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The Sacrifice of the New Originalism

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Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 *Geo. L.J.* 713 (2011).

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The Sacrifice of the New Originalism

THOMAS B. COLBY*

TABLE OF CONTENTS

INTRODUCTION	714
I. THE EMERGENCE OF THE NEW ORIGINALISM	716
A. FROM ORIGINAL INTENT TO ORIGINAL MEANING	720
B. FROM SUBJECTIVE MEANING TO OBJECTIVE MEANING	722
C. FROM ACTUAL TO HYPOTHETICAL UNDERSTANDING	724
D. EMBRACING STANDARDS AND GENERAL PRINCIPLES	724
E. EMBRACING BROADER LEVELS OF GENERALITY	726
F. FROM ORIGINAL EXPECTED APPLICATION TO ORIGINAL OBJECTIVE PRINCIPLES	728
G. DISTINGUISHING BETWEEN INTERPRETATION AND CONSTRUCTION	731
H. DISTINGUISHING BETWEEN NORMATIVE AND SEMANTIC ORIGINALISM	735
II. THE BENEFITS OF THE NEW ORIGINALISM	736
III. THE COST OF THE NEW ORIGINALISM	744
A. THE INEVITABLE MARRIAGE OF SOPHISTICATION AND FLEXIBILITY	746
B. THE PROFOUND FLEXIBILITY OF THE NEW ORIGINALISM	749
IV. OF SUBSTANCE AND SEMANTICS	764
A. FIXED AND CHANGING MEANINGS	765
B. INTERPRETATION AND CONSTRUCTION	766
V. ORIGINALIST RESPONSES	769
A. ARTICULATING NARROW THEORIES OF CONSTRUCTION	770
B. DECLINING TO ENDORSE THE FULL NEW ORIGINALIST PACKAGE	771

* Professor of Law, The George Washington University Law School. © 2011, Thomas B. Colby. For helpful suggestions on earlier drafts of this Article, I thank my colleagues, my father, and the participants at workshops at the University of Texas School of Law and the Cornell Law School.

C. FAILING TO WALK THE WALK	772
D. DENYING THE (SEEMINGLY) OBVIOUS	773
CONCLUSION	776

INTRODUCTION

Originalism¹ was born of a desire to constrain judges. Judicial constraint was its heart and soul—its *raison d'être*. But however intriguing it might have been to imagine a neutral theory that could purge the personal values of judges from the process of constitutional adjudication, originalism initially suffered from so many practical and theoretical defects that it failed even to be taken seriously, let alone to prevail, in the legal academy.

So it has evolved. It has responded to its critics, refined itself, and matured. It has indeed made such great theoretical strides as to win numerous adherents and significant respect in the scholarly community.

The advocates of this new and improved originalism have self-consciously adopted a new label—“the New Originalism”²—to distinguish their theory from its failed forerunner—what this Article identifies as “the Old Originalism.” But their theory is more distinct from its predecessor than many of them would like to admit. Intentionally or not, the New Originalism has left behind more than just the theoretical flaws of its predecessor. It has also effectively sacrificed the Old Originalism’s promise of judicial constraint. The very changes that make the New Originalism theoretically defensible also strip it of any pretense of a power to constrain judges to a meaningful degree.

Randy Barnett, one of the most prominent New Originalists, may not be excessively overstating the point when he claims that originalism “is now the prevailing approach to constitutional interpretation.”³ But that is because, in its New incarnation, originalism is no longer objectionable to liberals, libertarians, and other believers in a robust judiciary enforcing an evolving and growing body of constitutional rights and principles⁴—the very beliefs that the Old

1. Many constitutional theories can and do lay claim to the label of “originalism.” What those theories generally have in common is that they treat “the discoverable meaning of the Constitution at the time of its initial adoption as authoritative for purposes of constitutional interpretation in the present.” Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL’Y 599, 599 (2004) (defining the “basic theory” behind the variations of originalism).

2. This term appears to have been coined by Randy Barnett, see Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 620 (1999), and popularized by Keith Whittington, see Whittington, *supra* note 1. One can, however, find scattered references to the term that predate Barnett. See Evan S. Nadel, *The Amended Federal Rule of Civil Procedure 11 on Appeal: Reconsidering Cooter & Gell v. Hartmark Corporation*, 1996 ANN. SURV. AM. L. 665, 691 n.191; Jeffrey Rosen, *Introduction*, 66 GEO. WASH. L. REV. 1081, 1081 (1998).

3. Barnett, *supra* note 2, at 613.

4. See *id.* at 623 (claiming that “originalism has been rendered safe enough to tempt even political progressives to adopt it”); Ethan J. Leib, *The Perpetual Anxiety of Living Constitutionalism*, 24 CONST. COMMENT. 353, 353–54 (2007) (referring to the views of Jack Balkin, another leading New Originalist, as “lefty originalism”); Steven D. Smith, *Reply to Koppelman: Originalism and the (Merely) Human*

Originalism was created to oppose.

That is to say, in its New form, originalism has sacrificed the feature that once set it apart and gave it an identity and a mass appeal—the very thing that made it what it is. Originalism has sold its soul to gain respect and adherents.⁵ And it can recover its soul only by abandoning the theoretical sophistication that it needs in order to be taken seriously.

Although there is surely something of a “Monkey’s Paw” aspect to this—a dose of irony in the insufferable price of a granted wish⁶—there is nothing inherently illicit about the New Originalism. It would be unfair to saddle today’s New Originalists with the unreasonable constraining fantasies of their forebears. Indeed, some New Originalists explicitly part company from the Old Originalists by disavowing any serious claim to judicial constraint. Still, many other New Originalists continue to spin rhetoric about judicial constraint—making promises that their theory manifestly cannot keep. In addition, numerous self-professed originalists do not place themselves squarely in either the New or the Old camp. Instead, they muddle about with a foot in each camp, trying to have their cake and eat it too. They claim sophistication by drawing upon the theoretical advances of the New Originalism, while simultaneously claiming the mantle of constraint by drawing upon the rhetoric of the Old Originalism, all the while failing to recognize that these claims are mutually exclusive.

The purpose of this Article is to illuminate this fundamental truth, which has seemingly escaped the notice of many originalists currently basking in the glow of unprecedented success in the courts and the law reviews: Originalism has achieved its intellectual respectability only at the necessary expense of its ballyhooed promise of constraint. Part I recounts the theoretical advances of the New Originalism. Part II argues that, as a result of these advances, the New Originalism is substantially more defensible than was the Old one and is much better positioned to answer the scholarly critiques that demolished its predecessor. Part III explains that these benefits have, however, come at the cost of judicial constraint. By its very nature—and to a far greater degree than its proponents have tended to recognize—the New Originalism is a theory that affords massive discretion to judges in resolving contentious constitutional issues. Part IV seeks to clear up some confusion on these points that might stem

Constitution, 27 CONST. COMMENT. 189, 189 (2010) (arguing that Jack Balkin’s originalism “is able to justify pretty much any results that the most ardently progressive constitutional heart could desire”).

5. See Steven D. Smith, *That Old-Time Originalism* 11 (Univ. of San Diego Sch. of Law Legal Studies Research Paper Series, Research Paper No. 08-028, 2008), available at <http://ssrn.com/abstract=1150447> (“[I]n gaining Balkin and like-minded thinkers, originalism loses . . . well, its soul.”); cf. Reva B. Siegel, Heller & *Originalism’s Dead Hand—In Theory and Practice*, 56 UCLA L. REV. 1399, 1412 (2009) (arguing that New Originalist theories, which she calls “[s]econd-generation originalist theories,” “lose many of their distinctive methodological constraints as *originalist* theories of constitutional interpretation” (emphasis added)).

6. See generally W.W. JACOBS, *The Monkey’s Paw*, in THE LADY OF THE BARGE AND OTHERS, ENTIRE COLLECTION 14 (The Echo Library 2009) (1902) (a classic horror short story in which the paw of a dead monkey grants its owner three wishes, but at a great price for interfering with fate).

from an unfamiliarity with the jargon of the New Originalism, and Part V examines some of the ways in which originalists have sought, unsuccessfully, to avoid the consequences of the evolution of their theory.

The Article concludes by suggesting that there is something unsustainable in the current state of affairs. Originalism gains its salience in the public discourse by its continued reliance on a promise to constrain judges; it is that promise that brings it *lay* respect. Yet, it gains *academic* respect only by foregoing that promise. Originalism now garners esteem from much of both the public and the academy, but only because the public and the academy are speaking of very different things when they refer to originalism. Originalism somehow continues to thrive as both a political movement and as a scholarly theory, even though the features that make it attractive as a political movement render it impotent as a scholarly theory and vice versa.

I. THE EMERGENCE OF THE NEW ORIGINALISM

Originalism, as a distinct theory of constitutional interpretation, arose as a by-product of the conservative frustration with the broad, rights-expansive decisions of the Warren and Burger Courts.⁷ Richard Nixon based much of his campaign for the presidency on an attack on the liberal Warren Court and an insistence that it was “the job of the courts to interpret the law, not to make the law.”⁸ In appointing Justice Rehnquist to the bench, Nixon promised that his new Justice would “interpret the Constitution, . . . not twist or bend the Constitution in order to perpetuate his personal political and social views.”⁹ Rehnquist explained at his confirmation hearings that he would accomplish this feat by refusing “to disregard the intent of the [F]ramers of the Constitution and change it to achieve a result that [he] thought might be desirable for society.”¹⁰

These were the beginnings of the Old Originalism, and the themes that Rehnquist sounded were typical of its early scholarly defenders.¹¹ Old Original-

7. See John Harrison, *Forms of Originalism and the Study of History*, 26 HARV. J.L. & PUB. POL'Y 83, 83–86 (2003); Whittington, *supra* note 1, at 599–601 (arguing that “originalism was a reactive theory motivated by substantive disagreement with the recent and then-current actions of the Warren and Burger Courts”); cf. Larry Kramer, *Two (More) Problems with Originalism*, 31 HARV. J.L. & PUB. POL'Y 907, 908 (2008) (“The idea of originalism as an exclusive theory, as the criterion for measuring constitutional decisions, emerged only in the 1970s and 1980s.”). See generally JOHNATHAN O'NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY 94–110 (2005) (explaining the rise of originalism as, among other things, a product of a growing conservative political movement and a rejection of Warren Court decisions).

8. O'NEILL, *supra* note 7, at 96 (quoting President Nixon).

9. President Richard Nixon, Address to the Nation Announcing Intention To Nominate Lewis F. Powell, Jr., and William H. Rehnquist To Be Associate Justices of the Supreme Court of the United States (Oct. 21, 1971), in 1 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: RICHARD NIXON, 1971, at 1054 (1972).

10. *Nominations of William H. Rehnquist and Lewis F. Powell, Jr.: Hearings Before the S. Comm. on the Judiciary*, 92d Cong. 19 (1971) (question from Sen. John L. McClellan to William H. Rehnquist).

11. See Whittington, *supra* note 1, at 602 (noting that the “primary commitment” of the Old Originalism “was to judicial restraint” and that “[o]riginalist methods of constitutional interpretation

ists insisted that their theory, by employing an objective historical criterion that is “exterior to the will of the Justices,”¹² would limit the ability of judges to read their own personal policy preferences into the Constitution.¹³ As Raoul Berger put it: “If the Court may substitute its own meaning for that of the Framers it may . . . rewrite the Constitution without limit.”¹⁴ If, however, the Court is bound by the original intent of the Framers—if it “adhere[s] to the principles actually laid down in the historic Constitution”¹⁵—then it will no longer be able to issue Warren Court-style decisions that are based more on the Justices’ personal conceptions of the good than on the actual meaning of the Constitution.¹⁶ In Lillian BeVier’s words: “The criteria of originalism constrain all the participants in the game—including, most especially, the referees.”¹⁷

In this respect, originalism offered the promise of a truly distinct theory of constitutional interpretation—one that could constrain judges, respect democracy, and preserve the rule of law.¹⁸ It would be difficult to overstate the extent to which the Old Originalism was characterized by its own proponents as a theory that could constrain judges and preclude them from reading their own policy preferences—most importantly, their own preferred unenumerated rights—into the Constitution.¹⁹

were understood as a means to that end”—as a “mechanism to redirect judges from essentially subjective consideration of morality to objective consideration of legal meaning”); cf. O’NEILL, *supra* note 7, at 145–46, 154–55, 157 (explaining that the Old Originalism was conceived as a way to limit personal judgments by the Judiciary and to favor majoritarian decision making).

12. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 6 (1971).

13. See, e.g., OFFICE OF LEGAL POLICY, U.S. DEPT. OF JUSTICE, ORIGINAL MEANING JURISPRUDENCE: A SOURCEBOOK 2–3 (1987) [hereinafter OFFICE OF LEGAL POLICY].

14. RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 408 (Liberty Fund, 2d ed. 1997) (1977).

15. ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 163 (1990); see also Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823, 826 (1986) (“The only way in which the Constitution can constrain judges is if the judges interpret the document’s words according to the intentions of those who drafted, proposed, and ratified its provision and its various amendments.”).

16. See, e.g., BERGER, *supra* note 14, at 308–11 (“The Justices’ value choices may not displace those of the Framers.”); William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 695 (1976) (arguing that judges should not “address themselves to a social problem simply because other branches of government have failed or refused to do so” and should not substitute “some other set of values for those which may be derived from the language and intent of the [F]ramers”).

17. Lillian R. BeVier, *The Integrity and Impersonality of Originalism*, 19 HARV. J.L. & PUB. POL’Y 283, 291 (1996).

18. See Thomas B. Colby, *The Federal Marriage Amendment and the False Promise of Originalism*, 108 COLUM. L. REV. 529, 530 (2008) (“In asserting the existence of an objective, discoverable, fixed constitutional meaning capable of directing judicial decisionmaking in a value-neutral manner, originalism made an enticing promise—a way to ensure that judges do not subvert democracy and the rule of law by reading their personal values into the Constitution.”).

19. See generally O’NEILL, *supra* note 7, *passim* (detailing the rise of the originalist movement). Lino Graglia, for instance, argued that it would be “impossible” to “show that [nonoriginalist] constitutional law is something other than a means of substituting the liberal policy preferences of a cultural elite for the policy preferences of a majority of the American people.” Lino A. Graglia, *Constitutional Interpretation*, 44 SYRACUSE L. REV. 631, 640 (1993).

This was an enticing promise. In the words of Earl Maltz, one of the leading Old Originalists, it was “this potential for neutrality that account[ed] for the visceral appeal of originalism.”²⁰ The American people—especially political conservatives, who were enraged by the progressive decisions of the Warren Court—were intrigued. Originalism thus gained significant respect within the American political conservative movement.²¹ But if it was going to gain *academic* respect—respect among constitutional theorists—it would have to be able to stand up to the rigors of critical scrutiny. It would have to prove itself as a workable, coherent, and intellectually sound theory of constitutional interpretation.

The Old Originalism could not do that. Those outside of the movement buried it in a sea of devastating critiques—critiques that it could not withstand, at least not without substantially reformulating itself in order to deflect them. And at the same time, those within the movement began to recognize, and shore up, some of its flaws. Thus, over the course of the last two decades, originalism has evolved. The Old Originalism has all but withered away.²² In its place, a New Originalism has sprouted up, taken root, and thrived.²³

It would be a mistake to view either the Old or the New Originalism as a distinct and coherent constitutional theory; “originalism” is a label that has been, and continues to be, affixed to a remarkably diverse array of interpretive theories that in fact share surprisingly little in common.²⁴ But it is fair to say that there has been an unmistakable direction in the general flow of the

20. Earl Maltz, *Foreword: The Appeal of Originalism*, 1987 UTAH L. REV. 773, 794; see also Lawrence Rosenthal, *Does Due Process Have an Original Meaning? On Originalism, Due Process, Procedural Innovation . . . and Parking Tickets*, 60 OKLA. L. REV. 1, 1 (2007) (“[O]riginalism is said to tame the monster of judicial activism by teaching that a conscientious inquiry into historical sources will yield the original meaning of constitutional text and thereby provide a reliable and objective basis for constitutional adjudication.”); Michael W. McConnell, *The Role of Democratic Politics in Transforming Moral Convictions into Law*, 98 YALE L.J. 1501, 1525 (1989) (book review) (“The appeal of originalism is that the moral principles so applied will be the foundational principles of the American Republic . . . and not the political-moral principles of whomever happens to occupy the judicial office.”).

21. See Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right’s Living Constitution*, 75 FORDHAM L. REV. 545, 549 (2006).

22. See Whittington, *supra* note 1, at 603–07. But see Larry Alexander, *Simple-Minded Originalism passim* (Univ. of San Diego Sch. of Law Legal Studies Research Paper Series, Research Paper No. 08-067, 2008), available at <http://ssrn.com/abstract=1235722> (defending the Old Originalism); Walter Benn Michaels, *A Defense of Old Originalism*, 31 W. NEW ENG. L. REV. 21 *passim* (2009) (same); Smith, *supra* note 5, at 15 (tepidly opposing the transition from the Old Originalism to the New Originalism); cf. Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. U. L. REV. 703, 704 (2009) (defending a version of originalism that resembles the Old Originalism in many respects).

23. See Barnett, *supra* note 2, at 620–29; Stephen M. Griffin, *Rebooting Originalism*, 2008 U. ILL. L. REV. 1185, 1188–91; Whittington, *supra* note 1, at 607–12.

24. Peter Smith and I have explained elsewhere that the evolution of originalist thought has not been characterized by a tidy, steady, linear flow. At any given moment, there are numerous mutually exclusive theories of constitutional interpretation that all claim the mantle of “originalism,” and the discord in originalist thought is only increasing over time. See Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 258 (2009).

mainstream of originalist thought. In rejecting the Old Originalism and developing the New one, originalists have, by and large, made a series of significant theoretical moves that have brought them to a very different place from where they started. These moves have not been neatly sequential; different thinkers have embraced different moves at different times, and the various moves have often occurred simultaneously, each drawing upon the rationales driving the others.²⁵ Virtually every originalist has embraced at least some of these moves, yet only a few have explicitly embraced all of them.²⁶ As such, there is no magic line of demarcation between the New and Old Originalism.²⁷ There has, instead, been a gradual and ongoing—but clearly substantial—change of focus. Thus, although something called “originalism” has recently gained unprecedented acceptance in the academy, the particular originalism of the 1970s and early 1980s is not now (nor was it ever) especially influential in academic circles.²⁸ It is the New Originalism that has won over converts in the scholarly community.

The remainder of this Part sets out the theoretical moves from the Old to the New Originalism: (a) the move from original intent to original meaning; (b) the move from subjective meaning to objective meaning; (c) the move from actual

25. Indeed, many of these steps are so closely related that it may be difficult conceptually to separate them. See, e.g., Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 662 (2009) (suggesting that the distinction between original meaning and original expected application is “a question of the level of generality”).

26. See Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 22 CONST. COMMENT. 257, 260 (2005) (noting that much originalist scholarship “straddles the line” between the New and the Old versions); Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 GEO. L.J. 1113, 1142 & n.99 (2003) (discussing the work of Steven Calabresi and Saikrishna Prakash, who can be somewhat “imprecise” in describing the proper object of the originalist inquiry).

27. See Colby, *supra* note 18, at 573 (noting that differing originalisms are not “distinct schools of thought as much as they are . . . ranges on the continuum of originalist theory; they often bleed together, and many originalists have at times made statements consistent with more than one of them”). Commentators often articulate the line between the New and Old Originalisms as the transition from a theory of original intent to a theory of original meaning. See, e.g., Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 NW. U. L. REV. 923, 933 (2009). On this view, Justice Scalia—a great champion of original meaning rather than original intent, see *infra* note 38 and accompanying text—falls on the New Originalist side of the line. See Solum, *supra*. Other commentators, however, have noted that Justice Scalia has not in practice embraced other moves discussed below, and thus, they do not group Justice Scalia among the New Originalists. See, e.g., Greene, *supra* note 25, at 672 n.77 (differentiating Justice Scalia’s views from those of Keith Whittington and Randy Barnett). Vasan Kesavan and Michael Stokes Paulsen place Justice Scalia in the New Originalist camp, but recognize that his version of New Originalism is a less refined one that remains closer to the Old Originalism than do the theories of the leaders of the New Originalist movement. See Kesavan & Paulsen, *supra* note 26, at 1140 (“But even though Justice Scalia remains the dominant figure in the shift to originalist textualism, his is not always the most refined or consistent version of the theory. In some ways, he is a leader whose followers have bettered the leader’s own work. Scholars and judges a half-generation younger than Scalia, who are in some respects his heirs, often appear to be employing more thoroughly and carefully honed versions of originalist textualism.”); see also *id.* at 1141 n.96 (arguing that Judge Bork, in his later writings, moved away from the Old Originalism and most of the way to the New Originalism).

28. See Greene, *supra* note 25, at 662 & n.22, 670–71; *infra* notes 137–40 and accompanying text.

to hypothetical understanding; (d) the embrace of standards and general principles; (e) the embrace of broad levels of generality; (f) the move from original expected application to original objective principles; (g) the distinction between interpretation and construction; and (h) the distinction between normative and semantic originalism. Individually, each of these moves has, for the most part, been sensible; each deserves praise for responding to powerful criticisms and substantially improving the underlying theory. But collectively, they have had an ironic effect when examined against the backdrop of the animating promise of the early originalist movement.

A. FROM ORIGINAL INTENT TO ORIGINAL MEANING

The Old Originalism entailed a commitment to the original intent of the Framers. That is to say, in its early days, originalism was understood as a mandate to interpret the Constitution to mean what the Framers *intended* it mean: “judges should be guided by the intent of the Framers of the relevant constitutional provisions.”²⁹ Edwin Meese, for instance, insisted upon a “jurisprudence of original intention” that focused on “the original intent of the Framers.”³⁰ Raoul Berger decreed that the “‘original intention’ of the Framers . . . is binding on the Court.”³¹ Judge Robert Bork declared that “original intent is the only legitimate basis for constitutional decisionmaking.”³² And Justice Rehnquist demanded judicial allegiance to the “language and intent” of the Framers.³³

That focus, however, lent itself to devastating criticism. Among other stinging rebukes, critics charged that it is often impossible to uncover a single collective “intent” of “the [F]ramers” as a whole, insofar as different Framers were often motivated by different intentions.³⁴ Critics also argued that original intent is a self-defeating philosophy. The historical evidence shows that the Framers intended for future generations *not* to interpret the Constitution according to the intent of the Framers; as such, in order to follow the intent of the Framers, one must *not* follow the intent of the Framers.³⁵

In the face of these withering critiques, originalists began a “campaign to

29. Earl Maltz, *Some New Thoughts on an Old Problem—The Role of the Intent of the Framers in Constitutional Theory*, 63 B.U. L. REV. 811, 811–12 (1983).

30. Edwin Meese III, Att’y Gen. of the United States, Address Before the DC Chapter of the Federalist Society Lawyers Division (Nov. 15, 1985), in OFFICE OF LEGAL POLICY, *supra* note 13, at 91, 96–97.

31. BERGER, *supra* note 14, at 3.

32. Bork, *supra* note 15, at 823.

33. See Rehnquist, *supra* note 16, at 695, 697–98.

34. See, e.g., Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 209–22 (1980). For an Old Originalist response to this objection, see Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 248–51 (1988).

35. See H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 885–88 (1985). For Old Originalist responses, see Kay, *supra* note 34, at 273–81, and Charles A. Lofgren, *The Original Understanding of Original Intent?*, 5 CONST. COMMENT. 77, 77–79 (1988). For a

change the label from the Doctrine of Original Intent to the Doctrine of Original Meaning,³⁶ thus shifting the focus of their theory from a search for the original *intent* of the Framers to a search for the original *meaning* of the Constitution.³⁷ As Justice Scalia explained it, originalists began to seek “the original meaning of the text, not what the original draftsmen intended.”³⁸

This change in focus was a significant theoretical advancement. It instantly shored up the theory of originalism against the most powerful objections by

ostensibly avoid[ing] both the problem of determining the collective intent of the numerous Framers (the Framers may have had many reasons for enacting it, but the text nonetheless had only one meaning) and the problem of self-defeat (much of the historical evidence that was mustered to undermine the reliance on original intent actually supports the reliance on original meaning by suggesting that the Framers believed that the original meaning of the text, rather than the original intent of the drafters, would control future constitutional interpretation).³⁹

It also avoided the concern that the intent of the Framers might have been idiosyncratic and unknowable to the people in whose name the Constitution was adopted. Justice Scalia has explained that a focus on original *intent* can be seen as inconsistent with the rule of law—even worse than Nero’s practice of “posting edicts [so] high up on the pillars that they could not . . . easily be read by the people.”⁴⁰ “Government by unexpressed intent is similarly tyrannical. It is the *law* that governs, not the intent of the lawgiver.”⁴¹ This concern was mitigated by focusing on the original meaning of the publicly known law, rather than the private intentions of the lawgivers.

Originalism was changing; it was responding to its critics and purging its flaws by becoming more theoretically sophisticated.

more recent challenge to Powell’s historical evidence, see Robert G. Natelson, *The Founders’ Hermeneutic: The Real Original Understanding of Original Intentions*, 68 OHIO ST. L.J. 1239, 1245–46 (2007).

