

# THE CONSTITUTION AND THE LANGUAGE OF THE LAW

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## ABSTRACT

*A long-standing debate exists over whether the Constitution is written in ordinary or legal language. Yet no article has offered a framework for determining the nature of the Constitution's language, let alone systematically canvassed the evidence.*

*This Article fills the gap. First, it shows that a distinctive legal language exists. This language in the Constitution includes terms, like "Letters of Marque and Reprisal," that are unambiguously technical, and terms, like "good behavior," that are ambiguous in that they have both an ordinary and legal meaning but are better interpreted according to the latter. It also includes legal interpretive rules such as those that tell readers whether a term should be given its legal meaning or its ordinary meaning.*

*The Article explains how to determine whether a document is written in the language of the law. Unsurprisingly, the most important factor is the language of the document itself. The pervasive presence of technical legal terms provides strong evidence that a document is written in the language of the law because ordinary language cannot easily account for even a small number of legal terms. The purpose of the document also counts. Insofar as it is written to inform officials of their duties, a document is more likely to be written in legal language because that language allows more precision. The language of similar documents provides additional evidence. That other constitutions at the time were written in the*

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*language of the law militates in favor of reading the Constitution in that same language.*

*The Article supplies strong evidence that the Constitution is written in the language of the law. The Article is the first to count the legal terms in the Constitution and approximates them at one hundred. Moreover, the Constitution's text assumes the application of legal interpretive rules, both blocking the operation of certain legal interpretive rules and calling for the application of others. Finally, the judges and legislators charged with implementing the Constitution in the early Republic frequently deployed legal interpretive rules to resolve contested issues.*

*The Constitution's legal language has important theoretical and practical significance. Theoretically, it suggests that original-methods originalism is the correct form of originalism, because the Constitution's legal interpretive rules are crucial to accurately determine its meaning. Practically, the richness of the idiom of the language of the law provides resources to address otherwise unresolvable interpretive questions. As a result, much of modern originalist scholarship about specific provisions depends for its force on reading the Constitution in the language of the law.*

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## INTRODUCTION

The Constitution has launched hundreds of debates about its meaning. But before these disputes can be settled, an underlying clash of visions about the nature of its very language requires resolution. One view holds that the Constitution is written in ordinary language and is thus fully accessible to anyone with knowledge of the English language. Another view is that the Constitution is written, like many other documents with legal force, in the language of the law. Understanding its full meaning, then, requires legal as well as ordinary linguistic knowledge. While the ordinary-language view is often assumed,<sup>1</sup> the entire question has received little serious treatment. In this Article, the first devoted to the subject, we show that the Constitution was written in the language of the law.

Resolving this dispute is important for any interpretive theory that gives at least some weight to the Constitution's original meaning, which includes almost all of them.<sup>2</sup> But it is particularly important to originalism. Originalism posits that the meaning of the Constitution was fixed at the time of its enactment.<sup>3</sup> And that meaning was fixed by the Constitution's language.<sup>4</sup> Thus, the language in which the Constitution was written can make a fundamental difference to its interpretation.

The ordinary-language view understands the Constitution as written in standard, everyday English. Under this view, when the Constitution addresses fundamental political norms, it uses lan-

1. The Supreme Court has on occasion made this assumption. *See, e.g.*, United States v. Sprague, 282 U.S. 716, 731 (1931). It is also prevalent in legal scholarship. *See, e.g.*, Ian Bartrum, *Two Dogmas of Originalism*, 7 WASH. U. JURIS. REV. 157, 181 (2015) (criticizing originalism but agreeing with the assumption); Lawrence B. Solum, *We Are All Originalists Now*, in ROBERT W. BENNETT & LAWRENCE B. SOLUM, CONSTITUTIONAL ORIGINALISM: A DEBATE 1, 2-3 (2011) (suggesting that the importance of ordinary language is a tenet of the so-called new originalism).

2. *See, e.g.*, Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765, 1766 (1997) ("[V]irtually all practitioners of and commentators on constitutional law accept that original meaning has some relevance to constitutional interpretation.").

3. *See* Lawrence B. Solum, *What Is Originalism? The Evolution of Contemporary Originalist Theory*, in THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION 12, 33 (Grant Huscroft & Bradley W. Miller eds., 2011).

4. *See, e.g.*, *id.*

guage much as nonlegal documents, like newspapers at the time, used language. To be sure, sophisticated people may understand the implications of the document better than the less sophisticated, but no legal expertise is needed. Thus, in its purest form, this view suggests that all the Constitution's terms are terms in ordinary language.

Under the ordinary-language view, the Constitution is explicated based on ordinary interpretive rules. These rules guide interpretation of statements made in ordinary language.<sup>5</sup> For example, it is normally thought that a speaker or writer will not contradict himself in a document. Thus, interpreters try to understand different provisions as consistent.

But the ordinary-language view faces challenges. One issue for this view is how to interpret terms, like "Letters of Marque and Reprisal,"<sup>6</sup> that have no meaning outside of the law and are therefore unfamiliar to the ordinary language reader. A second issue is how to understand terms like "due process,"<sup>7</sup> that have both a legal meaning and an ordinary meaning. Yet another issue is how to address provisions, like the Supremacy Clause,<sup>8</sup> whose words invoke preexisting legal interpretive rules.<sup>9</sup> These are challenges because the ordinary-language view cannot easily account for meanings that are not part of ordinary language.

Understanding the Constitution as written in the language of the law dissolves these problems. Contrary to the ordinary-language view, the language-of-the-law view posits that the Constitution is written in the distinctive idiom of law. Like any technical language, the language of the law overlays ordinary language; it uses English as a foundation on which to build rather than creating a wholly new language.

A document written in the language of the law thus contains both ordinary language and legal language. Terms that have only legal meanings, like letter of Marque and Reprisal, are given their legal meaning. Terms that have only ordinary meanings are given their

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5. See *infra* Part I.A.2.

6. U.S. CONST. art. I, § 8, cl. 11.

7. *Id.* amend. V.

8. *Id.* art. VI, cl. 2.

9. See *infra* Part III.D.1.

ordinary meanings. And terms like due process, that have both an ordinary and a legal meaning, are treated as ambiguous. Under the language of the law, these terms have the meaning that the context and other interpretive rules indicate they have.

The language-of-the-law view also differs from the ordinary-language view in embracing legal interpretive rules. Law has over time generated distinctive rules that guide interpretation of documents written in its language. For example, the rule of lenity, which requires criminal prohibitions to be interpreted in favor of the criminal defendant, has regularly been applied to legal enactments, even though it does not apply in ordinary language.<sup>10</sup>

Through technical meanings and distinctive rules of interpretation, the language of the law can affix a more precise meaning to constitutional provisions than ordinary language can. For example, one legal meaning of due process is conformity with the legal procedures employed at common law.<sup>11</sup> That meaning is more precise than the ordinary language understanding of the term as fair procedures.

Reading the Constitution in the language of the law makes a substantial difference to originalism. Most importantly, if the Constitution is written in the language of the law, only reading it in that language will yield an accurate interpretation. For instance, if the right to confront witnesses under the Sixth Amendment is defined by the meaning of confrontation at common law, then the right will only receive that meaning if the Constitution is read in the language of the law. Similarly, if an “unreasonable” search or seizure under the Fourth Amendment meant a search or seizure prohibited by the common law, then only the language of the law will yield that meaning.

Moreover, the language of the law often provides a more precise answer when ordinary language would not provide a clear one. The ordinary meaning of the right to confront witnesses does not determine when the right is forfeited, but the legal meaning does.<sup>12</sup> The

10. See NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 59.3 (6th ed., 2001 rev., 2001).

11. For discussion of the common law interpretation of the Due Process Clause, see *infra* notes 450-54 and accompanying text.

12. See *infra* Part IV.A.

ordinary meaning of the word “unreasonable” in the Fourth Amendment<sup>13</sup> appears ambiguous, but a precise legal meaning may be determined by the common law of the time.<sup>14</sup> Similarly, “due process of law”<sup>15</sup> seems vague in ordinary language, but legal scholars have used legal language to find a determinate meaning.<sup>16</sup> Indeed, much of the best modern originalist scholarship is inconsistent with an ordinary language reading of the Constitution.

Like most benefits, the language of the law’s capacity for precision is not a free good. It is purchased at the cost of complete transparency to the ordinary reader. At times, it also requires the additional cost of employing lawyers. In many circumstances, those costs are worth paying as a normative matter. Indeed, the entire edifice of law is based on the proposition that, in the complex and important enterprises of life, greater precision is worth the cost of deploying a technical language fully familiar only to experts. But in this Article we limit ourselves to proving an important, nonnormative, interpretive claim that resolves the conflict of views about the nature of the Constitution’s language: the constitutional text is far better understood as written in the language of the law than in ordinary language.

Several pieces of evidence strongly support the conclusion that the Constitution is written in the language of the law. First, the Constitution refers to itself as law,<sup>17</sup> which suggests that it is written in the language in which laws are ordinarily written. Second, we show that the language of the Constitution is filled with numerous legal terms. Some of these terms are unambiguously legal. Others are ambiguous, having both an ordinary and legal meaning. And still others are possibly ambiguous—they have an ordinary meaning but they may also, depending upon the fruits of further historical research, turn out to have a legal meaning. Moreover, many of these different types of terms are used more than once in the Constitution, which reinforces the legal character of the document. While it is not entirely clear how many terms are used

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13. U.S. CONST. amend. IV.

14. For discussion, see *infra* notes 455-59 and accompanying text.

15. U.S. CONST. amend. V.

16. For discussion see *infra* notes 450-54 and accompanying text.

17. See U.S. CONST. art. VI, cl. 2.

with their legal meanings in the Constitution, it is a large number—likely more than one hundred. This Article is the first to provide a way of cataloging and categorizing these legal terms.

Third, the Constitution uses various phrases tied to legal interpretive rules. For example, it employs preambles and prefatory clauses that were used mainly, and perhaps only, in legal documents.<sup>18</sup> The interpretation of these phrases was governed by legal interpretive rules. Similarly, the Constitution also employs language that assumed the relevance of legal interpretive rules. For example, the Supremacy Clause<sup>19</sup> uses language (known as a non-obstante clause) that was employed as a term of art to invoke a legal interpretive rule that negated the application of another legal interpretive rule.<sup>20</sup> This language, then, shows that the document was written with legal interpretive rules in mind.

Early interpreters of the Constitution also interpreted it as a document written in the language of the law. The early Supreme Court, both the pre-Marshall Court and the Marshall Court, interpreted provisions to have legal meanings and applied legal interpretive rules.<sup>21</sup> In addition, legal meanings and legal interpretive rules were applied during the Philadelphia and ratification conventions. For example, the Philadelphia Convention was unsure whether a prohibition on ex post facto laws applied only to criminal law or also to civil ones.<sup>22</sup> The delegates resolved the question by consulting the leading legal treatise of the day, Blackstone's *Commentaries*.<sup>23</sup> Early interpreters in the Congress also employed legal meanings and legal interpretive rules.<sup>24</sup>

Finally, early interpreters also found legal meanings in state constitutions and applied the legal interpretive rules to these documents.<sup>25</sup> If state constitutions were understood to be written in the language of the law, that makes it more likely that a document of the same type at the federal level used that language as well.

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18. See *infra* Part III.D.2.

19. U.S. CONST. art. VI, cl. 2.

20. See *infra* Part III.D.1.

21. See *infra* Parts III.E.2-3.

22. For a full discussion, see *infra* notes 360-61 and accompanying text.

23. See *infra* note 361 and accompanying text.

24. See *infra* Part III.F.2.

25. See *infra* Part III.E.1.

Overall, then, evidence from the constitutional text and from early interpretations of constitutions powerfully indicates that the United States Constitution is written in the language of the law.

In Part I of our Article we show that a distinctive legal idiom exists. The case for a language of the law can be made under either a broad or narrow understanding of language. The broad conception of language reflects the view that language includes word meanings and any rules that speakers use to understand speech. These rules include not only grammatical rules but also any rules that tell speakers how to interpret the language. The commonsense argument for the broad conception is that language should include all the background rules that help decode the communication of a speaker or writer.

On this broad understanding, the language of the law is a distinctive technical language. It contains numerous words not part of ordinary English and is governed by interpretive rules inapplicable to ordinary language. Of course the language of the law is not wholly independent of ordinary language, but, like other technical languages, such as the language of medicine or psychology, is an overlay on ordinary language.

The language of the law is a central part of a legal education. Lawyers spend much of their education learning how to speak, write, and interpret legal language. Like other languages, technical and ordinary, the language of the law evolved over years to reflect the needs of those who use it. These needs include not only special technical terms to cover concepts not part of everyday use, but also legal interpretive rules to make language more precise than in everyday use.

Some scholars, however, take a narrower view of the content of language, limiting it to word meanings (semantics) and grammatical rules (syntax).<sup>26</sup> But, even under this narrower conception, the language of the law is a distinctive language. The technical vocabulary, of course, qualifies straightforwardly as semantics. But under this narrower view, language alone is insufficient to understand utterances: context is also needed. For instance, in ordinary language, to determine whether the word “diamond” refers to a gem or

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26. See *infra* Part I.B.

a ballfield, context indicates whether the conversation concerns jewelry or baseball. While the context is not technically part of the language, it is an essential ingredient for understanding an utterance.

Under the narrower view, legal interpretive rules are inextricably bound to the language of the law, because a legal document has a legal context that envelops it. And that context can be as important as language when interpreting what is said. It should not be surprising that the context of the language of the law is in some ways more rich and complicated than the contexts with which we interpret ordinary language. It has been built over centuries to try to make legal utterances more precise than utterances in the everyday world.

Having made the case for the existence of a distinctive language of the law, we then discuss in Part II the criteria by which one should assess whether a document is written in the language of the law. A variety of factors make it more likely that a document is written in that language. Most importantly, the pervasive presence of technical legal terms is overwhelming evidence that a document is written in the language of the law, because ordinary language cannot easily account for even a small number of legal terms. By contrast, the existence of ordinary language terms in a legal document does not militate against a finding that the document is written in the language of the law, because that language encompasses ordinary language as well.

The purpose of the document is also relevant. If one of the purposes of the Constitution was to articulate the fundamental law so that it could be implemented by government officials,<sup>27</sup> then this purpose suggests that the language of the law was employed, because that language allows for more precision. The authors and audience of the document are also relevant. If the authors and audience did not know the language of the law, this would suggest that that language was not employed. But in the case of the Constitution, the elites who authored the Constitution at Philadelphia were well acquainted with the language of the law.<sup>28</sup> To be sure, some members of the audience knew the language of the law

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27. See *infra* Part II.A.3.

28. See *infra* Part II.A.4.

and others did not.<sup>29</sup> But no strong inference can be drawn against the language of the law because the public had a general understanding of the document and had access to more precise statements from public debates among lawyers.

In Part III we review the overwhelming evidence described above from the language of the Constitution and its early interpretation showing that it is written in the language of the law.

It is true that the Constitution is written in the name of the people.<sup>30</sup> But it does not follow that it must be written in ordinary language. Many legal documents, like wills and contracts, are written in the name of ordinary people, even though they are written by lawyers in the language of the law.

We end in Part IV with a discussion of originalist scholarship and Supreme Court jurisprudence that relies on the language of the law. Much of the best originalist scholarship today and leading originalist Supreme Court cases are simply inconsistent with an ordinary-language view, because these works depend on conclusions and inferences that cannot be derived from ordinary language.

## I. THE LANGUAGE OF THE LAW

It makes both a theoretical and a practical difference whether the Constitution is written in the language of the law or ordinary language. The most obvious theoretical difference it makes is to the theory of originalism. While originalism is a family of theories, all versions of originalism share the view that meaning is fixed at the time the Constitution was enacted.<sup>31</sup> If originalism is defined by the Constitution's public meaning, the language of the document determines that meaning. If originalism is defined by the intent of the Constitution's enactors, its meaning is indicated by the language in which the enactors make their intent known. In both cases, if a document is written in the language of the law, that language will make a difference in its meaning.

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29. See *infra* notes 360-61 and accompanying text.

30. See U.S. CONST. pmlb.

31. Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 459, 528 (2013).

The language in which the Constitution is written also has theoretical implications for nonoriginalist approaches that take into account the Constitution's original meaning. For example, various pluralistic approaches to constitutional interpretation consider the Constitution's original meaning as well as other factors, such as precedent, ethics, or prudence.<sup>32</sup> To the extent that the original meaning is part of the analysis, our argument may change the results of those approaches as well.

The language in which the Constitution is written also has practical implications for the interpretation of particular clauses. First, as we describe below, it suggests that in some circumstances a technical legal term be given its technical legal meaning, even if the term has an ordinary meaning as well. "Due process" has already been mentioned as an example.<sup>33</sup> "Unusual" in the prohibition against "cruel and unusual punishments" is another<sup>34</sup>: "unusual" can be interpreted as a technical legal term meaning practices that are against "immemorial usage."<sup>35</sup>

Second, as we also describe below, the language of the law contains interpretive rules as an integral part of its meaning. For example, one interpretive rule at the time of founding was the rule of lenity, which provides that criminal prohibitions should be construed in favor of the criminal defendant.<sup>36</sup> If the rule is deemed applicable to the Constitution, the original meaning would require that the rule be employed. The Constitution provides that treason "shall consist only in levying War against [the United States], or in adhering to their Enemies, giving them Aid and Comfort."<sup>37</sup> Assuming the rule applies to the Constitution, if an interpreter does not interpret this language in favor of a criminal defendant, then he would diverge from the Constitution's actual meaning. Indeed, if the Constitution's authors expected that the rule of lenity would not be

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32. See PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 12-13 (1991) (describing such different modalities of constitutional interpretation).

33. See *supra* notes 12, 15-16 and accompanying text.

34. U.S. CONST. amend. VIII.

35. See John F. Stineford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1745 (2008).

36. See SINGER, *supra* note 10, § 59.3.

37. U.S. CONST. art. III, § 3.

applied, they may have written the language of the Treason Clause differently.

Another applicable interpretive rule provides that terms should in some circumstances be given the meaning that they had at common law. The Sixth Amendment states that “the accused shall enjoy the right ... to be confronted with the witnesses against him.”<sup>38</sup> If an interpreter were to ignore the common law meaning of this confrontation right, then once again he might be departing from the original meaning.<sup>39</sup>

We make our argument that the Constitution is written in the language of the law in three principal Parts. This Part explores the nature of the language of the law. We first offer a broader conception of the language of the law and then a narrower conception. In Part II, we explore how to determine whether a document, such as the Constitution, is written in the language of the law. In Part III, we present empirical evidence, from the constitutional language itself and the understandings of the people at the time, that the Constitution was written in this language.

#### A. *The Broad Conception of the Language of the Law*

In exploring the nature of the language of the law, we consider two different conceptions of that language—a narrow conception and a broad conception.<sup>40</sup> Under the narrow conception, language is

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38. U.S. CONST. amend. VI.

39. See *Crawford v. Washington*, 541 U.S. 36, 43-51 (2004) (explaining the common law that informed the Confrontation Clause, and concluding that “[t]he Sixth Amendment must be interpreted with this focus in mind”); see also Frederick Schauer, *Is Law a Technical Language?*, 52 SAN DIEGO L. REV. 501, 509-10, 510 n.42 (2015).

40. We are not the first to argue that documents may be written in language distinctive to law. This notion goes back to such luminaries as Francis Bacon, Edward Coke, and William Blackstone. See DAVID MELLINKOFF, THE LANGUAGE OF THE LAW 290 (1963). In modern times, H.L.A. Hart argued that all language used in law presupposes a legal system and is thus distinctively legal. See H.L.A. Hart, *Definition and Theory in Jurisprudence*, 70 LAW Q. REV. 37, 37 (1954). In contrast, Charles Caton argued that the idiom of law is limited to technical terms. See Charles E. Caton, *Introduction to PHILOSOPHY AND ORDINARY LANGUAGE* vii-viii (Charles E. Caton ed., 1963).

Our view differs from both Hart and Caton. Unlike Hart, we believe that some of the language of the law is ordinary language whose meaning is readily accessible to ordinary readers. Unlike Caton, we believe that legal language is not exhausted by technical terms, but includes legal interpretive rules. Indeed, these rules are essential to determining which terms are legal because some terms have both technical and ordinary meanings.

understood to include only semantics (word meanings) and syntax (grammar rules).<sup>41</sup> Under the broad conception, language is understood to include all rules that the author and audience follow in using language.<sup>42</sup> In addition to semantics and syntax, the broad conception includes other rules that govern language. In the case of the language of the law, those rules include the legal interpretive rules that tell speakers how to interpret the language.

There are good reasons for exploring each of these conceptions. The broad conception captures the regularities of how the language of the law is actually employed. It includes all rules that govern how speakers of this language communicate. Moreover, lawyers tend to understand these rules as part of the language that they speak—as part of thinking and speaking like a lawyer.

It also makes sense to explore the narrow conception, because it follows a common view that language is limited to rules of semantics and syntax. Under this view, the message communicated through language depends not only on the language itself, but also on the context (including the norms governing how words should be understood). Under the narrow conception, the legal interpretive rules are not part of the language, but are instead part of the context of utterances made in the language of the law. As part of that enduring context, these rules still need to be followed to determine the meaning communicated by utterances in the language of the law.

Ultimately, legal interpretive rules are essential to determining the meaning of statements under both the broad and narrow conceptions of the language of the law. While the result is the same under the two conceptions, considering both these conceptions helps enrich our understanding of an essential element of the way that lawyers communicate.

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More importantly, this Article is the first to provide systematic evidence that the Constitution is written in the language of the law and show that this language has important implications for constitutional interpretation. The closest recent work to ours is Schauer, *supra* note 39, at 501-02. But Schauer ultimately took no position on how much of law is a technical language. *See id.* at 502-03, 513.

