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2011

## How Different are Originalism and Non-Originalism?

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## How Different Are Originalism and Non-Originalism?

PETER J. SMITH\*

*Several prominent and self-described “new originalists” have begun to contend that the objective original meaning of many of the Constitution’s provisions should be ascertained at a very high level of generality. They have also urged recognition of a distinction between constitutional “interpretation,” which involves the determination of the meaning of the constitutional text, and constitutional “construction,” which involves the formulation of legal rules to apply the text to concrete situations. These scholars have noted that because the constitutional text often is phrased at a very high level of generality, originalist interpretation alone simply cannot answer many difficult questions of constitutional law, and thus courts must formulate rules that are not themselves dictated by the original meaning.*

*If this is what originalism entails, then there is no obvious distinction, at least in practice and possibly in theory, between new originalism and non-originalism. After all, most non-originalists treat the original meaning as the starting point for any interpretive inquiry, but are willing to look elsewhere—to history, precedent, structure, and policy, among others—to construct constitutional meaning when the text is vague or indeterminate.*

*All of this naturally leads one to question how different originalism and non-originalism really are. The short answer is that it depends on whom we ask, because not every originalist—indeed, not even every “new originalist”—accepts these recent modifications to originalist thinking. Given modern originalism’s origins as a response to the perceived excesses of non-originalism, it is not surprising that many originalists have resisted refinements to the theory that would tend to collapse the distinction between originalism and non-originalism. But the growing rift among originalists poses a greater risk to originalism than the mere prospect of intramural disagreement. Much of the force of the case for originalism has long derived from its claims to neutrality and objectivity. As the originalist tent grew, embracing scholars with a broad range of substantive commitments, these claims became perhaps more plausible. But originalists’ rejection of the claims of the “new new originalists”—claims that follow quite naturally, even if not inevitably, from the important refinements of new originalism itself—and their continuing insistence on an approach to constitutional interpretation that usually produces substantively conservative results have threatened once again to undermine their claims to neutrality and objectivity.*

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## INTRODUCTION

Modern originalism arose as a reaction to the Supreme Court's expansive interpretations of the Constitution's rights-granting provisions.<sup>1</sup> Critics of the Court began to urge fidelity to original intent as a way to constrain the Justices' ability to read their policy preferences into the Constitution.<sup>2</sup> Although early originalists such as Robert Bork and Raoul Berger sought to offer an affirmative justification for this approach, early originalism's most appealing feature, at least to its proponents, was simply that it was not non-originalism, the approach that had produced a right to privacy<sup>3</sup> and a broad range of rights for persons accused of crimes.<sup>4</sup>

Originalism has evolved a great deal since Bork's and Berger's initial defenses. The "old originalism," which tended to focus on the intent of the Framers and was largely a negative theory developed to criticize the decisions of the Warren and Burger Courts, has been mostly displaced by the "new originalism," which tends to focus on the objective meaning of the constitutional text and seeks to provide a positive basis for constitutional decisionmaking.<sup>5</sup> To be sure, this evolution was not linear, and at any given moment in the last forty years, there have been multiple, and often competing, versions of originalism.<sup>6</sup> But if nothing else, originalism has consistently evolved as originalists have refined their approach to respond to criticism and to achieve greater theoretical coherence.

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1. See *infra* Part I.

2. See *infra* Part I.

3. See *Griswold v. Connecticut*, 381 U.S. 479, 499 (1965).

4. See, e.g., *Miranda v. Arizona*, 384 U.S. 436, 498 (1966).

5. See Vasana Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1134-48 (2003); Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 599-610 (2004); *infra* notes 38-50 and accompanying text.

6. See Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 241, 242 (2009).

The academic debate about originalism remains vibrant and dynamic, and the theoretical case for originalism is more nuanced now than ever before. So nuanced, in fact, that—at least as described by several prominent originalists—originalism is no longer very different, either in theory or in application, from non-originalism.

Consider two recent and notable developments in the academic debate over originalism. First, several prominent and self-described new originalists have begun to contend that the objective original meaning of many of the Constitution's provisions—including the broad rights-granting provisions in the Fourteenth Amendment—should be ascertained at a very high level of generality.<sup>7</sup> Second, some new originalists have urged recognition of a distinction between constitutional interpretation, which involves the determination of the meaning of the constitutional text, and constitutional construction, which involves the formulation of legal rules to apply the text—particularly when it is vague or open ended—to concrete situations.<sup>8</sup> Originalism, they have noted, is merely a theory of interpretation, and because the constitutional text often is phrased at a very high level of generality, originalist interpretation alone simply cannot answer many difficult questions of constitutional law.<sup>9</sup> These originalists, accordingly, have argued that courts must formulate rules that are not themselves dictated by the original meaning, a process that necessarily “requires an act of creativity beyond interpretation.”<sup>10</sup> These originalists have readily acknowledged that the consequence of this focus on broader levels of generality and the frequent need for construction is that, in practice, judges have substantial discretion to identify rights in light of the Constitution's broad principles.<sup>11</sup> Because these theorists have, in pressing these arguments about originalism, taken the claims of other new originalists to a logical but novel conclusion, I call these theorists the “new new originalists.”

