmatic understanding of what the constitutional utterance is asserting. Under this view, the legal interpretive rules are part of the context that speakers of the language of the law assume when making and understanding such utterances. *Id.* at 1346–53.

84 *Id.* at 1369.

85 *Id.* at 1370–77.

86 *Id.* at 1374. It is impossible to tell without significant investigation how many of the terms that have both an ordinary and a legal meaning are properly interpreted to have a legal meaning. That determination will depend on an analysis of the two different meanings in the context of the specific clauses that contain them. But it is obvious that a significant number of the ambiguous terms will properly be given the legal meaning. A reader with knowledge of the language of the law would be able to recognize that many of the terms have both ordinary and legal meanings and therefore might be given legal meanings.

tution's enactment.<sup>87</sup> At present, we classify these terms as possibly having a legal meaning because making a determination would require extensive historical research. If the terms with possible legal meanings are included, there would be nearly 250 terms with a possible legal meaning.<sup>88</sup> Significantly, the Bill of Rights, enacted at virtually the same time as the original Constitution, also contains a high proportion of terms with legal meanings.

The Constitution's provisions and structure also strongly indicate that the application of the legal interpretive rules was assumed when the Constitution was written. For example, the Non-Obstante Clause of the Supremacy Clause was drafted with common-law interpretive rules in mind.<sup>89</sup> Thus, the Clause presents strong evidence that the constitutional enactors assumed that legal (and technical) interpretive rules would apply to the Constitution. Similar inferences can be drawn from the Constitution's use of a preamble and prefatory clauses for which there were established rules of legal interpretation.<sup>90</sup> The Bill of Rights, no less than the original Constitution, contains many legal terms and phrases that play off legal interpretive rules.<sup>91</sup>

Finally, in the early republic, both those who were expert in the language of the law, such as jurists, and those who were not necessarily experts, such as legislators, interpreted the Constitution by references to a wide variety of legal interpretive rules.<sup>92</sup> Among the rules that interpreters employed were the antisurplusage rule, the *expressio unius* rule, the rule of lenity, the rule that the specification of particulars is the exclusion of generals, the negative pregnant rule, the rule that unclear provisions should be interpreted in accord with their purpose, the rule that terms may be given a meaning based on historical practice, the rule of intratextualism, the rule

87 *Id.*

88 *Id.* at 1375 (recounting 242 terms with a possible legal meaning).

89 See Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 242 (2000). The Non-Obstante language of the Supremacy Clause is italicized here:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, *any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.*

U.S. CONST. art. VI, cl. 2 (emphasis added). Under the legal interpretive rules at the time, this language was a way for a law enactor to indicate that the law in its enactment should not be interpreted to avoid impliedly repealing prior laws (by attempting to reconcile the two laws), but instead should be interpreted without reference to the prior law. Thus, the Supremacy Clause was indicating that supreme federal laws should not be reconciled with state laws, but instead should be interpreted without reference to state laws. Thus, this language assumed the applicability of two legal interpretive rules—that implied repeals should be disfavored and that the non-obstante language indicated that the former rule should not be applied. See Nelson, *supra*, at 232.

90 McGinnis & Rappaport, *Language of the Law*, *supra* note 5, at 1381–83.

91 *Id.* at 1376–77, 1379–80 (providing the examples of the Supremacy Clause and the Ninth Amendment).

92 *Id.* at 1383–94 (providing many examples of the use of legislative interpretive rules from both judicial opinions and legislative debates).

that an interpreter should consider both the letter and the spirit of a provision, the rule that the interpretation of a document should accord with the nature of the document, and the rule that provisions should be interpreted in accord with legal maxims—such as no man should benefit from his own wrong.<sup>93</sup>

In sum, the Constitution's language of the law greatly reduces its legal uncertainty. Both the legal meanings of the terms as well as the legal interpretive rules operate to make the meaning of the document far more determinate. Put differently, if the Constitution had been written in ordinary language, there would be far less determinacy about its meaning than it actually has, having been written in the language of the law.

### III. RESOLVING DIFFERENT CATEGORIES OF LEGAL INDETERMINACY

Here we consider various categories that are thought to result in legal indeterminacy—ambiguity, vagueness, gaps, and contradiction. We explore each category in turn, describing carefully the relations between them. We then consider some of the paradigm examples in each category that are thought to necessitate construction, but we do not find any clear examples of constitutional language that are irreducibly uncertain. In addition, we explore a different cause of uncertainty—ignorance of the language of the law.

We argue that ambiguity can always be resolved through interpretation. Even in close cases, the evidence will be stronger in favor of one of the possible meanings of an ambiguous provision, and that meaning should be followed according to the 51–49 rule. We also argue that ambiguity is a much more common phenomenon than it is sometimes portrayed. Ambiguity includes not only a word with two unrelated meanings but also a term that has two related meanings. We then show that other indeterminacies, such as gaps and contradictions, can be addressed in the same manner.

Vagueness poses the most difficult issue of indeterminacy. We acknowledge cases of vagueness that might not be resolved by the legal interpretive rules, such as a law that referenced “tall” people. But while vagueness might involve an irreducible indeterminacy, it also might not. Some terms that appear vague may end up resulting in determinate meanings when they are interpreted more carefully. It turns out that in the Constitution, a carefully crafted legal document, vagueness leads to an irreducible indeterminacy much less often than many observers would assume.

First, some examples of what might be thought to be vagueness turn out to be examples of related-meaning ambiguity, which can be ultimately resolved through the requirement to choose the better attested meaning. Second, some provisions that are vague in ordinary language turn out not to be vague in the language of the law. Third, some terms that seem vague in the abstract turn out not to be vague when viewed in the context of a broader document. Finally, even if a term has some vague applications in borderline

---

93 *Id.* at 1369, 1383–94.



cases, the term will often yield clear results when the application is not one of these borderline cases, making any residual vagueness less important to constitutional law.

### A. *Ambiguity*

An ambiguous provision is typically considered a provision that has only two or a small number of different meanings. One type of ambiguity occurs when “a given word has two separate and unrelated meanings.”<sup>94</sup> A common example is the word “bank,” which can mean either the side of a river or a financial institution. Such ambiguity does not typically create much of a problem for legal interpretation, because the fact that the meanings are unrelated allows the context (and, if necessary, the interpretive rules) to resolve the ambiguity.

But ambiguity is not limited to situations where the two meanings are unrelated. People often use the same term in two or more distinct ways, even though those ways are related. Consider the term “property,” which is used in a number of distinct ways. The term has a narrow meaning referring to real property, but also a broader understanding that includes both real and personal property, and an even broader understanding that extends also to government entitlements. These different understandings of the term “property” constitute ambiguity because people use the term property in these different ways.<sup>95</sup> The fact that the terms are related does not somehow transform it into vagueness.<sup>96</sup>

That these meanings are related, however, does mean that it may be harder to resolve the ambiguity.<sup>97</sup> The context will not as clearly indicate which of these understandings is correct as compared to a case of unrelated

---

94 Andrei Marmor, *Varieties of Vagueness in the Law* 7 (USC Gould Sch. of L., Legal Stud. Rsch. Paper No. 12-8, 2013), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2039076](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2039076).

95 It might be claimed that these different meanings involve vagueness rather than ambiguity on the ground that they involve borderline cases. This appears to be the result of the fact that they involve related meanings. But as discussed above, these are not borderline cases. They are different usages. Speakers use all of these different meanings depending on what they want to say.

96 The correct terminology involving unrelated-meaning and related-meaning ambiguities is not clear. Some people refer to unrelated-meaning ambiguity as lexical ambiguity and related-meaning ambiguity as polysemy. See Adam Sennet, *Ambiguity*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2016), <http://plato.stanford.edu/archives/spr2016/entries/ambiguity/> (“One traditional carving is that ambiguity in words is a matter of two lexical entries that correspond to the same word and polysemy a single lexeme that has multiple meanings.”). But sometimes polysemy is treated differently than ambiguity. *Id.* (“[Polysemy] is sometimes characterized as a phenomenon subsumable under ambiguity (basically ambiguity where the meanings are tightly related) but sometimes it is taken to be a different phenomenon altogether.”).

97 That the term “property” is ambiguous between these three meanings does not mean that one of these meanings will not be vague. See *infra* notes 109–10 and accompanying text.

ambiguity. Still, we are confident that such related-meaning ambiguity can be resolved through the use of legal interpretive rules.<sup>98</sup> Those interpretive rules included a variety of considerations, such as preferring the meaning which conformed to the evident purpose of the provision<sup>99</sup> and favoring the meaning that accorded with the other clauses in the document.<sup>100</sup>

Most important of all, if these considerations result in a close case, the legal interpretive rules required that the judge select the meaning that was more likely than not—what we have termed the 51–49 interpretive rule. That rule should resolve almost any ambiguity, once the evidence for in interpretation is weighed against another.

An example of the articulation of the 51–49 rule at the time of the Constitution’s enactment is provided by Representative Fisher Ames, who was an important member of the Massachusetts Ratification Convention. In arguing for the constitutionality of the First Bank of the United States in the House, Ames invoked the rule: Ames “had no desire to extend the powers granted by the [C]onstitution beyond the limits prescribed them,” but “in cases where there was doubt as to its meaning and intention, he thought it his duty to consult his conscience and judgment to solve them.”<sup>101</sup> And “even if doubts did still remain on two different interpretations of it he would constantly embrace [the reading] least involved in doubt.”<sup>102</sup>

Additional reasons support the existence of the 51–49 rule at the time of the Framing. First, when the circumstances demanded a different rule for evidentiary weight, jurists and commentators stated a different rule. Blackstone famously wrote that it was better to let ten guilty men go rather than convict one innocent.<sup>103</sup> At the time of the Constitution’s enactment, judges had begun translating that insight into a special standard of proof for criminal trials that demanded acquittal when there were reasonable doubts about guilt.<sup>104</sup> The necessity to create a special rule for criminal trials itself suggests that the default 51–49 rule was usually embraced.

---

98 Normally, use of the term “property” without more will indicate that all types of property are included. But there can be exceptions. If a law were to state that any person “who digs on the property of another person” shall have committed a particular crime, there would be a reasonable argument that it extended only to real property, rather than personal property.

99 See *supra* note 78 and accompanying text.

100 See SCALIA & GARNER, *supra* note 53, at 167 (providing examples of this canon, including from English jurists, like Sir Edward Coke, well-known at the Framing).

101 14 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA MARCH 4, 1789–MARCH 3, 1791, at 390 (William Charles diGiacomantonio, Kenneth R. Bowling, Charlene Bangs Bickford & Helen E. Veit, eds., 1995) (remarks of Representative Fisher Ames on Feb. 3, 1791).