36. Justice Antonin Scalia, Address Before the Attorney General’s Conference on Economic Liberties in Washington, D.C. (June 14, 1986), in OFFICE OF LEGAL POLICY, *supra* note 13, at 101, 106.

37. For a discussion of this move in originalist thought, see Barnett, *supra* note 2, at 620–29, Kesavan & Paulsen, *supra* note 26, at 1134–48, Rosenthal, *supra* note 20, at 3–11, and Whittington, *supra* note 1, at 603–07.

38. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 38 (Amy Gutmann ed., 1997); see also BORK, *supra* note 15, at 144 (“The search is not for a subjective intention. If someone found a letter from George Washington to Martha telling her that what he meant by the power to lay taxes was not what other people meant, that would not change our reading of the Constitution in the slightest. Nor would the subjective intentions of all the members of a ratifying convention alter anything. When lawmakers use words, the law that results is what those words ordinarily mean.”).

39. Colby, *supra* note 18, at 531 (footnote omitted).

40. Scalia, *supra* note 38, at 17.

41. *Id.*

B. FROM SUBJECTIVE MEANING TO OBJECTIVE MEANING

The move from original intent to original meaning was a sound step, but it was initially an undertheorized one. What, exactly, did “original meaning” mean? To many originalists, it meant the “original understanding” of the Constitution’s meaning.⁴² But *whose* understanding? Many originalists sought the meaning that the *Framers* originally understood the Constitution to have.⁴³ Most originalists, however, came to view the original meaning as the meaning that the *public* originally understood the Constitution to have. As Keith Whittington explains, this approach was grounded in the belief that, “[i]n ratifying the document, the people appropriated it, giving its text the meaning that was publicly understood.”⁴⁴ Thus, many originalists began to articulate the interpretive task as a search for the “public understanding” of the meaning of the Constitution.⁴⁵ On this view, constitutional interpretation entails ascertaining “what the original language actually meant to those who used the terms in question”⁴⁶—that is, the “meaning of the provision to the public on whose behalf it was ratified.”⁴⁷

This approach helped to ameliorate the concerns about the illegitimacy of government by unexpressed intent; on this theory, the public was bound only by the meaning that was actually collectively understood by the people. Yet this approach failed to ameliorate other concerns with the Old Originalism. The move from original intent to original meaning had been premised in substantial part on a desire to avoid subjective interpretation. But defining “original meaning” as “original understanding” did not avoid the subjectivity problem; it simply replaced one subjective inquiry (the intent of the Framers) with another

42. See, e.g., *Kelo v. City of New London*, 545 U.S. 469, 506 (2005) (Thomas, J., dissenting) (equating original meaning with original understanding); *Utah v. Evans*, 536 U.S. 452, 491 (2002) (Thomas, J., concurring in part and dissenting in part) (same).

43. There was disagreement about whether the relevant Framers were those who drafted the Constitution, or those who ratified it. Compare Earl M. Maltz, *Personal Jurisdiction and Constitutional Theory—A Comment on Burnham v. Superior Court*, 22 RUTGERS L.J. 689, 696 (1991) (arguing that originalism “focuses on the original understanding of those who drafted the [F]ourteenth [A]mendment”), with Kesavan & Paulsen, *supra* note 26, at 1137 (“The shift to original understanding was part of an increased recognition that it was the . . . Constitution’s *Ratifiers* . . . whose actions gave legal life to the otherwise dead words on paper drafted by the Philadelphia Convention . . .”), and Lofgren, *supra* note 35 (arguing that the originalist inquiry should seek the understanding of the ratifiers).

44. KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* 60 (1999).

45. E.g., Kurt T. Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 TEX. L. REV. 331, 339 (2004).

46. Steven G. Calabresi, *The Originalist and Normative Case Against Judicial Activism: A Reply to Professor Randy Barnett*, 103 MICH. L. REV. 1081, 1081 (2005) (book review).

47. Michael J. Perry, *The Legitimacy of Particular Conceptions of Constitutional Interpretation*, 77 VA. L. REV. 669, 675 (1991); see also, e.g., Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127, 1136 (1998) (“Originalism is the idea that the words of the Constitution must be understood as they were understood by the ratifying public at the time of enactment.”).

one (the understanding of the Framers or of the public).⁴⁸ The inquiry was still focused on the subjective beliefs of particular persons. And the search for subjective beliefs is fraught with peril, especially when the quest is to determine the subjective understandings of the populace as a whole. What if the public did not share a single understanding? That is to say, what if different people understood the text to mean different things? At that point, the inquiry into original understanding will fail for precisely the same reasons that the inquiry into original intent will fail.⁴⁹

To make matters worse, critics charged that—just as with original intent—it is often impossible to determine the actual original understanding of a particular constitutional provision (even if we are willing to imagine that a single understanding in fact existed) because the historical record is contradictory,⁵⁰ incomplete,⁵¹ or severely compromised.⁵²

The move from original intent to original meaning, on its own, did nothing to obviate these concerns. Indeed, in some ways it merely exacerbated them by expanding the number of persons whose views and understandings were relevant.⁵³ Thus, over time, the focus of the originalist inquiry began to evolve again. Originalists began to speak of the “original meaning” project in more

48. See Tara Smith, *Why Originalism Won't Die—Common Mistakes in Competing Theories of Judicial Interpretation*, 2 DUKE J. CONST. L. & PUB. POL'Y 159, 201–02 (2007).

49. See Colby, *supra* note 18, at 596 (“When it came to controversial subjects, the constitutional language that emerged from the drafting process was generally capable of supporting more than one meaning, and the people were able to ratify it only because they did *not* agree on which of its possible meanings was correct.”); Kesavan & Paulsen, *supra* note 26, at 1138 (noting that a search for “the actual understanding of the Ratifiers” does not avoid “all the problems of use of legislative history and ascertaining collective intention”).

50. See Suzanna Sherry, *The Indeterminacy of Historical Evidence*, 19 HARV. J.L. & PUB. POL'Y 437, 440 (1996) (explaining that “careful historical analysis of the same evidence may yield opposite conclusions” with respect to the Framers’ original intent); Peter J. Smith, *The Sources of Federalism: An Empirical Analysis of the Court's Quest for Original Meaning*, 52 UCLA L. REV. 217, 281–83 (2004) (“It should come as no surprise, then, that well-meaning originalist judges can use the historical record to substantiate sharply conflicting views of the original understanding.”).

51. See, e.g., Mitchell Gordon, *Adjusting the Rear-View Mirror: Rethinking the Use of History in Supreme Court Jurisprudence*, 89 MARQ. L. REV. 475, 477 & n.8 (2006) (citing sources arguing “that the historical record is too incomplete or inconclusive for modern-day readers to pinpoint the Framers’ original meaning”).

52. The records of many of the key proceedings in the drafting and ratification of the original Constitution and the Bill of Rights were negligently recorded and selectively edited by partisans. See, e.g., Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085, 1088–89 (1989); James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEX. L. REV. 1, 12–24, 36 (1986).

53. See Kramer, *supra* note 7, at 910 (“The indeterminacy argument became stronger, because indeterminacy of intent was magnified by the expansion of the number of individuals whose intent was to be considered. It was not now a small group of fifty-five in Philadelphia whose intent was to be considered, but rather a vast body including every individual who voted on the Constitution. Originalists found themselves trying to recover the understanding of an exceedingly large group of people” (footnote omitted)).

objective terms: as a search for the original, *objective* meaning of the text,⁵⁴ thereby ostensibly evading the various subjectivity-based objections.

C. FROM ACTUAL TO HYPOTHETICAL UNDERSTANDING

As originalists developed this notion of a genuinely objective inquiry, they gradually became more sophisticated—and more aggressive—in how they articulated it. They explicitly disavowed not only original intent, but also original understanding.⁵⁵ Rejecting any effort to determine how the words of the Constitution were *actually* understood by the Framers or the public, they refocused the inquiry into an effort to determine how a hypothetical, reasonable person would have understood the words of the Constitution. The “search for original meaning” was no longer “a search for historically concrete understandings.”⁵⁶ It became instead “a hypothetical inquiry that asks how a fully informed public audience, knowing all that there is to know about the Constitution and the surrounding world, would understand a particular provision.”⁵⁷ In essence, it became a reasonable person test: the hypothetical understandings of the “reasonable American person of 1788.”⁵⁸

Here again, originalism was becoming more refined and more sophisticated. This move simultaneously deflected concerns about both historical indeterminacy and collective disagreement. That there was no actual agreement on the meaning of constitutional language—at least not one that can be reconstructed by reference to the sketchy historical record—was no longer necessarily fatal to the theory.

D. EMBRACING STANDARDS AND GENERAL PRINCIPLES

The Old Originalism, with its core commitment to judicial restraint, generally held on faith that the Constitution does not contain open-ended provisions

54. See, e.g., OFFICE OF LEGAL POLICY, *supra* note 13, at 14–16, 20; Barnett, *supra* note 2, at 621; Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 105 (2001); Scalia, *supra* note 38.

55. See Kesavan & Paulsen, *supra* note 26, at 1132 (“It is not a theory of anyone’s intent or intention. Nor is it a theory of anyone-in-particular’s understanding. Nor is it a theory of the collective intention of a particular body of people, or of a society as a whole.”).

56. Gary Lawson & Guy Seidman, *When Did the Constitution Become Law?*, 77 NOTRE DAME L. REV. 1, 25 (2001).

57. Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 398 (2002); see also Kesavan & Paulsen, *supra* note 26, at 1132 (explaining that the proper inquiry is how the words of the Constitution “would have been understood by a hypothetical, objective, reasonably well-informed reader of those words and phrases, in context, at the time they were adopted, and within the political and linguistic community in which they were adopted”). Michael Perry reaches essentially the same conclusion when he defends a version of original meaning that asks “how the provision was understood by the People, or would have been understood by them had they been paying attention and had they achieved access to all the relevant information.” Michael J. Perry, *The Constitution, the Courts, and the Question of Minimalism*, 88 NW. U. L. REV. 84, 89 (1993).

58. Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47, 48 (2006); see *id.* at 70–73 (describing this inquiry).

affording significant discretion to the judges who interpret them. Thus, Raoul Berger included an entire chapter in his enormously influential book, *Government by Judiciary*, rejecting what he called the “‘Open-Ended’ Phraseology Theory” of constitutional interpretation.⁵⁹ And Judge Bork famously analogized both the Ninth Amendment⁶⁰ and the Privileges or Immunities Clause of the Fourteenth Amendment⁶¹ to “ink blot[s]” on the Constitution, rejecting their seemingly capacious language on the ground that it is impossible to believe that the Framers *intended* to allow unelected judges to enforce rights not explicitly enumerated in the Constitution.⁶²

But this reasoning makes little sense once the originalist inquiry is directed away from a search for actual historical intentions. If the proper interpretive quest is, instead, for the objective meaning that a hypothetical reasonable observer would find in the text, then the actual or imagined reluctance on the part of the Framers to vest the Judiciary with interpretive discretion becomes less relevant. What matters is whether the text would, at the time, have been naturally read to contain open-ended standards.

Originalists soon came to realize that many provisions surely would have. The American Constitution is among the shortest in the world⁶³ and is “exceptional [not only] in how few enumerated rights it contains,” but also in that those rights are “by comparative standards exceptionally vague[] ones.”⁶⁴ Stephen Gardbaum explains that “[a]lmost all other constitutions contain longer lists of more particular liberties and an equality provision setting out prohibited bases of discrimination.”⁶⁵ Our Constitution, by contrast—with its short list of lofty guarantees like “equal protection of the laws,”⁶⁶ “freedom of speech,”⁶⁷ and “due process of law”⁶⁸—is *objectively* open-ended in many instances. Many New Originalists have found this conclusion inescapable. Randy Barnett, for instance, has concluded that “the Constitution includes . . . open-ended or abstract provisions, and thereby delegates discretion to judges.”⁶⁹ To deny that

59. See BERGER, *supra* note 14, at 116–31; see also O’NEILL, *supra* note 7, at 124–25 (noting that Berger did not allow for a broad or vague original meaning of the Fourteenth Amendment).

60. U.S. CONST. amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”).

61. U.S. CONST. amend. XIX, § 1, cl. 2 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . .”).

62. See BORK, *supra* note 15, at 166, 180–85; O’NEILL, *supra* note 7, at 139 (noting that Bork rejected any interpretation of these clauses as open-ended and enforceable by judges). Justice Scalia has echoed that the Ninth Amendment’s vague guarantee of “other rights” should not be enforced by judges. See *Troxel v. Granville*, 530 U.S. 57, 91–92 (2000) (Scalia, J., dissenting).

63. See Stephen Gardbaum, *The Myth and Reality of American Constitutional Exceptionalism*, 107 MICH. L. REV. 391, 399 (2008).

64. *Id.* at 399–400.

65. *Id.* at 400 (footnote omitted).

66. U.S. CONST. amend. XIV, § 1, cl. 2.

67. U.S. CONST. amend. I.

68. *E.g.*, U.S. CONST. amend. V.

69. Barnett, *supra* note 26, at 264; see also Barnett, *supra* note 2, at 623 (noting that the New Originalism has moved “from relatively specific *rule*-like commands to more abstract *principle*-like

discretion, Barnett argues, is in fact to *defy* the original meaning of the Constitution.⁷⁰ Jack Balkin has recently concurred, explaining that if we truly want to be “faithful to original meaning,” then we must enforce the text as written: “If the text states a determinate rule, we must apply the rule in today’s circumstances. If it states a standard, we must apply the standard. And if it states a general principle, we must apply the principle.”⁷¹

E. EMBRACING BROADER LEVELS OF GENERALITY

The revelation that constitutional provisions are not always entirely rule-like led to a related advancement in originalist thought—one involving the proper level of generality at which to articulate and to apply the governing principle, standard, or general rule. The Old Originalism viewed this task through the lens of curtailing judicial discretion, and thus favored narrower levels of generality.⁷² But critics charged that this approach was not genuinely originalist—that it looked not to history, but rather to political theory, to choose the proper level of generality.⁷³ In this regard, it was no less subjective and infiltrated with the personal politics of the judge than were the approaches from which originalists sought to distinguish themselves.

In a responsive effort to make the inquiry more objective and historical, originalists began to view the proper level of generality as a part of the original meaning of the provision itself. Judge Bork came to the view that the “role of a judge committed to the philosophy of original understanding is not to ‘choose a level of abstraction.’ Rather, it is to find the meaning of a text—a process which includes finding its degree of generality, which is part of its meaning”⁷⁴

injunctions”); Whittington, *supra* note 1, at 610 (“It is entirely possible for a text to embody principles or general rules, and much of the constitutional text does exactly that.”).

70. See Randy E. Barnett, *Scalia’s Infidelity: A Critique of “Faint-Hearted” Originalism*, 75 U. CIN. L. REV. 7, 11–13 (2006); cf. Steven G. Calabresi & Livia Fine, *Two Cheers for Professor Balkin’s Originalism*, 103 NW. U. L. REV. 663, 673 (2009) (“It is not an adequate answer in these situations to say, as Justice Scalia sometimes does, that originalist judges ought not to enforce Clauses of this kind because they do not lend themselves to principled judicial application.”).

71. Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 553 (2009).

72. See Raoul Berger, *Some Reflections on Interpretivism*, 55 GEO. WASH. L. REV. 1, 6–7 (1986) (agreeing with Judge Bork that original intent does not permit judges to use high levels of abstraction); Farber, *supra* note 52, at 1094–95 (discussing Bork, *supra* note 15, at 828); cf. O’NEILL, *supra* note 7, at 127 (noting that Raoul Berger “insisted that general terms in the text could not overcome clear extrinsic evidence that the [F]ramers intended the terms to have limited meaning”).

73. See Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1091–92 (1981) (“The fact is that all adjudication requires making choices among the levels of generality on which to articulate principles, and all such choices are inherently non-neutral.”); Farber, *supra* note 52, at 1095; see also RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 268–71, 298–300 (1996) (criticizing Judge Bork for failing to articulate a principled method for choosing the proper level of generality); cf. Richard A. Posner, *What Am I? A Potted Plant?*, NEW REPUBLIC, Sept. 28, 1987, at 23, 24–25 (“The Constitution does not say, ‘Read me broadly,’ or, ‘Read me narrowly.’ That decision must be made as a matter of political theory”).

74. BORK, *supra* note 15, at 149.

Subsequently, Michael McConnell articulated the inquiry in terms of original understanding—as the quest for “the level of generality at which the particular language was understood by its Framers.”⁷⁵ This necessitated a further recognition on McConnell’s part that it “is perfectly possible that, upon dispassionate historical investigation, the interpreter would discover that some provisions of the Constitution were understood at a high level of generality.”⁷⁶

More recently, those New Originalists who have explicitly disavowed the focus on actual, subjective intent or understanding, and who have refocused the inquiry in objective terms, have come to see the level of generality inquiry as a largely textualist one.⁷⁷ Jack Balkin, for instance, has rejected the “old and familiar debate about the level of generality at which we should construe the [F]ramers’ and ratifiers’ purposes” as “ beholden to the theory of original intention or original understanding.”⁷⁸ Balkin argues that “if what matters to us is the original meaning of the text, then the principles underlying the constitutional text should be as general as the text itself.”⁷⁹ The inquiry is still a historical one, but one that is designed to uncover the level of generality at which the constitutional terms would have been objectively understood by reasonable observers at the time of the framing.⁸⁰ And this inquiry, many New Originalists have determined, may yield the conclusion that “the original meaning is rather abstract, or at a higher level of generality.”⁸¹ In such cases—“when the text uses relatively abstract and general concepts”—a judge “must look to the principles that underlie the text to make sense of and apply [them].”⁸² And “[b]ecause the text points to general and abstract concepts, these underlying principles will usually also be general and abstract.”⁸³

75. Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin’s “Moral Reading” of the Constitution*, 65 *FORDHAM L. REV.* 1269, 1280 (1997).

76. *Id.* at 1281; see also WHITTINGTON, *supra* note 44, at 187 (explaining that “originalists would be equally misguided in simply dismissing the possibility that the founders intended to constitutionalize broader concepts”); Whittington, *supra* note 1, at 611 (“[I]t is entirely possible that the principles that the founders meant to embody in the text were fairly abstract.”).

77. See Barnett, *supra* note 70, at 23 (“[O]riginal public meaning originalism attempts to identify the level of generality in which the Constitution is objectively expressed.”).

78. Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 *CONST. COMMENT.* 427, 488 (2007).

79. *Id.*

80. See Barnett, *supra* note 2, at 644–45; Frank H. Easterbrook, *Abstraction and Authority*, 59 *U. CHI. L. REV.* 349, 359 (1992) (explaining that for Judge Bork “the question [is] the level of generality the ratifiers and other sophisticated political actors at the time would have imputed to the text”).

81. Barnett, *supra* note 26, at 263; see also Balkin, *supra* note 78, at 494 (arguing that the Fourteenth Amendment is expressed at a high level of generality).

82. Jack M. Balkin, *Abortion and Original Meaning*, 24 *CONST. COMMENT.* 291, 304–05 (2007).

83. *Id.* at 305; see also Balkin, *supra* note 78, at 493–94 (“The principles underlying the text should be at roughly the same level of generality as the text [For example,] the [F]ramers of the Fourteenth Amendment used the very general language of ‘equal protection of the laws’ and ‘privileges or immunities of citizens of the United States.’ Any underlying principles we associate with those texts must be as general as the words themselves.”).

F. FROM ORIGINAL EXPECTED APPLICATION TO ORIGINAL OBJECTIVE PRINCIPLES

This move from the actual, subjective, and narrow to the hypothetical, objective, and abstract brought along with it (at least for most originalists) a profound change in the way in which the theory of originalism was understood to apply to particular questions of constitutional law. If the object of the originalist inquiry is to determine what the Framers actually intended to accomplish, then answering constitutional questions becomes tantamount to an effort to get into the heads of the Framers—an effort to determine which answer they expected courts to reach. Thus, Old Originalists tended to answer constitutional questions by seeking the intent of the Framers with regard to the specific question at issue—the Framers’ expectations about how the Constitution would apply to that particular question.⁸⁴ The constitutionality of segregation, for example, could be confirmed by ascertaining from the historical sources that the “[F]ramers did not intend or expect . . . to outlaw segregation.”⁸⁵ Because “there was a pervasive assumption that segregation would remain,” the Fourteenth Amendment did not outlaw it.⁸⁶

When the original intent of the Framers with regard to the specific question could not be ascertained, the Old Originalism was generally understood to require judges to ask: “‘What Would the Framers Do?’”⁸⁷ In other words, the inquiry became a necessarily hypothetical, but still a narrow, one—an attempt to “channel[] the [F]ramers” to determine how they would have expected the Constitution to resolve the narrow question at issue, if they had contemplated it.⁸⁸

Implicit in this interpretive method, which Jack Balkin has dubbed “original expected application” originalism,⁸⁹ is that judges must answer constitutional

84. See DWORKIN, *supra* note 73, at 13 (“According to originalism, the great clauses of the Bill of Rights should be interpreted not as laying down the abstract moral principles they actually describe, but instead as referring, in a kind of code or disguise, to the [F]ramers’ own assumptions and expectations about the correct application of those principles.”); Raoul Berger, *Originalist Theories of Constitutional Interpretation*, 73 CORNELL L. REV. 350, 352–54 (1988) (criticizing as illegitimate any effort to “read general words in disregard of the specific intention[s]”); Bork, *supra* note 12, at 13 (same).

85. BERGER, *supra* note 14, at 118 (quoting ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 100 (2d ed. 1986)).

86. BERGER, *supra* note 14, at 125.

87. Christopher R. Green, *Originalism and the Sense-Reference Distinction*, 50 ST. LOUIS U. L.J. 555, 580 (2006) (describing Raoul Berger’s approach).

88. Barnett, *supra* note 54, at 111; see Randy E. Barnett, *The Relevance of the Framers’ Intent*, 19 HARV. J.L. & PUB. POL’Y 403, 405 (1996) (criticizing “a type of constitutional ‘channeling’ in which the originalist clairvoyants ask: ‘Oh Framers, tell us what would you think about the following law?’”); Rebecca L. Brown, *Tradition and Insight*, 103 YALE L.J. 177, 219 (1993) (noting that originalists “inquire how the Framers would have answered a particular question of constitutional law”); Maltz, *supra* note 20, at 796 (“In fact, originalist theory simply directs judges to use their best efforts to determine what the intent of the drafters would be in a particular situation.”); Cass R. Sunstein, *Five Theses on Originalism*, 19 HARV. J.L. & PUB. POL’Y 311, 312 (1996) (“For the hard originalist, we are trying to do something like go back in a time machine and ask the Framers very specific questions about how we ought to resolve very particular problems.”).

89. See Balkin, *supra* note 82, at 296.

questions the same way today as they would have answered them immediately after the constitutional provision at issue was adopted.⁹⁰ The correct result in any given case is the one that the Framers would have expected a judge to endorse. As such, the reach of the constitutional provision cannot change. No matter how many years have gone by and how much the world has changed, the provision applies in only those circumstances in which it would have been expected to apply when drafted.⁹¹

This interpretive approach was (seemingly) mandated by the Old Originalism's commitment to original *intent*.⁹² But it has also been employed as a form of original meaning jurisprudence⁹³—as an attempt to follow the original public meaning of the constitutional provision, with the gloss that the original expectations are dispositive evidence of how the original meaning applies to particular circumstances. On this view, when original expectations can be ascertained, “the original meaning of a constitutional provision is determined and constrained by the expectations of the framing generation as to how that provision would be applied to particular problems.”⁹⁴ In a sense, the original expected application *is* the original meaning. That is to say, this approach seems wedded to the notion that the “meaning” of a constitutional provision is not some sort of a broad principle that it enacts into law, but rather is a narrow understanding of what it will actually accomplish.⁹⁵

90. *See id.* at 295–97.

91. This view has deep roots. *See, e.g.*, *West Coast Hotel, Co. v. Parrish*, 300 U.S. 379, 403 (1937) (Sutherland, J., dissenting) (arguing that it is simply impermissible “to say . . . that the words of the Constitution mean today what they did not mean when written—that is, that they do not apply to a situation now to which they would have applied then”).

92. *See, e.g.*, Barnett, *supra* note 2, at 622–23; Barnett, *supra* note 54, at 105–06; David A.J. Richards, *Originalism Without Foundations*, 65 N.Y.U. L. REV. 1373, 1380 (1990) (book review) (noting that “Berger’s originalism” mandated that a “provision should be interpreted to include certain things only if those things would have been included within the meaning of the clause by the Founders”). Indeed, Berger believed that the original expected application of the Framers trumped the general terms of the text. *See* O’NEILL, *supra* note 7, at 127. So too did Bork, at least in his Old Originalist incarnation. *See* Bork, *supra* note 12, at 13 (“The words are general but surely that would not permit us to escape the [F]ramers’ intent if it were clear . . . I do not see how the Court could escape the choices revealed and substitute its own, even though the words are general and conditions have changed.”). Richard Kay has recently suggested, however, that a jurisprudence of original intent need not always follow the original expected application of the Framers. *See* Kay, *supra* note 22, at 710–11.