If, as the new new originalists contend, an originalist judge's obligation is to seek the original meaning of abstractly expressed text at a high level of generality—essentially divining the general principle that animates the text—and to formulate doctrine that seeks to apply that principle to modern circumstances—a process that inevitably permits a range of possible outcomes—then there is no obvious distinction, at least in practice and possibly in theory, between new new originalism and non-originalism. After all, most non-originalists treat the original meaning as

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7. See *infra* notes 52–53 and accompanying text.

8. See *infra* notes 54–64 and accompanying text.

9. See *infra* notes 54–64 and accompanying text.

10. KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 7 (1999).

11. See *infra* note 53 and accompanying text.

the starting point for any interpretive inquiry, but are willing to look elsewhere—to history, precedent, structure, and policy, among others—to construct constitutional meaning when the text is vague or indeterminate.<sup>12</sup>

All of this naturally leads one to question how different originalism and non-originalism really are. The short answer is that it depends on who we ask, because not every originalist—indeed, not even every “new originalist”—accepts these recent modifications to originalist thinking. Some originalists (including many self-described new originalists) agree in theory that judges should sometimes seek the original meaning at a high level of generality, but nevertheless conclude that, in fact, the Constitution generally contains limited and determinate provisions that accordingly do not confer broad discretion on judges.<sup>13</sup> Other originalists reject these moves altogether, concluding that judges should seek the original meaning at a high level of specificity, and that unconstrained construction is inconsistent with any proper theory of originalist decisionmaking.<sup>14</sup> To both these groups of originalists, originalism and non-originalism remain quite different, both in theory and in practice.

Given modern originalism’s origins as a response to the perceived excesses of non-originalism, it is not surprising that many originalists have resisted refinements to the theory that would tend to collapse the distinction between originalism and non-originalism. But the growing rift among originalists poses a greater risk to originalism than the mere prospect of intramural disagreement. Much of the force of the case for originalism has long derived from its claims to neutrality and objectivity.<sup>15</sup> As the originalist tent grew, embracing scholars with a broad range of substantive commitments, these claims became perhaps more plausible. But originalists’ rejection of the new new originalists’ claims—claims that follow quite naturally, even if not inevitably, from the most important refinements of new originalism itself—and their continuing insistence on an approach to constitutional interpretation that usually produces substantively conservative results have threatened, once again, to undermine their claims to neutrality and objectivity.

As originalism has evolved, in other words, it has increasingly presented its long-time proponents with a choice between equally unappealing options: They can acknowledge that originalism is a limited theory of interpretation that alone cannot answer many questions of constitutional law and thus, accept judicial creativity in implementing the

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12. See *infra* note 93 and accompanying text.

13. See *infra* notes 104–11 and accompanying text.

14. See *infra* notes 112–30 and accompanying text.

15. See, e.g., Earl Maltz, *Foreword: The Appeal of Originalism*, 1987 UTAH L. REV. 773, 779–95; *infra* notes 135–39 and accompanying text.

Constitution's abstract principles; or they can instead continue to claim that originalism can effectively answer most constitutional questions without any need for broad judicial discretion. If they choose the former, they essentially accept that originalism is not meaningfully different from non-originalism. If they choose the latter, they risk revealing originalism as a political philosophy, rather than an interpretive methodology. Originalists' choice will in large part determine the continuing viability of the methodology.

#### I. THE OLD ORIGINALISM, THE NEW ORIGINALISM, AND THE NEW NEW ORIGINALISM

Although originalism,<sup>16</sup> in one form or another, has deep historical roots in the Anglo-American legal tradition,<sup>17</sup> the modern American originalist movement arose in the early 1970s as a response to the controversial decisions of the Warren and Burger Courts. Early originalists were dismayed by the Court's capacious view of the Constitution, which had enabled it to find a right to privacy;<sup>18</sup> categorically to prohibit (even if only for a short time) the imposition of the death penalty;<sup>19</sup> and to impose on law enforcement officials a range of new constraints.<sup>20</sup> In these critics' view, the Warren Court, unconstrained by the Constitution's text or original intent, had effectively been making, rather than interpreting, the law, an act inconsistent with the judicial role in a democracy.<sup>21</sup>

The early originalists urged fidelity to the Framers' original intent as an antidote to these perceived excesses.<sup>22</sup> To these theorists, the Court's approach—then often called living constitutionalism<sup>23</sup> and today, in a sign of the originalists' inroads in the academic debate over constitutional

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16. As will become apparent, the label "originalism" embraces a wide range of interpretive theories, see Colby & Smith, *supra* note 6, at 241–42, but I use the term here to refer to the family of modern approaches that regard "the discoverable meaning of the Constitution at the time of its initial adoption as authoritative for purposes of constitutional interpretation in the present." Whittington, *supra* note 5, at 599.

