

## ARTICLES

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# COMMUNICATIVE CONTENT AND LEGAL CONTENT

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### INTRODUCTION

This Essay investigates a familiar set of questions about the relationship between legal texts (e.g., constitutions, statutes, opinions, orders, and contracts) and the content of the law (e.g., norms, rules, standards, doctrines, and mandates). Is the original meaning of the constitutional text binding on the Supreme Court when it develops doctrines of constitutional law? Should statutes be given their plain meaning or should judges devise statutory constructions that depart from the text to serve a purpose? What role should default rules play in the interpretation and construction of contracts? This Essay makes two moves that can help lawyers and legal theorists answer these questions. First, there is a fundamental conceptual distinction between “communicative content” (the linguistic meaning communicated by a legal text in context) and “legal content” (the doctrines of the legal rules associated with a text). Second, the relationship between communicative content and legal content varies with context; different kinds of legal texts produce different relationships between linguistic meaning and legal rules.

I will proceed as follows. In Part I, “Distinguishing Communicative Content and Legal Content,” I will investigate the questions raised by differentiating the linguistic meaning of legal texts from the legal content that the texts create. In Part II, “Communicative Content,” I will provide an account of communicative content in general and

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then apply that account in more particular contexts (contract formation, constitutional interpretation, and the interpretation of judicial opinions). My aim is to show that the differences between these contexts lead to systematic differences in the ways we discern the communicative content of different types of legal texts. In Part III, “Legal Content,” I will investigate the role that communicative content plays in the determination of legal content. Again, I will investigate different contexts of legal communication, but in this Part with the aim of showing that the role played by communicative content in determining legal content is context sensitive. In some contexts, the meaning of the text has pride of place, but in other contexts, communicative content plays only a secondary role. Finally, in the Conclusion, I will say something about the payoff of this investigation for legal theory and practice.

#### I. DISTINGUISHING COMMUNICATIVE CONTENT AND LEGAL CONTENT

For any given legal text, we can distinguish two kinds of content. First, legal texts have communicative content. The phrase “communicative content” is simply a precise way of labeling what we usually call the “meaning” or “linguistic meaning” of the text. Legal texts also have associated legal content. “Legal content” is a precise way of labeling the content of the legal norms the text produces. In the case of the Constitution, for example, we can distinguish the communicative content of the constitutional text and the legal content of the doctrines of constitutional law that are associated with the text.

Here is a simple example of the distinction between communicative content and legal content. The text of the First Amendment reads as follows:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.<sup>1</sup>

The word “Congress” in the First Amendment has communicative content, usually it is understood to refer to the Congress of the United States, consisting of the House of Representatives and the Senate. But the legal content of First Amendment doctrine is not limited in this way: for example, the freedom of the press applies to judicially created defamation law.<sup>2</sup>

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<sup>1</sup> U.S. CONST. amend. I.

<sup>2</sup> *New York Times v. Sullivan*, 376 U.S. 254, 291–92 (1964) (applying First Amendment freedom of speech to state defamation law).

Consider some examples of the issues that arise once we distinguish communicative content and legal content. In constitutional theory and practice, there is an important debate between originalists and living constitutionalists.<sup>3</sup> In the domain of statutory interpretation, there is the fundamental divide between plain meaning theorists and purposivists.<sup>4</sup> In discussions of the doctrine of stare decisis (or precedent), there is a long-standing dispute between the traditional theory of the *ratio decidendi* and the predictive theory (associated with legal realism) that sanctions legislative holdings.<sup>5</sup> In addition to these familiar debates, similar issues arise in more particular contexts—the interpretation and construction of contracts, wills, trusts, patents, judgments, injunctions, rules of procedure, administrative regulations, and so forth. These conundrums are explicitly disputed by legal scholars in the context of writings (authoritative legal texts that are inscribed and published), but similar problems arise in the context of unwritten or oral communications that possess legal authority—including oral contracts, rulings from the bench, and so forth.

These debates about the interactions between communicative content and legal content involve two distinct questions. The first question concerns the determination of communicative content: How do we discern the meaning communicated by a legal text? The second question concerns the role that communicative content plays in the construction of legal content: How does the linguistic meaning of a legal text contribute to the content of legal rules (understood broadly to include rules, standards, principles, and mandates) that in turn determine legal effect? The Essay will start by tackling the question of communicative content and then move to questions about the relationship between communicative content and legal content.

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3 See ROBERT W. BENNETT & LAWRENCE B. SOLUM, *CONSTITUTIONAL ORIGINALISM* 67 (2011).

4 See WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 13 (1994); Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 *YALE L.J.* 1750, 1762–64 (2010); John F. Manning, *Textualism and Legislative Intent*, 91 *VA. L. REV.* 419, 431–32 (2005).

5 See Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 *U. PA. J. CONST. L.* 155, 188–89 (2006); see also Charles W. Collier, *Precedent and Legal Authority: A Critical History*, 1988 *WIS. L. REV.* 771; Arthur L. Goodhart, *Determining the Ratio Decidendi of a Case*, 40 *YALE L.J.* 161 (1930); Max Radin, *Case Law and Stare Decisis: Concerning Präjudizienrecht in Amerika*, 33 *COLUM. L. REV.* 199, 200–01 (1933); Frederick Schauer, *Precedent*, 39 *STAN. L. REV.* 571 (1987). Ronald Dworkin uses the phrase, “an enactment force of precedent” to express an idea similar to the notion of a legislative holding. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 111 (1977).

The overall thesis of this Essay is the claim that the correct approach to each of these questions is context sensitive. That is, I will argue that the determination of communicative content proceeds differently in different legal contexts—although we can identify some very general features of legal communication that explain these differences. More concretely, drafting a constitution is different than entering into an oral contract, and writing a judicial opinion is different still. And I will argue that the contribution of communicative content to legal content is context sensitive as well. The considerations that bear on the contribution of the constitutional text to constitutional doctrine are different than the considerations that bear on the contribution of the text of statutes, wills, and judicial orders to legal doctrines (or rules in the broad sense) and hence to ultimate legal effect. Finally, I will make another claim about the relationship between communicative content and legal content. I will claim that it is possible for this relationship to be contested on normative grounds and that in American legal culture, the role of meaning in determining legal effect is, in fact, contested.

I should warn the reader that this Essay does not present a full account of my own views about the relationship between communicative content and legal content. Elsewhere, I have developed an account of constitutional interpretation and construction that argues for a particular theory of communicative content that roughly corresponds to what is sometimes called “public meaning originalism.”<sup>6</sup> And I have suggested that originalists characteristically endorse what I call the constraint principle—which requires that the communicative content of the Constitution (i.e., the original meaning) should constrain the content of constitutional doctrine, unless a defeasibility condition obtains.<sup>7</sup> With Tun-Jen Chiang, I have also written about the interpretation-construction distinction in the context of patent law.<sup>8</sup> My prior work does not address the analogous questions that arise in the interpretation and construction of statutes, contracts, oral judicial rulings, and so forth. The arguments made in this Essay will make it clear that my views about constitutional theory are bounded by con-

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6 Lawrence B. Solum, *Semantic Originalism* (Illinois Public Law and Legal Theory Research Paper Series, Research Paper No. 07-24, 2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1120244](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244).

7 Lawrence B. Solum, *Faith and Fidelity: Originalism and the Possibility of Constitutional Redemption*, 91 TEX. L. REV. 147, 154–155 (2012) (reviewing JACK M. BALKIN, *CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD* (2011) and JACK M. BALKIN, *LIVING ORIGINALISM* (2011)).

8 Tun-Jen Chiang & Lawrence B. Solum, *The Interpretation-Construction Distinction in Patent Law*, 123 YALE L.J. 530 (2013).

text; I will not present anything approaching a set of fully developed theories of interpretation and construction in nonconstitutional contexts, but I will gesture towards some of the considerations that might shape such theories for judicial opinions, statutes, and other legal texts.

Another preliminary point concerns terminology. Because this Essay is focused on the distinction between communicative content and legal content, it is important to distinguish between two related activities (“interpretation” and “construction”). The first activity is the discovery of the communicative content of a legal utterance: I will use the term *interpretation* to name this activity. The second activity is the determination of the legal content and legal effect produced by a legal text: I will use the term *construction* to name this second and distinct activity.

The interpretation-construction distinction is an old one in American legal theory.<sup>9</sup> Moreover, the theoretical distinction is reflected in legal usage: the interpretation-construction distinction has been invoked in numerous cases<sup>10</sup> and by a variety of distinguished authorities.<sup>11</sup> The distinction has been much discussed recently in constitutional theory, but the words “interpretation” and “construction” are also used in a broader sense to refer to a single process that encompasses both activities (discovering meaning and determining legal effect). Nothing hangs on the terminology, since

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9 FRANCIS LIEBER, *LEGAL AND POLITICAL HERMENEUTICS* 56, 63–64 (1839). Lieber’s definition of construction is related to the definition offered here: “Construction is the drawing of conclusions respecting subjects, that lie beyond the direct expression of the text, from elements known from and given in the text—conclusions which are in the spirit, though not within the letter of the text.” *Id.* at 56. For examples of the use of the distinction by courts and scholars, see Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 *FORDHAM L. REV.* 453, 486–87 (2013).

10 See *Ram Constr. Co. v. Am. States Ins. Co.*, 749 F.2d 1049, 1053 (3d Cir. 1984); *Williams v. Humble Oil & Ref. Co.*, 432 F.2d 165, 179 (5th Cir. 1970); *In re XTI Xonix Techs., Inc.*, 156 B.R. 821, 829 n.6 (Bankr. D. Or. 1993); *Fausel v. JRJ Enters.*, 603 N.W.2d 612, 618 (Iowa 1999); *Grinnell Mut. Reins. Co. v. Voeltz*, 431 N.W.2d 783, 785 (Iowa 1988); *Allen v. Highway Equip. Co.*, 239 N.W.2d 135, 139 (Iowa 1976); *Berg v. Hudesman*, 801 P.2d 222, 226 (Wash. 1990); *Joyner v. Adams*, 361 S.E.2d 902, 905 (N.C. Ct. App. 1987); *Chase Nat’l Bank v. Chi. Title & Trust Co.*, 299 N.Y.S. 926, 937–38 (N.Y. Sup. Ct. 1934).

11 See *RESTATEMENT (SECOND) OF CONTRACTS* § 200 cmt. c, and rep.’s note (1981); *RESTATEMENT OF CONFLICT OF LAWS* §§ 214, 251 (1934); 3 ARTHUR LINTON CORBIN, *CORBIN ON CONTRACTS* § 532, at 2 (1960); E. ALLAN FARNSWORTH, *CONTRACTS* § 7.11, at 459 (4th ed. 2004); 5 JOHN HENRY WIGMORE, *A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW* § 2464 (2d ed. 1923); 4 SAMUEL WILLISTON, *A TREATISE ON THE LAW OF CONTRACTS* §§ 600–02 (3d ed. 1961).

we could describe the interpretation-construction distinction using other words.<sup>12</sup>

Finally, some important issues are bracketed for the purposes of this Essay. There are strong connections between debates about the nature of law (between positivists, natural lawyers, and interpretivists) and the questions addressed here. This Essay will skirt these connections. If the positions that I take here are correct, then any theory of the nature of law must take them into account. I suspect that any sophisticated theory of the nature of law can accommodate the conclusions that I reach in this Essay, but I will not attempt to show that this is so—the contending philosophical theories of the nature of law (Dworkin,<sup>13</sup> Finnis,<sup>14</sup> Greenberg,<sup>15</sup> Hart,<sup>16</sup> Moore,<sup>17</sup> Murphy,<sup>18</sup> Raz,<sup>19</sup> Shapiro,<sup>20</sup> and others) are each complex and distinct. Laying them out and then investigating the connections between them and my views is a task that cannot be accomplished in a short paper.