102 *Id.*

103 See 4 WILLIAM BLACKSTONE, COMMENTARIES \*352 (“[A]ll presumptive evidence of felony should be admitted cautiously; for the law holds, that it is better that ten guilty persons escape, than that one innocent suffer.”).

104 See JOHN H. LANGBEIN, ORIGINS OF ADVERSARY CRIMINAL TRIAL 262–63 (2003).

Finally, it appears that the 51–49 rule would be the sensible default rule for decisions. Unless there is a reason systematically to prefer one interpretation to another, there is no reason to give more weight to one side than the other.

The case for the 51–49 rule seems particularly strong when one considers the alternatives. What would one do in the absence of the rule? If one did not believe that the meaning that has the stronger evidence is the meaning of the document, then it is not clear what rule to apply. While defenders of a significant construction zone seem generally to be committed to denying the 51–49 rule, what rule would they apply? Is it a 60–40 rule or a 70–30 rule, and if so, why?<sup>105</sup>

Even when there are more than two possible meanings, but still only a few possible ones, it would seem possible to resolve the question by selecting the best one. For example, if there are three possible interpretations, it would seem most consistent with the 51–49 rule to choose the best interpretation of the three, even if that interpretation was only slightly more likely than the other two.

### B. *Vagueness*

Vagueness has been defined as a term that has borderline cases.<sup>106</sup> A term will be vague if it has no clear line of demarcation and therefore it cannot be determined in borderline cases whether the term is satisfied. One example of a vague term is a “tall man.” It is not possible to determine exactly what the height cut-off is between a man who is tall and one who is not. Thus, men will exist whose height seems close to the cutoff, who are difficult to classify either as tall or as not tall. Another example of a vague term is a “conscientious student.” It is unclear whether a college student who on rare occasions fails to attend class, when he has a reason for not doing so, but though not a permissible excuse, can be described as a conscientious student.<sup>107</sup>

---

105 Gary Lawson amplifies this point. He writes that:

If the standard of proof requires only that an interpretation be the best available alternative (have “stronger evidence in its favor”) in order to be correct, the construction zone is going to be very small, and possibly even nonexistent . . . . Yet new originalists say little or nothing about how much ambiguity or vagueness is necessary in order to make an answer indeterminate. Certainly, if the correct standard of proof for meaning is very high, then a relatively modest amount of vagueness or ambiguity is enough to foreclose interpretative determinacy and potentially open the field quite broadly to construction. But if that kind of [argument] is an implicit premise of the new originalist constructionists, they should make that clear.

GARY LAWSON, EVIDENCE OF THE LAW: PROVING LEGAL CLAIMS 121–22 (2017).

106 Roy Sorensen, *Vagueness*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2018) (“[A] term is vague to the extent that it has borderline cases.”), <https://plato.stanford.edu/entries/vagueness/>.

107 Vagueness can also be classified as single or multidimensional. A “tall person” is vague along a single dimension of how tall a person must be in order to be considered tall.

The key feature in determining whether a term is vague depends on its meaning in context. If a term has a meaning that has unclear applications, then it is vague. For example, ordinary language offers no regular usage that indicates a specific minimum height of a tall man. It is not as if one sees people using the term in a way that indicates that they believe a specific height (say 5'11.25") is the cutoff. Thus, when people use the term "tall" in ordinary language, it is reasonable to assume that they are intending to use a vague term with unclear applications.

By contrast, other terms do not appear to be vague. For example, the term "two Senators," in the Constitution does not appear to be vague. The number of senators in this phrase has a precise line of demarcation, and even whether someone constitutes a senator does not appear to have borderline cases.

But talk of vagueness and nonvagueness as absolute categories may be somewhat misleading. Even terms that appear not to be vague can turn out to be vague when unexpected or unlikely applications arise. For example, it is possible that the provision that establishes the requirement of two senators for each state might be vague in certain unlikely circumstances.<sup>108</sup> Examples of this type suggest that it may be better to treat as nonvague not merely those terms that have no vague applications at all, but also those that have vague applications only in rare and unlikely circumstances. By adopting this approach, one will not misleadingly suggest that a term that has clear applications in all but the most unlikely circumstances is vague. Instead, one will treat such terms as not vague, even though they could conceivably be vague in some unusual situation. Although we believe that this terminology eliminates some misleading assertions, nothing substantive turns on the terminology so long as one keeps in mind the definitions of these terms.

---

The uncertainty about this term is clustered entirely around a single dimension—how tall a person is. Other vague terms might involve multiple dimensions. Whether someone is "healthy" appears to be vague but will depend upon a variety of factors, such as heart rate, body weight, and blood pressure. For example, one person might be healthy overall and another unhealthy, even though the healthy one has a less healthy heart rate. See TIMOTHY A.O. ENDICOTT, *VAGUENESS IN LAW* 178 (2000).

108 The constitutional command that each state have two senators, see U.S. CONST. art I, § 3, cl. 1., might be thought to involve the possibility of vague applications in unusual situations. Imagine that the Senate passed a rule that denied in certain circumstances the right to vote to certain senators, such as those senators from the twenty least populous states or those senators who show up last to the Senate on the day of the vote. Whether this law violates the two-senator command is a complicated matter turning on a variety of factors, including the constitutional powers of a senator and the power of the Senate to regulate voting rules and other rules of proceedings. But it is conceivable that one might, after analyzing the issues, conclude that such a regulation involved a borderline case. Still, the circumstance seems so unlikely to occur that it is useful to describe the provision requiring that each state have two senators as not being vague. On some aspects of this issue, see generally John O. McGinnis & Michael B. Rappaport, Essay, *The Rights of Legislators and the Wrongs of Interpretation: A Further Defense of the Constitutionality of Legislative Supermajority Rules*, 47 DUKE L.J. 327 (1997).

## 1. Distinguishing Vagueness from Ambiguity

Sometimes it is difficult to determine whether a particular case of indeterminacy involves vagueness or related-meaning ambiguity, as we described such ambiguity in the prior Section. In our view, some commentators wrongly classify related-meaning ambiguity as vagueness. But there is a clear distinction between the two types of indeterminacy.

Consider again the related-meaning ambiguity of the term “property,” which has a narrow meaning that refers to real property and a broader understanding that includes both personal and real property. The type of uncertainty exhibited by the term property differs significantly from the characteristic that we identified with the vagueness of the term “tall.” Unlike a term, such as “tall” where people do not use the term to refer to a specific lower bound, a term like “property” is actually used by people as reflected in these possibilities. Sometimes people used “property” to mean only real property, whereas at other times they used it more broadly to include both personal and real property. Even though the uncertainties involving “property” might be termed borderline cases, there are distinct senses of the term that people use to have those senses. And, therefore, they are properly termed ambiguities.<sup>109</sup>

Another reason that commentators may confuse vagueness with ambiguity is that sometimes a term can be ambiguous between two different meanings, one of which is vague and another not vague. If the ambiguity is resolved in favor of the nonvague meaning, then one can conclude that the term as used in the document is not vague, even though one of the meanings of the term is vague. An example, which we discuss below, of such an ambiguous provision is the term “jury,” which has both a vague and a nonvague meaning but is correctly interpreted not to be vague.<sup>110</sup>

If we ask, then, whether the term “jury” is ambiguous or vague, the answer might be both. It may be ambiguous between two meanings, one of which is vague and another not vague. And even though the term is sometimes vague, a provision containing the term might turn out to be determinate if the ambiguity is resolved in favor of the nonvague meaning.<sup>111</sup>

---

109 That the term “property” displays related-meaning ambiguity does not mean that it is not also sometimes vague. When interpreting the term “property,” the interpreter should first determine which of the meanings of “property” was employed. Then the interpreter must apply the term to a particular situation, which may or may not be vague. For example, consider the question whether “property” covers an individual’s DNA sequence. The first question is which meaning of “property” was employed. If the “real property” meaning was employed, then the answer is clearly no. But if the meaning of “real and personal property” was employed, the application might be vague.

110 See *infra* note 111 and accompanying text.

111 Another type of uncertainty in language is underspecification. Soames distinguishes between linguistic ambiguity and underspecificity due to semantic incompleteness. While ambiguity “arises from multiple preexisting linguistic conventions governing particular words or phrases,” underspecification involves a situation when “there is no end to the possible completion[ ]” of an utterance. Scott Soames, *To What Should Originalists be Faithful* 4 (Oct. 5, 2020) (unpublished manuscript) (<https://papers.ssrn.com/sol3/>

## 2. Resolving Vagueness

While this analysis suggests that whether a term is vague turns on its meaning as applied to (what might potentially be) borderline cases, its meaning in the Constitution will less often turn out to be vague than many commentators might at first believe for several reasons. First, even if a term is vague in ordinary language, it may not be so in legal language. The legal meaning of the term may not be vague. Or the legal interpretive rules may provide a nonvague understanding of the term. To take an actual example, consider a statute that provides that a civil jury shall have six members. Would such a statute be constitutional? In ordinary language, a jury might be thought not to require a specific number of jurors, but to allow a range. But is six a high enough number, or is a higher number required? One might reasonably conclude that the answer is unclear because the term jury is vague in ordinary language.

But the term jury might also have a legal meaning. Within the law, a consistent practice of having twelve people on a jury might lead the term to having a legal meaning of a body with twelve members. Alternatively, a legal interpretive rule might allow the historical experience of an institution to be considered when understanding how that institution is defined. In either case, one might believe that the term is ambiguous (since it has both an ordinary language and a legal meaning) and conclude—as the New Jersey Supreme Court did in 1776—that the meaning of the term “jury” in a constitutional provision was a body with twelve members.<sup>112</sup>

---

papers.cfm?abstract\_id=3696958). A legal example of underspecification arose in *Smith v. United States*, where the Supreme Court had to construe a federal criminal statute that provided that “whoever . . . uses or carries a firearm [in the course of committing a crime of violence or drug trafficking] shall, in addition to the punishment provided for such crime . . . be sentenced to a term of imprisonment of not less than five years.” 508 U.S. 223 (1993). The Court disagreed as to whether the language should be read to mean “uses a firearm as a weapon” or “uses a firearm for any purpose, including to barter.” Soames argues that the context will often provide a resolution to how the language was employed.

While underspecification differs from ambiguity, we believe that it will often be resolvable by reference to the same methods as ambiguity. As the example in *Smith* illustrates, the completion of the language *in a specific context* will generally involve a choice between a limited number of possibilities. Moreover, a determination that these are possible completions requires that people actually use the language in that way. As Justice Scalia made clear in *Smith*, people sometimes intend to assert, when they speak about using a firearm, that the firearm is used as a weapon. While there may be uncertainty about which possibility properly completes the utterance, the 51–49 rule can be employed to resolve this uncertainty.

