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An Evaluation of Historical Evidence for Constitutional Construction from the First Congress' Debate over the Constitutionality of the First Bank of the United States

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AN EVALUATION OF HISTORICAL EVIDENCE FOR CONSTITUTIONAL CONSTRUCTION FROM THE FIRST CONGRESS' DEBATE OVER THE CONSTITUTIONALITY OF THE FIRST BANK OF THE UNITED STATES

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I. INTRODUCTION

Originalism, a theory on its last legs in the 1980s,[1] gained renewed vigor in the late 1990s and early 2000s.[2] One of the reasons for this renewed vigor was the move that many originalists made from original intent originalism to original meaning originalism. This "New Originalism"[3] identified the Constitution's meaning as the original public meaning of the Constitution's text.[4]

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1. *See* Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 611 (1999) ("The received wisdom among law professors is that originalism is dead, having been defeated in intellectual combat sometime in the eighties.") [hereinafter Barnett, *An Originalism for Nonoriginalists*].

2. *See* Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599 (2004) (describing this resurgence).

3. *Id.*; *see also* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION (2004); KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW (1999).

4. Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1 (2015) [hereinafter Solum, *The Fixation Thesis*].

Constitutional construction was a concept (re)introduced[5] by originalists around the same time.[6] Constitutional construction is typically described by originalists as the activity of crafting constitutional meaning when the Constitution's original meaning is underdetermined.[7] Within this "construction zone," interpreters have discretion on how to create constitutional meaning.[8]

In this Essay, I review a modest selection of important evidence from the early Republic, the debate over the constitutionality of the First Bank of the United States in the First Congress, to evaluate whether, to what extent, and how Americans utilized constitutional construction in the early Republic. Though this investigation focused on only a subset of the large quantity of potential historical evidence, it surveyed an important historical episode in the early Republic, evidence that any plausible interpretation of the period must fit.[9]

This Essay derives a number of tentative conclusions from this evidence. First, the participants in this early debate appeared to believe that a necessary precondition for constitutional construction—underdeterminacy[10]—existed, at least *prima facie*. Second, the participants also argued as if, *after* the application of a number of interpretative rules,[11] the Constitution provided a determinate answer to the constitutional question. Third,

5. Originalists who advocate for the existence of construction argue that construction has existed as a phenomenon as long as the Constitution has existed. *See* KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 20–71 (1999) (describing the Chase impeachment as an example of construction) [hereinafter WHITTINGTON, CONSTITUTIONAL CONSTRUCTION].

6. *See* WHITTINGTON, CONSTITUTIONAL CONSTRUCTION, *supra* note 5 (providing a book-length treatment of the concept); *see also* Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 467–469 (2013) (describing this).

7. WHITTINGTON, *supra* note 3, at 9 ("The defining features of constitutional constructions are that they resolve textual indeterminacies and that they address constructional subject matter."); *see also* JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 139 (2013) (describing construction this way); *compare* Lawrence B. Solum, *Communicative Content and Legal Content*, 89 NOTRE DAME L. REV. 479, 507–518 (2013) (describing a conception of construction that occurs for both determined and underdetermined constitutional meaning) [hereinafter Solum, *Communicative Content*]; Solum, *Originalism and Constitutional Construction*, *supra* note 6, at 469–535 (same); Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 103–108 (2011) (arguing that construction also includes the determination of legal effect of determinate constitutional meaning) [hereinafter Solum, *The Interpretation-Construction Distinction*].

8. WHITTINGTON, *supra* note 3, at 6.

9. In other words, the debate over federal power to charter a national bank was so early and so important an issue debated by such prominent Framers and Ratifiers, that any conception of constitutional construction must be able to take it into account.

10. *See* Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462 (1987) [hereinafter Solum, *On the Indeterminacy Crisis*].

