BYU Law Review

Volume 2017 | Issue 6 Article 13

August 2017

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This Article contributes to the development of an originalist methodology by making the case for an approach that employs three distinct methods, each of which serves as a basis for confirming or questioning the results reached by the other two. This approach will be called the Method of Triangulation. The three component techniques are as follows:

1. The Method of Corpus Linguistics: *The method of corpus linguistics employs large-scale data sets (corpora) that provide evidence of linguistic practice.*
2. The Originalist Method of Immersion: *The method of immersion requires researchers to immerse themselves in the linguistic and conceptual world of the authors and readers of the constitutional provision being studied.*
3. The Method of Studying the Constitutional Record: *The method of studying the record framing, ratification, and implementation requires the researcher to examine the drafting process, including sources upon which the drafters relied, debates during the drafting and ratification process, and the early history of implementation of the constitutional provision.*

These three methods each provide different inputs into the process of constitutional interpretation and construction. Because each method

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can be checked against the others, the combination of the three methods results in what can be called "triangulation."

CONTENTS

INTRODUCTION

Originalism aims to recover the original meaning of the constitutional text and then put that meaning into practice. How can this aim be achieved? A complete theory of originalist interpretation requires the articulation of an interpretive methodology—a set of

guidelines and practices that maximize the likelihood of accurately recovering the original meaning of the constitutional text: we can call a set of such guidelines and practices *originalist methodology*. Ideally, such a methodology would be objective and replicable and hence would result in intersubjective agreement on original meaning. If disagreements persist despite the application of the methods, the reasons for disagreement should be transparent and subject to assessment and debate by judges, advocates, and scholars.

This Article contributes to the development of an originalist methodology by making the case for an approach that employs three distinct methods, each of which serves as a basis for confirming or questioning the results reached by the other two. This approach will be called the *Method of Triangulation*. The three component techniques are as follows:

- *The Method of Corpus Linguistics*: The method of corpus linguistics employs large-scale data sets (corpora) that provide evidence of linguistic practice.[1]
- *The Originalist Method of Immersion*: The method of immersion requires researchers to immerse themselves in the linguistic and conceptual world of the authors and readers of the constitutional provision being studied.[2]
- *The Method of Studying the Constitutional Record*: The method of studying the record framing, ratification, and implementation requires the researcher to examine the drafting process, including sources upon which the drafters relied, debates during the drafting and ratification process, and the early history of implementation of the constitutional provision.[3]

1. *See infra* Part IV.
2. *See infra* Part V.
3. *See infra* Part VI. The record of framing, ratification, and implementation overlaps with the "legislative history" of a constitutional provision. I do not use the phrase "legislative history" for three reasons: first, that phrase is closely connected to an intentionalist approach to interpretation; second, the method that I am describing includes materials that precede the drafting process and hence come before the start of the normal definition of "legislative history;" and, third, this method includes implementation history which starts after the legislative history concludes.

These three methods each provide different inputs into the process of constitutional interpretation and construction. Because each method can be checked against the others, the combination of the three methods results in what can be called "triangulation."

Ideally, triangulation would yield consilience—agreement between each of the three methods. When consilience is obtained, the Method of Triangulation provides strong evidence of original meaning. This evidence is even stronger when the results produced by the individual methods are replicated by independent researchers. When the methods disagree or when one method produces different results when employed by different researchers, further investigation may be required or the conflict between methods and researchers may be resolved by weighing the evidence or providing an explanation that resolves an apparent disagreement.

This Article investigates the Method of Triangulation from the perspective of public meaning originalism. Part I provides a brief introduction to public meaning priginalism. Part II lays out an account of public meaning as "communicative content" and explores the role of both semantics and context in the production of the original meaning of the constitutional text. Part III briefly surveys some of the difficulties with reliance on contemporary linguistic intuitions and dictionary definitions from the relevant period. Parts IV, V, and VI provide an account of the three component tools for investigating original meaning: corpus linguistics, immersion, and the record of framing, ratification, and implementation. Part VII lays out the Method of Triangulation. Part VIII connects the Method of Triangulation to the central aim of interpretation—to provide a translation of the constitutional text from the American English of the relevant period into contemporary American English. Part IX provides a brief discussion of various problems of implementation, including the role of triangulation in the courts. The Conclusion provides a brief summary.

I. A BRIEF INTRODUCTION TO PUBLIC MEANING ORIGINALISM

"Public meaning originalism" is a member of the originalist family of constitutional theories. Almost all originalists agree on two ideas:[4]

- *The Fixation Thesis*: The linguistic meaning or communicative content of the constitutional text is fixed at the time each provision is framed and ratified.[5]
- *The Constraint Principle*: Constitutional practice, including the decision of constitutional cases and the judicial articulation of constitutional doctrines, should be constrained by the original meaning of the constitutional text.[6]

The meaning of the constitutional text is fixed, and that fixed meaning is binding on constitutional actors, including judges, presidents and other executive officials, and members of legislative bodies. The claim made by the Fixation Thesis is empirical or factual: given the way language works, the communicative content of a writing is fixed at the time of drafting. The claim made by the Constraint Principle is normative: as a matter of political morality, constitutional actors ought to be bound by the fixed original meaning of the constitutional text.

Although originalists almost all agree on fixation and constraint, they disagree on other matters. One disagreement concerns the nature of original meaning. The range of views on this question include the following:

- *Public Meaning Originalism*: The original meaning of the constitutional text is the meaning that the text had for "We the People," the citizens who constituted the United States.

4. For a collection of sources supporting the claim that originalists agree on fixation and constraint, see Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 6 n.28 (2015) [hereinafter Solum, *The Fixation Thesis*].

5. *See id.*

6. Lawrence B. Solum, The Constraint Principle: Original Meaning and Constitutional Practice (Mar. 16, 2017) (unpublished manuscript) (available online at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2940215).

- *Original Intentions Originalism*: The original meaning of the constitutional text is the meaning that the framers intended to convey.
- *Ratifiers' Understandings Originalism*: The original meaning of the constitutional text is the meaning conveyed to the ratifiers of each provision.
- *Original Methods Originalism*: The original meaning of the constitutional text is the meaning produced by application of the original methods of constitutional interpretation and construction to the text.
- *Original Law Originalism*: The law in effect at the time the Constitution was ratified is legally binding unless it was changed by methods authorized by the original law.

Although different versions of originalism may produce different outcomes at the margins, it seems likely that they will converge when applied to most of the constitutional text. Because the framers intended to communicate to the public and the ratifiers were members of the public, the first three forms of originalism are likely to produce identical results except in cases where there was a failure of constitutional communication. The versions of originalism that focus on original methods and original law may diverge more substantially, because these theories do not accept the idea that the constitutional text was written to be accessible to "We the People."[7]

Because of the difference between and among originalists, we can distinguish between two modes of originalist theory and practice. The first mode is "sectarian": sectarian originalism adopts a particular version of originalism, for example, public meaning originalism. The second mode is "ecumenical": ecumenical originalism aims to develop theories and engage in practice that is neutral on the questions about which originalists disagree. This Article is primarily an exercise in sectarian originalism, argued from

7. The relationship between public meaning originalism and original methods requires extended discussion, but the divergence between these approaches should not be exaggerated. Public meaning originalism recognizes that some provisions of the Constitution have technical legal meanings; for this reason, the cases where original methods and original law provide the most distinctive meanings can be incorporated via the notion of a publicly accessible meaning and the division of linguistic labor.

the perspective of public meaning originalism; the case for the claim that public meaning originalism offers the best theory of originalism is not made here but is the subject of work in progress.[8] Nonetheless, the Method of Triangulation will be relevant to the recovery of the intentions of the framers, the understandings of the ratifiers, or any other form of original meaning. Corpus linguistics, immersion, and the record of framing, ratification, and implementation—all of these constituent methods can be applied to recovery of original meanings as conceived differently by different versions of originalism.

Some originalists embrace the interpretation-construction distinction,[9] which can be stated as follows:

- *Interpretation*: Constitutional interpretation is the activity that discovers the communicative content of the constitutional text.
- *Construction*: Constitutional construction is the activity that determines the legal effect of the constitutional text, including the decision of constitutional cases and the legal content of constitutional doctrines.

Although the interpretation-construction distinction can and should be embraced by all originalists, some originalists may prefer to use the terms *interpretation* and *construction* synonymously, using other vocabulary to describe these two distinct concepts.

Originalists differ on other questions, including the extent to which the constitutional text is underdeterminate. Some originalists believe that at least some provisions of the constitutional text create substantial "construction zones," because these provisions are vague or open textured.[10] Other originalists believe that the text is almost fully determinate; such determinacy might result from application of the original methods of constitutional interpretation and

8. Lawrence B. Solum, The Public Meaning Thesis (Nov. 28, 2017) (unpublished manuscript) (on file with author) [hereinafter Solum, The Public Meaning Thesis].

9. Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J. L. & PUB. POL'Y 65 (2011); Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95 (2010).

10. Other construction zones may be created if the text is irreducibly ambiguous or if the text has gaps or contradictions.

construction or it might result from the application of default rules, for example, a rule that requires deference to democratic institutions when the text is not clear.[11]

II. ORIGINAL PUBLIC MEANING AS PUBLICLY ACCESSIBLE COMMUNICATIVE CONTENT

A complete originalist theory must offer a theory and methodology of both interpretation and construction, but this Article is concerned with the methods by which constitutional actors and scholars can discover the original public meaning of the constitutional text. In other words, the Method of Triangulation provides guidance for originalist constitutional interpretation. Originalists must also provide an originalist account of constitutional construction, but that topic is outside the scope of this Article.[12]

This Part provides a brief summary of the theory of meaning adopted by public meaning originalism. The summary is brief and incomplete because a full account would require a deep dive into theoretical linguistics and the philosophy of language. The aim here is simply to lay out the assumptions upon which the methodology rests—not to provide the arguments or authority for those assumptions.[13]

A. The Situation of Constitutional Communication

The basic premise of public meaning originalism is that the authors of each constitutional provision intended to communicate content to "We the People," the body of citizens that constitute the polity of the United States. In other words, the constitutional text was intended to be accessible to the public.

11. *Cf.* John O. McGinnis & Michael B. Rappaport, *The Abstract Meaning Fallacy*, 2012 U. ILL. L. REV. 737 (arguing for the relative determinacy of the constitutional text and against the claim that the meaning of many constitutional provisions is general and abstract).

12. *See* Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453 (2013) (discussing originalist approaches to constitutional construction) [hereinafter Solum, *Constitutional Construction*].

13. In due course, public meaning originalists must provide justifications for their account of public meaning. My own version of such a justification will be provided in Solum, The Public Meaning Thesis, *supra* note 8.

To achieve this goal, the authors of the text were required to write in a way that would enable public comprehension of the text. Comprehension of the text by the public requires what we can call "public accessibility"—the communicative content of the text must be accessible by citizens, the group that constitutes the polity and hence the relevant segment of the population. A text has "unmediated public accessibility" if it can be read and understood by members of the public with reasonable effort. If the text employs technical language (terms of art), it may nonetheless be accessible. The accessibility of clauses that employ the specialized vocabulary of a linguistic subcommunity (such as lawyers) requires that two conditions be satisfied: (1) the technical language must be recognizable as such, and (2) the technical meaning must be accessible using reasonable effort. If these two conditions are satisfied, it results in what can be called "mediated public accessibility."[14]

The goal of conveying the communicative content of the constitutional text to "We the People" is achieved if all of the constitutional text satisfies the conditions for mediated or unmediated public accessibility. Notice that public accessibility does not require that each and every member of the public read and understand the constitutional text. When a particular constitutional provision is proposed, debated, and ratified, it is likely only a fraction of the public will actually read the text. Other members of the public may read secondary accounts, and those accounts may quote and explain the meaning of some of the provisions. Just as a highway is publicly accessible, even if some members of the public never use it, so too, the constitutional text is publicly accessible, even if some members of the public never read and comprehend it.

To achieve the goal of communicating constitutional content to the public via the text, the authors of each constitutional provision necessarily had to use the tools at hand, the transmission of meaning via a text in the context of constitutional communication. Simplifying, we can say that the constitutional text conveys meaning via two sets of tools: (1) *semantic tools*, including the conventional

14. Some citizens were not native speakers of English and some of those citizens may not have been sufficiently proficient in English to read and comprehend the Constitution.

semantic meanings of the words and phrases the regularities of syntax, grammar, and punctuation that allow words and phrases to be combined into meaningful units, and (2) *contextual tools*, including the ability to disambiguate words and phrases with multiple meanings and to enrich the semantic content of the text.

B. The Role of Conventional Semantic Meaning

Words and phrases have conventional semantic meanings, determined by patterns of usage. Lexicographers report these conventional semantic meanings in dictionary definitions, but such definitions are secondary evidence of patterns of usage.[15] Given the assumption that the constitutional text is intended to convey content to the public, the authors of the text were required to employ publicly accessible semantics if they were to achieve the goal of conveying meaning to the public.