41. *See, e.g.*, Lawrence B. Solum, *Intellectual History as Constitutional Theory*, 101 VA. L. REV. 1111, 1126 (2015). For discussion of the narrow conception, see *infra* Part I.B.

42. For discussion of the broad conception, see *infra* Part I.A.

We begin this Section by examining the broader conception of the language of the law, which includes not only words with legal meanings, but also legal interpretive rules. After exploring that understanding of language, we consider the narrower conception of language, which treats the legal interpretive rules as context for the language.

### *1. Existence of the Language of the Law*

It is clear that a language of the law exists—one that is employed by lawyers and others who are learned in the law.<sup>43</sup> A significant part of learning the law involves learning to speak, write, and interpret texts like a lawyer.<sup>44</sup> These tasks involve learning a distinctive legal language.<sup>45</sup> That language contains many technical legal terms.<sup>46</sup> It also contains numerous legal interpretive rules that indicate how language is to be interpreted and how its meaning is to be determined.<sup>47</sup>

The notion of a technical language is accepted in philosophy of language scholarship.<sup>48</sup> The language of the law is a technical language, like those of science or medicine.<sup>49</sup> Technical languages overlay an ordinary language.<sup>50</sup> They are not entirely separate, but

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43. See JAMES B. WHITE, THE LEGAL IMAGINATION: STUDIES IN THE NATURE OF LEGAL THOUGHT AND EXPRESSION 6-7 (1973).

44. See, e.g., PAUL W. KAHN, MAKING THE CASE: THE ART OF THE JUDICIAL OPINION x-xi (2016).

45. See J. Christopher Rideout & Jill J. Ramsfield, *Legal Writing: The View from Within*, 61 MERCER L. REV. 705, 710 (2009).

46. See, e.g., Schauer, *supra* note 39, at 501-02.

47. See *infra* notes 78-87 and accompanying text.

48. See, e.g., Caton, *supra* note 40, at vii; David Langslow, *Latin Technical Language: Synonyms and Greek Words in Latin Medical Terminology*, 87 TRANSACTIONS PHILOLOGICAL SOC'Y 33, 34-35 (1989).

49. See, e.g., Veda R. Charrow, Jo Ann Crandall & Robert P. Charrow, *Characteristics and Functions of Legal Language*, in *SUBLANGUAGE: STUDIES OF LANGUAGE IN RESTRICTED SEMANTIC DOMAINS* 175, 175 (Richard Kittredge & John Lehrberger eds., 1982); Mario Jori, *Legal Pragmatics*, in *PRAGMATICS AND LAW: PHILOSOPHICAL PERSPECTIVES* 33, 34 (Alessandro Capone & Francesca Poggi eds., 2016); Christopher Williams, *Legal English and Plain English: An Introduction*, in 1 ESP ACROSS CULTURES 111, 118 (2004).

50. See Caton, *supra* note 40, at vii-ix.

use ordinary language and lie on top of it.<sup>51</sup> They are found when specialized and accurate signification is required.

An important feature of a technical language is a vocabulary peculiar to the language.<sup>52</sup> Psychology, philosophy, and medicine, for instance, all have a technical language that includes terms that describe their particular perspective.<sup>53</sup> No one doubts, for instance, that “defense mechanism” has a specific meaning in psychology that is separate from the conjunction of “defense” and “mechanism” in ordinary language.<sup>54</sup> Law also has a peculiar vocabulary.<sup>55</sup> And it not only has its own words, but also employs ordinary words, like “property,” in a technical sense.<sup>56</sup>

As with other ordinary and technical languages, the lawyers who know this language often use it unselfconsciously. When another lawyer uses technical legal terms, they respond using other technical terms.<sup>57</sup> When they read a legal document, they naturally employ legal interpretive rules.<sup>58</sup> And when they draft a legal document,

51. See Langslow, *supra* note 48, at 34-35; see also Francesca Schironi, *Technical Languages: Science and Medicine*, in A COMPANION TO THE ANCIENT GREEK LANGUAGE 338, 342-44 (Egbert J. Bakker ed., 2010).

52. See, e.g., PETER M. TIERSMA, *LEGAL LANGUAGE* 108 (1999); Yon Maley, *The Language of the Law*, in *LANGUAGE AND THE LAW* 11, 22 (John Gibbons ed., 1994); see also MELLINKOFF, *supra* note 40, at 16-17 (discussing terms of art and identifying words and phrases of art lawyers commonly use).

53. See, e.g., George T. Hole, *Philosophical Counseling and Technical Language*, 1 PHIL. PRAC. 33, 33-34 (2005).

54. See *id.* at 33.

55. See Schauer, *supra* note 39, at 501-02 (noting that some legal terms “have no ordinary uses”); see also MELLINKOFF, *supra* note 40, at 17.

56. See Jori, *supra* note 49, at 35. Many scholars have seen the language of the law as even more pervasively technical, with all words to be read in light of the goals of a legal system, goals that are sometimes manifested in their legal interpretive rules. See Schauer, *supra* note 39, at 508-09. Thus, for instance, legal interpretive rules that encourage a statute to be read in terms of its purpose would show that “what counted as a *vehicle* in ordinary language might still not be a vehicle when understood as part of a legal rule.” See *id.* at 507 (citing Lon L. Fuller, Response, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 633 (1958)). On this view, legal interpretive rules are a distinctive feature of the language of the law as well because they change the meaning of words found in a legal context from what they would signify in ordinary language. While we agree that the legal texts have pervasively legal language, we do not necessarily agree with how these scholars regard the language of the law or determine legal meaning. In any event, as we will show, the Constitution in particular is full of distinctive legal words and references legal interpretive rules.

57. See, e.g., Victor Fleischer, *Regulatory Arbitrage*, 89 TEX. L. REV. 227, 267 n.221 (2010).

58. Cf. *supra* notes 36-39 and accompanying text (explaining, for example, how the rule

such as a statute, a regulation, or contract, they naturally use the language of the law.<sup>59</sup>

It is not surprising that the language of the law would differ significantly from ordinary language. The needs of lawyers differ from those of ordinary speakers, because lawyers must often communicate ideas with precision.<sup>60</sup> Lawyers also aim for concision,<sup>61</sup> because the instruments they create must cover many different situations without being overly prolix. Lawyers thus take advantage of the specialized vocabulary and interpretive rules of the law, which allow them to convey ideas in a richer and more precise way.<sup>62</sup> Through their education and training, lawyers can avail themselves of this specialized language and rules.<sup>63</sup>

It is not only those with legal knowledge who understand that the language of the law differs from ordinary language. Most lay people recognize that they cannot fully comprehend the language of the law.<sup>64</sup> This incapacity stems in part from an inability to understand many of the technical terms. But lay people also recognize that there are aspects of the language that, unlike obviously technical terms, they may not even realize are different—aspects such as legal interpretive rules that do not apply to ordinary language.<sup>65</sup> Thus, they worry about the danger of seeming to understand legal language without actually doing so. For this reason, after reading a legal document, a lay reader often says, “It seems fine to me, but to be sure I need to check with my lawyer.”<sup>66</sup>

The recognition that the language of the law differs from ordinary language is even reflected in ordinary language. When confronted with particularly hard to understand legal language, people refer to

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of lenity would apply to readings of the Constitution, and how the common law informs the meaning of the language in the Confrontation Clause of the Sixth Amendment).

59. See Jonathan Todres, *Teaching Health Law: Beyond the Case Method: Teaching Transactional Law Skills in the Classroom*, 37 J.L. MED. & ETHICS 375, 377 (2009).

60. See, e.g., TIERSMA, *supra* note 52, at 3; Todres, *supra* note 59, at 377.

61. See David A. Skeel, Jr., *Lawrence Joseph and Law and Literature*, 77 U. CIN. L. REV. 921, 930 (2009).

62. See, e.g., TIERSMA, *supra* note 52, at 3, 108.

63. See Rideout & Ramsfield, *supra* note 45, at 710.

64. See Heikki E.S. Mattila, *Legal Vocabulary*, in THE OXFORD HANDBOOK OF LANGUAGE AND LAW 27, 31 (Peter M. Tiersma & Lawrence M. Solan eds., 2012).

65. See *id.*; see also Schauer, *supra* note 39, at 501-02.

66. Legal language serves to put people on notice they need lawyers. See TIERSMA, *supra* note 52, at 141.

it as “legalese.”<sup>67</sup> But while it is tempting to call the language of the law legalese, that name would have a misleadingly pejorative connotation.<sup>68</sup> The language of the law does not necessarily consist of opaque and technical terms that are difficult to parse and can only be understood with effort by a lawyer. Indeed, the language of the law is only in part composed of technical terms. As we argue below, legal language also includes such majestic language as the Constitution’s preamble.<sup>69</sup>

## *2. Features of the Language of the Law*

What comprises the language of the law? As with other technical languages, the language of the law can be thought of as a language that builds on ordinary language, but then substantially supplements and modifies it.<sup>70</sup> Begin then with ordinary language. Under the broad conception of language, ordinary language includes semantic, syntactic, and interpretive rules. In each case, those rules would be limited to ordinary language. An example of an ordinary language interpretive rule is the rule that one assumes that an ambiguous term should be construed in accordance with the subject of an utterance.<sup>71</sup>

The language of the law then supplements and modifies ordinary language. The most obvious addition consists of an ample technical legal vocabulary.<sup>72</sup> We can divide this vocabulary into two types of words. Some words are unambiguously technical terms, such as the constitutional term “Bill of Attainder.”<sup>73</sup> These words have a legal meaning, but no ordinary language meaning. However, other words,

67. See, e.g., Vincent L. Teahan, *Why Don’t Our Clients Like Their Wills?*, N.Y. ST. B.J., Nov. 1997, at 26, 28.

68. See MELLINKOFF, *supra* note 40, at 4.

69. See *infra* Part III.D.2.

70. See Samantha Hargitt, Note, *What Could Be Gained in Translation: Legal Language and Lawyer-Linguists in a Globalized World*, 20 IND. J. GLOBAL LEGAL STUD. 425, 427 (2013).

71. See 24 PENNSYLVANIA LAW ENCYCLOPEDIA § 333 (2005). For example, if a speaker is talking baseball, then the statement “that should work on the diamond” should be interpreted to mean the baseball diamond rather than a gem.

72. See TIERSMA, *supra* note 52, at 108; Mattila, *supra* note 64, at 31.

73. U.S. CONST. art. 1, § 9, cl. 37.

like the term “property,” have both a technical and ordinary meaning.<sup>74</sup>

The other basic way that the language of the law supplements and modifies ordinary language is through the inclusion of legal interpretive rules. Legal interpretive rules are rules for interpreting documents written in the language of the law. Many of these rules do not apply to ordinary documents. For example, the rule of lenity is an interpretive rule that only applies to documents written in the language of the law.<sup>75</sup> People knowledgeable about the law recognize this rule and draft enactments with the rule in mind.

While the technical vocabulary is the most obvious aspect of the language of the law, it is the distinctive legal interpretive rules that are more foundational; these rules often determine whether the technical vocabulary has been employed. The legal interpretive rules tell the interpreter under what circumstances to apply the ordinary or the technical word meaning.<sup>76</sup> Thus, legal interpretive rules sometimes tell the interpreter to follow the ordinary meaning and sometimes tell him to follow the legal meaning.<sup>77</sup>

The language of the law encompasses a variety of legal interpretive rules. The most visible rules are those that provide guidance about how to interpret legal language in specific situations. In addition to the rule of lenity, prominent examples of these types of rules are the rule governing the interpretation of preambles,<sup>78</sup> the rule that implied repeals are disfavored,<sup>79</sup> the absurdity rule,<sup>80</sup> the rule that terms with both a legal meaning and an ordinary meaning may be interpreted in accord with either meaning depending on the

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74. See Jori, *supra* note 49, at 35. Such ambiguity has been recognized by the famous language theorist, J.L. Austin. See J.L. AUSTIN, PHILOSOPHICAL PAPERS 182-84 (J.O. Urmson & G.J. Warnock eds., 2d ed. 1970). With respect to both types of words—unambiguous technical terms and terms with both ordinary and technical meanings—the technical meanings would be excluded from the ordinary language.

75. See, e.g., Jim Chen, *Law as a Species of Language Acquisition*, 73 WASH. U. L.Q. 1263, 1299 (1995).

76. See Mattila, *supra* note 64, at 31.

77. See *infra* Part I.A.3.

78. See Max H. Hulme, Comment, *Preambles in Treaty Interpretation*, 164 U. PA. L. REV. 1281, 1290-91 (2016).

79. See THEODORE SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND APPLICATION OF STATUTORY AND CONSTITUTIONAL LAW 123 (1857).

80. See John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2388 (2003).

context,<sup>81</sup> and the rule now referred to as intratextualism.<sup>82</sup> Lawyers regularly follow these rules when interpreting legal documents.

A second set of legal interpretive rules resembles the above group, but are sometimes used when interpreting ordinary language.<sup>83</sup> The difference between these legal interpretive rules and the corresponding ordinary interpretive rules, however, is that the legal interpretive rules are applied more regularly and strictly to legal documents than to ordinary documents.<sup>84</sup> The naming of these rules allows them to be readily invoked without elaborate explanation. These rules include the rule that unclear provisions should be interpreted in accord with the purpose and the structure of the document,<sup>85</sup> the antisurplusage rule,<sup>86</sup> and the *expressio unius* rule.<sup>87</sup>

A third type of legal interpretive rule—and in some ways the most theoretically interesting—indicates the object of interpretation and the evidence that should be considered in determining that object. For example, an interpretive rule might provide that the object of the interpretation is the public meaning of the words in context. Or it might say that the object of the interpretation is the intent of the lawgiver. Either one of these legal interpretive rules could be part of the language of the law.

Interpretive rules under this category also govern the type of evidence to be examined in establishing the meaning of language. Suppose that in the language of the law the object of interpretation is the intended meaning of a law's enactors. The legal interpretive rules might then provide for consideration of legislative history to determine the intent of the enactors. Alternatively, such interpretive rules might prohibit use of the legislative history, looking instead to plausible conjectures about the enactors' intent based on public circumstances and accepted values.

81. See *infra* notes 102–05 and accompanying text.

82. See Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 748 (1999).

83. See, e.g., ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 174 (2012).

84. See J.G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION 333 (1891).

85. See Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. REV. 1487, 1493–94 (2005).

86. See SCALIA & GARNER, *supra* note 83, at 174.

87. See SUTHERLAND, *supra* note 84, at 410.

The question of the type of evidence to be examined can arise in various circumstances. One example involves the practice of interpreting the U.S. Constitution by looking to British constitutional practices,<sup>88</sup> from which many of the Constitution's provisions were derived. As Chief Justice John Marshall said in analyzing the pardon power:

As this power had been exercised from time immemorial by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance; we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it.<sup>89</sup>

A related practice guides the interpreter to look to Blackstone and other leading British authorities for more precise understanding of legal terms.<sup>90</sup> These rules are distinctive to the language of the law and are not present in ordinary language.<sup>91</sup>

This third type of legal interpretive rule is closely connected to the interpretive debates among originalists (and to a lesser extent other interpretive approaches) about whether to follow the original public meaning or the original intent, and what evidence to consider.<sup>92</sup> While theorists have attempted to resolve these matters through theoretical considerations, the language of the law suggests that the resolution depends in significant part on the legal interpretive rules that existed at the time of the Constitution's enactment.<sup>93</sup> If those rules required the interpreter to look to the original intent

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88. See, e.g., Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 428 (2010) (looking to the English law origins of the Fifth Amendment's Due Process Clause).

89. United States v. Wilson, 32 U.S. (7 Pet.) 150, 160 (1833). While this statement comes later than those we would generally consider probative of original meaning, it is made by Chief Justice Marshall who was himself a prominent member of the Virginia ratifying convention. We are confident that this rule existed at the time of the Constitution.

90. See, e.g., JOHN O. McGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 144-45 (2013); Williams, *supra* note 88, at 428.

91. See, e.g., Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L.J. 341, 344-45 (2010).

92. See, e.g., McGINNIS & RAPPAPORT, *supra* note 90, at 121-24.

93. For examples of the use of such rules, see *infra* Parts III.E-F.

based on the legislative history, then even under an original-public-meaning approach to interpretation, the interpreter would consider the legislative history.<sup>94</sup> The original public meaning would require that intent be considered.<sup>95</sup> Similarly, if the legal interpretive rules required an interpreter to follow the meaning that a knowledgeable and reasonable person would give to the language based on publicly available sources, then an original-intent approach would require that such public meaning be followed, because that would likely be the intent of the enactors.<sup>96</sup>

Legal interpretive rules may be tied to the type of document in which the language is written. While certain interpretive rules likely apply to all legal documents, other interpretive rules are limited to specific documents.<sup>97</sup> Thus, specific rules apply to wills, contracts, and statutes.<sup>98</sup> Other rules apply to more than one category of document or to all legal documents.<sup>99</sup> Legal interpretive rules for the Constitution may thus include the rules that applied to all legal documents at the time, the rules that applied to both the Constitution and other types of enactments such as statutes, and the rules that applied exclusively to the Constitution.<sup>100</sup>

### *3. Integrating Ordinary with Legal Language*

This Article does not catalogue all the legal interpretive rules deemed applicable to the Constitution. It does, however, refer to many interpretive rules employed at the time of the writing of the

94. See McGINNIS & RAPPAPORT, *supra* note 90, at 121, 123-24.

95. See *id.* at 123.

96. See *id.* at 123-25.

97. See Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 555-56 (2003) (explaining that this was true at the time of the Constitution's enactment).

98. See, e.g., Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 MICH. L. REV. 489, 489-90 (1989).

99. See, e.g., John M. Golden, *Redundancy: When Law Repeats Itself*, 94 TEX. L. REV. 629, 653 (2016) (suggesting that canons against redundancy apply to all legal documents).

100. See Nelson, *supra* note 97, at 555-56 (suggesting a special class of rules might apply only to the Constitution). Nelson rightly notes that determining the full set of rules of interpretation that apply to the Constitution is complicated. See *id.* at 556. We take no position on the full set of those rules here, but simply suggest that they are to be understood as part of the Constitution's language or context under a broad or narrow conception of language.

Constitution.<sup>101</sup> Here, though, we focus on one important interpretive rule with significant implications for the argument that the Constitution is written in the language of the law: the rule for resolving ambiguities between technical and ordinary language.

An important rule within the language of the law is the technical/ordinary language rule, which determines whether language should be understood in its technical or ordinary sense.<sup>102</sup> Understanding this rule shows why the view that a document is written in the language of the law does not imply that the Constitution consistently employs technical language. While the language of the law includes all the technical legal language that lawyers employ, it does not require that only technical terms be used, because it also includes all ordinary language. Thus, when one encounters language that has both a technical and ordinary meaning, one cannot necessarily conclude it has one or the other meaning.

The technical/ordinary rule determines whether a term should be given its ordinary or technical meaning.<sup>103</sup> In general, the rule treats this issue as one of ambiguity. There are two possible meanings to the term—the technical and the ordinary language meaning—and therefore the term is ambiguous.<sup>104</sup> As with other ambiguities, the resolution of the matter turns on various interpretive rules, such as the purpose of the provision and the structure of the document.<sup>105</sup>

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101. See *infra* Parts III.E-F (providing examples of such rules).

102. Another important legal interpretive rule is what we call the 51/49 rule—a rule that tells the interpreter to choose the better attested meaning even if its probability of being the meaning is merely 51 percent as compared with a 49 percent alternative. The rule thus governs the resolution of close cases. It is our belief that the prevailing rule at the time of the Constitution was to interpret provisions in constitutions and statutes based on the rule that the stronger interpretation should be followed, even if that interpretation is only slightly stronger than the competing one. The 51/49 rule is, of course, not the only conceivable rule. An alternative rule might hold that an interpretation is only supported if the evidence is considerably stronger for it than for its competitors.

103. See 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 453 (3d ed. 1858).

104. As was clear from the time of the early Republic. See *id.* (“[T]he same word often possesses a technical, and a common sense.”); see also *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 176 (1796) (Chase, 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.”).

105. See *Hylton*, 3 U.S. (3 Dall.) at 175 (offering considerations to determine the meaning of an ambiguous phrase); STORY, *supra* note 103, § 453 (suggesting presumptions in favor of ordinary meaning with many examples in which context overcomes that presumption).

#### *4. Determining Which Rules Are Part of the Language of the Law*

One last theoretical issue involving the language of the law is how much agreement there needs to be about the language. This issue arises as to two matters. First, how much agreement about the language generally is required to recognize it as a distinct language? Second, how much agreement is required to recognize an interpretive rule as part of that language? We argue that while a high degree of agreement is needed to recognize a distinct language of the law, much less agreement is needed to recognize particular rules within the language.

The existence of a language of the law, as a language distinct from ordinary English, requires wide agreement as to the overall body of rules of this language.<sup>106</sup> As with other languages, one can identify a language among its speakers and users when both groups know and follow a distinctive set of rules.<sup>107</sup> If no group of people embraces such a distinctive set of rules, it is doubtful that such a language exists.

Consequently, to establish the language of the law as genuine, it is necessary to show that the language is widely understood and followed by its speakers.<sup>108</sup> The language of the law clearly satisfies this condition, because lawyers understand and follow this language.<sup>109</sup> While disagreements persist about particular aspects of the language, lawyers widely recognize the existence of this language generally and follow it.<sup>110</sup>

However, it is not necessary for all particular rules of the language of the law to be widely accepted. A language can exist even when individual rules are contested. In fact, disagreements about proper language rules are normal, whether they involve the proper meaning of terms or grammatical rules. Such disagreements about individual rules, so long as they are not too common, do not cast

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106. See DAVID BLOOR, WITTGENSTEIN, RULES AND INSTITUTIONS 16 (1997).

