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The Interpretation/Construction Distinction in Constitutional Law: Annual Meeting of the AALS Section on Constitutional Law: Introduction

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Symposium

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INTRODUCTION

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One of the most interesting developments in the constitutional theory of new originalism is its exploration of the distinction between interpretation and construction in constitutional law. Within this framework, "interpretation" refers to the process of determining a text's linguistic meaning, and "construction" refers to the process of giving the text legal effect.[1] The distinction plays out in the new originalist approach to the Constitution as follows. The defining characteristic of new originalism is its argument that the original public meaning of the Constitution's text should control its interpretation.[2] Yet new originalists do not contend that the Constitution's original public meaning is capable of resolving every constitutional question.[3] The Constitution's provisions are written at varying levels of generality. When the original public meaning of the text establishes a broad principle rather than a specific legal rule,

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1. Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 95–96 (2010).

2. The "old originalism," by contrast, treated the original intentions of the Constitution's drafters as the gauge of the Constitution's meaning. For accounts of new originalism, see Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611 (1999); Lawrence B. Solum, District of Columbia v. Heller *and Originalism*, 103 NW. U.L. REV. 923 (2009); Keith Whittington, *The New Originalism,* 2 Geo. J.L. & Pub. Pol'y 599 (2004).

3. *See* Barnett, *supra* note 2, at 645 ("Due to either ambiguity or generality, the original meaning of the text may not always determine a unique rule of law to be applied to a particular case or controversy.").

interpretation alone cannot settle a dispute.[4] In that event, the need for construction arises.[5] The First Amendment is a classic example. As Larry Solum observes, that amendment "provides for 'freedom of speech' and forbids its 'abridgement,' but this does not create a bright line rule, and as a consequence most of the interesting work in free speech doctrine must be done by construction rather than interpretation."[6] Many, though not all, new originalists accept constitutional construction as a means of dealing with constitutional ambiguity and vagueness.[7]

4. Old originalists often relied heavily upon the framer's expected applications to resolve questions occasioned by ambiguity or vagueness. *See* Whittington, *supra* note 2, at 603 (describing the beliefs of old originalists in this regard). New originalists largely reject that approach. *See*, *e.g.*, Barnett, *supra* note 2, at 622–23 (distinguishing between "semantic" originalism and "expectations" originalism (*citing* Ronald Dworkin, *Comment*, in ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (Amy Gutman ed., 1997)); Whittington, *supra* note 2, at 610–11 (asserting that the founders' expectations about how a constitutional provision would be applied do not control the determination of that provision's meaning, for the "founders could be wrong about the application and operation of the principles that they intended to adopt"). *But see* John O. McGinnis & Michael Rappaport, *Original Interpretive Principles as the Core of Originalism*, 24 CONST. COMMENT. 371, 378–82 (2007) (contending that original expected applications can play an important role in the determination of the Constitution's original public meaning).

5. *See* KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, & JUDICIAL REVIEW 7 (1999) ("Regardless of the extent of judicial interpretation of certain aspects of the Constitution, there will remain an impenetrable sphere of meaning that cannot be simply discovered. The judiciary may be able to delimit textual meaning, hedging in the possibilities, but after all judgments have been rendered specifying discoverable meaning, major indeterminacies may remain. The specification of a single governing meaning from these possibilities requires an act of creativity beyond interpretation . . . . This additional step is the construction of meaning."). Solum contends that insofar as a text's linguistic and legal meaning conceptually differ and construction involves giving a text legal effect, construction technically occurs even when a text is precise. Solum, *supra* note 1, at 102 n.18 and accompanying text. Nonetheless, Solum concedes that "[c]onstruction . . . grabs our attention in cases in which the linguistic meaning of a text is vague."). *id.* at 106.

6. Lawrence B. Solum, *A Reader's Guide to Semantic Originalism and a Reply to Professor Griffin* (June 19, 2008) (unpublished manuscript, *available at* http://papers.ssrn.com/abstract=1130665).