The most basic component of publicly accessible semantics is what lawyers call "literal meaning"—the meaning that a text would have if interpreted to have only that meaning yielded by the conventional semantic meanings of the words and phrases as combined by syntax, grammar, and punctuation. Literal meaning is acontextual; it does not take the role of context in the production of communicative content into account. One can imagine communicative situations in which the context of communication is very thin, and hence, the author of a text would be required to rely almost entirely on semantics. For example, the author of a "message in a bottle" would know that the reader of the message would have very little information about the context in which the message was written. If the message itself did not provide information about the context of drafting, then the author would be required to rely almost entirely on literal meanings.

Some words and phrases have conventional semantic meanings that are widely or even almost universally shared within a linguistic community. But there are also "terms of art," words or phrases that have meanings within a linguistic subcommunity. For example,

15. *See generally* BO SVENSÉN, A HANDBOOK OF LEXICOGRAPHY: THE THEORY AND PRACTICE OF DICTIONARY-MAKING (2009) (describing the methods of lexicography).

Article I, Section VIII grants Congress power to "grant Letters of Marque and Reprisal,"[16] but it may well be that the phrase "Letters of Marque and Reprisal" would have been familiar to maritime lawyers, sea captains, and those involved in maritime commerce, but not to members of the general public. Terms of art involve a division of linguistic labor; usage by a linguistic subcommunity determines the conventional semantic meanings of specialized or technical vocabulary.[17] Public meaning originalism can account for terms of art via the notion of publicly accessible meaning;[18] more precisely, terms of art are publicly accessible via the mechanisms identified by the notion of mediated public meaning. For example, a farmer in Massachusetts who read the proposed Constitution of the United States might realize that "Letters of Marque and Reprisal" was a technical term and consult an expert (an admiralty lawyer or sea captain) about its meaning.

C. The Role of Context

The full communicative content of the constitutional text is not reducible to its literal meaning. This is because of the role that context plays in clarifying and enriching the communicative content conveyed by both oral and written communication. In the philosophy of language and theoretical linguistics, the role of context is described as "pragmatic" and "pragmatics" is contrasted to "semantics."[19] In the discussion that follows, I will use "context" and "contextual" in order to avoid confusion of "linguistic pragmatics"

16. U.S. CONST. art. I, § 8, cl. 11.

17. *See* Lawrence B. Solum, *Incorporation and Originalist Theory*, 18 J. CONTEMP. LEGAL ISSUES 409, 429–31 (2009). The idea of a division of linguistic labor is usually attributed to Hilary Putnam. *See* Hilary Putnam, *The Meaning of 'Meaning'*, *in* 7 LANGUAGE, MIND AND KNOWLEDGE (Keith Gunderson ed., 1975), *reprinted in* 2 MIND, LANGUAGE AND REALITY 215, 227 (1st ed. 1975); Robert Ware, *The Division of Linguistic Labor and Speaker Competence*, 34 PHIL. STUD. 37, 37 (1978).

18. In addition, there are words and phrases that are ambiguous with both public meanings and technical meanings. For example, the phrase "declare war" may have both a generally understood meaning that is relatively thin and thicker more technical meanings. I am grateful to William Treanor for this point. The question as to how public meaning originalism should handle cases of "public-meaning versus technical meaning ambiguity" is a difficult one and is outside the scope of this Article.

19. *See generally* ALAN CRUSE, MEANING IN LANGUAGE: AN INTRODUCTION TO SEMANTICS AND PRAGMATICS (3d. ed. 2011).

with "legal pragmatism," which is an unrelated position in general legal theory.[20]

1. Contextual disambiguation

The first role that context plays in communication relates to ambiguity. The word *ambiguity* is sometimes used to mean something like "the absence of clarity," but it also has a more precise and technical meaning that contrasts *ambiguity* with *vagueness* and *open texture*. In this technical sense, the word *ambiguity* refers to the multiplicity of possible meanings.[21] Thus, the word *cool* has a sense related to temperature (as in, "the room is cool"), another sense related to personal style (as in, "Miles Davis was cool"), and a third sense relating to temperament (as in, "he kept his cool"). Acontextually, the word *cool* is ambiguous, but in each of the supplied examples, *cool* is disambiguated by context and readers are easily able to glean the relevant sense.

Many of the words and phrases that make up the constitutional text would be ambiguous if they were read acontextually, but once context is taken into account, the meaning becomes clear, as in the following examples:

- Acontextually, the word *Senate* in Article I might refer to the Roman Senate, but in context, it clearly refers to the United States Senate as one of the two houses of Congress.
- Acontextually, the word *State* as used in many constitutional provisions might refer to the condition of some thing or person, but in context it clearly refers to the constituent political units of the United States, for example, Massachusetts, New York, and Virginia.
- Acontextually, the word *arms* as used in the Second Amendment might refer to human appendages, but in context it clearly refers to weapons that can be carried.

20. *See generally* RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY (2003).

21. Sometimes the word *polysemy* is used to refer to what I call "ambiguity." On the relationship of ambiguity, polysemy, and vagueness, see David Tuggy, *Ambiguity, Polysemy, and Vagueness*, 4 COGNITIVE LINGUISTICS 273 (1993).

These examples are all obvious, and may seem trivial, but their very obviousness demonstrates the power of contextual disambiguation.

2. Contextual (pragmatic) enrichment

Pragmatic or contextual enrichment is the mechanism by which authors can convey content to readers without making that content explicit. The mechanisms of contextual enrichment are intuitively accessible to competent language users. Consider four forms of contextual enrichment.

a. Implicature. The word *implicature* was coined by Paul Grice to refer to the ability of speakers to convey content without explicit statement.[22] For example, a law professor might write a letter for a student applying for a judicial clerkship that said only the following:

> I recommend Alice to you. She attended class regularly and was always on time.

This letter makes no explicit negative statements about Alice; the literal meaning is entirely positive. But in the context of a letter of recommendation, these statements are quite negative because they imply that the best that can be said for Alice does not include the attributes required of an excellent judicial clerk, including brilliance, analytic ability, diligence, and so forth. If the best that can be said about Alice is that she was on time and did not miss class, the implicature is that the recommender does not believe that she would be a good choice for the position of law clerk.

It is not clear that the United States Constitution contains any implicatures of the kind just identified. Sometimes the word *implicature* is used in a broad sense that would include phenomenon that are discussed below as impliciture or presupposition and the Constitution does include *implicatures* in this broad sense of the word.

b. Impliciture. The word *impliciture* was coined by Kent Bach to refer to a form of contextual enrichment that is distinct from "implicature."[23] The word *ellipses* is sometimes used to refer to the

22. *See* Wayne Davis, *Implicature*, STAN. ENCYCLOPEDIA PHIL., http://plato.stanford.edu/entries/implicature/ (last updated June 24, 2014).

23. Kent Bach, *Conversational Impliciture*, 9 MIND & LANGUAGE 124 (1994).

same phenomenon. The following examples are given by Bach, with the impliciture made explicit in the bracketed text:

- Jack and Jill are married [to each other].
- Bill insulted his boss and [as a result] got fired.
- Nina has had enough [pasta to eat].[24]

Thus, if someone says, "Bill insulted his boss and got fired," the implicit [as a result] is unstated but nonetheless communicated to the audience. The audience infers that the speaker intended to connect the two events causally.

One example of constitutional impliciture is contained in Article I, Section 9, which states, "No Bill of Attainder or ex post facto Law shall be passed,"[25] with [by Congress] as an impliciture. Read acontextually, the Ex Post Facto Clause might prohibit the passage of such laws by state or foreign governments, but the surrounding context of Section 9 makes it clear that the prohibition applies only to Congress. Section 10 uses the phrase "[n]o state shall"[26] to articulate restrictions on the several states. Section 9 omits explicit identification of the entity to which several of its restrictions apply, but its placement in Article I, which concerns Congress,[27] and the juxtaposition with Section 10, operate to create the impliciture that several of the Section 10 restrictions apply only to Congress.

c. Presupposition. Another form of contextual enrichment is called "presupposition." Presupposition operates to convey communicative content that is not explicitly stated but that is presupposed by what is said in a particular context.[28] Consider the following examples:

- Utterance: "Cass is no longer the head of OIRA." Presupposition: "Cass was once the head of OIRA."

24. Kent Bach, Impliciture vs. Explicature: What's the Difference? (unpublished manuscript) (available online at http://userwww.sfsu.edu/kbach/Bach.ImplExpl.pdf).

25. U.S. CONST. art. I, § 9, cl. 3.

26. *Id.* art. I, § 10.

27. *See id.* art. I, § 1.

28. *See, e.g.*, Philippe Schlenker, *Be Articulate: A Pragmatic Theory of Presupposition Projection*, 34 THEORETICAL LINGUISTICS 157 (2008); Bas C. van Fraassen, *Presupposition, Implication, and Self-Reference*, 65 J. PHIL. 136 (1968); David I. Beaver & Bart Geurts, *Presupposition*, STAN. ENCYCLOPEDIA PHIL. (April 1, 2011), http://plato.stanford.edu/entries/presupposition/.

- Utterance: "Adrian should not eat meat." Presupposition: "Adrian does eat meat."
- Utterance: "Lisa's wife is pregnant." Presupposition: "Lisa has a wife."

In each of the examples, the presupposed content is communicated by the utterance—even though it is not stated explicitly.

Presuppositions take various forms. We might distinguish between "conversational presuppositions" (also called "speaker presuppositions" or "pragmatic presuppositions") and "conventional presuppositions" (or "semantic presuppositions"). Conventional presuppositions are triggered by particular words or phrases; in the first example above, the phrase "no longer" triggers the presupposition that Cass was once the head of OIRA. For our purposes, we can put these technicalities to the side.

The constitutional text may have a variety of presuppositions. The most famous example is the Ninth Amendment, which reads: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[29]

The text does not explicitly state that there are rights that are retained by the people, but because it would make no sense to prohibit constructions that deny or disparage nonexistent rights, the existence of retained rights is a presupposition communicated by the Ninth Amendment.

d. Modulation. Finally, consider what is sometimes called *modulation*. The intuitive idea is that, in context, a conventional semantic meaning can be adjusted or modulated to fit the context—essentially a new meaning is created (sometimes on the spot) so that an old word is used in a new way. As Francois Recanati observes,

> Sense modulation is essential to speech, because we use a (more or less) fixed stock of lexemes to talk about an indefinite variety of things, situations and experiences. Through the interaction between the context-independent meanings of our words and the particulars of the situation talked about, contextualized, modulated senses emerge, appropriate to the situation at hand.[30]

29. U.S. CONST. amend. IX.
30. FRANCOIS RECANATI, LITERAL MEANING 131 (2004) (footnote omitted).

In ordinary speech, modulations may be "one-offs," used on a single occasion. But in the law, modulation can create a new technical meaning for a word that also has an ordinary sense.

The Constitution contains a variety of modulations—special purpose constitutional meanings that can be understood by paying attention to context. One example is (or hypothetically may be) the Recess Appointments Clause, which uses the word *recess*.[31] Read acontextually, a recess might be any break in the business of the Senate—even a lunch break. But in context, *recess* is best read as a modulation, the meaning of which plays off the complementary term *session*. The relevant sense of *recess* is a modulation of the conventional semantic meaning; it is limited to the break between sessions of the Senate.

Finally, there is a residual category of "free enrichments" that do not fit into any of these categories. For present purposes, the category of free enrichment is set aside.[32]

D. Distinguishing Expected Applications from Original Meaning

Original public meaning should be distinguished from what have been called "original expected application[s]."[33] The meaning of a text is one thing; expectations about how the text will or should be applied to particular cases or issues is another. Thus, the framers and ratifiers of the Second Amendment may have expected that the "right to . . . bear Arms" would be applied to muskets and flintlocks, but the meaning of *arms* is more general and would encompass modern weapons.[34] Public meaning originalism affirms the Constraint Principle with respect to the public meaning of the constitutional text and not the application expectations of the framers, ratifiers, or public at the time a constitutional provision went into effect.

Although original expected applications do not *constitute* the original meaning of the constitutional text, they are nonetheless

31. U.S. CONST. art. II, § 2, cl. 3.

32. NICHOLAS ALLOTT, KEY TERMS IN PRAGMATICS 80 (2010).

33. Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 295–26 (2007).

34. U.S. CONST. amend. II.

relevant to constitutional interpretation because they can provide *evidence* of the original public meaning. Thus, if the framers believed that muskets and flintlocks were "arms" within the meaning of the Second Amendment, that fact is evidence that favors any theory of the meaning of *arms* that encompasses muskets and flintlocks and is evidence that disfavors any interpretation that would exclude them.

Application expectations may frequently be important or even decisive evidence favoring or disfavoring a hypothesis regarding original meaning. For example, the hypothesis that *arms* in the Second Amendment refers to limbs attached to the upper body of humans would be inconsistent with evidence that the framers of that provision expected it to apply to muskets and flintlock pistols—which are clearly not limbs.

