

THE LETTER AND THE SPIRIT: A UNIFIED THEORY OF ORIGINALISM

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ABSTRACT

The concept of constitutional construction is of central importance to originalist theory but is both underdeveloped and controversial among originalists. Some object that its apparent open-endedness undermines the constraining virtues of originalism and exposes citizens to arbitrary judicial power. In this Article, we respond to this challenge by presenting an originalist theory of constitutional construction that can guide and constrain judicial activity within the “construction zone.” When combined with an originalist theory of constitutional interpretation, our approach yields a unified theory of originalism.

Our theory draws upon a familiar common-law concept long used in contract law to handle the problem of opportunistic abuse of contractual discretion: the duty of good-faith performance. We contend that judges who take an oath to “support this Constitution” enter into a fiduciary relationship with private citizens—a relationship characterized by discretionary powers in the hands of officials and a corresponding vulnerability in the citizenry. As fiduciaries, judges are morally and legally bound to follow the instructions given them in “this Constitution” in good faith. This means that judges engaging in constitutional construction or implementation must seek to give legal effect to both the Constitution’s “letter” (its original public meaning) and its “spirit” (the original function or purpose of the particular clauses and general structure of the text.)

Therefore, when interpretation of original meaning is not sufficient to resolve a controversy, judges have a duty of good-faith originalist construction. Good-faith construction consists in (a) accurately identifying the spirit—or original function—of the relevant constitutional provision at the time it was enacted and (b) devising implementing rules that are calculated to give effect to both the letter and the spirit of the text in the case at hand and in future cases. Conversely, bad-faith construction consists in opportunistically using the discretion inherent in implementing the Constitution to evade either its original letter or spirit (or both) in pursuit of their own extralegal preferences.

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INTRODUCTION

Interpretation differs from construction in that the former is the act of finding out the true sense of any form of words; that is, the sense which their author intended to convey; and of enabling others to derive from them the same idea which the author intended to convey. Construction, on the other hand, is the drawing of conclusions . . . which are *in the spirit, though not in the letter of the text*.—Justice Thomas M. Cooley¹

Originalist constitutional interpretation is committed to the letter of the constitutional text—its “original public meaning,” as famously proposed by Justice Antonin Scalia.² Our thesis is that originalism should go further than fidelity to the letter of the text; the best version of constitutional originalism entails a commitment to the Constitution’s original *spirit* as well. Implementing the Constitution requires adherence to the *original function* of the text—the purposes, goals, and aims implicit in the individual clauses and overall structure of the Constitution. We term this spirit-focused implementation *good-faith constitutional construction*.

We preface our development of this thesis with a brief discussion of “originalism” itself. Originalism is the view that *the meaning of the Constitution remains the same until it is properly changed*, with an Article V amendment being the only proper method of revision.³ All originalists hold two basic premises: (1) the meaning of a provision of the Constitution was *fixed* at the time it was enacted (the Fixation Thesis); (2) that fixed meaning ought to *constrain* constitutional decision-makers today (the Constraint Principle).⁴ But over the past thirty years, a well-known evolution of originalist thought has occurred with respect to *how* the meaning of constitutional text is fixed.

In the 1990s there arose a position that has been called “the New Originalism”⁵ and which is distinguishable from the “old originalism” in three respects. First, whereas the New Originalism contended that the meaning of constitutional text was fixed by the communicative content that the wording of a constitutional text conveyed to the general public at the time of ratification—commonly called its “original public meaning”—the old originalism maintained that the meaning of the Constitution was fixed by the intentions of the Constitution’s framers, drafters, or ratifiers.

¹ THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 40-1 (2d ed. 1871) (emphasis added).

² ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 47 (Amy Gutmann ed., 1997) [hereinafter “A Matter of Interpretation”].

³ The idea that originalism is a theory of constitutional change has been emphasized by Professor Stephen Sachs. See Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J. L. & PUB. POL’Y 817-888 (2015).

⁴ See Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 6-7 (2015).

⁵ See Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 626 (1999) (“the ascendent New Originalism [is] based, not on original intent, but original meaning”); Keith E. Whittington, *The New Originalism*, 2 GEO. J. L. & PUB. POL’Y 599 (2004).

Second, whereas the New Originalism distinguished between two different activities—interpretation and construction—the old originalism tended to run these two activities together (as do most living constitutionalists). By “interpretation” is meant the activity of ascertaining the communicative content of the text—that is, the information conveyed by the promulgated words on the page to the public.⁶ By “construction” is meant the activity of giving that content legal effect—typically (but not exclusively) by adopting implementing rules through which the text will be applied in particular contexts. These implementing rules are not in the text itself and are not part of its communicative content.⁷

Closely related to this second of these positions was a third: some New Originalists—including one of us—insisted that the usage of the terms “originalist” and “originalism” is properly confined to the activity of interpretation.⁸ That is, these terms should be confined to the activity of ascertaining the communicative content of the text. On this usage, whatever one decides is the best method to give this original public meaning legal effect cannot, strictly speaking, be “originalist;” and the label “originalism” is properly reserved to the activity of constitutional interpretation; and therefore, by definition, constitutional construction must be “nonoriginalist.” Put another way, by this way of thinking, originalists need to identify the best *nonoriginalist* method of construction to give legal effect to the original meaning of the text.

This last postulate is mistaken, and this mistake in theoretical exposition has led to unnecessary division among originalists. Most importantly, it may have led some originalists—most prominently Justice Scalia—to reject the interpretation-construction distinction itself. These originalist critics of the distinction believe that legitimating nonoriginalist methods of construction seriously undermines, if not entirely eliminates in practice, the “constraint” provided by originalist interpretation. Other originalists such as John McGinnis and Michael Rappaport, while accepting the distinction between interpretation and construction in principle,

⁶ Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL’Y 65 (2011); Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95 (2011).

⁷ While the texts of both the Ninth and Eleventh Amendments *do* provide rules of construction, these too need additional implementing rules to give them legal effect. We have in mind such implementing rules as the “presumption of liberty” for the former or “state sovereign immunity” for the latter.

⁸ Barnett, *An Originalism for Nonoriginalists*, *supra* note 6, at 69 (“Originalism is not a theory of what to do when original meaning runs out.”). We always agreed with Professor Lawrence Solum that originalist constitutional construction must conform to what Solum calls the “constraint principle” insofar as constitutional constructions must, at minimum, be consistent with the original meaning of the constitutional text. *See* Solum, *The Fixation Thesis*, *supra* note 4, at 8 (“All or almost all originalists can agree on a minimum level constraint: the doctrines of constitutional law and decisions in constitutional cases should be consistent with the original meaning—subject to limited and exceptional defeasibility conditions.”). We propose here that the constraint on construction goes beyond the minimum of “consistency” and contend that construction can be originalist “all the way down.” Thus, we affirm a version of what Solum has called “constraint as derivability.” *See* Lawrence B. Solum, *The Constraint Principle: Original Meaning and Constitutional Practice* 24-25 (unpublished manuscript, March 24, 2017), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2940215.

have sought to so “thicken” the meaning of the text revealed by “interpretation” that there would be little if any room for “construction.”

In this article, we seek to rectify this mistake by presenting a unified theory of originalism. We continue to insist that the activities of interpretation and construction—however one wishes to label them—are distinct, and that confusion results from running them both together under the rubric “interpretation.” But we now believe that construction, no less than interpretation, can be “originalist.” Indeed, we believe that construction *must* be originalist to be *faithful* to the original public meaning of the text.

In this article, we present an originalist theory of constitutional construction: *good faith originalist construction*. Just as originalist interpretation seeks to ascertain and adhere to the *original public meaning* of the “letter” of text; good faith originalist construction seeks to implement that meaning *faithfully* by seeking to ascertain and adhere to the *original functions*, ends, purposes, or objectives for which that text was adopted—what we call its “spirit.”⁹ Ascertaining the original spirit is no less an empirical and historical inquiry than is ascertaining the original communicative content of the text.

We hope that, by integrating both the letter and the spirit of the Constitution into a unified theory of originalism, this approach not only unifies modern originalists who have become divided over the merits of the interpretation-construction distinction. We hope it also unifies original public meaning originalists with originalists who remain intentionalists—such as Larry Alexander, Sai Prakash, and Richard Kay.¹⁰ If “intentions” are understood to be the general functions, purposes or objectives of particular constitutional provisions—as distinct from any subjective expectations on the part of the Framers, drafters, or ratifiers concerning how particular provisions would be applied—we believe these original functions, purposes, or objectives *should* guide and constrain the implementation of the text’s original public meaning when constitutional decision-makers are engaged in constitutional construction.¹¹

Indeed, we think it is time to move past the rhetoric of “new” versus “old” originalism. We employ the term “New Originalism” in this introduction solely to connect our project to what is, by now, familiar terminology to constitutional scholars. But, after some twenty years, it is hardly “new,” and is misleadingly exclusionary of other approaches that are even newer, including “original methods

⁹ Rather than reiterate “purposes, objectives, or functions” throughout this article, we will sometimes refer simply to “original spirit” or “original purposes” to refer to all three.

¹⁰ See Larry Alexander & Saikrishna Prakash, “*Is That English You’re Speaking?*” *Why Intention Free Interpretation Is an Impossibility*, 41 SAN DIEGO L. REV. 967 (2004); Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. U. L. REV. 704 (2009).

¹¹ We do not mean to imply that Alexander, Kay, or Prakash understand intentions in this limited sense. Rather, all three scholars hold that texts mean what their authors intended them to mean. In our terms, their theories are primarily theories of the meaning of the letter of legal text. We thank Lawrence Solum for this observation. We suspect that, because the “spirit” is so closely related to the “letter” as sometimes to be indistinguishable—and because both are the subject of historical inquiry—this has induced some intentionalists to reduce both into the “letter.” But this is only a hunch.

originalism”¹² and “original law originalism.”¹³ Because the phrase “New Originalism” could be used to encompass all these new forms of originalism, it has lost much of its usefulness as a distinct category. So, in the account of the history and development of originalism contained in Part I, we opt to drop the term.

We also believe that this unified theory of originalism helps distinguish originalism from some purposive versions of living constitutionalism. On our account, first comes the original meaning or letter of a provision (interpretation), and then comes its original spirit or function to implement that meaning (construction).¹⁴ For an originalist, the implementation step must neither supersede nor contradict the original meaning of a provision.

In contrast, some living constitutionalists profess their “fidelity” to the Constitution by ascertaining its purposes or underlying principles—sometimes even its *original* purposes—and then letting these purposes do all the work. For example, some living constitutionalists may believe that if the original purpose of recognizing an individual right of the people to keep and bear arms was to enhance public safety, it would be constitutionally faithful to apply that purpose to today’s circumstances, even if achieving the purpose would result in overriding the original meaning of the text itself. We reject this view and affirm the priority of the letter over the spirit.

Our principal claim about originalist constitutional construction is more modest than it might at first appear. Because reliance on original function or purpose is, and has always been, pervasive in legal thought and practice—as reflected in the common inclination to refer to the purposive intentions of the framers or drafters of a constitution or statute—acknowledging the proper role of original function construction, as distinct from original meaning interpretation, requires very little modification of existing institutional practice.

Much of what constitutional decision-makers in the legislative, executive, and judicial branches do, after all, is properly conceived as construction rather than as interpretation (which is why insisting that construction is necessarily “nonoriginalist” seemed to undermine originalism).¹⁵ The crucial difference in our approach is that we recognize that the spirit (original function) is not “baked into” the letter (original meaning); this recognition flows from the interpretation-construction distinction. The original functions that provide the spirit of the

¹² 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, 769 (2009) (developing original methods originalism).

¹³ See William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349 (2015) (developing original law originalism).

¹⁴ When we say that the letter comes first, we mean that it is lexically prior in the hierarchy of authority. The temporal order of determining the letter and spirit may by actual judges might be messy and complex; judges might begin by thinking about the spirit and then consider the text. What is crucial from our perspective is that the spirit must conform to the text, once the original meaning of the text has been ascertained.

¹⁵ In future work, we intend to apply this conception of “good faith constitutionalism” to the discretion exercised by legislators and executive branch officials. Indeed we think that good faith judicial implementation of the letter of the Constitution necessitates doctrines designed to ferret out bad faith exercises of legislative and executive discretion.

Constitution's clauses and structure are derived from, but not identical to, the original meaning of the constitutional text.

What still makes originalism distinctive as a theory is what always did: originalism's claim that the original spirit of the Constitution—its functions, purposes or objective—cannot be used as a justification or pretext for updating or overriding the original meaning of its letter. Neither can the purposes or objectives of today's constitutional decision-makers override the original functions of the text.

But be it a big move or small, the proof of the theoretical pudding is in the eating. Our analysis proceeds in the following steps. In Part I, we revisit the development of modern originalism. While this story has, by now, become familiar to constitutional scholars, we wish to update the narrative to include a division among originalists that has arisen concerning the interpretation-construction distinction—a rift we hope to help mend.

In Part II, we explain how our approach to constitutional construction is based on the fact that the Constitution sets up a fiduciary government. We contend that judges were understood to be public fiduciaries at the time of ratification and to have duties that tracked those of private fiduciaries. We focus on two fiduciary duties that are particularly relevant to constitutional adjudication: the duty to follow instructions and the duty to act in good faith. We argue that the voluntary assumption of office accompanied by the express oath to “support this Constitution” that Article VI requires of all government officials creates a fiduciary relationship that imposes those duties. We further argue that the oath imposes a moral and legal duty upon judges in particular to ascertain and give effect to the Constitution's original public meaning in good faith.

In Part III, we explore the contractual duty of good-faith performance and trace its implications for constitutional construction, drawing upon Steven Burton's seminal “foregone opportunities” theory of good-faith performance in order to do so.¹⁶ We argue that judges are duty-bound to give effect to the Constitution's *letter* (consisting in its linguistic meaning) and its *spirit* (consisting in the function of its particular provisions.) Accordingly, judges must *forgo* the opportunity to act on the basis of will—on the basis of preferences that are not grounded in the law, whether those extra-legal preferences are held by legislators, by executive branch officials or by the judges themselves.

In Part IV, we set forth guidelines for good-faith constitutional construction. We submit that it is the original spirit of the law that should guide judges within the construction zone. In the construction zone, judges should identify the original functions (or purposes, objects or ends) of constitutional provisions to formulate and apply rules of construction for the case at hand, and similar future cases, that are not only consistent with the letter, but calculated to *implement* the spirit that lies behind the text. Conversely, bad-faith construction consists of a judge using the process of implementation to evade the spirit of the text to achieve their own purposes, goals, ends, etc.

¹⁶ See Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369 (1980); Steven J. Burton, *More on Good Faith Performance of a Contract: A Reply to Professor Summers*, 69 IOWA L. REV. 497 (1984).

In Part V, we provide a couple of applications of the theory to illustrate how the method works. We examine an example of good faith originalist construction—judicial doctrines scrutinizing law regulating the time, place, and manner of speech—before turning to an example of bad faith construction: Justice Samuel Miller’s opinion in *The Slaughter-House Cases*. In this Part, our focus is on his method of construction, not the correctness of the result he reached.

In Part VI, we consider the objections that good-faith construction is a regression to the “old originalism” of original framers’ intent, that it recreates the “summing problem” associated with that approach, that it renders the interpretation-construction distinction unnecessary, and that seeking the spirit of the Constitution will lead judges astray.

I. THE NEED FOR A UNIFIED THEORY: A BRIEF HISTORY OF ORIGINALISM

By now, the history of originalism has been told many times.¹⁷ To appreciate the need for a unified theory of originalism, however, certain features of this history need to be highlighted and the narrative must be extended to the present.

A. *Introducing the Term “Originalism”*

Although we maintain that originalism as a *method* of constitutional interpretation is as old as the Constitution itself, the roots of originalism as a distinctive *theory* of interpretation can be traced to 1980. That was the year Stanford law professor Paul Brest published his now-classic critique of originalism, *The Misconceived Quest for Original Understanding*,¹⁸ in the *Boston University Law Review*.

Brest was vague as to which scholars were the targets of his criticism. Although he quoted Michigan Supreme Court Justice Thomas Cooley,¹⁹ and Supreme Court Justices David Brewer²⁰ and George Sutherland,²¹ along with University of

¹⁷ For sympathetic accounts by originalists, see Barnett, *supra* note 6, at 612-21. Vasav Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 GEO. L.J. 1113, 1134-48 (2003); Whittington, *The New Originalism*, *supra* note 7; Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 462-468 (2013). For a comprehensive overview by a historian, see JOHNATHAN O’NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL (2007). For a critical review of the literature, see Logan E. Sawyer III, *Principle and Politics in the New History of Originalism*, 57 AM. J. OF LEG. HISTORY 198 (2017) (“We have gone from too few histories of originalism to too many...”).

¹⁸ Paul Brest, *The Misconceived Quest for Original Understanding*, 60 B.U. L. REV. 204 (1980).

¹⁹ “The meaning of the constitution is fixed when it is adopted, and it is not different at any subsequent time when a court has occasion to pass upon it.” *Id.* at 208 (quoting Cooley, *supra* note 1, at 124).

²⁰ “The Constitution is a written instrument. As such, its meaning does not alter. That which it meant when adopted it means now.” *Id.* (quoting *South Carolina v. United States*, 199 U.S. 437, 448 (1895) (Brewer, J.)).

²¹ “[T]he whole aim of construction, as applied to a provision of the Constitution, is ... to ascertain and give effect to the intent of its framers and the people who adopted it.” *Id.* at 204 (quoting *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 453 (1934) (Sutherland, J.,dissenting)).

Chicago law professor William Crosskey,²² judging from the frequency of his examples, Brest's primary target was Harvard researcher Raoul Berger, whose book *Government by Judiciary* was published just three years before in 1977.²³ A secondary target was Yale law professor Robert Bork.²⁴

It was Brest who first dubbed Berger and Bork "originalists" and their approach "originalism," a term that had not previously appeared in the constitutional context: "By 'originalism' I mean the familiar approach to constitutional adjudication that accords binding authority to the text of the Constitution or the intentions of its adopters,"²⁵ an approach Brest contrasted with "what I shall call nonoriginalism."²⁶

Brest conceded up front that, "[a]t least since *Marbury*, in which Chief Justice Marshall emphasized the significance of our Constitution's being a written document, originalism in one form or another has been a major theme in the American constitutional tradition."²⁷ But he nevertheless took aim at what he called "strict originalism," which he said was characterized by its "strict intentionalism." "For the strict intentionalist, 'the whole aim of construction, as applied to a provision of the Constitution, is . . . to ascertain and give effect to the intent of its framers and the people who adopted it.'"²⁸

Brest then identified the problem with strict intentionalism:

Strict intentionalism requires the interpreter to determine how the adopters would have applied a provision to a given situation, and to apply it accordingly. The enterprise rests on the questionable assumption that the adopters of constitutional provisions intended them to be applied in this manner. But even if this were true, the interpreter confronts historiographic difficulties of such magnitude as to make the aim practicably unattainable.²⁹

For Brest, these "historiographical difficulties" arise by moving from the potentially ascertainable intentions of individual persons to identifying an "institutional intent of a multimember body."³⁰

²² See Brest, *supra* note 18, at 219 (citing WILLIAM WINSLOW CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* (1953)).

²³ See RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1977).

²⁴ See Brest, *supra* note 18, at 223 (citing Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L. J.* 1 (1971)).

²⁵ Brest, *supra* note 18, at 204.

²⁶ *Id.* at 205.

²⁷ *Id.* at 204.

²⁸ *Id.* (quoting Justice Sutherland's dissent in *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 453 (1934)). Brest also criticized another variant of "strict originalism" he called "'strict textualism' (or literalism)" which "purports to construe words and phrases very narrowly and precisely." *Id.* at 204. But it was his critique of strict intentionalism that had the most salience and to which originalists responded.

²⁹ *Id.* at 222.

³⁰ *Id.* at 212.

For a textual provision to become part of the Constitution, the requisite number of persons in each of these bodies must have assented to it. Likewise, an intention can only become binding—only become an institutional intention—when it is shared by at least the same number and distribution of adopters. . . .

If the only way a judge could ascertain institutional intent were to count individual intention-votes, her task would be impossible even with respect to a single multimember law-making body, and a fortiori where the assent of several such bodies were required.³¹

In support of this claim, Brest offered an extended and sophisticated analysis, which we will forgo summarizing, of why he believed that identifying an institutional intent from the myriad subjective intentions of all the members of multimember bodies is a fool's errand.³² This general line of objection has come to be called the "summing problem"³³—that is, the problem of identifying, and then somehow adding up or "summing," the subjective intentions of a diverse body or bodies of persons.

Only after Brest invented the term "originalism" did originalists adopt the label and defend it.³⁴ Perhaps the earliest, most visible, embrace was that of Edwin Meese III, who was President Ronald Reagan's Attorney General during Reagan's second term. In his address to the American Bar Association, on July 9, 1985, Meese forwent the usual platitudes and declared for "a jurisprudence of original intention":

It has been and will continue to be the policy of this administration to press for a Jurisprudence of Original Intention. In the cases we file and those we join as amicus, we will endeavor to resurrect the original meaning of constitutional provisions and statutes as the only reliable guide for judgment.³⁵

This address created quite a stir. For example, in October of that year, Justice William Brennan took the opportunity of a conference at the Georgetown University Law Center to reply to the Attorney General. Echoing Brest, Brennan declared:

[I]t is far from clear whose intention is relevant—that of the drafters, the congressional disputants, or the ratifiers in the states?—or even whether the idea of an original intention is a coherent way of thinking about a jointly drafted document drawing its authority from a general assent of the states.³⁶

³¹ *Id.* at 214.

³² *See id.* at 212-3.

³³ The term appears to have been first used in Robert Bennett, *Originalist Theories of Constitutional Interpretation*, 73 CORNELL L. REV. 355 (1988).