7. John McGinnis and Michael Rappaport have been the most vocal dissenters to what they describe as "constructionist originalism." *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, 752 (2009). Whether courts—as opposed to political actors—can legitimately engage in constitutional construction is a distinct question, but also a point of disagreement among originalists. Some—for example, Jack Balkin, Randy Barnett and Larry Solum—see constitutional construction as central to judicial review. S*ee* Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U.L. REV. 549 (2009); RANDY BARNETT, RESTORING THE LOST CONSTITUTION (2003); Solum, *supra* note 2. Others see constitutional construction as primarily the province of the political branches. *See*, *e.g.*, Michael Stokes Paulsen, *How to Interpret the Constitution (and How Not To)*, 115 YALE L.J. 2037, 2057 (2006) (implicitly rejecting judicial construction, at least in any strong form, by arguing that judges should defer to the political branches when the Constitution's meaning is "indeterminate (or

The new originalist move toward the interpretation-construction distinction has opened space for agreement between originalists and nonoriginalists. The old originalism was not known for an emphasis upon the role of factors such as values, purposes and precedent in the exercise of judicial review.[8] But insofar as constructing constitutional doctrine requires consideration of factors other than the text, it invites reliance upon some of the interpretive modalities that originalism had traditionally been understood to de-emphasize or even exclude.[9] The existence of this "construction zone"[10] has prompted some self-proclaimed "living constitutionalists" to defect to originalism on the rationale that the two theories are not, in fact, polar opposites.[11]

Originalism's embrace of this two-function model of constitutional decisionmaking also opens potential common ground for originalists and those nonoriginalists who employ a similar model. At roughly the same time that some new originalists began to focus on the interpretation-construction distinction,[12] some leading nonoriginalist scholars, spurred by

under-determinate) as to the specific question at hand"); KEITH WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 15 & 16 n.43 (1999) (not denying some role for the judiciary in constructing the Constitution, but emphasizing the primary role of the political branches in undertaking what he describes as an essentially political activity).

8. *See* Whittingon, *supra* note 2, at 600–03 (describing the concern of early originalists about decisions made according to subjective value choices and their related resistance to Warren Court precedent).

9. Philip Bobbit identifies six "modalities" of constitutional argumentation: historical, textual, structural, doctrinal, ethical, and prudential. *See* PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 12–22 (1991). New originalists do not deny the relevance of these modalities even at the point of determining the Constitution's original public meaning. *See* Whittington, *supra* note 2, at 611 n.59 ("Certainly originalists would be willing to draw inferences based on the constitutional structure, for example, or employ arguments based on precedent, though such arguments would ultimately be harnessed to some claim about the original meaning of the Constitution."). Yet insofar as the text recedes in importance at the stage of construction, those modalities other than original meaning of the text, which are the ones that nonoriginalists tend to emphasize, play a larger role. *Cf.* WHITTINGTON, *supra* note 7, at 6 (asserting that in the process of constitutional construction, "[s]omething external to the text—whether political principle, social interest, or partisan consideration—must be alloyed with it in order for the text to have a determinate and controlling meaning within a given governing context.").

10. This phrase belongs to Larry Solum. Solum, *supra* note 6, at 6.

11. *See*, *e.g.*, Balkin, supra note 7, at 551 (arguing that "original meaning originalism and living constitutionalism are not only not at odds, but are actually flip sides of the same coin."); Barnett, *supra* note 2, at 617–20 (discussing how the new originalism accommodates the values of political progressives).

12. Keith Whittington is credited with launching discussion of the interpretation/construction distinction in the new originalist literature. *See* WHITTINGTON, *supra* note 5; WHITTINGTON, *supra* note 7.