93. *See* Balkin, *supra* note 82, at 296–97 (noting Justice Scalia’s use of this technique); Colby, *supra* note 18, at 573–74 (same); Smith, *supra* note 48, at 188–89 (same); David Sosa, *The Unintentional Fallacy*, 86 CALIF. L. REV. 919, 935 (1998) (reviewing Scalia, *supra* note 38) (same).

94. Colby, *supra* note 18, at 573 (describing, but not endorsing, this approach).

95. One way of viewing this distinction is as a debate about “what the meaning of ‘meaning’ is.” Lawson & Seidman, *supra* note 58, at 51. The word “meaning” in the phrase “original meaning” is itself ambiguous. *See* Balkin, *supra* note 71, at 552; Solum, *supra* note 27, at 940–41. It could refer to a number of distinct concepts, one of which is what Lawrence Solum and Jack Balkin call “semantic content”: “‘what is the meaning of this word in English?’” Balkin, *supra* note 71, at 552; *accord* Solum, *supra* note 27, at 940. Another concept that might be invoked by the phrase “original meaning”—another possible meaning of “meaning”—is what Solum calls the “applicative sense” of meaning, Solum, *supra* note 27, at 941, and what Balkin calls the “practical applications” sense of meaning:

This approach has been heavily criticized not only as unworkable,⁹⁶ but also as theoretically indefensible in light of the New Originalism.⁹⁷ If the originalist task is an objective one, then it should not particularly matter what the Framers actually thought (or would have actually thought) about how the abstract constitutional text would apply to a particular problem. What should matter, instead, is what the text objectively meant: the (often quite general) principle that its words are objectively read to enact.⁹⁸ The framing generation may, after all, have misunderstood the way in which the principle that they enacted would apply to particular facts; or their understanding of the facts may have been mistaken; or the world may have changed enough that the principle now applies differently to those same facts.⁹⁹

Thus, originalists (by and large) have come to reject the search for original expected application.¹⁰⁰ As Keith Whittington puts it:

The point of originalist inquiry is not to ask Madison what he would do if he were a [J]justice on the Supreme Court hearing the case at issue. The point is to determine what principle Madison and his contemporaries adopted, and

“what does this mean in practice?,” Balkin, *supra* note 71, at 552. Original expected application originalism interprets the phrase “original meaning” as a search for the original meaning in the applicative sense. Most New Originalists, however, have come to view the phrase “original meaning” as a search for the original semantic content of the constitutional phrase. *See* Solum, *supra* note 27, at 940.

96. The counterfactual inquiry—what would the Framers have thought?—is inherently imprecise and often profoundly anachronistic. *See* Randy E. Barnett, *Constitutional Clichés*, 36 *CAP. U. L. REV.* 493, 504 (2008) (“Any such inquiry is counterfactual and not historical since there is no historical fact of the matter to be discovered by evidence. Therefore, in practice, reliance on original intent is entirely a product of judicial judgment in extrapolating speculative principles and metaphorical intentions from the meaning of the text.”). And even the factual inquiry—what did the Framers actually expect?—may be stymied either by a lack of evidence or by affirmative evidence that the Framers actually had conflicting expectations about how the provision would apply to particular facts. *See, e.g.*, Colby, *supra* note 18, at 574–75 (explaining, with respect to the Federal Marriage Amendment, that the historical record is such that it would be “futile” to attempt “to cut through the rhetoric in pursuit of the ‘true’ expectations”).

97. *See, e.g.*, Balkin, *supra* note 82, at 297–303; Andrew Koppelman, *Phony Originalism and the Establishment Clause*, 103 *NW. U. L. REV.* 727, 737–38 (2009) (labeling Scalia’s brand of originalism with respect to the Establishment Clause “‘I Have No Idea’ originalism”).

98. *See* Smith, *supra* note 48, at 185, 192 (criticizing original expected application originalism for failing to recognize that words are open-ended and arguing in favor of an “*objective criteria view*”); Solum, *supra* note 27, at 935 (“The linguistic meaning of a text is one thing, and the expectations about the application of that meaning to future cases are a different thing.”); Christopher Wolfe, *How the Constitution Was Taken Out of Constitutional Law*, 10 *HARV. J.L. & PUB. POL’Y* 597, 624–30 (1987).

99. *See* Green, *supra* note 87, at 580–81; Mark D. Greenberg & Harry Litman, *The Meaning of Original Meaning*, 86 *GEO. L.J.* 569, 584–85 (1998); McConnell, *supra* note 75, at 1284 (“Mainstream originalists recognize that the Framers’ analysis of particular applications could be wrong, or that circumstances could have changed and made them wrong.”); Whittington, *supra* note 1, at 610–11.

100. *See* MICHAEL J. PERRY, *THE CONSTITUTION IN THE COURTS: LAW OR POLITICS?* 43–44 (1994); Barnett, *supra* note 2, at 622; Mitchell N. Berman, *Originalism and Its Discontents (Plus a Thought or Two About Abortion)*, 24 *CONST. COMMENT.* 383, 385–89 (2007); McConnell, *supra* note 75, at 1284; Michael Stokes Paulsen, *How To Interpret the Constitution (and How Not To)*, 115 *YALE L.J.* 2037, 2059 (2006); Whittington, *supra* note 1, at 610–11.

then to figure out whether and how that principle applies to the current case.¹⁰¹

Originalists have come to the view that, even if the Framers often could not agree amongst themselves on how they expected the provision to apply to “particular fact situations,” or even if they were collectively mistaken about how the provision would apply to “particular fact situations,” there was nonetheless a single public meaning, or “major premise,” enacted by the constitutional language—and it is that major premise, not the Framers’ particularized expectations, that represents the original constitutional meaning.¹⁰²

G. DISTINGUISHING BETWEEN INTERPRETATION AND CONSTRUCTION

The recognition that the Constitution often enacts broad principles, rather than narrow rules of decision, has fostered another significant development in originalist thought: the emergence of a distinction between “constitutional interpretation” and “constitutional construction.”

More than twenty years ago, H. Jefferson Powell criticized originalists because they “sometimes write as if the interpretative task were over once the interpreter determined the historical meaning of the relevant constitutional provision. . . . But th[e] direct translation of history into norm is not possible . . . and an originalist approach must begin by recognizing this fundamental limit.”¹⁰³ Ten years later, David Sosa lodged a similar complaint, chastising originalists for failing to recognize that, because the constitutional text is often vague and indeterminate, in many instances “the plain meaning of [the constitutional] text does not determine its proper application to novel circumstances.”¹⁰⁴

Originalists have now come to terms with these objections. When the original meaning of a constitutional provision is narrow and rule-like, originalism can, at least in theory, dictate the proper decision in all cases arising under that provision. In such cases, there can be only one result that is consistent with original meaning.¹⁰⁵ But when the original meaning of a constitutional provision is more abstract and standard-like, originalists have come to recognize that a commitment to originalism is no longer sufficient to resolve constitutional

101. Whittington, *supra* note 1, at 611.

102. BORK, *supra* note 15, at 162–63; *see also* O’NEILL, *supra* note 7, at 178 (noting that, in his Supreme Court confirmation hearings, Bork expressed the view that the Equal Protection Clause could protect against sex discrimination, notwithstanding the expectations of the Framers to the contrary).

103. H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 662 (1987).

104. Sosa, *supra* note 93, at 920; *see also id.* at 930–31 (discussing the conclusion by JOHN R. SEARLE, *THE REDISCOVERY OF THE MIND* 178–79 (1992), that “the meaning of an expression cannot determine its application”).

105. *See* Lawrence B. Solum, *Semantic Originalism* 75 (Univ. of Ill. Coll. of Law Ill. Pub. Law & Legal Theory Research Paper Series, No. 07-24, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244.

cases.¹⁰⁶ As Randy Barnett explains:

[K]nowing the meaning of these words only takes us so far in resolving current cases and controversies. Due either to ambiguity or vagueness,^[107] the original meaning of the text may not always determine a unique rule of law to be applied to a particular case or controversy. While not indeterminate, the original meaning can be “underdeterminate.”¹⁰⁸

Thus, “there is often a gap between abstract or general principles of the kind found in the Constitution and the rules of law that are needed to put these principles into action.”¹⁰⁹ Put differently, for many constitutional provisions, the original meaning of the Constitution is sufficiently open-ended as to be incapable of resolving most concrete cases.¹¹⁰ There will be multiple rules of decision that are each consistent with the original meaning of the vague or ambiguous constitutional command.¹¹¹

In these instances, constitutional interpretation is insufficient to do the job of deciding cases.¹¹² In order to decide the case, the judge must pick among the

106. See Barnett, *supra* note 26, at 263–64 (“Sometimes the original meaning of a text is clear and rule-like—the age limits for presidents is the favorite example—and it directly dictates the outcome of a case or controversy. Other times, however, the original meaning is rather abstract, or at a higher level of generality. A contract law scholar would refer to the text as vague.”).

107. Randy Barnett and Lawrence Solum have helpfully distinguished between these two concepts. See Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 ARK. L. REV. 847, 852–56 (2003); Lawrence B. Solum, *Legal Theory Lexicon: Vagueness and Ambiguity*, LEGAL THEORY BLOG (Aug. 6, 2006, 4:29 PM), http://lsolum.typepad.com/legaltheory/2006/08/legal_theory_le.html. In their lexicon, a term is ambiguous if it could have more than one distinct meaning. Barnett, *supra*, at 853; Solum, *supra*. For instance, the word “cool” is ambiguous in that it could refer to temperature or to social attractiveness. Solum, *supra*. A term is vague if its meaning is clear, yet that meaning is open-ended enough that its application to marginal objects is disputable. Barnett, *supra*, at 852; Solum, *supra*. For instance, the word “tall” is vague in that there is room for reasonable disagreement as to whether or not someone who stands six feet, two inches is tall. Solum, *supra*. Many words can be both ambiguous and vague. *Id.* For instance, the word “arms” is ambiguous in that it can refer both to upper appendages and to weapons. Barnett, *supra*, at 853. And when its meaning is the latter one, it is vague in that one can question whether baseball bats or paring knives qualify as “arms.” *Id.* at 852.

108. Barnett, *supra* note 54, at 108.

109. *Id.* at 109–10.

110. See, e.g., KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDEND POWERS AND CONSTITUTIONAL MEANING 8 (1999) (“Traditional tools of interpretive analysis can be exhausted without providing a constitutional meaning that is sufficiently clear to guide government action. The text may specify a principle that is itself identifiable but is nonetheless indeterminate in its application to a particular situation Alternatively, the principle established by the text may be unclear” (footnote omitted)); Balkin, *supra* note 71, at 559–60; Barnett, *supra* note 2, at 645 (“Due to either ambiguity or generality, the original meaning of the text may not always determine a unique rule of law to be applied to a particular case or controversy.”); Whittington, *supra* note 1, at 611–12.

111. See Barnett, *supra* note 26, at 264–65.

112. See Barnett, *supra* note 2, at 645 (“When this happens, interpretation must be supplemented by constitutional construction—within the bounds established by original meaning.”); Solum, *supra* note 27, at 974 (“Interpretation is inapt as a method for resolving vagueness, because interpretation . . . cannot do the required work. When a word or phrase has a linguistic meaning that is

various rules that could be derived from the original meaning.¹¹³ Drawing upon contract law and theory,¹¹⁴ New Originalists refer to this activity as “constitutional construction.”¹¹⁵ Constitutional construction is necessary when constitutional interpretation “runs out” and cannot dictate a single rule of law adequate to resolve the case.¹¹⁶ Most constitutional doctrines—the levels of scrutiny, content-neutrality rules, and the like—are examples of constitutional constructions, not constitutional interpretations.¹¹⁷ They are not precisely mandated by the original meaning of the constitutional text, but rather, have been invented by judges in an effort to put the Constitution’s open-ended textual meaning into effect.¹¹⁸ Constitutional construction, then, aims to produce a rule of decision “that is consistent with . . . original meaning but not deducible from it.”¹¹⁹

vague, then interpretation runs out. . . . [V]agueness is the result of interpretation and not a problem to be solved by interpretation.”)

113. Kesavan and Paulsen have made a similar point in the following terms:

Sometimes the right answer, as a matter of interpretation, is that the text admits of a range of meanings, none of which can fairly be privileged over the others—that is, there is a range of indeterminacy, even applying correct interpretive methods. In such an event, one needs a second-order rule for matters of adjudication.

Kesavan & Paulsen, *supra* note 26, at 1129 n.54. The phrase “range of meanings” may be misleading in this context. A better formulation might be: open-ended meaning capable of supporting a range of rules and outcomes.

114. *See, e.g.*, *Fashion Fabrics of Iowa, Inc. v. Retail Investors Corp.*, 266 N.W.2d 22, 25 (Iowa 1978) (“Interpretation involves ascertaining the meaning of contractual words; construction refers to deciding their legal effect.”).

115. Barnett, *supra* note 26, at 264 (“[A]n original meaning originalist can take the abstract meaning as given, and accept that the application of this vague meaning to particular cases is left to future actors, including judges, to decide. The process of applying general abstract provisions to the facts of particular cases by adopting intermediate doctrines is properly called, not interpretation, but constitutional construction.”); Solum, *supra* note 105, at 20 (defining constitutional construction as “the activity of further specifying constitutional rules when the original public meaning of the text is vague (or underdeterminate for some other reason)”). *See generally* Solum, *supra* note 105, at 67–89 (discussing the distinction between interpretation and construction, and occasions for and theories of constitutional construction).

116. *Id.* at 20 (“original-meaning originalist[s] explicitly embrace the idea that the original public meaning of the text ‘runs out’ and hence that constitutional interpretation must be supplemented by constitutional construction”); *see id.* at 69 (“Constitutions must be construed where their semantic content does not resolve a particular constitutional issue or case . . .”).

117. *See* Barnett, *supra* note 26, at 264–65; Solum, *supra* note 27, at 978.

118. *Cf.* Whittington, *supra* note 1, at 611 (“An abstract text may be subject to judicial manipulation, but its meaning is historically determined.”).

119. RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 121 (2004); *see also* Barnett, *supra* note 26, at 265 (noting that “constitutional construction can be constrained by original meaning while not entirely determined deductively by it”). In this regard, Stephen Griffin seems perhaps to fail to fully capture the New Originalism when he writes that the “basic idea of construction is that constitutional meaning can be determined legitimately in a nonjudicial or political framework” and that “construction allows for the introduction of ‘an element of creativity’ into the interpretive process.” Griffin, *supra* note 23, at 1217 (quoting WHITTINGTON, *supra* note 110, at 5). According to the New Originalists, construction has nothing to do with “determining” the “constitutional meaning”; it seeks to put that meaning into action. The “element of creativity” comes not in “the interpretive process”—determining the meaning—but rather in deciding which of the various rules of decision that would be consistent with that meaning should be implemented.

On this way of thinking, originalism, by definition, does not and cannot dictate a “proper” constitutional construction. “It is important to keep in mind that originalism is warranted as a theory of *interpretation*—that is, as a method of determining the meaning of the words written in the Constitution.”¹²⁰ That is as far as originalism can take us. When originalist interpretation produces a meaning that is not specific enough to resolve the issue at hand, we must go beyond originalism in order to decide the case. There can be no originalist answer to the question of which construction to apply; by definition, construction supplements interpretation and cannot be dictated by it. Thus, “theories of constitutional construction are outside the domain of originalism as a theory of constitutional interpretation.”¹²¹ Indeed, theories about the proper way to go about the task of constitutional construction are not theories of constitutional interpretation at all.¹²²

In this regard, originalists have responded to Powell’s criticism by refining their approach. Originalists do indeed continue to “write as if the *interpretative* task were over once the interpreter determined the historical meaning of the relevant constitutional provision,”¹²³ but they now recognize that “direct translation of history into norm is [often] not possible,”¹²⁴ and they understand that originalism itself often cannot determine a single rule of decision.¹²⁵

120. Barnett, *supra* note 54, at 108.

121. Solum, *supra* note 27, at 967.

122. The distinction between interpretation and construction was anticipated by Michael Perry—a leading New Originalist—who, in the early 1990s, used the terms “constitutional interpretation” and “constitutional specification” to articulate a similar point:

[T]he question of the proper judicial approach to constitutional *interpretation*—to the interpretation of the constitutional text—should not be confused with the different question of the proper judicial approach to constitutional *specification*—to the specification of indeterminate constitutional norms or directives represented by the constitutional text. Constitutional adjudication comprises two distinct inquiries. There is, first, the *interpretive* inquiry, the inquiry into what directive or directives a particular provision of the constitutional text represents. Originalism is a position about the proper judicial approach to the interpretive inquiry. It bears emphasis that originalism is not a position about the proper judicial approach to the second inquiry: the *normative* inquiry, the inquiry into what shape to give, in a particular context, an indeterminate directive represented, or believed to be represented, by a particular provision of the constitutional text. Originalism is a position about constitutional interpretation, not about constitutional specification.

Perry, *supra* note 57, at 87. Perry explains that the “aim of the normative inquiry is to specify or shape the directive; it is to render the directive determinate in a particular context.” *Id.* at 105. “A specification ‘of a principle for a specific class of cases is not a deduction from it, nor a discovery of some implicit meaning; it is the act of setting a more concrete and categorical requirement in the spirit of the principle’” *Id.* at 110 (quoting Neil MacCormick, *Reconstruction After Deconstruction: A Response to CLS*, 10 OXFORD J. LEGAL STUD. 539, 548 (1990)). “The challenge of specifying an indeterminate constitutional directive, then, is the challenge of deciding how best to achieve, how best to ‘instantiate,’ in a particular context, the political-moral value embedded in the directive.” Perry, *supra* note 57, at 109.

123. Powell, *supra* note 103, at 662 (emphasis added).

124. *Id.*

125. In this manner, the distinction between interpretation and construction is also responsive to Cass Sunstein’s observation from more than a decade ago that, if one interprets the Constitution at a

H. DISTINGUISHING BETWEEN NORMATIVE AND SEMANTIC ORIGINALISM

A final step in the transition from the Old to the New Originalism involved the recognition of a distinction between an interpretive question—what does the Constitution mean?—and a normative question—should judges be obligated to follow the Constitution’s meaning? This was a distinction that at least some Old Originalists had recognized. Raoul Berger, for instance, observed: “Whether the ‘original intention’ of the [F]ramers should be binding on the present generation . . . should be distinguished from the issue: what did the [F]ramers mean to accomplish, what did the words they used mean to them.”¹²⁶ But to the Old Originalists, originalism was more than simply an interpretive theory of meaning; it was an adjudicative theory as well. It entailed a judicial commitment to follow the original meaning (which, to Old Originalists, meant original intent).¹²⁷ After all, Old Originalists expended a great deal of effort justifying their theory on normative grounds: arguing that judges must be originalists because deciding cases on the basis of anything but the original meaning of the Constitution is illegitimate and inconsistent with both democracy and the rule of law.¹²⁸

Many New Originalists, however, have come to the view that originalism can be understood as a purely interpretive theory. This step was taken perhaps most clearly and forcefully by Gary Lawson in a wonderfully clever 1997 essay that chastises constitutional theorists of all stripes for their “failure to distinguish theories of *interpretation* from theories of *adjudication*.”¹²⁹ Lawson argues that “interpreting the Constitution and applying the Constitution are two different enterprises.”¹³⁰ “[A] theory of interpretation allows us to determine what the Constitution truly means, while a theory of adjudication allows us to determine what role, if any, the Constitution’s meaning should play in particular decisions.”¹³¹ “One must first determine, through interpretation, what the Constitution means. Then, and only then, can one determine whether the properly interpreted Constitution generates any political obligations”¹³² Lawson explains that originalism need only be concerned with the first step of this inquiry: “[T]he merit of originalism as a . . . theory of interpretation does not

broader level of abstraction, “originalism needs supplementation” in order to be able to resolve real cases. Sunstein, *supra* note 88, at 313–14.

126. BERGER, *supra* note 14, at 8.

127. See *id.* at 402–10; Maltz, *supra* note 20, at 776; cf. O’NEILL, *supra* note 7, at 126 (characterizing Raoul Berger’s originalism as a “process-restraint approach” that “would maximize space for legislative politics”). See generally *supra* section I.A.

128. See Colby & Smith, *supra* note 24, at 273–81, 288–90 (detailing these arguments).

129. Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823, 1823 (1997).

130. *Id.* at 1835.

131. *Id.* at 1824.

132. *Id.* at 1823; see also Lawson & Seidman, *supra* note 58, at 53 (“When faced with an instruction manual, you must make two distinct decisions. First, you must decide whether you want to try to understand the instructions that it contains. If the answer is yes, this requires interpreting, or ‘expounding,’ the manual. Second, once you understand (or expound) the instructions, you must then decide whether you want to follow them. These are conceptually separate inquiries.”).

depend on social contract theory or any other theory of political legitimacy. One can be a strict interpretative originalist and forcefully deny that the Constitution has any political legitimacy.”¹³³ Lawson gives the example of an eighteenth-century recipe for fried chicken found hidden in an old house. The meaning of the recipe is its original public meaning—the meaning it would have had to readers at the time that it was written. Whether cooks today ought to follow the recipe is an entirely distinct question.¹³⁴

A decade later, Lawrence Solum reiterated and developed the theoretical foundation for this point by drawing extensively upon the philosophy of language.¹³⁵ Solum’s sophisticated argument is rich and theoretical, but its upshot is simple: “What words mean is one thing; what we should do about their meaning is another.”¹³⁶

II. THE BENEFITS OF THE NEW ORIGINALISM

The theoretical moves recounted above have been, on the whole, positive developments for originalism, at least insofar as they have boosted its stature within the scholarly community. Before those moves, the academic consensus was that originalism did not work—that it did not stand up to scrutiny.¹³⁷ Originalists themselves fully recognized that the Old Originalism was not respected within the academy.¹³⁸ They lamented that “a devotee of the Framers’

133. Lawson, *supra* note 129, at 1825; *see also* Kesavan & Paulsen, *supra* note 26, at 1127–28 (arguing that a choice to be bound by the Constitution is necessarily a choice to be bound by its original public meaning, but noting that “[o]ne might legitimately decide, as a political matter, not to treat ‘this Constitution’ as authoritative—that is, not to agree to be bound by the written document as supreme law in the first place”); Lawson & Seidman, *supra* note 58, at 53 (“We have nothing to say about whether any particular people . . . should try to follow the instructions in the Constitution once they are understood. That is a substantial question of political morality, not of interpretative theory, and we are not political moralists.”); McConnell, *supra* note 75, at 1285 (“It may be that, for various reasons, law either cannot or should not be conducted on the basis of interpretive fidelity.”); Paulsen, *supra* note 100, at 2062 (whether to be bound by the original meaning “is a political theory problem external to constitutional law”). H. Jefferson Powell made this same observation in 1987. *See* Powell, *supra* note 103, at 662 (“History cannot answer or even address the question of whether modern Americans ought to obey the intentions of the Constitution’s founders. That question belongs to political theory (or philosophy) or constitutional law and must be answered in the terms of those other spheres of discourse.”).

134. *See* Lawson, *supra* note 129, at 1825–32 (expanding the analogy). For further discussion of this analogy, *see infra* notes 257–76 and accompanying text.

135. *See* Solum, *supra* note 105, at 27–30.

136. *Id.* at 30; *see also* John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 *Nw. U. L. Rev.* 751, 754–55 (2009) (distinguishing between positive and normative originalist theories).

137. *See, e.g.*, Greene, *supra* note 25, at 661 (suggesting that “academic debate . . . has demonstrated that a strong form of originalism lacks satisfactory theoretical grounding”); Sanford Levinson, *Law as Literature*, 60 *Tex. L. Rev.* 373, 378 (1982) (noting that originalism is “increasingly without defenders, at least in the academic legal community”); Richards, *supra* note 92, at 1402 (arguing that Bork’s originalism “fails to meet the intellectual and moral tests to which such [a theory] must be held”).

138. *See, e.g.*, Maltz, *supra* note 20, at 773 (“Within the scholarly legal community . . . originalism is in disrepute.”).

intent is likely to be labeled . . . intellectually backward.”¹³⁹ As Randy Barnett once put it: “If ever a theory had a stake driven through its heart, it seems to be originalism.”¹⁴⁰

The Old Originalism simply had no answer for the theoretical shelling that it was taking from the nonoriginalist camp.¹⁴¹ Thus, as far back as 1987, H. Jefferson Powell had argued that if originalism wanted to be taken seriously, it needed to abandon its ill-fated focus on original intent and regroup around the notion of an objective original meaning.¹⁴² When originalism did so, and evolved in the related ways discussed above, it moved onto much more sound theoretical footing.

That is not, of course, to say that each of the New Originalist moves just recounted is above academic reproach. Many of them have indeed been subjected to powerful criticism.¹⁴³ It is just to say that they help; individually, and especially taken as a whole, they improve and refine the theory of originalism.