11. By "interpretative rules" I mean tools utilized by the debate participants to identify (what they perceived as) the Constitution's answer to the interpretative question. For instance, the participants appealed to the type of government created by the Constitution. By choosing this label, I am eliding the debate over whether there existed "original methods" that were constitutive of the original meaning.

the participants seemed ultimately to conclude that the Constitution's meaning provided a determinate answer to the question under debate (though they continued to disagree about what that answer was).

Before proceeding, let me emphasize that my claim is modest because of the limited evidence I reviewed. At the same time, the debate over the constitutionality of a nationally chartered bank was one of the most important, contentious, and thoroughly debated constitutional issues in the early Republic, so it is weighty evidence.

In Part II, I briefly describe originalism and constitutional construction. The heart of this Essay, Part III, derives two conclusions from the debate: first, the debate participants perceived that the Constitution did not provide patent answers to the debated constitutional question; and second, the participants believed that the application of interpretative rules showed that the Constitution ultimately provided a determinate answer to the question. Lastly, in Part IV, I suggest that whether these debates show the existence of constitutional construction depends on one's conception of originalism itself.

II. An Introduction to Constitutional Construction

Originalism's core is composed of the fixation thesis and the constraint principle.[12] The fixation thesis is the proposition that the Constitution's meaning was fixed when it was ratified.[13] The constraint principle is the proposition that the Constitution's original meaning constrains constitutional law.[14]

Originalism evolved in response to criticisms of its earlier incarnations, and these criticisms led originalists to articulate the concept of constitutional construction. One such criticism was that original intent originalism was theoretically impossible or practically too difficult.[15] This criticism was a subset of a more general criticism that the Constitution's original meaning does not answer all constitutional questions.[16]

Many originalists accepted these criticisms and reconceptualized originalism as original meaning originalism.[17] Originalists argued that the

12. *See* Lawrence B. Solum, *The Constraint Principle: Original Meaning and Constitutional Practice* (Mar. 24, 2017) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2940215 (describing the constraint principle) [hereinafter Solum, *The Constraint Principle*]; *see also* Solum, *The Fixation Thesis*, *supra* note 4, at 1 (describing the fixation thesis).

13. Solum, *The Fixation Thesis*, *supra* note 4, at 1.

14. Solum, *The Constraint Principle*, *supra* note 12, at 2.

15. *See* Lee J. Strang, *How Big Data Can Increase Originalism's Methodological Rigor: Using Corpus Linguistics to Reveal Original Language Conventions*, 50 U.C. Davis L. Rev. 1181, 1191 (2017) (identifying this argument).

16. Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. Rev. 204, 216–217, 220, 222 (1980).

17. Barnett, *supra* note 3, at 92; Whittington, *supra* note 3, at 88–109.

Constitution's public meaning, at the time it was ratified, was a fact-of-the-world, one that was not only theoretically accessible but also practically recoverable.[18]

However, the Constitution's original meaning is "thinner" than its original intent,[19] and therefore has more frequent instances of underdeterminacy.[20] Originalists argued that constitutional construction is the activity that occurs in these situations of underdeterminacy.[21] Thinking back to the fixation thesis and constraint principle, constitutional construction is the claim that the constitutional meaning that was fixed at ratification was insufficiently dense to fully constrain constitutional doctrine.

Currently, originalists debate the existence and characteristics of construction. Two of the most important such issues are the quantity of construction and who has the authority to construct constitutional meaning.[22] Most prominently, Professors McGinnis and Rappaport have argued that, properly understood, originalism likely has little-to-no room for constitutional construction: it is interpretation all the way down.[23] They reach this conclusion through two main moves. First, they argue that, even if the Constitution's semantic meaning is underdetermined, application of the original methods eliminates all (or almost all) indeterminacy.[24] Second, they argue that, even if there remained underderminacy after application of these original-methods-closure rules, an interpreter should choose that meaning supported by the most evidence.[25]

Among those originalists that argue for construction's existence, there are a variety of disagreements. For example, they disagree on which government officials have the authority to construct constitutional meaning. Many originalists argue that the judiciary possesses that authority, and many others argue that the elected branches have it.[26]

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18. Barnett, *An Originalism for Nonoriginalists*, *supra* note 1, at 649–650; WHITTINGTON, *supra* note 3, at 88–109.

