ARTICLES

THE PUBLIC MEANING THESIS: AN ORIGINALIST THEORY OF CONSTITUTIONAL MEANING[†]

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ABSTRACT

Public Meaning Originalism is the predominant form of constitutional originalism. What makes Public Meaning Originalism distinctive is the Public Meaning Thesis—the claim that the best understanding of constitutional meaning focuses on the meaning communicated by the constitutional text to the public at the time each constitutional provision was framed and ratified. This Article provides a precise formulation of the Public Meaning Thesis, supplies reasons for affirming the thesis, and answers objections. The constitutional record strongly supports the claim that the constitutional text was intended to communicate to the public. The Constitution begins with "We the People" and the ratification process included intense popular participation. Jurists and scholars emphasized the public nature of the Constitution.

The communication of public meaning is made possible by two features of constitutional communication. The first of these features is a shared language: the drafters of the constitutional text could rely on the fact that American English was spoken by most Americans and was accessible via translation to those who spoke German and Dutch. The second feature is a shared public context of constitutional communication: the drafters could rely on widely shared understandings of the circumstances in which the Constitution was framed and ratified. These features enable the creation of public meaning. Common objections to the Public Meaning Thesis, including the "summing problem," are based on mistaken assumptions about the way linguistic communication works. In sum, the central claim of the Article is that Public Meaning Originalism

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provides the best understanding of original meaning and hence the most attractive form of originalist constitutional theory.

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INTRODUCTION

The Public Meaning Thesis[1] is the claim that the original meaning of the constitutional text is best understood as its *public meaning*: roughly, the meaning that the text had for competent speakers of American English at the time each provision of the text was framed and ratified.[2] Properly understood, "constitutional interpretation" names the activity that aims to recover the meaning, or communicative content, of the constitutional text. The nature of constitutional meaning has long been disputed by constitutional theorists. Originalists have disagreed among themselves as to what is the best account of original meaning. Some living constitutionalists have nonoriginalist theories of the meaning of the constitutional text. This Article argues that the best theory of constitutional meaning is provided by Public Meaning Originalism ("PMO").[3]

[1] Phrases like "Public Meaning Thesis" and "Public Meaning Originalism" are capitalized to indicate that they are proper names for the particular theoretical concepts that are articulated and defined in this Article. Thus, there could be several variations on the idea that original meaning is public, but the specific version defended here is Public Meaning Originalism.

[2] This Article is part of a larger project that is in progress on the intersection of constitutional theory and the philosophy of language. *See generally* Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243 (2019) [hereinafter Solum, *Conceptual Structure*]; Lawrence B. Solum, *Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record*, 2017 BYU L. REV. 1621 [hereinafter Solum, *Triangulating Public Meaning*]; Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269 (2017); Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1 (2015) [hereinafter Solum, *The Fixation Thesis*]; Lawrence B. Solum, *Intellectual History as Constitutional Theory*, 101 VA. L. REV. 1111 (2015); Lawrence B. Solum, *Communicative Content and Legal Content*, 89 NOTRE DAME L. REV. 479 (2013); Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453 (2013); Lawrence B. Solum, *Construction and Constraint: Discussion of* Living Originalism, 7 JERUSALEM REV. LEGAL STUD. 17 (2013); Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95 (2010); Lawrence B. Solum, *What Is Originalism? The Evolution of Contemporary Originalist Theory*, *in* THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION 12 (Grant Huscroft & Bradley W. Miller eds., 2011); Lawrence B. Solum, *Incorporation and Originalist Theory*, 18 J. CONTEMP. LEGAL ISSUES 409 (2009); Lawrence B. Solum, District of Columbia v. Heller *and Originalism*, 103 NW. U. L. REV. 923 (2009). In addition to the published and forthcoming articles, works in progress on the subject include Lawrence B. Solum, The Constraint Principle: Original Meaning and Constitutional Practice (Apr. 3, 2019) (unpublished manuscript) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2940215) [hereinafter Solum, The Constraint Principle]. The earliest version of the project was developed in a work that is still in progress. *See generally* Lawrence B. Solum, *Semantic Originalism* (Ill. Pub. L. & Legal Theory Rsch. Papers Series No. 07-24, 2008), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244. The title, "Semantic Originalism," was, in retrospect, ill chosen. A better title would have been "Communicative Content Originalism."

[3] Public Meaning Originalism is the version of originalism that affirms the Public Meaning Thesis in addition to the Constraint Principle and the Fixation Thesis. Public Meaning Originalists are theorists and constitutional actors who affirm Public Meaning Originalism.

The Public Meaning Thesis can be clarified by situating the thesis in the landscape of contemporary constitutional theory and showing its connections to a variety of ideas in theoretical linguistics and the philosophy of language. The idea of public meaning is a general one: any text written for and conveyed to the public has a public meaning. But on this occasion, the Public Meaning Thesis is advanced as a claim within what we can call "constitutional originalism." Let us stipulate that "constitutional originalism" is a family of constitutional theories, almost all of which endorse two ideas: (1) the meaning of the constitutional text is fixed at the time each provision is framed and ratified and (2) that fixed meaning ought to constrain constitutional practice.[4] Almost all originalist theories agree on fixation and constraint,[5] but originalists disagree as to whether the best understanding of original meaning is captured by the Public Meaning Thesis or some other view, such as the views advanced by Original Intentions Originalism or Original Methods Originalism.

Two road maps are relevant to this Article. The first is the conventional preview of the parts. Part I lays out some preliminary conceptual distinctions and formulates a preliminary version of the Public Meaning Thesis. Part II explicates the role of the notion of "public meaning" in contemporary constitutional theory. Part III provides the affirmative case for the Public Meaning Thesis. Part IV argues for the normative priority of public meaning over other forms of meaning in the unusual cases in which public meaning diverges from the intended meaning of the drafters. Part V examines several objections and answers.

The second road map situates this Article in a larger project of making the case for constitutional originalism. This larger project includes three foundational distinctions:

- The first foundational distinction is between legal content and communicative content.[6]
- The second foundational distinction is between the activity that discovers the linguistic meaning of the constitutional text (interpretation) and the activity that determines the legal effect of the text (construction).[7]

[4] *See infra* Section II.A (defining the Fixation Thesis and the Constraint Principle as the foundational principles for constitutional originalism).

[5] For the only exception of which I am aware, see Stephen E. Sachs, *Originalism Without Text*, 127 YALE L.J. 156, 162-65 (2017) (rejecting theory that originalism is tied to text and the original intent behind such text).

[6] For an explication, see Solum, *Communicative Content and Legal Content*, *supra* note 2, at 480.

[7] For a further explanation, see Solum, *The Interpretation-Construction Distinction*, *supra* note 2, at 100-08.

- The third foundational distinction is between "originalism" and "living constitutionalism."[8]

These distinctions frame the case for originalism as a constitutional theory. The full case includes the following elements:

- The claim that the linguistic meaning (communicative content) of the constitutional text is fixed at the time each provision is framed and ratified.[9]
- The claim that the original meaning should constrain constitutional practice.[10]
- The claim that the best understanding of original meaning is the public meaning of the constitutional text, the subject of this Article.
- The claim that the original public meaning of the text is sufficiently determinate to have bite for a substantial number of constitutional cases and for important constitutional issues; in other words, the degree of underdeterminacy is only moderate.[11]
- A theory of the best originalist approach to the set of cases in which the original meaning underdetermines the legal content of constitutional doctrine.[12]
- A methodology for the recovery of original meaning.[13]
- The claim that constitutional originalism is a realistic possibility, in the feasible choice set for constitutional actors.[14]
- An account of a reasonable path from the constitutional status quo to the full implementation of originalism, a topic that will be examined in future work.

[8] For a further articulation, see generally Solum, *Conceptual Structure*, *supra* note 2.

[9] For an explication and defense of this claim, see Solum, *The Fixation Thesis*, *supra* note 2, at 15-16.

[10] For a defense of this claim, see generally Solum, The Constraint Principle, *supra* note 2.

[11] This project is not even halfway between the idea stage and a first draft. The case against strong or radical versions of the indeterminacy thesis and for the claim that the law is only moderately indeterminate is made in Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462 (1987).

[12] For a preliminary exploration, see Solum, *Originalism and Constitutional Construction*, *supra* note 2, at 460-72. This theory awaits full treatment in a future work.

[13] For a short outline of this methodology, see generally Solum, *Originalist Methodology*, *supra* note 2. For further elaboration, see generally Solum, *Triangulating Public Meaning*, *supra* note 2.

[14] For a further examination of this topic, see generally Lawrence B. Solum, *Constitutional Possibilities*, 83 IND. L.J. 307 (2008). I plan to continue exploring this subject in future work.

The articulation and defense of the Public Meaning Thesis begins with an exposition of the theoretical vocabulary that will enable a preliminary statement of the thesis.

I. A STATEMENT OF THE PUBLIC MEANING THESIS

Our investigation of public meaning can begin by marking some important conceptual distinctions in legal theory. The first distinction arises from the fact that the word "meaning" itself is ambiguous. In the legal context, the word "meaning" can be used in at least three distinct (but related) senses[15]:

Application Meaning: The application of a constitutional provision to a particular case or category of cases. Example: What does the Due Process Clause mean for the validity of the statute?

Teleological Meaning: The purpose or goal of a constitutional provision. Example: What did the authors of the Fourteenth Amendment mean to accomplish?

Communicative Meaning: The content (concepts and proposition) conveyed by a constitutional provision. Example: What idea did the phrase "right to jury trial at common law" in the Seventh Amendment convey?

In this Article, I will discuss public meaning as a form of communicative meaning. The Public Meaning Thesis is a claim about meaning in the communicative sense.

The second distinction is between communicative content and legal content. The basic idea can be illustrated by a statute that is given a saving construction in order to avoid a constitutional defect (as a consequence of the so-called avoidance canon).[16] In some cases, the application of the canon results in a

[15] On the ambiguity of "meaning" in the legal context, see C.K. OGDEN & I.A. RICHARDS, THE MEANING OF MEANING: A STUDY OF THE INFLUENCE OF LANGUAGE UPON THOUGHT AND OF THE SCIENCE OF SYMBOLISM 186-87 (1923) (exploring different senses of "meaning"). *See generally* Michael L. Geis, *The Meaning of* Meaning *in the Law*, 73 WASH. U. L.Q. 1125 (1995) (discussing different definitions of "meaning" as used by the Supreme Court and impact of lack of clarity on the Court's work); A. P. Martinich, *Four Senses of 'Meaning' in the History of Ideas: Quentin Skinner's Theory of Historical Interpretation*, 3 J. PHIL. HIST. 225 (2009) (distinguishing between communicative meaning, meaning as significance, literal meaning, and intention). The word "meaning" is associated with the object of legal interpretation in contemporary theoretical discourse in the United States, but in other disciplines, the word "meaning" may have a more restricted sense. Thus, the linguistic meaning of an utterance can be distinguished from its pragmatically enriched communicative content. Although the harmonization of terminology across disciplines would be really spiffy, my sense is that use of the word "meaning" and the phrase "communicative meaning" are the best choices for a legal audience. I am grateful to Scott Soames for his emphasis on this point.

[16] Clark v. Martinez, 543 U.S. 371, 381 (2005) (explaining that the avoidance canon is "a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts"). There is a large literature on the constitutional avoidance canon. *See,*

divergence between the legally effective construction of the statute (the saving construction) and the meaning that would ordinarily be given to the statute in context (the plain meaning).

Let us stipulate the following definitions of "legal content" and "communicative content"[17]:

> *Communicative Content*: The content conveyed by the relevant communicative meaning of the text.[18]
>
> *Legal Content*: The content assigned to the text by the relevant legal authorities, for example, by a court that gives a statute an authoritative legal construction.

Legal content and communicative content can differ in many ways: the legal content of a text might be richer than the communicative content (because of judicial elaboration or supplementation), or it might be a modified version of the communicative content (because of a saving construction or precedent that modifies some aspect of the text). The Public Meaning Thesis claims that the communicative content of the constitutional text conveyed or made accessible to the public is its original meaning—a factual claim. The Constraint Principle asserts that the communicative content ought to constrain constitutional practice—a normative claim.

When I use the word "content," it should be understood in terms of concepts and propositions. The content expressed by individual words and phrases in the constitutional text are concepts. The content expressed by whole clauses are propositions. When the communicative content of a constitutional provision is

e.g., Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189 (2006) (providing analytical tools for evaluating executive uses of constitutional avoidance); Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549 (2000) (defending constitutional avoidance as a resistance norm which protects federal judicial review's scope from legislative incursions); Philip P. Frickey, *Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court*, 93 CALIF. L. REV. 397 (2005) (examining role that avoidance played in shaping public law and relationship between Congress and the Supreme Court in the 1950s); Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003 (1994) (exploring justifications for the avoidance doctrine and the last resort rule); Frederick Schauer, Ashwander *Revisited*, 1995 SUP. CT. REV. 71 (critically examining the *Ashwander* principle of constitutional avoidance); Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945 (1997) (outlining development of modern canon of avoidance).

[17] *See generally* Solum, *Communicative Content and Legal Content*, *supra* note 2 (distinguishing between communicative content as the linguistic meaning of a text and legal content as a way of labeling the content of the legal norms produced by the text).

[18] I use the term "communicative content" to refer to the concepts and propositions conveyed by the text. *See infra* Section III.B. Some theorists distinguish between "character" and "content," but I will not employ that distinction in this Article. *See* David Braun, *Indexicals*, STAN. ENCYC. OF PHIL. (Jan. 16, 2015), https://plato.stanford.edu/archives/sum2017/entries/indexicals/ [https://perma.cc/7KKE-8C6T].

translated into constitutional doctrine, then it becomes a set of propositions of law. This talk about "concepts" and "propositions" may seem abstract and technical, but it will be explained in due course below.[19]

Having disambiguated the word "meaning" and drawn the distinction between communicative content and legal content, we can now introduce the interpretation-construction distinction.[20] Let us stipulate the following definitions:

> *Interpretation*: Interpretation is the activity that discerns the communicative content (roughly, contextualized linguistic meaning) of a legal text.
>
> *Construction*: Construction is the activity that determines the legal effect of a text, including the content of legal doctrines and the decision of cases on the basis of the legal content associated with the text.[21]

With these distinctions in mind, we can give a preliminary formulation of the idea of public meaning that is the subject of this Article:

> *Public Meaning*: The public meaning of a legal text is the communicative meaning conveyed or made accessible to[22] the public by the text, where "the public" is understood as a linguistic community (or set of overlapping linguistic subcommunities) encompassing the contemporaneous competent

[19] *See infra* Section III.B.

[20] For an overview of the interpretation-construction distinction and the role that it plays in contemporary originalism, see generally Solum, *Originalism and Constitutional Construction*, *supra* note 2; Solum, *The Interpretation-Construction Distinction*, *supra* note 2; Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL'Y 65 (2011). An early use in contemporary constitutional theory can be found in Robert N. Clinton, *Original Understanding, Legal Realism, and the Interpretation of "This Constitution*,*"* 72 IOWA L. REV. 1177, 1265 (1987). The distinction first became prominent in contemporary debates about originalism in the work of Keith Whittington. *See generally* KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW (1999) (examining possibilities and limitations of constitutional interpretation and judicial review in the context of originalism); KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING (1999) (arguing that Constitution has dual nature split comprised of interpretation and construction). It subsequently appeared in the work of Randy Barnett. *See* Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 645-46 (1999); RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 91-131 (rev. ed. 2014).

[21] Similar definitions were presented in Solum, *Originalism and Constitutional Construction*, *supra* note 2, at 457.

[22] The phrase "conveyed or made accessible to" is important. The Public Meaning Thesis does not claim that the full communicative content of the constitutional text was actually conveyed to every member of the public; that claim is obviously false. Some provisions of the constitutional text may not have been fully grasped by some citizens. This is especially likely in the case of provisions that employ technical terms or have a complex structure. Such provisions might have been understood by relatively few citizens, but they have "public meaning" so long as the communicative content was accessible to the public at large.

> speakers of the natural language in which the text was written, in the jurisdiction in which the text has legal effect.

Thus, the public meaning of a California statute enacted in 2022 would be the meaning communicated by that statute to competent English language speakers in California at the time the statute was drafted. Similarly, the public meaning of the provisions of the Constitution that were drafted in 1787 would be the communicative meaning of the Constitution for English language speakers within the United States in the period from 1787 through the early 1790s (the period during which the constitutional text was framed, ratified, and implemented).

If public meaning is understood in this way, then the Public Meaning Thesis is a claim about interpretation (as opposed to construction) and has as its object the identification of communicative content (as opposed to legal content). At this point, we can offer a slightly more precise (but still preliminary) statement of the thesis:

> *Public Meaning Thesis*: The original meaning of the constitutional text is best understood as the content communicated or made accessible to the public at the time each provision was framed and ratified—in other words, the original communicative content.

As formulated, the Public Meaning Thesis is a claim about "original meaning." It asserts that, given the situation of constitutional communication, the U.S. Constitution communicated content to the public and hence had public meaning.

This version of the Public Meaning Thesis attempts to be precise and is expressed in the theoretical vocabulary of contemporary constitutional theory, but the core idea can be expressed in other ways. For example, the Supreme Court stated a similar principle in 1886: "[w]ords in a constitution . . . are always to be given the meaning they have in common use, unless there are very strong reasons to the contrary."[23] And in 1889: "[t]he simplest and most obvious interpretation of a constitution, if in itself sensible, is the most likely to be that meant by the people in its adoption."[24] And again in 1929, "[t]he words used in the Constitution are to be taken in their natural and obvious sense and are to be given the meaning they have in common use unless there are very strong reasons to the contrary."[25]

Before proceeding further, one point of clarification is important. The Public Meaning Thesis uses the word "public" in a particular sense: "public meaning" is meaning for the public, the citizenry of the United States, and hence is related to the legal concept of "ordinary meaning" as distinguished from "technical meaning." The phrase "public meaning" could be used differently—so as to mark the difference between "private meanings" (mental states) and "public

[23] Tennessee v. Whitworth, 117 U.S. 139, 147 (1886).

[24] Lake County v. Rollins, 130 U.S. 662, 671 (1889).

[25] The Pocket Veto Case, 279 U.S. 655, 679 (1929) (citation omitted).

meanings" (the content communicated by writings and utterances).[26] The two different senses are closely related but conceptually distinct.[27] Public Meaning is not private in the public-versus-private sense, but neither are technical meanings.

II. THE ROLE OF PUBLIC MEANING IN CONTEMPORARY CONSTITUTIONAL THEORY

What role does the Public Meaning Thesis play in constitutional originalism? To get a handle on this question, we can begin with a brief introduction to originalism as a family of constitutional theories and then turn to the disagreements among originalists about the nature of original meaning. Finally, the relationship of the Public Meaning Thesis to living constitutionalism will be briefly discussed.

A. *What Is Originalism?*

Constitutional originalism is a family of constitutional theories united by two ideas, the *Fixation Thesis* and the *Constraint Principle*. The notion of a family of theories responds to the fact of theoretical divergence among contemporary versions of originalist constitutional theory. Although originalists agree about fixation and constraint, they disagree about a variety of other topics.

On this occasion, I will simply lay out simplified versions of the claims[28]:

> *The Fixation Thesis*: The Fixation Thesis is the claim that the communicative content of the constitutional text is fixed at the time each provision is framed and ratified.
>
> *The Constraint Principle*: The Constraint Principle is a normative principle that maintains that the legal content of constitutional doctrine should be constrained by the original meaning of the constitutional text.[29]

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[26] I am grateful to Michael Rappaport for calling this distinction to my attention.

[27] Thus, one can have a communicative intention to convey a public meaning in the sense of a meaning for the public. Contrariwise, a public expression can be evidence of a meaning that is private (in the sense that all mental states are private).

[28] However, for a fuller explication and defense of both the Fixation Thesis and the Constraint Principle, see generally Solum, *The Fixation Thesis*, *supra* note 2; Solum, The Constraint Principle, *supra* note 2.

[29] A more precise version of the Constraint Principle is called "Constraint as Consistency." Briefly, Constraint as Consistency requires that (1) the legal content of constitutional doctrine and norms be consistent with the communicative content of the constitutional text, (2) all of the communicative content of the constitutional text be reflected in the legal content of constitutional doctrine and norms, and (3) all of the legal content of constitutional doctrine and norms be fairly traceable to the constitutional text. The principle requires constitutional actors (such as Justices, judges, Presidents, executive officers, and legislators) to act in compliance with these requirements. Constitutional doctrines are announced in judicial decisions; constitutional norms are the equivalent for nonjudicial actors such as Congress and executive officials.

B. *Forms of Originalism*

The Public Meaning Thesis is affirmed by Public Meaning Originalism, which can be defined as follows:

> *Public Meaning Originalism*: The theory that holds that the original public meaning of the constitutional text should provide the legal content of constitutional doctrine.

Although Public Meaning Originalism is the predominant form of originalist constitutional theory, there are several variations. The following list includes the most prominent rivals to Public Meaning Originalism with a brief description of each:

> *Original Intentions Originalism*: The theory that holds that the constitutional preferences of the Framers and/or ratifiers should provide the legal content of constitutional doctrine.[30]
>
> *Original Methods Originalism*: The theory that holds that the original legal meaning of the constitutional text as it would have been determined by the interpretative methods that the constitutional enactors would have applied should provide the legal content of constitutional doctrine.[31]
>
> *Original Law Originalism*: The theory that holds that the positive law originally in force at the founding continues to be law, unless it was lawfully changed.[32]

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[30] *See* Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 228-29 (1988) (defining and defending Original Intentions Originalism). There is an important variation: Drafter's Communicative Intent Originalism, which is the theory that holds that the original meaning of the constitutional text is best understood as constituted by the content that the authors of each provision intended to communicate via readers' recognition of their communicative intentions. *See, e.g.*, Larry Alexander, *Constitutional Theories: A Taxonomy and (Implicit) Critique*, 51 SAN DIEGO L. REV. 623, 638-39 (2014). This variation is related to the work of Paul Grice on the philosophy of language. PAUL GRICE, STUDIES IN THE WAY OF WORDS 3-143 (1989); Richard E. Grandy & Richard Warner, *Paul Grice*, STAN. ENCYC. OF PHIL. (Oct. 9, 2017), https://plato.stanford.edu/entries/grice/ [https://perma.cc/5CR6-JJFH] (providing overview of Grice's work on philosophy of language).

[31] *See* John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 751 (2009) ("Under this approach, the Constitution should be interpreted using the interpretive methods that the constitutional enactors would have deemed applicable to it."); John O. McGinnis & Michael B. Rappaport, *The Abstract Meaning Fallacy*, 2012 U. ILL. L. REV. 737, 744 (explaining that Original Methods methodology interprets meaning of constitutional language as an informed speaker at the time using interpretive rules would have interpreted it). A fuller statement is found in their recent monograph. *See* JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 116-38 (2013) (arguing that determining actual meaning of Constitution requires application of original interpretive methods).

[32] Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 874 (2015) ("[O]ur law today is the Founders' law, as lawfully changed.").

Each of these views is a potential rival to Public Meaning Originalism. To the extent that Original Intentions Originalism asserts that the meaning of the constitutional text consists in the private intentions of the Framers or ratifiers, the truth of the Public Meaning Thesis would entail that intentionalism is false. Likewise, to the extent that Original Methods Originalism asserts that the constitutional text was written in the language of the law and therefore did not have a publicly accessible meaning, the truth of the Public Meaning Thesis is inconsistent with this assertion. The case of Original Law Originalism is less clear: if Original Law originalists accept that the original law prioritized the original public meaning of the constitutional text, their views may be consistent with the Public Meaning Thesis.

From a sectarian perspective, the various forms of constitutional originalism are rivals—but that fact should not obscure the more important fact that in practice, it seems likely that originalists will converge on most cases and issues. From an ecumenical perspective, sophisticated originalist constitutional theories are more united than divided.[33] The differences among originalists are not trivial, but the agreements among originalists are substantial.

C. *Public Meaning and Living Constitutionalism*

The Public Meaning Thesis is also relevant for many living constitutionalists. Living constitutionalism comes in many diverse forms.[34] For example, constitutional pluralists may accept that arguments from the original meaning of the constitutional text are a legitimate mode of constitutional argument: the Public Meaning Thesis would then play a role in living constitutionalist argument.[35] If arguments from the original public meaning of the constitutional text are legitimate and there is no hierarchy among the modalities of constitutional reasoning, then the Public Meaning Thesis is relevant to the resolution of each and every constitutional case and constitutional issue. At the same time, arguments from original public meaning are not necessarily decisive

[33] *See* Solum, *The Fixation Thesis*, *supra* note 2, at 9 (distinguishing sectarian and ecumenical originalism).

[34] For a catalog, see Solum, *Originalism Versus Living Constitutionalism*, *supra* note 2, at 1271-76.

[35] *Id.* at 1271 ("Constitutional Pluralism . . . is the view that law is a complex argumentative practice with plural forms of constitutional argument."). For other statements of the theory, see PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 12-13 (1991); Mitchell N. Berman & Kevin Toh, *Pluralistic Nonoriginalism and the Combinability Problem*, 91 TEX. L. REV. 1739, 1751-62 (2013) (developing a "pluralistic nonoriginalist" method of constitutional interpretation); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1193 (1987) (arguing that assessing various approaches to interpretation is important and often leads to single result); Stephen M. Griffin, *Pluralism in Constitutional Interpretation*, 72 TEX. L. REV. 1753, 1753 (1994) ("Pluralistic theories of constitutional interpretation hold that there are multiple legitimate methods of interpreting the Constitution.").

because one or more of the other modalities could overcome original public meaning in the context of a particular case or issue.

On the other hand, some living constitutionalists may reject the constitutional text altogether—for example, an unconstrained Thayerian might argue that courts should not engage in judicial review and that Congress is not bound by the constitutional text, entailing that the Public Meaning Thesis, even if true, is normatively inert.[36] There are many different forms of living constitutionalism. Each may have a distinctive take on the relevance of the communicative content of the constitutional text within its own theoretical structure; exploration of these issues is beyond the scope of this Article.

III. THE AFFIRMATIVE CASE FOR THE PUBLIC MEANING THESIS

This Part will present the affirmative case for the Public Meaning Thesis. The argument that I offer here is essentially a positive argument (*not* a normative one) that draws on and further develops ideas from theoretical linguistics and the philosophy of language. Of course, when the Public Meaning Thesis is combined with the Constraint Principle, the thesis has normative implications, but, with only a few exceptions, the normative case for the Constraint Principle does not play a role in the articulation and defense of the Public Meaning Thesis. Normative questions do arise in unusual cases in which the public meaning of the text diverges from the communicative intentions of the drafters.[37]

A. *Constitutional Communication*

The argument for the Public Meaning Thesis begins with the idea of constitutional communication. This idea is simple and intuitive. The authors of a constitutional text are attempting to communicate some content to their contemporary and future readers. Of course, they are doing other things as well, but they *are* communicating a rich set of content by spelling out a plan of government, a set of rights, and so forth. The constitutional text conveys this content to readers.[38]

Constitutional communication is continuous with other forms of linguistically mediated human communication.[39] Written constitutions are like other writings (e.g., books, letters, emails, and notes passed by students in class). They use the resources of a natural language (including the conventional semantic meanings

[36] "Unconstrained Thayerianism is the view that courts should defer to Congress and that Congress should have the constitutional power to revise the constitutional text, either by adopting amending legislation or by creating implicit amendments through ordinary statutes." Solum, *Originalism Versus Living Constitutionalism*, *supra* note 2, at 1274.