³⁴ The first academic defender of "originalism" after Brest took aim at the position was Richard Kay. *See* Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 244 (1988). Once again, this shows the recency of theorizing about originalism.

³⁵ *See* Attorney General Edwin Meese III, Address before the American Bar Association (July 9, 1985), in THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION 9 (1986).

³⁶ *See* William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433 (1986)

While the battle lines were now very publicly drawn, originalism as a theory had yet to be developed. To this point, originalism's only explication as a theory was Paul Brest's critical reconstruction. While scholars like Raoul Berger and Robert Bork were making originalist arguments, no scholar had presented a theoretical exposition of a theory of originalism. For this reason, Lawrence Solum has dubbed these early writers "proto-Originalists."³⁷ But a theory of originalism was in the offing.

B. *Original Public Meaning, Not Framers Intent*

Early discussion and development of originalism as a theory was initiated by the lawyers in the Office of Legal Counsel (OLC) in the Meese Justice Department. At one point or another—and in a span of just four years—its ranks included such future law professors as Bradford Clark, Robert Delahunty, Gary Lawson, John Harrison, Nelson Lund, John Manning, John McGinnis, Richard Nagareda, John C. Nagle, Michael Stokes Paulsen, and Michael Rappaport.³⁸

As they met in seminars and produced blue books on the original meaning of various clauses, they were addressed by then-Circuit Court Judge Antonin Scalia, who made the first important contribution to a genuine theory of originalism. Inspired in part by his antipathy towards legislative history in statutory interpretation, Scalia admonished the OLC attorneys to abandon their reference to the "original intentions of the framers" and adopt instead the pursuit of "the original public meaning of the text."³⁹

As they left the government in the 1990s, many of these lawyers began making important contributions to originalist scholarship as law professors. But it largely fell to Gary Lawson, first at Northwestern and then at Boston University, to expand upon Scalia's concept of original public meaning. In a series of essays Lawson elaborated the concept.⁴⁰ Others picked up the cue.⁴¹

³⁷ Solum, *The Fixation Thesis*, *supra* note 4, at 3.

³⁸ Also in the group were future-Justice Samuel Alito, future-judges Michael Luttig and Steven Markman, and constitutional litigators Michael Carvin, Charles Cooper, and Theodore Olson, as well as lawyer-author James Swanson.

³⁹ Antonin Scalia, Address Before the Attorney General's Conference on Economic Liberties in Washington, D.C. (June 14, 1986), in *ORIGINAL MEANING JURISPRUDENCE: A SOURCEBOOK* 101, 106 (U.S. Dep't of Justice ed., 1987).

⁴⁰ See, e.g., Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859 (1992); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994); Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1283 (1997).

⁴¹ See e.g., Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power To Execute the Laws*, 104 YALE L.J. 541 (1994); Michael S. Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1995). Prakash now identifies as an intentionalist. See See Larry Alexander & Saikrishna Prakash, *Mother May I? Imposing Mandatory Prospective Rules of Statutory Interpretation*, 20 CONST. COMMENT. 97, 100 (2003) ("[W]e are intentionalists and believe that the meanings of words are those meanings intended by the author(s) or speaker(s).").

The shift from original Framers' intent to original public meaning was a direct response to the "summing problem" associated by Paul Brest with "strict intentionalism." Gone was the need to ascertain the collective intentions, apart from whatever intention was manifested by the public meaning of the words of the text that was adopted. And it transformed what, in practice, was a counterfactual inquiry into what the framers of the Constitution *would have* thought of some contemporary issue, into an empirical investigation of linguistic usage.

The move from original Framers intent to original public meaning was the first step in formulating a more defensible theory of originalism than the one constructed by Paul Brest to serve as the basis of his critique. But it was not the last. The next big move came, not from a law professor, but from a political scientist.

C. *The Interpretation-Construction Distinction*

In 1999, Keith Whittington published two books in which he identified the difference between (a) identifying the meaning of the text and (b) making constitutional judgments when efforts to ascertain the original meaning of the text fail to yield a single determinate answer—that is, when the text “runs out.” The first of these activities he called “constitutional interpretation,”⁴² and the second “constitutional construction.”⁴³ As Whittington later summarized:

Constitutional meaning must be “constructed” in the absence of a determinate meaning that we can reasonably discover. The need for construction arises for a variety of reasons. In some cases, the founders simply had not thought of or adequately accounted for contingencies that arise within the course of political practice. In others, the language that the founders used may be unavoidably vague, leaving substantial uncertainties about cases that arise on the margins. Furthermore, even as faithful interpreters we may be limited in our capacity to understand fully what the constitutional commitments of the founders really were and how they might apply to our current concerns.⁴⁴

While a novelty in modern constitutional theory, the interpretation-construction distinction in constitutional theory can be found as early as the 1830s.⁴⁵ The

⁴² See KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* (1999).

⁴³ See KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* (1999).

⁴⁴ Whittington, *The New Originalism*, *supra* note 5, at 611-12.

⁴⁵ See generally Greg Klass, *Interpretation and Construction 1: Francis Lieber*, New Private Law: Project on the Foundations of Private Law, <http://blogs.harvard.edu/nplblog/2015/11/19/interpretation-and-construction-1-francis-lieber-greg-klass/>; Greg Klass, *Interpretation and Construction 2: Samuel Williston*, New Private Law: Project on the Foundations of Private Law, <https://blogs.harvard.edu/nplblog/2015/11/23/interpretation-and-construction-2-samuel-williston-greg-klass/>; Greg Klass, *Interpretation and Construction 3: Arthur Linton Corbin*, <http://blogs.harvard.edu/nplblog/2015/11/25/interpretation-and-construction-3-arthur-linton-corbin-greg-klass/>; see also Ralf Poscher, *The Hermeneutical Character of Legal Construction*, in *LAW'S HERMENEUTICS: OTHER INVESTIGATIONS* (Simone Glanert and Fabien Girard, eds., 2016). Available at SSRN: <http://ssrn.com/abstract=2696486>.

nineteenth-century scholar Francis Lieber is the earliest writer we currently know who formally distinguished between interpretation and construction. In his 1839 treatise, *Legal and Political Hermeneutics*, Lieber defined “construction” as “the drawing of conclusions respecting subjects, that lie beyond the direct expression of the text, from elements known from and given in the text—conclusions which are in the spirit, though not within the letter of the text.”⁴⁶ For Lieber, construction was a means by which to avoid “sacrificing the spirit of a text or the object, to the letter of the text” and thus defeating “the best and wisest intentions” of the makers of the written instrument.⁴⁷

In 1868, Lieber’s distinction was incorporated into a highly influential treatise on the limitations of state power by Thomas McIntyre Cooley. Cooley was a professor at the University of Michigan Law School from 1859 to 1884—serving as its dean from 1871 to 1883—and the Chief Justice of the Michigan Supreme Court from 1864 to 1885. His treatise, published the same year as the Fourteenth Amendment’s adoption, was entitled, *A Treatise On The Constitutional Limitations Which Rest Upon the Legislative Power of The States of The American Union*.

In a chapter on the construction of state constitutions, Cooley explained that interpretation differs from construction in that the former “is the act of finding out the true sense of any form of words; that is, the sense which their author intended to convey; and of enabling others to derive from them the same idea which the author intended to convey.”⁴⁸ Construction, on the other hand, “is the drawing of conclusions respecting subjects that lie beyond the direct expressions of the text, from elements known from and given in the text; conclusions which are *in the spirit, though not in the letter* of the text. Interpretation only takes place if the text conveys some meaning or other.”⁴⁹

In addition to Lieber, Cooley relied on *Bouvier’s Law Dictionary*:

Bouvier defines the two terms succinctly as follows: “*Interpretation*, the discovery and representation of the true meaning of any signs-used to convey ideas.” “*Construction*, in practice, determining the meaning and application as to the case in question of the provisions of a constitution, statute, will, or other instrument, or of an oral agreement.”⁵⁰

According to Cooley, the need for construction arises from a number of sources.

⁴⁶ FRANCIS LIEBER, LEGAL AND POLITICAL HERMENEUTICS, OR PRINCIPLES OF INTERPRETATION AND CONSTRUCTION IN LAW AND POLITICS 44 (William G. Hammond ed., 3d ed., St. Louis, F.H. Thomas & Co. 1880) (1837).

⁴⁷ *Id.* at 45.

⁴⁸ THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 41 n. 1 (1st ed. 1868) (emphasis added) [hereinafter “Constitutional Limitations”] (quoting Lieber’s *Legal and Political Hermeneutics*).

⁴⁹ *Id.* (same) (emphasis added).

⁵⁰ *Id.* at 39 (quoting JOHN BOUVIER, A LAW DICTIONARY, ADAPTED TO THE CONSTITUTION AND LAWS OF THE UNITED STATES OF AMERICA, AND OF THE SEVERAL STATES OF THE AMERICAN UNION (edition unknown)).

The deficiencies of human language are such that if written instruments were always carefully drawn, and by persons skilled in the use of words, we should not be surprised to find their meaning often drawn in question, or at least to meet with difficulties in their practical application. But these difficulties are greatly increased when draughtsmen are careless or incompetent, and they multiply rapidly when the instruments are to be applied, not only to the subjects directly within the contemplation of those who framed them, but also to a great variety of new circumstances which could not have been anticipated, but which must nevertheless be governed by the general rules which the instruments establish. So, also, the different stand-points which diverse interests occupy incline men to take different views of the instruments which affect those interests; and from all these considerations the subject of construction is always prominent in the practical administration of the law.⁵¹

The distinction between interpretation and construction was subsequently refined by contracts scholars, including Arthur Corbin, Edwin Patterson, and Allen Farnsworth.⁵² Corbin went beyond Lieber to maintain that any other judicial determinations besides ascertaining the meaning of expressions and determining that a contract existed were not part of “interpretation” but were rather part of “construction,” thereby categorically separating the linguistic meaning of a contract and its legal effect.⁵³ Thus refined, the distinction between interpretation and construction eventually made its way into the Restatement of Contracts and continues to play a role in contracts scholarship and to guide adjudication.⁵⁴

Informed by his views of popular sovereignty, Whittington had initially associated the activity of constitutional interpretation with the judiciary and the activity of constitutional construction solely with the “political” branches. In 1999, one of us—Randy Barnett—articulated a somewhat different view. First in “An Originalism for Nonoriginalists,”⁵⁵ and then in 2004 in *Restoring the Lost Constitution*,⁵⁶ Barnett contended that judges too needed to engage in constitutional construction when the original meaning of the text “runs out.”⁵⁷ That is, when

⁵¹ *Id.* at 38.

⁵² See 3 ARTHUR L. CORBIN, CORBIN ON CONTRACTS §§ 532–35 (1960 & Supp. 1980); Edwin W. Patterson, *The Interpretation and Construction of Contracts*, 64 COLUM. L. REV. 833 (1964); E. Allan Farnsworth, “Meaning” in the Law of Contracts, 76 YALE L.J. 939 (1967).

⁵³ For a discussion of the differences between Lieber and Corbin’s approaches, see Lawrence A. Cunningham, *Hermeneutics and Contract Default Rules: An Essay on Lieber and Corbin*, 16 CARDOZO L. REV. 2225 (1995).

⁵⁴ See Keith A. Rowley, *Contract Construction and Interpretation: From the “Four Corners” to Parol Evidence (and Everything in Between)*, 69 MISS. L. J. 73 (1999); Solum, *supra* note 18, at 485–87 (citing cases deploying the distinction).

⁵⁵ Barnett, *supra* note 6.

⁵⁶ See RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2004) [hereinafter “Restoring the Lost Constitution”]. See also Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95 (2011); Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453 (2013).

⁵⁷ See Barnett, *supra* note 56, at 121–30. Whittington would soon accept this expanded vision of the activity of constitutional construction. See Whittington, *The New Originalism*, *supra* note 5, at 612: [C]onstitutional constructions, as distinct from constitutional interpretations, must be and are made by political actors in and around the elected branches of government. Perhaps they should

original meaning was insufficient to determine the outcome of a case or controversy, the judiciary needed to engage in constitutional construction to supplement original meaning.⁵⁸

Soon thereafter, echoing Corbin, Lawrence Solum would clarify that, while constitutional interpretation was the activity of ascertaining the communicative content of the text, constitutional construction was the activity of giving the text legal effect.⁵⁹ Construction cannot be avoided because the choice to give legal effect to any text, no matter how clear or how vague—if only by deciding to follow and apply its meaning straightforwardly—is distinguishable from the activity of ascertaining its meaning.

So refined, the interpretation-construction distinction became the second major component of a defensible theory of originalism. But the introduction of this distinction into originalism theory would also open a schism among originalists that persists to this day—a schism we hope to heal in this article.

D. *The Schism Among Originalists*

As explicated by Whittington, Barnett, and Solum, the interpretation-construction distinction had a logical entailment. Because only constitutional interpretation was based on the original meaning of the text, only constitutional interpretation could be “originalist.” Because constitutional construction was needed precisely when the original meaning of the text “ran out” short of deciding a particular constitutional issue, constitutional construction of provisions that were underdeterminate (such as vague or open textured clauses) was not—and could not be—“originalist”:

According to the distinction between interpretation and construction, then, originalism is a method of constitutional interpretation that identifies the meaning of the text as its public meaning at the time of its enactment. The text of the Constitution may say a lot, but it does not say everything one needs to know to resolve all possible cases and controversies. *Originalism is not a theory of what to do when original meaning runs out.*⁶⁰

Furthermore, while ascertaining the original communicative content of the text was an empirical inquiry and therefore “constrained,” constitutional construction seemingly had little or no such empirical constraint. Therefore, the constraining “rule of law” benefits of originalism—indeed of a written constitution—did not

also be made on occasion by judges, but in doing so, judges are engaging in a political and creative enterprise and cannot simply rely on the authority of interpreting the founders’ Constitution.

The theory presented here takes issue with the claim that construction is necessarily “political.” *See also* Barnett, *supra* note 56, at 122-24 (rejecting the claim that construction is inherently political).

⁵⁸ *See* Barnett, *supra* note 56, at 121 (“When interpretation has provided all the guidance it can but more guidance is needed, constitutional interpretation must be supplemented by constitutional construction—within the bounds established by original meaning.”).

⁵⁹ Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL’Y 65, 69 (2011).

⁶⁰ *Id.*

seem to carry over to constitutional construction. To the extent a clause was irreducibly ambiguous or vague, judges (and other constitutional actors) seemed to regain the relatively open-ended discretion that characterizes living constitutionalism.

Moreover, Barnett maintained that choosing the proper method of constitutional construction is unavoidably a normative choice. Allowing judges to decide cases based on their normative views seemed offensive to many who were attracted to originalism as a way of policing exactly that. What exactly in their legal training qualifies judges to “get normative”? What gives them the *right* to impose their normative views on the rest of us or prevent other constitutional decision-makers from acting pursuant to different ones? Indeed, the latter seems to have been Whittington’s concern when he maintained that constitutional construction was the job of the “political” branches.⁶¹

But Barnett never actually claimed that judges should decide cases in accordance with their normative views. And he never contended that the appropriate method of construction was for judges to use their best moral or political-philosophical judgment on a case by case basis! What he maintained was that, just as we needed a theory of constitutional interpretation, so too do we need a theory of constitutional construction. It was the choice of *the theory* of construction—not judicial decision-making—that would unavoidably be normative. Such a theory, he said, would likely be grounded by the same normative considerations that grounded a commitment to originalist interpretation and to the original Constitution itself.⁶²

After all, originalism as a theory of interpretation also has a normative dimension. While identifying the original communicative content of the text is an empirical question, whether or not constitutional decision-makers are bound to adhere to that meaning is unavoidably normative. This is reflected in the two core tenets of all variations of originalism as identified by Solum: the “Fixation Thesis” is the claim the meaning of the text *is* fixed at the time of its enactment; the “Constraint Principle” is the claim that constitutional decision-makers *ought* to be bound or “constrained” by the original meaning of the text. Whatever theory of constitutional legitimacy justifies being constrained by original meaning, should also be used to select the proper method of constitutional construction.

Despite these caveats, the interpretation-construction distinction continues to be viewed by some originalists as a threat to the originalist project. While closing the door to pernicious judicial discretion by adopting originalist “interpretation,” it is said to open the window to pernicious judicial discretion in the form of nonoriginalist “construction.” Two types of responses have been made by those who share the concern that the interpretation-construction distinction licenses unconstrained judging.

⁶¹ Keith E. Whittington, *Constructing a New American Constitution*, 27 CONST. COMMENT. 119, 127 (2010) (reflecting upon his concern that the judiciary would “artificially limit the development of new constructions.”).

⁶² See RESTORING THE LOST CONSTITUTION, *supra* note 59, 126-8; Solum, Originalism and Constitutional Construction, *supra* note 17, at 495-499.

The first was simply to deny the distinction exists. This was the tack taken by Justice Scalia and Bryan Garner in their 2012 book, *Reading Law*. “[T]he noun construction answers both to construe (meaning “to interpret”) and to construct (meaning to build)” and “nontextualists have latched onto [this] duality of construction. From the germ of an idea in the theoretical works of Franz Lieber, scholars have elaborated a supposed distinction between interpretation and construction.”⁶³ “Thus is born, out of false linguistic association, a whole new field of legal inquiry.”⁶⁴ In short, according to Scalia and Garner, the interpretation-construction distinction was based on a linguistic misunderstanding.⁶⁵

Scalia and Garner were whistling past the graveyard. As it happens, Cooley in the first edition of “Constitutional Limitations” included a footnote that anticipated the semantic objection based on the ambiguities of the terms “interpretation” and “construction.”

In what we shall say in this chapter, the word *construction* will be employed in a sense embracing all that is covered by the two words *interpretation* and *construction* when used in their strictly accurate and technical sense. Their meaning is not the same, though they are frequently used as expressing the same idea.⁶⁶

Justice Cooley was right and Justice Scalia was wrong. Regardless of the labels used, ascertaining the communicative content of a text is simply a different activity than that of giving legal effect to that meaning. Figuring out what the constitution means is one thing; implementing that meaning is quite another. Though it be not interpretation, constitutional implementation is unavoidable. And most constitutional doctrine—that is, constitutional *law*—is neither to be found in, nor logically derivable from, the original meaning of the text itself.

Indeed, it is because he lacked the interpretation-construction distinction in his toolkit that Justice Scalia took so unfortunate a turn in his otherwise methodologically rigorous originalist opinion for the Court in *District of Columbia v. Heller*.⁶⁷ Had he accepted the distinction, Scalia would have been equipped to explain why implementing doctrines were needed to apply the original meaning of “the right to keep and bear arms” to particular types of firearms like machine guns, or to particular persons, like convicted felons. As it was, these were presented as ad hoc exceptions to the right without any explanation at all.⁶⁸

A second response was to accept the interpretation-construction distinction in principle, while denying it has much, if any, practical application. If construction

⁶³ ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 13 (2012) [hereinafter “Reading Law”].

⁶⁴ *Id.* at 15.

⁶⁵ For a response to Scalia and Garner, see Solum, *Originalism and Constitutional Construction*, *supra* note 17, at 483-488.

⁶⁶ *CONSTITUTIONAL LIMITATIONS*, *supra* note 48, at 41 n. 1 (emphasis added).

⁶⁷ 554 U.S. 570 (2008).

⁶⁸ See Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 *UCLA LAW REV.* 1343, 1345 (2009) (“the Court’s reasoning is at critical points so defective—and in some respects so transparently nonoriginalist—that *Heller* should be seen as an embarrassment for those who joined the majority opinion.”).

begins only when original meaning ends or “runs out,” then the thicker is the original meaning in general, the less there is any need to resort to construction at all. Conversely, if original meaning is generally thin, the construction zone is vast and virtually all litigated constitutional cases may require construction.

Indeed, we think a telling objection to Jack Balkin’s “framework originalism” is his overly thin conception of original meaning, which is limited to the bare semantic meaning of the text generally devoid of contextual enrichment.⁶⁹ So, for example, based on a dictionary definition, Balkin has maintained that, because the original semantic meaning of “commerce” included all “social interaction,” that is a permissible reading of the clause today.⁷⁰

While Solum and Barnett have explained that the communicative content of the Constitution is much thicker than its bare semantic meaning,⁷¹ others have sought to avoid constitutional construction by thickening it still further. Gary Lawson has done so by contending that interpretive presumptions to handle decision-making in the face of evidentiary uncertainty are a part of the text’s original meaning.⁷² John McGinnis and Michael Rappaport have pursued this thickening in two different ways. First, by contending that the “original methods” of judicial decision making are a part of the text’s original meaning.⁷³ Second by claiming that the Constitution is written in what they call “the language of the law,” which is thicker than the meaning that would be known to the general public.⁷⁴

This is not the place to express our reservations about these efforts to broaden the scope of original meaning and thereby reduce the scope for constitutional construction. But we share the concern that motivates them. *If*, as originalism critic Thomas Colby has put it, the original meaning of the Constitution is “sufficiently

⁶⁹ See Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549 (2009). In fairness to Balkin, he became an originalist when Solum and Barnett were referring to original meaning as “semantic meaning.” See e.g. Lawrence B. Solum, *Semantic Originalism*, (November 22, 2008). Illinois Public Law Research Paper No. 07-24. Available at SSRN: <https://ssrn.com/abstract=1120244> or <http://dx.doi.org/10.2139/ssrn.1120244>; Barnett, *supra* note 60, at 65 (defining originalism as “the belief that (a) the semantic meaning of the written Constitution was fixed at the time of its enactment, and that (b) this meaning should be followed by constitutional actors until it is properly changed by a written amendment.”); But *cf. id.* (“Interpretation is the activity of identifying the semantic meaning of a particular use of language *in context.*”) (emphasis added). As suggested by the latter formulation, we maintain that the communicative content of a text consists of its bare semantic meaning enriched by its context—or “contextual enrichment.” See Randy E Barnett, *The Gravitational Force of Originalism*, 82 FORDHAM L. REV. 411, 413-15 (2014) (identifying “three different sources of communicative content of language”: semantic meaning, constitutional implicature, and the publicly available communicative context).