19. At least absent incorporation of the original methods. MCGINNIS & RAPPAPORT, *supra* note 7, at 116–38, or some other closure rules internal to the original meaning. *See* Gary Lawson, *Legal Indeterminacy: Its Cause and Cure*, 19 HARV. J.L. & PUB. POL'Y 411, 423–428 (1996) (arguing that the Constitution prescribes burdens of proof).

20. Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. U.L. REV. 703, 719–725 (2009); Lee J. Strang, *Virtue's Home in Originalism*, 80 FORDHAM L. REV. 1997, 2008 (2012).

21. *See* BARNETT, *supra* note 3, at 118–130; WHITTINGTON, *supra* note 3, at 1–19; Solum, *The Fixation Thesis, supra* note 4, at 24.

22. *See* Solum, *Originalism and Constitutional Construction*, *supra* note 6, at 472–473 (noting these disagreements among originalists).

23. MCGINNIS & RAPPAPORT, *supra* note 7, at 139–153. Though Professors McGinnis and Rappaport's arguments are powerful, most originalists currently accept construction's existence.

24. *Id*. at 141. They further argue that application of the original methods is a necessary part of ascertaining the original meaning.

25. *Id*. at 141–142.

26. *Compare* WHITTINGTON, *supra* note 3, at 7, 9, 11 (arguing that construction is a political and hence non-judicial enterprise), *with* BARNETT, *supra* note 3, at 122 ("I do not share Whittington's characterization of the process of construction as 'political.' "). *But see* Keith E. Whittington,

Despite the nuances of this intra-originalist debate, all agree that construction, if it exists, includes *at least* the non-determined creation of constitutional meaning.[27] Unlike interpretation, which provides determinate answers to constitutional questions, construction leaves the questions unanswered or, more typically, narrows the universe of possible answers. The relevant constructor of meaning[28] must craft constitutional meaning that is consistent with the known original meaning.

Professor Lawrence Solum, who has been the most sophisticated and prolific scholar in this area, has recently clarified his conception of construction. He argued that constitutional construction is giving legal effect to constitutional meaning.[29] This occurs both when the Constitution's original meaning is determinate and when it is underdetermined. For instance, the Supreme Court ruled in *District of Columbia v. Heller*, that the original meaning of the Second Amendment was that it protected an individual right to keep and bear arms for self-defense.[30] The Court applied the Second Amendment to the District of Columbia's gun control restrictions and ruled that it had the legal effect of determining that an ordinance that banned the possession of a handgun in the home violated the Second Amendment.[31] This legal meaning is different from the Amendment's original meaning, Professor Solum would argue, even if the Amendment's original meaning determined *Heller*'s outcome. Under Professor Solum's view, construction occurs both when the original meaning determines a case and when it underdetermines a case.

There appears, therefore, to be an originalist consensus on (at least) one major point—that construction occurs (at least) when the original meaning underdetermines a case—and this point of agreement fits the ini-

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Constructing a New American Constitution, 27 CONST. COMMENT. 119, 125–129 (2010) (modifying his previous position and concluding that, "[s]o long as judges are acting as faithful agents to provisionally maintain constitutional understandings widely shared by other political actors, then their role in articulating constitutional constructions may not be objectionable."). *See also* Lee J. Strang, *Originalism as Popular Constitutionalism: Theoretical Possibilities and Practical Differences*, 87 NOTRE DAME L. REV. 253, 272–274 (2011) (describing where various originalists fall on this issue).

27. The most important recent intervention into this debate is Randy E. Barnett & Evan Bernick, *The Letter and the Spirit: A Unified Theory of Originalism* (Jan. 17, 2018) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3049056. Professors Barnett and Bernick likewise identify (at least a facet of) construction with underdetermined constitutional meaning. *See id*. at 1 ("Therefore, when interpretation of original meaning is not sufficient to resolve a controversy, judges have a duty of good-faith originalist construction.").