And they make it more difficult to argue with. Many of the old arguments—the ones that demolished the Old Originalism—no longer hit with quite the same force. Yes, it may be a fool’s errand to seek to divine the collective intent of a multimember body.¹⁴⁴ And yes, the historical evidence may reveal a range of intentions (or understandings or expectations) among the various Framers because there may not have been a consensus at the time of the framing.¹⁴⁵ And yes, the historical evidence is often conflicting.¹⁴⁶ And yes, when it comes right

139. *Id.* at 774; see also Gerard V. Bradley, *Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 HOFSTRA L. REV. 245, 249 (1991) (noting that most nonoriginalists “do not take [originalism] seriously,” and instead view it as “impossible,” “intellectually naïve,” “a cynical apology for a conservative political agenda,” or “worse”); Jonathan R. Macey, *Originalism as an “Ism,”* 19 HARV. J.L. & PUB. POL’Y 301, 301 (1996) (“Outside the comfortable confines of the Federalist Society, originalism is far from fashionable. Indeed among constitutional law scholars at elite schools, the idea of being an originalist is tantamount to being some sort of intellectual Luddite.”).

140. Barnett, *supra* note 2, at 613.

141. See *id.* at 612–13. Some originalists even recognized this point. See Maltz, *supra* note 20, at 774 (acknowledging that “many of the more sophisticated attacks on originalist theory have remained largely unanswered”). In fairness, however, this observation should be qualified by noting that Richard Kay authored a generally powerful and sophisticated defense of the jurisprudence of original intent around this same time. See Kay, *supra* note 34.

142. See Powell, *supra* note 103, at 659–60, 659 n.1.

143. See, e.g., Greene, *supra* note 25, at 663 (arguing that the distinction between expected application and objective principles “resists intelligent application”); *id.* at 663 n.31 (criticizing and choosing “not to honor [the distinction between interpretation and construction]”); Kay, *supra* note 22, at 721 (arguing that the notion that one can interpret a constitutional provision at the level of generality at which a hypothetical reasonable observer would have understood the text to be written does not work because the text may “simply . . . not specify one or another level of generality. No amount of philological exertion will change that.”); Smith, *supra* note 5, at 25–26 (arguing that original expected application may not be conceptually distinguishable from original objective public meaning); see also *infra* notes 162–64 and accompanying text (discussing the distinction between semantic and normative originalism).

144. See Brest, *supra* note 34, at 213–17; Farber, *supra* note 52, at 1089.

145. See, e.g., William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 435 (1986); Powell, *supra* note 103, at 684, 690–91.

146. See, e.g., Brennan, *supra* note 145; Powell, *supra* note 103, at 688–89; Sherry, *supra* note 50.

down to it, we can never truly know “how various people in fact understood particular phrases a century or two ago.”¹⁴⁷ But those objections—harmful as they were to the Old Originalism—are not fatal to the New one. What matters to the New Originalism is not the actual intent or expectations of any individual or group, or even the shared understanding of the people as a whole. The New Originalism does not depend on an ability to determine actual, historical “fact” at all.¹⁴⁸ Rather, what matters is simply the objective meaning that a hypothetical observer would reasonably have understood the language to reflect.¹⁴⁹

A New Originalist is thus not “discouraged by the fact that there was no actual, shared public understanding of the meaning of the text any more than she would be deterred by the fact that there was no single intent of the Framers and no shared public expectation of how the Amendment would apply.”¹⁵⁰ Instead, “she would opine that, due to imperfect information, misleading rhetoric, or flawed interpretation, the true meaning of the text . . . had been wrongly understood by one side or the other. Her task would be to use the tools of textualist interpretation to determine which side had it right.”¹⁵¹ Indeed, she might well conclude that the objective meaning of the text refers to a very general principle, which would account for the Framers’ conflicting expectations and intentions about how it would apply to particular circumstances. All of their expectations, conflicting though they were, may have been consistent with (though not mandated by) the objective original meaning.

By the same token, it might well be the case that the historical record is incomplete and gives us no guidance on the Framers’ views with respect to particular questions.¹⁵² And it may well be that the Framers never contemplated contemporary problems or even anything remotely resembling them.¹⁵³ And it

147. Laurence H. Tribe, *Comment*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW*, *supra* note 38, at 65, 72.

148. Thus, the New Originalism is also less damaged by the inaccuracy of the historical record of the framing and ratification, *see* Hutson, *supra* note 52, than is the Old Originalism. Because the Old Originalism necessitated a search for the intentions and understandings reflected in those records, the reliability of the records was essential to its success. But the New Originalism entails a search for an objective public meaning, not for the actual views of the drafters or the ratifiers.

149. *See, e.g.*, Barnett, *supra* note 26, at 257–58 (“Determining the public meaning of the words of the Constitution is much more practical than discovering the myriad subjective intentions of those who wrote or ratified it. That there is a unique original public meaning is a far more plausible claim than that one can discern a unique original intention from the potentially conflicting intentions of the various [F]ramers.”); Lawson & Seidman, *supra* note 58, at 62–67 (noting the strength of the summing of intentions objection but arguing that the move to a hypothetical reasonable person standard successfully overcomes it).

150. Colby, *supra* note 18, at 584.

151. *Id.* (footnote omitted).

152. *See, e.g.*, Farber, *supra* note 52, at 1087–88, 1104; Kramer, *supra* note 7, at 909; Powell, *supra* note 103, at 669.

153. *See, e.g.*, Farber, *supra* note 52, at 1093–95 (noting that many contemporary issues could not even have been conceived of at time of the framing); Powell, *supra* note 103, at 664–65 (“[T]he vast majority of contemporary constitutional disputes involve facts, practices, and problems that were not considered or even dreamt of by the founders.”).

may well be that the world has changed so much since the framing that we cannot productively seek to figure out what the Framers *would have* thought had they contemplated today's issues.¹⁵⁴ But those objections—devastating to the Old Originalism—do not trouble the New Originalist, for all that she needs to do is discover the principle that the Framers objectively codified and apply that principle herself to the new, unforeseen (and likely unforeseeable) problems.

Many of the other principal objections to the Old Originalism are similarly minimized by the New Originalism. H. Jefferson Powell's evidence that the Framers did not intend intentionalist interpretation, for instance, is actually a feather in the New Originalism's cap; Powell's sources by and large support the claim that the Framers *did* intend the text to be interpreted according to its objective public meaning.¹⁵⁵ Similarly, the New Originalism wholeheartedly concurs with the old objection that the people could not have been bound by the intent of those who drafted the Constitution—because the drafters had no lawmaking authority on their own¹⁵⁶—and thus, the New Originalism addresses this objection by binding the people only to the objective public meaning that they and the ratifiers—who *did* have lawmaking authority—would have understood. Likewise, the objection that originalism necessarily entails judicial subjectivity—because the choice of the level of generality at which to read a constitutional provision inherently requires a subjective value choice¹⁵⁷—is at least ostensibly obviated by the New Originalism's decision to adopt the level of generality that is objectively reflected in the words of the text. And the objection that judges, as opposed to historians, lack the skills and training to divine historical intentions¹⁵⁸ is answered by the New Originalism's shifting the focus from subjective individual intentions to objective textual analysis. *Historians* are best equipped to determine the actual views of historical figures, but *judges* are best equipped to determine the hypothetical views of the reasonable person; that is something that judges do all of the time.¹⁵⁹

Finally, the New Originalism has answers to the most central of all objections

154. See, e.g., William N. Eskridge, Jr., *Should the Supreme Court Read the Federalist but Not Statutory Legislative History?*, 66 GEO. WASH. L. REV. 1301, 1310–11 (1998); Greene, *supra* note 25, at 667; Powell, *supra* note 103, at 673–74.

155. See Barnett, *supra* note 2, at 627–28; Farber, *supra* note 52, at 1090 (noting that Powell's argument was that the Framers used the word "intent" to "refer[] to the objective meaning of the language used in the document, not the subjective intentions of the authors").

156. See, e.g., Kramer, *supra* note 7, at 909; Lofgren, *supra* note 35, at 84–85.

157. See Erwin Chemerinsky, *The Supreme Court 1988 Term—Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 93 (1989); Powell, *supra* note 103, at 665. For a discussion of this objection, see *supra* note 73 and accompanying text.

158. See, e.g., Farber, *supra* note 52, at 1089; William E. Nelson, *History and Neutrality in Constitutional Adjudication*, 72 VA. L. REV. 1237, 1250–51 (1986).

159. See Lawson & Seidman, *supra* note 58, at 50, 79–80 ("If, however, constitutional meaning depends upon a distinctively legal construct such as the reasonable person, as we maintain, then determining constitutional meaning is more properly the province of legal experts."); cf. William Michael Treanor, *Against Textualism*, 103 NW. U. L. REV. 983, 984 (2009) ("One need not be trained as an historian (or know a great deal of history) to recover original meaning.").

to the Old Originalism: the concern that originalism subjects us to the rule of the dead hand of the past, which is unacceptable both in theory—why should we be bound by the value choices of rich, white, slaveholding men who died 200 years ago?¹⁶⁰—and in practice—it would bind us to a set of rights, and a view of equality, that is unconscionably cramped by the standards of modern civilization.¹⁶¹

The New Originalism answers that concern in part by ducking it. The distinction between normative and semantic originalism allows New Originalists to cabin objections of this sort by claiming that originalism is simply a theory of what the Constitution *means*. Originalism does not speak to the provocative question of whether we should be *bound* by the original meaning.¹⁶²

That response is something of a cop out. Our legal system and legal culture presuppose that judges must follow the law, so if the meaning of the Constitution is its original public meaning, then it goes without saying that judges will have to follow it.¹⁶³ Indeed, as Michael Stokes Paulsen—himself a New Originalist proponent of this distinction—points out, since judges take an oath to support the Constitution, acceptance of the New Originalism entails a conclusion that they are bound to follow its original public meaning, regardless of whether doing so makes sense as a matter of justice and political theory; anything else would be “*revolution* by [J]udiciary.”¹⁶⁴

But the New Originalism mitigates the dead hand concern in a more profound way as well. Once we accept that the original meaning often reflects a high level of generality—such that the Framers’ abstract principles will still bind us, but not their specific intentions and expectations—then we are not so much ruled by the dead hand of the past as gently guided by it. The New Originalism allows us a great deal of leeway to “construct” constitutional doctrine that is consistent with our generation’s views of the scope of “equal protection of the law,” “due

160. See, e.g., Brest, *supra* note 34, at 225; Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 357 (1985) (“The dead hand of the past ought not to govern, for example, our treatment of the liberty of free speech, and any theory of interpretation that demands that it does is a bad theory.”); Larry G. Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation Be Justified?*, 73 CALIF. L. REV. 1482, 1499–1500 (1985) (“The Constitution was adopted by propertied, white males who had no strong incentives to attend to the concerns and interests of the impoverished, the nonwhites, or nonmales who were alive then, much less those of us alive today who hold conceptions of our interests and selves very different from the ones held by those in the original clique.”). For recent incarnations of the dead hand objection, see Leib, *supra* note 4, at 358–60; Richard A. Primus, *When Should Original Meanings Matter?*, 107 MICH. L. REV. 165, 192 & n.104 (2008).

161. See, e.g., Michael C. Dorf, Reply, *Recipe for Trouble: Some Thoughts on Meaning, Translation and Normative Theory*, 85 GEO. L.J. 1857, 1862 (1997); Farber, *supra* note 52, at 1095–96; Sunstein, *supra* note 88, at 312 (“The problem with hard originalism . . . is not that it is indeterminate, but that it would result in an unacceptably narrow set of liberties for the United States in the Twentieth Century.”).

162. See *supra* section I.H.

163. See Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 31–33 (2009); Dorf, *supra* note 161, at 1860; Smith, *supra* note 5, at 26–28.

164. Paulsen, *supra* note 100, at 2063.

process of law,” and the like.¹⁶⁵ Constitutional construction affords plenty of room to maneuver according to contemporary values.¹⁶⁶ Thus, for instance, the New Originalism allows us to ban segregation, and to grant constitutional protection to abortion rights, contraceptive rights, and even gay marriage, even though the Framers would never have intended or expected those particular results.¹⁶⁷

I should make clear that I do not mean to say that the New Originalism is completely successful in its efforts to parry the dead-hand problem—or any of the other objections to the Old Originalism, for that matter.¹⁶⁸ There are plenty of reasons to be skeptical on that front.¹⁶⁹ Perhaps chief among them is that, as many New Originalists themselves have recognized, the original objective meaning can often be established only by recourse to evidence of original intent or original expected application. That is to say, in many cases, the text is so abstract that the objective, hypothetical, reasonable person’s understanding can be discerned only by an examination of the actual views of actual historical persons.¹⁷⁰ As such, despite all of the brassy sound and fury about abandoning

165. See *supra* notes 66–71 and accompanying text.

166. See WHITTINGTON, *supra* note 44, at 206 (arguing that the distinction between interpretation and construction mitigates the dead-hand problem); Balkin, *supra* note 82, at 303 (arguing that the New Originalism recognizes that “the Constitution is more than the dead hand of the past, but is a continuing project that each generation takes on”); Balkin, *supra* note 78, at 433–34 (arguing that the move from original expected application to original meaning undercuts the dead hand objection); Eric J. Segall, *A Century Lost: The End of the Originalism Debate*, 15 CONST. COMMENT. 411, 431–32 (1998) (noting that higher levels of generality mitigate the dead-hand problem).

167. See *infra* section III.B.

168. Thus, Randy Barnett may be a little overzealous when he asserts that the “familiar criticisms” of originalism have been “largely neutralized.” Barnett, *supra* note 26, at 258.

169. See, e.g., Griffin, *supra* note 23, at 1186 (“New originalists claim that focusing on the public meaning of the Constitution addresses the chief flaws of originalism exposed in earlier debates. This claim is questionable. Many serious objections were lodged against earlier forms of originalism and the new originalism does not purport to deal with them all.” (footnote omitted)); Griffin, *supra* note 23, at 1205 (arguing that even the New Originalism suffers from “history without historicism”: the attempt to “use evidence from the past without considering the reality of historical change”); Leib, *supra* note 4, at 358–59 (arguing that the New Originalism, as practiced by Jack Balkin, does not answer the dead-hand objection); see also Griffin, *supra* note 23, at 1215 (“One characteristic of originalism, whether old or new, is a failure to take accurate measure of the differentness of the constitutional past and to fully acknowledge the incongruous nature of the quest to restore original meaning. Gauging the differentness of the past is not a matter of reading this or that clause, but appreciating that the founding generation had an essentially different outlook on key constitutional values.”).

170. See, e.g., CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 224 (1999) (arguing that because original meaning can usually be established only by looking at what people actually thought, “the movement from ‘intentions’ to ‘meaning’ is not a movement from something (entirely) subjective to something (entirely) objective”); Randy E. Barnett, *Underlying Principles*, 24 CONST. COMMENT. 405, 410 (2007) (agreeing with Jack Balkin “that evidence of the intentions of the Framers and ratifiers is often highly relevant to determining the public meaning of the words they decided to enact”); Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power To Execute the Laws*, 104 YALE L.J. 541, 556 (1994) (arguing that “everyone agrees” that “there is a range of genuine textual ambiguity about the original meaning” of the principal rights-bearing clauses, such that “the constitutional text, read alone, can give only incomplete answers as to the original understanding. The originalist inquiry, then, has usually been pushed back from purely textual arguments to

actual intentions, understandings, and expectations, the historical inquiry (with all of its seemingly insurmountable problems) continues to haunt even the New Originalism and may render it nearly as impossible in practice as its precursor.¹⁷¹ And on top of that, the New Originalism arguably invites its own additional objections.¹⁷²

Thus, it may well be that, at the end of the day, the New Originalism is still, as Mitchell Berman so colorfully puts it, “[b]unk.”¹⁷³ Indeed, to hear many New Originalists tell it, the Supreme Court’s recent landmark decision in *District of Columbia v. Heller*¹⁷⁴ is a triumph of the New Originalism.¹⁷⁵ If that is so, then perhaps all of the fancy theoretical footwork has amounted to nothing more than

arguments based on evidence from the Constitution’s enactment and postenactment history.”); Colby, *supra* note 18, at 598–99; Kay, *supra* note 22, at 714 (“Only in the most inventive academic hypotheticals . . . will [original intent and original public meaning] employ different techniques or yield different results.”); Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 549 n.133, 556–60 (2003); Solum, *supra* note 27, at 935 (“The fact that *original expected applications* are distinct from *original meanings* should not imply that the two are unrelated. Expected applications of a text may offer evidence about its meanings, even if these applications are neither decisive evidence of meaning nor meaning itself.”); Smith, *supra* note 5, at 19–20, 20 n.61.

171. See, e.g., Colby, *supra* note 18, at 583–86, 597–99; Nelson, *supra* note 170, at 557; Alexander, *supra* note 22, at 6 (noting that an objective, well-informed, hypothetical reasonable observer might well have been aware of conflicting possible meanings, and thus, would not have been able to identify a single, objectively correct one); see also Kramer, *supra* note 7, at 911 (“Yet public meaning originalism has some pretty serious defects of its own—the main one being that there was no agreed-upon public meaning of the constitutional terms most often in dispute.”). But see *infra* section IV.A (positing that the New Originalism may not be “impossible” so much as it is ineffective, but suggesting that these are really just two ways of articulating the same substantive point).

172. See, e.g., Alexander, *supra* note 22, at 4 & n.6 (explaining that proponents of original meaning originalism “[l]eav[e] aside the arbitrariness of constructing this hypothetical member of the public—what did he or she know about the authors and their context, how fluent was he or she, where did he or she live, how generally informed was he or she, and so on” and stating that this is a “very deep but almost never noted difficulty” with the original public meaning approach); see also Robert W. Bennett, *Originalism: Lessons from Things that Go Without Saying*, 45 SAN DIEGO L. REV. 645, 648 (2008) (making a similar point); Saul Cornell, Heller, *New Originalism, and Law Office History: “Meet the New Boss, Same as the Old Boss,”* 56 UCLA L. REV. 1095, 1101–06 (2009) (arguing that the New Originalism is inconsistent with the principal interpretive methodologies actually endorsed by the framing generation); Cornell, *supra*, at 1098–1100 (questioning whether the New Originalism is simply “law office philosophy”); Kay, *supra* note 22, at 721–23 (lodging an objection similar to Alexander’s and Bennett’s); Treanor, *supra* note 159, at 986 (arguing that the framing generation did not afford such primacy to text, and thus, “if we are to recapture the original public meaning, we should look beyond text in precisely the same way that the Founding generation did, looking to drafting history, the spirit of the document, and structural and policy concerns”). For another objection to the New Originalism, see *infra* note 297.

173. Berman, *supra* note 163, at 1. Berman’s chief objection focuses not on the impossibility of originalism in practice, but rather, on the inability of originalists to offer a defensible theoretical explanation for their central claim that, as a matter of constitutional legitimacy, the original public meaning must virtually always trump all other sources of possible constitutional meaning. See *id.* at 93–94. This Article, for the most part, leaves this important objection to the side.

174. 554 U.S. 570 (2008).

175. See, e.g., Randy E. Barnett, *News Flash: The Constitution Means What It Says*, WALL ST. J., June 27, 2008, at A13 (“Justice Scalia’s opinion is the finest example of what is now called ‘original public meaning’ jurisprudence ever adopted by the Supreme Court.”); Solum, *supra* note 27, at 940 (noting that “it is hard to imagine finding a clearer example of original public meaning originalism in an actual judicial decision”).

dancing in place. As both Mark Tushnet and Saul Cornell have powerfully argued, *Heller's* dubious use of historical sources to reach the conclusion that the original public meaning of the Second Amendment just happens to perfectly reflect the views of the modern Republican Party calls the New Originalism into serious question.¹⁷⁶

My object here is neither to venerate the New Originalism nor to pillory it. It is simply to point out that, when it comes to addressing the core objections to the originalist project, the New Originalism is noticeably better equipped than its predecessor.¹⁷⁷ It has a kind of an intellectual heft and sophistication that the Old Originalism lacked. And thus, it has done what the Old Originalism could never do: achieve a respectable place in the pantheon of constitutional theory.¹⁷⁸ Randy Barnett brags that, thanks to its theoretical maturation, originalism “is now the prevailing approach to constitutional interpretation” and has “virtually triumphed over its rivals.”¹⁷⁹ Ethan Leib, a committed nonoriginalist, regrettably concurs: “It certainly seems like the originalists are winning.”¹⁸⁰ These are probably overstatements.¹⁸¹ But what is indisputable is that, of late, originalism

176. See Saul Cornell, *Originalism on Trial: The Use and Abuse of History in District of Columbia v. Heller*, 69 OHIO ST. L.J. 625, 626, 630 (2008) (responding to Randy Barnett that “[r]ather than vindicate plain-meaning originalism, Scalia’s decision demonstrates that plain-meaning originalism is not a neutral interpretive methodology, but little more than a lawyer’s version of a magician’s parlor trick—admittedly clever, but without any intellectual heft,” and arguing that *Heller's* particular use of historical texts “is intellectually dishonest and suggests that Justice Scalia’s brand of plain-meaning originalism is little more than a smoke screen for his own political agenda”); Mark Tushnet, *Heller and the New Originalism*, 69 OHIO ST. L.J. 609, 610, 617 (2008) (concluding that “the new originalism cannot deliver on its promises, as *Heller* shows” because “[t]he new originalism, like the old, fails to deliver on its claim about eliminating judicial subjectivity, judgment, and choice.”); see also Daniel O. Conkle, *Judicial Activism and Fourteenth Amendment Privacy Claims: The Allure of Originalism and the Unappreciated Promise of Constrained Nonoriginalism*, 14 NEXUS: CHAPMAN’S J.L. & POL’Y 31, 36 (2009) (making a similar point about *Heller*). For a disillusioned originalist take on *Heller*, see Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343, 1345 (2009) (arguing that *Heller* “was a near perfect opportunity for the Court to demonstrate that original meaning jurisprudence is not just ‘living constitutionalism for conservatives,’” and concluding that the Justices “flunked [their] test” in a way that may be “widely (though unfairly) seen as an embarrassment for the interpretive approach that the Court purported to employ”).

177. See, e.g., Conkle, *supra* note 176, at 35 (arguing that originalism has “matured” to meet the objections raised by nonoriginalists); Greene, *supra* note 25, at 672 (“These versions of originalism are less susceptible to (though not wholly immune from) the critiques I have outlined.”); Kramer, *supra* note 7, at 911 (“Public meaning originalism is the prevalent version of originalism today, which makes sense given the way it responds to the critiques of both original understanding originalism and original intent originalism.”); Sunstein, *supra* note 88, at 313 (“Soft originalism thus does not run afoul of the problems faced by hard originalism . . .”).

178. See Barnett, *supra* note 26, at 257 (accurately observing that the New Originalism is “an intellectual contender”).

179. Barnett, *supra* note 2, at 613; see also Rosenthal, *supra* note 20, at 4 n.13 (collecting authorities who agree that originalism is now the prevailing interpretive approach).

180. Leib, *supra* note 4, at 353.

181. Mitchell Berman has noted that the tendency of some commentators to proclaim that “we are all originalists now” is largely the result of the inherent imprecision of the term “originalism.” See Berman, *supra* note 163, at 29 & n.72. If originalism refers to the notion that original intent and meaning matter in constitutional interpretation, then we are all indeed originalists. See *infra* note 244

is winning over theorists at a rate that would have been impossible back in the days of the Old Originalism.¹⁸² And even among those who have not endorsed it, it is increasingly, though certainly not universally, being treated with genuine respect, rather than disdain.

III. THE COST OF THE NEW ORIGINALISM

But this academic acceptance has come at great cost.¹⁸³ Twenty years ago, as the nascent New Originalism was just beginning to emerge, Erwin Chemerinsky made a remarkably insightful observation:

and accompanying text. But if originalism refers to the notion that the discoverable original meaning is generally *dispositive*—which is what most self-professed originalists mean to argue, *see supra* note 1—then we are surely not all originalists now. *See* Berman, *supra* note 163, at 29 n.72.

182. *See* Conkle, *supra* note 176, at 35 (noting that originalism is rapidly gaining adherents); *cf.* Barnett, *supra* note 26, at 257 (stating that originalism “has thrived like no other approach to interpretation”).

183. In addition to the cost that is the primary focus of this Article, it is worth mentioning two others that have been noted elsewhere. First, the splintering of originalism that has inevitably accompanied its theoretical maturation—the emergence of countless mutually exclusive originalist theories—has undermined the normative arguments often promulgated in its favor:

If even originalists cannot agree about what originalism is and what it entails, then how can originalism be uniquely coherent and self-evidently correct? And because different versions of originalism focus on different historical criteria—and, as a result, frequently produce different constitutional meanings—how can originalists maintain that originalism is uniquely determinate, and thus uniquely consistent with law and democracy? Finally, when one recognizes that the diversity of originalist theories allows originalist judges to pick and choose among the various strands of originalism from case to case to reach results that accord with their personal policy preferences, one is left to question the assertion that originalism is uniquely resistant to judicial activism.

Colby & Smith, *supra* note 24, at 247.

