Cooley's Constitutional Limitations and Constitutional Originalism

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ABSTRACT

Thomas Cooley's A Treatise on The Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union *was the most influential treatise of constitutional law in the second half of the nineteenth century. This Essay explores the ideas expressed in Cooley's treatise in light of contemporary originalist constitutional theory. In many ways, Constitutional Limitations anticipated some of the key moves made by contemporary public meaning originalists, including the interpretation-construction distinction and the idea that ordinary meaning, and not technical meaning, is the baseline for constitutional interpretation.*

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INTRODUCTION

Thomas Cooley, the author of *A Treatise on The Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union*,[1] is surely an important figure in American constitutional history.[2] But many of his central ideas seem outdated, irrelevant, and even pernicious from the perspective of the dominant strains of contemporary constitutional theory in the legal academy.[3] The mainstream appraisal of Cooley reflects the fact that living

1. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 58 (Boston, Little, Brown, & Co. 1868) [hereinafter CONSTITUTIONAL LIMITATIONS]. Citations are to this edition, unless specifically noted.

2. *See, e.g.*, Samuel R. Olken, *Justice George Sutherland and Economic Liberty: Constitutional Conservatism and the Problem of Factions*, 6 WM. & MARY BILL RTS. J. 1, 7 (1997) (Cooley and others "exerted enormous influence over members of the judiciary and the bar for more than half a century."); LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 545 (1973) (describing CONSTITUTIONAL LIMITATIONS as "the most important book for its own generation."); Andrew McLaughlin, *Thomas McIntyre Cooley*, 4 DICTIONARY OF AMERICAN BIOGRAPHY 392 (Alan Johnson & Dumas Malone eds., 1930) (describing CONSTITUTIONAL LIMITATIONS as "the chiefest American law book"); *Book Note*, 27 ALB. L. REV. 300 (1883) ("It is impossible to exaggerate CONSTITUTIONAL LIMITATIONS's merits. It is an ideal treatise, and not only a standard authority, but almost exclusively sovereign in its sphere. It is cited in every argument and opinion on the subjects of which it treats, and not only is the book authoritative as a digest of the law, but its author's opinions are regarded as almost conclusive."); David J. Barron, *The Promise of Cooley's City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 509 (1999) ("Cooley . . . was perhaps the leading constitutional theorist of his age."); Clark B. Lombardi, *Nineteenth-Century Free Exercise Jurisprudence and the Challenge of Polygamy: The Relevance of Nineteenth-Century Cases and Commentaries for Contemporary Debates About Free Exercise Exemptions*, 85 OR. L. REV. 369, 415 (2006) (characterizing CONSTITUTIONAL LIMITATIONS "as a leading authority on constitutional law."); David S. Law, *Generic Constitutional Law*, 89 MINN. L. REV. 652, 709 (2005) (CONSTITUTIONAL LIMITATIONS was "the best-selling law book of its time, and widely cited by judges and practitioners alike"); David T. Hardy, *The Rise and Demise of the "Collective Right" Interpretation of the Second Amendment*, 59 CLEV. ST. L. REV. 315, 340 (2011) (describing Cooley as the "leading constitutional commentator of the period"); William J. Fleener, Jr . . ., *Thomas McIntyre Cooley: Michigan's Most Influential Lawyer*, 79 MICH. B.J. 208, 209 (2000) (characterizing Cooley as "Michigan's most influential lawyer").

3. *See, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 571 n.4 (2d ed. 1988) (connecting Cooley with *Lochner*); JAMES W. HURST, THE GROWTH OF AMERICAN LAW: THE LAW

constitutionalism, in all of its variegated forms,[4] commanded center stage in scholarly discourse for almost a century. For most living constitutionalists, Cooley is outside the mainstream of American constitutional theory—a figure of mainly historical interest whose ideas can be set to one side.

But what if we looked at Cooley's most important work of scholarship, *Constitutional Limitations*, from the perspective of contemporary originalist constitutional theory?[5] Was Cooley's treatise "proto-originalist"[6]—a work of constitutional theory and doctrine that anticipated some of the ideas associated with twenty-first century originalism? How do Cooley's views in *Constitutional*

MAKERS 338 (1950) (criticizing Cooley for inventing constitutional doctrines); EDWARD S. CORWIN, LIBERTY AGAINST GOVERNMENT: THE RISE, FLOWERING AND DECLINE OF A FAMOUS JUDICIAL CONCEPT 67–68 (1948) (criticizing Cooley's due process theory).

4. I am using "living constitutionalism" to refer to the family of constitutional theories that affirm that the legal content of constitutional doctrine can and should change in response to changing circumstances and values and that deny that the original meaning of the constitutional text should bind constitutional actors. *See* Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243 (2019) (noting that the forms of living constitutionalism include: (1) Constitutional Pluralism, (2) Common Law Constitutionalism, (3) Moral Readings, (4) Superlegislature, (5) Popular Constitutionalism, (6) Extranational Constitutionalism, (7) Multiple Meanings, (8) Thayerian Deference, (9) Constitutional Antitheory, and (10) Constitutional Rejectionism).

5. This Article is one of a series investigating contemporary originalist constitutional theory from a variety of angles. *See* Lawrence B. Solum, *Originalist Theory and Precedent: A Public Meaning Approach*, 33 CONST. COMMENT. 451 (2018); Lawrence B. Solum, *Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record*, 2017 B.Y.U. L. REV. 1621 (2017); Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269 (2017); Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1 (2015); Lawrence B. Solum, *Intellectual History as Constitutional Theory*, 101 VA. L. REV. 1111 (2015); Lawrence B. Solum, *Communicative Content and Legal Content*, 89 NOTRE DAME L. REV. 479 (2013); Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453 (2013); Lawrence B. Solum, *Communicative Content and Legal Content*, 89 NOTRE DAME L. REV. 479 (2013); Lawrence B. Solum, *Construction and Constraint*, 7 JERUSALEM REV. LEG. STUD. 17, 22 (2013); Lawrence B. Solum, *Faith and Fidelity*, *Originalism and the Possibility of Constitutional Redemption*, 91 Tex. L. Rev. 147 (2012); Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95 (2010); Lawrence B. Solum, *What Is Originalism?*, *in* THE CHALLENGE OF ORIGINALISM: ESSAYS IN CONSTITUTIONAL THEORY (Grant Huscroft and Bradley W. Miller eds., 2011); Lawrence B. Solum, *Incorporation and Originalist Theory*, 18 J. CONTEMP. LEGAL ISSUES 409, 440 (2009); Lawrence B. Solum, District of Columbia v. Heller *and Originalism*, 103 NW. U. L. REV. 923–81 (2009).

In addition to the published and forthcoming articles, works-in-progress include Lawrence B. Solum, The Public Meaning Thesis (Aug. 20, 2015) (unpublished manuscript) (on file with author); Lawrence B. Solum, The Constraint Principle: Original Meaning and Constitutional Practice (Mar. 24, 2017) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2940215 [https://perma.cc/E2FG-U44W]. The earliest version of the project was developed in a work that is still in progress. *See* Lawrence B. Solum, Semantic Originalism (Nov. 22, 2008) (unpublished manuscript) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244 [https://perma.cc/S68G-QKQ4].

Two published papers aim to present the project in a more accessible, but less rigorous, form. *See* Lawrence B. Solum, *Surprising Originalism: The Regula Lecture*, 9 CONLAWNOW 235 (2018); Lawrence B. Solum, *Statement Presented at the Hearings on the Nomination of Honorable Neil M. Gorsuch to be an Associate Justice of the Supreme Court of the United States*, 31 DIRITTO PUBBLICO COMPARATO ED EUROPEO ONLINE 575 (2017).

