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Notes

FROM LANGUAGE TO LAW: INTERPRETATION AND CONSTRUCTION IN EARLY AMERICAN JUDICIAL PRACTICE

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ABSTRACT—This Note surveys evidence concerning how early American Supreme Court Justices approached interpretation and construction based on an analysis of Supreme Court opinions from 1795 to 1805. An evaluation of this evidence indicates two main trends. First, the Justices engaged in interpretation and construction as a single process, alternating between textual and normative reasoning to determine the intent of the Framers or of Congress. In some cases, textual reasoning seemed determinative; in others, normative reasoning was decisive. This finding illustrates some tension between the idea of limiting judicial discretion in construction and applying methods of interpretation and construction that would have been used in the Founding Era. This may highlight important questions for some original methods originalists. Second, the Justices utilized a variety of tools and canons in the construction zone. Acquiescing to historical practice, deferring to national interest concerns, and using legislative evidence were all fair game. To the extent that modern-day theorists or jurists find Founding-era evidence of judicial practice relevant to contemporary debates about interpretation and construction, this Note offers evidence of how early American Justices went about determining the meaning of legal texts, and offers tentative conclusions about the implications for contemporary debates.

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INTRODUCTION

In the law, words matter. And how judges go about deciding what words mean matters even more. Look no further than last year's Supreme Court term. The Justices' analysis of the text of federal and state statutes determined whether Ohio was impermissibly restricting its residents' constitutional right to vote.[1] The Justices' analysis of another federal statute determined whether the government could deport a lawful permanent resident.[2] The right to vote, the liberty to remain in the United States—the existence and contours of these and other foundational rights and liberties come down to written words, whether of state legislation, federal statutes, treaties, or the Constitution. Written words have always mattered when judges analyze legal texts. And in an age where, according to Supreme Court Justice Elena Kagan, "we're all textualists now,"[3] and where two more self-identified originalist judges have recently joined the Court,[4] how we get from written words to the law matters more than ever.

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[1] *See* Husted v. A. Philip Randolph Inst., 138 S. Ct. 1833, 1846 (2018) (finding that state statute did not violate the requirements of the National Voter Registration Act).

[2] *See* Sessions v. Dimaya, 138 S. Ct. 1204, 1216 (2018) (holding the statute unconstitutionally void in violation of due process).

[3] Harvard Law School, *The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE (Nov. 25, 2015), https://www.youtube.com/watch?v=dpEtszFT0Tg [https://perma.cc/N3EV-QB7C].

[4] While the originalist pedigree of Justices Brett Kavanaugh and Neil Gorsuch may be a topic of debate, both at least claim the label. *See* Brent Kendall, *Judge Neil Gorsuch Backs Scalia's "Originalist" Approach*, WALL ST. J. (Jan. 31, 2017), https://www.wsj.com/articles/judge-neil-gorsuch-backs-scalias-

It may be safe to say that "[e]verybody knows that in legal interpretation we start with written words and somehow end up with law," as Professors William Baude and Stephen Sachs assert in a recent article.[5] It may even be safe to say that everybody *agrees*—on that, at least. But it is even safer to say that not everybody agrees on exactly how we do, or how we should, get from written words to resolution of a legal dispute.

The interpretation-construction distinction offers one theory articulating how judges get from written text to the legal resolution of a case.[6] Professor Lawrence Solum, one of the most prolific contemporary scholars writing about the interpretation-construction distinction, has described it as follows. Analysis starts with the text in dispute: a provision of a statute, a phrase in a treaty, or even a single word in the Constitution. "Interpretation" applies linguistic rules to uncover the semantic meaning of the text.[7] In contrast, "construction" applies substantive or legal rules to resolve the disputed meaning of the text in question.[8] When jurists "interpret," they find out "the meaning of language"; when they "construct," they find out "its legal content—the changes it works in the law by its adoption or enactment."[9] Of course, not everybody agrees that Professor Solum's interpretation-construction distinction accurately describes how we get from written words to law. Some scholars argue that the interpretation-construction distinction does not exist.[10] Others acknowledge that the

originalist-approach-1485912175 [https://perma.cc/F6C2-GZ7M]; Aziz Huq, *Why You Shouldn't Care Whether Kavanaugh Is an 'Originalist,'* POLITICO (Aug. 9, 2018), https://www.politico.com/magazine/story/2018/08/09/kanavaugh-originalist-why-you-shouldnt-care-219344 [https://perma.cc/4BUP-3ZB3].

[5] William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1147 (2017).

[6] *See* Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 486–87 (2013) (collecting quotations from judicial opinions to illustrate the distinction between interpretation and construction); Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95 (2010) (explicating the nature of the interpretation-construction distinction).

[7] *See* Solum, *The Interpretation-Construction Distinction*, *supra* note 6, at 100 ("In general, interpretation recognizes or discovers the linguistic meaning of an authoritative legal text.").

[8] *See id.* at 103 ("[C]onstruction gives legal effect to the semantic content of a legal text.").

[9] *See* Baude & Sachs, *supra* note 5, at 1085–86.

[10] *See, e.g.*, ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 13–14 (2012) ("[T]he noun *construction* answers both to *construe* (meaning 'to interpret') and to *construct* (meaning 'to build')" and "nontextualists have latched onto [this] duality of *construction*. From the germ of an idea in the theoretical works of the 19th-century writer Francis Lieber, scholars have elaborated a supposed distinction between *interpretation* and *construction*.") (internal footnote omitted); Eric Berger, *Originalism's Pretenses*, 16 U. PA. J. CONST. L. 329, 356 (2013) ("The problem with this approach is that the new-originalist theory [of the interpretation-construction distinction] is likely doing little work in most cases, except taking the judge through a difficult, time-consuming investigation only to end up where she started, at step one."); Laura A. Cisneros, *The Constitutional Interpretation/Construction Distinction: A Useful Fiction*, 27 CONST. COMMENT. 71, 80 (2010)

distinction may be useful, but dispute what constitutes "construction" and what kinds of canons and evidence are appropriate for use in the "construction zone."[11]

While contemporary theories about the interpretation-construction distinction have generated robust debate,[12] historical evidence prior to the mid nineteenth century is less plentiful. Professor Solum notes that "[t]he interpretation-construction distinction is an old one, with deep historical roots in American jurisprudence."[13] Scholars point to an 1839 treatise by Francis Lieber as early evidence recognizing an explicit distinction between interpretation and construction as a theoretical matter.[14] But what about as a practical matter?

This Note explores what early American judicial practice indicates about interpretation, construction, and the interpretation-construction distinction based on an analysis of Supreme Court opinions from 1795 to 1805. In doing so, it canvasses the historical evidence of how early American Justices got from written words to law. It summarizes the trends in how early American Justices analyzed various texts and offers an assessment of how these trends might inform contemporary debates about interpretation and construction.

This Note proceeds on the assumption that evidence of early judicial practice has something to tell contemporary jurists about analyzing legal text. At minimum, it describes historical practice in the early years of this country. At best, it can guide contemporary judges in their analysis of legal texts, insofar as original methods originalists and others believe that early

("Ultimately, debate over the precise contours of constitutional interpretation and constitutional construction leaves us with a distinction that is neither obvious nor identifiable through the application of an accepted and uniform set of rules. One need only ask . . . theorists . . . to read a Supreme Court opinion and they may be hard-pressed to agree as to the point at which the Court stopped interpreting and started constructing. Thus, as an aid to the practice of judging, the interpretation/construction distinction is largely unhelpful.").

[11] *See infra* Part IV. Solum defines the construction zone as the "zone of underdeterminacy" in which construction is required to determine meaning, i.e., where judges are doing work "that goes beyond direct translation of semantic content into legal content." Solum, *The Interpretation-Construction Distinction*, *supra* note 6, at 108.

[12] *See supra* note 10 and accompanying text; *see also* Solum, *Originalism and Constitutional Construction*, *supra* note 6, at 476–90 (discussing objections to the interpretation-construction distinction on terminological and substantive grounds).

[13] *See* Solum, *Originalism and Constitutional Construction*, *supra* note 6, at 492.

[14] *See* Solum, *The Interpretation-Construction Distinction*, *supra* note 6, at 110 (citing FRANCIS LIEBER, LEGAL AND POLITICAL HERMENEUTICS, OR PRINCIPLES OF INTERPRETATION AND CONSTRUCTION IN LAW AND POLITICS 55–82 (Enlarged ed., Roy M. Mersky & J. Myron Jacobstein eds., Wm. S. Hein & Co., Inc. 1970) (1839)); *see also* Ralf Poscher, *The Hermeneutic Character of Legal Construction*, *in* LAW'S HERMENEUTICS: OTHER INVESTIGATIONS 207 (Simone Glanert & Fabien Girard eds., 2017) (discussing the history of the distinction between legal interpretation and construction).

judicial practice can and should do so. Even for those who believe Founding-era judicial practice should not guide, much less dictate, contemporary jurisprudence, a description of historical methods provides material for articulating arguments about how judges should proceed today. It is only by describing and understanding historical practice that we can make arguments about either its instructive value or its inadequacy as a guide to contemporary debates. With that historical evidence in hand, theorists and judges can more fulsomely engage in the debate about how we do and how we should get from written words to law.

This Note proceeds in four Parts. Part I places this evaluation in the context of scholarly debates about the interpretation-construction distinction. Part II begins by outlining the methodology used to select and analyze cases, including how evidence was characterized as "interpretation" as opposed to "construction." It then analyzes the Justices' opinions in one case, *Calder v. Bull*, to illustrate this methodology. Parts III and IV trace the trends in how early American Supreme Court Justices approached getting from written words to the legal resolution of the cases before them. Each Part presents the trend through illustrative case descriptions, offers an analysis of the implications for the interpretation-construction distinction, and argues how this evidence might inform contemporary judicial practice.

Part III of this Note describes how early American judicial practice does not neatly align with the interpretation-construction distinction as a matter of practice. Rather than engaging in a consistent two-step sequential process with discrete modes of analysis, early American Justices alternated between considering linguistic meaning and substantive norms to render the text determinate by giving effect to the drafters' purpose, engaging in both interpretation and construction in a unified process. This finding illustrates some tension between the idea of limiting judicial discretion in construction and applying methods of interpretation and construction that would have been used in the Founding Era. Such tension may highlight important questions for original methods originalists.

Part IV of this Note illustrates how Justices relied on a variety of tools (linguistic and normative canons) in the construction zone to derive legal meaning from the text they considered—a broader array than at least some originalists, including some original methods originalists, would condone.[15] This Note concludes by considering how this historical evidence can inform contemporary debates about how we do and should get from language to law.

[15] *See infra* Part IV.

I. THE INTERPRETATION-CONSTRUCTION DEBATE

The interpretation-construction distinction dates back at least as far as 1839 to a treatise by Francis Lieber.[16] A number of distinguished authorities have discussed the distinction since then, most notably in the context of interpreting contracts,[17] and the interpretation-construction distinction has generated robust debate among academics and legal theorists. Some originalist theorists have discussed interpretation and construction as separate "stages" in determining the meaning of constitutional provisions.[18] Other scholars have applied this interpretation-construction distinction to analyses of statutes, contracts, and other legal texts.[19] Still other scholars dispute the distinction's relevance and even its existence.[20] Professors John McGinnis and Michael Rappaport, for example, argue that interpretation and construction are essentially a single activity.[21] Beyond the realm of scholarly debate, jurists have also referenced the distinction in a number of federal and state court cases.[22]

So what is the interpretation-construction distinction these scholars and jurists are debating? Professor Solum, the most prolific scholar to explore

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[16] LIEBER, LEGAL AND POLITICAL HERMENEUTICS, *supra* note 14, at 56 (defining "construction" as "the drawing of conclusions respecting subjects, that lie beyond the direct expression of the text, from elements known from and given in the text—conclusions which are in the spirit, though not within the letter of the text"); *see also* Lawrence B. Solum, *Communicative Content and Legal Content*, 89 NOTRE DAME L. REV. 479, 483 (2013) [hereinafter Solum, *Communicative Content*] (discussing Lieber's treatise as some of the earliest evidence of the interpretation-construction distinction).

[17] *See* Solum, *Communicative Content*, *supra* note 16, at 483 n.11 (listing several contracts treatises).

[18] *See* Solum, *The Interpretation-Construction Distinction*, *supra* note 6, at 95; *see also* Lawrence B. Solum, *The Unity of Interpretation*, 90 B.U. L. REV. 551 (2010) (discussing the various stages of interpretation); Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL'Y 65, 69 (2011) ("[O]riginalism is a method of constitutional interpretation that identifies the meaning of the text as its public meaning at the time of its enactment."); Keith E. Whittington, *Constructing a New American Constitution*, 27 CONST. COMMENT. 119 (2010) (discussing relationship between constitutional interpretation and construction). *See generally* KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 6–7 (1999); KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 1–19 (1999).

[19] *See, e.g.*, E. Allan Farnsworth, "*Meaning" in the Law of Contracts*, 76 YALE L.J. 939 (1967) (discussing interpretation and construction in the context of contracts).

[20] *See supra* note 10 and accompanying text; *see also* Solum, *Communicative Content*, *supra* note 16, at 502–15 (discussing arguments of other scholars that the constitutional construction zone does not exist).

[21] *See, e.g.*, 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, 753 (2009) ("Moreover, a dichotomy between interpretation and construction that allows extraconstitutional norms undermines the stability of original meaning, because the Constitution would not govern many 'constitutional' issues.").