## II. COMMUNICATIVE CONTENT

We can begin with the idea of communicative content or linguistic meaning. Legal practitioners are likely to use the word “meaning” to express the concept of communicative content. There is nothing wrong with this usage: the word “meaning” is frequently used to refer to the content communicated by a legal text (and more generally to refer to the communicative content of all kinds of writings and sayings). But the word “meaning” is ambiguous. We can use “meaning” to refer to the *legal meaning* of a text, but legal content is not the same thing as communicative content. We can use the word “meaning” to refer to the *legal effect* of a text, as in the following question, “What will the judge’s order mean for my client?” And we can use the word “meaning” to refer to *purpose*: “What did he mean to accomplish by writing the clause in that way?” The phrase “communicative content” avoids these ambiguities in the meaning of the word “meaning.”

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12 Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95 (2010).

13 RONALD DWORKIN, *LAW’S EMPIRE* (1986).

14 JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (2d ed. 2011).

15 Mark Greenberg, *The Standard Picture and Its Discontents*, in 1 OXFORD STUDIES IN THE PHILOSOPHY OF LAW 39 (Leslie Green & Brian Leiter eds., 2011).

16 H.L.A. HART, *THE CONCEPT OF LAW* (Peter Cane et al. eds., 2d ed. 1994).

17 Michael S. Moore, *The Semantics of Judging*, 54 S. CAL. L. REV. 151 (1981).

18 MARK C. MURPHY, *NATURAL LAW IN JURISPRUDENCE AND POLITICS* (2006).

19 JOSEPH RAZ, *BETWEEN AUTHORITY AND INTERPRETATION* (2009).

20 SCOTT J. SHAPIRO, *LEGALITY* (2011).

A. *Communicative Content Does Not Reduce to Legal Content or Legal Effect*

Legal communications are “utterances” in the broad sense of that word, which encompasses both sayings and writings. Constitutions, statutes, and judicial opinions (and other legal communications) are complex speech acts. Speech act theory will be familiar to many readers of this Essay, but may be new to others. The core idea is that we can perform a variety of actions when we say things. To use a variant of J.L. Austin’s felicitous phrase, we can “do things with words.”<sup>21</sup> For example, we can promise, command, or assert. The action performed by an utterance can be called its “illocutionary force.” When a speech act succeeds and the audience recognizes its illocutionary force, we can say that there is “illocutionary uptake.”<sup>22</sup>

How do these ideas (of a speech act, illocutionary force, and uptake) apply to the law? By drafting and ratifying a constitution, we accomplish something in the world. So too with the drafting and enacting of statutes or the writing and publishing of judicial opinions. This obvious fact might lead us to an erroneous conclusion—that the meaning or content of a legal communication can be reduced to the legal effect that it produces. The irreducibility of communicative content to legal effect becomes clear once we notice the possibility of divergence. A contract is signed but a court refuses to enforce its terms—by saying that the court refused to enforce the terms of the contract, we distinguish between the terms (the content of the contract) and the legal effect that those terms produced (no effect in the case of a contract that was null and void *ab initio*). It would be odd to say that the meaning of the terms (e.g., that words to the effect that Smith agrees to fix Huang’s roof in exchange for a payment of \$5,000) is directly contrary to the ordinary and intended understanding. If this contract is void, it is not because it says it is void; the “voidness” was not part of the communicative content of the contract itself.

The distinction between content and effect can be demonstrated in another way, by noting the familiar distinction between the law on the books and the law in action.<sup>23</sup> This distinction assumes that the

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21 J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* (J.O. Urmson & Marina Sbisa eds., 2d ed. 1975).

22 See 2 JOHN LYONS, *SEMANTICS* 731 (1977); Mitchell S. Green, *Illocutionary Force and Semantic Content*, 23 *LINGUISTICS & PHIL.* 435 (2000); Kepa Korta & John Perry, *Pragmatics*, *STAN. ENCYC. PHIL.* (last revised Mar. 21, 2011), <http://plato.stanford.edu/entries/pragmatics/#Far1.2>.

23 The phrases come from the title of Roscoe Pound’s famous article. See Roscoe Pound, *Law in Books and Law in Action*, 44 *AM. L. REV.* 12 (1910).

law in action (legal effect) can be distinguished from the law on the books (communicative content).<sup>24</sup> The legal realist insight—that the law in action may differ systematically from the law on the books—assumes that we can distinguish the communicative content in the books from the legal content of the actions taken by legal officials.

So the first move in elucidating the distinction between communicative and legal content is to deny that communicative content reduces to legal effect. The second move is similar—communicative content does not reduce to legal content. Take another example—we have a will that (as written) violates the rule against perpetuities. We might declare the will void and distribute the estate according to the rules of intestate succession. But there is another possibility—we might adopt a saving construction (reformation) of the will, with legal content that gets as close to the terms of the will (its communicative content) as is possible without creating a perpetuity. The legal content produced by the will is not identical with its communicative content; nor (by hypothesis) is it identical with the content of the rules of intestate succession (those rules originate in other legal communications, not in the will itself). The only way to understand what happens in the case of a will given a saving construction is to attend carefully to the distinction between communicative content and legal content. This example illustrates the general point—that legal content and communicative content are not *necessarily* identical, although it is *possible* that the two kinds of content will be the same in particular cases.

These preliminary remarks are intended to demonstrate the plausibility of the idea of communicative content as something that is distinct from legal effect and legal content. The next step is to say something about what communicative content is and how it is produced. I will proceed here by starting with a very simple picture and then add layers of complexity.

### B. *Semantics and Pragmatics*

Let us begin with the idea that the communicative content of a legal utterance is a function of the semantic meaning of its component parts. The components are words or phrases. Immediately, we can see that something more is required—the meaning of an utterance is not a simple concatenation of the meanings of the words and phrases that are combined in the utterance. Utterances have structures, which we can try to capture with what are sometimes called rules of syntax and grammar—but the word “rules” is misleading here

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<sup>24</sup> See *id.* at 15. For a more complete statement of this point, see Solum, *supra* note 9, at 476–77.

because the patterns and regularities may not have a rigid rule-like structure. With this modification in place, we might say that the semantic meaning of an utterance is a function of the semantic meaning of the component units of meaning (the words and phrases) and the rules of syntax and grammar that enable combination of these units into larger units (i.e., sentences). We could refer to this notion of meaning as the principle of compositionality;<sup>25</sup> let us call meaning determined solely in this way *semantic meaning*; the corresponding content is *semantic content*.

If we stopped at this point, our conclusion would be that the communicative content of a legal utterance is identical to its semantic content. Legal practice and theory are familiar with this notion—although the legal terminology is different. In law, we refer to semantic content as “literal meaning.”<sup>26</sup> This phrase is rarely theorized when it is used, and it may be ambiguous, but when lawyers refer to the literal meaning of a legal text, it seems likely that they are referring to its semantic meaning.<sup>27</sup>

But the semantic meaning of a legal utterance does not necessarily capture all of the content that is communicated by the utterance. Why not? Because semantic content is sparse—legal utterances can communicate content that is richer than the literal meaning of the words and phrases. How? Semantic meaning can be enriched because of the role that context plays in communication generally and in legal communication in particular. Consider the following provision in the United States Constitution (which I selected almost at random):

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25 See DONALD DAVIDSON, *INQUIRIES INTO TRUTH AND INTERPRETATION* 3 (2001); Richard E. Grandy, *Understanding and the Principle of Compositionality*, in 4 *PHILOSOPHICAL PERSPECTIVES: ACTION THEORY AND PHILOSOPHY OF MIND* 557 (James E. Tomberlin ed., 1990).

26 See *Exxon Corp. v. Hunt*, 475 U.S. 355, 370 (1986); *Bob Jones Univ. v. Simon*, 416 U.S. 725, 731–32 (1974); *McFeely v. Comm’r*, 296 U.S. 102, 111 (1935); *Panama R.R. v. Rock*, 266 U.S. 209, 215 (1924) (Holmes, J., dissenting); Richard A. Epstein, *The Pitfalls of Interpretation*, 7 *HARV. J.L. & PUB. POL’Y* 101 (1984); Brian Flanagan, *Revisiting the Contribution of Literal Meaning to Legal Meaning*, 30 *O.J.L.S.* 255, 255 (2010); Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 *S. CAL. L. REV.* 277, 290–91 (1985); John R. Searle, *Literal Meaning*, 13 *ERKENNTNIS* 207 (1978). We can distinguish “literal meaning” and “plain meaning”—sometimes meaning is plain even where it is not literal, because context makes the meaning unambiguous.

27 For sources discussing literal meaning, see Gregory Klass, *Meaning, Purpose, and Cause in the Law of Deception*, 100 *GEO. L.J.* 449, 456–57 (2012); Peter Meijes Tiersma, *The Language of Perjury: “Literal Truth,” Ambiguity, and the False Statement Requirement*, 63 *S. CAL. L. REV.* 373, 379–80 (1990); Steven Walt, *The State of Debate over the Incorporation Strategy in Contract Law*, 38 *UCC L.J.* 255, 259 n.10 (2006).

No Tax or Duty shall be laid on Articles exported from any State.<sup>28</sup>

The literal meaning (semantic content) of this provision leaves many questions to be answered. Because it is phrased in the passive voice, the clause might be read as literally prohibiting any tax or duty—including sales or property tax imposed on a nondiscriminatory basis to both imported goods and goods produced within a state; think of New York City imposing a sales tax that applies all sugary sodas, whether they were produced in the State of New York or exported from New Jersey. Or the provision might be understood as prohibiting import taxes imposed by a foreign nation on goods exported from one of the states. The term “State” might refer to any government, or the term “article” might be understood in the narrow sense in which it applies to articles in law reviews and philosophy journals, but not to hairdryers or automobiles. But the semantic content of this provision does not exhaust the content that it communicates: in context, the provision clearly provides a limit on the power of the United States Congress to tax goods (tangible things of value) that are exported from any of the constituent “States” of the United States of America.<sup>29</sup>

The full communicative content of a legal writing is a product of the semantic content (the meaning of the words and phrases as combined by the rules of syntax and grammar) and the additional content provided by the available context of legal utterance. In the philosophy of language and theoretical linguistics, the phrase “pragmatic enrichment” is sometimes used to refer to the contribution that context makes to meaning. But in legal theory that phrase would be misleading because of the associations of “pragmatism” with legal pragmatism (a view that is related to but quite distinct from the philosophical tradition of American pragmatism).<sup>30</sup> For this reason, I shall use the phrase *contextual enrichment* to refer to the role of context in determining meaning. In the lingo of contemporary philosophy of law and linguistic theory, the full communicative content results from both the semantics and the pragmatics of the utterance.<sup>31</sup> Let me now mark the distinction I have been making by stipulating that *communicative content* refers to all of the content communicated by a legal text (or legally salient oral communication).