107. See *id.*

108. See WHITE, *supra* note 43, at 6-7.

109. See, e.g., *id.*; Schauer, *supra* note 39, at 502.

110. See WHITE, *supra* note 43, at 6-7.

doubt on the existence of the language. Nor do they necessarily deprive a contested rule of its status as part of the language.<sup>111</sup>

For example, consider the definition of a word or phrase that is disputed, such as the phrase “beg the question.” The traditional understanding meant “to use an argument that assumes as proved the very thing one is trying to prove,” whereas a new usage is to “raise the question.”<sup>112</sup> Let us assume (probably counterfactually) that English speakers are now relatively evenly divided about the traditional and new usages, with the traditionalists comprising a slightly larger group. Under a criterion that required rules and meanings to be widely followed, this phrase would not be part of the language—presumably it would have no meaning. But that is not how people would understand this phrase. Rather, people would probably assume that the more accepted meaning—the traditional one, in our example—was the one that was employed. But the interpreter would understand that some people use the phrase in the alternative way, and would follow that meaning if the circumstances of the utterance pointed to the alternative meaning.

This example suggests that the widely accepted criterion is not followed as to individual language rules. Instead, when language rules provoke disagreement, the majority rule is likely to be presumed, but the minority rule might be followed when circumstances so warrant.<sup>113</sup>

### *B. The Narrow Conception of the Language of the Law*

In the previous Section, we assumed that the language of the law includes word meanings, grammar, and interpretive rules. Thus, in

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111. For examples of disagreement about interpretive rules that are nevertheless applied, see *infra* notes 344-47 and accompanying text.

112. See Philip B. Corbett, *Begging the Question, Again*, N.Y. TIMES (Sept. 25, 2008, 8:53 PM), <https://afterdeadline.blogs.nytimes.com/2008/09/25/begging-the-question-again/> [<https://perma.cc/AJ4R-YSST>].

113. Even if the widely accepted criterion were applied to individual rules within ordinary language, that practice would not necessarily require that individual rules within the language of the law meet this same criterion. Suppose there were a meta interpretive rule within the language of the law providing that in case of disagreement about an interpretive rule, one should follow the rule that had stronger support—a 51/49 rule for interpretive rules. And suppose further that this 51/49 rule was widely followed. Then, the 51/49 rule would determine the existence and content of legal interpretive rules, although the widely accepted criterion is applied to determine individual interpretive rules within ordinary language.

using that language, one invokes the applicable legal interpretive rules. But under a narrower conception of language, the language of the law includes only semantics and syntax, not interpretive rules.

Nevertheless, accepting the narrow conception of the language of the law does not change how one would interpret that language. The philosophy of language has formalized the commonsense intuition that the context of an utterance can greatly affect its meaning. Legal interpretive rules, even if not part of the language of the law, are still part of the context of that language. Consequently, these legal interpretive rules should still be followed in determining the meaning of utterances made in that language.

### *1. Pragmatics, Context, and Meaning*

Even if the content of a language is narrowed to semantics and syntax, that restriction does not imply that the meaning of words uttered in the language is determined entirely by semantics and syntax. Philosophers of language understand the meaning of words to depend not only on semantics and syntax, but also on context. The branch of the philosophy of language called pragmatics explores how context contributes to meaning.<sup>114</sup>

Pragmatics focuses on usages of language in contexts that depart from the literal meaning of the language. In many contexts, a person asserts something that differs from the literal meaning of their words. For example, a doctor examining a gunshot wound may say to the patient, “You are not going to die.” While the literal meaning of the statement suggests that the patient will never die, we understand that in context the doctor was saying that the

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114. See Solum, *supra* note 41, at 1126. In this Article, we use the term “meaning” to refer to the proper interpretation of language in context, which is the focus of pragmatics. But philosophers writing within pragmatics often distinguish between the semantic meaning of the language and something else, which is the object of pragmatics. For example, Soames distinguishes between the semantic meaning of the language of a text and “everything asserted and conveyed in adopting” a text. See, e.g., 1 SCOTT SOAMES, *Interpreting Legal Texts: What Is, and Is Not, Special About the Law*, in *PHILOSOPHICAL ESSAYS: NATURAL LANGUAGE: WHAT IT MEANS AND HOW WE USE IT* 408-09 (2008). Since distinctions of this type are not well known in the academic legal literature, we have employed the more common usage of “meaning.” But the basic point remains the same. Under an originalist analysis of words in context, such as Soames’s, it is everything asserted and conveyed in adopting the Constitution that is the object of originalism.

patient would not die *from* the gunshot wound. Philosophers of language understand that context can influence the meaning of a statement in manifold ways.

The leading theory of how context can contribute to meaning is that of Paul Grice. Under Grice's view, the meaning of language often does not turn solely on the semantic and syntactic rules of the language.<sup>115</sup> At times, the literal or semantic meaning differs from the meaning of the words employed by the speaker in context. And that latter meaning is the one understood by both the speaker and the hearer. Sometimes the meaning implied by the context is referred to as an implicature.<sup>116</sup>

According to Grice, language often takes its meaning from the social settings in which words are uttered.<sup>117</sup> Grice focuses on conversational settings in which people usually act in a cooperative fashion.<sup>118</sup> This cooperative behavior yields a cooperative principle that can be summarized: make your conversational contribution helpful given the purpose and stage of the talk exchange in which you are engaged.<sup>119</sup> This cooperative principle yields four maxims that people use in communicating with others: the maxims of quantity, quality, relation, and manner.<sup>120</sup> For example, the maxim of quantity requires a speaker to “[m]ake [his] contribution as informative as is required (for the current purposes of the exchange).”<sup>121</sup>

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115. See PAUL GRICE, *STUDIES IN THE WAY OF WORDS* 22-40 (1st Harvard Univ. Press paperback ed. 1991). Geoffrey Miller was the first to explore the implications of Grice for legal interpretation. See Geoffrey P. Miller, *Pragmatics and the Maxims of Interpretation*, 1990 WIS. L. REV. 1179, 1182-84.

116. See Wayne Davis, *Implicature*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY §§ 1-2 (Edward N. Zalta ed., 2014), <https://plato.stanford.edu/entries/implicature> [<https://perma.cc/VA9W-S74E>]; see also GRICE, *supra* note 115, at 39-40.

117. See GRICE, *supra* note 115, at 24-26.

118. See *id.* at 26.

119. Grice's full description of the cooperative principle is, “Make your conversational contribution such as is required, at the stage at which it occurs, by the accepted purpose or direction of the talk exchange in which you are engaged.” *Id.*

120. See *id.*

121. *Id.*; Miller, *supra* note 115, at 1194. The maxim of quality provides, “Try to make your contribution one that is true.” GRICE, *supra* note 115, at 27; Miller, *supra* note 115, at 1202. The maxim of relation provides, “Be relevant.” GRICE, *supra* note 115, at 27; Miller, *supra* note 115, at 1218. The maxim of manner requires that one “[b]e perspicuous.” GRICE, *supra* note 115, at 27; Miller, *supra* note 115, at 1220.

Grice argued that speakers in conversational settings follow the cooperative principle and the four resulting maxims.<sup>122</sup> Listeners expect speakers to do so.<sup>123</sup> Based on the context and the maxims, listeners often interpret the speaker's words in ways that depart from the literal meaning.<sup>124</sup> For example, the patient knows that she will die someday and therefore does not interpret the doctor to mean that she will never die, a claim that would violate the maxim of quality's requirement that a speaker should not say what she believes to be false. Instead, the patient interprets the statement as relating to dying from the gunshot wound.

As this example shows, the literal meaning of the terms in the statement is not sufficient for understanding its meaning. Instead, the meaning must be understood by reference to the context—in particular, by reference to the maxims that govern cooperative conversation, by the possibility that speakers might flout those maxims, and by consideration of the possible meanings that the words might have.<sup>125</sup>

122. GRICE, *supra* note 115, at 26.

123. *See id.*

124. *See id.* at 31-32.

125. *See* Miller, *supra* note 115, at 1191-93. Significantly, some of the legal interpretive rules—in particular, many of the traditional canons of legal interpretation—appear to be consistent with or flow directly from the maxims of conversation. *See id.* at 1195-1202. For a discussion of how Grice's maxims might be applied to a question of constitutional interpretation, see John Mikhail, *The Constitution and the Philosophy of Language: Entailment, Implicature, and Implied Powers*, 101 VA. L. REV. 1063, 1069 (2015).

While the maxims of conversation and implicatures seem to support many of the canons of interpretation, we should note one complication of Miller's analysis. Miller relies on a situation in which two people are communicating with one another in an apparently equal and cooperative situation. *See* Miller, *supra* note 115, at 1201. Legal enactments, such as constitutions and statutes, differ from that situation in that they tend to involve directives or orders. *See* Andrei Marmor, *Can the Law Imply More than It Says? On Some Pragmatic Aspects of Strategic Speech*, in PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW 83, 83 (Andrei Marmor & Scott Soames eds., 2011).

It is not clear that precisely the same norms apply in this directive situation as in a cooperative situation. While the maxims may differ somewhat, it would be a mistake to overemphasize the differences. In a situation involving direction, the underlying maxims appear to be similar to those for conversation. The director wants the directed person to understand his communication, so that the directed will know what to do. The directed person wants to understand the direction to comply with it. Therefore, the communication has strong elements of cooperation. *See* Miller, *supra* note 115, at 1201. While the director could seek to deceive the directed (or vice versa), the same could occur in a cooperative conversation. In both situations, the deception would be likely to violate the relevant maxims. *See id.* at 1208. Moreover, in democratic politics the enactors are not simply issuing directives, but are

## 2. *The Context of Statements Made in the Language of the Law*

With this understanding of the importance of context to the content of a communication, we turn to statements made in the language of the law. We continue to assume here that a language includes only semantics and syntax, but not interpretive rules.

In this situation, the context of the statement made in the language of the law clearly includes legal interpretive rules. A speaker assumes that listeners will employ these interpretive rules. That assumption makes those interpretive rules part of the context. For example, when someone writes a criminal prohibition into a statute, it is understood that the rule of lenity applies and that, in close cases, the prohibition will be interpreted to favor the criminal defendant. Consequently, the interpretation of the provision may differ from what it would have been if the rule of lenity did not exist. Yet, the people who wrote the statute—as well as those reading it—would have understood that this interpretive rule would apply.

It is true that legal interpretive rules may sometimes lead to the conclusion that the meaning of the provision departs from its literal meaning. But that departure does not distinguish legal interpretive rules from other implicatures. Legal interpretive rules also lead

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communicating through their enactments to the voters who elect them.

Andrei Marmor argues that communication in the legislature (and in other legal contexts) differs significantly from ordinary conversation because the former involves strategic speech and norms. *See Marmor, supra*, at 83. Negotiations in the legislature involve strategic communications, in which the parties may not be fully cooperative or even honest. *See id.* But these strategic communications are not especially relevant to legal interpretation for two reasons. First, these strategic communications involve negotiations, not the directing of the public through authorized laws. *See id.* at 94. Directions, especially to the public, are subject to cooperative maxims. Only if the public treats these negotiations as informing the meaning of the legal directive will that strategic speech affect the meaning of the directive. However, this approach to legislative history has often been strongly criticized. *See Miller, supra* note 115, at 1179-80. Second, even if legislators are strategic with one another, judges are unlikely to credit these deceptions. Judges are obligated to view the parties from an impartial perspective. Thus, if a legislator engaged in deceptive speech, the judge would be unlikely to accept it as true.

Consider an ordinary language deception. John asks Bob, “Are you going to the party?” Bob’s response—“I have to work”—clearly implies that Bob is not going to the party. *See Davis, supra* note 116, § 1. If Bob goes to the party, he might try to justify his statement by claiming that he never said that he was not going to the party. But an impartial observer would conclude that Bob had clearly implied he was not going. If a similar exchange occurred between legislators about the meaning of a bill, a judge reviewing the exchange would be likely to treat Bob’s statement as asserting that he was not going to the party.

words written in the language of the law to be given different meanings than they would if written in ordinary language. But, again, that difference is not a problem. In the legal situation, the context differs from the ordinary language situation.

There are two ways to understand these legal interpretive rules as part of the context that contributes to the meaning of statements made in the language of the law. One way is to understand them as deriving from Grice's conversational maxim of quantity, which requires the speaker to make his contribution as informative as required for the current purposes of the exchange.<sup>126</sup> Under this view, people who use the language of the law—both the authors and the audience—know that the legal interpretive rules apply to statements made in that language.<sup>127</sup> Consequently, if the authors say nothing to indicate that those legal interpretive rules do not apply, the audience properly interprets this language in accord with those rules.<sup>128</sup> If the authors intended to depart from the rules, then it is reasonable to assume that they would have indicated that.<sup>129</sup>

The second way to understand legal interpretive rules is simply as a part of the context of the statement. Under this view, one need not link legal interpretive rules to a specific maxim of conversation within Grice's theory. There are, after all, various theories that discuss conversational and other implicatures.<sup>130</sup> The basic point is that when people use the language of the law, legal interpretive rules are part of the context of that language. Thus, any theory that takes context into account should apply the legal interpretive rules to utterances made in the language of the law.

One question about treating the legal interpretive rules as context is the scope of those rules. Does the context include only the legal interpretive rules known to all speakers of the language of the

126. See GRICE, *supra* note 115, at 26.

127. See John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 113 (2001).

128. If the authors had said something to depart from the applicable legal interpretive rules—if, for example, they had noted that this criminal prohibition should not be interpreted using the rule of lenity—this would be an example of cancelling the implicature. According to Grice, one of the key features of an implicature is that it can be cancelled. See GRICE, *supra* note 115, at 39.

129. See, e.g., *Young v. United States*, 535 U.S. 43, 49-50 (2002) (noting that Congress must be understood to legislate against certain background principles).

130. See Davis, *supra* note 116, § 2.

law? Or does it include all the actual legal interpretive rules—that is, all the rules that can be confirmed by consulting written and other expert sources—even if not everyone knows them?

In our view, the legal context includes all the actual legal interpretive rules. First, when lawyers write formal documents in the language of the law, they expect all the actual legal interpretive rules to apply to the document.<sup>131</sup> It is true that a lawyer may realize that she does not know all the rules. But the lawyer endeavors to learn additional rules to follow them in the document. Moreover, if another lawyer mentions a rule about which the author was ignorant, the author is likely to learn the rule and follow it in the document.<sup>132</sup> Thus, lawyers treat the actual legal interpretive rules as context when writing in the language of the law.

Second, this practice of lawyers considering the actual legal interpretive rules, rather than the interpretive rules known by parties to a communication, reflects the design of legal language to reduce uncertainty in communications between multiple authors and readers. Because there are multiple authors and readers of legal language, it is extremely difficult to determine which legal interpretive rules would have been known by these different people. Moreover, the difficulty of determining what rules were known and determining how many people were required to know the rules strongly argues for following the actual rules of the language of the law. The need to avoid uncertainty seems especially important as to legal language, which is often used to render rights and obligations more certain.<sup>133</sup>

Third, one might think it odd for context to include rules that might require the audience to look them up in books. After all, conversational implicatures are often informal and just known by the speakers. But the difference in context here makes all the difference. An informal conversation differs substantially from a formal legal writing. Formal legal writings are typically written and read under a practice that allows both the author and audience to

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131. See Manning, *supra* note 127, at 113 (noting relevant rules are those applied by “any ‘reasonably diligent lawyer’”).

132. Cf. Ethan Katsh, *Law in a Digital World: Computer Networks and Cyberspace*, 38 VILL. L. REV. 403, 418 (1993).

133. See, e.g., *supra* notes 60-62 and accompanying text (discussing the use of legal language to render meaning more precise).

take time with the document—allowing them to ponder the writing, to look up unfamiliar matters, and to consult experts. By contrast, informal conversation normally assumes that the parties have all relevant information at the ready and in part for that reason people may forego using vocabulary in informal conversation that they suspect the other party does not understand.

To conclude, then, the context of utterances made in the language of the law shows that they should be understood in accord with the actual legal interpretive rules. As a result, statements made in the language of the law are properly interpreted in the same way whether one adopts the broad view of language—in which the legal interpretive rules are part of the language—or the narrow view—in which the legal interpretive rules are part of the context. Thus, in the remainder of this Article, we largely ignore the issue of whether the legal interpretive rules are part of the language or context, and simply speak of a statement being made in the language of the law to cover both possibilities.

### *C. The Law of Interpretation's Critique of the Language of the Law*

Recently, William Baude and Stephen Sachs criticized the view of the language of the law offered here.<sup>134</sup> They argued that many legal interpretive rules are not part of the language of the law, and thus not part of the meaning of legal documents.<sup>135</sup> Instead, they claimed that these legal interpretive rules are part of what Baude and Sachs called the “law of interpretation.”<sup>136</sup> The law of interpretation exists outside the language of the law; it is part of the law.<sup>137</sup> In particular, it is part of the general common law—that is, judge-made or judge-found law of no particular jurisdiction.<sup>138</sup>

Baude and Sachs concede that legal texts may be written in a “specialized vocabulary and *linguistic conventions* that legally trained people use to talk to one another.”<sup>139</sup> But this concession to

134. See William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1135-36 (2017).

135. See *id.* at 1093.

136. See *id.* at 1095-96.

137. See *id.* at 1093, 1095.

138. See *id.* at 1137.

139. See *id.* at 1086-87 (emphasis added) (citing Schauer, *supra* note 39).

the language-of-the-law view appears to exclude some legal interpretive rules and thus does not fully capture that view as we have described it. Baude and Sachs based their reason for excluding certain legal interpretive rules from the language of the law on their claim that only linguistic rules reflect the regularities of language.<sup>140</sup> In contrast, they believe that other legal interpretive rules reflect normative considerations that the law brings to textual interpretation.

We dispute that their reasons distinguish these nonlinguistic interpretive rules from other aspects of the language of the law—aspects, like specialized technical terms, that they themselves recognize. First, even nonlinguistic legal interpretive rules reflect regularities of language—the way lawyers use language. Within the community of lawyers, the rule of lenity fixes the meaning of a phrase in a legal enactment no less than linguistic rules.<sup>141</sup> Lawyers draft and interpret criminal provisions against the background of this rule no less than they do against the background of linguistic rules.

It is possible that not all lawyers grasp all the legal interpretive rules as fully as people grasp linguistic rules. But as we have discussed above,<sup>142</sup> that difference is not surprising. Law is a deliberative, written language that people draft and read with the expectation that they may need to look up unfamiliar rules. Moreover, the same need for resort to reference is true of specialized technical terms: many, if not most, lawyers at the time of the framing would have lacked a full understanding of a specialized term like *ex post facto* law.<sup>143</sup> Thus, what makes for regularities of language may differ in the language of the law from ordinary languages.

Second, the normative origins of certain legal interpretive rules do not place them outside the language of the law. The rule of lenity no doubt reflected normative considerations as it evolved.<sup>144</sup> But its applicability to the Constitution depends on whether it was positively accepted as a rule of interpretation at the time of the

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140. See *id.* at 1088.

141. See *supra* notes 57-59 and accompanying text.

142. See *supra* notes 50-66 and accompanying text.

143. See *infra* notes 360-62 and accompanying text (discussing the uncertainty of the Philadelphia Convention about the precise meaning of *ex post facto* law).

144. See HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 93, 95 (1968).

Constitution's enactment.<sup>145</sup> The parallel between legal interpretive rules and specialized legal meanings of words is striking in this respect. The technical meaning of terms in the Constitution, like "Bill of Attainder," also evolved because of normative concerns.<sup>146</sup> Yet, in the Constitution it has a fixed meaning as a technical legal term based on the understanding current at the time of its enactment.<sup>147</sup>

The recognition that legal language reflects normative considerations and sometimes requires a reader to look up unknown terms responds to Baude and Sachs's specific claim that, to be part of the legal language, the antisurplusage canon must reflect only linguistic regularities, rather than attempt to make drafters do their work better. They argue:

It's no answer to say, as some defenders of the surplusage canon do, that "[s]tatutes *should* be carefully drafted, and encouraging courts to ignore sloppily inserted words results in legislative free-riding"—or that legislators "ought to hire eagle-eyed editors" to conform draft bills to the canon. The linguistic canons were made for man, not man for the linguistic canons.<sup>148</sup>

But this is not true. There is no reason that language conventions cannot have a prescriptive element. The language of the law allows men and women to communicate, and rules that promote clear communication are a common aspect of language. If these language rules are violated enough, they may cease to be conventions. But until that time, these rules can function in a prescriptive manner to promote social purposes.

## II. THE CONSTITUTION AND THE LANGUAGE OF THE LAW

With this understanding of the language of the law, we now show that the Constitution is written in this language. We start by

145. See Nelson, *supra* note 97, at 523-24.

146. U.S. CONST. art. 1, § 9, cl. 3; see also Williams, *supra* note 88, at 452-56.

147. For more general criticisms of Baude and Sachs' view of the law of interpretation, see John O. McGinnis & Michael B. Rappaport, *The Perplexities of a Law of Interpretation* (unpublished manuscript) (on file with authors).

148. Baude & Sachs, *supra* note 134, at 1126-27 (alteration in original) (footnote omitted) (quoting SCALIA & GARNER, *supra* note 83, at 179).

explaining how one determines the language in which a document is written. In the course of that explanation, we discuss some of the reasons why we conclude that the Constitution is written in the language of the law. We then address two challenges to our argument—that determining the language of the document is not the way to determine its original meaning, and that interpreting the Constitution in the language of the law has serious normative deficiencies. We then conclude by discussing the alternative to the claim that the Constitution is written in the language of the law—the view that the Constitution is written in ordinary language. We show that the ordinary-language view suffers from serious problems that prevent it from accounting for the Constitution’s language.