17. See Morton J. Horwitz, *Foreword: The Constitution of Change—Legal Fundamentalism Without Fundamentalism*, 107 HARV. L. REV. 30, 44 (1993).

18. See, e.g., *Roe v. Wade*, 410 U.S. 113, 164 (1973); *Griswold v. Connecticut*, 381 U.S. 479, 499 (1965).

19. See *Furman v. Georgia*, 408 U.S. 238, 239 (1972).

20. See *Miranda v. Arizona*, 384 U.S. 436, 498 (1966).

21. See, e.g., RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 283–311, 351–72 (1977); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 6–10 (1971).

22. See, e.g., BERGER, *supra* note 21, at 8; Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823, 823 (1986).

23. See William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 693 (1976).

interpretation, often called non-originalism<sup>24</sup>—was an unprincipled form of judicial lawmaking. Bork, for example, argued that unlike the approach of original intent, which tethers judges to constitutional text and history, any other approach inevitably invites judges to impose their own values and preferences on the rest of us and thus to engage in politics under the guise of interpretation.<sup>25</sup>

This early originalism, which Keith Whittington has called the “old originalism,”<sup>26</sup> was largely a negative and reactive theory, concerned principally with offering a critique of existing practice.<sup>27</sup> To be sure, the early originalists labored to advance an affirmative justification for their approach as well. Bork and Berger, for example, argued that originalism was the only neutral and objective approach to interpretation and thus, the only approach that was consistent with the judicial role in a democratic society.<sup>28</sup> But to its early adherents, originalism was appealing principally as a form of criticism, and primarily in contrast to what it was not.<sup>29</sup>

Originalism has evolved a great deal since the early 1970s. As Tom Colby and others have recently explained,<sup>30</sup> whereas the early proponents of originalism focused on the original *intent* of the Framers,<sup>31</sup> many originalists eventually concluded that the proper object of inquiry was

24. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 852–56 (1989).

25. See Bork, *supra* note 21, at 6–10; Robert H. Bork, *Styles in Constitutional Theory*, 26 S. TEX. L.J. 383, 394–95 (1985).

26. Whittington, *supra* note 5, at 599.

27. *Id.* at 601; see also Peter J. Smith & Robert W. Tuttle, *Biblical Literalism and Constitutional Originalism*, 86 NOTRE DAME L. REV. (forthcoming 2011) (manuscript at 31–35) (on file with the Hastings Law Journal).

28. See BERGER, *supra* note 21, at 296 (“Substitution by the Court of its own value choices for those embodied in the Constitution violates the basic principle of government by consent of the governed.”); ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 143 (1990) (“[O]nly the approach of original understanding meets the criteria that any theory of constitutional adjudication must meet in order to possess democratic legitimacy.”).

29. Cf. H. Jefferson Powell, *On Not Being “Not an Originalist”* 7 U. ST. THOMAS L.J. 259, 269, 274 (2010) (praising originalism as “an elegant response to a genuine problem,” but rejecting it because it would “open an all but unbridgeable chasm between constitutional decision making” and all other aspects of legal practice).

30. The evolution of originalist thought has become a familiar story. For more detailed accounts, see Colby & Smith, *supra* note 6, at 247–62; Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. (forthcoming 2011) (manuscript at 3–26) (on file with the Hastings Law Journal); Kesavan & Paulsen, *supra* note 5, at 1134–48; Whittington, *supra* note 5, at 599–610.

31. BERGER, *supra* note 21, at 3; Bork, *supra* note 22, at 823; 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); Rehnquist, *supra* note 23, at 694–97; Edwin Meese III, Att’y Gen. of the U.S., Address Before the D.C. Chapter of the Federalist Society Lawyers Division (Nov. 15, 1985), in U.S. DEP’T. OF JUSTICE, OFFICE OF LEGAL POLICY, ORIGINAL MEANING JURISPRUDENCE: A SOURCEBOOK app. b at 97 (1987) [hereinafter SOURCEBOOK].

the original *meaning*.<sup>32</sup> This change was necessary to respond to at least two serious problems with the focus on original intent: the difficulty of ascertaining collective intent<sup>33</sup> and the fact that the Framers apparently did not intend for subsequent generations to interpret the Constitution according to their original intent.<sup>34</sup> A focus on original meaning, by contrast, did not obviously suffer from these problems, because it could be framed as an inquiry to determine *objective* textual meaning,<sup>35</sup> measured by the hypothetical understanding of a reasonable person at the time of the framing,<sup>36</sup> and was largely consistent with the prevailing interpretive norms at the time of the framing.<sup>37</sup>