112 See William Michael Treanor, *supra* note 81, at 474–75 (describing how the decision of *Holmes v. Watson* about the size of the jury turns on the legal practice of requiring twelve men). Law may also have other resources to resolve vagueness. For example, although a term may have a large or continuous number of possible demarcations, the legal rule may call for defining the term in accord with a popular focal point. Thus, if the term “tall men” were used, six feet might be thought to provide the minimum bound of tallness because law would appeal to a bright-line rule consistent with popularity.

Second, a term may seem vague when viewed in the abstract but not vague when viewed in context. In particular, the context of a term in a document may lead it to be more precise than it seems in the abstract, because the document's structure, purpose, or other terms may provide indications of its meaning.

An example of this precisification through context is provided by the meaning of the terms "legislative" and "executive power," which we discuss below.<sup>113</sup> The question we consider there is whether the meaning of either of these terms covers the situation where the executive branch exercises prosecutorial discretion to not enforce a statute when the statute does not allow such prosecutorial discretion.

While the ordinary language meaning of executive and legislative power in the abstract do not appear to clearly address this situation, we argue below that the meaning of those constitutional terms in context does indicate that the legislative power requires that the executive follow the statute. In particular, the history and purposes underlying the Take Care Clause indicate that the executive could not decline to enforce such a statute if the statute did not allow prosecutorial discretion.

### C. *Vagueness in the Constitution*

To determine whether there are any constitutional issues within the construction zone, it is thus crucial to discover whether there any examples of irreducible vagueness in the Constitution. It is an empirical question whether there are any such examples and, if so, how many. Constitutional enactors, however, would have had strong reasons for avoiding vague terms. Such terms would force subsequent interpreters to address inherent uncertainties and would give up the enactors' own power to set the law.<sup>114</sup> But neither the possibility nor the extent of irreducibly vague terms can be ruled out on theoretical grounds.

As an empirical matter, we believe that many provisions that others consider to be vague are not actually vague. These alleged vague provisions turn out either not to use vague terms or to employ apparently vague terms that can be resolved. Of course, a conclusion that specific provisions are not vague does not mean that none of them are. But if one concludes that constitutional provisions that commentators have provided as exemplars of vague terms turn out not to be so, that is certainly some evidence of the relative lack of vagueness of constitutional provisions generally.

It is possible to envision provisions that would be vague. For example, the Takings Clause provides that private property shall not "be taken for pub-

---

113 See *infra* notes 119–131 and accompanying text.

114 McGinnis & Rappaport, *The Abstract Meaning Fallacy*, *supra* note 67, at 772–74 (suggesting that risk aversion militates against vague terms that delegate power to future decisionmakers). Of course, there also may be reasons to use vague terms. For example, a vague term might be useful if it is difficult to specify a rule in advance of particular cases.

lic use, without just compensation.”<sup>115</sup> It has been argued that “public use” is a vague concept.<sup>116</sup> Under that view, a public use is one that benefits a substantial portion of the public. But since there is no precise proportion that constitutes a substantial portion of the public, the constitutional language of public use might run out.

While this understanding of the term “public use” might render it vague, we are skeptical that this is the correct understanding. Although this is not the place to examine fully the evidence, we note that originalist interpretations by Justice Thomas and Ilya Somin have argued for an alternative reading of this provision’s original meaning that would eliminate this vagueness.<sup>117</sup> Under their interpretation, the original meaning requires that the property that is taken be open to use by the entire public—that is, that it be subject to something like a common carrier obligation to serve all reasonable comers.<sup>118</sup> In addition to the textual and other evidence that supports this interpretation, an interpretive rule that prefers interpretations that are not vague does so as well.

Larry Solum also offers an example of a vague constitutional term that is in the construction zone, but we believe that this term is not irreducibly vague and can be resolved through the use of interpretive rules. Solum argues that the terms “executive,” “legislative,” and “judicial” might be vague, arguing that particular instances of power might fall in the border between these powers.<sup>119</sup> In particular, he suggests that it is unclear whether President Obama’s decision not to deport “undocumented persons who came to the United States as children” is an exercise of legislative power or “executive power over the prosecutorial function.”<sup>120</sup>

We do not believe that the terms “executive” and “legislative power” in this context are irreducibly vague. These terms, when placed in a legal context, can be resolved through the ordinary legal interpretive rules. When the Constitution was enacted, these words were historical terms that gained specific meanings from their history in the state constitutions, in the British Constitution, and in other places.<sup>121</sup> These terms also must be construed in accord with one another and the remainder of the Constitution.<sup>122</sup> After

115 U.S. CONST. amend. V.

116 See, e.g., Marc R. Poirier, *The Virtue of Vagueness in Takings Doctrine*, 24 CARDOZO L. REV. 93, 138 (2002) (describing “public use” as vague).

117 See, e.g., *Kelo v. City of New London*, 545 U.S. 469, 521 (2005) (Thomas, J., dissenting) (“[T]he government may take property only if it actually uses or gives the public a legal right to use the property.”); ILYA SOMIN, *THE GRASPING HAND: KELO V. CITY OF NEW LONDON & THE LIMITS OF EMINENT DOMAIN* 131–32 (2015).

118 *Kelo*, 545 U.S. at 508–12 (Thomas, J., dissenting).

119 Solum, *Constitutional Construction*, *supra* note 24, at 470.

120 *Id.*

121 See, e.g., John Yoo, *Unitary, Executive, or Both?*, 76 U. CHI. L. REV. 1935, 1977 (2009) (book review) (discussing the influence of the British Constitution on these concepts).

122 See Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 579–99 (1994) (offering holistic reading of executive power through examining text of entire Constitution).



such consideration, we do not believe Solum's example of President Obama's decision not to deport certain undocumented persons who came to the United States as children involves irreducible vagueness.

One preliminary issue here is whether the governing immigration statute allows the prosecutorial discretion that the President exercised. This question must be addressed first, because the constitutional analysis depends on whether or not the statute allows the President to exercise this discretion. While the text of the statute may be largely silent on the question of prosecutorial discretion, the proper way to interpret the statute is to assume that Congress adopted the normal background principles that govern such discretion. Those principles involve a variety of factors, such as how easy it will be to obtain the conviction, how broad the exercise of discretion is, and how blameworthy the potential defendant appears to be.<sup>123</sup>

If the President's exercise of discretion was not authorized by these principles and therefore violates the statute, then we believe that the President's action would be unconstitutional. This conclusion would not rely on interpreting any irreducibly vague terms. There are three possible interpretations of the Constitution in this situation. The first interpretation is that determining enforcement priorities is legislative in nature. Congress retains the legislative power to tell the President what considerations he or she may take into account so long as it does not violate some independent constitutional prohibition, like the Bill of Attainder Clause.<sup>124</sup> A second possible interpretation is that the choice of against whom to take enforcement action is inherently executive.<sup>125</sup> The President retains the power to decide not to enforce any law for any reason he or she wants. The third possibility is that the President has the power to decline to enforce laws to some unspecified degree. Another way of putting this third possibility is that the President cannot be micromanaged too much by legislative direction.<sup>126</sup>

We believe that the first interpretation is the correct one. The Constitution included the Take Care Clause, which is often recognized as repudiating

---

123 These background principles may be vague, but that does not undermine our point. Our claims involve constitutional interpretation, not statutory interpretation.

124 See, e.g., Zachary S. Price, *Funding Restrictions and Separation of Powers*, 71 VAND. L. REV. 357, 437 (2018) ("Law enforcement is another area of near-plenary congressional control through appropriations limits. . . . [P]residents hold no constitutional authority to direct enforcement of federal laws in defiance of specific legislative constraints on public resources available for that purpose.").

125 See, e.g., Louis W. Fisher, *Executive Enforcement Discretion and the Separation of Powers: A Case Study on the Constitutionality of DACA and DAPA*, 120 W. VA. L. REV. 131, 139 (2017) (setting forth the position of inherent executive power over enforcement priorities).

126 See, e.g., Akhil Reed Amar, *Some Opinions on the Opinion Clause*, 82 VA. L. REV. 647, 660 (1996) (discussing the possibility that a strong reading of the unitary executive imposes restrictions on micromanagement by Congress). As described, this third possibility appears vague. But, as indicated below, we do not believe this is the correct reading of the Constitution.

the King of England's asserted power to suspend or dispense with the laws.<sup>127</sup> If the Constitution prohibits the President from not enforcing a law, then it is hard to imagine how it could give the President unlimited authority to decide against whom to take enforcement actions. While the third possibility, of the President enjoying the power to decline to enforce laws to some unspecified degree, is not as clearly mistaken as the second possibility of giving the President unlimited enforcement prioritization authority, it still fails for the same reason: the President can use this more limited discretion to decline to enforce binding laws that the legislature has enacted. Moreover, the first possibility, that of allowing Congress to deny discretion to the executive, accords with the standard view that allows Congress to pass statutes without executive discretion that confer mandatory rights on individuals (such as Social Security or privacy rights) or to require the executive to spend money.<sup>128</sup>

Now we consider the other possibility: the President's exercise of discretion was authorized by the background principles governing enforcement discretion. In that event, there is no issue of executive power overriding the legislature's direction. The only question here is whether the delegation of the discretion is consistent with the nondelegation doctrine. While a strict nondelegation doctrine may well be required by the Constitution's original meaning,<sup>129</sup> that doctrine does not extend to specific areas, such as foreign and military affairs, where the executive historically enjoyed much greater discretion.<sup>130</sup> Prosecutorial discretion is one of these specific areas where the executive enjoyed significant discretion.<sup>131</sup> Consequently, if the Congress conferred authority on the President to adopt his nonenforcement program, this action would have been well within any limits on Congress's constitutional power.

This analysis of Solum's proposed example of vagueness does more than simply argue that there is no irreducible vagueness in the Constitution on this point. It also illustrates how what might seem to be a type of vagueness—borderline cases between executive and legislative power—can be resolved through context and the language of the law. The question whether the President has any prosecutorial discretion to override legislative direction is

---

127 Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 808 (2013).

128 See OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, BUDGET OF THE UNITED STATES FEDERAL GOVERNMENT: FISCAL YEAR 2009, at 25–26 (2008), <https://www.govinfo.gov/content/pkg/BUDGET-2009-BUD/pdf/BUDGET-2009-BUD-7.pdf> (discussing mandatory budget).

129 See generally Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327 (2002).

130 See Michael B. Rappaport, *The Selective Nondelegation Doctrine and the Line Item Veto: A New Approach to the Nondelegation Doctrine and Its Implications for Clinton v. City of New York*, 76 TUL. L. REV. 265, 345–55 (2001).

131 See Bruce A. Green & Fred C. Zacharias, *Regulating Federal Prosecutors' Ethics*, 55 VAND. L. REV. 381, 439 (2002) (describing the time-honored tradition of prosecutorial discretion).

addressed by identifying three possibilities and then using constitutional structure and history to resolve the matter. The question whether Congress can confer significant prosecutorial discretion is addressed in much the same way.