28. The relevant constructor of constitutional meaning may be Congress, the president, the Supreme Court, and/or state officials, depending on one's conception of originalism.

29. Solum, *Communicative Content and Legal Content*, *supra* note 7, at 507–518; Solum, *Originalism and Constitutional Construction*, *supra* note 6, at 469–535; Solum, *The Interpretation-Construction Distinction*, *supra* note 7, at 103–108 (arguing that construction also includes the determination of legal effect of determinate constitutional meaning).

30. District of Columbia v. Heller, 554 U.S. 570, 647 (2008) ("[T]he individual right to possess and carry weapons in case of confrontation").

31. *Id*. at 635.

tial reasons originalists articulated the concept of construction, which I earlier described. Construction is the originalist acknowledgement that the original meaning "runs out," and that interpreters have discretion on how they construe constitutional meaning (when the meaning is underdetermined).

There is a lot at stake in the debate over the existence and scope of construction. I will note three implications. First, construction can dramatically affect the quantity of the Constitution's answers to important constitutional questions. The greater the scope of construction, the fewer determinate answers the Constitution provides. This profoundly affects the Constitution's ability to guide government officers and Americans generally. For instance, if the Interstate Commerce Clause is underdetermined on the point of whether, and to what extent, states may not affect interstate commerce in the absence of congressional action, then state officials and federal judges lack important guidance.

Second, and relatedly, construction affects the scope of federal power and constitutional rights. The greater the scope of construction then, depending on one's conception of construction, there is a greater or lesser federal power and constitutionally protected rights. For instance, if one's conception of construction includes a "presumption of liberty,"[32] then an underdetermined Commerce Clause is constructed to mean that Congress does not have power; on the contrary, if one's conception of construction includes a "presumption of authority," then Congress could construct its commerce power relatively more capaciously.[33]

Third, construction affects the relative power of the judiciary and the other federal branches and the states. The greater the scope of construction then, depending on one's conception of construction, the elected or judicial branches may possess relatively greater authority. If one's conception of construction includes federal court primacy in the construction zone, then federal courts are relatively more powerful; if one's conception of construction includes elected branch and state authority in the construction zone, then the federal courts are relatively less powerful.

Though originalists debate whether construction exists and its contours, they agree that, *if* it exists, it is the result of the Constitution's meaning's underdeterminacy.[34] Taking this point of consensus as the focus of my investigation, I evaluate below whether the participants in the debate over the constitutionality of federally chartering the First Bank of the United States possessed and utilized the concept—not the label—of construction. I do so by reviewing the prominent debate over the constitutionality of the

32. BARNETT, *supra* note 3, at 253–273.

33. *See* Lee J. Strang, *The Role of the Common Good in Legal and Constitutional Interpretation*, 3 U. ST. THOMAS L.J. 48, 70–72 (2005).

34. Since Professor Solum's conception of construction includes underdeterminacy as part of construction, my claim applies to it as well.

national bank in the early Republic to ascertain whether the participants perceived the Constitution's meaning as underdetermined and, if so, how they responded.

III. The First Congress' Debate Over the Constitutionality of the First Bank of the United States Suggests that the Debate Participants Believed that the Constitution's Meaning was *Prima Facie* Underdetermined; It Also Showed that the Participants Believed that the Constitution's Meaning was Sufficiently Clear After the Application of Rules of Interpretation

A. A Sample of an Important Debate in the Early Republic Over the Constitution's Meaning

In this Part, I review a sampling of one of the most prominent debates over the Constitution's meaning in the early Republic. I selected this debate for three primary reasons. First, it involved a robust debate over constitutional meaning. This debate was a contest between plausible alternative constitutional meanings. When more than one plausible constitutional meaning exists, that phenomenon suggests at least the possibility of constitutional underdeterminacy.