Second, originalists were once (and sometimes still are) fond of arguing that a “great merit of originalism” is “that it is a ‘simple’ concept.” Raoul Berger, *Original Intent and Boris Bittker*, 66 *IND. L.J.* 723, 755 (1991) (quoting Thomas Grey). Originalism, they insist, is “almost self-evidently correct,” Lino A. Graglia, “*Interpreting the Constitution: Posner on Bork*,” 44 *STAN. L. REV.* 1019, 1020 (1992), and “so obvious that it should hardly need a name, let alone a defense,” Steven G. Calabresi, Op-Ed, *The Right Judicial Litmus Test*, *WALL ST. J.*, Oct. 1, 2007, at A23. *See also* Greene, *supra* note 25, at 708 (noting that “originalism’s simplicity is also one of its chief selling points and, therefore, one of its greatest strengths”); Richards, *supra* note 92, at 1399 (noting originalism’s “appealingly simple slogan”). But the New Originalism is anything but simple. Its philosophical complexity and sophistication make it more palatable to constitutional theorists, but at the same time, such complexity and sophistication make it much harder for lawyers and judges to understand and apply it, or for lay audiences to see any obvious, commonsensical merit to it. *See* Smith, *supra* note 5, at 9–10 (“[O]riginalism is supposed to be an approach that actual lawyers and judges can employ in deciding actual cases. So if the approach becomes so conceptually cumbersome that only a theoretical elite can fully understand and participate in it, then what good is originalism? It would be as if a new Henry Ford were to design the perfect car, except that it is so complicated that only people with advanced degrees in engineering can actually drive it. . . . [S]ophistication robs originalism of [its] commonsensical quality . . . depriv[ing] the approach of a major part of its reason for being.”); Tushnet, *supra* note 176, at 615–16 (noting that the “[O]ld [O]riginalism’s great appeal was its apparent simplicity,” whereas “the [N]ew [O]riginalism is a complicated account of constitutional interpretation” with “many moving parts, and it is replete with distinctions that are hardly intuitive”).

In response to . . . criticisms, most originalists have come to reject specific intent originalism and instead claim that interpretation should be consistent with the [F]ramers' abstract intentions. . . . Although proponents of originalism defend it as a way to constrain the Court, the constraint vanishes once they concede that the Court need only be faithful to the [F]ramers' *abstract* intentions.¹⁸⁴

This, said Chemerinsky, posed a “conundrum—to be nonabsurd originalism must look to abstract intent but looking to abstract intent does not eliminate judicial value choices.”¹⁸⁵ Thus, originalism seemed to offer a no-win choice between “constraint at the price of absurdity, or flexibility at the cost of judicial value imposition.”¹⁸⁶ Twenty years later, originalists have made their choice. Although the New Originalism has deviated in its particulars from what Chemerinsky had in mind—it does not rely on “abstract intent,” but rather on abstract, objective textual meaning—Chemerinsky's basic observation was dead on. Originalism could choose constraint or it could choose intellectual respectability, but it could not achieve both. It opted for respectability (“nonabsurd[ity]” as Chemerinsky harshly put it¹⁸⁷), and it sacrificed constraint in order to get it. Originalism has earned scholarly respect at the expense of the very promise that used to be its defining trait.

This Part begins by explaining that sophistication in originalist theory necessarily produces flexibility. It then goes on to articulate the profound extent of that flexibility—the extraordinary degree to which the New Originalism, despite the protests of many of its adherents, fails to constrain judges.

184. Chemerinsky, *supra* note 157, at 92–93 (footnote omitted); *see also* Chemerinsky, *supra* note 157, at 94 (arguing that, once he began to accept more abstract intentions, “[n]o longer could Judge Bork claim that his approach had the methodological superiority of excluding the Justices' values from decision[.]making”).

185. Chemerinsky, *supra* note 157, at 93.

186. *Id.* at 94. That same year, Lawrence Solum penned an insightful essay in which he similarly noted that

[a]s originalism has been modified and defined in reaction to nonoriginalist critiques, the originalist's position has become more and more plausible as a theory of constitutional interpretation. . . . But the originalists have won a Pyrrhic victory. As originalism has been clarified in response to its critics, it has gradually become more and more evident that it has no force as a critique of the kind of constitutional interpretation practiced by the Warren Court.

Lawrence B. Solum, *Originalism as Transformative Politics*, 63 TUL. L. REV. 1599, 1601–02 (1989). Solum's point appears to differ to a degree from Chemerinsky's (and mine). Solum explained: “When I say plausible as a theory of constitutional interpretation, I mean that the most sophisticated forms of originalism provide an accurate description of the phenomenology of constitutional practice.” *Id.* at 1601. That is to say, they are more descriptively plausible than their predecessors, not normatively more defensible. And when he was referring to the potential for sophisticated originalism to yield a Warren Court-type jurisprudence, Solum was seemingly highlighting its ability to transform the status quo by appealing all the way back to first principles, *see id.* at 1627–29, rather than its open-ended potential to allow judges to follow contemporary (or personal) moral values.

187. Chemerinsky, *supra* note 157, at 93.

A. THE INEVITABLE MARRIAGE OF SOPHISTICATED AND FLEXIBILITY

The Old Originalism promised a distinctive method of constitutional interpretation that could constrain judges and prevent them from infusing the process of constitutional adjudication with their personal morals and value preferences.¹⁸⁸ As Keith Whittington explains: The Old “[O]riginalism was thought to limit the discretion of the judge.”¹⁸⁹ Old Originalists “repeatedly argued” that “the central problem of constitutional theory was how to prevent judges from acting as legislators and substituting their own substantive political preferences and values for those of the people and their elected representatives.”¹⁹⁰ They proffered originalism as the solution. “The ‘political seduction of the law’ was a constant threat in a system that armed judges with the powerful weapon of judicial review, and the best response to that threat was to lash judges to the solid mast of history.”¹⁹¹ “Originalist methods of constitutional interpretation were understood as a means to that end.”¹⁹²

It was the *critics* of originalism who advanced interpretive theories that advocated broader levels of generality, and thus, afforded flexibility to the courts. Ronald Dworkin, for instance, advocated a “moral reading” of the Constitution that, as explained by James Fleming, holds that “the Constitution embodies abstract moral principles rather than laying down particular historical conceptions, and interpreting and applying those principles require fresh judgments of political theory about how they are best understood.”¹⁹³ Cass Sunstein similarly argued that a “valuable” way to interpret the Constitution would be to “take the Framers’ understanding at a certain level of abstraction or generality.”¹⁹⁴ And Justice Brennan favored “ascertaining and applying the broad principles and values embodied in the general . . . words” of the Bill of Rights.¹⁹⁵

The Old Originalism’s very *raison d’être* was to reject this sort of general approach. That is what originalism initially *was*: an interpretive theory that was different from the others in precisely this way—in its refusal to cede wiggle

188. See *supra* notes 7–21 and accompanying text.

189. Whittington, *supra* note 1, at 602.

190. *Id.*

191. *Id.* (quoting BORK, *supra* note 15, at 240).

192. Whittington, *supra* note 1, at 602; see also Jamal Greene, *On the Origins of Originalism*, 88 TEX. L. REV. 1, 2 (2009) (“For the last quarter-century, originalism has been the idiom of judicial restraint in the United States.”).

193. James E. Fleming, *Judicial Review Without Judicial Supremacy: Taking the Constitution Seriously Outside the Courts*, 73 FORDHAM L. REV. 1377, 1381 (2005); see also DWORKIN, *supra* note 73, at 7 (“Many [constitutional] clauses are drafted in exceedingly abstract moral language. . . . According to the moral reading, these clauses must be understood in the way their language most naturally suggests: they refer to abstract moral principles and incorporate these by reference, as limits on government’s power.”).

194. Sunstein, *supra* note 88, at 313.

195. William J. Brennan, Jr., *Foreword: Neither Victims nor Executioners*, 8 NOTRE DAME J.L. ETHICS & PUB. POL’Y 1, 7 (1994) (referring specifically to the Eighth Amendment).

room to judges in which they might impose their own moral values.¹⁹⁶ Of course, whether it could back up that promise in practice is another story. But at least in theory, it offered concrete results. For instance, it squarely precluded any claim that the Fourteenth Amendment could be read to protect abortion rights because the Framers did not intend or expect such a result.¹⁹⁷

It was generally understood that a reliance on the narrow expectations of the Framers was the very essence of originalism—its core commitment and defining characteristic, its claim to fame, its selling point.¹⁹⁸ Indeed, that conception became so ingrained in legal theory circles that “a surprising number of . . . smart and careful scholars” who are critical of originalism continue, even today, to conceive of originalism in these terms.¹⁹⁹

But that is just not what originalism is anymore. Indeed, New Originalists frequently deflect nonoriginalist critiques by accusing nonoriginalists of attacking a straw man: a long superseded version of originalism.²⁰⁰ Originalism—or at least the originalism that fills the pages of law reviews—now allows judges to render decisions that run contrary to the original intent and expectations of the Framers²⁰¹ and that are inconsistent with what the Framers thought or would have thought about the issue.²⁰² It now reads the most important rights-granting clauses at broad levels of generality,²⁰³ thus affording judges substantial wiggle room in which to engage in constitutional construction.²⁰⁴ Indeed, according to several prominent New Originalists, originalism no longer even precludes a

196. Thus, originalists typically had extremely harsh words for theorists like Dworkin. *See, e.g.*, BORK, *supra* note 15, at 176–77, 351–55; Raoul Berger, *Ronald Dworkin's The Moral Reading of the Constitution: A Critique*, 72 IND. L.J. 1099 *passim* (1997).

197. *See, e.g.*, Balkin, *supra* note 82, at 291–94; *cf.* Graglia, *supra* note 19, at 632–33 (calling the argument for constitutional abortion rights “silly”).

198. *See* Solum, *supra* note 27, at 935 (citing CHRISTOPHER L. EISGRUBER, *CONSTITUTIONAL SELF-GOVERNMENT* 25–26 (2001)).

199. Berman, *supra* note 100, at 390 (citing KERMIT ROOSEVELT III, *THE MYTH OF JUDICIAL ACTIVISM* 47–58 (2006), and Aileen Kavanagh, *Original Intention, Enacted Text, and Constitutional Interpretation*, 47 AM. J. JURIS. 255, 265 (2002)); *see also* Greene, *supra* note 25, at 663 (viewing original expected application as an essential characteristic of the mainstream originalism that he seeks to criticize and explore). Some scholars who are enamored of originalism also view original expected application as essential to originalism. *See, e.g.*, O'NEILL, *supra* note 7, at 178–79 (equating originalism with a commitment to original expected application).

200. *See, e.g.*, Barnett, *supra* note 96, at 505 (“More often nowadays, however, Framers’ intent is invoked by critics of originalism who either do not know they are attacking a straw man, or do not care.”); Barnett, *supra* note 26, at 266 (charging that “some critics of originalism seek out its least plausible version so as to reject originalism as unacceptable”); McConnell, *supra* note 75, at 1284–85 (“Dworkin’s refutation of specific intentionalism no more discredits originalism than a refutation of Lamarck would discredit evolution.”); Paulsen, *supra* note 100, at 2059 (criticizing Jed Rubenfeld’s “caricature of originalism”); Lawrence B. Solum, *The Fourth Amendment in the Blogosphere & Constitutional Theory*, LEGAL THEORY BLOG (Aug. 19, 2006, 1:59 PM), http://lsolum.typepad.com/legaltheory/2006/08/the_fourth_amen.html.

201. *See supra* sections I.A & I.F.

202. *See supra* sections I.B & I.C.

203. *See supra* sections I.D & I.E.

204. *See supra* section I.G.

court from protecting the right to an abortion.²⁰⁵

One might be tempted to speculate that what is really going on here is not that originalism has fundamentally changed, but rather, that several former nonoriginalists have jumped on the originalism bandwagon and have attempted to co-opt the “originalist” label for their own decidedly nonoriginalist purposes.²⁰⁶ In other words, perhaps the New Originalism has not so much replaced the Old Originalism as it has cynically stolen its limelight. But that is not so. It is true that a few of the most vocal self-identified New Originalists have pushed the theory further in the direction of admitted flexibility than most other self-proclaimed originalists would be comfortable acknowledging.²⁰⁷ But it is also true that (almost) no one is an Old Originalist anymore. It is now nearly impossible to find an originalist who has not explicitly or implicitly endorsed at least some of the theoretical moves discussed in Part I of this Article.

Even Robert Bork—once the greatest of the Old Originalists—has come a long way from where he started. Bork has now rejected original intent in favor of original meaning,²⁰⁸ and he now endorses an originalism that relies on broad principles rather than on narrow intents and expectations.²⁰⁹ Similarly, Justice Scalia—“original meaning textualism’s patron saint”²¹⁰—was the leader of the “campaign to change the label from the Doctrine of Original Intent to the Doctrine of Original Meaning,”²¹¹ and he has expressly repudiated reliance on original expected application.²¹² And most of the academic originalists who have followed in Justice Scalia’s footsteps have gone even further in refining the theory than has Scalia.²¹³ For instance, Michael McConnell, whom Keith Whittington has called “undoubtedly the most prominent [N]ew [O]riginal-

205. See Balkin, *supra* note 82, at 291–94; Solum, *supra* note 27, at 970–71 (acknowledging the possibility that abortion rights can be reconciled with originalism); see also Barnett, *supra* note 170, at 411, 415 (noting that he is “sympathetic with” Balkin’s conclusion that abortion rights are properly grounded in originalism).

206. See Leib, *supra* note 4, at 355 (speculating that “many originalists will read Balkin to be a living constitutionalist in disguise—and may not let him into their club”); Lund, *supra* note 176, at 1371–72 (criticizing Balkin’s theory and pressing the need “to distinguish genuinely originalist interpretations from those that amount to living constitutionalism . . . dressed up in originalist clothing”).

207. For a discussion of this point, see *infra* Part V.

208. See BORK, *supra* note 15, at 144.

209. See *id.* at 162–63; James E. Fleming, *The Balkanization of Originalism*, 67 MD. L. REV. 10, 12–13 (2007) (noting that Bork’s claim that originalism seeks only a “major premise”—“a principle or stated value”—suggests that even Bork “has made spectacular concessions to critics of originalism” and has adopted a theory that relies on “elaborating abstract principles or values” rather than “discovering historical facts that are dispositive” (quoting BORK, *supra* note 15, at 162–63)).

210. Kesavan & Paulsen, *supra* note 26, at 1139.

211. Scalia, *supra* note 36, at 106.

212. See Antonin Scalia, *Response*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW, *supra* note 38, at 129, 144.

213. See *supra* note 27.

ist,”²¹⁴ has rejected original intent and original expected application,²¹⁵ concluded that originalism allows for an evolving set of constitutional rights that includes some that were not part of the original understanding,²¹⁶ and acknowledged that originalism may not yield a single, correct interpretation, but rather, a “legitimate range of interpretations.”²¹⁷ These theories are not anomalous; virtually every originalist has come at least a substantial way down the path from the Old to the New.

Earlier in this Article, I asserted that originalists in the late 1980s were faced with a choice—respect or constraint, but not both—and they chose respect.²¹⁸ But perhaps calling it a “choice” is misleading. Originalists did not view it as a choice at all. Rather, for all of the reasons discussed in Part I of this Article, originalists came to the realization that a commitment to originalism—a commitment to the notion that the Constitution has a fixed meaning based on its text—necessarily entails a commitment to the New Originalism rather than the Old one. If originalism was to be a genuine intellectual theory and not simply armchair political sloganeering camouflaged in the garb of constitutional interpretation, then it was inevitable that originalism would mature and refine itself as it faced both criticism from smart opponents and self-reflection from smart proponents. The New Originalism is simply the inevitable consequence of that maturation.²¹⁹ Again, that is not to say that every originalist has taken every conceptual step noted above or that every single one of those conceptual steps was absolutely unavoidable. But it was inevitable that the mainstream of originalist thought would flow very far indeed from where it all started.

B. THE PROFOUND FLEXIBILITY OF THE NEW ORIGINALISM

Some commentators have opined that the softening of originalism has essentially collapsed the distinction between originalism and nonoriginalism.²²⁰ This

214. Whittington, *supra* note 1, at 608.

215. See Michael W. McConnell, *On Reading the Constitution*, 73 *CORNELL L. REV.* 359, 361–63 (1988) (rejecting original expected application and declaring that original intent can have the effect of “subverting the rule of law”); McConnell, *supra* note 75, at 1284 (arguing that “no reputable originalist, with the possible exception of Raoul Berger, takes the view that the Framers’ ‘assumptions and expectation about the correct application’ of their principles is controlling” (quoting BORK, *supra* note 15, at 826)).

216. See McConnell, *supra* note 75, at 1292.

217. Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 *VA. L. REV.* 947, 1093 & n.729 (1995).

218. See *supra* notes 184–87 and accompanying text.

219. Cf. Balkin, *supra* note 78, at 443 (arguing that his theory is “the logical consequence[] of the turn to original meaning”).

220. See, e.g., Farber, *supra* note 52, at 1087 (noting that originalists “who focus on the [F]ramers’ general principles . . . may be difficult to distinguish from non-originalists” (footnote omitted)); Fleming, *supra* note 209, at 12; Segall, *supra* note 166, at 432–33 (“This move from specific intentions to general principles . . . eliminates any meaningful distinction between originalism and nonoriginalism . . .”); Smith, *supra* note 5, at 10 (arguing that the New Originalism “threaten[s] to dissolve originalism as a distinctive position by collapsing it into its long-time nemesis, the idea of the ‘living Constitution’”).

is true in some respects, but not in others. In practice, one cannot help but be struck by the extent to which the New Originalism's decision-making process mirrors that of its nonoriginalist rivals; today's originalists are engaging in the same maneuvers that nonoriginalists have been practicing for decades. On the ground, then, it is getting harder and harder to tell originalism and nonoriginalism apart. In theory, however, the New Originalism still differs from its nonoriginalist rivals in important ways in terms of its understanding of constitutional meaning, constitutional legitimacy, and the proper role of the Judiciary in our constitutional system.²²¹ And yet, when it comes to the potential to constrain the Judiciary, and to produce objective, determinable right and wrong answers to specific constitutional questions, originalism no longer offers any appreciable advantage over nonoriginalism. Of course, in practice, the Old Originalism could not actually produce much of an advantage either; but, in theory, the Old Originalism could at least *offer* an advantage—it could promise a way to avoid “the imposition of the judge’s merely personal values on the rest of us.”²²² The New Originalism, even in theory, has little to offer that differs from its nonoriginalist rivals. The Old Originalism could not keep the promise of constraint. The New Originalism cannot even make it.²²³

And yet, most New Originalists still do make that promise, at least to some degree.²²⁴ Keith Whittington has explained that “[t]he [N]ew [O]riginalism is less likely to emphasize a primary commitment to judicial restraint” than was the Old Originalism.²²⁵ “The [N]ew [O]riginalism does not require judges to get

221. See, e.g., SOTIRIOS A. BARBER & JAMES E. FLEMING, *CONSTITUTIONAL INTERPRETATION: THE BASIC QUESTIONS* 79–116 (2007) (arguing that Dworkin’s moral reading of the Constitution, which the authors endorse, is meaningfully different from the theories advanced by originalists, whether they be “narrow originalists,” “broad originalists,” or “[N]ew [O]riginalists”); Barnett, *supra* note 170, at 411–16 (suggesting theoretical differences between the New Originalism and nonoriginalism); Berman, *supra* note 163, at 31 & n.79; Berman, *supra* note 163, at 66 (noting that nonoriginalism, at least in some incarnations, does not posit that judges are constrained by a core fixed meaning, even one at a high level of generality, but rather, that judges are constrained by “the argumentative norms of a culture and of a practice” (footnote omitted)); Leib, *supra* note 4, at 357–58 (arguing that, even in its most open-ended form, the New Originalism is fundamentally different from living constitutionalism because it continues to accord dispositive authority to history).

222. Robert H. Bork, *Styles in Constitutional Theory*, 26 S. TEX. L.J. 383, 387 (1985); see, e.g., Graglia, *supra* note 19, at 632 (insisting that “as a practical matter we almost always know all that we need to know about the Constitution to decide actual cases” with the Old Originalism).

223. Cf. Berman, *supra* note 100, at 388 n.26 (noting that reading original meaning at high level of generality “sacrifice[s] originalism’s pretensions to serious historical inquiry and its promise to impose meaningful constraints on judges”); Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 432 n.25 (1997) (making a similar observation); Smith, *supra* note 5, at 11–12 (noting that Jack Balkin’s version of originalism sacrifices the claim to judicial constraint and the ability to criticize the Warren Court).

224. See, e.g., Douglas H. Ginsburg, *Originalism and Economic Analysis: Two Case Studies of Consistency and Coherence in Supreme Court Decision Making*, 33 HARV. J.L. & PUB. POL’Y 217, 237 (2010) (arguing that “originalism promises to constrain constitutional interpretation”); Stephen J. Markman, *An Interpretivist Judge and the Media*, 32 HARV. J.L. & PUB. POL’Y 149, 153 (2009).

225. Whittington, *supra* note 1, at 608. The Old Originalism, by contrast, admitted to being “primarily a philosophy of judicial restraint.” Maltz, *supra* note 20, at 793; see also Whittington, *supra* note 1, at 602 (“The primary commitment . . . was to judicial constraint.”).

out of the way of legislatures. It requires judges to uphold the original Constitution—nothing more, but also nothing less.”²²⁶ Still, although originalism in its New incarnation no longer emphasizes judicial *restraint*—in the sense of deference to legislative majorities—it continues to a substantial degree to emphasize judicial *constraint*—in the sense of promising to narrow the discretion of judges. New Originalists believe that the courts should sometimes be quite active in preserving (or restoring) the original constitutional meaning, but they do not believe that the courts are unconstrained in that activism. They are constrained by their obligation to remain faithful to the original meaning.

Indeed, Judge Douglas Ginsburg has argued that “originalism has become *more* constraining as originalist methodology has become more objective over time.”²²⁷ Whereas the Old Originalism “was bootless because the subjectivity of ‘intent’ made it malleable,” under the New Originalism, “the historical search has become refined and objectified,” such that “the search through historical materials will become ever less discretionary for the Justices.”²²⁸ Accordingly, even more than its predecessor, the New “[O]riginalism actually *is* constraining” and “narrows and often blocks the self-directed path of the courts.”²²⁹

Admittedly, Judge Ginsburg is unusually aggressive in this claim. Whittington is likely correct when he asserts that, in recent originalist writing, “there seems to be less emphasis on the capacity of originalism to limit the discretion of the judge,” and that the “[N]ew [O]riginalist is . . . unlikely to argue that only originalist methodology can prevent judicial abuses or can eliminate the need for judicial judgment.”²³⁰ But that does not mean that New Originalists have entirely abandoned the constraint promise.²³¹ It just means that they have qualified it. New Originalists tend to argue that, although their theory does not completely eliminate judicial subjectivity and the potential for judicial mischief, it is still meaningfully constraining, at least in comparison to the alternatives.²³²

226. Whittington, *supra* note 1, at 609; *see also* Griffin, *supra* note 23, at 1189 (noting that the New Originalism “implies that judges must stand ready to be ‘activist’—to strike down legislation inconsistent with the [original meaning] when necessary”).

227. Ginsburg, *supra* note 224 (emphasis added).

228. *Id.*

229. *Id.* at 236–37.

230. Whittington, *supra* note 1, at 608–09; *see also* Berman, *supra* note 163, at 8 (noting that the promise of mechanical constraint “is a fable to which few academic originalists subscribe; indeed, many have denounced it”).

231. One exception might be John Harrison, who has recently penned an especially thoughtful essay that expresses serious reservations about the constraining power of originalism in any form. *See* John Harrison, *On the Hypotheses that Lie at the Foundations of Originalism*, 31 HARV. J.L. & PUB. POL’Y 473, 473–74 (2008).

232. *See, e.g.,* BORK, *supra* note 15, at 163–64 (“In . . . its vindication of democracy against unprincipled judicial activism, the philosophy of original understanding does better by far than any other theory of constitutional adjudication can.”); Macey, *supra* note 139, at 302, 304 (arguing that “originalism is not nearly so determinate as its most vocal proponents would suggest,” but claiming that “originalism is defensible not because it restrains judges completely, or even well, but because it restrains judges better than alternative methods of judging”); Paulsen, *supra* note 100, at 2061 (arguing that imperfect constraint “is likely a less severe problem for originalism than for less-disciplined

But is it really? How can a theory that interprets the most contentious constitutional clauses at a very high level of abstraction claim to be any more constraining than other methods of constitutional interpretation? According to New Originalists, their theory promises constraint relative to nonoriginalism in three ways.

First, New Originalist constitutional interpretation remains a historical inquiry. A judge is not permitted to give the Constitution any reading that the text would, in the abstract, objectively bear. Instead, she is limited only to readings that reasonable observers would have understood at the time of adoption.²³³ Thus, for example, the Domestic Violence Clause provides: “The United States . . . shall protect each [State] against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.”²³⁴ Although the words “domestic violence” are often used today to refer to physical assaults between persons living in the same household, they were understood in 1787 to refer to an entirely different concept: riots or civil unrest.²³⁵ Because the New Originalism requires judges to read this clause in its historical context, it would not allow them to interpret this provision to mandate that the federal government must agree to fund a state’s spousal abuse prevention program.²³⁶ Nor would the New Originalism allow an enterprising judge to interpret the Second Amendment’s right to “bear Arms”²³⁷ to protect “no more than an entitlement to possess the stuffed forelimbs of grizzlies and Kodiaks.”²³⁸

Second, even when a New Originalist judge interprets a constitutional guarantee at a high level of generality and appeals to the broad principles that underlie it, she can never use those principles to contradict the text itself.²³⁹ “When you

nonoriginalist approaches”); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 863 (1989) (arguing that originalism is “less likely to aggravate the most significant weakness of the system of judicial review”—that is, that “the judges will mistake their own predilections for the law”); cf. WHITTINGTON, *supra* note 44, at 89–99, 204–06; Balkin, *supra* note 82, at 307–11.

