INTELLECTUAL HISTORY AS CONSTITUTIONAL THEORY

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INTRODUCTION

WHAT role, if any, should intellectual history play in constitutional theory?[1] This is a complex question, because there are many ways in which the history of ideas and the theory of constitutional law could interact. Two of the most important possibilities are captured by the distinction between "intellectual history *of* constitutional theory" and "intellectual history *as* constitutional theory."

Consider intellectual history *of* constitutional theory first. Intellectual history can take constitutional theory as an object of study, constructing narratives that trace the development of constitutional theories, elucidat-

[1] This Article is related to two others, both in draft as of this writing. *The Fixation Thesis* explicates and defends the claim that the communicative content of the constitutional text is fixed at the time each provision is framed and ratified. Lawrence B. Solum, The Fixation Thesis: The Role of Historical Fact in Original Meaning, Notre Dame L. Rev. (forthcoming, on file with the Virginia Law Review Association) [hereinafter Solum, Fixation Thesis]. *Originalism and History* explores the relationship between the original meaning of the constitutional text and historical facts, taking a larger view of history and historiography than this Article, which focuses on the methods of intellectual history in particular. Lawrence B. Solum, Originalism and History (Jan. 24, 2015) (unpublished manuscript, on file with the Virginia Law Review Association) [hereinafter Solum, Originalism and History].

ing the motives and goals of constitutional theorists, and explaining the processes by which constitutional theories influence constitutional practice (and vice versa). This is surely an important enterprise, valuable in itself and for the contribution it can make to the development of constitutional theory.[2] The intellectual history of constitutional theory and doctrine may give rise to problems and controversies, but such difficulties seem likely to be similar in kind to the history of ideas in related domains, such as political philosophy or jurisprudence.

This Article is mostly about the second possibility—intellectual history *as* constitutional theory. It might be argued that intellectual history could constitute a theory and method of constitutional interpretation—or to be more precise, of constitutional interpretation and construction. Professor Saul Cornell has discussed this possibility in his recent article, *Meaning and Understanding in the History of Constitutional Ideas: The Intellectual History Alternative to Originalism*.[3] Cornell proposes that constitutional interpretation utilize "the contextualist methodology favored by most contemporary American intellectual historians,"[4] which Cornell asserts provides "a common set of interpretive practices."[5] Cornell relies on the work of Professors James Kloppenberg[6] and David

[2] The history of constitutional ideas and their contexts is an important and valuable branch of legal scholarship. The works of Professor G. Edward White, a participant at the Jurisprudence and (Its) History Symposium at which an earlier version of this Article was presented, are illustrative. See G. Edward White, The Constitution and the New Deal (2000); G. Edward White, Chief Justice Marshall, Justice Holmes, and the Discourse of Constitutional Adjudication, 30 Wm. & Mary L. Rev. 131 (1988); G. Edward White, Constitutional Change and the New Deal: The Internalist/Externalist Debate, 110 Am. Hist. Rev. 1094 (2005); G. Edward White, Justice Holmes and the Modernization of Free Speech Jurisprudence: The Human Dimension, 80 Calif. L. Rev. 391 (1992); G. Edward White, The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America, 95 Mich. L. Rev. 299 (1996); G. Edward White, The Working Life of the Marshall Court, 1815–1835, 70 Va. L. Rev. 1 (1984).

[3] Saul Cornell, Meaning and Understanding in the History of Constitutional Ideas: The Intellectual History Alternative to Originalism, 82 Fordham L. Rev. 721 (2013).

[4] Id. at 723.

[5] Id.

[6] See id. at 723 n.9, 725 (discussing, inter alia, James T. Kloppenberg, Thinking Historically: A Manifesto of Pragmatic Hermeneutics, 9 Mod. Intell. Hist. 201 (2012)).

Hollinger,[7] as well as the work of the Cambridge School, represented by Professor Quentin Skinner[8] and others.

The nature of Cornell's claim about the role of intellectual theory is not entirely clear, and ultimately the important question is not what Cornell claims. The important question is what role intellectual history can and should play in constitutional practice. In order to get at that question, we will investigate a strong (and perhaps exaggerated) version of Cornell's thesis. We will consider the possibility that intellectual history (as practiced by contemporary historians like Kloppenberg and others) could be employed as a theory and method of constitutional interpretation that can displace the approaches represented by textualism[9] and originalism[10] and by those forms of living constitutionalism that incorporate textualism or originalism as one of a plurality of methods or modalities of constitutional interpretation.[11] That is, we will investigate the idea that interpretive methods drawn from intellectual history will do a

[7] See id. at 725 & n.17 (discussing David A. Hollinger, In the American Province: Studies in the History and Historiography of Ideas (1985)).

[8] See id. at 728–29, 729 n.38 (discussing, inter alia, Quentin Skinner, Meaning and Understanding in the History of Ideas, 8 Hist. & Theory 3 (1969), *reprinted in* Meaning and Context: Quentin Skinner and His Critics 29, 48 (James Tully ed., 1988)).

[9] For a discussion of the textualist approach, see generally Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts (2012); James E. Ryan, Laying Claim to the Constitution: The Promise of New Textualism, 97 Va. L. Rev. 1523 (2011).

[10] For a discussion of the originalist approach, see generally Jack M. Balkin, Living Originalism (2011); Robert W. Bennett & Lawrence B. Solum, Constitutional Originalism: A Debate 36–63 (2011); Randy E. Barnett, An Originalism for Nonoriginalists, 45 Loy. L. Rev. 611 (1999); Richard S. Kay, Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses, 82 Nw. U. L. Rev. 226 (1988); 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 (2009); Keith E. Whittington, The New Originalism, 2 Geo. J.L. & Pub. Pol'y 599 (2004).

[11] Many opponents of originalism concede that the original meaning of the constitutional text is and should be a relevant component of constitutional interpretation and construction. See, e.g., Mitchell N. Berman, Originalism Is Bunk, 84 N.Y.U. L. Rev. 1, 21 (2009) ("To be absolutely clear, then, Originalism is not the view that some feature of the original character of the U.S. Constitution—the intent of the framers, the understanding of the ratifiers, the text's original public meaning, or an amalgam of these things—'matters' or 'is relevant' to proper constitutional interpretation. So understood, Originalism would be a trivial thesis without dissenters."). For nonoriginalists whose theories provide a role for the constitutional text, 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, 1252–54 (1987); Stephen M. Griffin, Pluralism in Constitutional Interpretation, 72 Tex. L. Rev. 1753, 1753–54 (1994).

better job of extracting the "meaning" of constitutional text than the methods developed by judges, lawyers, and legal scholars.

This Article will begin that exploration in Part I by presenting a framework for assessing theories of constitutional interpretation and construction. Part II will investigate contextualist methodology used by selected intellectual historians. Part III will outline the difficulties with any attempt to utilize intellectual history as a method for discovering the communicative content of legal texts. Part IV will turn to the positive (but supporting) role that intellectual history can play in constitutional practice. A conclusion will follow.

The primary focus of this Article is the role of intellectual history in constitutional interpretation and construction; however, to some extent, an investigation of the "contextualist methodology" of intellectual history will require a comparison with ideas from legal theory. For this reason, textualism and originalism will be used as points of comparison.

I. THEORIES OF CONSTITUTIONAL INTERPRETATION AND CONSTRUCTION

Constitutional theory is a large and diverse field, tackling a variety of questions, including questions about the nature of constitutionalism, the normative legitimacy of constitutional systems, and the ideal content of a constitutional order. On this occasion, however, the focus is on the contribution that constitutional theory can make to our understanding of the process by which we discover or determine the "meaning" of the constitutional text. But what does the word "meaning" mean?

A. The Meaning of "Meaning"

Both intellectual history and constitutional theory make frequent use of the word "meaning." An intellectual historian may ask, "What is the 'meaning' of Locke's *Second Treatise*?"[12] A lawyer may ask, "What is the 'meaning' of the Second Amendment to the U.S. Constitution?"

These two questions, on the surface, appear to be about the same thing, "meaning." One might believe that at the level of deep structure, the intellectual historian and the lawyer should be employing the same methods. The surface structure of the methods might differ, in part because of different technical vocabularies employed by different disci-

[12] John Locke, Two Treatises of Government (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

plines with different intellectual antecedents and in part because legal texts may have unique characteristics that distinguish them from the wide variety of texts taken as the object of intellectual history. Even if we take these differences into account, the common concern with "meaning" might lead to the conclusion that the methods of intellectual history and the methods of constitutional interpretation are both aimed at the same target. Thus, we might think that the methods of intellectual history can be adapted to inquiries in the meaning of legal texts, including the U.S. Constitution.

But in this case, the surface impressions are misleading. The word "meaning" is notoriously ambiguous.[13] Sometimes we use the word "meaning" to refer to the concept of communicative content—roughly the linguistic meaning of an expression. Sometimes we use the word "meaning" to refer to the motivations or purposes that lie behind an action. Sometimes we use the word "meaning" to refer to the consequences or applications of a text. And sometimes we ask, "What is the meaning of life?" Clearly, the word "meaning" has several different senses. For this reason, we need to be very careful when we compare the approaches to meaning found in intellectual history and legal theory: If the two disciplines use the same word in different senses, then they may be addressing different questions and not giving different answers to the same question.

B. Legal Content and Communicative Content

What sort of "meaning" is involved in the interpretation and construction of legal texts? Lawyers, judges, and legal scholars know that legal texts (contracts, rules, regulations, statutes, and constitutions) have at least two distinct kinds of "meaning" or "content." On the one hand, lawyers ask questions about "plain meaning" or "literal meaning." On the other hand, they ask about the "legal meaning" or "legal effect" as-

[13] See C.K. Ogden & I.A. Richards, The Meaning of Meaning: A Study of the Influence of Language upon Thought and of the Science of Symbolism 186–87 (8th ed. 1948) (exploring different senses of "meaning"); Michael L. Geis, On *Meaning*: The Meaning of *Meaning* in the Law, 73 Wash. U. L.Q. 1125, 1125–26 (1995) (observing that the Supreme Court uses the words "means" and "meaning" in multiple ways); A.P. Martinich, Four Senses of 'Meaning' in the History of Ideas: Quentin Skinner's Theory of Historical Interpretation, 3 J. Phil. Hist. 225, 226 (2009) ("Equivocating on the word 'meaning' is easy both because that word has several related senses and because understanding the meaning of a text in one of these senses is crucial to understanding its meaning in another sense.").

sociated with the text. The two need not be identical. If a provision of a will violates the rule against perpetuities, the linguistic meaning of the will is quite different than its legal effect. We can capture the difference between these two distinct forms of meaning by using the phrases "communicative content" and "legal content."[14]

Let us stipulate that the phrase "communicative content of a legal text" points to the meaning that the text communicated (or perhaps "was intended to communicate") to its anticipated or intended readers. We might use the phrase "linguistic meaning" to convey the same idea. Roughly, this is the sort of meaning that lawyers are concerned with when they use phrases like "plain meaning" or "literal meaning"—the ordinary meaning of the text, as distinguished from the legal content that the text might produce. At this point, we can put aside the distinctions that lawyers make between the plain meaning of a legally salient text and its literal meaning—although that difference is substantial and important. The important point at this stage is that one sense of meaning that is relevant to lawyers is captured by the more technical phrase "communicative content."

The legal content associated with a legal text is the meaning that the text is given when it is put into practice, paradigmatically by judges but also by other officials and even by private citizens. For example, the phrase "freedom of speech" as it is used in the First Amendment to the U.S. Constitution is very general and abstract. But the legal content associated with that phrase includes a rich and complex set of constitutional doctrines, including rules concerning prior restraints, the regulation of child pornography, and even limits on the regulation of billboards. The legal content of free speech doctrine is, quite obviously, different than the communicative content of the First Amendment's Free Speech Clause.

[14] See Lawrence B. Solum, Communicative Content and Legal Content, 89 Notre Dame L. Rev. 479, 480 (2013). For a recent discussion of the distinction, see Mark Greenberg, The Moral Impact Theory of Law, 123 Yale L.J. 1288, 1292–93, 1327–28 (2014). The earliest use of the phrase "communicative content" in the Westlaw JLR database is found in David A.J. Richards, Free Speech and Obscenity Law: Toward A Moral Theory of the First Amendment, 123 U. Pa. L. Rev. 45, 55, 82 (1974). Professor Richards's article displays a clear awareness of Gricean views in the philosophy of language. See id. at 78 & n.181. For additional uses of Grice, see Peter Meijes Tiersma, Nonverbal Communication and the Freedom Of "Speech," 1993 Wis. L. Rev. 1525, 1552, 1560–61; Peter Meijes Tiersma, The Language of Perjury: "Literal Truth," Ambiguity, and the False Statement Requirement, 63 S. Cal. L. Rev. 373, 381–82 (1990) [hereinafter Tiersma, The Language of Perjury].