⁷⁰ Compare JACK M. BALKIN, LIVING ORIGINALISM 151-169 (2011) with Randy E. Barnett, *Jack Balkin’s Interaction Theory of “Commerce,”* 2012 U. ILL. LAW REV. 623 (2012).

⁷¹ See, e.g., Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269, 288-91 (2017) (discussing contextual enrichment of the sparse semantic content of the constitutional text).

⁷² See Gary Lawson, *Legal Indeterminacy: Its Cause and Cure*, 19 HARV. J.L. & PUB. POL’Y 411, 423-28 (1996).

⁷³ See McGinnis & Rappaport, *supra* note 12.

⁷⁴ John O. McGinnis & Michael B. Rappaport, *The Constitution and the Language of the Law*, San Diego Legal Studies Paper No. 17-262, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2928936.

open-ended as to be incapable of resolving most concrete cases” and *if* there will be “multiple rules of decision that are each consistent with the original meaning of the vague or ambiguous constitutional commands,” judges embarking upon a construction project might seem to be adrift in an ocean of discretion.⁷⁵ Balkin, for instance, has identified *eleven* kinds of appropriate arguments—arguments from text, structure, purpose, consequences, precedent, convention, custom, natural law, national ethos, political tradition and honored authority—that might be used to support particular constructions.⁷⁶

Loosely-bounded judicial discretion ought to be deeply troubling to anyone who values the rule of law. The more options judges have to “choose” from when determining whether a particular assertion of government power is lawful, the more that judges’ own power seems to be *arbitrary*—unmoored from any predetermined, publicly-accessible conclusions of reason in the law, and resting only upon judges’ beliefs or desires.⁷⁷ Originalism promises fixed limits on government power—not just *any* fixed limits, but those set forth in our written law.⁷⁸ But if most constitutional adjudication is only loosely constrained by the Constitution’s language and what takes place within those constraints is guided only by a grab-bag of nebulous normative principles that judges find attractive, it is questionable whether an originalism that acknowledges constitutional construction as legitimate can deliver on its promise of promoting the rule of law.

Finally, it is of little practical benefit to judges to be told that they are free (within the boundaries set by thin semantic meaning) to articulate whatever rules of decision they deem to be consistent with their preferred normative theories. Even if they enjoyed some advantages over legislators, Presidents, or agency officials in respect of moral and political-philosophical reflection—and we doubt that they do—judges do not have the time to consider how they might make the Constitution “the best it can be,” so long as they stay within the bounds of a capacious normative framework, and they have lots of other things to think about that do not involve moral or political philosophy.⁷⁹

A growing body of research supports the proposition that, whether because of the limits of time and cognitive capacity or because of the sheer computational intractability of the problems before them, judges (like the rest of us) rely upon

⁷⁵ Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO L.J. 713, 742 (2011).

⁷⁶ Jack M. Balkin, *The New Originalism and the Uses of History*, 82 FORD. L. REV. 641, 659-60 (2013).

⁷⁷ See BLACK’S LAW DICTIONARY 104 (9th ed. 2008) (defining “arbitrary” as “[w]ithout fair, solid, and substantial cause; that is without cause based upon the law.”).

⁷⁸ See Solum, *Semantic Originalism*, *supra* note 69, at *129 (noting that a “familiar justification for originalism is based on the great value of the rule of law and its associated values, predictability, certainty, and stability of legal rules.”). For a detailed historical exploration of the concept of the rule of law, see BRIAN TAMANAHA, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY* (2004); for a lucid theoretical exploration of the concept, see Tara Smith, *Neutrality Isn’t Neutral: On the Value-Neutrality of the Rule of Law*, 4 WASH. U. JUR. REV. WASH U. JUR. REV. 49 (2011).

⁷⁹ See RONALD DWORKIN, *LAW’S EMPIRE* 248 (1986). The preeminent “moral reading” theorist today is James Fleming. See JAMES E. FLEMING, *FIDELITY TO OUR IMPERFECT CONSTITUTION: FOR MORAL READINGS AND AGAINST ORIGINALISM* (2015).

heuristics: “fast and frugal”⁸⁰ mental shortcuts that simplify decision-making.⁸¹ While well-designed heuristics can better position decision-makers to make accurate judgments in certain contexts than can more complex and effortful strategies, heuristics that are not well-adapted to the decision-making environment can produce systematic errors.

One way to safeguard against such errors is to provide judges with methodological scripts that they can follow. Originalists who insist that the interpretation-construction distinction is unavoidable can address the concern that recognizing the interpretation-construction distinction exposes the citizenry to arbitrary judicial power, as well as provide practical guidance to judges, by developing a manageable and reliable methodology for disciplining constitutional construction.

We agree that because the original meaning of the text is thicker than what bare semantic analysis yields, the constitutional space for construction is narrower than is sometimes thought. Modern originalist scholarship has revealed that many of the supposedly abstract and open-ended provisions of the text have more definite and restricted meaning when contextually enriched. But because we continue to maintain that *some* construction is nevertheless inevitable,⁸² in this article, we approach this problem from the opposite direction by presenting a theory of constitutional construction that is constraining.

Because we contend that this constraining approach to construction is “originalist,” we are proposing that the term “originalist” can accurately be applied

⁸⁰ See Gerd Gigerenzer & Peter M. Todd, *Fast and Frugal Heuristics: The Adaptive Toolbox*, in *SIMPLE HEURISTICS THAT MAKE US SMART 3* (Gerd Gigerenzer, Peter M. Todd, and the ABC Research Group, eds., 1999).

⁸¹ The most influential article on heuristics in cognition is Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, in *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 3*, 3 (D. Kahneman, P. Slovic, A. Tversky, eds., 1982). For a recent collection of articles, see *HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT* (Thomas Gilovich et al. eds. 2002). For an accessible overview of heuristics, see Gerd Gigerenzer and Wolfgang Gassimaier, *Heuristic Decision Making*, 62 *ANN. REV. PSYCHOL.* 451 (2011). For a variety of perspectives on the use of heuristics in legal settings, see *HEURISTICS IN THE LAW* (Gerd Gigerenzer and Christoph Engel, eds., 2006). For evidence that judges rely on heuristic reasoning, see, e.g., Theodore Eisenberg, *Differing Perceptions of Attorney Fees in Bankruptcy Cases*, 72 *WASH. U. L. Q.* 979 (1994); W. Kip Viscusi, *How Do Judges Think About Risk?*, 1 *AM. L. & ECON. REV.* 26 (1999); Chris Guthrie et al., *Inside the Judicial Mind*, 86 *CORNELL. L. REV.* 777 (2001); Stephen M. Bainbridge & G. Mitu Gulati, *How Do Judges Maximize? (The Same Way Everybody Else Does—Boundedly): Rules of Thumb In Securities Fraud Opinions*, 51 *EMORY L.J.* 83 (2002); Chris Guthrie et al., *Inside the Bankruptcy Judge’s Mind*, 86 *B. U. L. REV.* 1227 (2006).

We stress that heuristics are not necessarily good or bad—the adaptability of a given heuristic can only be evaluated with reference to the decision-making environment in which it is used, in the context of the goal or goals which the decision-maker seeks to accomplish, and in comparison with alternative decision-making strategies. See Gerd Gigerenzer, *Is the Mind Irrational or Ecologically Rational?*, in *THE LAW AND ECONOMICS OF IRRATIONAL BEHAVIOR* 41 (Francesco Parisi & Vernon L. Smith, eds., 2005). Insofar as they reduce the time and effort that judges would otherwise spend deciding particular kinds of cases, good-faith constructions can be understood as heuristics.

⁸² See Solum, *Originalism and Constitutional Construction*, *supra* note 17, at 499-524 (discussing the ineliminability of the construction zone).

both to the activity of ascertaining the communicative content of the text *and* to the activity of giving legal effect to or implementing that meaning.

As a matter of lexicography, the use of the word “originalism” to describe an approach to construction that is concerned with original functions or purposes is entirely consistent with usage. Starting with Brest, the word “originalism” has been used to describe an approach that looks to the purposes, goals, and intentions of the framers and ratifiers. “Where the strict intentionalist tries to determine the adopters’ actual subjective purposes, the moderate intentionalist attempts to understand what the *adopters’ purposes* might plausibly have been, an aim far more readily achieved than a precise understanding of the adopters’ intentions.”⁸³

At a deeper level, the conceptual structure of originalism has always been concerned with origins: our approach focuses on the *original functions*—the functions that were present at the time each constitutional provision was enacted. The other side of this coin is our rejection of a living constitutionalist approach to constitutional function, and therefore to living constitutional construction. We reject the idea that constitutional construction should be guided by new constitutional functions, invented by judges or scholars to instantiate their own preferences. We are aware, of course, that history is messy and there may be hard questions concerning the level of generality at which to identify constitutional functions. Nevertheless, we insist that the proper context in which to focus inquiry into constitutional functions—namely, the point of ratification—and to deny that it is appropriate for judges to identify functions that cannot plausibly be inferred from evidence drawn from that context.

Our approach is based on the first principles of the Constitution itself, and was hinted at in Barnett’s early explication of constitutional construction:

If the original meaning is too vague to provide a resolution of the case or controversy at issue, then (step 2) Choose a construction that yields a specific enough rule or doctrine to reach a unique resolution of the case at hand and future cases without violating the meaning ascertained in step 1. I would further contend that when construction is needed, adopt one that (a) is consistent with the original meaning of the terms at issue and yet (b) *furtheres the constitutional principles* of, for example, separation of powers and federalism, and enhances the legitimacy of the lawmaking process.⁸⁴

⁸³ Brest, *supra* note 18, at 223 (emphasis added).

⁸⁴ RESTORING THE LOST CONSTITUTION, *supra* note 59, at 128. A similar suggestion was made by Lawrence Solum in response to Scalia and Garner: “Scalia and Garner might allow for judicial decision in the construction zone that honors the Constraint Principle and resolves vagueness and irreducible ambiguity in ways that *serve the purposes* of particular constitutional provisions and the overall constitutional structure: of course, Scalia and Garner *would limit the purposes to those fairly derived from text and history*, and would exclude purposes warranted only by the moral and political beliefs of judges.” Solum, Originalism and Constitutional Construction, *supra* note 17, at 488 (emphases added).

The approach we present here elaborates on step 2(b). It does so by building upon the groundwork laid by Gary Lawson and Guy Seidman (and before them by Robert Natelson), who have described what they call “the Fiduciary Constitution.”⁸⁵

II. FIDUCIARY GOVERNMENT AND JUDICIAL DUTY

To borrow James Iredell’s memorable description at the North Carolina ratifying convention, the American Constitution is “a great power of attorney.”⁸⁶ It bears the marks of a particular kind of legal document—one that creates a particular kind of relationship between “We the People” and their *agents* in government, who wield delegated, tightly circumscribed power on their behalf. Judges are no exception to a general principle that is central to understanding the Constitution’s structure and content—the principle of *fiduciary government*.

A. Constituting a Fiduciary Government

Understanding the principle of fiduciary government can begin with the role of fiduciary relationships in private law. In that context, fiduciary relationships are created when one person (the fiduciary) is entrusted with control or management of the assets or legal interests of another (the beneficiary) in order to promote the beneficiary’s interests.⁸⁷ One side of this relationship is characterized by discretionary power that is placed in the hands of the fiduciary; the other side is characterized by the dependency and vulnerability of the beneficiary to injury from opportunistic behavior by the fiduciary who controls the beneficiary’s resources.⁸⁸

By way of compensating for this imbalance and preventing opportunism,⁸⁹ the law imposes a set of stringent default rules on fiduciaries to ensure that they do not

⁸⁵ See *infra* Part II.

⁸⁶ THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 148-49 (Jonathan Elliot ed., 2d ed. 1901) (statement of Att’y Gen. Iredell) [hereinafter “Elliot’s Debates”]]. See GARY LAWSON & GUY SEIDMAN, “A GREAT POWER OF ATTORNEY”: UNDERSTANDING THE FIDUCIARY CONSTITUTION (2017) [hereinafter “Power of Attorney”] (discussing Iredell’s claim).

⁸⁷ See *id* at 13-27 (discussing the private law fiduciary background of the founding era); Paul B. Miller, *A Theory of Fiduciary Liability*, 56 MCGILL L.J. 235 (2011) (discussing contemporary fiduciary theory).

⁸⁸ By “opportunism,” we mean “self-interest seeking with guile,” to borrow economist Oliver Williamson’s widely-accepted definition. OLIVER W. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM: FIRMS, MARKETS, RELATIONAL CONTRACTING 47 (1985).

⁸⁹ In economic terms, the fiduciary’s control over the beneficiary’s resources creates agency costs that cannot as a practical matter be eliminated through elaborate agreements *ex ante* or by continuous *ex post* monitoring by the beneficiary. Fiduciary duties are designed to reduce those costs by aligning the incentives of the fiduciary with those of the beneficiary, namely, by making opportunism more costly to the fiduciary. Foundational articles on agency theory include Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976); Armen J. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 ECON. REV. 777 (1972).

betray their beneficiaries' trust.⁹⁰ These duties include the duty to follow the beneficiary's instructions; the duty to take reasonable care and competently pursue the beneficiary's interests; the duty of loyalty and good faith, that is, the honest pursuit of the beneficiary's interests rather than the fiduciary's own; if there are a multiple beneficiaries, the duty of impartiality in considering and balancing their interests; and the duty to account to the beneficiary.⁹¹

As Gary Lawson, Robert Natelson, and Guy Seidman have demonstrated through their pioneering research, the Constitution was designed to establish a government "whose conduct would mimic that of the private-law fiduciary."⁹² Americans did not invent the concept of fiduciary government, but they understood the relationship between 'government and governed' in fiduciary terms, influenced in this regard by their favorite political theorists.

John Locke, whose influence upon Founding-era political philosophy has been widely noted, presented government officials as fiduciaries who wielded powers delegated to them by the people "with this trust, that they shall be governed by declared laws" and referred to legislative power as a "fiduciary power to act for certain ends."⁹³ In their popular and highly influential series of essays, "Cato's Letters," published in the early 1720s, John Trenchard and Thomas Gordon described government as a "trust, which ought to be bounded with many and strong restraints" and stated that "[e]very violation . . . where such violation is considerable, ought to be met with proportionable punishment."⁹⁴

Baron de Montesquieu's *The Spirit of the Laws*, repeatedly cited by Federalists and Anti-Federalists alike, stated that citizens "entrusted" with public employment ought "to live, to act, and to think" for the sake of their fellow citizens alone.⁹⁵ References to government officials as servants, agents, guardians, and trustees

⁹⁰ See generally LEONARD I. ROTMAN, *FIDUCIARY LAW* (2005); J. C. SHEPHERD, *THE LAW OF FIDUCIARIES* (1981); L.S. Sealy, *Fiduciary Relationships*, 20 CAMBRIDGE L.J. CAMBRIDGE L.J. 69 (1962); Ernest J. Weinrib, *The Fiduciary Obligation*, 25 U. TORONTO L.J. 1 (1975); J.C. Shepherd, *Towards a Unified Concept of Fiduciary Relationships*, 97 L. Q. REV. 51 (1981); Robert Cooter & Bradley J. Freedman, *The Fiduciary Relationship: Its Economic Character and Legal Consequences*, 66 N.Y.U. L. REV. 1045 (1991); Frank H. Easterbrook & Daniel Fischel, *Contract and Fiduciary Duty*, 36 J.L. & ECON. 425 (1993).

⁹¹ See Robert G. Natelson, *Judicial Review of Special Interest Spending: The General Welfare Clause and the Fiduciary Law of the Founders*, 11 TEX. REV. L. & POL. 239, 255-62 (2007).

⁹² Our brief treatment relies on their more extensive account, which is summarized in LAWSON & SEIDMAN, *POWER OF ATTORNEY*, *supra* note 86. For more see, e.g., *id.*; Robert G. Natelson, *The Government as Fiduciary: A Practical Demonstration from the Reign of Trajan*, 35 U. RICH. L. REV. 191, 193 (2001); Robert G. Natelson, *The Constitution and the Public Trust*, 52 BUFF. L. REV. 1077 (2004); Gary Lawson et al., *THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE* 68-70 (2010); Gary Lawson et al., *The Fiduciary Foundations of Federal Equal Protection*, 94 B. U. L. REV. 415 (2014); Gary Lawson & Guy I. Seidman, *By Any Other Name: Rational Basis Inquiry and the Federal Government's Fiduciary Duty of Care* (Boston Univ. School of Law, Public Law Research Paper No. 16-29, 2016), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2822330

⁹³ JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* § 136 (Peter Haslett, ed. 1965) [hereinafter "Two Treatises"].

⁹⁴ JOHN TRENCHARD & THOMAS GORDON, *CATO'S LETTERS* 267 (Ronald Hamowy ed., 1995).

⁹⁵ CHARLES DE SECONDAT, *BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS*, in *MONTESQUIEU/ROUSSEAU* 31 (Thomas Nugent trans., Encyclopedia Britannica ed. 1952).

abound in Founding-era literature and in public debates over the Constitution—both the *Federalist Papers* and the *Anti-Federalist Papers* are chock-full of references to the ideal of government as fiduciary.⁹⁶

The Constitution’s structure, design, and content disclose its character as a fiduciary instrument. Like other eighteenth-century fiduciary documents, it begins with a preamble that states the purposes of the trust being established.⁹⁷ It then grants power to federal actors and institutions, as if to fiduciaries of “We the People.”⁹⁸ The Constitution refers to “public trust”⁹⁹ and to public offices “of trust”¹⁰⁰; Congress is empowered to enact measures that are “necessary and proper” for carrying delegated powers into execution, and to “lay and collect taxes, duties, imposts, and excises” in order to “provide for the . . . “general welfare”; and the President is required to “take care that the laws be *faithfully* executed.”

All of this language sounds in eighteenth-century fiduciary law.¹⁰¹ Writes Natelson, this language reveals a “purpose . . . to erect a government in which public officials would be bound by fiduciary duties to honor the law, exercise reasonable care, remain loyal to the public interest, exercise their power in a reasonably impartial fashion, and account for violations of these duties.”¹⁰²

B. Judges as Fiduciaries

Federal judges, no less than other government officials, draw their power from the Constitution—specifically, from Article III. By the time of the Founding, English public law routinely applied fiduciary norms to “executive” actors, a category that included judges.¹⁰³ That judges were publicly understood to be fiduciaries can be discerned from Founding-era writings that presented judges as representatives of the people, no less than legislators. Thus, Alexander Hamilton in *Federalist 78* argued that judges are obliged to prefer the “intention of the people” (expressed in the Constitution) to the intention of their “agents” in the legislature when those intentions conflicted.¹⁰⁴

⁹⁶ See, e.g., THE FEDERALIST No. 14 at 63 (James Madison) (Liberty Fund 2001) (in a republic, the people “assemble and administer [their government] by their representatives and agents”); THE FEDERALIST No. 46 at 243 (Madison) (“agents and trustees of the people”); THE FEDERALIST No. 59 at 310 (Alexander Hamilton) (“guardianship” and “trust”); THE COMPLETE ANTI-FEDERALIST 289 (Herbert Storing ed., 2008) (legislators “are our representatives and agents”).

⁹⁷ ROBERT G. NATELSON, THE ORIGINAL CONSTITUTION: WHAT IT ACTUALLY SAID AND MEANT 20 (2010) [hereinafter “The Original Constitution”].

⁹⁸ Lawson et al, Fiduciary Foundations, *supra* note 92, at 429.

⁹⁹ U.S. CONST. art. VI, cl. 3.

¹⁰⁰ U.S. CONST. art. I, §3, cl. 7 (“Office of . . . Trust”); *Id.*, art. I, § 9, cl. 8; *Id.*, art. II, § 1, cl. 2 (“Office of Trust”).

¹⁰¹ See Robert G. Natelson, The Legal Origins of the Necessary and Proper Clause, in THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE 52, 52-53 (2010); Robert G. Natelson, *The General Welfare Clause and the Public Trust: An Essay in Original Understanding*, 52 U. KAN. L. REV. 1 (2003); POWER OF ATTORNEY, *supra* note 86, at 7-13.

¹⁰² Robert G. Natelson, *The Constitution and the Public Trust*, 52 BUFF. L. REV. 1077, 1178 (2004).

¹⁰³ Lawson et al., Fiduciary Foundations *supra* note 92, at 434.

¹⁰⁴ THE FEDERALIST NO. 78 (Hamilton), *supra* note 96, at 404.