As Whittington has explained, the transition from original intent to objective original meaning roughly marked the move from the old originalism to the new originalism.<sup>38</sup> Whereas the old originalists were mostly concerned with criticizing alternative approaches to constitutional interpretation and with restraining judges, the new originalists offered an affirmative case for originalist interpretation and were principally concerned with constitutional fidelity, rather than judicial restraint simpliciter.<sup>39</sup> To be sure, there are still prominent originalists who closely identify with the old originalism,<sup>40</sup> and there are important disagreements among self-professed new originalists about both the appropriate

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32. See, e.g., Colby, *supra* note 30, at 8–13; Kesavan & Paulsen, *supra* note 5, at 1139–40; Antonin Scalia, Justice of the U.S. Supreme Court, Address Before the Attorney General’s Conference on Economic Liberties (June 14, 1986), in SOURCEBOOK, *supra* note 31, app. c at 106 (“I ought to campaign to change the label from the Doctrine of Original Intent to the Doctrine of Original Meaning.”). Many originalists embraced a focus on the original understanding—sometimes subjective, sometimes objective—during the journey from original intent to original meaning. See Colby & Smith, *supra* note 6, at 250–52; Colby, *supra* note 30, at 12–13.

33. See, e.g., Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 209–22 (1980).

34. See H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 948 (1985).

35. See, e.g., Kesavan & Paulsen, *supra* note 5, at 1132, 1147; Antonin Scalia, *Common-Law Courts in a Civil Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION 3, 17, 38 (Amy Gutmann ed., 1997).

36. See, e.g., Kesavan & Paulsen, *supra* note 5, at 1132; Gary Lawson & Guy Seidman, *When Did the Constitution Become Law?*, 77 NOTRE DAME L. REV. 1, 25 (2001).

37. Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085, 1090 (1989) (noting that Powell’s evidence demonstrated that the common law method of interpreting text focused on the language’s objective meaning in the document, not its author’s subjective intent).

38. Whittington, *supra* note 5, at 602–10.

39. *Id.* at 609.

40. See, e.g., Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 Nw. U. L. REV. 703, 704 (2009); Larry Alexander, *Simple-Minded Originalism 1* (Univ. of San Diego Sch. of Law Legal Studies Research Paper Series, Paper No. 08-067, 2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1235722](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1235722); Steven D. Smith, *That Old-Time Originalism 16–28* (Univ. of San Diego Sch. of Law Legal Studies Research Paper Series, Paper No. 08-028, 2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1150447](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1150447).

justification for the approach<sup>41</sup> and the approach's capacity to constrain judges,<sup>42</sup> among other things. Originalism today, in other words, is far from a monolithic movement. But new originalism clearly has had significantly more staying power in debates over constitutional interpretation than did the old originalism, and in recent years, new originalism has succeeded in winning new adherents, even among academics who previously did not identify as originalists at all.<sup>43</sup>

New originalism has been successful for at least two reasons. First, many new originalists have contended that the question of the Constitution's meaning is distinct from the question whether we ought to follow the Constitution in the first place.<sup>44</sup> This conclusion helps to soften, even if not entirely dispose of, a central challenge to originalism: that it suffers from an insurmountable dead-hand problem.<sup>45</sup> Non-originalism has long been animated by the concern that the Constitution, which can be amended only through a difficult super-majoritarian procedure, risks losing legitimacy today if it cannot be read to embody modern, rather than anachronistic, values.<sup>46</sup> Many new originalists

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41. Compare Kurt T. Lash, *Originalism, Popular Sovereignty, and Reverse Stare Decisis*, 93 VA. L. REV. 1437, 1440 (2007) (“[T]he most common and most influential justification for originalism[] [is] popular sovereignty and the judicially enforced will of the people.”), with Lawrence B. Solum, *Semantic Originalism* 26 (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](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244) (grounding originalism in the philosophy of language).

42. Compare Scalia, *supra* note 24, at 863–64 (arguing that originalism constrains judges, because it “establishes a historical criterion that is conceptually” distinct from the judge’s own preferences), with John Harrison, *On the Hypotheses That Lie at the Foundations of Originalism*, 31 HARV. J.L. & PUB. POL’Y 473, 473–76 (2008) (“Can originalism, or any methodology, keep interpreters from interpreting the Constitution along the lines that they think good? . . . [I]t cannot . . .”).