Richard Fallon's *Foreword* in the 1997 Harvard Law Review,[13] began writing about the distinction between interpretation and implementation in constitutional law. Fallon pointed out that while we talk about the Court engaging in "constitutional interpretation," much constitutional doctrine does not even purport to interpret the Constitution's "meaning." He argued that the Court's practice in this regard is reflective of the fact that, "[i]dentifying the 'meaning' of the Constitution is not the Court's only function. A crucial mission of the Court is to implement the Constitution successfully. In service of this mission, the Court often must craft doctrine that is driven by the Constitution, but does not reflect the Constitution's meaning precisely."[14] Others, including Mitch Berman and Kim Roosevelt, have followed Fallon's focus on the Court's dual functions of interpretation and implementation to offer rich accounts of how we should understand what the Court does. [15] Not everyone in the nonoriginalist camp has accepted this "two output thesis" about judicial review;[16] notably, both Rick Hills

13. Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54 (1997) [hereinafter Fallon, *Supreme Court*]; *See also* RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION (2001) [hereinafter FALLON, IMPLEMENTING]. Of course, even before the more recent discussions about constitutional construction and constitutional implementation, scholars had pointed out that constitutional doctrine does not always mirror—or even pretend to mirror—what the document itself requires. *See*, *e.g.*, Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 3 (1975) (distinguishing between judicial decisions actually interpreting the demands of the Constitution and the rules of "constitutional common law" that "draw[] their inspiration and authority from, but [are] not required by, various constitutional provisions."); Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1221 (1978) (asserting that judicial doctrines often stop short of enforcing constitutional norms to their full conceptual limits, and thus cannot be said to represent the "meaning" of those norms). This earlier work laid the foundation for contemporary theories.

14. Fallon, *Supreme Court*, *supra* note 13, at 57. Professor Fallon identifies the "rational basis" test under the Equal Protection Clause, the "actual malice" standard under the First Amendment, and the four-part test for evaluating First Amendment protection for commercial advertising as examples of implementing doctrine. FALLON, IMPLEMENTING, *supra* note 13 at 5.

15. Mitchell Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 36 (2004) [hereinafter Berman, *Rules*] (distinguishing between "constitutional meanings" and "constitutional rules."); Kermit Roosevelt, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649, 1655–58 (2005) (describing the "decision rules" model of constitutional law). See also Mitchell N. Berman, *Constitutional Constructions and Constitutional Decision Rules: Thoughts on the Carving of Implementation Space*, 27 CONST. COMMENT. 39, 41 n.3 [hereinafter Berman, *Constitutional Constructions*] (collecting citations to other scholars who have employed the interpretation/implementation model).

16. The term "two output thesis" belongs to Mitch Berman. *See* Mitchell Berman, *Aspirational Rights and the Two-Output Thesis*, 119 HARV. L. REV. F. 202, 220–21 (2006)

and Daryl Levinson have rejected it.[17] Thus, the interpretation-construction distinction gives new originalists something in common with many nonoriginalists that even the latter's fellow travelers do not share.[18]

The papers in this issue, which are the product of a panel hosted by the Constitutional Law Section at this year's annual meeting of the American Association of Law Schools, explore the implications of the interpretation-construction distinction for debates about constitutional theory. They reveal that despite the above-described points of convergence between originalism and its rivals, debates about originalism are alive and well. In particular, the interpretation-construction distinction does not eliminate long-running disputes about originalism's approach to interpretation. The new originalist commitment to original public meaning privileges semantic meaning over other factors and historical over modern understanding.[19] As such, this approach sometimes yields different results in hard cases than nonoriginalist approaches, even those that subscribe to the two-output thesis. It will sometimes exclude interpretations that a nonoriginalist would prefer, and because originalists treat a text's fixed semantic meaning as defining the permissible bounds of construction,[20] it will sometimes also rule out implementing

(defining the "two output thesis" as "the claim 'that there exists a conceptual distinction between two sorts of judicial work product each of which is integral to the functioning of constitutional adjudication,' namely judge-interpreted constitutional meaning and judge-crafted tests bearing an instrumental relationship to that meaning"). *See also* Berman, *Rules*, *supra* note 15, at 41 (emphasizing that constitutional operative propositions are 'logically and perhaps normatively prior to" constitutional decision rules).

17. *See* Roderick M. Hills, Jr., *The Pragmatist's View of Constitutional Implementation and Constitutional Meaning*, 119 HARV. L. REV. 173, 175 (2006) (objecting to the interpretation/implementation construct because "pragmatically speaking, the meaning of a constitutional provision *is* its implementation"); Daryl Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 858 (1999) (challenging a "rights essentialism" that attempts to separate a "pure constitutional value" from its "remedial apparatus").