[37] For further discussion of these cases, see *infra* Part IV (explaining that although usually Framers' intent and public meaning align, there may be cases where they do not, in which case public meaning should govern).

[38] The notion of content is explained in the next subsection, see *infra* Section III.B.

[39] We can call this idea the "Continuity Thesis."

of words and phrases and the syntax, grammar, and norms of punctuation that enable their combination into sentences).[40]

Communication delivers content—the communicative meaning of what is written or what is said. But that content (the set of propositions communicated) is not fully determined by semantics and syntax. This fact is well-known to lawyers. The meaning of an utterance or writing is almost always (or maybe always) in part a function of the context in which the communication occurs. In the philosophy of language and theoretical linguistics, the study of the role of context in communication is called "pragmatics." Context enables disambiguation and enrichment of the relatively sparse literal meaning (semantic content) of the constitutional text.

Constitutional communication must use the tools available for linguistic communication generally. "The Constitution" is in one sense just a document[41] drafted and ratified at various times in particular historical circumstances: the constitutional text has no mysterious properties that would allow its authors to communicate without using the words, phrases, and syntax of a natural language and the context that the authors shared with their readers.

B. *Communicative Content: Concepts and Propositions*

What is communicative content? The content that is communicated by a constitutional text is not the words and phrases. Words and phrases are means by which content is communicated. To get precise about the nature of communicative content, it is helpful to introduce two abstract philosophical ideas: *concepts* and *propositions*.[42]

We can begin with the distinction between words and concepts. I will use quotation marks to make it clear when I am mentioning a word: for example, the word "words" appeared twice in the preceding paragraph! Words and phrases are used to represent concepts. The easiest way to see the difference between words and concepts is to observe that the same concept may be represented by different words in different languages—and sometimes by multiple words in a single language. Thus, the word "law" in English, when used in the sense that refers to legal norms, is translated to the word "loi" in French, "recht" in German, and "ley" in Spanish. I will sometimes use italics to make it clear that I am referring to a concept rather than a word: thus, *law* can be represented by

[40] "Continuous" does not mean identical: the relationship between communication in the constitutional context with other forms of oral and written communication is explored in Section III.C and Section V.A.

[41] For a discussion of the senses in which the phrase "the Constitution" vary, see *infra* Section V.F.

[42] For a brief introduction to these philosophical ideas, see Eric Margolis & Stephen Laurence, *Concepts*, STAN. ENCYC. OF PHIL. (June 17, 2019), https://plato.stanford.edu/archives/sum2019/entries/concepts/ [https://perma.cc/4L8M-HWHF]; Matthew McGrath & Devin Frank, *Propositions*, STAN. ENCYC. OF PHIL. (Jan. 25, 2018), https://plato.stanford.edu/archives/spr2018/entries/propositions/ [https://perma.cc/K58A-2FEM].

"law," "loi," "recht," and "ley." Sometimes individual words are the unit of meaning, but other times a whole phrase (e.g., "due process of law") has a meaning that is not reducible to the meaning of the individual words.

As words are to concepts, so propositions are to sentences. The U.S. Constitution consists of many sentences in English, but the propositions conveyed by those words can be represented by sentences in another language. For example, during the period of ratification that followed the Philadelphia Convention, the draft Constitution was translated into Dutch and German.[43] A similar process takes places when we translate archaic constitutional language or grammar into modern parlance. The various clauses that make up the U.S. Constitution (disambiguated by context) express propositions which make up a large part of the communicative content of the constitutional text. Additional content results from contextual enrichment.

The Public Meaning Thesis claims that the set of propositions communicated by the constitutional text are those communicated or made accessible to the public at the time each provision was framed and ratified.

C. *The Communicative Situation*

Consider a second idea, which we can call the "situation of constitutional communication" (to be precise) or the "communicative situation" (to be concise). In this Section, I will build a description of the communicative situation in stepwise fashion, starting with an ordinary conversation and proceeding to complex constitutional communication. Along the way, I will be using ideas that were developed by the philosopher Paul Grice and many others.[44]

1. A Simple Communicative Situation: Face-to-Face Oral Communication

Let us begin with a one-on-one conversation between a speaker and the speaker's audience. Following Grice, call a particular oral communication an "utterance." Grice introduced the idea of "speaker's meaning" as an account for the meaning of utterances in ordinary conversation.[45] This idea is actually quite familiar. We get at the idea of speaker's meaning all the time in ordinary conversations: "What did she mean by that?" In the context of legal texts, we

[43] Christina Mulligan, Michael Douma, Hans Lind & Brian Quinn, *Founding-Era Translations of the U.S. Constitution*, 31 CONST. COMMENT. 1, 1 (2016).

[44] *See generally* GRICE, *supra* note 30. For other discussions of Grice's ideas, see Jeffrey Goldsworthy, *Legislative Intentions, Legislative Supremacy, and Legal Positivism*, 42 SAN DIEGO L. REV. 493, 510 n.57 (2005) (examining whether legislation meets Grice's criteria for communication); B. Jessie Hill, *Putting Religious Symbolism in Context: A Linguistic Critique of the Endorsement Test*, 104 MICH. L. REV. 491, 506 n.80 (2005) (discussing Grice's theory that to mean something is to intend that the utterance causes the listener to understand what the speaker intends to say); John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 72 n.7 (2006) (discussing Grice's "Cooperative Principle" and examining why people sometimes misstate their intended meaning).

[45] *See* GRICE, *supra* note 30, at 108.

ask questions like: "What did the legislature mean by the provision?" "What did the judge mean by that sentence in the opinion?" "What did the Framers mean by that clause in the Constitution?"

Grice contended that speaker's meaning is a function of speaker's (or author's) intentions.[46] His point is illustrated by the following thought experiment:

> [S]uppose that you stop your car at an intersection late at night. Another car flashes its lights at you. You think: "Why is she flashing lights at me? The best explanation is that she must intend me to think my lights are not on. There is no reason for her to deceive me, so my lights really must not be on."[47]

In this example, the meaning of the flashing lights is the product of the following complex intention—as explicated by Richard Grandy and Richard Warner:

> The driver flashes her lights intending
>
> 1. that you believe that your lights are not on;
> 2. that you recognize her intention;
> 3. that this recognition be part of your reason for believing that your lights are not on.[48]

In this example, communication occurs without the use of words. Nonlinguistic signals are used to convey the communicative intentions of the first driver to the second. In face-to-face oral communication, a variety of nonverbal mechanisms are available, including, for example, facial expressions, gestures, and props.

In written communication, nonverbal mechanisms are more limited, but diagrams and nonlinguistic symbols may be available. In the case of the U.S. Constitution, the conventional understanding is that all (or almost all)[49] of the content is conveyed by the text in context. For this reason, when we read the Constitution, we feel secure in relying on copies that provide the text but vary with respect to typeface, formatting, etc.

Some legal communications are like commands or imperatives. In the case of imperatives, the speaker or author's intention is that the audience (or reader) performs (or refrains from performing) a certain act on the basis of the reader's recognition of the author's intention that the reader perform (or refrain from

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[46] *See id.* (explaining that meaning may vary with speaker's intentions).

[47] This thought experiment derives from that offered by Richard Warner. *See* Richard Warner, *Introduction* to PAUL GRICE, ASPECTS OF REASON, at ix (Richard Warner ed., 2001).

[48] Grandy & Warner, *supra* note 30.

[49] The Constitution was signed and the signatures may convey nonlinguistic content. I am putting this issue aside.

performing) the act. We can use the phrase "illocutionary uptake" to describe this kind of recognition of the point of an utterance.[50]

Successful communication of a speaker's meaning requires that speakers and audiences have "common knowledge"[51] in a technical sense: the speaker must know to a sufficient degree what the audience knows about the speaker's intentions and vice versa. For communication to succeed, this common knowledge must be good enough for the circumstances; perfection is not required.

We can tentatively formulate speaker's meaning as follows:

> *Speaker's Meaning*: The speaker's meaning of an utterance is the communicative content that the speaker intended the audience to grasp on the basis of the audience's recognition of the speaker's communicative intention.

Grice formulated his notion in terms of speakers and listeners, implicitly assuming the context of oral communication between a speaker and an audience contiguous in space and time.

Speaker's meaning can be generalized to include written communication—so long as the author of the text and the reader of the text can satisfy the conditions for sufficient common knowledge of the author's beliefs regarding the audience's recognition of the author's intentions. Thus, the "author's meaning" or "drafter's meaning" of a text would be the communicative content that the author or drafter intended the reader to grasp on the basis of the reader's recognition of the author or drafter's communicative intention. This content consists of propositions that the reader recognizes that the author intended to convey via the text as well as a recognition of the illocutionary force of the utterance (command, request, promise, and so forth).

The account offered above is simplified and condensed. A full account would require a book-length treatment or many articles. The simplified account attempts to present the gist of the Gricean theory of communication and speech act theory to an audience of nonspecialists.

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[50] *See generally* J.L. Austin, HOW TO DO THINGS WITH WORDS: THE WILLIAM JAMES LECTURES DELIVERED AT HARVARD UNIVERSITY IN 1955 (1962) (defining "illocutionary acts" in the "speech act theory" context).

[51] On common knowledge, see Peter Vanderschraaf & Giacomo Sillari, *Common Knowledge*, STAN. ENCYC. OF PHIL. (July 23, 2013), http://plato.stanford.edu/entries/common-knowledge [https://perma.cc/M7E5-MZB6] (distinguishing "mutual knowledge," which is shared without knowledge of the fact of sharing from "common knowledge," which requires knowledge of the fact that content is shared); *see also* MICHAEL SUK-YOUNG CHWE, RATIONAL RITUAL: CULTURE, COORDINATION, AND COMMON KNOWLEDGE 3, 13 (2001) (explaining that successful communication requires "knowledge of others' knowledge"). This idea of common knowledge was introduced (so far as I know) by David Lewis. *See* DAVID K. LEWIS, CONVENTION: A PHILOSOPHICAL STUDY 52-60 (1969).

2. The Circumstances of Constitutional Communication

What were the actual circumstances of constitutional communication? For now, I offer a simplified answer to this big question, but a fuller account will be offered below.[52] The U.S. Constitution includes both the text that was drafted at the Philadelphia Convention as well as the twenty-seven amendments proposed by Congress and ratified by state legislatures or conventions held in the states. In the discussion that follows, I will put the communicative situation created by the amendment process to the side and focus on the Constitution of 1789.[53] The description that follows is a stipulated and simplified version of what actually occurred—a model and not a history.

The U.S. Constitution that was ratified in 1789[54] was drafted at a convention held in the summer of 1787 in Philadelphia.[55] The proceedings of the Philadelphia convention were held in secret,[56] and the records of the convention (including Madison's notes) were not made public until decades after ratification.[57] Some of the work of the convention was done via discussion of various plans (including the Virginia Plan, primarily drafted by James Madison)[58] followed by voting on a series of resolutions.[59] The actual drafting of the constitutional text took place in two committees of the convention—the

[52] *See infra* Section III.F (describing complex multiphase process of constitutional communication).

[53] A full account would require discussion of each constitutional amendment—a task beyond the scope of this Article.

[54] *See* Akhil Reed Amar, *Our Forgotten Constitution: A Bicentennial Comment*, 97 YALE L.J. 281, 298 (1987) (summarizing dates of major constitutional drafts); *see also* ACTS PASSED AT A CONGRESS OF THE UNITED STATES OF AMERICA, BEGUN AND HELD AT THE CITY OF NEW-YORK, ON WEDNESDAY THE FOURTH OF MARCH, IN THE YEAR M, DCC, LXXXIX AND OF THE INDEPENDENCE OF THE UNITED STATES, THE THIRTEENTH, at v-xiv (New York, Childs & Swaine 1789).

[55] *See* John Franklin Jameson, *Studies in the History of the Federal Convention of 1787*, *in* 1 ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION FOR 1902, at 87, 90-98 (1903).

[56] *See* Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1115 (2003) ("As is well known, the proceedings of the Philadelphia Convention—the body that proposed the Constitution for ratification by conventions assembled in the several States—were shrouded in secrecy.").

[57] *See id.* ("James Madison's notes of the proceedings of the Philadelphia Convention, widely considered to be the most influential, were not published until 1840—more than fifty years after the Founding." (footnote omitted)) .

[58] *See* Robert L. Jones, *Lessons from a Lost Constitution: The Council of Revision, the Bill of Rights, and the Role of the Judiciary in Democratic Governance*, 27 J.L. & POL. 459, 475 (2012).

[59] *See* Mary Sarah Bilder, *How Bad Were the Official Records of the Federal Convention?*, 80 GEO. WASH. L. REV. 1620, 1626 (2012) (discussing records of "the resolutions adopted by the Convention as the Committee of the Whole House").

Committee of Detail and the Committee of Style.[60] It seems likely that James Wilson's work for the Committee of Detail and Gouverneur Morris's work for the Committee of Style produced most of the word choice, sentence structure, and punctuation that make up the constitutional text.[61]

Assuming that Morris did most of the actual drafting, one might characterize him as the primary "drafter" of the constitutional text (before amendments were added). The Constitution itself established a ratification process. Copies of the constitutional text were widely circulated, published in newspapers, and transmitted to the ratifying conventions. Proponents and opponents of the Constitution made their case in written form (including the essays by John Jay, James Madison, and Alexander Hamilton that are now called *The Federalist Papers*[62] and similar writings by antifederalist opponents of the Constitution).[63] The debate and discussion also took place in oral form, at the ratifying conventions and in other forums.[64]

The situation of constitutional communication differs in significant ways from a face-to-face conversation between individuals. In a face-to-face conversation, the participants engage in an interactive process that can provide rich information about the communicative intentions of the speakers. At a very basic level, the participants share information about the context in which the conversation takes place. With rare exceptions, they know with respect to each utterance in the conversation *to whom* the utterance was directed, *when* it was uttered, *where* that occurred, and by *whom* the utterance was made; moreover, they are likely to know *why* the utterance was made. In some conversations, the participants will know each other, permitting them further inferences about the communicative intentions of their conversational partners. In other words, face-to-face conversations between persons who know each other are *information rich*. The context in which the communication occurs enables the participants to draw a variety of inferences about the communicative intentions of the particular person who is their conversational partner.[65]

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[60] *See* Vasan Kesavan & Michael Stokes Paulsen, *Is West Virginia Unconstitutional?*, 90 CALIF. L. REV. 291, 384-92 (2002).

[61] Letter from James Madison to Jared Sparks, American Historian (Apr. 8, 1831), *in* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 498, 499 (Max Farrand ed., 1911) ("The *finish* given to the style and arrangement of the Constitution fairly belongs to the pen of Mr[.] Morris; the task having, probably, been handed over to him by the chairman of the Committee, himself a highly respectable member, and with the ready concurrence of the others. A better choice could not have been made, as the performance of the task proved."); *see also* John R. Vile, *The Critical Role of Committees at the U.S. Constitutional Convention of 1787*, 48 AM. J. LEGAL HIST. 147, 171-74 (2006) (discussing the various committees).

[62] *See* Gregory E. Maggs, *A Concise Guide to the Federalist Papers as a Source of the Original Meaning of the United States Constitution*, 87 B.U. L. REV. 801, 802 (2007).

[63] *See generally* THE COMPLETE ANTI-FEDERALIST (Herbert J. Storing ed., 1981).

[64] There are many histories of the framing and ratification of the Constitution. The account offered in text is just a sketch.

[65] *See infra* Section V.A.

The situation of constitutional communication differs systematically from a one-on-one conversation between people who know each other. The Constitution is a written text and not an oral conversation. Constitutional communication is many-to-many communication (many drafters, many readers). Because the Philadelphia Convention was secret, almost all of the intended readers of the Constitution would have had very limited knowledge of the particular persons who did the drafting. If we view the text as the product of a group agent[66] (the Philadelphia Convention itself), readers still would have had very limited knowledge of the conditions under which the group agent produced the text.

The situation of constitutional communication resulted in limitations on the mechanisms by which the Framers could convey communicative content. The environment of constitutional communication was information poor. And the intended readers of the constitutional text were dispersed in space and time. The Constitution was intended to be submitted for ratification throughout the United States, from what is now Maine in the north to Georgia in the south. And constitutional communication was not limited to the people who elected delegates to the ratification conventions (and the delegates themselves). The Constitution is addressed to citizens and officials, including judges, in the future. An important part of the future audience would be the members of the first Congress, the first President and other executive officials, and the initial members of the Supreme Court. Many of those in this initial group participated in framing and ratification. But the Framers would have known that the Constitution, like a statute, might well be read by subsequent generations who would not have the special knowledge that some of the early readers had. Moreover, many early readers had very limited access to information about framing and ratification, and it would have been reasonable for the Framers to expect that such information would degrade over time as the founding generation passed.

All of these features of the situation of constitutional communication have implications for the mechanisms by which constitutional content can be successfully communicated. But before we examine those implications, we need to focus on an important feature of the communicative situation: intended readership. Who were the intended readers of the constitutional text?

3. Intended Readers in General

Communication is usually directed at some intended audience. Ordinarily, speakers and authors take their audience into account when they communicate. If you are writing for an audience that speaks English, you write in English. If your audience already possesses general background knowledge or knowledge of the context of utterance, then you may be able to express yourself parsimoniously, relying on your listener to infer things you did not say explicitly. Ordinarily we do not express ourselves in a way that would fill in all the relevant

[66] The notion of "group agency" is explained in greater detail *infra* Section III.F.6.c.

background knowledge or information about context for someone who is outside our intended audience or readership.

But in some special situations, we may want to communicate in a way that will be clear to listeners or readers outside our immediately intended audience. I might write a letter to a famous scholar with the knowledge that it will eventually be included in an archive that may be accessed by intellectual historians decades later: if I want the letter to be understood by the historians, I might need to be more explicit and precise than I would if I were indifferent to these future third-party readers.

4. Possible Intended Readers of the U.S. Constitution

With these general observations about intended readers in place, we can return to our question: "Who were the intended readers of the constitutional text?" Consider some illustrative possibilities:

> Possibility One: The intended readership was limited to the members of the Philadelphia Convention. The drafters (e.g., members of the convention like Gouverneur Morris and James Wilson) did not intend to communicate to anyone who was not present in Philadelphia.
>
> Possibility Two: The intended readership was limited to persons attending the ratifying conventions. The drafters (or the Philadelphia Convention itself as a group author) did not intend to communicate to persons who voted for delegates to the conventions or to the future government established by the Constitution.
>
> Possibility Three: The intended readership was limited to judges and lawyers who would implement the Constitution (and thereby indirectly to those to whom the judges and lawyers gave direction or counsel). The authors did not intend to communicate directly to the public or to officials who were not learned in the law.
>
> Possibility Four: The intended readership consisted of the members of the public in the United States who were able to read English or to understand English if it were read to them. The authors intended to communicate to all of the groups identified above (delegates to the conventions and officials of the new government) and to citizens of the United States generally.

There may be other possible audiences, perhaps including officials of foreign governments. We can also imagine various hybrid possibilities: for example, the intended audience could have included all of the groups in the first three possibilities. But on this occasion, I will limit my discussion to these four possibilities.

D. *Constitutional Communication Was Addressed to the Public*

The case that the Constitution was intended to communicate to the public of the United States (Possibility Four) is simple and compelling. The Constitution

itself begins with the words "We the People of the United States."[67] It guaranteed to the states a "Republican Form of Government,"[68] in which the people were to play important roles as voters and jurors.[69] The ratification process included extensive popular participation—as evidenced by the election of delegates to the ratifying conventions and extensive popular debate and discussion that occurred outside the ratifying conventions.[70]

The constitutional text was printed in newspapers and pamphlet form and distributed to the public.[71] In Connecticut, the people themselves debated the Constitution in town meetings held for the purpose of electing representatives to the ratifying convention.[72]

Popular participation in the ratification process flowed from the understanding of popular sovereignty that characterized the period. As Maier put it:

> Constitutional conventions and direct popular ratification of constitutions entered American practice only because the townsmen of Massachusetts not only understood the prevailing theoretical assumptions of their time but found ways of reducing them to practice. In effect, the sovereign people invented the institutions through which they could exercise their sovereign power.[73]

If the people are sovereign, then they must participate in ratification of the Constitution—and meaningful participation requires that the meaning of the constitutional text be accessible to them.

The idea that the intended audience of the constitutional text was the public is not a novel one, devised by modern historians or contemporary constitutional

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[67] U.S. CONST. pmbl.

[68] *Id.* art. IV, § 4.

[69] Thomas A. Smith, *The Rule of Law and the States: A New Interpretation of the Guarantee Clause*, 93 YALE L.J. 561, 567 n.43 (1984) (noting "a long tradition of equating republican government with government by the people").

[70] The eminent historian, Pauline Maier, summarized popular participation in the ratification process as follows:

> Debate over the Constitution raged in newspapers, taverns, coffeehouses, and over dinner tables as well as in the Confederation Congress, state legislatures, and state ratifying conventions. People who never left their home towns and were little known except to their neighbors studied the document, knew it well, and on some memorable occasions made their views known.

PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787-88, at ix (2010).

[71] *Id.* at 70 ("Before the end of 1787 there were as many as two hundred separate printings for the benefit of 'We the People,' who would decide, directly or indirectly, the Constitution's fate.").

[72] *Id.* at 134 ("Sometimes, however, the towns read and discussed the Constitution, then adjourned while a committee pondered whether the town should instruct its delegates how to vote.").

[73] *Id.* at 139.

theorists. As the first Justice Roberts put it, "[t]he Constitution was written to be understood by the voters."[74] Or, as Justice Story stated:

> In the first place, then, every word employed in the constitution is to be expounded in its plain, obvious, and common sense, unless the context furnishes some ground to control, qualify, or enlarge it. Constitutions are not designed for metaphysical or logical subtleties, for niceties of expression, for critical propriety, for elaborate shades of meaning, or for the exercise of philosophical acuteness, or judicial research. They are instruments of a practical nature, founded on the common business of human life, adapted to common wants, designed for common use, and fitted for common understandings. The people make them; the people adopt them; the people must be supposed to read them, with the help of common sense; and cannot be presumed to admit in them any recondite meaning, or any extraordinary gloss.[75]

Story is clear: the Constitution should be read as the people would read it.

The Constitution established the basic structure of government for the people. The government of the United States was intended to perform functions that would be directly relevant to members of the public, including interstate and international commerce, the postal system, and national defense. These ideas were expressed by the great nineteenth-century treatise writer, Thomas Cooley: "Narrow and technical reasoning is misplaced when it is brought to bear upon an instrument framed by the people themselves, for themselves, and designed as a chart upon which every man, learned and unlearned, may be able to trace the leading principles of government."[76]

At this point, the cumulative evidence may be repetitive, but I hope the reader will bear with me for a few more pages. Here is Brutus describing the interpretive authority of the federal courts:

> They are authorised to determine all questions that may arise upon the meaning of the constitution in law. This article vests the courts with authority to give the constitution a legal construction, or to explain it according to the rules laid down for construing a law.—These rules give a certain degree of latitude of explanation. According to this mode of construction, the courts are to give such meaning to the constitution as comports best with the common, and generally received acceptation of the

[74] United States v. Sprague, 282 U.S. 716, 731 (1931).

[75] 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 436-37 (Boston, Hilliard, Gray & Co. 1833); *see also* Nat'l Prohibition Cases, 253 U.S. 350, 398 (1920) (McKenna, J., dissenting) ("[I]n the exposition of statutes and constitutions, every word 'is to be expounded in its plain, obvious, and common sense, unless the context furnishes some ground to control, qualify or enlarge it,' and there cannot be imposed upon the words 'any recondite meaning or any extraordinary gloss.'" (quoting STORY, *supra*, at 436-37)).

[76] THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 59 (Boston, Little, Brown & Co. 1868). This passage occurs in a section discussing state constitutions.

> words in which it is expressed, regarding their ordinary and popular use, rather than their grammatical propriety. Where words are dubious, they will be explained by the context. The end of the clause will be attended to, and the words will be understood, as having a view to it; and the words will not be so understood as to bear no meaning or a very absurd one.[77]

Notice that this passage explicitly connects the meaning that was assigned to the text by lawyers and legal methods with the "ordinary and popular use" of the words in the text.

James Wilson expressed a more general version of this idea:

> Some, indeed, involve themselves in a thick mist of terms of art; and use a language unknown to all, but those of the profession. By such, the knowledge of the law, like the mysteries of some ancient divinity, is confined to its initiated votaries; as if all others were in duty bound, blindly and implicitly to obey. But this ought not to be the case. The knowledge of those rational principles on which the law is founded, ought, especially in a free government, to be diffused over the whole community.[78]

Wilson's point is about the law in general, but the early history of constitutional interpretation includes explicit statements that support the idea that the constitutional text should be understood in those statements' "natural" or "obvious" sense. And this continued through the end of the nineteenth century.

The ideas expressed by Story and Wilson are echoed in the decisions of the Supreme Court. Here are some examples:

- The words [of the Constitution] are to be taken in their natural and obvious sense, and not in a sense unreasonably restricted or enlarged.

  —Justice Story in *Martin v. Hunter's Lessee*[79]

- The word "necessary" is said to be a synonyme of "needful" But both these words are defined "indispensably requisite;" and most certainly this is the sense in which the word 'necessary' is used in the constitution. To give it a more lax sense, would be to alter the whole character of the government as a sovereignty of limited powers. This is not a purpose for which violence should be done to the obvious and

[77] Brutus, *XI*, N.Y. J., Jan. 31, 1788, *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 417, 419 (Herbert J. Storing ed., 1981).

[78] 1 JAMES WILSON, Of the Study of the Law in the United States (1790-1791), *in* THE WORKS OF THE HONOURABLE JAMES WILSON, L.L.D (Bird Wilson ed., Philadelphia, Bronson & Chauncey 1804), *reprinted in* 1 COLLECTED WORKS OF JAMES WILSON 414, 431, 436 (Kermit L. Hall & Mark David Hall eds., 2007).

[79] 14 U.S. (1 Wheat.) 304, 326 (1816).

> natural sense of any terms, used in an instrument drawn up with great simplicity, and with extraordinary precision.
>
> —Chief Justice John Marshall in *McCulloch v. Maryland*[80]

- As men whose intentions require no concealment generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said.

  —Chief Justice John Marshall in *Gibbons v. Ogden*[81]

- To say that the intention of the instrument must prevail; that this intention must be collected from its words, that its words are to be understood in that sense in which they are generally used by those for whom the instrument was intended; that its provisions are neither to be restricted into insignificance, nor extended to objects not comprehended in them, nor contemplated by its framers;—is to repeat what has been already said more at large, and is all that can be necessary.

  —Chief Justice John Marshall in *Ogden v. Saunders*[82]

- We know of no reason for holding otherwise than that the words "direct taxes," on the one hand, and "duties, imposts and excises," on the other, were used in the Constitution in their natural and obvious sense. Nor, in arriving at what those terms embrace, do we perceive any ground for enlarging them beyond, or narrowing them within, their natural and obvious import at the time the Constitution was framed and ratified.

  —Chief Justice Melville Fuller in *Pollock v. Farmers' Loan & Trust Co.*[83]

In the passage from *Gibbons v. Ogden* quoted above, Marshall draws the explicit connection between the meaning of the constitutional text and popular ratification.[84] By way of contrast, there seem to be no statements to the effect that the meaning of the constitutional text was written so as to be incomprehensible to the public.