The distinction between legal content and communicative content reveals a particular ambiguity in lawyers' use of the phrase, "the meaning of the constitutional text." When we ask, "What does First Amendment 'freedom of speech' mean?," we could be asking about the *legal content* of free speech doctrine or we could be asking about the *communicative content* of the constitutional text. The legal content inquiry might involve questions like, "Does free speech doctrine impose strict scrutiny for content-based regulations of communication?" The communicative content inquiry might involve questions like, "Was 'freedom of speech' a phrase of art with a technical meaning?" These are two distinct inquiries (and considerations that determine how the questions are answered will need to be different as well). The activity that we call "constitutional interpretation" or "constitutional construction" (using the terms interchangeably) is actually two distinct activities and the difference between them can be elucidated via the interpretation-construction distinction.

C. The Interpretation-Construction Distinction

In this Article, I will use the words "interpretation" and "construction" in a stipulated and technical sense rooted in American legal theory.[15] By "interpretation" and "construction," I mean to refer to two con-

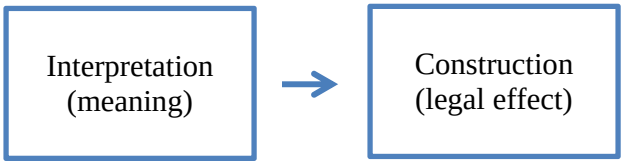
[15] The interpretation-construction distinction became prominent in contemporary constitutional theory via the work of Professor Keith Whittington. See Keith E. Whittington, Constitutional Construction: Divided Powers and Constitutional Meaning (1999); Keith E. Whittington, Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review (1999). Whittington's use of the distinction was later deployed by Professor Randy Barnett. See Randy E. Barnett, Restoring the Lost Constitution: The Presumption of Liberty 123–31 (2004). For an earlier use in connection with constitutional theory, see Robert N. Clinton, Original Understanding, Legal Realism, and the Interpretation of "This Constitution," 72 Iowa L. Rev. 1177, 1265 (1987).

For uses of the distinction by legal scholars, see 3 Arthur Linton Corbin, Corbin on Contracts: A Comprehensive Treatise on the Working Rules of Contract Law §§ 532–35 (1960 & Supp. 1980); 4 Samuel Williston, A Treatise on the Law of Contracts §§ 600–02 (3d ed. 1961); Tun-Jen Chiang & Lawrence B. Solum, The Interpretation-Construction Distinction in Patent Law, 123 Yale L.J. 530 (2013); E. Allan Farnsworth, "Meaning" in the Law of Contracts, 76 Yale L.J. 939 (1967); Edwin W. Patterson, The Interpretation and Construction of Contracts, 64 Colum. L. Rev. 833 (1964); Keith A. Rowley, Contract Construction and Interpretation: From the "Four Corners" to Parol Evidence (and Everything in Between), 69 Miss. L.J. 73 (1999); Peter M. Tiersma, The Ambiguity of Interpretation: Distinguishing Interpretation from Construction, 73 Wash. U. L.Q. 1095 (1995). Cases utilizing the distinction are collected in Lawrence B. Solum, Originalism and Constitutional Construction, 82 Fordham L. Rev. 453, 486–87 (2013) [hereinafter Solum, Originalism and Constitutional Construction]. The earliest use of the distinction of which I am aware was by Francis Lieber in 1839. See Francis Lieber, Legal and Political Hermeneutics, or Principles of Interpretation

ceptually distinct moments in constitutional practice. I shall use the word "interpretation" to refer to the activity of discovering the communicative content of the constitutional text. "Construction" shall refer to the activity of giving the text legal effect, including both developing constitutional doctrine and deciding constitutional cases.

The relationship between interpretation and construction can be captured by picturing two moments or steps in constitutional practice.[16] The first step is interpretation: We discover the communicative content of the constitutional text. The second step is construction: We determine the legal effect associated with the communicative content. This "two-moments model" can be represented as follows:

Figure 1: Two-Moments Model of Interpretation and Construction



The two-moments model is a rational reconstruction of a process that may be more complicated in practice. Judges might begin with a tentative hypothesis about legal effect and then investigate meaning, tacking back and forth between interpretation and construction. Crucially, the two-moments model makes it clear that constitutional practice always involves both interpretation and construction (although one step or the other may be tacit or unconscious). Thus, even if the constitutional text is perfectly clear and constitutional doctrine simply mirrors the communicative content of the text, the decision to conform doctrine to text is

and Construction in Law and Politics, with Remarks on Precedents and Authorities 19–20, 55–58 (Roy M. Mersky & J. Myron Jacobstein eds., Wm. S. Hein & Co. 1970) (1839). Lieber does not articulate the distinction using the notions of communicative content and legal effect that are the core of my stipulative definition.

For explication and analysis of the interpretation-construction distinction, see Randy E. Barnett, Interpretation and Construction, 34 Harv. J.L. & Pub. Pol'y 65 (2011); Solum, Originalism and Constitutional Construction, supra; Lawrence B. Solum, The Interpretation-Construction Distinction, 27 Const. Comment. 95 (2010) [hereinafter Solum, The Interpretation-Construction Distinction].

[16] See Solum, Originalism and Constitutional Construction, supra note 15, at 495–99 (discussing the two-moments model).

itself constitutional construction. Constitutional practice always involves both interpretation (meaning) and construction (legal effect).

The importance of the interpretation-construction distinction to constitutional theory comes to the fore in cases in which the text is unclear or underdeterminate. In theory, underdeterminacy could result from four distinct causes: (1) ambiguity, (2) vagueness, (3) gaps, and (4) contradictions. The discussion that follows will focus on ambiguity and vagueness.

Sometimes "ambiguity" and "vagueness" are used interchangeably as synonyms for "unclear," but I will use these terms in a more precise and technical sense.[17] A constitutional provision is ambiguous if it has more than one possible sense.[18] For example, the word "cool" is ambiguous because it has one sense that refers to temperature, another sense that refers to stylishness, and a third sense that refers to composure or temperament. Normally, we resolve ambiguity by resorting to context: For example, in the sentence "Miles Davis was the epitome of cool," the term "cool" is unambiguous; the context suggests that the term refers to his personal style and not to his body temperature. But in some cases, ambiguity may be irreducible. For example, a statute might be drafted ambiguously because the drafters could not reach agreement on a contentious issue. Let us call this kind of ambiguity "irreducible ambiguity."

A constitutional provision is vague if it admits borderline cases.[19] The word "tall" when used in the sense that refers to height has borderline cases. A man in the United States who is over seven feet in height is clearly tall and a man who is under five feet is clearly not tall, but some cases are on the borderline, such as a man who is five foot ten inches in height. For the purposes of this Article, I will use the term "open texture" to refer to multidimensional vagueness. "Reasonable" as used in

[17] See Solum, The Interpretation-Construction Distinction, supra note 15, at 97–98 (discussing the distinction between vagueness and ambiguity).

[18] This sense is given in the third definition of "ambiguity" in the Oxford English Dictionary: "Capability of being understood in two or more ways; double or dubious signification, ambiguousness." 1 The Oxford English Dictionary 386 (2d ed. 1989), available at http://www.oed.com/view/Entry/6144.

[19] See Roy Sorensen, Vagueness, Stan. Encyclopedia Phil., http://plato.stanford.edu/entries/vagueness (last updated Oct. 11, 2013) ("There is wide agreement that a term is vague to the extent that it has borderline cases."). For additional sources discussing vagueness, see Timothy A.O. Endicott, Vagueness in Law (2000); Rosanna Keefe, Theories of Vagueness (2000); Timothy Williamson, Vagueness (1994); Roy Sorensen, Vagueness Has No Function in Law, 7 Legal Theory 387 (2001); Jeremy Waldron, Vagueness in Law and Language: Some Philosophical Issues, 82 Calif. L. Rev. 509 (1994).

the law may be an open-textured term—unlike cool, which is vague in one dimension, reasonableness in law may depend on many factors.[20]

It seems likely that at least some provisions of the Constitution are vague or open textured. Obvious candidates include the Necessary and Proper Clause, the "freedom of speech" guarantee, and the term "unreasonable" in the Fourth Amendment. Unlike ambiguity, where context usually eliminates underdetermination, vagueness is likely to persist—even when the context is taken into account—although context might in some cases reduce the number of borderline cases or transform a vague term into one that is not vague. Thus, even a full consideration of the context of the word "unreasonable" in the Fourth Amendment is unlikely to yield an interpretation that provides a bright-line rule that labels every possible search or seizure as "reasonable" or "unreasonable."

Irreducible ambiguity, vagueness, and open texture create underdeterminacy.[21] That is, when the communicative content of the constitutional text cannot be directly translated into a bright-line rule, some other process will be required in order to articulate constitutional doctrine and decide constitutional cases. That process necessarily involves constitutional construction. We can call these areas of underdeterminacy "construction zones"—reflecting the fact that construction (which goes beyond mere translation of the communicative content yielded by interpretation into legal content) is required to provide constitutional norms that are sufficiently rich to apply the vague or irreducibly ambiguous

[20] The technical sense of the phrase "open texture" was coined by Friedrich Waismann. See Friedrich Waismann, Verifiability, 19 Proc. Aristotelian Soc'y 119, 121 (Supp. 1945), *reprinted in* Logic and Language 122, 125 (Antony Flew ed., 1965). Professor H.L.A. Hart used the phrase in his magnum opus, *The Concept of Law*. See H.L.A. Hart, The Concept of Law 124 (2d ed. 1994); see also Brian Bix, H.L.A. Hart and the "Open Texture" of Language, 10 L. & Phil. 51, 69–72 (1991) (discussing the impact and proper understanding of Hart's examination of open texture); Frederick Schauer, On the Open Texture of Law, 87 Grazer Philosophische Studien 197, 197 (2013) (discussing Hart's open-texture claims). Because "open texture" is a technical term, which is used in different ways by different authors, it may have more than one meaning. Professor Frederick Schauer emphasizes the idea that even nonvague terms may become vague when applied to novel phenomena. See Frederick Schauer, A Critical Guide to Vehicles in the Park, 83 N.Y.U. L. Rev. 1109, 1126–27 (2008). For the purposes of this Article, it is stipulated that the use of "open texture" refers to multidimensional vagueness and similar phenomena, such as concepts that involve incommensurable and multiple criteria.

[21] On the idea of underdeterminacy (as distinguished from indeterminacy), see Lawrence B. Solum, On the Indeterminacy Crisis: Critiquing Critical Dogma, 54 U. Chi. L. Rev. 462, 473 (1987); see also W.V. Quine, Two Dogmas of Empiricism, 60 Phil. Rev. 20, 42–43 (1951) (discussing the underdetermination of scientific theories by evidence).

constitutional text to cases at the borderline or affected by the ambiguity.[22]

We are now in a position to understand the role of theories of constitutional interpretation and construction with greater clarity. A theory of constitutional interpretation aims to provide the correct approach to discovering the communicative content of the constitutional text. Because constitutional communication (like legal communication generally) is simply a form of human communication, theories of constitutional interpretation must be reconciled with the general theory of the way linguistic communication works that has been developed in the philosophy of language and theoretical linguistics. A theory of constitutional construction aims to provide the best approach for determining the legal content of constitutional doctrine and deciding constitutional cases. Such a theory must be normative in some sense. One approach to justifying an approach to constitutional construction would look to legal norms, contending that the law required a particular theory of construction. Another, more common approach is to argue that a particular theory of construction ought to be adopted, usually on the basis of a political or moral theory.

If we fail to observe the distinction between communicative content (interpretation) and legal effect (construction), the role of a theory of "constitutional interpretation" in the broad sense that encompasses both "interpretation" and "construction" in their more precise and technical senses is more difficult to describe with precision. "Interpretation" in the broad sense involves both "meaning" (communicative content) and

[22] Cornell seems to assume that originalists deny the existence of underdetermination and that the existence of construction zones is inconsistent with the Fixation Thesis. See Cornell, supra note 3, at 732. Originalism is a family of constitutional theories, and not all originalists agree about the extent to which the constitutional text underdetermines the development of constitutional doctrine and the decision of constitutional cases. New Originalists (for example, Balkin, Barnett, Solum, and Whittington) characteristically accept the existence of substantial underdetermination. See Solum, Originalism and Constitutional Construction, supra note 15, at 467–69. Cornell's failure to appreciate this development is puzzling, since this has been a feature of the New Originalism since the late 1990s. See id.

Cornell makes a conceptual error when he argues that underdeterminacy is inconsistent with the Fixation Thesis. The Fixation Thesis claims that the communicative content of the constitutional text is fixed at the time each provision is framed and ratified. See Solum, Fixation Thesis, supra note 1, at 1, 9–10. If the communicative content is vague or open textured, then the underdetermination is fixed and constitutional construction will be required to fill in the legal content of constitutional doctrine. For an in depth discussion of these matters, see id. at 10.

"doctrine" (legal content that determines legal effect). If we confuse the two distinct activities, we are likely to produce a theory that is itself confused, entangling the essentially factual inquiry into communicative content with the essentially normative inquiry into legal content.