43. See Colby, *supra* note 30, at 34; *infra* notes 147–50 and accompanying text.

44. See, e.g., Kesavan & Paulsen, *supra* note 5, at 1127–28 (defending objective original meaning as the object of interpretation but acknowledging that it is legitimate “not to treat ‘this Constitution’ as authoritative”); Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823, 1835 (1997) (“[I]nterpreting the Constitution and applying the Constitution are two different enterprises.”); Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47, 53 (2006) (describing the question whether we should “follow the instructions in the Constitution” as a “question of political morality, not of interpretive theory”); Solum, *supra* note 41, at 30 (“What words mean is one thing; what we should do about their meaning is another.”).

45. See, e.g., Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 15 THE PAPERS OF THOMAS JEFFERSON 392, 392 (Julian P. Boyd & William H. Gaines, Jr. eds., 1958) (“The question [is] whether one generation of men has a right to bind another . . .”); see also Ethan J. Leib, *The Perpetual Anxiety of Living Constitutionalism*, 24 CONST. COMMENT. 353, 358–60 (2007) (“[N]on-originalists are plagued by anxiety about the dead hand of the past—and think we need to update and affirm the document’s underlying principles if it is to be binding on anyone living today.”); Richard A. Primus, *When Should Original Meanings Matter?*, 107 MICH. L. REV. 165, 192 (2008) (“[G]overning the population of the United States today according to the constitutional understandings of people long since dead should not be understood as showing respect for democratic-enactment authority.”).

46. See, e.g., William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 438 (1985) (“What the constitutional fundamentals meant to the

address this concern, at least in part by, maintaining that originalism is merely an interpretive theory designed to determine what the Constitution means, not to provide a theory of adjudication.<sup>47</sup> Gary Lawson, for example, has argued that the premise that the Constitution's meaning is determined by the objective original meaning of its text does not entail the conclusion that this meaning must control the outcome of any particular legal controversy.<sup>48</sup> Of course, simply asserting that these questions are conceptually distinct cannot entirely answer non-originalists' dead-hand-based objections, either in theory or as a matter of practice.<sup>49</sup> But by professing to remain agnostic on the question whether the Constitution ought to be binding, many new originalists have ostensibly moderated some of the more aggressive claims of the old originalists, who had insisted that it is categorically illegitimate for judges to decide cases based on anything other than original intent.<sup>50</sup>

Second, and more important, new originalism has been successful because once one accepts its basic claim that the proper object of interpretation is the objective original meaning of the constitutional text, other claims with substantially broader appeal logically—even if not

wisdom of other times cannot be the measure to the vision of our time. . . . Our Constitution was not intended to preserve a preexisting society but to make a new one . . . ."); Leib, *supra* note 45, at 358–60.

47. See, e.g., Kesavan & Paulsen, *supra* note 5, at 1127–28; Lawson, *supra* note 44, at 1824; Lawson & Seidman, *supra* note 44, at 53; Michael Stokes Paulsen, *How to Interpret the Constitution (and How Not to)*, 115 YALE L.J. 2037, 2062 (2006).

48. Lawson, *supra* note 44, at 1824 (“[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.”); *id.* at 1825 (“One can be a strict interpretive originalist and forcefully deny that the Constitution has any political legitimacy.”). Lawrence Solum has made a similar argument in distinguishing between “semantic originalism” and “normative originalism.” Solum, *supra* note 41, at 27–33.

49. Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 32 (2009) (“[B]ecause it is not in fact controversial in the contemporary debates over American constitutional interpretation that judges should enforce the law, the non-normative variant of Originalism is not interestingly distinct . . . from its more common, avowedly normative, cousin.”); Colby, *supra* note 30, at 30 (“[The] response [to the dead-hand problem] 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.”); Leib, *supra* note 45, at 359 (“[O]riginal meaning originalism . . . gives pride of place to the very dead hand living constitutionalists are convinced we must resist to maintain the document’s present-day legitimacy.”). Jack Balkin, who, as I explain *infra*, is a new new originalist, has nevertheless argued that, properly conceived, originalism addresses the dead-hand problem just as nimbly as does living constitutionalism. See Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 303 (2007) (“The Constitution is a great work that spans many lifetimes, a vibrant multi-generational undertaking, in which succeeding generations pledge faith in the constitutional project and exercise fidelity to the Constitution by making the Constitution their own.”); see also *infra* notes 73–84 and accompanying text.