[22] *See* Solum, *Communicative Content*, *supra* note 16, at 483 n.10 (listing cases referencing the interpretation-construction distinction).

the distinction, describes the distinction in terms of the difference between communicative content and legal content. He defines communicative content, the result of interpretation, as the "linguistic meaning" of a legal text,[23] while legal content, the result of construction, is "the content of the legal norms the text produces."[24] Legal content includes "rules, standards, principles, obligations, [and] mandates."[25] Where the meaning of a word or phrase renders a provision ambiguous (i.e., susceptible of multiple meanings), the activity of interpretation recovers the linguistic or semantic meaning of the text.[26] Interpretation analyzes linguistic facts: common usage, linguistic practice, and regular syntax and grammar rules.[27] But where a word or phrase renders the provision vague (i.e., having indefinite meaning) or irreducibly ambiguous, construction translates linguistic meaning into legal effect.[28] Construction considers legal norms and political morality and determines the legal content of the text.[29]

Professor Solum has clarified that while his theoretical model for interpretation and construction illustrates a sequential process, "real judges might begin with construction, move back to interpretation, and then revise the construction—or do both more or less simultaneously."[30] He argues that judges can proceed to constitutional construction even if the Constitution's original linguistic meaning determines the case, and not only when the Constitution's original meaning underdetermines the case.[31] But calling it the interpretation-construction *distinction* relies on the idea that there are two separate activities, even if they form a single process. The distinction does not require that these separate activities be sequential. But for the interpretation-construction distinction to do any work in limiting how judges analyze text, construction would have to be confined to underdeterminate cases—where interpretation and tools to discover semantic meaning alone

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[23] Professor Solum has called communicative content "semantic" or "linguistic" content. *See* Solum, *Communicative Content*, *supra* note 16, at 480 ("The phrase 'communicative content' is simply a precise way of labeling what we usually call the 'meaning' or 'linguistic meaning' of the text."); Solum, *Originalism and Constitutional Construction*, *supra* note 6, at 464 ("This aspect of meaning is sometimes called 'literal meaning'—the meaning that we get from the words alone (without reference to context). Using a slightly different vocabulary, we can call this aspect of meaning 'semantic content.'").

[24] *See* Solum, *Communicative Content*, *supra* note 16, at 480.

[25] *Id.* at 507.

[26] *See* Solum, *The Interpretation-Construction Distinction*, *supra* note 6, at 96–102.

[27] *Id.* at 99, 104.

[28] *Id.* at 103.

[29] *Id.* at 100 n.13, 104.

[30] Solum, *Originalism and Constitutional Construction*, *supra* note 6, at 495.

[31] *See* Solum, *The Interpretation-Construction Distinction*, *supra* note 6, at 103–08 (asserting that construction includes the determination of legal effect of both indeterminate and determinate constitutional meaning).

were insufficient to resolve the case. As discussed later in Part III, the historical evidence indicates that early American judicial practice more closely tracks Professor Solum's clarified approach.

Scholarly debate engages with a variety of questions regarding the interpretation-construction distinction. One area of debate queries which actors have the authority or legitimacy to properly engage in interpretation or construction.[32] This Note takes no position on whether certain actors more legitimately engage in interpretation or construction than others. Instead, it focuses on how early American Supreme Court Justices approached the project of determining meaning. In a recent essay, Professor Lee Strang examined evidence of how participants in the First Congress's debates about the Bank of the United States approached the construction of constitutional text.[33] In contrast, this Note focuses on different actors—Supreme Court Justices—from roughly the same historical period, offering a potentially complementary evaluation of historical evidence of the judiciary's approach. This Note also examines a wider array of material than Professor Strang's essay; rather than focusing only on cases dealing with constitutional provisions, this Note evaluates evidence of how Justices approached statutory and treaty interpretation and construction as well. This relates to another area of debate regarding parallelism:[34] whether the interpretation-construction distinction applies the same way to determining the meaning of statutes as well as of the Constitution. This Note considers how the Justices approached multiple kinds of legal texts. While this Note may provide evidence to inform further research questions, it leaves a more detailed analysis of parallelism in early American judicial practice to future research.

This Note focuses instead on two other questions in the debate surrounding the existence and definition of the interpretation-construction distinction. First, in practice, did early American jurists engage in interpretation and construction as separate, sequential activities or as part of a unified larger process? In either case, did they engage in construction—

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[32] *See* Lee J. Strang, *Originalism as Popular Constitutionalism?: Theoretical Possibilities and Practical Differences*, 87 NOTRE DAME L. REV. 253, 272–74 (2011) (describing the different stances of a number of scholars with regards to the actors who appropriately engage in construction); *see also* Lee J. Strang, *An Evaluation of Historical Evidence for Constitutional Construction from the First Congress' Debate over the Constitutionality of the First Bank of the United States*, 14 U. ST. THOMAS L.J. 193, 196 n.26 (2018) [hereinafter Strang, *An Evaluation of Historical Evidence*] (contrasting originalist stances on whether construction is a political task appropriately to the political branches, or whether judges properly engage in construction); Solum, *The Interpretation-Construction Distinction*, *supra* note 6, at 103 (distinguishing "judicial construction from political construction and private construction" (emphasis omitted)).

[33] Strang, *An Evaluation of Historical Evidence*, *supra* note 32, at 194.

[34] Parallelism here refers to the idea that approaches to determining the meaning of statutes do or should mirror approaches to determining the meaning of the Constitution.

giving legal effect—only where interpretation failed to render text sufficiently determinate? Or did early American jurists engage in construction even where interpretation sufficiently determined the text to resolve the case?[35] This Note evaluates evidence of how the Founding-era Justices engaged in the process of determining meaning and finds evidence indicating that early American Supreme Court Justices considered these activities as simultaneous parts of a larger process.[36] The evidence further indicates that Justices engaged in "construction" even in cases where "interpretation" rendered meaning determinate, not only in cases where the meaning was underdeterminate.[37]

Second, which tools, evidence, or rules are acceptable for use within the construction zone to determine meaning?[38] This Note presents initial findings regarding the tools and evidence that early American Supreme Court Justices relied upon to determine meaning. It also offers tentative conclusions about the implications of those findings for the interpretation-construction distinction and contemporary jurisprudence.

II. ANALYZING THE CASES

But how to go about answering these questions? Focusing on early American judicial practice means that looking at cases seems a good place to start. But which ones? And how can we analyze the Justices' approach to getting from words to law? This Part discusses the selection of and analytical approach to the cases. It also illustrates the approach by walking through the analysis of the Justices' opinions in a particular case, *Calder v. Bull*.[39]

The pool of cases includes Supreme Court opinions from 1795 to 1805[40] that reference the terms "interpret," "interpretation," "construe," or

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[35] *See* Solum, *Communicative Content*, *supra* note 16, at 511–18 (describing the different views of originalists and living constitutionalists regarding the scope of construction); *see also* Strang, *An Evaluation of Historical Evidence*, *supra* note 32, at 196–97 (noting the difference in opinion among originalists regarding whether constitutional construction occurs only in cases of underdeterminacy or whether it also occurs where interpretation yields a determinate result).

[36] For more on the scholarly debate on this question, see *infra* Section III.A.

[37] *See infra* Section III.B.

[38] *See infra* Part IV.

[39] 3 U.S. (3 Dall.) 386 (1798).

[40] The pool comprised thirty-three cases. This time frame captures cases in the early days of the independent United States to illustrate judicial practice following the Founding. It is designed to be broad-ranging substantively, which requires a narrow time period in order to provide a manageable number of cases for analysis. Substantively, this analysis considers cases where the Justices analyzed constitutional, federal statutory, and treaty provisions. It spans the transition between the period when the Justices issued seriatim opinions and when they transitioned to issuing majority, concurring, and dissenting opinions. It also spans the pre-Marshall Court and the early days of the Marshall Court. Further research can expand upon these initial findings to look for further trends—for example, whether the practice of the Marshall Court differed significantly from previous courts.

"construction," as identified by a keyword search of these terms.[41] Cases containing these keywords are likely the most relevant cases for analysis because where the Justice explicitly described his analysis as either "interpreting" or "constructing," he consciously referenced his method. Where the Justice was thus explicitly conscious of his method, it is more likely that the opinion will demonstrate how the Justice approached analyzing the text to determine its meaning.

However, the keyword search may not capture the entire universe of relevant cases. As Professor Solum notes, construction will be most apparent where the judge is in the "construction zone": where the text is indeterminate or underdeterminate and yields no clear semantic meaning.[42] In some cases, the semantic meaning may correspond directly to giving legal effect: where the language is neither vague nor ambiguous, the semantic meaning straightforwardly resolves the case. These cases may be omitted from an analysis of opinions where the Justice self-consciously engaged in an interpretive project. Additionally, such cases may also fail to reach the Supreme Court at all if they present little interpretive controversy. Ultimately, this sample is not intended to be exhaustive; rather, it facilitates examination of the kind of evidence early American judicial practice provides regarding interpretation, construction, and the interpretation-construction distinction.

An important note: the characterization in this Note of the Justices as "interpreting" or "constructing" did not rely on the Justices' use of either word—i.e., if the Justice used the word "interpret," this did not necessarily mean he was "interpreting" in Professor Solum's terms.[43] Similarly, if the Justice used the word "construct," this did not necessarily mean he was "constructing" in Professor Solum's terms. This is critical because several trends in these early cases indicate that the Justices did not consistently use the word "interpretation" to refer to semantic meaning and "construction" to

[41] A keyword search in LexisNexis was crosschecked with Westlaw to ensure consistency. This Note compares majority, concurring, dissenting, and seriatim opinions within each case and specifically references the Justice who authored the opinion. *See infra* note 62 for a brief background on seriatim opinions.

[42] For more on the "construction zone," see Solum, *The Interpretation-Construction Distinction*, *supra* note 6, at 108; *see also supra* text accompanying note 11.

[43] *See* Solum, *Originalism and Constitutional Construction*, *supra* note 6, at 496 (noting that "[c]onstitutional actors who are unfamiliar with the vocabulary and substance of the interpretation-construction distinction cannot be expected to engage in reliable reporting of their own deliberative processes in the technical vocabulary" used in contemporary theoretical debates). This Note does not rely upon the Justices to "engage in reliable reporting" of whether they are engaging in interpretation or construction, as Professor Solum would understand those terms.

refer to legal effect.[44] First, the frequency of usage indicates that the Justices generally relied on the term "construction" to refer to the process that included both discovering meaning and determining legal effect. Of the thirty-three cases in the final sample, twenty-five referred only to construction,[45] only six referenced both interpretation and construction,[46] and none used only "interpretation" or "interpret." Within those cases, the Justices overwhelmingly referenced "construction" or "construe,"[47] and only sparingly referenced "interpret" or "interpretation."[48] Second, the manner in which the Justices used "construction" indicates that they used it to describe any activity that went beyond plain meaning.[49] This included where the

[44] *See* Solum, *Communicative Content*, *supra* note 16, at 483 (noting that "[n]othing hangs on the terminology," and asserting that the words "interpretation" and "construction" can apply distinctly to the activities of discovering meaning and determining legal effect or, alternatively, to a process that includes both activities); *see also* Solum, *Originalism and Constitutional Construction*, *supra* note 6, at 475 ("The use of the terms 'interpretation' and 'construction' to mark the distinction between meaning and effect is not itself important. We could use a different vocabulary. For example, we might say 'linguistic interpretation' and 'constructive interpretation.' Or we might differentiate 'finding meaning' from 'determining legal effect.' Whatever vocabulary we use, we are marking a theoretical distinction that is not fully reflected in common usage."); SCALIA & GARNER, *supra* note 10, at 15 (noting that the terms "interpretation" and "construction" have never reflected courts' actual usage). This evidence appears to support Scalia and Garner's position insofar as early American judicial practice does not reflect usage of the terms as Professor Solum would understand them.

[45] *See, e.g.*, Church v. Hubbart, 6 U.S. (2 Cranch) 187 (1804); Faw v. Marsteller, 6 U.S. (2 Cranch) 10 (1804); Head & Amory v. Providence Ins. Co., 6 U.S. (2 Cranch) 127 (1804); Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804); Mason v. Ship Blaireau, 6 U.S. (2 Cranch) 240 (1804); Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804); Pennington v. Coxe, 6 U.S. (2 Cranch) 33 (1804); Hodgson v. Dexter, 5 U.S. (1 Cranch) 345 (1803); Hooe v. Groverman, 5 U.S. (1 Cranch) 214 (1803); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); United States v. Hooe, 5 U.S. (1 Cranch) 318 (1803); United States v. Simms, 5 U.S. (1 Cranch) 252 (1803); Wood v. Owings, 5 U.S. (1 Cranch) 239 (1803); Turner v. Fendall, 5 U.S. (1 Cranch) 117 (1801); United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801); Mossman v. Higginson, 4 U.S. (4 Dall.) 12 (1800); Priestman v. United States, 4 U.S. (4 Dall.) 28 (1800); Fowler v. Lindsey, 3 U.S. (3 Dall.) 411 (1799); Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798); Brown v. Barry, 3 U.S. (3 Dall.) 365 (1797); Brown v. Van Braam, 3 U.S. (3 Dall.) 344 (1797); Huger v. South Carolina, 3 U.S. (3 Dall.) 339 (1797); Hylton v. United States, 3 U.S. (3 Dall.) 171 (1796); Wiscart v. Dauchy, 3 U.S. (3 Dall.) 321 (1796); Talbot v. Janson, 3 U.S. (3 Dall.) 133 (1795).

[46] *See, e.g.*, Stuart v. Laird, 5 U.S. (1 Cranch) 299 (1803); Wilson v. Mason, 5 U.S. (1 Cranch) 45 (1801); Bas v. Tingy, 4 U.S. (4 Dall.) 37 (1800); Sims v. Irvine, 3 U.S. (3 Dall.) 425 (1799); Wilson v. Daniel, 3 U.S. (3 Dall.) 401 (1798); Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796).

[47] The cases included 139 instances where the Justices used "construction" and twenty-three where they used "construe."

[48] Thirteen instances, to be exact.

