TENSION BETWEEN CONSTITUTIONAL MEANING AND CONSTITUTIONAL CONSTRUCTION

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INTRODUCTION

The counter-majoritarian difficulty of judicial invalidation of democratically enacted laws is well known and frequently discussed.[1] As Robert Alexy has explained, "[t]he judges of the constitutional court have, as a rule, no direct democratic legitimation, and the people have, normally, no possibility of control by denying them re-election."[2] This thus raises the question of whether such judicial activity is "compatible with democracy."[3]

Originalism claims to be a solution to this problem because when judges interpret the original public meaning, they can claim the democratic legitimacy of a super-majoritarian law when invalidating a merely majoritarian policy. Justice Barrett recently reaffirmed this super-majoritarian justification for originalism while giving remarks at Notre Dame Law School.[4]

But of course, this claim rests on the assumption that the judiciary

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1. For a discussion of a thin theory of democracy, *see* Scott Hershovitz, *Legitimacy, Democracy, and Razian Authority*, 9 LEGAL THEORY 201 (2003).

2. ROBERT ALEXY, LAW'S IDEAL DIMENSION 136 (2021).

3. *Id.* at 139.

4. Notre Dame Law School, *Competing Approaches to Legal Interpretation—A Conversation Between Justices*, YOUTUBE (Feb. 9, 2024), at 16:10 https://youtu.be/ERtSSJoco4o?si=Ru-hrG7p5upbUrgS [https://perma.cc/DV8E-HH3X].

is actually implementing the original meaning of the Constitution. When the judiciary is operating in what some originalists describe as the "construction zone,"[5] that claim of democratic legitimacy can become more tenuous.

There are a number of reasons, discussed by multiple scholars, why judges often cannot claim to have identified the original communicative content with 100% certainty.[6] Text might be ambiguous, vague, or open-ended, meaning that the content itself may be underdetermined.[7] Or there may be epistemic under-determinacy resulting from things like divergent evidence about the meaning of a word or phrase (that is, evidence that cuts in both directions) or simply very sparse evidence of meaning.[8]

In this article, I will discuss a less focused-on phenomenon: the way in which judges can construct constitutional doctrines, or giving legal effect to communicative meaning, in ways that increase the strain on democratic legitimacy and could be viewed as requiring heightened levels of clarity in original meaning to be justified. I argue that as the tension between the communicative content and legal content of the constitutional text increases, or at least as the probability that the tension increases, the judiciary loses its claim to the mantle of super-majoritarian legitimacy and instead becomes vulnerable to all the original critiques of their counter-majoritarian action in tension with democratic principles. Another way of

5. *See* Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 469–72 (2013); Lawrence B. Solum, *Disaggregating Chevron*, 82 OHIO ST. L.J. 249, 259 (2021); Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 108 (2010); *see also* KEITH WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 6 (1999).

6. *See, e.g.*, Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269, 285 (2017).

7. A word or phrase might be ambiguous, in that it "has more than one sense." It might be vague, in that it "refers to situations in which a word or phrase has borderline cases." *Id.* at 286. Words that contain a scalar quality often fall into this latter category.

8. *Id.* Much ambiguity may be liquidated by context. But there is the possibility of "irreducible ambiguity." For example, if constitutional text employs a vague or open-textured term/concept, then the communicative content *is* underdeterminate. For a discussion of these concepts, *see* Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 10–11 (2015); Lawrence B. Solum, *Intellectual History As Constitutional Theory*, 101 VA. L. REV. 1111, 1120–22 (2015).

conceptualizing this issue is that the probability increases that the chosen constitutional construction is not faithful to the ends, objects or functions of the relevant object of constitutional interpretation.[9]

In this piece, I will discuss three interpretative issues that increase the risk of construction-interpretation tension. One occurs when a court pays insufficient attention to the level of generality that is most consistent with the original understanding and judicial restraint. A second occurs when a court relies on layered indeterminate meanings to justify a constitutional construction. A third arises when courts issue far-reaching remedies like facial invalidation of laws, as opposed to more modest as-applied remedies. I will close by explaining why simply deciding cases under the banner of "history and tradition," as the Court did in *New York State Rifle & Pistol Ass'n v. Bruen*,[10] does not remove the need to engage in constitutional construction or avoid this tension-increasing risk.

I. DEFINING TERMS

As a preliminary matter, some terminology is in order regarding the types of meaning the judiciary engages with when interpreting the Constitution.[11] Here for simplicity purposes (and space constraints), I largely adopt many of the terms that Lawrence Solum and Keith Whittington use regarding interpretation (the search for the communicative content of constitutional text) and construction (giving legal or practical content to the communicative content of

9. See RANDY BARNETT & EVAN D. BERNICK, THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT 9 (2021) (proposing an originalist theory of construction that seeks to effectuate the original "ends, purposes, goals, or objects that the Constitution was adopted to accomplish—its design functions"); Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1, 35 (2018) ("Judges should . . . specify a construction—an implementing doctrine—that resolves the case at hand in a manner that is consistent with the relevant original function, and susceptible of application to future cases of a similar kind.").