D. The Object of Intellectual History: Communicative Content or Something Else?

This Article is about the possible role of "intellectual history" or "contextualist methodology" in constitutional practice. The interpretation-construction distinction allows us to be more precise about what that role might be. The most plausible role for intellectual history would be as a method for determining communicative content, but before we turn to that possibility in Part II, we can turn briefly to the less obvious possibility—that intellectual history could serve as a method for determining legal effect (that is, as a theory of constitutional construction).

Intellectual history can tell us many things, but is clearly not itself a normative theory of constitutional construction. The fundamental reason for this conclusion is simple: Intellectual history is not a normative theory—it does not provide an account of what constitutional practices are right or justifiable by political morality and which are wrong or lack justification. Intellectual history may tell us much about the origins and development of our views about normative constitutional theory, but it is not itself such a theory.

But this does not entail the further conclusion that intellectual history cannot provide important inputs to constitutional construction. For example, intellectual history can describe how views of constitutional construction have changed over time. That is, intellectual history can tell us much about how constitutional practice has changed over time. And the perspective that intellectual history provides may illuminate our views about which practices are normatively desirable and which practices are illegitimate. The intellectual history of constitutional construction might teach us that some approaches work and others fail. Or it might provide insight into why certain practices came into favor and why others fell out of use. These lessons may provide valuable inputs when we evaluate current practices.

Suppose, however, that someone were to advance the view that the kind of "meaning" that the contextualist methodology of intellectual history produces should guide constitutional practice. One might argue that constitutional practice should be guided by the "intellectual-history

meaning of the Constitution" or by the "context of constitutional history" and not by the communicative content of the constitutional text. So far as I know, no one has explicitly adopted this position, but if it were to be advanced, a normative argument would need to be made. The fact that intellectual historians focus on context is not, by itself, a normative argument that judges should adopt the contextualist method as the method for determining the legal effect of the constitutional text.

The next Part of this Article examines the contextualist methodology of intellectual history as a theory of constitutional interpretation—that is, as a theory of the communicative content of the constitutional text. Other possible roles of intellectual history in constitutional practice will be taken up in Part IV.[23]

II. INTELLECTUAL HISTORY AS A THEORY OF CONSTITUTIONAL INTERPRETATION

So the question at hand is whether intellectual history provides a method for determining the communicative content of the constitutional text. We can consider the possibility that the contextualist methodology of intellectual history provides the means for recovering the communicative content of the constitutional text. This investigation is inspired by Cornell's work, but it is not clear that Cornell himself believes that the contextualist methodology of intellectual history yields communicative content (in the sense in which the phrase "communicative content" is used in this Article). Cornell does not provide an explicit account of what "meaning" or communicative content actually is, nor does he attempt to provide a systematic exposition of his "contextualist methodology."[24] Nonetheless, the question whether the contextualist methodology of intellectual history does yield communicative content is an important one—at least for originalists and textualists. Let us begin our exploration of this question with the various roles that context might play in intellectual history and constitutional interpretation.

A. The Roles of Context

What does it mean to take "context" into account when we engage in constitutional interpretation or construction? There are at least five roles

[23] See infra Part IV.
[24] See Cornell, supra note 3.

that context could play in constitutional practice: (1) context could enable pragmatic (or contextual) enrichment of the semantic meaning of the constitutional text (and hence contribute to communicative content); (2) context could be evidence of communicative intentions; (3) context could establish purpose; (4) context could provide a framework for understanding, in the broad sense in which "understanding" means illumination or comprehension; and (5) context could play a role in normative theories of constitutional construction. Each of these five roles will be explicated in turn.

1. Context and the Semantics-Pragmatics Distinction in the Philosophy of Language

In the philosophy of language and theoretical linguistics, a distinction is made between semantics and pragmatics. We can approach this distinction by developing the idea of semantic meaning or semantic content and then turning to an examination of the role of pragmatics.

a. Semantic Meaning

What is "semantic meaning"? We can begin with the simplistic (and incorrect) notion that the communicative content of a legal text, for example, a clause in the U.S. Constitution, is solely a function of the semantic meaning of its component parts. The components are words or phrases: "commerce" in Article I, Section 8[25] or "freedom of speech" in the First Amendment.[26]

It is obvious that the meaning of a legal text is not simply a concatenation of the conventional semantic meanings of the words and phrases. Legal texts have structures: subjects, verbs, and objects, relationships of modification between noun and adjective, verb and adverb, punctuation marks, and more. These relationships can be captured by the idea of syntax (or grammar). Sometimes we speak of rules of grammar, but the word "rule" can be misleading, because the patterns do not have a rigid, rule-like structure.[27]

[25] U.S. Const. art. I, § 8, cl. 3.

[26] Id. amend. I.

[27] When you break a rule of grammar, the consequence need not be a failure to communicate. Indeed, one can communicate by breaking the rules. Sentence fragments. Verbs is not in agreement with subjects. Rule breaking, yes. Meaningless, no. These matters are complex, but the notion of syntax is clear enough for our purposes.

Let us say that the semantic meaning of an utterance is a function of the conventional semantic meanings of the component units of meaning (the words and phrases) and the rules of syntax and grammar that enable combination of these units into larger units (that is, sentences or clauses). Call this the "principle of compositionality"[28] and call meaning determined solely in this way "semantic meaning." The corresponding content is "semantic content."

b. Pragmatics and Communicative Content

"Pragmatics" is the word used by philosophers of language and theoretical linguistics to refer to the role of context in enabling speakers and authors to create content richer than conventional semantic meanings. Semantic content is part of communicative content, but it is not the whole. Legal practice and theory are familiar with this notion—although the legal terminology is different. In law, we refer to semantic content as "literal meaning."[29] This phrase is rarely theorized when it is used, and it may be ambiguous, but when lawyers refer to the literal meaning of a legal text it seems likely that they are referring to its semantic meaning.[30]

Lawyers know that the literal meaning of a legal text is not necessarily the whole meaning or even the plain meaning. Why not*?* Because semantic content is sparse—legal texts can communicate content that is richer than the literal meaning of the words and phrases. How? Communicative content can be richer than semantic content because of the role

[28] See Donald Davidson, Theories of Meaning and Learnable Languages, *in* Inquiries into Truth and Interpretation 3, 3–4, 8 (2d ed. 2001); Richard E. Grandy, Understanding and the Principle of Compositionality, *in* 4 Philosophical Perspectives: Action Theory and Philosophy of Mind 557, 557 (James E. Tomberlin ed., 1990).

[29] See, e.g., Exxon Corp. v. Hunt, 475 U.S. 355, 370 (1986); Bob Jones Univ. v. Simon, 416 U.S. 725, 731–32 (1974); McFeely v. Comm'r, 296 U.S. 102, 111 (1935); Panama R.R. v. Rock, 266 U.S. 209, 215 (1924) (Holmes, J., dissenting); Brian Flanagan, Revisiting the Contribution of Literal Meaning to Legal Meaning, 30 Oxford J. Legal Stud. 255, 255 (2010); Michael S. Moore, A Natural Law Theory of Interpretation, 58 S. Cal. L. Rev. 277, 285 n.14, 290–91 (1985); John R. Searle, Literal Meaning, 13 Erkenntnis 207, 207 (1978). We can distinguish "literal meaning" and "plain meaning"—sometimes meaning is plain even where it is not literal, because context makes the meaning unambiguous.

[30] For sources discussing literal meaning, see Gregory Klass, Meaning, Purpose, and Cause in the Law of Deception, 100 Geo. L.J. 449, 456–57 (2012); Tiersma, The Language of Perjury, supra note 14, at 379–80; Steven Walt, The State of Debate over the Incorporation Strategy in Contract Law, 38 UCC L.J. 255, 259 n.10 (2006).

that context plays in communication generally and in legal communication in particular.

We can illustrate one of the roles that context plays in the enrichment of semantic content by examining Article I, Section 9, Clause 5 of the U.S. Constitution:[31]

> No Tax or Duty shall be laid on Articles exported from any State.[32]

The conventional semantic meaning of this provision is unclear. The provision is phrased in the passive voice, and therefore it could be read as prohibiting sales taxes that apply on a nondiscriminatory basis to goods that are imported and that are produced domestically. Thus, the clause might apply to a tax enacted by the City of New York on all sugary sodas, whether they were produced in the State of New York or imported from New Jersey. The soda from New Jersey is exported from New Jersey into New York, and so the semantic content of the clause is consistent with an interpretation and construction that prohibits such a tax. Moreover, the literal meaning might apply to a tax imposed by Great Britain or France on goods imported from New York. And the semantic meaning of the term "article" could be understood in the narrow sense that applies to articles in scientific journals or newspapers, but not "articles of clothing" or toasters. In other words, the acontextual meaning of this clause is both incomplete and ambiguous. In order to grasp its full meaning (that is, its communicative content), we need to consider the contribution of context.

c. The Idea of Contextual Enrichment

The semantic content of Article I, Section 9, Clause 5 does not exhaust the content that it communicates: In context, the provision seems to provide a limit on the power of the United States Congress to tax goods (tangible things of value) that are exported from any of the constituent "State[s]" of the United States of America.[33] Of course, the correctness of this interpretation depends on a variety of facts, the ascertainment of which is beyond the scope of this Article. Whether "article"

[31] The discussion of this example borrows from Solum, supra note 14, at 487–88.

[32] U.S. Const. art. I, § 9, cl. 5.

[33] On the meaning of the clause as interpreted by the United States Supreme Court, see *Dooley v. United States*, 183 U.S. 151, 152–54, 157 (1901) (holding that the clause did not apply to an import tax applied by Puerto Rico to exports from the states by way of the port of New York since the clause only applied to articles exported to foreign countries).

meant "goods" in the late eighteenth century depends on the linguistic facts (patterns of usage) at that time. Whether the word "state" in the Constitution refers to the constituent "State[s]" of the United States of America depends on both the context provided by the Constitution as a whole[34] and the contextual facts about the circumstances in which it was written—prominently the role that the states played under the Articles of Confederation. But even if this particular interpretation of the clause were incorrect, the example illustrates the larger point—that context must play a role in the determination of communicative content, because semantic content alone is sparse.

The full communicative content of a constitutional provision is a product of the semantic content (the meaning of the words and phrases as combined by the rules of syntax and grammar) and the additional content provided by the relevant context of constitutional communication. In the philosophy of language and theoretical linguistics, the phrase "pragmatic enrichment" is sometimes used to refer to the contribution that context makes to meaning.[35] But in legal theory that phrase would be misleading because of the associations of "pragmatism" with legal pragmatism (a view that is related to but quite distinct from the philosophical tradition of American pragmatism).[36] Instead, we can use "contextual enrichment" to refer to the role of context in determining the full communicative content of the constitutional text. In the lingo of contemporary philosophy of law and linguistic theory, the full communicative content results from both the semantics and the pragmatics of the utterance.[37]

d. Forms of Contextual Enrichment

Intellectual history or "contextualist methodology" could be seen as a method for identifying the relevant context of constitutional communication. If this were the case, we would expect intellectual history to follow

[34] For a discussion of the context provided by the whole constitutional text, see Lawrence B. Solum, Originalism and the Unwritten Constitution, 2013 U. Ill. L. Rev. 1935, 1962–65.

[35] François Recanati, Pragmatic Enrichment, *in* The Routledge Companion to Philosophy of Language 67, 67 (Gillian Russell & Delia Graff Fara eds., 2012); Hrafn Asgeirsson, Textualism, Pragmatic Enrichment, and Objective Communicative Content 5 (Sept. 6, 2012) (unpublished manuscript, available at http://ssrn.com/abstract=2142266).

[36] See Solum, supra note 14, at 488; Solum, supra note 15, at 465 n.47.

[37] Robyn Carston, Linguistic Communication and the Semantics/Pragmatics Distinction, 165 Synthese 321, 323 (2008).

the philosophy of language and theoretical linguistics in identifying the distinctive ways in which context contributes to meaning. This is disputed territory and I do not mean to take a position regarding which account of contextual enrichment is best. Instead, we can simply identify four possibilities, without making any claims that this list is exhaustive or that these four forms of contextual enrichment have been categorized in the best way.[38]

i. Contextual Disambiguation

The first and most obvious way that context enriches semantic content is via contextual disambiguation. When the constitutional text includes ambiguous language, context may allow us to identify the intended or understood sense. In the example explicated above, "No Tax or Duty shall be laid on Articles exported from any State," the terms were disambiguated, with "Articles" meaning goods or "articles of trade" and "State" referring to any of the United States of America. Similarly, the word "Indian" in the Indian Commerce Clause might refer to trade with the Indian subcontinent located in South Asia or with Native Americans: In context, it is clear that the latter sense (and not the former) is that which was intended and understood.

ii. Implicature

A second and more subtle form of contextual enrichment is "implicature"—a term coined by Professor Paul Grice to identify a particular method by which a speaker or author can convey communicative content that is both richer than and different from the semantic content of an utterance or text.[39] Consider the classic example of a letter of recommendation, written by a law professor for a student applying for a prestigious judicial clerkship. The entire body of the letter reads as follows: "I recommend Ben. He was always on time to class and his attendance record

[38] For example, Professor Paul Grice seems to have used "implicature" to refer to what other theorists call "impliciture" or "presupposition." See Paul Grice, Studies in the Way of Words 24–26 (1989).

