PAPERS

Contracts, Constitutions, and Getting the Interpretation-Construction Distinction Right

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ABSTRACT

Interpretation determines the meaning of a legal actor's words or other significant acts, construction their legal effect. Using contract law and two nineteenth century theories of constitutional interpretation as examples, this Article advances four claims about interpretation, construction, and the relationship between the two. First, many theorists, following Francis Lieber, assume that rules of construction apply only when interpretation runs out, such as when a text's meaning is ambiguous or does not address an issue. In fact, a rule of construction is always necessary to determine a legal speech act's effect, including when its meaning is clear and definite. Construction does not supplement interpretation, but compliments it. Second, there exists more than one form of interpretation, and correspondingly more than one type of meaning. The meaning a text or other speech act has depends on the questions one asks of it. Third, which type of meaning is legally relevant depends on the applicable rule of construction. Rules of construction are in this sense conceptually prior to legal interpretation. This priority has important consequences for how legal rules of interpretation are justified. Finally, because there exist multiple types of meaning, when one form of interpretation runs out, another form might step in. Whether that is so again depends on the applicable rule of construction.

These four claims apply to legal interpretation and construction generally. This Article supports them with a close examination of the interpretation and construction of contractual agreements. It then argues that this account of interpretation and construction illuminates the shared structure of Joseph Story's and Thomas Cooley's theories of constitutional interpretation, and by extension theories of constitutional interpretation generally.

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The interpretation-construction distinction is back. Contract scholars have long recognized the difference between deciding what words mean, or interpretation, and determining their legal effect, or construction. But in the last decade constitutional scholars have begun to attend to the difference as well. New Originalists like Randy Barnett, Jack Balkin, and Larry Solum have deployed the distinction to divide constitutional questions into two broad categories.[1] The first comprises questions that originalist interpretation can answer. These include easy questions, like how old a person must be to serve as President—"the Age of thirty five Years"[2]—and perhaps also harder ones, such as the scope of "the right of the People to keep and bear arms."[3] In the second category are questions that the text's original meaning does not answer, such as the reach of "freedom of speech," "due process of law" and other vague constitutional terms.[4] Questions in this latter category occupy a "construction zone," a region where interpretive

1. *See, e.g.*, Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 Const. Comment. 95 (2010); Randy Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL'Y 65 (2011); Jack M. Balkin, *The New Originalism and the Uses of History*, 82 FORDHAM L. REV. 641 (2013).

2. U.S. CONST. art. II, § 1.

3. U.S. CONST. amend. II.

4. U.S. CONST. amend. I & V.

rules and original meaning must be supplemented with other legal rules or principles to determine what the Constitution requires.[5]

To those of us who find the distinction between interpretation and construction helpful, the new attention from constitutional theorists is exciting. Contract scholars discussing the difference between interpretation and construction never claimed it applied only to the law of contracts. In fact, the concepts first appeared in Francis Lieber's more general 1839 work, *Legal and Political Hermeneutics*, which barely touches on contract law.[6] So it is good to see the ideas being taken up by scholars elsewhere.

At the same time, the new champions of the distinction have taken it in directions a contracts scholar might find surprising. The New Originalists divide constitutional questions between a zone of interpretation and a zone of construction. Although textualist approaches to contract interpretation have had many champions, few would claim that parties' contractual obligations can be determined only by interpreting their words. No matter how clear and unambiguous the parties' language, a court will not enforce an agreement that is unconscionable, against public policy, the result of fraud, mistake or duress, or in which a party lacked capacity. There is no contractual interpretation zone. By the same token, the idea of a construction zone is not native to contract law. Construction is ubiquitous in the determining parties' contractual obligations. The New Originalist divide between an interpretation zone and a construction zone does something new and different with the concepts.

This Article examines the interpretation-construction distinction from the perspective of contract law. I make four claims about the activities of interpretation and construction and the relationship between them. First, construction happens not only when interpretation runs out, but is always necessary to determine a text or other meaningful act's legal effect. Construction does not supplement interpretation but complements it. Second, there are multiple forms of interpretation and multiple types of meaning. What meaning a text or other speech act has depends on the questions one asks of it. Third, which type of meaning is legally relevant depends on the applicable rule of construction. Rules of construction are in the law conceptually prior to rules of interpretation. Finally, because a single text can have multiple types of meaning, when interpretation of one type runs out, interpretation of another might step in. Whether that is so again depends on the applicable rule of construction.

Although I make the case for these four claims with reference to the law of contract, they apply to legal exegesis generally. I use the occasion of the Georgetown Center for the Constitution's 2018 Salmon P. Chase Faculty

5. *See, e.g.*, Solum, *supra* note 1 at 108.

6. FRANCIS LIEBER, LEGAL AND POLITICAL HERMENEUTICS, OR PRINCIPLES OF INTERPRETATION AND CONSTRUCTION IN LAW AND POLITICS (enlarged ed. 1839/1970).

Colloquium[7] to argue that the above claims illuminate Cooley's, and before him Joseph Story's, theories of constitutional interpretation. Neither Cooley nor Story relies on the distinction between interpretation and construction. But each recognizes the existence of multiple types of meaning a constitutional text might have, each appeals to political principles to argue that the public meaning of the text at the time of ratification should control, and each recognizes that once one form of interpretation runs out, another might step in. Their theories therefore reflect both the difference between the activities of interpretation and construction and a correct understanding of the relationship between the two.

Section I of this Article provides basic definitions of "interpretation" and "construction," which together comprise legal exegesis. Section II uses the example of contract law to analyze the activities of interpretation and construction and the relationship between them. Section III argues that the account of legal exegesis developed in Section II illuminates Joseph Story's and Thomas Cooley's constitutional theories. Without attempting to provide an exhaustive account of Story's and Cooley's approaches, I argue that key moves in their parallel analyses exemplify the relationship between interpretation and construction described in Section II. Section IV briefly discusses the appearance of an analog to Lawrence Solum's fixation thesis in Cooley's treatise, and differences between the Solum's and Cooley's arguments for that claim.

I. BASIC CONCEPTS

As I will use the terms, the activity of *interpretation* identifies the meaning of a legal actor's words or actions, the activity of *construction* their legal effect. Rules of interpretation tell us how to discern the meaning of what legal actors say and do; rules of construction tell us how to determine the resulting legal state of affairs.

Rules of interpretation and rules of construction are different in kind. Interpretation—attributing meaning to words and actions—is something we do both inside and outside the law, and legal interpretation draws on meanings that originate outside it. The law does not speak its own language. Although there exist legal terms of art—"mens rea," "strict scrutiny," "unconscionability"—legal speakers mostly use words in their everyday meanings—"vehicles," "in," "park." When interpreting legal texts, *Webster's* is generally at least as useful as *Black's*. This is not to say that the activity of legal interpretation is identical to interpretation of other types. In addition to attending to legal terms of art, legal interpretation is often governed by special rules, such as restrictions on the evidence the interpreter may consider (the text alone, its drafting history, contemporaneous dictionaries, prior dealings, etc.) or rules that address who interprets a text (judge or jury). But the activity of legal interpretation—assigning meaning to legal actors' words and actions—is continuous with our everyday interpretive

7. The 2018 Salmon P. Chase Faculty Colloquium commemorated the 150th anniversary of the publication of Thomas Cooley's *Treatise on Constitutional Limitations*.

practices. The rules that give meaning to what legal actors say and do originate by and large outside the law.

Construction, in distinction, is a purely legal activity. Rules of construction are components of what H.L.A. Hart calls "secondary rules," rules that "provide that human beings may by doing or saying certain things introduce new [legal rules], extinguish or modify old ones, or in various ways determine their incidence or control."[8] If a public official's or private person's words effect a change in the legal landscape, it is not solely because of what those words mean. It is also because there exists a "rule of change" that gives that person the power to effect the legal change in that way.[9] Such rules include sub-rules of the form: When person *P* does or says *x*, the legal result is *y*. Those rules are, in the sense I use the term, rules of construction. They determine the legal effect of authorized speech acts. Whereas rules of interpretation originate outside the law, rules of construction are creatures of law. Rules of construction govern when and how a person's words or actions effect a legal change.

In this Article, I follow Lieber and use "exegesis" to refer to the practice of interpretation and construction together.[10] Legal exegesis is the process of determining the legal effect of a legal actor's words or actions. Often, though not always, legal exegesis involves both interpretation and construction.[11] A theoretical account of legal exegesis therefore requires an account of both legal activities and of the relationship between them.

This Article does not provide a complete theory of legal exegesis. My goal is to identify a few salient and often overlooked aspects of the relationship between its two components, interpretation and construction, using as illustrations first contract law and then two nineteenth century accounts of constitutional interpretation.

II. INTERPRETATION AND CONSTRUCTION IN CONTRACT LAW

It is easy to see the difference between interpretation and construction in the law of contracts. Because contractual obligations are chosen obligations, they depend in large part on the parties' intent. To identify the parties' intent, one must interpret their words and actions. Thus one commonly finds in contract decisions at the beginning of the court's analysis an affirmation that "[t]he primary goal in interpreting contracts is to determine and enforce the parties' intent."[12]

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8. H.L.A. HART, THE CONCEPT OF LAW 81 (2d ed. 1994).

9. *Id*. at 95–96.

10. LIEBER, *supra* note 6, at 64.

11. Not always because the construction of a legal formality, such as the private seal, does not require interpretation of its meaning. The use of the formality suffices to effect the legal change. That said, many legal formalities also include defenses, such as mistake, that call for interpretation of the parties' beliefs and intentions. The legal effect of such formalities is to create a presumptive legal change, which might be defeated by interpretation of what the particular use of the formality meant in context.

12. Old Kent Bank v. Sobczak, 243 Mich. App. 57, 63 (2000). A few other examples: "The fundamental, neutral precept of contract interpretation is that agreements are construed in accord with

Because contractual obligations are chosen obligations, their identification requires *interpretation* of parties' acts of choice.

But contractual obligations are not only a matter of party choice, and even when party choice controls, there are legal rules governing how to identify that choice. Examples are manifold. Sometimes when parties enter into a binding agreement, they do not have or do not express an intent one way or another on a matter—for example, whether the seller warrants the quality of the goods or what the remedy for a breach will be. Thus the importance of default terms: rules that determine parties' contractual obligation in the absence of evidence or expression of their contrary intent. Or the parties' expressions of intent might be ambiguous. When this occurs, a court might apply a rule like *contra proferentem*, interpreting against the drafter, or it might preference interpretations that serve the public interest. Neither rule requires further interpretation of the parties' words or actions. There are also cases in which the parties' intent is clear, but a court will decline to give it legal effect. This is so, for example, when the parties' agreement runs contrary to a mandatory rule, such as a minimum wage law, a civil rights law, the penalty rule for liquidated damages, or the generic prohibition on enforcing agreements against public policy. Courts also apply interpretive rules that predictably sometimes fail to capture the parties' intent. Plain meaning rules, for example, exclude context evidence that can be essential for understanding how the parties reasonably understood their own words. A recent defense of plain meaning interpretation therefore argues that sophisticated repeat players care less about interpretive accuracy than they do about predictability and reduced costs of interpretation.[13] Finally, the words "the parties' intent" are themselves ambiguous. Do they refer, for example, to parties' intent with respect to their *legal* obligations? Or do they refer only to their intended *exchange*, from which those legal obligations flow? Is it their actual, subjective intent? Is it their objective intent—what a reasonable person in their situation would understand their intent to be? Or is it some mix of the two? All this suggests that courts do much more than merely interpret contracting parties' words and actions. They apply rules of *construction* to determine those words and actions' legal effects.