In addition, there are cases where application expectations are incorrect and hence where evidence of the expectations does not provide good evidence of meaning. The clearest example of this kind of case would be the situation where the expectation was based on a false belief about the facts. To take a very simple example, if the members of the Philadelphia Convention had a false belief about the age of a potential presidential candidate, such that the individual would not have been eligible for election to the presidency in 1782 (because the individual was actually thirty-two and not thirty-six), the expectation that the Article II requirement that the President be thirty-five years of age would be satisfied does not provide evidence that the phrase "the age of thirty five years" had some weird meaning such that *thirty-five years* actually meant "thirty two years."[35] The factual error fully explains the erroneous application belief.

III. SOME PROBLEMS WITH LINGUISTIC INTUITIONS AND DICTIONARIES

Contemporary readers of the Constitution have pre-reflective beliefs about the meanings of the words and phrases that make up the text; these beliefs are called "linguistic intuitions." Similarly, the words in the constitutional text are defined in dictionaries, both

35. *Id.* art. II, § 1, cl. 5.

contemporary dictionaries and dictionaries from the historical periods in which the various provisions of the text were authored. We can imagine a naïve approach to originalist research that relied on contemporary linguistic intuitions and various dictionaries as the primary method for discovering the conventional semantic meanings of the words and phrases that make up the constitutional text.[36]

But an intuition-and-dictionary–based methodology for discovering the meaning of the constitutional text is problematic for a variety of reasons. Before we turn to the constituent elements of the Method of Triangulation, we can identify some of the problems with the intuition-and-dictionary approach.

Contemporary linguistic intuitions work well in determining the conventional semantic meanings of words and phrases in a text when the individual who is doing the interpreting has intuitions that are based on patterns of usage observed during a period that coincides with the writing of the text. Thus, the linguistic intuitions of an adult native speaker of American English in 2017 are likely to be an accurate guide to a text written in 2017 and several years before or after that date. But in the case of the constitutional text, many provisions are quite old. The most recent provisions to be drafted are the Twenty-Third through the Twenty-Sixth Amendments—which were proposed between 1960 and 1971. These four amendments were drafted at a time when many, but not all, contemporary interpreters were alive. The Twenty-Second Amendment was proposed in 1947—when the oldest serving Justice (as of this writing), Ruth Bader Ginsburg, was about fourteen years old. All the remaining provisions of the Constitution were drafted before any currently serving Justice was born. Of course, many lawyers, judges, and legal scholars were born after 1971. Justice Gorsuch was only four years of age when the Twenty-Sixth Amendment was proposed.

Because of the phenomenon of linguistic drift (or semantic shift), contemporary linguistic intuitions are not a reliable guide to the conventional semantic meanings of older provisions of the constitutional text. Consider the following examples of words or

36. The use of contemporary meaning is not necessarily naïve. Judges might deliberately substitute contemporary meanings for original meanings in order to amend the Constitution through linguistic subterfuge.

phrases in the constitutional text where contemporary linguistic intuitions would be a poor guide to the original meaning:

- *Domestic violence* in Article IV: The contemporary meaning of the phrase is something like "violence within the family, including spousal abuse, child abuse, and elder abuse," but the original meaning was likely "violence within a state, including riots, insurrections, and rebellions."[37]
- *Dollar* in the Seventh Amendment: The contemporary meaning of the word is the Federal Reserve Note issued by the United States Treasury, but the original meaning was likely the Spanish silver dollar, understood as a unit of hard currency defined by silver content.[38]
- *Science* in Article I: The contemporary meaning of the word is usually limited to the so-called hard sciences such as physics, chemistry, and biology, but the original meaning was systematic knowledge and would have included the humanities, including history, philosophy, and theology.[39]
- The number characteristic of verbs following the phrase *United States* in many clauses: The contemporary punctuation practice suggests that the use of the plural form

37. *See* Solum, *The Fixation Thesis*, *supra* note 4, at 16 ("The contemporary semantic meaning of 'domestic violence' is '"intimate partner abuse,' 'battering,' or 'wife-beating,'" and it is understood to be 'physical, sexual, psychological, and economic abuse that takes place in the context of an intimate relationship, including marriage.'").

38. Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269, 281–82 (2017) ("[A]n otherwise-excellent student note on the Seventh Amendment's 'Twenty Dollars Clause' makes the mistaken assumption that the word 'dollar' refers to the contemporary Federal Reserve note, when in fact the word 'dollar' almost certainly referred to the Spanish silver dollar weighing 416 grains and possibly other dollars with closely approximate silver content." (citations omitted)).

39. *See* Lawrence B. Solum, *Congress's Power to Promote the Progress of Science:* Eldred v. Ashcroft, 36 LOY. L.A. L. REV. 1, 51 (2002) ("The tendency of modern usage is to associate the term 'science' with the natural sciences, such as chemistry, physics, and biology. These are understood as the 'hard sciences' and as the exemplary or paradigm cases of science. Even a systematic and formal body of knowledge, such as geometry, mathematics, or symbolic logic, might be thought to be science in only a loose or derivative sense. To the extent this is a feature of modern usage, however, it does not conform to the understanding of the term 'science' in the founding era. Rather, there is general agreement that science was usually understood in a broader sense, so as to include knowledge, especially systematic or grounded knowledge of enduring value. Thus, the meanings of 'learning' and 'science' would be closely related." (footnotes omitted)).

> of verbs means that the *United States* refers to a collection of states rather than one nation, but the eighteenth-century grammar frequently used plural forms after singular nouns ending in the letter *s*.[40] In this example, it is grammar rather than semantics that has changed.[41]

Because semantics, syntax, and punctuation change over time, contemporary linguistic intuitions are not a reliable guide to the meaning of older texts.

This problem also exists for constitutional phrases of art. For example, the phrase "freedom of the press" has a contemporary meaning for lawyers that is shaped by the decisional law of the U.S. Supreme Court, but there is at least a strong possibility that the original meaning was a much narrower technical meaning that restricted the freedom of the press to a rule against the licensing of printing presses and prior restraints.[42]

There is another obvious problem with linguistic intuitions. Scholars and judges may form the intention to be objective and neutral when they consult their linguistic intuitions about the meaning of constitutional words and phrases, but they may have strong beliefs about what the constitutional language "ought to mean." The influence of these beliefs on their intuitions may not be fully transparent to the interpreters themselves; in other words, they may not recognize the role of their own biases and preconceptions. Those who engage in the interpretation of legal texts may engage in

40. William Michael Treanor, *Taking Text Too Seriously: Modern Textualism, Original Meaning, and the Case of Amar's* Bill of Rights, 106 MICH. L. REV. 487, 489 (2007) ("Justice Thomas, Professor Amar, and others have assigned critical interpretive weight to the fact that, '[i]n the Constitution, after all, "the United States" is consistently a plural noun.' This grammar would appear to suggest that the Constitution reflects the view that the United States is a collection of states rather than one nation. What this reading misses, however, is the fact that in the late eighteenth century, nouns ending in the letter s were commonly assigned plural verbs, regardless of whether or not the noun itself was plural." (footnote omitted)).

41. I am grateful to William Treanor for this example.

42. Discussion of the relevant history is far beyond the scope of this article. *See generally* David Jenkins, *The Sedition Act of 1798 and the Incorporation of Seditious Libel into First Amendment Jurisprudence*, 45 AM. J. LEGAL HIST. 154, 160 (2001) ("Until the last decade of the seventeenth century, both Parliament and English kings relied upon licensing to control the press.").

"motivated reasoning."[43] Lawyers are required to make the best reasonable case for the interpretation that favors their client, and they are subject to the same problems of bias and preconception that affect judges and scholars.

Some of the problems with dictionaries are different from and some are related to the problems with linguistic intuitions. Dictionaries are not written to influence the outcome of constitutional disputes and hence are unlikely to suffer from the motivated reasoning problem. Contemporary dictionaries are primarily intended to report current usage—although the *Oxford English Dictionary* provides extensive examples of usage with dates, which sometimes can be used to reconstruct the meanings that existed at the time a particular constitutional provision was drafted.

What about period dictionaries? There are two dictionaries that are used with some frequency in reconstructing the meaning of the early provisions of the Constitution—the unamended text and the first twelve amendments. The first of these is *A Dictionary of the English Language*, which was authored by Samuel Johnson. Johnson did the work on his dictionary by himself over a nine-year period; his dictionary was published in 1755.[44] Johnson's dictionary reports English usage in Great Britain from a period that ended thirty-two years before the drafting of the United States Constitution in 1787.

The second dictionary is Noah Webster's 1828 *American Dictionary of the English Language*. Webster borrowed from Johnson; he completed his dictionary over an eighteen-year period.[45] Although Webster's dictionary reports American English, it was published thirty-eight years after the Philadelphia Convention.

The ideal dictionary would report American usage in the late eighteenth century, but neither Samuel Johnson's nor Noah Webster's hits this precise target. Nonetheless, both dictionaries provide some relevant evidence of conventional semantic meanings

43. On the general idea of motivated reasoning, see Milton Lodge & Charles Taber, *Three Steps Toward a Theory of Motivated Political Reasoning*, *in* ELEMENTS OF REASON: COGNITION, CHOICE, AND THE BOUNDS OF RATIONALITY (Arthur Lupia, Mathew D. McCubbins, & Samuel L. Popkin eds., 2000).

44. *See* W. JACKSON BATE, SAMUEL JOHNSON 240–60 (1975).

45. *See* JOSHUA KENDALL, THE FORGOTTEN FOUNDING FATHER: NOAH WEBSTER'S OBSESSION AND THE CREATION OF AN AMERICAN CULTURE (2010).

of the early provisions of the constitutional text. Neither dictionary is perfect. Either dictionary could misreport the conventional semantic meanings of its era. Either dictionary could omit a meaning that was the relevant public meaning of a constitutional provision once context is taken into account. Neither dictionary provides primary evidence of the patterns of usage that constitute conventional semantic meaning.

Both contemporary linguistic intuitions and dictionaries have a role to play in originalist research, but there are good reasons to search for better methods. In the three Parts that follow, this Article investigates corpus linguistics, immersion, and the record of framing, ratification, and implementation as constituent elements of the Method of Triangulation. Once that investigation is complete, we will turn to the Method of Triangulation itself.

IV. CORPUS LINGUISTICS

The core of the method of corpus linguistics is the use of data sets (corpora) and search engines to identify primary evidence of the patterns of usage. After describing corpus methods, this Part will discuss corpus lexicography, the use of corpus linguistics in identifying historical patterns of usage that constitute conventional semantic meanings. A second use of corpus linguistics involves the identification of collocates (neighboring words); this technique provides a tool that can aid the process of contextual disambiguation. Finally, the relationship between corpus linguistics and contextual enrichment will be briefly discussed.

A. A Brief Description

Corpus linguistics is the name for an approach to investigating linguistic phenomena. The approach involves large datasets, called "corpora," that can be searched using a variety of techniques including key word in context (KWIC) searches and searches that identify "collocates" (words used in proximity with the search term). Most dictionaries are compiled using very selective and limited

datasets,[46] but corpus lexicography allows the investigation of word meaning using large datasets that can represent a wide variety of sources.

Recently, corpus lexicography has begun to play a role in the interpretation of legal texts. Following Stephen Mouritsen's important article, *The Dictionary Is Not a Fortress: Definitional Fallacies and a Corpus-Based Approach to Plain Meaning*,[47] the pioneering judicial opinion was a concurrence by Associate Chief Justice Lee of the Utah Supreme Court.[48] Corpus lexicography was utilized by the Supreme Court of Michigan in *People v. Harris*.[49] There is a growing body of legal scholarship exploring and using corpus techniques,[50] including an important forthcoming article co-authored by Justice Lee and Stephen Mouritsen.[51] The use of corpus linguistics in originalist research is currently limited with respect to the unamended Constitution and the first twelve amendments. The Corpus of the Founding Era American English (COFEA) is not yet available, and the Corpus of Historical American English (COHA) begins with 1810. When COFEA becomes available, there will be

46. For a description of data collection and data selection in contemporary lexicography, see SVENSÉN, *supra* note 15, at 39–75. For a discussion of a corpus-based approach to lexicography, see VINCENT B. Y. OOI, COMPUTER CORPUS LEXICOGRAPHY (1998).

47. Stephen C. Mouritsen, *The Dictionary Is Not a Fortress: Definitional Fallacies and a Corpus-Based Approach to Plain Meaning*, 2010 BYU L. REV. 1915.

48. State v. Rasabout, 2015 UT 72, ¶ 40, 356 P.3d 1258, 1271 (Lee, J., concurring in part and concurring in the judgment); *see also* Recent Case, State v. Rasabout, 129 HARV. L. REV. 1468 (2016).

49. People v. Harris, 885 N.W.2d 832, 838–39 (Mich. 2016) ("Keeping in mind that we must interpret the word 'information' as used in the DLEOA 'according to the common and approved usage of the language,' we apply a tool that can aid in the discovery of 'how particular words or phrases are actually used in written or spoken English.' The Corpus of Contemporary American English (COCA) allows users to 'analyze[] ordinary meaning through a method that is quantifiable and verifiable.'" (footnotes omitted)).