10. 142 S. Ct. 2111 (2022). Much of the discussion in this section draws from Stephanie H. Barclay, *Replacing Smith*, 133 YALE L.J. FORUM 436 (2023).

11. For a classic discussion of the ambiguity of "meaning," *see* C.K. OGDEN & I.A. RICHARDS, THE MEANING OF MEANING: A STUDY OF THE INFLUENCE OF LANGUAGE UPON THOUGHT AND OF THE SCIENCE OF SYMBOLISM 305–36 (1923).

the text). Solum defines communicative content as the content that the text conveyed or made reasonably accessible to the public at the time of framing and ratification.[12] For example, "the communicative content of the word 'dollar' as used in the Seventh Amendment refers to the Spanish silver dollar weighing 416 grains."[13] In contrast, legal content "is the content assigned to the text by relevant legal authorities, for example, by the Supreme Court when it gives the Constitution an authoritative legal construction."[14]

According to Keith Whittington, "interpretation is understood to be a more technical activity, concerned with employing a set of analytical tools to unearth the meaning inherent in the constitutional text."[15] And while "constitutional interpretation may be more of a craft than a science, . . . its results are immediately justified in terms that are internal to the Constitution itself. The tools of interpretation" include "aids such as precedent, history, and constitutional structure" as ways of "illuminat[ing] the text" rather than "alter[ing] or add[ing] to it."[16] In contrast, construction is a more "'imaginative'" process[17] that is necessary to "construct a determinate constitutional meaning to guide government practice."[18] This sort of process of construction is always necessary at some point, because "[t]raditional tools of interpretive analysis can be exhausted without providing a constitutional meaning that is sufficiently clear to guide government action."[19] The text may also "specify a principle that is itself identifiable but is nonetheless indeterminate in its application to a particular situation."[20] While Solum highlights ways in which the judiciary engages in the process of construction, Whittington notes that political actors engage in constitutional

12. Solum, *supra* note 6, at 271; Solum, *Original Public Meaning*, 2023 MICH ST. L. REV. 807, 846–47.

13. Solum, *supra* note 6, at 271.

14. *Id.*

15. WHITTINGTON, *supra* note 5, at 6.

16. *Id.*

17. *Id.* (quoting WILLIAM F. HARRIS II, THE INTERPRETABLE CONSTITUTION 118 (1993)).

18. *Id.*

19. *Id.* at 8.

20. *Id.*

construction as well.[21]

Finally, a word about democracy is in order. This Essay does not purport to focus on one specific conception of democracy, which is a hotly contested topic. Instead, I will refer to democracy in the thin sense as "a class of political systems that are participatory, where each citizen has the ability to participate (preferably, at some foundational stage, equally) in the creation of government and policy."[22] I will assume without defending the proposition that consistency with democratic principles should be a scalar rather than binary assessment, meaning some constitutional constructions could be more (or less) consistent with democratic principles than others.[23] And individual judicial decisions can be assessed on a retail basis for their degree of consistency with democratic principles.

The positive law at issue that the judiciary is assessing, and how the judiciary approaches its task with respect to that law, are also relevant to democratic compatibility. As Scott Hershovitz argues, law in a democracy does not merely "tell us what we may and may not do," but is "how *we decide* what we may and may not do" and thus may "lay[] the greatest claim to participatory development."[24] Given the democratic participation involved in the making of the United States Constitution, this argument also applies to constitutional law. One could argue that the more closely a court's constitutional construction hews to communicative content derived from constitutional interpretation,[25] the more democratically compatible

21. *Id.* at 6–8.

22. Hershovitz, *supra* note 1, at 213. For a discussion of the normative desirability of democracy, see NICHOLAS BARBER, THE PRINCIPLES OF CONSTITUTIONALISM 148–49 (2018); ROBERT DAHL, DEMOCRACY AND ITS CRITICS 164 (1989); AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT 27–49 (1996); JEREMY WALDRON, LAW AND DISAGREEMENT 8–9 (2001).

23. *See* Larry Solum, *Outcome Reasons and Process Reasons in Normative Constitutional Theory*, 172 U. PA. L. REV. 913, 933 (2024) ("Democratic legitimacy is a scalar and not a binary. Institutions can be more or less democratic.").

24. Hershovitz, *supra* note 1, at 209–10 (emphasis added).

25. For another important discussion of interpretation, see Timothy Endicott, *Legal Interpretation*, *in* THE ROUTLEDGE COMPANION TO PHILOSOPHY OF LAW 109, 112 (Andrei Marmor ed., 2012) (interpretation "comes into play when there is a possibility of argument as to the meaning [of a text]" and is not merely a matter of judgment). *But see*

that task is. On the other hand, the more the law at issue is open-ended and leaves the outcome up to the court's subjective judgment, the less one can link that judicial outcome to participation by citizens in a democratic process. Conversely, one could argue that the bigger interference a court's constitutional construction has on the democratic process, the more clarity the court may need to point to in communicative content to justify the relevant construction.