6. Lawrence B. Solum, *Originalism and Constitutional Construction*, *supra* note 5, at 462 (using the term "Proto-Originalism" to refer to early forms of originalist constitutional theory).

Limitations relate to so-called "new originalism?[7] How do the positions articulated in Cooley's treatise bear on the turn away from original intent and toward original public meaning? What did Cooley say about the interpretation-construction distinction? Did Cooley affirm the idea that the constitutional text should constrain judges? What did Cooley write about the role of extratextual sources in constitutional interpretation?

In this short Article, I can only scratch the surface of these questions. Part I provides a concise introduction to contemporary constitutional originalism. Part II explores the relationship between Cooley's ideas about constitutional interpretation and the contemporary notion of original public meaning. Part III examines the interpretation-construction distinction and attempts to excavate Cooley's theory of constitutional construction in cases of underdeterminacy. Part IV attempts to reconstruct Cooley's theory of the constraining force of the constitutional text. Part V applies that reconstruction to a more particular question: what does Cooley have to say about the role of extratextual sources in constitutional interpretation? Part VI offers some brief reflections on the methodological differences between constitutional history and constitutional theory.

I have two caveats before I begin. The first caveat concerns method. The aim of this investigation is not to situate Cooley's ideas in their historical context. I will not be attempting to uncover Cooley's motives, purposes, ideology, or politics. I will not attempt to trace the lineage of Cooley's views or to situate his ideas in the discourses and narratives of his time. Instead, my aim is to explore the

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7. The phrase "new originalism" is used in a variety of ways and does not have a clear meaning. At a minimum, "new originalism" is associated with the shift from original intent to public meaning. It may also be used to refer to forms of originalism that incorporate the idea of a construction zone. The first occurrence of the phrase "new originalism" in the Westlaw JLR database is by Evan Nadel. *See* Evan S. Nadel, *The Amended Federal Rule of Civil Procedure 11 on Appeal: Reconsidering* Cooter & Gell v. Hartmarx Corporation, 1996 ANN. SURV. AM. L. 665, 691 n.191 ("An example of the 'textualism' to which I refer is the 'New Originalism' theory often associated with Justice Scalia."). Nadel cited William Eskridge, *The New Textualism*, 37 UCLA L. REV. 621, 650–56 (1990), which discusses Scalia but does not use the terms "originalist" or "originalism." Randy Barnett (without citing Nadel) used the phrase in 1999. *See* Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 620 (1999). Barnett's use of the phrase was repeated by others. *E.g.*, Paul E. Salamanca, *Choice Programs and Market-Based Separationism*, 50 BUFF. L. REV. 931, 944 n.54 (2002). Keith Whittington used the phrase in a conference paper entitled "The New Originalism" in 2002. Whittington's remarks were later published, and Whittington's article seems to have popularized the phrase. *See* Keith Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599 (2004); *see also* Michael Kent Curtis, *Judicial Review and Populism*, 38 WAKE FOREST L. REV. 313, 318 n.23 (2003) (citing Whittington); Matthew D. Bunker, *Originalism 2.0 Meets the First Amendment: The "New Originalism," Interpretive Methodology, and Freedom of Expression*, 17 COMM. L. & POL'Y 329 (2012); Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713 (2011); Martin H. Redish & Matthew B. Arnould, *Judicial Review, Constitutional Interpretation, and the Democratic Dilemma: Proposing a "Controlled Activism" Alternative*, 64 FLA. L. REV. 1485, 1507 (2012) (characterizing New Originalism as embracing constitutional construction); Lawrence Rosenthal, *The New Originalism Meets the Fourteenth Amendment: Original Public Meaning and the Problem of Incorporation*, 18 J. CONTEMP. LEGAL ISSUES 361 (2009); Mark Tushnet, Heller *and the New Originalism*, 69 OHIO ST. L.J. 609 (2008); Daniel Hornal, *Why the Demands of Formalism Will Prevent New Originalism from Furthering Conservative Political Goals*, 5 THE CRIT: CRITICAL STUD. J. 1 (2012).

conceptual content of Cooley's ideas and to translate that content into a modern theoretical vocabulary. That is, my investigations are properly situated in the domain of constitutional theory and outside the fields of constitutional history, American political development, or the history of ideas.[8]

The second caveat stems from Cooley's focus on state constitutional law. *Constitutional Limitations* is mostly about the constitutions of the several states and not the federal constitution. Most of the work in contemporary originalist constitutional theory is about the United States Constitution. There may be differences between the two contexts that are relevant to basic questions in the theory of constitutional interpretation and construction, but for the purposes of this Article, I will assume that the two contexts are not substantially different. That assumption may well be incorrect, but its interrogation must be reserved for another occasion.

I. CONTEMPORARY CONSTITUTIONAL ORIGINALISM

We can begin with a brief exploration of contemporary constitutional originalism. A word of warning first: the word "originalism" may function differently in different realms of discourse. Thus, "originalism" may have one meaning in judicial practice and another in popular political discourse.[9] In the explication of constitutional originalism that follows, I am concerned with originalist constitutional theory in the realm of scholarly discourse. For example, in political discourse, originalism might be associated with the views of the Framers on particular questions: "What would Madison do?" might be considered an appropriate question for political originalists to ask. But this is not the approach of contemporary public meaning originalism.[10]

The word "originalism" appears to have been coined by Paul Brest in an article entitled *The Misconceived Quest for the Original Understanding*.[11] Brest stipulated the following definition:

> By '"originalism"'I mean the familiar approach to constitutional adjudication that accords binding authority to the text of the Constitution or the intentions of its adopters."[12]

Brest's formulation was ambiguous, encompassing what are now seen as opposing views, sometimes called "original intentions originalism"[13] and "original

8. I will return to methodological issues in Part VI.

9. *See* Solum, *Originalism Versus Living Constitutionalism*, *supra* note 5, at 1250-1262.

10. *See id*. at 1250.

11. Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980) [hereinafter Brest, *The Misconceived Quest*]. Brest reports that he believes he coined the term. E-mail from Paul Brest, Professor Emeritus, Stanford Law School, to author (Dec. 2, 2009, 6:01 PM) (on file with author).

12. Brest, *The Misconceived Quest*, *supra* note 11, at 204.

13. Larry Alexander, *Simple-Minded Originalism*, *in* THE CHALLENGE OF ORIGINALISM 87 (Grant Huscroft & Bradley W. Miller eds., 2011).

public meaning originalism."[14] Since Brest's time, new forms of originalism have emerged, including "original methods originalism"[15] and "original law originalism."[16]

It might be argued that the diversity of views among originalists entails that there is "no there there"—that the word "originalism" no longer refers to a cohesive set of ideas, assuming it once did.[17] The better view is that constitutional originalism is a family of constitutional theories united by two ideas, the *Fixation Thesis* and the *Constraint Principle*.[18] The notion of a family of theories responds to the fact of theoretical divergence among contemporary versions of originalist constitutional theory.

In other work, I have explicated and defended both the Fixation Thesis[19] and the Constraint Principle[20] in detail. On this occasion, I will simply lay out the claims:

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

For the purposes of this essay, I will leave the Fixation Thesis in this abstract form, but a bit more needs to be said about the Constraint Principle. This formulation of the Constraint Principle is ecumenical—it is deliberately formulated in an abstract and open-ended way—so that it can be affirmed by originalists of many stripes and even by some living constitutionalists. However, it is possible to identify a minimalist version of the Constraint Principle: almost all originalists would agree that, at a minimum, the constitutional doctrine must be consistent with the text. We can call this version of the Constraint Principle "Constraint as Consistency." A more precise version of this principle is provided below.[21]

Originalists mostly agree on some version of fixation and constraint, but they disagree about other matters. Perhaps the most important disagreement concerns

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14. Solum, District of Columbia v. Heller *and Originalism*, *supra* note 5.