[49] *See, e.g.*, *Pennington*, 6 U.S. (2 Cranch) at 51 ("The solution of this question depends on the construction of the act by which the duty was imposed."); *Calder*, 3 U.S. (3 Dall.) at 393 (opinion of Chase, J.) ("If the term ex post facto law is to be construed to include and to prohibit the enacting any law after a fact, it will greatly restrict the power of the federal and state legislatures; and the consequences of such a construction may not be foreseen." (emphasis omitted)); *Ware*, 3 U.S. (3 Dall.) at 233 (opinion of Chase, J.) ("[I]f the words in the enacting clause, in their nature, import, and common understanding, are not ambiguous, but plain and clear, and their operation and effect certain, there is no room for construction." (emphasis omitted)).

Justices relied on grammatical canons,[50] which Professor Solum would call "interpretation." Furthermore, where the Justices used both the term "interpretation" and "construction," they appeared to use them interchangeably.[51] For example, the Justices' use of the phrase "misconstruction" also indicated "construction" was used in place of "interpretation."[52] The way the Justices used construction to refer to both linguistic meaning and legal effect may indicate that they approached getting from written words to law as a single process that included both discovering meaning and determining legal content. Part III considers this implication in more detail.

Instead of relying on the words, the characterization of the Justices' analysis as "interpreting" or "constructing" depended on the underlying analysis, including the canons and other evidence the Justices used.[53] Sections of opinions classified as the Justices determining semantic content—Professor Solum's "interpretation"—included sections where the Justice focused on the literal meaning of words, referenced ordinary meaning as opposed to legal terms of art, or relied on classic linguistic canons of

[50] *See, e.g.*, *Schooner Peggy*, 5 U.S. (1 Cranch) at 109 ("On any other construction the word definitive would be rendered useless and inoperative." (emphasis omitted)); *Priestman*, 4 U.S. (4 Dall.) at 34 ("But it is too plain for argument, that this section cannot, by any fair and rational construction, be made to refer to the 19th section. It is inapplicable, because the objects are entirely different."); *Ware*, 3 U.S. (3 Dall.) at 284 (opinion of Cushing, J.) ("The 5th article, it is conceived, can not affect or alter the construction of the 4th article. For, first, it is against reason, that a special provision made respecting debts by name, should be taken away immediately after, in the next article, by general words, or words of implication, which words too, have, otherwise, ample matter to operate upon. 2d. No implication from the 5th article, can touch the present case, because that speaks only of actual confiscations, and here was no confiscation.").

[51] *See, e.g.*, *Stuart*, 5 U.S. (1 Cranch) at 299 ("[I]t is sufficient to observe, that practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature."); *Daniel*, 3 U.S. (3 Dall.) at 405 ("The construction, which is thus given, not only comports with every word in the law, but enables us to avoid an inconvenience, which would otherwise affect the impartial administration of justice . . . . It is not to be presumed that the Legislature intended to give any party such an advantage over his antagonist; and it ought to be avoided, as it may be avoided, by the fair and reasonable interpretation, which has been pronounced."); *Ware*, 3 U.S. (3 Dall.) at 240 (opinion of Chase, J.) ("When we collect the intention from the words only, as they lie in the writing before us, it is a literal interpretation; and indeed if the words, and the construction of a writing, are clear and precise, we can scarce call it interpretation to collect the intention of the writer from thence. The principal rule to be observed in literal interpretation, is to follow that sense, in respect both of the words, and the construction, which is agreeable to common use." (emphasis omitted)).

[52] *See, e.g.*, Little v. Barreme, 6 U.S. (2 Cranch) 170, 178 (1804) ("Is the officer who obeys them liable for damages sustained by this misconstruction of the act, or will his orders excuse him?"); *Ware*, 3 U.S. (3 Dall.) at 271 (opinion of Iredell, J.) ("In proceeding to examine the treaty with these sentiments, it may well be imagined I do it with a reverential and sacred awe, left by any misconstruction of mine, I should weaken any one of its provisions.").

[53] *See supra* notes 25–30 and accompanying text.

interpretation.[54] Sections of opinions classified as the Justices "giving legal effect"—Professor Solum's "construction"—included where the Justice relied on substantive canons of construction, consequentialist reasoning, or other legal norms to determine meaning.[55] These legal norms included national security interests, retroactivity, and historical context.[56] For example, Justices engaged in "interpretation" when they looked at the whole act to contextually determine the appropriate meaning of the word based on its use in other provisions of the same or related statutes.[57] In contrast, the Justices engaged in "construction" when they relied on normative reasoning based on the content of the statute to determine whether a given meaning was "just."[58]

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[54] *See* James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 12 (2005) ("Language canons consist of predictive guidelines as to what the legislature likely meant based on its choice of certain words rather than others, or its grammatical configuration of those words in a given sentence, or the relationship between those words and text found in other parts of the same statute or in similar statutes. These canons do not purport to convey a judge's own policy preferences, but rather to give effect to 'ordinary' or 'common' meaning of the language enacted by the legislature.") (footnote omitted). Professor Solum notes that such "language canons" are canons of interpretation, as opposed to construction. Solum, *Originalism and Constitutional Construction*, *supra* note 6, at 507 n.177.

[55] *See, e.g.*, Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 109–10 (2010) ("Federal courts have long employed substantive canons of construction to interpret federal statutes. Some substantive canons express a rule of thumb for choosing between equally plausible interpretations of ambiguous text. The rule of lenity is often described this way: it directs that courts interpret ambiguous penal statutes in favor of the defendant. Other canons are more aggressive, permitting a court to forgo a statute's most natural interpretation in favor of a less plausible one more protective of a particular value. For example, a court will strain the text of a statute to avoid deciding a serious constitutional question, and absent a clear statement, it will not interpret an otherwise unqualified statute to subject either the federal government or the states to suit. While courts and commentators sometimes seek to rationalize these and other substantive canons as proxies for congressional intent, it is generally recognized that substantive canons advance policies independent of those expressed in the statute."). Professor Solum notes that such substantive canons seek legal effect, not meaning. Solum, *Originalism and Constitutional Construction*, *supra* note 6, at 507 n.178.

[56] This Note discusses these particular norms because they were present in the cases in the sample.

[57] This approach applies Professor Solum's characterization of interpretation as including where jurists rely on linguistic canons. *See* Solum, *Originalism and Constitutional Construction*, *supra* note 6, at 507 n.177.

[58] *See id.* at 510 ("Moreover, to the extent that these methods resolve irreducible ambiguity or vagueness by considering factors like 'conducive to the public good,' 'public convenience,' 'general intent,' 'equality,' 'injustice,' 'inconvenience,' and 'equity of the case,' the original methods will yield constructions and not interpretations.").

In thirteen cases in the sample the Justices primarily interpreted federal statutes;[59] in eight cases they addressed state laws.[60] The Justices analyzed constitutional provisions in several cases in the sample.[61] This may represent a small sample from which to draw generalizations about how the Justices ascertained the meaning of constitutional, as opposed to statutory, text. While few in number, these cases nonetheless offer a variety of opinions to compare and contrast judicial approaches and from which to observe trends and outline further questions.

To illustrate the analytical approach, take the Justices' seriatim[62] opinions in *Calder v. Bull*. In *Calder*, Justices Chase, Patterson, and Iredell

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[59] *See* Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804) (interpreting a nonintercourse law with France); Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804) (same); Pennington v. Coxe, 6 U.S. (2 Cranch) 33 (1804) (interpreting an act repealing a duty on sugar refiners); Stuart v. Laird, 5 U.S. (1 Cranch) 299 (1803) (interpreting Congress's power to constitute "inferior tribunals" to determine the constitutionality of a federal statute reconfiguring circuit courts); United States v. Hooe, 5 U.S. (1 Cranch) 318 (1803) (interpreting the repeal reinstating a provision of the Judiciary Act of 1789 requiring that a statement of facts must accompany the transcript in chancery cases); United States v. Simms, 5 U.S. (1 Cranch) 252 (1803) (interpreting acts creating the District of Columbia and providing for its governance); Talbot v. Seeman, 5 U.S. (1 Cranch) 1 (1801) (interpreting acts on salvage rates for recaptured ships); Bas v. Tingy, 4 U.S. (4 Dall.) 37 (1800) (same); Mossman v. Higginson, 4 U.S. (4 Dall.) 12 (1800) (finding that under the Judiciary Act the court could hear a case involving a foreign citizen that regarded real property in the United States); Fowler v. Lindsey, 3 U.S. (3 Dall.) 411 (1799) (finding the court did not have original jurisdiction where states were not actual parties to suit about disputed land); Wilson v. Daniel, 3 U.S. (3 Dall.) 401 (1798) (finding that under the Judiciary Act the amount in controversy for subject matter jurisdiction depended on the original amount in dispute when the action was instituted); Wiscart v. Dauchy, 3 U.S. (3 Dall.) 321 (1796) (finding that deference owed to findings of fact appealed to the Court on causes of equity or admiral jurisdiction whether they had only the statement of facts or also included the evidence); Penhallow v. Doane's Adm'rs, 3 U.S. (3 Dall.) 54 (1795) (interpreting an act establishing court of admiralty).

[60] *See* Faw v. Marsteller, 6 U.S. (2 Cranch) 10 (1804) (interpreting a Virginia act for adjusting and settling contracts made after paper money had been taken out of circulation); Wood v. Owings, 5 U.S. (1 Cranch) 239 (1803) (interpreting a Maryland statute regarding deeds in light of a federal uniform bankruptcy statute); Turner v. Fendall, 5 U.S. (1 Cranch) 117 (1801) (interpreting a Virginia act providing terms to recover from sheriff executing a writ); Wilson v. Mason, 5 U.S. (1 Cranch) 45 (1801) (interpreting jurisdiction in a Virginia state law regarding property causes of action); Sims v. Irvine, 3 U.S. (3 Dall.) 425 (1799) (interpreting Virginia laws addressing land grants and title to property); Brown v. Barry, 3 U.S. (3 Dall.) 365 (1797) (interpreting Virginia laws providing for settling debts after paper money was taken out of circulation); Brown v. Van Braam, 3 U.S. (3 Dall.) 344 (1797) (interpreting Rhode Island courts' rules of decision in trials at common law against a federal judicial statute); Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796) (interpreting a Virginia state law confiscating British property in light of the peace treaty with Great Britain).

[61] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (interpreting "appellate jurisdiction" of the Supreme Court to determine its authority to directly issue a writ of mandamus); *Stuart*, 5 U.S. (1 Cranch) 299; Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798) (interpreting the "ex post facto" clause in light of a Connecticut statute providing for probate decision appeals); Hylton v. United States, 3 U.S. (3 Dall.) 171 (1796) (interpreting "duties" in the Taxing Clause as applied to a federal statute taxing carriages).

[62] Prior to the Marshall Court (1801–1835), U.S. Supreme Court Justices delivered judicial opinions seriatim, that is, each judge wrote his own opinion, rather than a single judge writing the opinion on behalf

ascertained the meaning of "ex post facto" law to determine whether a Connecticut law unconstitutionally granted parties a new hearing after a probate court declared a will invalid.[63] Justice Chase alternated between interpreting and constructing. He opened his opinion with a broad appeal to the principles of republican government,[64] before focusing on the Framers' purpose in prohibiting ex post facto laws.[65] He referenced the text of the constitutional provision, citing the language "that no state shall pass any ex post facto law,"[66] and then set off to define an "ex post facto" law "within the words and meaning" of the Constitution.[67] He noted that, "naked and without explanation," the prohibition "is unintelligible, and means nothing."[68] Justice Chase looked at the "plain and obvious meaning and intention of the prohibition,"[69] then noted that the Framers did not intend such laws to protect private rights.[70] He engaged in interpretation when he implicitly invoked the canon against surplusage: ex post facto could not mean simply "retroactive," otherwise the other prohibitions in the clause would be rendered superfluous.[71] Justice Chase noted that "ex post facto" laws have a technical meaning as legal terms of art,[72] and that Blackstone agreed with that definition, again interpreting.[73] He referenced the usage of "ex post facto" laws in state constitutions to refer to retroactivity.[74] He distinguished this by stating that where "ex post facto" was used in a context unrelated to legislative acts, it meant retroactive; however, in reference to legislative acts, it applied only to retroactive criminal laws.[75] He then engaged in construction when he found support for this in the Framers'

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of the entire court. Seriatim opinions provide particularly useful material to directly contrast the approach of multiple justices to the same question of interpretation or construction.

63 *Calder*, 3 U.S. (3 Dall.) at 387.

64 *Id.* at 388–89 (opinion of Chase, J.) ("To maintain that our Federal, or State, Legislature possesses such powers, if they had not been expressly restrained; would, in my opinion, be a political heresy, altogether inadmissible in our free republican governments." (emphasis omitted)).

65 *Id.* at 389.

66 *Id.*

67 *Id.* at 390.

68 *Id.*

69 *Id.*

70 *Id.*

71 The other items in the clause prohibit making anything but gold or silver coin a tender in payment of debts and passing any law impairing the obligation of contracts. *Id.*

72 *Id.* at 391 ("The expressions 'ex post facto laws,' are technical," and "had been in use long before the Revolution, and had acquired an appropriate meaning, by Legislators, Lawyers, and Authors." (emphasis omitted)).

73 *Id.*

74 *Id.* at 391–92.

75 *Id.* at 393.

purpose to constrict unjust legislative acts[76] and in applying separation of powers and federalism canons.[77] Justice Chase then pivoted back to interpretation when he further noted that "ex post facto" laws in the Constitution meant only criminal laws, because if they included civil retroactivity, the Takings Clause would be rendered surplus.[78] Throughout the opinion, Justice Chase alternated between considering text and substantive norms, between interpreting and constructing, and then found in this case that text ultimately controlled.[79]

In his opinion, Justice Paterson predominantly engaged in what Professor Solum would call interpretation as opposed to construction. He started with the technical and legal meaning of "ex post facto law" as a term of art, engaging in interpretation.[80] He then referenced history to support why ex post facto laws were prohibited.[81] Similarly to Justice Chase, Justice Paterson looked to usage in state constitutions and noted that if "ex post facto" meant "retroactive," it would render the subsequent term in the constitutional clause—that states cannot pass laws impairing the obligation of contracts—superfluous, again interpreting.[82] Continuing to interpret, Justice Paterson emphasized how the Framers would have understood the words,[83] and relied on the linguistic structure of the clause to indicate meaning.[84] He concluded that the phrase "ex post facto" must be considered in its technical legal sense to refer only to crimes, rather than in its "literal" meaning.[85]

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[76] *Id.* at 394.