This Article's working hypothesis is that exploring the interplay between interpretation and construction in contract law illuminates how those activities function elsewhere in the law. This Section identifies four structural features of interpretation and construction, each of which is readily apparent in the law of

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the parties' intent." Greenfield v. Philles Records, Inc., 98 N.Y.2d 562, 569 (2002). "Under statutory rules of contract interpretation, the mutual intention of the parties at the time the contract is formed governs interpretation." AIU Ins. Co. v. Superior Court, 51 Cal. 3d 807, 821 (1990) (*citing* Cal. Civ. Code § 1636). "The cardinal rule for interpretation of contracts is to ascertain the intention of the parties and to give effect to that intention, consistent with legal principles." Bob Pearsall Motors, Inc. v. Regal Chrysler-Plymouth, Inc., 521 S.W.2d 578, 580 (Tenn. 1975).

13. Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L. J. 541, 576 (2003) ("A risk-neutral party cares about the mean of the interpretion distribution but not the variance.").

contract. My claim—which I do not fully defend but begin to explore in Section III—is that these features are general ones. Although rules of legal exegesis differ across various domains of law, these four features hold constant. Section III argues that attending to them casts new light on Joseph Story and Thomas Cooley's constitutional theories.

A. Construction Does Not Supplement Interpretation, but Complements It

Francis Lieber, who introduced the interpretation-construction distinction in his 1839 book *Legal and Political Hermeneutics*, employs what I will call a "supplemental" conception of interpretation and construction. On Lieber's conception, interpretation alone sometimes suffices to determine a text's legal effect; construction is necessary only when interpretation either runs out or runs up against a higher-order rule. "[W]e have to settle whether in the given case, interpretation suffices, or whether we must have recourse to construction."[14] In the course of *Legal and Political Hermeneutics*, Lieber identifies three circumstances in which interpretation might not fully determine a text's legal effect—situations in which "interpretation ceases to avail."[15] The first is when the text's meaning is unclear, such as when it contains internal contradictions.[16] The second is when the lawgiver did not foresee certain cases, and therefore the law does not provide for them.[17] The third occurs when the text's meaning contravenes "more general and binding rules, [such as] constitutional, written and solemnly acknowledged rules, or moral ones, written in the heart of every man."[18] In each situation, interpretation alone does not tell us what the law is. One must supplement it with construction. In all other circumstances, interpretation suffices. The text's legal effect corresponds to its meaning, and the text's interpretation tells us what the law is.

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14. LIEBER, *supra* note 6, at 62.

15. *Id*. at 55. *Cf*. Lawrence A. Cunningham, *Hermeneutics and Contract Default Rules: An Essay on Lieber and Corbin*, 16 CARDOZO L. REV. 2225, 2228 (1995) (identifying four situations in which, according to Leiber, interpretation must be supplemented by construction).

16. *Id*. at 55–56. Today theorists would more likely emphasize ambiguities. Lieber, for reasons internal to his theory of meaning, holds that legal texts are never truly ambiguous. *Id*. at 86.

17. *Id*. at 56 ("Construction is likewise our guide, if we are bound to act in cases which have not been foreseen by framers of those rules, by which we are nevertheless obliged, for some binding reason, faithfully to regulate, as well as we can, our actions respecting the unforeseen case."); *id*. at 57 ("In politics, construction signifies generally the supplying of supposed or real imperfections, or insufficiencies of a text, according to proper principles and rules. By insufficiency, we understand, both imperfect provision for the cases, which might or ought to have been provided for, and the inadequateness of the text for cases which human wisdom could not foresee."); *id*. at 121 ("Construction is unavoidable. Men who use words, even with the best intent and great care as well as skill, cannot foresee all possible complex cases, and if they could, they would be unable to provide for them, for each complex case would require its own provision and rule.").

18. *Id*. at 166; *see also id*. at 115 ("But it is not said that interpretation is all that shall guide us, and . . . there are considerations, which ought to induce us to abandon interpretation, or with other words to sacrifice the direct meaning of a text to considerations still weightier; especially not to slaughter justice, the sovereign object of laws, to the law itself, the means of obtaining it.").

Lieber's supplemental conception might be traced to his focus on public law—statutes and constitutions, as distinguished from contracts, deeds and other private legal documents—together with an implicit adherence to the command theory of law.[19] The point of a command relationship is to give the commander the power to choose, within the scope of her command authority, what the recipient shall be required to do. When interpreting the commander's words, the recipient's job is therefore to discern the commander's choice, to seek out the intent behind those words. "When I say, 'Jump,' you say 'How high?'"[20] This is precisely how Lieber understands the activity of interpretation. "Interpretation is the art of finding out the . . . sense which their author intended to convey, and of enabling others to derive from them the very same idea which the author intended to convey."[21] When the sovereign's words clearly express her intent, we know the content of her command, and "interpretation suffices." Non-interpretive rules of construction appear only when either the sovereign's words do not express her intent or that intent contravenes a higher-order law or principle.

But contractual agreements are not commands, and Lieber's framework is a poor fit for the law of contract. Although contracting parties enjoy something like the power to make law for themselves, it would be odd to call the private persons who enter into contracts "sovereigns." It is not the parties' intent that makes the legal obligation. It is the law of contract, which attaches legal consequences to their exchange agreement, sometimes in the absence of an expressed intent to contract and sometimes notwithstanding the parties' expressed intent.[22] As the Supreme Court of New Hampshire observed as far back as 1926, "A contract is not a law, nor does it make law. 'It is the agreement plus the law that makes the ordinary contract an enforceable obligation.'"[23] The power to contract exists only because, and only insofar as, positive law grants it to persons. Interpretation of the parties' intent never suffices to identify their legal obligations.

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19. *See* HART, *supra* note 7, at 18–25 (describing the command theory); H.L.A. Hart, *Commands and Authoritative Legal Reasons*, *in* ESSAYS ON BENTHAM: STUDIES IN JURISPRUDENCE AND POLITICAL THEORY 243 (1982).

20. *See, e.g.*, UNIVERSAL SOLDIER (Studio Canal, 1992).

21. LIEBER, *supra* note 6, at 23.

22. For more on this idea, see the discussion of contract law's duty-imposing aspect in Gregory Klass, *Three Pictures of Contract: Duty, Power and Compound Rule*, 83 N.Y.U. L. REV. 1726 (2008).

23. Tullgren v. Amoskeag Mfg. Co., 133 A. 4, 6 (N.H. 1926) (quoting *Stanley v. Kimball*, 118 A. 636, 637 (N.H. 1922)); *see also* Norfolk & W. Ry. Co. v. Am. Train Dispatchers Ass'n, 499 U.S. 117, 130 (1991) ("A contract has no legal force apart from the law that acknowledges its binding character."); Groves v. John Wunder Co., 286 N.W. 235, 239–40 (Minn. 1939) (Olson, J., dissenting) (The "obligation of the contract does not inhere or subsist in the agreement itself *proprio vigore*, but in the law applicable to the agreement, that is, in the act of the law in binding the promisor to perform his promise. When it is said that one who enters upon an undertaking assumes the legal duties relating to it, what is really meant is that the law imposes the duties on him. A contract is not a law, nor does it make law. It is the agreement plus the law that makes the ordinary contract an enforceable obligation." (quoting 12 Am. Jur., Contracts, § 2)).

In the 1951 first edition of his contract treatise, Arthur Linton Corbin reconceptualized the interpretation-construction distinction in a way that better describes contract exegesis:

> By "interpretation of language" we determine what ideas that language induces in other persons. By "construction of the contract," as the term will be used here, we determine its legal operation—its effect upon the action of courts and administrative officials. If we make this distinction, then the construction of a contract starts with the interpretation of its language but does not end with it; while the process of interpretation stops wholly short of a determination of the legal relations of the parties.[24]

Whereas Lieber describes construction as supplementing interpretation, Corbin conceives of construction more generally as the activity of determining the legal consequences of contracting parties' words and actions.[25] Determining those consequences might require interpretation. But interpretation alone tells us only what some persons said, meant or intended. This is why "the process of interpretation stops wholly short of a determination of the legal relations of the parties." We require a rule of construction to determine which sayings or meanings or intendings of which legal actors have what legal effects. On Corbin's picture, construction does not supplement interpretation but complements it. Construction does not begin when interpretation ends, for the parties' contractual obligations always depend on a rule of construction, even when that rule provides that their contractual obligations are the ones they intended.[26]

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24. 3 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS: A COMPREHENSIVE TREATISE ON THE RULES OF CONTRACT LAW § 534, 7 (1951). [hereinafter 3 CORBIN (1st edition)].Those interested in the development of Corbin's thoughts on the interpretation-construction distinction should begin with a passage he added on the subject as editor the 1919 third American edition of Anson's *Principles of the Law of Contracts*. WILLIAM REYNELL ANSON, PRINCIPLES OF THE LAW OF CONTRACT: WITH A CHAPTER ON THE LAW OF AGENCY § 353, 405–06 (Arthur L. Corbin ed., 3d ed. 1919), *reprinted in* Arthur L. Corbin, *Conditions in the Law of Contract*, 28 YALE L.J. 739, 740–41 (1919). For a similar though not identical account of the relationship between Lieber's and Corbin's conceptions of interpretation and construction, see Lawrence A. Cunningham, *Hermeneutics and Contract Default Rules: An Essay on Lieber and Corbin*, 16 CARDOZO L. REV. 225, 227–34 (1995). Although I disagree with the details of Cunningham's account of Corbin's views, Cunningham is no doubt correct that Corbin's approach is closely tied to his legal realist commitments. *Id*. at 2234.

25. Corbin expressly rejects Lieber's account of interpretation and construction. 3 CORBIN (1st edition), *supra* note 24, at § 534, 11, n.11.

26. If one looks, one finds the seeds of this complementary conception in Lieber. There is a difference in kind between a text that does not answer a legal question because it is internally contradictory, ambiguous or contains gaps, and one whose definite meaning contravenes a higher-order rule. Lieber recognizes cases of the latter type, which suggest that rules of construction always lurk in the background, as they reflect limits on the sovereign's authority. Near the end a chapter on construction, Lieber writes:

> We have seen that interpretation means nothing more than finding out the true sense and meaning. But it is not said that interpretation is all that shall guide us, and . . . there are considerations, which ought to induce us to abandon interpretation, or with other words to sacrifice the direct meaning of a text to considerations still weightier; especially not to slaughter justice, the sovereign object of

Although this point is perhaps especially obvious when it comes to the law of contracts, it applies to legal exegesis generally. Recall Hart's argument that law is more than the sovereign's command backed by the threat of force. A mature legal system includes rules of recognition, which specify "the criteria of legal validity and its rules of change and adjudication" and which "must be effectively accepted as common public standards of official behavior by its officials."[27] In a mature legal system such as ours, the command of the sovereign is law only because it satisfies an accepted rule of recognition. Such a rule both gives the sovereign the power to issue new laws and specifies how she can exercise that power. Rules of recognition, in turn, include rules of construction—rules that specify how the sovereign's words and actions can effect a legal change. If one follows Hart on this point, the complementary conception of interpretation and construction is a general one.