50. See, e.g., BERGER, *supra* note 21, at 364 (“A judicial power to revise the Constitution transforms the bulwark of our liberties into a parchment barrier.”); Bork, *supra* note 21, at 6 (“[A] legitimate Court must be controlled by principles exterior to the will of the Justices.”).

inevitably—follow. And, indeed, several prominent and self-described new originalists have pressed such claims about the nature of the search for objective original meaning. I am interested here in two particular refinements to new originalist theory that have been urged by some new originalists, who I refer to as “new new originalists.”<sup>51</sup>

First, new originalism’s focus on the objective meaning of the constitutional text rather than on the Framers’ intentions or understandings has led some self-described originalists to conclude that at least some provisions of the Constitution are properly interpreted at a very high level of generality. Whereas many old originalists resisted the conclusion that the Constitution’s open-ended, ostensibly rights-granting provisions conferred broad discretion on judges to declare and protect rights that are not specifically enumerated,<sup>52</sup> some new originalists have begun to argue that fidelity to the original meaning requires the conclusion that some of those provisions do just that. Randy Barnett and Jack Balkin, for example, have contended that the Constitution’s more abstractly phrased provisions should be interpreted in light of the high level of generality at which they were written, leading them both to conclude that judges have substantial discretion to identify rights in light of the Constitution’s broad principles.<sup>53</sup>

Second, the new new originalists have recently recognized a distinction between constitutional interpretation, which involves the determination of the meaning of the constitutional text, and constitutional construction, which involves the formulation of legal rules

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51. Because the new new originalists believe that the Constitution’s vague provisions require judicial construction in the formulation of legal rules, *see infra* notes 55–66 and accompanying text, John McGinnis and Michael Rappaport refer to their approach as “constructionist originalism.” 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, 752 (2009).

52. *See, e.g.*, BERGER, *supra* note 21, at 99–116 (rejecting the “open-ended phraseology theory” (internal quotation marks omitted)). Bork also advanced such a view, *see* BORK, *supra* note 28, at 166, 178–85 (rejecting the view that the Constitution’s open-ended provisions authorize judges to create rights), although, as I explain *infra* note 76, he appears to be of two minds on this question.

53. Balkin, *supra* note 49, at 304–05 (“[T]he fact that adopters chose text that features general and abstract concepts is normally the best evidence that they sought to embody general and abstract principles of constitutional law, whose scope, in turn, will have to be fleshed out later on by later generations.”); Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 Nw. U. L. REV. 549, 553 (2009) (“[Constitutional drafters] use standards or principles because they want to channel politics but delegate the details to future generations.”); *id.* at 569–75 (describing the courts’ role in construction); Randy E. Barnett, *Scalia’s Infidelity: A Critique of “Faint-Hearted” Originalism*, 75 U. CIN. L. REV. 7, 11–13, 23 (2006) [hereinafter Barnett, *Scalia’s Infidelity*] (“That the founders and the authors of the Fourteenth Amendment drafted texts that leave some discretion in application to changing circumstances is not a bug. It’s a feature.”); Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 22 CONST. COMMENT. 257, 264 (2005) [hereinafter Barnett, *Trumping Precedent*] (“That the Constitution includes more open-ended or abstract provisions, and thereby delegates discretion to judges, does not justify ignoring these portions of the text.”).

to apply the text—particularly when it is vague or open ended—to concrete situations. Balkin, Barnett, Lawrence Solum, and Whittington have all noted that because the objective meaning of the constitutional text often is vague or “underdetermined,”<sup>54</sup> originalism, which is a theory only of interpretation, simply cannot produce answers to many questions of constitutional law.<sup>55</sup> In such cases, these theorists have argued, the questions can be resolved only by construction, which is “outside the domain of originalism”<sup>56</sup> and necessarily requires an act of creativity beyond interpretation.<sup>57</sup>

Barnett, for example, has defended original-meaning originalism, but has argued that construction is necessary when the original meaning of the constitutional text does not “provide enough guidance to identify a single rule of law to apply to a particular case at hand.”<sup>58</sup> Barnett acknowledges that there are often multiple plausible constructions that are consistent with the original meaning of the text, but he urges interpreters to choose constructions that enhance constitutional legitimacy.<sup>59</sup> Balkin has similarly defended fidelity to the original

54. WHITTINGTON, *supra* note 10, at 7.

55. RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 121 (2004); KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* 8 (1999); WHITTINGTON, *supra* note 10, at 5–14; Balkin, *supra* note 53, at 559–60; Barnett, *Trumping Precedent*, *supra* note 53, at 264–65; Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 *Nw. U. L. Rev.* 923, 974 (2009); Solum, *supra* note 41, at 20, 67–89.

56. Solum, *supra* note 55, at 967. Barnett has argued that “constitutional constructions, though not deducible immediately from the text, still may properly be connected to or constrained by it.” BARNETT, *supra* note 55, at 124–25; accord Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 *U. CHI. L. REV.* 101, 110 (2001) (“[T]hrough by definition constructions are not *in* the Constitution, they can be *of* the Constitution.”).