Second, the debate leaders' experience and expertise suggests that the debate included the best available arguments. The debate was led by the Constitution's leading Framers and Ratifiers, including James Madison and Alexander Hamilton in the House,[35] and Oliver Ellsworth and George Washington in the broader debate. They were well educated, many were attorneys, and they possessed intimate knowledge of the Constitution, and so could present reasonable arguments. Many of the debate leaders, like James Madison, were skilled in the craft of legal and constitutional interpretation, so they were adept at identifying constitutional underdeterminacy, if it existed.

Third, this debate was over an important constitutional issue; indeed, one of the most pressing political issues of the day. This issue's importance incentivized advocates on both sides to present arguments that the Constitution supported their respective interpretations, and that clearly happened in this debate. One would also expect that the stakes of these issues would incentivize the debate participants to identify constitutional underdeterminacy, if it existed, to support their respective positions.

35. Hamilton participated in the House debates in the form of his Report recommending that Congress charter a national bank.

B. Congressional Debate over Constitutionality of the First National Bank of the United States Reveals an Awareness by Debate Participants of Prima Facie *Constitutional Underdeterminacy and that the Constitution Ultimately Provided a Determinate Answer to the Constitutional Question*

The most important debate in the early Republic over the Constitution's meaning was over whether Congress possessed the power to charter a national bank. Chartering a national bank was important for a host of reasons. Economically, a national bank would significantly impact the American economy.[36] Politically, a national bank would be an important participant in the nation's political life.[37] Culturally, a national bank had the potential to push the fledgling United States away from agrarianism toward a commercial republic. Legally, chartering a national bank required a capacious interpretation of Congress' powers, one with precedent-setting weight on the scope of the Necessary and Proper Clause and the constitutional principle of limited and enumerated powers. The debate participants recognized these high stakes.

The debate over the constitutionality of a federally chartered national bank continued over nearly three decades in the early Republic. I focus my investigation on the initial debate in the House of Representatives. This initial debate began when Secretary of the Treasury Hamilton introduced his Report on a National Bank on December 14, 1790,[38] the debate occurred in the House in early 1791,[39] and the debate continued in the Washington Administration as President Washington deliberated on whether to sign the Act.[40] The debate concerned whether Congress possessed the authority under the Necessary and Proper Clause to charter a national bank. The House ultimately decided to charter the bank, and Congress passed the Act on February 25, 1791.[41]

This debate provides evidence of two conclusions: first, the debate participants believed that, at first blush, the Constitution's meaning was not patent; and second, the debate participants believed that the Constitution provided a determinate answer following a series of arguments drawing out

36. Though supporters and opponents disagreed on what those impacts would be and whether they would be beneficial.

37. Though, again, supporters and opponents disagreed on what forms that participation would take and whether it was positive.

38. Alexander Hamilton, *Report on a National Bank*, Communicated to the House of Representatives, Dec. 14, 1790, *reprinted in* 2 ANNALS OF CONG. 2031–2059 (1791).

39. 2 ANNALS OF CONG. 1940 (1791).

40. *See generally* LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES 2–114 (Matthew St. Clair Clarke & David A. Hall eds., 1832) (providing the basic documents for this debate).

41. An Act to incorporate the subscribers to the Bank of the United States, ch. 10, 1 Stat. 191 (1791).

the Constitution's meaning. Below, I describe the evidence supporting each proposition in turn.

1. The Debate Participants Appeared to Believe that, at First Blush, the Constitution's Meaning was Underdetermined

The participants appeared to acknowledge that the question was not open-and-shut; they did not appear to believe that arguments were unnecessary to establish the accuracy of their interpretation, nor did they appear to believe that their opponents' arguments were patently false or frivolous. Opposing the Bank's constitutionality, James Madison acknowledged that the Constitution was not completely perspicacious because that "is not the character of any human work, particularly the work of a body of men."[42] He argued that "[w]here a meaning is clear, the consequences, whatever they may be, are to be admitted—where doubtful, it is fairly triable by its consequences."[43] He then went on to catalogue the inadmissible negative consequences of the opposing view.[44] He identified the enumerated powers under which Bank supporters found such power as "[t]he only clauses under which such a power could be pretended are . . . ."[45] Madison also acknowledged at the end of his speech in the House that "[i]f the point be doubtful only . . . ."[46]