#### D. Gaps

Another possible problem thought to necessitate construction is a “gap” in the Constitution—a question where the Constitution provides no clear answer of how a matter is to be resolved.<sup>132</sup> Identifying a gap in the Constitution is not easy because in most cases the Constitution’s failure to mention a matter is one of the ways the Constitution addresses it. For example, if the Constitution does not provide Congress with an enumerated power, that is normally thought to be a way of denying such a power to Congress. Silence in this context is not a gap, but a method for imposing a rule. To find a gap in the Constitution, one must conclude that the document addresses the issue but does not answer it. This is a relatively uncommon situation. And when it does occur, it often has the characteristics of an ambiguity, which can be resolved with the interpretive rules.

Solum’s one example of a gap provides a useful demonstration of our approach.<sup>133</sup> Solum suggests that the power to remove federal officers may provide a gap in the Constitution because the Constitution does not provide an express rule for removal in contrast to the one it states for appointments.<sup>134</sup> We disagree that this issue creates a gap. Instead, we believe that the Constitution addresses this matter and at most is ambiguous about the correct result.

Solum’s example proceeds on the assumption that the Constitution is silent about removal, but we, like others, disagree. In our view, the Executive Power Vesting Clause provides the President with the power to remove executive officials. While there are several ways to reach this result, one common argument is that the Vesting Clause provides the President with all executive powers that executives typically possessed at the time of the Constitution’s enactment that had not been given to Congress or otherwise limited.<sup>135</sup> One executive power that executives such as the King of England possessed was the power to appoint and remove executive officers.<sup>136</sup> The Framers chose to depart from the traditional executive arrangement as to appointments, specifically providing that officers were to be appointed with the advice and

---

132 See Ken Levy, *Why the Late Justice Scalia Was Wrong: The Fallacies of Constitutional Textualism*, 21 LEWIS & CLARK L. REV. 45, 53–54 (2017) (suggesting the possibility of gaps in the Constitution).

133 Solum, *Constitutional Construction*, *supra* note 24, at 471.

134 *Id.*

135 See Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 255–57, 262 (2001) (arguing for a residual theory of the executive power in foreign affairs).

136 Calabresi & Prakash, *supra* note 122, at 596 n.212.

consent of the Senate.<sup>137</sup> But they did not depart for removals, thereby suggesting that the President enjoyed that traditional executive power. Under this interpretation, the Constitution did not leave a gap, but actually addressed the removal issue.

But suppose that the executive power is not best interpreted as providing the President with removal authority. The Constitution still would not leave a gap. Instead, the decision whether and how much authority the President should have to remove executive officers would be allocated to the Congress under the Necessary and Proper Clause.<sup>138</sup> Since the Constitution would not otherwise address the issue, Congress would have the authority to make the determination.<sup>139</sup> In the end, then, we believe that the Constitution allocates to the President removal authority over executive officers, but even if we are wrong, the Congress possesses the power to make the decision. At most, if it were not clear whether the Article II Vesting Clause conferred the authority on the President, one would be confronting an ambiguity—with the Vesting Clause possibly covering it or not—that would be resolved as other ambiguities are with the interpretive rules.<sup>140</sup>

Perhaps a better example of a gap involves an issue under the Takings Clause. The Clause provides “nor shall private property be taken for public use without just compensation.”<sup>141</sup> While the Clause prohibits uncompensated takings for public use, does it address takings—either compensated or uncompensated—for private use? By its express terms, the Clause does not appear to prohibit such takings for private use. But that seems extremely odd, because, if takings for public use are restricted, it would seem that the enactors would have all the more strongly favored restricting takings for private use.

If this is a gap in addressing takings for private use, it can be addressed in the ordinary way that any ambiguity can be. The question here is whether the Takings Clause should be understood as implicitly prohibiting takings for private use. One possibility is that the language implicitly prohibits takings for private use and another possibility is that it does not. If both of these possibilities are ways that the language would have been understood in context, then the interpretive rules can be used to resolve the ambiguity.

Consider first the case of uncompensated takings for private use. Takings for public use appear—based on the Framers’ values as well as our

137 U.S. CONST. art. II, § 2, cl. 2; cf. Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543, 1562 (2002) (making similar argument that the President retained the foreign affairs powers of the King as executive power except when those powers were assigned to another branch).

138 U.S. CONST. art I, § 8, cl. 18.

139 Peter M. Shane, *Conventionalism in Constitutional Interpretation and the Place of Administrative Agencies*, 36 AM. U. L. REV. 573, 586 (1987) (arguing that Congress has the power to regulate the removal of officials under the Necessary and Proper Clause).

140 Another conceivable interpretation is that an executive officer could be removed only with the advice and consent of Senate. But the Constitution simply does not say this, and it would have been easy for it to do so if that rule had been intended.

141 U.S. CONST. amend. V.

own—to clearly be normatively superior to takings for private use. Thus, if the Constitution prohibited uncompensated takings for public use, it would appear quite peculiar if it allowed uncompensated takings for private use.<sup>142</sup>

One might then understand the Constitution as implicitly assuming that an uncompensated private-use taking is unconstitutional. To draw an analogy, if a parent tells a child, “stop tapping on your brother’s arm,” that direction implicitly prohibits the child from punching the brother’s arm as well.<sup>143</sup> Admittedly, this type of interpretation seems to move a fair distance from the text. But if the private use taking really is so clearly worse than a public use taking, the implication may be supported based on how people sometimes communicate.

Consider now the case of compensated takings for private use. If the Constitution allowed such takings, this result would also be quite peculiar. If the Constitution had sought to allow compensated takings for both public use and private use, it could have easily provided “nor shall private property be taken without just compensation.” It was not necessary to add “for public use” if the public-use condition had no effect. Allowing compensated takings for private use would seriously conflict with the antisurplusage canon.<sup>144</sup> It would also violate the maxim of quantity, because the language would have provided more information than was necessary to communicating its message.<sup>145</sup>

While it is possible that the Takings Clause may implicitly prohibit takings (both uncompensated and compensated) for private use, it is also possible that it does not prohibit such takings.<sup>146</sup> If the Clause is not viewed as implicitly prohibiting private-use takings, then the Clause will still not have a gap. Instead, the Clause will simply be read as not prohibiting the government from engaging in private-use takings.<sup>147</sup> Although this result may seem

142 Cf. Timothy Sandefur, *Mine and Thine Distinct: What Kelo Says About Our Path*, 10 CHAP. L. REV. 1, 30 n.165 (2006) (labelling this an “absurd” result).

143 This interpretation would rely not on the literal or semantic meaning of the language, but instead on the pragmatic or contextual meaning of the language. Under the latter theory, people are understood as often asserting something that is not part of the literal meaning of their statement. See McGinnis & Rappaport, *Language of the Law*, *supra* note 5, at 1347–49. If people use the language in this way, then their implicit assertion can be understood as one meaning of the language in context. *Id.*

144 See SCALIA & GARNER, *supra* note 53, at 174 (defending the antisurplusage canon).

145 See PAUL GRICE, *STUDIES IN THE WAY OF WORDS* 26 (1989) (describing this maxim that applies even in ordinary language). The maxim of quantity provides that one should make an utterance as informative as is necessary, but no more informative than is necessary, for purposes of the communication. *Id.*

146 See Abraham Bell, *Private Takings*, 76 U. CHI. L. REV. 517, 581 (2009) (defending this position).

147 We leave aside here the possibility that the prohibition on private-use takings derives from some other constitutional clause, such as the Necessary and Proper Clause. That possibility would not change our basic point. The Constitution does not contain a gap. Instead, it either prohibits private-use takings (through the Takings Clause or another clause) or it allows them.

peculiar, it will simply be the result of interpreting the Takings Clause to not prohibit private-use takings.

Our point here is not to argue for a particular interpretation. Instead, it is to show that the apparent gap in the Takings Clause shares the characteristics of ambiguity and is resolvable through the normal methods for addressing such ambiguity. In this case, there are two plausible interpretations of the constitutional language. The correct interpretive resolution turns in part on how people communicated in the language of the law and on the proper interpretive rules.

Ultimately, then, the question of a gap in the Constitution under both examples turns out to require the resolution of an uncertainty that has the characteristics of an ambiguity. And like an ambiguity, it can be resolved through ordinary techniques of interpretation.

### *E. Contradictions*

Contradictions are another possible example of indeterminacy.<sup>148</sup> Contradictions create indeterminacies because it is impossible to comply with contradictory legal rules. But, again, the law has ways of addressing apparent contradictions. Legal interpretive rules existing at the time of the Founding reconciled such contradictions.

The standard interpretive approach to addressing contradictions requires first that an interpreter attempt to read apparently contradictory provisions to avoid the contradiction.<sup>149</sup> If that is not possible, then the interpreter should attempt to reconcile the two provisions as much as possible. In reconciling the two provisions, the interpreter should avoid readings that render one of the provisions inoperative or largely ineffective.<sup>150</sup> The interpreter should also give priority to specific provisions over more general ones, in part because that typically allows both provisions to have effect.<sup>151</sup>

---

148 See, e.g., András Jakab, *Judicial Reasoning in Constitutional Courts: A European Perspective*, 14 GERMAN L.J. 1215, 1234 (2013).

149 See SCALIA & GARNER, *supra* note 53, at 180–82 (collecting many examples of the use of this legal interpretive rule).

150 Ultimately, if the two provisions cannot be reconciled, then one would give effect to the later provision, based on the later-in-time rule. But giving effect to only one of the provisions is only a last resort since implied repeals are disfavored. See, e.g., 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 555 n.y<sup>1</sup> (Charles M. Barnes ed., Boston, Little, Brown & Co., 13th ed. 1884) (1826).

151 This interpretive approach also largely accords with how people normally express themselves in writing. It is normally assumed that a person issuing directives does not seek to impose contradictory instructions, since this may make it impossible for the obliged to follow those directives. This conclusion supports attempting to read apparently contradictory provisions not to conflict. It is also recognized that writers of formal documents do not generally include surplusage or inoperative provisions, which supports attempting to read the contradictory provisions to give effect to both provisions. Finally, it is normally thought that the specific should be given priority over the general. This reflects the practice that people anticipate specifically mentioned effects more than particular applications of a more general provision.

Solum's one example of a possible contradiction shows how apparent contradictions can be resolved through this interpretive approach.<sup>152</sup> Solum claims that the recess appointment of federal judges may pit two clauses of the Constitution against one another.<sup>153</sup> The first is the Recess Appointments Clause, which permits the President to appoint federal officials, including federal judges, to fill "Vacancies that may happen during the Recess of the Senate."<sup>154</sup> These appointments "expire at the End of [the Senate's] next Session."<sup>155</sup> But another clause provides that federal judges "hold their Offices during their good Behavior."<sup>156</sup> This term has been understood to give judges life tenure.<sup>157</sup> Thus, the potential contradiction Solum finds is that federal judges who are recess appointed may have their terms expire at the end of the Senate's session rather than having life tenure.