15. Michael B. Rappaport & John O. McGinnis, *The Constitution and the Language of the Law* (San Diego Legal Stud. No. 17-262, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2928936 [https://perma.cc/76BC-KVG8].

16. William Baude & Stephen E. Sachs, *Originalism's Bite*, 20 GREEN BAG 2d 103, 107–08 (2016); *see also* Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 874–81 (2015).

17. Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 269–72 (2009).

18. Solum, *The Fixation Thesis*, *supra* note 5, at 6.

19. Solum, *The Fixation Thesis*, *supra* note 5.

20. Solum, *The Constraint Principle*, *supra* note 5.

21. *See infra* Part IV.A, p. 67.

the nature of original meaning itself. The predominant form of originalism in both the legal academy and judicial practice is Public Meaning Originalism—the view that the original meaning of the constitutional text is best understood as its public meaning.[22]

But there are other forms of originalism. Original intentions originalism is the view that the original meaning is best understood as a function of the intentions of the Framers, ratifiers, or drafters. However, intentionalists themselves disagree about which intentions are relevant, with communicative intentions, purposes, and expectations as candidates for the relevant mental states.[23] Original methods originalists believe that the meaning of the constitutional text should be determined by the original methods of interpretation—roughly the canons of interpretation and construction that prevailed at the time each constitutional provision was framed and ratified; in addition, original methods originalists believe that the constitution was written in the language of the law and hence that technical legal meanings (not public meanings) should guide constitutional semantics.[24] Original law originalism is the view that the original law and changes authorized by original law provides the relevant standard.[25]

Originalists also disagree about the extent to which the constitutional text is determinate. Some originalists believe that at least some constitutional provisions are vague or open textured, creating substantial zones of underdeterminacy—although it should be emphasized the almost all originalists believe that many constitutional provisions substantially determine the content of constitutional doctrine and the outcome of constitutional cases.[26]

For originalists who affirm the fact of constitutional underdeterminacy, the distinction between interpretation and construction becomes important. That distinction can be summarized as follows:

> *Interpretation*. Constitutional interpretation is the activity that discovers the communicative content (roughly, linguistic meaning in context) conveyed by the constitutional text.
>
> *Construction*. Constitutional construction is the activity that determines the legal effect of the constitutional text, including the legal content of constitutional doctrine and the decision of constitutional cases.

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22. David J. Arkush, *The Original Meaning of Recess*, 17 U. PA. J. CONST. L. 161, 224 (2014) ("The most prominent contemporary originalist theory is known as 'original public meaning originalism' or simply 'New Originalism.'"); Ronald Turner, *On* Brown v. Board of Education *and Discretionary Originalism*, 2015 UTAH L. REV. 1143, 1154–59 (2015) (describing public meaning originalism as "the mainstream of originalist theory"); Cass R. Sunstein, *Originalism*, 93 NOTRE DAME L. REV. 1671, 1698 n.13 (2018) ("Public meaning originalism is the dominant approach . . . .").

23. For an example of recent original intentions originalism, see Alexander, *supra* note 13.

24. The original methods approach is developed in McGinnis & Rappaport, *supra* note 15.

25. The original law approach was articulated in Baude & Sachs, *supra* note 16.

26. For an illuminating discussion of the role of debates about determinacy and originalism, *see* Heidi Kitrosser, *Interpretive Modesty*, 104 GEO. L.J. 459, 468–81 (2016).

When the constitutional text underdetermines legal effect, we can say that we are in a "construction zone,"[27] where the theory or method of constitutional construction will determine the constitutional doctrines and decisions. But when the constitutional text is clear (approximating determinacy), we are in an "interpretation zone" where the constraining force of original meaning does the work. Importantly, "underdeterminacy" is not "indeterminacy." Even when an open-textured provision is not fully determinate, it may have a core of settled meaning that rules out some constructions and requires others.

Things are different from the perspective of living constitutionalism: for living constitutionalism, every constitutional issue is in the construction zone—where considerations other than meaning can, at least in principle, override the meaning of the constitutional text. For example, constitutionalist pluralists believe that text is only one of the modalities of constitutional interpretation and construction: other things, including constitutional values, pragmatic considerations, and precedent might justify constitutional decisions and doctrines that are inconsistent with the meaning of the text.[28]

While some originalists acknowledge a limited degree of constitutional underdeterminacy, other originalists believe that the original meaning of the constitutional text is determinate or that the degree of constitutional underdeterminacy is minimal or insignificant. For example, Michael Rappaport and John McGinnis believe that the original methods of constitutional interpretation yield fully determinate (or almost fully determinate) results.[29] Given the Constraint Principle, this entails that the interpretation-construction distinction is relatively unimportant: every case is in the interpretation zone.

In the discussion that follows, I will bracket the differences among contemporary originalists and focus on a version of public meaning originalism with the following assumptions: (1) the original meaning of the constitutional text is its public meaning, (2) constitutional interpretation and constitutional construction are conceptually distinct activities, and (3) the constitutional text does not fully determine the legal content of constitutional doctrine.

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Given this brief summary of contemporary constitutional theory, we can now turn to Cooley and the relationship of his views to contemporary originalist theory, beginning with his views on "public meaning."

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27. Lawrence B. Solum, *The Unity of Interpretation*, 90 B.U. L. REV. 551, 569 (2010).

28. For examples of constitutional pluralism, see PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 12–13 (1991); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1243–46, 1252–68 (1987); Stephen M. Griffin, *Pluralism in Constitutional Interpretation*, 72 TEX. L. REV. 1753, 1753 (1994).

29. John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 773 (2009).

II. COOLEY AND PUBLIC MEANING

What is the relationship between Cooley and public meaning originalism? The answer to this question begins with a brief explication of the public meaning thesis.

A. The Public Meaning Thesis

Public meaning originalists affirm the Public Meaning Thesis. To understand this thesis, we need first to define "public meaning."

> *Public Meaning*. The public meaning of a legal text is the communicative meaning conveyed to the public by the text, where "the public" is understood as a linguistic community (or overlapping set of linguistic subcommunities) encompassing the contemporaneous competent speakers of the natural language in which the text was written, in the jurisdiction in which the text has legal effect.

Thus, the public meaning of the portions of the constitutional text that were drafted at the Philadelphia Convention in 1787 is the meaning that was communicated to the public when the text was made public at the conclusion of the Convention.

The Public Meaning Thesis is the claim that the original meaning of the constitutional text is best understood as its public meaning. We can state this thesis more formally as follows:

> *Public Meaning Thesis*. The original meaning of the constitutional text is best understood as the meaning communicated to the public at the time each provision was framed and ratified.

The full case for the Public Meaning Thesis is beyond the scope of this article, but a brief summary of some of the evidence for the thesis may be helpful.