II. JUDICIAL APPROACHES THAT INCREASE TENSION BETWEEN INTERPRETATION AND CONSTRUCTION

Ideally, a court's constitutional construction would closely reflect the communicative meaning that could be identified through constitutional interpretation. This section explores ways in which a judicial constitutional construction creates a more tenuous link to the communicative content of constitutional text that can be determined through interpretation, and the legal content that results from constitutional construction. A tenuous link between interpretation and construction becomes even more problematic when the construction is of a type that puts more pressure on democratic principles.

A. Insufficient Attention to the Level of Abstraction

The level of generality a court identifies when engaging in constitutional construction is an issue of great relevance to how defensible that construction is.[26] Sometimes, for example, a construction that abstracts communicative content to a very high level makes the link between interpretation and construction more tenuous. This is because the applied legal meaning of the Constitution that results can both depart significantly from any of the original expected applications of the text, and also because at a high level of abstraction it is much easier for legal applications to result in highly divergent

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Francisco Urbina, *It Doesn't Matter What "Interpretation" Is*, 39 CONST. COMMENT (forthcoming 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4709491.

26. For a discussion of originalism and levels of generality, see LAWRENCE B. SOLUM & ROBERT W. BENNETT, CONSTITUTIONAL ORIGINALISM (2011). *But see* Peter J. Smith, *Originalism and Level of Generality*, 51 GA. L. REV. 485 (2017).

outcomes.

Consider the Supreme Court's constitutional construction of meaning in the Establishment Clause context, which has long been subject to significant criticism.[27] This criticism did not begin with the Court's decision in *Lemon v. Kurtzman*,[28] but that infamous case certainly escalated it. Decided in the "bygone era when th[e] Court took a more freewheeling approach to interpreting legal texts," the Court "sought to devise a one-size-fits-all test for resolving Establishment Clause disputes."[29] In that case, the Court acknowledged that it could only "dimly" perceive the communicative content of the Establishment Clause.[30] Instead of using the indeterminate meaning to weigh in favor of a more modest interpretation of the Establishment Clause, the Court arguably did the opposite. It constructed meaning at a very high level of generality, guided by the "evils against which the Establishment Clause was intended to afford protection."[31] Then the Court added another step of construction by noting that the evils only needed to be "respecting" those sorts of forbidden Establishment Clause objectives, even if "falling short" of an actual establishment.[32] From this reasoning, the Court constructed its famous three-part test, under which government action must have a secular purpose, could not have the primary effect of advancing religion, and could not excessively entangle government with religion.[33]

Given this approach, it is no surprise that the Court's application of this rule has identified as "establishments" government activity that bears little resemblance to actual legal establishments at the Founding. For example, before *Lemon*, in nearly two centuries of U.S. history, the Court had never held a public display of religion

27. For one summary of some of this criticism, see *Shurtleff v. City of Boston*, 142 S. Ct. 1583, 1603 (2022) (Gorsuch, J., concurring).

28. 403 U.S. 602 (1971).

29. *Shurtleff*, 142 S. Ct. at 1603–04 (Gorsuch, J., concurring) (internal quotation marks omitted) (quoting Food Mktg. Inst. v. Argus Leader Media, 139 S. Ct. 2356, 2364 (2019)).

30. *Lemon*, 403 U.S. at 612.

31. *Id.*

32. *Id.*

33. *Id.* at 612–13.

to constitute an unconstitutional "establishment" of religion.[34] And in fact, such displays were allowed at the Founding.[35] After *Lemon*, Establishment Clause challenges to religious public displays came "fast and furious."[36] With a legal rule so untethered from the communicative content of the Establishment Clause, these court decisions often resulted in conflicting outcomes that created more questions than answers about the legal content of the rule. Courts were split, for instance, on whether and when the government could display nativity scenes, menorahs, or a city seal with a cross.[37]

In *Kennedy v. Bremerton School District*, the Supreme Court made clear that it has now overruled *Lemon*,[38] and plans to return to a more historical approach to constitutional construction.[39] But not all constitutional constructions based on history are equivalent when it comes to removing tension between the communicative content and the legal content of the Establishment Clause.

For example, some scholars have argued that the Court has now adopted a coercion test,[40] perhaps at a high level of abstraction.

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34. *See* Michael McConnell, *No More (Old) Symbol Cases*, 2019 CATO SUP. CT. REV. 91, 107–09; *see also* C. BROUGHER, CONG. RSCH. SERV., RS22223, PUBLIC DISPLAY OF THE TEN COMMANDMENTS AND OTHER RELIGIOUS SYMBOLS 1–2 (2011); *Religious Displays and the Courts,* PEW RSCH. CTR. (Jun. 27, 2007) https://www.pewresearch.org/religion/2007/06/27/religious-displays-and-the-courts/ [https://perma.cc/KT4R-M8HT] (**"**The Supreme Court first addressed the constitutionality of public religious displays in 1980" in *Stone v. Graham*, 449 U.S. 39 (1980)).