18. For example, despite their many differences, Mitch Berman and Larry Solum both insist that a two-output model of constitutional decisionmaking is conceptually valuable. *See* Berman, *Constitutional Constructions*, *supra* note 15, at 60–68 (asserting, contrary to skeptics like Hills and Levinson, that the two-output thesis is conceptually valuable); Solum, *supra* note 6, at 42 ("[C]ollapsing this distinction [between interpretation and construction] can create practical confusion that is every bit as pernicious as the theoretical confusion that infects arguments over originalism.").

19. That is not to say that originalists exclude the possibility that other factors, such as precedent, may occasionally trump the original public meaning. *See, e.g.,* Solum, *supra* note 2, at 938–39.

20. *See* Barnett, *supra* note 2, at 647 (asserting that the original public meaning of a text, even when ambiguous or vague, "still provides a 'frame'" that excludes some possibilities and permits others).

doctrines that taxonomists like Fallon and Berman would embrace. The interpretation-construction distinction may have broadened the range of factors that originalists will consider in constitutional decisionmaking, giving them something in common with nonoriginalists, and the two-output thesis may have given them something in common with those nonoriginalists who identify themselves as taxonomists. But the foundational originalist commitment to fixed linguistic meaning remains a significant difference between originalism and competing theories of constitutional interpretation.

The articles that follow reflect this disagreement in a lively debate about the nature of interpretation and its role in the two-output thesis. Assuming that one accepts the two-output thesis, what should occur at the first stage of constitutional analysis, the one that both originalists and taxonomist nonoriginalists devote to "interpretation"?[21] Is the original semantic meaning of constitutional text entitled to significantly more weight than other interpretive considerations?[22] Does the interpretation-construction distinction have value for those who reject the originalist approach to interpretation?[23] If the process of interpretation is capacious enough to include considerations other than the text's semantic meaning, is it meaningful to separate the development of constitutional law into two steps, or should all constitutional decisionmaking be conceptually collapsed into the single step of "interpretation"?[24]

21. *Compare* Solum, *supra* note 1, at 95–96, 100–02 (describing the "interpretation" phase of the two-step framework as devoted to the determination of linguistic meaning) *with* Berman,*Constitutional Constructions*, *supra* note 15, at 45–46, 60–61 (describing the first, "interpretation" phase of the two-step framework as devoted to the determination of legal, not simply linguistic, meaning). *See also* Berman, *Constitutional Constructions*, *supra* note 15, at 59 (contending that it is "misleading or distracting to assign a particular label—and the label 'interpretation' at that!—to what is only one among the several arguments or considerations that, in appropriate cases, contribute to the Constitution's legal meaning.").

22. *See* Ian Bartrum, *Constructing the Constitutional Canon: The Metonymic Evolution of* Federalist 10, at 9, 13–15, 36 (arguing that original semantic meaning is just one consideration among the many that determine constitutional meaning); Berman, *Constitutional Constructions*, *supra* note 15, at 58–60 (denying that "fixed linguistic meaning" has "uniquely privileged status.").

23. Berman denies the utility of the originalist approach to the two-output thesis while defending the Fallon/Berman/Roosevelt variant of the two-step approach against pragmatist challenges. *See* Berman, *Constitutional Constructions*, *supra* note 15, at 60–68. Solum argues that separating linguistic from legal effect is conceptually important even for those who take a nonoriginalist approach to the determination of linguistic meaning. Solum, *supra* note 1, at 96, 105–18.