57. WHITTINGTON, *supra* note 10, at 7. Barnett explains the relationship between interpretation and construction as follows:

[O]riginalism is warranted as a theory of interpretation—that is, as a method of determining the meaning of the words written in the Constitution. For better or worse, knowing the meaning of these words only takes us so far in resolving current cases and controversies. Due either to ambiguity or vagueness, 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.” Indeed, because the framers frequently used abstract language, this will often be the case. When this happens, interpretation must be supplemented by constitutional construction—within the bounds established by original meaning. In this manner, construction fills the unavoidable gaps in constitutional meaning when interpretation has reached its limits.

Barnett, *supra* note 56, at 108 (footnote omitted). To be sure, Whittington’s claim about construction has been quite modest; he has argued that construction is as much the province of the political branches as it is the province of the courts. See WHITTINGTON, *supra* note 10, at 7–13, 172–73. But Balkin, Barnett, and Solum have all made clear that they view constitutional construction as an appropriate task for judges as well. See Balkin, *supra* note 53, at 569–75; Barnett, *Trumping Precedent*, *supra* note 53, at 264; Solum, *supra* note 55, at 979–80.

58. BARNETT, *supra* note 55, at 121.

59. *Id.* at 126. In Barnett’s view, constitutional legitimacy is accomplished through application of

meaning,<sup>60</sup> but has noted that the original meaning “does not dictate the results of constitutional construction,” which “for a very large number of disputed cases . . . is the name of the game.”<sup>61</sup> Balkin has offered a rich, multi-institutional account of construction, under which social movements, the political branches, and the courts engage in an ongoing process of constructing constitutional meaning.<sup>62</sup> In Balkin’s account, “courts translate constitutional politics into constitutional law,”<sup>63</sup> but unlike in Barnett’s account, there is no overarching substantive template to guide this process; instead, Balkin argues that the judges who engage in the process of construction should “use the various modalities of argument—text, structure, history, precedent, prudence, and national ethos—to decide the cases before them.”<sup>64</sup>

The new new originalists’ claim that some provisions of the Constitution ought to be interpreted at a high level of generality, and that even originalist interpretation often requires courts to engage in creative<sup>65</sup> and “political”<sup>66</sup> acts of construction in the formulation of legal rules did not come out of the blue. Instead, they flow logically, even if not inevitably, from core elements of new originalism.<sup>67</sup> As noted above, the core feature of new originalism was a focus on the objective original meaning of the text as the proper object of interpretation.<sup>68</sup> Once new

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a “presumption of liberty” that promotes a libertarian vision of constitutional meaning. *Id.* at 259–69.

60. See Balkin, *supra* note 53, at 552; Balkin, *supra* note 49, at 295.

61. Balkin, *supra* note 53, at 604–05.

62. See *id.* at 585–601.

63. *Id.* at 598.

64. *Id.* at 609.

65. WHITTINGTON, *supra* note 55, at 5 (“Unlike jurisprudential interpretation, construction provides for an element of creativity in construing constitutional meaning.”).

66. WHITTINGTON, *supra* note 10, at 5; see McGinnis & Rappaport, *supra* note 51, at 785 (arguing that choosing among possible constructions requires reference to “political morality”). Barnett objects to this characterization, because “it suggests that such constructions are themselves completely unconstrained by the determinable original meaning of the text.” BARNETT, *supra* note 55, at 124. But he agrees that there can be a range of permissible constructions, and that judges must choose among them. See Barnett, *Trumping Precedent*, *supra* note 53, at 265.

67. See Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 443 (2007) (“My Article . . . attempts to move th[e] analysis along, making salient the logical consequences of the turn to original [public] meaning.”).

68. See, e.g., Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 620 (1999) (“Perhaps most important of all, however, originalism has itself changed—from original intention to original meaning.”); Kesavan & Paulsen, *supra* note 5, at 1132, 1144 (coining the term “original, objective-public-meaning textualism” and defending the approach on the ground that it corrects the “jurisprudence of ‘original understanding,’” which changed the “jurisprudence of ‘original intent’” before that); Lawson, *supra* note 44, at 1834 (“[T]he Constitution’s meaning is its original public meaning. Other approaches to interpretation are simply wrong.”); *supra* note 32 and accompanying text. As a corollary to their embrace of the objective original meaning as the proper object of interpretation, most new originalists also rejected reliance on the original expected applications in determining constitutional meaning. See, e.g., Stephen G. Calabresi & Livia Fine, *Two Cheers for Professor Balkin’s Originalism*, 103 NW. U. L. REV. 663, 668–72 (2009); Michael W.

originalists had decided that the particular intent, understanding, or expectations of the Framers were not determinative of the original meaning, but instead that the proper object of the interpretive inquiry was the original objective meaning of the text, it followed that the text's objective meaning should be assessed at the level of generality at which a reasonable person would have read it.<sup>69</sup> And, indeed, many new originalists accept this claim, at least in theory.<sup>70</sup>

The new new originalists have simply taken this claim one step further. By their account, once one accepts that many of the Constitution's provisions are demonstrably expressed at a very high level of abstraction, it follows that the Constitution often states merely broad principles rather than concrete and determinate rules.<sup>71</sup> And once one recognizes that many constitutional provisions state only broad and vague principles, it is not a great leap to conclude that there are significant limits to originalism's capacity to resolve concrete questions of constitutional law and thus, that originalism must be supplemented by some other theory of adjudication.

