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AMUL R. THAPAR & JOE MASTERMAN

Fidelity and Construction

ABSTRACT. Lawrence Lessig's *Fidelity & Constraint: How the Supreme Court Has Read the American Constitution* makes an important contribution to "New Originalism." Lessig observes that judging is defined by two principles: fidelity to meaning and fidelity to role. To determine meaning, he argues, judges should engage in a two-step process: first determine the original meaning of the provision at issue, then translate that meaning into the modern context. But he also suggests that meaning should sometimes give way to other considerations — that balancing fidelity to meaning and role might sometimes require judges to compromise one to further the other.

We agree with Lessig about the basic nature of these two fidelities, but not about their relationship. Fidelity to meaning and fidelity to role are not in tension — they are complementary. Fidelity to role should never override fidelity to meaning. But it *can* inform what it means to be faithful to meaning. An originalist understanding of the judicial role may itself show how a judge should construe an underdeterminate constitutional provision.

This Review explores what the original understanding of the judicial role can tell us about how to construe such provisions. Specifically, it considers whether, as an originalist matter, judges should construe underdeterminate provisions against government action (that is, apply a presumption of liberty) or in favor of government action (that is, apply a presumption of democracy). After reviewing the debates between the Federalists and Anti-Federalists, as well as debates at the Constitutional Convention, we tentatively propose that judges should apply a presumption of liberty in cases about federal power but a presumption of democracy in cases about state power. Our primary hope is to suggest a direction for further historical analysis.

AUTHORS. Amul R. Thapar is a judge on the United States Court of Appeals for the Sixth Circuit. Joe Masterman is one of his former clerks. They wish to thank the Thapar clerk family for their thoughts and wisdom.

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INTRODUCTION

Judges must know their role to fulfill it. Lawrence Lessig helps judges do just that in *Fidelity & Constraint: How the Supreme Court Has Read the American Constitution*.[1] But his book is not just for judges; it is for anyone who cares about how the judiciary fits into our constitutional structure. Pages turn easily as Lessig describes the judicial role, explaining how our Constitution and nation have been shaped by the ways some of our great judges have done their jobs. *Fidelity & Constraint* offers example after example of how Justices from John Marshall to Antonin Scalia have balanced the necessity of fidelity to meaning with the constraints of the judicial role.

That much is clear from the book jacket. But we think *Fidelity & Constraint* also makes a contribution that is not as clear. Specifically, the book contributes what we think could be an important perspective to "New Originalism"[2] and, more specifically, to the debate over what judges should do when they find themselves in the so-called construction zone—the place where courts determine how to operationalize underdeterminate[3] text in specific "cases" or "controversies."

In Part I, we explain why the book is relevant to that debate. Lessig advocates a theory of constitutional adjudication called "translation," or "two-step originalism," in which a judge first determines the original meaning of a constitutional phrase and then "translates" that phrase to suit a modern situation.[4] A New Originalist might call these processes "interpretation," the discovery of se-

1. LAWRENCE LESSIG, FIDELITY & CONSTRAINT: HOW THE SUPREME COURT HAS READ THE AMERICAN CONSTITUTION (2019).

2. New Originalism's primary goal is to determine the Constitution's original public meaning and then apply that meaning to present-day circumstances. In doing so, New Originalists rely heavily on historical evidence, linguistic analysis, and academic and historical scholarship. New Originalists do their best to uphold the original meaning of the Constitution, even when that meaning counsels against "judicial restraint or democratic majoritarianism." Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 609 (2004).

3. "Underdeterminacy" describes a situation where the inputs (e.g., the text, the evidence) adequately rule out some, but less than all minus one, of the relevant hypotheses. *See generally* Kyle Stanford, *Underdetermination of Scientific Theory*, STAN. ENCYCLOPEDIA PHIL. (Aug. 12, 2009), https://plato.stanford.edu/entries/scientific-underdetermination [https://perma.cc/2A92-GWUS]. All or virtually all examples of legal indeterminacy are examples of underdeterminacy.

4. *See* LESSIG, *supra* note 1, at 63-64.

mantic content based on original public meaning, and "construction," the creation of doctrine within the parameters of original public meaning.[5] Lessig and New Originalists would seem to agree that these processes are distinct and ever present. But from that shared premise, many disagreements follow. To state things a little simply for now, originalists debate what to do when the original meaning is underdeterminate. Some originalists believe that when the meaning is underdeterminate, judges should apply a presumption of liberty (against the government action), whereas other originalists believe that judges should apply a presumption of democracy (in favor of the government action). Of course, judges must still decide cases even if the Constitution's guidance is less than determinate. The presumption they apply, if they must apply one, might determine whether a challenged law stands or falls.[6] *Fidelity & Constraint* suggests that this question is not simply one of political theory. Rather, Lessig believes that judges have an important duty to adhere to their role when interpreting the Constitution. Thus, judicial construction should be guided and limited by judicial role.

Lessig defines the judicial role through case studies of what judges have done historically. In other words, he takes a largely descriptive approach, walking through Supreme Court cases and then reaching a definition of "role." What judges do, according to Lessig, is balance two dueling fidelities: fidelity to meaning and fidelity to role.[7] He argues that the battle between these fidelities, which "compete for the attention of a court," explains why the Supreme Court has decided many important cases the way it has.[8] But his theory is not just descriptive. For Lessig, the descriptive becomes the normative: what judges *have* done out of fidelity to role is what judges *should* do.[9]

Regardless of what judges have done, we think the better approach is to determine the original understanding of a judge's role.[10] And rather than seeing

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5. *See* Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 455-58 (2013) (discussing the interpretation/construction distinction as applied to originalism).

6. One way to think about presumptions is to consider who has the burden of proof. When a presumption of liberty applies, the government would have the burden to prove the act is constitutional. In contrast, when a presumption of democracy applies, the person challenging government action would have the burden to prove the act is unconstitutional.

7. *See* LESSIG, *supra* note 1, at 18. In Lessig's conception, fidelity to meaning refers to fidelity of *textual* meaning, while fidelity to role refers to fidelity to institutional responsibility.

8. *Id.*

9. *See id.* at 451-56.

10. We use the term "original understanding" interchangeably with original meaning. We recognize that others might use it to reflect the original intent of the Founders, but we do not use it in this sense. *See* Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. U. L. REV. 703, 704 n.4 (2009).

the two fidelities Lessig identifies as competing, we think they are complementary. Fidelity to role should never override fidelity to meaning. Rather, fidelity to role informs fidelity to meaning when the text is underdeterminate. When a judge finds himself in the construction zone, he should look to the original understanding of judicial role to inform his inquiry. Lessig's important work motivated us to examine this history and to investigate the original understanding of the judicial role. We think our findings can offer insight, if not clear instructions, to judges in the construction zone.

In Part II, we put ourselves in the position of the Justices in many of the cases Lessig surveys—that is, in the construction zone. And we explore whether Founding-era sources give any guidance as to how a judge should understand his role in that zone. One book review is not space enough to test our hypothesis fully, and we would not presume to tell other judges how to do their jobs no matter how much space we had. Our goal is merely to help judges show fidelity to both meaning *and* role by supplementing Lessig's rich historical account. In doing so, we hope to show that the two fidelities Lessig identifies go hand in hand. And most of all, we hope to show how other scholars and judges might continue to study the original understanding of the judicial role.

Evidence from the Founding that we have reviewed—particularly Anti-Federalist critiques of the Constitution, Federalist responses, and the Constitution's drafting history—suggests that judges need not in fact make a binary choice in the construction zone between liberty and democracy. Instead, different presumptions might apply in different situations. Our research lends support to the idea that judges should apply a presumption of liberty in cases about federal power but a presumption of democracy in cases about state power. More research might well make this framework more nuanced. We have not had space here to investigate the relevant history of the Reconstruction Amendments, for example, which expanded the role of the federal government in some areas and, along with it, the role of the federal judge. Maybe an intrepid scholar with the space of a book will do a comprehensive study, or maybe other judges with the benefit of historical briefing will discover evidence for different presumptions case by case. Our modest goal is to show that this type of inquiry is not only possible but also useful.

This Review is premised upon the core assumption of originalism, namely that the Constitution's original meaning should govern whenever the Constitution applies. Throughout this Review, we will discuss how the core tenets of originalism might operate in several scenarios. But we offer no opinion about how any particular case could or should come out. One of us is a judge, who understands his role as limited to offering an opinion only after a full adversarial process. It would be especially inappropriate to overstep that limit in reviewing a book about fidelity to judicial role.

I. FIDELITY, CONSTRAINT, AND NEW ORIGINALISM

Fidelity & Constraint can be read as a contribution to New Originalism in two ways. First, Lessig implicitly adopts the distinction between interpretation and construction that underlies New Originalism. Thus, many of his case studies show that distinction at work. Second, his book suggests that judges might be bound by their very role as judges—as opposed to political philosophy, original methods of legal reasoning, or inferences from the Constitution—to construe underdeterminate provisions in certain ways. At least, that is our interpretation. To get there, we must first discuss what the book sets out to do and how it does or does not square with originalism.

A. Lessig's Fidelity to Meaning

Fidelity to meaning is easy enough to define, given our written Constitution. "The whole premise of a written constitution," says Lessig, "is that the words have meaning and that meaning both enables and constrains."[11] Yet "[t]hat constraint means nothing without an effort to remain faithful to the meaning so written."[12] Today, scholars and judges of all stripes acknowledge the importance of original meaning. Fidelity to meaning requires finding and applying that meaning.

Although Lessig believes the original meaning of the Constitution constrains judges, he criticizes originalists. He argues that originalist judges have practiced what he calls one-step originalism, where the only question is WWFD: What Would the Founders Do? If the Founders would not have contemplated and thus could not have sanctioned a particular practice by private parties or the government, then, in Lessig's telling, the one-step originalist would conclude that the Constitution does not protect or allow it.[13] By his lights, this is a pretty easy job—and one that limits constitutional solutions to modern problems.