Consider one final example, one of the most famous passages in all of constitutional law:

> Among the enumerated powers, we do not find that of establishing a bank or creating a corporation. But there is no phrase in the instrument

[80] 17 U.S. (4 Wheat.) 316, 367 (1819).
[81] 22 U.S. (9 Wheat.) 1, 188 (1824).
[82] 25 U.S. (12 Wheat.) 213, 332 (1827) (opinion of Marshall, C.J.).
[83] 158 U.S. 601, 619 (1895).
[84] *Gibbons*, 22 U.S. (9 Wheat.) at 188.

> which, like the articles of confederation, excludes incidental or implied powers; and which requires that every thing granted shall be expressly and minutely described. Even the 10th amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word "expressly," and declares only that the powers "not delegated to the United States, nor prohibited to the States, are reserved to the States or to the people;" thus leaving the question, whether the particular power which may become the subject of contest, has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the whole instrument. The men who drew and adopted this amendment had experienced the embarrassments resulting from the insertion of this word in the articles of confederation, and probably omitted it to avoid those embarrassments. A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American constitution, is not only to be inferred from the nature of the instrument, but from the language. Why else were some of the limitations, found in the ninth section of the 1st article, introduced? It is also, in some degree, warranted, by their having omitted to use any restrictive term which might prevent its receiving a fair and just interpretation. In considering this question, then, we must never forget that it is *a constitution* we are expounding.[85]

The final sentence in this passage is sometimes glossed as providing an argument for living constitutionalism, but the core argument is based on the assumption that the Constitution was drafted so that its meaning would be accessible to the public. If the Constitution had been drafted with "the prolixity of a legal code," then "[i]t would probably never be understood by the public."[86] The level of generality of key provisions of the constitutional text is consistent with the central claim of the Public Meaning Thesis and hence with Possibility Four.

Recall the four possible readerships of the constitutional text: (1) only the Framers at Philadelphia, (2) only ratifiers, (3) lawyers and judges, and (4) the public.[87] The case for Possibility Four is compelling, and each of the remaining possibilities has serious problems. Possibility One is a nonstarter. It seems quite clear that the Constitution was intended to communicate to a wider audience than the Philadelphia Convention: the Convention's function (as it developed in

[85] *McCulloch*, 17 U.S. (4 Wheat.) at 406-07.

[86] *Id.* at 407.

[87] *See* discussion *supra* Section III.C.4.

Philadelphia) was to propose a new constitution to be ratified in conventions and implemented by a new national government. For those functions to be carried out successfully, the Constitution needed to communicate successfully to participants in the ratification process and officials of the new government.

Likewise, Possibility Two can be ruled out for several reasons. It is clear that the Constitution was intended to communicate to audiences that preceded and antedated the ratifying conventions. As explained above, the ratification process was not limited to the ratifying conventions but included processes for selecting delegates, which in some states included direct public participation. And the Constitution was clearly intended to communicate to constitutional actors at the implementation stage, including members of Congress, future executive officials, and individual members of the public serving as voters and as jury members.

Indeed, the only serious rival to the public as the intended audience of the constitutional text would be Possibility Three—the subcommunity of persons learned in the law, including lawyers, judges, officials of the new government and of the governments of the several states, and others learned in the law. But it does not seem likely that the Constitution was addressed solely to persons learned in the law. To see why this is the case, we need to consider several features of the constitutional text.

Possibility Three finds some support in the fact that some of the words and phrases in the constitutional text had and still have special meanings for lawyers: "Letters of Marque and Reprisal,"[88] "ex post facto,"[89] "Bill of Attainder,"[90] and "Suits at common law."[91] Phrases like this employ terms of art (technical language) that have special meanings to persons learned in the law. But from the fact that the Constitution employs legal terms of art, it does not follow that the intended audience of constitutional communication was limited to members of the linguistic subcommunity of persons learned in the law.

Terms of art can be employed in communication directed at a nonspecialized audience. For example, this Article employs terms of art employed by philosophers of language and in theoretical linguistics: I have referred to "speech acts," "speaker's meaning," and "pragmatic enrichment." Nonetheless, the primary audience for this Article is made up of legal academics. As I was writing the Article, I was aware of the fact that many members of my intended audience would be reading some of these terms for the first time or would have only a rough idea of their technical meaning before reading this Article. From the fact that I use some technical terms from philosophy and theoretical linguistics, it does not follow that my intended readership consists only of philosophers and linguists. Indeed, my primary intended audience consists of law professors, lawyers, judges, and other persons learned in the law.

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[88] U.S. CONST. art. I, § 8, cl. 11.

[89] *Id.* art. I, § 9, cl. 3.

[90] *Id.*

[91] *Id.* amend. VII.

The Framers of the Constitution could rely on the division of linguistic labor to make the meaning of technical language in the constitutional text accessible to the public at large. If a farmer in western Massachusetts were unfamiliar with the phrase "Letters of Marque and Reprisal," he could consult a law dictionary, a lawyer, or a sea captain who could provide the necessary explanation. In all likelihood, it would be apparent from context that an extensive inquiry would be unnecessary given the practical concerns of the farmer. Sea captains might not be very interested in this clause, but its meaning would be accessible to them.

To make out the case that the intended audience of the constitutional text consists solely of persons learned in the law, one would need to argue that the Framers did not intend to communicate to the public and to officials who were not legally trained. But this seems very unlikely. Some of the delegates to the Philadelphia Convention and to the ratifying conventions lacked legal training. For example, George Washington and Benjamin Franklin were not trained as lawyers. Neither was James Madison, although he was, nonetheless, learned in the law.[92] The new government would not be likely to consist entirely of lawyers—and it did not. Citizens in their capacities as voters and jury members had functional roles that presupposed knowledge of the Constitution. And finally, we can return to the text itself. It seems unlikely that a document that begins with the words "We the People of the United States" was not intended to communicate to the public.

I will return to Possibility Three below,[93] but at this stage of the argument, we have good reasons to believe that the intended readership of the constitutional text was the public—the citizens of the United States. Our next step is to consider the implications of that fact for the question of whether the best form of originalism is Public Meaning Originalism.

E. *The Mechanisms of Constitutional Communication to the Public*

If the intended audience of the Constitution was the public, there are consequences for the mechanisms by which constitutional communication can occur if it is to be successful. Recall that in general, successful communication relies on conventional meanings of the language (for the intended audience) and those features of the communicative situation to which the intended audience has access. What are the implications of these general facts given that the intended audience of the constitutional text included the public?

1. The Public Meaning of the Words and Phrases

Successful constitutional communication to the public at large would require an awareness of the semantic and syntactic knowledge of the public. To communicate successfully to the public at large, the drafters would have had

[92] *See generally* Ralph R. Lounsbury, *Lawyers in the Constitutional Convention*, 13 A.B.A. J. 720 (1927) (discussing lawyers' roles at convention).

[93] *See infra* Section V.B.1.

good reason to use words in their ordinary and natural senses—reserving technical language or deviant usages for contexts in which the unusual sense would be self-identifying. In other words, constitutional communication is heavily reliant on conventional semantic meanings as well as standard syntax and grammar.

Heavy reliance does not entail that words cannot be used in special or idiosyncratic senses. Some of the most important words in the Constitution acquired new senses in the document itself. The Constitution created a new "Congress" composed of a "House of Representatives" and a "Senate."[94] The word "Congress" refers to the new body and not the Continental Congress or the Congress of Vienna. The word "Senate" refers to the new body composed of two representatives appointed by the legislatures of each state, and not to the Roman Senate or the Senate of University College, London. These words acquire their communicative content via a process of implicit constitutional stipulation or modulation.[95] But the new meanings are accessible via the conventional semantic meanings of other words in the document and from background knowledge that the Framers could assume would be accessible to the public. It seems likely that everyone understood the meaning of terms like "Congress" and the "Senate," even though these words were being used to refer to new institutions.

2. Enrichment by the Public Context of Constitutional Communication

Conventional semantic meanings and standard syntax are important tools of constitutional communication, but they are not the only tools. Context plays an important role in communication generally. I will explore the role of contextual enrichment in two stages. The first stage will explicate the notion of contextual enrichment via a typology of its forms. The second stage will explore constraints imposed on contextual enrichment by the fact that constitutional communication aims to convey content to the public across time and space to distant audiences.

a. *Forms of Contextual Enrichment*

This is not the occasion for the development of a full-blown theory of the mechanisms of contextual enrichment. Nonetheless, a simple typology will be helpful.

Contextual Disambiguation. The first and most obvious way that context enriches semantic content is via contextual disambiguation.[96] When the constitutional text includes ambiguous language, context may allow us to

[94] U.S. CONST. art. I, § 1.

[95] By "modulation," I mean the process by which a preexisting word or phrase acquires a new sense simply by being used in a new way. *See infra* Section III.E.2.a.

[96] I have categorized contextual disambiguation as a form of enrichment, but it would also be possible to understand disambiguation as on the semantic side of the semantics-pragmatics divide. My classification is for the sake of exposition, and I do not mean to take a stance on any controversial issues in the philosophy of language or theoretical linguistics.

identify the intended or understood sense. In the example explicated above, "No Tax or Duty shall be laid on Articles exported from any State,"[97] was disambiguated, with "Article" assigned the sense of a good or "article of trade" and "State" referring to any of the United States of America.

Ambiguity is a pervasive phenomenon, but in most cases, the intended sense of a word with multiple meanings is made clear by context. For, the word "Indian" in the Indian Commerce Clause[98] might refer to trade with the Indian Subcontinent located in South Asia or it could refer to Native Americans. But given the public context of constitutional communication, it is clear that the latter sense (and not the former) is that which was intended and understood.

Narrow Implicature. A second and more subtle form of contextual enrichment is "implicature"—a particular method by which a speaker or author can convey communicative content that is both richer than and different from the semantic content of an utterance or text.[99] Consider the classic example of a letter of recommendation, written by a law professor, for a student applying for a prestigious judicial clerkship. The entire body of the letter reads as follows: "I recommend Ben. He was always on time to class, and his attendance record was perfect." The semantic content of the letter consists of a speech act, recommendation, and two supporting statements regarding punctuality and regularity of attendance. But much more than the literal meaning is communicated in the context in which the letter was written. If the best that can be said about Ben is that he was on time and did not miss class, the implicature is that Ben is not suitable for the position of judicial clerk.

Precisely because implicatures are subtle, they do not provide a reliable means of constitutional communication. So far as I can tell, there are no examples of strict implicature in the U.S. Constitution. But please email me if you find some!

Impliciture. We might use the word "implicature" in a broad sense to refer to a variety of communicative phenomena, but some philosophers of language differentiate what is labeled "narrow implicature" from "impliciture"[100] (spelled with an *i*) where what is said implicitly includes something else that is closely related. Kent Bach gives the following examples, in which the impliciture (unstated) has been added in brackets:

Jack and Jill are married [to each other].

Bill insulted his boss and [as a result] got fired.

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[97] U.S. CONST. art. I, § 9, cl. 5.

[98] *Id.* art. I, § 8, cl. 3.

[99] This term was coined by Paul Grice. *See* Wayne Davis, *Implicature*, STAN. ENCYC. OF PHIL. (Sept. 6, 2019), http://plato.stanford.edu/entries/implicature/ [https://perma.cc/G7C5-ZLYU]; *see also* Jeffrey Goldsworthy, *Constitutional Cultures, Democracy, and Unwritten Principles*, 2012 U. ILL. L. REV. 683, 698 (defining implicature); Andrei Marmor, *Can the Law Imply More Than It Says? On Some Pragmatic Aspects of Strategic Speech*, *in* PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW 83, 85-87 (Andrei Marmor & Scott Soames eds., 2011) (discussing implicatures).

[100] Kent Bach, *Conversational Impliciture*, 9 MIND & LANGUAGE 124, 126 (1994).

You'll get promoted if [and only if] you work hard.

Ralph is ready [to go to work].

Nina has had enough [pasta to eat].[101]

Thus, if someone says, "Jack and Jill are married," the [to each other] is unstated but implicit, and so forth for the other examples. Constitutional impliciture is common: the Constitution explicitly states that "[n]o Bill of Attainder or ex post facto Law shall be passed,"[102] but [by Congress] is an impliciture. The words in the text are incomplete; the full content by the clause is supplied by an impliciture, the content of which is obvious from the context.[103]

Presupposition. In the technical sense,[104] presupposition is communicative content provided by an unstated assumption or background belief.[105] Again, examples are helpful:

Utterance: "Cass is no longer the head of OIRA." Presupposition: "Cass was once the head of OIRA."

Utterance: "Bruce should not eat meat." Presupposition: "Bruce does eat meat."

Utterance: "Jane's wife is pregnant." Presupposition: "Jane has a wife."

The constitutional text may have a variety of presuppositions. For example, the constitutional text may presuppose the existence of legal norms to which it refers. The phrase "the freedom of speech" in the First Amendment might presuppose an existing set of legal norms—even though there could be many other legal regimes that would be consistent with the thin semantic content of

[101] Kent Bach, *Impliciture vs. Explicature: What's the Difference?*, *in* EXPLICIT COMMUNICATION: ROBYN CARSTON'S PRAGMATICS 126, 127 (2010) (Belén Soria & Esther Romero eds., 2010).

[102] U.S. CONST. art I, § 9, cl. 3.

[103] Section Nine contains various limits on Congress—hence, the impliciture. Section Ten provides that "[n]o state shall . . . pass any Bill of Attainder [or] ex post facto Law." *Id.* art. I, § 10, cl. 1. In the case of Section Ten, no impliciture is necessary because the provision specifies "state" as the entity that may not pass an ex post facto law or bill of attainder.

[104] Philosophers of language distinguish between "conversational presuppositions" (also called "speaker presuppositions" or "pragmatic presuppositions") and "conventional presuppositions" (or "semantic presuppositions") that are triggered by particular words or phrases ("no longer" in the first example in text)—and there may be a third category, "utterance presuppositions." *See* David I. Beaver, Bart Geurts & Kristie Denlinger, *Presupposition*, STAN. ENCYC. OF PHIL. (Jan. 7, 2021), https://plato.stanford.edu/entries/presupposition/ [https://perma.cc/J23C-YJW4]. For our purposes, we can put these technicalities to the side.

[105] *See, e.g.*, *id.* ("Speakers take a lot for granted."); Bas C. van Fraassen, *Presupposition, Implication, and Self-Reference*, 65 J. PHIL. 136, 137-39 (1968); Philippe Schlenker, *Be Articulate: A Pragmatic Theory of Presupposition Projection*, 34 THEORETICAL LINGUISTICS 157, 161 (2008).

the words in the text.[106] The Ninth Amendment may presuppose the existence of "rights . . . retained by the people."[107]

Modulation. There is one more important form of contextual enrichment, which is called "modulation." The basic idea is that a conventional semantic meaning can be modulated on the fly, creating a specialized meaning in a particular context. The old word is used in a new way. François Recanati describes this phenomenon as follows:

> Sense modulation is essential to speech, because we use a (more or less) fixed stock of lexemes to talk about an indefinite variety of things, situations and experiences. Through the interaction between the context-independent meanings of our words and the particulars of the situation talked about, contextualized, modulated senses emerge, appropriate to the situation at hand.[108]

Once the modulation is introduced it can bring into being a new meaning for a word that also has an ordinary sense. Modulations are distinct from stipulations. Stipulations are explicit; modulations are implicit.

Modulations appear in the constitutional text. For example, the Recess Appointments Clause contains the word "Recess."[109] The acontextual conventional semantic meaning of "recess" could refer to any break in the business of the Senate—even a lunch break.[110] But in context, "Recess" is best read as a modulation, the meaning of which plays off the complementary term "Session." The relevant sense of "Recess" is a modulation of the conventional semantic meaning; it is limited to the break between sessions of the Senate.[111]

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[106] U.S. CONST. amend. I.

[107] *See* Lawrence B. Solum, *Surprising Originalism*, *The Regula Lecture*, 9 CONLAWNOW 235, 249 (2018) ("The text does not explicitly say that there are any 'rights . . . retained by the people' but nonetheless communicates the existence of such rights." (citing U.S. CONST. amend. IX)).

[108] FRANÇOIS RECANATI, LITERAL MEANING 131 (2004) (footnote omitted).

[109] U.S. CONST. art II, § 2, cl. 3.

[110] For example, Noah Webster's 1828 dictionary gives the following as the sixth definition of recess: "Remission or suspension of business or procedure; as, the house of representatives had a *recess* of half an hour." *Recess*, AM. DICTIONARY ENG. LANGUAGE, http://webstersdictionary1828.com/Dictionary/recess [https://perma.cc/F899-TQ7D] (last visited Dec. 5, 2021).

[111] The issue arose in *NLRB v. Noel Canning*, 573 U.S. 513, 575 (2014) (Scalia, J., concurring) (using public meaning of the word "Recess" to interpret the word within the Recess Appointments Clause and relying implicitly on the idea of a modulation).

> A sensible interpretation . . . should start by recognizing that the Clause uses the term "Recess" in contradistinction to the term "Session." As Alexander Hamilton wrote: "The time within which the power is to operate 'during the recess of the Senate' and the duration of the appointments 'to the end of the next session' of that body, conspire to elucidate the sense of the provision."

Id. (quoting THE FEDERALIST NO. 67, at 455 (Alexander Hamilton) (J. Cooke ed., 1961)).

Finally, there is a residual category of "free enrichments" that do not fit into any of these categories.[112] For present purposes, the category of free enrichment is set aside.

b. *The Publicly Accessible Context of Constitutional Communication*

The Framers could rely on contextual enrichment in a variety of ways. Most obviously, they could rely on contextual disambiguation of words, phrases, and clauses that would otherwise have produced semantic or syntactic ambiguity. And as we have seen, implicature, impliciture, and presupposition may play a role in constitutional communication.

But the fact that the Constitution's intended audience is the public has implications for the success conditions for contextual enrichment of constitutional content. This point can be put another way: if the Framers wanted to rely on contextual enrichment as a mechanism for communicating content to the public, they would need to consider the epistemic situation of the public. The public had limited access to the full context of constitutional communication. One obvious example of this is the fact that the public lacked access to the records of the Philadelphia Convention. This means that the Framers could not rely on the context provided by those records as a source of contextual enrichment. Likewise, private conversations among the Framers at the Convention or private letters written by the participants are not part of what we can call the "publicly accessible context of constitutional communication" which can be abbreviated as the "public context."

F. *The Complex Structure of Constitutional Communication*

The discussion so far has relied on a simplified description of the situation of constitutional communication. Constitutional communication in the pre-amendment context actually took place in at least six phases[113]: (1) initial drafting (mostly done by Gouverneur Morris and James Wilson);[114] (2) approval of the draft by the Committee of Style; (3) consideration, amendment, and approval of the proposed text at the Philadelphia Convention; (4) transmission to the Continental Congress, which in turn transmitted the proposed text for (5) ratification in state-convened ratifying conventions; and (6) implementation by Congress, the President and executive officials, and the judiciary in the post-ratification period. This complex process of constitutional communication is

[112] NICHOLAS ALLOTT, KEY TERMS IN PRAGMATICS 80 (2010) (defining term as "[p]ragmatic effects on the proposition expressed by an utterance which are not due to the filling in of slots or variables in the linguistic structure of the sentence, nor to disambiguation").

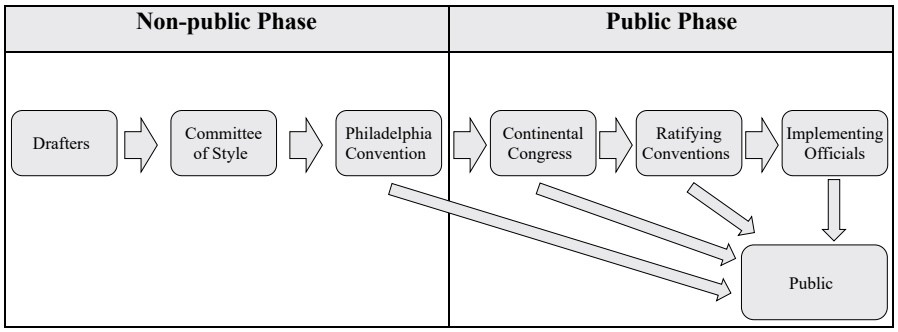
[113] The six phases identified are each important steps in the process of constitutional communication. It is possible that we could identify additional steps or consolidate steps, producing a slightly different description of the structure of constitutional communication. Nothing important hangs on the number of steps.

[114] *See supra* Section III.C.2.

best understood as a multistage process by which drafting done in private became a public document.[115]

These six phases are illustrated in Figure 1, below.

Figure 1. Six-Phase Process of Constitutional Communication.



The aim of the discussion that follows is to demonstrate that the case for the Public Meaning Thesis still holds after the complexities introduced by multiple stages and institutions are introduced.

1. The Phases of Constitutional Communication

The first phase of constitutional communication was the drafting process, which mostly occurred at the end of the Philadelphia Convention.[116] Although the members of the Convention voted out a series of resolutions that provided the broad outlines of the Constitution and settled a variety of important questions, the actual drafting of the constitutional text was primarily done by Gouverneur Morris, a skilled lawyer, with substantial participation by James Wilson, and more limited participation from others.[117] In the first phase, Morris actually wrote out a draft of the full constitutional text for the Committee of Style. At this stage, the process of constitutional communication involved one drafter and many readers. Although the process was ultimately aimed at an audience that included the public, the immediate audience for the text consisted of the members of the Committee of Style, but, at this point, the text was not public.

The second phase of constitutional communication involved Morris's presentation of a draft to the Committee of Style for approval or modification.

[115] The discussion here focuses on the unamended constitutional text. The process for the drafting, proposal, ratification, and implementation of constitutional amendments raises similar theoretical questions but is different at the level of detail.

[116] There were, of course, prior phases of the Convention, but the process of constitutional communication begins with the drafting of the text. Before communication could begin, the members of the Convention needed to decide what was to be communicated.

[117] Vile, *supra* note 61, at 171-74.

Once the Committee approved the draft, it was then presented to the full Philadelphia Convention. Once again, the text was not transmitted to the public.

The third phase of constitutional communication involved the members of the Convention modifying, approving, and then proposing the draft constitutional text for ratification. The Constitution itself specifies ratification by convention: "The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same."[118] The constitutional text was publicly printed by the Pennsylvania Packet and transmitted to the Continental Congress.[119]

The fourth phase of constitutional communication was brief: the Continental Congress received the text and then sent it to the states for ratification. The members of the Continental Congress were both readers and proposers of the text to the states for ratification by convention.

The fifth phase of constitutional communication was the ratification process that included both ratifying conventions and public debate (including the Federalist and Antifederalist Papers).[120] The ratifying conventions themselves were complex. The members of the conventions were readers of the constitutional text, but the act of ratification was itself constitutional communication. The constitutional text provided content for the speech act of ratification, which then conferred legal status on the text once the threshold of nine states was met. During ratification, both the public and its representatives at the ratifying conventions read the constitutional text, but only the members of the ratifying conventions voted on ratification. The conventions performed the legal act of ratification, which communicated to Congress and the public that the text had been approved.

The sixth and final phase of constitutional communication involved the implementation of the new Constitution. At the outset of this phase, the Continental Congress certified that the Constitution was ratified and set the dates for convening the new government.[121] At this stage, the Continental Congress was both a reader of the constitutional text and engaged in a speech act of certification, the final step in a legal process that moved the constitutional text from initial draft to report of proposal, to ratified, to certified, and finally, to implemented. The new federal and state governments then read the ratified and certified text as the complex machinery created by the text was assembled and began to operate. The public participated in this phase as well, both indirectly via their representatives and eventually in a direct fashion as jurors who participated in the operation of the new government and interpreters of the new Constitution.

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[118] U.S. CONST. art. VII.

[119] *See* MAIER, *supra* note 70, at 27, 52.

[120] *See id.* at ix.

[121] *See id.* at 429.

This six-phase model is a simplification of what actually occurred. The point of the model is not to provide a history of the framing and ratification; rather, it is to capture the essential features of the multistage process.

2. Communicative Content in Multistage Communication

The Public Meaning Thesis maintains that the communicative content of the constitutional text is the set of propositions that the text communicated or made accessible to the public at the time of framing and ratification. The six-phase model involves text that is drafted, read, approved, and then passed on to subsequent readers, who then act on the text by proposing, ratifying, certifying, and finally implementing the text. The meaning of the text can be viewed in two ways—as the drafter's meaning (the meaning that the drafter of each provision intended to convey to intended readers) and public meaning (the meaning actually conveyed or made accessible to the public by the text). Because the intended readership of the constitutional text was the public, the drafter's meaning and public meaning converge in ordinary cases. If the drafter is successful in communicating to the public, the drafter's meaning and public meaning are one and the same.

The public meaning of constitutional text (the content communicated to the public) does not become manifest until the text is published (made public). In the case of the unamended Constitution, publication occurred soon after the conclusion of the Philadelphia Convention (phase three). In the case of amendments, publication occurs no later than the public reading of the amendment when it is introduced in Congress. Of course, it is likely that the text of a constitutional amendment will be made public long before the official reading.[122] Even before the text is made public, the drafter's meaning of the text is intended to be the public meaning.

Once public meaning becomes manifest via publication, it is preserved. Thus, the ratifiers did not change the communicative content of the constitutional text when they ratified; the ratifying conventions considered a text with a preexisting public meaning. To be sure, it is possible that some of the ratifiers did not fully or accurately grasp the full public meaning of the constitutional text. The Public Meaning Thesis asserts that the relevant meaning for the purposes of constitutional communication is the public meaning and not the misunderstandings or mistakes of particular individuals, even members of the Philadelphia Convention or the ratifying conventions.

The role of communicative content in the multistage process of constitutional communication is illuminated by speech act theory, which distinguishes the

[122] For example, the proposed Equal Rights Amendment was drafted long before it was passed by Congress. *History of the Equal Rights Amendment*, EQUAL RTS. AMEND., https://www.equalrightsamendment.org/the-equal-rights-amendment [https://perma.cc/Q63G-LFC6] (last visited Dec. 5, 2021).

locutionary content of speech acts from illocutionary force.[123] The key idea is that we can perform actions by saying things: the thing we say has locutionary content, but the action we perform has illocutionary force. Thus, the illocutionary force of "I promise to meet you for lunch tomorrow" is promising.

Although the communicative content of the constitutional text is fixed when it is published, the illocutionary force that attaches to that communicative content is distinctive in different phases of the multistage process. Thus, the drafter proposes the text to the Committee of Style, which in turn proposes to the whole Convention, which in turn proposes to the Continental Congress and the ratifying conventions. At these stages, the illocutionary force is "proposing," and if the proposal gets uptake, then the proposal is considered; full success is achieved if the proposal is approved.

At the ratifying conventions, the locutionary content of the constitutional text remains its original public meaning, but the illocutionary force that attaches is ratification. Once ratified, the illocutionary force that attaches to the original meaning of the constitutional text is legal force: the various provisions of the text are now validly enacted sources of law. The illocutionary force of the distinct communicative acts (proposing, ratifying, implementing) changes with each phase of the multistage process of constitutional communication, but the locutionary content (the original public meaning) remains the same.