While these two Clauses may potentially conflict, the standard interpretive approach easily resolves the contradiction. The phrase "hold their Offices during their Good Behavior" comprises two requirements: a standard for removal (failure to engage in good behavior) and the idea that the official service does not include a term.<sup>158</sup> Given the apparent conflict between the good-behavior provision and the Recess Appointments Clause, one could resolve the conflict in one of three ways. First, one could interpret the good-behavior provision to take priority and conclude that the recess appointment of judges results in a permanent appointment. One would then be overriding the term provision in the Recess Appointments Clause. Second, one could again interpret the good-behavior provision to take priority but refuse to override the term provision. Under this interpretation, there would be no recess appointments of judges because recess appointments allow only a temporary term and judges must receive good-behavior appointments.<sup>159</sup> Third, one could interpret the Recess Appointment Clause to take priority. Under this view, the recess appointment of a judge continues until the end of the next Senate session, but the judge cannot be removed except for failure to engage in good behavior during the term of his appointment.<sup>160</sup>

It seems obvious that the third interpretation—which protects judges during their limited term recess appointments—is the correct one. The first interpretation would allow recess appointments of judges but would eliminate their temporary term. Clearly, this would eviscerate the advice-and-con-

152 Solum, *Constitutional Construction*, *supra* note 24, at 470–71.

153 *Id.*

154 U.S. CONST. art. II, § 2, cl. 3.

155 *Id.*

156 *Id.* art. III, § 1.

157 See Martin H. Redish, *Judicial Discipline, Judicial Independence, and the Constitution: A Textual and Structural Analysis*, 72 S. CAL. L. REV. 673, 698–99 (1999).

158 See Michael J. Gerhardt, *The Constitutional Limits to Impeachment and Its Alternatives*, 68 TEX. L. REV. 1, 66 (1989).

159 Michael Herz, *Abandoning Recess Appointments?: A Comment on Hartnett (and Others)*, 26 CARDOZO L. REV. 443, 449–50 (2005) (taking this position).

160 See Edward A. Hartnett, *Recess Appointments of Article III Judges: Three Constitutional Questions*, 26 CARDOZO L. REV. 377, 436–41 (2005) (taking this position).

sent requirement, permitting Presidents to make permanent judicial appointments during recesses without Senate confirmation. The second interpretation would completely eliminate the recess appointment of judges, which would be a significant problem in a world where judges were needed immediately to fill a vacancy. Moreover, both the first and second interpretations would override the specific provision in the Recess Appointments Clause, which allows the temporary appointment of judges.

By contrast, the third interpretation works much better in terms of preserving the text and purpose. This interpretation gives full effect to the specific text that requires judges (as officers of the United States) to have a limited term when recess appointed. It thus follows the canon of adhering to a specific provision in cases of apparent conflict.<sup>161</sup> Moreover, it adopts the sensible system of providing for a limited term, while affording judges protection from removal during that term. While it denies recess appointed judges a lifetime appointment, it does that in response to yet another specific provision—one that establishes a temporary term.<sup>162</sup>

Thus, the apparent contradiction between the good-behavior requirement and the Recess Appointments Clause can be reconciled by applying the normal interpretive rules for such situations. The apparent contradiction here again resembles the situation involving an ambiguity. There are a couple of different possible results that are indicated by the legal interpretive rules for addressing such contradictions. Each of these possible results are potential interpretations of the conflicting constitutional language that would be recognized by users of the language of the law. In this case, one of the interpretations best avoids undermining the text and the purposes of the different provisions. Thus, the contradiction in this case does not raise the possibility of irreducible indeterminacy, as some kinds of vagueness might.

#### *F. Ignorance of the Language of the Law*

We conclude this examination of types of uncertainty with one final type of uncertainty—uncertainty due to ignorance of the language of the law and the knowledge that it requires. This uncertainty differs from the other types of uncertainty, such as ambiguity and vagueness. The latter types of uncertainty involve the apparent indeterminacy of the constitutional language. The challenge to resolving this indeterminacy is whether the interpretive rules can be employed to select a single meaning.

By contrast, uncertainty due to ignorance is defined by its cause—lack of knowledge of various aspects of the language of the law. If the interpreter lacks knowledge of the language of the law, the interpreter may believe that a

---

161 The canon of interpretation to prefer the specific over the general is one of long-standing use in Anglo-Saxon law and is even reflected in Roman and Jewish law. See Geoffrey P. Miller, *Pragmatics and the Maxims of Interpretation*, 1990 WIS. L. REV. 1179, 1188, 1190.

162 It is true that recess-appointed judges might feel pressure to decide cases in a politically popular way to secure a permanent appointment. But that is a consequence of applying the Recess Appointment Clause to judges, which the Constitution clearly does.



determinate provision is indeterminate, even though the correct interpretation would render it determinate. For example, an interpreter may wrongfully believe that the term “natural-born citizen” is indeterminate, because he or she does not understand the legal meaning of the term at the time of the Constitution—a legal meaning persuasively uncovered by Mike Ramsey in an article we discuss below.<sup>163</sup> Similar uncertainty can hold for a large number of terms with legal meanings, such as “session,” “due process,” or “recess of the Senate.” Here uncertainty derives not from the constitutional language, but from the ignorance of its interpreters.

The ignorance of the language of the law may involve ignorance of a variety of matters, including the legal meanings of terms at the time, the purposes of the provisions, the history of the terms or the institutions associated with them, or the legal interpretive rules at the time. Without this knowledge, a constitutional provision may appear vague or otherwise uncertain, even though an interpreter with full knowledge could resolve that uncertainty with the standard interpretive techniques.

To mention just a few of the most important ways that ignorance can lead to mistaken uncertainty: an interpreter may not know that a term had a legal meaning and so interpret it in accord with its vague ordinary-language meaning. Or the interpreter may recognize that the term has a legal meaning, but not know much about that legal meaning and therefore be uncertain about its meaning. Or the interpreter may know a fair bit about the legal meaning but may be ignorant of an important aspect of that meaning that resolves the question at hand. Ignorance may contribute in a variety of other ways to uncertainty.

But while ignorance can create uncertainty, this ignorance is uncertainty *about* the original meaning, not uncertainty *of* the original meaning. If twenty-first century readers lack the knowledge that eighteenth-century lawyers would have possessed, then those readers will be uncertain about the original meaning. But the original meaning itself—as determinable by an eighteenth-century lawyer—might have been determinate based on the legal knowledge at the time. Thus, if modern readers recover knowledge about the historical meaning of the language of the law, this uncertainty should be greatly reduced or eliminated.

Unfortunately, ignorance of the historical meaning of the language of the law is a significant part of our current constitutional culture. In the modern era, there has been a relative lack of interest until recently in the original meaning of constitutional provisions on the part of the Supreme Court and the legal academy.<sup>164</sup> As a result, interpreters cannot draw on as rich a pool

---

163 See *infra* note 189. Ramsey’s work has cleared up the ambiguities and mysteries that have frustrated others. See, e.g., Lawrence B. Solum, *Originalism and the Natural Born Citizen Clause*, 107 MICH. L. REV. FIRST IMPRESSIONS 22 (2008) [hereinafter, Solum, *Natural Born Citizen Clause*].

164 See John Calhoun, Note, *Measuring the Fortress: Explaining Trends in Supreme Court and Circuit Court Dictionary Use*, 124 YALE L.J. 484, 498–501 (2014) (using N-Gram to measure exponential rise in originalism in the 1990s and beyond).

of knowledge as should be available. While the next Part discusses how scholars are now investigating and discovering the original legal meaning of many constitutional provisions, interpretation is still bedeviled by a significant degree of ignorance of legal meaning due to a lack of work on original meaning and a lack of knowledge of the available work by constitutional lawyers. Thus, a substantial degree of uncertainty flows from this ignorance.

### G. *A Small Construction Zone*

Our investigation of the scope of legal indeterminacy as to the Constitution is significant. The new originalism, with its substantial construction zone, has often been thought to create a large role for extraconstitutional norms to be used when judges and other officials apply the Constitution. In some accounts, the construction zone is thought to be so large that the differences between originalism and living constitutionalism are viewed as minor.

Our understanding of interpretation and the relevant historical materials leads us to believe that these claims are wildly exaggerated. Even if one accepts the concept of a construction zone, that does not mean in practice cases in the construction zone will overall confer large amounts of discretion.

This Part has identified several reasons why the construction zone is unlikely to confer significant discretion on constitutional interpreters. First, most types of uncertainty, such as ambiguity, contradictions, and gaps, will not fall within the construction zone because they are resolvable through the legal interpretive rules. It is only vague terms that will potentially fall within the zone. Second, even apparently vague terms will often turn out not to involve irreducible uncertainty because many of these terms will be resolvable. Some of these apparently vague terms will turn out to have determinate legal meanings, especially as informed by historical legal meanings. Others will be, in reality, related-meaning ambiguities resolvable by the 51–49 rule. Other apparently vague provisions may be resolvable through legal interpretive rules, such as by reference to the purpose of the provision.

Third, even when terms that have irreducibly vague applications are applied, those terms will be in the construction zone only when irreducibly vague applications are implicated. Fourth, even when applications in the construction zone arise, those applications will generally not involve fundamental questions. Instead, these questions will arise on the borders of the meaning of a term. Thus, questions of construction will involve borderline cases rather than basic questions about the provision.

Given the rich and reticulated process we have outlined for resolving apparently uncertain terms, we believe that the construction zone under the Constitution is likely to be of minor significance. While the construction zone may not be empty, it is likely to have a relatively small size and not to have a central role to play in the implementation of the Constitution. Cases in the construction zone will not often arise and when they do arise will not involve fundamental questions. We call a construction zone of this type “a small construction zone.”

Of course, it is difficult to prove the exact size of the construction zone in an Article of this size. The ultimate test for a question of this type would be to interpret the entire Constitution and then examine how often and how significant cases in the construction zone are. But we believe that our process of analysis, particularly as applied to supposed exemplars of indeterminacy, makes a strong case that the construction zone is small.

Our conclusion here that the construction zone is small is buttressed by the next Part. There we show that much of the newest originalist scholarship does not find issues to be within the construction zone, but instead employs the language of the law to discover determinate answers to questions that might otherwise seem to be uncertain.

#### IV. THE FRUITS OF MODERN ORIGINALIST SCHOLARSHIP: FINDING DETERMINATE MEANINGS

In this Part, we show that much of the best modern originalist scholarship is focused on resolving ambiguity and vagueness, generally relying on the language of the law to do so.<sup>165</sup> Indeed, it is striking that so little originalist scholarship does the opposite: show that that a provision of the Constitution is irreducibly indeterminate because of vagueness, ambiguity, gaps, or contradictions. Thus, while the new originalism made a large theoretical splash by distinguishing between an interpretation zone and a construction zone, the construction zone has left relatively little mark on originalism in practice. Similarly, while critics of the new originalism have accurately suggested that its conceptual distinction could in theory sacrifice much of the determinacy that is one of originalism's key benefits, in practice that sacrifice has not occurred.