Lessig argues that judges should instead preserve meaning through translation, or what he calls two-step originalism. He says, correctly, that "[t]he aim of a court interpreting a constitution, at least according to the ideals of interpretive

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11. LESSIG, *supra* note 1, at 445.

12. *Id.* One can debate whether a written constitution is necessary to maintain Founding values. *See generally* Stephen E. Sachs, *Originalism Without Text*, 127 YALE L.J. 156 (2017) (arguing that a written constitution or written statutes are not fundamental to originalism as a theory). But we think none can debate that, because our Constitution is written, its words must be respected.

13. *See* LESSIG, *supra* note 1, at 63-64.

fidelity, should be to preserve that constitution's meaning across time."[14] Translation is his metaphor for "produc[ing] a reading of the original text in the current context that has the same meaning as an original reading of that text in its original context."[15] Picture a judge with headphones, listening to the public discourse of 1787 and transcribing the common usage of the Constitution's words and phrases. (If only.) Two-step originalism is Lessig's conception of how translation works in judicial practice. "In the first step, the translator understands the text in its original context. In the second step, the translator then carries that first step meaning into the present or target context."[16]

Respectfully, Lessig's "one-step" originalist is a straw man. We are unaware of a serious originalist argument that, for example, the Second Amendment protects only muskets. Originalists do agree that the meaning of a constitutional provision is fixed when the provision is ratified and that judges are constrained by that fixed meaning. But that does not mean that the Constitution was made only for Colonial Williamsburg and not for Williamsburg, Brooklyn. Rather, as will be discussed more below, judges must construe constitutional provisions in contexts the Founders did not specifically foresee and can do so consistently with original meaning. Consider a Fourth Amendment case. Courts can still apply the original meaning of "search"—a purposeful investigative act[17]—even in situations the Founders could not have envisioned, such as searches conducted through infrared technology. The meaning of "search" does not change, even if the technology does.

Lessig's translation theory fails to secure an important virtue of originalism: constraint.[18] His theory loosens the bounds of constraint in two ways. First, it confuses interpretation with construction by arguing that translation is mere interpretation. This distinction might seem nitpicky, but, as we will explain, it has important consequences. To be sure, translation starts with interpretation, or the discovery of original semantic meaning. But the end result is a construction that,

14. *Id.* at 71.

15. *Id.*

16. *Id.* at 63-64.

17. We will explain this interpretation further when we get to our discussion of *Morgan v. Fairfield County*, 903 F.3d 553 (6th Cir. 2018). *See infra* text accompanying notes 27-28.

18. *See* William Baude, *Originalism as a Constraint on Judges*, 84 U. CHI. L. REV. 2213, 2213 (2017) ("One important feature of Scalia's particular arguments for originalism was constraint—the idea that originalism was centrally a way, the best way, to constrain judicial decisionmaking, whereas nonoriginalist theories would essentially license judges to make up constitutional law as they went along."); Lawrence B. Solum, The Constraint Principle: Original Meaning and Constitutional Practice (Apr. 13, 2018) (unpublished manuscript), https://ssrn.com/abstract=2940215 [https://perma.cc/9D2X-PXSE].

to the best of the interpreter's ability, fits the text to the grammatical rules of a new language. The poet John Keats describes this reality in *On First Looking into Chapman's Homer*.[19] Keats certainly knew his Homer, but still was astonished when he read George Chapman's rigorous translation ("Yet did I never breathe its pure serene / Till I heard Chapman speak out loud and bold").[20] Through translation, Homer had become Chapman's Homer. He interpreted the text, true, but he ultimately construed it to make his own version. That can happen too when judges claim to interpret but really construe (or construct).[21] But the Constitution is not Judge Thapar's Constitution. Its legitimacy derives from the people, not from the person interpreting it. And judges are bound by what the people enacted. Some construction might be inevitable in constitutional interpretation. But that is why judges must recognize when they are in the construction zone and be sensitive to the power that comes with it. That zone is hazardous for original meaning, which judges must be careful not to bulldoze as they construe. A judge who construes under the guise of interpretation has too much power over the text, for he can pretend that he is merely applying original meaning when in fact he is changing it. Lessig's theory of translation blurs this important line.

That gets to the second and larger problem left open by the translation theory: nothing in the theory ensures that a judge *will* show fidelity to the text. In fact, the theory does not require such fidelity. Invoking a different classical artist, Lessig pictures

> [a] concert pianist [who] plays a series of outdoor concerts. On the third night, the temperature falls dramatically, causing the piano to fall out of tune. Is it more faithful to Beethoven to leave the piano out of tune? Would tuning the piano be the same kind of infidelity as adding a couple of bars to the end of the first movement?[22]

The proper analogue for the Constitution in this metaphor is not the piano but the Beethoven sheet music. One might think the pianist is "translating" the work to modern ears by replacing a few bars with a solo riff. But he is changing the work. And it is exactly that temptation that originalism seeks to curb, for "it is a

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19. 1 JOHN KEATS, *On First Looking into Chapman's Homer* (1817), *reprinted in* THE COMPLETE WORKS OF JOHN KEATS 46 (H. Buxton Forman ed., 1900).

20. *Id.*

21. We hope not to be smote for using these terms synonymously. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 13-15 (2012).

22. LESSIG, *supra* note 1, at 54-55.

constitution we are expounding," and not one that judges have power to change.[23] To change the sheet music is no longer to play Beethoven; similarly, to depart from the text of the Constitution is no longer to interpret it faithfully.

To see how the translation theory can misconstrue original meaning, consider *Katz v. United States*,[24] which found for the first time that the Fourth Amendment protects against not just warrantless physical intrusions but against warrantless intrusions on "reasonable expectations of privacy."[25] Lessig offers *Katz* as an example of two-step originalist translation,[26] but as one of us had the opportunity to discuss in *Morgan v. Fairfield County*,[27] *Katz*'s fidelity to original meaning is dubious to say the least.[28] *Katz* unintentionally narrowed the meaning of "search" in the Fourth Amendment, which meant at the Founding what it still means today: a purposeful, investigative act. And while the Justices might have believed that they were merely extending the Fourth Amendment to present-day circumstances, they narrowed Fourth Amendment protections in counterintuitive ways. Searching a person's garbage or reading her bank records are no longer searches in the constitutional sense when a person exposes her garbage to the public or her bank records to third parties, even though these are still "searches" as that word was understood.[29] Thus, conflating the search inquiry with a reasonableness inquiry might have been an act of translation, but that does not mean that it preserved original meaning.

Overall, Lessig rightly recognizes the importance of fidelity to constitutional meaning as originally understood. But his two-step translation theory blurs the important distinction between construction and interpretation, leaving judges less constrained.

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23. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819); *see also* Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1119, 1120 (1998) ("An interpreter who bypasses or downplays the text becomes a lawmaker without obeying the constitutional rules for making law.").

24. 389 U.S. 347 (1967).

25. *Id.* at 362 (Harlan, J., concurring).

26. *See* LESSIG, *supra* note 1, at 263-64.

27. 903 F.3d 553 (6th Cir. 2018).

28. *See id.* at 568-70 (Thapar, J., concurring in part and dissenting in part); *see also* Carpenter v. United States, 138 S. Ct. 2206, 2264 (2018) (Gorsuch, J., dissenting) (arguing that "*Katz's* problems start with the text and the original understanding of the Fourth Amendment").

29. *See* California v. Greenwood, 486 U.S. 35, 37-38, 40 (1988) (holding that the Fourth Amendment does not prohibit the warrantless search of garbage left for collection outside of someone's house); United States v. Miller, 425 U.S. 435, 437 (1976) (holding that a depositor's Fourth Amendment rights were not implicated when bank records were produced in response to a subpoena request).

B. Fidelity to Meaning and Originalism

Because Lessig's two-step originalism does not constrain judges to interpret the text before they construe it, it does not achieve the goals of originalism. But it can help us reframe and advance a debate within originalism: namely, what a judge should do when the meaning of a constitutional provision is underdeterminate. As discussed more below, some scholars argue that the Constitution's meaning never "runs out" because it is discoverable, for example, through modes of legal reasoning practiced at the Founding.[30] But as far as we know, no one disputes that some constitutional provisions are underdeterminate on their own. And a judge cannot just throw up his hands in that situation, since the most basic tenet of the judicial role is to decide cases properly before the court. Thus, having and resolving this debate is vital to proper judging—that is, judging constrained by the Constitution's original meaning.

First, we need to define some concepts. To do so, we will use terms in circulation among—though not necessarily agreed upon by—originalist scholars. The terms themselves do not matter; the concepts do. As mentioned earlier, originalists old and new agree on what Lawrence Solum and others have called the principles of fixation and constraint.[31] The principle of fixation is that "the linguistic meaning of the constitutional text is fixed for each provision at the time that provision was framed and ratified."[32] The principle of constraint is that "constitutional construction should be constrained by the original meaning of the constitutional text."[33]

But originalism is not a monolith, and these principles leave substantial room for disagreement. Linguistic meaning could be fixed by the subjective intent of those who framed a given constitutional provision or those who voted to ratify it;[34] by the ordinary public meaning of the provision's terms;[35] or by the methods of legal interpretation practiced when the provision was adopted.[36] The importance of linguistic context, and of particular contextual evidence, is also

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30. *See infra* text accompanying notes 53-56.

31. *See supra* notes 11-12 and accompanying text.

32. Solum, *supra* note 5, at 459.

33. *Id.* at 460.

34. *See, e.g.*, Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 17 (1971).

35. *See, e.g.*, Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859, 875 (1992).

36. *See* John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 752 (2009) (arguing that the most accurate meaning of the Constitution can be derived from using interpretive rules in place when the Constitution was enacted).

open to debate.[37] The strength of the constraint varies between originalist theories. Originalists can (and do) debate, for example, whether the Fourteenth Amendment's Privileges or Immunities Clause[38] protects rights beyond those enumerated in other amendments.[39] Whichever side is right, both make arguments from the original public meaning of the text.