[39] See Wayne Davis, Implicature, Stan. Encyclopedia Phil., http://plato.stanford.edu/archives/fall2014/entries/implicature (last updated June 24, 2014). On the role of implicature in law, see Jeffrey Goldsworthy, Constitutional Cultures, Democracy, and Unwritten Principles, 2012 U. Ill. L. Rev. 683, 698; Andrei Marmor, Can the Law Imply More Than It Says? On Some Pragmatic Aspects of Strategic Speech, *in* Philosophical Foundations of Language in the Law 83, 85–87 (Andrei Marmor & Scott Soames eds., 2011).

was perfect." The semantic content of the letter consists of a speech act, recommendation, and two supporting statements regarding punctuality and regularity of attendance. But in the context in which the letter was written, much more than the literal meaning is communicated. If the best that can be said about Ben is that he was on time and did not miss class, the implicature is that Ben is not suitable for the position of judicial clerk.

Notice that if the context is changed, the implicature may disappear. If Ben has applied for a position as a night watchperson and the letter writer had been told that the primary qualification is punctuality and reliability, the negative implicature disappears. Likewise, we can add another few sentences to the letter that negate the implicature:

> I apologize that I cannot tell you more. This was a large class, and I anticipated being able to tell you about Ben's exam performance when I agreed to write, but I am late in finishing my grading. This is my fault, not Ben's. Unfortunately, I do not keep records of class comments, and I failed to hold office hours—so the exam is the only thing I have to go on.

The letter is no longer positive, but the negative implicature has been cancelled—even though the semantic content or literal meaning of the preceding text remains the same.

One final point about implicature: It is not the same as logical implication. The letter of recommendation about Ben does not logically entail the conclusion that he is unsuited for the position. If we want to be precise, we should distinguish the logical implications of the content of legal texts from their implicatures.

iii. Impliciture

We can use the word "implicature" to refer to a variety of communicative phenomena, but some philosophers of language differentiate "impliciture"[40] (spelled with an "i")—where what is said implicitly includes something else that is closely related. Professor Kent Bach gives the following examples, in which the impliciture (unstated) has been added in brackets:

> Jack and Jill are married [to each other].

[40] Kent Bach, Conversational Impliciture, 9 Mind & Language 124, 126 (1994).

> Bill insulted his boss and [as a result] got fired.
>
> Nina has had enough [pasta to eat].[41]

Thus, if someone says, "Jack and Jill are married," the "[to each other]" is unstated but implicit, and so forth for the other examples. Constitutional impliciture is common: Article I, Section 9 of the Constitution explicitly states, "No Bill of Attainder or ex post facto Law shall be passed,"[42] but "[by Congress]" is an impliciture.

iv. Presupposition

Presupposition (in the technical sense) is communicative content provided by an unstated assumption or background belief.[43] Again, examples are helpful:

> Utterance: "Cass is no longer the head of OIRA."
> Presupposition: "Cass was once the head of OIRA."
>
> Utterance: "Bruce should not eat meat."
> Presupposition: "Bruce does eat meat."
>
> Utterance: "Bill's wife is pregnant."
> Presupposition: "Bill has a wife."

Philosophers of language distinguish between "conversational presuppositions" (also called "speaker presuppositions" or "pragmatic presuppositions") and "conventional presuppositions" (or "semantic presuppositions") that are triggered by particular words or phrases (such as the phrase "no longer" in the first example above)—and there may be a third category, "utterance presuppositions."[44] For our purposes, we can put these technicalities to the side.

Legal texts may have a variety of presuppositions. For example, a legal text might presuppose the existence of some already-existing body of

[41] Kent Bach, Impliciture vs. Explicature: What's the Difference? 1 (June 2, 2006) (unpublished manuscript, available at http://userwww.sfsu.edu/kbach/Bach.ImplExpl.pdf).

[42] U.S. Const. art. I, § 9, cl. 3.

[43] See, e.g., Philippe Schlenker, *Be Articulate*: A Pragmatic Theory of Presupposition Projection, 34 Theoretical Linguistics 157, 160 (2008); Bas C. van Fraassen, Presupposition, Implication, and Self-Reference, 65 J. Phil. 136, 137 (1968); David I. Beaver & Bart Geurts, Presupposition, Stan. Encyclopedia Phil. 1, http://plato.stanford.edu/entries/presupposition (last updated Dec. 17, 2014).

[44] See Beaver & Geurts, supra note 43.

law. The phrase "the freedom of speech" in the First Amendment[45] might presuppose an existing set of legal rules—even though there could be many other legal regimes that would be consistent with the thin semantic content of the words in the text. The notion of "the executive power" in Article II[46] might presuppose common ground about the proper role of the executive—even though there are many other possible assignments of powers that would fit the thin semantic content of the phrase.

v. The Point of Enumerating the Forms of Contextual Enrichment

On this occasion, I am not attempting to provide or even sketch a theory of contextual enrichment—that is a very large task. Rather, the point of identifying contextual disambiguation, implicature, impliciture, and presupposition is to show that the relationship between context and meaning should not be understood as making an undifferentiated holistic contribution to meaning. Perhaps more importantly, acknowledging the contribution of context to communicative content does not entail the conclusion that we should understand the meaning of the constitutional text to be an organic whole that cannot be dissected and analyzed.[47] Context contributes to meaning in particular ways. If one claims that the meaning of a given clause is enriched by context, then one should be able to redeem that claim by (1) identifying the mechanism by which enrichment occurs; (2) specifying the contribution made by the enrichment; and (3) articulating the enriched communicative content (for example, by giving a paraphrase that makes the implicit content explicit).

2. Context and "Meaning" as Communicative Intention

Context could play another role, closely related to contextual enrichment. One theory of communicative content we can stipulate is to be called "intentionalism"—which is, very crudely, the view that the meaning of an utterance or text is a function of the communicative intentions of the speaker or author.

[45] U.S. Const. amend. I.

[46] Id. art. II, § 2, cl. 1.

[47] See Solum, supra note 34, at 1963–65 (presenting arguments against "organic-unity holism," the view that the meaning of the constitutional text is an undifferentiated whole and not based on the meaning of individual clauses and their relationships).

a. Contextual Evidence of Intentions

Assume that communicative intentions are mental states, and hence that they must be inferred from evidence about the literal meaning of the text and the author's beliefs and desires (using "desires" in a very broad sense). Authors live at particular times in particular places, and information about those particularities will be relevant to our attempts to determine the beliefs and desires that support inferences about communicative intentions.

We can restate the point made in the immediately prior paragraph in terms of context. The historical context in which a particular author lived will be relevant to our determination of the author's beliefs, desires, and hence communicative intentions. This should not be controversial.

b. Communicative Intentions and the Reflexivity of Speaker's Meaning

What are the relevant communicative intentions? Folk theories (or naïve theories) of meaning suggest the following picture: The author of a text has an "idea" (mental state) that the author then "encodes" using the graphemes of a natural language (in English, the letters of the Roman alphabet).[48] This could be called a form of "intentionalism," in that the relevant mental states are intentional.

But the encoding-decoding theory has big problems. One of these problems is that the theory seems to allow for meanings that are wildly different from what was said. In the context of constitutional law, this is the problem of so-called "secret intentions."[49] Suppose, for example, that I were to tell you that when I wrote this Article, I actually intended the whole essay to communicate the following and only the following: "The New Pornographers are a great band, but not as good as Vampire Weekend." Actually, for the hypothetical to work, suppose that the article that I wrote was identical to this one—except that it did not include this paragraph and the two following paragraphs. Of course, you might think I

[48] This view has an affinity to John Locke's view of meaning. See Charles Landesman, Locke's Theory of Meaning, 14 J. Hist. Phil. 23, 23–24 (1976).

[49] See, e.g., Barnett, supra note 10, at 633; Jeffrey Goldsworthy, Clarifying, Creating, and Changing Meaning in Constitutional Interpretation: A Comment on András Jakab, "Constitutional Reasoning in Constitutional Courts—A European Perspective," 14 German L.J. 1279, 1289 (2013); David B. Kopel & Christopher C. Little, Communitarians, Neorepublicans, and Guns: Assessing the Case for Firearms Prohibition, 56 Md. L. Rev. 438, 522 n.440 (1997).

was loony, but if the encoding-decoding theory were true, then that would be the meaning of the article. We can imagine someone coming across a diary entry in which I said exactly that. But surely something is wrong here—any theory that would have to bite the bullet that this article is only an assertion about the New Pornographers and Vampire Weekend is seriously wrong in some way.

Sophisticated intentionalism does not have this problem. Consider, for example, Grice's theory. The speaker's meaning of an utterance is the meaning that the speaker intended the audience to grasp via the audience's recognition of the speaker's communicative intentions.[50] Grice's formulation describes a reflexive relationship: Successful communication requires that the audience grasp the speaker's communicative intention, which itself is formulated in a way that takes this very recognition into account.

This means that intentions that the speaker knows the audience cannot recognize cannot be the speaker's meaning of an utterance. Imagine that as I write this Article, I am thinking, "This Article's true and totally secret meaning is, 'The New Pornographers are a great band, but not as good as Vampire Weekend.'" (Again, with the caveat that this paragraph and the prior two paragraphs are not included.) This thought cannot be the relevant communicative intention, because a totally secret meaning cannot be a meaning that I would intend the readers of this Article to grasp on the basis of their recognition of my communicative intention. Of course, if I had arranged a code in advance with one of my readers, then I could have relevant intention, but in the hypothetical there is no such prearranged code. I could not coherently form the intention to communicate the proposition, "The New Pornographers are a great band, but not as good as Vampire Weekend," through audiences' recognition of my communicative intent in this Article (minus these three paragraphs), because I could not believe that anyone in the audience would recognize this as my communicative intention—unless I were batshit crazy.[51]

[50] See Grice, supra note 38, at 25–26.

[51] On the meaning of "batshit crazy," see Batshit Crazy, Urban Dictionary, http://www.urbandictionary.com/define.php?term=batshit+crazy (last visited Jan. 22, 2015).

c. The Role of Public Meaning in the Context of Legal Communication

The Gricean picture entails that the intended audience for a text is relevant to the shape that the author's communicative intention can take. The Constitution of 1789 had a secret drafting history, at least until James Madison's notes were published.[52] Suppose (counterfactually) that a member of the Philadelphia Constitutional Convention had stipulated a definition for a key phrase in the constitutional text:

> Gouverneur Morris: "By using the word 'enumerated,' we mean that the powers in Article I, Section Eight are actually not enumerated in the ordinary sense. Instead, we mean that these powers are 'illustrative' examples of unlimited legislative powers."
>
> James Madison: "But that is not the ordinary signification of these words."
>
> Gouverneur Morris: "True, but that is the meaning that will be best for the country."
>
> James Madison: "If that were our goal, then we should say what we mean, for only those present today would know that we intended to use the language in your peculiar way. Furthermore, I doubt your conclusion that it would be best for the country."
>
> Gouverneur Morris: "Concededly our intention will not be known, but if we were to say it plainly, then the acceptance by the country would be in doubt."
>
> James Madison: "But if we were to follow your suggestion, then the plain meaning of the Constitution will be contrary to your intention. This seems an unhappy result."

This imaginary dialogue illustrates an important point about legal communication. Some legal texts, like the U.S. Constitution and perhaps some statutes, are directed to the public at large. For texts like this, the author's communicative intentions must be formulated in terms of the meaning the author intends the public to grasp based on public recognition of the author's communicative intentions. In this situation, the notion of "public meaning" is built into the relevant communicative intentions.

[52] Vasan Kesavan & Michael Stokes Paulsen, The Interpretive Force of the Constitution's Secret Drafting History, 91 Geo. L.J. 1113, 1115 (2003).

This last point is quite important, because it shows that what is sometimes called "public meaning originalism" is actually consistent with and a consequence of what is called "original intentions originalism"—except in the rare case where the author is crazy or for some other reason is radically mistaken about the linguistic beliefs and competences of the intended audience. This becomes apparent once we see that the relevant intentions are communicative intentions directed to the public.[53] The Framers' meaning of the constitutional text is the meaning the Framers intended the public to grasp on the basis of the public's recognition of the Framers' communicative intentions: That meaning is necessarily public meaning.[54] For this reason, the structure of communicative intentions (the object of original intentions originalism) necessarily focuses on public meaning (the object of public meaning originalism) as the means by which communication occurs.

d. The Evidentiary Role of Private Intentions

This is not to say that private beliefs and intentions are completely irrelevant. They can play an evidentiary role. Thus, speeches made at the Philadelphia Constitutional Convention may be evidence of what the participants thought the public meaning was. And a diary entry, never read by anyone other than the author (and a modern historian) might also serve as evidence of the relevant communicative intentions.

But once we understand the relevant structure of communicative intentions, it becomes clear that the evidentiary role of private beliefs, purposes, motives, and other intentional mental states is limited. The evidence must be shown to support an inference that the author of the text had a communicative intention of the relevant kind—one that takes the situation of constitutional communication into account and hence an intention to communicate public meaning.