[77] *Id.* at 393 ("If the term ex post facto law is to be construed to include and to prohibit the enacting any law after a fact, it will greatly restrict the power of the federal and state legislatures; and the consequences of such a construction may not be foreseen." (emphasis omitted)).

[78] *Id.* at 394.

[79] *Id.* at 392 ("[It] is not within the letter of the prohibition; and, for the reasons assigned, I am clearly of opinion, that it is not within the intention of the prohibition; and if within the intention, but out of the letter, I should not, therefore, consider myself justified to continue it within the prohibition." (emphasis omitted)).

[80] *Id.* at 396 (opinion of Paterson, J.).

[81] *Id.* ("The historic page abundantly evinces, that the power of passing such laws should be withheld from legislators; as it is a dangerous instrument in the hands of bold, unprincipled, aspiring, and party men, and has been t[o]o often used to effect the most detestable purposes.").

[82] *Id.* at 397 ("Again, the words of the Constitution of the United States are, 'That no State shall pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts.' Article 1st section 10. Where is the necessity or use of the latter words, if a law impairing the obligation of contracts, be comprehended within the terms ex post facto law?").

[83] *Id.*

[84] *Id.*

[85] *Id.*

Justice Iredell, too, stuck to interpretation. Justice Iredell started his opinion with the purpose of the Framers and reasoned back from intent.[86] He looked at the danger the Framers sought to guard against[87] and determined that the "policy, the reason and humanity, of the prohibition, do not . . . extend to civil cases."[88] He then appealed to pragmatic considerations of government function[89] to conclude that "ex post facto" only concerned criminal laws.

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Walking through the Justices' opinions in *Calder v. Bull* illustrates how the analysis examined judicial language and characterized where the Justice was engaged in either "interpretation" or "construction." Applying this analysis to all the cases in the sample offers a modest examination of evidence of how early American Justices approached interpretation, construction, and the interpretation-construction distinction. But what does that evidence show? The next Part provides some answers.

III. EARLY AMERICAN JUDICIAL PRACTICE: CONSISTENTLY INCONSISTENT

This Part discusses the cases and the first trend in the Justices' approach to getting from written words to the legal resolution of the cases before them. Did the way the Justices analyzed the text indicate that they considered discovering meaning and determining legal content to be distinct activities? And did the way the Justices analyzed the text indicate that construction was appropriate only in cases where the text was underdeterminate, or also when the text was determinate? This Part describes how the Justices engaged in interpretation and construction as both simultaneous and sequential processes of analysis. It first describes the trend through illustrative cases and then offers tentative conclusions about the implications for the contemporary debate about interpretation and construction and original methods originalism. Most notably, this trend indicates a tension between the idea that judicial discretion in construction should be limited, and the idea that modern-day judges should approach interpretation and

[86] *Id.* at 399–400 (opinion of Iredell, J.).

[87] *Id.* ("The history of every country in Europe will furnish flagrant instances of tyranny exercised under the pretext of penal dispensations . . . . [T]he framers of the American Constitutions have wisely denied to the respective Legislatures, Federal as well as State, the possession of the power [of passing ex post facto laws] itself." (emphasis omitted)).

[88] *Id.* at 400.

[89] *Id.* ("Without the possession of this power the operations of Government would often be obstructed, and society itself would be endangered.").

construction, of the Constitution at least, by applying methods of interpretation and construction that would have been used in the Founding Era.[90] Can original methods originalists reconcile these two imperatives, and if so, how?

Professor Solum has clarified that while his theoretical model for interpretation and construction illustrates a sequential process, "real judges might begin with construction, move back to interpretation, and then revise the construction—or do both more or less simultaneously."[91] Yet calling it the interpretation-construction *distinction* relies on the idea that there are two separate activities, even if they form a single process. The distinction does not require that these separate activities be sequential. But for the interpretation-construction distinction to do any work in limiting how judges analyze text, construction would have to be confined to underdeterminate cases—where interpretation and tools to discover semantic meaning alone were insufficient to resolve the case. We would expect to see evidence that the Justices consistently looked at whether the text was ambiguous. First, we would expect to see the Justices look only at linguistic evidence of semantic meaning. Only if the text remained ambiguous—if interpretation was insufficient to render the text determinate—would they proceed to the construction zone to give legal effect to the text based on substantive norms.

So, is that what the Justices did? Not exactly. The Justices did not consistently treat ambiguity as a threshold question, an approach we would expect if they confined "construction" only to underdeterminate cases. As this Part discusses, we do not see the Justices first look only at linguistic evidence of semantic meaning, state that the text remained ambiguous, and only then proceed to the "construction zone" to give legal effect to the text based on substantive norms.

Instead, the cases illustrate two elements of the Justices' approaches. First, the Justices alternated between considering linguistic meaning and substantive norms to render the text determinate by giving effect to the drafters' purpose. That is, the Justices engaged in both interpretation and construction in a unified process. Section A describes this approach and considers three illustrative opinions as examples of where the Justices did not follow a sequential process. It then considers evidence that Chief Justice Marshall employed a more sequential approach. Second, the Justices found neither textual nor normative rationales consistently determinative in resolving the dispute before them. Section B describes this finding by

[90] *See, e.g.*, McGinnis & Rappaport, *supra* note 21, at 783–84 (arguing that judicial discretion in construction is more likely to be inconsistent and produce less representative results than an original methods approach outlined by the authors).

[91] Solum, *Originalism and Constitutional Construction*, *supra* note 6, at 495.

contrasting cases where the Justices found textual rationales compelling with cases where normative rationales won out. Section C then discusses the implications of this evidence for the interpretation-construction distinction and the limitations on judicial activity in the construction zone.

A. Alternatively Interpreting and Constructing in a Single Process

Instead of a sequential, two-step approach from interpretation to construction, where the Justices proceed into the construction zone only after finding the text ambiguous and underdeterminate, we find the Justices alternatively interpreting and constructing in a single process. This Section discusses several opinions in illustrative cases where the Justices alternated between linguistic and normative premises to give effect to the purpose underlying the law: Justice Chase's opinion in *Calder v. Bull*, Justice Paterson's opinion in *Hylton v. United States*, and Justice Chase's opinion in *Ware v. Hylton*. This Section then considers evidence that Chief Justice Marshall engaged in a more sequential approach by examining his opinion in *Pennington v. Coxe*.

1. Calder v. Bull—*Justice Chase*

Take, for example, Justice Chase's opinion in *Calder v. Bull*, as previously discussed. Justice Chase alternated between considering text and substantive norms, and found in this case that text ultimately controlled.[92] Justice Chase alternately considered semantic meaning and normative premises: he looked at the plain meaning of "ex post facto," then the Framers' intent that the phrase exclude private rights, and then the canon against surplusage. He noted that ex post facto laws are legal terms of art, considered meaning in light of the purpose to constrict unjust legislative acts, and then appealed to separation of powers and substantive canons to find that ex post facto cannot mean merely retroactive.[93]

In *Calder*, Justice Chase alternated between grammatical canons of legal terms of art and surplusage, then separation of powers and federalism canons, before returning to textual considerations to determine the case.[94] Justice Chase's opinion in *Calder* also demonstrates that while the Justice

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[92] *Calder*, 3 U.S. (3 Dall.) at 392 (opinion of Chase, J.) ("[It] is not within the letter of the prohibition; and, for the reasons assigned, I am clearly of opinion, that it is not within the intention of the prohibition; and if within the intention, but out of the letter, I should not, therefore, consider myself justified to continue it within the prohibition." (emphasis omitted)).

[93] *See supra* notes 71−72.

[94] *See supra* notes 65–80.

acknowledged where the text was vague or ambiguous, he did not necessarily treat it as a threshold issue for proceeding into the construction zone.[95]

2. Hylton v. United States—*Justice Paterson*

Consider next *Hylton v. United States*, in which Justice Paterson similarly alternated between linguistic analysis of the term tax, evidence of the intent of the Framers, and historical context.[96] In *Hylton*, the Justices offered seriatim opinions that examined the word "duties" in the Taxing Clause and whether a federal statute taxing carriages represented a direct tax, which would require it be administered by a rule of apportionment.[97] Justice Paterson began his opinion by stating that "duty" and "tax" were ambiguous.[98] He then noted that the Framers clearly intended to give Congress plenary authority to levy taxes.[99] Justice Paterson asserted that the term tax is a "genus" that includes direct taxes, duties, imposts, excises, and all other indirect taxes.[100] He reiterated that the Framers intended to directly tax only enslaved people and land by the rule of apportionment. He offered support by examining the particular history of the states at the time of the Framing and called it a pragmatic compromise to placate southern states.[101] Southern states were home to a large number of enslaved people and had more land that was sparsely settled and not extensively farmed.[102] Most other states were more densely settled and farmed a higher portion of their land.[103] Justice Paterson found that the Framers drafted the Taxing Clause to address these diverging interests by taxing enslaved people and land by apportionment.[104] He rejected "extending" the rule of apportionment by "construction," because while it represented a necessary compromise in the

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[95] *Calder*, 3 U.S. (3 Dall.) at 390 (opinion of Chase, J.) (The phrase "ex post facto" "naked and without explanation . . . is unintelligible, and means nothing.").

[96] 3 U.S. (3 Dall.) 171 (1796).

[97] *Id.*

[98] *Id.* at 176 (opinion of Paterson, J.) ("What is the natural and common, or technical and appropriate, meaning of the words, duty and excise, it is not easy to ascertain. They present no clear and precise idea to the mind. Different persons will annex different significations to the terms.").

[99] *Id.*

[100] *Id.*

[101] *Id.* at 177 ("Local considerations, and the particular circumstances, and relative situation of the states, naturally lead to this view of the subject. The provision was made in favor of the southern States.").

[102] *Id.*

[103] *Id.*

[104] *Id.* at 179 ("The southern states, if no provision had been introduced in the Constitution, would have been wholly at the mercy of the other states. Congress in such case, might tax slaves, at discretion or arbitrarily, and land in every part of the Union after the same rate or measure: so much a head in the first instance, and so much an acre in the second. To guard them against imposition in these particulars, was the reason of introducing the clause in the Constitution, which directs that representatives and direct taxes shall be apportioned among the states, according to their respective numbers.").

Constitution, treating enslaved people differently from property could not "be supported by any solid reasoning."[105] Justice Paterson added that population is not directly correlated with wealth, which also weighed "against the extension of the principle laid down in the Constitution."[106] He noted that while "[a]n equal rule [was] doubtless the best," apportioning a tax on carriages—requiring each state to pay an equal amount—"would be oppressive and pernicious."[107] It would mean that if only one or two people in the state owned carriages, they would have to pay the whole amount, which "would be absurd, and inequitable."[108] Justice Paterson closed by affirming that a tax on each carriage would appropriately assess the tax burden on the purchaser of a commodity.[109]

Justice Paterson did not consider linguistic and substantive canons as discrete steps in a sequential process. Instead, he alternated between textual and normative reasoning in determining the meaning of the text. Furthermore, Justice Paterson did not consider ambiguity or irreducible vagueness as a threshold issue before moving into the construction zone.

3. Ware v. Hylton—*Justice Chase*

In *Ware v. Hylton*, Justice Chase looked at purpose before breaking down the text of the treaty to examine the meaning of each phrase.[110] He determined the meaning of some clauses based on plain meaning, others on technical meaning, and another based on intent.[111] In *Ware*, a British subject sued to recover his debts that were confiscated during the war under a Virginia law. The Justices delivered seriatim opinions determining whether this was possible when the final peace treaty with Great Britain did not explicitly provide for such recovery.[112] Justice Chase first considered whether Virginia had the right to pass the law in question.[113] He noted that upon declaring independence from Britain, the people of Virginia delegated their sovereign power to the state legislature.[114] He concluded that the Virginia legislature had the power to confiscate British debts, reasoning that if Congress had the power to do so, that the same reasoning applied to

[105] *Id.* at 177–78 ("The Constitution has been considered as an accommodating system; it was the effect of mutual sacrifices and concessions; it was the work of compromise. The rule of apportionment is of this nature; it is radically wrong; it cannot be supported by any solid reasoning.").

[106] *Id.* at 178.

[107] *Id.* at 178–79.

[108] *Id.* at 179.

[109] *Id.* at 180–81.

[110] 3 U.S. (3 Dall.) 199 (1796) (opinion of Chase, J.).

[111] *Id.* at 241–45.

[112] *Id.* at 230.

[113] *Id.* at 223.

[114] *Id.*

Virginia as a sovereign state at the time.[115] Justice Chase then looked at the preamble of the Virginia act, which specifically stated that debts should not be confiscated.[116] However, he noted that, preamble notwithstanding, where substantive provisions clearly expressed the intention of the legislature, "there is no room for construction."[117] Justice Chase proceeded to interpret the substantive provisions of the Virginia statute to authorize acts that essentially confiscated debts, paying particular attention to the word "confiscate."[118] Justice Chase then turned to the treaty ending the Revolutionary War to determine whether its provisions nullified the Virginia statute,[119] citing the Constitution to affirm the supremacy of the treaty over the Virginia law.[120]

Justice Chase began his analysis of the treaty with the drafters' purposes,[121] which included the return of confiscated debts. He also noted that the drafters would have known that laws like Virginia's existed,[122] and would have drafted with that background knowledge.[123] Justice Chase noted that the fifth article of the treaty addressed the purpose to restore confiscated British debts,[124] and that the fourth article specifically provided that "creditors, on either side, shall meet with no lawful impediment to the recovery of the full value, in sterling money, of all bona fide debts, heretofore contracted."[125] Justice Chase cited two treatises as guidance in interpreting treaties,[126] concluding that "[i]f the recovery of the present debt is not within

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[115] *Id.* at 224.