35. "[W]hen designing a seal for the new Nation in 1776, Benjamin Franklin and Thomas Jefferson proposed a familiar Biblical scene—Moses leading the Israelites across the Red Sea. The seal ultimately adopted by Congress in 1782 features 'the Eye of Providence' surrounded by 'glory' above the motto Annuit Coeptis—'He [God] has favored our undertakings.'" Shurtleff v. City of Boston, 142 S. Ct. 1583, 1610 (2022) (Gorsuch, J., concurring) (internal citations omitted).

36. *Id.* at 1604 (Gorsuch, J., concurring).

37. *Id.*

38. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2427 (2022) (citing Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2079–81 (2019)).

39. *Id.* at 2428 (quoting Town of Greece v. Galloway, 572 U.S. 565, 576 (2014)) ("In place of *Lemon* and the endorsement test," the Court instructed "that the Establishment Clause must be interpreted by 'reference to historical practices and understandings.'").

40. *See* Noah Feldman, *Supreme Court is Eroding the Wall Between Church and State*, BLOOMBERG (June 27, 2022, 12:05 PM), https://www.bloomberg.com/opinion/articles/2022-06-27/supreme-court-upends-church-state-law-in-case-of-praying-coach

Without more historical trappings than that, such a test risks replacing one amorphous "one-size-fits-all test" with another. Such a move might well simply "tak[e] us right back to the dog's breakfast" that the Court "warned against" when it disregarded *Lemon*.[41]

I argue that the Supreme Court seems to be adopting a more nuanced rule than that—a constitutional construction of legal meaning at a much lower level of generality, focusing on creating specific doctrinal tests from each of the six specific historical hallmarks of an Establishment.[42] And that is a good thing for the democratic legitimacy of the Court's construction of the constitutional text of the Establishment Clause.

Specifically, the Court explained that historically, government action that coerced individuals to participate in a religious exercise on pain of legal penalty "was among the foremost hallmarks of religious establishments the framers sought to prohibit when they adopted the First Amendment."[43] The use of "among" is important. The Court did not say that coercion, in the abstract, was the new *sine qua non* of historical religious establishments.[44] The Court also concluded that sentence by citing in footnote 5 to Michael McConnell's scholarship that identifies multiple important historical hallmarks of established religions,[45] and by citing approvingly to a concurrence by Justice Gorsuch in a prior case.[46] This

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[https://perma.cc/VU7X-97X7]; *see also* Ira C. Lupu & Robert W. Tuttle, Response, Kennedy v. Bremerton School District—*A Sledgehammer to the Bedrock of Nonestablishment*, GEO. WASH. L. REV. ON DOCKET (July 26, 2022), https://gwlr.org/kennedy-v-bremerton-school-district-a-sledgehammer-to-the-bedrock-of-nonestablishment [https://perma.cc/CM5A-6MQY].

41. This was a quip by Justice Gorsuch in oral argument of *American Legion*, when grappling with what test could replace *Lemon*. *See* Jacob Sullum, *In Giant Cross Case, Justices Struggle to Clean Up a 'Dog's Breakfast' of Confusing Precedents*, REASON (Feb. 28, 2019, 3:30 PM), https://reason.com/2019/02/28/in-giant-cross-case-scotus-struggles-to/ [https://perma.cc/9RYF-Q6ME].

42. *See* Stephanie H. Barclay, *The Religion Clauses after* Kennedy v. Bremerton School District, 108 IOWA L. REV. 2097, 2099 (2023).

43. *Kennedy*, 142 S. Ct. at 2429.

44. Barclay, *supra* note 42, at 2104.

45. Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2110–12, 2131 (2003).

46. Shurtleff v. City of Boston, 142 S. Ct. 1583, 1607-11 (2022) (Gorsuch, J., concurring).

concurrence both summarized the distinct historical hallmarks of an establishment and provided guidance about how the communicative meaning of these hallmarks could be given a legal construction at a low level of generality.[47] It states the following:

> Beyond a formal declaration that a religious denomination was in fact the established church, it seems that founding-era religious establishments often bore certain other telling traits. *First*, the government exerted control over the doctrine and personnel of the established church. *Second*, the government mandated attendance in the established church and punished people for failing to participate. *Third*, the government punished dissenting churches and individuals for their religious exercise. *Fourth*, the government restricted political participation by dissenters. *Fifth*, the government provided financial support for the established church, often in a way that preferred the established denomination over other churches. And *sixth*, the government used the established church to carry out certain civil functions, often by giving the established church a monopoly over a specific function.[48]

Notably, some of these hallmarks could themselves be interpreted at higher levels of abstraction or lower ones. For example, at a lower level of abstraction, the denial of political participation by religious dissenters is *sui generis*, and a distinct kind of harm widely understood at the Founding to constitute an establishment of religion, which the First Amendment prohibited the federal government from enforcing. But at a high level of abstraction, one could interpret such a hallmark of an establishment to involve the denial of any important government benefit to religious dissenters. This latter type of legal construction would have far broader implications with applications that likely diverged much more dramatically from expected applications of the text at the Founding, and thus increase the tension between the communicative content of the constitutional text and the legal content. I argue that the former type of construction likely carries far more democratic legitimacy

47. *Id.*

48. *Id.* at 1609 (emphasis added) (internal citations omitted).

and is thus preferable.