#### *A. Determining that the Constitution Is Written in the Language of the Law*

It is our thesis that the Constitution is written in the language of the law. Here we address the question of how one makes that determination, and offer some of the reasons why we conclude that the Constitution is written in that language.

##### *1. Examining the Language of the Document*

The main way to determine the language in which a document is written is to examine that language. To see if a document is written in English or French, or in Middle English or Modern English, or in ordinary English or technical legal English, one would first read the document and see what words it used, what syntax it exhibited, and what interpretive rules it employed.<sup>149</sup> Significantly, making that determination requires knowledge of the relevant languages in which the document might have been written. Without knowing Middle English, it would be difficult to choose between Modern

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149. We make the comparison between English and French to make obvious the relevance of consulting the text to determine the language in which a document is written. We recognize that the difference between ordinary language and legal language is a subtler one, and thus use other comparisons, like that between British and American English, to bring out that subtlety where required. The relation between a technical language and its ordinary parent language is unique and cannot be fully captured by a comparison of either different languages or of different dialects of the same language. But these comparisons still illuminate the question of how to determine whether a document is written in a technical language.

English and Middle English. Without knowing technical legal English, it would be difficult to choose between ordinary English and the language of the law.

In many cases, the identity of the relevant language is obvious. To someone who knows French and English, which of these two languages a document is written in is clear. But when the languages are more similar, the question is harder. Determining which of two dialects is being employed—say, British English or American English—may be even more difficult. Similarly, determining whether a document is written in ordinary language or a technical language requires knowledge of both languages.<sup>150</sup> In arguing that the Constitution is written in the language of the law, we spend considerable time examining the language of the Constitution. We show that in various ways its language should be understood as using legal terms and legal interpretive rules. The language contains numerous technical terms. Similarly, we show that the Constitution employed distinctive legal forms, such as preambles, that are interpreted with legal interpretive rules. We also show that the Constitution assumes the application of legal interpretive rules. These legal terms and interpretive rules make it difficult for the Constitution to be viewed as written in ordinary language.

## *2. The Language in Which the Same Type of Documents Are Written*

The words and interpretive rules employed are, of course, the strongest evidence for identifying the language of a document. But in cases in which the possible languages are similar to one another (as with British and American English or technical and ordinary language), other types of evidence can prove important. One significant piece of evidence involves the language in which documents of the same type are typically written. If medical records, such as postoperative reports, are normally written in the language of medicine, then that practice provides some evidence that a

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150. If one does not know the language of the law, one could still determine that the Constitution was not written in ordinary English, even though one could not be sure that it was written in the language of the law. Combined with other cues from the document, such as the fact that it is a legal document, someone who did not know the language of the law could still make a reasonably good guess that it was written in the language of the law.

particular medical record is also written in that language. Similarly, if constitutions and similar documents at the time were written in the language of the law, that practice would provide additional evidence that the U.S. Constitution was written in the language of the law. In the next Part, we present evidence that prior state constitutions were written in the language of the law.

### *3. The Purposes of the Document*

Another kind of evidence concerns the purposes of the document. An author may choose a specific language because that language advances his purposes. For example, a doctor may choose to communicate medical information about a patient's condition with another doctor in the technical language of medicine because that language allows more precision. Those same considerations apply to writing the Constitution in the language of the law.

In the case of the Constitution, the document has several different purposes. One purpose—perhaps its principal purpose—is to state the fundamental law so that government officials can implement it.<sup>151</sup> Writing the document in the language of the law furthers this purpose. The precision of the language of the law enables government officials to more accurately implement the Constitution's provisions, because they either know the language of the law or have access to people who know it.

Another purpose is to communicate the fundamental law, so that a decision can be made whether to adopt it or change it.<sup>152</sup> Under the Constitution, the decision to adopt the Constitution or to amend it is made principally by officials or elites. For example, amendments are passed either by legislatures or by conventions composed of representatives.<sup>153</sup> Once again, this purpose would be furthered by writing the Constitution and the amendments in the language of the law because that language communicates such matters more precisely.

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151. As is clear from, among other things, the obligations to follow the Constitution imposed on officials. *See* U.S. CONST. art. VI, cl. 2.

152. *See* Adam Shinar, *Dissenting from Within: Why and How Public Officials Resist the Law*, 40 FLA. ST. U. L. REV. 601, 619 n.84 (2013) (acknowledging this purpose).

153. U.S. CONST. art. V.

It is true that ordinary citizens as voters also participate in adoption or amendment. They elect the representatives who make these decisions. If those citizens do not know the language of the law, then using the language would hinder their participation. But several reasons suggest that this disadvantage is considerably smaller in terms of the purposes of the Constitution's enactors than the advantages generated by the language of the law.

Representative government assumes that the representatives possess more knowledge about issues than the voters do.<sup>154</sup> The voters generally make the broad value choices, while the representatives work out the details and implementation of those values.<sup>155</sup> The language of the law conforms to this division of labor. Under this arrangement, voters who understand only ordinary language can understand the broad values and basic outline of the matters contained in constitutional language. They can then cast their votes for representatives who will make informed decisions on the details of the law that further the voters' values.

Public debate also informs the voters. If a voter was interested enough in an ordinary language provision to read about it, which would often be necessary to make an informed decision, that same voter could read explanations by lawyers about a provision in the language of the law, and then make an informed decision about it. During the debates over the ratification of the Constitution, a significant portion of the essays pro and con involved discussion about what the terms in constitutional provisions, including the legal terms, actually meant.<sup>156</sup>

Given the representative nature of the Constitution, it is not clear to what extent, if any, the fact that ordinary voters do not know the language of the law counts as a factor suggesting that the Constitution is not written in that language. But even if it so regarded, this factor seems far outweighed by other factors pointing in the opposite direction—such as that a document in the language of the law

154. See Adrian Vermeule, *Congress and the Costs of Information: A Response to Jane Schacter*, 89 B.U. L. REV. 677, 681, 684 (2009).

155. See George A. Nation III, *We the People: The Consent of the Governed in the Twenty-First Century: The People's Unalienable Right to Make Law*, 4 DREXEL L. REV. 319, 368-69 (2012).

156. See Akhil Reed Amar, Comment, *Our Forgotten Constitution: A Bicentennial Commitment*, 97 YALE L.J. 281, 289 (1987).

improves both the process of implementing and amending the fundamental law.

#### *4. The Authors and Addressees of the Document*

Another piece of evidence—somewhat related to the purpose of the document—concerns the authors of and the audience for the Constitution. If the authors or the audience did not know the language of the law, then that might suggest that the document was not written in that language.

While similar, these two bits of evidence have different weight. If the authors did not know the language, then such ignorance offers strong evidence that the document was not written in that language. By contrast, if people to whom the document was addressed did not understand the language, such ignorance would offer weaker evidence to conclude it was not written in that language. A writer who did understand both languages might yet choose to use the one not fully understood by its recipient if she had reason to write in that language—such as knowing that language better or believing it was a better language for expressing her point—and she believed that someone would be available to translate the letter to the recipient.<sup>157</sup> Such an action would be even more likely if the languages in question were quite similar, such as British and American English or ordinary language and the language of the law. In that case, the recipient could understand much of the language without assistance.

These considerations also support the language-of-the-law view. The authors of the Constitution were the Philadelphia Convention, a super elite who were dominated by those who were learned in the law.<sup>158</sup> That Convention then appointed a Committee of Detail to mold its resolutions into a coherent document.<sup>159</sup> Four of the five members of this committee were lawyers: James Wilson, Oliver

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157. For example, a doctor who knew the technical language of medicine might use that language in a letter about an ailment to his friend who did not have medical training because the doctor believed that the technical term more precisely described his meaning and he expected his friend to consult with doctors about the matter.

158. Thirty-three of the fifty-five delegates were lawyers. *See CHARLES A. BEARD & MARY R. BEARD, THE RISE OF AMERICAN CIVILIZATION 101* (new ed. 1937).

159. *See William Ewald, The Committee of Detail, 28 CONST. COMMENT. 197, 202-03 (2012).*

Ellsworth, John Rutledge, and Edmund Randolph.<sup>160</sup> And not just any lawyers, but the most distinguished lawyers of a body that was already largely made up of lawyers.<sup>161</sup> The first three were appointed to the Supreme Court, the latter two as Chief Justice.<sup>162</sup> The fourth became the first Attorney General of the United States.<sup>163</sup> It was the work of the Committee of Detail that formed the basis of the Constitution's language, which the Philadelphia Convention approved and the state conventions later ratified.<sup>164</sup> Thus, the authors of the Constitution recognized it was written in the language of the law.

The intended audience for the Constitution is more diverse, falling into three groups. The first group is the officials, such as judges and other officers, who implement and conform government actions to the Constitution.<sup>165</sup> The second group is the officials who decide whether to enact the Constitution or to amend it.<sup>166</sup> The third group is the voting public, who elect the representatives who will then determine—either in conventions or legislatures—whether to ratify or amend the Constitution.<sup>167</sup>

As with the analysis of the purposes of the Constitution, the great majority of the people involved here know (or have easy access to those who know) the language of the law. And the one group that does not know the language—the voters—can still generally understand the language, which is sufficient for their limited role of selecting representatives.

##### *5. Inferences from a Document Written in the Name of the People*

One possible argument against the proposition that the Constitution is written in the language of the law is that the document claims to speak in the name of “We the People,” not “We the

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160. See *id.*

161. See *id.* at 203.

162. See *id.*

163. See *id.*

164. See *id.* at 201-03.

165. See U.S. CONST. art. VI, cl. 2.

166. See *id.* art. V.

167. See *id.*

Lawyers.”<sup>168</sup> Thus, the argument would run, a document written in the name of the people must reflect a popular understanding. This inference about the nature of the Constitution’s language is thought to be confirmed by ratification of the document by special conventions elected by popular vote.<sup>169</sup>

But this objection is mistaken. It was a common occurrence when the Constitution was written, as it is today, for a client to have their lawyer draft documents in legal language that speak in the client’s name.<sup>170</sup> That the document is drafted in the client’s name does not transform the document’s language from the language of the law into ordinary language.

Moreover, the participation of the people in drafting and ratifying the Constitution was similar to, but even less than, the participation of a client when a lawyer drafts a document for him. A lawyer normally writes a document for an individual pursuant to the individual’s instructions. While the Constitution was written pursuant to instructions from the Continental Congress and the state legislatures,<sup>171</sup> the drafters appeared to depart from those instructions in significant ways.<sup>172</sup> An individual learns about the contents of the document he is to sign from his lawyer. Similarly, the public could discern the Constitution’s meaning from the ratification debates about its meaning by people with legal knowledge.<sup>173</sup> Finally, while an individual makes the decision whether to assent to the document written on his behalf, the people did not directly assent. That was the responsibility of their elected representatives.

### *B. Is the Language of the Document the Correct Standard?*

Larry Solum contests our analysis of how the language of a legal document should be identified. In a recent article, Solum argued that the Constitution should not be interpreted in accordance with

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168. See *id.* pml.

169. See RICHARD BEEMAN, PLAIN, HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION 293, 340 (2009).

170. See Douglas Litowitz, *Legal Writing: Its Nature, Limits, and Dangers*, 49 MERCER L. REV. 709, 711 (1998).

171. See BEEMAN, *supra* note 169, at 20.

172. See Christopher Terranova, Note, *The Constitutional Life of Legislative Instructions in America*, 84 N.Y.U. L. REV. 1331, 1340-41, 1340 n.61 (2009).

173. See, e.g., *infra* notes 362-69 and accompanying text.

the language of the law, because many of the people to whom it was addressed—the citizens of the United States—would not have known that language (and some of the people who wrote the Constitution at the Philadelphia Convention were not lawyers).<sup>174</sup>

Solum's analysis appears to be based on his idea that a constitution written in the language of the law would violate the conditions for successful communication.<sup>175</sup> While oral, face-to-face communications reasonably rely on a rich information context of facial expression, hand motions, and immediate clarifications, other documents, like the Constitution, are drafted in private and then issued to the public only in written form.<sup>176</sup> In this situation, Solum argues that one must normally rely on the conventional semantic meaning of the document, plus some other publicly available information.<sup>177</sup> Since such information is publicly available, Solum's approach meets the conditions for successful communication. In contrast, Solum believes that a constitution written in the language of the law would not meet the conditions for successful communication, because most of the public at large to whom it is addressed would not have knowledge of the language of the law or the legal context.<sup>178</sup>

We disagree with Solum's analysis. The knowledge of the person to whom the writing is addressed is not the sole or the most important consideration in determining whether to treat the language as having a legal meaning. Rather, the key issue is the language in which the document is written. For example, if a letter is written in French, then its terms should be understood in accord with their French meanings, regardless of whether the addressee knows French or not. The addressee may not understand the letter, but may be able to have the letter translated into English. But even if translation were not possible, the meaning of the letter would not

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174. See Lawrence B. Solum, *Communicative Content and Legal Content*, 89 NOTRE DAME L. REV. 479, 497, 506 (2013).

175. See *id.* at 492, 497, 506.

176. See *id.* at 493-96.

177. See *id.* at 498-99.

178. See *id.* at 492, 497, 506. Solum also argues that some of the authors of the Constitution at the Philadelphia Convention did not have this legal knowledge. See *id.* at 506. Of course, if a document is jointly authored, it is not necessary for all the authors to have full knowledge of all its provisions. The lawyers at the Convention could explain the legal intricacies to the nonlawyers.

change, which would be the meaning of the language in French. Similarly, if the document is written in the language of the law, it should be understood in that language even if some readers do not understand it.

An author's audience is simply one factor—and not the most important—in the analysis of what language the writing is in and what meaning it should be given. The most important consideration in determining that language and meaning are the words of the document. If the language is not clear, then other considerations would be relevant, including the type of document in which the language appears,<sup>179</sup> the purposes of the communication,<sup>180</sup> and the persons to whom it is addressed.<sup>181</sup> We have argued above that these factors favor understanding the Constitution in the language of the law.

### *C. A Brief Normative Digression*

It might be argued that ordinary citizens will be deceived or confused as to the meaning of the Constitution as written in the language of the law. They might believe it is written in ordinary language. If it is then given its legal meaning, people may support (or reject) the constitutional provisions based on a mistaken understanding.

This argument is not directly relevant to our thesis, which makes an interpretive rather than normative argument for reading the Constitution in the language of the law. Even if people would be deceived by the Constitution, that circumstance would not change the meaning of the Constitution. It would simply imply that the communication had not been successful for some of the people in the communication. Of course, communications are often not successful, because people become confused or misunderstand what is being said due to mistakes, carelessness, or other causes.

Yet, normative considerations sometimes influence people's receptivity to interpretive arguments. As a result, we briefly rebut the claim that the people would be confused or deceived by a Constitu-

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179. See *supra* Part II.A.2.

180. See *supra* Part II.A.3.

181. See *supra* Part II.A.4.

tion written in the language of the law. First, as we describe below, the language of the Constitution makes clear that it is written in the language of the law. The Constitution contains many technical terms that ordinary speakers would recognize as legal. In addition, it contains legal forms, such as preambles, and legal interpretive rules, like the Ninth Amendment,<sup>182</sup> that are not normally used in legal documents. In fact, the Constitution itself explicitly states it is law.<sup>183</sup> Overall, then, a person reading the Constitution would recognize that it is not an ordinary language document.

Solum concedes that an ordinary reader would know that individual terms that were patently technical would have legal meanings.<sup>184</sup> But Solum appears to argue that such a reader would not know that other terms, which are latently technical, could be given legal meanings.<sup>185</sup> We doubt this argument, because an ordinary reader, when confronted with a document that contains many patently technical terms as well as other legal forms, would have good reason to believe that the entire document might require legal knowledge to understand it. Thus, he would not be reasonably deceived or confused as to its meaning.

Second, people who were ignorant of the Constitution's legal language would still be able to acquire information about the Constitution from the public debates about the document. Lawyers both supported and opposed the ratifying of the Constitution.<sup>186</sup> Thus, if supporters of the Constitution attempted to deceive or mislead those who lacked legal knowledge, many knowledgeable opponents could inform the voters of this fact.

Moreover, a document written in the language of the law can be understood in general terms by someone who knows only ordinary English. It will most often be the details of the provisions that will

182. U.S. CONST. amend. IX.

183. *See id.* art. VI, cl. 2.

184. This position seems to follow from his narrow understanding of the semantic meaning of technical terms—that they are those that a layman would understand are defined by experts. *See* Lawrence B. Solum, *Semantic Originalism* 54–55 (Ill. Public Law Research Paper Series, Working Paper No. 07-24, 2008), <https://ssrn.com/abstract=1120244> [<https://perma.cc/P5GG-XH9V>].

185. *See id.*

186. Representative examples of legal opponents include Alexander Hamilton and Brutus. *See generally* Shlomo Slonim, *Federalist No. 78 and Brutus' Neglected Thesis on Judicial Supremacy*, 23 CONST. COMMENT. 7 (2006) (discussing Brutus's concerns about judicial supremacy and Hamilton's response).

differ, with the language of the law providing a specific meaning to a concept that is more indeterminate in ordinary language.<sup>187</sup>

Thus, use of the language of the law does not significantly mislead the public. By contrast, the advantages of that language can be quite significant. Especially from an originalist perspective, the language of the law promotes a more accurate and constraining Constitution. It promotes accuracy about the meaning of what was enacted, better fixes limits on government, and leaves fewer gaps into which officials can place their own values.

#### *D. An Exploration of the Ordinary-Language View*

Determining whether the Constitution is written in the language of the law also requires consideration of the alternative claim—that the Constitution is written in ordinary language. Ultimately, one must choose between these claims to determine in what language the Constitution was written. Here we explore a couple of versions of the ordinary-language view, showing that they suffer from serious difficulties in accounting for the Constitution’s language.

In its most basic form, the ordinary-language view holds that the Constitution is written in ordinary language. Since technical terms and legal interpretive rules are not part of ordinary language or its context, these terms and rules would appear to be excluded from the Constitution.

The problem with this view is that, as we show below, the Constitution clearly contains technical terms and assumes legal interpretive rules.<sup>188</sup> Consider, for example, the term “Bill of Attainder,”<sup>189</sup> which is not part of ordinary language, but only part of the language of the law. The ordinary-language view lacks resources for interpreting that term.

A defender of the ordinary-language view might respond that the existence of a few technical terms is not a serious problem.<sup>190</sup> Imagine that a letter was written in English, but contained one or two French terms. One would simply interpret the letter in English,

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187. See, e.g., *supra* notes 12-16 and accompanying text.

188. See *infra* Parts III.B, III.D.

189. U.S. CONST. art. I, § 9, cl. 3.

190. See Caton, *supra* note 40, at vii-viii.

and treat the French terms as a minor exception that is otherwise ignored.

Though this solution may work for the letter, it cannot work for the Constitution. As we show below, the Constitution encompasses many technical terms.<sup>191</sup> In addition, the Constitution also assumes and refers to distinctively legal interpretive rules.<sup>192</sup> One cannot cordon off these terms and rules as if they were an isolated exception. Instead, they put the reader on notice that *the whole document*, and not merely isolated technical terms, requires that she consult someone with legal knowledge.

Solum has offered another possible solution to addressing technical terms within an ordinary-language view even if there are quite a few technical terms within a document.<sup>193</sup> Solum argued that when an ordinary reader confronts a patently technical term, such as “Letter of Marque and Reprisal,” the reader will reason that this does not seem like a part of ordinary language.<sup>194</sup> Rather, it appears to be a technical term that requires the expertise of a lawyer to understand it.<sup>195</sup> In this way, the ordinary reader using ordinary language can be thought to process, if not understand, patently technical terms as terms that require legal knowledge.<sup>196</sup>

But Solum’s analysis applies only to patently technical terms—terms that on their face indicate that they are technical. By contrast, for the many latently technical terms in the Constitution—terms that have both an ordinary and technical meaning, such as the term property—his response is wholly ineffective. Since the ordinary reader will be aware of only the ordinary meaning, Solum’s analysis thus does not interpret latently technical terms to have a technical meaning, even if the available evidence suggests that they have such a meaning.<sup>197</sup>

191. See *infra* Part III.B.

192. See *infra* Part III.D.

193. See Solum, *supra* note 184, at 54.

194. See *id.*

195. See *id.* at 54-55.

196. Solum says this maneuver involves the linguistic division of labor, which he borrows from Hilary Putnam’s work in philosophy. See *id.* at 55 (citing 2 HILARY PUTNAM, *The Meaning of ‘Meaning,’ in PHILOSOPHICAL PAPERS: MIND, LANGUAGE AND REALITY* 215, 215 (1975)). The idea is that the meaning of some terms requires the understanding of experts. See *id.*

197. On this problem generally, see Mattila, *supra* note 64, at 31. For a discussion of such terms in the Constitution, see *infra* notes 243-54 and accompanying text.

We are also skeptical of Solum's response as applied to patently technical terms. First, an indication on the face of the language that a term can only be understood by someone with special knowledge does not make that term part of the ordinary language or understandable to the ordinary reader. To the contrary, it suggests that the term is not part of the ordinary language and not understandable to the ordinary reader.

Solum appears to argue that people will consult experts when they encounter a term that appears to require such expertise.<sup>198</sup> But even if that practice were followed, it would not imply that the term was part of ordinary language or understandable to lay people. Thus, this argument proves too much. That lay people may consult experts to understand technical terms does not suggest that the technical terms are part of a language that has been effectively communicated to them.<sup>199</sup>

### III. THE LINGUISTIC AND HISTORICAL EVIDENCE THAT THE CONSTITUTION IS WRITTEN IN THE LANGUAGE OF THE LAW

In the previous Parts, we argued that there is a language of the law and indicated how one would know that the Constitution is written in that language. Here we present some of the empirical evidence that supports that conclusion—evidence concerning the legal vocabulary of the Constitution, evidence showing that the Constitution's language contains clear indications legal interpretive rules should be employed in interpreting it, and evidence indicating that early interpreters of both the Constitution and the state constitutions that preceded it regularly applied legal interpretive rules to the documents.