[53] Of course, it is possible that constitutional communication will misfire: For example, the Framers might be mistaken about the conventional semantic meaning of a word or clause, or they could have false beliefs about what context is shared with the public.

[54] This reconciliation may not be complete. Where the Framers' communicative intentions are based on false beliefs about public meaning, the meaning understood by the public may not match the meaning the speaker intended the public to grasp.

e. Private Purposes, Motives, and Expectations Are Not Communicative Content

It may be helpful to sum up. The encoding-decoding theory does not provide a plausible account of communicative content. Something like Grice's account provides an adequate theory, but that theory has implications for the role that context can play in providing evidence of the relevant communicative intentions. Given the situation of constitutional communication (the audience is the public), the relevant intentions must be to convey public meaning. As a consequence, private purposes, motives, and expectations (private intentions) do not provide the communicative content of the constitutional text.

3. Context and "Meaning" as Purpose, Motive, or Expectation

Context could also play a role in determining the purpose for which a given constitutional provision was adopted. We need not tarry long on this possibility. We might be interested in purpose for a variety of reasons. Purposes may provide evidence relevant to the determination of public meaning in a variety of ways: This role for context has already been examined. Context might also be relevant to constitutional construct: When the constitutional text is underdeterminate, purpose might be used to guide the development of constitutional doctrine in the construction zone.

But some might think that purpose could play a constitutive role: that the purpose for which a provision is adopted is the "meaning" of the provision. Because of the ambiguity of the word "meaning," there is nothing deeply wrong with saying something like "'meaning' in one of its senses is synonymous with 'purpose.'" Whether the word "meaning" has this sense depends on whether the word is sometimes used in this way. But it would be a conceptual mistake to take the further step of asserting that the purpose for which a provision was written is the communicative content of the provision. Indeed, that position is almost nonsensical. We communicate content for purposes, but by saying that, we presuppose that the purpose and the content are two different things.

This point about the implausible view of communicative content can be generalized to other mental states for which context provides evidence. We can have expectations about the effect of a constitutional provision and those expectations can be evidence of the communicative content, but the expectations are not identical to the content. The same

goes for motives and a variety of other mental states that could be about the communicative content of the constitutional text.

4. Context and "Meaning" as Understanding

Consider one final variant about the relationship of context to meaning. One might argue that context is relevant to "meaning" in a very broad sense, which may be captured by the word "understanding." One can imagine an argument that goes something like this:

> Textualists and originalists are interested in the communicative content of the text, but that is "meaning" in a very narrow sense. The methods of intellectual history are relevant to "meaning" in the broader sense of understanding. Our understanding of the Constitution will be richer and deeper if we know about the broad context in which the Constitution was adopted and put into action. This kind of "meaning" illuminates the text; it helps us to understand that many different contradictory purposes were held by different actors when they supported or opposed the adoption of the Constitution, and it enables us to better understand the causal processes by which we came to have the constitutional text.

And of course, this may be correct, but "meaning as understanding" in this sense does not obviously lead to any particular theory of constitutional practice. Illumination is surely a good thing, but without some connection to the interpretation and construction of the constitutional text, its relevance to constitutional decision-making is unclear at best.

5. Context in Construction

Finally, context might be relevant to constitutional construction in any one of a variety of ways. For example, it might be the case that the best constitutional theory sanctions rules of constitutional law that are not derived from the constitutional text—but rather from an "unwritten constitution" that supplements the written text.[55] The intellectual context of the Founding era might help us to identify these principles, and hence play a role in constitutional construction. But this role for context does not compete directly with a theory of interpretation that aims to recover

[55] See Solum, supra note 34, at 1950–53.

communicative content—unless the background principles are presuppositions in the sense discussed above.[56]

B. The Methods of Intellectual History

Now that we have investigated the possible roles of context in constitutional interpretation, we can turn to a direct examination of the contextualist methodology of intellectual history. Of course, a comprehensive survey of the methods of intellectual history is far outside the scope of this Article. On this occasion, we use Cornell's investigation of intellectual history as an alternative to originalism as a tentative and provisional guide to the methods of intellectual history.[57] Cornell does not clearly identify the content of the method, but he does provide citations to other writers, who he asserts do provide the relevant method.[58] Our investigation of "contextualist methodology" can begin with these figures, and then we can examine Cornell's own remarks in more detail.

1. James Kloppenberg

Cornell writes, "Although there is considerable methodological eclecticism among intellectual historians working in American universities, the field of American intellectual history has coalesced around a common set of interpretive practices."[59] This passage concludes with a footnote,[60] which then cites James Kloppenberg's article, *Thinking Historically: A Manifesto of Pragmatic Hermeneutics*,[61] and Professor William Fisher's *Texts and Contexts: The Application to American Legal History of the Methodologies of Intellectual History*.[62]

Before we proceed to Kloppenberg, a word about Fisher. The citation to Fisher is preceded by a "cf." signal, and the parenthetical reads, "concluding that the field lacked a common method."[63] Pace Cornell, Fisher denies that there is a common set of interpretative practices. So the

[56] See supra Subsection II.A.1.d.iv.
[57] Cornell, supra note 3, at 723.
[58] Id.
[59] See id.
[60] Id. at 723 n.9.
[61] See James T. Kloppenberg, Thinking Historically: A Manifesto of Pragmatic Hermeneutics, 9 Mod. Intell. Hist. 201 (2012).
[62] William W. Fisher III, Texts and Contexts: The Application to American Legal History of the Methodologies of Intellectual History, 49 Stan. L. Rev. 1065 (1997).
[63] Cornell, supra note 3, at 723 n.9.

"common set of interpretive practices" must be found in Kloppenberg, not Fisher.

At this point, it is difficult to know how to proceed, because the Kloppenberg article does not provide a systematic presentation of a common set of interpretive practices. It does provide an overview of the field of intellectual history, which identifies a variety of approaches used by intellectual historians and topics addressed by intellectual history. It most certainly does not provide a theory of communicative content or a set of methods that could be employed by intellectual historians to recover the communicative intentions of the authors of legal texts.

I do not mean to suggest that Kloppenberg has nothing to say about method; he says many things. Kloppenberg uses the phrase "pragmatic hermeneutics" to describe the method of intellectual history—although he is never clear about what differentiates "pragmatic hermeneutics" from other approaches to history or interpretation.[64]

What is "pragmatic hermeneutics"? The use of the term "hermeneutics" is clear enough, since "hermeneutics" conventionally refers to interpretation. But what is added by the term "pragmatic"? Kloppenberg does not seem to be using "pragmatic" in the sense of the pragmatics-semantics distinction: There is nothing in the article that suggests any connection to the way that phrase is used in the philosophy of language. The phrase "pragmatic hermeneutics" is sometimes used to refer to hermeneutics connected to the tradition of American philosophical pragmatism (C.S. Pierce, John Dewey, William James) but it is difficult to see any connection between Kloppenberg's use of the phrase and any particular view associated with the American philosophical pragmatists,[65] although Kloppenberg does mention the American pragmatist John Dewey in his article.[66] Wilhelm Dilthey used the phrase "pragmatic hermeneutics" to refer to naïve interpretation which he contrasted with methodical hermeneutics or historical understanding,[67] but this is almost certainly not the way that Kloppenberg employs the phrase. Surely,

[64] See Kloppenberg, supra note 61, at 201.

[65] See Anthony C. Thiselton, New Horizons in Hermeneutics: The Theory and Practice of Transforming Biblical Reading 10–12 (1992); Dmitri N. Shalin, Signing in the Flesh: Notes on Pragmatist Hermeneutics, 25 Soc. Theory 193, 197 (2007).

[66] See Kloppenberg, supra note 61, at 215.

[67] F.P.A. Demeterio III, The Romanticist Hermeneutics of Schleiermacher and Dilthey, F.P.A. Demeterio's Phil. & Cultural Theory Page (June 2001), https://sites.google.com/site/feorillodemeterio/romanticisthermeneutics.

Kloppenberg does not mean to say that the method of intellectual history is not historical or methodical.

However, Kloppenberg may have had Dilthey in mind, because he cites Dilthey as a practitioner of "pragmatic hermeneutics."[68] The relevant passage reads:

> Intellectual historians have been studying a widening range of texts through increasingly diverse techniques since the 1960s, but in practice most of them have deployed the method of pragmatic hermeneutics. That method originated in the late nineteenth- and early twentieth-century writings of Europeans such as Wilhelm Dilthey, Max Weber, and Jean Jaurès, and Americans such as James Harvey Robinson, Charles Beard and Mary Beard, and Carl Becker. Yoking archival research to their understanding that history is written in the present and for the present, these writers shared a commitment to producing history that, no matter how precisely it follows the evidence, inevitably reflects the concerns of the moment. They aimed to reconstruct the past with as much accuracy as possible and to address the needs and aspirations of their contemporary cultures as they understood them. Twenty-first-century inheritors of their legacy will extend both of those commitments by embracing past scholarly practices and incorporating new insights and technologies into historical writing.[69]

This passage suggests that the word "pragmatic" may simply mean "useful" or "useful to the interpreter." That is, "pragmatic hermeneutics" may simply be interpretation of historical texts in a useful way from the point of view of the historian situated in the present. If so, then this is not a description of a method, but rather an abstract description of the goal of intellectual history.

Kloppenberg does describe pragmatic hermeneutics in terms that suggest that context plays a key role. Here is the passage in which this is expressed most clearly:

> Just as pragmatic hermeneutics uses the figure of hermeneutic circles to express the dynamic movement of the restless historian, so a series of concentric circles helps explain the diverse objects of analysis in intellectual history. Place a particular text at the center, and arrange around it an ever-widening set of circles that trace the contexts sur-

[68] Kloppenberg, supra note 61, at 201.
[69] Id.

> rounding any text, whether it is a published work of philosophy or political theory, a diary entry or an anonymous pamphlet, an advertisement or a material object, such as a quilt or a sofa, in which numerous cultural currents collide.[70]

This passage does come close to suggesting at least part of a contextualist methodology. We would begin with the constitutional text, and then consider context, beginning with the immediate context of framing and ratification, then proceeding to the larger context including (perhaps) the intellectual background of the Framers (for example, Locke, the Scottish Enlightenment, and so forth) and the political context (for example, difficulties with the Articles of Confederation, disagreements about slavery, and so forth). Notably, Kloppenberg does not tell us how context is to be used, but, as we have seen, there are many possibilities: context as contextual enrichment of communicative content, context as a source of inferences about communicative intentions, context as a source of purposes and expectations, and context as the basis for holistic understanding. Without a precise account of the way context is to be used, it simply is not clear how the contextualist methodology of intellectual history can provide a method for the interpretation of the constitutional text.

Kloppenberg provides another methodological principle (roughly, the injunction to consider the author) in the following passage:

> Every text must be studied in relation to its author or authors, particular persons existing in a particular time and place, and interpreted as the embodiment of a particular set of practices and purposes. Ideas, as Vico and Spinoza argued and as intellectual historians understand them in the twenty-first century, never exist in the abstract. Even if we want to examine texts in relation to other texts, either earlier, contemporaneous, or later, we must acknowledge that every text came into being through a specific historical process and emerged and survived as a result of the actions of one or more individuals.[71]

But what does it mean to study a text "in relation to its author"? The following passage suggests that Kloppenberg may have authorial intent in mind:

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[70] Id. at 202.
[71] Id.

> Ever since Quentin Skinner's path-breaking methodological essays of the 1960s, identifying authorial intent has been among the aims of almost everyone interested in the historical study of ideas; detailed knowledge of the author's life and discursive communities is prerequisite to identifying what she meant to do in a particular text.[72]

We will take up Skinner in detail below.[73] At this stage, it is important that we clarify an ambiguity in Kloppenberg's formulation. It is clear that Kloppenberg believes that authorial intention is relevant to interpretation, but it is not clear precisely what kind of intention or what the intention will show once it has been identified. If Kloppenberg is referring to communicative intentions, then his position is simply a form of intentionalism, reflected in constitutional theory in original-intentions originalism. But he may mean a different sort of intention, reflected in the use of the word "do" in the final sentence of the passage quoted immediately above. What authors "do" in a text could be the creation of communicative content, but it could also refer to the purposes or goals they seek to accomplish by creating the communicative content.

In the following passage, Kloppenberg elaborates on his understanding of Skinner and the Cambridge School in a way that points back to context:

> Scholars associated with the Cambridge [S]chool have shown the value of piecing together the discursive communities within which the canonical texts of political theory first appeared. Unless we know what problems individual authors meant to solve, and the conversations in which they took part, we cannot grasp the historical meaning of individual texts.[74]

This phrase "historical meaning" is suggestive but unclear. If Kloppenberg means to assert that one must have comprehensive or even substantial knowledge of the particular motivations and individual background of the author in order to grasp the communicative content of a writing, then his assertion is simply false.[75] We know this because we

[72] Id. at 203 (footnote omitted).

[73] See infra Subsection II.B.3.

[74] Kloppenberg, supra note 61, at 204.