Instead, the new scholarship reveals that much of the claimed irreducible indeterminacy in our Constitution has been a function of sheer ignorance. In the decades when originalism went into eclipse, particularly among academics, provisions were more likely to seem indeterminate because little serious research was done into their original meaning. In contrast, today a golden age of scholarly originalism encourages papers to be regularly published on the original meaning of both the structural and rights provisions of the Constitution. Conferences are then regularly held to discuss these results to better reach the truth.

It is also striking that this new knowledge comes from plumbing the legal depths of the Constitution's meaning, both the legal meaning of words and the legal interpretive rules that were applied at the time. Originalism needed again to become respectable in the academy for this knowledge to be

---

165 This phenomenon is notable in the Supreme Court as well as in legal scholarship. For instance, the Court has found a more precise meaning of the Confrontation Clause by understanding the Clause in the context of the common-law rules that governed confrontation at the time of the Constitution's enactment. For a description of the Court's resolution of indeterminacy in this area, see McGinnis & Rappaport, *Language of the Law*, *supra* note 5, at 1401–04.

discovered, because exact meaning would often not be gleaned from casual perusal of the Constitution's words. Since the Constitution is written in the language of the law, there is a necessary division of labor between scholars steeped in a particular provision and the ordinary reader or even a reader with cursory knowledge of the language of the law. The originalist revival in constitutional law translates knowledge into determinate conclusions about our fundamental law.

Not all of the scholars discussed in this section talk about the distinctions between interpretation and construction or ordinary language and legal language. There seems to be a division of labor between theorists of originalism and practitioners of it even at the academic level! But originalist scholars who focus on particular provisions are now emphatically offering views of what a constitutional provision determinately meant at the time it was enacted. And they generally appeal to legal concepts and legal language to make the meaning precise. They are conversant with the language of the law even if they do not boast of their facility.

In this Part we review some of this scholarship to show the progress that is made when provisions are read through the prism of the language of the law. Our purpose is not to endorse every resolution, but to show that greater knowledge has led scholars to find more determinate meanings in key provisions of the Constitution that earlier, less knowledgeable generations might have found hopelessly ambiguous, vague, or opaque. This trend in legal scholarship itself provides reasons to believe that the construction zone is small in size.<sup>166</sup>

### A. *Structure*

Scholars have used the language of the law to settle fundamental questions of constitutional structure that might seem otherwise indeterminate. First, consider the question of what are the obligations of the President in Article II that requires him or her to "Take Care that the Laws be faithfully executed." The Clause can be understood in ordinary language, but only in the most general terms. Most people would understand that it requires that the President carry out the commands of the law. But an ordinary reader would not have much sense of the precise obligations imposed.

Yet a recent article in the *Harvard Law Review* by Professors Andrew Kent, Ethan Leib, and Jed Shugerman clarifies that the Take Care Clause imposed very specific obligations.<sup>167</sup> The article expressly says that the obligations would be obvious to "late-eighteenth-century Anglo-Americans who

---

166 Here we focus on legal scholarship. But the judiciary is also contributing to using the language of the law to reach determinate conclusions about meanings that might otherwise seem vague. See, e.g., *id.* (showing how Justice Antonin Scalia used the language of the law to make determinate conclusions about when cross-examination of a witness by defendant is required by the Confrontation Clause).

167 Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111 (2019).

were conversant in *the language of law*.”<sup>168</sup> Those obligations included “(1) diligent, careful, good faith, and impartial execution of law or office; (2) a duty not to misuse the office’s funds or take unauthorized profits; and (3) a duty not to act ultra vires, that is, beyond the scope of one’s office.”<sup>169</sup> The article then further unpacks each set of obligations, the nature of which would have hardly been clear to any ordinary language reader at the time of the Constitution’s enactment, let alone today.<sup>170</sup>

An ordinary language meaning leaves another term in Article II indeterminate. The Recess Appointments Clause provides: “The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.”<sup>171</sup> “Recess” is not defined in the Constitution, and in ordinary language it was a quite vague term even at the time of the Constitution’s enactment, not making clear whether it include recesses of any duration or recesses of some substantial duration, let alone offering any clear rule for how to measure the requisite duration.

But drawing on the legal background of the English Constitution and the legal language of contemporaneous state constitutions, one of us showed that the better interpretation was to refer to the period between sessions of Congress.<sup>172</sup> Parliament in England broke from business in three ways. First, there were adjournments that could be of any length.<sup>173</sup> Second, the King could prorogue Parliament, which ended one session and began another.<sup>174</sup> Finally, the King could dissolve Parliament, which resulted in new elections.<sup>175</sup>

The elimination of the monarch in the United States resulted in a modification of some of these practices in the U.S. Constitution. Parliament did not need the King to adjourn, and thus Congress was simply given the sole power over adjournments with rules regulating the relations of adjournments between the Houses.<sup>176</sup> But given that there was no King, the Framers also gave Congress the right to end sessions, which resulted in a recess.<sup>177</sup> The term “recess” had already been used in the sense of a break between legislative sessions in the Massachusetts Constitution, which served in some respects as a model for the federal one.<sup>178</sup> Immediately after the ratification of the federal Constitution, the term “recess” was used again with the same meaning

---

168 *Id.* at 2178 (emphasis added).

169 *Id.*

170 *Id.* at 2178–91.

171 U.S. CONST. art. II, § 2, cl. 3.

172 Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. REV. 1487 (2005).

173 *Id.* at 1550.

174 *Id.* at 1550–51.

175 *Id.* at 1551.

176 *Id.*

177 *Id.*

178 *Id.* at 1552.

in the New Hampshire Constitution.<sup>179</sup> Thus, understanding “recess” as a legal term used in contemporary American constitutions along with the background of English law gives it a precision that it would lack in ordinary language: it meant the period of time between sessions of Congress.<sup>180</sup>

The language of the law has also illuminated terms within Article I. It might be thought that there is no clear answer to the question of within what time period the three lawmaking institutions—the House, the Senate, and the President—must act in order for a law to be validly enacted. The Constitution might then have a gap. To be sure, it might be argued that if the House and Senate voted on a bill at radically different times—with the House, for example, passing a bill ten years after the Senate had passed it—that lapse of time might undermine notions of democratic consensus that underlie the legislative process. But the purpose of the Constitution’s lawmaking provisions hardly gives a precise temporal limit, and thus the requisite synchronicity between the acts of the various lawmaking bodies would seem to be vague.

But in a recent paper in the *Harvard Law Review*, Sai Prakash argues that the Constitution provides a precise rule by using the term “session.”<sup>181</sup> Of course, the term “session” to an ordinary reader would not convey any time limit for legislation. But Prakash argues that “session” “incorporates the prevailing conception of that word.”<sup>182</sup> And that concept reflected the practices under the English legal system that “bills that did not become law within a [single] session of Parliament had to be repassed” in a new session if they were to become law.<sup>183</sup> The key evidence for that understanding comes from

---

179 *Id.* Robert G. Natelson has provided more evidence that “recess” as a legal term applied at the time of the Constitution’s enactment only to intersessions between legislative sessions, including evidence of usage by the Continental Congress. See Robert G. Natelson, *The Origins and Meaning of “Vacancies That May Happen During the Recess” in the Constitution’s Recess Appointments Clause*, 37 HARV. J.L. & PUB. POL’Y 199, 217–27 (2014).

We recognize, of course, that only four Justices adopted this view of the original meaning of “recess” in the recent case of *NLRB v. Noel Canning*, 573 U.S. 513, 570 (2014) (Scalia, J., concurring in the judgment), but as we have noted, disagreement about an ambiguity is not evidence of indeterminacy.

180 Ian Wurman provides another example of using previous law to fill in the meaning of Article II, showing that there is a constitutional basis for courts to defer to executive agencies in interpreting ambiguous statutes on the basis of reading the Constitution to include a “specification power” as part of executive power where the President or agencies could fill in the interstices of statutes. See Ian Wurman, *The Specification Power*, 168 U. PA. L. REV. 689 (2020). It is hardly clear to the ordinary reader of the Constitution that it includes a specification power, even if that reader knew what a specification power is. Nevertheless, Wurman argues that this prerogative power of the King was carried over in the scope of executive power within Article II. *Id.* at 720. He supports his legal reading by an investigation of Blackstone as well as cases in the early republic. *Id.* at 715–22. Thus, he uses the language of the law to clarify any aspect of executive power, which would otherwise be vague or opaque on this important question.

181 See Prakash, *supra* note 73, at 1256–68.

182 *Id.* at 1258.

183 *Id.*

Blackstone, who explained that the Crown could not only veto legislation but also could prevent passage within chambers by proroguing Parliament and thereby ending a session.<sup>184</sup> That understanding was then reflected in early actions of both Congress and the President.<sup>185</sup> One of the great early scholars of American law, James Kent, confirmed this understanding.<sup>186</sup> Thus, the question of the time period during which legislation needed to be perfected was not vague, but had a clear answer once the term “session” was given the meaning it had in its legal historical context.<sup>187</sup>

The language of the law even illuminates the nature of the meaning of law in the Constitution. One fundamental question that has been thought ambiguous is the meaning of “laws made pursuant to the Constitution” in the Supremacy Clause. For instance, Henry Monaghan has noted that executive agreements are sometimes given the force of law and has suggested that the meaning of law in the Supremacy Clause is sufficiently unclear to “include the commands of any institution whose lawmaking authority has been recognized over time.”<sup>188</sup>

But Michael Ramsey has shown that the better view is that the laws referenced by the Supremacy Clause include only those commands made through the legislative procedures set out in Article I.<sup>189</sup> He shows further that eighteenth-century separation-of-powers theory emphatically rejected the view that the executive in the person of a monarch could issue decrees that created binding obligations.<sup>190</sup> Ramsey supported his conclusion with references not only to Montesquieu but to Blackstone.<sup>191</sup> Thus, while the nature of law may

184 *Id.*

185 Prakash notes that Congress had “frenzied” periods at the end of a session to clear their calendar of all bills ready for passage. *Id.* at 1260. And President Washington believed that he had to sign a bill before the session ended and thus even moved to the Capitol to maximize his time for deliberation. *Id.*

186 *Id.* at 1261.