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<sup>28</sup> U.S. CONST. art. I, § 9, cl. 5.

<sup>29</sup> On the meaning of the clause, see *Dooley v. United States*, 183 U.S. 151, 151–58 (1901) (holding that the clause did not apply to an import tax applied by Puerto Rico to exports from one of the states by way of the port of New York).

<sup>30</sup> See Solum, *supra* note 9, at 465 n.47 (discussing “pragmatic enrichment” as compared to the use of “contextual enrichment” in the legal context).

<sup>31</sup> Robyn Carston, *Linguistic Communication and the Semantics/Pragmatics Distinction*, 165 *SYNTHESE* 321, 323 (2008).

At this point, we face an obvious obstacle to the further investigation of communicative content. Linguistic theory and the philosophy of language have produced a variety of perspectives on meaning—from the early work of Frege on sense and reference<sup>32</sup> to Wittgensteinian views that connect meaning with use<sup>33</sup> to variations on Kripke’s new theory of reference.<sup>34</sup> Debates between and among these views constitute a whole field of inquiry and cannot be summarized, much less resolved, in a short paper. In the remainder of this Part of the Essay, I am going to sketch a particular approach that draws on ideas elaborated by Paul Grice,<sup>35</sup> although the account I will offer of the communicative content of legal utterances differs from Grice’s own account in significant ways.

### C. *Speaker’s Meaning and Expression Meaning*

Grice introduced a distinction between “speaker’s meaning” and “sentence meaning” (or “expression meaning”).<sup>36</sup> Grice’s idea of speaker’s meaning is actually quite familiar. We get at the idea of speaker’s meaning all the time in ordinary conversations: “What did she mean by that?” In the context of legal texts, we ask questions like: “What did the legislature mean by the provision?” “What did the judge mean by that sentence in the opinion?” “What did the framers mean by that clause in the Constitution?”

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32 Gottlieb Frege, *Über Sinn und Bedeutung*, in 100 ZEITSCHRIFT FÜR PHILOSOPHIE UND PHILOSOPHISCHE KRITIK 1, 25–50 (1892).

33 LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* ¶ 43 (P.M. S. Hacker & Joachim Schulte eds., G.E.M. Anscombe et al. trans., 4th ed. 2009) (“For a *large* class of cases of the employment of the word ‘meaning’—though not for *all*—this word can be explained in this way: the meaning of a word is its use in the language.”).

34 SAUL A. KRIPKE, *NAMING AND NECESSITY* (1980). The origins of the so-called “New Theory of Reference” are disputed. See *THE NEW THEORY OF REFERENCE: KRIPKE, MARCUS, AND ITS ORIGINS* (Paul W. Humphreys & James H. Fetzer eds., 1998).

35 See PAUL GRICE, *STUDIES IN THE WAY OF WORDS* 3–143 (1989). Grice articulated that the main focus of the first part of the book is on “the nature and philosophical importance of two closely linked ideas . . . which may be loosely characterized as that of assertion and implication and that of meaning; these ideas form the topic of the lectures.” *Id.* at v; see also Jeffrey Goldsworthy, *Legislative Intentions, Legislative Supremacy, and Legal Positivism*, 42 SAN DIEGO L. REV. 493, 510 n.57 (2005); B. Jessie Hill, *Putting Religious Symbolism in Context: A Linguistic Critique of the Endorsement Test*, 104 MICH. L. REV. 491, 506 n.80 (2005); John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 72 n.7 (2006). I owe a great debt to Rogers Albritton who pointed me to Grice when we discussed these issues in the early 1980s.

36 H.P. Grice, *Utterer’s Meaning, Sentence-Meaning, and Word-Meaning*, 4 FOUND. LANGUAGE 225, 225 (1968).

Grice contended that speaker's meaning should be analyzed in terms of a speaker's (or author's) intentions.<sup>37</sup> His point is illustrated by the following thought experiment, which introduces the idea in a context where communication occurs without the use of words.

Imagine that you have stopped at night at an intersection. The driver of another car flashes her lights at you, and you make the inference the reason for her doing this is that she wants to cause you to believe that your lights are not on. And based on this inference, you now do, in fact, realize that your lights are not on.<sup>38</sup>

In this example, the meaning of the flashing lights is the product of the following complex intention—as explicated by Richard Grandy and Richard Warner:

1. The driver flashes her lights intending
2. that you believe that your lights are not on;
3. that you recognize her intention (1);
4. that this recognition be part of your reason for believing that your lights are not on.<sup>39</sup>

In the case of imperatives, for example, the intention is that the listener (or reader) performs a certain act on the basis of the listener's recognition of the author's intention that the listener performs the act. Speaker's meaning requires that speakers and listeners have "common knowledge"<sup>40</sup> in a technical sense: the speaker must know what the audience knows about the speaker's intentions and vice versa.

We can tentatively formulate this notion of speaker's meaning as follows:

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37 *Id.*

38 This example is a slightly altered version of the thought experiment originally offered by Richard Warner. See Richard Warner, *Introduction: Grice on Reasons and Rationality*, in PAUL GRICE, *ASPECTS OF REASON*, at ix (Richard Warner ed., 2001).

39 Richard E. Grandy & Richard Warner, *Paul Grice*, STAN. ENCYC. PHIL. (last revised Sept. 9, 2013), <http://plato.stanford.edu/archives/fall2013/entries/grice/>.

40 See Peter Vanderschraaf & Giacomo Sillari, *Common Knowledge*, STAN. ENCYC. PHIL. (last revised July 23, 2013), <http://plato.stanford.edu/archives/fall2013/entries/common-knowledge/> (distinguishing "mutual knowledge," which is shared without knowledge of the fact of sharing, from "common knowledge," which requires knowledge of the fact that content is shared); see also MICHAEL SUK-YOUNG CHWE, *RATIONAL RITUAL: CULTURE, COORDINATION, AND COMMON KNOWLEDGE* 3, 9–10 (2001) (explaining common knowledge). This idea of common knowledge was introduced (so far as I know) by David Lewis. See DAVID LEWIS, *CONVENTION: A PHILOSOPHICAL STUDY* 52–60 (1969).

*Speaker's meaning:* The speaker's meaning (or utterer's meaning) of an utterance is the illocutionary uptake that the speaker intended to produce in the audience on the basis of the audience's recognition of the speaker's intention.

Grice formulated his notion in terms of speakers and listeners (or audience members),<sup>41</sup> implicitly assuming the context of oral communication between a speaker and an audience contiguous in space and time. At this stage in the argument, we can assume that this notion could be generalized to include written communication—so long as the author of the text and the reader of the text could satisfy the conditions for common knowledge of the author's beliefs regarding audience recognition of the author's intentions. Thus, the "author's meaning" of a text would be the uptake<sup>42</sup> that the author intended to produce in the reader on the basis of the reader's recognition of the author's intention.

What about sentence meaning? (Sometimes the phrase "expression meaning" is used to refer to the same notion as "sentence meaning.") In its simplest (and perhaps simplified) form, the idea is that words and expressions have standard meanings—the meanings that are conventional given relevant linguistic practices. As Hurd puts it: "[t]he sentence meaning of a particular utterance can be understood not by reference to the illocutionary intentions of the speaker, but rather by reference to the illocutionary intentions that speakers *in general* have when employing such an utterance."<sup>43</sup> Hurd goes on to criticize this view,<sup>44</sup> but I want to put this sort of controversy to the side at this point. Let us tentatively use the following formulation:

*Sentence meaning:* The sentence meaning (or "expression meaning") of an utterance is the conventional semantic meaning of the words and phrases that combine to form the utterance.<sup>45</sup>

The phrase "sentence meaning" does not contain the same implicit reference to oral communication under conditions of proximity as that which attaches to "utterance" (as used in ordinary English). Thus, texts and speeches can have "sentence meaning," irrespective of whether the utterance is read or heard in spatial and temporal proximity to the occasion of writing or saying.

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41 GRICE, *supra* note 35, at 103, 302–03.

42 See *supra* note 22 and accompanying text.

43 Heidi M. Hurd, *Sovereignty in Silence*, 99 YALE L.J. 945, 964 (1990).

44 *Id.*

45 This tentative formulation is incomplete because it fails to account for the role of syntax (or grammar) in the production of meaning. See *supra* note 25 and accompanying text.

So we have a distinction between speaker's meaning and sentence meaning, but what light does that distinction shed on the problem of determining the communicative content of legal texts? The answer to that question brings us to the role of context in the determination of communicative content.

*D. Examples of the Role of Context in the Determination of the Communicative Content of Legal Utterances*

There is a minor terminological problem here. I am going to use "contextualism" as the label for the view that different types of legal communication (where constitutions, statutes, contracts, and judicial orders are types) have distinct contextual features that affect the way in which communicative content is produced. But the word "contextualism" plays different roles in other theoretical contexts. I am using "contextualism" in a stipulated sense, which may or may not be connected to other uses of the word "contextualism" in legal theory, theoretical linguistics, or the philosophy of language.<sup>46</sup>

With the terminology clarified, let me preview my argument. I am going to begin with the claim that certain legal utterance types<sup>47</sup> involve the determination of communicative content on the model of Grice's notion of rich speaker's meaning—judicial orders to parties and contracts are examples. Other legal utterance types communicate in a way that approximates sentence meaning—although context continues to play an important role. Constitutions and statutes are like this.

Why? The answer to that question lies in the notion of a "success condition"—for a speaker to convey her intentions to a listener, the context in which communication occurs must provide sufficient information for the listener to grasp the speaker's intention and the speaker must know that the listener will be able to do this. In face-to-face communication, the possibility of interaction between conversational partners creates an information rich environment with multiple and redundant channels for the production of common knowledge of

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46 A classic example of contextualism in theoretical linguistics and the philosophy of language arises in the case of indexical expressions. The meaning of a sentence like, "I am here" depends on the context of an utterance. So if Lawrence Solum utters "I am here" in Washington, D.C., the meaning is different than an utterance of the same words by Alexandra Sloan in Redondo Beach, California.

47 I am using the word "type" in the technical sense in which "types" are distinguished from "tokens." See Linda Wetzel, *Types and Tokens*, STAN. ENCYC. PHILOSOPHY (Apr. 28, 2006), <http://plato.stanford.edu/entries/types-tokens/> ("The distinction between a *type* and its *tokens* is an ontological one between a general sort of thing and its particular concrete instances (to put it in an intuitive and preliminary way).").

the relevant communicative intentions. But not all communicative situations are information rich. In information poor communicative environments, the speaker or author will need to engage in a communicative strategy that can succeed in utilizing the communicative resources that are available. One such strategy is to exploit (as much as possible) the conventional semantic meaning of words and phrases and standard forms of grammar and syntax, while attempting to avoid ambiguity.