3. Multimember Institutions and the "Summing Problem"

Because the process of constitutional communication was complex and involved multiple stages, a full elaboration of the Public Meaning Thesis must provide an account of the role played by the individuals and institutions that participated in the process. In particular, we need to understand how communication works in multimember bodies, such as the Philadelphia Convention and the ratifying conventions held in the several states. This account is important because of the so-called summing problem.[124] The basic idea is that the Philadelphia Convention was a multimember body and different Framers had different intentions. Therefore, there is no such thing as *the* original intention of the Framers. There are individual intentions and no way of "summing" them into a group intention.

[123] *See* J.L. AUSTIN, HOW TO DO THINGS WITH WORDS 95-96, 109 (J.O. Urmson & Marina Sbisà eds., 2d ed. 1975) ("We first distinguished a group of things we do in saying something, which together we summed up by saying we perform a *locutionary act*, which is roughly equivalent to uttering a certain sentence with a certain sense and reference, which again is roughly equivalent to 'meaning' in the traditional sense. Second, we said that we also perform *illocutionary acts* such as informing, ordering, warning, undertaking, &c, i.e. utterances which have a certain (conventional) force.").

[124] Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 209-17 (1980) (introducing the concept); *see also* Robert W. Bennett, *Objectivity in Constitutional Law*, 132 U. PA. L. REV. 445, 456 (1984) (describing "the 'summing' problem of developing a group intention for the complex activity of promulgating constitutional language that is carried on by many people in many different legislative bodies").

The nature of the summing problem is not easy to state, in part because the notion of the original intentions of the Framers is itself ambiguous. One version of the summing problem takes the relevant intentions to be application intentions—for example, the will of the Framers regarding the application of the Constitution to particular cases or issues. That version of the problem does not create a difficulty for Public Meaning Originalism for familiar reasons. Application expectations may provide evidence of public meaning, but such expectations are not themselves binding. From the perspective of Public Meaning Originalism, it does not matter whether the application expectations of the Framers mesh to form a coherent single application intention.

But the Public Meaning Thesis does rely on the idea of the drafter's communicative intent. The communicative intent of the drafters provides the communicative content of the constitutional text in the first phase of the multistage process of constitutional communication. Does the summing problem undermine this account? No! Although different parts of the constitutional text were drafted by different individuals, each part (clause or article) was drafted by one individual—albeit with input from others.

"Drafter's intent" as the phrase is used here is not the same as "Framers' communicative intent"—as the latter phrase is used to refer to the communicative intentions of the Philadelphia Convention or all of its members.[125] Drafter's intent is the communicative intention of an individual—the one who drafted a particular clause. There is no summing problem at the drafting stage because there is a single communicative intention.

If there is a summing problem, it would emerge at a subsequent phase of the multistage process of constitutional communication. For example, when the draft constitutional text was presented to the Philadelphia Convention, it is possible—indeed likely—that members of the convention understood at least some of the provisions in different ways. The multistage process of constitutional communication involves several multimember bodies, including (1) the Committee of Style; (2) the Philadelphia Convention; (3) the Continental Congress; (4) the various ratifying conventions; and (5) implementing institutions, including the new Congress. It could be argued that constitutional communication is impossible, once we move from individual drafters to the collective bodies that proposed and ratified the text.

This objection deserves an answer, but before I develop the answer in depth, we should pause to question the intuitive plausibility of the objection. Could it really be the case that constitutional communication was impossible? Surely, the Constitution does have communicative content. Law students, legal scholars, lawyers, judges, Justices, and even nonlegal folk are able to understand most of the constitutional text without difficulty. There are some clauses that remain

[125] *See* Solum, *Communicative Content and Legal Content*, *supra* note 2, at 493-94 (providing example of communicative intentions).

ambiguous even after context is taken into account.[126] Other clauses seem vague or open textured.[127] But ambiguity, vagueness, and open texture are pervasive features of ordinary communication. If the summing problem really makes constitutional communication impossible, then how are we able to identify the communicative content of the constitutional text? The claim that no one in the founding era nor today understands any part of the constitutional text is radically implausible.

Moreover, communication involving multimember bodies is pervasive. If the summing problem were really an obstacle to the creation of communicative content, the problem would affect law faculties that adopt grading policies and requirements for graduation, condominium boards that adopt rules regarding the permissible colors of exterior walls, city councils that enact speeding ordinances, and so forth. The ubiquity of group communication suggests that something must be wrong with the communicative-intentions version of the summing objection.

The discussion that follows provides the theoretical foundation for the common-sense belief that groups can communicate. This foundation is developed in three stages: first, by introducing the idea of "ghostwriting;" second, by discussing the idea of second-order communicative intentions; and third, by explication of the idea of group agency.[128]

4. Ghostwriting

Individuals and groups do not need to draft anything in order to communicate via written communication. Politicians deliver speeches that were written by speechwriters and books that were written by professional writers. This is the well-known phenomenon of ghostwriting. Sometimes, ghostwriting is transparent: everyone knows that the Presidents of the United States do not write all their own speeches. Sometimes, ghostwriting is carefully concealed. These cases of ghostwriting are related to a much more general phenomenon. Suppose you purchase a "No Soliciting" sign at an office supply store: someone else wrote the text, but you can communicate using the ghostwritten sign by displaying it outside the fence to your yard.[129] Likewise, when we swear an oath, we recite words that were penned by another.

From this point forward, I will use the word "ghostwriting" in a new and stipulated sense to refer to the general phenomenon whereby one person communicates using words written by another. This stipulated sense of ghostwriting includes ordinary ghostwriting (such as novels and speeches) but also encompasses such diverse phenomenon as contractual boilerplate,

[126] *See, e.g.*, U.S. CONST. art. 1, § 8 (granting Congress the power "[t]o make all Laws which shall be necessary and proper").

[127] *See, e.g.*, *Id.* amend. IX.

[128] *See infra* Section III.F.4.

[129] For further discussion of this example, see *infra* Section V.A.

borrowed statutory text, and legal drafting that is not done by the person or persons authorized by law to enact, agree to, or otherwise promulgate the text.

The constitutional text was ghostwritten by the drafters of the various clauses and amendments. The drafters of the Constitution lacked power to make the Constitution law. Indeed, the drafters in 1787 only had the authority to propose the draft to the Committee of Style and to the full membership of the Philadelphia Convention. And the Convention only asserted the power to propose constitutional text to state legislatures for ratification by "[C]onventions of . . . States."[130] The illocutionary act of ratification could only be done by ratifying conventions in the case of the 1787 text and by state legislatures in the case of the various amendments.[131]

Here is the crucial point: the ratifiers did not create the communicative content that they ratified. The communicative content was already attached to the text. This is reflected in the way that we ordinarily think about the texts that we are asked to approve. If I am asked to vote for a new grading policy, I don't think that text had no meaning until my vote! Rather, I vote for a policy with a preexisting meaning. The same is true of a wide variety of legal texts: statutes, rules, regulations, contracts, wills, and trust instruments—all have communicative content that preexists the formal acts that give them legal effect.

5. First-Order and Second-Order Communicative Intentions

How does ghostwriting work? How are we able to adopt the preexisting meaning of a text that we did not write? The answer to these questions lies in the distinction between first-order and second-order communicative intentions. Let us begin with stipulated definitions:

> *First-order Communicative Intention*: A first-order communicative intention is an intent to convey particular communicative content via a token communicative act (an utterance or a writing).
>
> *Second-order Communicative Intention*: A second-order communicative intention is an intention about first-order communicative intentions.

A first-order communicative intention is an intention to convey some content by engaging in a communicative act (uttering some words, writing a text, making a gesture). First-order communicative intentions take content as their object. When I utter the words, "The faculty meeting is at 12 p.m.," I have a first-order communicative intention to convey the proposition, *the faculty meeting is at 12 p.m*.

A second-order communicative intention takes a first-order communicative intention as its object. Second-order communicative intentions can be explicit or implicit. Thus, I can have a second-order communicative intention that the meaning of this paragraph should be understood as the literal meaning of the

[130] U.S. CONST. art. VII.

[131] *Id.* Article V also provides for ratification of amendments by conventions held in each state. *Id.* art. V.

words—and I can convey that second-order communicative intention to readers, as I would have done by saying so explicitly. But second-order communicative intentions can be conveyed implicitly as well. Second-order communicative intentions may be obvious given the context in which communication occurs. For example, my actual second-order communicative intention was for readers to understand this paragraph in context—considering contextual disambiguation and enrichment.

The notion of a "second-order communicative intention" may sound abstract and technical, but the idea is simple and intuitive once the terminology is explained. Second-order communicative intentions are ubiquitous. In ordinary, face-to-face, oral communication, the speaker's meaning of an utterance is the meaning the speaker intends to convey via the listener's recognition of the speaker's communicative intention: because this intention is reflexive, it includes a second-order intention. I want you to recognize the content that I intend to convey.

Now consider the case of a ghostwritten speech. The politician who delivers the speech has a second-order communicative intention—to convey the content created by the speechwriter for the politician. No one who is sensible will think that ghostwritten speeches are meaningless.

Notice that in these cases, the person who delivers the speech does not need to have first-order communicative intentions that fully mesh with those of the ghostwriter. Indeed, in an extreme case, a politician might read off a teleprompter while thinking about some other topic entirely—perhaps a looming scandal. The words might be delivered without any real comprehension on the part of the speaker. This happens routinely when a speaker delivers a ghostwritten speech in a foreign language.

Next consider members of a legislature. The bills they enact are frequently ghostwritten, either by staff members or by outside interest groups. The legislators who vote for the bills may or may not have read the entire text. In the case of long and complex legislation that runs to hundreds or thousands of pages, it is possible that no member of the legislature has read the whole text.[132] Nonetheless, the legislators can have a second-order communicative intention to enact the communicative content created by the drafter, whoever that may be. The illocutionary force of enactment attached to that content, even in the absence of first-order communicative intentions to convey that content.[133]

In the case of the Constitution before amendment, the ghostwriters were members of the Philadelphia Convention (Gouverneur Morris, James Wilson,

[132] Victoria McGrane, *Read the Bill? It Might Not Help*, POLITICO (Sept. 8, 2009, 4:24 AM), https://www.politico.com/story/2009/09/read-the-bill-it-might-not-help-026846 [https://perma.cc/89S6-KTN9] ("Lawmakers, with troubling frequency, are voting on bills before there's time for anyone — including individual members — to vet them.").

[133] In the case of statutes, the relevant second-order communicative intention is best understood as the intention to convey "plain meaning." For a discussion, see Lawrence B. Solum, *Disaggregating* Chevron, 82 OHIO ST. L.J. 249, 283 (2021).

and others).[134] Presumably, all or almost all of the members of the convention read the whole text of the Constitution—although given human nature, we would not be completely surprised if we learned that one of the members confessed in a private diary that he neglected to read Article IV having skipped on to Article V and then forgot to go back.

The members of the Convention would have understood their final vote to propose the text for ratification as expressing a second-order communicative intention to propose the preexisting communicative content. Similarly, the members of the ratifying conventions would have had a similar second-order communicative intention. These second-order intentions can mesh even if some members of the conventions lacked first-order intentions with respect to some provisions or if they had first-order intentions that differed. They did not vote for their own first-order intentions; they voted for the public meaning of the constitutional text. Meshing does not require unanimity or conscious awareness, but it does require that there be general tacit agreement by members of the group on the second-order communicative intention.

These ideas are quite familiar to lawyers. When members of Congress vote for a bill, they vote for the content conveyed by the plain meaning of the statutory text; they do not vote to enact their individual first-order communicative intentions. I am now using jargon to express precisely an idea that might be stated more simply (but less precisely) as "members of Congress vote for the text itself and not for their private views about its meaning." The same held for the members of the Philadelphia Convention.

6. From the Drafters to the Philadelphia Convention and the Ratifying Conventions

The discussion so far has focused on individuals and not on groups or institutions. But some account must be given of the role of institutions in constitutional communication. The discussion will take place in three stages: (a) a description of the standard problem with the idea of legislative intentions (and hence of intentions attaching to the Philadelphia Convention or the ratifying conventions), (b) a solution that relies only on the meshing of second-order intentions of individuals, and (c) a solution that relies instead on the idea that groups can have proper agency and intentions that are not reducible to the individual intentions of group members.

a. *The Problem of "Legislative Intent" and Group Mental States*

To begin, we need to identify the problem. Although our immediate concern is the question of whether the Philadelphia Convention or the Ratifying Conventions could form communicative intentions, the best place to start is with the literature discussing "legislative intent." If legislatures cannot form

[134] Jack Heyburn, *Gouverneur Morris and James Wilson at the Constitutional Convention*, 20 U. PA. J. CONST. L. 169, 171, 172 & n.20 (2017).

intentions, then it seems likely that other institutional actors, such as constitutional conventions, will suffer from a similar problem.

The basic idea of "the meaninglessness of the concept of 'legislative intent'" is familiar from the summing problem objection to original intent: "[i]ndividuals have intentions and purpose and motives; collections of individuals do not. To pretend otherwise is fanciful."[135] The core idea that only individuals can have intentions, and therefore legislatures cannot, has a long history.[136]

One understanding of "legislative intent" is that it is shorthand for the preference of the legislature with respect to an issue, as in, "the legislature would not have wanted the statute to apply in these circumstances." That notion of legislative intent that focuses on policy preferences is conceptually distinct from the idea of communicative intentions of institutions such as the Philadelphia Convention. Criticisms of the claim that legislatures have collective policy preferences do not directly apply to the claim that institutions can form second-order communicative intentions.

The idea underlying the summing problem and Shepsle's critique of legislative intent is that all intentions (whether they be preferences or communicative intentions) are mental states of some kind. Intentions might be occurrent mental states—that is, they might be conscious thoughts. Alternatively, intentions might be dispositional mental states—that is,

[135] Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239, 254 (1992). Shepsle's spin on this was based on his insight that Kenneth Arrow's famous impossibility theorem implied that legislators' individual policy preferences could not be transformed into policy preferences of the group as a whole, given certain plausible assumptions. *See id.* ("The argument of this brief paper has been that an underappreciated branch of public choice theory—that growing out of Arrow's impossibility theorem—provides insight into the meaninglessness of the concept of 'legislative intent.'"). For an introduction to Arrow's theorem, see Michael Morreau, *Arrow's Theorem*, STAN. ENCYC. OF PHIL. (Nov. 26, 2019), https://plato.stanford.edu/entries/arrows-theorem/ [https://perma.cc/3PCV-KM34] (briefly explaining Arrow's impossibility theorem).

[136] *See, e.g.*, Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 869-70 (1930) ("A legislature certainly has no intention whatever in connection with words which some two or three men drafted, which a considerable number rejected, and in regard to which many of the approving majority might have had, and often demonstrably did have, different ideas and beliefs."); Harry Jones, *Statutory Doubts and Legislative Intention*, 40 COLUM. L. REV. 957, 968 (1940) ("If 'legislative intention' is supposed to signify a construction placed upon statutory language by every individual member of the two enacting houses, it is, obviously, a concept of purely fictional status."); Warren Lehman, *How to Interpret a Difficult Statute*, 1979 WIS. L. REV. 489, 500 (1979) ("[A] legislature does not . . . have a will, for it has no set of coherent but unexpressed intentions."); Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 535 n.3 (1983) ("A statute has meaning apart from the drafters' personal intentions, and to speak of intent is to commit the 'intentional fallacy' properly denounced in literary criticism."); RONALD DWORKIN, LAW'S EMPIRE 355 (1986) (discussing issue of aggregating multiple legislators' intentions into one meaning). For a very illuminating contemporary discussion, see Ryan D. Doerfler, *Who Cares How Congress Really Works?*, 66 DUKE L.J. 979, 1044 (2017) ("Because legislative intent is a fiction, Congress has no actual but unexpressed intentions to discover.").

dispositions to react in certain ways. In either event, the usual assumption is that human beings do have mental states, but institutions do not. Human beings have brains that support the cognitive processes that constitute "intentions," but legislatures are like the Scarecrow in *The Wizard of Oz*—they could form intentions and dream up cool inventions, if they only had a brain.[137] But they don't. So, they can't.

Therefore, the argument goes, institutions (legislatures, constitutional conventions, and so forth) cannot form communicative intentions. And if they cannot form communicative intentions, then we are only left with the communicative intentions of the individual members of the institution. But individual members of the Philadelphia Convention and the ratifying conventions did not all have identical communicative intentions, and some individuals probably lacked communicative intentions at all with respect to some or many of the individual clauses that make up the constitutional text. This creates the summing problem, and lacking unanimity, there seems to be no nonarbitrary way of solving this problem.

Before proceeding further, it is worth noting that this problem seems very odd at the level of common sense. Group communication is not a rare exotic bird. It is a pervasive feature of social life; it may well be the case that there are no "legislative intentions" that tell us a legislature's institutional preferences with respect to particular issues or cases. But this does not establish that institutions and groups cannot communicate.

What then is the solution to the "legislative intentions" problem as applied to the communicative intentions of the Philadelphia Convention members and the ratifying conventions? Two solutions follow, one focused on the meshing of individual second-order communicative intentions and the other based on the idea that group agency enables institutional intentions. Either solution dissolves the problem.

b. *Solution One: Meshing of Individual Second-Order Communicative Intentions*

The first solution to the legislative intent problem relies on the distinction between first-order and second-order communicative intentions. It would be theoretically possible for the first-order communicative intentions of a multimember body (e.g., a legislature or constitutional convention) to mesh. This happens all the time with communication by small groups: for example, some friends and I compose a birthday card together and we have no problem agreeing on communicative intent. As groups grow larger, this agreement on communicative intent becomes more difficult. Of course, the members of a legislature could go through a statute line by line and reach explicit agreement on the meaning of each and every provision, but that would be time-consuming

[137] HAROLD ARLEN & YIP HARBURG, *If I Only Had a Brain*, *on* THE WIZARD OF OZ (Metro-Goldwyn-Mayer 1939).

and difficult. So far as we know, there was no such effort at the Philadelphia Convention—and it seems like we would know if it had happened.

The meshing of second-order communicative intentions is much less difficult. Thus, a legislature could agree that the drafter's meaning of a statute was the whole group's intended meaning. Such agreements need not be explicit. An implicit agreement to adopt a second-order communicative intention about the drafter's meaning of a ghostwritten document is ubiquitous in ordinary communication. And even if there is neither explicit nor implicit agreement, the second-order communicative intentions of the group can mesh so long as the second-order communicative intention is taken for granted by all or almost all of the members of the group. Thus, the members of a legislature can form a second-order communicative intention that the meaning of a statute is the drafter's meaning—the meaning the statute's drafter intended to convey to the intended readership.

Nothing weird is going on in group communication by large groups. We do not need to imagine a group mind in the ether or a group brain in the fifth dimension. What we do need is second-order communicative intentions. Ordinary folk may be unfamiliar with the terminology, but you do not need to be trained in the philosophy of language or theoretical linguistics to have tacit knowledge of the way group communication works. We get it—even if we can't quite explain what it is that we get.

The various individuals who made up the Philadelphia Convention and the ratifying conventions would have formed meshing second-order communicative intentions to convey the public meaning of the constitutional text for all the reasons examined above.[138] They must have intuitively understood that they were endorsing a text that already had communicative content—after all, they were reading it. That communicative content was the public meaning of the text because they wanted the text to have meaning that the public could understand with reasonable effort. And by voting to propose or ratify the text, they were endorsing that public meaning.

None of this requires that legislators or members of the Philadelphia or ratifying conventions need have conscious awareness of the distinction between first-order and second-order communicative intentions. Tacit knowledge is sufficient. Moreover, communicative intentions need not be occurrent mental states, and second-order communicative intentions rarely are. It is rare that when we say something like, "Pass me the butter!" that we also have a conscious thought along the lines of [When I say, "Pass me the butter!" I mean for you to grasp *pass me the butter*].[139] Both first-order and second-order communicative intentions are dispositional mental states almost all of the time.

In sum, the first solution to the problem of legislative intentions is based on the idea that public meaning can be conveyed via the meshing of second-order communicative intentions. Such meshing is possible because the second-order

[138] *See supra* Section III.D.

[139] The use of brackets indicates that the bracketed material is a thought.

communicative intentions are simple. And such meshing actually occurs, because participants in group communication intuitively understand what they are doing.

c. *Solution Two: Group Agency and Institutional Intentions*

While the first solution to the legislative intent problem views the institutional communicator (legislature or convention) as a collection of individuals, the second solution is that such institutions are proper group agents with communicative intentions that are not reducible to the communicative intentions of their individual members.

A full explication of the second solution would require an extensive discussion of the idea of group agency—a task that would consume dozens of pages and take us far afield from the task at hand. The idea is intuitive and simple. We are all familiar with situations in which humans act through groups to communicate. For example, a photography club adopts a set of rules which establish the offices of President, Vice President, and Treasurer and a procedure for electing these officers. In another example, a faculty adopts a policy governing the appeal of grades. The commonsense understanding of group communication is that the group has acted. The club adopted the rules; the faculty adopted the policy. By doing these things, the group has communicated content; the photography club rules and the faculty grading appeals policy are meaningful. Our common-sense understanding does not require us to believe in group minds. There is a substantial philosophical literature that provides a rigorous account of group agency and group intentions.[140] The discussion that follows assumes that there are proper group agents and that group agents can form intentions, including communicative intentions.

The existence of group agents and group communicative intentions is part of the answer to the problem of legislative intent. But a full answer requires us to give an account of how a group agent can form the kind of communicative intentions that are necessary for a group agent to convey the full communicative content of a statute or constitution. Group agency and group intention explain how the Philadelphia Convention as a group agent can propose the constitutional text to the ratifying conventions—but how could the Philadelphia Convention itself *mean* something by the constitutional text?

We have already developed all the tools we need to answer the question of group communicative intentions. In the case of a structured institution like the Philadelphia Convention or the ratifying conventions, rules of procedure structure the ability of the institution to act. Thus, the Philadelphia Convention intentionally had rules that enabled the Convention itself to approve the final version of the constitutional text and propose it to the state ratifying conventions

[140] *See, e.g.*, CHRISTIAN LIST & PHILIP PETTIT, GROUP AGENCY: THE POSSIBILITY, DESIGN, AND STATUS OF CORPORATE AGENTS (2011); Philip Pettit, *Groups with Minds of Their Own*, *in* SOCIALIZING METAPHYSICS: THE NATURE OF SOCIAL REALITY 167 (Frederick F. Schmitt ed., 2003); Michael E. Bratman, *Shared Intention*, 104 ETHICS 97 (1993).

for their approval and adoption. In order for that act to convey communicative content we need a further intention to convey meaning—a communicative intention. What we don't have is a group communicative intention that corresponds to the first-order communicative intentions of the drafters of the text. The rules of the convention do not enable the formation of such complex content-rich intentions. What we do have is the ability of the group to coordinate on a second-order communicative intention. And in the case of the Philadelphia Convention, we know what that second-order communicative intention was—the Convention intended to convey the public meaning of the constitutional text. That simple group intention is sufficient for constitutional communication by a group agent to deliver communicative content.

Thus, there are two solutions to the problem of legislative intent. The first solution offers an individualistic account: individual second-order communicative intentions mesh. The second solution offers a group-agency account: the group agent forms a second-order communicative intention to convey the public meaning of the constitutional text. Either solution is sufficient to dissolve the problem of legislative intentions. In other words, *the summing problem is no problem at all*. And that is what common sense told us all along. We receive and participate in group communications all the time in our social and professional roles. We knew all along that group participation was possible, even if we were unaware of the underlying theoretical explanation for the mechanisms that make this possible.

I have now completed the affirmative case for the Public Meaning Thesis—as a claim that is internal to originalism. The core of the argument flows from a fact about the situation of constitutional communication: the constitutional text is intended to convey meaning to the public, and therefore, the intended meaning (misfires aside) is the public meaning. To the extent that public meaning diverges from intended meaning, Public Meaning Originalism requires adherence to the public meaning. The case for the priority of public meaning in cases of divergence is the topic of the next Part of this Article.

IV. THE PRIORITY OF PUBLIC MEANING

This Part makes the case that the original public meaning of the constitutional text should have priority over other forms in meaning, such as drafter's meaning, in cases of divergence. For example, if Gouverneur Morris intended the semicolon in Article IV, Section 3, following "no new State shall be formed or erected within the Jurisdiction of any other State"[141] to prohibit the division of one state into two—even with "the Consent of the Legislatures of the States concerned as well as of the Congress"[142]—but the public understood division with consent to be permissible, then the public meaning should prevail. Both the

[141] U.S. CONST. art. IV, § 3, cl. 1.

[142] *Id.*; *see also* Kesavan & Paulsen, *supra* note 60, at 295 (discussing Clause's meaning and discussing possibility that semicolon might separate different requirements).

drafter's meaning and the public meaning exist, but Public Meaning Originalism endorses the priority of public meaning for normative reasons.

A. *Convergence on Public Meaning*

As competent communicators, the Framers would likely have had an intuitive understanding of their communicative situation. They would have likely used words in their ordinary senses and reserved technical language for cases of need. They would have likely recognized the limits imposed on contextual enrichment by the publicly available context of constitutional communication. But the Framers could have made mistakes about the content of the publicly available context. Such a mistake might result in constitutional communication misfiring—content that the Framers intended to convey might not actually have been conveyed.

Likewise, the Framers would have likely intuitively understood that departures from ordinary meanings (conventional semantic meanings) would create a risk of miscommunication, but there was no guarantee that they always succeeded when they employed technical language. For example, the meaning of a phrase like "Privileges and Immunities of Citizens in the Several States"[143] in Article IV might or might not be clear and precise.

This point can be restated in Gricean terms.[144] The drafter's meaning of the constitutional text is the meaning that the drafter of each particular provision intended the public to grasp based on the public's recognition of the drafter's communicative intentions. That is, the relevant intentions are publicly recognizable communicative intentions. The drafters could not coherently form an intention to convey communicative content via recognition of a private (nonpublic) intention. There are limits to the mechanisms by which publicly recognizable communicative intentions can be conveyed. Conventional semantic meanings are publicly accessible. The publicly accessible context of constitutional communication can convey additional content via contextual enrichment. When drafting a constitution, you must use the tools that are at hand. Given those tools and the situation of constitutional communication, the drafters faced problems of linguistic engineering: conveying constitutional content through a complex multistage process of constitutional communication is not always easy—but just because a task is hard does not entail that it is impossible.

These facts about the nature of constitutional communication lead to the conclusion that much of the seeming theoretical divergence among theories of the nature of original meaning can be reconciled. Given the situation of constitutional communication to the public, it follows that the communicative intentions of the Framers are to convey public meaning.

Similar considerations lead to the conclusion that the ratifiers' understandings of the communicative content of the constitutional text will converge with the text's public meaning. This point should be obvious: the ratifiers are essentially

[143] U.S. CONST. amend. XIV, § 2, cl. 1.

[144] *See* discussion *supra* note 30.

in the same communicative situation as the public at large. And given all of these arguments, the original methods of constitutional interpretation would also yield public meaning since "interpretation" by definition aims at the recovery of communicative content. Of course, there may also be other original methods of constitutional construction (not interpretation)—that is, methods used to supplement or alter the communicative content of legal texts at the time each provision of the Constitution was framed and ratified. The Public Meaning Thesis does not take a stand on the authority of the original methods of constitutional construction—that topic requires a theory of constitutional construction (a subject that is outside the scope of this Article).