[116] *Id.* at 233.

[117] *Id.* ("[I]f the words or effect and operation, of the enacting clause, are ambiguous or doubtful, such construction should be made as not to extend the provisions in the enacting clause, beyond the intention of the legislature, so clearly expressed in the preamble; but if the words in the enacting clause, in their nature, import, and common understanding, are not ambiguous, but plain and clear, and their operation and effect certain, there is no room for construction." (emphasis omitted)).

[118] *Id.* at 233–34.

[119] *Id.* at 235.

[120] *Id.* at 237.

[121] *Id.* at 238.

[122] *Id.* ("The following facts were of the most public notoriety, at the time when the treaty was made, and therefore must have been very well known to the gentleman who assented to it.").

[123] *Id.*

[124] *Id.* at 238−39.

[125] *Id.* at 239 (emphasis omitted).

[126] *Id.* at 239−40 ("The intention of the framers of the treaty, must be collected from a view of the whole instrument, and from the words made use of by them to express their intention, or from probable or rational conjectures. If the words express the meaning of the parties plainly, distinctly, and perfectly, there ought to be no other means of interpretation; but if the words are obscure, or ambiguous, or imperfect, recourse must be had to other means of interpretation, and in these three cases, we must collect the meaning from the words, or from probable or rational conjectures, or from both. When we collect the intention from the words only, as they lie in the writing before us, it is a literal interpretation; and indeed if the words, and the construction of a writing, are clear and precise, we can scarce call it interpretation

the clear and manifest intention and letter of the [fourth] article of the treaty, and if it was not intended by it to annul the law of Virginia," then the Virginia law should stand.[127]

After framing his analysis around intent, Justice Chase then analyzed the text.[128] He broke the fourth article down into component phrases and analyzed them separately: from "it is agreed," "that creditors on either side," and "shall meet with no lawful impediment," to "to the recovery," "in the full value in *sterling* money," "of all *bona fide* debts," and "heretofore contracted."[129] For some clauses, he looked to plain meaning,[130] for some to technical meaning,[131] and for others to intent.[132] He asserted that this individual analysis of each part indicated the meaning of the clause as a whole.[133] Justice Chase noted that "creditors" could not be taken literally; it must relate to debts, or the treaty would have provided nothing for British creditors, which would be illogical.[134] He concluded that "legal impediment" referred exclusively to preventing American courts from barring recovery of British debts, and thus did not annul the acts of the state legislatures.[135] In closing, Justice Chase noted that the treaty drafters could not have "express[ed] their meaning in more accurate and intelligible words, or in words more proper and effectual to carry their intention into execution."[136] He found "the words, in their natural import, and common use," allowed the British debtor to recover.[137]

Thus, Justice Chase did not consider ambiguity or irreducible vagueness as a threshold issue, nor did he separately analyze linguistic and substantive canons as discrete steps in a sequential process. Instead, he alternated between textual and normative reasoning in determining the meaning of the text.

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to collect the intention of the writer from thence. The principal rule to be observed in literal interpretation, is to follow that sense, in respect both of the words, and the construction, which is agreeable to common use." (emphasis omitted)).

[127] *Id.* at 240.

[128] *Id.* ("I will examine the 4th article of the treaty in its several parts; and endeavor to affix the plain and natural meaning of each part." (emphasis omitted)).

[129] *Id.* at 240–42.

[130] *Id.* at 240.

[131] *Id.* at 241.

[132] *Id.*

[133] *Id.* at 242 ("If the words of the 4th article taken separately, truly bear the meaning I have given them, their sense collectively, cannot be mistake, and must be the same.").

[134] *Id.* at 243 ("This adhering to the letter, is to destroy the plain meaning of the provision . . . [because] by this construction, nothing was done for British creditors.").

[135] *Id.* at 244.

[136] *Id.* at 245 (emphasis omitted).

[137] *Id.*

4. *Sometimes Sequential? Chief Justice Marshall in* Pennington v. Coxe

Unlike Justice Chase's nonsequential reasoning, Chief Justice Marshall, at least, seemed to follow the more sequential approach that might indicate construction as appropriate only for cases where linguistic meaning fails to determine the case. For example, as discussed below, in *Pennington v. Coxe*, Chief Justice Marshall approached his opinion in a sequential fashion, considering "construction" only after he had determined that linguistic canons could not render the case determinate.[138] Chief Justice Marshall looked to grammatical canons and other tools of "interpretation," noted that the phrase "duty" was ambiguous, and then proceeded to reason based on the context of the legislation's historical enactment.[139]

In *Pennington*, Chief Justice Marshall, writing for the Court, examined the implications of a federal statute that repealed a previous act imposing a duty on sugar.[140] A refiner, left with sugar in his warehouse at the time the repeal went into effect, sought to determine whether he still had to pay a duty on that sugar.[141] Chief Justice Marshall looked at the scope of the language in the original statute: whether a tax that shall be "levied, collected and paid upon all sugar which shall be refined within the United States" meant that the duty began to accrue on the sugar at the moment it was refined, even if it had not yet been sent out from the building, or whether the duty was owed on the sugar at the moment it left the warehouse.[142] He began with the whole act,[143] considering the second section, which imposed the duty, and the fourth section, which laid out the requirements for sugar refiners in rendering account of the sugar they refined.[144] Chief Justice Marshall discounted other statutes that were argued to be *in pari materia*,[145] asserting that "a law is the best expositor of itself, [and] that every part of an act is to be taken into view, for the purpose of discovering the mind of the legislature."[146] Considering all sections of an act was "among those plain rules laid down by common sense for the exposition of statutes which have been uniformly acknowledged."[147]

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[138] 6 U.S. (2 Cranch) 33 (1804).

[139] *Id.* at 51.

[140] *Id.*

[141] *Id.*

[142] *Id.* at 51−52 (emphasis omitted).

[143] *Id.* at 52–53 ("[T]he details of one part may contain regulations restricting the extent of general expressions used in another part of the same act.").

[144] *Id.* at 52 ("Other sections of this act have been relied on by the counsel on both sides, and the phraseology of the law, in other acts said to be *in pari materia* has been brought into view.").

[145] Or, for those who prefer plain English: in light of other statutes.

[146] *Id.* at 52.

[147] *Id.* at 52–53.

In order to interpret these sections together, Chief Justice Marshall found it necessary "to ascertain with precision the import of the words [levied, collected and paid]."[148] He looked at their placement in a list of verbs acting on the same object,[149] noting that even if they were not synonymous, they were at least "co-extensive in their operation."[150] From there, Chief Justice Marshall asserted that if the terms "collected" and "paid" were used elsewhere in the act to refer to sugars *to be* refined—as opposed to sugars that *have been* refined and sent out of the building—then this would indicate that the tax was levied on sugar that had not yet left the warehouse, a result the statute could not have been aiming at.[151] Chief Justice Marshall found that the fifth section described only the time of payment, and did not explicitly limit the imposition of the duty in the second section.[152] He then asked if the more specific terms in the fifth section—regarding timing and payment—restricted the more general terms in the earlier section, but found it was ambiguous.[153]

Thus far, Chief Justice Marshall appeared to be interpreting; however, after noting the ambiguity, he turned to the history of the legislation's enactment. He asserted that the object of the act was to generate revenue, not discourage manufacture, and that "unless the words require that construction," the meaning must be determined in light of that purpose to generate revenue.[154] He observed that the law's tax-generating provisions referred "exclusively to sugars sent out of the building."[155] Chief Justice Marshall noted that common legislative practice indicated that the legislature intended to impose a tax on the sugar immediately upon being refined,[156] but rejected it because "this construction would be admitted to conflict with the obvious meaning of the law."[157] He dismissed the fifth section's requirement of daily accounting as not indicative of legislative intent to impose the duty immediately after refinement because the accounting was instead designed to prevent fraud.[158]

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[148] *Id.* at 53.

[149] *Id.* at 53–54.

[150] *Id.* at 54.

[151] *Id.*

[152] *Id.* at 54–55.

[153] *Id.* at 55 ("It is one on which the most correct minds may form opposite opinions, without exciting surprise.").

[154] *Id.*

[155] *Id.*

[156] *Id.* at 56.

[157] *Id.* at 57.

[158] *Id.*

Chief Justice Marshall also dismissed a further argument analogizing the sugar tax to a different tax on home-distilled spirits on separation of powers grounds: where the legislature made a political decision to distinguish between home-distilled spirits and sugar, it was not for the Court to find them analogous.[159] He affirmed that "[i]t is the duty of the court to discover the intention of the legislature, and to respect that intention."[160] Chief Justice Marshall reiterated that it was "most apparently the object of the legislature" in creating the system of duties and excises "to tax expense and not industry."[161] After engaging in both modern "interpretation" and "construction," Chief Justice Marshall concluded that the duty did not accrue until the sugars left the building—and thus that the refiner was not bound to pay the duty on the sugar that remained in his warehouse when the repeal went into effect.[162]

As his opinion in *Pennington* indicates, Chief Justice Marshall, at least, relied at least once on a more sequential approach, considering vagueness or ambiguity as a threshold issue before considering any evidence beyond plain meaning, even other linguistic canons. If the text had a clear meaning, then there was no room for the Justice to utilize other grammatical canons to interpret the text beyond that clear meaning. However, the Justice did not treat this as a threshold for moving from textual indications of semantic meaning (interpretation) to normative premises (construction), but as a requirement before considering anything other than plain meaning.

Chief Justice Marshall's sequential approach in *Pennington* therefore only partially maps onto Professor Solum's interpretation-construction distinction, as ambiguity was not a threshold consideration before Chief Justice Marshall proceeded to consider substantive canons and legal norms, but rather a threshold question before considering any evidence beyond plain meaning. It is thus still consistent with the broader trend that the Justices did not confine construction—considering legal norms or substantive canons—to underdeterminate cases where linguistic canons alone could not resolve the issue. Justice Chase's opinion in *Calder*, Justice Paterson's opinion in *Hylton*, and Justice Chase's opinion in *Ware* illustrate how the Justices alternated between interpretation and construction, rather than engaging in a sequential process of analysis. In practice, the Justices did not observe the

[159] *Id.* at 59 ("Those political motives which induce the legislature to select objects of revenue and to tax them under particular circumstances, are not for judicial consideration. Where the legislature distinguishes between different objects, and in imposing a duty on them evidences a will to charge them in different situations, it is not for the courts to beat down these distinctions on the allegation that they are capriciously made, and therefore to be disregarded.").

[160] *Id.*

[161] *Id.* at 61–62.

[162] *Id.*

interpretation-construction distinction as a limiting principle on their ability to consider linguistic and normative reasoning together, in order to resolve the meaning of the text before them.

B. Neither Textual nor Normative Concerns Were Consistently Determinative

For it to limit judicial discretion, judges should reach construction—analyzing meaning based on substantive legal norms—only after finding interpretation insufficient and concluding that linguistic reasoning alone cannot determine meaning. Under this sequential two-step model, textual concerns are determinative in all cases, unless and until the judges find that linguistic reasoning cannot determine the meaning of the text. Only in those cases can the judges consider normative reasoning, and only in those cases can the judges find that normative concerns govern. If, as Section A described, the Justices alternated between interpretation and construction, considering both linguistic and substantive canons in a single process, did textual or normative reasoning govern? Did the Justices observe any limitations on which kinds of reasoning they found ultimately persuasive in determining the meaning of the text before them?

In brief, no. The Justices found neither textual nor normative rationales consistently determinative in resolving the dispute before them. This Section describes this finding by contrasting cases where the Justices found textual rationales compelling with cases where normative rationales won out.

1. Look No Further Than the Text

In some cases, the Justices found that more textual rationales outweighed normative considerations. In *Bas v. Tingy*, the Justices authored four seriatim opinions on the rate of salvage that applied to a ship captured from the French.[163] One law, enacted in June 1798, referred to salvage of ships that were "re-captures from the French"; a second law, enacted in March 1799, referred to "re-captures from the enemy."[164] The two laws provided for different rates of salvage, and so the Justices determined whether "the enemy" in the second act referred only to the French as in the first act, or whether it provided generally for any enemy of the United States in a future war.[165] The Justices utilized various approaches to answering this question.

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[163] 4 U.S. (4 Dall.) 37 (1800).

[164] *Id.* at 40 (opinion of Washington, J.) (emphasis omitted).

[165] *Id.*

Justice Moore noted that the case "depend[ed] on the construction of the act, for the regulation of the navy."[166] He rejected dictionary definitions of the word "enemy,"[167] noting that since "our situation is so extraordinary . . . I doubt whether a parallel case can be traced in the history of nations," and thus a literal definition could not resolve the issue.[168] He looked to the idea the word "enemy" represented, and found it referred to the official state of war.[169] Justice Moore ultimately resolved the issue on a broader principle: where two laws were inconsistent, "the latter is a virtual repeal of the former, without any express declaration on the subject."[170]

Justice Washington, on the other hand, looked to the realities of hostilities between France and the United States when the laws were passed.[171] He rejected the argument that Congress did not consider those hostilities an outright war, even though none of the laws before March of 1799 referred to France as the "enemy" or officially declared war against France.[172] Justice Washington further noted that while the 1799 act authorized some captures not covered by previous laws, it could cover both previously authorized captures and prospective ones.[173] He argued that implied repeals were inappropriate based on separation of powers,[174] except where there was "sufficient evidence of such a change in the legislative will."[175] Justice Washington then looked for that "evidence of legislative will."[176] He found it in a separate section of the same act referring to "prizes" taken from the enemy: "[t]his then is a legislative interpretation of the word enemy; and if the enemy as to prizes, surely they preserve the same character as to re-captures."[177] He confirmed this was the appropriate meaning in light of the purpose of enacting the 1799 law both to provide for salvage for re-

[166] *Id.* at 39 (opinion of Moore, J.).