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198. See Solum, *supra* note 184, at 55.

199. Nor is it clear that Putnam's linguistic division of labor argument helps Solum's case. Putnam argued that people often rely on a linguistic division of labor in the sense that the meaning of many terms requires an expert's knowledge that ordinary people lack. See 2 HILARY PUTNAM, *The Meaning of 'Meaning,'* in PHILOSOPHICAL PAPERS: MIND, LANGUAGE AND REALITY 215, 227-28 (1975). But the situation Solum describes differs from that used by Putnam. Putnam's article is not principally about patently technical terms. Instead, it is about terms like water or elm tree, which are not thought of as being technical. See *id.* at 223, 226. Putnam's point is that one might require expert knowledge to fully understand or apply these terms. See *id.* at 227-28. But this need for expertise does not suggest that all patently technical terms are communicated to ordinary readers.

This Part discusses a diverse group of legal interpretive rules. As described below,<sup>200</sup> these rules include the rule that implied repeals are disfavored, the rule of lenity, the rule governing the interpretation of preambles, the absurdity rule, the rule that terms with a historical legal meaning may be interpreted in accord with that meaning, the antisurplusage rule, the *expressio unius* rule, the rule that the specification of particulars is the exclusion of generals, the negative pregnant rule, the rule that unclear provisions should be interpreted in accord with their purpose, the rule of intratextualism, the rule that an interpreter should consider both the letter and the spirit of a provision, the rule that the interpretation of a document should accord with the nature of the document, the rule that provisions should be interpreted in accord with legal maxims—such as no man should benefit from his own wrong—and various other rules. Some of these rules are legal interpretive rules, such as *expressio unius*,<sup>201</sup> but they might also be applied to some formal documents that are not legal. But many others, like the rule of lenity, would clearly not be applied to a nonlegal document.<sup>202</sup>

Taken together the evidence presented in this Part makes an overwhelming case that the U.S. Constitution is written in the language of the law.

#### A. *The Self-Declaration*

The text of the Constitution provides the most obvious argument for its legal nature. In the Supremacy Clause, the Constitution defines itself as the “supreme Law of the Land.”<sup>203</sup> The status of the Constitution as law was not simply left to implication by the enactors, but was explicitly set forth within the Constitution itself. Thus, the text of the Constitution creates a strong presumption that the enactors understood it as a document written in legal language, to be interpreted using the rules applied to contemporary legal documents of its kind. It is possible that the presumption could be defeated if the document otherwise suggested that it was intended to have legal effects but was not written in legal language. But other

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200. See *infra* Parts III.E-F.

201. See Scott, *supra* note 91, at 351.

202. See *id.* at 389 n.267.

203. U.S. CONST. art. VI.

evidence negates this possibility and instead confirms the presumption.

### B. The Language of the Constitution

The Constitution is full of legal terms. As we have argued, it is extremely difficult to account for legal terms under the ordinary-language view of the Constitution. Thus, the presence of numerous legal terms strongly supports the language-of-the-law view. Indeed, it turns out that the Constitution contains many more legal terms than most people may have imagined. In this Section, we categorize and count the legal and potentially legal terms in the Constitution. Others may, of course, disagree with some of our particular categorizations. Our purpose here is not to create a definitive list of terms in these categories, but to show that, on any fair estimate, these terms are far too numerous to fit with an ordinary-language view of the Constitution.

Analyzing the number of legal terms in the Constitution requires distinguishing between several groups of terms. The first group consists of unambiguously legal terms. These terms have a legal meaning but no ordinary meaning, and in most cases that legal meaning would be unknown to most nonlawyers. For example, the term “Letters of Marque and Reprisal”<sup>204</sup> has a legal meaning but does not have an ordinary language meaning.<sup>205</sup> Similarly, the term “Bill of Attainder”<sup>206</sup> has a legal meaning, but no ordinary meaning.<sup>207</sup> Other terms in this category include “Writs of Election,”<sup>208</sup> “President *pro tempore*,”<sup>209</sup> “Writ of *Habeas Corpus*,”<sup>210</sup> “high Crimes and Misdemeanors,”<sup>211</sup> “original Jurisdiction,”<sup>212</sup> “appellate Jurisdic-

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204. *Id.* art I, § 8, cl. 11.

205. See Solum, *supra* note 184, at 54.

206. U.S. CONST. art. I, § 9, cl. 3.

207. See Solum, *supra* note 184, at 52 n.162. Some nonlawyers may know the term “bill of attainder,” but that understanding does not imply that it is an ordinary language term. After all, knowledgeable nonlawyers may have knowledge of some legal terms. Deciding whether such a term is an ordinary language term might require comparing the rate of knowledge of a term among lawyers and nonlawyers.

208. U.S. CONST. art. I, § 2, cl. 4.

209. *Id.* art. I, § 3, cl. 5.

210. *Id.* art. I, § 9, cl. 2.

211. *Id.* art. II, § 4.

212. *Id.* art. III, § 2, cl. 2.

tion,”<sup>213</sup> “Attainder of Treason,”<sup>214</sup> “Full Faith and Credit,”<sup>215</sup> “Duty of Tonnage,”<sup>216</sup> “admiralty … Jurisdiction,”<sup>217</sup> and “maritime Jurisdiction.”<sup>218</sup>

A second group consists of ambiguous terms—terms that have both a legal and a nonlegal meaning. For example, while the term “Recess” in the Recess Appointments Clause had an ordinary language meaning that suggested a break of any length, it also had a legal meaning that referred to a break between two legislative sessions.<sup>219</sup> In addition, while the term “good Behaviour” had an ordinary language meaning, it also had a distinct legal meaning applicable to judicial officers.<sup>220</sup> Other terms in this category include “Treason,”<sup>221</sup> “declare War,”<sup>222</sup> “War,”<sup>223</sup> “receive Ambassadors,”<sup>224</sup> “necessary and proper,”<sup>225</sup> “Privileges,”<sup>226</sup> “Immunities,”<sup>227</sup> “executive Power,”<sup>228</sup> and “any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.”<sup>229</sup>

213. *Id.*

214. *Id.* art. III, § 3, cl. 2.

215. *Id.* art IV, § 1; see Stephen E. Sachs, *Full Faith and Credit in the Early Congress*, 95 VA. L. REV. 1201, 1209 (2009) (“Understanding the Full Faith and Credit Clause requires an understanding of the legal environment in which it was written.”).

216. U.S. CONST. art. I, § 10, cl. 3.

217. *Id.* art. III, § 2, cl. 1.

218. *Id.*

219. *Id.* art. II, § 2, cl. 3; see, e.g., Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. REV. 1487, 1491 (2005).

220. U.S. CONST. art. III, § 1; see, e.g., Saikrishna Prakash & Steven D. Smith, *How to Remove a Federal Judge*, 116 YALE L.J. 72, 82-84 (2006).

221. U.S. CONST. art. III, § 3.

222. *Id.* art. 1, § 8, cl. 11; see, e.g., Robert F. Turner, *War and the Forgotten Executive Power Clause of the Constitution: A Review Essay of John Hart Ely's War and Responsibility*, 34 VA. J. INT'L L. 903, 906-07 (1994).

223. U.S. CONST. art. I, § 8, cl. 11.

224. *Id.* art. II, § 3.

225. *Id.* art. I, § 8, cl. 18; see, e.g., Gary Lawson & Patricia B. Granger, *The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 286-89 (1993).

226. U.S. CONST. art. IV, § 2, cl. 1; see, e.g., Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part I. “Privileges and Immunities” as an Antebellum Term of Art*, 98 GEO. L.J. 1241, 1252-63 (2010).

227. U.S. CONST. art. IV, § 2, cl. 1; see also Lash, *supra* note 226, at 1252-63.

228. U.S. CONST. art. II, § 1, cl. 1; see, e.g., Michael D. Ramsey, *Executive Agreements and the (Non)Treaty Power*, 77 N.C. L. REV. 133, 212 (1998).

229. U.S. CONST. art. VI, § 2; see, e.g., *infra* notes 279-87 and accompanying text. The other ambiguous terms are “Impeachment,” “Indictment,” “ex post facto,” “Felony,” “Breach of the Peace,” “be privileged from Arrest during their Attendance at the Session of their respective

These two groups of terms provide powerful evidence for the legal character of the Constitution's language. It is true that not all the ambiguous terms will turn out to have been used with their legal meaning. When an ambiguous term is employed, its meaning ultimately depends on the context and the other legal interpretive rules for resolving ambiguity—on considerations such as the purpose of the provision, the type and structure of the document, and how common the different meanings are.<sup>230</sup> Thus, the number of ambiguous terms helps determine the maximum number of legal meanings that might have been employed, not the actual number.

Still, the number of ambiguous terms is an important consideration in determining the language used in the document. First, the number of ambiguous terms provides a window into the number of terms that will turn out to have legal meanings once the involved task of interpreting the document is completed. While it would be laborious to interpret all the ambiguous terms, it is likely that a significant number of these ambiguous terms are properly interpreted to have legal meanings in the Constitution. For example, the term "good behavior," discussed above, is certain to have its legal meaning in the Constitution.<sup>231</sup> Similarly, the term "Jury"<sup>232</sup> is likely to have been employed with its technical meaning of a body of twelve people, rather than the ordinary meaning of an indeterminate number of people.

Second, a legally knowledgeable reader of the document at the time of its enactment would not be able to know for certain which meaning all these terms had. That assessment would require interpreting them all in context. Such a reader, however, would still make the judgment that this evidence of ambiguous terms supported the conclusion that the document was written in the language of the law, because he would believe that a substantial percentage of these terms would ultimately receive their legal meaning. Put differently, even if it is not possible for a reader to

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Houses," "Treaty," "Reprieves," "Pardons," "Bribery," "Jury," "Forfeiture," "jurisdiction of the crime," "Piracies," "Bills of Credit," "Imposts," "Excises," "Law of Nations," "Captures," "raise and support," "Cession," "Capitation," "Alliance," "Confederation," "Compact," "Ambassadors," "Public Ministers," "Consuls," "commission," "take Care that the Laws be faithfully executed," "Controversies," and "in law" and "in ... Equity." U.S. CONST. arts. I-IV.

230. See, e.g., Scott, *supra* note 91, at 362.

231. See *supra* note 220 and accompanying text.

232. U.S. CONST. art. III, § 2, cl. 3.

determine the exact number of terms that have a legal meaning in the Constitution, the number of ambiguously legal terms would help confirm that the Constitution was written in legal language.

Our review of the Constitution found a substantial number of terms falling into these two groups. We have tentatively classified thirteen terms as being unambiguously legal.<sup>233</sup> This is too large a number to dismiss these terms as isolated or aberrational examples of legal terms.

We have also found that another forty-four terms are ambiguous, having both an ordinary and legal meaning.<sup>234</sup> This is a large number. In addition, it is not always evident whether a term clearly has only a legal meaning, or whether it is ambiguous because it also has an ordinary meaning.<sup>235</sup> For example, the term “overt [a]ct”<sup>236</sup> is clearly a legal term, but it is hard to know whether it has an ordinary meaning. We are more inclined to believe it is not used in ordinary language, except in a legal context, but we are not certain. Thus, we classify it as on the border. Similarly, we are not sure whether the term “Corruption of Blood”<sup>237</sup> had only a legal meaning or also an ordinary meaning. In addition to these two terms, we found an additional three terms in this group of terms that are unclear whether they have only a single legal meaning or also an ordinary meaning: “Prejudice any Claims of the United States”<sup>238</sup> and “Privileges and Immunities of Citizens in the several States,”<sup>239</sup> and “direct Taxes.”<sup>240</sup>

Overall, we found numerous terms—sixty-two—to have at least a legal meaning.<sup>241</sup> The Constitution is a short document. The ordinary-language view cannot account for this result.

233. *See supra* notes 204-18 and accompanying text.

234. *See supra* notes 219-29 and accompanying text.

235. *See* Mattila, *supra* note 64, at 31.

236. U.S. CONST. art. III, § 3, cl. 1.

237. *Id.* art. III, § 3, cl. 2.

238. *Id.* art. IV, § 3, cl. 2.

239. *Id.* art. IV, § 2, cl. 1. As we have said, “privileges” and “immunities” seem clearly to have an ordinary meaning as well as a legal meaning when each word is considered individually. Here we consider the question of whether the longer phrase is written in the language of the law.

240. *Id.* art. I, § 2, cl. 3.

241. That is, either to be unambiguously legal, to be ambiguous between an ordinary and legal meaning, or to have a legal meaning and to be unclear as to whether it also has an ordinary meaning.

This initial assessment understates the actual number of legal terms. The numbers given so far merely count the separate terms in the Constitution with a legal meaning. The Constitution uses many of these terms more than once. The repetition of these terms is relevant. If a document uses three legal terms once each, it has a less legal character than a document that uses three legal terms five times each. The fifteen legal terms in the latter document greatly magnify the legal impression. With the repetitions of legal terms, the Constitution has 103 terms with a legal meaning.<sup>242</sup>

Even this more extended assessment is an understatement. So far, we have included only terms certain to have at least one legal meaning. But the Constitution contains many terms about which it is difficult to know for sure, without significant research, whether they have a legal meaning in addition to the ordinary meaning. Thus, another relevant group of terms are those that clearly have an ordinary meaning but might or might not have a legal meaning.

Including this group might seem unnecessary, if it only comprised terms which had the mere possibility of having a legal meaning. But we include only terms that have some significant chance of having a legal meaning. For example, the terms “legislative Powers,”<sup>243</sup> “Citizen of the United States,”<sup>244</sup> “natural born Citizen,”<sup>245</sup> “inferior Courts,”<sup>246</sup> “the Recess of the Legislature of any State,”<sup>247</sup> “the Rules of [a legislative house’s] Proceedings,”<sup>248</sup> “Tender in Payment of Debts,”<sup>249</sup> “inspection Laws,”<sup>250</sup> “Speech or Debate,”<sup>251</sup> “Commander in Chief,”<sup>252</sup> and “Office of honor, Trust or Profit,”<sup>253</sup> possibly have a legal meaning in addition to their ordinary meaning. It turns out that numerous terms fit into this group. Adding this last group

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242. In the first group of clearly unambiguously legal terms, the thirteen terms are used fifteen times. In the second group of ambiguous legal terms, the forty-four terms are used eighty-two times. The borderline group of five terms is used six times.

243. U.S. CONST. art. I, § 1.

244. *Id.* art. I, § 2, cl. 2.

245. *Id.* art. II, § 1, cl. 5.

246. *Id.* art. III, § 1.

247. *Id.* art. I, § 3, cl. 2.

248. *Id.* art. I, § 5, cl. 2.

249. *Id.* art. I, § 10, cl. 1.

250. *Id.* art. I, § 10, cl. 2.

251. *Id.* art. I, § 6, cl. 1.

252. *Id.* art. II, § 2, cl. 1.

253. *Id.* art. I, § 3, cl. 7.

expands the number of terms in the Constitution that potentially have a legal meaning. If repetitions are counted, the Constitution uses 139 terms that might have one legal meaning.<sup>254</sup>

These various groups produce an extremely large number: the Constitution contains 242 terms with at least a possible legal meaning. Of course, that number needs to be discounted by the possibility that some of these terms will turn out not to have an alternative legal meaning, and that others with alternative legal meanings will not have that legal meaning in the document. Still, even taking those discounts into account, it would be surprising if the number of words with applicable legal meanings fell below one hundred. Regardless of their exact number, their abundance constitutes extremely strong evidence in favor of the language-of-the-law view.

One possible objection is that the ambiguous terms in the Constitution do not put the ordinary language reader on notice of the legal character of the document. According to this view, because the ordinary language reader does not know about the legal meaning of ambiguous terms, she will simply assume that they have only an ordinary meaning, and will therefore fail to recognize that the document contains legal terms. As we have noted, however, the language in which a document is written is best determined by people who are familiar with both the relevant languages. The relative ignorance of readers who do not know the language of the law is largely irrelevant.

But, as we have also argued, the Constitution would be unlikely to fool people who lack knowledge of the language of the law into believing it is written in ordinary language. The Constitution states that it is a legal document and many terms in the document are unambiguously legal. Even if these features would not prove to a lay reader that the Constitution is written in the language of the law, it would show that this language is a strong possibility.

Particularly in that context, even ambiguous terms strengthen the notice to the ordinary language reader that the document might be written in the language of the law. Consider the following appar-

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254. Based on our review, sixty-nine separate terms might have one legal meaning. When all instances of the term are included, this number increases to 139. See John O. McGinnis & Michael B. Rappaport, *List of Constitutional Legal Terms* (unpublished list on file with authors).

ently ambiguous terms from the Constitution: “Impeachment,”<sup>255</sup> “Quorum,”<sup>256</sup> “Imposts,”<sup>257</sup> “Breach of the Peace,”<sup>258</sup> “Cession,”<sup>259</sup> “Jurisdiction of the Crime,”<sup>260</sup> “Felony,”<sup>261</sup> and “Captures.”<sup>262</sup> An ordinary reader would be aware that all these terms involve legal matters and are not frequently used in ordinary language. When an ordinary language reader encounters a document like the Constitution, with so many such terms, the reader is likely to recognize that these terms might have a legal meaning that he does not fully understand.

In this Section we have considered only terms in the original Constitution, not those in the Bill of Rights. But the Bill of Rights also contains numerous technical, legal terms. Prominent examples include: “establishment of religion,”<sup>263</sup> “abridging the freedom of speech,”<sup>264</sup> “keep and bear Arms,”<sup>265</sup> “probable cause,”<sup>266</sup> “Warrants,”<sup>267</sup> “due process,”<sup>268</sup> “right ... to be confronted with the witnesses against him,”<sup>269</sup> and “cruel and unusual punishments.”<sup>270</sup> Like the language of the original Constitution, the language of the law in the Bill of Rights thus encompasses terms that are unambiguously legal, such as warrants,<sup>271</sup> terms that are ambiguous between ordinary meaning and the language of the law, such as “abridging the freedom of speech,”<sup>272</sup> and terms that may seem to be written in ordinary language but turn out not to be, such as cruel and unusual punishment.<sup>273</sup> And as we will discuss, the Ninth Amendment

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255. U.S. CONST. art. II, § 4.

256. *Id.* art. I, § 5, cl. 1.

257. *Id.* art. I, § 10, cl. 2.

258. *Id.* art. I, § 6, cl. 1.

259. *Id.* art. I, § 8, cl. 17.

260. *Id.* art. IV, § 2, cl. 2.

261. *Id.* art. I, § 6, cl. 1.

262. *Id.* art. I, § 8, cl. 11.

263. *Id.* amend. I.

264. *Id.*

265. *Id.* amend. II.

266. *Id.* amend. IV.

267. *Id.*

268. *Id.* amend. V.

269. *Id.* amend. VI.

270. *Id.* amend. VIII.

271. See *id.* amend. IV.

272. *Id.* amend. I.

273. See *id.* amend. VIII.

appears to presuppose legal interpretive rules.<sup>274</sup> In fact, the Bill of Rights may even more strongly support the language-of-the-law view, since it appears to include a higher ratio of legal language to ordinary language than the original Constitution.

We will have occasion to discuss some of these legal terms in our Section on the centrality of the language of the law to modern originalist scholarship and jurisprudence.<sup>275</sup> While it would be laborious to go through the same detailed analysis of the legal terms in the Bill of Rights that we have undertaken as to the original Constitution, it is clear that Congress's decision to write down the people's rights in the language of the law provides additional support for the view that the Constitution is written in that language.

### *C. The Nature and Structure of the Document*

The structure of the Constitution underscores its legal nature. The Constitution consists largely of procedures and enumerated powers. A document setting forth the powers of various actors has a strong family resemblance to many other documents written in the language of the law—from a power of attorney, to a conveyance of portions of real property, to a corporate charter.<sup>276</sup> Thus, the very substance of the document suggests its legal nature.

The Constitution was more complex than these documents, but observers at the time recognized that this complexity itself required specialized knowledge and methods. As St. George Tucker wrote, “science, only, is equal to the task” of making sense of the complexity of our constitutional system of government.<sup>277</sup>

It was also recognized that the legal science applied to the Constitution depended on understanding the document against principles to be found in other laws:

[T]he study of the constitution is not more necessary to the right understanding of the force and obligation of any positive law,

274. See *infra* notes 289-93 and accompanying text.

275. See *infra* Part IV.C.

276. See, e.g., Geoffrey P. Miller, *The Corporate Law Background of the Necessary and Proper Clause*, 79 GEO. WASH. L. REV. 1, 3 (2010).

277. ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA xv (1803).

than the study of the law, as a science, is to a full and perfect understanding of the constitution: for the rules of law must not unfrequently be consulted, to explain the principles contained in the constitution: thus, they mutually contribute to the due investigation and understanding of each other.<sup>278</sup>

Thus, the Constitution announces that it is written in the language of the law through its extensive use of legal terms and its references to other bodies of law. Its family resemblance to other legal documents also indicates that it is written in the legal language. And its greater complexity than those documents suggested to contemporary observers that it was to be interpreted against a complex body of preexisting rules.

#### *D. The Explicit and Implicit References to Legal Interpretive Rules*

Some of the strongest evidence that the Constitution was written in the language of the law lies in provisions showing that the enactors believed it would be interpreted according to legal interpretive rules. The Constitution contains specific clauses that block the application of legal interpretive rules that would otherwise apply. It also contains other clauses that invite the application of legal interpretive rules. These clauses were governed by legal interpretive rules and would not characteristically appear in documents written in ordinary language.