B. *The Possibility of Divergence of Drafter's Meaning from Public Meaning*

When constitutional communication is successful, the drafter's meaning and Original Public Meaning will converge. The individual who drafts a particular constitutional provision succeeds if the text they write successfully conveys their first-order communicative intentions to the public. My sense is that most of the constitutional text, including the amendments, was communicated successfully—but showing this would involve painstaking clause-by-clause analysis. But even if most of the text was communicated successfully, it is possible that in some cases there is divergence between the first-order communicative intentions of the drafters and the content that was actually communicated to the public. What about that?

We can begin with three possible ways in which constitutional communication could fail to transform the first-order communicative intentions of the drafters into public meaning:

> Way One: The drafter might be mistaken about the public meaning of some word or phrase, but no one noticed. So far as I know, there are no examples of this kind of failure.
>
> Way Two: The drafter assumed that a pragmatic enrichment (implicature, impliciture, presupposition, or modulation) would successfully convey content to the public, but this did not occur. This kind of failure might occur because the drafter did not fully anticipate public context of constitutional communication or because the drafter assumed background knowledge that was not shared by the public.
>
> Way Three: The drafter was attempting to deceive judges and officials by conveying communicative content to them that diverged from the public meaning of the text. This would happen if the drafter of a provision was trying to "pull a fast one." In this case, we might call the divergence between the drafter's communicative intentions and the original public meaning "deception" instead of "failure."

The first two ways of failure involve drafter's mistakes. The third way involves constitutional deception.

The first two kinds of failure are likely to be rare. The Philadelphia Convention was a group effort. The final drafting of the constitutional text

occurred in the Committee of Style, and their work was then presented to the Convention. Obvious linguistic mistakes would likely be caught at this stage because it is extremely unlikely that more than a few Framers would share individual linguistic idiosyncrasies. A similar point can be made about mistaken beliefs about the public context of constitutional communication: one framer might be mistaken, maybe even a few, but it is unlikely that the convention as a whole would make such mistakes. In this respect, *the complex multistage process of constitutional communication makes it more likely, not less likely, that the final document reflects the communicative intentions of the drafters*.[145]

Nonetheless, there may be isolated cases of divergence. In such cases, we must then decide whether to go with the drafter's communicative intentions, or to instead prioritize the public meaning. Original Public Meaning Originalism takes the position that public meaning governs, but Drafter's Meaning Originalism would embrace the opposing position.

C. *The Case for the Priority of Public Meaning*

At this point, we have two meanings: Drafter's Meaning and Original Public Meaning—and we are considering a possible set of cases in which the relevant content of the two meanings diverges. Recall the example of divergence between the public meaning and drafter's meaning of the clause enabling the creation of new states.[146] Of course, not all meanings are created equal. The Original Public Meaning is the meaning that follows from the ratifiers' second-order communicative intentions to approve the public meaning and then convey that meaning to the officials and institutions of the new government. But that fact of the matter does not entail the normative conclusion that the public meaning, and not the Framer's private intended meaning, should prevail. To establish that normative conclusion, normative arguments are required.

Much could be said about the question whether public meaning should be prioritized over the private first-order communicative intentions of the particular individuals who drafted various constitutional provisions. The most compelling argument sounds in constitutional legitimacy.[147]

For present purposes, two aspects of constitutional legitimacy are important. First, the public meaning of the constitutional text possesses *democratic legitimacy* to a greater degree than does the private meaning. The public meaning of the constitutional text is, by definition, the meaning that was conveyed to the public and their representatives during the ratification process. In divergence cases, the private first-order communicative intentions of the

[145] The italics signify the importance of the point!

[146] *See supra* text accompanying note 142.

[147] For an in-depth discussion of the concept of constitutional legitimacy, see Solum, The Constraint Principle, *supra* note 2 (manuscript at 73) ("We can think of legitimacy as a process value: that a law is legitimate is a reason to consider it authoritative, providing a *pro tanto* reason for action that stems from characteristics of the law other than the moral rightness of its substantive content.").

drafters were not discussed and debated by the public or ratified by their representatives. Indeed, it is impossible to ratify the drafters' *private* communicative intentions.

Second, prioritizing public meaning is more consonant with our understanding of institutional legitimacy—especially in connection with constitutional amendments. Drafters are not given institutional authority to enact a constitution. In 1787, institutional authority to enact was vested in the ratifying conventions; respect for that authority would seem to require the prioritization of public meaning (which is the meaning for the ratifiers), as opposed to the drafters' private intentions. The authority to ratify amendments rested with state legislatures. Again, respect for their authority supports prioritizing the meaning that the amendment had for them—once again, the public meaning.

The third possibility identified above involved deceptive constitutional communication.[148] There is a separate discussion of Original Methods Originalism, which posits that the Constitution's original meaning is its meaning for lawyers, judges, and persons learned in the law,[149] but that discussion does not focus on a normative comparison between public meaning and lawyer's meaning.

It might be argued that Drafter's Meaning should be prioritized because it is the only "real" or "true" meaning of the constitutional text. According to this argument, when Public Meaning departs from Drafter's Meaning, the Public Meaning is a kind of fiction. This argument raises deep questions, full consideration of which is beyond the scope of this Article. The most direct response to the argument is that it rests on a mistaken premise about the way communication works—the assumption that meanings are solely a product of first-order communicative intentions. That premise is false: even in the case of Gricean speaker's meaning, a second-order intention is involved. In the case of constitutional communication, the relevant second-order communicative intention is to convey public meaning. Public Meaning is a real meaning and does not rest on a legal fiction. And if we had to select the "one true meaning" of the constitutional text, the fact that public meaning was intended by the drafters, Framers, and ratifiers strongly suggests that Original Public Meaning should be our choice.

V. OBJECTIONS AND ANSWERS

In this Part, I will consider and answer objections to the Public Meaning Thesis. One objection, the summing-problem objection, has already been discussed in detail above.[150]

[148] This is examined in depth *infra* Section V.D.

[149] *See infra* Section V.B.

[150] *See supra* Section III.F.3.

A. *The Difficulty-of Pragmatic-Enrichment Objection*

In a sophisticated, deep, and important forthcoming article, *The Chimerical Concept of Original Public Meaning*, Professor Richard Fallon's objection to the Public Meaning Thesis focuses on the difficulty or impossibility of pragmatic enrichment of the constitutional text.[151] The core idea is that successful pragmatic enrichment ordinarily requires "biographical information about both the speaker and the listeners and about the assumptions that they share."[152] In the constitutional context, however, such information is not likely to be present. So Fallon concludes: "In the context of constitutional interpretation, however, the normal foundations of pragmatic enrichment do not exist, and public meaning originalists have produced no adequate substitute."[153] If this objection were correct, then pragmatic enrichment would fail and hence Original Public Meaning will be too sparse to resolve constitutional cases and issues that hinge on a dispute about the constitutional text communicative content. Fallon's article is the most sophisticated challenge to the Public Meaning Thesis of which I am aware.

Notably, Fallon's challenge is aimed at the pragmatic dimension of public meaning. Fallon does not dispute that linguistic communication via the constitutional text is possible, nor does he deny that linguistic communities are able to produce conventional semantic meanings and norms of syntax and punctuation. But Fallon correctly observes that the literal meaning (semantic content) of constitutional text is sparse.[154] So, if successful pragmatic enrichment and contextual disambiguation are impossible (or very rare), the communicative content of some provisions will be substantially underdeterminate.

This challenge is truly important and demands an answer. But even if original public meaning of the constitutional text were limited to the semantic content (as disambiguated by the document's context itself and the most obvious information about the public context of constitutional communication), many important constitutional provisions will have communicative content that is sufficiently determinate to resolve many constitutional issues and cases. The list of clauses that do not require pragmatic enrichment to have relatively determinate content is too long to list, but many examples are obvious, such as age qualifications for President, senators, and representatives; bicameralism and presentment; the requirement that treaties be ratified by a two-thirds vote of the Senate; the extension of voting rights to women; and on and on.

So, Fallon is concerned with a subset of cases and issues, those in which the meaning is contested because the disambiguated semantic content is insufficient to resolve some important constitutional case or issue. Importantly, original

[151] Richard H. Fallon, Jr., *The Chimerical Concept of Original Public Meaning*, 107 VA. L. REV. 1421, 1457 (2021).

[152] *See id.*

[153] *See id.* at 1458.

[154] *See id.* at 1440.

public meaning itself is not "chimerical," even if Fallon's argument succeeds. Moreover, with two exceptions, Fallon does not actually attempt to demonstrate with evidence and argument that the meaning of any particular constitutional provision is substantially underdeterminate. The two exceptions are the Privileges or Immunities Clause and Equal Protection of the Laws Clause, which are discussed below.

The main question is whether Fallon is right about the difficulty of pragmatic enrichment in the context of constitutional communication to the public. The key assumption of his argument is that the public lacked necessary information about the drafters of individual constitutional provisions.[155] The public may not have known (or had access to) the identity of the drafters, and even if drafter identity was known, the public is unlikely to have had detailed "biographical information" about the speaker. But, Fallon argues, pragmatic enrichment requires an informational environment with rich information about the speaker, which, in the case of the U.S. Constitution, would be the drafter of each individual constitutional provision.

Fallon acknowledges the basic strategy for overcoming this problem. Complex multistage constitutional communication is enabled by meshing a second-order communicative intention to convey public meaning.[156] Here is the key passage in Fallon's article that directly addresses this strategy:

> Although intended as an answer, Solum's account of relevant speakers' intentions begs the central question that arises in every case that is not covered by a provision's minimally necessary or noncontroversial meaning. Contextual or pragmatic enrichment—on which PMO relies to define public meaning—involves inferences by reasonable listeners concerning a speaker's communicative intentions in making a particular utterance on a particular occasion. When we take up the perspective of a reasonable and informed reader, Solum's suggestion that we should assume that the Constitution's authors intended to convey the public meaning of their text proves utterly unhelpful in any reasonably disputed case. It affords no guidance to either a member of the public or an interpreter who is puzzled, substantively, about what a text asserts and who would normally regard facts about the author's assumptions and specific communicative intentions as pertinent in determining its contextual meaning.[157]

Fallon's argument is based on an underlying assumption that seems natural at first glance but that is false once carefully examined.

The underlying assumption of Fallon's argument arises from the history of pragmatics in the philosophy of language and theoretical linguistics. As noted above,[158] the Gricean tradition emerged from a simple cooperative conversation

[155] *See id.* at 1457.

[156] *See supra* Section III.F.

[157] Fallon, *supra* note 151, at 1459-60.

[158] *See supra* Section III.C.1.

between two speakers. For this reason, theorists in the tradition focus on this model situation.[159] And in that situation, the listener may need rich biographical information about the speaker in order to grasp the speaker's communicative intentions. However, the reason for the need of listeners for rich biographical information in some one-on-one conversations is *not* that such information is a necessary precondition for *all* successful communication of communicative intentions via pragmatic enrichments. Rather, the reason is that, when rich biographical information is present, a speaker can rely on the listener's knowledge to communicate more efficiently.[160] Speakers take advantage of a rich informational environment by saying little and implying much.[161] If they do so, then but only then, rich biographical information is required.

Here is a simple example:

Caleb: Lunch?

John: Where?

Caleb: The usual. See you there.

Caleb and John then meet at Lampo's pizza at 11:45 a.m. on that day.

John is able to infer that Caleb's communicative intention in uttering "the usual" is to refer to Lampo's Pizza and that the communicative intention in uttering "see you there" is something like, *You and I will meet at Lampo's pizza for lunch at 11:45 a.m. today*. Caleb knows that John knows that their usual lunch spot is Lampo's and that they always meet for lunch at 11:45 a.m., unless a different time is specified. This is a case where Caleb's utterance is formulated to communicate efficiently (few words) because of the rich common knowledge shared by Caleb and John. The content of "the usual" depends on the context: if Caleb and John were making a dinner plan, "the usual" might refer to Fleurie, a fancy restaurant. The content of "see you there" includes an implicit statement of a plan ("see you" = *I will meet you*), an indexical "there" (at Lampo's), and a complex impliciture regarding the date and time. The whole statement is equivalent to: "I plan to meet you at Lampo's for lunch at 11:45 a.m. today."

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[159] Deirdre Wilson & Dan Sperber, *Relevance Theory*, *in* THE HANDBOOK OF PRAGMATICS 607, 607, 616 (Laurence R. Horn & Gregory Ward eds., 2004) (exemplifying inferential pragmatics and stating that Grice's "alternative to the classical code model" is analyzed through a speaker-listener framework).

[160] Davis, *supra* note 99 ("Neo-Gricean theories modify Grice's principles to some extent, and Relevance theories replace them with a principle of communicative efficiency."); *see also* Wilson & Sperber, *supra* note 159, at 615-16 (providing "schematic outline" to exemplify how listeners use "specific expectations" to identify "explicatures and implicated premises"). There are important differences between the efficiency theory and the Gricean Maxims of Conversation (discussed in the next sentence in text), but these differences are not relevant to the point being made in the text accompanying this note.

[161] Grice accounted for this phenomenon via his Maxims of Conversation and in particular, the Maxim of Quantity. *See* GRICE, *supra* note 30, at 26. This phenomenon can be summarized as "provid[ing] as much information as needed but no more." Lawrence B. Solum, *Contractual Communication*, 133 HARV. L. REV. F. 23, 30 (2019).

Fallon is right to notice that in this simple exchange, rich information is required to produce an impliciture because Caleb formulated his utterance based on his knowledge of John's knowledge of Caleb's history with John. Now imagine Caleb is having lunch with Megan, who he has recently met:

Caleb: Lunch?

Megan: Great. Where?

Caleb: Lampo's has fantastic pizza. 11:45?

Megan: See you there!

Caleb and Megan then meet at Lampo's pizza on that day.

Megan knows some general facts about Caleb (e.g., that he is a law professor who teaches at the same law school as she does), but because she has just met him recently, she lacks rich biographical information. Nonetheless, Megan and Caleb are able to exchange communicative content far richer than their utterances' literal meaning. Megan understands that the utterance of "Lunch" with a rising tone communicates an implicture: *[Would you like to have] Lunch [with me, Caleb, today?]*. Caleb grasps that "Great" communicates both the speech act of accepting the invitation along and a positive evaluative attitude about the plan. Megan grasps that "Lampo's has fantastic pizza" communicates both a statement about the quality of pizza at Lampo's and the speech act of proposing Lampo's as the place to have lunch and that "11:45" communicates *11:45 [a.m., today]*. Caleb understands that "See you there" communicates the speech act by Megan of accepting Caleb's proposal and also predicts that Megan will literally "see" Caleb when they meet.

Caleb must be more explicit with Megan than with John. Why? Because Caleb knows that he and Megan are communicating in an environment that is information poor in comparison to the environment in Caleb spoke to John. Megan knows very little about Caleb personally; they just met for the first time, but she does know a lot about the general type of person that Caleb is and how communication with a person of that type works. Caleb is a law professor who is her colleague, and colleagues frequently have lunch with each other.

Now imagine that Caleb wants to communicate to a more general audience via a written communication. Before the start of a first-year law school class on the very first day of the first semester, he writes on the board:

"Lunch.

Noon, Commons.

Grab a sandwich, and join me at the big table."

Caleb sits at the largest table in the commons at noon on that day. Several students join him, with various beverages, sandwiches, salads, and not-so-great commons pizza.

This is one-to-many communication between strangers. The students know very little about Caleb, and Caleb has no individualized biographical information about any of the students. Moreover, the students have not yet

learned that there is a custom of professors making themselves available for lunch at the big table in the commons. Nonetheless, Caleb did not need to communicate explicitly. "Lunch" was understood as, *I am inviting you, the members of this law school class, to have lunch with me, Caleb*. "Noon, Commons" was understood as, *The invitation is for 12:00 p.m. today in the Law School Commons*. "Grab a sandwich" was understood as *Bring something to eat and drink*. "Join me at the big table" was understood as *I invite you, the members of this class, to join me, Caleb, at the largest table in the Law School Commons*. Obviously, lots of pragmatic enrichment!

What about many-to-many communication to the public? Is it possible to draft a text for the public with successfully communicative content that is richer and more precise than the explicit semantic content? Of course! It happens every day in newspaper and magazine ads, via posted signs, and via Twitter, Facebook, and blogs.

Here is an example: a sign posted on a fence surrounding an open field near Charlottesville, Virginia, states, "No Trespassing." This is an example of multistage many-to-many communication in an information poor environment. The sign was ghostwritten.[162] Many members of the pubic who read the sign don't know who drafted the text or by whom the sign was posted. The drafter knew nothing about the fenced open field or the members of the public who would read the sign. The poster knew nothing about the drafter of the sign and might have known something about some likely readers of the sign but nothing at all about others.

The public context of communication in the "No Trespassing" sign example is located near one extreme of the spectrum from information poor (very little common knowledge relevant to communicative intention) to information rich (lots of such common knowledge). Yet, in this example, pragmatic enrichment is likely to succeed. The semantic content of "No Trespassing" is both ambiguous and incomplete. Does it mean, *as a matter of fact, no trespassing has occurred at this location*? Or, *no one should ever trespass at any location*? No. Neither of those statements captures the sign's communicative content. In fact, it communicates a much more specific message that is something like: *Trespassing on the field that is surrounded by the fence upon which this sign is posted is forbidden*. This relatively rich communicative content is produced by pragmatic enrichment, despite the fact that readers have no "biographical information" about either the drafter or the poster of the sign. It follows that pragmatic enrichment in many-to-many communication to the public is possible without such information. Readers know that the sign is addressed to the public and they interpret its message with this fact in mind. My guess is that almost any competent speaker and reader of American English who encounters this sign would be able to grasp its communicative content.

[162] *See supra* Section III.F.4.

What has been established so far is that Fallon's core argument is clearly incorrect. It is not "utterly unhelpful"[163] for participants in communication to know to whom the communication was addressed and therefore what the listener or reader would be able to infer about the speaker's communicative intentions. Quite the opposite—knowing the difference between conversations between close friends, casual acquaintances, and strangers is key to grasping communicative intentions in general and pragmatic enrichments in particular. Drafters need to know what audience they are writing for, in order to know what they must make explicit and what can be left unsaid. Readers need the same information.

Contextual disambiguation and pragmatic enrichment is possible in complex multistage communication to the public. But more is required! Vindication of the Public Meaning Thesis requires that the U.S. Constitution actually did succeed (to a substantial degree) in communicating to the public. And because literal meaning is sparse, it must be shown that contextual disambiguations and pragmatic enrichments were successfully conveyed from drafters to Framers, to ratifiers, to implementing officials and the public. Abstract theorizing is insufficient. The requisite showing requires consideration of particular clauses.

We have already seen several examples of successful pragmatic enrichment in the Constitution.[164] The Ex Post Facto Clause states "No Bill of Attainder or ex post facto Law shall be passed"[165] but it does not tell us by what institution. From the context, it is clear that the "whom" is Congress. Hence, the full communicative content is something like: *Congress shall not have the power to enact a bill of attainder or an ex post facto law*. This is impliciture, a form of pragmatic enrichment. Likewise, the Ninth Amendment states: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[166] The text does not explicitly say that there are any "rights . . . retained by the people"[167] but nonetheless communicates the existence of such rights via presupposition, another form of pragmatic enrichment.[168]

Fallon does not discuss the Ex Post Facto Clause, but he does discuss the Ninth Amendment, quoting Professor Ryan Williams who distinguishes

[163] Fallon, *supra* note 151, at 1459.

[164] *See supra* Section III.E.2.a.

[165] U.S. CONST. art. 1 § 9, cl. 3.

[166] *Id.* amend. IX.

[167] *Id.*

[168] Randy E. Barnett, *The Misconceived Assumption About Constitutional Assumptions*, 103 NW. U. L. REV. 615, 623 (2009) (highlighting Ninth Amendment's implicit recognition of "natural rights"); Goldsworthy, *supra* note 99, at 700 ("There are many examples of presuppositions and implications that have been inferred from the terms of the U.S. Constitution."); Ryan C. Williams, *The Ninth Amendment as a Rule of Construction*, 111 COLUM. L. REV. 498, 546 (2011) (analyzing whether Ninth Amendment "would have nonetheless been understood by a reasonable member of the ratifying public as carrying with it a clear and obvious implied meaning").

between implied content that arises as a matter of logical necessity and pragmatic enrichments.[169] Williams takes the normative position that logical implications should bind constitutional actors: this position is fully consistent with the Constraint Principle.[170] But Williams also says the following:

> [I]f the implied content is not semantically encoded in the text, interpreters should inquire whether a reasonable member of the ratifying public at the time of enactment would have recognized the implied content as following obviously and noncontroversially from the choice of the particular language used in the provision and the relevant background context.[171]

This passage is complex.[172] The key idea is that pragmatic enrichments should be limited to communicative content that follows "obviously and noncontroversially" and to those that follow "from the choice of the particular language" of the text in the publicly available context of constitutional communication. These restrictions are justified by normative reasons—they are not constituents of the communicative content of the text. Williams is arguing that, for normative reasons, pragmatic enrichments that actually exist and that are supported, on balance, by consideration of all the available evidence, should be disregarded if they are either (1) nonobvious, (2) controversial, or (3) not based on the particular language of the specific constitutional provision at issue. Public Meaning Originalism rejects all three restrictions, both as a matter of interpretation and as a matter of construction.

As a matter of interpretation, the actual communicative content of the constitutional text is what it is—as a matter of fact. Some contextual enrichments are publicly accessible even though they may not have been "obvious" in the sense that recognizing them might require thought and reflection. Other contextual enrichments may exist, even though they were controversial—because controversy can be generated by motivated reasoning or bad faith argumentation driven by ideology or interest. Finally, many pragmatic enrichments are not based on the particular language of the specific constitutional provision but instead arise from the interaction between the

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[169] *See* Fallon, *supra* note 151, at 1477 (quoting Williams, *supra* note 168, at 544) (laying out rules Williams proposes for shifting from "purely semantic" to "contextually enriched" meaning).

[170] *See* Williams, *supra* note 168, at 544 (proposing "two-part test for recognizing constitutional implicatures that takes into account the particular distinctions between communications made in the context of ordinary conversations and communications that emerge as the end result of a complex and nontransparent legislative process"). This follows from the fuller statement of the Constraint Principle articulated *supra* note 29.

[171] *See* Williams, *supra* note 168, at 544.

[172] One idea is that pragmatic enrichments should be assessed from the perspective of "a reasonable member of the ratifying public at the time of enactment." *Id.* This idea is consistent with Public Meaning Originalism, so long as we understand that the idea of "a reasonable member of the ratifying public" is a heuristic and not an account of the causal mechanism by which communicative content is conveyed. *See id.*

purpose of the provision and background assumptions or between one provision and overall constitutional structure.

As a matter of construction, Public Meaning Originalism is committed to the Constraint Principle, which requires consistency with, full expression of, and fair traceability to the communicative content of the constitutional text. For this reason, Public Meaning Originalism rejects Williams's three restrictions on pragmatic enrichment. I will not engage with Williams's normative argument on this occasion. The point of this paragraph is simply to clarify the stance taken by Public Meaning Originalism.

With all of this said, we can return to Fallon's deployment of Williams. Fallon writes, "embrace of Williams's strictures would dramatically circumscribe the range of issues to which the original public meanings of constitutional provisions could provide definitive resolutions."[173] Agreed. And Fallon is correct that in a prior version of this Article, I stated that my position was "very close"[174] to Williams. It was an error to make that statement without defining "very close" and explaining how my position differed from his. I apologize, and now endeavor to correct the mistake.

Given the discussion so far, it follows that the conclusions that would follow from Williams's normative restrictions on pragmatic enrichment are not embraced by Public Meaning Originalism. In particular, Fallon argues:

> With regard to the Fourteenth Amendment, for example, Professor Foner's findings suggest that the *minimally necessary and historically noncontroversial content* of the Equal Protection and Privileges or Immunities Clauses could not resolve any of the disputed interpretive questions that arose in the near aftermath of Reconstruction, including those about the permissibility of state-enforced segregation with regard to social rights, discrimination in public education, and exclusions of women from the practice of law.[175]

But the communicative content of the Equal Protection of the Laws Clause and the Privileges or Immunities Clause is not limited to that which is "minimally necessary and historically noncontroversial." Public Meaning Originalism requires constraint by all of the communicative content. When there is controversy over the public meaning, we aim for the interpretation that best explains all the available evidence.[176]

At this point, we turn to what Fallon has to say about the communicative content of the Equal Protection of the Laws Clause and the Privileges or

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[173] *See* Fallon, *supra* note 151, at 1478.

[174] *See id.*

[175] *Id.* (emphasis added).

[176] That is, interpretation proceeds by abduction or the method of inference to the best explanation. *See* Lawrence B. Solum, *Legal Theory Lexicon 089: Inference to the Best Explanation (Abduction)*, LEGAL THEORY LEXICON (Dec. 27, 2020), https://lsolum.typepad.com/legal_theory_lexicon/2019/02/legal-theory-lexicon-089-inference-to-the-best-explanation-abduction.html [https://perma.cc/75PY-LR8K].

Immunities Clause. Notably, these are two of the most difficult constitutional provisions from an originalist perspective. The Privileges or Immunities Clause was substantially nullified by the Supreme Court in *The Slaughterhouse Cases*[177] and *United States v. Cruikshank*.[178] The original public meaning of the Equal Protection of the Laws Clause was substantially altered, turning from its original focus on protection of the laws into the modern, complexly structured tiers of scrutiny—a judicial creation with no anchor in original public meaning. Recovering original public meaning is always difficult when the provision has been ignored for decades or current doctrine has drifted far away from original meaning.

Moreover, the drafting of Section One of the Fourteenth Amendment was far from perfect. The two clauses that Fallon picked may be the very best for use in an argument that public meaning is substantially underdeterminate. In any event, the case for Public Meaning Originalism would actually be quite strong if, at the end of the day, it turned out that only these two important clauses were so underdeterminate that their original public meaning left almost all of the important contemporary questions in the construction zone. But, as we shall see, it is far from clear that this is the case.

With respect to the Privileges or Immunities Clause, Fallon makes two points. His first point is that there is a significant and persistent debate among public meaning originalists about the communicative content of the Clause, citing the work of Randy Barnett and Kurt Lash.[179] This is true, but the fact of disagreement is not sufficient to demonstrate that the Clause has a radically indeterminate meaning. First, even Lash and Barnett agree on an undisputed core of meaning that includes the set of rights protected by the first eight amendments to the constitutional text and many other issues as well.[180] Second, persistent disagreement may be a function of the sociology of the legal academy and the psychology of individual scholars. What Fallon would need to show is that there is no better side of the argument, and to do that he needs to get into the weeds and assess the evidence and arguments advanced by those who disagree.

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[177] 83 U.S. (16 Wall.) 36, 74 (1873) (refusing to include states under Privileges or Immunities Clause's umbrella).

[178] 92 U.S. 542, 549 (1876) ("The same person may be at the same time a citizen of the United States and a citizen of a State, but his rights of citizenship under one of these governments will be different from those he has under the other.").

[179] *See* Fallon, *supra* note 151, at 1479 & n.213 (first citing Randy E. Barnett & Evan D. Bernick, *The Privileges or Immunities Clause, Abridged: A Critique of Kurt Lash on the Fourteenth Amendment*, 95 NOTRE DAME L. REV. 499, 507 (2019); and then citing Kurt T. Lash, *The Enumerated-Rights Reading of the Privileges or Immunities Clause: A Response to Barnett and Bernick*, 95 NOTRE DAME L. REV. 591, 593 (2019)) ("Randy Barnett and Kurt Lash have recently produced dueling, book-length disquisitions that arrive at competing conclusions.").