233. See Balkin, *supra* note 78, at 488–89, 492–93; Barnett, *supra* note 170, at 411 (claiming that “originalism properly done requires careful attention to evidence; it is not enough that a particular interpretation is a plausible fit with the text”), Primus, *supra* note 160, at 187 (noting that “a pure textualist can interpret and apply a legal provision without knowing when it was adopted or anything else about the circumstances of its enactment, but a pure originalist cannot”).

234. U.S. CONST. art. IV, § 4.

235. See Balkin, *supra* note 78, at 430.

236. See *id.*; Solum, *supra* note 27, at 945–46.

237. U.S. CONST. amend. II (“A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”).

238. Akhil Reed Amar, *Rethinking Originalism: Original Intent for Liberals (and for Conservatives and Moderates, Too)*, SLATE (Sept. 21, 2005, 12:36 PM), <http://www.slate.com/toolbar.aspx?action=print&id=2126680> (“As I see it, text without context is empty. Constitutional interpretation heedless of enactment history becomes a pun-game: The right to ‘bear arms’ could mean no more than an entitlement to possess the stuffed forelimbs of grizzlies and Kodiaks.”); see also Barnett, *supra* note 70, at 20 (explaining that only historical inquiry can tell us whether the Second Amendment refers to weapons or limbs).

239. See Barnett, *supra* note 170, at 412–13; Solum, *supra* note 27, at 959.

need to penetrate beneath the surface of the text to the principles that lie underneath, you must reemerge through the text.”²⁴⁰

Third, New Originalists argue that their methodology constrains because, even if it does not dictate a single rule of law, it narrows the field of possible contenders. The objective historical inquiry can rule out meanings that would not have been viable at the time of the framing.²⁴¹ “[W]hen the original public meaning of a term or provision in a written constitution fails to provide a unique rule of law to apply to a particular case, it still provides a ‘frame’ that . . . exclud[es] many possibilities”²⁴²

In theory, these limitations appear compelling, but in reality, none of them ends up amounting to much of anything of substance. Nobody would read the Second Amendment to guarantee the right to own stuffed animal limbs, and nobody would read the Domestic Violence Clause to apply to spousal abuse.²⁴³ All constitutional theorists, even those who aggressively eschew the label of “originalist,” genuinely respect history and original meaning, at least to some degree.²⁴⁴ Modern theorists disagree about the category of weapons that fall within the constitutional notion of “Arms,” and they disagree about the nature of the “right” to bear them, but they do not dispute that the Second Amendment is about weapons rather than forelimbs. Nor do they interpret the Domestic Violence Clause to apply to spousal abuse, or Article IV’s promise that the “United States shall guarantee to every State in this Union a Republican Form of Government”²⁴⁵ to justify the Supreme Court’s finding for the Republican Party candidate in *Bush v. Gore*.²⁴⁶

Similarly, when it comes to constitutional interpretation, nobody appeals to underlying principles in order to contradict the text. Nonoriginalists appeal to underlying principles to determine the meaning or appropriate reach of the

240. Barnett, *supra* note 170, at 413.

241. See, e.g., Thomas B. McAfee, *Originalism and Indeterminacy*, 19 HARV. J.L. & PUB. POL’Y 429, 431 (1996).

242. Barnett, *supra* note 2, at 647; see also Ginsburg, *supra* note 224, at 237 (“By restricting the acceptable bases of a decision, originalism limits the range of plausible outcomes.”); Paulsen, *supra* note 100, at 2050 (arguing that “one may recognize that originalism sometimes does not dictate clear answers but merely frames the legitimate bounds of disagreement”).

243. But see Mark S. Stein, *The Domestic Violence Clause in “New Originalist” Theory*, 37 HASTINGS CONST. L.Q. 129, 133–35 (2009) (offering a clever argument that perhaps the New Originalism itself would allow such a reading).

244. See, e.g., Farber, *supra* note 52, at 1086; James E. Fleming, Response, *Original Meaning Without Originalism*, 85 GEO. L.J. 1849, 1856 (1997); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 880–81 (1996).

245. U.S. CONST. art. IV, § 4.

246. 531 U.S. 98 (2000); see Jack M. Balkin & Sanford Levinson, *Legal Historicism and Legal Academics: The Roles of Law Professors in the Wake of Bush v. Gore*, 90 GEO. L.J. 173, 179 (2001) (noting that all lawyers from across the political spectrum would reject such an argument as “a mere play on words and would conclude that such an argument is simply not within the realm of current possibility”); see also Greene, *supra* note 192, at 8–9 (“If, by fortuity, the word ‘Senator’ comes in a later age to mean ‘sandwich,’ each state is not thereby entitled to two free lunches. Unless, that is, we are not interested in constitutional fidelity.”).

indeterminate text, not to justify defying it.²⁴⁷ The example that New Originalists like to give here is, again, the Second Amendment. They suggest that a nonoriginalist might identify the principle underlying the Second Amendment as the maintenance of public safety to conclude that in today's world, guns actually undermine public safety, and thus, can be banned without violating the Constitution.²⁴⁸ Alternatively, New Originalists suggest, a nonoriginalist might read the Amendment's preamble to indicate that the underlying purpose of the Amendment was to preserve the militia to conclude that because we no longer have a militia, we should deny any effect to the Amendment.²⁴⁹ But those who reject the view that the Second Amendment guarantees an individual right to possess firearms for self defense do not generally offer these arguments. Instead, they argue that because the "right to bear Arms" is vague or ambiguous, the preamble should be sensibly used to ascertain the principles that underlie the amendment, *in order to determine the scope of the right protected by the text*. That is to say, they use the underlying principles to *inform* the inquiry into the meaning of the text, not to *supersede* it.²⁵⁰

In other words, originalists manufacture conflict when they charge that the "term 'living constitution' . . . was coined to justify ignoring or contradicting the text in favor of applying the principles allegedly underlying the text to new facts and changing circumstances."²⁵¹ Instead, that term is generally used to justify using the text's underlying principles to give the indeterminate text a meaning (or if you prefer, construction) that is suitable for modern circum-

247. Thus, when Michael Stokes Paulsen seeks to parody nonoriginalist thinking with an article suggesting that in the modern era of longer life expectancies, the principle underlying the constitutional requirement that the President be at least thirty-five years of age would justify a rule that the President must be at least fifty-nine and half, see Michael Stokes Paulsen, *Is Bill Clinton Unconstitutional? The Case for President Strom Thurmond*, 13 CONST. COMMENT. 217, 219–20 (1996), he engages in a form of argument that no reputable nonoriginalist would endorse.

248. See Barnett, *supra* note 170, at 413

249. See *id.*

250. Thus, Justice Stevens began his *Heller* dissent as follows:

The question presented by this case is not whether the Second Amendment protects a "collective right" or an "individual right." Surely it protects a right that can be enforced by individuals. But a conclusion that the Second Amendment protects an individual right does not tell us anything about the scope of that right.

Guns are used to hunt, for self-defense, to commit crimes, for sporting activities, and to perform military duties. The Second Amendment plainly does not protect the right to use a gun to rob a bank; it is equally clear that it *does* encompass the right to use weapons for certain military purposes. Whether it also protects the right to possess and use guns for nonmilitary purposes like hunting and personal self-defense is the question presented by this case. The text of the Amendment, its history, and our decision in *United States v. Miller* provide a clear answer to that question.

District of Columbia v. *Heller*, 554 U.S. 570, 636 (2008) (Stevens, J., dissenting) (citation omitted). Even those who interpret the Amendment, in light of its preamble, to protect a collective right, rather than an individual one, are not seeking to ignore or override the text; they are seeking to define the right protected by the text. See, e.g., Cass R. Sunstein, Op-Ed, *Staring Down the Barrel*, BOS. GLOBE, Dec. 2, 2007, at E9.

251. Barnett, *supra* note 170, at 414.

stances, not to justify *ignoring or contradicting* the text in order to apply its underlying principles to new facts and changing circumstances. As Justice Brennan put it, a judge should “look to the history of the time of the framing” in order to ascertain the underlying principles, with an eye toward ultimately determining what “the *words of the text* mean in our time.”²⁵² “For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs.”²⁵³

Finally, in practice, there is very little to the claim that originalism, even in its softened form, at least narrows the field of possible outcomes more than its competition does. Consider the following argument in favor of originalism: “The precise original meaning of the [D]ue [P]rocess [C]lause, for example, might be difficult to determine, but at the very least we should be able to agree that the clause is limited to *process*, and does not entitle courts to conduct a *substantive* review of the wisdom of legislation.”²⁵⁴ Not so. Even if we limit ourselves to an inquiry into the objective, original public meaning of the text, we cannot all agree on that proposition. The concept of substantive due process was well-known at the time of the framing of the Due Process Clauses, and a hypothetical, well-informed, reasonable observer would likely have been aware of that.²⁵⁵ The New Originalism may not *mandate* the recognition of substantive due process—and it surely does not mandate the particular applications of that doctrine that the Supreme Court has endorsed—but nor does it *preclude* them.²⁵⁶

252. Brennan, *supra* note 145, at 438 (emphasis added).

253. *Id.* To be fair, credit for coining the term “living constitutionalism” is generally given to Thomas Grey, who did advocate a theory that found constitutional meaning beyond the four corners of the text. See Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 706 (1975) (“Where the broader view of judicial review diverges from the pure interpretive model is in its acceptance of the courts’ additional role as the expounder of basic national ideals of individual liberty and fair treatment, even when the content of these ideals is not expressed as a matter of positive law in the written Constitution.”). That theory might be viewed uncharitably as a warrant for ignoring the text. Originalists, though, should be careful not to cast stones in this regard because they too often endorse structural arguments that are not clearly grounded in constitutional text. See Colby & Smith, *supra* note 24, at 292–94 (discussing Justice Scalia’s approach to constitutional interpretation). A better way to view it might be as a warrant for supplementing the text. But either way, it is not a warrant for contradicting the text. And in any event, Grey’s understanding of living constitutionalism as noninterpretivism has been abandoned by nonoriginalists on the ground that “it is difficult to imagine *any* judge or scholar in the United States who does not claim that his or her constitutional opinions are in some sense interpretations of the Constitution. The current debate is over how, not whether, to interpret it.” Powell, *supra* note 103, at 659 n.1.

254. OFFICE OF LEGAL POLICY, *supra* note 13, at 7–8.

255. See Berman, *supra* note 163, at 22 n.51; Conkle, *supra* note 176, at 36; Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585, 668–70 (2009) (offering a detailed account of substantive due process as being fully consistent with a careful application of public meaning originalism); cf. John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493, 542–55 (1997) (noting that the historical evidence regarding the propriety of substantive due process is not clear cut).

256. See *supra* section I.G.

It does not narrow the field of possible outcomes.

I do not mean to suggest that a method of interpretation that seeks a text's original public meaning is inherently unconstraining. Such a methodology could indeed prove quite determinative when applied to a wide variety of documents. It could even be meaningfully constraining as a method of constitutional interpretation, *if we had a different constitution*. But it is not so with ours.

This point can be illustrated by reference to Gary Lawson's clever analogizing of the Constitution to an eighteenth-century recipe for fried chicken.²⁵⁷ Lawson imagines:

Suppose that we find a document hidden in an old house. The document appears to be written in English, and both linguistic analysis and scientific dating techniques indicate that the document was produced in the late-eighteenth century in the area commonly known as Philadelphia, Pennsylvania. The document lists quantities of items such as "one 2 1/2 pound chicken," "1/4 cup of flour," "one teaspoon of salt," "plenty of lard for frying," and "pepper to taste." It also contains instructions for combining and manipulating those items, such as "combine the one teaspoon of salt with the 1/4 cup of flour," "add pepper to taste to the salt and flour mixture," "coat the chicken with the flour," and "fry the coated chicken in hot lard until golden brown." The document, in other words, appears to be a late-eighteenth-century recipe for preparing fried chicken.²⁵⁸

What, asks Lawson, does this document mean? We know from our general cultural knowledge that recipes are instructions designed to achieve particular goals, and we know that, generally speaking, they are intended to be read and followed by persons other than the author. It thus follows that the meaning of the recipe is its original public meaning: "the meaning that it would have to the audience to which [it] addresses itself"²⁵⁹—people in the late eighteenth century who might be interested in how to make fried chicken.²⁶⁰

Lawson then asks us to suppose that years later "cooks began to depart from the recipe in significant ways. For instance, cooks today might overwhelmingly substitute rosemary for pepper because that is what current consumers seem to prefer." Does that change the meaning of the recipe? Of course not, says Lawson: "The recipe says 'pepper,' and if modern cooks use rosemary instead, they are not *interpreting* the original recipe, but rather they are *amending* it—perhaps for the better, but amending it nonetheless."²⁶¹ Things might be different if the recipe said something like "add seasonings to taste." If that were so, the choice to use rosemary rather than pepper would be perfectly consistent

257. See *supra* notes 129–34 and accompanying text.

258. Lawson, *supra* note 129, at 1825.

259. *Id.* at 1826.

260. See *id.*

261. *Id.* at 1830.

with the original meaning of the recipe, which was to grant discretion to the cook to choose the seasonings that the cook finds most tasty. But this recipe specifically said “pepper,” and thus, the substitution of rosemary was a deviation from its meaning.²⁶²

Bringing the point home, Lawson declares that “[t]he Constitution of the United States is a recipe—a recipe for a particular form of government.”²⁶³ As such, its meaning is also its original public meaning, and when judges deviate from that meaning—even in desirable ways—they are amending the Constitution, not interpreting it.²⁶⁴

We can agree with everything that Lawson says, however, and still not end up with a meaningfully constrained Judiciary. To be sure, there are provisions in the Constitution that are somewhat recipe-like in their precision. For example, when Article I, Section 3 says that the Senate shall consist of two Senators from each state, that means we cannot choose one or three, even though some states are now so much larger than others that it seems unfair and undemocratic not to make some changes.²⁶⁵ We are constrained by the original meaning. But precisely because they are so clear and unambiguous, these were not the sorts of constitutional provisions that provided the impetus for the originalist movement. Originalism was born primarily of a desire to constrain judicial interpretation of the Constitution’s rights-bearing provisions—principally the Bill of Rights and the various clauses of Section 1 of the Fourteenth Amendment.²⁶⁶ Those provisions look nothing at all like a typical recipe.²⁶⁷

If the Equal Protection Clause were like Lawson’s fried chicken recipe, it would go on for several pages, perhaps beginning with something along these lines:

No state shall discriminate on the basis of race, gender, physical or mental disability, sexual orientation, or national origin, in the provision of education, welfare entitlements, access to the legal system, or public accommodations, or in the scope or enforcement of laws, regulations, or other governmental policies or practices, whether written or unwritten, except when necessary in order to serve a compelling public interest in health, safety, diversity, or national security. Laws that legislate facially along racial lines, or that were enacted out of a desire to harm members of a particular race, shall be

262. *See id.* at 1830–31.

263. *Id.* at 1833.

264. *See id.* at 1830, 1833–34.

265. *See* SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* 49–62 (2006) (critiquing this rule as fundamentally undemocratic).

266. *See, e.g.,* BORK, *supra* note 15, at 17–18, 129, 351–53; Graglia, *supra* note 19, at 632–35; Greene, *supra* note 25, at 679–81; Powell, *supra* note 103, at 696–97.

267. Nor do they look like a “blueprint for a machine,” Barnett, *supra* note 88, at 407, or “an instruction manual,” Lawson & Seidman, *supra* note 58, at 52—two other analogies offered by New Originalists. *See also* Bennett, *supra* note 172, at 672 (noting that “the Constitution is not in many of its provisions anything like an instruction manual”).

considered “discriminatory,” but laws that are facially neutral and were not born of a discriminatory intent shall not be considered “discriminatory” even if they have a disparate impact on particular races. Furthermore, . . .

But the Equal Protection Clause does not read anything like that. It says simply: “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”²⁶⁸ If we were to try to analogize it to a chicken recipe, it would have to be a recipe that reads, in its entirety, something like this: “Prepare and season chicken until tasty.” How should we cook the chicken? What seasonings should we use? The recipe—such as it is—does not say.

If we were to bind ourselves to the original intentions or expectations of the author (or authors) of this recipe, we might be able to determine a more particularized set of cooking instructions, depending on the available evidence about the recipe’s author (or authors).²⁶⁹ But if we disavow those intentions and expectations, and look instead to the objective meaning of the recipe, then we have little with which to work. We can agree that the recipe’s true “meaning” is its original public meaning. And we can decide to follow its original public meaning. But we still do not know how to make dinner. The recipe is not particularly constraining. We could make the sort of fried chicken that its authors might have had in mind. Or we could make a more modern fried chicken with eleven herbs and spices. Or we could make Buffalo Wings, Tandoori Chicken, Chicken Cordon Bleu, or a thousand other tasty chicken dishes. We could make any of those things while still complying with the recipe.²⁷⁰

268. U.S. CONST. amend. XIV, § 1.

269. However, we would probably find that the reason the recipe was written in such capacious terms was that it had to be agreed upon by a very large number of people, each of whom had quite different ideas about how to cook chicken. Perhaps it was written by a convention of chefs who were tasked with designing a chicken recipe that would command unanimous approval as the single best way to make chicken. The only way to get all of those disparate, strong-willed cooking professionals to agree was to make the recipe so open-ended that it could be read to allow or reflect each of their preferred methods. See *infra* note 284 and accompanying text.

270. If I may indulge this silly thought experiment just a moment longer, it can help to illustrate the ways in which the New Originalism mitigates (though does not obviate) the dead-hand problem, but does so at the expense of constraint. Let us imagine that the Constitution *does* contain a broad mandate to cook tasty chicken. If we were to interpret that mandate according to the intent and expectations of the Framers—if we were to treat this broad recipe as in fact requiring us to cook chicken in precisely the way that the Framers intended or expected—then, even if we could satisfy ourselves as to just what it is that the Framers intended and expected, we would have to wrestle with some very difficult questions. Why should men who have been dead for two centuries get to control what we have for dinner today? Maybe back in the 1780s, everybody loved fried chicken, but that is because fried chicken was all that they knew. After more than a century of immigration and culinary innovation, we now have many more tasty options to choose from: Teriyaki Chicken; Chicken Satay; Chicken Gyros; et cetera. Why should we be denied all of that delicious food because the white, Anglo-Saxon, culinarily challenged Framers liked their chicken bland? And what about health issues? The Framers did not know about cholesterol. The recipe that they intended poses serious health risks that they could never have anticipated. If we were allowed to appeal to the recipe’s underlying principles, we might be able to get away with swapping the lard for a healthier, cholesterol-free alternative, but an original

This same point can be made in an equally fanciful, but perhaps slightly more helpful, manner by imagining that we have in our house not an old recipe for chicken, but rather an old home-spun embroidery that reads: “Family Rule: Be a Good Parent.” If we read this rule as an Old Originalist would, we might conceivably find ourselves to be meaningfully (and probably stiflingly) constrained by eighteenth-century notions of good parenting. An Old Originalist would seek to determine which particular forms of treatment, punishment, and the like, were approved of by those who stitched the embroidery.²⁷¹ But if we read the rule as a New Originalist would, we would find that it does nothing to cabin us as we make difficult child-rearing decisions. There are today—just as there were centuries ago—many conceptions of the “good,” and the text affords no basis for choosing among them. The objective textual meaning is not going to be of much use in determining whether mommy broke the family rule by failing to bring home expensive souvenirs for the kids from her last business trip, or by refusing to cook an alternate vegetable for little Jimmy, who hates broccoli. Either of these activities can be defended as good parenting or condemned as bad parenting, depending on one’s personal views of child rearing. There are many different schools of parenting that can all lay claim to conformance with the open-ended family rule.²⁷² Any effort to enforce the rule and make concrete determinations in these situations would necessarily amount to the imposition of the personal values of the person charged with the enforcement authority.

With respect to its key rights provisions, the Constitution resembles this family rule much more than it does Lawson’s recipe for fried chicken. Because it speaks in “majestic generalities,”²⁷³ reading the Constitution’s words at the level of generality that their language objectively suggests²⁷⁴ will yield an abstract, flexible meaning.²⁷⁵ Thus, a great many possible rules of decision—including many that contradict each other—would all be faithful to the original meaning.²⁷⁶

intent or original expected application originalist would not permit such an appeal. New Originalist interpretation, by contrast, would let us cook our chicken however we want, so long as it is tasty by our standards today. That mitigates the dead-hand problem, but it fails to constrain modern chefs. (And it does not, it should be noted, fully eliminate the dead-hand problem. Why should twenty-first century vegetarians be forced to eat chicken because the Framers had no problem with killing and eating animals?)

271. See *supra* notes 29–33 and accompanying text.

272. Cf. *supra* notes 105–11 and accompanying text (discussing open-ended constitutional provisions).

273. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943); see also Balkin, *supra* note 71, at 555 (referring to the “glittering generalities” of the Fourteenth Amendment).

274. See *supra* section I.E.

275. See, e.g., Gregory Bassham, *Freedom’s Politics: A Review Essay of Ronald Dworkin’s Freedom Law: The Moral Reading of the American Constitution*, 72 NOTRE DAME L. REV. 1235, 1239 (1997) (book review) (noting that “the very generality and abstractness of the language naturally suggests a broad rather than a narrow interpretation of these clauses”).

276. See, e.g., Kay, *supra* note 22, at 706 (noting that in hard cases “courts deal with conflicting interpretations that are both consistent with the objective meaning of the text”); Primus, *supra* note 160,

Consider the examples of two controversial issues, one from the past and one from the present: segregation and affirmative action. A commitment to the original intentions or narrow expectations of the Framers of the Fourteenth Amendment might (in theory anyway²⁷⁷) be sufficient to eliminate judicial subjectivity from these divisive inquiries.²⁷⁸ So too, perhaps, could an intermediate form of originalism that looks to the actual, historical understanding of the framing generation as the source of the proper level of generality at which to determine constitutional meaning.²⁷⁹ Michael McConnell has found “some degree of historical support” for a number of different conceptions of the equality that was guaranteed by the Equal Protection Clause: a “rule of strict formal equality, requiring all citizens to be treated without regard to race or other morally irrelevant distinctions”; a rule of “‘limited absolute equality’—absolute equality of all citizens with respect to a limited category of rights (civil rights, but not social or political rights)”; a prohibition against “class legislation” or “special legislation”; or a ban on “discrimination that partakes of ‘caste,’ something akin to modern anti-subordination theories.”²⁸⁰ In theory, an originalist of this stripe could satisfy herself after extensive historical research that one of these particular conceptions represents the one actually understood by the American public in 1868, and she could apply that conception to the problem of segregation or affirmative action to get a definitive answer.

A New Originalist, however, could not do so. A New Originalist would recognize that the text of the Equal Protection Clause is objectively broader and more abstract than any of these narrower (though still quite broad) conceptions

at 206–07 (arguing that Balkin’s version of originalism “permits any significant American interest group” to claim fidelity to original meaning because “[w]ithin the compass of actually contested issues that an official might have to decide, Balkin’s version of originalist reasoning could probably support either side of the question.”).

277. *But see* McConnell, *supra* note 217 (seeking to demonstrate that the Framers narrowly understood the Fourteenth Amendment to preclude segregation, but recognizing “that history sometimes reveals a ‘range of ‘original understandings’” rather than a single answer” (quoting Powell, *supra* note 103, at 690)).

278. *See* BERGER, *supra* note 14, at 117–18, 139–40 (discussing Alexander Bickel’s belief that the Framers did not intend to forbid segregation and providing additional evidence that the Framers did not have such an intent); Maltz, *supra* note 29, at 846 (citing sources to support the argument that “the historical record indicates unambiguously that the Framers of the [F]ourteenth [A]mendment did not intend to outlaw state-imposed segregation per se”); Rubinfeld, *supra* note 223, at 429–32 (arguing that race-conscious Reconstruction programs show that the Framers of the Fourteenth Amendment did not expect it to preclude affirmative action); Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 754–83 (1985) (same); *supra* notes 85–86 and accompanying text (discussing segregation).

279. *See, e.g.*, Lash, *supra* note 45, at 339–40 (“[H]istorical evidence also may allow us to conclude that some core meanings were more likely shared by the general public”); McConnell, *supra* note 47, at 1136 (“Originalism is the idea that the words of the Constitution must be understood as they were understood by the ratifying public at the time of enactment.”).