Originalists also disagree about the role of judges. Modern originalism began largely as a reaction to the perceived excesses of the Warren Court.[40] "Old" originalists believed that protections of individual liberty should primarily come from legislatures, not courts. They worried most about the courts encroaching on democracy's role. Where a judge had "no basis other than his own values upon which to set aside the community judgment," he had no basis to intervene.[41] This approach effects "judicial restraint," giving the political branches the benefit of the doubt. Restraint is different from constraint, which only refers to the limiting power of text. Restraint refers to judges' behavior—their humility in exercising the judicial power.

"New Originalists," on the other hand, believe that the correct interpretive model does not depend on responding to the Warren Court's encroachments on federalism and the separation of powers. New Originalism "does not require judges to get out of the way of legislatures. It requires judges to uphold the original Constitution—nothing more, but also nothing less."[42] The "primary virtue claimed by the new originalism is one of constitutional fidelity, not of judicial restraint or democratic majoritarianism."[43] Although a limited judicial role and democracy are still important under New Originalism, the line dividing courts and legislatures must be grounded in the original public meaning of the specific text of the Constitution rather than a broader theory of the virtues of restrained judging. Most originalist judges today are New Originalists.

New Originalists in the mold of Lawrence Solum, Randy Barnett, Keith Whittington, and others agree on two additional principles beyond fixation and constraint. First, constitutional meaning is fixed by the text's original public

37. *See* Solum, *supra* note 5, at 464-66.

38. *See* U.S. CONST. amend. XIV, § 1.

39. *See, e.g.*, Kurt T. Lash, *The Enumerated Rights Reading of the Privileges or Immunities Clause: A Response to Randy E. Barnett and Evan D. Bernick's "A Critique of Kurt Lash on the Fourteenth Amendment"* (Mar. 12, 2019), https://ssrn.com/abstract=3351142 [https://perma.cc/4AKM-74AP].

40. *See* JOHNATHAN O'NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY 94-95, 107 (2005).

41. Bork, *supra* note 34, at 10.

42. Whittington, *supra* note 2, at 609.

43. *Id.*

meaning.[44] This principle actually predates the New Originalist wave and has gained acceptance among originalists generally.[45] The second and more contentious principle is that constitutional adjudication involves both interpretation and construction and that those tasks are distinct.[46] As used in this dichotomy, interpretation means "discovering the linguistic meaning or communicative content of the constitutional text."[47] For example, what did the Framers and Ratifiers of the First Amendment understand by the term "speech"? Construction is the second-order act of "determining the legal effect given to the text" through judicial decisions and resulting doctrines.[48] To continue the example, whether obscene speech is protected depends today not just on the First Amendment but on the three-part test constructed in *Miller v. California*.[49]

When the constitutional text is clear, interpretation can answer the question. The Presidential Qualifications Clause is quite clear that "[n]o person . . . shall be eligible to the Office of President . . . who shall not have attained to the Age of thirty five Years."[50] If a justiciable case arose under this Clause—perhaps brought by a losing, of-age candidate against an underage winner—a court could give legal effect to the Clause simply by following what it says. Some constitutional provisions are clear on their face.

But many are less clear, as is well known to any judge who has had to determine whether something is "speech" under the First Amendment or whether a search was "reasonable" under the Fourth Amendment.[51] To call these provisions vague is not to criticize James Madison as a stylist. It is to recognize—as the Framers did—that some principles cannot and should not be reduced to bright-line rules.[52] Instead, they must be stated broadly enough to address the

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44. *See, e.g.*, Solum, *supra* note 5, at 459.

45. Justice Scalia urged this turn early on. *See* Antonin Scalia, Address Before the Attorney General's Conference on Economic Liberties in Washington, D.C. (June 14, 1986), *in* OFFICE OF LEGAL POL'Y, U.S. DEP'T OF JUSTICE, ORIGINAL MEANING JURISPRUDENCE: A SOURCEBOOK app. C (1987).

46. *See* Solum, *supra* note 5, at 466-67.

47. *Id.* at 468.

48. *Id.*

49. 413 U.S. 15, 24-25 (1973).

50. U.S. CONST. art. II, § 1, cl. 5.

51. *Id.* amends. I, IV.

52. While one of us has a strong preference for bright-line rules, *see* Amul R. Thapar & Benjamin Beaton, *The Pragmatism of Interpretation: A Review of Richard A. Posner,* The Federal Judiciary, 116 MICH. L. REV. 819 (2018), we both recognize that not every constitutional provision creates such a rule (as much as we wish it could). *See* Steven G. Calabresi & Gary Lawson, *The*

many borderline cases that inevitably arise. This is the construction zone: the zone of constitutional underdeterminacy. The Fourth Amendment does not specify which types of searches are reasonable, nor do the Fifth and Fourteenth specify exactly what process is due. The Constitution does not come with an instruction manual. Thus, judges often construct doctrine to help guide courts and create some level of consistency.

Still, brilliant people debate the size and the very existence of the construction zone. Some originalist theories would limit or eliminate it. For example, John McGinnis and Michael Rappaport's "original methods originalism" would have judges apply the canons of legal interpretation or construction practiced when a particular constitutional provision was adopted—reducing both vagueness and the need for new construction.[53] Gary Lawson's theory of default rules would require judges to resolve uncertainty in favor of federalism—again eliminating the need for judicial construction.[54] And Michael Stokes Paulsen argues that the Constitution itself, specifically the Ninth Amendment, prescribes rules for its own interpretation—namely that ambiguities be resolved in favor of democracy—once again eliminating the need for further construction.[55] Others have argued in turn that these theories are themselves tools of construction that judges can bring with them into the construction zone.[56]

This debate is interesting and important, and our recap is cribbed and incomplete. But we agree that constitutional adjudication requires some level of construction.[57] Even if the Constitution does contain its own rules of interpretation, those rules must be determined and given effect. To do so is an act of

Rule of Law as a Law of Law, 90 NOTRE DAME L. REV. 483, 487 (2014) (explaining that several parts of the Constitution prescribe the use of standards rather than rules).

53. *See* McGinnis & Rappaport, *supra* note 36, at 751. Will Baude and Stephen Sachs have proposed a somewhat related version of New Originalism called "original law originalism." *See* William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 NW. U. L. REV. 1455 (2019). They argue that whatever rules we had at the Founding, including rules of interpretation and construction, remain our law unless they were lawfully changed. *Id.* at 1457. This theory does not directly address but does relate to the construction zone, since it would have judges resolve constitutional vagueness by determining and then applying the relevant original rule of construction.

54. *See* Gary Lawson, *Dead Document Walking*, 92 B.U. L. REV. 1225, 1234 (2012).

55. *See* Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, 103 NW. U. L. REV. 857, 884-90 (2009).

56. *See* Solum, *supra* note 5, at 512-16, 535.

57. We recognize that some originalists would say simply giving meaning to doctrine through construction is not construction at all. And for purposes of this Review, we do not venture to resolve this debate but rather accept as a given that application of meaning to a particular situation often involves construction. *See* Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1, 15 (2018) ("Regardless of the labels

construction. This understanding of construction does not simply define the debate away. Every call requires some construction. Indeed, some believe that simply applying a provision as written is itself construction.[58]

Think of a contract. A judge's task is generally to interpret and then enforce a contract's plain terms. But courts have also developed various default rules that, if the parties do not contract around them, are considered likely estimates of the parties' intent—such as that ambiguities are read against the drafter. Thus, the legal effect of a contract is a matter both of its plain terms and of various judicial doctrines, i.e., constructions. Indeed, the doctrine that contracts are to be enforced according to their terms is just that: a doctrine. The goal is to enforce the parties' intent, but since the judge was not there for the meeting of the minds, he must settle for their approximate (or "constructive") intent.

Construction is also unavoidable with social contracts like our Constitution. Judges might have "merely judgment," as Hamilton said,[59] but judgment they have and must use.[60] Moreover, doctrines are necessary to prevent judicial idiosyncrasy and to ensure that the thousands of judges across ninety-four federal district courts, thirteen federal appeals courts, and fifty state court systems apply constitutional provisions in a uniform way—or, as Lessig might say, to ensure fidelity to the judicial role. Whatever difficulties might arise from the *Miller* standard, lower-court judges would have a harder time still if the test for obscenity really was "I know it when I see it"[61] (with due respect to Justice Stewart). And if constitutional law were only so many elephant tests,[62] the Constitution would look quite different in practice from one court to the next. But judges must exercise extreme care in construction. They must not only adhere to the constraint principle, but just as importantly they must not pass off a construction as an interpretation.

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used, ascertaining the communicative content of a text is a different activity than giving legal effect to that meaning. Although it is not interpretation, constitutional construction—call it implementation if you like—is unavoidable.").

58. *See* William Michael Treanor, *Against Textualism*, 103 NW. U. L. REV. 983, 985 (2009).

59. THE FEDERALIST NO. 78, at 523 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

60. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.").

61. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

62. *See* Cadogan Estates Ltd. v. Morris [1998] EWCA (Civ) 1671 [17] (Eng.) ("This seems to me to be an application of the well known elephant test. It is difficult to describe, but you know it when you see it.").