[180] *See* Randy E. Barnett & Evan D. Bernick, *The Difference Narrows: A Reply to Kurt Lash*, 95 NOTRE DAME L. REV. 679, 679-87 (2019) (itemizing points where article's authors and Lash agree). Barnett, Bernick, and Lash all confirm a substantial range of agreement in email correspondence with the author.

Fallon's second point concerns *Bradwell v. Illinois*,[181] in which the Supreme Court rejected Myra Bradwell's claim that Illinois had violated the Privileges or Immunities Clause by denying her admission to the bar after she had passed the equivalent of what we now call the "bar exam."[182] M. Frances Rooney has argued that the original public meaning of the Privileges or Immunities Clause supported Bradwell's argument.[183] A reconstruction of Rooney's argument has five steps: (1) women were indisputably citizens within the meaning of the Fourteenth Amendment and hence protected by the clause; (2) the right to engage in a lawful occupation (including the practice of law) was within the core of the basic rights protected by the Privileges or Immunities Clause; (3) although the state would not violate the clause by reasonably regulating who can practice law, the exclusion of women was justified on the basis of a factual belief that women (like children) lacked the mental capacity to practice law; (4) we now know that this factual belief is false; (5) factual beliefs are not part of the communicative content of the constitutional text. Therefore, we know that *Bradwell* was wrongly decided (once the true facts are considered).

Fallon does not contest any of these premises. Instead, he says the following:

> Although I understand why Solum's [use of Rooney's] interpretation would have been a plausible one, others could have seen, and some apparently did see, the drafting context of the Fourteenth Amendment—which specifically linked states' representation in Congress to nondiscrimination against "male" citizens with regard to voting—as signaling an implicit tolerance for some sex-based disparities.[184]

Fallon does not present the primary evidence for this conclusion, but he does cite Eric Foner's *The Second Founding: How the Civil War and Reconstruction Remade the Constitution*.[185] The cited passages in *The Second Founding* do not explain how Section Two of the Fourteenth Amendment gave rise to an inference that the Privileges or Immunities Clause applied only to male citizens—despite the fact that the first sentence of Section One clearly includes all persons born in the United States and does not exclude women.[186] Here is the passage that comes the closest:

> To be sure, by introducing the word "male" into the Constitution, the Fourteenth Amendment implicitly confirmed women's subordinate

[181] 83 U.S. (16 Wall.) 130 (1873).

[182] *Id.* (describing Myra Bradwell's claim as "very clearly a case to which [the Privileges or Immunities Clause] is inapplicable").

[183] M. Frances Rooney, *The Privileges or Immunities Clause of the Fourteenth Amendment and an Originalist Defense of Gender Nondiscrimination*, 15 GEO. J.L. & PUB. POL'Y 737, 740 (2017).

[184] Fallon, *supra* note 151, at 1469-70 (footnotes omitted) (citing U.S. CONST. amend. XIV, § 2).

[185] *Id.* at *passim* (citing ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION *passim* (2019)).

[186] U.S. CONST. amend. XIV, § 1.

> *political* status. Yet the first section makes no mention of gender, and women activists quickly claimed that its guarantees of the privileges or immunities of citizens . . . invalidated the numerous state laws denying women basic rights, including the right to vote.[187]

This passage does not support Fallon's point. Section Two concerns voting rights, which are "political rights."[188] The limitation of the protection of Section Two to "male inhabitants"[189] does support an inference that the basic rights protected by the Privileges or Immunities Clause are limited to "civil rights" and do not include political rights. But Myra Bradwell was claiming a civil right, the right to engage in a lawful occupation.[190]

Quite obviously, limiting the set of basic rights protected by the Privileges or Immunities Clause to civil rights and excluding political rights does not undermine Rooney's argument. The right to vote is political, but the right to engage in a lawful occupation is civil.

Finally, consider the Equal Protection of the Laws Clause. Here is the key passage from Fallon:

> As Professor Foner establishes, in 1866, when Congress proposed the Equal Protection Clause, the meaning of equality was "in flux." To grasp a concept—such as "equal" or "equal protection" or "equal protection of the laws"—is normally to know how to apply it. If usage was in flux, judgments about the concept's proper applications were in flux, too.[191]

Again, *The Second Founding* does not support Fallon's conclusion. Here is the key passage from Foner:

> [T]he meaning of key concepts embedded in the Reconstruction amendments such as citizenship, liberty, equality, rights, and the proper location of political authority—ideas that are inherently contested—were themselves in flux.[192]

This passage is far from clear. Foner does not clarify what "embedded" means. He seems to be referring to the idea of essentially contested concepts[193] which is drawn from contemporary political theory and not Reconstruction era history.[194] What he does not do in this passage is discuss the communicative

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[187] *See* FONER, *supra* note 185, at 136-37 (emphasis added).

[188] Rooney, *supra* note 183, at 769 (The Fourteenth Amendment "certainly did not guarantee [women] political rights—the right to vote, to sit on a jury, or hold office").

[189] U.S. CONST. amend. XIV, § 2.

[190] Rooney, *supra* note 183, at 751 (identifying "the right to pursue a lawful occupation, including the practice of law" as among the "privileges or immunities of the citizens of the United States").

[191] Fallon, *supra* note 151, at 1455 (footnotes omitted).

[192] FONER, *supra* note 185, at xxiv.

[193] *See* Solum, *The Fixation Thesis*, *supra* note 2, at 43.

[194] *See id.* For the first use of the idea, see W. B. Gallie, *Essentially Contested Concepts*, 56 PROC. OF THE ARISTOTELIAN SOC'Y 167, 167 (1956).

content of the phrase "equal protection of the laws."[195] And it is this phrase and not the general political ideal of equality that is found in the Fourteenth Amendment.

What is the original public meaning of the phrase "equal protection of the laws"? The account that I find most plausible is found in two articles by Christopher Green: *The Original Sense of the (Equal) Protection Clause: Pre-Enactment History*[196] and *The Original Sense of the (Equal) Protection Clause: Subsequent Interpretation and Application*.[197] Green's account focuses on the phrase "protection of the laws,"[198] usually neglected in interpretation of the Equal Protection of the Laws Clause. The core of the right protected by the clause was understood to be the protection of persons (including but not limited to the formerly enslaved) from violence, theft, fraud, and similar invasions of their life, liberty, or property.[199]

Does Foner provide evidence that undermines this interpretation? Consider this passage:

> In 1863, when the *National Anti-Slavery Standard* published an article entitled "Equal Protection Under the Law," it had to do with the failure of police to protect blacks from mob assault during the New York City Draft Riots. In the context of the violence sweeping the postwar South, the word "protection" in the Fourteenth Amendment conjured up not simply unequal laws but personal safety. Much congressional discussion in 1866, and much testimony before the Joint Committee, dealt with intimidation of the freed people and white Unionists by private parties. Garfield spoke of the need to ensure that the rights of citizens "were no longer left to the caprice of mobs."[200]

Far from undermining Green's theory, this passage provides powerful support for the idea that the original public meaning of "equal protection of the laws" was focused on "protection."

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[195] U.S. CONST. amend. XIV, § 1.

[196] Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Pre-Enactment History*, 19 GEO. MASON U. C.R.L.J. 1, 3 (2008) (utilizing 1866 debates and history of phrase "protection of the laws" to endorse "'duty-to-protect' view" over anticlassification reading).

[197] Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Subsequent Interpretation and Application*, 19 GEO. MASON U. C.R.L.J. 219, 224, 255 (2009) (endorsing "duty-to-protect reading" further based on Republican Equal Protection Clause interpretations during 1871 Civil Rights Act debates, and because early Fourteenth Amendment interpretations saw Privileges or Immunities Clause as mechanism that "[s]ecures [e]qual [c]itizenship").

[198] *Id.* at 220 (citing U.S. CONST. amend. XIV, § 1).

[199] Protection against violence, theft, and fraud are core examples of protection of life, liberty, and property. The brief account here is obviously simplified for the sake of compact exposition.

[200] FONER, *supra* note 185, at 79.

Although I cannot do the work here, it almost goes without saying that Green's theory provides determinate outcomes on a wide variety of cases. On the one hand, almost all of modern "equal protection doctrine" is untethered to the protection of the laws.[201] On the other hand, *DeShaney v. Winnebago City Department of Social Services*[202] would clearly raise an Equal Protection of the Laws Clause issue; a strong case could be made that the city's failure to protect Joshua DeShaney from child abuse violated the clause.[203]

Of course, we need to survey all of the available evidence before reaching final conclusions—a process that Green has started and others have continued. If Green's theory is correct, it does not follow that the communicative content of the Equal Protection of the Laws Clause fully determines the legal content of constitutional doctrine. The protection of the laws against violence, theft, fraud, and other invasions of "life, liberty, and property" must be equal. Designing implementing rules for *equal* protection is a task for constitutional construction and there may be several different sets of such rules that are consistent with the communicative content of the Clause.

So, the original public meaning of the Equal Protection of the Laws Clause is likely underdeterminate. But this is what Public Meaning Originalism has always maintained. Moderate underdeterminacy of communicative content is fully consistent with the Public Meaning Thesis, the Fixation Thesis, and the Constraint Principle. The resolution of such underdeterminacy requires a theory of constitutional construction.

Fallon does discuss constitutional construction in a brief section of *The Chimerical Concept of Original Public Meaning*.[204] For example, he discusses *The Original Meaning of the Fourteenth Amendment: Its Letter and Spirit* by Professors Randy Barnett and Evan Bernick, the most sophisticated sustained attempt to develop a theory of constitutional construction within the framework of Public Meaning Originalism.[205]

Here is what Fallon says:

> In a new book, Professors Barnett and Bernick argue that that decisions about constitutional construction should accord with the "spirit" as well as with the assertive content of constitutional language. According to the authors, "[t]he spirit of the text is its original function(s), purpose(s),

[201] Green, *supra* note 197, at 219 (challenging "Supreme Court's current view that the Equal Protection Clause generically forbids improper classifications").

[202] 489 U.S. 189 (1989).

[203] *Id.* at 196. *See* Christopher R. Green, *A Textual Analysis of the Possible Impact of Measure 26 on the Mississippi Bill of Rights*, 81 MISS. L.J. 39, 47-52 (2011). For a discussion of further implications of the Clause, including for police violence, see Evan D. Bernick, *Antisubjugation and the Equal Protection of the Laws*, 110 GEO. L.J. 1, 4 (2021) (arguing Equal Protection Clause's "antisubjugation spirit should be implemented by Congress through the enactment of remedies for state failure to protect life, liberty, and property").

[204] Fallon, *supra* note 151, at 1480.

[205] *See generally* RANDY E. BARNETT & EVAN D. BERNICK, THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER AND SPIRIT (2021).

> object(s), end(s), aim(s), or goal(s)." To grasp the spirit of a constitutional provision, judges, they write, "must investigate not only the immediate context of communication but antecedent legal, political, and social history that might shed light on what kinds of normative goods the text was designed to capture" and then "formulate rules for decision-making that . . . are well adapted to that writing." This prescription is vague. In applying it to the Fourteenth Amendment, Professors Barnett and Bernick illustrate a number of the kinds of judgment that its application requires, many of them highly contestable. Nevertheless, I am frankly unsure how much more determinacy one could reasonably demand. Without purporting to settle that question, I would expect other public meaning originalists who recognized the limited resolving power of original public meanings to attach a high priority to the elaboration of fuller theories of constitutional construction.[206]

The bare assertion that Barnett and Bernick's position is vague without discussion of the specific examples and underlying theoretical constructs may strike many readers as unsatisfying.[207] But the general point that Fallon makes in this passage is correct. Public Meaning Originalism requires a well-developed theory of constitutional construction.[208] The development and defense of such a theory is a large task and though substantial progress on this task has been made by Barnett and Bernick, in my opinion, more work needs to be done. Although some provisions of the constitutional text are quite clear and precise, others are underdeterminate. That fact underscores the importance of the interpretation-construction distinction and the development of approaches to constitutional construction zones that eliminate or reduce underdeterminacy. But the fact that the original public meaning of the constitutional text is sometimes underdeterminate does not entail that meaning itself is chimerical. In this regard, public meaning is in exactly the same position as meanings in ordinary conversations. Contextual disambiguation and pragmatic enrichment can dramatically reduce underdeterminacy, but no one should think that the public meaning of the constitutional text fully determines the resolution of every constitutional issue or the outcome of every constitutional case.

But this Article is an elaboration and defense of the Public Meaning Thesis. The Public Meaning Thesis does not claim that the original public meaning of the constitutional text is fully determinate. The idea of moderate

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[206] Fallon, *supra* note 151, at 1479-80 (quoting BARNETT & BERNICK, *supra* note 205, at 227-28).

[207] Fallon uses the word "vague" but is not using that term in its restricted technical sense. *See* Lawrence B. Solum, *051: Vagueness and Ambiguity*, LEGAL THEORY LEXICON (Mar. 14, 2020), https://lsolum.typepad.com/legal_theory_lexicon/2006/08/legal_theory_le.html [https://perma.cc/U6A5-HUMF].

[208] I have not produced my own theory, one of many components of a full statement of Public Meaning Originalism that is still in the works. That's a big promissory note and it must be redeemed in due course.

underdeterminacy and construction zones is baked into the theory.[209] A full treatment of the question as to the extent of constitutional underdeterminacy is a separate project. Ultimately, the underdeterminacy question can only be addressed clause by clause by considering all of the relevant evidence from primary sources and the secondary literature.[210] That project is too big for a single scholar. From the perspective of originalism, it is a project for a generation of originalist scholars—and not a subsection of a single article. As of the writing of this Article, no critic of originalism has demonstrated that the communicative content of the constitutional text as a whole is so underdeterminate that Public Meaning Originalism would provide no substantial constraint for most or almost all important and contested constitutional issues. As is frequently the case, the proof will be in the pudding and not the recipe.

Fallon raises another objection the Public Meaning Thesis, which he frames in terms of the idea of "truth conditions":

> To be more precise, the original public meaning of a constitutional provision is partly a function of the theory by which the original public meaning is defined. Reliance on a "reasonable person" standard could thus furnish meaningful standards of inquiry only if public meaning originalists had a sufficiently specified theory to tell reasonable inquirers what they ought to look for and ultimately how to produce correct results. A theory linked instead to what people actually thought or believed would need an account of which mental states or dispositions mattered—given that very few people would likely have studied the language of proposed provisions or reflected thoughtfully on the language's implications for particular issues. It would also have to specify the conditions under which a contested view should count as the singularly correct original meaning. When confronted with theoretical and conceptual challenges such as these, PMO comes up dramatically short. Without clear criteria for identifying the truth conditions for claims about original public meanings in cases of actual historical disagreement, PMO appears to insist that "we know it when we see it." Yet an "it" that exists only insofar as particular practitioners of PMO see it is not the kind of "original public meaning" that they or anyone else should want to make the object of historical inquiry.[211]

He makes a similar point later in his article, stating, "With regard to historically disputed matters, claims of objective status for either imputed speakers' intentions or the contested conclusions that they supposedly support are plainly

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[209] *See supra* text accompanying note 11.

[210] *See* Solum, *Semantic Originalism*, *supra* note 2, at 19 ("[O]riginal-meaning originalist[s] explicitly embrace the idea that the original public meaning of the text 'runs out' and hence that constitutional interpretation must be supplemented by constitutional construction, the results of which must be guided by something other than the semantic content of the constitutional text.").

[211] Fallon, *supra* note 151, at 1433-34 (footnote omitted).

not purely factual. If we ask what are the truth conditions for such claims, originalists have furnished no good answer."[212]

What are we to make of Fallon's objection? The key to understanding the objection is Fallon's distinction between public meanings that are "noncontroversial" and those that are "disputed." He offers the following as the truth condition for a noncontroversial public meaning:

> To a rough approximation, the truth conditions for claims of minimal and noncontroversial meanings would centrally include its being the case that nearly every resident of the United States who was linguistically competent, properly informed, and reasonably unbiased either agreed or would have had no good factual reason to disagree about those meanings' existence and content.[213]

Fallon's next sentence moves from noncontroversial meanings to cases where there is disagreement:

> But when adherents of PMO insist that the content of original public meanings that existed as a matter of fact can be and often are broader than minimal and noncontroversial meanings, and encompass reasonably disputable propositions, we should insist that the proponents of such claims tell us much more than they have told us so far about what they think makes their claims true as a matter of fact.[214]

In order to understand Fallon's point, we need to distinguish two very different claims that he might be making. The first claim is about situations in which the text of a constitutional provision conveys two or more significantly different propositions to different members of the public at the time a constitutional provision was framed and ratified. The second claim is about situations in which judges, lawyers, or scholars today disagree about what position was communicated to the public in the past.

First, Fallon might be arguing that that there are situations in which the constitutional text conveyed different propositions to different readers. This might happen unintentionally; the drafters of a clause might have failed to recognize that some word or phrase was ambiguous and that the public would not be able to resolve the ambiguity on the basis of the publicly available context of constitutional communication. But irreducible ambiguity could also be intentional. It is at least theoretically possible that a constitutional provision was drafted to convey different messages to different audiences; this is sometimes called "strategic ambiguity." If this is what Fallon is arguing, then the substance of his objection is discussed below.[215]

Before discussing the second possible claim, one clarification is important. Fallon seems to be suggesting that successfully conveying unequivocal public

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[212] *Id.* at 1463 (footnote omitted).

[213] *Id.* at 1474.

[214] *Id.*

[215] *See infra* Sections V.C, V.D.

meaning requires that the meaning be grasped by "nearly every resident of the United States."[216] Fallon does not argue for this criterion; nor does he consider the alternatives. A more reasonable position is that successful communication to the public requires broad agreement, not unanimity or near unanimity. Of course, "broad agreement" is vague in the technical sense. There will surely be borderline cases, although we might think it is clear that something like 90% agreement is enough and that a constitutional provision that was read one way by 60% of the population and in another, substantially different way, by the remaining 40% of citizens created what we can call an "irreducible ambiguity." Such cases create a distinct kind of construction zone, for which a complete theory of constitutional construction must account. The claim that a given clause in the Constitution conveyed some proposition, P, is true if and only if it in fact conveyed P to the public, such that there was broad agreement that the clause did, in fact, mean P.

The second understanding of Fallon's claim is that he is pointing to the possibility that there might be disagreement today about what proposition was conveyed to the public at the time a constitutional provision was framed and ratified. When Fallon asks for "truth conditions," he might be asking how disputes over Public Meaning should be resolved. If that is Fallon's point, then it is not a claim about the truth conditions for assertions about public meaning. This version of Fallon's claim concerns the resolution of contemporary disputes about meaning and not the truth conditions.

Of course, much could be said about how to resolve such disputes. Legal disputes about law and fact are pervasive. Disputes about original public meaning are a distinct kind of factual dispute. In the face of disagreement, judges ought to consider all of the evidence and make the decision that they believe is best supported by the evidence. No one should think that a factual dispute can only be resolved if evidence is sufficiently one-sided to produce near unanimity. Some questions about public meaning may be close, while others are clear.

Ultimately, the questions that Fallon raises about truth conditions cannot be resolved by speculation about original public meaning in general. These questions can only be answered by considering particular clauses and all of the relevant evidence. Pointing to contemporary disagreement about the original public meaning of one or more clauses does not establish that the contending views are equally plausible and hence that there is no view that best accounts for all the evidence. Public Meaning is not chimerical. The theory offered in this Article offers an account of how public meaning is conveyed via ordinary and technical meanings of words and phrases, regularities of syntax and punctuation, contextual disambiguation, and pragmatic enrichment based on the publicly available context of constitutional communication. The communicative content of the constitutional text may be moderately underdeterminate and some provisions may create relatively large construction zones, but these facts are consistent with the Public Meaning Thesis.

[216] Fallon, *supra* note 151, at 1474.

Fallon's article has done a real service to the community of constitutional theorists by raising many important issues, only some of which I have been able to address here. The claim that public meaning is chimerical—that there is no sufficiently determinative original public meaning—is not well supported by the philosophy of language or by history, but that does not entail the further conclusion that the arguments raised by Fallon are uninteresting or unimportant. Fallon has identified real challenges to which Public Meaning Originalism must respond.

B. *Terms of Art and the Division of Linguistic Labor*

We have already considered an objection based on the fact that the constitutional text contains terms of art, and hence meanings that are not strictly "public."[217] Whether the premise of the objection holds as a matter of fact would require an investigation of linguistic facts at the time each provision of the Constitution was framed and ratified. Assuming that the factual predicate of the objection is correct, what follows is a clarification or modification of the Public Meaning Thesis. The best formulation of the revised version of the thesis would require that the constitutional content of the constitutional text be publicly accessible. The use of a term of art does not render the communicative content inaccessible so long as two conditions are met: (1) it must be apparent from the constitutional text (in the publicly accessible context) that the word or phrase *is* a term of art and (2) it must be possible for members of the public to access the technical meaning through reasonable effort, for example, by a reference book or consulting someone with the requisite knowledge of usage in the relevant linguistic subcommunity.[218] So long as these conditions are met, the employment of terms of art in the constitutional text is consistent with the Public Meaning Thesis.

1. The Language of the Law Thesis

One of the most important challenges to the Public Meaning Thesis is posed by Original Methods Originalism. John McGinnis and Michael Rappaport's argument for Original Meaning Originalism includes many strands, but one of their central ideas is the Language of the Law Thesis: the claim that the constitutional text is written in the legal language aimed at lawyers and judges.[219] If this claim is true, then the Public Meaning Thesis would be false.

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[217] *See supra* Part III.

[218] The idea of a division of linguistic labor comes from Hilary Putnam. *See* HILARY PUTNAM, *The Meaning of 'Meaning,' in* 2 PHILOSOPHICAL PAPERS: MIND, LANGUAGE AND REALITY 215, 227-29 (1975) ("[E]veryone to whom gold is important for any reason has to *acquire* the word 'gold'; but he does not have to acquire the *method of recognizing* if something is or is not gold. He can rely on a special subclass of speakers.").

[219] John O. McGinnis & Michael B. Rappaport, *The Constitution and the Language of the Law*, 59 WM. & MARY L. REV. 1321, 1325-32 (2018) ("[I]f the Constitution is written in the language of the law, only reading it in that language will yield an accurate interpretation.").

The audience for the Constitution would be lawyers and judges, and its meaning would not be publicly accessible.

a. *The Radical Version*

This Language of the Law Thesis could be interpreted in at least two ways: the "radical version" and the "modest version." The radical version takes the idea of a distinct "language of the law" literally. So, the idea is that there were two languages in 1787, "American English" and "Legal English," spoken by two distinct linguistic communities, call them "ordinary folk" and "lawyers."[220] Although there were cognate words in the two languages, their meanings were frequently different. Lawyers were bilingual: they spoke both American English and Legal English, but most ordinary folk were monolingual.[221]

The radical version of the thesis is wholly implausible. There is no distinct language of Legal English. Lawyers are not a separate linguistic community—as are English speakers and French speakers. Rather, lawyers are a linguistic subcommunity. American Legal English in 1787 was not a distinct language; rather, it is part of American English.[222]

This point can be illustrated in the contemporary context. Some words and phrases like "res judicata" are technical terms, the meaning of which is known by most lawyers and other legal professionals but known only by a few ordinary folks. Other words and phrases have specialized senses for the linguistic subcommunity of lawyers. Words like "standing" have a technical meaning that is related to but slightly different than an ordinary sense of the word: thus, a teacher might tell a student that she lacks standing to challenge the grade of another student, employing the word in a sense that is related to but not identical with the "standing" in constitutional law. Many legal words are part of American English and are understood by ordinary folk: "murder," "jury," "judge," "felony," and countless others. And lawyers employ ordinary words that do not have specialized legal senses; it seems likely that most of the hundreds of thousands of English words have no technical legal meaning.[223] Because legal language is part of American English, the radical version of the Language of the Law Thesis is false. For these reasons, I will assume that McGinnis and Rappaport do not intend to assert the radical version of the thesis.

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[220] *See id.* at 1328 ("[T]he entire edifice of law is based on the proposition that, in the complex and important enterprises of life, greater precision is worth the cost of deploying a technical language fully familiar only to experts.").

[221] *See id.* at 1325 ("Understanding [the Constitution's] full meaning, then, requires legal as well as ordinary linguistic knowledge.").

[222] *See* PETER M. TIERSMA, LEGAL LANGUAGE 49 (1999) ("[I]t seems best to regard [legal English] as a variety of English.").

[223] On the number of words in the English language, see *How Many Words Are There in English?*, MERRIAM-WEBSTER, https://www.merriam-webster.com/help/faq-how-many-english-words [https://perma.cc/3M7W-PH2K] (last visited Dec. 5, 2021) ("*Webster's Third New International Dictionary*, Unabridged, together with its 1993 Addenda Section, includes some 470,000 entries.").

b. *The Modest Version*

This fact leads us to the modest version of the Language of the Law Thesis. The modest version takes "the language of the law" metaphorically rather than literally. The modest version of the hypothesis is fully consistent with the Public Meaning Thesis, so long as the technical meanings employed in the constitutional text were publicly accessible. Public accessibility is easily established for technical terms in the Constitution that can easily be spotted by ordinary folk. "Habeas Corpus," "Letters of Marque and Reprisal," and "the right to trial by jury at common law" are easily recognized as employing technical legal language.[224]

Some terms in the Constitution have ordinary meanings and technical meanings—sometimes closely related but sometimes substantially different.[225] Suppose that some words and phrases in the constitutional text involve this special kind of semantic ambiguity; call this "ordinary-legal sense ambiguity." If the public context of constitutional communication would enable ordinary folk to disambiguate and recognize the technical meaning, then use of the technical sense would not pose a problem for the Public Meaning Thesis. Call this sort of case "transparent ambiguity." The ambiguity is transparent because ordinary folk can recognize it.

What would pose a problem are cases in which the public context of constitutional communication would not permit ordinary folk to detect the special ambiguity, and hence such folk would assume that the term had its ordinary meaning, when in fact the meaning intended by the drafter was technical. Call this situation "opaque ambiguity." The ambiguity is opaque because it would not be seen by ordinary folks. The technical meaning is concealed by the ordinary meaning.

There are three distinct scenarios that could account for opaque ambiguity:

> Scenario One, Drafter's Mistake: It might be the case that the drafter believed that the ambiguity would be recognized by ordinary folk but that the drafter was wrong.
>
> Scenario Two, Intentional Opacity: It might be the case that the drafter was intentionally misleading the public, using words in such a way that they conveyed one meaning to the public while simultaneously conveying a different meaning to lawyers.

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[224] In my work developing a version of Public Meaning Originalism, I have recognized the existence of technical terms from the very beginning. *See* Solum, *Semantic Originalism*, *supra* note 2, at 54-56 ("[S]ome of the words and phrases that comprise the constitutional text are 'terms of art,' the meaning of which is accessible only to a specialist audience.").

[225] *See id.* at 71-72 ("The phrase 'we the people of the United States' is even ambiguous if we know that it refers to *the people of the United States of America*, because the term 'the people' might refer to the human beings who are in the United States or it might be a term of art that refers to *the citizens of the United States of America* or to the citizens as a collective political entity.").

> Scenario Three, Legal Audience: It might be the case that the drafters of the constitutional text did not intend to communicate to the public but instead were writing only for the linguistic subcommunity that would recognize the ambiguity and resolve it in favor of the legal meaning.