187 The vagueness in the enumerated powers may also be narrowed by reading them in their legal context. While an ordinary reading of the Clause may make the Necessary and Proper Clause seem vague, a recent book argues that its concepts have clear foundations in eighteenth-century Anglo-American law. For instance, one of the authors uses fiduciary law to conclude that the incidental powers authorized by the Clause had to be less substantial than the principal powers specifically granted. See Robert G. Natelson, *The Framing and Adoption of the Necessary and Proper Clause*, in GARY LAWSON, GEOFFREY P. MILLER, ROBERT G. NATELSON & GUY I. SEIDMAN, *THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE* 84, 89–91 (2010); see also William Baude, *Rethinking the Federal Eminent Domain Power*, 122 *YALE L.J.* 1738, 1750 (2013) (using the theory of great powers, based on British administrative law at the time of the Constitution, to conclude the federal government had no power of eminent domain outside the territories).

188 Henry Paul Monaghan, *Supremacy Clause Textualism*, 110 *COLUM. L. REV.* 731, 742 (2010).

189 See Michael D. Ramsey, *The Supremacy Clause, Original Meaning, and Modern Law*, 74 *OHIO ST. L.J.* 559, 572–73 (2013).

190 *Id.* at 573.

191 *Id.* at 573 n.68.

be vague in ordinary language, it has a precision in the Supremacy Clause that excluded making executive agreements the supreme law of the land.<sup>192</sup>

The language of the law also illuminates the relations between individuals, the states, and the federal government in the original Constitution. Article IV provides: “The United States shall guarantee to every State in this Union a Republican Form of Government.”<sup>193</sup> It has been contested whether the Clause provides an individual right to require the federal government, including the federal courts, to provide a republican form of government.<sup>194</sup> The ordinary meaning of the Clause would not appear to provide a clear answer to this question, but in a recent article Ryan Williams has shown that the relevant legal understanding of the term “guarantee” indicates that it provided no individual right to call for federal aid, but imposed an obligation only on the federal government to protect the republican nature of the state government should the state call for its protection.<sup>195</sup>

Williams shows that such guarantee clauses were familiar from treaties among nation-states at the time of the Constitution’s enactment.<sup>196</sup> They required the guaranteeing state to come to the aid of the guaranteed state if that state called on the guarantor to fulfill this obligation.<sup>197</sup> But it gave no entitlement to the guaranteeing state to intervene when it believed that the object of its guarantee was not being fulfilled.<sup>198</sup> The state which had sought the guarantee would not want to give such power to a generally more powerful state.<sup>199</sup> Viewed through this legal background, the Guarantee Clause does not provide unilateral power to the federal government, including the federal judiciary, to intervene in the affairs of a state. Thus, the term “guarantee” has a legal meaning that makes clear the limits of a guarantee’s effect. Moreover, this meaning also makes any vagueness or ambiguity of the meaning of “Republican Form of Government” of less practical importance

---

192 Michael Ramsey also relies on the language of the law to argue that a “natural-born citizen” is a person who was a citizen under the laws at the time of his birth. See Michael D. Ramsey, *The Original Meaning of “Natural Born,”* 20 U. PA. J. CONST. L. 199, 244 (2017). He bases this interpretation on reading the term “natural-born citizen” to mean what a related term meant under English law at the time of the Constitution’s enactment. Under English law, someone born outside of the country could be a “natural-born subject” if that person were so classified under the law at the time of his or her birth. *Id.* at 210–24. This interpretation is again more determinate than that which would be provided by the ordinary meaning of natural-born citizen, which might seem quite opaque and thus susceptible of a variety of meanings. Ramsey’s analysis provides a riposte to the argument of Larry Solum that “natural born” may be indeterminate—one of the few law review articles by an originalist that analyzes a specific provision to find it indeterminate. See, e.g., Solum, *Natural Born Citizen Clause*, *supra* note 163, at 30.

193 U.S. CONST. art. IV, § 4.

194 See, e.g., AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 276–81 (2005).

195 See Ryan C. Williams, *The “Guarantee” Clause*, 132 HARV. L. REV. 602, 687 (2018).

196 *Id.* at 615–20.

197 *Id.* at 618.

198 *Id.* at 618–19.

199 *Id.* at 619.



because the federal government cannot take the initiative to enforce this guarantee.<sup>200</sup>

The use of legal interpretive rules also provides for more determinate meaning. The Supremacy Clause provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, *any Thing in the Constitution or Laws of any State to the Contrary notwithstanding*.<sup>201</sup>

To an ordinary reader, it would not be clear exactly what, if anything, the italicized words add to the requirement that the various categories of federal enactment be treated as supreme, particularly because that command on its own appears to give these federal enactments priority over state laws.

But knowing the legal context of the Constitution and the legal interpretive rules at the time provides a precise meaning to the last phrase of the Supremacy Clause. Under traditional law, according to Caleb Nelson, this phrase was used to prevent the application of a legal interpretive rule—the rule against implied repeals.<sup>202</sup> If the rule against implied repeals was applied, state law would have to be not merely inconsistent with federal law to be displaced but would have to be grossly inconsistent—that is, state and federal law would have to be not capable of being harmonized.<sup>203</sup> The “notwithstanding” language of the Supremacy Clause directs interpreters not to try to harmonize federal and state law to preserve state law.<sup>204</sup> Instead, they are to displace state law if there is any conflict between it and a fair reading of federal law.<sup>205</sup>

### B. Rights

The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.<sup>206</sup>

Read in ordinary language, the word “unreasonable” would seem to be a paradigm of vagueness, a term that would require continuous construction.

---

200 We have also discussed elsewhere at length how scholars have used legal language to determine that the “executive power” in the Vesting Clause of Article II encompasses an authority over foreign affairs—a result that is unclear on an ordinary-language understanding of the Clause. See McGinnis & Rappaport, *Language of the Law*, *supra* note 5, at 1404–07.

201 U.S. CONST. art. VI, cl. 2 (emphasis added).

202 See Nelson, *supra* note 89, at 241–42, 246–48.

203 *Id.* at 241–42.

204 *Id.*

205 *Id.*

206 U.S. CONST. amend. IV.

But Laura Donohue has argued that the word “unreasonable” should instead be read with the legal meaning of “against the reason of the common law.”<sup>207</sup> Under Donohue’s language of the law interpretation, the Amendment should be read to incorporate the historical common law’s protections against unreasonable searches and seizures. Reference to this reticulated body of law would help to cash out the Amendment’s meaning without resorting to a free form construction of the term reasonable.<sup>208</sup> Despite its roots in the common law, the analysis has present-day implications: Donohue recently argued that an originalist view shows that people have a right to Fourth Amendment protection of their digital data because of their property rights in that data.<sup>209</sup>

The ordinary meaning of the Fifth Amendment’s Due Process Clause also seems quite vague. If understood in ordinary language, it might seem simply to promise the people the process that is due them, leaving quite open what such process might be depending on the circumstances and rather abstract notions of fairness. But originalist scholars have shown the term “due process” to have a legal meaning that comes from Magna Carta and was unpacked in the course of English legal history.<sup>210</sup> Due process prevented the legislature from exercising judicial power or violating common-law procedural protections.<sup>211</sup>

Still, it might be thought particularly difficult to determine from ordinary language how due process should apply in extraordinary circumstances, like that of war. But even here, settled legal understandings provide a determinate guide to the application of the Clause. Based on his review of the historical usage of the term in England and its application in America, Nathan Chapman argues that deprivations of property and liberty had to be authorized by law even in times of war, although domestic law incorporated the law of nations, including the law of war.<sup>212</sup> Moreover, settled legal understanding illuminated the circumstances in which judicial procedure was required. For instance, courts applied elaborate trial procedures to

---

207 Laura K. Donohue, *The Original Fourth Amendment*, 83 U. CHI. L. REV. 1181, 1192–93 (2016).

208 *Id.*

209 Laura K. Donohue, *Functional Equivalence and Residual Rights Post-Carpenter: Framing a Test Consistent with Precedent and Original Meaning*, 2018 SUP. CT. REV. 347, 353–54.

210 See Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1681 (2012).

211 See *id.* at 1677. Ryan Williams argues legal interpretation of the Due Process Clause in the Fourteenth Amendment incorporated substantive as well as procedural protections. See, e.g., Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 469–70 (2010). But he too bases his argument on the language of law and in particular on more than a score of antebellum court decisions that abandoned an essentially procedural understanding in the years leading up to Reconstruction. *Id.* at 460–70.

212 Nathan S. Chapman, *Due Process of War*, 94 NOTRE DAME L. REV. 639, 642–44 (2018).

enemy aliens and neutrals in prize cases.<sup>213</sup> In contrast, they did not provide due process obligations in cases of court-martial on the battlefield.<sup>214</sup>

The scope of due process is also not clear on an ordinary reading. Due process applies to “persons.” While “persons” has an ordinary meaning that extends to human beings, it could also apply to any entity with legal personhood. In a recent article, Ingrid Wuerth shows that sovereign states were considered persons by the leading authorities, like Vattel, at the time of the Constitution’s enactment.<sup>215</sup> Moreover, Justices in the early republic referred to states as persons, even if they were artificial ones.<sup>216</sup>

We cannot review all of the recent substantial scholarship that interprets the Constitution’s original meaning. But our review certainly shows that this scholarship uses knowledge of law and its history to find determinate meanings of language that might otherwise seem vague or indeterminate. It is not too much to say that a dominant theme of modern originalist scholarship that interprets specific constitutional provisions is to apply knowledge of legal language and of legal context to make the Constitution more determinate and less subject to construction than would have been previously thought by the casual or ordinary reader of the words.

## V. A SMALLER CONSTRUCTION ZONE HAS SUBSTANTIAL ADVANTAGES

Our argument that the Constitution has a small construction zone has two important normative implications. First, a smaller construction zone means that more of constitutional law is anchored in the Constitution’s original meaning. Consequently, it makes it less important to resolve the many competing arguments for how judges should resolve cases in the construction zone. Second, a smaller construction zone produces a more desirable Constitution because the content of constitutional provisions will be determined more by the rich deliberation and consensus produced by the supermajoritarian enactment process. In contrast, schemes for filling the construction zone are the product of academics or Justices, who are few in number and do not have to reach consensus. This problem shows that originalism as practiced with a large construction zone does not differ much

---

213 *Id.* at 699–703.

214 *Id.* at 704–05.

215 Ingrid Wuerth, *The Due Process and Other Constitutional Rights of Foreign Nations*, 88 *FORDHAM L. REV.* 633, 677–78 (2019).