280. McConnell, *supra* note 75, at 1282 (quoting EARL M. MALTZ, *CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863–1869*, at 68, 157–58 (1990)) (citing John Harrison, *Equality, Race Discrimination, and the Fourteenth Amendment*, 13 CONST. COMMENT. 243 (1996)).

of equality.²⁸¹ And she would further recognize that the historical support for each of these various conceptions of equality indicates that “equal protection of the laws”²⁸² was not a term of art with an objectively determinable narrow meaning.²⁸³ Rather, all of these various conceptions of equality—definitions of equal protection at a medium to high level of generality—are plausible fits with the objective meaning of the text. The clause was written in terms so broad and vague as to be textually capable of supporting all of these various (though often mutually exclusive) principles. In fact, a New Originalist would likely determine that this was no accident. The Framers were probably *forced* to use such lofty and ill-defined language in order to convince the various people who held these numerous competing conceptions to go along with it.²⁸⁴ Or perhaps the Framers voluntarily chose to use such broad language in order to ensure that the abstract mandate of equality would continue to remain vital in an ever-changing world.²⁸⁵ Indeed, perhaps they affirmatively wanted to vest subsequent genera-

281. Michael Dorf has noted that “the issue [of choosing one of these conceptions] is not one of abstraction, *per se*,” because some of these conceptions are simultaneously both broader and narrower than others—for example, color-blindness is narrower than antisubordination because it does not condemn laws that discriminate on the basis of sexual orientation, but it is broader than antisubordination because it prohibits affirmative action. Michael C. Dorf, *Truth, Justice, and the American Constitution*, 97 COLUM. L. REV. 133, 140 (1997) (book review). Thus, Dorf articulates the issue as a choice among competing principles, not as a quest for the proper level of generality at which to view a particular principle. *See id.* This is correct. My point here is that the text cannot be read to objectively state a specific principle at some particular level of generality, but rather, must be read broadly to reflect an abstract commitment that could be cashed out through a variety of different principles at various levels of generality.

282. U.S. CONST. amend XIV, § 1, cl. 2.

283. *See* Balkin, *supra* note 78, at 495 (noting that, given its broad text, this Clause should not be read to reflect a particular conception of equality “[u]nless we have strong evidence that the term ‘equal protection of the laws’ was a generally recognized term of art”).

284. *See* Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 61–63 (1955) (arguing that moderates and radicals intentionally chose open-ended language so that the Fourteenth Amendment could be read to support a wide range of outcomes, and thus, could appeal to a wide range of constituencies); *cf.* ANDREW KULL, *THE COLOR-BLIND CONSTITUTION* 67–69 (1992) (“Congress indicated that it preferred the more malleable notions of equality and ‘equal protection’ . . .”). Many originalists remain deeply hostile to this notion. Steven Smith explains:

In theory, to be sure, originalism is compatible with the possibility that the people might simply incorporate some general principle into positive law and thereby authorize future judges to enforce the principle as they come to understand it. But in fact it seems unlikely that citizens and political actors would readily choose to make such an open-ended (and irresponsible?) decision. Thus, originalists are characteristically as resistant to such interpretations as progressive non-originalists are enthusiastic.

Smith, *supra* note 4, at 6 n.18. This objection ignores, I believe, the political realities of legislating by supermajority on controversial topics. I have previously argued that this is, in fact, a nearly universal phenomenon when it comes to controversial constitutional provisions. *See* Colby, *supra* note 18, at 535, 590–95 (developing the point that “as a natural consequence of the constitution-making process, a constitutional provision addressing a deeply controversial subject can only hope to be enacted when it is drafted with highly [vague or] ambiguous language so that, rather than possessing a single [narrow] original meaning, it appeals to disparate factions with divergent understandings of its terms.”).

285. *See, e.g.*, William J. Brennan, Jr., *Constitutional Adjudication and the Death Penalty: A View from the Court*, 100 HARV. L. REV. 313, 325–26 (1986) (“[O]ur Framers knew what they were doing.

tions of judges with the power to determine which conception of equality to enforce.²⁸⁶ Whatever the reason for the Framers' actions, a fully informed and educated, hypothetical, reasonable contemporary should be taken to have been aware that various people viewed the Amendment as reflecting each of these conceptions of equality. And she would have recognized that the text is abstract enough to be consistent with each of them. As such, she would have concluded that the text is objectively read to enact a broader principle still, one that can encompass any of these competing medium- to high-level possibilities: an abstract, unspecified, amorphous commitment to equality. Accordingly, its original meaning is consistent with both upholding and striking down segregation and affirmative action, insofar as advocates on both sides of these issues have made plausible arguments grounded in differing conceptions of equality. The New Originalism does not constrain the judge on these contentious questions.²⁸⁷

And there is nothing unique about these particular issues. "Equal protection of the laws" is no more abstract than "due process of law,"²⁸⁸ "privileges or immunities,"²⁸⁹ "other rights,"²⁹⁰ "freedom of speech,"²⁹¹ "free exercise of religion,"²⁹² and the like. "As all parties to a dispute become more able to ground good arguments in original meaning, attention to original meaning can do less and less to adjudicate the issue."²⁹³

They were careful draftsmen. . . . [They] fully underst[ood] that this language was *not* specific and could be interpreted in any number of ways, and this choice to employ a broad principle must be similarly respected."); Perry, *supra* note 57, at 112 (arguing that broad levels of generality that are profoundly underdeterminate may be chosen because of a desire for the underlying values of constitutional rights to continue to have resonance in a changing world).

286. See, e.g., Balkin, *supra* note 78, at 456 ("The [F]ramers of [S]ection 1 of the Fourteenth Amendment deliberately chose a text with fairly abstract principles and vague standards that would delegate most issues to the future . . ."); Berman, *supra* note 163, at 30–31 (noting this possibility and observing that "if there are many such provisions (or even a small number of provisions that are especially fertile as generators of litigation), then some of Originalism's supposed benefits, such as its constraining effect on judicial subjectivity . . . are likely to prove rather more modest than its proponents often claim"); Powell, *supra* note 103, at 670–71 (noting that there are many instances "in which history indicates that the founders consciously chose to leave a question of constitutional meaning for later interpreters"); Whittington, *supra* note 1, at 611 (noting the possibility "that the founders merely meant to delegate discretion to future decisionmakers to act on a given subject matter with very little guidance as to how that discretion should be used or on the substantive content of the principles on which those decisionmakers should act").

287. See Balkin, *supra* note 71, at 555, 600 (arguing that both *Plessy v. Ferguson*, 163 U.S. 537 (1896), and *Brown v. Board of Education*, 347 U.S. 483 (1954), are consistent with the original meaning of the Fourteenth Amendment); Barnett, *supra* note 26, at 260, 265–66 (arguing that the Old Originalism possibly allowed only one answer to the segregation question, but the New Originalism allows either answer because "separate but equal" is a constitutional construction, and therefore, "[e]ven if it is consistent [with the original meaning of the Fourteenth Amendment], it can nevertheless be rejected in favor of another construction that is also consistent with the original meaning").

288. E.g., U.S. CONST. amend. V.

289. U.S. CONST. amend. XIV, § 1, cl. 1.

290. See U.S. CONST. amend. IX.

291. U.S. CONST. amend. I.

292. See *id.*

293. Primus, *supra* note 160, at 207.

As such, the difficult work of deciding cases will have to be done by what the New Originalists call constitutional construction—the act of choosing a rule of decision when the original meaning is capable of supporting multiple rules.²⁹⁴ As Jack Balkin puts it: “[O]riginalism does not dictate the results of constitutional construction, and for a very large number of disputed cases, construction is the name of the game.”²⁹⁵ A New Originalist can thus, as Randy Barnett explains, “take the abstract meaning as a given, and accept that the application of this vague meaning to particular cases is left to future actors, including judges, to decide.”²⁹⁶ Originalism is accordingly not particularly constraining on the judge.²⁹⁷ Balkin confesses that the Constitution’s original meaning “will not be sufficient to decide a wide range of controversies and so judges will have to engage in considerable constitutional construction Hence fidelity to original meaning cannot constrain judicial behavior all by itself.”²⁹⁸

294. See *supra* section I.G.

295. Balkin, *supra* note 71, at 604–05.

296. Barnett, *supra* note 26, at 264; see also *id.* (arguing that “the Constitution includes more open-ended or abstract provisions, and thereby delegates discretion to judges”). A number of New Originalists do not believe that judges should be permitted to engage in constitutional construction. See *infra* section V.A.

297. Richard Kay has recently argued that “original public meaning interpretation, in the hands of less careful or rigorous judges, leads to an enlarged range of plausible outcomes, threatening to subvert the clarity and stability of constitutional meaning that is central to the constitutionalist enterprise.” Kay, *supra* note 22, at 704. Kay’s argument (which he offers as a reason to return to something more like the Old Originalism) is that “public meaning originalism will generate more cases of constitutional indeterminacy than will the originalism of original intentions.” *Id.* at 721. This is so, he says, because it is impossible for a New Originalist judge to determine the proper “objective” level of generality at which to interpret a constitutional provision. A quest for the actual intentions of actual people can yield actual correct answers; a quest for the hypothetical views of a hypothetical reasonable person is likely to simply yield the view that the judge herself thinks of as most reasonable. See *id.* at 722–23; see also Conkle, *supra* note 176, at 37 (arguing that New Originalists can disagree about the proper level of generality, which “highlights the weakness of originalism in providing objective standards that can control the discretion of the Court”). There is much to be said for this argument, which differs from the one that I am making here. Kay’s view is that the New Originalism produces indeterminacy “in the hands of less careful or less rigorous judges.” Kay, *supra* note 22, at 704. He continues: “I do not mean, of course, that adoption of the original public meaning approach necessarily leads to this elastic kind of constitutional interpretation. But relying on an artificial concept instead of on an actual historical event inevitably enlarges the field of such imaginative reconstructions.” *Id.* at 725. My point is that the New Originalism *does* “necessarily lead[] to this elastic kind of constitutional interpretation,” *id.*, even in the hands of careful and rigorous judges, because, objectively, the Constitution’s primary rights-granting provisions reflect a very high level of generality.

298. Balkin, *supra* note 71, at 551; see Balkin, *supra* note 71, at 557 (arguing that the New Originalism “does not preclude us from a wide range of possible future constitutional constructions”); see also Akhil Reed Amar, *The Supreme Court 1999 Term—Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 28 (2000) (“Granted, even after close study the document itself will often be indeterminate over a wide range of potential applications. Within this range, judicial doctrine can work alongside practical resolutions achieved by other branches to specify particular outcomes and thereby concretize the Constitution.”); Barnett, *supra* note 26, at 265 (noting that it is “quite common” for there to be multiple competing constructions available to the judge); Perry, *supra* note 57, at 105–06, 115–53 (defending a version of the New Originalism dictating that because the original meaning is often quite abstract and indeterminate, judges can be committed originalists and still impose their own views of the best way to implement the Constitution’s broad rights provisions). Lawrence

Fidelity to original meaning would thus not have prohibited the Warren and Burger Courts from issuing the decisions that were the initial impetus for originalism in the first place.²⁹⁹ And it might even authorize judges to go further still. According to Randy Barnett: “[T]he original meanings of the Ninth Amendment and the Privileges or Immunities Clause offer far more justifiable and robust protection of personal liberty, for example, than do current approaches based on the Due Process [C]lauses.”³⁰⁰

The New Originalism is thus no more constraining than other theories of constitutional interpretation. And it may even be less constraining. Some nonoriginalist theories—common law constitutionalism and representation reinforcement come to mind—have their own constraining mechanisms that might well place more effective limits on judicial whim than does the New Originalism.³⁰¹

IV. OF SUBSTANCE AND SEMANTICS

As it has become more sophisticated (and less constraining), the New Originalism has developed a lexicon of its own, much of which is reflected throughout this Article. There is nothing inherently wrong with that; it helps to be precise when articulating complicated theoretical concepts, and developing a common

Solum concedes the possibility that open-ended clauses like the Privileges or Immunities Clause might be “radically ambiguous,” necessitating construction within a very wide range. *See Solum, supra* note 27, at 967. And he concedes that, “[i]f originalist theory requires this result, then it might undermine one of the normative justifications sometimes offered for originalism—that it constrains judicial discretion and reinforces the rule of law.” *Id.* But he suggests the possibility that these clauses may not be as radically ambiguous as they might first appear, because they might have been objectively understood at the time as terms of art. *Id.* at 968. The Privileges or Immunities Clause, for instance, might have been objectively understood as a commitment to a natural rights jurisprudence. *See id.* at 968–70. Even if that is so, however, it does little to constrain the Judiciary. *See JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 14–30, 34–41, 48–54 (1980) (arguing against reading the Constitution to allow judges to protect natural law rights on the ground that doing so would place far too much unbridled power in the hands of unelected judges).

299. *See Balkin, supra* note 78, at 449 (claiming that the Fourteenth Amendment’s broad language legitimizes the results in many major cases); Barnett, *supra* note 170, at 416 (“I share [Balkin’s] belief that many, though not all, of the most cherished progressive results can be supported by a proper use of this methodology.”); McConnell, *supra* note 75, at 1286 (claiming that his version of originalism would recognize the constitutional right to contraception); Perry, *supra* note 47, at 710 (arguing that the “modern constitutional decisions found most objectionable by Robert Bork and many others are, in the main, consistent with an originalist approach to constitutional adjudication”); *cf.* Balkin, *supra* note 71, at 559 (arguing that the welfare state and the civil rights revolution are “perfectly consistent” with originalism because they are legitimate “exercises in constitutional construction”).

300. Barnett, *supra* note 70, at 21.

301. *Cf.* Conkle, *supra* note 176, at 39–43 (“[Nonoriginalism] honor[s] majoritarian self-government and judicial objectivity to a considerable degree . . .”); Thomas W. Merrill, *Originalism, Stare Decisis and the Promotion of Judicial Restraint*, 22 CONST. COMMENT. 271, 277–82 (2005) (arguing that “a strong theory of precedent—and a correspondingly reduced role for originalist reasoning—will result in more judicial restraint”); Primus, *supra* note 160, at 214–15 (“[I]t would be extravagant to claim that attention to original meanings alone would yield less discretionary decisionmaking than, say, a jurisprudence that looked only at judicial precedents.”); Strauss, *supra* note 244, at 925–34 (arguing that common law constitutionalism is “superior to its competitors” with respect to addressing concerns with democracy and judicial constraint).

vocabulary can assist in that process. But such a lexicon can be misleading to outsiders—especially when it co-opts old terms and gives them new (or more refined) definitions. This Part seeks to identify two instances in which that has begun to happen with the New Originalism in ways that might obscure the central argument made in this Article.

A. FIXED AND CHANGING MEANINGS

I and others have previously referred to competing readings of the scope or mandate of constitutional provisions as different potential “meanings” of those provisions to argue that the very existence of those competing readings at the time of the framing indicates that there was no single original public meaning.³⁰²

This Article makes that same substantive point by employing different terminology. It argues that the existence of competing readings of the scope or mandate of constitutional provisions indicates that the original shared or objective “meaning” of those provisions must have been extremely broad and thus capable of being cashed out through any number of principles yielding any number of doctrinal applications.

These are two ways of articulating essentially the same argument. The latter just draws upon the rhetoric of the New Originalism, which relies on a different sense of the word “meaning.”³⁰³ The first way of phrasing the argument uses the word “meaning” as shorthand for the scope or mandate of the provision: the legal rule, principle, or standard that it enacts.³⁰⁴ And it concludes that there is

302. See Colby, *supra* note 18, at 535 (arguing that a constitutional provision dealing with controversial rights can only hope to gain the necessary supermajority support to pass when it is drafted in vague or ambiguous terms “so that, rather than possessing a single original meaning, it appeals to disparate factions with divergent understandings of its terms”); see also JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 6 (1996); Tushnet, *supra* note 176, at 610–11 (“History is replete with . . . ‘contested truths.’ These contests are precisely contests over conventional meaning. That is, give me an interesting term used in a constitution, and I will find a bunch of people at the time of its adoption who understood it to mean one thing, and a bunch of other people who understood it to mean something else.” (footnote omitted)).

303. See, e.g., Barnett, *supra* note 26, at 269 (“[O]riginal meaning can be determinate at a higher level of generality, while the application of this meaning to particular objects is left to the discretion of future decision makers.”). New Originalists have specifically discussed these different conceptions of the meaning of “meaning.” See *supra* note 95.

304. In the days of the Old Originalism, theorists on both sides of the debate tended to speak of constitutional “meaning” in this narrower sense—as a way of describing how the provision applies to particular cases. Thus, Raoul Berger equated the proper “meaning” of the Constitution with the original intent of the Framers as to its intended scope, BERGER, *supra* note 14, at 402, and labeled any decision that deviated from the Framers’ narrow intent or expectations as inconsistent with the true meaning of the Constitution. See *id.* at 403–04. Justice Brennan, by contrast, insisted on a very different “meaning” of the Constitution, but one that also focused on how it applies to modern issues:

[T]he ultimate question must be: What do the words of the text mean in our time? For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs.

Brennan, *supra* note 145, at 438.

no original “meaning” because the provision could be read to enact many different rules or principles, and thus, to have an undefined original mandate or scope. The second way of phrasing the argument uses the word “meaning” more broadly: It allows that a clause may have an original semantic “meaning” in the sense that it reflects some sort of concept, but one that is so abstract as to be unable to dictate a particular mandate or scope. Think of a political candidate who promises “better government.” In the first sense, that promise is “meaningless” blather because it does not commit the candidate to any particular course of action, nor does it offer any concrete proposals for improvement. In the second sense, the promise has meaning, but it still fails to articulate actual policy commitments.

It is too easy to get hung up in the semantics of this distinction—to fret over the proper meaning of “meaning” in constitutional interpretation. As it relates to the central thesis of this Article, nothing of substance turns on the way in which we define “meaning,” and by extension, on the way in which we articulate the basic point about the indeterminacy of originalism. When it comes to examining the constraining power of originalism, there is no distinction between saying on the one hand that there are multiple possible meanings rather than one single original meaning of a provision, and saying on the other hand that the provision’s original meaning is open-ended enough to be consistent with a huge number of possible rules, doctrines, and outcomes. Six of one, half dozen of the other. Either way, originalism does not meaningfully constrain judges.

But confusion may result because New Originalists tend to speak of “meaning” in a sense other than the previously prevailing one. This can give the appearance that we are all talking past one another when we are not; we are all talking about the same thing in slightly different terms.

In effect, the New Originalism replaces an old objection—originalism is impossible because there is no discoverable original meaning—with a new one—originalism fails to constrain because the original meaning is too indeterminate to decide most contentious cases. As a matter of substance, the two objections cover essentially the same ground. As a matter of theoretical legitimacy, however, there is a major difference between the two. The former objection, if true, rendered the Old Originalism a fraud. The latter objection, if true, does not defeat the New Originalism; it simply neutralizes its ability to promise constraint. This, again, is the fundamental truth of originalism: it can offer promise only through illegitimacy, or legitimacy only by foregoing promise. A necessary consequence of the theoretical sophistication of the New Originalism is its sacrifice of judicial constraint.

B. INTERPRETATION AND CONSTRUCTION

Most judges and constitutional theorists have traditionally viewed the process of fashioning constitutional doctrine and applying it to particular issues as a

process of constitutional “interpretation.”³⁰⁵ The New Originalism, however, distinguishes between constitutional “interpretation” and constitutional “construction,” and treats that process as a matter of construction, except perhaps where the constitutional language is so specific as to support only one outcome.³⁰⁶

This distinction can be a useful one, and it makes sense on its own terms. But it is not one that has generally been employed in our constitutional discourse. Most constitutional theorists either subsume the activity that New Originalists call “construction” within their definition of “interpretation,”³⁰⁷ or use the two terms interchangeably.³⁰⁸ Thus, there is again great potential for confusion, or for giving the impression that we are all talking past one another when we are not. We sometimes have to “translate” prior cases or monographs before we can relate them to the New Originalism. But when we do so, we can often find great insight into the open-ended nature of the New Originalism.

Consider the notorious case of *Home Building & Loan Ass’n v. Blaisdell*,³⁰⁹ a frequent object of scorn by originalists.³¹⁰ Chief Justice Hughes’ opinion for the Court, which upheld against a Contracts Clause³¹¹ challenge a state law that temporarily prevented mortgage holders from foreclosing on mortgages during the Great Depression, even though the Contracts Clause was apparently motivated by a desire to preclude precisely this sort of debtor relief legislation, has often been treated as a paragon of nonoriginalism.³¹² But if we read Hughes’ language with an anachronistic, New Originalist eye to terminology, it actually appears to be a paragon of the New Originalism rather than nonoriginalism:

When the provisions of the Constitution, in grant or restriction, are specific, so particularized as not to admit of construction, no question is presented. Thus, emergency would not permit a state to have more than two Senators in

305. See, e.g., 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 496 (1996) (“[T]he same interest that supports regulation of potentially misleading advertising, namely, the public’s interest in receiving accurate commercial information, also supports an interpretation of the First Amendment that provides constitutional protection for the dissemination of accurate and nonmisleading commercial messages.”); *Ford v. Wainwright*, 477 U.S. 399, 405 (1986) (“Since this Court last had occasion to consider the infliction of the death penalty upon the insane, our interpretations of the Due Process Clause and the Eighth Amendment have evolved substantially.”).

306. See *supra* section I.G.

307. See BARBER & FLEMING, *supra* note 221, at 97 (noting that under the New Originalism, “construction” does the work that “interpretation” does under the authors’ constitutional theory).

308. See *id.* (“The terms ‘construction’ and ‘interpretation’ are freely used as synonyms for each other in *The Federalist* and throughout constitutional history and commentary before Whittington.”).

309. 290 U.S. 398 (1934).

310. See, e.g., Raoul Berger, *An Anatomy of False Analysis: Original Intent*, 1994 *BYU L. REV.* 715, 721 (agreeing with Richard Epstein that *Blaisdell* “contains some of the most misguided thinking on Constitutional interpretation imaginable”); Steven G. Calabresi, *The Tradition of the Written Constitution: A Comment on Professor Lessig’s Theory of Translation*, 65 *FORDHAM L. REV.* 1435, 1449 n.53 (1997) (arguing that *Blaisdell* cannot be defended on originalist grounds).

311. U.S. CONST. art. I, § 10, cl. 1 (“No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . .”).

312. See, e.g., Greene, *supra* note 25, at 677–78, 678 n.112; Lund, *supra* note 176, at 1369–70.

the Congress, or permit the election of President by a general popular vote without regard to the number of electors to which the States are respectively entitled, or permit the States to “coin money” or to “make anything but gold and silver coin a tender in payment of debts.” But, where constitutional grants and limitations of power are set forth in general clauses, which afford a broad outline, the process of construction is essential to fill in the details.³¹³

The Court went on to examine the framing history and underlying principles of the Contracts Clause, but made clear that “full recognition of the occasion and general purpose of the clause does not suffice to fix its precise scope.”³¹⁴

The Court ultimately reached a conclusion that it believed, in New Originalist fashion, to be the most consistent with the language and underlying purposes of the Clause as applied to modern circumstances (here, one must substitute the word “construction” for the word “interpretation,” and one must be aware of the different uses of the term “meaning,” in order to translate the passage):

It is no answer to say that this public need was not apprehended a century ago, or to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time. If by the statement that what the Constitution meant at the time of its adoption it means to-day, it is intended to say that the great clauses of the Constitution must be confined to the interpretation [read: construction] which the [F]ramers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation. It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning: “We must never forget, that it is a constitution we are expounding”; “a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs.”³¹⁵

This passage rejects the proposition that the Constitution’s “meaning” should be understood in the narrow sense of its scope or mandate, endorsing instead the view that the Constitution’s “meaning” is broader and more abstract. Responding to Justice Sutherland’s dissent, which sounded in the rhetoric of the Old Originalism,³¹⁶ the Court—again in New Originalist fashion—recognized the “fine distinction between the intended meaning of the words of the Constitution and their intended application,” though it ultimately found no need to rely on that distinction in the instant case because there was “no warrant” for believing

313. *Blaisdell*, 290 U.S. at 426.

314. *Id.* at 428.

315. *Id.* at 442–43 (citation omitted) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407, 415 (1819)).

316. *See id.* at 448–53 (Sutherland, J., dissenting). Justice Sutherland’s dissent nicely illustrates that the terms “interpretation” and “construction” have not traditionally been distinguished in constitutional law. *See id.* at 453 (“The whole aim of construction, as applied to a provision of the Constitution, is to discover the meaning, to ascertain and give effect to the intent of its framers and the people who adopted it.”).

that the Framers “would have interpreted the clause differently had they had occasion to assume that responsibility in the conditions of the later day.”³¹⁷

When its apparent methodological compatibility with the New Originalism is recognized, *Blaisdell* might serve as an illustration of the inability of the New Originalism to constrain judges or obviate outcomes despised by many champions of originalism.

V. ORIGINALIST RESPONSES

How have originalists dealt with originalism achieving theoretical sophistication only by sacrificing the promise that made it appealing in the first place?

For some New Originalists, this truth is not especially troublesome. Many of the most prolific New Originalists—and the ones who have pushed the theory the furthest in the directions outlined above—have never been particularly interested in judicial constraint. They were drawn to originalism by its theoretical attractiveness, not by the results that it promised. Indeed, some of them are more than happy to see judges use originalism to liberal or libertarian ends.³¹⁸ To them, the flexibility that comes from higher levels of generality “is not a bug” of originalism; rather, “[i]t’s a feature.”³¹⁹ Some of these theorists were, in fact, once nonoriginalists.³²⁰ It was only when originalism began to move in the New direction that they came to embrace it. It was the theoretical appeal that brought them on board, and they shed no tears for the constraint that was sacrificed along the way.