That was the preview of the strategy. Here is the execution.

### 1. Oral Contracts

Let us begin with legal utterances that take place in contexts that are characteristically rich in information about the speaker's communicative intentions. One such context is the formation of a contract through oral communication. Consider the following stylized example:

Ben: Can you fix that? [Pointing to the leaky roof of his home.]

Alice: Sure, but it will be expensive if you want it done before the storm this weekend.

Ben: How much?

Alice: \$4,000 dollars.

Ben: O.K., we have a deal.

[Alice shakes her head left and right.]

Alice: I'll need half in advance.

[Ben nods his head up and down.]

Ben: I'll write you a check.

Alice: Make it out to Alice Adams roofing.

In this exchange, each of the two participants succeeds in recognizing the communicative intentions of the other. Alice recognizes that the indexical use of the word "that" in Ben's first remark is intended by Ben to refer to the leaky roof of his house. Ben recognizes that when Alice shakes her head and says, "I'll need half in advance" that her intention is to reject his offer and propose another contract term—payment of \$2,000 in advance of the work being performed. Alice recognizes that when Ben nods and says, "I'll write you a check," he both means to convey his acceptance of the additional term (something he has not explicitly said) and to express his present intention to write the check. The communicative content of the exchange is richer than the semantic content (the literal meaning) of Ben's and Alice's utterances; there was no literal or explicit offer and accept-

ance. But a court should have no difficulty in recognizing the communicative content on the basis of testimony that accurately recreates the exchange: the content can easily be inferred from the words given the context.

So the communicative content of the oral agreement (as it would be found by a competent finder of fact) fits Grice's model of rich speaker's meaning. Alice communicates an offer to Ben based on Ben's recognition of her communicative intentions. Ben tries to accept what he believes is Alice's complete offer, but that attempt is rebuffed. Ben then successfully accepts the full offer (with the more fully specified terms of payment). All of this happens because Alice and Ben mutually recognize one another's communicative intentions.

Finally, notice that the communicative content of the oral agreement may not provide the full legal content of Ben and Alice's contract. Ben and Alice's agreement is what contract theorists call an "incomplete contract"<sup>48</sup>—it does not fully specify either Ben's or Alice's legal obligations. For example, it does not provide for the contingency that the storm could arrive before the work can be started, potentially requiring an adjustment in the price. Nor does the contract specify the remedy to which Ben would be entitled if Alice failed to complete the repair or if her work was shoddy and the roof continued to leak. The law of contracts may contain default rules that specify the missing terms, or it might authorize a judge to provide the terms on the basis of a set of legally salient factors embodied in a legal standard.<sup>49</sup> In either event, the legal content of the contract would not be identical to the communicative content of Ben and Alice's agreement.

## 2. Constitutional Clauses

Many legal communications do not take place in the information rich environment that characterized Ben and Alice's successful contract negotiation. Consider the very different circumstances that attended the drafting of the Constitution of 1789 (the United States

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48 Lawrence B. Solum, *The Boundaries of Legal Discourse and the Debate over Default Rules in Contract*, 3 S. CAL. INTERDISC. L.J. 311, 324 n.23 (1993) (internal quotation marks omitted).

49 There is a large body of literature on default and mandatory rules in contract law. See, e.g., Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 127-30 (1989); Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821, 827 (1992); Solum, *supra* note 48, at 332; Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 704 (1999).

Constitution that went into effect in that year).<sup>50</sup> The Constitution was drafted by the Constitutional Convention, which held secret meetings in Philadelphia.<sup>51</sup> Although James Madison and others kept notes, these notes were not published until decades after the Constitution went into effect.<sup>52</sup> Even as to the events on the floor of the Convention, the notes are fragmentary and incomplete—and at least some of the content of the published notes was created or altered years later.<sup>53</sup> Moreover, the work of drafting the constitutional text was not actually done on the floor of the Convention. The whole Convention adopted a series of resolutions that were then translated into the text by the work done first by the Committee on Detail and then the Committee on Style.<sup>54</sup> There are no detailed internal records of the work of these committees, and even their membership was unknown to most of the officials (judges, members of Congress, executive officers) who were tasked with giving legal effect to the constitutional text.<sup>55</sup>

The text of the Constitution was a group effort. From what we do know, it appears that different authors drafted different bits of the text, and many individual clauses bore the marks of many hands.<sup>56</sup> Moreover, the Constitutional Convention had no authority to adopt the Constitution—that task was given to ratifying conventions held in each of the thirteen states.<sup>57</sup> And those ratifying conventions were also group efforts—with a diverse group of delegates. We know that

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50 GREGORY E. MAGGS & PETER J. SMITH, *CONSTITUTIONAL LAW* 9 (2d ed. 2011).

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

52 *See id.*

53 *See id.* at 1193 & n.354.

54 *Id.* at 1204, 1207.

55 Our knowledge of the workings of the committees is derived from a variety of sources, including for example the *Report of Committee of Style* (Sept. 12, 1787), in 2 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 590 (Max Farrand ed., rev. ed. 1937). We also have various reports about the work of the Committee of Style, for example in private letters. Gouverneur Morris reports that he drafted the final version of the Constitution in a letter to Thomas Pickering. *Gouverneur Morris to Timothy Pickering, December 22, 1814*, in 3 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, *supra*, at 419, 420. From Morris's report to Pickering, we can infer that his precise role in the drafting of the text was not common public knowledge in the early nineteenth century. None of the extant reports include a detailed reconstruction of the Committee's work. My understanding of the role of the Committee on Style is indebted to recent unpublished work by William Treanor. *See* William Michael Treanor, *Gouverneur Morris's Constitution* (October 24, 2014) (unpublished manuscript on file with the author).

56 *See* MAGGS & SMITH, *supra* note 50, at 7.

57 *Id.*

different delegates had different understandings of the text because they said so.<sup>58</sup> And we have very little evidence regarding the understandings of many or most of the delegates to the ratifying conventions—because they said nothing that appears on the records of the conventions and perhaps said nothing at all.<sup>59</sup>

Moreover, the participants in the process of drafting and ratification would have known that the Constitution would require interpretation by officials who knew even less about the communicative intentions of the drafters and ratifiers than did the framers and ratifiers themselves. The Constitution was to apply in a wide geographic area (the territory of the United States) for an indefinite period of time (from the time it became legally effective until it was replaced in whole or altered in part by amendment). This meant that it would govern officials (judges, state legislators, and others) who would have scanty knowledge of the circumstances surrounding framing and ratification. At least some of these officials would be in almost complete ignorance of the drafting process and have very limited knowledge of the particular circumstances of ratification.

Contemporary knowledge of the drafting processes at the Philadelphia Convention may actually be more substantial than the knowledge of many early interpreters. The Convention was conducted in secret, no records of the Convention were available before 1819, and Madison's notes did not become available until 1840.<sup>60</sup> Before these records became available, one might have assumed that knowledge of the drafting history would actual degrade over time—as the founding generation passed from the scene.

Given these circumstances, it is difficult to make the case that the success conditions for *rich* Gricean speaker's meaning could have been satisfied in the case of the United States Constitution. For speaker's meaning to be "rich," the listener must have access to information about the specific communicative intentions of the speaker. Such access is necessarily a function of what we can call "the communicative situation"—the conditions in which communication occurs. Some communicative situations are information rich: conversations

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58 Kesavan & Paulsen, *supra* note 51, at 1162.

59 Of course, verification of this claim would require a systematic examination of the records of the ratification debates. For these records, see THE DEBATES OF THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787 (Jonathan Elliot ed., 2d ed. 1856), available at <http://memory.loc.gov/ammem/amlaw/lwed.html> (last visited Oct. 22, 2013).

60 See James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEX. L. REV. 1 (1986).

between individuals who know a great deal about one another are examples of information rich communicative environments. Other communication situations are information poor: discovering a message in a bottle with no knowledge about the identity of the sender or the circumstances of the sending.

The audience for the Constitution (including officials, judges, and “We the People”) had limited knowledge of the specific communicative intentions of the individual framers that drafted particular clauses in the constitutional text.<sup>61</sup> The context of constitutional communication was information poor, and the problem of determining the relevant communicative intentions of the large group of individuals who participated in the drafting and ratification process was daunting.<sup>62</sup> One might doubt that the kind of communicative intentions necessary for Gricean speaker’s meaning exist when a text is drafted by multiple authors and then put into legal force by a different set of institutions. Despite such doubts, let us assume that the best theoretical account posits the existence of the required intentions.<sup>63</sup> Rich speaker’s meaning requires more than the theoretical existence of the relevant intentions—it requires that the relevant intentions be successfully communicated. So far as I know, no one has attempted to demonstrate that the drafters and ratifiers themselves had common knowledge of the relevant intentions (of course, the knowledge could have been tacit or implicit). And this would not suffice, because the intended audience, the officials and citizens to whom the Constitution was addressed (“We the People”), would have had to share this common knowledge.

At this point, the reader might infer that I am about to reach a skeptical conclusion—that constitutional communication was impossible given the context of constitutional communication. But that is not where I am going. That is because an alternative strategy was available to the framers and ratifiers of the Constitution. They could rely on

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61 *See id.* at 1115 n.7.

62 *See id.* at 1162.

63 There are at least three possible accounts of the relevant communicative intentions. First, they might be the intentions of the individuals who authored particular passages; in the case of the Constitution this would include numerous individuals at the Philadelphia Convention. Second, the relevant intentions might be group intentions derived from the intentions of all the members of the relevant group; in the case of the Constitution, the relevant group could be either the Philadelphia Convention or the ratifying conventions, or both. Third, the relevant intentions might be the intentions of a group agent. On this third idea, see CHRISTIAN LIST & PHILIP PETTIT, *GROUP AGENCY* 1–16 (2011) (developing a theory of group agency). My own (tentative) view is that a group-agency account is the most promising, but these issues are beyond the scope of this Essay.

the public meaning of the text—that is the conventional semantic meaning of the words and phrases as combined by widely shared regularities of syntax and grammar.<sup>64</sup> Following Grice’s use of the phrase “sentence meaning,” we might call this the *clause meaning* of the Constitution.<sup>65</sup>

How can we understand clause meaning? We will begin with a first approximation and then provide a more complete understanding. The first approximation is provided by a simplified version of original public meaning originalism. As Blackstone wrote, “Words are generally to be understood in their usual and most known signification.”<sup>66</sup> The original public meaning version of originalism emphasizes the meaning that the Constitution (or its Amendments) would have had to the relevant audience at the time of its adoption.<sup>67</sup> Thus, the relevant question in the recognition or discovery<sup>68</sup> of clause meaning is, “How would the Constitution of 1789 have been understood by a competent speaker of American English at the time it was adopted?” This question points us to the ordinary and conventional meanings of the words and phrases of the Constitution. Rather than assigning these words and phrases special or idiosyncratic meanings based on the secret and divergent intentions of multiple authors, an ordinary member of the public would have been required to look to common usage and public meanings.