C. *The Contribution of Lessig's Fidelity to Meaning*

With this rather prolix preamble, Lessig's first contribution to New Originalism becomes clear. As an adjudicative scheme, Lessig's two-step originalism tracks the dual processes of interpretation and construction. At the first step, Lessig says, the judge asks what the Constitution means as originally written.[63] That is like interpretation. At the second step, the judge applies that meaning to the situation before him, often a situation that the Founders never anticipated.[64] That is like construction. Thus, the many cases that Lessig cites as proof of concept for two-step originalism, from *Hammer v. Dagenhart*[65] to *National League of Cities v. Usery*[66] and many in between, are also evidence of the construction zone. Lessig himself portrays the rule of *Carter v. Carter Coal Co.*[67] — that whether the Commerce Clause permits Congress to regulate an activity depends on the kind of activity and not on the degree of its effect on interstate commerce — as a "'*construction*,' no doubt, but one justified by interpretive fidelity."[68] Although Lessig's conception of originalism conflicts with New Originalism, his descriptions show that construction exists. One might argue that this point is too obvious to be much of a thesis; not even those who deny the existence of the construction zone would deny that judges have construed the Constitution, for better and for worse. But as Lessig's examples show, judges do not often *say* they are doing so. And the lens of New Originalism shows when the judges in those examples have interpreted the Constitution and when they have made impermissible additions to it. Thus, the book's first contribution to New Originalism is to provide examples that clarify the boundaries of the construction zone.

D. *The Contribution of Lessig's Fidelity to Role*

The second contribution comes from Lessig's theory of fidelity to role: judges must consider their role when interpreting the Constitution. Our claim might surprise because that theory is the aspect of *Fidelity & Constraint* with which originalists are most likely to disagree. Lessig argues that judges sometimes sacrifice fidelity to meaning out of fidelity to role, which, according to him,

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63. *See* LESSIG, *supra* note 1, at 63-64.

64. *See id.*

65. 247 U.S. 251 (1918); *see* LESSIG, *supra* note 1, at 83-84.

66. 426 U.S. 833 (1976); *see* LESSIG, *supra* note 1, at 177-78.

67. 298 U.S. 238 (1936).

68. LESSIG, *supra* note 1, at 91.

requires judges to maintain the strength of the judiciary as a coequal branch. Sometimes, he says, this fidelity requires judges to grow the judicial role, and other times requires judges to avoid making decisions that could be perceived as political.[69] Under this approach, a judge could ignore or bend plain meaning to avoid potential backlash—or, one might say, make a politically motivated decision to avoid the appearance of making a politically motivated decision. Lessig seems to endorse this approach.[70]

Like other originalists,[71] we depart from Lessig at this point. Judges take an oath to uphold the Constitution, not to satisfy commentators. That oath vindicates a central promise of the Founders, who put the power to make and change law in the people's hands. That some judges as a descriptive matter might have taken that power into their own hands does not make political judging valid as a normative or originalist principle. Thus, only one of Lessig's two fidelities is absolute: fidelity to meaning. When a judge allows other considerations to supersede the Constitution's meaning, he forsakes judging for policy-making. Simply put, fidelity to role *requires* fidelity to meaning. It should go without saying that a judge is constrained by the Constitution's determinate provisions. So, too, with underdeterminate provisions. That the construction zone exists does not mean that judges have a permit to build whatever they want. Rather, even those originalists who accept construction believe it is limited by the original meaning of the Constitution, including federalism and separation-of-powers principles.[72] So to the extent *Fidelity & Constraint* implies that judges do not owe fidelity *to* constraint, in the sense of originalism's constraint principle, we respectfully disagree.

Nevertheless, it is undeniable that judges feel the weight of their role. How could they not? Many federal judges come from the ranks of law firms and U.S. Attorneys' offices. One day, they are trying to convince a judge to decide a case their way; the next, the President signs a piece of paper and they become the decider, presumptively for life, and often in the very place where they were just

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69. *See, e.g.*, *id.* at 171.

70. *See, e.g.*, *id.* at 32-33.

71. *See, e.g.*, Lawrence Solum, *Fidelity, Translation, and Originalism: Thoughts on Lessig's "Fidelity and Constraint,"* BALKINIZATION (June 27, 2019, 9:30 AM), https://balkin.blogspot.com/2019/06/fidelity-translation-and-originalism.html [https://perma.cc/6ZRM-YSJH] ("To the extent that Lessig's conception of fidelity to judicial role allows for violations of the Constraint Principle, his theory is a version of living constitutionalism and not a version of originalism.").

72. *See* Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL'Y 65, 69-70 (2011); *see also* Solum, *supra* note 5, at 488 (describing a version of originalism that "allow[s] for judicial decision in the construction zone" that is constrained by constitutional principles derived from text and history).

practicing. The Framers clearly put thought into the judicial role. Whereas they channeled how Congress would exercise the "legislative power" by defining the things Congress could do,[73] they channeled how judges would exercise the "judicial power" by defining the judicial role. Although presumptively lifelong and thus insulated from political pressure, the power is limited to "Cases" and "Controversies" and to the courts the Congress might choose to establish.[74]

Lessig is therefore correct that judges must be attuned to their institutional role. We simply think that neither arrogating power nor abdicating duty can be called fidelity to role. Rather, fidelity to role means respecting the limits of that role and fulfilling it when called to. Apply the law only as written, but apply it. An example of how we think this fidelity works in practice is *United States v. Slone*.[75] There, the federal government was considering whether to seek the death penalty against Eugene Slone. As part of this process, defendants may present mitigating evidence to the Department of Justice.[76] Slone asked the court to extend certain deadlines for his presentation.[77] Slone's was not an unusual request. Previous courts believed they had the power to manage the Department's internal process in this way.[78] One might call the exercise of this power an expression of fidelity to role in the Lessig sense. Exercising the power would elevate the court from bystander to important player in the government's decision. But where that alleged power came from was unclear; it was neither explicit in a statute nor stated in the Constitution.[79] The court could not intervene (in Judge Thapar's view) because a judge's role is limited to those powers specifically delineated by Congress and the Constitution.[80]

Another example comes from *In re University of Michigan*.[81] There, a district judge ordered a high-ranking state official to attend a mandatory public settlement conference so he could explain his policy decisions to his constituents.[82]

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73. *See* U.S. CONST. art. I, §§ 1, 8.

74. *See id.* art. III.

75. 969 F. Supp. 2d 830 (E.D. Ky. 2013).

76. *Id.* at 832.

77. *Id.* at 833.

78. *See* United States v. McGill, No. 09cr2856-IEG, 2010 WL 1571200 (S.D. Cal. Apr. 16, 2010); Order, United States v. Benavides, No. 06–62-M-DWM (D. Mont. Oct. 21, 2008), ECF No. 123 (order amending scheduling order). While these judges obviously did not discuss role in the same way as Lessig, their view definitely gains support in Lessig's view of judicial role.

79. *Slone*, 969 F. Supp. 2d at 833-39.

80. *Id.* at 838.

81. 936 F.3d 460 (6th Cir. 2019).

82. *Id.* at 462.

But Judge Thapar voted to grant the extraordinary remedy of a writ of mandamus to stop the conference because the district judge's actions exceeded the proper judicial role.[83] Why? Because judges only have power to act if the asserted power is granted by Congress or by the Constitution.[84] And when judges exercise power beyond those sources, they violate the judicial role.[85]

Once again, then, we disagree with Lessig's particular articulation of this fidelity but think that the concept provides a useful perspective on judging. And not just abstract judging, but originalist judging. Specifically, by recognizing the importance of role—and more specifically how a judge's understanding of his role affects his decisions—Lessig helps us look differently at the construction zone. Judges might take an oath to the Constitution, but that oath does not tell them how to apply the Constitution when it comes to cases.[86] Just like wedding vows do not tell us exactly how "to have and to hold" one's partner in sickness and in health. Thus, as discussed more thoroughly in the next Part, New Originalists debate how exactly a judge's oath constrains judges in practice, particularly when the original meaning does not provide a clear answer. Following Lessig's emphasis on role, judges might be *required*—by the original understanding of the judicial role created by the Constitution—to construe underdeterminate provisions a certain way. That is the book's second contribution to New Originalism. Our goal for the rest of this Review is to elaborate upon and explore it.

II. ROLE AND CONSTRUCTION

To see these contributions in action, think about actually construing a constitutional provision. There are many to choose from. The Commerce Clause, for example, gives Congress the power "[t]o regulate Commerce . . . among the several States."[87] Lessig charts how that power has ebbed and flowed with the Supreme Court's decisions.[88] Again, we take no position on *what* the Commerce Clause means; that would conflict with the judicial role that one of us occupies. Our goal is to determine *how* to construe provisions like the Commerce Clause that can give rise to arguably borderline cases. When does an item leave interstate commerce and enter purely intrastate commerce? An interesting and early

83. *Id.*

84. *Id.*

85. *Id.* at 461, 466.

86. *See* 28 U.S.C. § 453 (2018).

87. U.S. CONST. art. I, § 8, cl. 3.

88. *See* LESSIG, *supra* note 1, at 79-94, 137-40, 182-94.

example of an attempt to answer this difficult question through constitutional construction is the "original package doctrine." Chief Justice Marshall devised the doctrine when trying to determine when states could tax goods that were once in interstate commerce. His answer was that the state was able to tax a good whenever the original package was broken and the goods inside were mixed with other goods.[89]

Similar questions could be asked about many constitutional provisions. Under the First Amendment, Congress may not prohibit the free exercise of religion, but originalists debate whether that requires religious exemptions to neutral and generally applicable laws.[90] The First Amendment also protects speech, but originalists debate the extent to which it protects anonymous political speech.[91] And on and on. Indeed, the Constitution does not define "the judicial power," leading to the originalist debate[92] we are concerned with here: how should a judge exercise that power when constitutional language is underdeterminate? Our contention is that if as an original matter the Constitution imposed obligations on judicial behavior, then those obligations would bind the exercise of the "judicial power." At the very least, judges and scholars would need to grapple with how those obligations guide construction, like other background legal principles or methods of interpretation that originalists argue the Constitution incorporated.[93] But we are at only the first step. *Is* there an originalist understanding of the judicial role?

Justice Jackson, for one, seems not to have thought so—at least not in the Commerce Clause cases that Lessig offers as paradigms for how a judge's understanding of his role affects construction. Justice Jackson looked hard for any judicially enforceable limit on Congress's power under that Clause and came up

89. Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 441-42 (1827). This construction was ultimately abandoned by the Supreme Court in *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1975).