In an important recent article by Mark Storslee, he weds insightful historical arguments with some claims about constitutional construction that would increase the level of generality considered under the Establishment Clause and create a more tenuous connection between constitutional meaning and constitutional construction.[49] For instance, he points out that the Founding generation objected to laws mandating government-sponsored attendance to religious worship, even if such laws allowed for exemptions for religious dissenters.[50] From this, he argues that Justices Scalia and Thomas were wrong in the school prayer cases to focus their concern on instances of direct coercion. Storslee argues for a "constitutional construction" operating at a higher level of abstraction that would prohibit government from making any attempt to claim power to enforce religious duties, even if that power is coupled with exemptions that would prevent that power from ever being exercised against religious dissenters.[51] Storslee rightly points out that his "conclusions here proceed by way of analogy—inquiring whether Founding-era convictions, understood at a modest level of generality, reasonably apply to new circumstances like modern, mandatory school prayer" and involving "an act of judgment that history can inform but not ultimately dictate."[52]

While Storslee's argument about construction at a higher level of generality is certainly plausible, let me briefly point to some considerations that point the other way. Storslee points to history showing that "by the time of the Founding, [mandatory attendance] laws contained opt-outs for dissenters, including some that allowed objectors to avoid worshipping altogether," and yet that proved controversial.[53] But while these laws did remove coercion for religious objectors, note that the laws also applied real coercion to members of the relevant church identified in the law. Thus, if

49. Mark Storslee, *History and the School Prayer Cases*, 110 VA. L. REV. 1619, 1628 (2024)
50. *Id.*
51. *Id.* at 1628, 1695.
52. *Id.* at 1697.
53. *Id.*

someone's desire to avoid worship was simply that they did not feel like going to their own faith, there was no protection for them under the conscientious objection sorts of opt-outs. In other words, these laws did in fact involve direct coercion with real penalties for some members of the population, precisely the type that Justices Scalia and Thomas speak to as a relevant hallmark of the Establishment.[54] There is no historical evidence Storslee points to that the Founding generation would have supported judicial enforcement of some of these laws (as opposed to mere political objection to them) by a claimant who had in fact experienced *no* direct coercion at the hands of such a law. In other words, limiting Establishment Clause prohibitions regarding mandated religious observance to contexts with direct coercion and real legal penalties, as Justices Scalia and Thomas argue, is a method of construction consistent with the historical evidence.[55]

The contrasting constitutional construction Storslee offers is a number of steps removed and provides a less clear limiting principle for what would not count as government coercion, thus increasing tension with democratic principles as the judiciary can categorically enforce a much more vague principle.

B. Relying on Layered Meaning

There is another, independent reason why the Court's constitutional construction of the Establishment Clause under *Lemon* was problematic. The Court had to rely on more than one layer of debatable communicative content (and corresponding legal

54. *See* Lee v. Weisman, 505 U.S. 577, 640–42 (1992) Scalia, J., dissenting (discussing "persons required to attend church and observe the Sabbath"); Van Orden v. Perry, 545 U.S. 677, 693 (2005) (Thomas, J., concurring) ("The Framers understood an establishment 'necessarily [to] involve actual legal coercion."' (quoting Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 29 (2004) (Thomas, J., concurring in the judgment))); Town of Greece v. Galloway, 572 U.S. 565, 610 (2014) (Thomas, J., concurring in part and in the judgment) (similar).

55. Elsewhere I have written about why some of the school prayer cases may be defensible under a separate historical hallmark of established religion, even if they cannot be justified under notions of government coercion. *See* Stephanie H. Barclay, *The Religion Clauses After* Kennedy v. Bremerton School District, 108 IOWA L. REV. 2097, 2108 (2023).

construction of that content) to ultimately craft its rule under *Lemon*. Specifically, additional debate exists about whether the Establishment Clause was the type of privilege or immunity of citizenship that was understood to be properly incorporated against state and local governments *at all* under the Fourteenth Amendment. Perhaps more than any other protection listed in the Bill of Rights, the Establishment Clause has sparked heated debate about whether incorporation was proper.

Justice Thomas has argued that at the Founding, the Establishment Clause served only to "protec[t] States, and by extension their citizens, from the imposition of an established religion by the Federal Government."[56] And there is "mixed historical evidence concerning whether the Establishment Clause was understood as an individual right at the time of the Fourteenth Amendment's ratification." [57] Under that view, "the Clause resists incorporation against the States" under the Fourteenth Amendment.[58]

Regardless of one's views under either the meaning of the Establishment Clause at the Founding, or the secondary interpretive question of whether it was understood to be incorporated under the Fourteenth Amendment, my point is that a legal construction that relies on compounded questions of communicative content increases the likelihood that there is a tenuous link between the ultimate legal construction and the communicative meaning of the constitutional provision. That is because, at least under a rule along the lines adopted by the Court in *Lemon*, (or the rule that Storslee proposes) one would have to be correct about *both* independent questions of communicative content to have a justified legal

56. Zelman v. Simmons-Harris, 536 U.S. 639, 678 (2002) (Thomas, J., concurring); *see also, e.g.*, Town of Greece v. Galloway, 572 U.S. 565, 604–607 (2014) (Thomas, J., concurring in part and concurring in the judgment); Elk Grove Unified School Dist. v. Newdow, 542 U.S. 1, 49–50 (2004) (Thomas, J., concurring in judgment).

57. Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2264 (2020) (Thomas, J., concurring) (citing *Town of Greece*, 572 U.S. at 604, 607–08); *see* Kurt Lash, *The Second Adoption of the Establishment Clause: The Rise of the Non-Establishment Principle*, 27 ARIZ. ST. L.J. 1085, 1141–1145 (1995); *but cf.* STEVEN SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM 50–52 (1995).

58. *Espinoza*, 140 S. Ct. at 2263 (Thomas, J., concurring).

construction. As any statistician could point out, while the probability of flipping heads in one coin toss is 50%, the probability of flipping heads twice in a row is only 25%.[59] So, if the communicative content of both questions is uncertain, the compounded communicative content will be far less certain, increasing the likelihood that there is a tension between interpretation and construction.

Consider this issue in the separate constitutional context of the Supreme Court's Section Five jurisprudence, and its decision in *City of Boerne v. Flores*.[60] There, as with the Establishment Clause, the Court's chosen legal outcome depended on interpreting at least two independent (and layered) constitutional questions: what was the meaning of the First Amendment's Free Exercise Clause, and what was the meaning of Congress's enforcement authority under Section Five of the Fourteenth Amendment?

Under both questions, the communicative content the Court claimed to have identified was dubious. First, the Court referred back to its decision in *Employment Division v. Smith* to affirm its interpretation of the Free Exercise Clause as only prohibiting government discrimination against religion (rather than prohibiting government burdens of religious exercise whether discriminatory or not).[61] But in that earlier opinion, the Court had not claimed to be interpreting the communicative meaning of the Free Exercise Clause. If anything, it was opting to under-enforce the meaning of that text out of concerns relating to institutional competencies of the various branches of government in a democracy.[62] Indeed, the Court admitted in *Smith* that its nondiscrimination interpretation of the Free Exercise Clause was only one of multiple "permissible reading[s]" of the constitutional text.[63]

But the Court's interpretive problems did not end there. In *Boerne*,

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59. *If I flip a coin twice, what is the probability of getting both heads?*, CUEMATH, https://www.cuemath.com/questions/if-i-flip-a-coin-twice-what-is-the-probability-of-getting-both-heads/ [https://perma.cc/CH9E-2PL6].

60. 521 U.S. 507 (1997).

61. 494 U.S. 872, 883–90 (1990).

62. *See* Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153, 189–92 (1997).

63. *Smith*, 494 U.S. at 878.

the Court next adopted an equally dubious interpretation of Congress's authority under Section Five of the Fourteenth Amendment. To understand why, a bit of background is in order. The Supreme Court's decision in *Smith* received widespread criticism,[64] and there is strong historical evidence suggesting that this interpretation was not the most consistent with the original communicative content of the Free Exercise Clause.[65] Congress responded to *Smith* just three years later in nearly unanimous action by passing the Religious Freedom Restoration Act (RFRA).[66] RFRA offered heightened legislative protection to religious exercise where the Court was no longer offering protection under the judicial constitutional minimum of that right.[67] RFRA again permitted government to substantially burden religious exercise *only* when it was necessary to do so to advance a compelling government interest.[68] And this statute was enacted pursuant to Congress's power under Section Five of the Fourteenth Amendment to pass "appropriate legislation" to

64. *See* Ira C. Lupu, Employment Division v. Smith *and the Decline of Supreme Court-Centrism*, 1993 B.Y.U. L. REV. 259, 260 n.9 (1993) (collecting sources that discuss potential implications of Smith); *see also* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 559 (1993) (Souter, J., concurring in part and concurring in the judgment) (noting that there are doubts as to whether "the *Smith* rule merits adherence"); Richard F. Duncan, *Free Exercise Is Dead, Long Live Free Exercise:* Smith*,* Lukumi *and the General Applicability Requirement*, 3 U. PA. J. CONST. L. 850, 851–56 (2001); James D. Gordon III, *Free Exercise on the Mountaintop*, 79 CALIF. L. REV. 91, 114 (1991); Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 2–3 (arguing that *Smith* was incorrectly decided based on precedent and original intent); Michael W. McConnell, *Free Exercise Revisionism and the S*mith *Decision*, 57 U. CHI. L. REV. 1109, 1111 (1990) ("There are many ways in which to criticize the *Smith* decision. . . . *Smith* is contrary to the deep logic of the First Amendment."); Harry F. Tepker, Jr., *Hallucinations of Neutrality in the Oregon Peyote Case*, 16 AM. INDIAN L. REV. 1, 11–26 (1991). *But see* Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915, 916 (1992) (questioning the originalist historical evidence in favor of religious exemptions); William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 309 (1991) (defending "*Smith*'s rejection of constitutionally compelled free exercise exemptions without defending *Smith* itself").