Although the idea can be obscured by his emphasis on the "construction zone," Lawrence Solum also advocates a complementary conception of constitutional interpretation and construction, which Solum calls the "Two Moments Model."

> In some cases, judges may attend only to interpretation (because construction seems obvious and intuitive). In other cases, judges may focus entirely on construction; this is especially likely when an area of constitutional law involves a provision that is highly vague and abstract, or when case law provides a thick and complex body of constitutional doctrines. In the former cases, construction may be tacit and unconscious, while in the latter cases, interpretation may be invisible.[28]

That said, because he is an originalist, Solum emphasizes Lieber's ordering: interpretation first, construction second. In the discussion that follows, I focus on how relevant rules of construction determine what counts as the correct approach to interpretation—that is to say, ways in which rules of construction, which call for legal and political justifications rather than philosophical-linguistic ones, precede and structure legal interpretation.

B. There Are Multiple Meanings of "Meaning," Which Correspond to Multiple Types of Interpretation

Although Lieber and Corbin have different understandings of the relationship between interpretation and construction, each has a relatively narrow conception of meaning. For Lieber, "[t]rue sense is . . . the meaning which the person or

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> laws, to the law itself, the means of obtaining it. In this respect, interpretation is much like political economy, a highly useful science, yet, withal, its object is to ascertain the laws which regulate the physical existence of society, and there are subjects superior to this.

LIEBER, *supra* note 6, at 115. Whereas my argument is a conceptual one, Lieber's explanation sounds in the register of political morality. It might be summarized—appropriately, given this colloquium's venue—as: Law is but the means, justice is the end.

27. HART, *supra* note 8, at 116.

28. Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 499 (2013); *see also id.* at 481–82. What I am calling the "supplemental conception" is something like what Solum calls the "Alternative Methods Model." *Id.* at 498.

persons, who made use of the words, intended to convey to others, whether he used them correctly, skillfully, logically or not."[29] Corbin employs a more listener-centered account of meaning, but one that is similarly unequivocal. "By 'interpretation of language' we determine what ideas that language induces in other persons."[30] Although their conceptions differ, both Lieber and Corbin assume that meaning is a simple concept—and accordingly, that interpretation is always the same activity.

Contemporary linguistic theories reject that assumption. Since at least the early twentieth century, language theorists have differentiated multiple types of meaning that a single speech act—a text, utterance, or other communicative act—can have. J.L. Austin, for example, distinguished a speech act's locutionary, illocutionary, and perlocutionary forces, which correspond roughly to what the speaker's words literally mean, what the speaker intends to say with them, and what the speaker intends to accomplish by so saying.[31] And contemporary linguists commonly differentiate between a speech act's pragmatic meaning—the best interpretation of the speaker's communicative intentions—and its semantic meaning—its conventional meaning, which can be identified independently of the speaker's apparent intentions.[32]

Behind the suggestion that there are multiple types of meaning is the idea that meaning is not something just out there, waiting to be discovered, in the way, say, that water on Mars might be. Meaning is the product of interpretive practices —initially the interpretive practices of members of the linguistic community in which a speech act occurs, and sometimes also the interpretive practices of persons outside that community.[33] This is not to deny that a speech act's meaning is a fact about the world or that there are better or worse interpretations of it. But its meaning is a social fact, one whose existence depends on the relevant social interpretive practices. And because there are multiple, sometimes overlapping social interpretive practices, there are multiple, sometimes overlapping types of meaning. Which interpretive practice we deploy in given situation—that is, what type of meaning we care about—depends on the goal of the inquiry.

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29. LIEBER, *supra* note 6, at 23; *see also id*. at 19 ("[I]t is necessary for him, for whose benefit [signs] are intended, to find out, what those persons who use the sign, intend to convey to the mind of the beholder or hearer.").

30. 3 CORBIN (1st edition), *supra* note 24, § 534, 7.

31. J.L. AUSTIN, HOW TO DO THINGS WITH WORDS, 94–108 (1962).

32. These definitions, which I think are the most productive for legal applications, oversimplify. Robyn Carston, *Linguistic Communication and the Semantics/Pragmatics Distinction*, 165 SYNTHESE 321, 322 (2008) (identifying five separate ways scholars have tried to draw the distinction between pragmatic meaning and semantic meaning). And the topic is rich enough to be the subject of at least one doctoral dissertation. KRISTIN BÖRJESSON, THE SEMANTICS-PRAGMATICS CONTROVERSY (2014); *see also* Kent Bach, *The Semantics/Pragmatic Distinction: What It Is and Why It Matters*, LINGUISTISCHE BERICHTE, SONDERHEFT 8, 33 (1997).

33. On the last point, think about the meanings a group of experimental psychologists might assign to the words of children they are observing.

Although Corbin employs a simple theory of meaning, contract law too distinguishes among multiple types of meaning. Without too much violence to the phenomena, the relevant questions can be grouped under three headings: Whose meaning governs? What type of meaning governs? And what facts determine that meaning?

1. Whose Meaning Governs?

Contracts are generated by the communications of two or more parties, sometimes with potential third-party enforcers in mind. Because different people can attach different meanings to the same words or actions, contract disputes sometimes raise the question of whose meaning is legally relevant.

Various answers have been given.[34] To begin with a somewhat obscure example, in the 1890 first edition of his contracts treatise, Joseph Chitty recommends William Paley's rule for promises: contractual obligations should turn on the speaker's understanding of how the hearer understood her. "Where the terms of promise admit of more senses than one, the promise is to be performed in that sense in which the promiser apprehended, at the time, that the promise received it."[35] Another, more familiar answer to the "whose meaning" question is the strong version of the so-called objective theory. According to that rule, the meaning of neither party controls, but rather the objectively reasonable understanding of their words and the circumstances in which those words were used. Thus Learned Hand famously opined:

> A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent. If, however, it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them, he would still be held, unless there were some mutual mistake, or something else of the sort.[36]

The Second Restatement adopts a third option and mixed rule. Oversimplifying a bit, when the parties' subjective meanings converge—when

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34. Calamari and Perillo, for example, identify six possible answers to the question "whose meaning is to be given to an agreement." John D. Calamari & Joseph M. Perillo, *Plea for a Uniform Parol Evidence Rule and Principles of Contract Interpretation*, 42 IND. L.J. 333, 345–46 (1967). Their list is incomplete, as it does not include Chitty's suggestion, discussed in this paragraph.

35. JOSEPH CHITTY, A TREATISE ON THE LAW OF CONTRACTS AND UPON THE DEFENCES TO ACTIONS THEREON 127 (12th ed. 1890) (quoting William Paley, *The Principles of Moral and Political Philosophy* 58 (1819)). For a contemporary criticism, see Fredrik Pollock, *Principles of Contract: A Treatise on the General Principles Concerning the Validity of Agreements in the Law of England* 235 (5th ed. 1889). For a modern example of a similarly structured rule, see RESTATEMENT (SECOND) OF CONTRACTS § 211 (3) (AM. LAW INST. 1981) ("Where the [party drafting a standardized agreement] has reason to believe that the party manifesting . . . assent [to it] would not do so if he knew that the writing contained a particular term, the term is not part of the agreement.").

36. Hotchkiss v. Nat'l City Bank of N.Y., 200 F.287, 293 (S.D.N.Y. 1911).

they have the same actual understandings of the agreement—those subjective meanings govern; when the parties attach different subjective meanings to their words and actions, the words' objective meaning governs.[37] In principle, under this mixed rule contract interpretation should begin by looking to the parties' actual, or subjective, understandings, and look to objective meaning only when there is a subjective disagreement.[38]

There is occasionally a second variety of question under the "whose meaning" heading. Parties sometimes agree to writings that they themselves have not authored. In so-called contracts of adhesion, one party drafts a written agreement that it then gives to the other party on a take-it-or-leave-it basis. In other transactions, parties might use an off-the-rack standard form drafted by an industry association or nonprofit, or purchased from a commercial source. In either case, one can distinguish between the author of the agreement and its authorizer, again raising the question of whose understanding should control.

Although it is rarely put this way, the possible gap between the author of a contractual agreement and the parties who authorize it raises interesting questions. Because contracts are first and foremost private transactions, authorizer meaning —the meaning the parties attach to their words—is typically more salient than author meaning. But the *contra proferentem* rule provides that an ambiguous agreement will be interpreted against the drafting party.[39] Thus when only one party authors the agreement, courts sometimes discount that party's understanding, even though it is also an authorizer. Alternatively, when an industry association or public entity has drafted the agreement, it might make sense to give weight to author understanding, even at the expense of the understanding of one or both authorizing parties.[40] As compared to the parties, an industry association might, for example, have a greater interest in and insight into the effects of one or another interpretation on future users of its standard form. If the court's reading of the standard form's words is likely to be applied to future parties, the author's understanding of its meaning could generate the best outcome.

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37. RESTATEMENT (SECOND) OF CONTRACTS § 201(1) (AM. LAW INST. 1981). For a detailed account, see Lawrence M. Solan, *Contract as Agreement*, 83 Notre Dame L. Rev. 353 (2007).

38. In practice, courts begin contract interpretation by seeking the objective meaning of the parties' words and actions, as objective meaning almost always suffices to decide the controversy.

39. *See* RESTATEMENT (SECOND) OF CONTRACTS § 206 (AM. LAW INST. 1981).

40. *See, e.g.*, In re Lehman Bros. Holdings Inc., 2015 WL 7194609, (S.D.N.Y. 2015) (relying on arguments in amicus brief by the International Swap Dealers Association, which had authored the form contract used in the transaction, and an expert report from a principal drafter); Town Bank v. City Real Estate Dev., LLC, 793 N.W.2d 476, 490–93 (Wis. 2010) (Bradley, J., dissenting) (repeating arguments in an amicus brief by the Wisconsin Bankers Association, which had drafted the loan agreement at issue in the case). Along these lines, Stephen Choi and Mitu Gulati suggested that "contracting parties should have the ability to designate a standard-setting entity to provide a definitive source of interpretive authority for the contract," and that when parties do so courts should be required "to adopt the interpretation of the designated standard setter." Stephen J. Choi & Mitu Gulati, *Contract as Statute*, 104 MICH. L. REV. 1129, 1162 (2006). I discuss when deference to the drafter of a mandatory clause or standard form is appropriate in *Boilerplate and Party Intent*, 82 L. & CONTEMP. PROBS. 105, 116–30 (2019).