That is, judges were understood to have a fiduciary duty to ensure that the people's agents in the other branches adhered to *their* fiduciary duties. Shortly after the Constitution was ratified, a number of judges were impeached for violating fiduciary principles. For example, when Judge John Pickering was impeached in 1803-4, he was charged with acting "contrary to his trust."¹⁰⁵

We are persuaded by the evidence adduced by Lawson, Natelson, and Seidman that judges were understood by members of the ratifying public to be fiduciaries, with corresponding duties. But we also believe that the fiduciary model *accurately* captures descriptively the original meaning of the text and normatively the proper relationship between federal judges and members of the public today. As we will discuss below, judges receive considerable discretionary power through a formal process that entails, among other things, a specific agreement to "support *this* Constitution." Because we are all vulnerable to judicial decisions that bring the government's coercive power to bear upon us to our detriment, or that prevent the government's power from being used to our benefit, federal judges *ought* to be understood to be fiduciaries, with corresponding duties.¹⁰⁶

Fiduciary duties map on well to the judicial office. In an illuminating article, Ethan Leib, David L. David, Michael Serota identify and trace the implications of several fiduciary duties for the judicial office: the duty of loyalty, the duty of care, and the duty of accounting.¹⁰⁷ The fiduciary duty of loyalty—the duty to use one's powers exclusively to serve the interests of one's beneficiaries—translates into a judicial duty of unbiased adjudication, which has served as "the cornerstone of the ethical commitment of judges, both historically and in the contemporary ethical rules governing judges."¹⁰⁸ The duty of care, applied to judges, requires them to "engage in reason-based decision making, while giving reasons for their

¹⁰⁵ 3 ANNALS OF CONG. 319–22 (1804). Pickering suffered from both alcoholism and insanity. See EMILY FIELD VAN TASSEL & PAUL FINKELMAN, IMPEACHABLE OFFENSES: A DOCUMENTARY HISTORY FROM 1787 TO THE PRESENT 91-100 (1999). The first article of impeachment charged that the judge, "with intent to evade" the law, ordered a seized ship and two cables returned to "a certain Eliphalet Ladd, who claimed the same" without a prior appraisal and certificates from customs officers. The second article charged that Pickering, "with intent to defeat the just claims of the United States," refused to hear the district attorney's witnesses and ordered the restoration of the ship and cables to Ladd. Article three accused the judge of "wickedly meaning and intending to injure the revenues of the United States" by refusing the district attorney's appeal to the circuit court. The fourth article described Pickering as being intoxicated at the trial and stated that "being a man of loose morals and intemperate habits" he lacked "essential qualities in the character of a judge." See H. LOWELL BROWN, HIGH CRIMES AND MISDEMEANORS IN PRESIDENTIAL IMPEACHMENT 130-4 (2010). For an argument that the impeachment was a politically-motivated and "tragic blunder which reflected discredit upon everyone connected with it," see Lynn W. Turner, *The Impeachment of John Pickering*, 54 AM. HIST. REV. 485, 487 (1949). Although we take no position on the merits of the impeachment, we find the fact that three of the charges sound in bad faith instructive.

¹⁰⁶ The scholar who has made the most of the oath in recent years is Richard Re, whose work we discuss *infra* at 33-4.

¹⁰⁷ Ethan J. Leib et al., *A Fiduciary Theory of Judging*, 101 CAL. L. REV. 699, 712 (2013).

¹⁰⁸ *Id.* at 731.

decisions.”¹⁰⁹ Finally, the duty of accounting requires judges to be “forthright in their opinion writing, explaining honestly why they are deciding as they are.”¹¹⁰

In the context of constitutional interpretation and construction, the most salient fiduciary duties are the duty to follow instructions and to do so in good faith. We will begin by discussing the duty to follow instructions.

Judges not only draw their power from the Constitution but are required (like other federal officials) by Article VI of the Constitution to take an oath to “support” it.¹¹¹ It is “*this* Constitution” that must guide judges in their conduct in office. Guiding their conduct by “this Constitution” entails following the particular instructions given to them in the provisions of the Constitution that authorize and delimit their power.

Article III’s text is sparse but thick with meaning. As Philip Hamburger has shown in his authoritative study of what we now call judicial review, the authorization of the “[t]he judicial power” incorporates a concept of the judicial office that was sufficiently well-understood during the Founding era as to be unnecessary to spell out in any great detail.¹¹² At its core, the office of judging was an office of *independent* judgment in accordance with what Sir Edward Coke described as “the artificial reason of the law”¹¹³—judgment free from the distorting influence of will.¹¹⁴

Judges were to decide cases properly before them in conformance with the law of the land—not the extralegal preferences of government officials, or judges’ own extralegal preferences.¹¹⁵ Judges’ own convictions concerning the law’s justice could not overcome their duty to give effect to the law where the meaning of the law was clear, although in *uncertain* statutory cases, they would adopt equitable interpretations informed by natural law principles, on what Hamburger describes as the “charitable supposition that the injustice had not been intended.”¹¹⁶

¹⁰⁹ *Id.* at 736.

¹¹⁰ *Id.* at 730.

¹¹¹ U.S. CONST. art. VI, cl. 3

¹¹² PHILIP HAMBURGER, *LAW AND JUDICIAL DUTY* (2006).

¹¹³ The phrase comes from Coke’s famous reply to King James I’s assertion that since law was founded upon reason, the king, being as rational as any judge, could ascertain the law as well as the judges. This Coke denied:

[T]rue it was, that God had endowed his Majesty with excellent Science, and great Endowments of Nature; but his Majesty was not learned in the Laws of his Realm of England, and Causes which concern the Life, or Inheritance, or Goods, or Fortunes of his Subjects, are not to be decided by natural Reason but by the artificial Reason and Judgment of Law, which Law is an Act which requires long Study and Experience, before that a Man can attain to the Cognizance of it . . .

E. COKE, *REPORTS* 63, 65 (pt. 12, 4th ed. 1738), *reprinted in* 77 Eng. Rep. 1342, 1343 (1907).

¹¹⁴ *LAW AND JUDICIAL DUTY*, *supra* note 112, at 148.

¹¹⁵ *See id.* at 148-159 (discussing need to resist influence of Crown officials seeking deference to executive power—externally imposed will); *id.* at 173-178 (discussing need to resist influence of own political inclinations—internal will).

¹¹⁶ *Id.* at 54-5 (explaining that “judges at least by the sixteenth century came to recognize that they could pursue charitable suppositions about a statute’s intent only when its intent was otherwise unclear.”).

In the early American republic, the duty of independent judgment was a duty with countermajoritarian implications. The principal threats to liberty in eighteenth-century America came from state legislatures and popular majorities that (as Hamburger explains) “repeatedly threatened the freedom of various racial, religious, political, and propertied minorities.”¹¹⁷ While judges in England could take refuge in popular support when they resisted pressure from executive officials to defer to royal will, American judges often found themselves alone.¹¹⁸ Nonetheless, they did their duty and came to be regarded as essential to the maintenance of the rule of law and the protection of individual rights. Thus, the 1787 Constitution provides for a structurally independent federal judiciary, staffed by judges who would serve during “good behaviour” and enjoy undiminished salaries (by way of warding off threats to their independent judgment),¹¹⁹ to (in Alexander Hamilton’s words) “guard the Constitution and the rights of individuals.”¹²⁰

By establishing a structurally-independent judiciary, staffed by judges with a duty of independent judgment, Article III assures individuals who are confronted with assertions of government power, which they believe to be unlawful, that they need not resort to revolution in order to vindicate their rights—rights that, as experience had shown, could be threatened by local legislatures no less than by a distant monarch. To borrow Locke’s phrasing, Americans are guaranteed a “known and indifferent judge” who will “determine all differences according to the established law.”¹²¹ Article III is designed to provide individuals with access to impartial adjudicators who will give effect to the “supreme law of the land.”

C. *The Promise of Each and Every Judge*

Agency is a consensual relationship; it is “the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act

¹¹⁷ *Id.* at 324. See also GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787* 408 (2d ed. 1998) [hereinafter “Creation of the American Republic”] (detailing how in the 1780s “Americans’ inveterate suspicion and jealousy of political power, once concentrated almost exclusively on the Crown and its agents, was transferred to the various state legislatures,” which had become “the institutions to be most feared.”); MICHAEL KLARMAN, *THE FRAMERS’ COUP* (2017) (documenting the Framers’ “deep distrust of the people” and arguing that “nearly every substantive choice made in the Constitution” was informed by that distrust).

¹¹⁸ LAW AND JUDICIAL DUTY, *supra* note 112, at 324.

¹¹⁹ See U.S. CONST. art. III, §1.

¹²⁰ THE FEDERALIST NO. 78 (Hamilton), *supra* note 96, at 405. Hamburger cautions against projecting such functional considerations into the minds of judges deciding cases. See LAW AND JUDICIAL DUTY, *supra* note 112, at 610 (“[J]udges ordinarily assumed that they served the function of enforcing the constitution and protecting liberty by doing their duty—by deciding in accord with the law of the land”). But “[it] was understood that in doing their duty, the judges served broader constitutional functions.” *Id.* at 322.

¹²¹ TWO TREATISES, *supra* note 93, at §125. See Philip A. Hamburger, *Revolution and Judicial Review: Chief Justice Holt’s Opinion in City of London v. Wood*, 94 COLUM. L. REV. 2091, 2153 (1994) (“American judicial review—based on written constitutions, the separation of powers, and the independence of the judiciary—offered a partial, temporal solution to the problem that, as Americans knew all too well, might otherwise require an appeal to heaven.”).

on his behalf and subject to his control, and consent by the other so to act.”¹²² Although private-law agency relationships require mutual assent, some fiduciary relationships arise unilaterally. For example, a guardian voluntarily assumes a fiduciary relationship with a ward.

Although we maintain that it is a fiction to claim that each and every person subject to the jurisdiction of a government “tacitly” consents to that jurisdiction,¹²³ each and every judge *expressly* consents to be bound by “this Constitution.” This is no fiction. The consent of the judge who swears the required oath is as real and pristine as the consent to any contract. In this way, the fiduciary relationship between federal judges and the rest of us arises through a formal promise. As Judge Frank Easterbrook has described it:

Like other judges, I took an oath to support and enforce both the laws and the Constitution. That is to say, I made a promise—a contract. In exchange for receiving power and lifetime tenure I agreed to limit the extent of my discretion.¹²⁴

What is the content of that judicial promise? Article VI declares that “[t]his Constitution . . . shall be the supreme law of the land” and goes on to state that “judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation to support *this* Constitution.” *This* same Constitution that is the “supreme law of the land” is the Constitution that “judicial officers” are bound by law and in conscience to support.

We emphasize, “in conscience.” At common law, oaths were charged with religious significance.¹²⁵ Judges confronted by efforts to sway their will in the direction of government power steeled themselves not to fear men but only God and to give effect to the law of the land by emulating the dispassionate, impartial giver of the *highest* law.¹²⁶

Richard Re has explains how the oath “gives rise to personal moral obligations” in our more secular age. Re observes that “[n]o hand—either dead or alive—forces individuals to run for office, take the oath, or lead others to think that

¹²² RESTATEMENT (SECOND) OF AGENCY § 1 (1957). On the relationship of agency to contractual relationships, see Randy E. Barnett, *Squaring Undisclosed Agency Law with Contract Theory*, 75 CAL. L. REV. 1969 (1987).

¹²³ See RESTORING THE LOST CONSTITUTION, *supra* note 59, at 10-31 (critiquing claims for government authority based on “tacit consent”). *But see also* RANDY E. BARNETT, OUR REPUBLICAN CONSTITUTION: RESTORING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE 73-78 (2017) [hereinafter “Our Republican Constitution”] (explaining the proper role of “presumed consent” in setting the boundaries of discretionary legislative power).

¹²⁴ Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1119, 1122 (1998). Because one of us denies that contract law is based on “promise,” we doubt that the formal promise of the oath constitutes a “contract” strictly speaking. See Randy E. Barnett, *Contract Is Not Promise; Contract Is Consent*, 45 SUFFOLK U. L. REV. 647 (2012). But we nevertheless insist that the judicial promise establishes a real, not fictitious, voluntary fiduciary relationship that is legally and morally binding.

¹²⁵ See LAW AND JUDICIAL DUTY, *supra* note 112, at 106-12.

¹²⁶ *Id.*

they will take ‘the Constitution’ seriously.”¹²⁷ Once officials do make such a promise, however, they are entrusted with power that they would not otherwise possess, a power that has moral implications.

Accordingly, while a mere document cannot create binding moral obligations simply in virtue of its existence, officials who are entrusted with power *over other people* that they would not otherwise possess in virtue of a voluntary promise to adhere to the terms of that document are morally bound to keep that promise. The oath thus “functions as a bridge between the document and the duty to obey it.”¹²⁸

More specifically, an oath to support the Constitution creates a morally binding promise to “to support the historical document known by that name” and thus “to adopt an interpretive theory tethered to the Constitution’s text and history.”¹²⁹ Were judges free to interpret the Constitution however they saw fit, in the service of whatever ends they deemed desirable, it is not clear what significance the oath would have.

That the elevation to federal office triggers a duty to perform one’s constitutional duties in good faith is made explicit in the current text of the oath required of all federal officers:

I, AB, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and *faithfully* discharge the duties of the office on which I am about to enter. So help me God.¹³⁰

¹²⁷ Richard M. Re, *Promising the Constitution*, 110 NW. U. L. REV. 299 (2016). See also JOSEPH RAZ, *THE AUTHORITY OF LAW* 239 (2d ed. 2009) (“[A]n oath may impose a moral obligation to obey (e.g. when voluntarily undertaken prior to assuming an office of state which one is under no compulsion or great pressure to assume.)”); STEVE SHEPPARD, *I DO SOLEMNLY SWEAR: THE MORAL OBLIGATIONS OF LEGAL OFFICIALS* (2009) (“Oaths are not taken alone . . . They are said aloud, in a manner that ensures at least the appearance of being voluntary. The oath represents an assurance that invites reliance upon those subject to the official’s authority.”).

¹²⁸ Re, *supra* note 127, at 308.

¹²⁹ *Id.* at 323-4. We agree with Re that the oath creates a morally binding promise. However, we depart from his contention that officials have a promissory obligation to adhere to the public’s understanding of “the Constitution” *at the time they take their oaths*. *Id.* at 304. As Christopher Green has shown, indexical language—language whose reference shifts from context to context, like “this,” “now,” “here” and “that”—throughout the Constitution points toward a historical document. Thus, the oath-taker’s authority under “this Constitution” is contingent upon fidelity to *that* document. See Christopher Green, “*This Constitution*”: *Constitutional Indexicals as a Basis for Textualist Semi-Originalism*, 84 NOTRE DAME L. REV. 1607 (2008). For similar arguments, see Akhil Reed Amar, *The Document and the Doctrine*, 114 HARV. L. REV. 26, 33 (2000) (“With these words [in the Supremacy Clause], the Constitution crowns itself king; judges and other officials must pledge allegiance to the document.”); Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for its Own Interpretation?*, 103 NW. U. L. REV. (2008) (“‘This Constitution,’ means, each time it is invoked . . . the text of the written Constitution . . . the document specifies the document as authoritative.”).

¹³⁰ 5 U.S.C. §3331 (emphasis added).

The duty of good faith on the part of judges and Justices specifically is also explicit in the current text of the federal judicial oath.

I, AB, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will *faithfully* and impartially discharge and perform all the duties incumbent upon me as ___ under the Constitution and laws of the United States. So help me God.¹³¹

To say, however, that judges are fiduciaries who are duty-bound to exercise independent judgment and *faithfully* follow their constitutional instructions provides little guidance concerning (a) *how* judges are to interpret the Constitution; or (b) what they are to do in cases where they are unable to arrive at one determinate answer to a particular legal question solely by relying on the communicative content of the text. After all, even the Constitution’s defenders acknowledged the inherent imprecision in language and the impossibility of providing for every contingency in a written text.¹³²

Originalists have a ready answer to the first question: judges are to ascertain the communicative content of the Constitution’s text, a content that is fixed at the time of its enactment. Originalists have not yet developed a framework for addressing the second question. We look to contract law for guidance here.

Just as the predominant originalist approach to interpretation—original public meaning¹³³—closely resembles contract law’s “objective theory of assent” that is ascertained at the time of a contract’s formation,¹³⁴ we believe the proper approach to constitutional construction resembles the contractual duty of good faith performance. It is to that doctrine we now turn.

III. THE JUDICIAL DUTY OF GOOD-FAITH PERFORMANCE

In Part II, we explained why judges who voluntarily assume public office through an express oath to support “this Constitution” thereby become fiduciaries who expressly bind themselves morally and legally to ascertain and “faithfully” give effect to the Constitution’s original meaning. That meaning constitutes the instructions that they must follow in good faith. But how, precisely, are judges to follow those instructions when the communicative content of the text of the Constitution does not yield a single determinate answer and they must, therefore, exercise some discretion in giving legal effect to its meaning?

The same issue arises in contract law, when contracts delegate discretionary powers to one of the parties as they often do. How is this discretionary power to be exercised? In particular, how are ordinary contracting parties to be protected from

¹³¹ 28 USC § 453 (emphasis added).

¹³² See THE FEDERALIST No. 37 (Madison), *supra* note 96, at 183.

¹³³ See JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 123 (2013) (noting that public meaning originalism is “the predominant originalist theory.”).

¹³⁴ See RANDY E. BARNETT, THE OXFORD INTRODUCTION TO U.S. LAW: CONTRACTS 68-74 (2010) (describing and explaining the rationale for the objective theory of assent).

the opportunistic abuses of such discretionary powers? Contract law has answered these questions by recognizing the duty of good-faith performance. This doctrine bars from using the discretion accorded them under the express terms of an agreement to defeat the fundamental purposes—or “spirit”—of the agreement.

In what follows, we will consider how a model of good-faith contractual performance can give us insight into how judges ought faithfully to exercise their own discretionary power.

A. *The Contractual Duty of Good-Faith Performance: The Foregone Opportunities Theory*

The duty to perform contracts in good faith has long been recognized as a general principle of contract law.¹³⁵ Section 1-304 of the Uniform Commercial Code—the law governing the sale of goods in 49 states—stipulates that “Every contract or duty within the Uniform Commercial Code imposes an obligation of good faith in its performance and enforcement.”¹³⁶ Because it is implicit in every contract, the duty of good-faith performance cannot be waived (though the scope of performance can be more precisely defined in the contract).

Importantly, as the Official Comment explains, “the doctrine of good faith merely directs a court towards interpreting contracts within the commercial context in which they are created, performed, and enforced, and does not create a separate duty of fairness and reasonableness which can be independently breached.”¹³⁷ Likewise the duty of good faith originalist construction means applying to the text to specific circumstances within the context in which it was adopted; it is not a separate duty to enforce the judge’s own conception of fairness or reasonableness.

The duty of good faith performance of a contract rests upon factual premises that are easily appreciated: people are not omniscient, they do not have endless time, they could not make agreements that provide for every contingency even if they desired to do so, and they would be discouraged from making agreements at all if they had to worry about every exercise of discretion given to another party being used to defeat the purposes for which they entered into agreements in the first place.¹³⁸ Moreover, parties often contract to receive the benefit of expert knowledge and judgment that they themselves lack.¹³⁹ By necessity, that expert knowledge must be drawn upon and that judgment must be exercised at the discretion of the other party.

The duty of good-faith performance is a “gap-filling” doctrine that is calculated to preserve people’s reasonable expectations in receiving the performance of the other party and the benefit of their bargains, notwithstanding

¹³⁵ See E. Allan Farnsworth, *Good Faith Performance and Commercial Reasonableness under the Uniform Commercial Code*, 30 U. CHI. L. REV. 666, 671 (1963) (tracing the duty of good-faith performance back to Roman law).

¹³⁶ Uniform Commercial Code, § 1-304.

¹³⁷ U.C.C. § 1-304 cmt. 1 (2008).

¹³⁸ See Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821-22 (1992).

¹³⁹ *Id.* at 892.

any discretion in performance that is delegated by the contract to the other party. The doctrine operates to thwart exercises of discretion that violate those reasonable expectations, even if that behavior does not violate any express contractual terms.¹⁴⁰

Though entrenched in our law, the duty of good-faith performance has at times been bedeviled by uncertain and inconsistent formulations and applications. To render the concept more precise, in 1980, Steven Burton presented a theory of the duty of good faith performance of contracts that focused on contractually-delegated discretion.¹⁴¹ Surveying 400 cases in which courts expressly referred to good faith performance, Burton contended that good faith in contract law operates as a means of ensuring that parties do not use the discretion accorded them under the terms of a contract to “recapture opportunities . . . foregone on entering the contract, interpreted objectively.”¹⁴²

According to Burton, good-faith performance “occurs when a party’s discretion is exercised for any *purpose* within the reasonable contemplation of the parties at the time of formation—to capture opportunities that were preserved upon entering the contract.”¹⁴³ The doctrine of good-faith performance thus “directs attention to the opportunities foregone by a discretion-exercising party at formation, and to that party’s *reasons* for exercising discretion during performance.”¹⁴⁴ The identity of foregone opportunities is determined by focusing on the expectations of reasonable persons in the position of the dependent parties—expectations as to benefits to be received by the promisee and expectations as to costs (foregone opportunities) to be borne by the promisor.¹⁴⁵

Thus, whether a particular discretion-exercising party acted *in order to* recapture foregone opportunities as objectively provided by the agreement is a question of *subjective* intent of the party exercising discretion. If a discretion-exercising party uses its control under the letter of the contract *for the purpose of* recapturing a foregone opportunity—even when the conduct is within the letter of the contract because the letter has granted that party discretion—the discretion-exercising party has acted in bad faith. Burton offered several illustrative examples from the case law, two of which involved contractual conditions the satisfaction of which was in the control of one party.

In *Ide Farm & Stable, Inc. v. Cardi*,¹⁴⁶ a contract for the sale of land was conditioned on the buyer’s obtaining financing. The buyer did not go through with the deal, claiming an inability to obtain financing. The seller sued, claiming that the

¹⁴⁰ See Michael P. Van Alstine, *Of Textualism, Party Autonomy, and Good Faith*, 40 WM. & MARY L. REV. 1223, 1255 (1999) (“[A] core function of the duty of good faith lies in imposing limitations on a party’s exercise of a discretionary power to control an aspect of a contractual relationship after formation.”).

¹⁴¹ Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369 (1980)

¹⁴² *Id.* at 373.

¹⁴³ *Id.* (emphases added).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 387.