[75] Similar points can be made about Kloppenberg's discussion of individual emotions. See id. at 205 ("Inasmuch as the textual evidence will allow access to writers' and readers' emotional lives, the study of the passions—even if no longer likely to be filtered through Freudian lenses—will remain a dimension of intellectual history worth scholars' attention.").

are able to understand total strangers in ordinary conversation—despite our lack of access to thick information about their motives or background. When you encounter a stranger who shares competence with you in a natural language (English), then usually you can communicate about a wide variety of topics with very thin information about the stranger. Of course, deeper knowledge may facilitate communication, and with someone who you know intimately, an elliptical remark and gesture may convey rich communicative content. With strangers, we need to rely on widely shared conventional semantic meanings and the kind of contextual information that strangers are likely to possess.

So Kloppenberg should not be interpreted as making the implausible claim that extensive knowledge of motivations and individual background is required to determine communicative content. The more plausible interpretation of his remarks is that "historical meaning" is something other than communicative content. Perhaps the historical meaning of an event is meaning in the sense of holistic understanding or illumination or something else.

Yet another possibility is that Kloppenberg is referring to readers' reception of texts when he uses the phrase "historical meaning" as in the following passage:

> The meanings of historical texts, even when those meanings are specifically restricted to particular times and discursive communities, remain problematical. The distinction I am drawing between embodiment and embeddedness should thus be understood as a heuristic device, the first calling attention to the physical bodies of individuals, the second to the multiple forms of embeddedness that interest historians who examine ideas. Studies of reception, reader response, and the multiple meanings of complex texts have shown that identifying the precise historical meanings of texts is very hard work. The history of the book, originating in France and quickly imported to America, has enriched and complicated intellectual historians' understanding of the role of ideas in history. Controversies over the relative significance of familiar Enlightenment authors and the clandestine literature of mid-eighteenth-century France have illuminated the difficulty of pinning down the precise meanings readers took from the materials they read.[76]

[76] Id. at 205 (footnote omitted).

Again, this passage is ambiguous. When Kloppenberg refers to the "multiple meanings of complex" texts, he could be referring to any one of a number of quite distinct but related phenomena. First, he might be pointing to semantic ambiguity—the possibility that some portion of text has more than one sense. Semantic ambiguity might be intentional—as when an author intends two distinct audiences to grasp different messages—or unintentional as is the case when an author is unaware of an alternative sense of a word or phrase and then uses the word or phrase in a way in which the context does not allow the reader to disambiguate.

Second, Kloppenberg might be referring to the well-known phenomenon of misunderstanding. Particularly with highly complex texts that employ obscure modes of expression, it is possible that the reader will make interpretive mistakes, with different readers committing different errors and some readers correctly discerning the intended communicative content. Such misunderstandings may be historically significant for any one of a variety of reasons, and hence might be referred to as "historical meanings."

Third, Kloppenberg may not be referring to communicative content at all, but may instead be referring to the varying uses to which ideas can be put. Even if the communicative content of a text is clear, different readers may see different implications. This is particularly true in the case of a philosophical text (for example, Locke's *Second Treatise of Government*: One reader may use Locke's contractarian framework to argue for a libertarian conception of the state, but another, emphasizing the Lockean Proviso (enough and as good for others) may believe that Locke's ideas support an egalitarian regime). These different uses of Locke might be called "historical meanings" but they are not the kind of meaning at which legal interpretation (in the narrow sense) aims.

Another "method" found in Kloppenberg is that of the "new social history" which focuses on disadvantaged groups.[77] For present purposes,

[77] See id. at 208 ("The new social history changed intellectual history forever. No longer could historians blithely characterize ideas or experiences as 'American.' In the wake of detailed studies devoted to specific towns and communities and particular groups of women and men with distinct ethnoracial and class identities, generalizations would now be hard-won. Despite their champions' crusading spirit, as Ellen Fitzpatrick has shown in *History's Memory* (2002), such studies marked a return to American historians' practices at the turn of the twentieth century rather than an innovation. But history from the bottom up brought a shift in focus away from elites of all sorts—economic, political, social, and intellectual—and the commitment to studying ordinary people assumed an ideological as well as a methodological character.").

the important point is that this is clearly not a method for discerning the communicative content; rather, the new social history would shift the focus on inquiry away from the meaning of the constitutional text. Such a shift may have many forms of payoff, but communicative content of the U.S. Constitution does not seem likely to be one of them.

In sum, our aim was to investigate Kloppenberg's work in order to find "a common set of interpretive practices," but a close examination of what Kloppenberg actually says does not yield the promised set. Kloppenberg has many interesting things to say, but he does not identify a methodology for determining the communicative content of the constitutional text, much less show that such a methodology is the common method of intellectual historians.

2. David Hollinger

Cornell introduces Hollinger as follows: "In the case of anonymous authors and collective authorship, most intellectual historians would follow David Hollinger's model of rooting texts within particular discursive communities,"[78] citing Hollinger's monograph *In the American Province: Studies in the History and Historiography of Ideas*.[79] Cornell does not explain the model. His citation is to the entirety of Hollinger's monograph, but only one chapter focuses in an explicit way on discursive communities.[80] The chapter, entitled "Historians and the Discourse of Intellectuals," has many interesting things to say about discourse and its relationship to intellectual history.[81]

One way to get a sense of Hollinger's approach is to quote an early passage in which the notion of a community of discourse makes an appearance: "Much of the scholarly work that goes by the name of 'intellectual history' consists of efforts to study the discourse of communities of intellectuals."[82] The notion of a discursive community is dependent on Hollinger's notion of discourse, which he explicates in the following extended passage:

> By identifying "discourse" as a basic subject matter of inquiry I intend several implications. Discourse is a social as well as an intellec-

[78] Cornell, supra note 3, at 725 & n.17.
[79] Hollinger, supra note 7.
[80] Id. at 130.
[81] Id. at 130–51.
[82] Id. at 131.

> tual activity; it entails interaction between minds, and it revolves around something possessed in common. Participants in any given discourse are bound to share certain values, beliefs, perceptions, and concepts—"ideas," as these potentially distinctive mental phenomena are called for short—but the most concrete and functional elements shared, surely, are *questions*. Even when one grants that the choice of questions on the part of contributors to a discourse is in itself an act of evaluation, and when one grants further that conflicting "answers" offered to these questions will be structured partly by the ethical, aesthetic, and cognitive agreements among the participants, it remains true that questions are at the active heart of discourse. Questions are the points of contact between minds, where agreements are consolidated and where differences are acknowledged and dealt with; questions are the dynamisms whereby membership in a community is established, renewed, and sometimes terminated.[83]

The passage continues, but the portion quoted above is sufficient, I hope, to give the reader a sense for Hollinger's set of methodological principles. We identify a community of discourse in terms of a common set of questions, and these questions allow us to understand the beliefs, values, and ideas that are shared or contested within the community.

I have no doubt that Hollinger's approach produces interesting results in the discipline of intellectual history. Nor do I doubt that work done using this method could shed interesting light on constitutional practice. What questions did the discursive communities that constituted the Philadelphia Constitutional Convention or the various state ratifying conventions and the overlapping intellectual communities that participated in debates over ratification ask? The identification of such questions is likely to be a fruitful source of context, which in turn may be used in determining the communicative content of the constitutional text. But it is apparent that this approach does not constitute a method that is sufficient to identify the communicative content of the constitutional text. Identifying questions does not yield the conventional semantic meanings of the words and phrases. Identifying questions is not a method for identifying particular forms of contextual enrichment (disambiguation, implicature, impliciture, or presupposition). Indeed, we will need to understand the communicative content of discourse *in order to* identify the questions that discursive communities share.

[83] Id. at 132.

This last point is important. Hollinger's method presupposes that the intellectual historian already understands the communicative content of the various writings from a discursive community—at least on a provisional basis. This strongly suggests that Hollinger's method is not aimed at recovering communicative content per se, but rather is targeted at something else—perhaps the motives for, the purposes of, or the uses to which the communications are put.

Moreover, the method of focusing on discursive communities, if applied in a wooden fashion, would be a recipe for misunderstanding the communicative content of the constitutional text. Originalists seek the public meaning of the constitutional texts; textualists seek the plain meaning of statutory texts. Public meanings are not necessarily the same as the meanings that exist for particular discursive communities. Of course, the practices of particular discursive communities may shed light on public meaning. And the public at large may consist of many overlapping discursive communities. But it would simply be a mistake to identify the public meaning of the constitutional text with the way in which the text related to the questions of a particular discursive community. In other words, public meaning is not the same thing as meaning for a particular discursive community.

Finally, recall Cornell's assertion: "In the case of anonymous authors and collective authorship, most intellectual historians would follow David Hollinger's model of rooting texts within particular discursive communities."[84] I was unable to find any reference in Hollinger's writing to methods for determining the meaning of anonymous authors and collective authors. If readers know of passages that I have missed, I would be most grateful for instruction.

Cornell glosses Hollinger's approach in the following passage, which provides the context for the sentence quoted at the beginning of this Subsection:

> In the case of anonymous authors and collective authorship, most intellectual historians would follow David Hollinger's model of rooting texts within particular discursive communities. It is easy to see how this new model of intellectual history differs from the classic approach to the history of ideas found in the pioneering studies of scholars such as Perry Miller. In his pathbreaking study, *The New England Mind*, Miller wove together different Puritan texts to create a single Puritan

[84] Cornell, supra note 3, at 725 (footnote omitted).

> mind. His emphasis lay on systematic thought, such as Ramist logic and the "Augustinan strain of piety." Although more recent studies of Puritanism have not abandoned theology, the field has adapted the insights of cultural history, bringing a fresh perspective to one of the most studied fields in American history. David Hall's work is representative of the recent trends in contemporary intellectual history. His analysis of the Puritan diarist Samuel Sewall devotes as much attention to the way Puritans in New England experienced darkness as it does to the traditional questions that vexed Miller, issues such as covenant theology.[85]

Perhaps there is an obvious connection between David Hall's exploration of the way New England Puritan's experienced darkness[86] and the difficult problems associated with the interpretation of works created by collective authors, but this reader is unable to discern it. Perhaps the talk of cultural history is meant to convey the role of context in determining meaning, but perhaps not. In any event, Cornell makes no effort to show how Hollinger's method or Hall's work provides a contextualist method for determining the communicative content of the constitutional text.

3. Quentin Skinner

Cornell's essay also suggests that intellectual history is informed by the work of Quentin Skinner and the Cambridge School. Cornell describes Skinner's approach in the following passage:

> The current model of intellectual history, what Kloppenberg calls pragmatic hermeneutics, also acknowledges an important debt to the work of the Cambridge School's approach to the history of political thought. The leading theoretician associated with the Cambridge School, Quentin Skinner, published a number of influential essays using modern language philosophy to ground the contextualist method of intellectual history. In an early essay elaborating his approach to interpreting historical texts, Skinner concisely states one of his most important theoretical claims about contextualist historical method: to understand a historical text one must first define the range of possible meanings an utterance might have had at a given historical moment.

[85] Id. at 725–26 (footnotes omitted).

[86] David D. Hall, A Reforming People: Puritanism and the Transformation of Public Life in New England (2011).

> The first rule of any truly historicist method, he asserts, is that: "[N]o agent can eventually be said to have meant or done something which he could never be brought to accept as a correct description of what he had meant or done." This rule might be dubbed the injunction against anachronism. In the view of philosopher Richard Rorty, this aspect of Skinner's method is central to any effort to understand the meaning of historical texts, including texts in the history of philosophy. The second rule states, "The success of any act of communication necessarily depends on . . . a whole complex of conventions, social as well as linguistic." Skinner's point is not that meaning is objective, but rather that it is public and hence intersubjective. Moreover, the public and intersubjective nature of language enjoins historians to recognize that the meaning of a text is determined by a range of contextual factors, some linguistic and others social.[87]

This package requires unpacking, but the first thing to note is that it does not actually describe Skinner's theory of the meaning of historical texts—more on that later. Instead, Cornell identifies two of the component ideas in that theory.

Consider first the injunction against anachronism. Surely, originalists will embrace the idea that the meaning of the constitutional text is the meaning that the text had at the time the text was adopted. This notion has been theorized as the Fixation Thesis, and it is one of the two central claims that unite contemporary originalists.[88] But the injunction against anachronism merely identifies the target of a theory of interpretation: The target is the meaning that the text communicated at the time it was written. But identification of the target does not provide a method for hitting the bull's-eye.

Consider second the notion that successful communication relies on conventions, both linguistic and social. Again, this observation about meaning is an accepted part of originalist methodology. Linguistic conventions determine the conventional semantic meanings of individual words and phrases and the syntax that govern their relationships. Likewise, the contribution that context makes to communicative content is embraced by public-meaning originalism. Indeed, when Cornell ob-

[87] Cornell, supra note 3, at 728–29 (alteration in original) (footnotes omitted) (quoting Skinner, supra note 8).

[88] See Bennett & Solum, supra note 10, at 2, 4.

serves that meaning is public, he seems to be endorsing the central notion of public-meaning originalism.