2. What Type of Meaning Governs?

Whereas the "whose meaning" question has long been front and center in contract law, less attention has been paid to the different types of meaning a contractual agreement can have. Contract theorists have yet to integrate late twentieth-century lessons from the philosophy of language into their accounts of contract exegesis.[41]

One issue under the "what type of meaning" heading is familiar: the existence of local dialects, in contract law often termed "usages of trade."[42] Courts have long recognized that words can have local conventional meanings, especially within merchant communities. Williston, following Wigmore, distinguishes between the "*popular* standard, meaning the common and normal sense of words," and "the *local* standard, including the special usages of a religious sect, a body of traders, and alien population, or a local dialect."[43] The Second Restatement provides that when both parties know or should be aware of a local standard—for example, when both are members of the same merchant community—the words of their agreement are interpreted in accordance with that standard.[44] Thus if among rabbit dealers, the word "thousand" is commonly used to refer to one-hundred dozen, a contract between merchants to sell rabbits at "60£ per thousand" will be read to specify a price of sixty pounds per twelve-hundred rabbits.[45] As between the popular conventional meaning and a local conventional meaning, courts will interpret their words per the latter so long as both parties are members of the relevant linguistic community.

A subtler and less theorized question is the choice between semantic and pragmatic meaning. Should the parties' words be interpreted in accordance with their literal meanings—that is to say, their conventional meanings in some language (popular or local)—or should they be interpreted in light of one or both parties' actual or apparent communicative intentions? When sophisticated parties write out the terms of their agreement, they often invest considerable resources to ensure that their words' conventional meanings correspond to their intended agreement. Such agreements are unlikely to include figures of speech, in which the intended meaning is a nonliteral one. Unlawyered contractual agreements, in

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41. An important exception was Peter Tiersma. *See, e.g.*, Peter Tiersma, *The Language of Offer and Acceptance: Speech Acts and the Question of Intent*, 74 CAL. L. REV. 189 (1986); Peter Meijes Tiersma, *Reassessing Unilateral Contracts: The Role of Offer, Acceptance and Promise*, 26 U.C. DAVIS L. REV. 1 (1992); Peter Tiersma, *The Language of Silence*, 48 RUTGERS L. REV. 1 (1995).

42. "Usages of trade" is used to refer both to specialized meanings that words might have among a group of merchants and to the typical practices of those merchants. The former usages are relevant to interpretation. The latter provide gap fillers, or defaults—which are rules of construction. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 220 & 221 (AM. LAW INST. 1981) (providing respectively rules for "Usage Relevant to Interpretation" and "Usage Supplementing an Agreement").

43. 2 SAMUEL WILLISTON, THE LAW OF CONTRACTS, § 604, 1162 (1920) [hereinafter "Williston (1st edition)"] (quoting 4 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN LAW OF EVIDENCE AT TRIALS AT COMMON LAW, § 2641, 3474 (1905)).

44. RESTATEMENT (SECOND) OF CONTRACTS § 220 (AM. LAW INST. 1981).

45. *Id.* at Ill. 8 (based on *Smith v. Wilson* (1832) 110 Rev. Rep. 266).

distinction, are more likely to generate gaps between the pragmatic and semantic meanings of the parties' words and actions.

Familiar examples of the latter include joking offers and sales talk.[46] Another can be found in the casebook staple, *Embry v. Hargadine, McKittrick Dry Goods Co.*, where a Missouri appellate court considered the correct interpretation of the words, "Go ahead, you're all right; get your men out and don't let that worry you," spoken by the company's president, McKittrick, to an employee, Embry, who was threatening to quit unless given a new contract.[47] At trial, the jury was instructed to find that there was a contract only "if you (the jury) find both parties thereby intended and did contract with each other for plaintiff's employment."[48] The appellate court held this was an error. "[T]hough McKittrick may not have intended to employ Embry by what transpired between them ... yet if what McKittrick said would have been taken by a reasonable man to be an employment, and Embry so understood it, it constituted a valid contract of employment."[49] In short, the existence of a contract depended on the objective meaning of the president's statement, not on his subjective understanding of it. What neither the trial nor the appellate court questioned, however, was that the outcome did not turn on the literal meaning of the defendant's words: "Go ahead, you're all right; get your men out and don't let that worry you." What mattered was the communicative intent—subjective or objective—behind the statements. Contract interpretation generally aims at pragmatic meaning.

Even when courts take a highly textualist approach to the words in a written agreement, they do not limit themselves to their semantic meaning. Williston, who is commonly identified as a formalist on contract interpretation, explained in the first edition of his treatise:

> [I]n giving effect to the general meaning of a writing particular words are sometimes wholly disregarded, or supplied. Thus "or" may be given the meaning of "and," or vice versa, if the remainder of the agreement shows that a reasonable person in the position of the parties would so understand it.[50]

Similarly, the New York Court of Appeals, which takes a textualist approach to contract interpretation, has recently affirmed that "[a] written contract will be read as a whole, and every part will be interpreted with reference to the whole; and if possible it will be so interpreted as to give effect to its general purpose."[51] Although conventional meanings obviously figure into contract interpretation,

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46. The two classic teaching cases for joking offers are *Lucy v. Zehmer*, 84 S.E.2d 516 (1954) and *Leonard v. Pepsico*, 88 F.Supp.2d 116 (S.D.N.Y. 1999). For sales talk, see U.C.C. § 2-313(2). (AM. LAW INST. & UNIF. LAW COMM'N 2010).

47. Embry v. Hargadine, McKittrick Dry Goods Co., 105 S.W. 777, 777 (Mo. Ct. App. 1907).

48. *Id*. at 778.

49. *Id*. at 779.

50. Williston (1st edition), 1199.

51. Westmoreland Coal Co. v. Entech, Inc., 100 N.Y.2d 352, 358 (2003) (internal quotation marks omitted).

that interpretation typically seeks to identify more than the semantic content of the parties' words. It seeks out their pragmatic meaning—the parties' actual, apparent or probable intent in using them.

An older New York case, *William C. Atwater & Co. v. Panama Railroad Co.*, illustrates the salience of pragmatic meaning in even highly textualist interpretation of contractual writings between sophisticated parties. At issue was an installment contract for the sale of coal and the legal effect of a clause reading: "Any portion of the tonnage remaining unshipped at the date of expiration of this agreement shall be considered canceled without notice."[52] The sentence's literal, or semantic, meaning was that both parties would be released from liability for any coal unshipped by the end of the installment period. But it was paired with a provision that permitted the seller to reduce installments upon buyer breach. After the buyer wrongfully refused to accept shipments and the seller exercised its option to halt deliveries, the buyer attempted to avoid all liability for undelivered shipments by invoking the quoted clause. Read literally, the provision excused the buyer from liability. But reading the agreement as a whole, and in light of the seller's contractual option to reduce installments after buyer breach, the Court of Appeals concluded that the clause's purpose was to limit the seller's liability upon exercise of the option, not to insulate the buyer from liability for losses resulting from its own breach. "Reason, equity, fairness—all such lights on the probable intention of the parties—show what the real agreement was."[53] The apparent purpose of the contract term was legally controlling at the expense of the words' literal meaning. Although the literal, or semantic, meanings of parties' words are important, the ultimate goal of contract interpretation is usually to get at their pragmatic content—at the parties' apparent or actual intent in using them.

3. What Facts Determine the Legally Relevant Meaning?

A third question is what types of evidence the interpreter may consider—in other words, what facts determine the legally relevant meaning. This question too is a familiar one. Contracts scholars often use New York and California as archetypes of the different answers courts give to the "what facts" question.

As noted above, New York courts employ a textualist rule. In *W.W.W. Associates, Inc. v. Giancontieri*, the New York Court of Appeals stated it as follows:

> [W]hen parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms. Evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing.[54]

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52. William C. Atwater & Co. v. Panama Railroad Co., 159 N.E. 418, 419 (N.Y. 1927).

53. *Id.*

54. W.W.W. Assocs., Inc. v. Giancontieri, 77 N.Y.2d 157, 162 (1990); *see also* R/S Assocs. v. N.Y. Job Dev. Auth., 98 N.Y.2d 29, 32 (2002).

In New York, extrinsic evidence—evidence other than the text of the agreement, the interpreter's background understanding, and perhaps a dictionary—may be introduced only if the writing itself is ambiguous or its meaning is otherwise unclear. Moreover, whether the writing is ambiguous is also to be determined from the text alone. "[E]xtrinsic and parol evidence is not admissible to create an ambiguity in a written agreement which is complete and clear and unambiguous upon its face."[55] Courts and scholars commonly refer to the meaning that can be gleaned solely from the text of a written agreement as its "plain meaning."[56]

California's very different approach appears in Justice Traynor's classic opinion in *Pacific Gas & Electric v. G.W. Thomas Drayage & Rigging*:

> The test of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether it appears to the court to be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible.[57]

In other words, when considering a written agreement, the judge may always look to extrinsic evidence to determine its possible meanings. Interpretation aims not at the writing's plain meaning, but at the meaning of the words in light of the context in which they were used.

Although the New York and California rules are often characterized as occupying two sides of a textualist-contextualist divide, the choice of interpretive facts is not a binary one.[58] Contract law distinguishes several types of interpretive inputs. In addition to the words or actions whose meaning is at issue, the inputs can include the interpreter's familiarity with language and her background knowledge of the world; dictionary definitions and rules of grammar; information about who the parties are and the commercial setting of their transaction; evidence of local linguistic practices and common terms of trade; other communications among or by the parties, especially during negotiations; the parties' prior dealings with one another; and the course of the parties' performance under the contract. Any given rule of contract interpretation can permit more or less evidence of meaning, depending on the types of evidence it authorizes (it might admit, for example, evidence of usages of trade but not of course of performance), on when that evidence is allowed in (always, only when the plain meaning is ambiguous, only in informal or nonintegrated communications, etc.), on who may consider the

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55. *Id*. at 163 (quoting *Intercontinental Planning v. Daystrom*, Inc., 24 N.Y.2d 372, 379 (1969)).

56. As the above discussion shows, plain meaning is a form of pragmatic meaning. A written agreement's plain meaning might not be its literal meaning.

57. Pacific Gas & E. Co. v. G.W. Thomas Drayage & R. Co., 69 Cal. 2d 33, 37 (1968).

58. I am not the first to make this point. *See* Henry E. Smith, *The Language of Property: Form, Context, and Audience*, 55 STAN. L. REV. 1105, 1157–66 (2003) (identifying ways that rules can be designed to achieve a "differential formalism"); Avery Weiner Katz, *The Economics of Form and Substance in Contract Interpretation*, 104 COLUM. L. REV. 496, 515–19 (2004) (observing several ways in which courts can permit more or less evidence in interpretation).

evidence (only the judge, also the jury), and so forth. The question is not simply whether or not to limit the interpretive evidence to the text and a dictionary, but how much evidence of what type to allow under what circumstances. Possible answers include "None ever," "All always," and many points between.