[167] *Id.* at 39 ("A number of books have been cited to furnish a glossary on the word enemy; yet, our situation is so extraordinary, that I doubt whether a parallel case can be traced in the history of nations." (emphasis omitted)).

[168] *Id.*

[169] *Id.* ("But, if words are the representatives of ideas, let me ask, by what other word the idea of the relative situation of America and France could be communicated, than by that of hostility, or war?" (emphasis omitted)).

[170] *Id.* at 40.

[171] *Id.* (opinion of Washington, J.).

[172] *Id.* at 40–41.

[173] *Id.* at 41−42.

[174] *Id.* at 42.

[175] *Id.*

[176] *Id.*

[177] *Id.*

captured ships and to condition the rate proportional to the amount of risk taken in re-capturing the ship.[178]

Next, Justice Chase looked to four other acts from this period to demonstrate that at the time the second law was passed, France was still an enemy, even if Congress had not formally declared war.[179] Justice Chase relied on text to reject the argument that Congress intended the 1799 law to refer only to future cases where Congress officially declared war.[180] Finally, Justice Paterson followed an approach similar to Justice Washington and looked to other sections of the act to determine the appropriate meaning of the word "enemy" based on legislative intent.[181] Like Justice Washington, Justice Paterson found that the section discussing "prizes" referred exclusively to France, which was determinative of legislative intent that "the enemy" refer to the French.[182] Thus, as these opinions demonstrate, textual considerations alone were sufficient for all four Justices to resolve some cases.

2. . . . Except When Normative Reasoning Is More Compelling

Though in some cases the Justices found textual reasoning alone sufficient, they resolved other cases on pragmatic or normative grounds.[183] For example, in *Hylton v. United States*, Justice Iredell's opinion found "the Constitution itself . . . a clear guide to decide the controversy": Congress had the power to tax anything, in any way it wanted, except for imposing a duty on exports.[184] Justice Iredell inferred from constitutional silence on the subject that the tax on carriages should be uniform: the Constitution was "particularly intended to affect individuals, and not states," because this was "the leading distinction between the Articles of Confederation and the present Constitution."[185] He then relied on logic—if all direct taxes must be

[178] *Id.*

[179] *Id.* at 43−44 (opinion of Chase, J.).

[180] *Id.* at 44−45.

[181] *Id.* at 46 (opinion of Paterson, J.) ("Besides, the intention of the legislature as to the meaning of this word, enemy, is clearly deducible from the act for the government of the navy, passed the 2d of March 1799. This act embraces the past, present, and future, and contains passages, which point the character of enemy at the French, in the most clear and irresistible manner." (emphasis omitted)).

[182] *Id.*

[183] *See, e.g.*, Stuart v. Laird, 5 U.S. (1 Cranch) 299, 309 (1803) ("[I]t is sufficient to observe, that practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature."); United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 110 (1801); Ware v. Hylton, 3 U.S. (3 Dall.) 199, 260 (1796) (opinion of Iredell, J.) ("These are considerations of policy, considerations of extreme magnitude, and certainly entirely incompetent to the examination and decision of a Court of Justice."); *see also infra* note 249.

[184] 3 U.S. (3 Dall.) 171, 181 (1796) (opinion of Iredell, J.).

[185] *Id.*

apportioned, then if the tax on carriages could not be apportioned, it was not a direct tax within the meaning of the Constitution.[186] Justice Iredell relied on the federalism canon to reject a uniform tax on the states as "arbitrary" and against the "common interest."[187]

Similarly, recall Justice Paterson's opinion in *Hylton*.[188] Justice Paterson considered textual and normative reasoning in tandem to determine the Framers' intent. He began by considering linguistic canons to resolve the meaning of the words "duty" and "tax." He then reasoned by way of history, based on the context of slaveholding states at the time of the Framing. Justice Paterson found that the Framers drafted the Taxing Clause to address the diverging interests of the northern and southern states by taxing enslaved people and land by apportionment.[189] He rejected "extending" the rule of apportionment by "construction," because while it represented a necessary compromise in the Constitution, treating enslaved people differently from other property could not "be supported by any solid reasoning."[190]

Textual reasoning was determinative for the Justices in some cases—except where it was not. As discussed in this Section, in alternating between linguistic and substantive reasoning, the Justices weighed all kinds of evidence to resolve the meaning of the text before them. This approach did not observe the limiting principle of confining normative considerations to a construction zone, reached only after textual considerations proved insufficient to resolve ambiguous or vague text.

C. Implications for Contemporary Debates

Evidence from these early American cases more closely tracks Professor Solum's clarification of the interpretation-construction distinction—that in practice, the Justices moved back and forth between interpretation and construction, or even engaged in them simultaneously. These early cases indicate that at least some of the Justices in practice did indeed alternate between construction and interpretation rather than engaging in a two-step process with a discrete interpretation phase followed by a discrete construction phase. Construction was not confined only to underdeterminate cases: there is mixed evidence in early American judicial

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[186] *Id.*

[187] *Id.* at 183 ("Such an arbitrary method of taxing different states differently, is a suggestion altogether new, and would lead, if practiced, to such dangerous consequences, that it will require very powerful arguments to shew [*sic*] . . . I deem it utterly irreconcilable, it being altogether destructive of the notion of a common interest, upon which the very principles of the Constitution are founded, so far as the condition of the United States will admit." (emphasis omitted)).

[188] *See supra* Section III.A.2.

[189] *Hylton*, 3 U.S. (3 Dall.) at 177 (opinion of Paterson, J.).

[190] *Id.* at 177–78.

practice that the Justices engaged in construction both where meaning was underdeterminate and where it was determinate.

Professors McGinnis and Rappaport describe a single step of interpretation.[191] The early evidence described herein could support this position as far as process goes. However, the Justices considered a variety of evidence in this single phase of interpretation. Professors McGinnis and Rappaport might consider that all these tools and considerations appropriately fall within a thick interpretation stage, but this does not lend itself to a clear limiting principle on how judges can proceed within this thick interpretation stage. The early Justices analyzed text in one step during which they considered both linguistic and normative considerations, and neither text nor normative reasoning was consistently determinative. The Justices had more leeway in weighing evidence to determine the meaning of the text at hand.

This trend illustrates a tension between the idea that judicial discretion in construction should be limited and the idea that modern judges' approach to interpretation and construction should be guided by early American judicial practice. On the one hand, some original methods originalists argue that judicial discretion in construction should be limited.[192] On the other hand, some of those same original methods originalists argue that original methods, those used at the Founding and by the Founders, should guide how judges get from words to law, at least when interpreting the Constitution.[193] This Part described how early American judicial practice does not neatly align with an approach to interpretation and construction that limits judicial discretion. Rather than engaging in a consistent two-step sequential process with discrete modes of analysis, early American Justices alternated between considering linguistic meaning and substantive norms to render the text determinate by giving effect to the drafters' purpose, engaging in both interpretation and construction in a unified process.[194]

Perhaps reconciling these two ideas is as simple as saying that judicial practice is not the best evidence of interpretive methods at the Founding. Or that the methods used from 1795 to 1805 are not close enough to the Founding to be authoritative. But highlighting this tension is important,

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[191] McGinnis & Rappaport, *supra* note 21, at 752–53. Professors McGinnis and Rappaport describe a single step because, as a positive and normative matter, they argue that construction is not justified. *See id.*

[192] *See, e.g.*, McGinnis & Rappaport, *supra* note 21, at 783–84 (arguing that judicial discretion in construction is more likely to be inconsistent and produce less representative results than an original methods approach outlined by the authors).

[193] *See, e.g.*, *id.* at 752 (arguing that the Constitution, at least, should be interpreted using the interpretive rules its enactors would have used).

[194] *See supra* Part III.

because it at least prompts the question of whether these two imperatives can be reconciled, and if so, how? Answers to such questions are far beyond the scope of this Note, but they do provide some grist for the mill.

IV. A VARIETY OF "ACCEPTABLE" TOOLS IN THE CONSTRUCTION ZONE

Further grist for the mill is found in the second trend in the historical evidence, discussed in this Part: that early American Justices used a variety of tools in the construction zone. Another key component of the interpretation-construction distinction concerns the tools judges should use once in the construction zone. Where a term is vague or irreducibly ambiguous, Professor Solum acknowledges that judges may determine that interpretation alone is insufficient to ascertain a term's meaning; judges can then rely on additional tools of construction in the construction zone.[195] He also distinguishes between tools appropriately used in the "interpretation," as opposed to the "construction," stage.[196] According to Professor Solum, interpretation relies exclusively on linguistic facts and canons to justify the "correct" meaning of the text; in contrast, construction is justified by legal norms.[197] Scholars, however, differ regarding which tools of statutory construction judges can appropriately use in the construction zone, and consequently, what kinds of evidence reliably indicate textual meaning.[198]

In early practice, the Justices relied on a variety of evidence in the construction zone. They did so not merely to render underdetermined text sufficiently specific to resolve the case, but more broadly in considering all available evidence of the drafters' intent. This Part first examines linguistic and grammatical canons, before turning to the substantive canons and legal norms the Justices commonly relied on. It concludes by evaluating the implications for debate regarding the appropriate tools in the construction zone.

A. Linguistic or Grammatical Canons

The Justices frequently relied on the linguistic canons of plain meaning, related words, the whole act canon, *in pari materia*, and the canon against surplusage. The Justices did not consistently begin their analysis with the plain meaning of the text, but they often acknowledged plain meaning.[199]

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[195] *See* Solum, *The Interpretation-Construction Distinction*, *supra* note 6, at 108.

[196] *See id.* at 113–14.

[197] *See id.* at 104.

[198] *See id.* at 108; *see also* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 123–26 (2004).

[199] *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 175 (1803) ("[T]he plain import of the words seems to be, that in one class of cases its jurisdiction is original, and not appellate; in the other it

They also considered where the legal or technical meaning of a term was more appropriate.[200] As Justice Scalia would have been delighted to note, in some cases the Justices cited dictionary definitions as reference.[201]

The Justices relied on several rules to achieve internal grammatical consistency within a particular clause. They looked to the other words in the clause to provide context for the meaning of the term at issue.[202] In some cases, this included finding that the level of generality of some terms in the clause indicated that the other terms in the clause should be interpreted at the same level of generality.[203] In other cases, the Justices inferred meaning from the sequence of terms, based on whether more specific terms followed more general ones;[204] this also included inferring meaning from the relationship between items in a list under the *noscitur a sociis* or *ejusdem generis*

is appellate, and not original. If any other construction would render the clause inoperative, that is an additional reason for rejecting such other construction, and for adhering to their obvious meaning."); Turner v. Fendall, 5 U.S. (1 Cranch) 117, 131 (1801) ("The words must be very plain indeed which will force a court to put upon them so irrational a construction as this."); Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798) (opinion of Chase, J.) ("The prohibition, in the letter, is not to pass any law concerning, and after the fact; but the plain and obvious meaning and intention of the prohibition is this; that the Legislatures of the several states, shall not pass laws, after a fact done by a subject, or citizen, which shall have relation to such fact, and shall punish him for having done it." (emphasis omitted)); Ware v. Hylton, 3 U.S. (3 Dall.) 199, 240 (1796) (opinion of Chase, J.) ("I will examine the 4th article of the treaty in its several parts; and endeavor to affix the plain and natural meaning of each part." (emphasis omitted)); *id.* at 243 ("This adhering to the letter, is to destroy the plain meaning of the provision." (emphasis omitted)).

[200] *See, e.g.*, *Calder*, 3 U.S. (3 Dall.) at 391 (opinion of Chase, J.) ("The expressions 'ex post facto laws' are technical, they had been in use long before the Revolution, and had acquired an appropriate meaning, by Legislators, Lawyers, and Authors." (emphasis omitted)); *Ware*, 3 U.S. (3 Dall.) at 241 (opinion of Chase, J.) ("Bona fide is a legal technical expression; and the law of Great Britain and this country has annexed a certain idea to it." (emphasis omitted)); Hylton v. United States, 3 U.S. (3 Dall.) 171, 176 (1796) (opinion of Paterson, J.) ("What is the natural and common, or technical and appropriate, meaning of the words, duty and excise, it is not easy to ascertain.").

[201] *See, e.g.*, Bas v. Tingy, 4 U.S. (4 Dall.) 37, 39 (1800) (opinion of Moore, J.) ("A number of books have been cited to furnish a glossary on the word enemy; yet, our situation is so extraordinary, that I doubt whether a parallel case can be traced in the history of nations." (emphasis omitted)).

[202] *See, e.g.*, Faw v. Marsteller, 6 U.S. (2 Cranch) 10, 24 (1804) ("To understand in this sense the words of the act which are considered as restrictive, does not appear to the court to be such a violence to their natural import as to be inadmissible; and to understand them in this sense reconciles the different parts of the clause with each other."); *Ware*, 3 U.S. (3 Dall.) at 278 (opinion of Iredell, J.) ("These words must be construed as relative to the former, for the whole clause must be taken together.").

[203] *See, e.g.*, *Faw*, 6 U.S. (2 Cranch) at 28 ("The terms used in the third member of the sentence are certainly very comprehensive, and their general natural import does not appear to be so restrained by their connection with other parts of the section, as necessarily to confine their operation to cases where debtors only can derive advantage from them.").