50. *See, e.g.*, D. Carolina Núñez, *War of the Words: Aliens, Immigrants, Citizens, and the Language of Exclusion*, 2013 BYU L. REV. 1517; Daniel Ortner, *The Merciful Corpus: The Rule of Lenity, Ambiguity and Corpus Linguistics*, 25 B.U. PUB. INT. L.J. 101 (2016); James C Phillips, Daniel M. Ortner & Thomas R. Lee, *Corpus Linguistics & Original Public Meaning: A New Tool to Make Originalism More Empirical*, 126 YALE L.J. F. 21 (2016); Lawrence M. Solan, *Can Corpus Linguistics Help Make Originalism Scientific?*, 126 YALE L.J. F. 57 (2016); Lee J. Strang, *How Big Data Can Increase Originalism's Methodological Rigor: Using Corpus Linguistics to Reveal Original Language Conventions*, 50 U.C. DAVIS L. REV. 1181 (2017).

51. Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. (forthcoming 2018).

corpora with coverage corresponding to the relevant historical period for all the provisions of the United States Constitution.[52]

B. Corpus Lexicography and Conventional Semantic Meaning

The primary use of corpus linguistics in the investigation of original public meaning is likely to be in connection with the identification of the relevant senses or meanings of the words and phrases that appear in the constitutional text. It seems likely that many of the words and phrases had meanings at the time of drafting that correspond to their contemporary meanings (their conventional semantic meanings in twenty-first century American English). Thus, it seems extremely unlikely that numerical words, as in *two senators*, have undergone significant linguistic drift. In other cases, the relevant sense of the word may not be available to contemporary linguistic intuitions because of linguistic drift or semantic shift. For these cases, the application of corpus techniques may reveal the relevant meaning.

For example, a corpus lexicography approach to the meaning of the word *science* in late eighteenth century American English would begin by identifying relevant corpora. The best corpus for this purpose will be COFEA, which is currently under development at Brigham Young University Law School.[53] When COFEA becomes available, a collocates search using the phrase *science of* could be conducted. Results of the search could then be coded (using blind coding) as consistent or inconsistent with various candidate meanings. The outcome of this process would be a set of candidate meanings—different senses of the word *science* that might have been employed in the Intellectual Property Clause of Article I, Section 8.

For illustrative purposes, we can conduct the search in COHA (which targets a later historical period). The most common collocates, include the following, ranked one through twenty in terms of frequency:

52. *See* Law & Corpus Linguistics Conference, BYU L., http://lawcorpus.byu.edu/ (last visited Jan. 23, 2018) ("BYU Law School is currently developing the Corpus of Founding Era American English (COFEA).").

53. *Id.*

Table 1: Collocates for *science of*

Rank	**Collocate of *science of***	**Frequency**
1	Government	142
2	Economy	105
3	Many	71
4	Life	65
5	Language	65
6	War	62
7	Language	61
8	Life	59
9	Politics	57
10	Art	54
11	Law	54
12	Chemistry	53
13	History	43
14	Education	42
15	Astronomy	41
16	Religion	40
17	Society	37
18	Psychology	36
19	Theology	34
20	Physics	33

Although this "toy" application of corpus lexicography is very crude, it illustrates the kind of information that can be revealed by corpus techniques. There is a modern sense of *science* that is associated with the STEM disciplines; a modern reader might assume that *science* means the hard sciences and excludes the social sciences, humanities, and even the other components of STEM (technology, engineering, and mathematics). But this reading would be incorrect; the frequent use of *science of* in proximity with words like *government*, *politics*, *art*, *law*, *religion*, and *theology* suggests that the word *science* may have had a broader meaning, perhaps corresponding to

"[k]nowledge or understanding acquired by study; acquaintance with or mastery of any branch of learning"—one of the definitions offered by the *Oxford English Dictionary*.[54]

C. Collocates and Contextual Disambiguation

Although corpus lexicography can help to identify the conventional semantic meanings that were available to the authors and readers of a constitutional provision, corpus data alone cannot disambiguate the text. Corpus data may tell us something about the relative frequency of the various meanings, but the most frequent meaning is not necessarily the ordinary meaning in context.[55] For example, the most frequent use of the word *impeachment* may be "the action of calling into question the integrity or validity of something" as in "impeachment of a witness," but in the context of Article I, Sections 2 and 3 and Article II, Sections 2 and 4, *impeachment* is used in the sense that refers to "a charge of misconduct made against the holder of a public office."

Contextual disambiguation is usually accomplished by reading the relevant provision and determining which meaning of an ambiguous word or phrase gives the provision a coherent meaning. It would make little sense for the House of Representatives to have the power to impeach witnesses, but it makes perfect sense for the

54. *Science*, OXFORD ENG. DICTIONARY, http://www.oed.com/view/Entry/172672?redirectedFrom=science#eid (last visited Jan. 23, 2018) (providing, as one definition of *science*, "The kind of organized knowledge or intellectual activity of which the various branches of learning are examples").

55. Professor Clarissa Hessick writes, "Corpus linguists advocate treating the 'ordinary meaning' inquiry in statutory interpretation as an empirical question: the ordinary meaning should be ascertained by consulting a linguistics database to determine how frequently a term is used in a certain manner." Clarissa Hessick, *Corpus Linguistics and the Criminal Law*, 2017 BYU L. REV. 1503, 1504. To the extent that Professor Hessick is making a claim about all (or almost all) advocates of corpus linguistics, this claim is in error and unsubstantiated. Frequency data may be evidence of the ordinary meaning of a term in context, but this evidence must be combined with contextual disambiguation, including the context provided by the text itself (e.g., the whole statute or whole constitution) and the relevant context of communication (e.g., the publicly available context of constitutional communication). Another corpus technique—the identification of collocates—may assist the process of contextual disambiguation, as is illustrated in Table 1 above. Hessick does not discuss the role that an analysis of collocates might play in contextual disambiguation, nor does she consider the role that corpus linguistics should play in a more comprehensive methodology of statutory interpretation—analogous to the method of incorporation proposed in this Article.

House to levy a charge of misconduct against "[t]he President, Vice-President, and all civil officers of the United States"[56] and for those officials to be tried by the Senate and then removed from office if convicted. Corpus lexicography can identify the set of candidate meanings and the surrounding and connecting provisions then disambiguate.

Nonetheless, corpus techniques may also be useful in the process of contextual disambiguation. Corpus techniques allow searches for words used in proximity with each other. Thus, the word *commerce* in Article I, Section 8 appears near the word *regulate*. COFEA could be searched for occurrences of these words or related forms of their root words in proximity, and such searches might be relevant to the question whether the word *commerce* was used in a sense referring to "trade in goods" or whether it instead was used to mean something like "social interaction."[57]

D. Corpus Linguistics and Contextual Enrichment

Corpus techniques play an even more attenuated role in the discovery of contextual enrichments. Contextual enrichments are context specific, whereas corpus techniques reveal data about the use of words in phrases outside the particular context of use. This is not to say that corpus lexicography plays no role in the identification of contextual enrichments. In order to understand the context that gives rise to an enrichment, the interpreter must understand the words and phrases that constitute the context. In this sense, contextual enrichments are almost always parasitic on semantic meanings.[58]

The existence of modulations provides an important limitation on the use of corpus lexicography. Modulations can be created on

56. U.S. CONST. art. II, § 4.

57. *Compare* Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1 (2010) (arguing that "commerce" means "intercourse") *with* Randy E. Barnett, *Jack Balkin's Interaction Theory of "Commerce"*, 2012 U. ILL. L. REV. 623 (criticizing Balkin's view and arguing that "commerce" meant the trade or transportation of things or persons).

58. I say "almost always" because it is at least possible that a contextual enrichment could result from nonverbal cues that do not depend on semantic meaning. This possibility may be limited to oral communication or the unusual case of face-to-face written communication (e.g., the use of signs or cue-cards). I am bracketing questions involving sign language.

the fly—the meaning of a word can be modified through usage. Thus, the word *recess* in the Recess Appointments Clause may have been a modulation created by the juxtaposition of the recess of the Senate with the session of the Senate. This modulation may have come into being when the Recess Appointments Clause was drafted. This sense of *recess* would not be revealed by corpus techniques focused on usage prior to the Constitution, because the modulation did not preexist the Constitution itself. Post-Constitution usage might reveal the modulation, but only if the corpora included the modulated term.

V. THE ORIGINALIST METHOD OF IMMERSION

Corpus linguistics is data-driven. It involves large datasets, coding, and quantification. The method of immersion is quite different; it requires the investigators to immerse themselves in the texts from the relevant period in order to "train up" their linguistic intuitions. The method of immersion is related to methods utilized by historians and political scientists, particularly methods associated with the intellectual history tradition in history departments and the American political development tradition in political science, but, as we shall see, it is different in significant respects.

A. What is "Immersion"?

For the purposes of this Article, let us stipulate the following description of the method of immersion:

> The originalist method of immersion in the language of the period consists in the researcher reading a wide variety of sources from the relevant period. To count as immersive, the reading must draw on sources that are representative of language use of the relevant period. Such sources are not limited to writings directly relevant to the Constitution, but should include sources such as diaries, newspapers, broadsheets, novels, and letters. Immersion requires a substantial period, months and years, not days and weeks.

This description should be viewed as tentative—a proposal for discussion at a preliminary stage rather than a well-developed and tested standard for scholarly practice.

B. Is Immersion Required to Recover Communicative Content?

Native speakers of a natural language possess linguistic competence. This means that in ordinary cases they will be able glean the communicative content of well-formed expressions in that language. Thus, because I am a native speaker of American English of the second half of the twentieth century and the early twenty-first century, I am usually able to understand written and spoken English produced during my lifetime—although I might have difficulty with some dialects and the specialized vocabulary of some linguistic subcommunities. The linguistic competence of non-native speakers is different: I have had some formal training in German, Italian, and Spanish. Although I am not fluent in any of those languages, I can understand simple sentences, and I can usually translate German into English with the aid of a dictionary. Some non-native speakers may achieve linguistic competence in a second language that is substantially equivalent to that acquired by native speakers. There are no native speakers of eighteenth century or nineteenth century American English today, but it is at least possible that the method of immersion could produce linguistic competence that approximates the linguistic competences of eighteenth and nineteenth century native speakers of American English.

Public meaning originalism requires the reconstruction of the communicative content of the constitutional text. Such reconstruction requires interpreters to be able to access the semantics and pragmatics available to a competent speaker of American English at the time each provision was framed and ratified.

Consider semantics first! Because twenty-first century American English is closely related to the American English of the late eighteenth century, the nineteenth century, and the early twentieth century, acquiring competence for those periods is not as difficult as acquiring linguistic competence in a foreign language or in the English of a much earlier period. Although there are variations in semantics (due to linguistic drift) the semantics of the relevant periods are not difficult to acquire. For example, American law students read eighteenth-century texts, including the Constitution, *The Federalist Papers*, and excerpts from the Philadelphia Convention as well as many early nineteenth-century opinions. Reading such texts may be difficult, but it is not impossible. Even constitutional

scholars may fail to notice that a word or phrase had a different meaning in the relevant period, but such mistakes are likely to be rare. For example, contemporary readers of the constitution are unlikely to read *domestic violence* in Article IV as referring to spousal abuse, child abuse, or elder abuse; the surrounding context is sufficient to avoid the error.

Not every case of linguistic drift is easily detectible. Modern readers may be unaware of the fact that the primary use of *dollar* in the eighteenth century referred to a Spanish coin.[59] It is even possible for a modern reader to make the egregious mistake of assuming that *dollar* referred to modern Federal Reserve Notes. But even in this case, immersion in the primary materials is not required to detect the linguistic drift. The *Oxford English Dictionary* provides the following definition of *dollar*:

> 2. The English name for the peso or piece of eight (i.e. eight reales), formerly current in Spain and the Spanish American colonies, and largely used in the British N. American Colonies at the time of their revolt.[60]

The definition itself mentions the use of the Spanish dollar during the relevant historical period, and the first instance of usage for the definition that refers to U.S. currency dates from 1782.[61] Thus, even casual research is sufficient to raise the possibility of linguistic drift.

So far as I am aware, no one has produced an example of linguistic drift that could only be detected by someone who has immersed themselves in eighteenth century sources—although it is possible that such examples exist. Because the language of the constitutional text has been in continuous use and thereby influences contemporary usage and because there has been substantial continuity in the evolution of American English, most contemporary readers who acquire some background knowledge are likely to believe that they understand the constitutional text. There may be some exceptions. Some constitutional provisions—perhaps the Necessary and Proper Clause and the Privileges or Immunities

59. *Dollar*, OXFORD ENG. DICTIONARY, http://www.oed.com/view/Entry/56602?redirectedFrom=dollar#eid (last visited Jan. 23, 2018).

60. *Id.*

61. *Id.*

Clause—may seem obscure to contemporary readers. I have an intuitive sense of the meaning of the individual words in these clauses, but their precise communicative content is difficult to parse. When confronted with these clauses, my instinct is that extensive consultation of the constitutional record may be necessary to glean their original meaning.[62]

If it is unlikely that immersion is required to access the semantic content of most of the constitutional text, what about contextual disambiguation and enrichment? Immersion might be required to recreate the context that enables disambiguation of words or phrases with multiple meaning. Likewise, immersion might enable recreation of the context necessary for contextual enrichments such as implicatures, implicitures, and presuppositions. The extent to which immersion is necessary depends on particular enrichments. Some enrichments are obvious with general knowledge of the context, whereas others may be subtle and require the deep knowledge produced by immersion. Because it requires actual immersion and a search for original communicative content to recognize enrichments that require deep knowledge, it may well be the case that we do not yet know what enrichments would emerge from immersive study of the text.