¹⁴⁶ 110 R.I. 735 (1972).

buyer had failed to perform in good faith. The evidence indicated that the buyer had approached four banks in the hopes of obtaining financing, but was refused because of a tight money market. In this case, wrote Burton, “*the reason for the buyer’s failure was indeed the very one that induces the typical financing condition in land sale contracts*” and thus the “buyer’s discretion [in declining to accept financing at the proffered terms] . . . was exercised in good faith in light of the purpose that parties normally have in mind in so conditioning a promise to buy land.”¹⁴⁷

Burton contrasted *Cardi* with *Fry v. George Elkins Co.*,¹⁴⁸ which involved a sale of a residential home that was conditioned on the buyer securing financing at a specified rate. Here, the buyer was informed at the time of the formation of the contract that he could not obtain such financing from a bank but that it could probably be obtained from a particular mortgage company that already had a substantial loan on the property. Nonetheless, the buyer only approached banks and made no application or inquiry of the mortgage company. The evidence indicated that the buyer had lost all interest in the house and had decided to move to Hawaii—a reason decidedly “outside the normal reasons for so conditioning a promise to buy a house” and thus grounds for concluding that the buyer had subjectively “sought to recapture an opportunity foregone upon entering the contract.”¹⁴⁹ (Of course, the buyer was always free under the terms of the contract to buy *both* houses.)

Difficult though it may be in a given case to determine whether a party has exercised discretion *for the purpose of* recapturing a foregone opportunity, Burton’s theory focuses judicial attention in the right place: whether discretionary power under the terms of a contract has been used to undercut the purpose for which discretion was given, as assessed with reference to the parties’ reasonable expectations at the time of the contract’s formation, and evidence that one party abused his discretion by acting for the purpose of evading or defeating those expectations.

B. *Implications for Judicial Duty: Adhering to the Spirit of the Text.*

Though distinct from the mutual consent needed to form a contract—which ordinarily does not create a fiduciary relationship between the parties—a fiduciary relationship is nonetheless a voluntary assumption of the duties that correspond to the powers that are allotted to the fiduciary. Judges are fiduciaries, not ordinary contracting parties. Yet, as fiduciary law scholar D. Gordon Smith has observed, the fiduciary duty of good faith and the contractual duty of good faith are directed at a common evil: opportunism arising from discretion and vulnerability. In a 2002 article in which he set forth a “critical resources” theory of fiduciary law, Smith expressly drew upon Burton’s theory to identify that common evil:

Fiduciary duty and the duty of good faith and fair dealing both exist because contracts are less than complete. In fiduciary relationships, discretion provides

¹⁴⁷ Burton, *supra* note 145, at 402 (emphasis added).

¹⁴⁸ 162 Cal.App.2d 256 (1958).

¹⁴⁹ Burton, *supra* note 145, at 402.

the fiduciary with the opportunity to expropriate value from the beneficiary; in contractual relationships, discretion provides one contracting party with the opportunity to “recapture opportunities forgone at formation.”¹⁵⁰

The common evil of opportunism that both the contractual and fiduciary duty of good faith are designed to thwart, taken together with Burton’s specific focus on the opportunistic abuse of discretionary power under the letter of contracts, suggests the utility of Burton’s theory of good-faith contractual performance as a means of guiding constitutional construction by our judicial fiduciaries.

Judges receive their power from the letter of a written instrument and by necessity they enjoy a great deal of discretion, owing to the nature of the instructions given them—instructions the linguistic meaning of which may not yield determinate answers in cases that judges are duty-bound to decide.¹⁵¹ That power is delegated to judges by the people on the basis of their expert knowledge of the law and judgment in deciding cases, which they draw upon and exercise at their discretion.

But, as with contractual discretion, judicial discretion can be abused. As a consequence, the people are vulnerable to opportunistic behavior on the part of their judicial agents that threatens their liberty, their property, even their lives. Just as contracting parties can use their contractual discretion in bad faith to undermine the “spirit” of the contract, so too can fiduciaries abuse the discretion they are delegated to violate the spirit of their trust.

What, then, is the “spirit” of the trust that is the Constitution? At common law and in eighteenth-century America, the distinction between the linguistic meaning of a provision of a legal instrument and that instrument’s fundamental purpose or function—whether a contract or a constitution—was expressed through a Christian trope: the distinction between the “letter” and the “spirit.”¹⁵² While ordinarily the letter was sufficient to resolve a given question, where the letter was obscure and judges therefore confronted a need to choose, judges followed the spirit of the text.

An instructive example: When Edmund Pendleton, then President of the Virginia Court of Appeals, gave his opinion in the 1782 case of *Commonwealth v. Caton*,¹⁵³ he said that because “[t]he language of the clause [of the Virginia Treason Act] . . . admits of both the constructions mentioned by the attorney general,” the choice of constructions should be “decided according to the spirit.”¹⁵⁴ Revealingly, Pendleton stated that he “prefer[red] the first, as most congenial to the spirit, and not inconsistent with the letter, of the constitution.”¹⁵⁵

¹⁵⁰ D. Gordon Smith, *The Critical Resources Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399, 1491 (2002) (quoting Burton, *Breach*, *supra* note 145, at 397).

¹⁵¹ Indeed, Burton appreciated how his theory could serve as a means of guiding the exercise of judicial discretion, elaborating a comprehensive theory of good-faith adjudication in his 1992 book, *Judging in Good Faith*—albeit without advocating any particular theory of constitutional interpretation. STEVEN J. BURTON, *JUDGING IN GOOD FAITH* (1992).

¹⁵² LAW AND JUDICIAL DUTY, *supra* note 112, at 52-6.

¹⁵³ 8 Va. (4 Call) 5 (1782).

¹⁵⁴ *Id.* at 16.

¹⁵⁵ *Id.* at 19.

In this respect, Pendleton, like American judges more generally,¹⁵⁶ followed Sir William Blackstone, who wrote that “the most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is by considering the reason and spirit of it . . . for when this reason ceases, the law itself ought likewise to cease with it.”¹⁵⁷ The spirit of the law was considered to be part of the law—no less than the letter.¹⁵⁸

The distinction between letter and spirit—and recourse to the spirit (only) upon failure of the letter—captures an enduring truth. The Constitution’s provisions—like the Constitution as a whole—are calculated to perform particular functions, and they would be without value if they did not do so. Truly understanding and applying the text may *require* an understanding of those functions.¹⁵⁹ Lacking certainty about how to resolve a given case on the basis of the Constitution’s linguistic meaning alone, judges must make a decision on the basis of *some* reason. To formulate a rule with reference to the function that the relevant provision is designed to perform is not a matter of making the law “the best it can be” but giving effect *to* the law as best one can. A judge who decided a case on the basis of some *other* reason—however appealing—would be departing from the law entirely.

In Burton’s terms, then, judges upon taking their oath receive discretionary power from their principals to serve as an impartial adjudicator who will give effect to the law of the land. With this judicial power comes the corresponding duty to follow the instructions in “this Constitution” in good faith. To do so, judges must *forego* the opportunity to act on the basis of *anything but* the letter and the spirit of the law. They must not only act consistently with the letter of the instrument from which they draw their power—they must not use their discretion under that instrument to give effect to their own beliefs and desires. Where the letter of the Constitution is unclear they must turn to the law’s spirit.

¹⁵⁶ See Robert G. Natelson, *The Founders' Hermeneutic: The Real Original Understanding of Original Intent*, 68 OHIO ST. L.J. 1239 (2007) (reliance upon the “spirit,” “sense,” “meaning,” or “reason” of an enactment “for purposes of documentary constructions—sometimes even at the expense of the literal wording—reflected the norm in Anglo-American jurisprudence.”).

¹⁵⁷ WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 59-61 (St. George Tucker ed., William Young Birch and Abraham Small 1803).

¹⁵⁸ Consider a much-quoted passage by Edmund Plowden, among the most highly regarded legal authorities in England and America and often cited by American judges. See *Eyston v. Studd*, (C.P. 1574) 2 P1. Com. 459, 465, 75 Eng. Rep. 688, 695 (reporter’s commentary).

[I]t is not the words of the law, but the internal sense of it that makes the law, and our law (like all others) consists of two parts, viz. of body and soul, the letter of the law is the body of the law, and the sense and reason of the law is the soul of the law, quia ratio legis est anima legis. [“For the reason of the law is the soul of the law.”] And the law may be resembled to a nut, which has a shell and a kernel within, the letter of the law represents the shell, and the sense of it the kernel, and as you will be no better for the nut if you make use only of the shell, so you will receive no benefit by the law, if you rely only upon the letter, and as the fruit and profit of the nut lies in the kernel, and not in the shell, so the fruit and profit of the law consists in the sense more than in the letter.

For Founding-era American citations to Plowden, see Natelson, *supra* note 156, at 1253 n. 64.

¹⁵⁹ See Lawrence B. Solum, *Communicative Content and Legal Content*, 89 NOTRE DAME L. REV. 479, 500 (2013) (explaining that the “public context may include facts about the general point or purpose of the provision (as opposed to “the intention of the author”), and those facts may resolve [textual] ambiguities.”).

In the next section, we provide guidelines by which we can assess the good faith of judges engaged in constitutional construction.

IV. GOOD FAITH CONSTITUTIONAL CONSTRUCTION

No theory of constitutional interpretation or construction can prevent federal judges from acting opportunistically if those judges do not value adherence to rules that are distinguishable from his preferences;¹⁶⁰ do not care about how they are regarded by their colleagues and professional peers;¹⁶¹ and do not take their oath to the written Constitution of the United States seriously.¹⁶² But suppose that judges generally do care about such things. By articulating guidelines for how judges are to engage in good-faith construction and thereby enabling observers to monitor construction and identify opportunistic abuses of judicial discretion, we might be able to make it both more likely that good-faith construction will take place and bad-faith construction will be critically examined, censured and thereby minimized.

A. Guidelines for Good-Faith Originalist Construction

It bears emphasizing that, although constitutional construction necessarily takes place every time constitutional text is given legal effect, judges need not—indeed, should not—enter into the construction zone in every constitutional case. The Constitution’s communicative content is rich. Seemingly sparse text—like the text of Article III—can refer to concepts that have been defined and refined in legal thought and doctrine, have informed governmental practice, and have been the subject of political theory for centuries.

Terms that appear to be vague or “thin” may be considerably less vague and much “thicker” after contextual enrichment. The original public meaning of seemingly open-textured provisions like the Eighth Amendment’s ban on “cruel and unusual punishment” are much more precise their contextually enriched meaning is revealed by rigorous research.¹⁶³ The original meaning of “recess” in the Recess Appointments Clause refers to the period between “sessions” of Congress, once context is taken into account.¹⁶⁴ “Commerce . . . among the several states” encompasses activity of particular kinds: the trade, exchange and

¹⁶⁰ *But see* MICHAEL A. BAILEY & FORREST MALTZMAN, *THE CONSTRAINED COURT: LAW, POLITICS, AND THE DECISIONS JUSTICES MAKE* (2011) (adducing evidence that legal factors influence judicial behavior as well as ideological factors).

¹⁶¹ *But see* LAWRENCE BAUM, *JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR* (2006) (adducing evidence that judges’ desires for good reputations influence their behavior).

¹⁶² *But see* LEE EPSTEIN, WILLIAM M. LANDES, AND RICHARD A. POSNER, *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE* (2013) (adducing evidence that judges “audition” for higher office).

¹⁶³ *See* J.F. Stinneford, *The Original Meaning of “Unusual”: The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739 (2008).

¹⁶⁴ *See* Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, UCLA L. REV. 1487 (2005).

transportation or movement of things.¹⁶⁵ The so-called “general welfare clause,” is not an open-ended grant of congressional power to tax and spend in order to “provide for the . . . general welfare” but a limitation on congressional power. It imposes a fiduciary duty of impartiality and thus prohibits Congress from appropriating money for projects that serve primarily local or special interests.¹⁶⁶

The attempt by originalists to recapture the more determinate “thicker” meaning of these and other clauses is in its relative infancy. Originalist constitutional scholars have been searching for the *original public meaning* of the text—as opposed to the *original intentions* of the Framers—for little more than twenty years. Despite the public prominence of constitutional originalism, the number of originalist scholars has been few (indeed, almost miniscule if compared to the numbers of living constitutionalists). Work on rigorous originalist methodology and the development of best practices for originalist scholarship is very recent.¹⁶⁷ Important tools, such as corpus linguistics, have only just been introduced.¹⁶⁸

Further, as Gary Lawson has observed, the early originalists—like Berger and Bork—were in the final analysis *moral* readers.¹⁶⁹ They were primarily focused on “judges, democracy, constraint, and authority,” not on “meaning, language, and communication.”¹⁷⁰ (We suspect this was because they were actually engaged in constitutional construction, not interpretation.) The *empirical* turn in originalism—originalism’s shift from (as Lawson puts it) an “intellectual rather than political enterprise”—is quite recent.¹⁷¹

Once enriched, the seemingly vague or ambiguous language of the Constitution may be rendered precise enough to enable judges to arrive at many more answers to interpretive questions that, if not certainly correct, are *more plausible* than any competing answers—answers that are “thick” enough to resolve more particular cases.¹⁷² A good-faith effort to resolve a case on the basis of interpretation alone—to ascertain and simply give legal effect to the

¹⁶⁵ See Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001).

¹⁶⁶ See Robert G. Natelson, *Judicial Review of Special Interest Spending: The General Welfare Clause and the Fiduciary Law of the Founders*, 11 TEX. REV. L. & POL. 239 (2006).

¹⁶⁷ See Solum, *Originalist Methodology*, supra note 70.

¹⁶⁸ See Lee J. Strang, *How Big Data Can Increase Originalism's Methodological Rigor: Using Corpus Linguistics to Reveal Original Language Conventions*, 50 U.C. DAVIS L. REV. 1181 (2017); Lawrence M. Solan, *Can Corpus Linguistics Help Make Originalism Scientific?*, 126 YALE L.J. FORUM 57 (2016); James C Phillips, Daniel M. Ortner, & Thomas R. Lee, *Corpus Linguistics & Original Public Meaning: A New Tool to Make Originalism More Empirical*, 126 YALE L.J. FORUM 20 (2016).

¹⁶⁹ See Gary Lawson, *Confessions of an Empirical Reader, Or, Could Fleming Be Right This Time?*, 96 B. U. L. REV. 1457, 1472 (2016).

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 1473.

¹⁷² See GARY LAWSON, EVIDENCE OF THE LAW: PROVING LEGAL CLAIMS 75 (2017) (arguing that a legal proposition “is deemed correct if it is better, meaning more plausible, than its available alternatives.”).

communicative content of the relevant provision—must precede any activity within the construction zone.

Conversely, it is bad faith for a judge who is engaged in interpretation to seek to establish an ambiguity against the weight of the available evidence. For example, we think the Court was interpreting the Contracts Clause in bad faith in *Home Building & Loan Ass'n v. Blaisdell*,¹⁷³ which involved a debtor relief statute that exempted property from foreclosure even though the debtor had defaulted on his *contractual* mortgage obligations. The Constitution's prohibition against state laws "impairing the obligation of contracts" does not recognize any exceptions; and the Court simply had no warrant to ignore the meaning of the fundamental law that constrains the powers of the State of Minnesota, and the justices themselves, by ingenious "interpretations"—indeed, by interpretations that contradicted the fundamental purpose or function of the Contracts Clause at the time it was enacted.

When, however, interpretation alone does not yield enough information to resolve a case, judges *must* enter the construction zone—and they will, *whether they acknowledge the interpretation-construction distinction or not*. A rule must be applied—either a previously formulated rule or a new one. But merely saying that an implementation rule must be consistent with the letter of the law—which is what advocates of the interpretation-construction have long said¹⁷⁴—is not enough.

When a determinate answer cannot be ascertained through interpretation, either because the text is irreducibly ambiguous, inherently vague, or simply because busy, fallible, institutionally constrained judges are unable, despite their best, most disciplined efforts, to attain the needed clarity concerning the answer to a particular interpretive question, judges should turn to the spirit of the relevant text. Crucially, identification of the spirit entails recourse to many of the same materials as the identification of the letter. For any given provision of the Constitution, there are *reasons* that the particular words were chosen, *functions* that those words were designed to perform.

Just as discovering the "spirit of the deal"¹⁷⁵ requires an investigation into "the commercial context in which [a contract is] created,"¹⁷⁶ discovering the functions of various clauses of the Constitution entails investigation into the context in which they were enacted. This is familiar turf for originalists—the inquiry into the law's spirit is no less empirical, no less grounded in publicly available facts, than inquiry into the law's letter. Constitutions, statutes, and contracts are products of human design, and—as we will elaborate—one need not read minds to determine what they are designed to do.¹⁷⁷

¹⁷³ 290 U.S. 398 (1934)

¹⁷⁴ See, e.g., LIVING ORIGINALISM, *supra* note 70, at 341-2 n. 2 ("Interpretations and constructions may not contradict original meaning, therefore once we know the original meaning of the text, it trumps any other form of argument"); RESTORING THE LOST CONSTITUTION, *supra* note 59, at 101-2 ("[A]ny construction must not contradict whatever meaning has been discerned by interpretation.").

¹⁷⁵ Summers, *supra* note 142, at 203.

¹⁷⁶ U.C.C. § 1-304 cmt. 1 (2008).

¹⁷⁷ See Richard A. Posner, *Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 196 (1986) (observing that "[a] document can manifest a single

Judges do, however, need to take care to properly identify the level of abstraction at which the function of a provision should be characterized, just as they must take care to properly identify the level of abstraction at which to understand particular words. There is no way to identify the appropriate level of abstraction without examining the evidence.

John McGinnis and Michael Rappaport have rightly warned about the dangers of the “abstract meaning fallacy”—concluding that constitutional language has an abstract meaning without sufficiently considering the alternative possibilities.¹⁷⁸ Judges must be equally wary of settling upon abstract *purpose* or function without closely investigating historical sources, with an eye to capturing, not the personal intentions and expectations of the framers, but those functions that the framers, ratifiers, and members of the public generally understood particular provisions to serve.

Many constitutional provisions were designed to perform several different functions, and judges must be sensitive to the context of the case at hand in deciding which function should guide construction. For example, the Second Amendment’s prefatory clause indicates a particular function—ensuring that the newly-created federal government would not eliminate a pre-existing institution—the general “militia” consisting of the body of the people with their own private arms¹⁷⁹—that was deemed “necessary to the security of a free state.”¹⁸⁰ This is one of the reasons that “the right to keep and bear arms” protected by the Amendment was possessed by individuals.

Yet, though the preservation of a general militia composed of individual citizens with their own arms be its express purpose, the Amendment does not specify the function or functions to be played *by the general militia* or armed population. Although this is not the place to rehearse it, the evidence is powerful that the general militia was thought necessary for *both* personal and collective self-defense.¹⁸¹

purpose even though those who drafted it and approved it had a variety of private motives and expectations.”).

¹⁷⁸ See John O. McGinnis & Michael B. Rappaport, *The Abstract Meaning Fallacy* (Northwestern Public Law Research Paper No. 11-67 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1959668&download=yes

¹⁷⁹ In the eighteenth century, the term “militia” referred to what was called the “general” militia consisting of “the body of” or “the whole of” the people. See, e.g., VA.. CONST. OF 1776 art. I, §13 (“[A] well-regulated militia, composed of the body of the people”); 3 ELLIOT’S DEBATES, *supra* note 86, at 425 (remarks of George Mason at Virginia ratifying convention (“What are the militia? They consist now of the whole people); Letters from the Federal Farmer (XVIII), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 96, at 341 (“A militia, when properly formed, are in fact the people themselves . . . and include . . . all men capable of bearing arms”). It did not refer to organized military units, which were either “select” militia or a standing army but encompassed all of those who qualified for military service. See JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT 163 (1994) (“The argument that today’s National Guardsmen, members of a select militia, would constitute the only persons entitled to keep and bear arms has no historical foundation.”).

¹⁸⁰ U.S. CONST. amdt. 2.

¹⁸¹ *Id.* at 2790-99. See e.g. Constitution of Pennsylvania (September 28, 1776) (“That the people have a right to bear arms for the defence of *themselves and* the state. . . .” (emphasis added)).

Assuming this claim is borne out by the weight of the evidence, the *relevant* function of the Second Amendment in cases involving modern restrictions on the private ownership of weapons is that of ensuring that law-abiding citizens can defend themselves against public *or* private violence.¹⁸² It is *that* historically-identifiable function judges should apply in determining how the right to bear arms might “reasonably” be regulated. For example, a ban on “arms” that create an unreasonable risk of harm to innocent third parties even when properly used in self-defense might well be consistent with the original function—or spirit—of the Second Amendment, given the great variety of arms that do not create such a risk.

In a much-disparaged¹⁸³ passage of his opinion for the Court in *District of Columbia v. Heller*,¹⁸⁴ Justice Scalia allowed for a series of exceptions for particular weapons and persons, such as machine guns and felons. Because he rejected the interpretation-construction distinction, Justice Scalia thought he was identifying the historical contours of the right itself.¹⁸⁵ Yet, because he presented little or no historical evidence that the original meaning of the right included such exceptions, his assertions had the appearance of what Scalia in a heated dissent in another case called “bald, unreasoned disclaimer[s].”¹⁸⁶ We believe that that the evidence of original meaning persuasively shows that the right to arms was a right of private individuals to possess and carry weapons for personal and collective self-defense;¹⁸⁷ but we do not believe the current state of the historical evidence establishes such specific contours of that right. If not, these must be supplied by construction, not interpretation.

This goes to show that wishing the interpretation-construction distinction away does not make it so. What Justice Scalia needed to do—in a future case, not in *Heller*—was to more carefully identify the spirit of the Second Amendment to see if the exceptions he flagged were consistent with that spirit. For example, do fully automatic “machine guns” that can “spray” bullets by holding down the trigger create an unreasonable risk of harm to innocent third parties when properly used in self-defense as compared, for example, with semi-automatic weapons that fire one bullet with each squeeze of the trigger?