[204] *See, e.g.*, *id.* at 23 ("[T]he terms used in the first part of the section are such, that if they stood alone, they would include, in their letter, the case at bar: but it is contended, that there are subsequent words which limit those just quoted, so as to restrain their operation to contracts capable of being extinguished.").

canons.[205] The Justices also avoided interpretations that expanded exceptions to swallow a general rule, particularly where the text enumerated specific exceptions to a general term.[206]

The Justices also interpreted clauses together to achieve grammatical consistency of the act as a whole.[207] For example, in one case, they specifically noted that more specific subsequent clauses governed more general language in earlier clauses.[208] In another case, the Justices found a later section did not apply to interpreting an earlier one where the two sections addressed different topics.[209] One case in particular noted that where substantive provisions seemed to conflict with the preamble, the substantive provisions should govern; they were sequentially later, thus indicating that

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[205] *See, e.g.*, Pennington v. Coxe, 6 U.S. (2 Cranch) 33, 53–54 (1804) (looking at the phrase "levied, collected, and paid" and reasoning that "[e]ach of these words implies a charge upon the article, and if either of them had been used singly, no doubt could have been entertained that the article would have been burthened with the tax. They present to the mind distinct ideas, and when used together seem to designate distinct actions required by the law . . . . But, however, this may be, they act on the same subject and at the same time. The object of each verb is precisely the same . . . . It has then been very correctly said, that these words, though not synonimous [*sic*], are certainly as they stand in the sentence, co-extensive in their operation. They reach and embrace the same article at the same time."); *Hylton*, 3 U.S. (3 Dall.) at 174 (1796) (opinion of Chase, J.) ("Duties, imposts, and excises, were enumerated, after the general term taxes, only for the purpose of declaring, that they were to be laid by the rule of uniformity." (emphasis omitted)).

[206] *See, e.g.*, *Faw*, 6 U.S. (2 Cranch) at 27−28, 30 ("In reasoning from the words of the law, they say, that the two cases put, are by way of example" and represent the general rule that court should exercise equitable power for benefit of debtor; "the exception, if it receives the construction which the court seems inclined to give it, would destroy the rule."); *id.* at 23 ("When those who introduced these exceptions, were so very cautious as expressly to take a contract for tobacco, or other specific property, out of the operations of a law made solely for money contracts, there are additional inducements to believe that every possible contract, not included within the exceptions, was designed to be comprehended in the general rule.").

[207] *See* Little v. Barreme, 6 U.S. (2 Cranch) 170, 177–78 (1804) (interpreting meaning by looking at 1st and 5th sections of the act together); *Pennington*, 6 U.S. (2 Cranch) at 52–53 ("That a law is the best expositor of itself, that every part of an act is to be taken into view, for the purpose of discovering the mind of the legislature; and that the details of one part may contain regulations restricting the extent of general expressions used in another part of the same act, are among those plain rules laid down by common sense for the exposition of statutes which have been uniformly acknowledged."); Wiscart v. Dauchy, 3 U.S. (3 Dall.) 321, 326 (1796) (opinion of Wilson, J.) ("By so doing, the two sections of the law can be reconciled; and, by so doing, without including admiralty causes, every description of suit may be reasonably satisfied.").

[208] *See Pennington*, 6 U.S. (2 Cranch) at 54 ("If then the other parts of the act demonstrate, that the words collected and paid, have not for their object all sugars to be refined, this section is necessarily restrained in its operation by those which follow and designate more particularly what is in the first instance expressed in general terms.").

[209] *See* Priestman v. United States, 4 U.S. (4 Dall.) 28, 34 (1800) ("But it is too plain for argument, that this section cannot, by any fair and rational construction, be made to refer to the 19th section. It is inapplicable, because the objects are entirely different.").

the legislature may have changed its intention.[210] Additionally, the Justices sought consistency in interpreting statutes with common purposes as *in pari materia* and construed them together.[211] They found that without clear terms in a later statute specifying that it was modifying the earlier one, it was not appropriate to imply amendment or appeal of the earlier statute.[212]

The Justices commonly relied upon the canon against surplusage in interpreting constitutional and statutory provisions.[213] In at least one instance, Justice Chase opted for an interpretation that would render part of the clause mere surplusage because otherwise the interpretation would be inconsistent with common law tradition.[214] Avoiding surplusage never appeared determinative; the Justices considered possible surplusage as one of multiple indications of the appropriate meaning.[215]

B. Substantive Canons and Legal Norms

The Justices relied on a variety of evidence and normative premises to support a particular possible meaning; this included historical context at the time of drafting, legislative history of the drafters' purpose, and separation of powers and federalism canons. The Justices often considered historical

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[210] *See, e.g.*, Ware v. Hylton, 3 U.S. (3 Dall.) 199, 233 (1796) (opinion of Chase, J.) ("It is not an uncommon case for a legislature, in a preamble, to declare their intention to provide for certain cases, or to punish certain offenses, and in enacting clauses to include other cases, and other offences . . . . If the preamble is contradicted by the enacting clause, as to the intention of the legislature, it must prevail, on the principle that the legislature changed their intention." (emphasis omitted)).

[211] *See, e.g.*, *Pennington*, 6 U.S. (2 Cranch) at 58 (discussing "that all the revenue acts of the United States" should be looked at "as *in pari materia*, as forming one connected system, and therefore to be compared together, when any one of them is to be construed"); Talbot v. Seeman, 5 U.S. (1 Cranch) 1, 33 (1801) ("[I]f one part of the system shall be manifestly founded on this construction of the other part, it would have considerable weight in rendering certain what might before have been doubtful.").

[212] *See, e.g.*, Sims v. Irvine, 3 U.S. (3 Dall.) 425, 460 (1799) (opinion of Iredell, J.) ("I should deem it unwarranted to extend it to any others by construction of a subsequent law, without plain words of extension, unless there was an irresistible implication to authorise it.").

[213] *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803) ("The subsequent part of the section is mere surplusage, is entirely without meaning, if such is to be the construction . . . . It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it."); United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 109 (1801) ("On any other construction the word *definitive* would be rendered useless and inoperative."); Calder v. Bull, 3 U.S. (3 Dall.) 386, 397 (1798) (opinion of Paterson, J.) ("Where is the necessity or use of the latter words, if a law impairing the obligation of contracts, be comprehended within the terms *ex post facto law*?").

[214] *See, e.g.*, Wilson v. Daniel, 3 U.S. (3 Dall.) 401, 407 (1798) (opinion of Chase, J.) (rejecting an interpretation that "is inconsistent with the nature of a common law judgment; it must be treated as mere surplusage").

[215] *See, e.g.*, *Marbury*, 5 U.S. (1 Cranch) at 175 ("If any other construction would render the clause inoperative, that is an additional reason for rejecting such other construction, and for adhering to their obvious meaning.").

context at the time of drafting to shed light on the meaning of the text.[216] In one instance, Justice Iredell highlighted the importance of examining the historical events that informed the drafting of the text, and the need to avoid considering the intent of the drafters in light of subsequent events.[217] However, the Justices considered the subsequent history of laws where they examined two conflicting laws: in both cases in the sample where the Justices did so, they found that the later statute effected an implied repeal of the earlier act.[218] In one case, the Justices approached the basis for the implied repeal differently;[219] in the second, the Justices agreed that where two laws were passed in the same session, in the case of conflict the second should be implied to repeal the first.[220] The Justices relied on legislative history to

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[216] *See, e.g.*, Faw v. Marsteller, 6 U.S. (2 Cranch) 10, 28 (1804) ("The legislature was performing a very extraordinary act. It was interfering in the mass of contracts entered into between the first of January, 1777, and the first of January, 1782, and ascertaining the value of those contracts, by a rule different from that which had been adopted by the parties themselves . . . . This sentiment might produce the fifth section, and if it did, the general terms used, ought to be applied to the relief of the injured party, whether he was the creditor or the debtor."); *Calder*, 3 U.S. (3 Dall.) at 389 (opinion of Chase, J.) ("The prohibition against their making any ex post facto laws was introduced for greater caution, and very probably arose from the knowledge, that the Parliament of Great Britain claimed and exercised a power to pass such laws, under the denomination of bills of attainder, or bills of pains and penalties . . . . To prevent such, and similar, acts of violence and injustice, I believe, the Federal and State Legislatures were prohibited from passing any bill of attainder; or any ex post facto law." (emphasis omitted); Hylton v. United States, 3 U.S. (3 Dall.) 171, 181 (1796) (opinion of Iredell, J.) ("[B]ecause the present Constitution was particularly intended to affect individuals, and not states, except in particular cases specified: And this is the leading distinction between the articles of Confederation and the present Constitution."); Penhallow v. Doane's Adm'rs, 3 U.S. (3 Dall.) 54, 112 (1795) (opinion of Blair, J.) ("I take the truth to be, that the framers of that instrument were contemplating what powers Congress ought to have had at the beginning; and that in reference to the first occasion of their assembling to oppose the tyranny of Great Brittain [*sic*], at least in reference to the time of framing the confederation, say, the states shall *retain*.").

[217] *See, e.g.*, Ware v. Hylton, 3 U.S. (3 Dall.) 199, 267 (1796) (opinion of Iredell, J.) ("We are too apt, in estimating a law passed at a remote period, to combine in our consideration, all the subsequent events which have had an influence upon it, instead of confining ourselves (which we ought to do) to the existing circumstances at the time of its passing.").

[218] *See* Bas v. Tingy, 4 U.S. (4 Dall.) 37, 40–43 (1800) (opinion of Moore, J.); Brown v. Barry, 3 U.S. (3 Dall.) 365, 367 (1797).

[219] *Compare Bas*, 4 U.S. (4 Dall.) at 40 (opinion of Moore, J.) ("But if two laws are inconsistent, (as, in my judgment, the laws in question are) the latter is a virtual repeal of the former, without any express declaration on the subject.") *with id.* at 42 (opinion of Washington, J.) ("[I]f there is sufficient evidence of such a change in the legislative will, and the two laws are in collision, we are forced to presume it.").

[220] *See Brown*, 3 U.S. (3 Dall.) at 367 ("[W]hen a question shall arise, whether a law passed during any session changes, or repeals, a former law during the same session, which is the present case, the same construction shall be made, as if the act of 1785 had never been passed.").

interpret treaties and federal statutes,[221] even quoting directly from committee reports as evidence of legislative purpose in enacting the text.[222]

The Justices also justified their opinions in light of separation of powers principles in both constitutional and statutory cases;[223] Professor Solum would consider this "construction." The Justices used the canon to explicitly reject a possible meaning; they also alluded to it when they discussed the appropriate judicial role in interpreting a federal statute, as it constituted the product of a coequal branch of government entrusted with lawmaking authority.[224] In some cases the Justices relied on the substantive separation of powers canon to support determining legislative intent.[225] The Justices frequently and explicitly avoided absurd constructions.[226] They also noted that acquiescence to longstanding practice could fix meaning, even where

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[221] *See, e.g.*, *Ware*, 3 U.S. (3 Dall.) at 276 (opinion of Iredell, J.) ("But I must admit that there is also a very high authority, and to which we naturally should be more partial, against this construction. It is the authority of the Congress of the United States in the year 1787. It is an authority derived from an [*sic*] unanimous opinion of that truly respectable body, conveyed in a circular letter from Congress to the different States on this very subject." (emphasis omitted)).

[222] *See, e.g.*, *Penhallow*, 3 U.S. (3 Dall.) at 82−85 (opinion of Paterson, J.) ("In the Resolutions of Congress of the 6th of March, 1779, is contained a course of reasoning, which, in my opinion, is cogent and conclusive . . . . 'The committee, consisting of Mr. Floyd, Mr. Ellery, and Mr. Burke, to whom was referred the report of the committee on appeals of January 19th, 1779, having, in pursuance of the instructions to them given, examined into the causes of the refusal of the Judge of the Court of Admiralty for the State of Pennsylvania, to carry into execution the decree of the Court or committee of appeals, report."). Justice Paterson continued to quote directly from the report for three pages of the opinion. *See id.*

[223] *See, e.g.*, *Ware*, 3 U.S. (3 Dall.) at 260 (opinion of Iredell, J.) ("These are considerations of policy, considerations of extreme magnitude, and certainly entirely incompetent to the examination and definition of a Court of Justice."); *Penhallow*, 3 U.S. (3 Dall.) at 84 (opinion of Paterson, J.) (rejecting "a construction which involves many inconveniences and absurdities, destroys an essential part of the power of war and peace entrusted to Congress, and would disable the Congress of the United States, from giving satisfaction to foreign nations complaining of violation of neutralities, of treaties, or other breaches of the law of nations, and would enable a jury, in any one state, to involve the United States in hostilities; a construction, which for these and many other reasons, is inadmissible").

[224] *Compare* Calder v. Bull, 3 U.S. (3 Dall.) 386, 393 (1798) (opinion of Chase, J.) ("If the term ex post facto law is to be construed to include and to prohibit the enacting any law after a fact, it will greatly restrict the power of the federal and state legislatures; and the consequences of such a construction may not be foreseen."), *with Bas*, 4 U.S. (4 Dall.) at 42 (opinion of Washington, J.) ("This ground is not taken, because such an effect involves an indecent censure upon the legislature for passing contradictory laws.").

[225] *See, e.g.*, Sims v. Irvine, 3 U.S. (3 Dall.) 425, 461 (1799) (opinion of Iredell, J.) ("I therefore am compelled, upon principles of respect to the Legislature, to abandon this construction.").