##### *1. Clauses Blocking the Application of Legal Interpretive Rules*

The Supremacy Clause contains a provision that blocks the application of a legal interpretive rule—the rule against implied repeals—that might otherwise have been applicable.<sup>279</sup> After stating that the Constitution and other federal law is the supreme law of the land, the Clause provides: “[A]ny Thing in the Constitution or Laws of any state to the Contrary notwithstanding.”<sup>280</sup> Caleb Nelson

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278. *Id.* at xvii. For further reading on the importance of Tucker, see G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE, 1815-35, at 82 (1988).

279. See U.S. CONST. art. VI, cl. 2.

280. *Id.*

recently explained the reason for the appearance of this phrase, which is called the “*non obstante*” clause.<sup>281</sup>

The Supremacy Clause, of course, gives the Constitution, statutes, and treaties priority over inconsistent state law.<sup>282</sup> But it might be debated how much inconsistency was needed between the state and federal laws for the federal law to displace a state law. For that question there was a potentially relevant preexisting common law rule that spoke to the amount of inconsistency required. Under the common law, implied repeals were extremely disfavored. Thus, the inconsistency would have to be glaring for the second law to be interpreted as displacing the prior law.<sup>283</sup>

Otherwise, the common law directed the interpreter to reconcile the two laws.<sup>284</sup> When legislators did not desire this harmonization, they added a legal term of art—the “*non obstante*” phrase—to negate the operation of the common law rule against implied repeals.<sup>285</sup> The rule against implied repeals is not an ordinary language rule, but an interpretive rule about how to construe two laws—a quintessential legal interpretive rule.<sup>286</sup>

Under the common law regime that preceded the Constitution, an interpreter might well have understood the Supremacy Clause to be triggered only if the previous state laws in tension were absolutely contradictory to the subsequent federal ones. The *non obstante* clause in the Supremacy Clause was deemed necessary as a guide to judges precisely because the enactors understood that the Constitution would be interpreted against the background of preexisting legal rules.<sup>287</sup>

The *non obstante* clause did not merely show that the Framers believed that legal interpretive rules would apply to the Constitution. It also showed that the *specific language* of this clause could not be understood without recognizing that it was invoking a legal interpretive rule that would prevent the operation of another legal

281. See Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 241-42, 246-48 (2000).

282. See U.S. CONST. art. VI, cl. 2.

283. See Nelson, *supra* note 281, at 241-42.

284. See *id.* at 292.

285. See *id.* at 294.

286. See *id.* at 241-42.

287. See *id.* at 232.

interpretive rule.<sup>288</sup> The clause is a clear indication that the Constitution is written in the language of the law.

The Ninth Amendment also reflects the understanding that the Constitution was written in the language of the law and would be interpreted according to legal interpretive rules. The Amendment provides, “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”<sup>289</sup> While there is disagreement about what the Ninth Amendment means, “everyone agrees that it focuses primarily on forbidding an interpretive inference: inferring from the enumeration of [certain] rights that the people do not enjoy other rights” not so enumerated.<sup>290</sup>

One inference would have been based on the anti-surplusage rule: enumeration might lead an interpreter to conclude that Congress actually possessed the regulatory power that the listed right blocked.<sup>291</sup> For example, in opposing the Bill of Rights, Alexander Hamilton noted that if the right to freedom of the press were included, even though Congress did not have an enumerated power to regulate the press, that inclusion might lead an interpreter to conclude that Congress actually possessed that regulatory power.<sup>292</sup> A second fear was that interpreters would assume that a listing of rights meant that unlisted rights were not protected. This inference would have been based on another interpretive rule—*expressio unius est exclusio alterius*.<sup>293</sup> Accordingly, the two leading approaches to the Ninth Amendment assume the Constitution was written in the language of the law with legal interpretive rules in the background.

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288. See *id.*

289. U.S. CONST. amend. IX.

290. See McGINNIS & RAPPAPORT, *supra* note 90, at 127.

291. See *id.*

292. See THE FEDERALIST No. 84 (Alexander Hamilton).

293. See *id.* *Expressio unius est exclusio alterius* means “[t]he expression of one thing is the exclusion of another.” *Expressio unius est exclusio alterius*, BLACK’S LAW DICTIONARY (7th ed. 1999).

*2. Clauses Calling for the Application of Legal Interpretive Rules*

A preamble and prefatory clauses also appear in the Constitution and invite the application of legal rules. The preamble runs:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.<sup>294</sup>

The preamble of the Constitution is not the kind of opening that generally appears in documents written in ordinary language. Its presence also raises questions about its relation to the remainder of the document. A contemporary legal interpretive rule provided that a preamble stated the purpose of a document, and thereby clarified ambiguities in its language. As explained by Joseph Story in his commentaries:

[The Preamble's] true office is to expound the nature and extent, and application of the powers actually conferred by the constitution, and not substantively to create them.... [S]uppose the terms of a given power admit of two constructions, the one more restrictive, the other more liberal, and each of them is consistent with the words, but is, and ought to be, governed by the intent of the power; if one would promote, and the other defeat ... ought not the former, upon the soundest principles of interpretation to be adopted?<sup>295</sup>

Story is here stating the traditional rule outlined by Blackstone for the use of preambles: that they may be used to resolve ambiguities but not to add or subtract from the clear meaning of the operative

294. U.S. CONST. pml.

295. STORY, *supra* note 103, § 462.

phrases in the rest of the document.<sup>296</sup> Case law around the time of the Constitution reflected that view as well.<sup>297</sup>

It appears that a similar rule applied to prefatory clauses, such as the Second Amendment language providing “[a] well regulated Militia, being necessary to the security of a free State.”<sup>298</sup> While lawyers at the time did not use the phrase “prefatory clause,” the preamble rule would likely have applied to prefatory clauses. First, as Blackstone makes clear, the rule on preambles is a specific instance of the way the verbal context surrounding a specific phrase should be treated,<sup>299</sup> and prefatory clauses provide a context resembling preambles. Second, a prefatory clause is essentially a preamble to a sentence. Cases discussing preambles contrast them with the “enacting clause[s]” of a statute.<sup>300</sup> This contrast suggests that preambles and prefatory clauses would be given similar interpretive effect, because prefatory clauses, like preambles, offer general sentiments in advance of the operative language of an enactment. Accordingly, the preamble and prefatory clauses offer language whose purport was understood through legal interpretive rules.

Indeed, in *District of Columbia v. Heller* Justice Antonin Scalia appealed to his understanding of the role of prefatory clauses to help settle the meaning of the Second Amendment.<sup>301</sup> One argument against finding an individual right to bear arms is that the prefatory clause’s focus on the militia limits that right to bearing arms in connection with a militia. But Scalia found that the relevant canon of interpretation at the time posited that a prefatory clause could clarify an ambiguity, but could not otherwise limit or expand the

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296. See TUCKER, *supra* note 277, at 59 (noting that in cases of ambiguity “the proeme, or preamble, is often called in to help the construction of an act of parliament”).

297. See, e.g., Brett v. Brett, (1826) 162 Eng. Rep. 456, 458-59 (“It is to the preamble more especially that we ... look for the reason or spirit of every statute; rehearsing this, as it ordinarily does, ... in the best and most satisfactory manner, the object or intention of the legislature.”). For a more general discussion of different views of the appropriate legal interpretive rule applied to a preamble, see David Thomas Konig, *Why the Second Amendment Has a Preamble: Original Public Meaning and the Political Culture of Written Constitutions in Revolutionary America*, 56 UCLA L. REV. 1295, 1307-25 (2009).

298. U.S. CONST. amend. II.

299. See TUCKER, *supra* note 277, at 59 (“If words happen to be still dubious, we may establish their meaning from the context.”).

300. See Brett, 162 Eng. Rep. at 460.

301. 554 U.S. 570, 577 (2008).

operative clause.<sup>302</sup> Relying on the canon, he then held that the operative clause—the right of the people to keep and bear arms—was unambiguous and therefore could not be limited by the militia preamble.<sup>303</sup>

Thus, the constitutional text both blocks the operation of certain legal interpretive rules and contains clauses that call for the application of legal interpretive rules. Both kinds of provisions supplement the already strong evidence of the Constitution's legal language—from its self-declaration, language, and structure.

### *E. The Interpretive Practices of Early Jurists*

The practices of judges and justices in the early Republic confirm that state constitutions and the Federal Constitution were understood to be written in the language of the law and to be interpreted by using legal interpretive rules. Even before the Federal Constitution, state constitutions used legal methods of interpretation that would have been unlikely to be familiar to the lay public. Both the pre-Marshall and the Marshall Courts applied interpretive rules to cash out the meaning of difficult-to-interpret phrases in the Constitution. The applied interpretive rules, moreover, went beyond the regularities of ordinary language, to the use of legal interpretive rules directing interpreters to the legal background or purpose of the provision, or spirit of the entire document.

#### *1. Early State Courts*

The Federal Constitution was not the first such instrument to be enacted in the early Republic. Eleven of the thirteen states wrote their own constitutions.<sup>304</sup> Some of the early cases rendering decisions under them show that these constitutions were regarded as written in the language of the law, setting a precedent for how the Federal Constitution would be understood.

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302. See *id.* at 578.

303. See *id.* at 579-81.

304. See Mark A. Graber, *State Constitutions as National Constitutions*, 69 ARK. L. REV. 371, 373 (2016).

In *Holmes v. Watson*, one of the earliest cases of judicial review, the issue concerned what constituted a jury.<sup>305</sup> The New Jersey Supreme Court struck down a state statute that provided that the trial to determine whether property was loyalist property and thus subject to seizure was to be by a “jury of six men.”<sup>306</sup> The Constitution guaranteed a right to jury trial, but did not specify the number of people on the requisite jury.<sup>307</sup> Nevertheless, the court objected to the constitutionality of the statute, even though it would have appeared to comply with the ordinary language meaning of the term jury. While we do not have the text of the opinion, it appears the court appealed to historical legal understandings in the law that specified twelve as the appropriate number of jurors. As William Treanor observes:

The requirement that a jury consist of twelve persons was presumably derived from English common law or colonial-era documents. In particular, foundational documents for the two parts of New Jersey—the West Jersey Concessions and Agreements of 1676 and the East Jersey House of Representatives’ 1699 Declaration of Rights and Privileges—provided that trials shall be by “twelve honest men of the neighborhood” and “by the verdict of twelve men,” respectively.<sup>308</sup>

Thus, while the term jury could have been read colloquially as encompassing a body of lay decision makers of indeterminate size, the *Holmes* court interpreted it to have a legal meaning based on a legal reference.<sup>309</sup>

In *Commonwealth v. Caton*, judges in a series of opinions and lawyers in a variety of arguments showed that they believed that the Virginia Constitution was written in the language of the law, and that legal interpretive rules were needed to resolve ambiguities.<sup>310</sup> In *Caton*, three prisoners prosecuted by the Commonwealth

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305. While there was no opinion in *Holmes v. Watson*, a case decided in 1780, the holding of the case was discussed in *State v. Parkhurst*, 9 N.J.L. 427, 444 (1802).

306. *See id.*

307. *See U.S. CONST. amend. VI.*

308. William Michael Treanor, *Judicial Review Before Marbury*, 58 STAN. L. REV. 455, 475 (2005) (footnote omitted).

309. *See id.*

310. 8 Va. (4 Call) 5 (1782).

of Virginia for treason relied on a resolution of the Virginia House of Delegates that pardoned them to try to avoid execution.<sup>311</sup> But the Senate had not concurred, and a previously passed statute stated that a pardon could not be provided by the governor alone, but required a resolution of both the House and Senate.<sup>312</sup> A provision of the constitution, however, arguably gave the House of Delegates alone the power to pardon.<sup>313</sup>

Judge George Wythe concluded that the statute barring the pardon by the House of Delegates was constitutional for two separate reasons, both of which employed legal interpretive rules. First, he argued that the last clause of the constitutional provision that arguably gave the House this power (“in which *cases*, no reprieve, or pardon, shall be granted, but by resolve of the house of delegates”) applied only to impeachments carried out by the House of Delegates.<sup>314</sup> He read the clause in this manner because it reflected the historical contest between the Crown and Parliament in England, where Parliament did not want subjects of impeachments pardoned by the King.<sup>315</sup> Thus, like the judges in *Holmes*, he used the legal background of a provision to disambiguate it.

But even if the last clause of the constitutional provision were relevant to the case, Judge Wythe rejected the House’s unilateral pardon power. He held that the word “resolve” in that clause should be understood to require the concurrence of the Senate. First, he noted an ambiguity in the word “resolve” in the Virginia Constitution: it could mean either a resolution of the House of Delegates only or of both the Senate and House.<sup>316</sup> He then dissolved the ambiguity by referring to the general background principle of bicameralism, reflecting a rule that an ambiguity in the constitution could be resolved in light of its structure and its more general intent.<sup>317</sup>

311. *See id.* at 5.

312. *See id.*

313. *See id.* at 9.

314. *See id.* at 9-11.

315. *See id.* at 10.

316. *See id.* at 12 (emphasis omitted).

317. *See id.* (“Because a word of equivocal signification, ought to be understood according to that sense, which is conformable to the general scope of the instrument; for the general scope manifests the particular intent of those, who used it.”). In this case the intent was to make sure that when the “vital interests of the community” were affected as in prosecution of crime, both houses of the legislature have to negate the conviction through a pardon. *Id.* at 10.

Judge Edward Pendleton discovered a similar ambiguity in the Virginia Constitution, stating that the constitution could either mean that the House of Delegates's power to pardon was limited to impeachment or extended to all offenses.<sup>318</sup> Judge Pendleton preferred "the first [meaning], as most congenial to the spirit, and not inconsistent with the letter, of the constitution."<sup>319</sup> The "spirit" here was derived from the constitution's consistent concern with abuse of the pardon power, abuses being more likely when power is lodged in a single institution.<sup>320</sup>

Some of the lawyers in the case also employed interpretive rules, showing that the professional community understood the Virginia Constitution to be written in the language of the law. For example, Andrew Ronald, attorney for the prisoners, argued that a House pardon was effective under the constitutional provision.<sup>321</sup> But he also contended that even if the Constitution were ambiguous, a rule of lenity should apply: "[T]he construction ought, in favour of life, to incline to the side of mercy."<sup>322</sup> Edmund Randolph and St. George Tucker also employed legal interpretive rules in their arguments to the court.<sup>323</sup>

In *Kamper v. Hawkins*, two judges also employed legal interpretive rules.<sup>324</sup> In *Kamper*, the Virginia legislature had not followed the appointment method and other specified requirements in the Virginia Constitution for creating a district court.<sup>325</sup> Judge Spencer Roane held that the statute was unconstitutional because it was "in

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318. *See id.* at 19.

319. *Id.*

320. *See id.* at 18-19.

321. *See id.* at 7.

322. *See id.*

323. *See* 3 ST. GEORGE TUCKER, LAW REPORTS AND SELECTED PAPERS 1782-1825, at 1741, 1742-46 (Charles F. Hobson ed., 2013) (amicus brief by St. George Tucker relying on both the "Spirit of [the] Constitution" and the more general structure of reservation of privileges to resolve any ambiguity in the Constitution in favor of the prisoners); Letter from Edmund Randolph to James Madison (Nov. 8, 1782), *reprinted in* 5 THE PAPERS OF JAMES MADISON 262, 263 (William T. Hutchinson & William M.E. Rachal eds., 1967) (Randolph stated that his argument, that the legislature could mandate the concurrence of the Senate, depended on legal understandings and "to any but lawyers ... would appear unintelligible"); Treanor, *supra* note 308, at 490-91.

324. 3 Va. (1 Va. Cas.) 20 (1793).

325. *See id.* at 22-23.

opposition to the fundamental principles” of the constitution.<sup>326</sup> He wrote:

By fundamental principles I understand, those great principles growing out of the Constitution, by the aid of which, in dubious cases, the Constitution may be explained and preserved inviolate; those land-marks, which it may be necessary to resort to, on account of the impossibility to foresee or provide for cases within the *spirit*, but without the *letter* of the Constitution.<sup>327</sup>

Judge Roane’s distinction between the spirit and the letter followed a common interpretive rule at the time. The reference to “the letter” reflected the manner of interpreting a clause by reference to its text.<sup>328</sup> The reference to “the spirit” reflected the resolution of textual ambiguity by reference to the purpose, structure, or intent of a document or clause.<sup>329</sup>

Judge Tucker’s opinion also employed a similar interpretive rule to hold the statute unconstitutional. Judge Tucker held the provision unconstitutional, emphasizing “the spirit of our government” as well as the text of the constitution.<sup>330</sup> Elsewhere, Tucker also applied an anti-surplusage rule.<sup>331</sup>

## 2. The Pre-Marshall Court

Even before the advent of Chief Justice Marshall, the Supreme Court employed interpretive rules to resolve the meaning of the newly enacted Constitution. *Chisholm v. Georgia* may be the most famous case from the pre-Marshall Court.<sup>332</sup> There the question was whether the Constitution permitted citizens of one state to sue another state in federal court, even if the state claimed sovereign

326. See *id.* at 35-36 (Roane, J.).

327. *Id.* at 40 (emphasis added).

328. See John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 84-85 (2006).

329. See *id.* at 85.

330. See *Kamper*, 3 Va. (1 Va. Cas.) at 68 (Tucker, J.).

331. See *id.* at 88 n.d1 (“Since every word in that instrument, the constitution of the commonwealth, should be construed to have its effect; a rule applied to all written instruments whatsoever, and more peculiarly applicable, I should presume, to that which expresses the collective, and sovereign will and intention of the people.”).

332. 2 U.S. (2 Dall.) 419 (1793).

immunity from the lawsuit.<sup>333</sup> The Court, in a 4-1 decision, held that private citizens could maintain these suits.<sup>334</sup> The most relevant language in the Constitution appears in Article III's grant of federal court jurisdiction for “[c]ontroversies ... between a State and Citizens of another State.”<sup>335</sup>

Despite this language, some jurists thought that sovereign immunity precluded the suit.<sup>336</sup> The argument depended on a venerable rule of interpretation that delegations of sovereign power should be strictly construed—a rule that goes back at least to the middle of the eighteenth century.<sup>337</sup> Justice James Iredell agreed with this view. While his dissenting opinion in *Chisolm* focused on the statutory issue, Justice Iredell also drafted a dissent that he did not issue that employed the legal interpretive rule of strict construction against the delegation of sovereign powers.<sup>338</sup>

At least one of the *seriatim* opinions for the majority in *Chisolm* also deployed legal interpretive rules. Chief Justice John Jay rejected the claim that the language of Article III should be interpreted to include states only as plaintiffs but not defendants to honor the principle of sovereign immunity.<sup>339</sup> He argued that “[t]he ordinary rules for construction will easily decide whether those words are to be understood in that limited sense.”<sup>340</sup> There were two such relevant rules. One was that remedial rules should be construed liberally, which Chief Justice Jay thought applied to Article III, because he considered it “remedial.”<sup>341</sup> The second was to construe the provision in accord with the preamble, using the

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333. *See id.* at 469 (Jay, C.J.).

334. *See id.* at 479.

335. U.S. CONST. art. III, § 2, cl. 1.

336. *See* Letter from Edmund Pendleton to Nathaniel Pendleton (May 21, 1792), reprinted in 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, at 157, 157-58 (Maeva Marcus ed., 1994).

337. As articulated by the famous jurist Emer de Vattel. *See* EMER DE VATTTEL, THE LAW OF NATIONS; OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS 9 (Joseph Chitty ed., new ed., Philadelphia, T. & J.W. Johnson & Co. 1863) (1758).

338. *See generally* James Iredell's Supreme Court Opinion (Feb. 18, 1793), reprinted in 5 DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, *supra* note 336, at 164.

339. *See Chisholm*, 2 U.S. (2 Dall.) at 473, 476 (Jay, C.J.).

340. *Id.* at 476.

341. *See id.* at 476-77.

language of the preamble to function as Joseph Story argued it should function—not to provide independent provisions of positive law, but principles for resolving ambiguities.<sup>342</sup> Chief Justice Jay stated that because the preamble made clear that the Constitution is to establish justice, the provision should be read in accord with republican equality, allowing states to both sue and be sued.<sup>343</sup>

### *3. The Marshall Court*

Many of the most important cases in the Marshall Court concerned legal interpretive rules. *McCulloch v. Maryland*, for instance, turned on a battle among different interpretive rules rooted in the nature of the Constitution.<sup>344</sup> For instance, the eminent lawyer St. George Tucker argued that the Constitution was a compact of the sovereign states.<sup>345</sup> This characterization of the union allowed them to employ the traditional common law interpretive rule, discussed above, that grants of powers by a sovereign should be narrowly construed. This rule formed the legal basis for Maryland's argument that the enumerated powers should be strictly construed.<sup>346</sup>

Chief Justice Marshall rejected this argument, not because he rejected legal interpretive rules, but because he disagreed with Maryland's characterization of the Constitution and the interpretive rules drawn from it. For Marshall, the Constitution was not a compact among the states, but a delegation of power by the national people to their representatives.<sup>347</sup> Thus, Marshall argued for his own interpretive rule—that strict construction is incompatible with the nature of the Constitution—based on a different understanding of the document.

In other cases, Chief Justice Marshall employed common law interpretive rules to reach his result. In *Gibbons v. Ogden*, he argued

342. See STORY, *supra* note 103, § 462 (discussing Story's view of the preamble).

343. See *Chisholm*, 2 U.S. (2 Dall.) at 477 (Jay, C.J.).

344. 17 U.S. (4 Wheat.) 316, 400-01 (1819).

345. See TUCKER, *supra* note 277, app. at 151. For a discussion of the relation of compact theory to strict construction, see generally Kurt T. Lash, "Tucker's Rule": *St. George Tucker and the Limited Construction of Federal Power*, 47 WM. & MARY L. REV. 1343 (2006).