90. *See, e.g.*, Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109 (1990). *Compare* Emp't Div. v. Smith, 494 U.S. 872, 885 (1990) ("The government's ability to enforce generally applicable prohibitions of socially harmful conduct . . . cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." (internal quotation marks omitted)), *with* Kennedy v. Bremerton Sch. Dist., 139 S. Ct. 634, 636-37 (2019) (mem.) (Alito, J., concurring in denial of certiorari) (observing that petitioner, a football coach terminated for praying on the field before a game in violation of school district policy, "still has live claims under the Free Exercise Clause").

91. *See, e.g.*, McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995).

92. *See supra* Section I.B.

93. *See* Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 851-52 (2015) ("Whether or not we share the moral and political traditions of the Founders, we continue a *legal* tradition that started at the Founding and that we haven't abandoned since.").

empty. "[T]he determination of the limit is not a matter of legal principle," he wrote in a memo to his law clerk, "but of personal opinion; not one of constitutional law, but one of economic policy."[94] A judge's role is to apply principle, not policy, so Justice Jackson concluded that the Commerce Clause could not be judicially construed at all: "[T]he interstate commerce power has no limits except those which Congress sees fit to observe."[95]

Far be it from us to disagree with one of the greats, but was Justice Jackson right to despair?[96] Are there legal principles to guide judicial construction of the Constitution? Many originalists think there are. Here again we will not do justice to every nuance of this important debate, but will focus on the two predominant theories of originalist construction that adhere to the principles of fixation and constraint.[97] And in the mode of scholars such as Ilan Wurman, Randy Barnett, and James Bradley Thayer, we will discuss these theories as presumptions: the presumption of liberty and the presumption of democracy.[98]

A. Two Presumptions: Liberty and Democracy

A judge who applies the presumption of liberty would construe constitutional vagueness in the way that best preserves individual rights. The presumption of liberty places the burden on the government to demonstrate that the law is constitutional by showing that Congress used a specifically delineated power to pass the law.[99] Barnett argues that the Commerce Clause, Necessary and Proper Clause, Ninth Amendment, and the Privileges or Immunities Clause all

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94. LESSIG, *supra* note 1, at 170 (quoting BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION 217 (1998)).

95. *Id.*

96. As a preliminary matter, Justice Jackson seems to have been wrong to conclude that the original meaning of commerce is so unbounded. As Justice Thomas has shown, the Commerce Clause—as originally understood—had significant discernible restraints. *See* United States v. Lopez, 514 U.S. 549, 585-602 (1995) (Thomas, J., concurring).

97. Other scholars have suggested progressive presumptions that would require judges to construe the Constitution in light of social change. Such presumptions do not adhere to the fixation and constraint principles, so they are outside of our purview. And as of yet we have found no historical evidence to support them. *See generally* Ilan Wurman, *The Original Understanding of Constitutional Legitimacy*, 2014 BYU L. REV. 819 (discussing the different presumptions).

98. *See, e.g.*, *id.*

99. ILAN WURMAN, A DEBT AGAINST THE LIVING: AN INTRODUCTION TO ORIGINALISM 84 (2017).

justify this presumption.[100] So how would this presumption affect Justice Jackson's conclusion? In a Commerce Clause case, this presumption would limit federal power, leaving economic activity either unregulated or regulated by the states when Congress cannot point to a specifically enumerated power to support its regulation.[101]

By contrast, a judge who applies the presumption of democracy would more readily allow the people, through their representatives in federal or state legislatures, to settle what the Constitution does not. On this theory, laws would at least have a presumption of constitutionality, and importantly, the burden would be on the challenger to demonstrate that the law is clearly prohibited. Perhaps the most famous proponent of this theory was Thayer. In his famous article, *The Origin and Scope of the American Doctrine of Constitutional Law*, Thayer stated that courts should not invalidate a popularly enacted law unless the law was so clearly unconstitutional that it was "not open to rational question."[102]

As mentioned, some originalists can and do support each theory. Since either presumption applies only when constitutional text is underdeterminate, one can advocate either presumption and still respect the constraints of the Constitution's fixed meaning as far as they go. Indeed, originalists argue that their favored presumptions arise from the Constitution itself. When one provision's meaning does not provide the answer, the argument goes, other provisions—like the Privileges or Immunities Clause, the Ninth Amendment's reservation of rights, or the Tenth Amendment's reservation of regulatory authority to the states or the people—tell a judge what to do. For purposes of this discussion, then, we can envision the presumptions operating like background canons that a judge might apply in statutory interpretation, such as the rule of lenity. Unlike grammatical canons (like *noscitur a sociis* and *ejusdem generis*, for example), the presumptions do not tell a judge what particular words mean; rather they tell a judge, all else being equal, which way to lean. Such a "canon" would have the benefit of being constitutionally inspired.[103] Whether the test under a given pre-

100. RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 152 (2004).

101. *See Lopez*, 514 U.S. at 585-93 (Thomas, J., concurring) (discussing powers originally understood to be conferred by the Commerce Clause); *see also* Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 104 (2001) (defending Justice Thomas's narrow, originalist interpretation of the Commerce Clause against its critics).

102. James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893).

103. *See* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 176-77 (2010).

sumption should in fact be as demanding as Thayer says is an important question, but it is second order to the question of whether originalism has anything to say about which presumption applies to a given problem of construction.[104]

Lessig's attention to role helps answer that preliminary question by clarifying a fundamental difference between these theories. The theories differ in their conception of the judicial role. Whether a judge should apply a presumption of liberty or democracy depends on whether a judge's role is to preserve rights or to enhance democracy. One presumption counsels action in the face of vagueness, the other restraint. Since both purport to be originalist, however, the question naturally arises: which one does Founding-era evidence support?

This question should matter to originalists and, especially, to judges who consider themselves originalists. True, the construction debate has so far focused largely on political theory, since the question of the proper presumption may depend on whether the Constitution is an essentially democratic or libertarian document.[105] And that question is arguably not strictly historical. But if the ratifying public expected that the exercise of the Article III judicial power would entail a particular theory of construction, and if we can determine which, then the principles of fixation and constraint would require a judge to apply it. Others have analyzed the judicial role as it relates to stare decisis or the foundations of judicial review.[106] We seek to analyze role as it relates to the construction zone. As Solum has noted, "The defender of Originalist Thayerianism [that is, the democratic presumption] might try to argue that something about the publicly available context of constitutional communication would have implicitly communicated the presumption of constitutionality," yet "no one has attempted to supply this argument" for either presumption.[107]

We recognize the "substantial difficulty" of this argument, namely that the historical evidence might itself prove indeterminate.[108] We still think it is worth

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104. Thus, if a particular presumption is in fact incorporated into a background principle of the judicial role, how exactly a judge's role requires the judge to utilize the presumption would be yet another question for further research.

105. *See generally* RANDY E. BARNETT, OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE (2016) (outlining the historical origins of the democratic and republican views of the Constitution and arguing for a renewal of the latter—i.e., the reprioritization of constitutional rights and individual sovereignty).

106. *See, e.g.*, Nelson Lund, *Judicial Review and Judicial Duty: The Original Understanding*, 26 CONST. COMMENT. 169 (2009) (reviewing PHILIP HAMBURGER, LAW AND JUDICIAL DUTY (2008)); McGinnis & Rappaport, *supra* note 36.

107. Solum, *supra* note 5, at 520.

108. *Id.*

a try.[109] Taking the construction debate out of the strictly theoretical realm could bring it closer to a resolution that judges can reliably apply. Judges do not always have time to sit down with hundreds of pages of dense theory. Even if they did, their decisions should ultimately be based on discernible, democratically legitimate sources of law. And theory itself is neither law nor always easy to discern. But if judges were *required* as a matter of historical fact to apply a particular presumption when in the construction zone, because that presumption is embedded in their role, this aspect of originalism becomes all the more operational.

So, imagine yourself as a judge in a case arising under, say, the First Amendment. And imagine that the text is underdeterminate with respect to the situation before you. Probably no one in the Founding generation foresaw all the ways that discourse happens now, and anyone who did would have been called crazy. If the plaintiff before you argued that some regulation of some aspect of modern discourse violated the First Amendment, the doctrine you applied would be a construction. It would thus be shaped by the presumption you applied, or, to use Lessig's terms, your understanding of your role.

How do you ensure that you understand your role as the Framers did? We look at two sources: the debates between the Federalists and Anti-Federalists and the debates at the Constitutional Convention. We recognize that this choice breeds a swarm of its own questions. Were the Federalist Papers not tendentious partisan documents? Did anyone read them? And the Anti-Federalists—did those guys not lose? As for the Convention debates, why is that any more relevant than legislative history is for interpreting a statute? And how does one weigh and rank different originalist sources?

We try to account for some of these concerns, mainly by relying on these sources only to the extent they reflect original public meaning—that is, to the extent they might be evidence of a larger debate at the Founding, not just one person's idiosyncratic views. We also try to avoid the potential dangers of "law office history" by reviewing the relevant sources impartially and by not pretending that we have reviewed them all. Our hope here is to show *how* a judge can properly figure out his role, and thus to offer an alternative approach to the one that Lessig bases on post-Founding cases. We have to start somewhere.

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109. The beauty of originalism, unlike many other methodologies, is that one must show their work for everyone to see and test. Thus, if a person cherry-picks sources that favor their preferred theory, the critics can call them out and point to the sources not considered. In some sense, unlike a sociology-based opinion, it is provable and disprovable. It is also why we cannot reach a definitive solution here; rather, as we note in the Conclusion, that will take an in-depth study of all of the source material available. Hopefully, when that review is ultimately performed, the weight of the evidence will provide a definitive answer as to the judge's role when meaning does not provide a clear answer in the case at issue.