The debate participants treated the subject of debate as legitimately open to debate. They heartily joined the debate. For example, Jeremiah Smith used "the principles advanced by Mr. Madison, in the debate on the power of removability" to argue for a congressional power to charter the national bank.[47] The debates were sometimes heated and even personal. Theodore Sedgwick, for instance, suggested that James Madison's argument against the implied power to incorporate the national bank was inconsistent with his earlier support of the President's implied power to remove federal officers.[48]

The debate participants did not argue that the Constitution's text patently determined the issue. In fact, they often acknowledged the opposite. For example, Fisher Ames explicitly acknowledged that the issue was not patently clear because he "had noticed the great marks by which the construction of the Constitution . . . must be guided . . .; and these, if not absolutely certain, were very far from being arbitrary or unsafe."[49] Ames explained earlier, in the same lengthy speech to the House, why this oc-

42. 2 Annals of Cong. 1949 (1791).
43. *Id*. at 1946.
44. *Id*. at 1946–1949.
45. *Id*. at 1946.
46. *Id*. at 1951–1952.
47. *Id.* at 1980.
48. 2 Annals of Cong. 1960 (1791).
49. *Id.* at 1958.

curred: "the ingenuity of man was unequal to providing, especially beforehand, for all the contingencies that would happen."[50]

House members expressly tied the need for reasoned interpretation to this *prima facie* opacity. Representative Theodore Sedgwick stated that the House, "in his opinion, indispensably must construe the powers which had been granted to them."[51] Similarly, Elias Boudinot stated that "[w]hatever power is exercised by Congress must be drawn from the Constitution; either from the express words or apparent meaning, or from a necessary implication."[52]

The debate participants also identified reasons for the Constitution's lack of full clarity on the debated constitutional issue. James Madison acknowledged that "[i]t is not pretended that every insertion or omission in the Constitution is the effect of systematic attention. This is not the character of any human work, particularly the work of a body of men."[53] Supporting the Bank's constitutionality, Fisher Ames identified a cause of reasonable disagreement over the Constitution's meaning. He said

> that the ingenuity of man was unequal to providing, especially beforehand, for all the contingencies that would happen. The Constitution contains the principles which are to govern in making laws; but every law requires an application of the rule to the case in question. We may err in applying it; but we are to exercise our judgments, and on every occasion to decide according to an honest conviction of its true meaning.[54]

Theodore Sedgwick noted that "probably no instrument for the delegation of power could be drawn with such precision and accuracy as to leave nothing to necessary implication."[55]

The participants also identified "rules" of interpretation, as James Madison called them,[56] *prior* to applying them. This showed that the participants believed that rules of interpretation were needed to elucidate constitutional meaning. After describing the practical "advantages" and "disadvantages" of a national bank,[57] Madison identified the "rules" of interpretation "[a]s *preliminaries* to a right interpretation."[58] It was only after the rules' application that Madison was able to identify the Constitution's answer to the question before the House.[59] Elias Boudinot began his argument for his interpretation of the Constitution by first noting that the Con-

50. *Id.* at 1954.
51. *Id.* at 1961.
52. *Id.* at 1970.
53. *Id*. at 1949.
54. 2 ANNALS OF CONG. 1954 (1791).
55. *Id.* at 1960.
56. *Id.* at 1944.
57. *Id.*
58. *Id*. at 1945 (emphasis added).
59. *Id*. at 1945–1946.

stitution's text was not always clear, and he likewise identified his rules of interpretation.[60]

One of the commonly identified rules of interpretation was: "[w]here a meaning is clear, the consequences . . . are to be admitted—where doubtful, it is fairly triable by its consequences."[61] Many of the debate participants relied on the good or bad consequences of the proposed interpretations to "try" the issue. For example, according to James Madison, the capacious interpretation of federal power necessary to authorize Congress to charter a national bank would have the bad consequence of destroying the federal government's character as one of limited and enumerated powers.[62] This shows that the participants believed that the Constitution's meaning was initially "doubtful."