C. Distinguishing Immersion from the Methods of Intellectual History

The method of immersion, as I have described it, bears important affinities to methods employed by historians and particularly to the methods employed in the subfield of intellectual history. Intellectual historians immerse themselves in the texts of the period, actor, or set of ideas that they study. There are, however, substantial differences between the two approaches. A full account of the relationship between history and originalism is far beyond the scope of this Article. Nonetheless, some of the differences can be sketched:

- The originalist method of immersion aims to recover the communicative content of the constitutional text. Historical

62. On the difficulties with interpretation of the Necessary and Proper Clauses, see John Mikhail, *The Necessary and Proper Clauses*, 102 GEO. L.J. 1045 (2014).

immersion typically has different aims, including the construction of narratives that illuminate causal connections and the discovery of the motives and aim of historical actors.

- The originalist method of immersion draws on sources that are relevant given the theory of original meaning. For public meaning originalism, immersion aims to recreate the linguistic competence of members of the public who were members of the intended readership of the constitutional text.[63]
- The originalist method of immersion assumes that the constitutional text provides a coherent plan of government that should constrain constitutional practice—a claim that originalists redeem by making arguments for the Constraint Principle (or a similar idea). Historians may not share this aim, and may instead believe that the Constitution is incoherent, unworkable, illegitimate, or evil.[64] Given these background beliefs, some historians have no interest in recovering the communicative content of the constitutional text—an enterprise they may regard as pernicious or foolish.

Given the differences in aim, sources, and assumptions, the originalist method of immersion and the kinds of immersion practiced by historians are likely to diverge in practice.

Work by the eminent constitutional historian Jack Rakove reflects immersion in the framing period,[65] but Rakove's *Original Meanings* does not focus on the communicative content of the text—indeed, the text is rarely quoted and never (or almost never) parsed for its

63. Other versions of originalism would have different versions of immersion. For example, original methods originalism would aim to recover the legal competence of practitioners of the original methods of constitutional interpretation and construction. Intentionalists would aim to recover the communicative intentions of the authors of particular constitutional provision. Similar points could be made about other forms of originalism.

64. *See* Mary Sarah Bilder, *The Constitution Doesn't Mean What You Think It Means*, BOS. GLOBE (Apr. 2, 2017), https://www.bostonglobe.com/ideas/2017/04/01/the-constitution-doesn-mean-what-you-think-means/2fvpqWCBD7BP1CPLCBHlZP/story.html. For some questions about Bilder's claims, see Lawrence B. Solum, *Professor Bilder, Please Answer These Questions!*, LEGAL THEORY BLOG (Apr. 2, 2017), http://lsolum.typepad.com/legaltheory/2017/04/professor-bilder-please-answer-these-questions.html.

65. JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION (1st Vintage Books Ed. 2010).

communicative content. Like most intellectual historians, Rakove's primary concern is with motivations, ideology, and ideas, and not with the semantics or pragmatics of the Constitution. Another recent example of the divergence is provided by Michael Klarman's *The Framers' Coup*,[66] a history of the framing and ratification of the Constitution that is almost wholly unconcerned with the original public meaning of the constitutional text.[67] Klarman's neo-Beardisan account of the making of the Constitution is aimed at establishing the antidemocratic nature of the Constitution and the self-interested motives of the framers, but Klarman does not aim to recover the communicative content of any of the specific clauses that make up the constitutional text. The aim of immersion as practiced by Rakove, Klarman, and others is not the recovery of original meaning. This suggests that originalist immersion, despite its similarity to immersion as practiced by historians, will differ in significant respects. Many intellectual historians do not aim at the recovery of the linguistic competences of the public as their primary goal.

This point about the aims of historians should be qualified. Some historians are very interested in the original meaning of the constitutional text—even if they are also interested in purposes, motives, and political context.[68]

VI. THE METHOD OF STUDYING THE CONSTITUTIONAL RECORD

The method of studying the constitutional record is the most familiar and widely practiced approach to originalist research. The first step in the explication of this method is identification of its component parts.

66. MICHAEL J. KLARMAN, THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION (2016).

67. The phrase *public meaning* does not appear in *The Framers' Coup*, nor do related phrases like *original meaning* (except in citations), *communicative content*, *linguistic meaning*, or *semantic meaning* (and the word *semantic* in any usage). Indeed, the word *meaning* is almost always used in one of its senses that is not connected to linguistic meaning. The search was conducted on the Kindle version of *The Framer's Coup*.

68. This claim is not susceptible of documentation. My impression is that this group of historians includes Dean William Treanor at Georgetown University Law Center and G. Edward White at the University of Virginia School of Law. It seems likely that there are many others.

A. Five Components: Precursor Provisions, Drafting History, Ratification Debates, Early Historical Practice, and Early Judicial Decisions

There are at least five components of the method of studying the constitutional record: (1) precursor provisions and proposals, (2) the drafting history, (3) the ratification debates, (4) the early historical practice, and (5) early judicial decisions. From the perspective of public meaning originalism, the point of studying the record of framing, ratification, and implementation is that it may shed light on the communicative content of the constitutional text.[69] This list is not intended to be exclusive, but these five components are among the most important elements of the constitutional record. Brief comments on each component provide a sketch of the way the method operates.

1. Precursor provisions and proposals

The first component is examination of precursor provisions and proposals. For example, the Articles of Confederation and various state constitutions provide precursors of the U.S. Constitution. Similarly, there are various precursors of the first eight amendments to the Constitution—now called "the Bill of Rights." The examination of precursor provisions provides insight into the language of constitutional provisions. Where the language is similar or identical, discussion of the meaning of the precursor provision may provide insight into the language of the constitutional text. Where the language is different, the differences may illuminate the meaning—especially if the drafting history focuses on the difference.

2. The drafting history

The second component is the drafting history. In the case of the unamended text, the drafting history is provided by the records of the Philadelphia Convention—although the official record is sparse and recent scholarship claims (with substantial support) that

69. Other forms of originalism will be interested in the record for other reasons. For example, intentionalists will be especially interested in the legislative history for the light it sheds on the communicative intentions of the drafters.

Madison made substantial revisions of his more complete record of the deliberations at the Convention.[70] The various amendments were drafted by Congress pursuant to its Article V power to propose amendments for ratification by the states.[71]

From the perspective of public meaning originalism, it is important to understand the limited role of the drafting history. This topic was explored by Vasan Kesavan and Michael Stokes Paulsen in their important article, *The Interpretive Force of the Constitution's Secret Drafting History*.[72] The drafting history, like any other text from the period, can shed light on the conventional semantic meanings of the words and phrases that comprise the constitutional text. In other words, the drafting history can provide evidence of conventional semantic meaning, but this role is evidential. The drafting history may be a valuable source because it provides instances of usage of the words that are likely to reflect the senses in which the words would have been understood by the public. Likewise, the drafting history may provide evidence that confirms or disconfirms the hypothesis that a particular provision gives rise to a contextual enrichment.

But this role is only evidential. For a variety of reasons, it is at least possible that the public meaning of the text will diverge from the meaning supported by the evidence provided by the drafting history. For example, it is at least possible that obscure language would acquire a more definite meaning during the drafting process because of "echo chamber effects."[73] The provision is explicated and the explication is accepted and repeated. Through this process, language that is unclear could come to seem clear to the participants in the drafting process even though the public would simply not understand the language or would have an understanding that diverged from that of the drafters. Another possibility is that the

70. MARY SARAH BILDER, MADISON'S HAND: REVISING THE CONSTITUTIONAL CONVENTION (2015).

71. See U.S. CONST. art. V.

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

73. The notion of an echo-chamber effect is usually invoked in nonlinguistic contexts. *See, e.g.*, Nicholas DiFonzo, *The Echo-Chamber Effect*, N.Y. TIMES (Apr. 22, 2011, 3:56 PM), https://www.nytimes.com/roomfordebate/2011/04/22/barack-obama-and-the-psychology-of-the-birther-myth/the-echo-chamber-effect.

language was drafted to convey one impression to the public, but a different meaning was to be conveyed to insiders (for example, members of the Supreme Court).[74] Secret drafting processes or the manipulation of the drafting record could create space for this kind of deception.

3. The ratification debates

The third component is the record of ratification. In the case of the unamended Constitution, the ratification debates are the records of the ratifying conventions held in the several states and the public debates in various sources, including prominently *The Federalist Papers* and the writings of various Antifederalists. In the case of the amendments, ratification occurs in the state legislatures. Depending on the amendment, such records may or may not be easily available; in some cases, they may be nonexistent.

Debates over ratification of a constitutional provision have significant advantages over the drafting history as evidence of public meaning. Many ratifiers of the unamended Constitution were not participants in the drafting process; the perspective of these ratifiers is similar to that of the public. The ratification debates for the unamended Constitution were conducted in a variety of forums: in the ratifying conventions, newspapers, pamphlets, and broadsheets. Both supporters and opponents of the constitution participated in the debates. Amendments are debated in state legislatures, and their deliberations are accompanied by public political debate—although such debate rarely approaches the extensive and intensive discussions that characterized the Philadelphia Convention and *The Federalist Papers.*

74. For a discussion of the possibility that the Fourteenth Amendment was drafted to create deliberate ambiguity, see WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 51–53 (1988) (discussing ambiguity introduced by final version of Section One of the Fourteenth Amendment and stating "[a] second explanation [for the ambiguity] is the committee . . . substituted a phrasing that was sufficiently broad so that those who favored federal protection of political rights could construe it to provide such protection, and sufficiently innocuous so that those who opposed giving such power to the federal government could be reassured that the amendment did no such thing").

There are, however, limits on the evidentiary value of the ratification debates. Adversarial discourse is unlikely to result in dispassionate and neutral assessment of the communicative content of the text. Opponents of ratification are likely to interpret the text in ways that support arguments that adoption would produce consequences that would be viewed as undesirable. Proponents of the text will do the opposite. This phenomenon is familiar from debates about the extent of the legislative power granted by the text produced by the Philadelphia Convention. Antifederalists argued that the broad goals outlined in the Preamble and the Necessary and Proper Clause would produce virtually unlimited federal power[75]; Federalists countered that Article I conferred only those legislative powers "herein granted," that the enumeration of powers in Section 8 was limited, and that the Necessary and Proper Clause would not confer unlimited power.[76] After ratification, a remarkable transformation took place. High Federalists argued that federal power was virtually unlimited, and Antifederalists opposed this reading.[77]

4. Early historical practice

The early history of implementation also provides evidence bearing on the communicative content of the constitutional text. If those who implemented the text intended to act in ways that are consistent with the text, what they did is evidence of what they understood the text to mean. This evidence disfavors hypotheses that are inconsistent with the early implementation history and favors those that are consistent. Moreover, the meaning of the text may have been debated in connection with early historical practice; those debates may shed light on the meaning of the text.

Once again, there are limitations on the value of this category of evidence. There is no guarantee that the officials (e.g., presidents and members of Congress) did in fact make good faith efforts to

75. *See* Mikhail, *supra* note 62, at 1059–60.

76. *See* Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459, 1507 (2001).

77. For history of the debates after ratification, see JOSEPH M. LYNCH, NEGOTIATING THE CONSTITUTION: THE EARLIEST DEBATES OVER ORIGINAL INTENT 71–92 (1999).

remain in compliance with the Constitution. In some cases, they may simply have neglected to consider the constitutional questions; in other cases, they may have deliberately decided to violate the Constitution. Even if they acted in good faith, they may have engaged in motivated reasoning, convincing themselves that their action was consistent with public meaning of the text when in fact it was not.

One way to sort out the evidentiary value of early historical practice is to distinguish three categories: (1) disputed practice, (2) undisputed practice, and (3) inaction.

a. Disputed historical practice. The most prominent example of the role of early historical practice in constitutional interpretation and construction is the controversy over the First Bank of the United States. The constitutionality of the Bank was the subject of a serious dispute, famously including opinions from various members of President Washington's cabinet, including Hamilton, Madison, and Randolph.[78] The fact of dispute itself is relevant to the assessment of the meaning of the Sweepings Clause—and one lesson of the dispute might be that the clause's public meaning was ambiguous. The concept of "liquidation" is associated with the Bank dispute and its subsequent treatment by Madison in connection with his decision to sign the bill establishing the Second Bank of the United States—despite his earlier doubts about the constitutionality of the First Bank.[79] One reading of Madison's theory of liquidation is that it was a method of construction for the resolution of ambiguity and therefore not a method for discovery of the public meaning of the text.