We (twenty-first century citizens and officials) are not ordinary members of the public of 1789: contemporary American English is not identical to late eighteenth-century American English. In many particular cases, however, the contemporary meanings of the words and phrases in the constitutional text today are identical to the meanings at the time the Constitution was framed and ratified. In theory and practice, however, there can be, and are, cases of divergence. For us to determine whether there is divergence with respect to a particular clause, we would be required to consult evidence as to late eighteenth-century usage. So, for example, we might consult newspapers, political pamphlets, and a variety of other general sources for evidence about the meaning of particular phrases.

We might also consult evidence that is directly connected to the drafting and ratification of the Constitution. For example, the

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64 See Kesavan & Paulsen, *supra* note 51, at 1132.

65 Grice, *supra* note 36, at 236.

66 1 ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES 59 (1803).

67 See Kesavan & Paulsen, *supra* note 51, at 1132.

68 The phrase “recognition or discovery” is chosen with care and used in preference to “determination” or “attribution” in order to convey the factual nature of the inquiry.

debates at the Constitutional Convention in Philadelphia may shed light on the question of how the Constitution produced by the Convention would have been understood by those who did not participate in the secret deliberations of the drafters. The ratification debates and Federalist Papers can be supplemented by evidence of ordinary usage of the words and phrases used in the constitutional text. And further evidence is provided by the constructions placed on the Constitution by the political branches and the states in the early years after its adoption. But it is important to emphasize that all of these sources are *evidence* of the public meaning (clause meaning) of the text. The secret deliberations of the convention can provide evidence of the way the constitutional text would be understood by its intended readers (outside the convention), but given the communicative situation, the value of this particular kind of evidence is limited and its significance can be misunderstood.

The first approximation of clause meaning draws on conventional semantic meanings as structured by syntax and grammar, but this first approximation fails to capture the full communicative content of the constitutional text. Why is this so? The framers and ratifiers of the Constitution would not have assumed that the Constitution would be interpreted by readers who were in complete ignorance of the context of constitutional communication. Certain features of the context could be assumed to be accessible (under normal conditions) by anyone who would read the Constitution in the course of what we might call “American constitutional practice,” that is, as part of the activity of interpreting and construing the Constitution in the role of official or citizen.<sup>69</sup> Not every feature of the context of constitutional communication could have been assumed to be publicly available in this way. The whole context of constitutional communication consists of a vast array of facts, ranging from the trivial to the fundamental. But some of these facts would have been assumed by the framers and ratifiers to be publicly available to everyone who engages in American constitutional practice. Call these facts *the publicly available context of constitutional communication* (or *the public context*, for short). The precise contours of the public context can only be defined by careful inquiry, but one element is indisputable: the public context of each individual clause includes the whole constitutional text.

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69 Of course, one can imagine possible worlds in which the public context of constitutional communication would become lost because of some science fiction calamity that destroyed all the relevant records and memories. These possibilities are not inconsistent with an assumption that in the actual world, some elements of the context of constitutional communication could be expected to remain accessible as long as the Constitution remained in force.

The public context is relevant to clause meaning in the following way. Given that the framers and ratifiers believed that readers engaged in American constitutional practice would know the public context and that they would also know that the framers and ratifiers would believe that they would have such knowledge, the public context satisfies the conditions for common knowledge and can successfully determine clause meaning. Here is an example of a fact that lies within the domain of the public context: the constitutional text is the text of the Constitution of the United States—the nation state that came into existence as a result of the Revolutionary War between the American colonies and Britain. Importantly, the public context may include facts about the general point or purpose of the provision (as opposed to “the intention of the author”), and those facts may resolve ambiguities.<sup>70</sup>

A full account of clause meaning would include a theory of the criteria for inclusion in the set of facts that constitute the publicly available context of constitutional communication. Application of the conception of clause meaning to particular issues of interpretation and construction would require the identification of those aspects of the public context that are relevant to the issue at hand. On this occasion, I will provide neither the criteria nor an enumeration of the facts that meet the criteria. Rather, the limited purpose of this discussion is to introduce the public context as a modification of the conception of clause meaning.

The account of clause meaning that I offer here is incomplete. So far, the account includes: (1) the semantic meaning of the text, and (2) the publicly available context of constitutional communication. There are at least three other considerations that would need to be taken into account for a complete account of the communicative content of the Constitution: (3) some constitutional language seems to be technical in nature—the full account would need to tell a story about constitutional terms (and phrases) of art and the division of linguistic labor that explains their success conditions;<sup>71</sup> (4) some of the language in the Constitution stipulates new names for entities that

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<sup>70</sup> As a consequence, the theory of clause meaning does not suffer from a “missing step” problem. See Abner S. Greene, *The Missing Step of Textualism*, 74 *FORDHAM L. REV.* 1913, 1923 (2006). Assessment of clause meaning does not require arbitrary exclusion of any information about the context of utterance—all such evidence can come in, but only in order to determine the clause meaning, that is, the conventional semantic meaning in light of the publicly available context.

<sup>71</sup> The idea of a division of linguistic labor is usually attributed to Hilary Putnam. See Hilary Putnam, *The Meaning of ‘Meaning,’* in 2 *PHILOSOPHICAL PAPERS: MIND, LANGUAGE AND REALITY* 215, 227 (1985).

did not exist prior to the Constitution's implementation ("Congress of the United States" is an example)—the full account would need to tell a story about constitutional stipulations;<sup>72</sup> (5) as with other communications, the constitutional text (when read in context) communicates things that go without saying or that are implicated by what is said explicitly—the full account would need to tell a story about constitutional implicature,<sup>73</sup> presupposition,<sup>74</sup> and implicature.<sup>75</sup> There may be other considerations, but for the purposes of this Essay, these five elements define what I call *clause meaning*.

Notice that the communicative content of the Constitution cannot account for all of the content of constitutional doctrine. For example, the Constitution includes a number of general, abstract, and vague phrases—"freedom of speech," "legislative power," and so forth. The constitutional doctrines that are associated with the phrases have legal content that is richer than the communicative content of the provisions in which the phrases occur. Free speech doctrine includes rules concerning billboards<sup>76</sup> and prior restraint,<sup>77</sup> but the content of these rules is not part of the communicative content of the First Amendment. In such cases, the legal content of constitutional doctrine is provided by constitutional construction that goes beyond mere translation of communicative content into legal rules.

We are now in a position to summarize our account of constitutional communication. The framers and ratifiers of the United States

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72 I use the word "stipulation" to refer to the process that creates the connection created between a proper name, like "Congress of the United States" and the thing it names. In the philosophy of language, this is sometimes called a "dubbing" or "baptism." See Sam Cumming, *Names*, STAN. ENCYC. PHIL. (last revised Mar 19, 2013), <http://plato.stanford.edu/entries/names/>.

73 See Wayne Davis, *Implicature*, STAN. ENCYC. PHIL. (last revised Sept. 22, 2010), <http://plato.stanford.edu/entries/implicature/>; see also Jeffrey Goldsworthy, *Constitutional Cultures, Democracy, and Unwritten Principles*, 2012 U. ILL. L. REV. 683, 698; Andrei A. Marmor, *Can the Law Imply More Than It Says? On Some Pragmatic Aspects of Strategic Speech*, in PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW 83 (Andrei A. Marmor & Scott Soames eds., 2011).

74 See Goldsworthy, *supra* note 73, at 698–99 ("Presuppositions, or tacit assumptions, are not deliberately communicated by implication. Instead, they are taken for granted: they are so obvious that they do not need to be mentioned or (sometimes) even consciously taken into account.").

75 See Kent Bach, *Conversational Implicature*, 9 MIND & LANGUAGE 124, 126 (1994).

76 See *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 520 (1981) (holding that a city ordinance restricting billboard advertising was an unconstitutional exercise of city's police power and abridged First Amendment rights).

77 See *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (*per curiam*) (holding that the government did not meet its burden to enjoin newspaper from publishing classified information).

Constitution faced a communicative context that created distinctive constraints on successful communication: (1) the information about the communicative intentions of the framers and ratifiers that would be available to the addressees of the Constitution (officials and citizens) was sparse; (2) the Constitution was drafted by multiple authors who themselves had limited knowledge about the communicative intentions of the individuals who drafted particular passages; and (3) there was nonetheless a publicly available context of constitutional communication. These constraints differentiate the circumstances of constitutional communication from an ordinary conversation (and from an oral contract negotiation). The crucial consequence of this differentiation is that the success conditions for constitutional communication requires reliance on the conventional semantic meaning of the words and phrases, standard grammar and syntax, and additional contextual information provided by the publicly available context of constitutional communication.

### 3. Judicial Opinions

Judicial opinions involve a distinct communicative context. Opinions are drafted in secret—an elaborate set of rules and practices ensures that the drafting process does not become public until long after the text of the opinion is published. But judicial opinions in the United States are quite unlike statutes and constitutional provisions because the opinions themselves provide rich contextual information. For example, a Supreme Court opinion will typically provide a recitation of the facts and procedural history of the case and an elaborate discussion of the legal texts that are relevant to the issues presented. These texts might be constitutional provisions or statutes, but almost all Supreme Court opinions will discuss the prior decisions of the Court, and many opinions will discuss the opinions of other courts as well.

Although there is elaborate literature on the interpretation and construction of constitutions and statutes (indeed, whole subfields of law are devoted to these topics), the literature on the interpretation of judicial opinions is sparse and focused (almost entirely) on the legal content of these opinions. Thus, there are both doctrinal and theoretical discussions of the doctrine of *stare decisis* that are focused on the question of what legal rules a Supreme Court opinion creates. But very little has been written about the problems associated with determining the communicative content of Supreme Court opinions.

The interpretation of judicial opinions is a large and fascinating topic, but in this Essay I can only make a few points. These points will

be limited to judicial opinions in the United States; judicial opinions function differently in other legal cultures that have different conventions regarding the content and style of official judicial writings.<sup>78</sup> Judicial opinions are written for a specialized audience—those learned in the law, including judges, lawyers, and legal scholars. Although there may be exceptional cases in which some or all of a judicial opinion is deliberately crafted so as to be comprehensible to the public at large, the standard judicial opinion employs technical vocabulary and assumes background knowledge that enables the reader to glean communicative content that would not be captured by the conventional semantic meaning of the text itself. This point is well known to anyone who has studied the law using the case method: in the first few weeks of law school, it is simply impossible for a law student to glean the full communicative content of most judicial opinions—students lack knowledge of the meaning of technical language and background knowledge about the substance of the law that the opinion writers assumed would be shared by the audience of the opinion. And this is a good thing because a fully explicit opinion (with definitions of all technical terms and a full statement of the legal background) that would be comprehensible to the public at large could be very long indeed—running into the tens of thousands of pages. Such an opinion would essentially provide a legal education to the reader.