346. See *McCulloch*, 17 U.S. (4 Wheat.) at 403-04.

347. See Robert N. Clinton, *Original Understanding, Legal Realism, and the Interpretation of "This Constitution,"* 72 IOWA L. REV. 1177, 1248-49 (1987).

that, if it is unclear on its face whether commerce encompassed navigation, one should resort to a clarifying legal interpretive rule:

If, from the imperfection of human language, there should be serious doubts respecting the extent of any given power, it is a well settled rule, that the objects for which it was given, especially when those objects are expressed in the instrument itself, should have great influence in the construction. We know of no reason for excluding this rule from the present case.<sup>348</sup>

Because Marshall believed it was clear that the national government was to have power over vessels and seamen, he concluded that the term “commerce” must be understood to include navigation.<sup>349</sup>

Moreover, Marshall’s assessment that such a power was an object of the Constitution flowed from yet another interpretive rule:

It is a rule of construction, acknowledged by all, that the exceptions from a power mark its extent; for it would be absurd, as well as useless, to except from a granted power, that which was not granted—that which the words of the grant could not comprehend. If, then, there are in the constitution plain exceptions from the power over navigation, plain inhibitions to the exercise of that power in a particular way, it is a proof that those who made these exceptions, and prescribed these inhibitions, understood the power to which they applied as being granted.<sup>350</sup>

Given that the Constitution prohibited certain regulations of navigation, Marshall concluded that the regulation of navigation must be one of the objects of the Clause.<sup>351</sup>

Besides invoking the purpose of a provision, Marshall also applied the venerable rule about consulting the spirit of the entire instrument. As he put it in *Sturges v. Crowninshield*, “[A]lthough the spirit of an instrument, especially of a constitution, is to be respected not less than its letter, yet the spirit is to be collected chiefly from its words.”<sup>352</sup> He went on to provide a rule to describe a

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348. 22 U.S. (9 Wheat.) 1, 188-89 (1824).

349. *See id.* at 89-90.

350. *Id.* at 191.

351. *See id.*

352. 17 U.S. (4 Wheat.) 122, 202 (1819).

circumstance when interpretation would have to consider the spirit beyond that which can be collected through the words: “Where words conflict with each other, where the different clauses of an instrument bear upon each other, and would be inconsistent unless the natural and common import of words be varied, construction becomes necessary, and a departure from the obvious meaning of words is justifiable.”<sup>353</sup> Thus, Marshall deployed yet another well-established legal rule of interpretation.

Marshall also discussed the absurdity rule, which he alluded to, but did not apply, in several opinions. For instance, in *Trustees of Dartmouth College v. Woodward* he held that a corporate charter was a contract under the Contracts Clause.<sup>354</sup> But he admitted that even if something is within the literal scope of a provision, it may be outside its legal meaning:

The case being within the words of the rule, must be within its operation likewise, unless there be something in the literal construction so obviously absurd, or mischievous, or repugnant to the general spirit of the instrument, as to justify those who expound the constitution in making it an exception.<sup>355</sup>

Marshall made similar reference to the absurdity rule in *Sturges*.<sup>356</sup>

In *Marbury v. Madison*, Marshall also used the rule against surplusage to reject the capacity of Congress to add original jurisdiction on the Court.<sup>357</sup> In *McCulloch*, Marshall argued that “necessary” in the Necessary and Proper Clause should not be read as strictly necessary because the term necessary is qualified as absolutely necessary elsewhere in the Constitution.<sup>358</sup> Here he applied a traditional canon of interpretation, now sometimes referred to as

<sup>353.</sup> *Id.*

<sup>354.</sup> 17 U.S. (4 Wheat.) 518, 592 (1819).

<sup>355.</sup> *Id.* at 644-45.

<sup>356.</sup> See *Sturges*, 17 U.S. at 202-03, (“But if, in any case, the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded, because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case, would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application.”).

<sup>357.</sup> See 5 U.S. (1 Cranch) 137, 175 (1803).

<sup>358.</sup> See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 413-14 (1819).

intratextualism, that discovers meaning by comparing variations on wording within the Constitution.<sup>359</sup>

Thus, the Great Chief Justice was the great interpreter of the language of the law in the Constitution. Marshall deployed many different kinds of interpretive rules, including rules that would be applied only to legal documents, such as traditional common law rules, and rules he gathered from the nature of the Constitution itself.

#### *F. The Interpretive Practices of the Framers and Early Legislators*

It was not only judges who treated the Constitution as a document written in the language of the law. Officials did so as well, beginning with the Framers and extending into the early Congresses. This evidence may be even more probative of the language in which the Constitution was written. Politicians are not disciplined by a professional culture to resort to legal interpretive rules. That they also understood the Constitution as a legal document is more evidence of its legal nature.

##### *1. The Framing*

One of the best pieces of evidence that the Framers thought the Constitution was written in the language of the law comes from the Philadelphia Convention itself. The Convention had decided to bar ex post facto laws, but was uncertain whether the prohibition applied only to criminal laws or also to civil laws.<sup>360</sup> The term means “after the fact” in Latin, but has no literal object of reference in ordinary English. To this day, the term is sometimes used in a nontechnical sense simply to refer to retroactive laws. This leads to some uncertainty or ambiguity. At the Convention, John Dickinson resolved this ambiguity by reporting that Blackstone’s *Commentaries* indicated that the term applied only to criminal laws, and thus some other provision was necessary to prevent the retrospective application of civil laws.<sup>361</sup> This incident shows that the Framers

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359. See Amar, *supra* note 82, at 748.

360. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 448-49 (Max Farrand ed., 1911) [hereinafter RECORDS].

361. See *id.*; see also 1 WILLIAM BLACKSTONE, COMMENTARIES, \*46.

themselves understood that they were writing a document that would be interpreted based on legal materials and language.<sup>362</sup>

After the Convention, the Framers continued to treat the Constitution as written in the language of the law. Alexander Hamilton provides an excellent example. In the *Federalist Papers*, Hamilton relied on a variety of legal rules. He applied to the Constitution the rule that “[a] specification of particulars is an exclusion of generals” and “[t]he expression of one thing is the exclusion of another.”<sup>363</sup> He also employed “what lawyers call a negative pregnant,” involving an interpretive rule that says the negation of one thing is the affirmation of another, and the antisurplusage rule.<sup>364</sup> Moreover, in his famous opinion on the Bank of the United States, Hamilton as Treasury Secretary was even more explicit about the importance of the legal interpretive rules, stating that the “intention [of the Constitution] is to be sought ... according to the usual [and] established rules of construction.”<sup>365</sup>

During the ratification debates, even the opponents of the Constitution understood that the Constitution would be construed as having a legal meaning, even if they decried the fact. Brutus, perhaps the most famous pamphleteer against the Constitution, stated that Article III made clear that the courts were to give “the constitution a legal construction, or to explain it according to the rules laid down for construing a law.”<sup>366</sup> He argued further that the objectives of the preamble would have interpretive force in construing the

362. The debates at the state conventions were no different. In defending the notion that treaties were the supreme law of the land, Madison referred to Blackstone's *Commentaries*. See *The Debates in the Convention of the Common Wealth of Virginia on the Adoption of the Federal Constitution*, in 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 500-01 (Jonathan Elliot ed., 2d ed. 1901) (remarks of James Madison); *see id.* at 510 (remarks of Francis Corbin) (making the same point).

363. THE FEDERALIST No. 83, at 496 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

364. THE FEDERALIST No. 32, *supra* note 363, at 200 (Alexander Hamilton).

365. Alexander Hamilton, *Opinion on the Constitutionality of an Act to Establish a Bank* (Feb. 23, 1791), reprinted in 8 THE PAPERS OF ALEXANDER HAMILTON 63, 111 (Harold C. Syrett ed., 1965).

While one passage by Hamilton in the *Federalist* might be thought to militate against reliance on legal interpretive rules, we explain that this interpretation is mistaken in other work. See John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 768 n.66 (2009).

366. *See Essays of Brutus No. XI*, N.Y.J., Jan. 31, 1788, reprinted in 2 THE COMPLETE ANTI-FEDERALIST 417, 419 (Herbert J. Storing ed., 1981).

Constitution.<sup>367</sup> The reason for his view was an interpretive rule: “It is a rule in construing a law to consider the objects the legislature had in view in passing it, and to give it such an explanation as to promote their intention. The same rule will apply in explaining a constitution.”<sup>368</sup>

At the Virginia ratifying convention, Patrick Henry recognized the legal nature of the Constitution’s language when he complained that trial by jury was a technical term. He stated that he

had rather it had been left out altogether, than have it so vaguely and equivocally provided for. Poor people do not understand technical terms—Their rights ought to be secured in language of which they know the meaning. As they do not know the meaning of such terms, they may be injured with impunity.<sup>369</sup>

## *2. Debates About the Constitution in the Early Congresses*

The legislative debates in the early Republic also show that the people at the time treated the Constitution as written in the language of the law. The substantial majority of members of Congress had no experience as jurists, yet they frequently resorted to legal rules of interpretation to clarify the Constitution’s meaning. We offer a synopsis of this evidence, discussing a debate over a specific constitutional question—whether a senator can be impeached—and providing a sampling of the many legal interpretive rules that early members of the House and Senate employed.

The question of the scope of impeachment occasioned substantial legal interpretation in Congress. The House had impeached William Blount, a Senator, for allegedly conspiring with the British to seize American territory.<sup>370</sup> But questions existed about the propriety of impeaching Blount. One question was whether senators were civil officers of the United States subject to impeachment.<sup>371</sup> Blount’s

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367. See *Essays of Brutus No. V*, N.Y.J., Dec. 13, 1787, reprinted in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 366, at 388, 388-89.

368. See *id.* at 389.

369. Patrick Henry, Remarks at the Virginia Convention (June 20, 1788), reprinted in 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1421 (John P. Kaminski & Gaspare J. Saladino eds., 1993).

370. See 8 ANNALS OF CONG. 2246, 2339-401 (1798).

371. See *id.* at 2263, 2282.

lawyers cited Blackstone and other authorities to explicate the legal meaning of impeachment and define its scope.<sup>372</sup> They invoked the rule of lenity to suggest that any doubts about the scope of officials subject to impeachment should be resolved in favor of the defendant.<sup>373</sup> They also argued from the legal maxim *expressio unius* that the Constitution's mention of a term denoting executive officers as impeachable shows the legislators were excluded from the scope of this proceeding.<sup>374</sup> Another question was whether the fact that Blount was no longer a senator, having been expelled, barred his impeachment.<sup>375</sup> House managers invoked the legal maxim that no man should benefit from his own wrong to argue that the scope of impeachment should not be narrowed to permit events subsequent to Blount's crime to defeat jurisdiction over impeachment.<sup>376</sup>

Traditional legal interpretive rules were also sprinkled throughout other debates. These invocations were self-conscious acts. As Congressman Pindall stated, “[W]e are accustomed to resort to the law of nations; the maritime law, the common law of England, the civil law, or some other unwritten law, or known rule of interpretation.”<sup>377</sup> And the variety of rules of interpretation referenced was quite wide. Some examples are *expressio unius*,<sup>378</sup> the rule against surplusage,<sup>379</sup> the rule that all terms in a document should be given the same meaning,<sup>380</sup> the avoidance of absurd consequences,<sup>381</sup> and the purpose of a constitutional provision as a method for resolving

372. See *id.* at 2279-81.

373. See *id.* at 2281.

374. See *id.* at 2271.

375. See DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 278 (1997).

376. See 8 ANNALS OF CONG. 2278.

377. 31 ANNALS OF CONG. 918 (1818). Congressman Pindall was talking of “settling the meaning” the Congress’s power to establish uniform rules of bankruptcy. See *id.*

378. See 41 ANNALS OF CONG. 1071-72 (1824) (remarks of Congressman McDuffie); 26 ANNALS OF CONG. 653 (1814) (remarks of Senator Gore); 11 ANNALS OF CONG. 775 (1802) (remarks of Congressman Griswold); 8 ANNALS OF CONG. 1968 (1798) (remarks of Congressman Baldwin).

379. See, e.g., 8 ANNALS OF CONG. 1967-68 (remarks of Congressman Baldwin); *id.* at 1962 (remarks of Congressman Williams).

380. See 35 ANNALS OF CONG. 318 (1820) (remarks of Senator Barbour concerning intratextualism).

381. See 2 ANNALS OF CONG. 1896-97 (1791) (remarks of Congressman Madison) (arguing that reading the general welfare clause so elastically as to permit the Bank of the United States, “would render nugatory the enumeration of particular powers”).

ambiguity.<sup>382</sup> Some rules were even more specific and detailed than the foregoing, such as the rule that when one exception was made expressly to a general grant of power, no other exception could be implied.<sup>383</sup>

At other times, there were debates about which interpretive rule was more relevant. For instance, the question arose whether Congress could eliminate inferior courts once it had established them. Senator Jackson appealed to rules about the powers of grantors in deeds—that the first grant could not be modified by implication by a subsequent grant.<sup>384</sup> Thus, he argued that the grant of power to Congress to establish courts, which carried the incidental power to eliminate them, could therefore not be limited by the decision to give judges life tenure.<sup>385</sup> Senator Chipman argued, in contrast, that the rule about grantors was irrelevant to interpreting the Constitution.<sup>386</sup> The more relevant rule, he maintained, lay in the requirement to give full meaning to every term in the Constitution, including “life tenure.”<sup>387</sup> Congressional capacity to eliminate the circuit courts would have deprived the term of its full function in the document.<sup>388</sup>

#### *G. Answers to Possible Objections*

In this Section, we respond to possible objections to the view that the Constitution is written in the language of the law rather than ordinary language.

We first consider the claim that Chief Justice Marshall believed that the Constitution should always be interpreted in accord with ordinary language. We then reject Saul Cornell’s argument that the Constitution is as legitimately interpreted in a popular as in a legal mode.

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382. See 35 ANNALS OF CONG. 319 (remarks of Senator Barbour); 2 ANNALS OF CONG. 1946-48 (remarks of Congressman Gerry).

383. See 11 ANNALS OF CONG. 130 (remarks of Senator Chipman).

384. See *id.* at 128 (remarks of Senator Jackson).

385. See *id.*

386. See *id.* (remarks of Senator Chipman).

387. See *id.* at 128-30.

388. See *id.*

### *1. Marshall and Ordinary Language*

Chief Justice Marshall is sometimes enlisted for the argument that the Constitution is written in ordinary language. The passage often used as evidence for this proposition comes from *Gibbons*:

As men, whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said.<sup>389</sup>

We think the quotation is weak support for the ordinary-language hypothesis. The passage's reference to "natural sense" could conceivably be read to draw a contrast between ordinary meaning and legal meaning. But it is better read to contrast the natural meaning with the strict construction supported by the Jeffersonians. The contrast between natural meaning and strict construction would involve no presumption against the legal meaning, since the natural meaning would often involve the legal understanding of the words. We think that Marshall was referring to this contrast between natural meaning and strict construction for two significant reasons. First, it reflects the context of the quotation. Second, Marshall himself often deployed many legal interpretive rules to determine the legal meaning.

First, Marshall made this statement in the context of rejecting a specific legal rule of the Jeffersonians—the Jeffersonian rule against "strict construction" of Congress's enumerated powers.<sup>390</sup> One can understand Marshall's assertion in *Gibbons* as claiming that the natural as opposed to the constricted meaning should control.<sup>391</sup> Under this view, the natural meaning includes the usual legal meaning of terms.

Second, as we have discussed above, Marshall often used legal interpretive rules—rules that would not have been employed by most citizens—to interpret the Constitution. For instance, he famously

389. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 188 (1824).

390. *See id.*

391. *Cf. id.*

stated that “we must never forget[] that it is *a constitution* we are expounding.”<sup>392</sup> Here he made clear that the category of the law being interpreted makes a difference to its meaning. His endorsement of the absurdity rule shows that he was willing to depart from ordinary meaning.<sup>393</sup> His embrace of consulting the objects and spirit of constitutional provisions shows that he was willing to supplement ordinary meaning.<sup>394</sup> To be sure, Marshall, like other jurists of the time, often made use of the ordinary meaning of the text, but his decision to do so depended on the inapplicability of other legal interpretive rules.

## *2. Cornell and Popular Constitutionalism*

Saul Cornell has argued that we are wrong not to accept that it is as legitimate to interpret the Constitution as a popular document as a legal one.<sup>395</sup> His argument fails for two reasons. First, Cornell does not show much, if any, evidence that contemporaries thought the Constitution would be read as a popular document written in

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392. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

393. See *supra* notes 354-56 and accompanying text.

394. See *supra* notes 352-53 and accompanying text. Justice Scalia is also often thought to have supported the view that the Constitution is written in ordinary rather than legal language. See, e.g., *District of Columbia v. Heller*, 554 U.S. 570, 576-77 (2008). But Scalia himself regularly relied on the legal meanings of terms in the Constitution. See, e.g., *Crawford v. Washington*, 541 U.S. 36, 54 (2004) (“[T]he ‘right ... to be confronted with the witnesses against him,’ is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding. As the English authorities above reveal, the common law in 1791 conditioned admissibility of an absent witness’s examination on unavailability and a prior opportunity to cross-examine.” (first quoting U.S. CONST. amend. VI; then citing *Mattox v. United States*, 156 U.S. 237, 243 (1895); and then citing *State v. Houser*, 26 Mo. 431, 433-35 (1858)); see also *Giles v. California*, 554 U.S. 353, 358 (2008) (making a similar point).

The common law understanding of the right is, of course, the legal meaning of the Sixth Amendment. One cannot assume that the ordinary reader understood that meaning; therefore, Scalia seemed to contradict the view that he strongly preferred the ordinary meaning. Indeed, as discussed above, see *supra* notes 301-03 and accompanying text, in *Heller* Scalia appealed to the language of the law in the form of an interpretive rule to help settle the meaning of the Second Amendment. Thus, Scalia’s practice was not to prefer the ordinary meaning, but was instead consistent with the ordinary/technical language interpretive rule, which resolves cases of ambiguity between ordinary and technical language terms based on legal interpretive rules that look to factors such as purpose and structure.

395. See Saul Cornell, *The People’s Constitution vs. the Lawyer’s Constitution: Popular Constitutionalism and the Original Debate over Originalism*, 23 YALE J.L. & HUMAN. 295, 300-04 (2011).

ordinary language. To be sure, he shows that some commentators wanted a constitution written in ordinary language, but these citizens opposed the Constitution in part because they felt it would be read in the language of the law.

For instance, Cornell argues that Brutus wanted to confine constitutional interpretation to the plain text. As he puts it, Brutus “accepted the first of Blackstone’s rules, which enjoined judges to read legal texts in light of the common use of words.”<sup>396</sup> While Cornell makes a persuasive case that Brutus favored law that was written in ordinary language, that is not the language in which Brutus thought the Constitution would be interpreted. He believed the Constitution would be read with lawyer’s craft to consolidate powers in the federal government.<sup>397</sup> For that reason, he was an opponent of both judicial review and the Constitution.

Cornell also suggests that an event in which a defendant made arguments grounded in ordinary language to the popular institution of the jury militates against understanding the Constitution as written in ordinary language. In this incident, Eleazer Oswald opposed a contempt citation from a judge for attempting to prejudice a jury with out-of-court comments.<sup>398</sup> Oswald made various “popular arguments” against the charge, claiming that it should be decided by a jury rather than a judge, and that it violated the freedom of the press in the Pennsylvania Constitution, which he argued should be interpreted in plain terms, not in the traditional legal terms that may have limited the right.<sup>399</sup>

Cornell is undoubtedly correct that Oswald wanted to understand the Pennsylvania Constitution in popular terms. But even if we were to agree with Cornell’s assumption that this single incident is representative of a more general view of the Pennsylvania Constitution’s language, this evidence does not show that the U.S. Constitution is to be read in a similar vein. First, the Pennsylvania Constitution is an uncertain guide to the U.S. Constitution. Many have argued that the Pennsylvania Constitution broke most decisively with traditions inherited from Britain, such as bicameralism,

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396. *Id.* at 314.

397. Cornell himself seems to acknowledge this belief. *See id.* at 315-17.

398. *See id.* at 326-34.

399. *Id.* at 328-29.

that were incorporated into the U.S. Constitution.<sup>400</sup> Moreover, while Oswald insisted on taking his legislative redress against the judge who held him in contempt,<sup>401</sup> the legislature rejected his attempt.<sup>402</sup> Thus, his views of how to interpret the Pennsylvania Constitution coincided with neither the judiciary nor the popular assembly. Finally, like more famous Antifederalists, he also opposed the U.S. Constitution.<sup>403</sup>

The second reason Cornell's argument fails is that, as we have discussed above, the internal evidence, such as imbedded language and references to technical rules, shows that the Constitution was written in the language of the law. In other words, even if some people claimed that the Constitution was written in wholly popular language, they advanced an unreasonable hypothesis that did not comport with this key evidence. Cornell does not discuss the language of the Constitution, which is odd for one who demands a "rigorous historical methodology" to determine the nature of the document and the methods by which it should be read.<sup>404</sup>

#### IV. THE LANGUAGE OF THE LAW AND MODERN ORIGINALISM

We end the Article by showing that the language of the law is an essential component of the current practice of originalism. As originalism has become more sophisticated both in legal scholarship and on the Court, the language of the law has become central to fixing the meaning of many of the Constitution's provisions. The turn to the language of the law should not be surprising. If the Constitution is written in the language of the law, it is necessary to read it in that language to render an accurate interpretation. Moreover, legal language may give clear and precise answers where ordinary language is imprecise or vague.

This originalist work employs key features of the language of the law, such as using the legal meaning of terms that appear as

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400. See, e.g., Robin West, *Tom Paine's Constitution*, 89 VA. L. REV. 1413, 1420-21 (2003) (discussing the populism of Pennsylvania's Constitution).