65. *See, e.g.*, Barclay, *supra* note 10.

66. 42 U.S.C. §§ 2000bb to bb–4; *see also* H.R. 1308, 103rd Cong. (1993) (enacted).

67. For a more detailed exposition of this view of RFRA, *see generally* Mark L. Rienzi & Stephanie H. Barclay, *Constitutional Anomalies or As-Applied Challenges? A Defense of Religious Exemptions*, 59 B.C. L. REV. 1595 (2018).

68. *See* 42 U.S.C. § 2000bb-1.

"enforce" the provisions of that Amendment.[69]

Yet in a surprising turn of events in *City of Boerne*, the Supreme Court struck down RFRA as an unconstitutional use of Congress's Section Five power.[70] The Court did not just resuscitate *Smith*'s methodological conclusions; it evinced a surprising territoriality about constitutional interpretation itself: "The power to interpret the Constitution in a case or controversy remains in the Judiciary."[71] Put differently, only the Court, and not Congress, can determine rights' bounds—Section 5 notwithstanding. In arrogating to itself not just the power to adjudicate rights claims but also the power to interpret any aspect of the constitutional rights,[72] the Court "adopted a startlingly strong view of judicial supremacy . . . the most judge-centered view of constitutional law since *Cooper v. Aaron*."[73]

There is fairly robust historical evidence to suggest that the Court got it wrong under its interpretation of Congress's Section Five authority. As Michael McConnell has explained,

> It may seem odd to say that the legislative branch can engage in constitutional interpretation, but it should not. The congressional power to interpret the Fourteenth Amendment for purposes of passing Section Five enforcement legislation is one instance of the general principle that each branch of government has the authority to interpret the Constitution for itself, within the scope of its own powers . . . . Such situations have occurred, not infrequently, throughout our history."[74]

He also noted that during the Reconstruction Era, "Congress did not consider itself limited to enforcing judicially determined rights under the Fourteenth Amendment. Between 1866 and 1875, Congress engaged in extensive debates over the substantive reach of the

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69. U.S. CONST. amend. XIV, § 5.

70. *See* City of Boerne v. Flores, 521 U.S. 507, 524 (1997).

71. *Id.*

72. For under *City of Boerne,* it is the judiciary—and the judiciary alone—that draws the class of excluded reasons.

73. McConnell, *supra* note 62, at 163.

74. *Id.* at 171 (internal citation omitted).

various Reconstruction era Civil Rights Acts."[75] Congress did so because it believed that its "interpretation mattered. [Congress was] not content to leave the specification of protected rights to judicial decision."[76]

Regardless of where one comes out on either the interpretive question of the Free Exercise Clause, or the interpretive question of Section Five of the Fourteenth Amendment, the point is that the Court's decision in *Boerne* requires it to have gotten it right under *both* independent questions of constitutional interpretation. And the real uncertainty that the Court got it right under *either* question compounds by layering these questions, thus increasing the likelihood of problematic interpretation-construction tension.

C. Issuing Broad Remedies

Another method of construction that can increase the pressure a constitutional construction places on democratic principles involves the types of constitutional remedies the court issues as part of its constitutional construction.

Here, let us assess two alternative remedial approaches to enforce the meaning of the nondelegation doctrine. The nondelegation doctrine stands for the principle that Congress cannot delegate its legislative powers or lawmaking ability to other entities, which most often involves questions about delegations to the executive branch. The widespread view of American jurists since the Founding is that this doctrine at least imposes *some* limits on Congress's power to delegate its legislative power to other entities, particularly the executive branch.[77] "It will not be contended," Chief Justice John Marshall said, "that Congress can delegate to the Courts, or to any other

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75. *Id.* at 175.

76. *Id.* at 176; *see generally* DAVID CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801 (1997).

77. *See* U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."); Louis Capozzi, *In Defense of the Major Questions Doctrine*, 100 NOTRE DAME L. REV. (forthcoming 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4741118. *But see* Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 367 (2021).

tribunals, powers which are strictly and exclusively legislative."[78] Justice Story articulated a similar view.[79] In *Field v. Clark*, the Supreme Court said the nondelegation doctrine was "vital to the integrity and maintenance of the system of government ordained by the Constitution."[80]

Still, the question remains about what type of constitutional construction should be used to enforce this doctrine. And part of that analysis requires determining the proper legal remedy. In the 1930s, the Supreme Court facially invalidated some statutes passed by Congress as impermissible delegations of Congressional authority.[81] But over time, that approach fell out of favor.

More recently, the Court has begun to enforce this constitutional principle through the major questions doctrine. This doctrine operates as a type of clear statement rule, under which courts will not lightly assume that agencies have been delegated power to pass regulations about major questions unless Congress has been clear in that interpretation.[82] Rather than operating to essentially strike down a statute whole cloth, this alternative constitutional construction operates as a form of "clarity tax" on Congress—it prevents potential constitutional violations while also giving Congress the chance to more intentionally decide whether to test constitutional boundaries.[83]

Let me offer two potential arguments as to why the Court's more recent approach to nondelegation remedies is a more defensible constitutional construction than its former approach. First, clear statement sorts of judicial remedies have a much more robust

78. Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42–43 (1825).