4. The Interplay Between the Three Questions

Although the above questions—whose meaning, what type of meaning, and what evidence of meaning—are logically distinct, there are obvious connections among their answers. If contract interpretation were to aim only at literal meaning, for example, the question of whose meaning would be answered and the most relevant interpretive facts would be those found in dictionaries and grammar books. If contract interpretation were to aim only at the parties' subjective understanding of their agreement, the course of their performance under it would be of greater evidentiary value than it would be under a purely objective theory.

That said, theorists risk confusion by running the different questions together. Consider the common division of interpretive theories into "textualist" and "purposivist" camps. Although the categories are historically descriptive—1980s statutory textualism arose in response to the purposivism of Henry Hart and Albert Sacks's legal process theory[59]—they answer different questions. Textualism provides an answer to the "what evidence" question: interpretation should begin, and when possible end, with the text. Purposivism, in distinction, is about the type of meaning: one should interpret a legal text in light of its apparent purpose, perhaps at the expense of its literal meaning. Although some versions of purposivism—including Hart and Sacks's[60]—recommend looking to extratextual evidence, textualism is perfectly compatible with the search for purpose. Thus textualist approaches to contract interpretation commonly affirm that the writing is to be "read as a whole to determine its purpose and intent."[61]

Another mistake is to equate the objective theory, which is about whose meaning controls, with textualism, which is again about what facts go into interpretation. In *Empro Manufacturing v. Ball–Co Manufacturing*, Judge Easterbrook invokes the principle that "'intent' in contract law is objective rather than subjective,"[62] to reach the conclusion that "intent must be determined solely from the language used when no ambiguity in its terms exists."[63] The latter proposition does not follow from the former. Although it is true that extrinsic evidence is especially probative of subjective intent, the objective theory does not entail that an interpreter should limit herself to the words on the page. Evidence of context

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59. *See* Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 23–29 (2006).

60. *See* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1211–54 (W. Eskridge, Jr., & P. Frickey, eds. 1994) (discussing the use of legislative history).

61. *Giancontieri*, 77 N.Y.2d at 162.

62. 870 F.2d 423, 425 (8th Cir. 1989). *See also* Skycom Corp. v. Telstar Corp., 813 F.2d 810, 814–17 (7th Cir. 1987).

63. *Empro*, 870 F.2d 423, 425 (quoting *Schek v. Chi. Transit Auth.*, 42 Ill.2d 362, 364 (1969)).

is sometimes essential for determining the understanding of a reasonable person standing in the shoes of the parties. In short, the answer to the "whose meaning" question does not determine the answer to the "what evidence" question.

C. Because Legal Interpretation Serves Construction, the Applicable Rule of Construction Determines the Correct Rule of Interpretation

This third structural feature follows fairly closely upon the second. Because there are multiple types of meaning and interpretation, we require a rule to determine which type is legally relevant—which meaning goes into determining a speech act's legal effects.[64] That rule will not be found in a theory of language. Theories of language provide at most menus of possible meanings, not reasons for picking one meaning over another. The rule that determines which meaning is legally relevant is, rather, a rule of construction. It is a rule that determines how parties' words and actions will affect their legal obligations. Consequently, although the activity of interpretation commonly comes first in the process of exegesis, rules of construction enjoy a certain conceptual priority. One cannot know what type of meaning to seek out—what rule of interpretation to apply—without first knowing the applicable rule of construction.

Here we see a further advantage of the complementary conception of interpretation and construction. Leiber's supplemental conception, which treats construction as necessary only when interpretation runs out, cannot explain how the law chooses among different meanings. The problem is not obvious in the context of Lieber's theory. Although Lieber distinguishes different approaches to interpretation, he rejects the idea that a legal text might have more than one meaning.[65] Consequently, when an authoritative text's one true sense is discernible, it decides the issue.

But Lieber's supplemental conception falls apart if a text does not have only one true sense—that is, if "meaning" is ambiguous. Once one abandons simple

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64. Cass Sunstein and Richard Fallon have each recently suggested that public law texts can have multiple meanings, paralleling my observation about contractual agreements. Cass Sunstein, *There Is Nothing that Interpretation Just Is*, 30 CONST. COMMENT. 193, 193 (2015) (stating that "there is nothing that interpretation 'just is,'" and "no approach to constitutional interpretation is mandatory"); Richard H. Fallon, Jr., *The Meaning of Legal "Meaning" and Its Implications for Theories of Legal Interpretation*, 82 U. CHI. L. REV. 1235, 1239 (2015) (there is a "diversity of senses of meaning that constitute . . . potential 'referents' for claims of legal meaning"). Neither however, suggests a simple rule for choosing amongst them. Sunstein recommends an outcome-based approach as the choice among interpretive methods in constitutional law. "Among the reasonable alternatives, any particular approach to the Constitution must be defended on the ground that it makes the relevant constitutional order better rather than worse." Sunstein, 30 CONST. COMMENT. at 212. To date Sunstein has not made an outcome-based case for one or another form of constitutional interpretation. Fallon argues that it is a mistake to equate statutory or constitutional meaning with any one type of meaning. Rather than selecting a single mode of interpretation on the basis of overall outcomes, Fallon recommends "a relatively case-by-case approach to selecting" the appropriate sort of meaning. Fallon, 82 U. CHI. L. REV. at 1303.

65. Whereas theologians might distinguish between the Bible's "typical, allegorical, parabolical, anagogical, moral and accommodatory senses, and of corresponding modes of interpretation, . . . [i]n politics and law we have to deal with plain words and human use of them only." LIEBER, *supra* note 6, at 76.

theories of meaning, it is obvious that the law requires a rule for choosing among the various meanings a single speech act might have. That rule is not one of interpretation. It is a rule of construction. The diversity of meanings therefore provides a further argument for the complementary conception of interpretation and construction.

The point is not merely about the advantages of one or another conception of the interpretation-construction distinction. The conceptual priority of construction reflects an important fact about the types of arguments needed to justify legal rules of interpretation. Consider Justice Traynor's argument in *Pacific Gas*, quoting from Corbin, for interpreting written agreements in light of the surrounding circumstances:

> Words, however, do not have absolute and constant referents. . . . The meaning of particular words or groups of words varies with the "verbal context and surrounding circumstances and purposes in view of the linguistic education and experience of their users and their hearers or readers (not excluding judges). . . . A word has no meaning apart from these factors; much less does it have an objective meaning, one true meaning."[66]

Such appeals to the theory of meaning are relatively common among anti-textualist contract theorists. Thus Melvin Eisenberg argues, "The proper interpretation of all purposive expressions, including contractual expressions, is necessarily dynamic, because the meaning of a purposive expression is always determined in part by its context, and the context is prior to the expression."[67] E. Allen Farnsworth maintains, "The very concept of plain meaning finds scant support in semantics, where one of the cardinal teachings is the fallibility of language as a means of communication."[68] The comments to section 212 of the Second Restatement assert that "meaning can almost never be plain except in a context."[69] And the comments to section 2-202 of the UCC provide, "This section definitively rejects . . . [t]he premise that the language used has the meaning

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66. 442 P.2d at 644–45 (quoting Arthur Linton Corbin, *The Interpretation of Words and the Parol Evidence Rule*, 50 CORNELL L.Q. 161, 187 (1965)).

67. Melvin Aron Eisenberg, *The Emergence of Dynamic Contract Law*, 2 THEORETICAL INQ. L. 1, 27 (2001).

68. E. Allen Farnsworth, "*Meaning" in the Law of Contracts*, 76 YALE L.J. 939, 952 (1967). *See also* E. ALLAN FARNSWORTH, CONTRACTS § 7.10, 454 (4th ed. 2004) ("Indeed, it is questionable whether a word has meaning at all when divorced from the circumstances in which it is used.").

69. RESTATEMENT (SECOND) OF CONTRACTS § 212 cmt. b; *cf.* 3 Corbin (1st edition) § 542, 100–02 ("[S]ome of the surrounding circumstances always must be known before the meaning of the words can be plain and clear."). A similar claim can be found in the comments to section 214 of the Second Restatement:

> Words, written or oral, cannot apply themselves to the subject matter. . . . Even though words seem on their face to have only a single possible meaning, other meanings often appear when the circumstances are disclosed.

Restatement (Second) of Contracts § 214, cmt. b.

attributable to such language by rules of construction existing in the law rather than the meaning which arises out of the commercial context in which it was used."[70]

These appeals to the theory of language are flawed. It might well be that parties in fact understand one another in light of the context, their purpose and their linguistic experience. It is not, however, a given that the parties' contractual obligation should track those understandings, or that legal interpretation should mirror the parties' interpretive practices. The contextually enriched pragmatic meaning that often anchors the parties' understanding of their agreement is not the only meaning the law might look to, and might not even be the meaning that the parties themselves, if they thought about it, would want to control.[71] Deciding which meaning should govern requires attending to more than the theory of language. With respect to contractual interpretation, relevant considerations include: (a) costs of drafting; (b) costs of litigation; (c) the ability of third-party enforcers to accurately identify one or another type of meaning; (d) predictability of outcomes; (e) how responsive parties are to the incentives legal interpretive rules generate, and especially whether they are likely to draft their agreements to take account of those rules; (f) relational costs, both of putting everything into an agreement and of interpretive rules that give legal effect to behavior outside of a writing; (g) parties' expressed or probable preference with respect to how their agreement is interpreted; and more generally (h) society's reasons for attaching legal consequences to exchange agreements.[72] Other factors will be relevant in other areas of the law. But in all instances, the reasons for picking one or another meaning will be found in political and legal principles, policies and practicalities, not in the theory of language. The choice requires a rule of construction, and rules of construction are creatures of law.

D. When One Type of Interpretation Runs Out, Another Type Might Step in

On the supplemental conception, when interpretation fails to attribute to the text a legally effective meaning, noninterpretive rules of construction step in. Perhaps something like this idea lies behind Randy Barnett's suggestion that "[w]hen original meaning runs out, constitutional 'interpretation,' strictly speaking, is over, and some new noninterpretive activity must supplement the information revealed by interpretation."[73] But if there are multiple types of meaning, and

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70. U.C.C. § 2-202 cmt. 1.

71. The latter point is argued at length in Schwartz & Scott, *supra* note 13, at 573–94, and Jody S. Kraus & Robert E. Scott, *Contract Design and the Structure of Contractual Intent*, 84 N.Y.U. L. Rev. 1023, 1046–62 (2009).

72. For other lists of relevant factors, see Avery Weiner Katz, *The Economics of Form and Substance in Contract Interpretation*, 104 Colum. L. Rev. 496, 522–36 (2004) and Eric A. Posner, *The Parol Evidence Rule, the Plain Meaning Rule, and the Principles of Contractual Interpretation*, 146 U. Pa. L. Rev. 533, 543–47 (1998).

73. Randy Barnett, *The Gravitational Force of Originalism*, 82 FORDHAM L. REV. 411, 419 (2013). Of course it all depends on what you mean by "interpretation." More recently, Barnett and Evan Bernick have argued that once original meaning runs out, judges should "identify the original functions or spirit

therefore multiple approaches to interpretation, a rule of construction might specify that when one type of interpretation runs out, another type steps in.