The core of the argument is based on the situation of constitutional communication. The public was part of the audience to whom the Constitution was addressed. In the words of the first Justice Roberts, "The Constitution was written to be understood by the voters."[30]

This understanding of the situation of constitutional communication is reflected in Justice Story's *Commentaries on the Constitution of the United States*:

> In the first place, then, every word employed in the constitution is to be expounded in its plain, obvious, and common sense, unless the context furnishes some ground to control, qualify, or enlarge it. Constitutions are not designed for metaphysical or logical subtleties, for niceties of expression, for

30. United States v. Sprague, 282 U.S. 716, 731 (1931).

> critical propriety, for elaborate shades of meaning, or for the exercise of philosophical acuteness, or judicial research. They are instruments of a practical nature, founded on the common business of human life, adapted to common wants, designed for common use, and fitted for common understandings. The people make them; the people adopt them; the people must be supposed to read them, with the help of common sense; and cannot be presumed to admit in them any recondite meaning, or any extraordinary gloss.[31]

What evidence favors this understanding of the situation of constitutional communication? Of course, there is the obvious fact that the constitutional text begins with the words, "We the People"—a phrase that strongly suggests that the Constitution was drafted on behalf of the people and hence that one of its functions was to communicate to the people.

This understanding of the situation of constitutional communication finds additional support from the ratification process. Paulene Maier summarized popular participation in the ratification process in her monograph, *Ratification: The People Debate the Constitution*:[32]

> Debate over the Constitution raged in newspapers, taverns, coffeehouses, and over dinner tables as well as in the Confederation Congress, state legislatures, and ratifying conventions. People who never left their home towns and were little known except to their neighbors studied the document, knew it well, and one some memorable occasions made their views known.[33]

The constitutional text was widely distributed to the public; it was published in pamphlets and newspapers.[34] In some states, the public debated the Constitution at local town meetings for the election of representatives to the ratifying conventions.[35]

Moreover, the idea that the Constitution was addressed to the public can be viewed as a corollary to the idea of popular sovereignty. As Maier explained:

> Constitutional conventions and direct popular ratification of constitutions entered American practice only because the townsmen of Massachusetts not only understood the prevailing theoretical assumptions of their time but found

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31. 1 JOSEPH L. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 451 (Boston, Hilliard, Gray, & Co. 1833); *see also* State of Rhode Island v. Palmer, 253 U.S. 350, 398 (1920) (stating "in the exposition of statutes and constitutions, every word 'is to be expounded in its plain, obvious, and common sense, unless the context furnishes some ground to control, qualify or enlarge it,' and there cannot be imposed upon the words 'any recondite meaning or any extraordinary gloss'") (citing 1 JOSEPH L. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 451 (Boston, Hilliard, Gray, & Co. 1833)).

32. PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION 1787–88 (2010).

33. *Id*. at ix.

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

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

> ways of reducing them to practice. In effect, the sovereign people invented the institutions through which they could exercise their sovereignty.[36]

For the constitution to be legitimate, it must be ratified by the public. For this reason, the legitimacy of the Constitution required that the meaning of the constitutional text be accessible to the public.

The early history of constitutional interpretation is consonant with this view. Consider, for example, the following passage from Chief Justice Marshall's opinion in *Gibbons v. Ogden*:

> As men whose intentions require no concealment generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our Constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said.[37]

This passage draws the explicit connection between the meaning of the constitutional text and popular ratification.

There is much more to be said about the case for the Public Meaning Thesis,[38] but for the purposes of this Article, I assume, rather than show, that the best understanding of original meaning is original public meaning.

B. Cooley's View of Meaning in "Constitutional Limitations"

What is Cooley's view of constitutional meaning? The following passage seems consistent with the Public Meaning Thesis:

> 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.[39]

This passage expresses the view that state constitutions (Cooley's topic) should be understood as communicating to the public.

What about terms of art? The view of contemporary public meaning originalists is that at least some constitutional provisions are expressed in technical terms. The general idea of a term of art was expressed by William Blackstone: terms of art "must be taken according to the acceptation of the learned in each art, trade, and science."[40] The philosopher Hilary Putnam uses the idea of a division

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36. *Id*. at 139.
37. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 188 (1824).
38. *See* Solum, The Public Meaning Thesis, *supra* note 5.
39. THOMAS COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 62 (2d ed. 1871).
40. 1 WILLIAM BLACKSTONE, COMMENTARIES *59–*61.

of linguistic labor to account for terms of art;[41] we can adapt the core of this idea to explain how the public could access the meaning of technical language. Terms of art have conventional semantic meanings in a linguistic subcommunity. For example, the phrase "letters of marque and reprisal"[42] might not have been familiar to the ordinary citizen at the time the Constitution was drafted, ratified, and put into effect, but it might be that the linguistic subcommunity of seamen and admiralty lawyers had a precise understanding of this phrase.[43]

What was Cooley's understanding of technical meaning?

> But it must not be forgotten, in construing our constitutions, that in many particulars they are but the legitimate successors of the great charters of English liberty, whose provisions declaratory of the rights of the subject have acquired a well-understood meaning, which the people must be supposed to have had in view in adopting them. We cannot understand these provisions unless we understand their history; and when we find them expressed in technical words, and words of art, we must suppose these words to be employed in their technical sense. When the Constitution speaks of an ex post facto law, it means a law technically known by that designation; the meaning of the phrase having become defined in the history of constitutional law, and being so familiar to the people that it is not necessary to imply language of a more popular character to designate it. The technical sense in these cases is the sense popularly understood, because that is the sense fixed upon the words in legal and constitutional history where they have been employed for the protection of popular rights.[44]

Cooley's formulation is very similar to the view expressed by public meaning originalists. The use of technical language is consistent with public meaning because the technical meanings of phrases like "ex post facto" would have been accessible to the public.[45] Like contemporary public meaning originalists, Cooley recognizes the existence of technical terms, but he argues that such terms had public meaning because they were "familiar to the people."[46]

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41. The idea of a division of linguistic labor is usually attributed to Hilary Putnam. *See* Hilary Putnam, *The Meaning of 'Meaning,' in* 2 PHILOSOPHICAL PAPERS: MIND, LANGUAGE AND REALITY (1985); *see also* Mark Greenberg, *Incomplete Understanding, Deference, and the Content of Thought* (UCLA Sch. of Law Pub. Law & Legal Theory Res. Paper No. 07-30, 2007); Robert Ware, *The Division of Linguistic Labor and Speaker Competence*, 34 PHIL. STUD. 37 (1978). I am using the notion of a division of linguistic labor for a limited purpose, and I am not importing with that notion the theoretical framework in which Putnam's deployment of the notion is embedded.

42. U.S. CONST. art. I, § 8.

43. Solum, District of Columbia v. Heller *and Originalism*, *supra* note 5, at 968.

44. THOMAS M. COOLEY, CONSTITUTIONAL LIMITATIONS 666 (5th ed. 1998) (1883).

45. Solum, *Incorporation and Originalist Theory*, *supra* note 5, at 431; Solum, *Triangulating Public Meaning*, *supra* note 5, at 1632.

46. Cooley, *supra* note 44, at 666.

III. COOLEY AND THE INTERPRETATION-CONSTRUCTION DISTINCTION

Although some contemporary theorists may believe that interpretation-construction distinction is an invention of recent constitutional theory, the distinction is actually quite old. Cooley may well have been the first American legal scholar to apply the distinction to constitutional law. Our investigation of this topic begins with the role of the distinction in contemporary originalist constitutional theory and then proceeds to consideration of Cooley's views.

A. The Interpretation-Construction Distinction in Contemporary Originalism

Both the interpretation-construction distinction and the existence of constructions zones (issues and cases for which the original meaning of the constitutional text underdetermines doctrines and outcomes) are controversial. Many originalists—including Jack Balkin,[47] Randy Barnett,[48] Lee Strang,[49] Keith Whittington,[50] and me[51] (as well as others)[52]—embrace these ideas. Other originalists, including Justice Scalia, reject the interpretation-construction distinction. And some originalists accept the distinction but reject the empirical claim that, as a matter of fact, some provisions of the constitutional text are underdeterminate.