But most originalists who have endorsed the New Originalism to any degree are not willing to admit its consequences. They continue to insist that originalism is meaningfully constraining—to make the promise of constraint³²¹—because to do otherwise would undermine their entire constitutional worldview and the very mission of their theory. “The core of originalism,” they insist, “is the proposition that text and history impose meaningful, binding constraints on interpretive discretion.”³²² Thus, they are highly skeptical of some of the more progressive New Originalists and their open insistence on the flexibility of

317. *Id.* at 443 (majority opinion).

318. See, e.g., RANDY BARNETT, *THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW passim* (1998) (outlining a philosophy of libertarianism); Barnett, *supra* note 170, at 405 (noting that Jack Balkin is a “progressive constitutional theorist[]”); Perry, *supra* note 57, at 86 (describing himself as “an apologetic and unreconstructed” “constitutional progressive”); Smith, *supra* note 5, at 11 (noting that “Balkin sacrifices little or nothing by the conversion” to originalism).

319. Barnett, *supra* note 70, at 23; see also Barnett, *supra* note 2, at 645 (arguing that the “lack of determinacy” that comes from high levels of abstraction is “one of the well-known virtues of this particular writing”).

320. See Barnett, *supra* note 170, at 405 (stating that “[he] considered [him]self a nonoriginalist” and noting that Jack Balkin was once a nonoriginalist); Farber, *supra* note 52, at 1086 (describing Michael Perry as “a leading non-originalist”).

321. See *supra* notes 227–42 and accompanying text.

322. Lund, *supra* note 176, at 1372.

originalism.³²³ They insist that the New Originalism has achieved theoretical sophistication and defensibility without having sacrificed its potential for meaningful constraint.

Their efforts to deny the sacrifice have taken four forms: (1) the adoption of theories of constitutional construction that deny a role for *judges* in choosing among the various outcomes that are consistent with the open-ended original meaning; (2) a refusal to go along with (or a failure to acknowledge) some of the flexibility-creating New Originalist theoretical moves; (3) a failure to follow through in practice on a commitment in theory to some of the New Originalist moves; and (4) an insistence that the original, objective public meaning of the major constitutional rights provisions is actually remarkably narrow.

None of these strategies succeeds.

A. ARTICULATING NARROW THEORIES OF CONSTRUCTION

Some New Originalists have sought to avoid the nonconstraining implications of the New Originalism by advocating theories of constitutional construction that disavow judicial discretion. They recognize that the constitutional rights provisions are drafted in broad terms capable of supporting many different outcomes, but they insist that so long as a law or governmental action is consistent with the open-ended original meaning—so long as it falls within the broad range of supportable outcomes—judges must sustain it. Constitutional construction is a job for the political branches, not the courts. Keith Whittington, for instance, argues that where the original public meaning is broad enough to accommodate competing outcomes, “historically inherited restraints on current majorities do not exist.”³²⁴ As such, it is the political branches who should determine “how constitutional meaning is shaped so as to accommodate contemporary political needs and desires.”³²⁵ Constitutional “construction alleviates the pressure on the [J]udiciary to provide and account for all the flexibility that might exist in the Constitution.”³²⁶

This is a viable political theory. But by definition under the New Originalist lexicon, it is not an effort at constitutional interpretation; it is instead a decision about what to do when the Constitution, fairly interpreted, does not yield an

323. See Smith, *supra* note 5, at 14 (“Old-time originalists might naturally be suspicious of the announced conversions of dubious characters like Balkin (and Randy Barnett, and Michael Perry), and they might try to exclude these would-be converts from the fold . . .”); sources cited *supra* note 206.

324. WHITTINGTON, *supra* note 44, at 206.

325. *Id.* at 205.

326. *Id.* at 204. Other originalists have made essentially the same point without embracing the language of “constitutional construction.” See, e.g., Kesavan & Paulsen, *supra* note 26, at 1129 n.54 (arguing that where “there is a range of indeterminacy, even applying correct interpretive methods. . . there is no basis for the courts to invalidate the political branches’ choice” (citation omitted)); Paulsen, *supra* note 100, at 2057–58 (admitting that the “interesting and difficult cases concern the periphery,” but arguing that because in such cases the Constitution is “actually indeterminate (or underdeterminate) as to the specific question at hand,” the “court has no basis for displacing the rule supplied by” a democratically enacted statute).

answer.³²⁷ As such, it is a political choice, not a course of action mandated by a commitment to original public meaning. Judges could just as easily, and just as consistently with the original meaning of the Constitution, choose other theories of construction—some of which contemplate a much greater role for the Judiciary.³²⁸ Thus, the essential truth remains: The New Originalism allows judges to choose discretion-limiting theories of construction, but it also allows them to choose discretion-granting theories. It does not constrain them.

One could no doubt articulate structural arguments in service of a claim that this narrow theory of construction actually *is* mandated by the Constitution—arguments emphasizing the unelected nature of the Judiciary.³²⁹ But because those arguments would not depend upon the meaning of the constitutional text (which is silent on the issue), they would not sound squarely in the New Originalism.³³⁰ Nor would they be particularly good historical arguments, insofar as there is strong evidence that the Framers understood the Constitution to contemplate a substantial role for the courts in resolving constitutional indeterminacy.³³¹

B. DECLINING TO ENDORSE THE FULL NEW ORIGINALIST PACKAGE

A second way in which some originalists have arguably mitigated the consequences of theoretical evolution is by stopping short of endorsing the full New Originalist theoretical package. That is to say, some originalists have accepted some of the New Originalist theoretical moves, but not others (sometimes

327. See *supra* section I.G.

328. Randy Barnett would adopt a “Presumption of Liberty” that would empower an active Judiciary. See Barnett, *supra* note 26, at 264–65. Jack Balkin would adopt “living constitutionalism” as his preferred theory of construction—thus reconciling originalism with its archnemesis. See Balkin, *supra* note 71, at 559–60.

329. Cf. Calabresi, *supra* note 46, at 1091–94 (rejecting Barnett’s presumption of liberty construction because its active role for the Judiciary seems inconsistent with the overall constitutional structure); Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289, 296 n.18 (2005) (declaring that “a decision invalidating political action where the constitutional text is vague or ambiguous (in the sense of failing to yield a determinate rule of law) . . . is incorrect on originalist grounds” and “corrupts the interpretive theory of originalism”). Lynn Baker notes that these arguments tend to be undertheorized—relying merely on abstract notions of “majoritarianism.” See Lynn A. Baker, *Constitutional Ambiguities and Originalism: Lessons from the Spending Power*, 103 NW. U. L. REV. 495, 496, 499–503 (2009).

330. The potential exception here is Michael Stokes Paulsen, who has recently argued that “the Constitution’s text itself suggests . . . a default rule of interpretation where the constitutional text is unspecific: popular republican self-government.” See Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, 103 NW. U. L. REV. 857, 881–82 (2009).

331. See THE FEDERALIST NO. 37, at 229 (James Madison) (Clinton Rossiter ed., 1961) (“All new laws, though penned with the greatest technical skill and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications.”); Peter J. Smith, *The Marshall Court and the Originalist’s Dilemma*, 90 MINN. L. REV. 612, 624 (2006) (arguing that “the ratification debates suggest something of a consensus (at least between the warring Federalist and Anti-Federalist camps) that case-by-case adjudication in the courts would play a central role in assigning fixed constitutional meaning when the text of the Constitution was ambiguous”).

explicitly rejecting them, more often simply not acknowledging or engaging them). Justice Scalia, for instance, has championed the move from original intent to original meaning,³³² but has not said much about most of the other New Originalist moves. Justice Thomas is even further behind; he has not even consistently or explicitly acknowledged that the proper search is for the original public meaning rather than the original intent of the Framers.³³³ Other originalists have endorsed original meaning, but seemingly continue to favor original expected application.³³⁴ And still others have endorsed original meaning, and rejected original intent and original expected application, but have not yet bought into the notion that the proper search is for the objective understandings of a hypothetical observer; these originalists continue to search for the actual understandings of the actual ratifiers or public.³³⁵

These intermediate approaches can allow an originalist to find (or at least claim to find) a historically determined meaning at a narrower level of generality than the text would objectively dictate, which can then be used to place greater constraints on judicial discretion.³³⁶ But these approaches do not mitigate the originalists' quandary so much as they exemplify it. The New Originalist moves strengthen originalism and make it a more viable and defensible theory.³³⁷ The fewer of these moves that an originalist accepts, the less theoretically sound her theory.³³⁸ The more she refuses to sacrifice constraint, the less she can claim sophistication.

C. FAILING TO WALK THE WALK

Sometimes, originalists will accept the New Originalist moves in theory, but then turn around and not actually employ them in practice. Justice Scalia, for

332. See *supra* notes 210–12 and accompanying text.

333. See Colby & Smith, *supra* note 24, at 300–02 (noting that Justice Thomas “seems not to contemplate any distinction among original intent, original understanding, and original textual meaning”); cf. Gregory E. Maggs, *Which Original Meaning of the Constitution Matters to Justice Thomas?*, 4 N.Y.U. J.L. & LIBERTY 494, 511–14 (2009) (hypothesizing that Justice Thomas seeks the “general original meaning” of the Constitution by searching for agreement among sources of original intent, original understanding, and original objective meaning).

334. See John O. McGinnis & Michael Rappaport, *Original Interpretive Principles as the Core of Originalism*, 24 CONST. COMMENT. 371, 378–81 (2007) (arguing in favor of giving heavy weight to original expected application).

335. See, e.g., Lash, *supra* note 45, at 338–40; McConnell, *supra* note 75, at 1280.

336. See, e.g., *supra* note 280 and accompanying text (discussing equal protection).

337. See *supra* Part II.

338. In a provocative recent article, John McGinnis and Michael Rappaport refuse to accept the distinction between interpretation and construction, arguing that even seemingly vague and ambiguous constitutional provisions can nonetheless be “interpreted” to produce proper narrow outcomes by employing settled interpretive methods that were in place at the time of the framing—methods that will dictate narrow answers to specific questions. See McGinnis & Rappaport, *supra* note 136, at 751–54. This is a bold assertion given the profoundly open-ended nature of much of the constitutional text, and McGinnis and Rappaport still have much work to do to back it up. Indeed, Caleb Nelson has found that there was no agreement among the framing generation as to the proper interpretive conventions. See Nelson, *supra* note 170, at 560–78; see also Cornell, *supra* note 172, at 1101 (arguing that “the Founders disagreed over the proper methodology for reading constitutional texts”).

instance, has claimed to reject original expected application. He insists that an originalist owes fidelity to “what the text would reasonably be understood to mean,” not the “concrete expectations of the lawgivers.”³³⁹ But in practice, he often employs the very expectations jurisprudence that he claims to have disavowed.³⁴⁰ The same can perhaps be said of Steven Calabresi, who has insisted that “[w]hat judges must be faithful to is the enacted law, not the expectations of the parties who wrote the law,”³⁴¹ but who has criticized Randy Barnett for reading the broad language of the Constitution in a way that contravenes the narrow expectations of the Framers.³⁴²

The consequences of the New Originalism cannot be avoided with smoke and mirrors. Originalists cannot have it both ways, simultaneously articulating a theory that sounds sophisticated while applying a theory that is constraining only by abandoning that sophistication.

D. DENYING THE (SEEMINGLY) OBVIOUS

Finally, some originalists seek to avoid the consequences of the New Originalism by insisting that the objective, original public meaning of the Constitution’s major rights clauses is much less abstract than this Article has suggested. Thus, they argue, constitutional interpretation is substantially more determinate (and therefore constitutional construction is markedly more constrained) than one might think.³⁴³ If this claim were true, then it would indeed negate the sacrifice—it would make the New Originalism both theoretically sophisticated and functionally constraining.³⁴⁴ But originalists have done little to inspire confidence in it.

Although various originalists have made this claim with regard to just about every constitutional right,³⁴⁵ the brief discussion here will focus on the recent work of Steven Calabresi, as he is the long-time originalist who has most

339. Scalia, *supra* note 212, at 144.

340. For detailed substantiation of this point, see Balkin, *supra* note 82, at 295–97; Berman, *supra* note 100, at 386 & n.21; Thomas B. Colby, *A Constitutional Hierarchy of Religions? Justice Scalia, the Ten Commandments, and the Future of the Establishment Clause*, 100 *Nw. U. L. REV.* 1097, 1132–38 (2006); Colby & Smith, *supra* note 24, at 296–97; Green, *supra* note 87, at 556–58; Greenberg & Litman, *supra* note 99, at 574–82; Koppelman, *supra* note 97, at 733–40.

341. Calabresi & Fine, *supra* note 70, at 669.

342. See Calabresi, *supra* note 46, at 1085 (“There is simply no way to argue that the [F]ramers of the Fourteenth Amendment would have understood sodomy or abortion as a privilege or immunity. Nor would the [F]ramers of the Ninth Amendment have understood the rights retained by the people as including a right to engage in sodomy or to have an abortion.”).

343. See, e.g., *District of Columbia v. Heller*, 554 U.S. 570, 604–05 (2008) (“Justice Stevens’ view thus relies on the proposition . . . that different people of the founding period had vastly different conceptions of the right to keep and bear arms. That simply does not comport with our longstanding view that the Bill of Rights codified venerable, widely understood liberties.”).

344. With one significant exception: the dead-hand objection would retake center stage, and for many people, would eliminate any claim to theoretical legitimacy.

345. See, e.g., *Rutan v. Republican Party*, 497 U.S. 62, 95 n.1 (1990) (Scalia, J., dissenting) (claiming that the meaning of the Equal Protection Clause is unambiguous and clearly forbids segregation); Paulsen, *supra* note 100, at 2047–48 (insisting on a clear textual meaning of the Ninth

directly engaged the cutting edge of the New Originalism.³⁴⁶ For the most part, Calabresi accepts the New Originalist methodology, but he insists that as a matter of original, objective public meaning, provisions like “the Privileges or Immunities, Equal Protection, and Due Process Clauses all have very determinate content.”³⁴⁷

Consider first the Privileges or Immunities Clause. Judge Bork famously dubbed this a provision “whose meaning is largely unknown” and “cannot be ascertained.”³⁴⁸ But Calabresi (along with co-author Livia Fine) reaches the rather remarkable conclusion that, “[i]n its own way, the Privileges or Immunities Clause is as specific in meaning as the requirement that the President be at least thirty-five years old.”³⁴⁹ Its words—“[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States”³⁵⁰—somehow plainly mean that all citizens must enjoy the same fundamental and common law rights as white citizens enjoyed at the time of its enactment.³⁵¹ Thus, it is actually very determinate, and it justifies (ever so conveniently) many of the modern Supreme Court’s most universally celebrated decisions, including *Loving v. Virginia*.³⁵² Calabresi writes:

Did one white citizen enjoy a common law or fundamental right to marry another white citizen of the opposite sex in 1868? Of course he or she did. . . . If a white citizen has a right to marry another white citizen then an African American must enjoy “the same right.” . . . The text compels this answer.³⁵³

Really? One could just as easily rephrase the inquiry: “Did one white citizen enjoy a common law or fundamental right to marry a person of another race? Of course she didn’t. If a white person does not have a right to marry a person of another race then an African American does not enjoy that same right either. The text compels this answer.” Why is that reasoning any more or less compelled by the text than Calabresi’s? The result in *Loving* was indeed compelled by many things—morality, equality, precedent—but the plain, objective, unambiguous meaning of the text of the Privileges or Immunities Clause (which nowhere even mentions race, marriage, or equality, and which was not relied upon by the *Loving* Court) is not one of them. That result is *permitted* by the open-ended objective meaning of the Privileges or Immunities Clause (or the

Amendment and declaring that a view of that Amendment as allowing judges to protect unenumerated rights “is simply not textually defensible”).

346. See Calabresi, *supra* note 46, *passim* (challenging Randy Barnett’s understanding of originalism); Calabresi & Fine, *supra* note 70 (suggesting refinements to Jack Balkin’s theory of originalism).

347. Calabresi & Fine, *supra* note 70, at 665 (footnotes omitted).

348. BORK, *supra* note 15, at 39, 166.

349. Calabresi & Fine, *supra* note 70, at 694–95.

350. U.S. CONST. amend. XIV, § 1, cl. 2.

351. See Calabresi & Fine, *supra* note 70, at 694–95.

352. 388 U.S. 1, 8, 12 (1967) (striking down a ban on interracial marriage).

353. Calabresi & Fine, *supra* note 70, at 670 (footnote omitted).

Equal Protection Clause, or the Due Process Clause), but it is hardly compelled by it. Calabresi's insistence that the deeply capacious language of the Privileges or Immunities Clause is capable of only one narrow, determinate meaning is simply not plausible. If proof is needed for that assertion, consider that at the end of the sentence implausibly declaring that this Clause has a meaning as specific as the presidential age limitation, Calabresi drops a footnote with a "but see" citation to a recent originalist law review article that posits a very different (and much broader) original meaning of that same clause. The author of that article? Steven Calabresi.³⁵⁴

The same basic point can be made about Calabresi's discussion of the Equal Protection and Due Process Clauses. Calabresi insists that the plain, objective meaning of the Equal Protection Clause is simply that the states must enforce their generally applicable, neutrally written laws in a way that does not discriminate against classes of citizens; contrary to over a century of conventional wisdom, the Clause does not forbid the making of unequal laws.³⁵⁵ For this proposition, Calabresi cites the work of John Harrison.³⁵⁶ Harrison, however, was much more modest in his conclusions, admitting that the task of interpreting the Equal Protection Clause "is not easy," and offering his reading only as the "best" one—as "probably" correct—not as clearly and unambiguously correct.³⁵⁷

Similarly, Calabresi rejects the "oxymoron" of substantive due process with the *ipse dixit* that the Due Process Clauses "simply have no application to legislative deprivation, and they are not at all vague or open-ended on this point."³⁵⁸ But even John Harrison, Calabresi's sole source for the meaning of

354. The article was cowritten with Sarah Agudo. *See id.* at 695 n.160 (citing Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7, 88 (2008) (providing evidence that the Privileges or Immunities Clause may have constitutionalized broad protection for natural and inalienable rights)). In addition, numerous originalist scholars have recently proposed still other original meanings of the Privileges or Immunities Clause. *See, e.g.*, Philip Hamburger, *Privileges or Immunities*, 105 NW. U. L. REV. (forthcoming 2011) (arguing that the original meaning of the Clause was to guarantee Comity Clause rights to free blacks); Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part II: John Bingham and the Second Draft of the Fourteenth Amendment*, 99 GEO. L.J. 329 (2011) (providing evidence that the Clause's author understood it to incorporate only enumerated rights against the states); Christopher R. Green, *The Original Sense of "Of" in the Privileges or Immunities Clause* 87–114 (2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1658010 (presenting evidence of original meaning suggesting that the Clause is, at least in part, an equal citizenship guarantee); *cf.* McDonald v. City of Chicago, 130 S. Ct. 3020, 3089 & n.2 (2010) (Stevens, J., dissenting) (noting the lack of consensus among legal scholars as to the original meaning of the Clause); Lawrence Rosenthal, *The New Originalism Meets the Fourteenth Amendment: Original Public Meaning and the Problem of Incorporation*, 18 J. CONTEMP. LEGAL ISSUES 361, 365–400 (2009) (arguing that historical argument cannot establish a single original public meaning of the Clause).

355. *See* Calabresi & Fine, *supra* note 70, at 695.

356. *See id.* (citing John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385 (1992)).

357. Harrison, *supra* note 356, at 1448, 1450.

358. Calabresi & Fine, *supra* note 70, at 692.

the Equal Protection Clause, has concluded that that there is a powerful originalist case to be made for the proposition that the substantive due process doctrine is consistent with the original meaning of the Due Process Clauses—a case that other originalists have carefully and thoughtfully made.³⁵⁹

This is not the place to attempt to conclusively establish the meaning of these various clauses. The point here is simply that it is highly implausible that, even after careful historical investigation, one could confidently tease such narrow “objective” meanings from the text, taken at the level of generality naturally suggested by its broad words.³⁶⁰ Even the Old Originalists recognized this fact—which is why they insisted on a jurisprudence of narrow original intent and expectations. In Raoul Berger’s words:

Resort to original intention is required if only because some words in the Constitution are susceptible of an enormous range of meaning. One has only to think of equal protection, for example. It means so much that one commentator says it means nothing. Unless limited by the original intention, those words serve as a crystal ball from which a judge, like a soothsayer, can draw forth anything he wants.³⁶¹

The reality of the New Originalism cannot be defeated by wishfully turning a blind eye to the generality of the very text by which originalists claim to be bound.

CONCLUSION

This Article has sought to highlight an unheralded and ironic consequence of the emergence of the New Originalism. Whereas the Old Originalism promised constraint but lacked respectability, the New Originalism has achieved respectability, but only by sacrificing constraint. It is not possible for an originalist theory to have both at the same time.

This phenomenon is not just bedeviling; in practice, there is something illicit about it. The Old Originalism arose simultaneously in both the academy and the broader public discourse. At the same time that originalist scholars and judges were first articulating their theory in monographs and judicial opinions, originalism “emerged as a new and powerful kind of constitutional politics in which claims about the sole legitimate method of interpreting the Constitution inspired conservative mobilization in both electoral politics and in the legal profession.”³⁶² Scholarly originalists claimed fidelity to original intent as a means of constraining “activist” judges, and the conservative political movement quickly jumped on board. Originalism was both an academic theory and popular rallying cry.

359. See *supra* note 255 and accompanying text.

360. See *supra* notes 105–11 (discussing the open-ended nature of many constitutional provisions).

361. Berger, *supra* note 84, at 351.

362. Post & Siegel, *supra* note 21, at 548.

But the political and the intellectual histories of originalism have diverged.³⁶³ The academic portrait of a jurisprudence of original intent capable of purging judicial subjectivity from the process of constitutional adjudication was quickly demolished in law reviews. Yet, that ivory tower criticism has generally not penetrated the popular consciousness. The Old Originalism was murdered, but it will not die.³⁶⁴ Mitchell Berman argues that originalism is “pernicious because of its tendency to be deployed in the public square—on the campaign trail, on talk radio, in Senate confirmation hearings, even in Supreme Court opinions—to bolster the popular fable that constitutional adjudication can be practiced in something close to an objective and mechanical fashion.”³⁶⁵

If anything, Berman understates the perniciousness. Originalism is generally no longer deployed in this way in the academy—by those who actually define and defend it intellectually—but it continues to be deployed in this way in the public arena.³⁶⁶ In the academic world, originalism has evolved into a theory that affords significant discretion to judges. But in the public arena, it is still portrayed by the likes of Rush Limbaugh as a panacea for judicial activism:

The only antidote to this kind of judicial activism is the conservative judicial philosophy known as Originalism. As Supreme Court Justice Clarence Thomas explained in a February 2001 speech to the American Enterprise Institute: “The Constitution means what the delegates of the Philadelphia Convention and of the state ratifying conventions understood it to mean; not what we judges think it should mean.” Hallelujah.

Originalism means not molding the Constitution to fit your political and social beliefs. It means not citing foreign law to support your preferences. It means not imposing your personal policy whims on society via judicial fiat.³⁶⁷

363. Cf. Jamal Greene, Nathaniel Persily, & Stephen Ansolabehere, *Profiling Originalism* 3 (Dec. 2, 2010) (unpublished manuscript), available at http://www.law.yale.edu/documents/pdf/Intellectual_Life/Persily.Yale.pdf (“[I]t is not clear that frequent invocations of the founding fathers or original intent on cable news, on talk radio, or even at Supreme Court confirmation hearings has much at all to do with the serious work of historians and legal scholars.”).

364. Cf. Smith, *supra* note 48, at 161 (“The deeper reason that Originalism will not die, I think, is that it has staked out the moral high ground, championing the *objectivity* of interpretation that is essential to the ideal of the rule of law.”).

365. Berman, *supra* note 163, at 8.

366. Cf. Greene, *supra* note 192, at 10 (noting that the distinction between interpretation and construction is “fastidiously maintained in academic literature but generally unexpressed in judicial opinions or public discourse”); Greene, *supra* note 25, at 662 (noting that “the political rhetoric associated with originalism does not distinguish between” original intent and original meaning); Todd E. Pettys, *The Myth of the Written Constitution*, 84 NOTRE DAME L. REV. 991, 1011 (2009) (discussing the distinction between interpretation and construction and noting that even though “originalism has grown continually more sophisticated in scholarly circles . . . [it] certainly does not mean that popular conceptions have kept pace”).

367. *Limbaugh Fundamentals: What Is Originalism?*, RUSHLIMBAUGH.COM, <http://www.rushlimbaugh.com/home/menu/limfunoriginalism.guest.html> (last visited Oct. 8, 2010).

Originalism seems to be having its cake and eating it too. It is both a respectable academic theory and a popularly celebrated antidote for judicial activism, even though it is impossible for an originalist theory to be both. Originalism is cheating. It is overcoming its sacrifice by ignoring it.³⁶⁸

368. Efforts to bring the sacrifice to the attention of the public will likely prove difficult. *See* Greene, Persily, & Ansolabehere, *supra* note 363, at 33 (noting that surveys of the public show that endorsement of originalism correlates closely with opposition to *Roe v. Wade*, and suggesting that “a kind of cognitive dissonance may hinder efforts to sever the link between methodology and result,” and thus, “[s]cholars like Jack Balkin who have tried to advance an originalist argument for abortion rights may be fruitlessly inserting a legal argument into the culture wars”).