B. Debates Between the Federalists and Anti-Federalists

Like many judges before, we look to the Federalist Papers. Published in New York while many state ratifying conventions were still considering whether to adopt the Constitution, these essays were the primary effort of the Constitution's supporters—specifically Alexander Hamilton, James Madison, and John Jay—to state their positive case. Of course, the Federalist Papers were not circulated over the Internet. But they were serialized in some local papers, and Hamilton sent them to Virginia "for use as a 'debater's handbook' in the Virginia ratifying convention."[110] The Federalist Papers are thus evidence of the debate raging at the time, from taverns to state ratifying conventions, about the Constitution. They are a crystalline form of one side of that debate.

But only one side. As Justice Thomas has pointed out, the Federalist Papers are "only the most famous example of the outpouring of anonymous political writing that occurred during the ratification of the Constitution."[111] The Constitution's opponents, the Anti-Federalists, wrote too. Although one might question why we should listen to the debate's "losers," the Anti-Federalist Papers are relevant for the same reason that the Federalist Papers are: to quote Justice Scalia, "their writings, like those of other intelligent and informed people of the time, display how the text of the Constitution was originally understood."[112] Plus, the Anti-Federalists did not exactly "lose," in the same way in which a party who settles a case but gets important concessions does not "lose" the case. That is particularly true when it comes to the original understanding of the judicial role. The Anti-Federalists were concerned about the power being vested in the new federal judiciary. And the Federalist Papers responded specifically to these concerns. Because the Federalists responded to the Anti-Federalists' concerns with a promise that the power did not go that far, both the critique and response are key components of a determination of the original meaning.[113] After all, one must read both sides of a debate to understand what exactly a concession means.

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110. Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1154 (2003).

111. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 360 (1995) (Thomas, J., concurring in judgment).

112. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 38 (Amy Gutmann ed., 1997) (discussing the Federalist Papers). As Judge Oldham recently noted in an en banc majority opinion, if the Anti-Federalists' views did not matter, the Federalists would not have written a whole book responding to them. Langley v. Prince, 926 F.3d 145, 170 n.12 (5th Cir. 2019) (en banc).

113. *See* Andrew S. Oldham, *The Anti-Federalists: Past as Prologue*, 12 N.Y.U. J.L. & LIBERTY 451, 453-57 (2019).

That is why judges read both the petitioner's and respondent's briefs before deciding what the parties agree upon and what they dispute.

Thus, both sets of papers are relevant to the original public understanding of the powers a judge should have.[114] And both overlap in ways relevant to an originalist understanding of judicial role. Specifically, as will shortly be seen, both agreed that federal judges should not actively seek to grow federal power, implying that a presumption of liberty applies at least to federal regulation. But we are not looking only for agreements. Divergences can clarify the strength that presumptions should receive in particular contexts. For example, if all agreed on the importance of federalism—as appears to be so—then the presumption of democracy might equate to a strong presumption in favor of state regulation as opposed to federal regulation, whereas it might apply with less strength (if at all) in cases that do not implicate federalism concerns.

Some originalists today advocate for the presumption of liberty to prevent either the federal or state governments from intruding on individual liberty. The Anti-Federalists had a different worry. Their ultimate concern was that the federal government would aggrandize its power at the expense of the states. While the Anti-Federalists acknowledged liberty as the ultimate aim of government, they feared a tyrannical federal government and believed that liberty would be best protected by protecting the states' prerogatives.[115] Their argument about the judicial role was no different. Anti-Federalists felt strongly that federal judges, like the federal government itself, must be limited in their power. And they proposed two limits that readers of *Fidelity & Constraint* will recognize as akin to fidelity to meaning and fidelity to role. Anti-Federalists argued, first, that federal judges should adhere to the original public meaning of the Constitution

114. Justice Thomas recently demonstrated the perils of ignoring the Anti-Federalists' complaints. In *Franchise Tax Board of California v. Hyatt*, 139 S. Ct. 1485, 1496 (2019), he pointed out that the Supreme Court's decision in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), was the result of the Supreme Court ignoring (in part) the Anti-Federalists' concerns. As a result, *Chisholm* "precipitated an immediate 'furor' and 'uproar' across the country," which ultimately resulted in the passage of the Eleventh Amendment. *Hyatt*, 139 S. Ct. at 1495-96.

115. Patrick Henry believed that "liberty ought to be the direct end of your government" but argued that state governments would be more responsive and thus more protective of liberty. Patrick Henry, *Speeches of Patrick Henry in the Virginia State Ratifying Convention, 5 June 1788, in* 5 THE COMPLETE ANTI-FEDERALIST 211, 211-20 (Herbert J. Storing ed., 1981). Other Anti-Federalists, including Cato and Philadelphiensis, made similar points. *See* Cato, *Letter III*, *in* THE ESSENTIAL ANTIFEDERALIST 26-29 (W.B. Allen & Gordon Lloyd eds., 2d ed. 2002); Philadelphiensis, *IX*, *in* 3 THE COMPLETE ANTI-FEDERALIST 127, 127-28 (Herbert J. Storing ed., 1981).

and, second, that a judge's role was limited to applying original public meaning—in other words, that judges should adhere to a limited role in constitutional construction.

Brutus, the pen name of one leading Anti-Federalist, made perhaps the clearest argument of anyone in the Founding generation that judges should adhere to the Constitution's original public meaning. He described this fidelity to meaning in words an originalist would love:

> [T]he courts are to give such meaning to the constitution as comports best with the common, and generally received acceptation of the words in which it is expressed, regarding their ordinary and popular use rather than their grammatical propriety. Where words are dubious, they will be explained by the context. The end of the clause will be attended to, and the words will be understood, as having a view to it; and the words will not be so understood as to bear no meaning or a very absurd one.[116]

Brutus worried that courts would have an incentive to expand their role and thus their power, and that they could do so by purporting to construe the Constitution consistent with its spirit.[117] Hence his focus on the text. But the Constitution did not give anyone the power to review the reviewers. So Brutus still worried that judges would feel "independent of the people, of the legislature, and of every power under heaven."[118] "Men placed in this situation," he warned, "will generally soon feel themselves independent of heaven itself."[119] Echoing the Anti-Federalists' main concern, Brutus predicted that independent judges would interpret the Constitution to favor the federal government, and thus themselves, at the expense of the states.[120] He further predicted that this usurpation would take the form of judicial constructions based on the Constitution's general, unspoken spirit.[121] He therefore wanted reassurance that federal judges would in fact only apply the Constitution's plain meaning—that is, that they would have a limited role in the construction zone. He proposed two solutions: (1) to give

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116. Brutus, *Essay XI*, *in* THE ESSENTIAL ANTIFEDERALIST, *supra* note 115, at 185, 187 [hereinafter Brutus, *XI*].

117. *Id.*

118. Brutus, *Essay XV*, *in* THE ESSENTIAL ANTIFEDERALIST, *supra* note 115, at 196-97 [hereinafter Brutus, *XV*].

119. *Id.*

120. Brutus, *XI*, *supra* note 116, at 188. Brutus also feared that the federal courts would "gradually" extend the reach of the federal government so as to ultimately destroy the state governments. Brutus, *XV*, *supra* note 118, at 199.

121. Brutus, *Essay XII*, *in* THE ESSENTIAL ANTIFEDERALIST, *supra* note 115, at 190, 192.

Congress the power to review judicial decisions, since Congress would at least be more responsive to the people; and (2) more importantly, to leave the power in the states because the best way to protect people's liberty was to allow power to rest closest to the people.[122] Had he spoken in terms of presumptions, he would have advocated for a presumption of federalism.

Hamilton had a response. In *Federalist 81*, he first addressed Brutus's argument that an independent judge would stray from the original meaning of the Constitution and construe the document according to its spirit. Specifically, he said that "there is not a syllable in the plan under consideration which directly empowers the national courts to construe the laws according to the spirit of the Constitution."[123] Although he went on to note that, "wherever there is an evident opposition, the laws ought to give place to the constitution,"[124] he rejected the claim that the Court would act as Congress's accomplice against the states. He called the worry that judges would enter the province of the legislature a "phantom."[125]

This exchange lends support to a particular kind of presumption of democracy: namely, a presumption of constitutionality that applies to state but not federal laws.[126] Anti-Federalists wanted to preserve liberty; they just did not trust federal judges to do so. Thus, they wanted federal judges to enforce federalism. They thought judicial construction would otherwise favor the federal government, and thus wanted judges to adhere to a limited role—as Hamilton assured them they would.

So did Madison. He believed that the best way to protect liberty was through the separation of powers. Like Hamilton, he did note that judicial review would exist—that is, that judges would need to interpret and apply laws "according to the rules of the Constitution."[127] But the Constitution in turn needed to ensure, and thus needed to be read to ensure, that the three branches were not allowed

122. Brutus, *XV*, *supra* note 118, at 200.

123. THE FEDERALIST NO. 81, *supra* note 59, at 543 (Alexander Hamilton) (emphasis omitted).

124. *Id.*

125. *Id.*

126. Gary Lawson has stated the presumption this way: "[P]resume that state laws and acts are constitutional unless something in this Constitution convinces you otherwise and presume that federal laws and acts are unconstitutional unless something in this Constitution convinces you otherwise." Lawson, *supra* note 54, at 1234.

127. In Federalist 39, Madison noted that the Court would have to construe the law "impartially" and "according to the rules of the constitution." THE FEDERALIST NO. 39, *supra* note 59, at 256 (James Madison).

to usurp one another's power.[128] For if one branch had the power to create, execute, and adjudicate the law, tyranny would result.[129] Citing Montesquieu, Madison observed in *Federalist 47* that if judges could rewrite the laws, "the life and liberty of the subject would be exposed to arbitrary controul."[130] And if judges exercised executive power, they "might behave with all the violence of an oppressor."[131] The logic behind separating judges from other governmental powers shows that the Founders expected judges to have limited powers and thus suggests that they expected judges to have limited discretion in the construction zone. Otherwise, that separation would be for naught.