One difficulty with early but disputed practice is that the statements of the disputants may not provide accurate representations of the communicative content of the constitutional

78. Robert J. Reinstein, *The Limits of Congressional Power*, 89 TEMP. L. REV. 1, 7–45 (2016); Michael Coblenz, *The Fight Goes on Forever: "Limited Government" and the First Bank of the United States*, 39 S. ILL. U. L.J. 391, 409–38 (2015).

79. The basic idea of liquidation is that historical practice may resolve a dispute about the meaning of the text by "liquidating" the ambiguity. For a discussion of "liquidation," see William Baude, Constitutional Liquidation (Aug. 26, 2017) (unpublished manuscript) (on file with author); Paul G. Ream, Note, *Liquidation of Constitutional Meaning Through Use*, 66 DUKE L.J. 1645 (2017).

text. They may engage in motivated reasoning or have incentives to "twist words" to achieve a political objective. Disputes over the constitutionality of early practice provide evidence of meaning, but that evidence needs to be carefully assessed.

b. Undisputed historical practice. Another kind of early historical practice occurs when constitutionally salient action is taken without discussion or debate of the constitutional issues. Thus, legislation enacted by the First Congress provides some evidence that the enacted measures were thought to be within the legislative power of Congress, and this evidence would count against any theory of the meaning of Article I that is inconsistent with such evidence.

Undisputed historical practice suffers from a different problem than does the disputed variety. If the constitutional issues are never discussed, it is possible that the early practice was unconstitutional but uncontroversial. Once again, undisputed historical practice provides evidence relevant to communicative content, but careful assessment of the evidence is required.

c. Inaction. The final category is not historical practice in the conventional sense of a constitutionally salient action; rather this category consists of "dogs that did not bark"—actions that were not taken during the historical period shortly following the adoption of a constitutional provision. That Congress failed to enact a particular piece of legislation is consistent both with the hypothesis that it lacked power to do so and with the hypothesis that it did have such power. This evidence, however is highly dependent on context.

Most inaction provides very weak evidence of original meaning because inaction can result from so many reasons and causes. Members of Congress may never have considered the possibility of passing the law in question. Or they may have considered the possibility and concluded that the legislation was undesirable. Or they may have considered the legislation, concluded that it was desirable, but then realized that the proposed legislation was unconstitutional. If inaction is accompanied by a record of deliberation about a constitutional issue, that record may provide evidence of original meaning—although the usual caveats about the possibility of motivated reasoning apply.

One example of the use of inaction as evidence of constitutional meaning is contained in Chief Justice Roberts' opinion in *National Federation of Independent Businesses v. Sebelius.*[80] Roberts reasoned that the failure of Congress to use the power to mandate some action by individuals not currently engaged in interstate commerce had never been exercised by Congress in the past and that this provided evidence that Congress lacked such a power.[81]

5. Early judicial decisions

Another aspect of the record that may bear on public meaning of the constitutional text is early judicial decisions interpreting the Constitution. The case for the evidentiary value of the early decisions is similar to that of early historical practice by the political branches. The early judicial decisions are close in time to drafting of the text. If judges aim in good faith to determine the public meaning of the text, their understanding would be strong evidence of that meaning. If an early decision provides a discussion of the linguistic meaning of the provision,that would be especially valuable evidence of the original public meaning, but applications would also have evidentiary value. Interpretations that are consistent with early decisions would be favored by those decisions, whereas interpretations that are inconsistent with the early decisions would be disfavored.

As with early historical practice, there may be reasons to discount early judicial decisions. The assumption that the judges in early cases are attempting to discern public meaning in good faith may be false. Early judges may have had political or ideological agendas. For example, some may believe that John Marshall's early constitutional decisions served a pro-nationalist or High Federalist political agenda—expanding the power of the national government beyond that authorized by the original public meaning of the constitutional

80. NFIB v. Sebelius, 567 U.S. 519 (2012).

81. *Id*. at 549–51 ("[S]ometimes the most telling indication of a severe constitutional problem is the lack of historical precedent for Congress's action." (internal citations and punctuation omitted)); *see also* Leah M. Litman, *Debunking Antinovelty*, 66 DUKE L.J. 1407 (2017) (critiquing the argument that a novel exercise of power is evidence of that power's unconstitutionality).

text.[82] Others may believe that the Supreme Court's decision in the *Slaughterhouse Cases* substantially departed from the original meaning of the Privileges or Immunities Clause of the Fourteenth Amendment—perhaps because of judicial hostility.[83]

Even if early judges acted in subjective good faith, their political or ideological views might have had a subconscious biasing effect on their decisions. For example, if language is ambiguous, there may be a natural tendency to prefer the normatively more attractive interpretation—and in the early period, judges relied almost exclusively on their own linguistic intuitions without a significant external check.

Multimember courts may provide a check on the linguistic intuitions of individual judges: the biased or mistaken intuitions of one judge might be counteracted by the more accurate intuitions of another. But even in this case, it is possible that all judges on the court share the same bias—for example, during the period following the election of 1800 when Federalist judges dominated the judiciary but Democratic-Republicans controlled Congress and the Presidency. And multi-member courts may be subject to echo-chamber effects, whereby an initial interpretation comes to dominate the interpretation of the group through repetition such that an actual ambiguity becomes invisible to those in the echo chamber.

Another issue is raised by the fact that very few of the earliest constitutional provisions (through the first ten amendments) produced judicial decisions. Many of the decisions that are now recognized as important were rendered many years after the Philadelphia Convention or the First Congress. For example,

82. FRANCIS N. STITES, JOHN MARSHALL: DEFENDER OF THE CONSTITUTION 132–34 (Oscar Handlin ed., 1981) (noting criticisms of Marshall's opinion in McCulloch); Mark R. Killenbeck, *Madison,* M'Culloch*, and Matters of Judicial Cognizance: Some Thoughts on the Nature and Scope of Judicial Review*, 55 ARK. L. REV. 901, 916 (2003) ("Many of the most significant political conflicts during the post-ratification years were precipitated by the Court, in particular by decisions of John Marshall and his brethren that the Jeffersonian Republicans abhorred as expressions of a reactionary High Federalist approach to the interrelated questions of federal power and federal-state relations.").

83. Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the* Slaughter-House *Cases*, 70 CHI.-KENT. L. REV. 627, 627 (1994) ("'[E]veryone' agrees the [Supreme] Court incorrectly interpreted the Privileges or Immunities Clause.").

McCulloch v. Maryland was decided in 1819—some thirty-two years after the drafting of the Article I.[84] *Gibbons v. Ogden* was decided in 1824—thirty-seven years after the drafting of the Commerce Clause.[85] Whatever evidentiary value should be afforded these cases, they do not represent immediate implementation of the Constitution.

B. Caveats

The method of studying the record is subject to several caveats, some of which have been mentioned implicitly in the discussion of the five components.

1. Distinguishing communicative content and legal content

When engaging in the method of studying the record, it is important to bear in mind the distinction between communicative content and legal content.[86] During the founding era (as today), interpretation and construction can become blurred. The communicative content of the constitutional text may not clearly be distinguished from the legal content of implementing doctrines. This issue is particularly important with respect to the record of implementation by the political branches and early judicial decisions. Courts articulate legal doctrines, and they may move from discussion of the linguistic meaning to legal meaning seamlessly, without clearly identifying the transition from the interpretation of the text to the construction of implementing rules.

For this reason, it is important to distinguish between the use of the record of framing, ratification, and implementation as evidence of communicative content of the constitutional text from the use of the record as evidence of the legal content of constitutional doctrine during the period that is proximate in time to the framing and ratification. Public originalism uses the record as evidence of the former but rejects the use of the same evidence for the purpose of

84. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

85. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

86. *See* Lawrence B. Solum, *Communicative Content and Legal Content*, 89 NOTRE DAME L. REV. 479 (2013) (discussing the distinction between communicative content and legal content).

establishing the legal content of early constitutional doctrine that is supposed to be binding on the present. Original legal content can provide evidence of public meaning, but legal content does not itself *constitute* binding original meaning.[87]

2. The proper role of original application expectations

The distinction between communicative content and legal content is closely related to a caution about the relationship of original expected applications to original public meaning. *Applications* are, by definition, on the construction side of the interpretation-construction distinction. *Expectations* about applications are beliefs about how a provision will be applied to a particular case or issue. *Original* expected applications are the expectations about applications that were held at the time a constitutional provision was framed and ratified. Expectations are mental states and, for that reason, different actors can have different expectations regarding the application of the same constitutional provision. Thus, there could be applications by the individual drafters, by the convention or Congress that proposed a constitutional provision, by the members of the ratifying convention or state legislature, or by the public.

Crucially, application expectations, even by the author of a text, are fundamentally different from the communicative content of the text. The correct application of a text to a legal issue or particular case involves the *application* of *law* to *fact*. Suppose that an expectation about application is based on a true belief about the public meaning of the constitutional text. An application expectation could nonetheless be a misleading guide to recovering the communicative content of the text if that expectation was based on a false belief about the facts. Consider the following hypothetical example:[88]

87. Note that original law originalism may regard the original legal content as binding today—unless it has been validly changed.

88. The hypothetical examples draw on text in Mary Frances Rooney's work on this issue. *See* M. Frances Rooney, *The Privileges or Immunities Clause of the Fourteenth Amendment and an Originalist Defense of Gender Nondiscrimination*, 15 GEO. J.L. & PUB. POL'Y 737 (2017).

> Suppose that the Privileges or Immunities Clause of the Fourteenth Amendment protects a set of basic rights (privileges and immunities) that include the right to pursue a lawful occupation. These rights are extended to all citizens of the United States. Suppose further that these rights are subject to reasonable regulation for the public good, and hence that a state legislature can enact a law that limits certain lawful occupations to persons who are capable of competently engaging in the occupation. The practice of law is a lawful occupation, but nonetheless, a state legislature can require that lawyers pass a test (a bar exam) as a condition for practicing law. And the legislature might also pass a law that limits the practice of law on the basis of age—disqualifying children from practicing law on a categorical basis because it is in fact the case that almost all children lack the intellectual capacity to practice law. Further suppose that the constitutional record reveals such an application expectation belief: hypothetically, in debates over the Fourteenth Amendment, someone might have said that the Privileges or Immunities Clause would not be violated by a statute that required lawyers to pass a bar exam and be of eighteen or more years of age.

This application belief is consistent with the postulated interpretation—that the Privileges or Immunities Clause protects a set of basic rights among which was the right to pursue a lawful application.

Now consider a second hypothetical example:

> Suppose the understanding of the Privileges or Immunities Clause postulated above. Assume in addition that at the time the Fourteenth Amendment was adopted, almost everyone had a false belief that women have intellectual capacities that are similar to those of children and, hence, that women are incapable of practicing law. Once again, the question arises whether the application of the amendment to a statute—this time, one that restricts the practice of law to adult men who have passed the bar exam. And once again, the record reveals an application belief that this statue would not be invalidated.

In this second example, one might fallaciously argue that the application belief is evidence that the Privileges or Immunities Clause does not protect the rights of women at all because the term *citizen* was limited to men. The fallacy in this argument is apparent: the application belief (restricting the practice of law to men is consistent

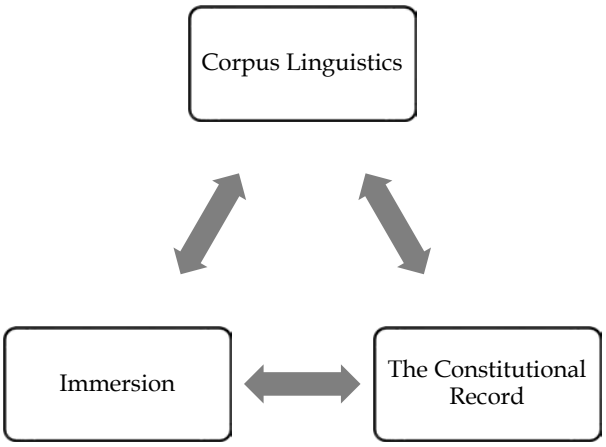
with the Privileges or Immunities Clause) is explained by a false belief about the facts that is perfectly consistent with a belief that women are citizens and hence that they do have a right to pursue a lawful occupation and therefore to practice law—if they have the intellectual capacity to do so.

These hypotheticals shed light on the relevance of *Bradwell v. Illinois*[89] to the interpretation of the Privilege or Immunities Clause. The Court rejected Myra Bradwell's argument that her exclusion from the practice of law by the State of Illinois violated the Privileges or Immunities Clause. The majority opinion in *Bradwell* was based on the Court's prior decisions in the *Slaughterhouse Cases* and *United States v. Cruickshank*[90]—cases in which the majority restricted the meaning of "Privileges or Immunities of Citizens of the United States" to an extremely small set so as to virtually nullify the clause. Another group of Justices accepted the basic rights interpretation of the Privileges or Immunities Clause and did not question that women were citizens. These Justices rejected Bradwell's claim on the basis of a false factual belief—that women lacked the intellectual capacity necessary for the practice of law. This kind of factual belief is not part of the communicative content of the Privileges or Immunities Clause. Hence, the application beliefs revealed by the opinions in *Bradwell* may not provide evidence that the Privileges or Immunities Clause does not encompass the basic economic rights of women, once the process of application is guided by true beliefs about the intellectual capacities of women. Thus, the original public meaning of the Privileges or Immunities Clause might be consistent with conclusion the coverture laws are unconstitutional, given true beliefs about the capacity of women to manage their own affairs, while similar restrictions of the property and contractual rights of young children would nonetheless be constitutional because on the actual facts, these restrictions are reasonable.

89. Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873).
90. United States v. Cruikshank, 92 U.S. 542 (1876).

VII. THE METHOD OF TRIANGULATION

Having discussed the three vertexes of the triangle (corpus linguistics, immersion, and the record), we can now discuss the Method of Triangulation itself. How can these three methods be combined?



A. Immersion versus Corpus Linguistics

The method of corpus linguistics aims to recover the original public meaning of the constitutional text by systematic analysis of corpora—typically large databases that are designed to capture representative patterns of usage and can be coded to reveal the range and frequency of conventional semantic meanings. The method of immersion (as practiced by originalists) aims to recreate the linguistic capacities of a competent speaker of American English at the time the constitutional provision at issue was framed and ratified. How can these methods cross-check each other?

Consider first the role of corpus linguistics in checking the linguistic intuitions generated by the method of immersion. Were immersion perfect, it would result in a group of scholars each of whom had a set of linguistic intuitions that would closely approximate the linguistic intuitions of native speakers of the American English of the era.

Of course, different native speakers will have different sets of linguistic intuitions, reflecting different histories of exposure to the language. These sets will vary in a number of dimensions. Different

speakers are exposed to different ranges of usage. Some speakers acquire larger vocabularies than others—acquiring familiarity with a greater number of words and phrases. Some speakers become acquainted with a wider range of meanings and hence have an ability to disambiguate more accurately, whereas others may have been exposed to a narrower range of senses of the same words and phrases. Some speakers acquire knowledge of specialized vocabulary of linguistic subcommunities, for example, the technical terms used by lawyers, mariners, or bookkeepers. Other speakers may not be members of a linguistic subcommunity with a specialized vocabulary. For this reason, a comprehensive recreation of the linguistic world of any particular period, for example, the late eighteenth century, would require multiple immersions—each of which would duplicate representative speakers of the period. In practice, this ideal may never be fully realized.

Can the kind of immersion that could be feasibly practiced by modern scholars replicate the linguistic capacities of competent speakers from early constitutional periods? Native speakers acquire language in a particular way: as children, they interact with other native speakers. This process of interaction includes explicit language teaching, corrections of errors in usage, observations of success and failure when the speaker aims to achieve some aim, listening to conversations, and reading texts of many different kinds. The interactive component of language acquisition is difficult or impossible to replicate. For example, historians who practice the method of immersion typically immerse themselves in texts relevant to their research project, but they cannot interact with native speakers of eighteenth-century or mid-nineteenth-century English. Unless, of course, they have access to a time machine.

Another problem with the replication of linguistic competence by the method of immersion concerns the representativeness of the texts that are selected. Historians and legal scholars who immerse themselves in the texts of a particular period may face selection bias problems. For example, a constitutional historian might focus on texts that are relevant to the historian's research project. This might include many different sources, letters, diaries, broadsheets, works of political philosophy, legal texts, and so forth. But such a historian might not sample nursery rhymes, childrearing manuals, novels, or the diaries of farmers who did not engage in constitutional debates.

In other words, text selection may not be adequate to recreate the linguistic competences of a wide range of ordinary speakers.

The method of corpus linguistics may provide a useful cross check on these limitations on immersion. First and foremost, well-designed corpora can address the data limitations inherent in the method of immersion. Corpora can be very large—much larger than the body of literature that could be assimilated by any single immersion scholar. Corpora can be designed to provide representative samples of the written linguistic world of a particular period. And corpora can also be designed to include texts that represent a particular linguistic subculture.

Second, corpus linguistics allows for rigorous intersubjective validation of individual subjective judgments about word meaning. One of the dangers of the method of immersion is that immersed scholars may essentially say, "Trust me. I immersed myself in the texts of the period. I know what this provision of the Constitution means." But how do we know whether the supposedly immersed scholar is actually immersed? And even if some scholar was deeply immersed, did biases and prejudices (conscious or unconscious) distort the scholars understanding of the meaning of the provisions? Corpus linguistics evidence provides a basis for checking the interpretations offered by immersed scholars. If corpus research reveals that the meaning proposed by an immersed scholar was very rare or nonexistent in the corpus (or corpora) that are queried, that fact would undermine the proposed interpretation.

Just as corpus linguistics can provide a check on immersion, the reverse is the case. Immersion can provide a useful check on the results reached via corpus linguistics. Corpus research can reveal the range of meanings of a given word or phrase and the relative frequencies with which these meanings appear within a given corpus. And via the use of collocates, corpus research can provide some information relevant to disambiguation. But immersed scholars may be in a better position than non-immersed scholars when it comes to disambiguation—especially if the ambiguity in question is subtle, difficult, or complex. Simple lexical ambiguities may be resolved by contextual features that can be recognized by non-immersed scholars. But there may be syntactic ambiguities that are more difficult to detect. Some forms of ambiguity, such as the ambiguity

between *de dicto* and *de re* usages, may be especially difficult to recognize, and immersion in the context may help in these cases.[91]

Corpus techniques are particularly ill-suited to cases in which the constitution employs a modulation—creating a new meaning for a word that deviates in some significant way from preexisting meanings. The Recess Appointments Clause, discussed above, provides an example of the possible existence of a constitutional modulation. The clause reads as follows: "The president shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session."[92]

One understanding of this clause is that the phrase "recess of the Senate" is a modulation, to be understood in juxtaposition with the "session" of the Senate, and hence limited to what are now called "intersession recesses." A corpus-based inquiry into the use of the word "recess" before the adoption could not have revealed this meaning—which, assuming that the modulation theory is correct, came into being with the drafting of the constitutional text.

Moreover, corpus techniques will be most useful in the investigation of constitutional semantics and syntax, including contextual disambiguation, but corpus evidence will rarely bear directly on contextual enrichments such as implicatures, implicitures, and presuppositions. Because contextual enrichments depend on shared context, immersion in publicly available context of constitutional communication may assist the reliable discovery of contextual enrichments and hence supplement the semantic information yielded by corpus linguistics.

In sum, the method of corpus linguistics and the method of immersion are complementary. Both techniques aim to give contemporary readers access to the communicative content of the constitutional text, but they do so in different ways. Corpus linguistics is especially relevant to the discovery of conventional semantic meanings and can aid disambiguation. Immersion provides

91. United States v. Whittemore, 944 F. Supp. 2d 1003, 1011, 1011 n.7 (D. Nev. 2013), *aff'd*, 776 F.3d 1074 (9th Cir. 2015); Jill Anderson, *Just Semantics: The Lost Readings of the Americans with Disabilities Act*, 117 YALE L.J. 992 (2008).

92. U.S. CONST. art. II, § 2, cl. 3.

an alternative and less systematic route to semantics and is especially suited to the recovery of contextual enrichments.

B. Corpus Linguistics Versus the Constitutional Record

The relationship between corpus linguistics and the method of studying the constitutional record is similar to the relationship between corpus linguistics and immersion. Indeed, the method of studying the constitutional record is itself a specialized and limited form of immersion, utilizing a selected set of historical materials that are directly relevant to the constitutional question at issue.

The most direct and obvious way in which corpus linguistics can assist in the study of the constitutional record is that the record itself must be deciphered. Just as older provisions of the constitutional text (especially through the Twelfth Amendment) are written in the American English of more than 200 years ago, so too, the constitutional record of those provisions is itself written in that language. The conventional sources, including Madison's notes of the Philadelphia Convention, *The Federalist Papers*, Anti-Federalist writings, the ratification debates, and the records of the First Congress, all contain words and phrases that may have had different senses than the contemporary sense of the language.

The method of the constitutional record can be especially helpful in providing evidence concerning beliefs of constitutional actors (framers, ratifiers, debaters, members of Congress, judges) that are related to but not identical with their beliefs about the meanings of the words and phrases (their semantic beliefs). Of course, the constitutional record may sometimes reveal direct evidence of semantic beliefs, when, for example, a constitutional actor defines or paraphrases a constitutional word or phrase. More frequently, the constitutional record will provide evidence of beliefs that provide indirect evidence of semantic beliefs, such as beliefs expressing expectations concerning the application of the constitutional text to specific issues or actual and hypothetical situations. Because application beliefs underdetermine communicative content and because they can actually be inconsistent with communicative content, the method of corpus linguistics provides an important corrective to the method of the constitutional record.

Similarly, the method of the constitutional record can supplement and check the results obtained from corpus linguistics. Most obviously, the method of corpus linguistics may not be sufficient to resolve semantic ambiguities; contextual disambiguation requires knowledge of the public context and the constitutional record provides the most directly relevant elements of that context. Likewise, corpus linguistics may not yield information sufficient to identify modulations, but the constitutional record could be a fruitful source of information that confirms or disconfirms the hypothesis that a particular word or phrase constitutes a modulation.

C. The Constitutional Record and Immersion

Finally, consider the relationship between the method of immersion and the method of studying the constitutional record. Much of the ground has already between covered, but some aspects of this relationship require separate comment. This relationship implicates the debate over what is sometimes called "law office history" and the "history-common-room law."[93] Some brief discussion of that debate is necessary to elucidate the two methods and the ways in which they can each supplement and check the other.

The charge that lawyers practice "law office history" is a common one, although the history of this rhetorically charged phrase is quite different from what one might imagine. The phrase was first applied to work done by historians in connection with *Brown v. Board of Education*[94]—and the charge was that the historians had engaged in advocacy-driven history in order to support a result that conformed to their political and ideological

93. Nicholas J. Johnson, *Rights Versus Duties, History Department Lawyering, and the Incoherence of Justice Steven's Heller Dissent*, 39 FORDHAM URB. L.J. 1503 (2012); Gary Lawson, *No History, No Certainty, No Legitimacy . . . No Problem: Originalism and the Limits of Legal Theory*, 64 FLA. L. REV. 1551, 1559 (2012); Saikrishna Prakash, *Unoriginalism's Law Without Meaning*, 15 CONST. COMMENT 529, 538 (1998). The phrase "history-common-room law" appears in Lawrence B. Solum, *Intellectual History as Constitutional Theory*, 101 VA. L. REV. 1111, 1163 (2015).

94. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

preferences. Subsequently, the criticism has been extended to the use of history by lawyers, judges, and legal scholars.[95]

A full telling of the law-office history debate is outside the scope of this Article, but two of the criticisms of law-office history are particularly relevant to the Method of Triangulation. The first criticism is that judges, lawyers, and legal scholars "cherry pick" the historical materials, taking individual sentences and paragraphs out of context and ignoring contrary evidence. The second criticism is that studying the historical record in isolation is insufficient for deep understanding because the meaning of the constitutional record itself can be understood only by scholars who have immersed themselves in the "thought world" or intellectual and political context in which the constitutional record is situated.

Although the charge that historians practice "history common room law" is made less frequently than the "law office history" charge, it bears significant resemblance to its counterpart. Here, we need to distinguish between two kinds of historians. Many legal and constitutional historians are trained in both law and history, possessing both a *Juris Doctor* and a *Doctor of Philosophy* in history or political science. Other historians lack legal training. When historians without legal training engage in scholarship about constitutional history, several difficulties may arise. First, historians who lack a grounding in contemporary constitutional theory and doctrine may be criticized on the ground that they do not comprehend the legal significance of the historical materials they study. Second, the lack of legal training could result in a lack of capacity to understanding the contemporary legal implications of even those aspects of history that they do, in fact, understand correctly. Some historians may also lack a grounding in the philosophy of language and the discipline of historical linguistics. Although these deficiencies may not be

95. The literature on "law office history" includes Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 S. CT. REV. 119 (locus classicus); Howard Jay Graham, *The Fourteenth Amendment and School Segregation*, 3 BUFF. L. REV. 1, 7 (1953); David T. Hardy, *Lawyers, Historians, and "Law-Office History,"* 46 CUMB. L. REV. 1 (2015); Rebecca Piller, *History in the Making: Why Courts Are Ill-Equipped to Employ Originalism*, 34 REV. LITIG. 187 (2015); John Phillip Reid, *Law and History*, 27 LOY. L.A. L. REV. 193 (1993); Neil M. Richards, *Clio and the Court: A Reassessment of the Supreme Court's Uses of History*, 13 J.L. & POL. 809 (1997).

significant given the projects that historians typically pursue, they may create problems in the context of the originalist project of recovering the communicative content of the constitutional text.

One might equate "law office history" with the method of studying the constitutional record and "history-common-room law" with the originalist method of immersion, but these simplifications are not correct on either score.