In fact, this is how contract law often proceeds. I have already mentioned two examples. Courts that adopt a textualist approach to written agreements regularly consider extratextual facts to resolve textual ambiguities. When textualist interpretation runs out, another interpretive rule steps in. And the Restatement provides that when interpretation of subjective meaning does not produce a single result, objective meaning controls. If the parties' subjective understandings of their words and actions agree, that meaning governs; if their subjective understandings conflict, their legal obligations are determined by the objective meaning of their words and actions.

The existence of rules of construction that specify more than one type of meaning entails that is doubly wrong to divide the activity of exegesis into two distinct stages: first interpretation and second construction. Not only do the correct rules of interpretation depend on the relevant rule of construction—the conceptual priority of construction—but a rule of construction might specify multiple stages of interpretation.

III. INTERPRETATION AND CONSTRUCTION IN CONSTITUTIONAL LAW: JOSEPH STORY AND THOMAS COOLEY

I believe the above claims about the nature of and relationship between interpretation and construction are true of legal exegesis generally. Identifying the effect of any legal text or other speech act requires knowing more than its meaning. Any legal speech act might be subjected to different types of interpretation, to which correspond various types of meaning. The choice among types of meaning cannot be resolved by the theory of language, but always involves considerations of principle, policy and practicality. And the existence of multiple types of meaning generally entails that when one form of interpretation runs out, another might step in.

Depending on one's tastes, it would be either very interesting or very tedious to explore how those claims apply across the entire range of legal exegesis. That is not the project of this Article. But the subject matter of the 2018 Salmon P. Chase Faculty Colloquium provides an opportunity to illustrate the value of the above analysis for understanding two nineteenth-century approaches to constitutional interpretation. The remainder of this Article argues that the above theory of interpretation and construction provides a useful framework for understanding Thomas Cooley's and Joseph Story's accounts of constitutional interpretation.

Cooley's 1868 *A Treatise on Constitutional Limitations Which Rests on the Legislative Power of the States of the American Union* is largely a discussion of

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of the provision" at issue and formulate a rule designed to implement that function. Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1, 35 (2018). Barnett and Bernick describe this as a rule of constitutional construction, which is to be applied only in the construction zone. *Id*. at 6. But identifying the function or spirit of a constitutional provision requires interpretation of it.

state constitutions.[74] Cooley's treatise nonetheless draws heavily on Story's 1833 *Commentaries on the Constitution of the United States*.[75] Although Cooley briefly mentions the interpretation-construction distinction at the outset of his chapter on constitutional interpretation, neither he nor Story incorporates it into his theory of constitutional exegesis.[76] Nonetheless, distinguishing the two activities and the types of rules that govern each provides critical insight into Cooley and Story's shared approach to constitutional exegesis. More specifically, each of the four structural features identified in Section II—the complementarity of interpretation and construction, the multiple meanings of "meaning," the conceptual priority of rules of construction, and the fact that when one type of interpretation runs out, another can step in—appears in both Story's and Cooley's theories.

The starting point for understanding Story's and Cooley's accounts of constitutional exegesis is their shared answer to the "whose meaning" question. Each in the course of his analysis recognizes at least three possible answers. The legally relevant meaning of the constitutional text might be the meaning it had for those who drafted the documents—participants in the Philadelphia Convention or state analogs. This is a form of author meaning, which I will call "framer meaning." If a constitution is ratified by an elected body, as the U.S. Constitution was by state conventions called specially for that purpose, the relevant meaning might be the understandings of members of the ratifying bodies. Call this "ratifier meaning." Finally, the relevant meaning might be the meaning the text had at the time of ratification for the public at large, or its "public meaning." How Story and Cooley go about picking among these meanings illustrates the conceptual priority of construction. Their arguments for public meaning can be broken down into two parts.

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74. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (1868).

75. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (1833). After the publication of his *Treatise*, Cooley served as editor of the 1873 fourth edition of Story's *Commentaries*.

76. At the outset of the chapter "Of the Construction of State Constitutions" in the first edition of his treatise, Cooley briefly discusses Lieber's distinction between interpretation and construction. COOLEY, *supra* note 74, at 33, n. 1; *see also* THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH RESTS ON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 40–41 (2d ed. 1871). But Cooley does not distinguish between the two activities in his account of constitutional exegesis. In the 1871 second edition, Cooley explains that "[i]n common use, however, the word *construction* is generally employed in the law in a sense embracing all that is properly covered by both when used in a sense strictly and technically correct; and we shall so employ it in the present chapter." *Id*. at 41. The first edition of Story's *Commentaries* was published six years before Lieber published his book on the interpretation-construction distinction. Story neither anticipates the distinction in the first edition nor incorporates it into later editions.

Theodore Sedgwick is perhaps the nineteenth century treatise writer who follows Lieber most closely, though Sedgwick writes that he does not consider the interpretation-construction distinction "of much value for the student of jurisprudence." THEODORE SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND APPLICATION OF STATUTORY AND CONSTITUTIONAL LAW 227 (1857). The structure of Sedgwick's discussion of statutory interpretation follows Lieber's distinction: Chapter Six provides rules of interpretation aimed at discerning legislative intent; Chapter Seven discusses how judges should decide cases when interpretation runs out.

The first is the thesis, shared with Lieber, that the goal of legal interpretation is to discover the sovereign lawgiver's intent. Story puts the point as follows: "The first and fundamental rule in the interpretation of all instruments is, to construe them according to the sense of the terms, and the intention of the parties."[77] Cooley similarly states: "In the case of all written laws, it is the intent of the lawgiver that is to be enforced."[78] As in Lieber, this thesis suggests a command theory of law. Because law is the command of the sovereign, legal interpretation should seek to discover that sovereign's intent.

It follows that the answer to the "whose meaning" question cannot be framer meaning. The framers of the state and federal constitutions did not authorize the constitutional texts; they merely authored them. Consequently, constitutional interpretation should not give any special weight to the proceedings at drafting conventions or to framers' understandings of the resulting documents. Cooley's explanation of the difference between a constitution and ordinary legislation nicely illustrates the importance of distinguishing author from authorizer:

> For as the constitution does not derive its force from the convention which framed, but from the people who ratified it, the intent to be arrived at is that of the people. . . . These proceedings therefore are less conclusive of the proper construction of the instrument than are legislative proceedings of the proper construction of a statute; since in the latter case it is the intent of the legislature we seek, while in the former we are endeavoring to arrive at the intent of the people through the discussions and deliberations of their representatives.[79]

In ordinary legislation author and authorizer might overlap. The legislative text might be authored by a committee of legislators, sometimes amended by the legislature as a whole, and then authorized by the legislature as a whole.[80] A constitution, in distinction, is more akin to a standard form contract. The author is not the authorizer. And according to the command theory, it is only the intent of the latter that matters. Framer meaning is rejected on the basis of a political claim about whose meaning controls: that of the sovereign who authorizes the constitution.

The second component of Story and Cooley's answer to the "whose meaning" question is their shared position that in the United States the people are sovereign,

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77. STORY, *supra* note 75, at 383.

78. COOLEY, *supra* note 74, at 55.

79. COOLEY, *supra* note 74, at 66–67. *See also* STORY, *supra* note 75, at 392 n.1 (making a similar point in response to Jefferson's suggestion that constitutional interpretation look to the records of the Philadelphia and ratifying conventions: "The people adopted the constitution according to the words of the text in their reasonable interpretation, and not according to the private interpretation of any particular men. The opinions of the latter may sometimes aid us in arriving at just results; but they can never be conclusive.")

80. For an account of how it is we can assign collective intentions, including collective communicative intentions, to legislative bodies, see Victoria Nourse, *Misreading Law, Misreading Democracy* (2016).

and that a constitution's legal authority, whether state or federal, derives from its authorization by the people. Story opens his Chapter Five account of constitutional interpretation with an extended discussion:

> In our future commentaries upon the constitution we shall treat it, then, as it is denominated in the instrument itself, as a CONSTITUTION of government, ordained and established by the people of the United States for themselves and their posterity. They have declared it the supreme law of the land. They have made it a limited government. They have defined its authority. They have restrained it to the exercise of certain powers, and reserved all others to the states or to the people. It is a popular government. Those who administer it are responsible to the people. It is as popular, and just as much emanating from the people, as the state governments. It is created for one purpose; the state governments for another. It may be altered, and amended, and abolished at the will of the people. In short, it was made by the people, made for the people, and is responsible to the people.[81]

Cooley articulates a similar view of both the national Constitution and state constitutions:

> The theory of our political system is that the ultimate sovereignty is in the people, from whom springs all legitimate authority. They have created a national Constitution, and conferred upon it powers of sovereignty over certain subjects, and they create State governments upon which they confer the remaining powers of sovereignty, so far as they are disposed to allow them to be exercised at all.[82]

It follows that the meaning that matters for constitutional interpretation is not ratifier meaning, but the text's public meaning. If the goal of legal interpretation is to identify the intent of the sovereign who authorized the legal text (the first component of the argument), and if constitutions are authorized by the sovereign people (the second component), then the proper aim of constitutional interpretation

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81. STORY, *supra* note 75, at 382 (footnote omitted).

82. COOLEY, *supra* note 74, at 28 (footnote omitted).

Cooley was less a theorist than was Story. The above passage is supported not by an argument, but by a citation to Justice McLean's opinion, riding circuit, in *Spooner v. McConnell*, 1 McLean 337, 347 (1838). *Id.* at 28 n. 3. And whereas Story speaks from within the theory of popular sovereignty, Cooley speaks as if he is reporting the theory of the U.S. political system—from the perspective of an observer rather than participant. Thus, the above passage is followed by a discussion of the limited franchise, in which Cooley makes clear that he is merely reporting the judgment of the polity as to who should have the franchise, not treating that judgment as justified. "What *should* be the correct rule on this subject, it does not fall within our province to consider." *Id.* at 29. For a more ambitious post-Civil War argument for a national popular-sovereignty theory, see John Alexander Jameson, *The Constitutional Convention: Its History, Powers, and Modes of Proceeding* 17–65 (1867).

is to identify the public meaning of the constitutional text. "[T]he real question is what the people meant." [83]

To the reader not steeped in the early nineteenth century constitutional debates, this appeal to popular sovereignty might read like a bland invocation of the Lockean contractualist tradition. But Story's popular-sovereignty theory of the U.S. Constitution was taking sides in one of the more contentious political-theoretical debates of the time.[84] The division was between those who viewed the Constitution as a compact between the states, or between the people of the several states, and those who viewed it as authorized by the people of the United States as a whole.[85] For my purposes, a few examples of the compact view suffice to identify the highly political quality of Story's theory of national popular sovereignty.