But the Federalist and Anti-Federalist Papers alone do not resolve the question. Hamilton also believed, as he said in *Federalist 78*, that it was the judiciary's province to declare laws "void" if they conflicted with the Constitution.[132] "Without this, all the reservations of particular rights or privileges would amount to nothing."[133] He went on to say that it was the responsibility of the courts to keep the legislature within its "assigned" role and thus protect the people's rights.[134] Indeed, Hamilton believed that it was the very independence the Anti-Federalists feared that would allow judges to stand up to the legislature and protect people's rights.[135] These statements lend support to the presumption of liberty—the presumption that judges must actively protect individual rights from democratic encroachment.

On their own, therefore, the Federalist and Anti-Federalist Papers appear to cohere around the belief that the judicial role was to preserve individual rights. Yet they offer divergent views of how that would work in judicial practice. The Anti-Federalists feared any construction that did not promote federalism, and in turn, suggested a limited judicial role. Madison's idea of separate powers likewise implied a limited judicial role, except where other branches encroach on judicial power. But Hamilton's idea of judicial review might imply a more active role. Though they disagreed on these matters, perhaps the Founders shared some baseline understanding of how judges should exercise their role when textual meaning is underdeterminate. For example, that Hamilton thought courts

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128. *See* THE FEDERALIST NO. 47, *supra* note 59, at 325-26 (James Madison).

129. *Id.* at 326.

130. *Id.* (quoting MONTESQUIEU, THE SPIRIT OF THE LAWS, bk. XI, ch. VI, at 152 (Anne M. Cohler et al. trans. & eds., 1989) (1748)).

131. *Id.* (emphasis omitted).

132. THE FEDERALIST NO. 78, *supra* note 59, at 524 (Alexander Hamilton).

133. *Id.* at 525.

134. *Id.*

135. *Id.* at 523.

should protect rights does not necessarily mean he thought they should protect unenumerated rights. If these particular members of the Founding generation are working from a baseline, further sources might help illuminate that shared understanding.

C. Debates at the Constitutional Convention

Records of the debates at the Constitutional Convention in Philadelphia provide an additional source of evidence. On a few days in particular, "the delegates made their most revealing comments about judicial review."[136] But we think these records are relevant for two reasons aside from what the delegates themselves thought. First, they might corroborate evidence gleaned from the Federalist Papers and Anti-Federalist Papers. Think of those Papers like the tip of a semantic iceberg. If we see the same ideas discussed in the lower, wider layers, then the ideas so cogently discussed in the Federalist Papers and Anti-Federalist Papers are more probative of original public meaning. And we can see which of those ideas in fact reflected public understanding—that is, which is really the iceberg and which a trick of the light.

Second, the Convention debates demonstrate original public meaning in their own right, as persuasively argued by Vasan Kesavan and Michael Stokes Paulsen. Although the delegates debated the Constitution in secret, their debates are "important evidence of the way informed eighteenth-century Americans understood and used the language of the Constitution."[137] That is in large part why originalists look to any source from the time of the Constitution's drafting and ratification. They do so to see how the public understood the words and phrases that they made law—in other words, to find the original public meaning. But the Convention debates also provide an important piece of evidence that other sources cannot. They show the problems that the Constitution was intended to solve.[138]

In short, the debates are perhaps the most direct evidence of the original meaning of the Constitution's phrases. Of course, when using the Constitution's

136. Jack N. Rakove, *Judicial Power in the Constitutional Theory of James Madison*, 43 WM. & MARY L. REV. 1513, 1521 (2002).

137. Kesavan & Paulsen, *supra* note 110, at 1187.

138. *Cf.* Samuel L. Bray, *The Mischief Rule* (Notre Dame L. Sch. Legal Studies Research Paper No. 19912, 2019), https://ssrn.com/abstracts=3452037 [https://perma.cc/932V-6H4T] (explaining that the mischief rule tells an interpreter to read a statute in light of the problem that led to it).

"secret drafting history," one must avoid the well-known problems of using legislative history.[139] But those problems seem less likely with the debates. For example, we are unaware that, while busy forming the most important document in our history, anyone tried to smuggle something into the debate records in the hope of influencing courts later on. And if anyone did, courts can still avoid error by relying on the debates not for intention but as indicia of meaning, which can always be cross-checked against other contemporaneous sources.

The Convention debates provide evidence about the role that the Framers expected judges to play. As with the Federalist Papers and Anti-Federalist Papers, explicit agreements are of course probative. But so are principles that both sides of a disagreement share and thus that can be effectuated through the presumptions in a way that both sides might agree with.

As recorded by James Madison,[140] the delegates debated at length whether the judiciary and/or the executive would have prior review—that is, the ability to weigh in on legislation before it becomes a law. In the Constitution's final form, of course, the President has the power of prior review (through the veto) and the judiciary has only subsequent review. How the delegates reached this compromise reveals some of their thoughts about the judicial role. On Monday, June 4, 1787, the delegates discussed a potential "Council of Revision" composed of judges who would review legislation passed by Congress before it was enacted. Elbridge Gerry

> doubt[ed] whether the Judiciary ought to form a part of it, as they will have a sufficient check ag[ainst] encroachments on their own department by their exposition of the laws, which involved a power of deciding on their Constitutionality. In some States the Judges had actually set aside laws, as being ag[ainst] the Constitution. This was done too with

139. *Cf.* John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 448 n.95 (2005) (explaining textualist wariness of using legislative history because it risks substituting the opinion of a sponsor or committee for the body as a whole).

140. Madison's notes offer the views of just one Convention delegate. As with any witness testimony, one must take the witness's motives and potential biases into account. *See* Gerard N. Magliocca, *A Faction of One: Revisiting Madison's Notes on the Constitutional Convention*, 43 LAW & SOC. INQUIRY 267, 271 (2018) (reviewing MARY SARAH BILDER, MADISON'S HAND: REVISING THE CONSTITUTIONAL CONVENTION (2015)). But like any other piece of originalist evidence, his notes are relevant to the extent they present the views and word usage of an informed eighteenth-century American or where, as here, the goal is to find out what happened at the Convention. *Id.* at 279, n.20.

> general approbation. It was quite foreign from the nature of [their] office to make them judges of the policy of public measures.[141]

Gerry moved to give only the Executive the power of prior review. Rufus King seconded the motion, "observing that the Judges ought to be able to expound the law as it should come before them, free from the bias of having participated in its formation."[142] The state delegations voted for Gerry's motion eight to two.[143] The motion to establish the "Council of Revision" was brought up again on July 21.[144] Nathanial Gorham argued that

> [a]ll agree that a check on the Legislature is necessary. But there are two objections ag[ainst] admitting the Judges to share in it which no observations on the other side seem to obviate. [T]he [first] is that the Judges ought to carry into the exposition of the laws no prepossessions with regard to them. [The second] that as the Judges will outnumber the Executive, the revisionary check would be thrown entirely out of the Executive['s] hands, and instead of enabling him to defend himself, would enable the Judges to sacrifice him.[145]

And Gerry continued to argue that

> [t]he motion was liable to strong objections. It was combining [and] mixing together the Legislative [and] the other departments. It was establishing an improper coalition between the Executive [and] Judiciary departments. It was making Statesmen of the Judges; and setting them up as the guardians of the Rights of the people. He relied for his part on the Representatives of the people as the guardians of their Rights [and] interests. It was making the Expositors of the Laws, the Legislators which ought never to be done.[146]

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141. *See 2* JAMES MADISON, THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA 51 (Gaillard Hunt & James Brown Scott eds., 1920) (June 4).

142. *Id.*

143. *Id.* at 56.

144. *Id.* at 294 (July 21).

145. *Id.* at 299-300.

146. *Id.* at 296.

Caleb Strong summarized the objections: "the power of making ought to be kept distinct from that of expounding, the laws. No maxim was better established."[147] The motion failed.[148]

Although these exchanges are not explicitly about the role of a judge, they offer data about the Framers' understanding of that role. First, the identities of the motion's proponents are revealing. The motion was initially proposed and supported by James Wilson, one of the most prominent lawyers of the time, who went on to become one of the first Supreme Court Justices.[149] A powerful supporter of popular sovereignty, he wanted even senators and the President to be popularly elected.[150] And in his famous October 6, 1787 speech in the courtyard behind Independence Hall—which, like the Federalist Papers, was printed in various newspapers[151]—he argued that a federal bill of rights would have been "superfluous" because "every thing which is not given [to the federal government], is reserved."[152] Much like the Anti-Federalists, he expected that individual rights would best be protected by existing state bills of rights and the absence of federal interference. Another apparent proponent of the Council of Revision idea was Madison himself, who introduced a similar motion on August 15, 1787.[153] As we have seen, Madison believed that judges should keep to their separate sphere. That both he and Wilson supported the Council motion thus suggests that those who understood the judicial role to be limited—whether by the separation of powers or the limited scope of federal authority—did not necessarily expect the judiciary always to be in a backseat to democracy. A role in prior

147. *Id.*

148. *Id.* at 300.

149. *Id.* at 294.

150. *See id.* at 70-71 (June 7); Matt Riffe, *James Wilson, Popular Sovereignty, and the Electoral College*, NAT'L CONST. CTR.: CONST. DAILY (Nov. 28, 2016), https://constitutioncenter.org/blog/james-wilson-popular-sovereignty-and-the-electoral-college [https://perma.cc/REZ4-AP39].

151. *See* BURTON ALVA KONKLE, JAMES WILSON AND THE CONSTITUTION: THE OPENING ADDRESS IN THE OFFICIAL SERIES OF EVENTS KNOWN AS THE JAMES MADISON MEMORIAL (1907); *supra* text accompanying note 110.

152. JAMES WILSON, *State House Yard Speech (Oct. 6, 1787)*, *in* 1 COLLECTED WORKS OF JAMES WILSON 171, 172 (Kermit L. Hall & Mark David Hall eds., 2007).