Such underdeterminacy could result from several causes, including (1) language that is vague or open-textured,[53] (2) irreducible ambiguity,[54]

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47. Jack M. Balkin, *Arguing About the Constitution: The Topics in Constitutional Interpretation*, 33 CONST. COMMENT. 145, 249 (2018); Jack M. Balkin, *The New Originalism and the Uses of History*, 82 FORDHAM L. REV. 641, 654 (2013);

48. RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION 120–23 (2004).

49. Lee J. Strang, *An Evaluation of Historical Evidence for Constitutional Construction from the First Congress'Congress'Congress' Debate over the Constitutionality of the First Bank of the United States*, 14 U. ST. THOMAS L.J. 193, 194 (2018).

50. KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION 3–15 (1999); KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION 5–13 (1999).

51. *See* Solum, *The Interpretation-Construction Distinction*, *supra* note 5; Solum, *Originalism and Constitutional Construction*, *supra* note 5.

52. *See, e.g.*, Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1, 10 (2018); M. Frances Rooney, *The Privileges or Immunities Clause of the Fourteenth Amendment and an Originalist Defense of Gender Nondiscrimination*, 15 GEO. J.L. & PUB. POL'Y 737, 742 (2017).

53. The standard philosophical analysis of "vagueness" (in the technical sense that is differentiated from "ambiguity") is that a term or phrase is vague if and only if it has borderline cases—that is, cases in which the term or phrase may or may not apply. *See* Roy Sorensen, *Vagueness*, STAN. ENCYCLOPEDIA OF PHIL. (Spring 2016 ed.), http://plato.stanford.edu/archives/spr2016/entries/vagueness [https://perma.cc/KF97-MRPF]. I am using the phrase "open-texture" in a stipulated sense that encompasses to include (but not necessarily limited to) the following: (1) terms that express family resemblance concepts; (2) terms that express multi-criterial concepts where the criteria are incommensurable; and (3) terms that express concepts that involve multi-dimensional vagueness. Whatever the ultimate nature of "open texture," I will assume that an open-textured provision has a core of settled meaning and penumbral cases. *See* H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1957) ("There must be a core of settled meaning, but there will be, as well, a penumbra of debatable cases in which words are neither obviously applicable nor obviously ruled out."). On the idea of multi-criterial concepts with incommensurable dimensions, see Hrafn Asgeirsson, *On the Instrumental Value of Vagueness in the Law*, 125 ETHICS 425, 429–31 (2015).

54. The phrase "irreducible ambiguity" has a stipulated technical meaning in this context. Although the word "ambiguity" can be used to refer to a lack of clarity in general, I am using the term to refer to

(3) gaps,[55] and (4) contradictions.[56] For example, the constitutional text uses the phrases "legislative power," "executive power," and "judicial power" to specify the separation-of-powers between the three branches of government. It is at least possible that these phrases are open-textured. Thus, the phrase "legislative power" might have a core of settled meaning that would include the enactment of criminal statutes, but there might also be underdeterminate cases, where the line between the three great powers involves a "gray zone." For example, private bills that adjudicate the legal status of particular individuals might be on the borderline between judicial and legislative power.

The borderline between legislative and judicial power is just one example of underdeterminacy. Whatever the source of underdeterminacy, its existence has an important implication. If the original meaning of the constitutional text does not determine the legal content of constitutional doctrine, then something else must do the work. In other words, originalism requires a method or theory of constitutional construction for cases and issues that fall in the construction zone. The aim of such a theory is to provide legal norms, such as implementing rules, *precisifications*, or default rules, that provide the necessary legal content.

There are many possibilities,[57] but the following are illustrative:

- *The Original Functions Approach*: Randy Barnett and Evan Bernick have proposed that constitutional construction be guided by the original functions that are immanent in the constitutional text.[58]

- *The Default Rules of Deference Approach*: Drawing on work by Gary Lawson[59] and Michael Paulsen,[60] originalists might adopt default rules of deference in the construction zone.[61]

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cases in which a word or phrase has more than one sense or linguistic meaning: this can be called "semantic ambiguity." Usually, semantic ambiguities are resolved by context, but in some cases the context of usage will not be sufficient to pick out the intended sense of a word or phrase. The term "irreducible ambiguity" refers to these cases. *See* Tun-Jen Chiang & Lawrence B. Solum, *The Interpretation-Construction Distinction in Patent Law*, 123 YALE L.J. 530, 592–93 (2013); Solum, *Incorporation and Originalist Theory*, *supra* note 5, at 427; Lawrence B. Solum, *Originalism and the Unwritten Constitution*, 2013 U. ILL. L. REV. 1935, 1946 (2013). There are other forms of ambiguity, such as syntactic ambiguity, which may be irreducibile as well.

55. As used here, the word "gap" refers to cases where the constitutional text requires the existence of a rule of constitutional law but fails to provide the content of the rule. *See* Solum, *Originalism and Constitutional Construction*, *supra* note 5, at 471; Solum, *The Interpretation-Construction Distinction*, *supra* note 5, at 107.

56. Solum, *The Interpretation-Construction Distinction*, *supra* note 5, at 107.

57. For additional discussion, see Solum, *Originalism and Constitutional Construction*, *supra* note 5.

58. Barnett & Bernick, *supra* note 52.

59. *See* Gary Lawson, *Dead Document Walking*, 92 B.U. L. REV. 1225, 1234 (2012); Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823, 1823 (1997).

60. *See* Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, 103 NW. U. L. REV. 857 (2009).

61. *See* Solum, *Originalism and Constitutional Construction*, *supra* note 5, at 511–16.

- *The Constrained Pluralist Approach*: Constitutional construction might employ a plurality of methods, including attention to historical practice, precedent, and constitutional structure.[62] This approach is superficially similar to living constitutionalist approaches, with the important difference that the original meaning of the constitutional text operates as a constraint that limits the space within which nontextualist methods are allowed to operate.

Each of these approaches might be viewed as a complete theory of constitutional construction, but they could be combined in various ways. For example, issues in the construction zone might be resolved by looking first to the original function of the provision and then considering precedent and historical practice. If the issue remained unresolved, then a default rule might be employed.

B. Cooley's Position on the Interpretation-Construction Distinction in "Constitutional Limitations"

Cooley explicitly endorses the interpretation-construction distinction in *Constitutional Limitations*. His position changed in subtle but significant ways in various editions. His statement in the first edition is as follows:

> In what we shall say in this chapter, the word *construction* will be employed in a sense embracing all that is covered by the two words *interpretation* and *construction* when used in their strictly accurate and technical sense. Their meaning is not the same, though they are frequently used as expressing the same idea.[63]

Cooley gets the distinction from Lieber's *Legal and Political Hermeneutics*, and the continuation of the passage above with his extended quotation from Lieber is worth quoting in full:

> Lieber distinguishes thus "Interpretation is the act of finding out the true sense of any form of words, that is, the sense which their author intended to convey, and of enabling others to derive from them the same idea which the author intended to convey. Construction is the drawing of conclusions respecting subjects that lie beyond the direct expressions of the text, from elements known from and given in the text; conclusions which are in the spirit, though not in the letter of the text. Interpretation only takes place if the text conveys some meaning or other. But construction is resorted to when, in comparing two different writings of the same individual, or two different enactments by the same legislative body, there is found contradiction where there was evidently no intention of such contradiction one of another, or where it happens that part of

62. *See, e.g.*, Bobbitt, *supra* note 28; Fallon, *supra* note 28; Griffin, *supra* note 28.
63. CONSTITUTIONAL LIMITATIONS, *supra* note 1, at 38 n.1.