Cornell's presentation of Skinner is incomplete. Skinner's most important statement of his theory is found in his *Meaning and Understanding in the History of Ideas*,[89] viewed by many as an important and perhaps canonical text within the subfield of intellectual history.[90]

To the extent that Cornell believes that Skinner's work grounds the correct approach for determining the communicative content of legal texts, the conceptual foundations of his claim would be shaky. Skinner's article aims at producing a theory of the meaning of historical texts based on ideas from the philosophy of language. So far as I can tell there are two inconsistent strands of thought in Skinner's account of historical meaning, which we might call the *Wittgensteinian strand*[91] and the *Gricean strand*. The two strands yield inconsistent theories of meaning, and neither strand does the work that some followers of Skinner seem to assume.

The Wittgensteinian strand in Skinner's article is transparent in the following passage: "The appropriate, and famous, formula—famous to philosophers, at least—is rather that we should study not the meanings of the words, but their use."[92] The famous formula is then attributed in a footnote to Ludwig Wittgenstein.[93] It is true that Wittgenstein is associated with the notion that meaning is use, or as he put it, "Words are deeds."[94] The idea is that the meaning of an expression is the use to which it is put. Wittgenstein was onto something, but it was not a theory of communicative content. Words are used to accomplish deeds, but the deeds are not the meaning of the words in the relevant sense of meaning. We can extend Wittgenstein's observation about words to texts. Put crudely, texts can be used to accomplish deeds. Locke's *Second Treatise* could be part of Lord Shaftesbury's political program. Thomas Hobbes's

[89] Skinner, supra note 8.

[90] Cf. Paul Brest, The Misconceived Quest for the Original Understanding, *in* Interpreting the Constitution: The Debate over Original Intent 227, 238–39 (Jack N. Rakove ed., 1990) (expressing the difficulties in interpreting text written in a different context than present day realities); Mark A. Graber, Foreword: Making Sense of an Eighteenth-Century Constitution in a Twenty-First-Century World, 67 Md. L. Rev. 1, 1 (2007) (noting that context regarding the author is essential to studying a text).

[91] Skinner, supra note 89, at 37 & n.154.

[92] Id. at 37.

[93] Id. at 37 n.154.

[94] Ludwig Wittgenstein, Culture and Value 46, 46e (G.H. von Wright ed., Peter Winch trans., 1980) ("Worte sind Taten.").

Leviathan could be restoration ideology. John Rawls's *A Theory of Justice* could be an apology for the Great Society. There is nothing wrong with calling the political purposes of these historical texts their "meaning," so long as we are clear that this is not their meaning in the sense of communicative content.

When Skinner says, "we should study not the meanings for the words, but their use,"[95] he may have sound practical advice for historians of ideas whose practical interest is not the content of the *Second Treatise*, *Leviathan*, or *A Theory of Justice*, but the connection of these texts to other historical events. But this would not be sound advice to anyone who is seeking the communicative content of the texts. Were they to follow Skinner's advice, they would be "put off the scent" of communicative content—they would be chasing after something very different, such as purposes or motives.

What I call the *Gricean strand* is illustrated in the following two passages from Skinner:

> The understanding of texts, I have sought to insist, presupposes the grasp both of what they were intended to mean, and how this meaning was intended to be taken. It follows from this that to understand a text must be to understand both the intention to be understood, and the intention that this intention should be understood, which the text itself as an intended act of communication must at least have embodied.[96]

And the second passage:

> The essential question . . . in studying any given text, is what its author, in writing at the time he did write for the audience he intended to address, could in practice have been intending to communicate by the utterance of this given utterance. It follows that the essential aim, in any attempt to understand the utterances themselves, must be to recover this complex intention on the part of the author.[97]

There are no footnotes to these passages. In prior passages, Skinner relies heavily on J.L. Austin's account of illocutionary acts, but the parallelism between Skinner's theory of text's meaning and Grice's theory of speaker's meaning is unmistakable. And in a recent interview, Skinner said, "I should add that, rightly or wrongly, I similarly regarded Paul

[95] Skinner, supra note 89, at 37.
[96] Id. at 48.
[97] Id. at 48–49.

Grice's theory of meaning as an appendix to Austin, treating Grice's analysis of communicative intentions as a further analysis, in effect, of Austin's pivotal notion of an illocutionary act."[98] Skinner's misunderstandings of Austin are well known.[99]

Skinner was deeply confused about the implications of Wittgenstein and Grice for the meaning of historical texts. The Wittgensteinian strand of his account of textual meaning is inconsistent (if viewed as a theory of communicative content) with the Gricean strand: The notion that meaning is use is not equivalent to the idea that speech acts have illocutionary content. This conclusion is apparent from Skinner's own arguments. Skinner's very crude paraphrase of Grice on speaker's meaning does not support the claim that the meaning of a text is its use; instead it leads to the very different and inconsistent claim that the meaning of a text is the meaning that the author intended the audience to grasp based on the audience's recognition of the speaker's intention—a view that has already been examined in this Article. In other words, Skinner's Gricean strand is predicated on the same theoretical foundations as neo-Gricean intentionalism, a form of originalism.

Cornell acknowledges the incompleteness of Skinner's theoretical account[100] and criticisms offered by A.P. Martinich.[101] He goes on to suggest that intellectual history can appropriate the theoretical apparatus of the philosophy of language as a method for determining the meaning of legal texts: "Martinich's application of Gricean insights to the practice of intellectual history is an important step forward in the evolving effort to clarify the practice of intellectual history."[102] That is, Cornell might be suggesting that the method of intellectual history might be the method of interpretation developed in contemporary theoretical linguistics and the philosophy of language. This possibility will be explored below.[103]

[98] Petri Koikkalainen & Sami Syrjamaki, Quentin Skinner on Encountering the Past, 6 Redescriptions Y.B. Pol. Thought, Conceptual Hist., & Feminist Theory 34, 48 (2002) (interview); see generally K.R. Minogue, Method in Intellectual History: Quentin Skinner's Foundations, 56 Philosophy 533, 545 (1981) (discussing Skinner's relationship to ideas in the philosophy of language).

[99] A.P. Martinich, A Moderate Logic of the History of Ideas, 73 J. Hist. Ideas 609, 616 (2012).

[100] Cornell, supra note 3, at 730.

[101] Id. at 730–31 (citing, inter alia, Martinich, supra note 99, at 610–11.).

[102] Cornell, supra note 3, at 731 (footnote omitted).

[103] See infra Section II.D.

C. Another Possibility: Intellectual History as Tacit Knowledge of a Craft

Perhaps the method of intellectual history is not articulated in theoretical terms because it is a craft that one learns through doing or involves tacit knowledge.[104] Riding a bicycle involves tacit knowledge: You can do it even if you cannot explain how you do it. Perhaps intellectuals learn a craft from examples (the work of other intellectual historians) and by practicing the craft (for example, by writing a dissertation under the supervision of someone initiated into the ways of the craft). A similar point could be made about lawyers and their methods of interpretation. Traditionally, law school classes involve the reading of legal texts.

So far as I know, intellectual historians do not explicitly make the claim that their method is based on tacit knowledge of a craft, but it seems like an obvious possibility. But if this is the case, then it is not obvious that the craft of intellectual history provides distinctive tools and methods appropriate to the interpretation of legal texts in general or the constitutional text in particular. Of course, legal historians who specialize in constitutional history are likely to be expert readers of legal texts, but this is because they have legal skills—the ability to parse legal texts closely for precise meanings and fine distinctions. And this ability may involve tacit knowledge—indeed, my own intuitive sense is that it does. But this ability is not a distinctive method learned by intellectual historians—as opposed to academic lawyers in general and legal historians in particular.

Moreover, when intellectual historians read other texts, their aims are not primarily the recovery of communicative content. When intellectual historians read a text they surely do want to understand the communicative content of the text, but that is a starting point and not the end of their inquiry. This is not a criticism of intellectual history, which includes much work that is fine and valuable. My point is simply that the things that make the craft of intellectual history distinctive are not better suited to the task of determining the communicative content of the constitutional texts when compared to the skills associated with lawyering in general and the academic study of constitutional law in particular.

[104] See Jeremy Fantl, Knowledge How, Stan. Encyclopedia Phil. 6, http://plato.stanford.edu/entries/knowledge-how (last updated Sept. 6, 2014).

D. A Final Possibility: Intellectual History as Neo-Gricean Intentionalism

As we have already seen, Cornell acknowledges that the philosophy of language may inform the contextualist methodology of intellectual history, identifying the work of Professors Scott Soames[105] and Andrei Marmor[106] as models.[107] If Cornell's argument is that the contextualist methodology of intellectual history already has a theory of communicative content derived from contemporary work in the philosophy of language and theoretical linguistics, his claim seems implausible. The scholar that Cornell identifies who does rely on the philosophy of language is Skinner, but as we have already seen, Skinner's approach is philosophically confused. If Cornell means to suggest that intellectual history may evolve to incorporate a neo-Gricean framework, then his point is speculative at best.

Whatever the merits of Cornell's argument, the larger point is that our preliminary survey of the methods of intellectual history does not yield a distinctive method for the determination of the communicative content of the constitutional text. Intellectual history may produce knowledge that is relevant to constitutional interpretation. In particular, intellectual history seems likely to yield facts about context that may be relevant to the determination of the public meaning of the constitutional text. But this role is supplementary and complementary to the methods employed by originalists and textualists.

III. DIFFICULTIES WITH INTELLECTUAL HISTORY AS AN EXCLUSIVE[108] METHOD FOR DETERMINING THE COMMUNICATIVE CONTENT OF THE CONSTITUTIONAL TEXT

We are now in a position to summarize the problems with the hypothesis that the contextualist methods of intellectual history could provide a distinctive and exclusive method for determining the communicative content of the constitutional text.

[105] Scott Soames, What Vagueness and Inconsistency Tell Us About Interpretation, *in* Philosophical Foundations of Language in the Law, supra note 39, at 31, 42–43.

[106] Andrei Marmor, The Pragmatics of Legal Language, 21 Ratio Juris 423, 424–26 (2008).

[107] See Cornell, supra note 3, at 723 nn.8 & 11, 731, 732, 743.

[108] It is perhaps revealing that when I first composed this heading, I accidentally wrote "elusive" rather than "exclusive."

A. The Underspecification Problem: The Lack of a Clearly Identified Contextualist Methodology

The first problem falls out of the discussion of Cornell and his sources above.[109] The contextualist methodology of intellectual history, as presented by Cornell and developed by the sources that he cites, is underspecified, if viewed as a method for determining the communicative content of the constitutional text. Many of the methods mentioned by Cornell, Kloppenberg, Hollinger, and Skinner are not directed at communicative content at all (more on this below[110]). With the exception of Skinner, none of the authors present a method distinctive to intellectual history that would be *sufficient* to yield communicative content. Intellectual history does identify context as a relevant factor in interpretation. And consideration of context is a *necessary* step in interpretation. But even with respect to context, the methods of intellectual history are underspecified, because they do not take into account the many roles that context can play (discussed above[111]). We can call this difficulty the "Underspecification Problem."

The Underspecification Problem is not intended as a criticism of intellectual history as a discipline. The problem would arise if intellectual history were repurposed as a method for the interpretation of legal texts. When intellectual history performs its central role, its methods seem perfectly suited to its primary purposes.

B. The Ambiguity-of-"Meaning" Problem: Historical Meaning Versus Meaning as Communicative Content

The second problem might be the "Ambiguity-of-'Meaning' Problem." This problem has been explored in depth by Professor A.P. Martinich in his essay, Four Senses of 'Meaning' in the History of Ideas: Quentin Skinner's Theory of Historical Interpretation,[112] which raises the problem in the context of Skinner's views. Here is Martinich's summary of the problem:

> Roughly, [Skinner's] position is that in order to understand what a historical text means, it is necessary to know what the author meant or

[109] See supra Section II.B.
[110] See infra Section III.B.
[111] See supra Section II.A.
[112] Martinich, supra note 13, at 226.

> what he or she was doing in writing it; and since the only way to know what the author was doing is to understand his or her context, one must identify the context in order to understand what the author was doing. Although he is right about the necessity of considering context, his theory is untenable as a theory of the proper method of interpretation in the history of ideas for two main reasons. One is that he builds his case by equivocating on the sense of 'mean' and its cognates. The other is that even if he were right about how to identify what the speaker was doing, he would not have described the sense in which historians try to identify the meaning of texts and events.[113]

In the context of the interpretation (in the narrow sense) of legal texts, the difficulty is that the contextualist methodology of legal history is primarily aimed at "meaning" in one or more senses that are *not* communicative content. Martinich thought that intellectual historians aim at meaning in the sense of "significance" or importance. In my opinion, the concerns of intellectual historians are broader and include "meaning" in the senses of purpose and holistic understanding. But for the most part, intellectual historians are not concerned with meaning as communicative content when they write about methodology.