153. *See* MADISON, *supra* note 141, at 405 (Aug. 15).

review would have been an inherently more active one,[154] and thus more in line with what we have been calling the presumption of liberty.[155]

Of course, the motion did not pass. Yet the objections quoted above reveal that it did not pass in part because the delegates did not think it was necessary. Each of the above objectors presumed that judges would have the power to "expound" upon the laws. Judges thus would already have an active role in construing the Constitution. That role simply existed after a law was passed, not before. The objectors' presumption aligns with the more active presumption of liberty.

But that judges could construe did not mean they had unlimited license in the construction zone. Gerry explicitly rejected "making statesmen of the Judges, and setting them up as the guardians of the rights of the people."[156] Although he noted that state judges had set aside laws as unconstitutional "with general approbation," that kind of judging was different in his view than judging "the policy of public measures."[157] To give judges that power would, in Gorham's term, "sacrifice" the other branches—that is, the branches that should do politics.[158] This concern is of course embodied in the governmental structure that the Framers ultimately created. Rather than putting judges above Congress in the Council of Revision, they gave Congress power over the judicial branch by giving Congress the power to create and abolish however many federal courts it wants (other than the Supreme Court, which is the only one the Constitution requires).[159]

This debate therefore suggests that the Framers saw a role for judges in construction, but not an unbridled one. Whether or not they supported judicial prior review, no one expected judges to defer reflexively to the political branches. Yet neither did they picture judges as "statesmen." They appear to have seen a line between the presumptions of liberty and democracy, a line we will trace more clearly in the following Part.

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154. While we believe this to be true, we recognize that when judges rewrite statutes or save them from unconstitutionality by changing the meaning, they may be doing "violence" to the text.

155. To be clear, our concern is not any of these people's subjective intentions. Rather, we consider this particular debate as potentially indicative of a larger debate about the judicial role and of any common understanding that might have come out of it.

156. *See* MADISON, *supra* note 141, at 296 (July 21).

157. *Id.* at 51 (June 4).

158. *Id.* at 300 (July 21).

159. *See* U.S. CONST. art. I, § 8, cl. 9.

III. CURRENT CONCLUSIONS

We have examined three of the richest available sources of original public meaning: the often-quoted Federalist Papers, the less-often-quoted but equally important Anti-Federalist Papers, and records from the Constitutional Convention. Though we usually consider the ordinary usage of words beyond just the words of the Founders, these sources are especially helpful when we consider an important question at the Founding: what is the role of the judge? We have tried to handle those sources as a judge would handle any other evidence, by acknowledging the inherent limits of any piece of evidence standing alone and by asking whether one piece corroborates another. Although our analysis is preliminary, we think this sort of process would be useful for a judge who finds himself in the construction zone (and who has the benefit of adversarial briefing and argument). Although preliminary, our analysis reveals two important things.

First, it appears correct as an originalist matter to think about the construction zone in Lessig's terms—that is, to frame the question of what presumption to apply as a question of judicial role. In the sources we have examined, the Framers do not explicitly discuss presumptions of liberty or democracy. But they do discuss similar concepts, such as whether and how judges should protect individual rights while preserving democracy. And they discuss these concepts in terms of role. Would the features of their role make federal judges "independent of heaven itself"? Were judges "assigned" to be protectors of liberty? Would they go too far and become "statesmen"? Thus, when called on to construe one of the Constitution's underdeterminate phrases, an originalist judge should ask himself, "what is my role?" That question will lead the judge to examine the evidence above—and hopefully more—and then to the right presumption to take into the construction zone. In short, we think that an original meaning of the judicial role will ensure fidelity both to meaning and to role. Lessig is mistaken about the relationship between these two fidelities, because fidelity to role requires fidelity to meaning. An inquiry about role as a way of determining the proper presumption helpfully guides the choice of presumption and also ensures that judges will construe constitutional provisions as the Framers would have.

Second, the sources we have examined suggest more nuance to the presumptions of liberty and democracy than we gave in our initial description of those presumptions. When conducting the role inquiry we have just suggested, judges therefore are not left to look merely for the amorphous "spirit" of the Constitution. Instead there is evidence of a specific set of obligations that is among the Constitution's background principles and thus that judges should honor in the construction zone. The Framers do not appear to have thought that judges would presumptively defer to democracy or presumptively not do so. Rather,

they appear to have thought that different presumptions would apply in different contexts. That is largely due to the ways they expected rights to be protected, namely through federalism (the Anti-Federalists' main cause) and the separation of powers (one of Madison's main causes). Thus, when we talk about the presumption of democracy, we need to be careful about the level of government to which we defer. The Anti-Federalists wanted to keep power in the states, and many other Framers agreed that judges would not become national policy-makers. A presumption of democracy, and in turn of more limited judicial review, might therefore apply to state regulation. And a presumption of liberty and more rigorous review might apply to federal regulation.

That is for two reasons. First, federalism: the federal government would have limited, enumerated powers, and both Federalists and Anti-Federalists alike saw judges as a check on aggrandizement. Second, the separation of powers: judges would also, as Gerry said, "check against encroachments on their own department."[160] Or as Madison put it in *Federalist 51*, each branch—the judiciary included—would jealously guard its sphere and thus be on the lookout for aggrandizements by other branches.[161] That was necessary for individual rights, because any other way lies tyranny. Thus, to put you back in the shoes of a judge faced with an underdeterminate constitutional provision: armed with the above historical evidence and any other that you might find, you might conclude that a state regulation is a presumptively valid democratic enactment but look more skeptically at a federal regulation that may encroach on liberty.

We are not saying we are right about all this, at least not right now. For one, the Reconstruction Amendments might have removed the presumption of democracy for state enactments, at least for enactments that implicate rights protected by other amendments.[162] So historical evidence might point against using a presumption (or any presumption) for certain questions of construction—even if, as discussed earlier, it would not be anachronistic in general to use presumptions that the Framers might not have had specifically in mind to give effect to notions of judicial role that were part of original public meaning. Ultimately, we hope to have shown that history adds an important, missing perspective on the New Originalist debate about the construction zone. And we encourage scholars

160. *See* MADISON, *supra* note 141, at 51 (June 4).

161. THE FEDERALIST NO. 51, *supra* note 59, at 347-53 (James Madison).

162. *See, e.g.*, Randy E. Barnett, *Three Federalisms*, 39 LOY. U. CHI. L.J. 285, 289-90 (2008) (stating that "the Reconstruction Amendments significantly altered the balance of federal power and the nature of federalism" and that they "add[ed] a new federal power to protect the fundamental rights of citizens from violation by states in the creation, application, and enforcement of state laws").

and judges to continue the investigation. In the hope that they do, we offer two parting thoughts about other potential leads.

The first is early judicial practice. Early opinions are most relevant to this question to the extent they reflect original public understanding. For example, Lessig interprets early cases as applying effectively a presumption of self-preservation; he argues that the early Court showed a fidelity to role by ensuring its own power going forward even though the cases did not implicate the separation of powers.[163] Although his discussion of these cases is fascinating, the sources we have reviewed do not mention such a presumption. This is not a critique of Chief Justice Marshall. As we have seen, the principle of judicial review he invoked in *Marbury v. Madison* was presaged in sources like *Federalist 78*. Thus, one should look at early decisions along with other sources of original public meaning.

The second potential lead is corpus linguistics.[164] This tool draws on the common knowledge of the lay person by enabling lawyers to search through databases ("corpuses") to find examples of how a word was used at any given time.[165] Corpus linguistics can thus serve as another cross-check for original public meaning.[166] And it is an important one: after all, the Constitution gets its authority from "We the People," not just people who wear robes. Of course, a judge will ultimately need to decide for himself what the original public meaning of the judicial role was. And he will need to exercise the same caution in making that decision as in any other decision based on semantic or other evidence.[167] In our imagined case, the judge is not determining the meaning of a statutory or constitutional term — the as-yet most common use of corpus linguistics — but rather a concept in public debate.[168] Corpus linguistics is thus relevant in at least two ways. First, it can prove that a concept like judicial role was in fact a matter

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163. *See, e.g.*, LESSIG, *supra* note 1, at 32.

164. *See* Wilson v. Safelite Grp., Inc., 930 F.3d 429, 440 (6th Cir. 2019) (Thapar, J., concurring in part and concurring in the judgment) ("We ought to embrace another tool to ascertain the ordinary meaning of the words in a statute. This tool — corpus linguistics — draws on the common knowledge of the lay person by showing us the ordinary uses of words in our common language.").

165. *See* State v. Rasabout, 356 P.3d 1258, 1275-76, 1289 (Utah 2015) (Lee, Associate C.J., concurring in part and concurring in the judgment).

166. *See* Lawrence B. Solum, *Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record*, 2017 BYU L. REV. 1621, 1669 ("[C]orpus linguistics allows for rigorous intersubjective validation of individual subjective judgments about word meaning.").

167. *See, e.g.*, *Wilson*, 930 F.3d at 440-42 (discussing best practices for using corpus linguistics).

168. For a guide in using corpus linguistics, see James C. Phillips, Daniel M. Ortner & Thomas R. Lee, *Corpus Linguistics & Original Public Meaning: A New Tool to Make Originalism More Empirical*, 126 YALE L.J.F. 21 (2016).

of public debate and thus that an original public meaning is discoverable. Second, it can offer further proof that the views expressed in sources like the Federalist Papers and Anti-Federalist Papers, the tips of the semantic iceberg, were widely shared. They put the "public" in original public meaning. A judge who sees his role today as finding and applying that meaning should therefore consider these sources as well.

One might look to further sources still, from Blackstone, to Story's *Commentaries*, to state-level judicial practices, constitutions, and ratifying conventions. That would take a book unto itself, which maybe Lessig or another originalist scholar would be interested in writing. That project would be useful to originalists and most of all to judges. Lessig has shown that judges are guided, as they must be, by how they understand their role. It is therefore imperative that judges understand their role properly—that is, that they understand the role they were originally meant to fulfill.