Correctly identifying the relevant function of a provision is not sufficient, however. Judges should then specify an implementing rule or construction that resolves the case at hand in a manner that is consistent with that function, and susceptible of application to future cases of a similar kind.

¹⁸² See Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 ALA. L. REV. 103 (1987) (observing that political oppression is not “the main reason modern civilians want to possess arms nor the main effect that private possession of arms has on the political community” and proceeding to consider whether the underlying right to self-defense encompasses also “the people’s right to the means of defending themselves from [private violence].”).

¹⁸³ For a thorough demolition, see Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343 (2009).

¹⁸⁴ 554 U.S. 570 (2008).

¹⁸⁵ See READING LAW, *supra* note 63, at 15.

¹⁸⁶ *Lawrence v. Texas*, 539 U.S. 558, 604 (2003) (Scalia, J., dissenting).

¹⁸⁷ See Randy E. Barnett, *Was the Right to Keep and Bear Arms Conditioned on Service in an Organized Militia?*, 83 TEX. L. REV. 237-277 (2004); Randy E. Barnett & Don B. Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 EMORY L. J. 1139 (1996).

A rule for one case only is no rule at all. Nor is a rule that is set forth without explanation likely to equip judges to effectuate a provision in future cases. Once derived and sufficiently explained, however, a construction can stand on its own. In future cases, judges need only to explain why and how a construction applies and then apply it. They need not continually revisit how that construction facilitates the original function or spirit of the text.

The application of such constructions—or implementing doctrines¹⁸⁸—is what we call “constitutional *law*.” Of course, as preexisting doctrines meet new and unanticipated circumstance these rules of constitutional law may have to be adjusted and refined in light of the functions the provisions of the text they implement were adopted to perform. That, indeed, is just how the common law of contract was developed over centuries.¹⁸⁹

When the evidence concerning the original functions of a particular provision is not sufficiently clear for judges to identify and apply, judges should have recourse to the spirit of the Constitution as a whole—the original function of the system. The Constitution is not a treatise in political philosophy, but it rests upon political values and principles that were shared by its proponents and opponents alike.¹⁹⁰ The Constitution’s Preamble refers to several of them—effective government (“to form a more perfect union,” “ensure domestic tranquility”), impartial government (“establish justice” and “provide for the common defense”), fiduciary government (“promote the general welfare”—as distinct from that of particular individuals or groups) and the protection of individual rights that precede government (“secure the blessings of liberty”).¹⁹¹

Good faith interpretation and construction thus consists in three separate steps:

- (1) Make a good-faith effort to determine the original meaning of the text of the relevant provision and to resolve the case on the basis of the letter.
- (2) Failing this, identify the original functions or spirit of the provision, and
- (3) Formulate a rule to be followed in the case at hand and in the future that is
 - (a) consistent with the letter and
 - (b) designed to implement the original functions of
 - (i) the provision at issue or, failing that,
 - (ii) the structure in which the provision appears or, failing that,
 - (ii) the Constitution as a whole.

¹⁸⁸ See RICHARD H. FALLON, JR., *IMPLEMENTING THE CONSTITUTION* (2001).

¹⁸⁹ See generally A.W.B. SIMPSON, *A HISTORY OF THE COMMON LAW OF CONTRACT* (1987). See also RANDY E. BARNETT, *THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW* 109-32 (2d ed. 2014) (identifying the evolutionary nature of the common law decision process as a discovery mechanism).

¹⁹⁰ See SCOTT DOUGLAS GERBER, *TO SECURE THESE RIGHTS: THE DECLARATION OF INDEPENDENCE AND CONSTITUTIONAL INTERPRETATION* 58-92 (2000) (canvassing evidence from the framing and ratification debates, the Federalist Papers, the Anti-Federalist Papers, and writings and speeches from leading intellectual figures during the framing era and concluding that “there was a continuity of Lockean liberal ideals between the revolutionary period and the constitutional period with regard to the fundamental purpose of the state.”).

¹⁹¹ See *THE ORIGINAL CONSTITUTION*, *supra* note 97, at 20-1.

Do all this candidly and carefully, explaining why the implementing rule is consistent with the spirit of the Constitution, setting forth the rule clearly and concisely and modeling its proper application.

B. *Detecting Bad Faith Originalist Construction*

One way to characterize bad-faith constitutional construction is as follows: When a judge takes an oath to follow “this Constitution,” the judge (when acting in the capacity of a judge) foregoes the opportunity to change the Constitution to something the judge likes better. Put in contract law terms, it is bad faith for a party to exercise his or her discretion to improve, evade, or get out of the deal. If judges use their discretion to adopt constitutional constructions that undermine rather than consist with the spirit of “this Constitution,” they are evading the deal when they made when they received powers in return for their oath to uphold “this constitution.” However noble may be their motives, they are literally acting in bad faith, and such bad faith constitutional constructions are to be opposed.

Lee Strang has cautioned against evaluating whether originalist interpretation has been performed in good faith, on the grounds that subjective inquiries into judges’ good faith can be both distracting and disruptive.¹⁹² Such inquiries invite scholars and litigants to “delv[e] into the nonjudicial utterances of judges to try to show subjective bad faith,” potentially undermining and even paving the way for the overruling of valuable rules on the basis of (unwarranted) doubt concerning the motivations of those who formulated them.¹⁹³ Further, “intrusive search[es] into judges’ nonjudicial writings and statements” could “discourage qualified personnel from accepting judicial office.”¹⁹⁴ Finally, when it comes to identifying original meaning, the motives or purposes of the judge are irrelevant. What matters is whether he or she got the interpretation right.

We think these points are well taken. Yet, while determining whether a particular construction is a “good-faith construction” *does* involve inquiry into the subjective purpose of the judge, there is only one purpose that is forbidden: attempting to recapture the foregone opportunity to change or amend the written Constitution, after having been empowered as a judge on condition of taking an oath of fidelity to “this Constitution.” Adopting constructions for the purpose of undermining the operation of the Constitution as it is written—for example, by effectively whole clauses—is “bad faith.”

But *defining* “good faith” and “bad faith” construction in the general way we propose is one thing; *proving* it is another. Because good-faith originalist construction involves implementing the original spirit of the Constitution, and because that spirit or function of any portion of the text is a fact to be discovered not invented, whether a judge has acted with *subjective* bad faith can and should be assessed *objectively* by examining the functions of the text the judge has identified

¹⁹² Lee J. Strang, *An Originalist Theory of Precedent: The Privileged Place of Originalist Precedent*, 2010 BYU L. REV. 1729 (2010).

¹⁹³ *Id.* at 1744.

¹⁹⁴ *Id.*

and the evidence put forward on their behalf. The form of “bad faith” we are looking for can be identified “objectively” by examining the reasoning of a judge without inquiring into his or her subjective mental state. And typically a proposed construction will not be evaluated in isolation but as compared with alternative constructions that might comport better with the letter and spirit of the text.¹⁹⁵

While determining whether a judge has properly identified the spirit of the law may seem abstract and intimidating, it should not be. As noted above, the inquiry is empirical, and empirical inquiries can be evaluated with reference to the rigor of the method through which evidence is collected, the presentation of that evidence, and the persuasiveness of arguments made on the basis of that evidence. Since most of the research that a judge will need to perform in order to identify the spirit will already have been conducted in the course of initial interpretive efforts, evaluating the identification of the spirit will not be much different than evaluating any other originalist endeavor.

An objective appraisal of good faith can look like this: Has the judge taken account of the text, structure, and history of the provision? Has he explained why text, structure, and history point towards a particular function? Has he defined that function with precision, at the proper level of generality? If a provision serves as a number of functions and he has concluded that one is particularly relevant to the kind of case that is now before the court, has he explained why? If more than one is relevant, has he sought to identify which function is of primary importance? How does the function he claims for the text compare with others?

Evaluating the translation of the spirit of the text into an effective implementing rule is a more complex matter. It will be difficult to determine whether the articulation of a rule following a good-faith effort to ascertain the letter and a successful identification of the spirit of a provision is itself performed in good faith. Without knowing how a newly-minted rule will apply in future cases, we can only evaluate the arguments that the judge has made to justify the rule and the consequences of the application in a given case.

Has the judge given a convincing explanation of why the rule is consistent with the spirit of the provision? Has she explained how the rule will produce results consistent with the spirit of the provision, not just in this case, but in future cases? Has she considered and responded to counterarguments? Is it evident how the

¹⁹⁵ We note that while modern fiduciary law insists that private fiduciaries like corporate directors are under a continuous duty not to act opportunistically, it can be very difficult to prove bad faith in court. For example, under Delaware law, directors must be shown to have “consciously disregard [] [their] duties to the corporation and its stockholders.” *Nagy v. Bistricher*, 770 A.2d 43, 48 n.2 (Del. Ch. 2000). A finding of conscious disregard, in turn, requires a showing that the directors “knowingly and completely failed to undertake their responsibilities,” not merely that they made an “inadequate or flawed effort to carry out fiduciary duties.” *Ryan v. Lyondell Chemical Co.* 2008 WL 2923427 (Del. Ch. 2008) (denying summary judgment), reversed 970 A.2d 235, 242-4 (Del 2009). Such deferential review is arguably for the good of all concerned—as Judge Frank Easterbrook and Daniel Fischel observed in a famous article, zealous judicial efforts to thwart opportunistic behavior by fiduciaries may “not make principals better off” and “instead lead to fewer agents, or higher costs.” See Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J.L. & ECON. 425, 426 (1993).

application of the rule in the instant case produces a result that is consistent with the spirit?

It may be that a rule that is effective at implementing a constitutional guarantee at time *A* may be ineffective, counterproductive, or unmanageable at time *B*. When confronted with arguments that a rule has failed in practice to effectuate the law's spirit, judges must be prepared to reevaluate that rule. At the same time, a decision to preserve a rule is not necessarily an act of bad faith. We should ask: Has the judge acknowledged any credible evidence in the record that a rule has proven ineffective, counterproductive, or unmanageable? Has he responded to arguments based on that evidence? Has he applied the rule in the case at hand in a way that inspires confidence in the rule?

Good-faith construction—and the evaluation of whether construction is being performed in good faith—cannot be reduced to a mechanical formula. The chief virtue of our approach is that it serves to focus the attention of judges, as well as those who are evaluating their performance, on the right kind of things. It tells judges how to perform their duties, and provides a criteria by which others can scrutinize whether judges are performing their duties in good faith. If the “heaven” of determinate answers to constitutional questions escapes judges from time to time, they need not plunge into an “abyss” of contested normative claims that are unmoored from the law, and citizens need not be at a loss as to whether judges are acting as faithful fiduciaries or are betraying their trust.¹⁹⁶

Towards the end of his article criticizing Justice Scalia's construction work in *Heller*, Nelson Lund provides a sketch of what he terms “conscientious originalism” that is strikingly similar to our own prescription for constitutional construction: “When the text does not supply an adequately precise answer,” he advised, “a conscientiously originalist court has no choice but to decide the issue in light of *the purpose of the provision* as that purpose was understood by those who adopted it.”¹⁹⁷ We take Lund to be referring here, not to the conscious understandings or mental states of the ratifiers, but to the functions or design features of the text at the time it was approved—design features that were as knowable by the ratifiers as was the meaning of the words themselves.

We like the term “conscientious,” which strikes us as getting at the same thing as what we are calling “good faith.” Hence our approach could be labeled “conscientious originalist construction.” We prefer the term “good faith,” however, because it connects the method of construction with the fiduciary duties that judges, along with every constitutional decision-maker, voluntarily assume by taking their oath.

But we are not surprised by the similarity between Professor Lund's approach and our own. We suspect that, in practice, what we are calling good faith originalist construction may well be the natural default method of applying or implementing

¹⁹⁶ Martha Nussbaum, *Recoiling from Reason*, NY Rev of Books 36, 41 (Dec 7, 1989), reviewing ALISDAIR MACINTYRE, *WHOSE JUSTICE? WHICH RATIONALITY?* (1988).

¹⁹⁷ Lund, *supra* note 183, at 1372 (emphasis added). See also Joel Alicea & Donald L. Drakeman, *The Limits Of New Originalism*, 15 J. CONST. L 1161, 1214 (2013) (“It . . . seems reasonable to consider that there may be cases where there is documentary evidence of what the Framers of a particular provision were trying to accomplish when they adopted the constitutional language.”)

the original meaning of the text when the communicative content of the text itself is insufficient.

Suppose that Strang is correct that overzealous policing of judicial bad faith in the context of constitutional interpretation may discourage qualified personnel from seeking office. That concern could be addressed through working to create a legal-cultural norm pursuant to which we are *justified* in presuming good faith and the burden on those who would charge bad faith is therefore properly demanding. We are uncertain that this describes the current legal culture in which deviation from the letter and original spirit of the Constitution is lauded rather than condemned.

IV. EXAMPLES OF GOOD-FAITH AND BAD-FAITH ORIGINALIST CONSTRUCTION

Our theory of good-faith originalist construction is designed to equip judges to discharge their constitutional duties. To show both how good faith originalist construction can work in practice—and how we can distinguish between good-faith and bad-faith construction—we now consider two doctrines.

A. *Good Faith Originalist Construction: Time, Place, and Manner Regulations of Speech*

Demonstrating that any particular implementing construction or rule is consistent with the letter and the spirit of the Constitution requires a deeper dive into both the original meaning and original functions of the relevant text than is feasible in this space. To illustrate what we mean by good faith originalist construction, we offer the familiar doctrines of intermediate scrutiny of content-neutral regulations of the time, place, and manner of speech and strict scrutiny of content-based speech restrictions.

Recently, Jud Campbell has presented evidence in support of the proposition that the speech and press freedoms protected by the First Amendment were a reference to individual rights that are derived from human nature—that is, natural rights—but which can be reasonably regulated in civil society.¹⁹⁸ Campbell maintains that “Americans typically viewed natural rights as aspects of natural liberty that governments should help protect against private abridgment (through tort law, property law, and so forth) and which governments could restrain only to promote the public good and only so long as the people or their representatives consented.”¹⁹⁹ He further argues that natural rights were “not legal ‘trumps’ in the way that we often talk about rights today.”²⁰⁰ We will assume for the purposes of this discussion that Campbell is correct about the original meaning of the text.

On Campbell’s account, while natural rights were expansive, they were not unbounded. “There was no natural right to assault others, for instance, because assault interfered with the natural right of personal security.”²⁰¹ The boundaries of natural rights could be policed *ex post* by common law actions in contract, tort, and

¹⁹⁸ Jud Campbell, *Natural Rights and the First Amendment*, YALE L. J. ____ (forthcoming 2017), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3016815

¹⁹⁹ *Id.*

²⁰⁰ See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 24 (1978).

²⁰¹ Campbell, *supra* note 198, at *22.

property, which served to define the scope of the rights. They could also be policed *ex ante* by means of general laws or regulations that were designed to protect the common law defined rights of individual members of the public—thus promoting the public good.

The Supreme Court has never wholly embraced the position—sometimes associated with Justice Hugo Black—that the freedom of speech and of the press can *never* be regulated.²⁰² State and local governments have enacted many laws that regulate speech to protect the public, and the Court has upheld those laws on numerous occasions. For example, the Court in *Cox v. New Hampshire*²⁰³ upheld regulations barring “parade(s) or procession(s)” through public streets without a special permit. Such demonstrations risk interfering with the use of public streets and sidewalks by other citizens who are trying to go about their business. Another example: in *Kovacs v. Cooper*,²⁰⁴ the Court upheld local ordinances preventing the use of “sound trucks” with blaring speakers in residential neighborhoods or after certain hours. Such regulations protect the peaceful enjoyment of property by residents.

At the same time, in the course of resolving these cases, the Court has developed doctrines designed to ensure that the government has regulated in good faith to protect individual rights. One such doctrine provides that laws which either facially, or by design, target speech on the basis of its *content* receive strict judicial scrutiny rather than the intermediate scrutiny applied to content-neutral time, place, and manner regulations.

The Court’s specific concern with content-based restrictions on speech first became pronounced in *Police Dept. of Chicago v. Mosley*,²⁰⁵ a case in which the Court invalidated a local ordinance that prohibited all picketing, except labor picketing, near a school. In *Mosley*, the presumptive illegitimacy of content-based speech distinctions was presented as a synthesis of a number of decisions involving constitutionally protected—if provocative—speech.²⁰⁶ These decisions were taken to stand for the principle that “government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”²⁰⁷ Concern about the deliberate imposition of ideological preferences has permeated decisions concerning content-based speech restrictions since *Mosley*.²⁰⁸

²⁰² See, e.g., *New York Times Co. v. United States*, 403 U.S. 713, 717-18 (1971) (Black, J., concurring).

²⁰³ 312 US 569 (1941).

²⁰⁴ 336 U.S. 77 (1949).

²⁰⁵ 408 US 92 (1972).

²⁰⁶ Among them: *Cohen v. California*, 403 US 15 (1971); *New York Times v. Sullivan* 376 US 254 (1964); *Terminiello v. Chicago*, 337 US 1 (1949).

²⁰⁷ *Mosley*, 408 US at 95.

²⁰⁸ See, e.g., *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991) (reaffirming that content-based burdens “raise[] the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace”); *Cohen v. California*, 403 U.S. 15, 21 (1971) (stating that allowing government to silence “offensive” speech in public would “effectively empower a majority to silence dissidents simply as a matter of personal predilections”); *Reed v. Town of Gilbert, Az.* 135 S. Ct. 2218, 2229 (2015) (quoting *Hill v. Colorado*, 530 U.S. 703,

The idea appears to be that content-based speech regulations are rarely enacted in good faith to protect individual rights, but are instead bad faith attempts to suppress speech or speakers of which the government disapproves.²⁰⁹ So such measures are viewed more skeptically by the courts than content-neutral regulations that are more likely to have been enacted in good faith.

These doctrines cannot be derived from any straightforward interpretations of constitutional text.²¹⁰ The text of the First Amendment says nothing about time, place, or manner or about treating content-based speech restrictions differently from content-neutral speech restrictions. But if Campbell is correct that the original meaning of “the freedom of speech, and of the press” denoted natural, individual rights, and that the exercise of natural rights was understood to be bounded by rights of others, regulations that are designed to maintain those boundaries—as distinct from suppressing their exercise—are consistent with the letter and original spirit of the text. In contrast, speech restrictions that are designed only to impose what Cass Sunstein has termed “naked preferences” for certain ideas violate that spirit.²¹¹ Indeed, we think Sunstein’s powerful trope of “naked preferences” can be understood in terms of what we are calling “good faith constitutionalism.”

The legislature too has a fiduciary duty of good faith to the people to properly exercise its delegated powers (which we intend to examine in the future). As Justice Bradley put it when discussing the general police power of a state, “there are certain fundamental rights which this right of regulation cannot infringe. It may prescribe the manner of their exercise, but it cannot subvert the rights themselves.”²¹² Judicially-created time, place and manner doctrines serve as a means for courts to “smoke out” bad-faith legislative abuses of regulatory power that subvert, rather than reasonably regulate, the natural rights of free speech and press. In this way, they equip judges to give effect to the letter in light of the spirit of the First Amendment.

We do not claim that there was anything inevitable about the precise forms that these First Amendment doctrines have taken; they emerged relatively late in our history over the course of decades and have gone through many permutations. Nor do we claim that the spirit of the speech and press clauses dictate that these doctrines and *only* these doctrines be applied, or that these doctrines are somehow “optimally” designed to implement that spirit. Although we have not conducted a

743 (2000) (Scalia, J., dissenting) (“The vice of content-based legislation . . . is not that it is always used for invidious, thought-control purposes, but that it lends itself to use for those purposes.”).

²⁰⁹ See RESTORING THE LOST CONSTITUTION, *supra* note 59, at 341 (observing that speech “does not ordinarily interfere with the liberty of others because of its content.”)

²¹⁰ IMPLEMENTING THE CONSTITUTION, *supra* note 188, at 90. We note that Justice Scalia, despite his negative view of construction, never objected to these doctrines. See *Hill v. Colorado*, 530 U.S. at 743 (Scalia, J., dissenting); *McCullen v. Coakley*, 134 S. Ct. 2518, 2541 (2014) (Scalia, J., concurring). When it came to construction, Scalia, like Molière’s M. Jourdain, may have been speaking prose all of his life without knowing it. MOLIERE, *LE BOURGEOIS GENTILHOMME* act 2, sc. 4 (Jean Serroy ed., Gallimard 1998).

²¹¹ See Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1690, 1692 (1984) (distinguishing between “legitimate effort(s) to promote the public good” and “the exercise of raw political power.”).

²¹² *The Slaughter-House Cases*, 83 US 36, 114 (1873) (Bradley, J dissenting).

comprehensive survey, we suspect that is more than one way to implement (in particular contexts) the original functions of the First Amendment’s speech and press clauses.

That good-faith construction to implement the original meaning of the text consistently with its original function may prove *underdeterminate*—in the sense that it will not produce one and only one implementing rule, in a nontrivial number of constitutional contexts—does not trouble us.²¹³ By identifying the outer boundaries of constitutional discretion, good-faith construction makes it more likely that judges will arrive at rules that are consistent with the original function of the provisions. This makes it preferable to alternative approaches that leave *all* linguistically permissible rules on the table, thereby permitting judges to implement their own preferences rather than the ones embodied in the text and its spirit.

More broadly, “good faith constitutionalism,” as it were, does not eliminate the inevitable discretion lodged in the fiduciary agents of the people—be they legislators, executives or judges—any more than the duty of good faith performance of contracts eliminates all discretion of contracting parties. Instead, both concepts define the outer bounds of that discretion. Just as legislatures must exercise their discretionary powers in good faith, so too must the judiciary implement the original meaning of the letter of the text in good faith by adhering to its original spirit.