The Ambiguity-of-"Meaning" Problem is a serious one for the suggestion that intellectual history could provide a distinctive and exclusive method for constitutional interpretation, because it suggests that conceptual confusion lies at the heart of this proposal. If the methods of intellectual history do not seek to recover communicative content, then they are not competitors with the methods of legal theory (in the narrow sense).

C. The Underspecification-of-Intention Problem: Communicative Intentions and Public Meaning Revisited

Intellectual history is concerned with a variety of mental states, including intentional mental states such as purposes, motives, expectations, and communicative intentions. But it is only the last of these (communicative intentions) that plays a constitutive role in the interpretation (in the narrow sense) of legal texts. When the particular form of intentional mental state is not identified, the result is the "Underspecification-of-Intention Problem." It seems clear that the methods of intellec-

[113] Id. at 225–26 (footnote omitted).

tual history are not primarily aimed at the recovery of communicative intentions—other mental states, such as motives and purposes, are the more frequent target of intellectual historians. Skinner is a partial exception here, but his understanding of communicative intentions is conceptually confused. Cornell affirms the role of mental states in determining communicative content by embracing the philosophy of language,[114] but this acknowledgement is a tacit admission that the contextualist methodology of intellectual history does not itself provide an adequate theory of the role of communicative intentions in determining meaning (in the relevant, communicative sense).

D. The Indeterminate-Role-of-Context Problem: Contextual Enrichment and Communicative Content

Investigation of context is certainly an important component of any method for determining communicative content, and intellectual history certainly investigates context. But this does not entail the further conclusion that the specific kinds of contextual investigations done by intellectual historians provide appropriate methods for identifying contextual enrichment of communicative content. The difficulty is that context has many roles in intellectual history (as explored above[115]). The contextualist methodologies of intellectual history are not primarily aimed at the recovery of the contextual enrichment of communicative content: Intellectual historians rarely identify contextual disambiguations, implica-

[114] See Cornell, supra note 3, at 723 & n.10, 725, 728 n.37, 729 n.40, 730.

Cornell misrepresents my views (and the view of other originalists) when he states that public-meaning originalism rejects a role for communicative intentions and context. See id. at 733. In 2008, in the unpublished working paper "Semantic Originalism," it was made clear that the public meaning of a text is the necessarily intended meaning of authors directing their communication to the public at large. Lawrence B. Solum, Semantic Originalism 40 (Nov. 22, 2008) (unpublished manuscript, available at http://ssrn.com/abstract=1120244) [hereinafter Solum, Semantic Originalism]. In 2009, this position was summarized in two articles. See Lawrence B. Solum, *District of Columbia v. Heller* and Originalism, 103 Nw. U. L. Rev. 923, 947–53 (2009); Lawrence B. Solum, Incorporation and Originalist Theory, 18 J. Contemp. Legal Issues 409, 412 & n.10 (2009) [hereinafter Solum, Incorporation and Originalist Theory].

Likewise, contrary to Cornell's misleading assertions, the role of context in the determination of original meaning has been an explicit feature of my writings on originalism from the beginning. See Solum, Incorporation and Originalist Theory, supra, at 427, 440; Solum, Originalism and Constitutional Construction, supra note 15, at 465; Solum, Semantic Originalism, supra, at 5, 26, 31 n.123, 32–33, 52–54. These are extensive, explicit, and obvious discussions.

[115] See supra Section II.A.

tures, implicitures, and presuppositions. We can call this problem the "Indeterminate-Role-of-Context Problem."

Once again, this is not a difficulty for intellectual history per se. Rather, the problem arises when intellectual history is proposed as a method for ascertaining the communicative content of legal texts.

E. The Nongeneralizability Problem: The Method of Intellectual History and Contemporary Legal Texts

One final difficulty: If the contextualist methodology of intellectual history did provide the appropriate method of interpreting historical legal texts, then this argument would generalize to the interpretation of contemporary legal texts as well. Contemporary texts are embedded in complex political and intellectual contexts. The lawyers who interpret these texts are frequently unaware of the larger contexts in which statutes, rules, regulations, and even judicial decisions are produced. If it were really the case that the methods of intellectual history are necessary for the reading of older texts because comprehensive knowledge of context is required for the recovery of communicative content, then it follows that only the methods of intellectual history are capable of recovering the meaning of contemporary texts as well. But that conclusion seems highly dubious, perhaps absurd. Lawyers, judges, and legal scholars are trained to interpret contemporary legal texts, and even if their work is imperfect, no one contends that they need to be trained in graduate programs in history before they can do their jobs competently. We can call this the "Nongeneralizability Problem."

IV. THE ROLE OF INTELLECTUAL HISTORY IN CONSTITUTIONAL PRACTICE

The immediately prior Part of this Article identified five difficulties with intellectual history *as* constitutional theory. In this Part, we will explore the positive contribution that intellectual history can make *in* constitutional theory and practice. Even if intellectual history cannot substitute for legal methods of constitutional interpretation, it seems likely that contextualist methodologies can supplement and enrich legal approaches, including textualism and originalism.

A. Disciplinary Boundaries and the Division of Intellectual Labor

Before we examine the specific roles that intellectual history can play in constitutional practice, a comment about disciplinary boundaries and

the division of intellectual labor is appropriate. Different disciplines address different questions, employing different methods, knowledge, and assumptions. Lawyers and intellectual historians are trained differently—although some scholars have training in both disciplines.

The discipline of intellectual history is likely to provide methods and knowledge of use to lawyers, and vice versa. In particular, intellectual history may provide both methods and knowledge relevant to understanding the background assumptions of the authors of the constitutional text. Those background assumptions may be important to the interpretation of particular constitutional provisions.

In this regard, consider the Ninth Amendment, which reads:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.[116]

What are "rights" "retained by the people"? Does the Ninth Amendment communicate via implicature or presupposition that there are retained rights? That such rights are law? Lawyers will have their own distinctive approaches to these questions, but their inquiries may be aided by intellectual history.

The division of intellectual labor between the disciplines may both facilitate and obstruct the role that intellectual history can play in law. Intellectual history may develop useful knowledge that would not emerge in the law schools, but the differences in the two disciplines may make it difficult for academic lawyers (without historical training) to access such knowledge. This suggests that the presence of intellectual history within law faculties is likely to be especially valuable—facilitating the translation of intellectual history into legal terms, and vice versa.

B. Three Roles for Intellectual History in Constitutional Practice

There are at least three constructive roles that intellectual history can play in constitutional practice. We can begin with semantics.

1. Intellectual History and Semantic Content

Because of semantic drift,[117] words and phrases change their meaning over time. Intellectual history may have a useful role to play in detecting

[116] U.S. Const. amend. IX.

[117] See generally Sol Steinmetz, Semantic Antics: How and Why Words Change Meaning (2008) (explaining that words undergo changes in meaning over time).

such shifts in meaning, especially when the shifts are subtle or the concepts represented by the words have complex intellectual content. This role of intellectual history might be supplemented by another discipline, historical linguistics.[118] Of particular interest will be the methods of "corpus linguistics," which provide tools for the investigation of semantics and syntax via large data sets.[119]

There are reasons for caution in using the methods of intellectual history in the investigation of conventional semantic meaning. As I have already noted, intellectual historians may be more interested in forms of meaning other than communicative content. And intellectual historians might be especially interested in deviant meanings associated with small linguistic subcommunities (Hollinger's discursive communities) and even with idiosyncratic meanings associated with a single author of a tract or intellectual treatise. These meanings may shed light on the public meaning of the constitutional text, but they should not be mistaken for that meaning.

2. Intellectual History and Contextual Enrichment

The second and most obvious role for intellectual history is in the identification of the intellectual context of the constitutional text. This topic has already been covered in some detail and I will not repeat the points already made. Again, caution is appropriate because intellectual historians identify contexts for purposes different from those of legal interpreters. Nonetheless, there are surely cases in which intellectual history will be a fruitful source of contextual information relevant to contextual disambiguation, implicature, and impliciture. The special role of

[118] See, e.g., Lyle Campbell, Historical Linguistics: An Introduction 221–45 (3d ed. 2013); Terry Crowley & Claire Bowern, An Introduction to Historical Linguistics 199–214, 217–26 (4th ed. 2010); Hans Henrich Hock & Brian D. Joseph, Language History, Language Change, and Language Relationship: An Introduction to Historical and Comparative Linguistics 229–40, 278–83 (2d rev. ed. 2009); Winfred P. Lehmann, Historical Linguistics: An Introduction 2–3, 254–76 (3d ed. 1992); Don Ringe & Joseph F. Eska, Historical Linguistics: Toward a Twenty-First Century Reintegration 45–58 (2013).

[119] See, e.g., Douglas Biber et al., Corpus Linguistics: Investigating Language Structure and Use 1–9 (1998); Corpus Linguistics: Readings in a Widening Discipline 1–5 (Geoffrey Sampson & Diana McCarthy eds., 2004); Tony McEnery & Andrew Hardie, Corpus Linguistics: Method, Theory and Practice 1–2, 6–13 (2012); Charles F. Meyer, English Corpus Linguistics: An Introduction 1–2, 11 (2002).

intellectual history in contextual enrichment by presupposition has already been discussed.[120]

3. Intellectual History and the Construction Zone

Finally, intellectual history may have an important role to play in the construction zone. Although this Article has skirted the topic, elsewhere I have provided a more complete exposition on the conceptual structure of theories of constitutional construction.[121] On this occasion, an example may be more useful than theoretical elaboration.

Professor Philip Bobbitt's influential theory of constitutional interpretation and construction identifies multiple modalities of constitutional argument,[122] including text, history, structure, precedent, "ethos" of the American social order, and prudence.[123] Professor Stephen Griffin calls a variation of this view "pluralism."[124] Suppose that one had an approach to constitutional construction that emphasized the historical *ethos* (roughly, a system of social norms or values) of the American people as one of the modalities of constitutional construction. Intellectual history might well provide important insights into the content of that ethos. Of course, intellectual history might call into question the notion of a shared ethos, pointing out the normative differences between discursive communities or focusing on the dissenting ethoi of nonprivileged or oppressed peoples. But this critical stance might itself contribute to the development of the multiple-modalities approach, perhaps leading to the modification or abandonment of the ethos modality.

C. Some Thoughts About Constructive Engagement Between Legal Scholars and Intellectual Historians

One final question: How can intellectual history and constitutional theory constructively engage one another? This problem is larger than

[120] See supra Section IV.A.

[121] Solum, Originalism and Constitutional Construction, supra note 15, at 472–74.

[122] The idea that law is a complex argumentative practice is developed by Professor Dennis Patterson. See Dennis Patterson, Law and Truth 128–50 (1996).

[123] Philip Bobbitt, Constitutional Interpretation 12–13 (1991).

[124] Stephen M. Griffin, Pluralism in Constitutional Interpretation, 72 Tex. L. Rev. 1753, 1753 (1994) ("Pluralistic theories of constitutional interpretation hold that there are multiple legitimate methods of interpreting the Constitution."); see also Fallon, supra note 11, at 1244–46, 1252–68 (discussing forms of constitutional argument including text, historical intent, theory, precedent, and value).

the disputes between some intellectual historians and constitutional originalists; it is the problem of interdisciplinary and multidisciplinary work in general—a problem that becomes particularly urgent when disciplinary pride is at stake and the issue at hand has substantial consequences implicating politics and ideology.

On the one hand, constructive engagement calls for disciplinary modesty and a willingness to learn. Intellectual historians have both knowledge and theory that should interest constitutional theorists, and vice versa. With disciplinary modesty goes civility—something that is all too frequently absent in conversations between historians and constitutional theorists. In this regard, one might be cautious about labels like "law office history" or "history-common-room law." Perhaps one should hesitate to apply such labels in the absence of expertise and actual knowledge of the content of the labeled works.

On the other hand, constructive engagement may, on occasion, need to be frank and evaluative. Historians should not hesitate in calling obvious and verifiable errors to the attention of lawyers, and vice versa. Conceptual confusion is the enemy of constructive engagement and it must be exposed (hopefully with respect and charity), even at the price of hurt feelings or wounded pride.

CONCLUSION

This Article began with the distinction between intellectual theory *as* constitutional theory and intellectual history *of* constitutional theory. We have come to see that there is a third possibility. Intellectual history has an important role to play *in* both constitutional theory and practice. In constitutional practice, intellectual history has a role to play in determining the context that contributes to the communicative content of the constitutional text. In constitutional theory, intellectual history can enrich theorists' understandings of their own views and those of their rivals.

What intellectual history cannot do is provide *the* distinctive and exclusive method of constitutional interpretation and construction. It is obvious that the varying contextualist methodologies employed by different intellectual historians cannot provide the moral readings (constructions) of the constitutional text sought by living constitutionalists influenced by Professor Ronald Dworkin. And it should now be clear that intellectual history does not offer a distinctive method of constitutional interpretation (in the narrow sense used here). Communicative content is one thing. Significance, contexts, purposes, and expected

applications—these things are related to meaning (in the communicative sense) but they are not meaning itself. To think otherwise is to be conceptually confused or ill-informed about the nature of communicative content. If this Article has made the nature of that problem clear, it will have achieved its goal.