24. Berman resists a collapse of the interpretation-construction distinction as he defines it on the ground that "even if law is determined in ways favored by most theorists who lean 'pragmatic' or 'nonoriginalist,' it is nonetheless of pragmatic value to recognize

Because it is the privilege of an Introduction to raise questions without answering them, I will conclude by identifying some of the questions about the interpretation/construction distinction that this symposium provokes for future discussion. Perhaps because originalists focus on the document and nonoriginalists on the doctrine,[25] originalist work on the two-output thesis has tended to focus heavily on the question of interpretation, while nonoriginalists working with the thesis have more closely considered the factors that inform the implementation stage of constitutional decisionmaking.[26] But what of judicial construction for the originalist? A key feature of nonoriginalist work on implementation is the acceptance of doctrines that overenforce the Constitution's operative provisions.[27] Does the originalist approach to construction permit judicial overenforcement?[28] Underenforcement?[29] Even apart

that courts build conceptually separate norms, tests, frameworks—in a word, doctrine—to implement pragmatically determined law." Berman, *Constitutional Constructions*, *supra* note 15, at 63. Solum resists a collapse of the interpretation-construction as he explains it on the ground that whatever "interpretation" is defined to include, a conceptual difference between the determination of semantic and legal meaning remains. Solum, *supra* note 1, at 110, 115–16.

25. *See* Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 26–27 (2000) (distinguishing between "documentarians," who emphasize "the amended Constitution's specific words and word patterns, the historical experiences that birthed and rebirthed the texts, and the conceptual schemas and structures organizing the document," and "doctrinalists," who focus less on the text, history, and structure and more on "synthesiz[ing] what the Supreme Court has said and done, sometimes rather loosely, in the name of the Constitution").

26. Jack Balkin, who places far more emphasis on construction than interpretation, is an exception. *See*, *e.g.*, Balkin, *supra* note 7, at 569–83. I am also focusing here on *judicial* construction. Keith Whittington has offered a rich account of the process of political construction of the Constitution. *See* WHITTINGTON, *supra* note 7.

27. *See*, *e.g.*, Berman, *supra* note 15, at 18-50; FALLON, IMPLEMENTING, *supra* note 13, at 6; Roosevelt, *supra* note 15, at 1669–72.

28. Originalists insist that constitutional constructions must be consistent with the provisions they enforce. *See*, *e.g.*, Barnett, *supra* note 2, at 647. But because an overenforcing doctrine supplements rather than contradicts the relevant constitutional provision, an overenforcing doctrine is not necessarily inconsistent with the provision. Moreover, there may be room for overenforcement in originalist theory even if overenforcing doctrines of judicial review are illegitimate. *See* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 168–77 (2010) (describing Justice Scalia's rejection of overenforcing doctrines of judicial review, but opining that even originalists may accept some overenforcement of the Constitution through the use of constitutionally based substantive canons of construction).

29. Nonoriginalist scholars have given serious attention to the doctrines of judicial review that underenforce the Constitution's operative propositions. *See* Fallon, *Supreme Court*, *supra* note 13, at 64–67; Richard H. Fallon, Jr. *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274 (2006); Kermit Roosevelt, *Aspiration and Underenforcement*, 119 HARV. L. REV. F. 193 (supporting judicial underenforcement but expressing serious reservations about nonjudicial underenforcement). *See also* Sager, *supra* note 13.

from the problem of under and overenforcement, what factors should drive the development of implementing doctrines?[30] Is any deference due the political branches on matters of construction, and if so, how much?[31]

It is unrealistic to expect originalists to provide a uniform answer to any of these questions. But as the papers in this symposium illustrate, debate about the interpretation/ construction distinction brings new perspectives to age-old disputes about judicial review. Whether you ultimately agree or disagree with the theory, it is one worth reading about.

30. Originalists have offered some thoughts, but it is a topic on which they disagree and on which there is room to say more. *See* McGinnis & Rappaport, *supra* note 7, at 773 n. 79 (noting disagreement among new originalists about the factors that should guide the process of constitutional construction).

31. As stated above, some originalists conceive of construction as an essentially political activity. *See supra* note 7. But even those originalists who understand construction as also a judicial function must decide whether the political branches are due some measure of deference with respect to their constitutional constructions, as opposed to their constitutional interpretations. Jack Balkin has had the most to say about the interaction of political and judicial constructions. *See* Balkin, *supra* note 7 at 559–85