> a writing or declaration contradicts the rest. When this is the case, and the nature of the document or declaration, or whatever else it may be, is such as not to allow us to consider the whole as being invalidated by a partial or other contradiction, then resort must be had to construction; so, too, if found to act in cases which have not been foreseer by the framers of those rules, by which we are nevertheless obliged, for some binding reason, faithfully to regulate as well as we can our action respecting the unforeseen case."[64]

This is not quite the contemporary version of the distinction, which focuses on the difference between meaning (communicative content) and legal effect (doctrine and decision).

In the second edition of *Constitutional Limitations*, the long quotation from Lieber is moved from footnote to the text,[65] and a footnote is added with the following quotation from Bouvier's *Law Dictionary*:

> Bouvier defines the two terms succinctly as follows: '*Interpretation*, the discovery and representation of the true meaning of any signs used to convey ideas.' '*Construction*, in practice, determining the meaning and application as to the case in question of the provisions of a constitution, statute, will, or other instrument, or of an oral agreement.'[66]

This formulation is quite close to the version of the distinction that appears in contemporary constitutional theory.[67]

Although I am far from sure that Cooley's understanding of the interpretation-construction distinction is the modern one, there are other elements of his constitutional thought that suggest that he grasped the implication of the distinction for cases in which the constitutional text underdetermines legal effect. He uses the term "self-executing" to express the idea:

> A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law.[68]

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64. *Id*. (quoting E. FITCH SMITH, COMMENTARIES ON STATUTE AND CONSTITUTIONAL LAW AND STATUTORY AND CONSTITUTIONAL CONSTRUCTION § 439, at 600–01 (Albany, Gould, Banks & Gould 1848) (*adapted from* FRANCIS LIEBER, LEGAL AND POLITICAL HERMENEUTICS 23, 55–56 (Boston, C.C. Little and J. Brown 1839))).

65. COOLEY, *supra* note 39, at 40–41.

66. *Id*. at 41 n.1 (quoting 1 BOUVIER'S LAW DICTIONARY (12th ed. 1868) 337, 743).

67. *See, e.g*., Solum, *The Interpretation-Construction Distinction*, *supra* note 5, at 96.

68. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 101 (Boston, Little, Brown, & Co. 4th ed. 1878).

Conceptually, Cooley's position closely approximates the use of the interpretation-construction distinction in contemporary originalist constitutional theory. And this leads us to the question: does Cooley have a method of constitutional construction?

C. Cooley and Construction Zones

Cooley does not use the contemporary locution, "construction zone," but he says various things about how courts should handle cases of underdeterminacy. In the following passage, Cooley seems to adopt a default rules of deference approach:

> But when all legitimate lights for ascertaining the meaning of the Constitution have been made use of, it may still happen that the construction remains in doubt. In such a case, it seems clear that every one called upon to act where, in his opinion, the proposed action would be of doubtful constitutionality, is bound upon that doubt alone to abstain from acting. Whoever derives power from the Constitution to perform any public function, is disloyal to that instrument, and grossly derelict in duty, if he does that which he is not reasonably satisfied the Constitution permits. Whether the power be legislative, executive, or judicial, there is manifest disregard of constitutional and moral obligation by one who, having taken and oath to observe that instrument, takes part in an action which he cannot say he believes to be no violation of its provisions.[69]

Notice, however, that the default rule that Cooley proposes applies to all constitutional actors and not just the courts. Thus, if a case falls within the construction zone, Cooley's principle for cases of "doubtful constitutionality" is to resolve the uncertainty against action that might violate the Constitution. Thus, if Congress were unsure as to whether proposed legislation exceeded its enumerated powers as enhanced by the Necessary and Proper Clause, its constitutional obligation would be to refrain from enacting the legislation.

What, then, should the courts do if another branch does not refrain from acting in a doubtful case?

> A doubt of the constitutionality of any proposed legislative enactment should in any case be reason sufficient for refusing to adopt it; and, if legislators do not act upon this principle, the reasons upon which are based the judicial decisions sustaining legislation in very many cases will cease to be of force.[70]

In this case, the proposed default rule seems to be the contrary of that suggested by the work of Lawson and Paulsen.[71] In cases in which the legislature fails to abstain from action of doubtful constitutionality, the courts should defer to the

69. CONSTITUTIONAL LIMITATIONS, *supra* note 1, at 73–74.
70. *Id*. at 74.
71. *See* sources cited *supra* notes 59–60.

legislature. Presumably, this would entail striking down the offending legislation —assuming the court, at the end of the day, failed to be convinced of its constitutionality.

Another passage from Cooley seems to suggest something akin to the original functions approach, advocated by Barnett and Bernick.[72] In the passage quoted from Lieber, the suggestion is that constitutional construction should be guided by the "spirit" of the constitution. For Barnett and Bernick, the contrast between "letter" and "spirit" is cashed out in terms of the difference between the communicative content of the text (the letter) and the function that can be discerned from the design of the text (the spirit). This is a plausible reading of Cooley's use of the term "spirit," but it is difficult to say whether Cooley would endorse the "original function" approach to constitutional construction, were he to be made aware of the modern formulation of this idea.

IV. COOLEY AND THE CONSTRAINT PRINCIPLE

Our penultimate topic concerns the relationship between Cooley's views and the Constraint Principle—the contemporary originalist idea that the original meaning of the constitutional text is binding; thus, constitutional actors ought, at a minimum, act in ways that are consistent with and fairly traceable to the constitutional text.

A. The Constraint Principle in Contemporary Constitutional Theory

We can begin by laying out the way in which the Constraint Principle is understood in contemporary constitutional theory. A full discussion of constraint is beyond the scope of this article.[73] Instead, I will simply lay out my formulation of the principle, which is offered as a "least common denominator" or basis for agreement among originalists. I call this version of the Constraint Principle "Constraint as Consistency" to emphasize the core idea—that constraint by the constitutional text requires consistency with the original meaning of the text. Here is the formulation:

> *Constraint as Consistency*. Constraint as Consistency is the conjunction of three requirements and three qualifications as follows:
>
> *Requirement One*: Constitutional doctrines[74] and the decisions of constitutional cases must be consistent with the "translation set." The translation set consists of the set of doctrines that themselves directly translate the communicative content of the text into doctrine and the set of doctrines that are the logical implications of that set.

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72. *See* Barnett & Bernick, *supra* note 52.

73. For fuller discussion, see Solum, *The Constraint Principle*, *supra* note 5.

74. The phrase "constitutional doctrine" as used in this specification of Constraint as Consistency should be understood to encompass the set of legal constitutional norms and is not limited to norms announced by courts.

> *Requirement Two*: All of the communicative content of the constitutional text and its logical implications must be reflected in the legal content of constitutional doctrine.
>
> *Requirement Three*: All of the content of constitutional doctrine must be fairly traceable to the direct translation set, with traceable content including precisifications, implementation rules, and default rules presupposed (or otherwise supported) by the text.
>
> *Qualification One*: Requirements One, Two, and Three operate only to the extent that the communicative content of the constitutional text is epistemically accessible given appropriate levels of epistemic reasonableness; the three requirements are not violated by departures from unknown communicative content.
>
> *Qualification Two*: If Requirements One, Two, and Three are not satisfied, then constitutional practice should be brought into compliance with constraint over time, giving due regard to the effects of constitutional change on the rule of law.
>
> *Qualification Three*: Requirements One, Two, and Three are defeasible in limited and extraordinary circumstances, as specified by the best theory of defeasibility.[75]

This formulation of the Constraint Principle is intended to be precise, and as a consequence, it is complex. A simpler version of Constraint as Consistency might be formulated as follows:

> *Simplified Version of Constraint as Consistency*: Constitutional practice must be consistent with and fairly traceable to the original meaning of the constitutional text.