The originalist method of immersion, properly understood, has a specific structure. This structure flows from the target at which the method is aimed—recovery of the original public meaning of the constitutional text. Originalist immersion aims to recover the communicative competence of a competent speaker of American English at the time a given constitutional provision was framed and ratified, and relatedly to recover the competences of the members of the linguistic subcommunities that employed the technical language and terms of art that appear in the constitutional text (e.g., "Letters of Marque and Reprisal"). It is possible that some historians have this aim, but typically that is not the case. Immersion by historians can aim at any number of goals—uncovering the political and ideological motives of historical actors, recreating the life world of particular groups (e.g., working-class women, slaves, or recent immigrants), and so forth. These aims are radically different. Immersion in the life world of recent German immigrants in the late eighteenth century is obviously a poor way to recover the communicative competence of speakers of American English during that same period. The originalist practice of immersion is not identical with "history common room law."

Likewise, the method of studying the constitutional record of framing, ratification, and implementation is not identical to "law office history." A preliminary distinction is important. The method of studying the constitutional record can be practiced by different kinds of actors, including judges, law clerks, lawyers, legal scholars, and scholars in other disciplines, including history and political science. These different categories of actors are importantly different in many respects.

Law clerks (so-called "elbow clerks") typically serve for one or two years. Their examination of the historical record would be likely to focus on those aspects of the record that are directly relevant to the case to which they assigned, perhaps in connection with writing a

bench memorandum or drafting an opinion. Typically, bench memos must be written in a fairly short period of time—perhaps a few days but a few weeks at most. The drafting of an opinion may extend for several weeks or a few months, but it is rare for the writing of an opinion to approach (and much less exceed) a single calendar year. These time constraints have implications for the breadth and depth of research that law clerks can conduct. Likewise, lawyers are subject to time constraints, but they are also obligated to advocate for their client—and this role may encourage "cherry picking," especially given the very strict limits on the length of briefs allowed by the rules of court. Judges and law clerks are obligated to fairly consider the arguments of both sides, but once a decision has been made, there may be a tendency to emphasize the evidence that supports the decision and to ignore or discount evidence on the other side; dissenting or concurring opinions, if they are written, may prompt consideration of contrary evidence, but there is no guarantee that this will occur.

Legal scholars are in a different position. A research project, even if limited in scope to a particular issue concerning a particular clause, may involve many years of research—decades in some cases. In practice, there is no bright line between the method of immersion and the method of studying the constitutional record. The most extensive research undertaken by legal scholars who practice the method of studying the constitutional record will approximate the research undertaken by scholars who practice the method of immersion. Research of this kind involves an internal process of supplementation and checking—immersion in texts surrounding the constitutional record are part of the process of studying the record itself.

When the two methods diverge, the supplementation and checking function may be performed by comparing and contrasting the results reached by practitioners of each method. Studying the constitutional record without immersion might result in a misunderstanding of the record itself for the reasons that have already been discussed. Similarly, the method of immersion could be practiced in a way that does not pay sufficient attention to the constitutional record—failing to recognize the importance of evidence drawn from the constitutional record of framing, ratification, and implementation.

D. Consilience as the Aim of the Method of Triangulation

There can be no *a priori* guarantees that the Method of Triangulation will produce agreement. It is at least possible that the results of corpus linguistics will be inconsistent with those produced by immersion and that immersion will call into question the results derived from study of the constitutional record. Nonetheless, the corollary of this observation is equally important: we cannot rule out in advance the possibility of *consilience*. Triangulation of corpus linguistics, immersion, and the constitutional record may produce a set of mutually supportive findings. Where consilience emerges from the application of all three methods and is reinforced by replication of each of the individual methods by independent researches, we would have very good reason to be confident in our conclusions regarding the original meaning of the constitutional text. "Replicated consilience" should be the gold standard of originalist research.

A lessor degree of confidence would attach to other scenarios. For example, where two of the methods agree, but a third is inconclusive, we might ultimately reach the conclusion that the results of the two methods provide the best available evidence of original meaning—even though that evidence does not have the same high degree of confidence as does consilience. More disturbing would be scenarios where the results of one of the three methods contradicts the results derived from the other methods. In some cases, such disagreement may be explained. For example, if immersion and the constitutional record suggests that a particular word should be understood as a modulation of the conventional semantic meaning,[96] then corpus evidence that supports the conventional meaning would be explained in a way that would dissolve the seeming contradiction. We can use the phrase "partial consilience" to designate scenarios in which there is partial agreement between methods and residual disagreement is explainable.

96. As explained *supra* Sections IV.D, VII.A, the word "recess" in the Recess Appointments Clause might be a modulation of the conventional semantic meaning of recess. U.S. CONST. art. II, § 2, cl. 3.

Finally, there may be cases in which conflicts between the methods might not be explainable. Where even partial consilience is absent, there may be substantial uncertainty about the original meaning of the constitutional text. In such cases, the allocation of the burden of persuasion might be essential for the practical resolution of a constitutional controversy.[97] For example, we might evaluate the conflicting evidence and conclude that one interpretation of the text is supported by the "weight of the evidence"—lawyers use phrases like "preponderance of the evidence" or "clear and convincing evidence" to describe the burdens of persuasion that operate in resolving evidentiary conflicts.

VIII. FROM TRIANGULATION TO TRANSLATION

The Method of Triangulation uses corpus linguistics, immersion, and the constitutional record to discover the original public meaning of the constitutional text. This means that the primary focus of originalist methodology is the text itself. One way to think about this activity is via an analogy with translation. The ultimate aim of originalist methodology is to translate the constitutional provisions written in the American English of the period in which each provision was written into contemporary American English. In many cases, the analogy of translation is misleading—because contemporary American English overlaps substantially, even with the American English of the late eighteenth century. When it comes to the provision that was drafted most recently, the Twenty-Sixth Amendment, it seems likely that there is virtually no divergence with respect to semantics and if there are substantively significant contextual enrichments, they are not apparent to me.[98]

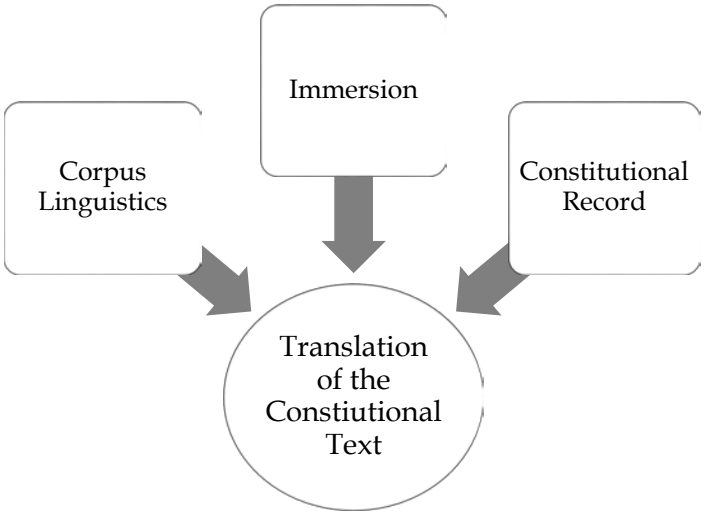
97. *See* GARY LAWSON, EVIDENCE OF THE LAW: PROVING LEGAL CLAIMS (2017).

98.

> Section 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.
>
> Section 2. The Congress shall have the power to enforce this article by appropriate legislation.
>
> Without doing careful analysis, it appears to this author that all of the words and phrases in the Twenty-Sixth Amendment are comprehensible to a modern audience.

U.S. CONST. amend. XXVI, §§ 1–2.

We might represent the movement from triangulation to translation via the following diagram:



We read the text having considered the results yielded by the methods of corpus linguistics, immersion, and study of the constitutional record. Taking all three approaches into account, we then translate the provision at issue from the language of the relevant period into contemporary language. That translation is the "original meaning of the constitutional text" as expressed in contemporary American English. The translation represents the propositions expressed by the original text in the meaning of the original period in a modern text (a gloss). The translation is accurate if and only if the propositions expressed in the constitutional text are identical to the propositions expressed in the gloss.

The word *proposition* is being used in a technical sense. Propositions are to sentences as concepts are to words. Just as the same word *law* expresses a concept that can be represented by different words in other languages (*recht* in German, *loi* in French), so can the propositional content of the constitutional text can

be represented in contemporary American English or another natural language.[99]

A further step is required to translate the communicative content of the text into the legal content of constitutional doctrine. Determining communicative content is "interpretation," whereas the specification of legal content is "construction." The Constraint Principle requires judges (or other constitutional actors) to craft doctrines that are consistent with the original public meaning. If the communicative content of the constitutional text fully determines the legal content of constitutional doctrine, the process of constitutional construction may be simple and direct. But if the communicative content underdetermines legal content, then the relevant constitutional actors may be required to craft implementing rules—as specified by a theory of constitutional construction.[100]

IX. IMPLEMENTATION OF THE METHOD OF TRIANGULATION

Implementation of the Method of Triangulation is itself a large topic. Here I will express a few tentative thoughts about the steps that would need to be taken in order to put the Method of Triangulation into effect.

A. Triangulation and the Division of Intellectual Labor

For readers who are already familiar with the methods of originalist research, it will be apparent that full implementation of the Method of Triangulation is a large task. No one individual could complete the task of applying all three methods to the full text of the U.S. Constitution in a single lifetime; indeed, for many of the Constitution's articles and clauses, it seems likely that it is not feasible for a single individual to do all the work necessary to apply

99. *See* Matthew McGrath, *Propositions*, STAN. ENCYCLOPEDIA PHIL., https://plato.stanford.edu/entries/propositions/ (last updated June 20, 2012); Eric Margolis & Stephen Laurence, *Concepts*, STAN. ENCYCLOPEDIA PHIL., https://plato.stanford.edu/entries/concepts/ (last visited Jan. 23, 2018).

100. *See generally* Solum, *Constitutional Construction*, *supra* note 12 (discussing originalist approaches to constitutional construction). For a recent example of an originalist theory of constitutional construction, see Randy E. Barnett & Evan D. Bernick, The Letter and the Spirit: A Unified Theory of Originalism (Oct. 9, 2017) (unpublished manuscript) (available online at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3049056).

the Method of Triangulation. The likelihood that this is true strongly suggests that implementation of the Method of Triangulation will require a division of intellectual labor.

We might speculate that some scholars will specialize in each of the three methods—with some scholars doing corpus linguistics work, while others practice the methods of immersion and studying the constitutional record. It is also imaginable that some scholars would master more than one of the methods, for example, employing both corpus linguistics and study of the constitutional record, while achieving some degree of immersion as well. Scholarship that employs the Method of Triangulation might be co-authored, with an empiricist executing the corpus linguistics portion of the article and others deploying the methods of immersion and study of the constitutional record.

B. Triangulation and Interdisciplinary and Multidisciplinary Scholarship

Another dimension of the Method of Triangulation is that it requires some degree of interdisciplinary collaboration combined with multidisciplinary training for legal scholars. For example, legal scholars could collaborate with linguistics scholars in the design of corpora and corpus linguistic methods for the investigation of legal texts. Legal scholars might collaborate with historians and political scientists trained in the American political development tradition in designing research programs for implementation of the method of immersion. Similarly, we might imagine a multidisciplinary training program for originalist scholars that involves the study of linguistics, philosophy of language, corpus linguistics, constitutional history, and historiography.

C. Triangulation in the Courts

Finally, there is the question as to how the Method of Triangulation can be employed in the courts. Certainly, judges and their law clerks can employ the method of studying the historical record directly: this method is familiar to sophisticated lawyers and judges. The pioneering efforts of Justice Thomas Lee of the Utah Supreme Court and Justice Joan Larsen of the Michigan Supreme Court demonstrate that judges and law clerks can learn to employ

the method of corpus linguistics. It is obvious, however, that the method of immersion will be inconsistent with the career path and duties of most judges, lawyers, and law clerks.

For this reason, it seems likely that implementation of the Method of Triangulation will involve the production of originalist scholarship in the academy with consumption of that scholarship by the courts. For this to work well, lawyers, judges, and judicial clerks will need to be familiar with the Method of Triangulation and its constituent elements. It is even imaginable that courts of last resort, including the U.S. Supreme Court and the highest courts of the several states would employ professionals trained in corpus linguistics or immersed in particular historical periods to produce sophisticated in-house evaluations of the originalist claims made in briefs and in legal scholarship.

CONCLUSION

Originalism as a constitutional theory has evolved substantially since the word *originalism* was coined by Paul Brest in 1980.[101] The emphasis on the original intentions of the framers has given way to forms of originalism focused on public meaning, original methods, and original law. Applied originalism has flourished, with so many articles and monographs that compiling a catalog would be a daunting task. But despite the flourishing of originalist theory and practice, method has lagged behind. The aim of this Article is to initiate a conversation about originalist methodology and to make tentative suggestions about an approach that promises objective and transparent methods that aim at convergent answers to questions about the original meaning of the constitutional text. The Method of Triangulation aims at consilience—agreement between the methods of corpus linguistics, immersion, and study of the constitutional record.

Where consilience between the methods of corpus linguistics, immersion, and study of the constitutional record is achieved and replicated, we can be reasonably confident that we have recovered

101. Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 234 (1980).

the original public meaning of the constitutional text. The recovery of original public meaning may be difficult, and in some cases impossible, but the Method of Triangulation combined with replication provides the ideal to which originalists can aspire.