So the typical communicative context of judicial opinion writing involves a rich set of common knowledge shared by the authors of the opinions and their intended audience. And the communicative context is enriched explicitly within opinions themselves; as we have already noted, judicial opinions usually provide their own description of the context in which the decision was made—facts, procedural history, and legal background. But there is another sense in which the communicative context is sparse. We have already noted the secrecy that surrounds the drafting process.<sup>79</sup> Traditionally, judges were also circumspect in making public remarks that would illuminate their decision making, although many contemporary judges now engage in extensive extra-judicial writing about their judicial philosophies and views on the abstract questions of legal theory, policy, and principle. But it is rare for American judges to discuss the particular motivations and communicative intentions that shaped their drafting of judicial

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78 See Richard B. Cappalli, *At the Point of Decision: The Common Law's Advantage over the Civil Law*, 12 TEMP. INT'L & COMP. L.J. 87, 91 (1998) (noting the "large, systemic differences in theory and practice" between common law and civil law traditions).

79 See *supra* notes 60–61 and accompanying text.

opinions—and very rare indeed if a judge is still a member of the court for which an opinion was drafted.

Of course, the actual work of drafting is frequently not done by the judges themselves. In many cases, judicial opinions are drafted by law clerks.<sup>80</sup> We know even less about the communicative intentions of the law clerks than we do about those of the judges. There are occasional exceptions. For example, Footnote Four of *Carolene Products* was drafted by Louis Lusky,<sup>81</sup> and because of the importance of this footnote, his role has become the subject of public discussion.<sup>82</sup> But no one thinks that courts should consult historical evidence of the mental states of law clerks to determine the meaning (communicative content) of judicial opinions. The obviousness of this conclusion flows from our intuitive understanding of the communicative situation, which prevents access to this information at the time opinions are released (and for years afterwards).

Judges and lawyers rely on the structure of the situation of judicial communication to determine the meaning of judicial opinions. The publicly available context of judicial communication includes the opinion itself, the briefs (if they are publicly available), and the relevant legal background. We do not rely on the private deliberations of the judges or their law clerks because these are outside the publicly available context. And judges and their law clerks understand that our access to information shapes their communicative situation (either explicitly or implicitly). For example, law clerks understand that the opinions (or parts of opinions they write) are written for lawyers and judges who can only grasp communicative intentions that are communicated via semantic content and publicly available context.

So the communicative context of judicial opinion writing involves common knowledge that includes a rich set of background assumptions and the opinions themselves provide a rich description of the legal and factual context in which the decision was made, but the practices that govern opinion drafting and judicial conduct create an information poor environment when it comes to the particular pur-

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80 See Richard A. Posner, *Legal Scholarship Today*, 115 HARV. L. REV. 1314, 1320 (2002) (observing “many judicial opinions were and are ghostwritten, by law clerks”).

81 See Louis Lusky, *Footnote Redux: A Carolene Products Reminiscence*, 82 COLUM. L. REV. 1093 (1982).

82 See Felix Gilman, *The Famous Footnote Four: A History of the Carolene Products Footnote*, 46 S. TEX. L. REV. 163, 196 (2004); Peter Linze, *The Carolene Products Footnote and the Preferred Position of Individual Rights: Louis Lusky and John Hart Ely vs. Harlan Fiske Stone*, 12 CONST. COMMENT. 277, 278 (1995); Matthew Perry, *Justice Stone and Footnote 4*, 6 GEO. MASON U. CIV. RTS. L.J. 35, 43 (1996).

poses and communicative intentions of those who draft the opinions, whether the drafters are judges or their clerks.

When we engage in interpretation of judicial opinions, we must take this communicative context into account. Judges know that we share (or can acquire) the relevant background knowledge. They know that we are aware of the conventions that govern opinion writing, and hence that we will read the legally operative passages (the holding) in the context of the facts, procedural history, and background discussion of the law. But they assume that we won't know about the particular motives, purposes, and communicative intentions of the opinion drafters—except to the extent that these can be inferred from the text of the opinion or from shared background knowledge. So judges will attempt to write opinions that communicate successfully given the communicative situation. We know that they are doing this, and they know that we know.

Given this understanding of the communicative situation of judicial opinion writing, we can observe the ways in which the communicative context of judicial opinion writing differs systematically from the contexts of contractual and constitutional communication. An oral contract negotiation is similar to an ordinary conversation—the participants (both of whom occupy the roles of speaker and audience) are both present. They can ask questions and clarify misunderstandings. But oral contract negotiations usually do not include an explicit recitation of background context. Although there could in theory be an oral recitation of the circumstances of negotiation and of the general principles of contract law, such a recitation would be unusual. There may be shared background knowledge, as in an oral contract between sophisticated businesspersons who share technical vocabulary and assumptions about customs that supply default rules, but there may not, as in contracts between strangers where one of the parties has never before entered into an agreement of this kind. The typical context for communication via a judicial opinion is systematically different from the contexts that are characteristic of contracts (and these contexts vary by subtype).

Likewise, there are systematic similarities and differences between the context of constitutional communication and the context of communication via judicial opinion. Both the United States Constitution<sup>83</sup> and judicial opinions are written in secret—with an information poor environment with respect to the particular purposes and communicative intentions of the drafters. But judicial opinions incorporate rich internal descriptions of communicative content, whereas

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83 Kesavan & Paulsen, *supra* note 51, at 1115.

the Constitution of the United States has a Preamble of only fifty-two words.<sup>84</sup> Judicial opinions are aimed at legal practitioners who share common knowledge (with the authors of the opinions) of specialized vocabulary and background facts about the law. The audience for the Constitution was wider and many of those who participated in drafting and ratification were nonlawyers.<sup>85</sup> So we understand the United States Constitution differently than we do judicial opinions.

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We have investigated three contexts of legal communication: oral contracts, constitutions, and judicial opinions. But the analysis could be extended to other legal contexts, including the interpretation and construction of statutes, regulations promulgated by administrative agencies, rules of procedure adopted by courts, wills, trusts, contracts between sophisticated business entities, and other legal texts. Tun-Jen Chiang and I have recently authored an in-depth investigation of the interpretation and construction of patent claims.<sup>86</sup> Each context might involve special considerations. The communicative content of a contract drafted by lawyers with meticulous attention to the impact of language choice on prior court decisions might be determined by legal terms of art, where some of the same words in an oral contract between a consumer and a sole proprietor of a small business might be determined by conventional semantic meanings in ordinary speech.<sup>87</sup>

#### *E. Contextualism About Communicative Content Generally*

What do these examples teach us? Legal communications can be categorized into familiar types. These types include, but are not limited to, constitutions, statutes, regulations, judicial opinions, judicial orders, oral contracts negotiated by the parties, written contracts

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84 Those words are:

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

U.S. CONST. pmbl.

85 See *America's Founding Fathers: Delegates to the Constitutional Convention*, NAT'L ARCHIVES, [http://www.archives.gov/exhibits/charters/constitution\\_founding\\_fathers\\_overview.html](http://www.archives.gov/exhibits/charters/constitution_founding_fathers_overview.html) (last visited Nov. 15, 2013) (noting that only thirty-five of the fifty-five delegates who attended the Constitutional Convention were lawyers or had legal training).

86 Chiang & Solum, *supra* note 8.

87 I owe this point to a discussion with my colleague Gregory Klass.

negotiated by lawyers, and wills. Each of these types involves a distinctive and characteristic communicative situation. Associated with each communicative situation are success conditions. The success conditions for constitutional communication differ systematically from the success conditions for the formation of an oral contract. In order to determine the communicative content of a legal communication, we need to take these success conditions into account. Recall that we are using the term “interpretation” to name the activity of determining the communicative content of a legal text. For interpretation of a legal text to succeed in recovering its communicative content, the interpreter must take context into account—in particular, the interpreter must understand the distinct constraints on successful communication associated with the type of legal text.

With this sketch of communicative content in place, we can now turn to legal content.

### III. LEGAL CONTENT

What is legal content and how is it determined? In this Part of the Essay, I will investigate these questions and then turn to the role that the communicative content of legal texts plays in the determination of legal content. Ultimately, I will make the case that our account of the relationship between communicative and legal content must take into consideration systematic differences in context associated with distinctive types of legal communication. For example, the role of constitutional text in determining the content of doctrines of constitutional law is systematically different than the role that oral exchanges play in determining the content of a contractual agreement.

#### A. *What Is Legal Content?*

By using the phrase “legal content,” I mean to refer to the content of legal norms. I use the word “norm” because of its generality. There are (at least) several types of legal norms: we talk of rules, standards, principles, obligations, mandates, and so forth. Consider the case of constitutional law and adjudication. At one level, the legal content of constitutional law consists of a large and complicated set of doctrines. These doctrines include very general structures (e.g., the tiers of scrutiny associated with the Equal Protection Clause doc-

trine)<sup>88</sup> and more particular rules (e.g., the unconstitutionality of one house legislative vetoes).<sup>89</sup> But there are constitutional norms that are more particular; for example, the particular legislative veto of deportation decisions that was at issue and found unconstitutional in *INS v. Chadha*.<sup>90</sup> Even more focused constitutional norms are created in constitutional adjudication. The Supreme Court and the federal courts of appeals issue mandates—the directives aimed at lower courts that require specific actions, (e.g., that a judgment be vacated). Moreover, the norms of contract law and the law of wills and trusts enable individuals to create legal norms that govern relationships among particular persons and the disposition of particular property. Legal content includes the content of all of these norm types.

For reasons that we have already rehearsed, legal content is not identical to the communicative content of legal texts. The content of free speech doctrine is legal content, but this doctrine far outruns the communicative content of the First Amendment. Legal content is also distinct from legal effect. The effect of legal texts and legal doctrines (the “law in action”) is the point at which legal content meets the world. The point of contact is frequently itself a legal text—an order or injunction—that expresses a legal norm that in turn shapes the conduct of officials and citizens. Legal effect is the shaping of conduct—and not the norm that does the shaping.

### B. *What Does Communicative Content Contribute to Legal Content?*

Mark Greenberg has helpfully discussed the relationship between communicative content and legal content using the notion of *contribution*.<sup>91</sup> We can ask the question, “What contribution does the communicative content of a particular legal text (e.g., a clause of the Constitution, a statute, or a judicial opinion) make to the law?” Greenberg frames his question in the context of legislation,<sup>92</sup> but I want to ask the question more generally—taking into account the full range of legal texts (including constitutions and judicial opinions which are relevant to the legal content associated with statutes).

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88 Kathryn A. McAluney, *Equal Protection, in Developments in State Constitutional Law: 1995*, 27 RUTGERS L.J. 963, 1074 (1996) (noting the three levels of scrutiny for Equal Protection analysis).

89 *INS v. Chadha*, 462 U.S. 919, 958–59 (1983).

90 *Id.*

91 Mark Greenberg, *Legislation as Communication? Legal Interpretation and the Study of Linguistic Communication*, in PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW, *supra* note 73, at 217, 218.

92 *Id.*

Let's begin by ruling out the possibility that the full legal content associated with a single legal text (e.g., a statute or clause of the Constitution) is necessarily identical to the communicative content of that text. I have already made this point via examples (e.g., the text of the First Amendment versus the content of free speech doctrine).<sup>93</sup> At this point, I will say something that is more systematic. There are at least four reasons why legal content can differ from communicative content.