2. *The Debate Participants Appeared to Believe that the Constitution Provided Determinate Answers Following Application of Rules of Interpretation*

The debate participants did not give up or stop working to extract meaning from the Constitution to answer the issue before them, despite (what they perceived as) the Constitution's *prima facie* lack of clarity. Additionally, none seemed to believe that the Constitution failed to answer the question. Nor did the participants argue that the proposed bank's normative attractiveness, or lack thereof, was itself sufficient reason to conclude that Congress possessed the power to charter it or lacked the power to do so. Instead, the participants worked hard to wring meaning from the Constitution until they found that it answered the question.

To do so, the debate participants employed what they called "rules" of interpretation. They utilized these rules to make patent the Constitution's otherwise-opaque meaning. Fisher Ames, for example, noted in his speech that, "[i]f, therefore, some interpretation of the Constitution must be indulged, by what rules is it to be governed?"[63] John Lawrence,[64] from New York, analogized the debate over incorporation to the earlier House debate on the President's removal power. He acknowledged that, regarding "constructions . . . it was necessary to be lamented that they should ever be necessary; but they have been made."[65]

The debate participants applied these rules of interpretation to arrive at what they perceived as determinate answers to the question of constitutional meaning. For instance, James Madison stated that, by following the "rules"

60. 2 ANNALS OF CONG. 1970 (1791).
61. *Id.* at 1946 (statement of James Madison).
62. *Id.* at 1947.
63. *Id.* at 1955.
64. Congressman Lawrence's name was also spelled "Laurance."
65. 2 ANNALS OF CONG. 1966 (1791).

of interpretation, he would arrive at the "right interpretation"[66]: "Reviewing the Constitution with an eye to these positions [rules of interpretation], it is not possible to discover in it the power to incorporate a Bank."[67] Following a lengthy speech, Fisher Ames concluded: "In proving that Congress may exercise powers which are not expressly granted by the Constitution, he had endeavored to establish such rules of interpretation, and had illustrated his ideas by such observations as would anticipate . . . the application of his principles to the point in question."[68] Concretely, Representative Lawrence applied the rule of absurdity in favor of finding a power to incorporate the national bank and stated that "[t]o suppose that this Government does not possess the powers for which the Constitution was adopted involves the grossest absurdity."[69] Elias Boudinot, after an exhaustive review of arguments and counter-arguments concluded:

> Upon the whole, then, . . . that on taking the power in question in every point of view, and giving the Constitution the fullest consideration, under the advantage of having the objections placed in the strongest point of light by the great abilities of the gentlemen in the opposition, he was clearly in favor of the bill; . . . and unless more conclusive arguments could be adduced to show its unconstitutionality, he should in the end vote for the passing of the bill.[70]

Likewise, after (exhaustive) application of his many arguments, James Madison's own summary of his argument suggested that he believed that the Constitution determinatively answered the constitutional question:

> It appeared on the whole . . . that the power exercised by the bill was condemned by the silence of the Constitution; was condemned by the rule of interpretation arising out of the Constitution; was condemned by its tendency to destroy the main characteristic of the Constitution; was condemned by the exposition of the friends of the Constitution, whilst depending before the public; was condemned by the apparent intention of the parties which ratified the Constitution; was condemned by the explanatory amendments proposed by Congress themselves to the Constitution; and he hoped it would receive its final condemnation by the vote of this House.[71]

By their vote, a majority of his colleagues appeared to believe that the Constitution held otherwise.

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66. *Id*. at 1945.
67. *Id.* at 1946.
68. *Id.* at 1958.
69. *Id*. at 1965.
70. *Id*. at 1979.
71. 2 ANNALS OF CONG. 1952 (1791).