B. *Bad-Faith Originalist Construction: The Slaughter-House Cases*

In contrast with good faith constructions distinguishing proper from improper regulations of the freedom of speech, we believe that the Supreme Court interpreted the Privileges or Immunities Clause of the Fourteenth Amendment in bad faith in the *Slaughter-House Cases*²¹⁴ when it rendered that clause a virtual nullity five years after the Fourteenth Amendment was ratified in 1868. The majority’s reasoning in *Slaughter-House* provides a useful example of the misuse of the “purpose” or spirit of the text.

The *Slaughter-House Cases* concerned a Louisiana statute that gave a private corporation composed of seventeen butchers an exclusive right to maintain a central slaughter-house south of New Orleans and required slaughtering to be performed exclusively at that facility. All other butchers—numbering about 1,000—who were not members of the corporation and sought to use the facility had to pay a fee for the privilege.²¹⁵ A group of independent butchers challenged the statute, charging that the monopoly constituted an arbitrary burden on their right to pursue a lawful

²¹³ For a thorough exploration of the distinctions between determinacy, indeterminacy, and underdeterminacy, see Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462 (1987). Good-faith construction may not always yield one and only one result—thus, it may not be always be *determinate*—but the set of results that it will produce will not be “identical with the set of all imaginable results”—thus, it will not be *indeterminate*, but, rather, *underdeterminate*. *Id.* at 473.

²¹⁴ 83 US 36 (1873).

²¹⁵ For a summary of the factual background of the statute and the litigation, see Randy E. Barnett, *The Three Narratives of the Slaughter-House Cases*, 41 J. SUP. CT. HISTORY 29 (2016) (describing the narratives of public health, public corruption, and race).

calling—a right that they claimed was secured against the states by the Privileges or Immunities Clause.²¹⁶

By a vote of 5-4, the Court rejected the butchers’ arguments. Writing for the majority, Justice Samuel Miller determined that the Privileges or Immunities Clause protected only a handful of incidents of “national citizenship,” including the right to travel to the nation’s capital, the right to protection on the high seas and foreign lands, and the right to visit subtreasuries.²¹⁷ While even a cursory inquiry into the context in which the Fourteenth Amendment was adopted make it obvious that the protection of *those* rights was not a priority, Miller’s reasoning was guided by his understanding of the “one pervading purpose” of the Reconstruction Amendments, namely, “the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizens.”²¹⁸ *That* purpose obviously did not encompass the protection of white butchers against slaughtering monopolies.

Miller might have sought to determine why the text of Section One of the Fourteenth Amendment—unlike Section Two, or the Fifteenth Amendment—made no mention of race.²¹⁹ The omission of any mention of race was a clue that the Fourteenth Amendment had a broader function than that which Miller identified. The Fourteenth Amendment was certainly designed to protect recently freed African-Americans from those who (in Miller’s words) had “formerly exercised unlimited dominion over them.”²²⁰ Yet the amendment generally—and the Privileges or Immunities Clause in particular—was by no means limited to that function.

When one situates the amendment in the context of Republican constitutional thought that held national citizenship to be a guarantee of natural and civil rights that states could not abridge, it becomes apparent that the Privileges or Immunities Clause was designed to affirm beyond any doubt that states must respect the natural and civil rights of *all* citizens and to expressly authorize the federal government, including the federal judiciary, to enforce those rights.²²¹

²¹⁶ The only full-length book on the *Slaughter-House Cases* is RONALD LABBE & JONATHAN LURIE, *THE SLAUGHTERHOUSE CASES* (2003). While it provides a useful history of the case, its discussion of the legal issues is deeply flawed. For a critique, See Timothy Sandefur, *Slaughtering the Fourteenth Amendment*, 4 CLAREMONT REV. OF BOOKS CLAREMONT REV. OF BOOKS 39 (2004), available at http://www.claremont.org/publications/crb/Id.1381/article_detail.asp. (among other errors, the authors “do not describe the background or passage of the 14th Amendment” and they dismiss the butchers’ arguments as “clever and cynical” without mentioning “the myriad cases which, before 1873, upheld the common-law right to earn a living”).

²¹⁷ *Slaughter-House Cases*, 83 US at 80-1.

²¹⁸ *Id.* at 71.

²¹⁹ Miller noted the distinction, but passed quickly over it. *Id.* at 71-2.

²²⁰ *Id.* at 72.

²²¹ For accounts of the political-philosophical and constitutional thought that informed the Fourteenth Amendment, see generally JACOBUS TENBROEK, *THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT* (1951); JACOBUS TENBROEK *EQUAL UNDER LAW* (1965); WILLIAM M. WIECEK *THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848* (1977); MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1986); Daniel A. Farber and John E. Muench, *Ideological Origins of the Fourteenth Amendment*, 1 CONST. COMMENT. 235 (1994); Rebecca E. Zietlow, *Congressional Enforcement of*

It is noteworthy that Miller *misquoted* the text of the Privileges and Immunities Clause of Article IV, Section 2 in a way that obscured—perhaps deliberately²²²—how many Republicans, influenced in this regard by abolitionist constitutionalists like Joel Tiffany, had come to understand that provision.²²³ The text provides that “[t]he citizens of each State shall be entitled to all Privileges and Immunities of Citizens *in* the several States.”²²⁴ Yet Miller quoted the text of the Privileges and Immunities Clause as follows: “The citizens of each State shall be entitled to all *the* privileges and immunities of citizens *of* the several States.”²²⁵ As Richard Aynes has pointed out, the effect was to “ma[ke] th[e] provision appear to protect state, not national rights.”²²⁶

Like the Court in *Blaisdell*, the Court in the *Slaughter-House Cases* did not candidly assert that it was departing from the law of the land in pursuance of its own will—perhaps because it disagreed with the wisdom of the “radicals” in Congress who managed to get the Fourteenth Amendment into the Constitution. But the majority’s reasoning left little doubt that the justices were seeking to avoid an interpretation that they believed would “radically change[] . . . the whole theory of the relations of the State and Federal Governments to each other and of both of these governments to the people.”²²⁷

The possibility that the Fourteenth Amendment was designed to do precisely that—or that it was designed to implement an understanding of the “whole theory and relations of the State and Federal Governments to each other and of both of these governments to the people” that was contrary to that of the justices—was not seriously pursued. The Court employed an inaccurate conception of the spirit of the law in order to effectively redact an entire clause of the Constitution from its letter.

We do not claim here that the underlying legislation violated either the letter or the spirit of the Privileges or Immunities Clause correctly understood. As reflected in the record below, as well as the independent research of historians, it may well have been that the Slaughter-House Act was a reasonable exercise of the

Civil Rights and John Bingham’s Theory of Citizenship, 36 AKRON L. REV. 717, 719-39 (2003); Randy E. Barnett, *Whence Comes Section One?: The Abolitionist Origins of the Fourteenth Amendment*, 3 J. LEG. ANALYSIS 165 (2011).

²²² See LOUIS LUSKY, *BY WHAT RIGHT? A COMMENTARY ON THE SUPREME COURT’S POWER TO REVISE THE CONSTITUTION* 201 (1975) (accusing Miller of “deliberately misquot[ing]” the text).

²²³ See JOEL TIFFANY, *A TREATISE ON THE CONSTITUTIONALITY OF AMERICAN SLAVERY, TOGETHER WITH THE POWERS AND DUTIES OF THE FEDERAL GOVERNMENT IN RELATION TO THAT SUBJECT* 97-9 (1849).

²²⁴ U.S. CONST. art. IV, §2.

²²⁵ *Slaughter-House Cases*, 83 U.S. at 75 (emphasis added).

²²⁶ See Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, The Fourteenth Amendment, and the Slaughter-House Cases*, 70 CHI.-KENT. L. REV. 627, 647 (1994).

²²⁷ *Slaughter-House Cases*, 83 US at 78. See G. Edward White, *Reconstructing the Constitutional Jurisprudence of Salmon P. Chase*, 21 N. KY. L. REV. 41, 115-16 (1993) (positing that the majority’s approach was dictated by “antebellum assumptions” that individual rights were largely left to the states for protection and corresponding concerns that the interpretation of the Fourteenth Amendment advanced by the butchers would allow “both the federal courts and Congress [to] get into the business of displacing the private law of the states.”).

states' police power to protect the health and safety of the general public.²²⁸ If so, the constitutional question would then turn on whether the grant of a monopoly to a private company was a constitutionally proper method of regulation.

But because the *Slaughter-House* majority concluded that the Fourteenth Amendment did not protect a right to pursue a lawful occupation at all, the outcome of the case did not turn on an impartial adjudication of the facts. This was demonstrated the very next day when the Court upheld an Illinois law barring women from the practice of law in *Bradwell v. Illinois*.²²⁹ To uphold the law, the Court merely cited its holding in *Slaughter-House*. No record evidence or marshalling of the facts was necessary to reach that result.²³⁰

We *do* claim that the Court in *Slaughter-House* engaged in bad-faith construction. Not only was its decision mistaken about the original meaning of the text, and therefore erroneous as a matter of constitutional interpretation—as many constitutional scholars have concluded.²³¹ Justice Miller's opinion also illustrates how an appeal to the “purpose” or spirit of the text can improperly be used in bad faith to supersede the meaning of the text.

V. OBJECTIONS TO GOOD-FAITH ORIGINALIST CONSTRUCTION

Good-faith originalist construction seeks to meet a well-recognized need to guide judges in discharging their duty when the original meaning of the text does not provide a sufficient basis to decide a case—and to provide members of the public with assurance that they will not be exposed to arbitrary judicial power. That is to say, it aspires to do for constitutional construction what Burton's “foregone

²²⁸ See Barnett, *supra* note 215, at 296-301 (summarizing the evidence developed by historians in support of the act as a good faith public health measure, as well as evidence that it was a bad faith product of public corruption).

²²⁹ *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1872).

²³⁰ In contrast, the three dissenters in *Slaughter-House* who joined the *Bradwell* majority were compelled by their reasoning to affirmatively justify the reasonableness of Illinois' restriction on the right to pursue a lawful occupation. This task fell to Justice Joseph Bradley in his now-notorious concurring opinion. See *Bradwell*, 83 U.S. (16 Wall.) at 139 (Bradley, J. concurring). Chief Justice Salmon P. Chase dissented in both *Slaughter-House* and *Bradwell*. See Barnett, *supra* note 215, at 302-07 (discussing how the differing approaches of Miller and Bradley in *Slaughter-House* dictated their differential opinions in *Bradwell*).

²³¹ See, e.g., AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 213 (1998) (remarking upon “[t]he obvious inadequacy” of Justice Miller's majority opinion in *Slaughterhouse*); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1287 n. 247 (1995) (averring that Miller “incorrectly gutted the Privileges or Immunities Clause”); Richard L. Aynes, *supra* note 226, at 627 (reporting that “virtually everyone agrees the [Supreme] Court incorrectly interpreted the Privileges or Immunities Clause.”). *But see* KURT T. LASH, *THE FOURTEENTH AMENDMENT AND THE PRIVILEGES OR IMMUNITIES OF AMERICAN CITIZENSHIP* 252-265 (2011) (noting general rejection of Miller's opinion by “[p]ost-New Deal legal academics” but finding that Miller was “absolutely right” not to “read the Fourteenth Amendment as eradicating constitutional federalism”); Kevin Christopher Newsom, *Setting Incorporationism Straight: A Reinterpretation of The Slaughter-House Cases*, 109 YALE L.J. 643 (2000) (acknowledging the “almost crushing weight” of contrary scholarly opinion but arguing that Miller's opinion supports the incorporation of the Bill of Rights against the states and is correct).

opportunities” theory did for the duty of good-faith performance in contract law, and what original meaning originalism did for constitutional interpretation. We now turn to some potential objections to the theory.

A. *Does It Revive the Old Originalism?*

Viewing proper construction as a product of, and limited to, the original spirit of the Constitution, strikes some of the same chords as appeals to the original intentions of the Framers as a form of originalism—that is, it echoes pre-theoretical “old originalism” or proto-originalism. This may be more than coincidental if the proto-originalists” were often engaged in constitutional construction themselves—that is, if proto-originalists like Berger resorted to framers’ intent, not to identify the original meaning of the text, but precisely when the original meaning of the text was ambiguous or vague. Reformulated in this way, proto-originalism might be conceived as seeking the “spirit of the Constitution” when the letter of the Constitution—its original public meaning—is underdeterminate.

The appeal of proto-originalists’ invocation of “original intent” has always been that it purports to put the “framers’ values” ahead of the judge’s own, and is thereby constraining. And *this is just what we are advocating*: putting the objectively-identified *original* functions, purposes or spirit of the text itself ahead of the judge’s own preferences.

The problem was that, when seeking to apply the text to modern circumstances, proto-originalists often went beyond identifying the original function or purpose of a provision to ask “what would the framers do?”—which one of us has disparaged as “channeling the framers.”²³² Because the facts arising in certain cases—say, cases involving violent video-games²³³—may have been inconceivable to the Framers, this is not an historical inquiry. Rather, unlike versions of originalism that entail factual inquiry into the communicative content of language at a given point in time, asking how the framers *would have* applied the text to a modern case is a *counter-factual* thought experiment.

In contrast, good faith originalist construction seeks to identify an empirical fact: the original function, objective, or purpose of a provision of particular clauses, or of the Constitution as a whole. Each clause of the Constitution was the result of a careful “design process.” Each was chosen for a reason or reasons.²³⁴ We discover these reasons by consulting what was said about them both in public and in private.

²³²See RESTORING THE LOST CONSTITUTION, *supra* note 59, at 111. For a call for originalists to return to this approach, see Steven D. Smith, *Meanings or Decisions? Getting Originalism Back on Track*, Library of Law and Liberty, December 2, 2014, available at <http://www.libertylawsite.org/liberty-forum/meanings-or-decisions-getting-originalism-back-on-track/> (terming this approach “original decisions originalism.”).

²³³ See *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729 (2011).

²³⁴ We recognize that the possibility of encountering bad spirits raises hard normative questions. Among them: Might there be cases in which the spirit of a clause is so bad that a judge would be morally justified in disregarding it? We do not claim that the legal and moral duty of constitutional fiduciaries to give effect to the letter and the spirit of the Constitution could never be defeated by a superior moral obligation. On the other hand, we do claim that the amended Constitution is normatively “good enough” to be *prima facie* binding. See *generally* RESTORING THE LOST

For this reason, the appeal to the original spirit of the text is quite different than seeking the original subjective “intentions” or motives of its framers or ratifiers as individuals. And it is very different than seeking how the framers or ratifiers of the text thought it applied, or would apply, to particular factual circumstances, which has been called “original expected applications.”²³⁵ Had they actually conceived of a particular application—as opposed to this being a counterfactual construct about what they *would have* thought—they may well have been in error.

By contrast, like original meaning, the original function, purpose or object of a particular provision is an empirical historical fact, which is identified by evidence. The only sense in which the framers and ratifiers could have been in “error” about what they hoped to achieve is if what they were actually trying to accomplish was wrong (as it could well have been).

To appreciate why it is appropriate to consult private as well as public statements about original function, consider the example of an old-fashioned analogue watch. A watch has a primary function or purpose: to tell time. That purpose is discoverable by examining it, once one figures out what the numbers around the circumference and the hands that point to them represent. Now open the watch and see the flywheel, gears, and springs, each of which has its own secondary function that facilitates the fulfillment of the watch’s primary function. While it is obvious that the parts are all designed to work together to move the hands, unless one is a watchmaker, the exact function or purpose of each part is difficult to discern. And these “intended” functions or “purposes” of the constituent parts of the watch are different than the *motives* of the watch designer, which may have been to earn a paycheck, or even the esteem of fellow watch designers.

One way to identify these functions would be to speak with the watch designer. Failing that, one could consult the written comments by the designer about what each part is supposed to do and why it, rather than another design, was chosen. The watch designer’s views are “authoritative,” not because he has some legal power over a watch user, but because of what he knows about watch design in general and the choices he made when designing this particular watch. As one of us observed, in this way, the framers of the Constitution can be viewed as designers or architects of a system of government.²³⁶

If “the Framers are viewed as designers or architects of the lawmaking ‘machine,’” we “consult them when we want to know how the machine is supposed to work, not because they are a surrogate for the majority of the people who lived two hundred years ago, but because they might have special insight into the

CONSTITUTION, *supra* note 59. If so, there is a good reason to doubt that conflicts between letter and spirit and any superior moral obligations will take place with any frequency. Thus, while we are prepared to acknowledge that there might be such cases, we do not think that they should be provided for within the framework of good-faith construction. We invite those who disagree to provide workable accounts of how to deal with conflicts between either letter or spirit and superior moral obligations in individual cases.

²³⁵ Balkin, *supra* note 70, at 293.

²³⁶ See Randy E. Barnett, *The Relevance of Framers’ Intent*, 19 HARV. J.L. & PUB. POL’Y 403 (1996) (distinguishing “two reasons to consult the Framers. The first views the Framers as wardens; the second as designers or architects.”).

machine that they designed—especially its internal quality-control procedures.”²³⁷ They “gave its purpose and design much thought—perhaps more thought than we have—and we benefit from their learning in interpreting their design.”²³⁸ On this view, the Framers’ beliefs about the functional construction of the Constitution play an evidentiary role. The goal is to discern the original function or purpose of the provisions and structure of the constitutional machine—not the subjective goals or expectations of the Framers.

This way of viewing “Framers’ intent” has two advantages. First, the Framers-as-Designers approach “explains why we remain so fascinated and influenced by the views of the small group of persons who framed—as opposed to ratified—the Constitution. . . .”²³⁹ Indeed, “we generally confine our attention to just a handful of the Framers,” such as James Madison, James Wilson, or Gouverneur Morris, “as opposed to the views of other members of the convention or of the reigning majority of the time.”²⁴⁰ We listen to them more carefully than others because we believe that they had insight into the functioning of the system they helped design.

Second, according to the Framers-as-Designers approach, we consult the writings of the Framers “to discern not their specific hypothetical intentions towards particular legislation, but the design principles that explain the specific provisions and general structure of the Constitution. Among the design principles are federalism, separation of powers, the duty to apply the Constitution as supreme law, and freedom of speech and religion.”²⁴¹

The Constitution can be thought of as describing a device or mechanism like a watch. Like the watch, the Constitution as a whole has functions or purposes (described in the Preamble). Like the flywheel, gears and springs of the watch, each of its clauses was designed to work harmoniously with the others to fulfill those functions. Like the watch, each of its constituent parts have their own secondary functions as means to the more general ends.²⁴²

Like a watch, the Constitution was consciously designed. Where the function or purpose of a provision is not obvious, we can attempt to “reverse engineer” the design from close examination of its workings. But we can also seek out the explanations left behind by its designers. Whether these explanations were published or not, they would still help us to understand the functions of each constituent part as we attempt to use the device of the Constitution to perform its intended functions by seeking its spirit.

²³⁷ *Id.* at 408.

²³⁸ *Id.*

²³⁹ *Id.* at 408-09.

²⁴⁰ *Id.* at 409.

²⁴¹ *Id.*

²⁴² In the context of statutory interpretation, John Manning has drawn a similar distinction between the “ulterior” or “background” purposes of a statute and the “implemental” purposes that particular provisions are designed to achieve. See John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 115 (2011) (“[T]he law’s ‘purpose,’ properly understood, embodies not merely a statute’s substantive ends (its ‘ulterior purposes’), but also Congress’s specific choices about the means to carry those ends into effect (its ‘implemental purposes’).”)

B. *But What about the Summing Problem?*

But wait! Didn't originalists abandon the old proto-originalism because of devastating objections by Paul Brest and others that rested upon the impossibility of identifying the intentions of myriad framers and ratifiers? Didn't we see in Part II that this is why originalists moved to original public meaning in the first place? Do not all these same problems now return with originalist construction based on the "purposes" of the Constitution?

Well, not so fast. The term "purpose" is ambiguous. It could refer to something as subjective as the intentions, motives or "purposes" of particular framers. Or it could refer to the functions or "purposes" of a particular artifact like a watch. To avoid this semantic confusion, we prefer the term "original function" to that of "original purpose," though sometimes "purpose," "object," "end," or "goal" reads better than "function." We believe that constructions should aim to realize the objective functions of the constitution and not the subjective purposes of individual framers.

Even Paul Brest acknowledged that the "general purposes" of a provision of the text were ascertainable and that it is perfectly sensible to seek to adhere to them. Judges, he observed, "are more concerned with the adopters' *general purposes* than with their intentions in a very precise sense."²⁴³ Describing what he called "moderate intentionalism," he wrote: "A moderate intentionalist applies a provision consistent with the adopters' intent at a relatively high level of generality, consistent with what is sometimes called *the 'purpose of the provision.'*"²⁴⁴ The moderate intentionalist "attempts to understand what the adopters' *purposes* might plausibly have been, an aim far more readily achieved than a precise understanding of the adopters' intentions."²⁴⁵

Brest also discussed how one goes about identifying these purposes:

Interpreters often treat the writings or statements of the framers of a provision as evidence of the adopters' intent. This is a justifiable strategy for the moderate originalist who is concerned with the framers' intent on a relatively abstract level of generality—abstract enough to permit the inference that it reflects a broad social consensus rather than notions peculiar to a handful of the adopters.²⁴⁶

And he characterized "moderate originalism" as "a perfectly sensible strategy of constitutional decision-making."²⁴⁷

One of Brest's mistakes here is referring to "framers' intent," rather than to framers' design or function; another is using the ambiguous word "purpose," which can mean either, thereby muddying the water. But the important preliminary point is that the most famous original critic of originalism conceded that (a) attempting to identify the "general purposes" of provisions of the text is more "readily

²⁴³ Brest, *supra* note 18, at 205 (emphasis added).

²⁴⁴ *Id.* at 228 (emphasis added).

²⁴⁵ *Id.* (emphasis added).

²⁴⁶ *Id.* at 214.