401. See Cornell, *supra* note 395, at 330.

402. See Vernon O. Stumpf, Colonel Eleazer Oswald: Politician and Editor 285-309 (1968) (unpublished Ph.D. dissertation, Duke University) (on file with authors).

403. See *id.* at 241-43.

404. See Cornell, *supra* note 395, at 296, 335.

ordinary language to laypeople and deploying legal interpretive rules. The ordinary-language view simply does not comport with much of the best originalist work being done today. If modern originalism has a set of best practices, employing the language of the law is one of them.

This Part discusses many examples of modern originalist scholarship that employ the language of the law. We discuss the foreign-affairs interpretation of executive power and then briefly cover five other examples of originalist scholarship that use the language of the law. We begin, however, with a discussion of one of the most important areas of the originalist revival on the Supreme Court—the interpretation of the Confrontation Clause.

#### A. *The Confrontation Clause*

The Supreme Court’s jurisprudence on the Confrontation Clause is a highpoint of originalism at the Court. In particular, the opinions in *Crawford v. Washington*<sup>405</sup> and *Giles v. California*<sup>406</sup> are two of the most thorough recent investigations of original meaning in the U.S. Reports. But these decisions are inconsistent with an ordinary-language reading of the Constitution. The meaning of the Confrontation Clause, these opinions explicate, is a meaning found in the language of the law—one that is constituted for this provision by a set of common law rules.

The Confrontation Clause provides that “[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.”<sup>407</sup> In this Section, we consider how the language of the law resolves three issues about the scope of the Clause. The first is whether “witnesses” includes only those present at trial or also extends to witnesses whose statements are introduced at trial even if they are not themselves present. The second question concerns the content of the Confrontation Clause right, such as whether it includes the right of cross-examination. The third question asks the extent to which the defendant can forfeit the right by preventing the witness from testifying at trial.

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405. 541 U.S. 36 (2004).

406. 554 U.S. 353 (2008).

407. See U.S. CONST. amend. VI.

In *Crawford*, the state sought to introduce a tape-recorded statement made to the police by the defendant's wife.<sup>408</sup> The statement appeared reliable, but the defendant had not been afforded the opportunity to cross-examine the witness.<sup>409</sup> The Court, in an opinion by Justice Scalia, recognized that the question of whether the clause applies only to witnesses at trial is not answered by the "Constitution's text ... alone."<sup>410</sup> Justice Scalia stated that "[o]ne could plausibly read 'witnesses against' a defendant to mean those who actually testify at trial, those whose statements are offered at trial, or something in-between."<sup>411</sup>

To resolve this uncertainty, Justice Scalia looked at the legal meaning of the constitutional provision. He argued that the "founding generation's immediate source of the concept" of the right to confront one's accusers "was the common law."<sup>412</sup> The common law treated witnesses who testified outside the scope of trial as subject to the right of confrontation.<sup>413</sup> Indeed, the civil law abuses at which the common law right of confrontation was aimed occurred largely outside the context of trial.<sup>414</sup> Thus, if the right to confront witnesses were understood in ordinary language, the meaning of "witness" would be at best ambiguous. But once its common law or legal meaning was considered, its meaning became clear.<sup>415</sup>

The content of confrontation rights is also vague if the term confrontation is viewed in ordinary language. But the Court instead understood the term from the perspective of the language of the law, considering its common law meaning to determine the precise content of the right:

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408. *Crawford*, 541 U.S. at 40.

409. *See id.*

410. *Id.* at 42.

411. *Id.* at 42-43 (citations omitted).

412. *Id.* at 43.

413. *See id.* at 45.

414. *See id.* at 44-47.

415. The same focus on the common law right of confrontation led the Court to conclude that the Clause only applies to testimonial statements—statements made under examination or in other solemn ways. *See id.* at 51-52. The Court found that those kinds of statements were the concern of the common law right of confrontation, not stray or casual remarks that might be used against the accused. *See id.* at 51. Thus, the Court held that the concerns of the Confrontation Clause are not coextensive with those of hearsay. *See id.* Some testimonial statements may be admissible under hearsay doctrine, but must nevertheless be excluded. *See id.*

As the English authorities above reveal, the common law in 1791 conditioned admissibility of an absent witness's examination on unavailability and a prior opportunity to cross-examine. The Sixth Amendment therefore incorporates those limitations. The numerous early state decisions applying the same test confirm that these principles were received as part of the common law in this country.<sup>416</sup>

Once again, the language of the law gave clear meaning to a term that would be vague if treated as written in ordinary language.

In *Giles*, the Court defined the circumstances in which the right of confrontation can be forfeited.<sup>417</sup> In that case, the defendant killed the witness whose testimony was to be introduced without the benefit of cross-examination.<sup>418</sup> The Court again looked at the common law and concluded that the defendant forfeited his right only if he made the witness unavailable with the design of preventing the witness's testimony.<sup>419</sup> The Court was again clear that it was bound by the legal meaning, not the ordinary meaning, of the language: "[T]he Confrontation Clause is 'most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding.'"<sup>420</sup>

Thus, the originalist jurisprudence of the Confrontation Clause cannot be accounted for by the ordinary-language view. It also illustrates several important propositions about the language of the law. The Court can choose the language of the law over ordinary language when the terms at issue appear ambiguous as between ordinary language and legal language. The *Crawford* Court's treatment of "witnesses" in the language of the law is an example of such a reading.<sup>421</sup> The Court can also read the language of the law to find a meaning not present at all in ordinary language. The *Giles* decision about when the right of confrontation is forfeited finds a meaning in the Clause present only in the language of the law, not in ordinary language.<sup>422</sup> More generally, the jurisprudence of the

416. *Id.* at 54.

417. See *Giles v. California*, 554 U.S. 353, 361-62 (2008).

418. See *id.* at 356.

419. See *id.* at 359-63.

420. See *id.* at 358 (quoting *Crawford*, 541 U.S. at 54).

421. See *Crawford*, 541 U.S. at 42-43.

422. See *Giles*, 554 U.S. at 358.

Confrontation Clause shows how the language of the law can condense information in just a few words: it is both a shorthand that allows for concision and a reference to prior rules that allows for precision.<sup>423</sup>

### B. The Executive Power Vesting Clause

One important area of originalist scholarship that relies on the language-of-the-law view is the foreign-affairs interpretation of the executive power. According to this interpretation, which has been powerfully defended by Sai Prakash and Michael Ramsey, the Executive Power Vesting Clause confers substantial foreign-affairs authority on the President.<sup>424</sup> Under the language-of-the-law view, this interpretation provides a compelling originalist account of the various powers the President enjoys, such as the power to communicate with foreign governments and to announce the foreign policy of the United States. By contrast, under the ordinary-language view, this interpretation is much weaker and may not even be possible.

The foreign-affairs interpretation of executive power employs two basic arguments that rely upon the language-of-the-law view. First, the Constitution confers on the President, not simply the specifically enumerated executive powers in Article II, but a residual executive power provided by the Executive Power Vesting Clause.<sup>425</sup> Under this view, the powers understood to be executive at the time of the Constitution were conferred on the President, except to the extent that they were given to another branch, such as Congress, or were limited, such as the power to make treaties with the advice and

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423. Gary Lawson has suggested that *Crawford* and *Giles* may be wrong to focus on the understanding of the Confrontation Clause at the time of the original Constitution. See generally Gary Lawson, *Confronting Crawford: Justice Scalia, the Judicial Method, and the Adjudicative Limits of Originalism*, 84 U. CHI. L. REV. (SPECIAL ISSUE: IN MEMORIAM: JUSTICE ANTONIN SCALIA (1936-2016)) 2265 (2017). Given that *Crawford* and *Giles* were state cases, the relevant question is the meaning of the Confrontation Clause as incorporated by the Fourteenth Amendment. But even if Professor Lawson is correct, these cases show how the Confrontation Clause as applied to the federal government requires a legal reading of the Constitution. And it may well be the case that the meaning of the incorporated provision will require consideration of the legal background of how the Clause was understood at the time of the enactment of the Fourteenth Amendment.

424. See Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 252-53 (2001).

425. See *id.* at 253.

consent of the Senate.<sup>426</sup> Second, the relevant meaning of executive power at the time included the foreign-affairs power.<sup>427</sup>

The first argument—that the Executive Power Vesting Clause confers general executive powers that are not limited by the enumerated executive powers listed in Article II<sup>428</sup>—assumes a strong textualist view of interpretation. The argument carefully compares the Vesting Clauses of Articles I and II. The Legislative Power Vesting Clause provides that “[a]ll legislative Powers *herein granted* shall be vested in a Congress of the United States.”<sup>429</sup> By contrast, the Executive Power Vesting Clause provides that “[t]he executive Power shall be vested in a President of the United States.”<sup>430</sup> Comparing these clauses shows that Congress’s legislative powers are limited by the listed powers in the Constitution, but the President’s are not.<sup>431</sup> Instead, the President possesses powers deemed executive that were not otherwise allocated by the Constitution.<sup>432</sup>

Much of the strength of this argument derives from the strong textualism that it assumes. The argument is that the omission of two words—“herein granted”—from the Executive Power Vesting Clause had enormous consequences.<sup>433</sup> Such a focus on these two words fits comfortably with the language-of-the-law view. Lawyers are known to take such details into account and to derive significant consequences from them. They often employ a strong textualism.

But a strong textualist approach is open to powerful criticism if one assumes that the Constitution is written in ordinary language. Some opponents of the foreign-affairs interpretation question whether the omission of two words can make so much difference. For example, Curtis Bradley and Martin Flaherty argue that the inclusion of these words in the Legislative Power Vesting Clause may have been accidental.<sup>434</sup> More generally, explanations such as oversight, sloppiness, or accident are often used to resist the argument

426. See *id.* at 253-54.

427. See *id.* at 252-53.

428. See *id.* at 253.

429. U.S. CONST. art. I, § 1 (emphasis added).

430. *Id.* art. II, § 1, cl. 1.

431. See Prakash & Ramsey, *supra* note 424, at 256-57.

432. See *id.*

433. See *id.*

434. See Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545, 553-54 (2004).

that minor changes in language result in significant legal consequences.<sup>435</sup>

This criticism gains its force from the ordinary-language view of the Constitution. Ordinary language, whether employed in spoken speech or in written documents, is far less likely to rely on strong inferences from minor changes in language. Such inferences even appear rare in documents (other than legal or technical ones) that are carefully drafted. Stringent textualism is simply not the common practice of ordinary language. By contrast, the stringent textualist argument for the nature of executive power becomes stronger if the Constitution is understood as written in the language of the law. Then the deliberation and careful attention to technical detail characteristic of legal language make the inferences drawn by theorists like Ramsey and Prakash much more plausible.

The second argument claims that “the executive power” in the Vesting Clause includes the foreign-affairs power.<sup>436</sup> Prakash and Ramsey implicitly rely on the language-of-the-law view here. They do not argue based on the ordinary meaning of executive power; instead, they look to the meaning of the term employed in various elite discussions of the law. Prakash and Ramsey rely on Blackstone’s *Commentaries*,<sup>437</sup> probably the leading law book on English Law at the time of the drafting of the Constitution. They also discuss legal writings by Emer de Vattel (*The Law of Nations*) and Thomas Rutherford (*Institutes of Natural Law*), as well as two other works that discuss constitutional and natural law, John Locke’s *Second Treatise* and Montesquieu’s *The Spirit of the Laws*.<sup>438</sup>

Prakash and Ramsey show that these elite, legal writers share an understanding of executive power that includes the foreign-affairs power.<sup>439</sup> Thus, it is no surprise that Prakash and Ramsey show that the attendees of the drafting and ratification conventions, as well as other newspaper participants in the debates on the Constitution—elites with knowledge of the language of the law—also understood

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435. See, e.g., CURRIE, *supra* note 375, at 177; Bradley & Flaherty, *supra* note 434, at 625-26.

436. See Prakash & Ramsey, *supra* note 424, at 252-53.

437. See *id.* at 268-69.

438. See *id.* at 266-70.

439. See *id.* at 271-72.

the executive power to include foreign-affairs authority.<sup>440</sup> By contrast, the foreign-affairs power is not found in the ordinary meaning of executive power as typically specified. For example, Webster defines “executive” as “[t]he officer, whether king, president or other chief magistrate, who superintends the execution of the laws; the person who administers the government; executive power or authority in government.”<sup>441</sup> The most straightforward understanding of this definition is that “executive” includes only those who implement the law. Under this interpretation, the foreign-affairs authority would not be included.<sup>442</sup>

Overall, then, the success of the foreign-affairs interpretation turns largely on the language-of-the-law view. Under that view, the strong textualism and the legal meaning of executive power reinforce one another to provide a persuasive account of the Executive Power Vesting Clause. Under the ordinary-language view, by contrast, that interpretation is much weaker.

440. See *id.* at 285-88, 294-95. It might be argued that authors such as Locke and Montesquieu were writing political theory and therefore not using the language of the law. But this argument is mistaken. First, Locke and Montesquieu are not properly understood as nonlegal writers. Locke wrote about the proper organization of the constitution and the natural law. See *id.* at 266-68. His understanding of these matters overlapped significantly with the constitutional law of England. Lois G. Schwoerer, *Locke, Lockean Ideas, and the Glorious Revolution*, 51 J. HIST. IDEAS 531, 547-48 (1990). Indeed, because his understandings were so influential, they worked their way into legal discussions and the law of England and the United States. See, e.g., Prakash & Ramsey, *supra* note 424, at 271-72; Schwoerer, *supra*, at 547-48. Locke also influenced Blackstone. See PAUL O. CARRESE, THE CLOAKING OF POWER: MONTESQUIEU, BLACKSTONE, AND THE RISE OF JUDICIAL ACTIVISM 126 (2003). Montesquieu also influenced legal discussion in England and America. See, e.g., *id.* at 126-27; Prakash & Ramsey, *supra* note 424, at 271-72. Indeed, Montesquieu’s famous chapter on the separation of powers was entitled “Of the Constitution of England.” 1 BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 162 (J.V. Prichard ed., Thomas Nugent trans., George Bell & Sons rev. ed. 1909) (1748).

But even if one believed that Locke and Montesquieu were not speaking the language of the law, that would not support the ordinary-language view. Locke and Montesquieu were elite political theorists and their understanding of terms, such as executive power, might reflect the specialized understandings of these elite political theorists. Such concepts might be as alien to ordinary speakers as those within the language of the law.

441. 1 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 690 (1828).

442. Cf. *id.* It is possible that other dictionaries might have a different definition or that this definition’s reference to “executive power” would have been understood as containing the foreign-affairs power. But in the absence of such evidence, this definition suggests that the ordinary meaning of executive power was restricted to the power to administer or superintend the laws.

### C. Five Other Examples of Originalist Scholarship Relying on the Language of the Law

We have provided two sustained examples of influential originalist interpretation that depend on reading the Constitution as written in the language of the law and are inconsistent with reading the Constitution as written in ordinary language. We now offer brief descriptions of important recent scholarship that supports this same proposition.

John Stinneford has provided a new interpretation of the Eighth Amendment by reading the Clause in the language of the law.<sup>443</sup> The Eighth Amendment provides, “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”<sup>444</sup> Stinneford argued that “unusual” means against “immemorial usage”—a common law concept.<sup>445</sup> The use of this legal meaning resolves any ambiguity that would exist if the term were read in ordinary language, in which “unusual” would more likely suggest evaluating a punishment against current norms rather than past norms.

Stinneford also shows that the term “cruel” is ambiguous if viewed from an ordinary language perspective, because it could apply to cruelly disproportionate punishment or to punishment done with cruel intent.<sup>446</sup> He again uses the legal history of the term to show that its legal meaning was the former.<sup>447</sup> He also uses a legal interpretive rule, *noscitur a sociis*, to argue that disproportion is the more appropriate interpretation of cruel, given that the term appears in a clause that also bans “excessive” fines and “excessive” bail, terms themselves that focus on disproportionate effect.<sup>448</sup> He shows that this interpretive rule existed at the time of enactment of the Bill of Rights.<sup>449</sup> Thus, his analysis not only turns on the language of the law, but also on the use of a specific legal interpretive

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443. Cf. Stinneford, *supra* note 35, at 1745.

444. U.S. CONST. amend. VIII.

445. See Stinneford, *supra* note 35, at 1745.

446. See John F. Stinneford, *The Original Meaning of “Cruel,”* 105 GEO. L.J. 441, 444 (2017).

447. See *id.* at 473-74.

448. See *id.* at 471-73.

449. See *id.* at 472 n.181.

rule that was applied to legal language at the time of the Clause's enactment.

Scholars have recently tried to discover the original meaning of the Due Process Clause by giving the Clause its legal meaning rather than its ordinary meaning. Like Stinneford's reading of "cruel and unusual punishment," Nathan Chapman and Michael McConnell interpret the term "due process" as placing into the Constitution certain common law understandings.<sup>450</sup> As a result, they understand it as preventing the legislature from exercising judicial power or violating common law procedural protections.<sup>451</sup> Ryan Williams adopts a different interpretation of the Due Process Clause, but he also embraces the legal meaning of the Clause. Williams maintains that the Due Process Clause changed meaning prior to ratification of the Fourteenth Amendment.<sup>452</sup> He argues that numerous antebellum judicial decisions abandoned an essentially procedural understanding and interpreted the Clause in a more substantive way.<sup>453</sup> Those legal decisions established a new legal meaning for the Clause.<sup>454</sup> Indeed, it seems unlikely that the ordinary meaning of due process would have changed during this period.

Scholars have also maintained that language that looks most ordinary is better understood as part of the language of the law. The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.<sup>455</sup>

The word "unreasonable" is sometimes used as an example of a vague word in ordinary language that renders the meaning of a

450. See Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1677 (2012).

451. *See id.*

452. See Williams, *supra* note 88, at 469-70.

453. *See id.* at 465-69.

454. *See id.* at 469.

455. U.S. CONST. amend. IV.

constitutional provision indeterminate.<sup>456</sup> But Laura Donohue has argued that the word “unreasonable” should be instead read with the legal meaning of “against the reason of the common law.”<sup>457</sup> As a result, the Fourth Amendment does not incorporate some free-floating reasonableness test, but a set of specific prohibitions of searches that violated the common law.<sup>458</sup> For instance, she argues that warrantless entry into homes except in pursuit of a fleeing felon was a paradigmatic example of a search “against the reason of the common law” and is therefore prohibited.<sup>459</sup> Under this view, the Fourth Amendment is not a provision of magnificent yet indeterminate generality, but a relatively precise catalogue of prohibitions on government action.

Other recent scholarship has suggested the language of the law is essential to deciding who can hold the highest office in the land. The Natural Born Citizen Clause provides, “No Person except a natural born Citizen ... shall be eligible [for] the Office of President.”<sup>460</sup> It is not clear that the term “natural born Citizen” would even register in ordinary language. But if it could be read in ordinary language, it would appear to require that only those born in United States territory were eligible for the presidency. Under English law, however, a person born outside of the country could still be a natural born subject if he was classified as a subject under the laws at the time of his birth.<sup>461</sup> Thus, Michael Ramsey argues that a natural born citizen is a person who was a citizen under the laws at the time of his birth.<sup>462</sup> By treating a constitutional provision as written in the language of the law, Ramsey found its meaning in legal history.

The language of the law is also at the heart of reevaluation of the meaning of the Necessary and Proper Clause.<sup>463</sup> While an ordinary

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456. Cf. Laura K. Donohue, *The Original Fourth Amendment*, 83 U. CHI. L. REV. 1181, 1190, 1192 (2016) (demonstrating unpredictability and change in the court-interpreted meaning of “unreasonable” in the Fourth Amendment).

457. *Id.* at 1192-93.

458. *See id.*

459. *Id.* at 1192, 1228-29.

460. U.S. CONST. art. II, § 1, cl. 5.

461. See Michael D. Ramsey, The Original Meaning of “Natural Born” 3 (Jan. 7, 2016) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2712485](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2712485) [<https://perma.cc/PWG5-N2UB>].

462. *See id.* at 3-4.

463. U.S. CONST. art. I, § 8, cl. 18.

reading of the Clause may make it seem vague, a recent book argues that its concepts have clear foundations in eighteenth-century Anglo-American law.<sup>464</sup> One of the authors uses fiduciary law to conclude that the incidental powers authorized by the Clause had to be less than the principal powers specifically authorized by the Constitution.<sup>465</sup> Another interesting conclusion from this analysis is that the meaning of the Clause requires that this power be used impartially and thus that the original Constitution applied some form of an equality principle to the federal government.<sup>466</sup> Whatever the validity of this interpretation, it would be impossible to derive such an interpretation from the ordinary meaning of the words.

Thus, as originalist scholarship has grown more sophisticated and serious in the past decade, academics have turned to the language of the law to understand the Constitution's meaning. These interpretations cannot be derived from ordinary meaning. This legal turn provides more evidence that the Constitution is best understood as written in the language of the law, not ordinary language.

## CONCLUSION

Understanding the nature of the language in which the Constitution is written is the first step to accurate interpretation of our fundamental law. The Constitution's language plays an essential role in constitutional interpretation. The centrality of legal interpretive rules in the language of the law suggests that original-methods originalism offers the best understanding of originalism. And the richness of the legal idiom shows that originalism has resources to dissolve interpretive issues that may seem unresolvable on an ordinary-language view. Only by getting the language of a document right can interpretation be placed on a secure foundation.

464. See *Raiders of the Lost Clause: Excavating the Buried Foundations of the Necessary and Proper Clause*, in GARY LAWSON ET AL., THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE 1, 4-5 (2010).

465. See Robert G. Natelson, *The Framing and Adoption of the Necessary and Proper Clause*, in THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE, *supra* note 464, at 84, 89-91, 119.

466. See Gary Lawson & Guy I. Seidman, *Necessity, Propriety, and Reasonableness*, in THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE, *supra* note 464, at 120, 138, 141.