What, if anything, does Cooley have to say about the role of constraint in constitutional law?

B. Cooley on Constraint

In *Constitutional Limitations*, Cooley seems to endorse a robust version of the Constraint Principle. For example, he approvingly quotes Chief Justice Bronson of New York, as follows:

> It is highly probable that inconvenience will result from following the Constitution as it is written. But that consideration can have no force with me. It is not for us, but for those who make the instrument, to supply its defects.[76]

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75. This formulation appears in Solum, *The Constraint Principle*, *supra* note 5.

76. CONSTITUTIONAL LIMITATIONS, *supra* note 1, at 72 n.2 (quoting Oakley v. Aspinwall, 3 N.Y. 547, 568 (1850)).

And in the following passage, Cooley seems to endorse both the Fixation Thesis and the Constraint Principle:

> What a court is to do, therefore, is to declare the law as written, leaving it to the people themselves to make such changes as new circumstances may require. 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.[77]

And to similar effect:

> Constitutions do not change with the varying tides of public opinion and desire; the will of the people therein recorded is the same inflexible law until changed by their own deliberative action; and it cannot be permissible to the courts that in order to aid evasions and circumventions, they shall subject these instruments, which in the main only undertake to lay down broad general principles, to a literal and technical construction, as if they were great public enemies standing in the way of progress, and the duty of every good citizen was to get around their provisions whenever practicable, and give them a damaging thrust whenever convenient. They must construe them as the people did in their adoption, if the means of arriving at that construction are within their power.[78]

In each of these passages, Cooley explicitly endorses the idea that the Constitution is binding law that may only be changed through the process of amendment.

It might be objected that Cooley could have been endorsing a principle of fidelity to something other than the constitutional text; perhaps he believed that the constitution that is binding is actually a living constitution. But that reading of Cooley seems to be foreclosed by passages like the following:

> In American constitutional law the word constitution is used in a restricted sense, as implying the written instrument agreed upon by the people of the Union, or of any one of the States, as the absolute rule of action and decision for all departments and officers of the government, in respect to all the points covered by it, until it shall be changed by the authority which established it, and in opposition to which any act or rule of any department or officer of the government, or even of the people themselves, will be altogether void.[79]

Moreover, it seems unlikely that a thinker from Cooley's period would have had a modern living constitutionalist conception of the Constitution. As Paul Carrington writes, "no one contended that courts could responsibly employ their

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77. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 89 (Boston, Little, Brown, & Co., 7th ed. 1903).

78. People ex rel. Bay City v. State Treasurer, 23 Mich. 499, 506 (1871).

79. CONSTITUTIONAL LIMITATIONS, *supra* note 1, at 3.

constitutional powers to correct apparent oversights or even perceived injustices in the constitutions they were charged to enforce."[80] Perhaps "no one" is an exaggeration, but the thrust of Carrington's remark seems correct: the versions of living constitutionalism that animate contemporary constitutional theory and practice seem alien to the world of legal thought that Cooley inhabited.

V. COOLEY AND EXTRATEXTUAL SOURCES OF CONSTITUTIONAL LAW

One final topic needs to be addressed. As I have articulated it, the Constraint Principle requires both "consistency" and "fair traceability." In the discussion that follows, I will examine the originalist position on extratextual sources of constitutional law and then consider the relationship of these originalist ideas to Cooley's view of the role of common law in constitutional interpretation.

A. An Originalist Account of the Role of Extratextual Sources of Constitutional Law

Public meaning originalism can be understood as a form of textualism. The Fixation Thesis makes it clear that the meaning of the constitutional text is best understood as its original meaning—the meaning of the words and phrases in context at the time each provision was written. What, then, should originalists say about extratextual sources of constitutional law? Such sources might include other documents, such as the Treaty of Paris or the Declaration of Independence. Or the extratextual sources might include English common law as it was received in the United States. The most controversial extratextual sources of constitutional law cluster around moral values and political ideologies, whether they be found in the beliefs of the Supreme Court Justices, the values shared by the American people, or the moral truths discoverable by right reason.

Understanding the originalist position on the role of extratextual sources requires us to distinguish between three distinct roles that such sources can play:

- *First, A Role as Evidence of Original Meaning*: Extratextual sources can provide evidence relevant to the original public meaning of the constitutional text. For example, the content of English common law might provide evidence regarding the meaning of phrases like "ex post facto" or "right to jury trial at common law."

- *Second, A Role in Constitutional Construction Bound to the Text*: Extratextual sources can play a role in constitutional construction where the constitutional text underdetermines the legal content of constitutional doctrine. For example, ideals expressed in the Declaration of Independence might be relevant to construction of the Equal Protection Clause to that extent that the clause is vague or open textured.

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80. Paul D. Carrington, *The Constitutional Law Scholarship of Thomas McIntyre Cooley*, 41 AM. J. LEGAL HIST. 368, 377 (1997).

- *Third, A Role as a Source of Unbound Constitutional Norms*: Finally, extratextual sources might be a source of constitutional norms that are not bound to the text. For example, the value of privacy might serve as the basis for a constitutional right to choose whether or not to use contraception —even if such a right could not be tethered to any constitutional provision (or combination of provisions).

In prior work, I have argued that the first and second role for extratextual sources is entirely consistent with originalism. The third role ought to be rejected by originalists.[81]

First, the meaning of the constitutional text is in large part a function of the public context of constitutional communication—the aspect of meaning that is called "pragmatics" in theoretical linguistics and the philosophy of language. This means that originalism requires consideration of those extratextual sources that shed light on the meaning of ambiguous provisions. Public meaning originalism would limit such consideration to extratextual sources that either are part of the public context of constitutional communication or that provide evidence of the content of the public context.

Second, originalism is consistent with the consideration of extratextual sources as part of the process of constitutional construction, for those cases and issues with respect to which the meaning of the constitutional text underdetermines the legal content of constitutional doctrines or the decision of constitutional cases. The precise role that extratextual sources will play is relative to a specific theory of constitutional construction. For example, the original functions approach could look to extratextual sources as evidence of the original function of a constitutional provision. Thus, the original function of "freedom of speech" might be illuminated by the common law background of the right.

Third, originalist constitutional theory ought to reject the idea that extratextual sources can serve as the sources of constitutional doctrines that are not fairly traceable to the constitutional text. Constitutional norms can be traceable to the text in a variety of ways. A constitutional norm that directly expresses the content of a textual provision is bound to the text, but so too is a constitutional norm that precisifies a vague or open-textured provision or provides an implementing rule. Contrawise, a constitutional norm is not bound to the text if it is freestanding—providing a constitutional rule that is neither authorized by the text nor an implementing rule for a vague or open-textured provision. In the discussion that follows, I will distinguish between constitutional norms that are bound to the text in the sense that they can be fairly traced a particular clause or a structural relationship between clauses, on the one hand, and constitutional norms that are unbound to the text in the sense that they are not so traceable, on the other hand.

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81. Solum, *Originalism and the Unwritten Constitution*, *supra* note 54.

For the purposes of this Article, I am bracketing the interesting but complex questions raised by the Ninth Amendment and the Privileges or Immunities Clause of the Fourteenth Amendment. My position is that these provisions likely do provide the textual anchor for some set of unenumerated constitutional rights—but I cannot provide the argument for this position on this occasion.