IV. This Evidence Suggests Three Additional Possibilities Regarding Constitutional Construction

Let me close by suggesting that this evidence from the debate over the constitutionality of the national bank suggests three further possibilities: first, it suggests that, whether construction exists depends on one's understanding of the existence and role of rules of interpretation; second, there may be a way to synthesize at least some of the disparate conceptions of construction; and third, it may suggest that the category of constitutional construction is an empty set.

First, this evidence makes more likely the possibility that, whether constitutional construction exists, depends on whether one's conception of the original meaning includes *as a constitutive facet of the original meaning itself* the original methods of interpretation. If the original meaning includes the meaning that results from application of the original rules of interpretation, then this debate suggests that construction[72] does not exist. By contrast, if one's conception of the original meaning treats rules of interpretation like those utilized by the debate participants as extrinsic to the original meaning, then their use in the debates is evidence of the original meaning's underdeterminacy.

This is not a new contribution. What is new is that the surveyed debate seems to provide evidence that could be understood as supporting either conception. The debate participants appeared to believe they arrived at determinate answers, but only after application of rules of interpretation. This could show that the Constitution's meaning was underdetermined; it could also show that the meaning was determinate. It depends on whether the applied rules of interpretation were constitutive of the original meaning or extrinsic to it.

Second, and relatedly, this evidence suggests a way to synthesize at least some facets of the disparate originalist conceptions of constitutional construction. The evidence I surveyed contains two different and yet related characteristics: (1) the participants appeared to believe that the Constitution's meaning did not clearly answer the constitutional question; and (2) the participants appeared to believe that, after application of sufficient interpretative argumentation, the Constitution's meaning did answer the question. These characteristics suggest that, on the one hand, the conception of construction that identifies construction as a zone of constitutional underdeterminacy is accurate. On the other hand, the conception of construction that identifies a thick interpretative practice as part of the Constitution's original meaning and which (at least) reduces constitutional underdeterminacy and (at most) eliminates underdeterminacy is also accurate.

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72. Construction as defined to include only those situations of constitutional underdeterminacy.

The debate over the constitutionality of the national bank tends to show that constitutional construction exists only as *initial* and *epistemic* indeterminacy.[73] The evidence I reviewed suggests that the debate participants proceeded on the premise that the Constitution did not *prima facie* answer the question at issue. They believed that the Constitution did not obviously answer the question of whether Congress could charter a national bank.

However, this is not sufficient evidence of construction, at least if understood as requiring constitutional underdeterminacy (which is the conventional originalist understanding). This is because the debate participants seemed to believe that the Constitution ultimately did answer the question—that the Constitution was not underdeterminate—on this question, after the application of rules of interpretation, which the participants believed also provided evidence of the Constitution's meaning.

Third, this evidence may show that constitutional construction is an empty set. The evidence I reviewed suggests that the debate participants believed that the Constitution's meaning determinatively answered the questions at issue *after* application of the rules of interpretation. Therefore, the precondition to construction—underdeterminacy—did not exist.

V. Conclusion

In this brief Essay, I made three moves. First, I briefly described constitutional construction. Second, I reviewed the evidence of the House debate over the constitutionality of the bill to charter the First Bank of the United States. From this debate I drew two tentative conclusions: (1) the debate participants believed that, at first blush, the Constitution's meaning was not patent; and (2), the debate participants believed that the Constitution provided determinate answers following a series of arguments drawing out the Constitution's meaning. Third, I suggested three further implications for the current originalist debate over constitutional construction.

73. *See* Ken Kress, *A Preface to Epistemological Indeterminacy*, 85 Nw. U. L. Rev. 134 (1990) (describing the concept of epistemic indeterminacy); Lee J. Strang, *An Originalist Theory of Precedent: The Privileged Place of Originalist Precedent*, 2010 B.Y.U. L. Rev. 1729, 1758–1762 (2010) (leveraging this concept in the contexts of constitutional construction and precedent).