79. Shankland v. Washington, 30 U.S. 390, 395 (1831) ("[T]he general rule of law is, that a delegated authority cannot be delegated.").

80. Marshall Field & Co. v. Clark, 143 U.S. 649, 692 (1892); *see also* Ga. R.R. v. Smith, 70 Ga. 694, 699 (1883) (insisting on "difference between the power to pass a law and the power to adopt rules and regulations to carry into effect a law already passed").

81. Panama Refining Co. v. Ryan, 293 U.S. 388, 415, 418 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 521–23 (1935).

82. Capozzi, *supra* note 77, at 6.

83. John Manning, *Clear Statement Rules and the Constitution,* 110 COLUM. L. REV., 399, 399 (2010).

historical pedigree than facial invalidation, as I along with other scholars have written about elsewhere.[84] Second, the types of remedies the judiciary uses have different consequences for the rule of law in a democracy.

For example, Justice Stevens has described facial remedies as legal sledgehammers to democratic work product.[85] On the other hand, he describes as-applied remedies as legal "scalpel[s]" that attempt to redress constitutional problems in a very targeted way.[86] And clear statement rules operate in similar ways.

These labels are perhaps unhelpful, and the distinction may be less binary and more one of degree. But a facial remedy refers to a situation where the court's reasoning means that no aspect of a statutory provision could be validly applied in any context, and Congress cannot simply pass another version of that same statute. In contrast, a remedy saying a clear statement rule has not been satisfied simply invalidates an executive official's particular interpretation of a statute. It does not prevent Congress from legislating with more clarity in the future. Nor does it prevent the agency from passing the same rule relying on different statutory authority.

The former approach thus arguably has a smaller effect on disrupting the rule of law. Thus, the major questions doctrine is an example of a constitutional construction that creates less of a democratic strain than does a different judicial construction (a facial remedy), even though both constructions derive from the same communicative content of the relevant constitutional text.

III. A HISTORY AND TRADITION APPROACH TO INTERPRETATION DOES NOT AVOID THESE CONSTRUCTION RISKS

Let me close with one brief observation. Some of the defenders of a historical analog approach along the lines the Court adopted in

84. See Stephanie H. Barclay, *The Historical Origins of Judicial Religious Exemptions*, 96 NOTRE DAME L. REV. 55, 69–90 (2020); Samuel Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 425-427 (2017).

85. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 399 (2010) (Stevens, J., concurring in part and dissenting in part).

86. *Id.*

New York State Rifle & Pistol Ass'n v. Bruen[87] have argued that we should let the history itself be the constitutional doctrine, rather than rely on constitutional constructions. And they've held out *Bruen* as a model for all constitutional rights.

But I am not convinced that examining Founding-era history can obviate the need for constitutional construction, at least when it comes to the creation of legal doctrine to implement constitutional meaning. *Bruen* is a prime example. There, the Court found no historical practice of government regulation resembling the modern gun-control law at issue in that case. As a result, the Court struck down the gun-control law. But the Court could have just as easily flipped the presumption, and held that unless it found historical analogs of the relevant types of firearms practices at issue, those practices would not receive constitutional protection. It could have also looked not for evidence of government *regulation* of the right, but for government *protection* of the right in order to construct a relevant legal doctrine. Further, a court also engages in constitutional construction under this test when it must decide at what level of generality to identify the historical analog.

My point is not that the historical inquiry is unimportant for seeking to determine the likely communicative content of the constitutional text. My point is that some layer of constitutional construction will almost always be necessary to give that meaning legal content through the creation of legal doctrine. This essay offers some preliminary thoughts about what sorts of considerations ought to guide that construction process in ways that lead to more consistency with democratic principles. But much more work on this topic is warranted.

IV. CONCLUSION: JUDICIAL MODESTY IN THE FACE OF INTERPRETIVE INDETERMINACY

In some ways, one could possibly think of a sliding scale between interpretation and construction. As a constitutional construction's impact on democratic principles increases, one should expect the

87. 142 S. Ct. 2111 (2022).

communicative content of the underlying constitutional provision to similarly increase in clarity in sanctioning the countermajoritarian impact on society. So where a court is enforcing facial remedies against the government in categorical ways, one might expect much stronger evidence of communicative content justifying such an outcome. Conversely, as the certainty about clarity of the communicative content of a constitutional provision decreases, one should expect the judiciary's constitutional construction to evince much more modesty in the types of doctrines created and remedies offered.

This judicial modesty could occur through a construction that hews to a much lower level of abstraction of the most plausible expected constitutional applications of the provision, that is mindful of the compounded uncertainty by layering construction upon construction, and that adopts remedies with less dramatic interruptions on the rule of law in a democracy.

In contrast, the types of constitutional constructions that seem least eligible to claim the mantle of supermajoritarian democratic legitimacy are those that have abstracted the communicative content to a very high level of generality (when not called for by the original meaning), that rely on multiple debatable constitutional constructions layered on one another, and that issue remedies with widespread impacts on democratically-enacted work product.