B. Cooley and Common Law Limitations on Legislative Power

Cooley believed that the common law had an important role to play in the interpretation and construction of American constitutions. Stephen Siegel has emphasized this aspect of Cooley's approach:

> Accordingly, [Cooley] asserts that the key to interpreting the intended meaning of constitutional provisions is to read them in light of their "known source," which "the people must be supposed to have had in view in adopting them." Since Cooley regards the common law as the preeminent expression of America's "pre-existing . . . laws, rights habits, and modes of thought," this assertion entails drawing from the common law to interpret constitutional text. In sum, his central technique of constitutional interpretation is to read the constitutional text through the prism of the Anglo-American common law.[82]

This passage is strongly suggestive of the first role of extratextual sources identified above: the common law can provide evidence of the meaning of the constitutional text.

So far as I know, Cooley does not explicitly discuss the second role for extratextual sources. Although Cooley embraced the interpretation-construction distinction, he does not explicitly discuss the relationship between common law and constitutional construction. He does, however, seem to explicitly reject the third role—as a source of unbound constitutional norms. Thus, Cooley writes:

> [E]xcept where the constitution has imposed limits upon the legislative power, it must be considered as practically absolute, whether it operate according to natural justice or not in any particular case. The courts are not the guardians of the rights of the people of the State, except as those rights are secured by some constitutional provision which comes within the judicial cognizance.[83]

And to similar effect:

> But it is only in express constitutional provisions, limiting legislative power and controlling the temporary will of a majority, by a permanent and paramount law. settled by the deliberate wisdom of the nation, that I can find a safe

82. Stephen A. Siegel, *Historism in Late Nineteenth-Century Constitutional Thought*, 1990 WIS. L. REV. 1431, 1507–08 (1990) (footnotes omitted).

83. CONSTITUTIONAL LIMITATIONS, *supra* note 1, at 168.

> and solid ground for the authority of courts of justice to declare void any legislative enactment.[84]

Although this passage is limited to rights, it does explicit reject the existence of such rights to the extent that they are unbound and therefore not fairly traceable to the text.

The more difficult case is raised by Cooley's views on legislative power. My understanding of his views is strongly influenced by the work of Stephen Siegel, from whom I will quote at length:

> Almost invariably, articles in nineteenth-century state constitutions describing the legislative branch of government begin with phrases such as: "The legislative power of this State shall be vested in a senate and assembly." To Cooley, these phrases are grants of power whose scope and limits are defined by the common law. "The maxims of Magna Charta and the common law," he asserts, "are the interpreters of constitutional grants of power." In consequence, he maintains that [t]he Parliament of Great Britain, as possessing the sovereignty of the country, has the power to disregard fundamental principles . . . [Yet t]he rules which confine the discretion of Parliament within the ancient landmarks are rules for the construction of the powers of the American legislatures; and however proper and prudent it may be expressly to prohibit those things which are not understood to be within the proper attributes of legislative power, such prohibition can never be regarded as essential, when the extent of the power apportioned to the legislative department is considered . . . The absence of such prohibition cannot, by implication, confer power.

Therefore, even in the absence of express textual prohibitions, American legislatures cannot adopt declaratory acts, grant new trials or authorize someone to judge his own cause. Similarly, even in the absence of express textual prohibitions,

> a legislative enactment to pass one man's property over to another would nevertheless be void. If the act proceeded upon the assumption that such other person was justly entitled to the estate . . . it would be void, because judicial in its nature; and if it proceeded without reasons, it would be equally void, as neither legislative nor judicial, but a mere arbitrary fiat.[85]

My tentative view is that this aspect of Cooley's thought is consistent with originalism. His understanding of the role of common law in giving meaning to legislative and judicial power is best understood as involving the first role of common law as an extratextual source, although it might also involve the second role as a source of constitutional constructions for underdeterminate provisions.

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84. *Id*. at 172.

85. Siegel, *supra* note 82, at 1508–09 (quoting CONSTITUTIONAL LIMITATIONS, *supra* note 1, at 175–76).

Cooley is affirming common law limits on legislative and judicial power as an interpretation and construction of the relevant constitutional language. I have found no indication that he believes these limits are freestanding in *Constitutional Limitations*.

VI. A BRIEF DIGRESSION ON HOLISM AND MODULARITY IN CONSTITUTIONAL HISTORY AND THEORY

Before I conclude, I want to return to the methodological concerns that were discussed briefly in the *Introduction*.[86] This is not the occasion to offer a well-theorized account of the different roles played by historical thinkers in constitutional and intellectual history, on the one hand, and constitutional theory, on the other. But I will offer a brief observation.

Intellectual historians may well be uncomfortable with the investigation of Cooley undertaken in this Article. One way to understand this discomfort is that it is, in part, a function of methodological holism. A deep understanding of Cooley as a thinker may require an investigation that is holistic in two senses. First, Cooley's views on topics like the role of public meaning, the interpretation-construction distinction, and the Constraint Principle may best be understood as a function of the whole body of his work—all of his monographs and judicial decisions. One might plausibly believe that his views on particular topics are interconnected—to understand part, one must grasp the whole. Second, Cooley's jurisprudence may be illuminated by the historical context in which he lived—the social, cultural, political, and legal context in which his treatises and judicial opinions were deployed. Moreover, such a holistic approach seems especially important if one is after an understanding of Cooley's motives, purposes, and ideology. If we want to know the reasons for Cooley's particular jurisprudential moves, then we must understand the context in which he made them.

The aims of constitutional theory are different. Constitutional theory attempts to develop conceptual tools and normative arguments—clarifying the nature of constitutional ideas and providing a framework for the evaluation of constitutional practice from the perspective of normative legal theory. The work of constitutional theory does not take place in a historical vacuum. Contemporary constitutional theory is influenced by ideas old and new, by John Hart Ely and James Bradley Thayer, by Antonin Scalia and John Marshall, by Aristotle and Martha Nussbaum. The work of constitutional theory is different than the work of the intellectual history of constitutionalism. Constitutional theory aims at the truth about the grand questions of constitutionalism—while intellectual history aims to understand the motivations and causal forces that produced various answers to the grand questions in their historical context. Constitutional theory adopts a stance that we might call "methodological modularity"—picking and choosing among ideas on the basis of their intellectual merits and combining

86. *See supra* text accompanying notes 1–8.

ideas in new ways to produce new theories. Where intellectual history is holistic, constitutional theory is modular.

CONCLUSION

The goal of contemporary originalist constitutional theory is to develop the best theory of constitutional interpretation and construction. Public meaning originalism is one such theory. Like the Cooley of *Constitutional Limitations*, public meaning originalists affirm that the meaning of the constitutional text is its "public meaning"—the meaning of the text for "We the People." Like the Cooley of *Constitutional Limitations*, many public meaning originalists affirm the interpretation-construction distinction—the fundamental conceptual distinction between discovering the meaning of the constitutional text and its legal effect. Like the Cooley of *Constitutional Limitations*, many public meaning originalists affirm the existence of doubtful cases, where the meaning of the text underdetermines the legal content of constitutional doctrine. Like the Cooley of *Constitutional Limitations*, public meaning originalists have developed theories of constitutional construction that look to the spirit of the constitutional text when the letter alone will not suffice. And like the Cooley of *Constitutional Limitations*, contemporary originalists affirm fixation and constraint. The fixed original public meaning of the constitutional text should constrain constitutional practice.

It would be a mistake to classify the Cooley of *Constitutional Limitations* as a "new originalist." Contemporary originalists draw on ideas that were unknown to Cooley and respond to developments in constitutional law that Cooley could not have anticipated. But the historical distance between contemporary originalism and Cooley should not blind us to the depth and power of his thought. Cooley's work is complex, rich, and important. Constitutional theorists should read Cooley.