²⁴⁷ *Id.* at 231.

achieved” than aggregating the subjective intentions of myriad framers and ratifiers and (b) consulting “the writings or statements of the framers of a provision” was a “justified strategy” for discovering these more “abstract” original functions.²⁴⁸

When combined, two recent developments in philosophy support such a stance. The first is artifact theory, which defines an “artifact” as “an object that has been intentionally made or produced for a certain purpose.”²⁴⁹ As explained by Risto Hilpinen, an artifact requires a maker or designer,²⁵⁰ but the concept “allows the possibility that an artifact has several authors who contribute to its production. Such objects may be termed ‘collectively produced artifacts.’”²⁵¹

Of particular relevance to our discussion of “Framers intent” is the fact that artifacts have functions or purposes that are imparted to them by their makers or authors.²⁵² “The existence and some of the properties of an artifact depend on an author’s intention to make an object of certain kind.”²⁵³ The “causal” tie between “an artifact and its author’s productive intention — is constituted by an author’s actions, that is, by his work on the object.” The “success of an author’s productive activity depends on the degree of fit or agreement between the intended and the actual character of the object.”²⁵⁴

Hilpinen then explains how we can discover the productive intention behind an artifact:

An author’s productive intention is often expressed by cognitive artifacts which show the character of the intended artifact and the way it should be constructed, for example, a drawing, a diagram, or a model of the artifact, together with a list of parts and materials and a set of instructions (a precept) for the production process.²⁵⁵

Moreover, such “representations are especially important in the case of collectively produced complex artifacts. They are necessary for successful communication

²⁴⁸ In the last part of his critique, Brest questioned whether moderate originalism accurately describes the practice of the courts. “Contrary to the moderate originalist’s faith, the text and original understanding have contributed little to the development of many doctrines she accepts as legitimate.” *Id.* Whatever else may be said about this criticism, it is distinct from questioning the feasibility of originalism.

²⁴⁹ Risto Hilpinen, *Artifact*, *The Stanford Encyclopedia of Philosophy* (Winter 2011 Edition), Edward N. Zalta (ed.), available at <<https://plato.stanford.edu/archives/win2011/entries/artifact/>>.

²⁵⁰ *Id.* (“An artifact has necessarily a maker or an author; thus artifact and author can be regarded as correlative concepts.”).

²⁵¹ *Id.*

²⁵² *See id.*:

When a person intends to make an object of a certain kind, his productive intention has as its content some description of the intended object, and the author’s intention “ties” to an artifact a number of predicates which determine the intended character of the object.

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.*

among the authors of the artifact and for the coordination of their productive actions.”²⁵⁶

Finally, the “study of artifacts (*qua* artifacts) is intrinsically evaluative, since viewing an object as an artifact means viewing it in the light of intentions and purposes.”²⁵⁷ By this Hilpinen means we evaluate whether the artifact well- or ill-serves its intended purposes. Nevertheless, what purposes of the artifact was intended to serve remains an empirical fact to be discovered.

An example will help to illustrate the implications of artifact theory. Consider a complex device like a smart phone. Smart phones are designed to make telephone calls, to send and receive emails and text messages, to function as a camera, and to run apps that enable the phone to perform many other functions. Modern smart phones do not have a single designer. They are designed by teams, with different groups working on hardware and software. We have no difficulty discerning the functions that a smart phone was intended to perform. The summing problem simply drops away, because identification of the functions *as a property of the artifact* is conceptually distinct from an inquiry into the psychological motives and purposes of the individual members of the various design teams.

The implications of artifact theory for good faith originalist construction are too obvious to require much elaboration. From one perspective, the Constitution can itself be treated as an artifact that was made or created by a collective body of authors, who had a “productive intention” to make a certain kind or type of thing that functioned in certain ways to accomplish certain ends. From another perspective, the Constitution is the “set of instructions” or a recipe²⁵⁸ created by the authors to describe how the complex artifact—a new national government—it establishes is supposed to operate.

From either perspective, originalism is a commitment to following this original design, first, by correctly *interpreting* the instructions, the meaning of which was fixed at the time they were published, and second by *implementing* the instructions in a manner that faithfully effectuates the original purposes it was designed to achieve. By this route we arrive at a unified theory of originalism.

But how realistic is the view that groups like the Framers (or drafters)) of a constitution can have an “intention” that is distinct from the subjective intentions of its constituent members? Can we avoid the problem of “summing” all their diverse intentions? This philosophical question has been addressed by Christian List and Philip Pettit in their work on “group agency.”²⁵⁹

List and Pettit’s project is far more ambitious than what is needed here. Their aim is, not only to identify the existence and character of group agents and their intentions, but to show how such agents can be held morally responsible for “their” actions. Of course, such an idea should not startle anyone who thinks that a

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ See Lawson, On Recipes, *supra* note 40.

²⁵⁹ See CHRISTIAN LIST & PHILIP PETTIT, GROUP AGENCY THE POSSIBILITY, DESIGN, AND STATUS OF CORPORATE AGENTS (2011). See generally Abraham Sesshu Roth, Shared Agency, The Stanford Encyclopedia of Philosophy (Summer 2017 Edition), Edward N. Zalta (ed.), available at <<https://plato.stanford.edu/archives/sum2017/entries/shared-agency/>>.

corporation ought to be liable to suit as an entity and held legally accountable for the harms it causes separate from the liability of its employees or even its officers and owners. According to List and Pettit, group or corporate agency is no “legal fiction”; it is quite real.

Along the way, they ask “[h]ow could a multi-member group move from the distinct and possibly conflicting intentional attitudes of its members to a single system of such attitudes endorsed by the group as a whole?”²⁶⁰ In other words, “how can a group of individuals make collective judgments on some propositions based on the group members’ individual judgments on them?” Because their analysis of these questions is too rich to be fully reported here, their general conclusion will need to suffice:

A group forms a judgment or other attitude over a certain proposition when the proposition is presented for consideration—it is included in the agenda—and the group takes whatever steps are prescribed in its organizational structure for endorsing it. . . . [T]hese steps may involve a vote in the committee-of-the-whole, a vote in an authorized subgroup, or the determination of an appointed official.²⁶¹

At the risk of oversimplifying, individual agents are individually responsible for their choice to design and make a group—like the convention in Philadelphia—that has the structural or procedural features that are necessary to reach decisions about its ends and to adopt means by which they can be effectuated. Not just any collection of persons, but a group that is *organized in this way*, they contend, has all the requirements of a responsible agent.

Integrating the concept of an artifact that is made for a purpose with a coherent account of group agency enables us to identify a potential solution to the summing problem. On List and Pettit’s account, those who gathered in Philadelphia can be said to have organized themselves so as to constitute a group agent. The intentions of the Convention (the group agent) can be understood as the purposes or functions of the artifact they designed—the Constitution—as a whole and of its constituent parts (rather than the personal motives of each individual designer).

To return to the analogy of a watch, a watch is an artifact designed to perform the function of telling time, and each gear, spring and flywheel has an essential, if not indispensable, role in the watch performing that function. Each constituent part has its own functions within the watch that, when combined with the functions of the other parts, results in an accurate time keeping instrument. On this view, the Constitution is a collectively-produced artifact made by a group agent (the Framers assembled in a Convention governed by rules of procedure) and designed to perform certain primary functions—set forth in the Preamble. Its various articles and clauses perform secondary functions that are supportive of those preambular functions.

We do not affirm the correctness of the above particular renditions of artifact or group agency theory. We have not done the work necessary to make an independent judgment about the soundness of either philosophical stance. But we

²⁶⁰ List & Pettit, *supra* note 259, at 40.

²⁶¹ *Id.* at 159.

do find both claims to be initially persuasive. If they are correct, there is no insuperable “summing problem” in identifying the types of group functions, objectives, or what Brest called the “general purposes” that the various constituent parts of the Constitution were adopted to perform, and which provide the basis of good faith originalist construction.

Importantly, we now believe that the so-called summing problem is founded on, at minimum, contestable assumptions about the nature of artifacts and the possibility of group agency. The summing problem is simply not a knock-down argument that defeats the possibility of what we call *original functions*. Both the common sense of lawyers and contemporary philosophy support our contention that the provision and structure of the Constitution have original functions.

C. *Why Distinguish Interpretation from Construction?*

If the text of the Constitution has functions or purposes, and those functions are ascertainable facts, why persist in distinguishing between “interpretation” and “construction”? Our answer is simple: because identifying the communicated content of the text is still a different activity than identifying its intended function or purpose, and the respective activities have a lexical order: the spirit should not be used to override the letter.

Some nonoriginalists who favor some variant on a “living constitution” profess to be faithful to the Constitution’s text. But they operate by identifying the purpose or “underlying principles” of the text, and then applying these principles to future cases and controversies while generally leaving the text behind, or limiting its scope.²⁶² So if the framers of the text had a purpose in mind, but we now conclude that enforcing the original meaning of the text would actually defeat that purpose, we are free to ignore the text. For example, if the original purpose of protecting an individual right to keep and bear arms was to achieve public safety, laws restricting gun ownership by individuals are constitutional if a legislature concludes they are necessary to achieve public safety, notwithstanding the textual recognition of an individual right.

Alternatively, by focusing on one purpose, to the exclusion of others, the scope of a more general provision can be limited. Consider Justice Stephen Breyer’s dissent in *McCutcheon v. FEC*,²⁶³ a case involving provisions of the Bipartisan Campaign Reform Act that limited the total amount of political contributions that any one person could give to federal candidates, political committees, and political parties combined in a two-year election cycle. Justice Breyer began by identifying “one reason why the First Amendment protects political speech”: the promotion of a “politically oriented ‘marketplace’ of ideas.”²⁶⁴ Although Breyer noted that “the First Amendment advances . . . the individual’s right to engage in political speech,”²⁶⁵ he quickly added that the First Amendment “advances . . . also the

²⁶² See Randy E. Barnett, *Underlying Principles*, 24 CONST. COMMENT. 405 (2007).

²⁶³ 134 S.Ct. 1434 (2014).

²⁶⁴ *McCutcheon*, 134 S.Ct. at 1467 (Breyer, J., dissenting).

²⁶⁵ *Id.*

public's interest in preserving a democratic order in which collective speech matters," and the rest of his opinion focuses almost exclusively on the latter "interest."²⁶⁶

To be sure, Breyer was correct that the promotion of a politically-oriented marketplace of ideas—or, if you prefer, “debate on public issues” that is “uninhibited, robust, and wide-open”—is *among* the functions of the First Amendment.²⁶⁷ Lost in Breyer's interest-balancing was the significance of the fact that the First Amendment's text expressly protects “the freedom of speech” and “the freedom of speech,” understood in historical context, refers to an *individual* right—a natural right that one could enjoy in the absence of government and prior to any “democratic order.”²⁶⁸ Nor did Breyer acknowledge that the text of the First Amendment draws no distinction between different kinds of subject matter by way of ensuring that individuals have the freedom to express themselves on any subject at all, so long as the content or mode of their expression does not injure others.

Careful attention to the original meaning of the text of the First Amendment thus discloses its primarily individualist function. By focusing on purpose or spirit, and losing track of the letter of the text, Breyer also lost track of any function of the text other than the one that he identified. In the end, he advocated an approach to evaluating contribution limits that would lend itself easily to the suppression of individual rights on the basis of vaguely-defined “collective” interests.

In short, the interpretation-construction is needed if for no other reason than to appreciate why first comes the letter of the Constitution, and only then comes a consideration of its spirit, as well as why the latter cannot properly be used to undermine or supplant the former.

D. Will the Spirit Lead Judges Astray?

Judicial recourse to the spirit of the law has a bad reputation among textualists, in part because of its association with *Church of the Holy Trinity v. United States*.²⁶⁹ *Holy Trinity* was an 1892 decision that Justice Scalia denounced as a “prototypical” example of the perils of using legislative history to inform statutory interpretation.²⁷⁰ There the Court relied on the “familiar rule that a thing may be within the letter of the statute and yet not within the statute because not within its

²⁶⁶ *Id.*

²⁶⁷ *New York Times, Co. v. Sullivan*, 376 U.S. 254 (1964).

²⁶⁸ See e.g. 3 ELLIOT'S DEBATES, *supra* note 86, at 449 (statement of Patrick Henry at the Virginia ratifying convention) (describing the “freedom of the press” as among the “rights of human nature”); Roger Sherman, Proposed Committee Report (July 21-28, 1789) in *Creating the Bill of Rights* 266, 267 (Helen E. Veit et al. eds., 1991) (rights of “speaking, writing, and publishing. . . sentiments” are among the “natural rights which are retained by [individuals] when they enter society”). See generally Campbell, *supra* note 198 (discussing the freedom of speech as an individual natural right).

²⁶⁹ 143 U.S. 457 (1892).

²⁷⁰ See Antonin Scalia, *Common Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION*, *supra* note 2, at 18-23.

spirit nor within the intention of its makers”²⁷¹ to improperly—say the critics—narrow the scope of the statute.

Textualists offer two related objections to inquiry into the spirit of the text: First, they say that the spirit of the law is simply *not* the law and thus not a proper object of judicial focus.²⁷² Second, textualists say recourse to the spirit will lead judges to depart from the law’s actual meaning.²⁷³ As our previous discussion shows, we are sympathetic with concerns about these abuses of recourse to the “spirit” or “intent” of the law. Still, we think that the potential for abuse is not properly addressed by discouraging *proper* recourse to the spirit of the laws, given that some kind of judicial construction is inevitable.

In support of their critique, textualists might cite Hamilton’s response to Anti-Federalists concerns that federal judges would draw upon the spirit of the Constitution to enlarge the power of the federal government.²⁷⁴ In *Federalist 81*, Hamilton replied that “there is not a syllable in the plan under consideration which directly empowers the national courts to construe the laws according to the spirit of the Constitution.”²⁷⁵

This statement by Hamilton notwithstanding, as we explained above,²⁷⁶ the evidence is overwhelming that recourse to the spirit was regarded as an entirely legitimate, and indeed essential, move in the judicial interpretation and construction of written instruments at common law and during the Founding era.²⁷⁷ *Federalist 81* will not bear the weight of a rejection of any and all judicial recourse to the spirit.

To begin with, after denying that the text of the Constitution empowers courts to “construe the laws according to the spirit of the Constitution,” Hamilton added

²⁷¹ Church of the Holy Trinity, 143 U.S. at 459.

²⁷² See Frank H. Easterbrook, *What Does Legislative History Tell Us?*, 66 CHI.-KENT L. REV. 441, 443 (1990) (arguing that “laws themselves do not have purposes or spirits—only the authors are sentient”). As we saw *supra* at notes 249-261, artifact and group agency theory undermine Judge Easterbrook’s claim.

²⁷³ See John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 450 (2005) (in the context of statutory interpretation, “efforts to augment or vary the text in the name of serving a genuine but unexpressed legislative intent risks displacing whatever bargain was actually reached.”).

²⁷⁴ See “Brutus” XII, N.Y. J., Feb. 7 and 14, 1788, reprinted in 1 THE COMPLETE ANTI-FEDERALIST, *supra* note 96, at 423 (warning that judges will draw upon the spirit of the Constitution to “give [the Constitution] such a construction as to extend the powers of the general government, as much as possible, to the diminution, and finally to the destruction, of that of the respective states.”). Brutus did not deny the legitimacy of recourse to the spirit—he worried about abuses. See “Brutus” XI, N.Y. J., Dec. 13, 1787, reprinted in 1 THE COMPLETE ANTI-FEDERALIST, *supra* note 96, at 389 (“It is a rule in construing a law to consider the objects the legislature had in view in passing it, and to give it such an explanation as to promote their intention. The same rule will apply in explaining a Constitution.”). Not all Anti-Federalists shared this precise concern—others worried that the spirit would be ignored. See “Agrippa,” MASS GAZETTE, Feb. 5, 1788, reprinted in 2 THE DEBATE ON THE CONSTITUTION (Bernard Bailyn ed., 1993) (fearing that “intention” of the Constitution would be disregarded).

²⁷⁵ THE FEDERALIST No. 81 (Hamilton), *supra* note 96, at 418.

²⁷⁶ *Supra* notes 157-9.

²⁷⁷ See LAW AND JUDICIAL DUTY, *supra* note 112, at 53-8; Natelson, *supra* note 156.

“or which gives them any more latitude *in this respect* than may be claimed by the courts of every State.”²⁷⁸ Yet, state courts could—and did—have recourse to the spirit.²⁷⁹

Further, Hamilton went on to “admit . . . that the Constitution ought to be the standard of construction for the laws, and that wherever there is an evident opposition, the laws ought to give place to the Constitution,” thus acknowledging that the Constitution authorizes judges to hold unconstitutional laws void.²⁸⁰ But, he wrote, “this doctrine is not deducible from any circumstance peculiar to the plan of the convention, but from the general theory of a limited Constitution.”²⁸¹ Here Hamilton is himself relying on what we are calling the spirit or function of the text. After all, according to Hamilton, not a syllable in the plan expressly authorized judges to hold unconstitutional laws void either, and yet he represented that judges *would* have that power.

Moreover, in *Federalist 32*, Hamilton accused Anti-Federalists of *distorting* the spirit of the proposed Constitution in their arguments that it conferred upon Congress an exclusive power to tax all articles other than imports and exports. Hamilton pointed out that the fact that states were specifically forbidden from taxing exports and imports (absent “the consent of Congress” or “for the purpose of executing [their] inspection laws²⁸²”) “implies an admission that, if it were not inserted, the States would possess the power it excludes; and . . . a further admission, that as to all other taxes, the authority of the states remains undiminished.”²⁸³ Therefore, Hamilton contended that it “could not have been the *intention*,” to create an exclusive taxing power in Congress, “and that [the Constitution] *will not bear a construction* of the kind.”²⁸⁴ Following the ratification of the Constitution, Hamilton would again have recourse to the spirit of the law in arguing that the Constitution authorized Congress to establish a national bank.²⁸⁵

There is no objection to judicial reliance on the original spirit of the Constitution that cannot be made against originalism more generally. Yes, identifying the functions of constitutional provisions may at times be difficult work. (Although at other times, it may be pretty easy.) Yes, formulating rules that are calculated to implement those functions is an enterprise that is fraught with peril. (Although it is not as perilous as formulating rules to implement a judge’s extralegal

²⁷⁸ THE FEDERALIST No. 81 (Hamilton), *supra* note 96, at 418 (emphasis added).

²⁷⁹ See Caton, 8 Va. (4 Call).

²⁸⁰ THE FEDERALIST No. 81 (Hamilton), *supra* note 96, at 418.

²⁸¹ *Id.*

²⁸² See U.S. CONST. art. I, §10, cl. 2.

²⁸³ THE FEDERALIST No. 32 (Hamilton), *supra* note 96, at 156. Hamilton insisted that the Constitution granted federal and state governments “concurrent and co-equal authority” over general taxation. *Id.*

²⁸⁴ *Id.* (emphasis added).

²⁸⁵ Hamilton denied that recourse to the personal intentions of the framers was appropriate—the legally binding intention was to be sought “in the instrument itself.” ALEXANDER HAMILTON: WRITINGS 623 (Library of America, 2001). But in making his case for the constitutionality of the bank, he appealed to the “*object* of the [government’s] specified powers.” *Id.* at 620 (emphasis added).

preferences.) But the same can be said for any effort to ascertain the linguistic meaning of centuries-old text and give effect to that meaning in complex, fact-sensitive cases that those who enacted the text into law did not anticipate or could not anticipate. Simply put, originalism depends upon hard work; and originalists are not infallible.

Our thesis is that there are contexts in which judicial recourse to the original spirit of the Constitution is not only proper but necessary, if the law of the land is to be given effect on as broad a scale as possible. The latter goal is poorly served if judges who are duty-bound to give effect to the law refuse to pursue its spirit for fear of being led astray.

CONCLUSION: A UNIFIED THEORY OF ORIGINALISM

In this article, we have presented a unified theory of originalist interpretation and construction. We continue to insist that, as an empirical matter, originalism cannot do without the interpretation-construction distinction, nor can originalists deny the existence of the construction zone. But neither can originalism do without a methodology that equips judges to navigate the construction zone—one that enables them to give full effect to the law and safeguards the rest of us from arbitrary judicial power. We have advanced three propositions in this article:

- First, judges are fiduciaries of the people to whom the Constitution entrusts a great deal of discretionary power, and with such discretion comes corresponding fiduciary duties.
- Second, upon voluntarily taking their oath, judges become morally and legally bound to follow faithfully the instructions given them in the written Constitution.
- Third, to be faithful to “this constitution,” judges should wield their discretionary power in a manner that is consistent with the “supreme law of the land,” consisting in both its letter and its spirit, resolving cases on the basis of the spirit where the letter fails.

If judges are to discharge what James Iredell described as “the duty of th[e] power”²⁸⁶ to interpret the Constitution and, if necessary, nullify unconstitutional acts, they need a methodology for understanding the nature and limits of their inevitable discretion to implement the meaning of the text: such discretion must be exercised in good faith. Good-faith originalist construction recognizes that, even when the *letter* of the law gives out, the *law* does not—and neither does judicial duty to follow and enforce the Constitution’s requirements.

It has been a mere thirty-seven years since Paul Brest invented the term “originalism,” and even fewer years since self-identified “originalists” first began developing its theory, and then researching the original meaning of the Constitution, clause-by-clause. If originalism is still in an early stage of development as a school of constitutional interpretation, understanding the proper role and scope of good-faith originalist construction has only just begun. And yet this understanding is essential to completing the originalist project. Recognizing

²⁸⁶ Letter from James Iredell to Richard Dobbs Spaight (Aug. 26, 1787), in 2 LIFE AND CORRESPONDENCE OF JAMES IREDELL 169 (Griffith J. McRee ed., 1857).

the duty of good-faith originalist construction meets a need as urgent as that of an independent judiciary itself.