First, some legal texts are vague. A text is vague if it contains an operative word or phrase that admits of borderline cases—it is useful here to think of H.L.A. Hart's metaphor of the core and penumbra of a legal rule.<sup>94</sup> When the law deals with a penumbral case, the resolution of the case will require more than the linguistic meaning (or communicative content) of the text. By hypothesis, the case is not covered by the core of the rule. Because there are recurring borderline cases, the law frequently supplements the vague text with legal doctrines that eliminate or reduce vagueness.<sup>95</sup> This phenomenon is particularly clear with many of the general and abstract provisions of the United States Constitution, including freedom of speech and the separation of powers provisions.

Second, there are cases in which the communicative content of a particular legal text is irreducibly ambiguous. Of course, many legal texts contain ambiguities that can be resolved by reference to the available context of legal utterance. But sometimes context is insufficient. This might be a function of epistemic problems—we may not know enough about the context of utterance to resolve the ambiguity (this may result from secret drafting processes, for example). Irreducible ambiguity might also be deliberate. When drafting requires agreement among parties with conflicting goals or interests, compromise may be necessary. One form of compromise involves the deliberate creation of ambiguity that “kicks the can down the road.”<sup>96</sup> For example, a deliberately ambiguous statute may require resolution by a judicially created construction that chooses one of two possible mean-

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93 See *supra* text accompanying notes 1–2, 76, 104–105.

94 HART, *supra* note 16, at 123.

95 See *id.* at 12–13, 125–36.

96 For discussions of deliberate ambiguity in contracts, see B. Douglas Bernheim & Michael D. Whinston, *Incomplete Contracts and Strategic Ambiguity*, 88 AM. ECON. REV. 902 (1998) and Gregory M. Duhl, *Conscious Ambiguity: Slaying Cerberus in the Interpretation of Contractual Inconsistencies*, 71 U. PITT. L. REV. 71 (2009).

ings (or that creates a legal rule that splits the difference between them).<sup>97</sup>

Third, there are cases in which the legal text that is intended to provide a set of legal norms that is complete within a particular domain contains a gap. Suppose that there are three possible situations, *A*, *B*, and *C* that are covered by a rule. The rule directs outcome 1 in situation *A*, and outcome 2 in situation *B*, but the drafters of the rule did not foresee situation *C* (or did foresee it, but forgot to provide a rule for it, or didn't forget, but deliberately said nothing about it). We now have a gap, and some other legal decisionmaker (e.g., a judge) will need to deploy some default rule or create a new rule to cover the gap.<sup>98</sup>

Fourth, there may be situations in which legal texts have communicative content that is contradictory (e.g., two provisions that require conflicting outcomes in a particular case). Contradictory semantic content does not necessarily create contradictory communicative content. When the literal meaning of two provisions conflict, it may be the case that we can resolve the apparent contradiction by resorting to context—which might reveal, for example, an implied scope restriction that resolves the conflict. But there is no guarantee that this will be the case; contradictions in communicative content are certainly possible in theory and likely occur in practice. But legal effects cannot be contradictory, so if things develop such that the contradiction must be resolved in a constitutional dispute, legal content will have to be constructed that avoids the contradiction. This might be done with a judicially created gloss that imposes a scope restriction on one of the two contradictory provisions, or some other technique might be used.<sup>99</sup>

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97 See George I. Lovell, *That Sick Chicken Won't Hunt: The Limits of a Judicially Enforced Non-delegation Doctrine*, 17 CONST. COMMENT. 79, 104–05 (2000) (discussing deliberate legislative ambiguity).

98 For an example of a gap, see Keith E. Whittington, *Constructing a New American Constitution*, 27 CONST. COMMENT. 119, 123–24 (2010) (“Arguably, the removal power is an instance of such a gap. The U.S. Constitution specifies how executive branch officials are to be appointed, but does not specify how they are to be removed from office, except by impeachment. The First Congress puzzled over several alternatives as to how officers might be removed and how such removals might be constitutionally justified. The statutes creating the Cabinet departments settled on unilateral presidential removal, but there was little agreement in Congress over the rationale behind that settlement. A removal power is a requisite part of the constitutional scheme.”).

99 For a possible example of a contradiction, see *United States v. Woodley*, 726 F.2d 1328, 1329 (9th Cir. 1983) (“We are thus called upon to address the inherent tension between the so-called recess appointment clause, which on its face applies to vacancies in any government office, and section 1 of article III which provides that only

We have reached a general conclusion; the legal content associated with a particular legal text is not necessarily identical with the communicative content of that text. In practice, many legal texts are associated with legal content that is richer than the communicative content of the text. All of this is familiar to practicing lawyers and legal theorists, and none of it should be controversial.

There are two additional problems associated with the relationship between communicative content and legal content that are controversial. The first problem concerns the question whether judicial officials do or should have the authority to create legal content that contradicts the communicative content of some legal texts—in particular, constitutions and statutes. The second problem concerns the question whether judicial officials do or should have the authority to create (or recognize) legal content that is not authorized by the right kind of legal text—again the focus is usually on constitutions and statutes. Both problems are related to Mark Greenberg’s question about the contribution that communicative content makes to legal content,<sup>100</sup> and I will have something to say about that question in the next Section.<sup>101</sup>

Suppose that we have a constitutional provision with communicative content. Do judges have legal authority to adopt rules of constitutional law that conflict with that content? Should they have such authority? For example, suppose for the sake of argument that the Second Amendment to the United States Constitution has communicative content that creates an individual right to possess and carry weapons such as handguns. And suppose that the members of the Supreme Court believe that the judicial enforcement of this right would be unwise as a matter of policy. Would a decision by the Supreme Court adopting a judicial construction of the Second Amendment that nullified the individual right be legally permissible? And should the Supreme Court have such a legal power (whether or not it does have it as a matter of existing legal practice)?

These are questions about the relationship between the communicative content of the Constitution and the legal content of constitutional law. The answers to these questions are controversial. Originalists or textualists characteristically answer “no” to both questions: the Supreme Court does not have legal authority to adopt deci-

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judges with article III protection may exercise the judicial power of the United States. We are required to decide, in other words, whether the recess appointment power of the President applies to vacancies in the judicial as well as the executive branch of government.”), *rev’d en banc*, 751 F.2d 1008 (9th Cir. 1985).

100 Greenberg, *supra* note 91, at 218–19.

101 See *infra* Section III.C.

sions that contradict the communicative content of the constitutional text, and it should not have that authority.<sup>102</sup> Some living constitutionalists answer “yes” to both questions: the Supreme Court does and should have legal authority to make decisions that are inconsistent with the text.<sup>103</sup> (Of course, one could answer “yes” to the descriptive question and “no” to the normative question, or vice versa.)

Recall that we are now talking about legal content that contradicts the text—constitutional doctrine that goes beyond the text without contradicting it raises a separate problem. It is difficult to isolate examples of actual contradiction. For example, the text of the First Amendment begins “Congress shall make no law,” but judicial doctrine has extended the freedom of speech to judicial, executive, and state action. There may be some doubt, but for the sake of argument assume that the communicative content of the First Amendment is limited to action by only one institution, the United States Congress, and hence does not apply to the executive branch of the federal government, to courts, or to the governments of several states. Do decisions like *New York Times Co. v. Sullivan*,<sup>104</sup> which apply the freedom of speech to actors other than Congress, create legal content that contradicts the communicative content of the Constitution? One might answer “no” to this question, on the grounds that the First Amendment does not explicitly prohibit constitutional rules that protect freedom of speech from judicial interference, and the Ninth Amendment to the Constitution explicitly rules out constitutional constructions that deny or disparage unenumerated rights based on an inference that the explicit recognition of some rights in the text implicitly negates those rights that are not enumerated.<sup>105</sup> Likewise, *Bolling v. Sharpe* extended the protections of the Equal Protection Clause to the District of Columbia, despite the fact that the text of the Fourteenth Amendment is explicitly limited to actions by the several States and does not apply to the federal government.<sup>106</sup> But again, this is an example of going beyond the constitutional text and not an example

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102 The general rule might be subject to limited defeasibility conditions, for emergencies or radically unanticipated circumstances. See generally THE LOGIC OF LEGAL REQUIREMENTS (Jordi Ferrer Beltrán & Giovanni Battista Ratti eds., 2012) (collecting essays that discuss the idea of defeasibility in law).

103 Solum, *supra* note 9, at 525–26.

104 376 U.S. 254, 265 (1964) (applying First Amendment freedom of speech analysis to state defamation law).

105 For a contrary view, see Ephraim Unell, The First Word Revisited 11 & n.51 (February 26, 2013) (unpublished paper), available at <http://ssrn.com/abstract=2219953>.

106 347 U.S. 497, 498–99 (1954).

of direct contradiction. It might be argued that the expansion of federal legislative power by the New Deal Court and the Warren Court directly contradicts the limitations on federal power in Article I and the Tenth Amendment of the Constitution, but this was not what the Supreme Court said it was doing, and the communicative content of the Necessary and Proper Clause is complicated to say the least.

What about the second problem—legal content that is not authorized by a legal text that was adopted by democratic processes, for instance, by some statute or constitutional provision?<sup>107</sup> For example, some critics of the Supreme Court's unenumerated rights jurisprudence contend that the judicial recognition of a constitutional right to privacy is not authorized by the constitutional text and hence is not legitimate. The focus of this controversy has been the Due Process Clauses of the Fifth and Fourteenth Amendments. Assume for the sake of argument that the communicative content of these clauses does not explicitly or implicitly include a right to privacy, and that no other provisions of the Constitution have communicative content that states or authorizes the creation of such a right. (The other candidates are usually the Ninth Amendment and the Privileges or Immunities Clause of the Fourteenth Amendment.) Given these assumptions (which are contested), many originalists and textualists would reach the conclusion that the Supreme Court does not have the legal authority to recognize a constitutional right to privacy (or if it currently does have such authority, our constitutional practice should be revised so as to eliminate it). And given the assumptions, many living constitutionalists would nonetheless endorse the Supreme Court's privacy jurisprudence.