Richard Tuck has observed that at the time of the founding there was widespread agreement that the U.S. Constitution required ratification not by state legislatures, as the Articles of Confederation had been, but by specially constituted assemblies.[86] Circumventing state legislatures, however, did not preclude a view of the Constitution as a compact among the several states. Tuck takes George Mason's views as exemplary:

> It should be noted (since the issue became hugely important in the latter interpretation of the Constitution) that at least in Mason's eyes an appeal to the people over the heads of the legislatures was compatible with the separate identity of those people in their respective states; it was possible to believe in the necessity of a democratic process within each state as the guarantee of the federal Constitution's legitimacy, without believing that the people had created a new and unitary nation.[87]

The compact theory of the Constitution found application in the 1798 and 1799 Kentucky and Virginia Resolutions, which purported to adjudge unconstitutional the federal Alien and Sedition Acts. Each maintained that because the

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83. COOLEY, *supra* note 74, at 61.

84. Cooley's adoption of a similar position on state constitutions was less controversial. *See* Richard Tuck, *The Sleeping Sovereign: The Invention of Modern Democracy* 191–97 (2016) (describing the use of plebiscites to ratify state constitutions in the period between 1778 and the beginning of the Civil War).

85. Richard Tuck provides a good overview of how that divide played out over time. *Id*. at 181–242.

86. *Id*. at 206–07.

87. *Id*. at 207. Tuck reads Madison as articulating a similar argument in Federalist 39, though Federalist 39 maintained that the Constitution would also have a national character. For example:

> That it will be a federal and not a national act, as these terms are understood by the objectors; the act of the people, as forming so many independent States, not as forming one aggregate nation, is obvious from this single consideration, that it is to result neither from the decision of a *majority* of the people of the Union, nor from that of a *majority* of the States.

THE FEDERALIST No. 39, at 196–97 (James Madison) (George W. Carey & James McClellan eds., 2001).

Constitution was a compact between the states, the states had the power to determine violations of it.[88] In his 1803 edition of *Blackstone's Commentaries*, George Tucker gave a systematic account of the theory. The Constitution was for Tucker "a compact freely, voluntarily and solemnly entered into by the several states, and ratified by the people thereof, respectively."[89] Tucker drew from this a rule of construction, namely, that the powers of the federal government were only those expressly enumerated in the Constitution:

> for, *expressum facit taccre tacituni* is a maxim in all cases of construction: it is likewise a maxim of political law, that sovereign states cannot be deprived of any of their rights by implication; nor in any manner whatever but by their own voluntary consent, or by submission to a conqueror.[90]

Citing Tucker and others, H. Jefferson Powell has argued that in the first decade of the nineteenth century, "the constitutional theory of the Virginia and Kentucky resolutions established itself as American political orthodoxy," an orthodoxy that "stood virtually unquestioned until the nullification crisis of 1828 through 1832."[91]

Whether or not the compact theory ever attained the status of orthodoxy,[92] there is no doubt that in his 1833 *Commentaries* Story set out to refute it and to

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88. The Virginia Resolution provided:

> [T]his Assembly doth explicitly and peremptorily declare, that it views the powers of the federal government, as resulting from the compact, to which the states are parties; . . . and that in case of a deliberate, palpable, and dangerous exercise of other powers, not granted by the said compact, the states who are parties thereto, have the right, and are in duty bound, to interpose for arresting the progress of the evil, and for maintaining within their respective limits, the authorities, rights and liberties appertaining to them.

VIRGINIA RESOLUTIONS OF 1798 *in* 4 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787 554, 554 (2nd ed., 1888). The Kentucky Resolutions similarly provided that "the several states who formed [the federal Constitution], being sovereign and independent, have the unquestionable right to judge of its infraction; and that a nullification, by those sovereignties, of all unauthorized acts done under colour of that instrument, is the rightful remedy." KENTUCKY RESOLUTIONS OF 1799 *in* 4 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787 566, 571 (2nd ed., 1888).

89. 1 BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA 155 (St. George Tucker ed., 1803); *see also id.* at 148 ("It is a federal compact; several sovereign and independent states may unite themselves together by a perpetual confederacy, without each ceasing to be a perfect state."); *id.* at 169 ("It is a compact by which the several states and the people thereof, respectively, have bound themselves to each other, and to the federal government.").

90. *Id.* at 143.

91. H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 934, 935 (1985); *see also* H. Jefferson Powell, *Joseph Story's Commentaries on the Constitution: A Belated Review*, 94 YALE L.J. 1285, 1302 (1985) (describing the constitutional argument behind the South Carolina Exposition of 1828).

92. For a critical assessment of Powell's use of original sources, see Charles A. Lofgren, *The Original Understanding of Original Intent?*, 5 CONST. COMM. 77 (1988).

give an alternative account of the authorization and authority of the U.S. Constitution. Chapter Three of the *Commentaries*, titled "Nature of the Constitution—Whether a Compact," provides a detailed criticism of Tucker's theory.[93] Story's arguments range from high political theory to a close reading of the constitutional text. Interesting though the details are, the important point for my purposes is that they all sound in the register of jurisprudence, political principle, history and textual analysis. The chapter provides a political theory of the Constitution, which in turn provides the basis for Story's answer in Chapter Five to the "whose meaning" question.[94] Because the people as a whole authorized the Constitution, it is their understanding of the document that matters, not that of the participants at state ratifying conventions. The answer is not given by the theory of language, but rather by a rule of construction that, on the basis of legal and political considerations, determines which meaning matters. This is the conceptual priority of construction.

Story's arguments about the nature of sovereignty in the United States can appear quaint to a modern, realist eye—akin to arguments about the actual location of a business that is incorporated in one state and has agents in another.[95] But the "whose meaning" question has hardly disappeared from constitutional theory. It lies, for example, at the bottom of the disagreement between original-intent originalists and original-meaning originalists. Original-intent originalism recommends interpreting the framers' intent or purpose when they drafted the constitutional text. Original-meaning originalism recommends interpreting how, at the time of drafting, ordinary citizens would have understood the constitutional text. The disagreement is in one sense about how constitutional interpretation should proceed. But it cannot be answered by the theory of meaning. Neither side denies that one *might* interpret the constitution as the other advocates. The question is: which type of meaning *should* make a legal difference? That is a question not of interpretation, but of construction. Its answer will be found not in the theory of language, but in political principles, policy priorities, and practical considerations.[96]

The question has occasionally arisen in the Supreme Court as well. William Treanor documents several instances in which the Court has relied on drafts of the U.S. Constitution that antedate the final text produced by the Committee on

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93. STORY, *supra* note 75, at 279–343.

94. Story was also an advocate, and marshaled more than one argument for his answer to the whose meaning question. Thus he also observed that the diversity of opinion at the ratifying conventions provide neither the certainty nor the uniformity necessary for a foundational document. *Id*. at 388–89. This is an argument that relies on practical legal considerations, rather than political principle. It too, however, extends beyond the theory of meaning.

95. *See* Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 809–12 (1935).

96. Jack Balkin makes a similar point with respect to constitutional history generally: "[I]n constitutional construction, history is a resource, not a command. . . . [H]ow history is used and how it becomes relevant depends on each modality's underlying theory of justification." Balkin, *supra* note 1, at 652.

Style.[97] Such arguments suggest an emphasis on framer meaning, as distinguished from either ratifier or popular meaning. Justice Thomas has objected to relying on such draft texts, explaining: "I focus on the words of the adopted Constitution."[98]

Section II.2 distinguished three categories of questions regarding the various meanings a legal speech act can have: Whose meaning matters? What type of meaning matters? And what facts go into the determination of the meaning that matters? And I observed that, although the questions are analytically distinct, their answers are often practically connected. The answer to one of the questions often informs the answers to the others.

This dynamic too can be seen in both Cooley and Story. Their shared answer to the "whose meaning" question—public meaning—informs other aspects of their theories of constitutional interpretation. We can start with a choice among various conventional, or semantic, meanings a constitutional text can have. Both Story and Cooley recognize that a single word in a constitution might have multiple conventional meanings. Whereas contract law emphasizes the difference between popular meanings and usages of trade, Story and Cooley discuss the difference between popular meanings and technical legal meanings. Both maintain that legal terms of art, such as "habeas corpus," must be read in their technical senses. But, they argue, ordinary words in a constitution should be read in accordance with their popular meanings.[99] Cooley explains: "Narrow and technical reasoning is misplaced when it is brought to bear upon an instrument framed by the people themselves, for themselves, and designed as a chart upon which every man, learned and unlearned, may be able to trace the leading principles of government."[100] Or as Story puts the point:

> Constitutions are not designed for metaphysical or logical subtleties, for niceties of expression, for critical propriety, for elaborate shades of meaning, or for the exercise of philosophical acuteness, or judicial research. . . . The people make them; the people adopt them; the people must be supposed to read them, with the help of common sense; and cannot be presumed to admit in them any recondite meaning, or any extraordinary gloss.[101]

The choice among semantic meanings turns on Story and Cooley's answer to the "whose meaning" question. In contract law, the relevance of the parties'

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97. William Michael Treanor, *Framer's Intent: Gouverneur Morris, the Committee of Style, and the Creation of the Federalist Constitution* 43–50 (17 Oct., 2019), https://ssrn.com/abstract=3383183 [https://perma.cc/Y8H5-74KL].

98. Utah v. Evans, 536 U.S. 452, 496 (2002) (Thomas, J., dissenting).

99. COOLEY, *supra* note 74, at 58 ("In interpreting clauses we must presume that *words have been employed in their natural and ordinary meaning*."); STORY, *supra* note 75, at 436 ("[E]very word employed in the constitution is to be expounded in its plain, obvious, and common sense, unless the context furnishes some ground to control, qualify, or enlarge it.").

100. COOLEY, *supra* note 74, at 59.

101. STORY, *supra* note 75, at 436–37.

understanding (whose meaning) suggests taking account of relevant usages of trade (what type of meaning). In Story's and Cooley's constitutional theories, the relevance of the people's understanding (whose meaning) suggests attending to the text's popular meaning rather than any technical legal meaning it might have (what type of meaning).

Another distinction among types of meaning is that between a text's semantic and its pragmatic meanings. Although Story did not have the technical tools to draw it, he recognizes something akin to this distinction. At the outset of his chapter on constitutional interpretation, Story catalogues various types of interpretation identified by other theorists. One is Thomas Rutherforth's differentiation, in his lectures on Grotius, between "literal" and "rational" interpretation:

> The first [literal interpretation] is, where we collect the intention of the party from his words only, as they lie before us. The second [rational interpretation] is, where his words do not express that intention perfectly, but exceed it, or fall short of it, and we are to collect it from probable or rational conjectures only.[102]

Story relates Rutherforth's categories to one understanding of the difference between "strict" and "large" interpretation:

> [A]s, on the one hand, we call it a strict interpretation, where we contend, that the letter is to be adhered to precisely; so, on the other hand, we call it a large interpretation, where we contend, that the words ought to be taken in such a sense, as common usage will not fully justify; or that the meaning of the legislator is something different from what his words in any usage would import. In this sense a large interpretation is synonymous with what has before been called a rational interpretation.[103]

Story maintains that constitutional interpretation should be, in these senses, rational and large.