216 *Id.* at 678. Scholars have also used legal meaning to resolve indeterminacies that might otherwise exist in the meaning of provisions of the Bill of Rights, as incorporated by the Fourteenth Amendment. See Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 *Nw. U. L. REV.* 1106, 1137–40 (1994) (using antebellum state court judicial decisions interpreting state free exercise clauses to resolve the otherwise ambiguous questions of whether the Free Exercise Clause as incorporated by the Fourteenth Amendment requires exemptions from neutrally applicable laws).

from living constitutionalism where decisions depend on divergent normative judgments.<sup>217</sup>

A. *Reducing the Importance of Deciding How to Fill the Construction Zone*

Originalism becomes a far less unified theory when it comes to filling in the construction zone. Originalists agree that the interpretation of the Constitution is fixed by the original meaning of the Constitution, with the great majority understanding that meaning as the original public meaning. But there is no agreement on how to fill in the construction zone. Indeed, originalism cannot deliver agreement because, by definition, original meaning runs out in the construction zone.<sup>218</sup>

As with living constitutionalism, there are almost as many notions for filling in the construction zone as there are originalists. First, scholars dispute whether this filling in the construction zone should depend on normative considerations or an appeal to positive law. On the positivist side, some theorists, most prominently William Baude and Stephen Sachs, believe that the construction zone should be filled by the preexisting legal rules.<sup>219</sup>

But other proposals for filling in the construction zone depend on normative claims,<sup>220</sup> and the norms on which they are based clash. Some scholars might believe that a norm of democracy pervades the Constitution and thus requires judicial restraint in the construction zone.<sup>221</sup> Others call for a construction zone that gives priority to a presumption of liberty.<sup>222</sup>

Indeed, these debates about the construction zone resemble nothing so much as the debates about what is widely regarded as the opposite of originalism—living constitutionalism. Some living constitutionalists are positivists, arguing that living constitutionalism captures the manner that the Court has interpreted the Constitution.<sup>223</sup> Others make normative defenses, but the content of these defenses depends on the normative justifications adduced.<sup>224</sup> And the content of living constitutionalism, like the content of

217 Michael W. McConnell, Lecture, *Time, Institutions, and Interpretation*, 95 B.U. L. REV. 1745, 1777 (2015) (describing how living constitutionalism is problematic because it depends on normative approaches of the individual judge).

218 See Solum, *Constitutional Construction*, *supra* note 24, at 469–72.

219 See Baude & Sachs, *supra* note 46, at 1128–30.

220 See Solum, *Constitutional Construction*, *supra* note 24, at 473 (describing role of normative arguments in the construction zone).

221 See *id.* at 523 (reconstructing arguments for deference as normative principles to guide constitutional construction).

222 Barnett, *supra* note 29, at 69–70.

223 See, e.g., André LeDuc, *Paradoxes of Positivism and Pragmatism in the Debate About Originalism*, 42 OHIO N.U. L. REV. 613, 668 (2016) (describing how living constitutionalism is necessary for a rule of recognition that evolves for the Court to capture exogenous events).

224 See, e.g., McConnell, *supra* note 217, at 1779–80 (arguing that the essence of living constitutionalism is the willingness of interpreters to use moral principles as basis for invalidating laws in judicial review).

construction, will vary depending on the normative consideration invoked.<sup>225</sup>

Given that these various positions diverge substantially as to jurisprudential theory as well as the results reached, this divergence creates fundamental problems for originalism. If the construction zone is large, what will be doing the work for most of constitutional law is not a fixed meaning but a construction zone that leads to disagreements in principle that originalism cannot resolve. A large construction zone thus vindicates the claim of nonoriginalists that the new originalism has sacrificed most of what is promised by originalism—a constitutional law fixed at the framing of the relevant provision—in favor of a malleable Constitution that depends on the fiat of construction.

To be sure, originalists have some disagreements among themselves about the nature of originalism.<sup>226</sup> But there is wide agreement that originalism is a family of theories that agree that the meaning of the constitutional provision is fixed at the time it was enacted.<sup>227</sup> Their disagreements can largely in principle be resolved by evidence.

Moreover, some originalists have argued that even what are thought to be opposite originalist approaches—original intent and original public meaning—converge in theory and in fact.<sup>228</sup> In contrast, the different approaches to construction are often impossible to reconcile in principle and outcome. Positive theories of filling the construction zone are inconsistent with normative theories. Normative theories are inconsistent with one another: judicial restraint cannot be integrated with judicial engagement.<sup>229</sup>

In any event, whatever the disagreements originalists have about how to fix meaning, construction creates a new zone of disagreement that the toolkit

225 See Aileen Kavanagh, *The Idea of a Living Constitution*, 16 CANADIAN J.L. & JURIS. 55, 56 (2003) (“What does it mean [to] say that we should construe the Constitution as a ‘living one?’” This question “admits of many answers, all depending on the extent and source of constitutional change which is thought appropriate for judges of the constitutional court. Even amongst those who support the idea of a ‘living Constitution’, controversy abounds about the kind of considerations on which judges should rely in developing the content of constitutional guarantees.”).

226 Compare, e.g., Kay, *supra* note 13 (defending original intent originalism), with Solum, Heller and Originalism, *supra* note 13 (defending public-meaning originalism).

227 See, e.g., Richard A. Primus, *When Should Original Meanings Matter?*, 107 MICH. L. REV. 165, 186–87 (2008); Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243, 1265–66 (2019) (“[A]most all contemporary forms of originalist constitutional theory endorse [the view that] the original meaning of the constitutional text was fixed at the time each provision was framed, ratified, and made public.”).

228 See McGinnis & Rappaport, *Unifying Original Intent and Original Public Meaning*, *supra* note 66, at 1372–75 (offering arguments about how these perspectives converge both as a matter of theory and practice).

229 Compare Matthew J. Franck, *James Bradley Thayer and the Presumption of Constitutionality: A Strange Posthumous Career*, 8 AM. POL. THOUGHT 393 (2019), with Alan Gura, *Heller and the Triumph of Originalist Judicial Engagement: A Response to Judge Harvie Wilkinson*, 56 UCLA L. REV. 1127, 1128–31, 1136–37 (2009).

of originalism cannot resolve. Even more importantly, relying on construction where interpretation will do reduces the accuracy and fidelity of constitutional law. That alone makes reducing the size of the construction zone, where possible, enormously desirable for originalism.

*B. Reducing the Construction Zone Creates More Desirable Constitutional Law*

A smaller construction zone necessarily increases the amount of constitutional law determined by the original meaning. Moreover, there is strong reason to believe that the original meaning will be better today than results produced by construction. It is the original meaning that received consensus, supermajoritarian support.<sup>230</sup> In the original Constitution, that consensus was reflected both in the overwhelming support received at the Philadelphia Convention and the requirement that at least nine of the thirteen states ratify the Constitution.<sup>231</sup> The consensus for the constitutional amendments enacted has come from Article V's requirement of a two-thirds vote in the House and Senate and of ratification by three-quarters of the states.<sup>232</sup>

The requirement of a consensus to enact constitutional provisions has substantial implications for securing a beneficial Constitution. First, that consensus requirement assures that the Constitution enjoys an allegiance among the American people. A constitution that did not come about through consensus might well be regarded as partisan and rejected by a substantial portion of the citizenry.<sup>233</sup> Second, the consensus requirement assures rich deliberation about constitutional provisions.<sup>234</sup> It screens out many proposals, assuring more discussion for those that have some chance of passing.<sup>235</sup> Third, the consensus requirement for passing and changing the Constitution creates a veil of ignorance because citizens cannot be sure how their personal circumstances and that of their descendants will be affected in

---

230 MCGINNIS & RAPPAPORT, *supra* note 52, at 62–66.

231 *Id.* at 63–64.

232 *Id.*

233 See Jiunn-Rong Yeh & Wen-Chen Chang, *From Origin to Delta: Changing Landscape of Modern Constitutionalism* 6–7 (bepress Legal Series, Working Paper No. 1815, Oct. 6, 2006), <http://law.bepress.com/cgi/viewcontent.cgi?article=8667&context=espresso> (arguing that a constitution needs to reflect social consensus).

234 It might be argued that the benefits of the supermajority enactment process did not occur because most of the public did not understand the language of the law. But this objection misunderstands how the supermajoritarian process operated to ratify the Constitution. First, the Constitution was ratified in conventions rather than by the voters as a whole, and many of the convention delegates had knowledge of the language of the law. Second, both in the conventions and in the popular debates over ratification, people discussed what the constitutional provisions meant. People who had knowledge of the language of the law explained the meaning that the Constitution would have when interpreted as a legal document. Thus, the supermajoritarian process did not require that all persons understand the language of the law for it to produce a desirable Constitution.

235 See Jason Mazzone, *Unamendments*, 90 IOWA L. REV. 1747, 1836 (2005).

the long-term by a hard-to-amend provision.<sup>236</sup> Thus, they are more likely to consider the public interest rather than narrow personal interest in deciding to support it.<sup>237</sup>

In contrast, methods of construction and, thus, the results of construction enjoy no such consensus. Currently, theories of construction are many and academic: choosing among them is the opposite of acting through popular consensus. Even if adopted by the Supreme Court, an approach to construction is unlikely to represent a consensus. The Justices are nine elite lawyers who decide matters by majority vote.<sup>238</sup>

It might be argued that the benefits of a consensus based on the original meaning are a chimera, because not everyone is an originalist. Although it is true that not everyone is an originalist, originalists argue everyone should be and in fact there is a growing culture of originalism. Our principal point here is that even if most people become originalists, a large construction zone will undermine the benefits that originalism offers.<sup>239</sup>

#### CONCLUSION

For too long, it has been assumed even by many originalists that the Constitution is full of indeterminate provisions that resist interpretation. But that assumption has depended both on the view that the Constitution is written in imprecise, ordinary language and on ignorance of its more precise meaning. That ignorance is disappearing as originalism increasingly grows within our legal culture and scholars research the meaning of constitutional provisions. In this Article, we provide a theoretical framework for these essential developments in constitutional theory. We show that reading the Constitution in the language of the law dissolves much indeterminacy. We also offer a framework for interpretation that turns much of what appears to be vagueness into ambiguity. With knowledge of this language and these tools, we argue that the process of interpretation is sufficiently powerful to fix the meaning of our fundamental law in its most important dimensions.

---

236 See Adrian Vermeule, *Veil of Ignorance Rules in Constitutional Law*, 111 YALE L.J. 399, 407–08 (2001).

237 *Id.* at 404.

238 See MCGINNIS & RAPPAPORT, *supra* note 52, at 86. It might be argued that a construction of constitutional provisions, even one made without a consensus-forcing process, is better than the consensus offered by the original meaning because that consensus is old. But this argument fails to consider that the Constitution has an amendment process that permits the crystallization of a new constitutional consensus. *Id.* at 85.

239 Because original meaning is fixed, it remains stable over time. That is not necessarily true of construction. If construction is based on normative considerations, what is normatively desirable may change from era to era even within a single normative framework. Even if the construction zone is filled by what Baude and Sachs see as a general law of construction, *supra* note 46, 1128–32, 1137, constitutional law can mutate because the general law can change. See, e.g., Stephen E. Sachs, Pennoyer Was Right, 95 TEX. L. REV. 1249, 1319 (2017).