Scenarios One and Two are consistent with the Public Meaning Thesis, but they do pose special problems. In such cases, we have a special kind of ambiguity. In the ordinary case, drafter's meaning and public meaning converge, but in these cases, they diverge. In such cases, Public Meaning Originalism prioritizes public meaning.

2. The Arguments for the Modest Version, Answers Thereto

The principal reasons for believing that constitutional communication was aimed at the public have already been surveyed.[226] McGinnis and Rappaport present a variety of arguments for the Language of the Law Thesis.[227] Each of these will be considered briefly here.

a. *The Supremacy Clause*

McGinnis and Rappaport argue that the Supremacy Clause supports the Language of the Law Thesis because it explicitly states that the Constitution is the "Supreme *Law* of the Land."[228] Here is the crucial passage:

> The status of the Constitution as law was not simply left to implication by the enactors, but was explicitly set forth within the Constitution itself. Thus, the text of the Constitution creates a strong presumption that the enactors understood it as a document written in legal language, to be interpreted using the rules applied to contemporary legal documents of this kind.[229]

Of course, the Language of the Law Thesis does not follow directly from the fact that the constitutional text refers to the Constitution as law. Unpacking the argument, it has two premises (P1, P2) and a conclusion (C):

> P1: The Constitution refers to itself as law.
>
> P2: If a document refers to itself as law, then there is a strong presumption that it is written in technical legal language.
>
> C: Therefore, there is a strong presumption that the Constitution is written in technical legal language.

The key to this argument is P2.

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[226] *See supra* Section III.D.

[227] *See generally* McGinnis & Rappaport, *supra* note 219 (arguing that language, structure, references to legal interpretive rules, and interpretive practices of early jurists and the Framers support that the Constitution is written for legal audience).

[228] *Id.* at 1369 (emphasis added) (quoting U.S. CONST. art. IV).

[229] *Id.*

No support or explanation is offered for the second premise. Perhaps McGinnis and Rappaport believe that this premise is intuitively obvious, but it is not obvious to me nor, I suspect, to many readers who are not already committed to Original Meaning Originalism. It is not a necessary truth: we can imagine a possible world in which the Constitution referred to itself as law but also included a "plain meaning clause" such that Public Meaning Originalism followed from the text.

McGinnis and Rappaport might believe that P2 is an empirical generalization: if so, they provide no evidence. The relevant evidence would be a sample of legal documents from the relevant period (roughly the eighteenth century) that refer to themselves as law which could be sorted into those that were interpreted as written in the language of the law and those that were not. So far as I know, no one has done the work necessary to create such a sample.

Moreover, there are strong arguments (presented above)[230] that the Constitution is relevantly different from a statute directed only to lawyers and judges. Recall Justice Story, "The people make [constitutions]; the people adopt them; the people must be supposed to read them, with the help of common sense; and cannot be presumed to admit in them any recondite meaning, or any extraordinary gloss."[231] And even if the Constitution were just an ordinary statute, there are good reasons to believe that many statutes were understood to speak to the people and hence were given their public meaning—although assessing all the evidence is too large a task to undertake in this Article.

b. *The Use of Legal Terms in the Constitutional Text*

McGinnis and Rappaport's second argument is based on the fact that the constitutional text uses legal terms. Here is their statement of the argument:

> The Constitution is full of legal terms. As we have argued, it is extremely difficult to account for legal terms under the ordinary language view of the Constitution. Thus, the presence of numerous legal terms strongly supports the language-of-the-law view. Indeed, it turns out that the Constitution contains many more legal terms than most people have imagined.[232]

When McGinnis and Rappaport refer to the "ordinary language view of the Constitution," they are referring to the account of technical terms offered above and previously presented in a less sophisticated form in an unpublished working paper written in 2008 before McGinnis and Rappaport had published any work on Original Meaning Originalism and before they had developed the Language of the Law Thesis.[233]

Public Meaning Originalists do not claim that the constitutional text is free of technical terms. Rather, the central idea is that Public Meaning Thesis requires

[230] *See supra* Section III.D.

[231] STORY, *supra* note 75, at § 451.

[232] McGinnis & Rappaport, *supra* note 219, at 1370.

[233] *See id.* (citing Solum, *Semantic Originalism*, *supra* note 2).

the communicative content be *publicly accessible*. Given the division of linguistic labor, publicly accessibility can be accomplished if two conditions are met: (1) the technical language is recognizable as such given the publicly available context of constitutional communication and (2) the public can access the technical meaning (e.g., by asking a lawyer or using a dictionary).[234] Some terms are obviously technical ("Letter of Marque and Reprisal") and others may have what I call "ordinary-legal sense ambiguity," having both ordinary and technical meanings.

McGinnis and Rappaport respond to this position in the following passage:

> Solum argued that when an ordinary reader confronts a patently technical term, such as "Letter of Marque and Reprisal," the reader will reason that this does not seem like a part of ordinary language. Rather, it appears to be a technical term that requires the expertise of a lawyer to understand it. In this way, the ordinary reader using ordinary language can be thought to process, if not understand, patently technical terms, as terms that require legal knowledge.
>
> But Solum's analysis applies only to patently technical terms – terms that on their face indicate that they are technical. By contrast, for the many latently technical terms in the Constitution – terms have both an ordinary and technical meaning such as the term property – his response is wholly ineffective. Since the ordinary reader will be aware only of the ordinary meaning, Solum's analysis thus does not interpret latently technical terms to have a technical meaning, even if the available evidence suggests that they have such a meaning.
>
> We are also skeptical of Solum's response as applied to patently technical terms. First, an indication on the face of the language that a term can only be understood by someone with special knowledge does not make that term part of the ordinary language or understandable to the ordinary reader. To the contrary, it suggests that the term is not part of the ordinary language and not understandable to the ordinary reader.[235]

McGinnis and Rappaport are right to observe that there is a difference between terms that have only technical meanings and those with ordinary-

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[234] The idea of a division of linguistic labor comes from Hilary Putnam. *See* PUTNAM, *supra* note 218, at 228 ("Today it is obviously necessary for every speaker to recognize water . . . but only a few adult speakers [can] distinguish water from liquids which . . . resemble[] water. In case of doubt, other speakers would rely on the judgment of these 'expert' speakers. Thus, the way of recognizing possessed by these 'expert' speakers is also, through them, possessed by the collective linguistic body even though it is not possessed by each individual member of the body . . . ."); *see also* Robert Ware, *The Division of Linguistic Labor and Speaker Competence*, 34 PHIL. STUD. 37, 37 (1978) ("I try to show that there is a much broader variety of authorities than Putnam has indicated and that their role is more diversified.").

[235] McGinnis & Rappaport, *supra* note 219, at 1367-68 (footnotes omitted) (citing Solum, *Semantic Originalism*, *supra* note 2, at 54-55).

technical meaning ambiguity.[236] But this does not entail the conclusion that ordinary folk will always be unaware of the ambiguity. The question at hand is whether the Constitution was written in a way that makes ordinary-technical ambiguities undetectable. Recall that we have already established that strong evidence points to public readership. In the normal case, the intended meaning will be the ordinary meaning, unless the context makes it clear that the technical meaning was intended.[237] Of course, it is possible that the drafters made a mistake about the detectability of the ambiguity: in that case, constitutional communication misfires and constitutional construction will be required. It is possible that the drafters were trying to "put one over" on the public: in that case, the public meaning should prevail for reasons derived from the rule of law value of publicity and the legitimacy value of transparency.[238]

There is strong evidence from the constitutional record that terms with technical and ordinary meanings were understood as having their ordinary meaning. Consider, for example, the following passage from George Mason at the Virginia ratifying convention:

> They cannot pay [the revolutionary war debt] any other way than according to the nominal value; for they are prohibited from making *ex post facto* laws; and it would be *ex post facto*, to all intents and purposes, to pay off creditors with less than the nominal sum, which they were originally promised. But the honorable gentleman [Edmund Randoph] has called to his aid technical definitions. He says, that *ex post facto* laws relate solely to criminal matters. I beg leave to differ from him. Whatever it may be at the bar, or in a professional line, I conceive that, according to the common acceptation of the words, *ex post facto* laws and retrospective laws, are synonymous terms. Are we to trust business of this sort to technical definitions? The contrary is the plain meaning of the words. Congress has no power to scale this money. The states are equally precluded. The debt is transferred without the means of discharging it. Implication will not do. The means of paying it are expressly withheld. When this matter comes before the federal judiciary, they must determine according to this constitution. It says expressly, that they shall not make *ex post facto* laws. *Whatever may be the professional meaning, yet the general meaning of* ex post facto *law, is an act having a retrospective operation.* This construction is agreeable to its primary etymology. Will it not be the duty of the federal court to say that, such laws are prohibited? This goes to the destruction and annihilation of all the citizens of the United States, to enrich a few.[239]

[236] *Id.* at 1367 (arguing that terms like "property" in the Constitution have both technical and ordinary meaning).

[237] *See supra* Section III.D.

[238] These values are discussed in Solum, The Constraint Principle, *supra* note 2 (manuscript at 54-78).

[239] 2 THE DEBATES, RESOLUTIONS, AND OTHER PROCEEDINGS IN CONVENTION ON THE

Of course, this passage is not decisive evidence that disproves the Language of the Law Thesis. What it does demonstrate, however, is that the presence of terms with both ordinary and technical legal meanings in the constitutional text was not understood at the time as inconsistent with the idea that the constitutional text was addressed to the public—and that the ordinary meanings should prevail. Moreover, such passages provide strong evidence in favor of the Public Meaning Thesis.

Thus, McGinnis and Rappaport's argument from the existence of technical terms only works if we assume that the public was not in the intended readership of the Constitution. But that is the very point at issue. In other words, their argument assumes its conclusion or "begs the question" in the narrow meaning of the phrase.[240]

McGinnis and Rappaport make another argument based on the idea that there are so many technical terms in the constitutional text that it is clear that it was written in the language of the law and not intended to be publicly accessible: "Overall we found numerous terms—sixty-two—to have at least a legal meaning. The Constitution is a short document. The ordinary language view cannot account for this result."[241] There are a total of 867 different words in the constitutional text.[242] As of this draft, I haven't done the coding, but readers of this Article can read the constitutional text: my conclusion is that neither the word composition nor the way that words are used in the text support the Language of the Law Thesis. In any event, this is an empirical question: settling the issue would require a well-designed study.

c. *The Complexity of Constitutional Structure*

The argument from complexity has a similar structure to the argument from the presence of technical language. McGinnis and Rappaport note that the Constitution has a complex structure and then observe: "A document setting

ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA ON THE 17TH OF SEPTEMBER, 1787, at 353 (Jonathan Elliot ed., Washington, Jonathan Elliot 1828) (emphasis added).

[240] McGinnis and Rappaport also make the following argument:

> Solum appears to argue that people will consult experts when they encounter a term that appears to require such expertise. But even if that practice were followed, it would not imply that the term was part of ordinary language or understandable to lay people. Thus, this argument proves too much. That lay people may consult experts to understand technical terms does not suggest that the technical terms are part of a language that has been effectively communicated to them.

McGinnis & Rappaport, *supra* note 219, at 1368 (citing Solum, *Semantic Originalism*, *supra* note 2, at 55). I hope it is now clear that this argument does not respond to my position as it is stated here.

[241] *Id.* at 1373 (footnote omitted).

[242] This number resulted from analysis of the text using Kaleberg Concordance. *See* KALEBERG CONCORDANCE, http://www.kaleberg.com/software/concord/index.html [https://perma.cc/UU5T-NTZQ] (last visited Dec. 5, 2021).

forth the powers of various actors has a strong family resemblance to many other documents written in the language of the law—from a power of attorney, to a conveyance of portions of real property, to a corporate charter."[243] Once again, McGinnis and Rappaport assume their conclusion. Complexity is not inconsistent with public accessibility. American English is publicly accessible but can be used to communicate content that is very complex. The Constitution does resemble a corporate charter in some respects, but that does not establish that it was intended to communicate its content *only* to lawyers. Unlike a corporate charter, the Constitution was widely circulated, debated in public, and ratified by a process with substantial popular participation.[244]

d. *References in the Text to "Legal" Interpretive Rules*

McGinnis and Rappaport also argue that the Constitution is written in the language of the law because it includes interpretive rules that they characterize as "legal." Here is an example:

> The Supremacy Clause contains a provision that blocks the application of a legal interpretive rule—the rule against implied repeals—that might otherwise have been applicable. After stating that the Constitution and other federal law is the supreme law of the land, the Clause provides: "[A]ny Thing in the Constitution or the Laws of any states to the Contrary notwithstanding."[245]

They make a similar argument based on the text of the Ninth Amendment:

> The Amendment provides, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." While there is disagreement about what the Ninth Amendment means, "everyone agrees that it focuses primarily on forbidding an interpretive inference: inferring from the enumeration of [certain] rights that the people do not enjoy other rights" not so enumerated.[246]

I do not understand how these examples could possibly support the Language of the Law Thesis: both provisions are easily understood without resort to technical expertise. It is true that this language is intended to have a legal effect, and it may well be true that the reason for including this language is to safeguard against a legal argument of which the public would have been unaware—although frankly this seems implausible. The Public Meaning Thesis is fully

[243] McGinnis & Rappaport, *supra* note 219, at 1377.

[244] *See* MAIER, *supra* note 70, at ix-xvi ("Debate over the Constitution raged in newspapers, taverns, coffeehouses, and over dinner tables . . . . People who never left their hometowns . . . studied the document, [and] knew it well . . . .").

[245] *See* McGinnis & Rappaport, *supra* note 219, at 1378 (citing U.S. CONST. art. VI, cl. 2) ("Some of the strongest evidence that the Constitution was written in the language of the law lies in provisions showing that the enactors believed it would be interpreted according to legal interpretive rules.").

[246] *Id.* at 1380 (quoting MCGINNIS & RAPPAPORT, *supra* note 31, at 127 (quoting U.S. CONST. art. IX)).

consistent with the Supremacy Clause and the Ninth Amendment. The comprehensibility of both provisions provides support for the Public Meaning Thesis and undermines the Language of the Law Thesis.

e. *Early Interpretive Practices*

We have already seen that there is substantial support in early judicial opinions and treatises for the Public Meaning Thesis.[247] In this Article, I cannot undertake a comprehensive survey of early American practices of constitutional interpretation and construction, but I will examine the first of the cases that McGinnis and Rappaport use in support of the Language of the Law Thesis.[248]

Holmes v. Watson[249] involved the right to jury trial under the New Jersey Constitution of 1776. Article XXII, the relevant provision, reads as follows:

> That the common law of *England*, as well as so much of the Statute Law, as have been heretofore practiced in this Colony, shall still remain in Force, until they shall be altered by a future Law of the Legislature; such parts only excepted, as are repugnant to the Rights and Privileges contained in this Charter; and that the inestimable Right of Trial by Jury shall remain confirmed as a Part of the Law of this Colony, without Repeal, for-ever.[250]

Here is the argument made by McGinnis and Rappaport:

> The Constitution guaranteed a right to jury trial but did not specify the number of people on the requisite jury. Nevertheless, the Court objected to the constitutionality of the statute, even though it would have appeared to comply with the ordinary language meaning of the term jury. While we do not have the text of the opinion, it appears that the court appealed to historical legal understandings in the law that specified twelve as the appropriate number of jurors.[251]

Given the wording of the constitutional provision (not mentioned by McGinnis and Rappaport), it is clear that *Holmes* is fully consistent with the

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[247] *See supra* Part III.

[248] *See* McGinnis & Rappaport, *supra* note 219, at 1384.

[249] There is no published report, but the case was described in a subsequent opinion as follows:

> At an early period of our government, while the minds of men were yet unbiased by party prejudices, this question was brought forward, in the case of Holmes and Walton, arising on what was then called the seizure laws. There it had been enacted that the trial should be by a jury of six men; and it was objected that this was not a constitutional jury; and so, it was held; and the act upon solemn argument was adjudged to be unconstitutional, and in that case inoperative. And upon this decision the act, or at least that part of it which relates to the six men jury, was repealed, and a constitutional jury of twelve men substituted in its place. This, then, is not only a judicial decision, but a decision recognized and acquiesced in by the legislative body of the state.

State v. Parkhurst, 9 N.J.L. 427, 444 (1802), *aff'd*, 9 N.J.L. 434 (N.J. 1828).

[250] N.J. CONST. of 1776, art. XXII.

[251] McGinnis & Rappaport, *supra* note 219, at 1384 (footnote omitted).

Public Meaning Thesis. The meaning of Article XXII was almost surely accessible to the relevant public (citizens of New Jersey in 1776): the text explicitly makes reference to the common law and it is clear that the preexisting right is "confirmed."[252] The public meaning of the text refers to preexisting law. Of course, a curious citizen might need to ask a lawyer or read a book to become well informed about the details of the common law right to jury trial, although it seems likely that the particular issue in *Holmes* (the rule that a jury consistent of twelve persons) would have been part of the fund of common legal knowledge. *Holmes* illustrates the way that the Public Meaning Thesis can accommodate specialized legal knowledge.[253] In other words, *Holmes* undermines the case for the Language of the Law Thesis.

3. Common Ground Between Original Methods and Public Meaning

Although Public Meaning Originalism rejects the Language of the Law Thesis and affirms the Public Meaning Thesis, there is substantial common ground with the original methods approach. As we have seen, there is strong evidence that the original methods of constitutional interpretation incorporated a principle that is much like the Public Meaning Thesis.[254] Public Meaning Originalism affirms that some provisions of the Constitution involve technical legal meanings and agrees with Original Meaning Originalism that the communicative content of these provisions should reflect the linguistic practices of the subcommunity of persons learned in the law.[255] To the extent that there is divergence, it may well be the case that Original Methods could be used as a method of constitutional construction for the resolution of cases and issues in the construction zone. From a sectarian perspective, Public Meaning Originalism and Original Meaning Originalism are in opposition, but ecumenical originalism emphasizes the substantial degree to which these two theories would agree on a wide range of issues.[256]

C. *Constitutional Obscurity*

We have already considered the possibility that the original public meaning of the constitutional text could diverge from the first-order communicative intentions of the drafters when we examined the arguments for the priority of public over private meaning when such divergence results from mistake or deception.[257] We now turn our attention to another possibility: failure of constitutional communication might result in constitutional obscurity—provisions of the constitutional text that altogether lack public meaning.

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[252] N.J. CONST. of 1776, art. XXII.

[253] *See* PUTNAM, *supra* note 218, at 228 (arguing that knowledge of experts regarding technical terms becomes part of collective knowledge of linguistic group).

[254] *See supra* Part IV.

[255] *See* Solum, *Semantic Originalism*, *supra* note 2, at 54-56.

[256] *See* Solum, *The Fixation Thesis*, *supra* note 2, at 9.

[257] *See supra* Part IV.

How could this happen? In the case of the unamended provisions of 1787, the drafters were skilled lawyers; their work was scrutinized by lawyer and nonlawyer[258] members of the Philadelphia Convention—a talented bunch by any standard. Nonetheless, there are mechanisms by which drafters' mistakes could make it through the convention. One such mechanism is the echo-chamber effect, especially when combined with the phenomenon of metalinguistic negotiation. These ideas might be unfamiliar; the next paragraph unpacks the terminology.

Suppose, for example, that the phrase "direct tax" did not have a clear public meaning, but that the phrase acquired a more definite sense within the deliberations of the convention through a process of metalinguistic negotiation. Members of the convention *echo* the new meaning, and through the process of echoing, the newly negotiated sense of the phrase becomes settled within a linguistic microcommunity (the Philadelphia Convention itself). In other words, the Framers might have been speaking a microdialect confined (metaphorically) to the hall in which they met.

When the constitutional text leaves the Philadelphia Convention and enters public discourse, the course of linguistic events could flow in various ways. There is a happy story: the new meaning of "direct tax" could diffuse from the Philadelphia Convention via ongoing metalinguistic negotiation by the members of the convention as they participate in public debates and discussions of the constitutional text—in newspapers, letters, public speeches, and at the ratifying conventions.[259] This process could lead to the new meaning becoming the (or "a") conventional semantic meaning of the phrase; it might be sufficient if the new meaning became one of the several standard senses of the phrase, since the constitutional context might suffice for contextual disambiguation. The happy story is that these possibilities were realized. The phrase "direct tax" could acquire a public meaning, even though the phrase itself was introduced into the text by a drafter's mistake.

But there is a tragic story as well: the new meaning of "direct tax" fails to diffuse. The phrase is contained in a relatively obscure part of the Constitution.[260] Many readers of the text might assume that the phrase was a term of art with a clear meaning for those learned in the law. Public debate and discussion of the Constitution might focus on other provisions—which were more important or more controversial. As a consequence, the attempt at metalinguistic negotiation might not *take*; the new meaning could fail to become

[258] Nonlawyers included Jacob Broome, William Leigh Pierce, Daniel Carroll, James McHenry, Elbridge Gerry, Nicholas Gilman, John Langdon, William C. Houston, William Blount, Richard Dobbs Spaight, Sr., Hugh Williamson, George Clymer, Thomas Fitzsimons, Benjamin Franklin, Thomas Mifflin, Robert Morris, Pierce Butler, James McClurg, and George Washington. *See Meet the Framers of the Constitution*, NAT'L ARCHIVES (Mar. 16, 2020), https://www.archives.gov/founding-docs/founding-fathers [https://perma.cc/9U2A-AGT9].

[259] *See* MAIER, *supra* note 70, at ix-xvi.

[260] *See* U.S. CONST. art. I, § 2, cl. 3.

the public meaning. The result would be a failure of constitutional communication. The drafters', meaning Framers', understanding of the phrase "direct tax" would not be the public meaning. The public meaning might be irreducibly ambiguous as between many possible understandings of "direct tax" based on the bare semantic content of the words "direct" and "tax." Even more disturbing, the phrase "direct tax" might have no meaning at all—becoming an empty vessel or "ink blot."

On this occasion, I am not taking a position on the question whether even a single such failure of constitutional communication actually occurred. That would require a very careful investigation of the actual circumstances of constitutional communication and linguistic facts at the time each provision of the Constitution was written. If such failures have occurred, then they require a qualification of the Public Meaning Thesis. The modified thesis would claim something like "almost all provisions of the constitutional text have public meaning, but some provisions are obscure."

Originalist constitutional theory would then need to provide an account of constitutional construction for such exceptional cases. The provision that failed to create public meaning might be rendered null and void—the "ink blot" strategy adopted by Robert Bork.[261] Or the courts might adopt the Framers' meaning of the phrase as the source for the legal content of constitutional doctrine. Or the courts might apply some general default rule—such as deference to the political branches. The choice among these possibilities is important, but these issues are beyond the scope of this Article, which is about the Public Meaning Thesis and not about a theory of constitutional construction for what are surely rare and exceptional cases.

What does seem clear is that constitutional obscurity, if it even exists, is rare and not pervasive. That fact is sufficient to redeem the Public Meaning Thesis.

D. *Deceptive Constitutional Communication*

The Framers' mistakes could be unintentional, but there is another way that public meaning could fail. It is at least theoretically possible that the Framers (or a subgroup of the Framers) engaged in deceptive constitutional communication, writing the Constitution so that it would have one meaning for the public at large but a different meaning for the political elites that would be charged with implementing the Constitution or interpreting the text as members of the future Supreme Court.

Hypothetically, let us assume that James Wilson did some of the critical drafting work for the Committee of Detail in a relatively short period of time at the very end of the convention, when many of the members of the convention were anxious to go home. It might have been possible for Wilson to engage in clever drafting that would create a gap between the meaning of the constitutional

[261] *See Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 100th Cong. 249 (1987) (statement of Robert H. Bork, J., U.S. Court of Appeals for the D.C. Circuit).

text to a casual reader and the meaning that would be revealed by a very close reading of a complex text by those who were learned in the law. For example, Wilson might have drafted the Necessary and Proper Clause in a way that would enable two distinct readings. On one reading, the Clause would give the impression that Article I created a scheme of limited "enumerated" powers—leaving the vast bulk of legislative power to the states.[262] On another reading, the reference to "all other Powers vested by this Constitution in the Government of the United States"[263] combined with the broad statement of purposes in the preamble ("promote the general welfare")[264] would give Congress plenary and virtually unlimited legislative power. Our hypothetical Wilson might have thought that the first reading would carry the day during the ratification process, but that the second reading would be available once the Federalists were in control of the new government. This would have been a deceptive strategy—creating an ambiguity with the hope that during the ratification process opponents of the broader meaning could be induced to focus instead on the narrower one.[265] Again, hypothetically, let us suppose that Wilson collaborated with Gouverneur Morris, and that the deceptive clause made it through the Committee of Style and ultimately was ratified.

Once again, we have a possible divergence between Framers' meaning and public meaning. And once again, originalism will need to take a stance on the legal effects of this divergence. Such cases must be addressed by constitutional construction—because the communicative content of the constitutional text suffers from a special kind of metalinguistic ambiguity. One obvious solution would be to say that the public meaning governs for normative reasons: the public meaning is the meaning that was ratified, whereas the alternative meaning was the product of deliberate deception. In these circumstances, the public meaning seems preferable for normative reasons of democratic legitimacy and the illegitimacy of constitution making by deception.

Consider another type of constitutional deception. Faced with an intractable disagreement about major constitutional questions, the Framers might have "kicked the can down the road" by creating ambiguous language that could be sold to different groups on the basis of inconsistent but plausible interpretations.

Hypothetically, let us imagine that the Framers dealt with the issue of enslaving people in this way—kicking the can down the road through deliberate ambiguity. Suppose that a constitution that explicitly endorsed slavery could not have been ratified in the North, but that a constitution that failed to provide protection for slavery could not have been ratified in the South. One solution to

[262] *See* U.S. CONST. art. I, § 8 (describing legislative branch powers).

[263] *Id.* art I, § 8, cl. 18.

[264] *Id.* pmbl.

[265] This hypothetical is inspired by the work of John Mikhail on the Necessary and Proper Clauses. *See* John Mikhail, *The Necessary and Proper Clauses*, 102 GEO. L.J. 1045, 1096-1103 (2014). The hypothetical is not advanced as a representation of Mikhail's more subtle and complex view.

this problem might have been to employ language that could be read in two ways. "Persons bound to service" might be slaves or they might be bonded servants and apprentices. In the South, that constitution could be sold as a pro-slavery document; in the North, that constitution could be defended as neutral or ambiguous on the question of slavery.

In that situation, once again, that constitution would lack a clear public meaning. Or put another way, the text will have two different and inconsistent public meanings (and two Framers' meanings as well). And once again, originalism must make a normative choice. One possibility is that the deliberate ambiguity should be read as a delegation to the future. The issue of enslaving people would need to be resolved by the new government, but that resolution might be provisional. The Constitution might be read one way by the First Congress (allowing slavery to persist) but another way at some indefinite point in the future (when slavery would eventually be abolished). Originalists might endorse this solution as a reasonable response to irreducible ambiguity. Or it might be argued that the initial resolution of the ambiguity by the First Congress "liquidated" the ambiguity, fixing the meaning through historical practice. As a matter of theory, either solution is provided by construction and not interpretation.

The bottom line is that the actual or possible existence of deceptive constitutional communication is not a decisive objection to the Public Meaning Thesis. Of course, it would be a very serious problem if it could be shown that constitutional deception was pervasive—that the whole document from top to bottom was one big fraud. But this version of objection seems far-fetched. And no one has provided the evidence and argument that would be necessary to establish this version of the objection.