Again Story's argument lies in his answer to the "whose meaning" question, and in the political theories that together support it—the command and popular-sovereignty theories. Because the goal of constitutional interpretation is to get at the probable intentions of the populace that authorized the document, the constitutional text must be interpreted as a whole according to its apparent purpose. "The words are not, indeed, to be stretched beyond their fair sense; but within that range, the rule of interpretation must be taken, which best follows out the

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102. STORY, *supra* note 75, at 385; *see* 2 T. RUTHERFORTH, INSTITUTES OF NATURAL LAW; BEING THE SUBSTANCE OF A COURSE OF LECTURES ON GROTIUS DE JURE BELLI ET PACIS, READ IN ST. JOHN'S COLLEGE, CAMBRIDGE 407–08 (1832) ("Where we collect the intention of the speaker or the writer from his words only, as they lie before us, this is literal interpretation. Where his words do not express his intention perfectly, but either exceed it or fall short of it, so that we are to collect it from probable or rational conjectures only, this is rational interpretation.").

103. STORY, *supra* note 75, at 386.

apparent intention."[104] In contemporary parlance, although semantic meaning no doubt matters, the ultimate goal is to discern a constitution's pragmatic meaning.

Unlike Story, Cooley does not employ the distinctions between literal and rational or large and narrow interpretation. But he identifies the connection between popular authorization and the intent behind the constitutional text:

> Every such instrument is adopted as a whole, and a clause which, standing by itself, might seem of doubtful import, may yet be made plain by comparison with other clauses or portions of the same law. It is therefore a rule of construction, that *the whole is to be examined with a view to arriving at the true intention of each part*.[105]

The ultimate goal of constitutional interpretation is to discover not the document's literal meaning but its intended one. When the text's semantic and pragmatic meanings conflict, literal meaning gives way to the apparent intended meaning of its words.

The final question I identified under the "what type of meaning" heading concerns what facts go into the determination of a text or other speech act's meaning. Story and Cooley's emphasis on purpose does not preclude a shared adherence to textualism. Both theorists give primacy to the constitutional text. Although the goal is to ascertain the sovereign people's intent, as Cooley puts it, "this intent is to be found in the instrument itself. It is to be presumed that language has been employed with sufficient precision to convey it, and unless examination demonstrates that the presumption does not hold good in the particular case, nothing will remain except to enforce it."[106] Textualism of this sort was common in nineteenth century jurisprudence. But Story expressly ties his constitutional textualism to the theory of popular sovereignty. The Constitution's plain meaning governs because "[n]othing but the text itself was adopted by the people."[107]

Story's and Cooley's answers to the "what facts" question are not the legal analog of *sola scriptura*. I have suggested that the existence of multiple meanings entails that when one form of interpretation runs out, another might step in. Story and Cooley's answer to the "what facts" question illustrates just that. When the constitutional text alone does not answer a legal question, the interpreter should

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104. *Id*. at 397; *see also id*. at 406 ("But a constitution of government, founded by the people for themselves and their posterity, and for objects of the most momentous nature, for perpetual union, for the establishment of justice, for the general welfare, and for a perpetuation of the blessings of liberty, necessarily requires, that every interpretation of its powers should have a constant reference to these objects.").

105. COOLEY, *supra* note 74, at 57.

106. *Id*. at 55.

107. STORY, *supra* note 75, at 389. *Compare id*. at 392 n.1 ("The people adopted the constitution according to the words of the text in their reasonable interpretation, and not according to the private interpretation of any particular men."), *with* 2 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 606, 1165 (1st. ed.) ("Where [the parties] incorporate their agreement into a writing they have attempted more than to assent by means of symbols to certain things, they have assented to the writing as the adequate expression of the things to which they agree.").

look to extrinsic evidence of its meaning. Thus, Cooley writes, "It is possible . . . that after we shall have made use of all the lights which the instrument itself affords, there may still be doubts to clear up and ambiguities to explain. Then, and only then, are we warranted in seeking elsewhere for aid."[108] Similarly, Story argues that the "contemporary construction" of the text may be used "to illustrate, and confirm the text, to explain a doubtful phrase, or to expound an obscure clause."[109] In short, when the constitutional text's plain meaning does not resolve a legal question, interpretation may consider evidence from outside the text. When one form of interpretation runs out, another can step in.

The above discussion does not cover all of Cooley's and Story's views regarding constitutional interpretation. Nor does everything Cooley and Story say tie back to my analysis of interpretation and construction. But many of their core arguments are consistent with that analysis. Both Story and Cooley ground large portions of their respective theories of constitutional interpretation not on a theory of meaning, but on a political theory of constitutions: the command theory of law combined with a commitment to popular sovereignty. They use that political theory to develop a theory of constitutional construction that identifies as legally relevant the text's public meaning, as distinguished from the framers' authorial understanding, or the meaning ratifiers might have attached to the text; that prioritizes nontechnical over technical meanings; that looks to pragmatic rather than semantic meaning; that gives priority to textual interpretation; and that allows for extrinsic evidence of meaning when textual interpretation runs out. These arguments nicely illustrate the complementary conception of interpretation and construction, the multiplicity of meanings, the conceptual priority of construction, and the fact that when one form of interpretation is exhausted, another can step in.

IV. THE FIXATION THESIS

Before ending, I want to consider one more passage from Cooley's *Treatise* that further confirms the value of the above theoretical account of interpretation and construction. Early in his chapter on constitutional interpretation, Cooley advances a claim strikingly similar to what Solum refers to as the "fixation thesis." Solum articulates the thesis as follows: "The object of constitutional interpretation is the communicative content of the constitutional text, and that content was fixed when each provision was framed and/or ratified."[110] Cooley writes: "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."[111]

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108. COOLEY, *supra* note 74, at 65.

109. STORY, *supra* note 75, at 390.

110. Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Facts in Original Meaning*, 91 NOTRE DAME L. REV. 1, 15 (2015).

111. COOLEY, *supra* note 74, at 55.

Taken out of context, one might read Cooley's statement in either of two ways. First, it might be a claim within the theory of language: the meaning of a speech act is a fact about the speech act that does not change over time. Second, one might read it as belonging to political theory: the purpose of a constitution is better served by attributing its words meanings that do not change over time.

Solum's fixation thesis should be understood in the first sense. Solum argues that the communicative content of a speech act depends on two facts: the conventional semantic meaning of the words in it and relevant aspects of the context that enrich its semantic content.[112] Both are facts about the world at the time that the speech act was produced. Because the facts that go into determining a speech act's communicative content are "time-bound," so too is that meaning. Solum's fixation thesis is therefore not a claim about law, but rather about communicative content. "The core of the affirmative case for the Fixation Thesis is rooted in common sense intuitions about the meaning of old texts."[113]

Although Solum's conception of communicative content is relatively catholic, in the sense that it can accommodate different versions of originalism,[114] it describes only one category of meanings that a constitutional text might possess. Solum considers whether pluralism about meanings provides an objection to the fixation thesis.[115] He takes Mark Greenberg's work as an example and argues that the three types of meaning Greenberg identifies—framer meaning, ratifier meaning, and literal clause meaning—"all . . . are fixed, albeit at slightly different times."[116] But those are only the three types of meaning Greenberg happens to discuss, not an exhaustive list of possible meanings. With respect to the idea that there might be "other unfixed meanings" of the constitutional text, such as "the meaning that is normatively reasonable given contemporary circumstances and values," Solum offers two answers. First, he observes that reasonable contemporary meaning "is not a plausible meaning of the authoritative token of the constitutional text."[117] I understand this to be a restatement of Solum's commitment to originalism, which is a commitment to the thesis that the words in the Constitution should be given the meaning they "had in the original expression token."[118] But as Solum himself recognizes, there are other approaches to interpreting the constitutional text. The U.S. Supreme Court often treats its words as types rather than tokens, finding their meaning in post-ratification acts of judicial interpretation and contemporary usages.[119] Solum's second answer is that "[t]he

112. Solum, *supra* note 108, at 23–25.

113. *Id*. at 29.

114. *See id*. at 15 ("The use of the phrase 'communicative content' is intended to be neutral as between various theories of content, e.g., original public meaning versus original intentions (and other theories).").

115. *Id*. at 67–70 (discussing Mark Greenberg, *The Moral Impact Theory of Law*, 123 YALE L.J. 1288 (2014)).

116. *Id*. at 69.

117. *Id*.

118. *Id*. at 39.

119. *Id*.

communicative content of the original Constitution, written in 1787, cannot be plausibly viewed as identical to the content that would be reasonable today."[120] This answer assumes that the goal of constitutional interpretation is to identify the text's communicative content. Like the token argument, it also assumes we already know which meaning is legally relevant. But the multiple meanings objection is that we need an argument for claims about what type of meaning matters. Solum's fixation thesis is a claim about one type of meaning, not an argument that that type should govern.

In contrast to Solum's linguistic argument for the fixation thesis, Cooley's argument is a functional one. It turns not on the nature of language but on what we want a written constitution to do:

> A constitution is not to be made to mean one thing at one time, and another at some subsequent time when the circumstances may have so changed as perhaps to make a different rule in the case seem desirable. A principal share of the benefit expected from written constitutions would be lost if the rules they established were so flexible as to bend to circumstances or be modified by public opinion. It is with special reference to the varying moods of public opinion, and with a view to putting the fundamentals of government beyond their control, that these instruments are framed; and there can be no such steady and imperceptible change in their rules as inheres in the principles of the common law.[121]

Cooley's version of the fixation thesis is not based not on "common sense intuitions about the meaning of old texts." It originates, rather, in a theory of what constitutional interpretation must look like if the polity is to secure the benefits of a written constitution. Cooley's argument is not about language, but rather about law. It is desirable that the meaning of a written constitution not change over time. Although this is a claim about what constitutional interpretation should look like, it is ultimately about the best rule of constitutional construction. It is about which of the constitutional text's meanings should matter when determining the document's legal effect.

The point of the above is not to argue that one or another version of the fixation thesis is better. It is to illustrate the value of distinguishing between interpretation and construction along the lines I have suggested. Each author's version of the fixation thesis is incomplete in its own way. Solum's linguistic argument, if successful, demonstrates that if the Constitution's original communicative content is its legally relevant meaning, then that meaning is fixed. The argument does not prove the truth of the antecedent—that the Constitution's original communicative content should be the legally relevant meaning. In Solum's constitutional theory,

120. *Id*. at 69.
121. COOLEY, *supra* note 74, at 54.

that is the job of the separate Constraint Principle.[122] Cooley's argument, if successful, identifies a desideratum for any legally relevant meaning: that it be fixed. It too does not in itself tell us which meaning is relevant, as more than one might be fixed at the time of ratification. In contrast to Solum's argument, however, Cooley's analysis operates at the level on which questions of constitutional interpretive theory must ultimately be answered. This is the level of rules of construction, which in law are conceptually prior to rules of interpretation.

122. Solum, *supra* note 110, at 64 (suggesting that arguments for using the contemporary meanings of the words in the Constitution "target[] the Constraint Principle and not the Fixation Thesis"), 75 ("Normative arguments would be required to show that the best legal construction of the Eighth Amendment should follow the correct interpretation of its communicative content. In other words, the Constraint Principle requires a normative justification.").