[226] *See, e.g.*, Wilson v. Mason, 5 U.S. (1 Cranch) 45, 102 (1801) ("This construction would be universally rejected as absurd, and all would expect the court to understand the words more liberally, and to expound them so as to give some effect to the legislative will."); *Sims*, 3 U.S. (3 Dall.) at 459 (opinion of Iredell, J.) ("I confess I have had great difficulty in construing the two Virginia acts, of May, and October, 1779, and if the latter act had admitted of such a construction that I could, without absurdity or manifest injustice have confined the words 'or assigns' in that act, to mean only the heirs or assigns of those specially named in the former, I should undoubtedly have preferred that construction." (emphasis omitted)).

the text might indicate otherwise.[227] The Justices generally avoided interpretations that would apply laws retroactively, but justified doing so in one case where national security was at stake.[228]

Professor Solum notes that construction includes reliance on norms of "the public good," "equality," "injustice," and "equity."[229] The Justices frequently reference "just" or "fair" construction in selecting one possible meaning in place of another.[230] In such instances, the Justices relied on legal norms or principles for determining that a given particular meaning was appropriate. In some cases those substantive legal norms were more complex, such as retroactivity or procedural fairness,[231] while in others they reflected principles as elemental as consistency or evenhandedness.[232] This

[227] *See, e.g.*, United States v. Hooe, 5 U.S. (1 Cranch) 318, 320 (1803) ("One legislature has taken cognizance of the construction given by the court, and has provided for the case, but another legislature has repealed that provision and thereby given a subsequent legislative construction, or at least shewn such a legislative acquiescence under the construction which this court formerly gave to the act, as is now conclusive."); Stuart v. Laird, 5 U.S. (1 Cranch) 299, 309 (1803) ("[I]t is sufficient to observe, that practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled.").

[228] *See, e.g.*, United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 110 (1801) ("It is true that in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties, but in great national concerns where individual rights, acquired by war, are sacrificed for national purposes, the contract, making the sacrifice, ought always to receive a construction conforming to its manifest import.").

[229] Solum, *Originalism and Constitutional Construction*, *supra* note 6, at 510.

[230] In some cases, "fair" seems to indicate what is "appropriate" rather than a reliance on substantive legal norms. Consider *Wiscart v. Dauchy*, where the Justice used "fair" in the sense of "appropriate." 3 U.S. (3 Dall.) 321, 326 (1796) ("If, however, causes of admiralty jurisdiction are fairly excluded from the first member of the 22d section, that provides for a removal from the District to the Circuit Court, impartiality and consistency of construction must lead us likewise to exclude them from this member of the section, that provides for a removal from the Circuit to the Supreme Court."). Consider also *Pennington v. Coxe*, where Chief Justice Marshall used "just" to mean appropriate or correct. 6 U.S. (2 Cranch) 33, 52 (1804) ("[B]ut as the case depends principally on the just construction of the sections which have been quoted, those sections only are stated for the present."). Given this dual usage, this analysis distinguished between where the Justices reference "fair" as appropriate as opposed to utilizing "fair" as part of reliance on broader legal norms or principles to justify a particular interpretation.

[231] See *Mason v. Ship Blaireau*, where the Justice characterized precedent cases, thus relying on legal norms and principles of justice and fairness to argue for given meaning. 6 U.S. (2 Cranch) 240, 270 (1804) ("The counsel does not appear to the court to construe that case correctly, when he says, that it does not determine the right as between the master and the apprentice. The fair understanding of that case is, that the money was decreed to the apprentice, and was to be paid for his benefit."). See also *Faw v. Marsteller*, where the Justice referred to procedural fairness. 6 U.S. (2 Cranch) 10, 30 (1804) ("But although the just construction of the 5th section of the law, admits a creditor, who would be greatly injured by the application of the general rule to his case, to show circumstances which authorise a departure from that rule," it would have to be an extraordinary case.).

[232] See, for example, *Turner v. Fendall*, in which the Court rejects "unusual" and "unjust" construction that would overly restrict the rights of parties, opting instead for a "fair" construction that

reliance on substantive legal norms, even those as fundamental as "fairness" and "justice," distinguishes "construction" as an activity giving legal effect from "interpretation" as an activity relying purely on grammatical or linguistic reasoning to determine semantic content.

C. Implications for Debates Regarding "Appropriate" Tools in the Construction Zone

The Justices relied on substantive canons and legislative evidence in a manner inconsistent with many scholars' approach to the tools that are "appropriate" for use in the construction zone.[233] For example, the Justices frequently relied on the absurdity canon to reject the idea that Congress could have intended a particular policy outcome.[234] The Justices' reliance on a variety of evidence might instead be more consistent with Professor Jack Balkin's description of a broad array of appropriate tools for construction.[235] This Section considers three examples of where the Justices relied on evidence that might spark controversy among contemporary jurists and theorists who are most concerned with limiting judicial discretion in analyzing text: (1) reliance on historical acquiescence, (2) deferring to concerns about the national interest, and (3) utilizing legislative evidence.

1. Relying on Historical Acquiescence

First, the Justices relied on acquiescence to historical practice as a pragmatic resolution to arguably unconstitutional actions. Consider *Stuart v. Laird*, for example. In that case, the Court examined whether a federal statute that reconfigured the circuit courts was unconstitutional.[236] After a bond was issued in the fourth circuit of Virginia, the federal statute reconstituted the fourth circuit as part of the fifth circuit court of Virginia.[237] Justice Paterson wrote for the Court and examined whether the bond could be returned to the

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would conform with legal norms for trial motion procedures. 5 U.S. (1 Cranch) 117, 131–32 (1801) ("The words, 'such court,' on fair construction, refer to the court in which the motion has been made, and not to the term to which notice was given."). And consider *Talbot v. Seeman*, where the Justice used "fair" as consistent and just to apply evenly to the same acts. 5 U.S. (1 Cranch) 1, 33 (1801) ("There must then be incidents growing out of those acts of hostility specifically authorized, which a fair construction of the acts will authorize likewise.").

[233] *See* Antonin Scalia & John F. Manning, *A Dialogue on Statutory and Constitutional Interpretation*, 80 GEO. WASH. L. REV. 1610, 1614 (2012).

[234] *See* discussion *supra* note 221. Justice Scalia would have rejected such reasoning. *See, e.g.*, Scalia & Manning, *supra* note 233, at 1614 ("I'm not willing to let judges decide at large what is or is not absurd. There are pretty absurd statutes out there. That is what you get from legislative compromise.").

[235] Jack M. Balkin, *The New Originalism and the Uses of History*, 82 FORDHAM L. REV. 641, 659–60 (2013) (identifying eleven appropriate arguments in construction: text, structure, purpose, consequences, precedent, convention, custom, natural law, national ethos, political tradition, and honored authority).

[236] 5 U.S. (1 Cranch) 299 (1803).

[237] *Id.*

fifth circuit court.[238] He noted that this would be illegal if no text directly authorized the action.[239] However, he interpreted the Constitution[240] to allow Congress to authorize this kind of transfer, because the clause did not explicitly prohibit Congress from doing so.[241] Justice Paterson rejected the additional objection that Supreme Court Justices must receive a specific commission to sit on that circuit court, because acquiescence to this practice for several years confirmed it was an allowable "construction."[242]

Judges have relied on historical acquiescence to practice in order to justify executive action as constitutional, and a case like *Stuart* indicates that the roots of such reliance stretch back to the early days of the Republic—although the Justices relied on historical acquiescence to justify congressional action. Would that place long-standing congressional New Deal programs beyond constitutional challenge? Justice Paterson, for one, might think so.

2. Deferring to Concerns About the National Interest

Second, the Justices deferred to concerns about the national interest in ways that veer away from the typical linguistic or even substantive canons traditionally appropriate for resolving the meaning of legal text. The case of *United States v. Schooner Peggy* provides a useful example. Chief Justice Marshall wrote for the Court, determining that the case of the schooner Peggy fell within a provision of the treaty with France that provided restitution for "definite condemnation" and ships "definitively condemned."[243] Chief Justice Marshall rejected the argument that "definitive" referred to the final nature of the sentence of the circuit court below, finding that it was not definitive "in the sense in which that term [was] used in the treaty."[244] The court's decree was final with relation to the court, "not in relation to the property itself."[245] Chief Justice Marshall found instead that the treaty referred to the actual condition of the property, otherwise those

[238] *Id.*

[239] *Id.* at 308–09 ("[N]o other court could legally proceed upon the said bond . . . if there be no statutable provision to direct and authorize such proceeding.").

[240] *Id.* at 309 (referring to U.S. CONST. art. III, § 2, cl. 2).

[241] *Id.* ("In this last particular, there are no words in the constitution to prohibit or restrain the exercise of legislative power.").

[242] *Id.* ("[I]t is sufficient to observe, that practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled. Of course, the question is at rest, and ought not now to be disturbed.").

[243] United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 108 (1801).

[244] *Id.*

[245] *Id.* at 109.

terms would be rendered surplus.[246] He also noted that interpreting "definitive" otherwise would include situations where the ships were not actually condemned,[247] which was not within the contemplation or design of the contracting parties.[248] Finally, Chief Justice Marshall noted that while courts generally avoided retroactive constructions, where great national concerns of war were involved, the construction should account for the importance of those interests.[249]

This kind of deference to important national interests allowed Chief Justice Marshall significant leeway in resolving the meaning of the word "definitive." While this sort of deference may seem unsurprising given the vast expansion of executive power since the nineteenth century, Chief Justice Marshall was not considering a challenge to the constitutionality of executive power. He was interpreting one word to resolve the meaning of a treaty favorably for the United States and had significant leeway to do so.

3. Using Legislative Evidence

One of the most controversial tools in the construction zone may be the use of legislative evidence. In *Ware v. Hylton*, however, Justice Iredell not only considered legislative evidence, but found it quite compelling. Justice Iredell noted first that at the time the Virginia law was passed, a British creditor, as an enemy during wartime, could not sue to recover his debt anyway.[250] He further noted that the Virginia law was necessary, given the depreciation of paper currency.[251] Justice Iredell then looked to the treaty text and analyzed the separate phrases "[c]reditors," "[n]o lawful impediment," and "[t]o the recovery of the full value in sterling money of all *bona fide* debts heretofore contracted."[252] He considered legislative evidence, ultimately interpreting the words narrowly because a broad interpretation would interfere with property rights.[253]

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[246] *Id.*

[247] *Id.*

[248] *Id.*

[249] *Id.* at 110 ("It is true that in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties, but in great national concerns where individual rights, acquired by war, are sacrificed for national purposes, the contract, making the sacrifice, ought always to receive a construction conforming to its manifest import.").

[250] Ware v. Hylton, 3 U.S. (3 Dall.) 199, 267–68 (1796) (opinion of Iredell, J.) ("Let us, however, recollect, that at this period no *British* creditor could institute a suit for the recovery of his debt, as the war constituted him an alien enemy, and therefore his remedy stood suspended at common law, so that he ran the risque of the entire loss of every debt, where his debtor proved insolvent during the war.").

[251] *Id.* at 270.

[252] *Id.* at 278−80.

[253] *Id.* at 279 ("This construction derives great weight from the recommendatory letter of Congress I before mentioned."); *id.* at 280 ("When these general words, therefore, can comprehend so many cases,

Justice Iredell's use of legislative history is an example of where Justices relied on legislative history to demonstrate legislative intent,[254] which Justice Scalia and other theorists would have rejected.[255] Justice Scalia would only have allowed legislative history in a very limited way: for example, to show that a word was used in a certain way in a floor debate.[256] If legislative evidence was good enough for Justice Iredell (and Justice Paterson), might it be good enough for contemporary jurists?

The Justices relied on a wide variety of linguistic and substantive canons in determining the meaning of various cases — a wide variety of tools and evidence that contemporary jurists might similarly utilize. For original methods originalists and others who consider early American judicial practice a guide to how contemporary judges should approach getting from words to law, this evidence indicates that a wider variety of tools and evidence are appropriate for use, whether they consider judges to be acting in the construction zone or not.

CONCLUSION

This Note opened by asserting that evidence of early judicial practice has something to tell contemporary jurists about analyzing legal text: that at minimum, it holds descriptive value of early American historical practice, and at best, material for normative arguments about how contemporary judges should approach analyzing legal text. Insofar as original methods originalists and others believe that early judicial practice determines the methods available to contemporary jurists, such historical evidence may outline the approach and tools available to judges today. Even for those who believe Founding-era judicial practice should not guide, much less dictate, contemporary jurisprudence, a description of historical methods still provides material for articulating arguments about how judges should proceed today. It is only by describing and understanding historical practice that we can make arguments about its instructive value or inadequacy. With that historical evidence in hand, theorists and judges can more fulsomely engage in the debate about how we get from language to law.

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all reasonable objects of the article, I cannot think I am compelled as a Judge, and therefore I ought not to do so, to say that the general words of this article, shall extinguish private as well as public rights." (emphasis omitted)).

254 *See* discussion *supra* notes 216−218.

255 *See, e.g.*, Scalia & Manning, *supra* note 233, at 1612 ("Well, they owe that fidelity, first of all, because we are governed by what the legislators enacted, not by the purposes they had in mind. When what they enacted diverges from what they intended, it is the former that controls.").

256 *See, e.g.*, *id.* at 1616 (Scalia rejects the use of legislative history to look at legislative intent, although he "do[es]n't mind using legislative history just to show that a word could mean a certain thing").

So, what does the historical evidence show? First, that Justices engaged in interpretation and construction as a single process, alternating between textual and normative reasoning to determine the intent of the Framers or of Congress. In some cases, textual arguments seemed determinative; in others, normative reasoning was decisive. This finding illustrates some tension between the idea of limiting judicial discretion in construction and applying methods of interpretation and construction that would have been used in the Founding Era, at least to interpretation of the Constitution. Such tension may highlight important questions for some original methods originalists. Second, the Justices utilized a variety of tools and canons in the construction zone. To the extent that jurists believe historical methods should guide contemporary jurisprudential debates, acquiescing to historical practice, deferring to national interest concerns, and using legislative evidence are all fair game.

To the extent that modern-day theorists or jurists find Founding-era evidence of judicial practice relevant to contemporary debates regarding the interpretation-construction, this Note offers evidence of how early American jurists did—and did not—go about determining the meaning of legal texts. While scholars and jurists will certainly continue to disagree about how we ought to get from language to law, this evidence adds to what we know about how our nation's first highest jurists did so.