E. *Linguistic Diversity*

The account of public meaning on offer here seems to assume that conventional semantic meanings were shared by a single linguistic community at the time each provision of the Constitution was framed and ratified. But in fact, there was considerable linguistic diversity. Many Americans did not speak English; there were substantial areas of the country where the dominant language was German or Dutch and it seems likely that there were various regional dialects.[266]

The fact of linguistic diversity per se does not pose a problem for the Public Meaning Thesis so long as there was general awareness of its nature. German or Dutch speakers would need to read the Constitution in translation—and in fact translations in those languages were circulated.[267] The speakers of regional dialects would need to take linguistic variation into account when reading the Constitution, but this would have been a familiar problem, encountered when

[266] On the role of German and Dutch in the ratification process, see Mulligan et al., *supra* note 43, at 3-4, 32 & n.137.

[267] *See id.* at 3.

reading letters, newspapers, contracts, and many other texts. Speakers of regional dialects could understand the Constitution as long as they had access to the version of English used in the constitutional text—perhaps this was the English of Mid-Atlantic educated speakers or the English of educated speakers in coastal communities throughout the United States. The fact of linguistic diversity does not establish that constitutional communication failed.

Linguistic diversity would pose a problem if there were regional or cultural variations that created metalinguistic ambiguity that escaped the attention of the Framers. This scenario seems unlikely. The Convention was geographically diverse, and to the extent that linguistic diversity was actually a barrier to communication, the Framers would have been aware of the problem (intuitively if not consciously). The questions raised by the linguistic diversity objection can only be answered definitively by historical linguistics, but such an inquiry is outside the scope of this Article.

F. *The Nature-of-Law Objection*

Recently, Professor Jonathan Gienapp has raised an objection to originalism that I shall call the "Nature-of-Law Objection."[268] The gist of the objection, as I understand it, is that the founding generation's understanding of the nature of law was based on natural law theory and not legal positivism.[269] Gienapp does not explicitly address the Public Meaning Thesis, but the implications of his argument for that thesis can be reconstructed as follows: because originalists have a positivist theory of law, they do not understand that the Original Public Meaning of "the Constitution" was not its true content. Instead, given their understanding of "the Constitution" as that phrase was used in 1787, that content was fundamentally a function of principles of natural law discoverable by right reason. Hence, the Public Meaning Thesis is false.

Gienapp's argument is complex and articulated using the vocabulary of the philosophy of law and legal theory in a nonstandard way. For this reason, his argument is difficult to unpack. In addition, Gienapp never provides a precise account of how the founding generation would have translated its understanding of "the Constitution" into legal content—or what range of translation methods would have been in play. Moreover, Gienapp does not direct his argument at any particular version of originalist theory, picking and choosing among many diverse originalists when he presents the generic originalist position. This response focuses on Public Meaning Originalism as articulated in this Article.

We can begin with the following passage:

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[268] *See* Jonathan Gienapp, *Written Constitutionalism, Past and Present*, 39 LAW & HIST. REV. 321, 322 (2021) ("A careful look at the original Constitution and the history surrounding its creation shows that the Constitution was not, at first, clearly understood to have possessed many of the defining features that originalists often assume it must have.").

[269] *See id.* at 324 ("Founding-Era constitutionalists by and large were not positivists. They tended to think that much of the law was 'out there'—like the principles of mathematics or natural philosophy—awaiting discovery through reason and observation.").

> Of the various elements that define the orthodox originalist conception of the Constitution, none is seemingly more essential than the idea that the Constitution is an exclusively written text. Every other originalist assumption, in one way or another, seems to depend on it.[270]

Before we proceed to Gienapp's discussion of the implications of this assumption, we need to clarify its meaning. It is not clear what Gienapp means by "the Constitution" in this passage. Gienapp might mean by "the Constitution" to refer to the document itself—the constitutional text that is preserved in the national archives. Then, he is correct that originalists believe that the written text of the Constitution is, in fact, a written text, but this belief is not distinctive to originalism: no one thinks that the document itself is not a written text.

Gienapp might be asserting that originalists believe that the written constitutional text itself fully determines the legal content of constitutional doctrine. In other words, he could be using "the Constitution" in the sense in which it refers to the legal content of constitutional norms. If that is his assertion, that originalists believe that the text alone provides the content of the norms, it is clearly incorrect for two reasons. First, the constitutional text, by itself, does not fully determine its communicative content. That content is determined by both semantics and pragmatics. The full communicative content is not just the literal meaning of the text; that meaning is sparse indeed. To derive the full communicative content, context must be taken into account, including contextual disambiguation and pragmatic enrichment.[271] In other words, the communicative content of the constitutional text is heavily dependent on context.[272] So, "the Constitution" in this alternative sense includes text and context.

Second, the communicative content of the constitutional text underdetermines the legal content of constitutional doctrine. This underdeterminacy results from the fact that the text contains provisions that are vague or open-textured and may

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[270] *Id.* at 322. *See generally* John Mikhail, *Does Originalism Have a Natural Law Problem?*, 39 LAW & HIST. REV. 361 (2021) (discussing Gienapp's article). I am grateful to Professor Mikhail for discussion of Gienapp's article.

[271] *See supra* Part II. Gienapp recognizes that originalists insist on the role of context in the production of meaning but then states: "None of these qualifications, however, change the basic fact that, for orthodox originalists, constitutional meaning is exclusively accessed through and derived from the constitutional text." Gienapp, *supra* note 268, at 326. But if meaning is a function of context and text, then it follows that constitutional meaning is *not* exclusively accessed through and derived from the text. Likewise, when Gienapp states that originalists believe that the "meaning of the words themselves, and nothing else, bind us today," he is clearly mistaken at least with respect to Public Meaning Originalism. *See id.* at 328. It is the communicative content (produced by text and context) and not "the words themselves, and nothing else" that ought to constrain constitutional practice. *See id.*

[272] Solum, *Communicative Content and Legal Content*, *supra* note 2, at 502-03 ("The framers and ratifiers of the United States Constitution faced a communicative context that created distinctive constraints on successful communication . . . . [T]he success conditions for constitutional communication require[d] reliance on . . . additional contextual information provided by the publicly available context of constitutional communication.").

also contain provisions that are irreducibly ambiguous, have gaps, or are contradictory.[273] This entails that many constitutional cases and issues are in the construction zone, where something other than the communicative content of the constitutional text will determine the legal content of constitutional doctrine. Hence, "the Constitution" understood as the legal content of constitutional doctrine, is produced by constitutional construction and not limited to the communicative content of the text. Therefore, Gienapp is clearly wrong about what Public Meaning Originalists believe.

Gienapp expresses his point a different way in the following passage:

> Originalists could redeem [their] jurisprudential claim if, and *only* if, they concede that when they say "the original Constitution" they in fact mean a stipulated modern legal fiction that should not be confused with the actual eighteenth-century Constitution that real people made, ratified, and debated at an actual moment in time.[274]

The phrase "the original Constitution" is ambiguous in the way that we have just discussed. The constitutional text is not a fiction. That text was "made" (drafted) by real people, ratified by real people, and debated by real people. The idea of legal content of constitutional doctrine that is consistent with the constitutional text is an abstract entity, but it is not fictional. The original public meaning of the constitutional text is not a fiction: meanings (communicative contents) are real. The Public Meaning Thesis can be redeemed without "a stipulated modern legal fiction."[275] Gienapp's argument to the contrary is clearly unsound, once we unpack the ambiguities in its formulation.

So, Public Meaning Originalists do believe that the Constitution is an "exclusively written text"[276] in the sense in which that statement is trivially true, but they do *not* believe this proposition if by "the Constitution," Gienapp means something like "the legal content of constitutional law."

Because Gienapp's argument as stated in the passages quoted above is so obviously unsound, it seems likely that Gienapp was trying to say something else entirely. Here is a passage from the next paragraph, where Gienapp suggests that originalists hold the following "*conception* of writtenness"[277]:

> What matters most is not that originalists emphasize the Constitution's writtenness, but rather the *conception* of writtenness that they attach to it. Almost across the board, they see the Constitution in avowedly positivist terms: written law that was intentionally constructed, enacted, and commanded by authorized lawmakers.[278]

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[273] *See* Solum, *Originalism and Constitutional Construction*, *supra* note 2, at 453.

[274] Gienapp, *supra* note 268, at 359.

[275] *See id.*

[276] *Id.* at 322.

[277] *Id.*

[278] *Id.* at 322-23.

Here, Gienapp appears to have made a common conceptual error by confusing "legal positivism" with "legal formalism." We can unpack Gienapp's mistake in three steps. First, we distinguish legal positivism from legal formalism. Second, we will assume that Gienapp means what he says: originalists assume legal positivism as a general theory of the nature of law and that this undermines originalism as a theory. On this interpretation the argument cannot succeed. Third, we assume that Gienapp actually meant to assert that originalists are legal formalists: Gienapp's argument fails on this alternative interpretation as well.

Step One: Legal Positivism and Legal Formalism. Let's begin with stipulated definitions:

> *Legal Positivism*: Legal positivism is the view that legal content is determined by social facts and not by moral facts. Legal positivism is a view of the nature of law and is usually contrasted with natural law theory.[279]
>
> *Legal Formalism*: Legal formalism is the view that the adjudication of legal disputes should be determined by preexisting sources and not by the policy preferences or moral views of adjudicators. For example, the legal content of constitutional doctrine should be determined by the communicative content of the constitutional text and precedent—and not by judges' views about what constitutional doctrines are best. Legal formalism is a normative theory of adjudication and is usually contrasted with legal realism or legal instrumentalism.[280]

So defined, it is clear that legal positivism does not entail legal formalism. Legal positivists can (and many do) reject legal formalism.[281] Thus, a legal positivist can maintain that judges should not be bound by the constitutional text

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[279] There are many complications that are elided by these definitions, including the important distinction between exclusive and inclusive legal positivists. *See* Jules L. Coleman, *The Architecture of Jurisprudence*, 121 YALE L.J. 2, 54 (2011) ("[I]nclusive legal positivism rejects the idea that normative or moral facts cannot contribute to the law's content, but it does not endorse thereby the claim that law and morality are necessarily connected. . . . The deep point about exclusive legal positivism is that it holds that moral facts necessarily cannot contribute to legal content precisely because (among other reasons), at a more fundamental level, law and morality are necessarily connected.").

[280] *See* Lawrence B. Solum, *Legal Theory Lexicon 043: Formalism and Instrumentalism*, LEGAL THEORY LEXICON (Jan. 26, 2020), https://lsolum.typepad.com/legal_theory_lexicon/2005/05/legal_theory_le_1.html [https://perma.cc/5LE2-ZKCE] (contrasting legal formalist emphasis on consistent application of the law through rule-like decision-making with legal realist perspective that legal rules should be applied to be consistent with their purposes).

[281] *See, e.g.*, Leslie Green & Thomas Adams, *Legal Positivism*, STAN. ENCYC. OF PHIL. (Dec. 17, 2019), https://plato.stanford.edu/entries/legal-positivism/ [https://perma.cc/RD9L-TG5S] ("Lawyers often use 'positivist' abusively, to condemn a formalistic doctrine according to which law is always clear and, however pointless or wrong, is to be rigorously applied by officials and obeyed by subjects. It is doubtful that anyone ever held this view, but it is in any case false and has nothing to do with legal positivism.").

but should instead create constitutional doctrine on the basis of considerations of policy and principle. The content of constitutional law would then depend on a social fact (judicial lawmaking) and not on what is really required by morality. Similarly, a positivist can believe that common law judges engage in interstitial lawmaking. In both cases, legal content is determined by a social fact (i.e., what judges decide).

Step Two: The Legal Positivist Interpretation of Gienapp's Argument. On the positivist interpretation, Gienapp's argument fails as a critique of Public Meaning Originalism for several reasons. If legal positivists are correct, then all law, irrespective of the historical period in which it was situated, was determined by social facts. Legal positivism is a claim about what law actually is; positivists have a theory of the nature of law. Legal positivism is not a claim about what the founding generation believed about the nature of law. From the perspective of legal positivism, the Founders' beliefs about the nature of law could well have been mistaken, but their false beliefs would not have changed either the nature or content of the law.

Thus, to the extent that Gienapp believes that Public Meaning Originalism embraces legal positivism as a theory of the nature of law, the charge that it is "anachronistic"[282] is a conceptual mistake. It is akin to arguing that we should use eighteenth-century chemistry to determine the cause of an explosion in 1787. Inquiry into the founding generation's beliefs about the nature of law is interesting and valuable. But it is simply a fallacy to equate their beliefs about the nature of law with the actual nature of law in 1787. Gienapp does not assert that natural law theory is true now; his claim is about the beliefs of the founding generation.

Moreover, putting aside the natural law rhetoric of the founding generation, many of the particular beliefs that Gienapp attributes to the late eighteenth-century Americans are wholly consistent with contemporary legal positivism. Here is an example:

> What had been customarily accepted—since time immemorial—was presumptively lawful. "[C]ustom," Wilson explained, carried the mark of "internal evidence, of the strongest kind, that the law has been introduced by common *consent*," and, moreover, underscored "that this consent rests upon the most solid basis—experience as well as opinion." Long usage was considered the best evidence of consent. But custom was also considered the best evidence of what reason required.[283]

Statements like this are easy to explain from a positivist perspective. The content of custom is a social fact. Hence, custom as a source of law is fully consistent with the legal positivist claim that legal content is determined by social facts. The remainder of the argument is a claim about the moral

[282] Gienapp, *supra* note 268, at 324 ("Originalists' understanding of constitutional writtenness, however, is anachronistic, a species of modern constitutional thinking that they unwittingly and uncritically impose on the eighteenth century.").

[283] *Id.* at 340 (footnotes omitted).

desirability of law that is consistent with custom: custom is evidence of consent and is consistent evidence of what right reason requires. These are claims about moral epistemology. Legal positivism itself takes no stand on the objectivity of morality and has no stance on the question of whether customary law is presumptively good.

The flip side of Gienapp's argument that originalists are legal positivists is his assertion that the founding generation embraced natural law. This claim is correct: modern legal positivism mostly arose after the U.S. Constitution was drafted in 1787.[284] But this does not entail the conclusion that the communicative content of the constitutional text was not intended to constrain constitutional actors. Many constitutional provisions establish structures and procedures. No one thinks that bicameralism and presentment or the composition of the House of Representatives and the Senate are determined by right reason. Likewise, some provisions of the Constitution refer to preexisting legal rules. For example, the Seventh Amendment provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.[285]

This common-law "right of trial by jury" cannot be derived from right reason, which is consistent with a variety of modes of trial. Rather, the legal norm is found in "the rules of the common law." The rules of the common law are not statutes enacted by a legislature, but from a positivist perspective, that does not mean that they are not law. The legal content of common law rules is derived from judicial decisions or customs—and these are social facts, not moral facts.

Even with respect to general and abstract provisions, natural law theory allows for the precisification of right reason via elaboration in the form of enactments: this is classic "determinatio" of the natural law tradition.[286] Thus, from a natural law perspective, the legal content of constitutional law (what Gienapp calls "the Constitution") could be the communicative content of a constitutional provision that provides the determinatio (precisification) of a natural right.

There is another possibility: that Gienapp is asserting that the framing generation embraced the natural law principle *lex iniusta non est lex*.[287] This would entail that seriously unjust constitutional provisions are not legally valid

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[284] *See* Green & Adams, *supra* note 281.

[285] U.S. CONST. amend. VII.

[286] This theory is described and discussed by the foremost modern natural lawyer, John Finnis, in his monograph. JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 289 (Paul Craig ed., 2d ed. 2011); *see also* JOHN FINNIS, *Natural Law Theories*, STAN. ENCYC. OF PHIL. (June 3, 2020), https://plato.stanford.edu/archives/sum2020/entries/natural-law-theories/ [https://perma.cc/4YR6-G774].

[287] For an explanation of the principle of *lex iniusta non est lex*, see Finnis, *supra* note 286, at 363-66 (describing the principle in relation to legal positivism).

and hence are not part of the legal content of constitutional doctrine—"the Constitution" in Gienapp's words. This idea is not discussed in Gienapp's article, and for that reason, I do not discuss it further on this occasion.

In sum, natural law theory does not reject the idea that, in a wide variety of instances (but not all), legal content is determined by the communicative content of enactments. Hence, even a natural conception of "the Constitution" would overlap substantially with and require consideration of the Original Public Meaning of the constitutional text.

Step Three: The Legal Formalist Interpretation of Gienapp's Argument. There is, however, another interpretation of Gienapp's argument. Perhaps his critique is based on the claim that originalists are legal formalists. Gienapp's article does not use the phrases "legal formalism" or "legal realism." But Gienapp's version of legal positivism suggests that he actually means to refer to legal formalism. The following passage is especially illuminating:

> There are different ways to adopt a positivist orientation toward law, however. One standard way is to believe that law is whatever authorized lawmakers *formally* enact—which thus places special emphasis on the written commands of those particular legal authorities. . . . [T]his kind of positivism . . . is the sense emphasized here.[288]

No contemporary positivist should think that the legal content is fully determined by enacted constitutional provisions, statutes, regulations, and rules. That view is obviously false. Judicial decisions articulate legal norms that are nonidentical to the communicative content of constitutional and statutory texts, and these norms are "law" in the sense that law is meant by legal positivists. Legal formalism, on the other hand, does embrace a view that is similar to (but importantly different from) Gienapp's understanding of legal positivism.

Legal formalism is best understood as a general normative theory of law. The core idea of legal formalism is that judges should decide cases and announce doctrines (legal norms articulated in judicial opinions) on the basis of preexisting legal sources and not on the basis of their own views about what will produce good consequences or comply with the requirements of justice.

Thus, Gienapp's claim might be that originalists are legal formalists but that the members of the framing generation were not. If so, then Gienapp's claim fails to clash with Public Meaning Originalism.[289] Public Meaning Originalism does endorse a limited form of legal formalism via the Constraint Principle. But the Constraint Principle is not a historical claim about the beliefs of the founding generation. Instead, it is a normative claim made in the present based on facts as they are today and political morality as it is now understood. Even if the founding generation did not embrace some approximation of the Constraint Principle, that fact does not provide a normative argument for a version of living

[288] Gienapp, *supra* note 268, at 323 n.3 (emphasis added).

[289] *See supra* text accompanying note 29 (describing how constraint principle circumscribes the legal content of constitutional doctrine to constitutional text's original meaning).

constitutionalism that would have judges decide constitutional cases on the basis of right reason. Just as we are not today bound by eighteenth-century theories of the nature of law, we are not bound by the founding generation's general normative views about the law.

I need to make it clear that I am *not* endorsing the claim that the founding generation rejected all the plausible versions of legal formalism. And it is certainly not the case that they embraced modern legal realism or legal instrumentalism—although I cannot demonstrate that in this Article. Because Gienapp does not discuss the actual content of the Constraint Principle, he does not attempt to show that the Framers rejected it.[290] The point made in the immediately prior paragraph assumes, arguendo, that Gienapp's claim is correct. Moreover, Gienapp does not offer a rigorous and precise account of the legal content of "the Constitution" on the conception he attributes to the founding generation. The consequence is that the implications of his argument remain a mystery.

Our investigation of the Nature-of-Law Objection will conclude with three examples that illustrate the depth of Gienapp's misunderstandings of the roles that positivism and formalism play in Public Meaning Originalism.

Example One is Gienapp's discussion of *Holmes*, discussed above, about which Gienapp writes: "In New Jersey in 1780, in *Holmes v. Walton*, the state supreme court struck down a statute permitting a six-man jury, no matter that nothing written in the state's constitution required otherwise, on the basis that it was 'contrary to the constitution, practices and laws of the land.'"[291]

But Gienapp is clearly wrong about the communicative content of the New Jersey Constitution, which provided that an "inestimable Right of Trial by Jury shall remain confirmed as a Part of the Law of this Colony."[292] The "right of trial by jury" referred to existing common law right which required twelve jurors. Gienapp's mistake is to equate positivism and formalism (and originalism) with a literalism that limits communicative content to what is explicitly stated. The decision in *Holmes* is fully consistent with the communicative content of the constitutional text.[293] A similar point could be made about the Seventh Amendment, as discussed above.[294]

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[290] Gienapp does mention the principle in passing, saying "what should constrain is . . . the 'linguistic meaning' of the 'constitutional text.'" Gienapp, *supra* note 268, at 327. The term "linguistic meaning" is not correct because it does not take contextual disambiguation and pragmatic enrichment into account.

[291] *Id.* at 346 (quoting Austin Scott, Holmes vs. Walton*: The New Jersey Precedent*, 4 AM. HIST. REV. 456, 458 (1899)).

[292] N.J. CONST. of 1776, art. XXII.

[293] *See supra* Section II.B.1.e (discussing Public Meaning Originalist explication of *Holmes*).

[294] *See supra* text accompanying note 285.

Example Two is provided by Gienapp's citation to Professor Jud Campbell's important article, *Natural Rights and the First Amendment*[295] as support for his position. Here is how Campbell summarizes his argument:

> This Article argues that Founding Era elites shared certain understandings of speech and press freedoms, as concepts, even when they divided over how to apply those concepts. In particular, their approach to expressive freedom was grounded in a multifaceted understanding of natural rights that no longer survives in American constitutional thought. Speech and press freedoms referred, in part, to natural rights that were expansive in scope but weak in their legal effect, allowing for restrictions of expression to promote the public good. In this respect, speech and press freedoms were equivalent concepts with highly contestable implications that depended on calculations of the public good. But expressive freedom connoted more determinate legal protections as well. The liberty of the press, for instance, often referred specifically to the rule against press licensing, while the freedom of speaking, writing, and publishing ensured that well-intentioned statements of one's views were immune from governmental regulation. In this respect, speech and press freedoms carried distinct meanings. Much of our modern confusion stems from how the Founders—immersed in their own constitutional language—silently shifted between these complementary frames of reference.[296]

Gienapp cites Campbell for the statement: "Revolutionary Americans thought this way about the sources and content of fundamental law because, like so many others in the eighteenth century, they understood law in strikingly non-positivist terms."[297] Campbell's article says no such thing: the words "positivism" and "positivist" appear nowhere in the article. Campbell makes an impressive argument that the words of the rights in the First Amendment were understood in light of natural rights theory[298] and hence that the text of the First Amendment should be understood as communicating content that is substantially different from modern First Amendment doctrine.[299] That content included rights that were broad in scope but weak in effect, plus more specific prohibitions,

[295] Gienapp, *supra* note 270, at 339 n.67 (citing Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 290-94 (2017)).

[296] Campbell, *supra* note 295, at 246.

[297] Gienapp, *supra* note 268, at 339 (citing Campbell, *supra* note 295, at 290-94).

[298] Perhaps Gienapp understands "natural rights" and "natural law" as equivalent. On the distinction between these two ideas, see Randy E. Barnett, *Getting Normative: The Role of Natural Rights in Constitutional Adjudication*, 12 CONST. COMMENT. 93, 107-08 (1995) ("[W]hereas natural law assesses the propriety or *ethics* of individual conduct, natural rights assesses the propriety or *justice* of restrictions imposed on individual conduct.").

[299] Importantly, beliefs about natural rights theory can play a role in determining the communicative content of a constitutional provision that recognizes preexisting rights. This fact does not entail the conclusion that "natural rights" theory is true and correct.

including a rule against press licensing.[300] Indeed, Campbell's article shows how Public Meaning Originalism can incorporate thick eighteenth-century ideas—an implication that is directly contrary to Gienapp's central thesis.

Example Three is provided by Gienapp's use of cherry-picked quotations from[301] and citations to[302] Randy Barnett. Gienapp's treatment of Barnett is illustrative of a larger problem in Gienapp's attempt to criticize a generic originalism without any serious analysis of what commitments almost all originalists share and what differences divide them. Read fairly, Gienapp represents Barnett as a generic originalist—and hence as a "legal positivist" (whatever that means) who is insufficiently attentive to the role of natural law and natural rights in the framing era and believes that the founders thought that all of the legal content of constitutional doctrine was explicit in the constitutional text. Anyone familiar with Barnett's work would find this representation to be utterly implausible and a gross misrepresentation of his position. Barnett is famous for his theory of the role of natural rights in the Constitution and for an interpretation of the Ninth Amendment that argues that "the rights retained by the People" referred to a robust set of natural rights.[303] There may be originalists who still believe that the Ninth Amendment is like an "inkblot,"[304] but Barnett is not one of them.

The three examples illustrate the deep problems in Gienapp's understandings of both legal positivism and contemporary originalist theory. If "the past is a foreign country"[305] to many contemporary lawyers, judges, and legal scholars, so too contemporary legal theory seems to be a distant planet to many historians. There is much more to be said about Gienapp's rich and deeply interesting article. For the purposes of this Article, the important point is that the Nature-of-Law Objection in no way undermines the Public Meaning Thesis.

CONCLUSION

The communicative meaning of the constitutional text is best understood as its public meaning—the Public Meaning Thesis. The case for the thesis is made from within originalist constitutional theory with the aid of the philosophy of

[300] Campbell, *supra* note 295, *passim*.

[301] *See, e.g.*, Gienapp, *supra* note 270, at 327-28 (quoting BARNETT, *supra* note 20, at 108).

[302] *See, e.g.*, *id.* at 325 n.10, 326 n.12, 326 n.14, 326 n.15, 328 n.24, 331 n.37, 356 n.140, 359 n.144.

[303] Indeed, this is a central claim of BARNETT, *supra* note 20, at 235 (citing U.S. CONST. amend. IX) (arguing that Ninth Amendment's phrasing "was a reference to the natural or liberty rights that are retained by the people when forming a government"). Chapter Nine explicates Barnett's theory of the Ninth Amendment. Chapters Two and Three provide his theory of natural rights. Gienapp does not discuss originalist analysis of the Ninth Amendment in his article, but does cite the book three times.

[304] For the origin of the "inkblot" analogy to the Ninth Amendment, see *Nomination of Robert Bork*, *supra* note 261, at 249.

[305] *See generally* DAVID LOWENTHAL, THE PAST IS A FOREIGN COUNTRY (1985) (describing how the past influences present life).

language and theoretical linguistics. Once we understand the way communication works in ordinary cases, we can see that communication to the public must rely on *public meaning* if it is to be successful. The intended readers of the Constitution of the United States were the citizens of the United States, "We the People."[306] The fact that the meaning of the Constitution was intended to be public was recognized early in American history and was manifested in the public nature of the ratification process. There are caveats and possible exceptions, but the general implication of these facts is that the meaning of the constitutional text is a function of the conventional semantic meanings of the words and phrases as they are enriched and disambiguated by the public context of constitutional communication. In unusual cases, there can be divergence between the meaning of constitutional provisions that were intended by its Framers and public meaning. In such cases, Public Meaning Originalism holds that the content communicated to the public should govern for reasons grounded in the rule of law and legitimacy.

The Public Meaning Thesis is only part of the full justification for Public Meaning Originalism. Much work remains to be done. Nonetheless, important parts of the full justification are in place. The Fixation Thesis holds the public meaning of the constitutional text was fixed at the time each provision was framed and ratified. The Constraint Principle requires that constitutional practice be consistent with, fully expressive of, and fairly traceable to the original public meaning of the constitutional text. Together, these three ideas support the proposition that judges and public officials should be bound by the original public meaning of the constitutional text.

[306] U.S. CONST. pmbl.