In this Essay, my aim is not to resolve these debates about the proper relationship between communicative content and legal content in constitutional interpretation. Recall that my thesis is that this relationship is dependent on context. So my point is that the kinds of reasons that are offered for and against implied fundamental rights or *Bolling v. Sharpe* or the application of free speech to institutions other than Congress frequently depend on the distinctive features of the constitutional context. For example, living constitutionalists frequently invoke the difficulty of constitutional amendment, the age of the Constitution, and associated problems of the dead hand when they argue that the Supreme Court should have authority to adopt constitutional constructions that contradict the constitutional text or

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107 For an extended discussion of these issues in the constitutional context, see Lawrence B. Solum, *Originalism and the Unwritten Constitution*, 2013 U. ILL. L. REV. 1935.

that create constitutional doctrines that are not required to address the problems of vagueness, irreducible ambiguity, gaps, and contradictions.<sup>108</sup> Likewise, originalists and textualists also rely (at least in part) on arguments that are specific to the constitutional context. Popular sovereignty justifications for originalism rely on the claim that the Constitution was adopted by “We the People” and hence that its communicative content (its original public meaning) is both binding and uniquely legitimate.<sup>109</sup> Similarly, some rule-of-law advocates for originalism argue that the communicative content of the Constitution should constrain judicial interpretation and construction because the alternative (ultimate and unconstrained judicial power to create supreme law) is inconsistent with the rule-of-law values of constraint, predictability, stability, and certainty.<sup>110</sup>

These arguments do not play out the same way with respect to other legal texts. For example, statutes can be amended and repealed by ordinary (mostly majoritarian) legislative processes. So one can argue that the case for freedom in interpretation and construction with respect to statutes is weaker than the case for freedom with respect to constitutions because the dead hand problem is less severe. Frequently, courts interpret statutes in a communicative context that is rich with information about the purposes of the drafters and adopters of the statute. When these purposes conflict with the communicative content of the statute, a case can be made that the courts ought to act as faithful agents of the legislature and adopt statutory constructions that effectuate the “spirit” of the statute even when they contradict its “letter.” These constructions can be overturned by ordinary legislative action, and hence there may be less concern with the possibility that judicial power to adopt amendment constructions will be abused.

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108 See John O. McGinnis & Michael B. Rappaport, *Originalism and the Good Constitution*, 98 GEO. L.J. 1693, 1741–42 (2010) (describing how advocates of judicial updating of the Constitution feel justified in doing so because of the difficulties of the constitutional amendment process); Adam M. Samaha, *Dead Hand Arguments and Constitutional Interpretation*, 108 COLUM. L. REV. 606 (2008) (providing a comprehensive account of dead hand arguments); David A. Strauss, *Common Law, Common Ground, and Jefferson’s Principle*, 112 YALE L.J. 1717, 1717 (2003) (“Why do we care about the Framers of the Constitution? After all, they lived long ago, in a world that was different in countless ways from ours.”).

109 See Kurt T. Lash, *Originalism, Popular Sovereignty, and Reverse Stare Decisis*, 93 VA. L. REV. 1437, 1440 (2007) (asserting that that popular sovereignty is the “most common and most influential justification for originalism”).

110 See Lawrence B. Solum, *Should We Be Originalists?*, in ROBERT W. BENNETT & LAWRENCE B. SOLUM, *CONSTITUTIONAL ORIGINALISM* 36–63 (2011).

And quite different considerations are played out in the context of determining the legal content and effect of judicial opinions. One such difference is quite striking. American courts differentiate sharply between vertical and horizontal stare decisis. For example, the Supreme Court does not consider itself bound by its own prior decisions, but, on questions of federal law, its decisions bind all other courts in the United States. Of course, the communicative content is the same, but the legal content could not be more different: binding authority is one thing, whereas presumptively valid authority is quite another.

Moreover, the great debates about what is binding are shaped by the context in which judicial decisions are made. For example, the institutional capacities of courts and the litigation process support the narrow understanding of a holding that is associated with the traditional common law conception of the *ratio decidendi*. The *ratio decidendi* of a case might be stated correctly by the court that renders the decision, but this need not be the case because a court could easily state its own holding in terms that outrun the reasons necessary to the decision (the *ratio decidendi*). Likewise, advocates of the more realist approach associated with the concept of a legislative holding might argue that the traditional approach creates too much uncertainty: courts lack control over the fact patterns presented to them and if the courts must create the law “one step at a time,” substantial uncertainties about legal content may persist for long periods of time.<sup>111</sup> Again, contextual factors shape the argument over the relationship between communicative content and legal content.<sup>112</sup>

### C. *Communicative Content and Legal Content in the System as a Whole*

The discussion in this Section involves a digression or detour—after which we will return to the main theme of the Essay, contextualism. Up to this point, we have been considering the relationship of communicative content and legal content with respect to particular legal texts (tokens) and to general kinds of texts such as statutes and judicial opinions (types). At this point, I am going to shift gears and turn to a different question: What is the relationship between the communicative content of all of the operative legal texts in a particu-

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111 See Collier, *supra* note 5, at 784 (discussing the traditional approach’s gradual movement which allowed for changes in various directions due to its extremely slow, deliberate pace).

112 For a recent discussion of formalist and realist approaches to stare decisis, see Lawrence B. Solum, *How NFIB v. Sebelius Affects the Constitutional Gestalt*, 91 WASH. U. L. REV. 1 (2013).

lar legal system and the legal content of that system? This question places our problem in a new light.

For example, the rule of *New York Times v. Sullivan* is part of the legal content of constitutional doctrine, but it is not part of the communicative content of the text of the First Amendment. Now suppose we ask about the relationship between the communicative content of the whole set of relevant legal texts, including all the relevant judicial decisions and constitutional provisions. The Supreme Court's opinion in *New York Times v. Sullivan* has communicative content. So the communicative content of the set of legal texts that includes the Constitution and all the constitutional decisions of American courts does include communicative content that corresponds to the Supreme Court's defamation doctrine. We can generalize this idea and posit the set of all legally authoritative texts. Is there any legal content that outruns the communicative content of the authoritative legal materials as a whole?

Of course, this question should not be confused with a quite different inquiry. We might ask whether the communicative content of all the relevant legal materials determines the answer to every actual or possible legal dispute. One plausible answer to that question is "no," because the communicative content of the complete set of authoritative legal materials may underdetermine the results of some cases. This does not mean that such cases will go undecided—it simply means that their decision will proceed in some way other than the application of an existing rule provided by the communicative content of the complete set. For example, the complete set might authorize a discretionary decision in the particular case—the method of case-by-case decision making. Or the complete set might authorize a legal official (e.g., a judge) to create a rule to cover the case. Or the complete set might provide a standard that lays out the relevant considerations but underdetermines the outcome.

However, the question that is on the table now is not about the determinacy of the communicative content; rather we are asking about the relationship between the communicative content of the complete set of authoritative legal materials and the legal content of the complete set of legal norms. Some readers may believe that this relationship is clear—that there simply is no such thing as a legal norm that cannot be found somewhere in the communicative content of the complete set of authoritative legal materials. The plausibility of this position rests in part on the fact that communicative content outruns explicit semantic content. Communicative content includes not only the explicit semantic content of the authoritative legal texts; it also includes legal implicature, presupposition, and implicature—the

things that go without saying or that are implicated by or implicit in what is said.<sup>113</sup>

Let us call the claim that the legal content of the whole set of legal norms is identical to the communicative content of the whole set of legally operative texts the “whole system identity thesis.” What is the alternative to this thesis? Who holds it? And what arguments are advanced against the whole system identity thesis?

Consider Dworkin’s theory (or my reconstruction of his theory, since Dworkin himself is notoriously difficult to pin down and doesn’t use the terminology of communicative content and legal content). Hercules develops the theory that best fits and justifies the institutional history of the law as a whole.<sup>114</sup> Legal content is a product of that theory. Communicative content contributes to legal content because the communicative content of legally operative texts constitutes a large and central part of institutional history that Hercules must address. But in a Dworkinian theory, legal content will differ systematically from communicative content. For one thing, some communicative content will turn out to be entirely mistaken. For another thing, the best justification for the law as a whole is likely to call for significant revisions. Of course, if the theory that best fits and justifies the prior institutional history were itself inscribed as a legal text, then that legal text would (at least for a moment) be identical to legal content. But there is no such text and if there were, its content would be superseded as changes in the institutional history would require changes in legal content. So as a matter of fact, legal content will not be identical to the communicative content of the whole set of legally operative texts.

Or consider a version of natural law theory that posits that moral facts can determine legal content in at least some circumstances. On such a theory, it may well be the case that most or even almost all of legal content would map onto the communicative content of the full set of legally operative texts. But there will be variations, for example, where the text of a statute produces an outcome that would constitute a serious moral wrong and there is no legally operative text that forbids this outcome. Once again, we have legal content that cannot be explained on the basis of the communicative content of the whole set of legal materials.

Even an exclusive legal positivist might deny that all legal content is the product of the full set of legally operative texts. Suppose that exclusive legal positivism is the view that it is necessarily the case that

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113 See Marmor, *supra* note 73, at 83–84.

114 DWORKIN, *supra* note 13.

only social facts determine legal content.<sup>115</sup> Is it the case that all of the social facts that do the work of determining legal content consist of the communicative content of legal texts? Not necessarily. It might be the case that some of the social facts that do the work lack explicit communicative content. For example, one might believe that a social practice can determine legal content in a way that is not captured by the communicative content associated with the practice. Suppose there is a custom that provides legal content, but the custom is constituted by a set of practices that could be, but have not yet been, articulated in a text or oral communication. Likewise, the terms of a contract might include content that is produced by a course of conduct that is not fully articulated—and hence is not part of the communicative content of the relevant legally operative texts or oral communications.

#### *D. Contextualism and Legal Content*

Back to the main point of this Part of the Essay! My thesis is that the role of communicative content in the determination of legal content depends on context. In particular, I have claimed that this role varies with legal context types. The role of the communicative content of constitutional text in the determination of the legal content of constitutional doctrine varies systematically from the role that the communicative content of judicial opinions plays in the determination of the legal content of case law. My argument for this claim was based on considering the arguments made by theorists and practitioners and showing that these arguments depended on the contextual features that vary based on the characteristics of different kinds or types of legal texts.

#### CONCLUSION

Suppose that you accept both of the major claims advanced in this Essay: (1) the determination of communicative content varies with context, and (2) context also substantially affects the role of communicative content in the determination of legal content. What is the payoff? Is there any cash value here? In other words, what difference does contextualism make to legal theory and practice?

Let's begin with theory. The main contribution of contextualism about communicative content and its relationship to legal content is theoretical clarity. Debates about constitutional theory, statutory

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<sup>115</sup> See Jules Coleman, *The Architecture of Jurisprudence*, 121 *YALE L.J.* 2, 46–47 (2011).

interpretation, and the doctrine of precedent are frequently conducted in ways that conflate the difference between communicative content and legal content and that fail to take the difference that context makes into account. If we can untangle the strands of argument and rearticulate the positions so that the real grounds of disagreement are made clear, we have made theoretical progress.

The relationship of legal theory to legal practice is much disputed. Some may doubt the capacity of general legal theory to make any significant contribution to the law in action. A theory skeptic might eschew theorizing altogether and adopt an anti-theoretical stance like *ad hoc* legal pragmatism or strong legal particularism.

But the history of legal thought in the United States suggests that theory makes a difference. Historically, the influence of American legal realism on legal practice for both good and ill seems difficult to deny. And contemporary debates about various forms of neoformalism—for example, originalism in constitutional theory and plain meaning approaches to statutory interpretation—are of obvious practical influence. These debates are about communicative content and its relationship to legal content. Theoretical clarity enables such debates to get down to brass tacks—the real points of disagreement—and to avoid sidetracks created by conceptual confusion. I hope to have shown that paying close attention to the distinction between communicative content and legal content and understanding the role of context does clarify and refocus these fundamental debates.