In one respect, then, new new originalism is not meaningfully different from new originalism. Both recognize that a genuine commitment to the original objective meaning of the constitutional text

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McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution*, 65 *FORDHAM L. REV.* 1269, 1284 (1997); Paulsen, *supra* note 47, at 2059; Antonin Scalia, *Response*, in *MATTER OF INTERPRETATION*, *supra* note 35, at 144. Accordingly, most new originalists claim not to interpret the Constitution by seeking to determine how the Framers of a constitutional provision would have answered a particular question of constitutional law, but instead by seeking the objective original meaning of the text, as measured by the "hypothetical understandings" of an "artificially constructed" "reasonable person" at the time of ratification. Lawson & Seidman, *supra* note 44, at 48.

69. See WHITTINGTON, *supra* note 10, at 182–87; *id.* at 187 ("The level of generality at which terms were defined is not an a priori theoretical question but a contextualized historical one."); Frank H. Easterbrook, *Abstraction and Authority*, 59 *U. CHI. L. REV.* 349, 359 (1992) ("Thus the question becomes the level of generality the ratifiers and other sophisticated political actors at the time would have imputed to the text.").

70. See, e.g., Calabresi & Fine, *supra* note 68, at 672–74 ("[Some provisions of the Constitution] employ standards and not rules. . . . 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."); McConnell, *supra* note 68, at 1280–81 ("A genuine commitment to the semantic intentions of the Framers requires the interpreter to seek the level of generality at which the particular language was understood by its Framers . . . 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 . . ."); *infra* notes 71–78 and accompanying text.

71. See Whittington, *supra* note 5, at 611 ("[I]t is entirely possible that the principles that the founders meant to embody in the text were fairly abstract."); Balkin, *supra* note 53, at 553 ("If [the text of the Constitution] states a standard, we must apply the standard. And if it states a general principle, we must apply the principle."); Barnett, *Trumping Precedent*, *supra* note 53, at 263 ("[Sometimes] the original meaning is rather abstract, or at a higher level of generality.").

might, at least in theory, require the conclusion that some provisions of the Constitution express only abstract principles.<sup>72</sup> Just as new new originalist Balkin has argued that the “proper level of generality for the constitutional principles in the text is the one we find in the text itself,”<sup>73</sup> Michael McConnell, who Whittington has described as the “most prominent new originalist,”<sup>74</sup> has noted that a “genuine commitment” to originalism “requires the interpreter to seek the level of generality at which the particular language was understood by its Framers.”<sup>75</sup> Indeed, even Bork, the original patron saint of old originalism, eventually came to the view that the faithful practice of originalism requires the interpreter, in seeking the “meaning of a text,” to determine “its degree of generality, which is part of its meaning,” and then to apply it.<sup>76</sup> As Steven Smith has explained, “most originalists have long advocated, basically, the ‘method of text and principle’” originalism that Balkin has

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72. New originalists have generally embraced the objective original meaning of the text as the touchstone of interpretation. See, e.g., Kesavan & Paulsen, *supra* note 5, at 1132; Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 398 (2002); Scalia, *supra* note 35, at 38. New new originalists have as well. See, e.g., Balkin, *supra* note 53, at 552–55; Barnett, *supra* note 56, at 105; Solum, *supra* note 55, at 940–41.

73. Balkin, *supra* note 67, at 494.

74. Whittington, *supra* note 5, at 608.

75. McConnell, *supra* note 68, at 1280.

76. BORK, *supra* note 28, at 149 (arguing that the correct level of generality is the level that “the text and historical evidence warrant”). On this view, the Constitution provides only a “major premise”—that is, a “principle or stated value that the ratifiers wanted to protect”—against which the interpreter must judge the challenged action. *Id.* at 162–63. Bork famously followed this form of reasoning in attempting to defend *Brown v. Board of Education*, 347 U.S. 483 (1954), on originalist grounds. See BORK, *supra* note 28, at 82 (“[E]quality and segregation were mutually inconsistent, though the ratifiers did not understand that . . . . The purpose that brought the fourteenth amendment into being was equality . . . .”). In practice, however, Bork has tended to vary the level of generality at which he seeks the original meaning without any explanation about why some provisions should be interpreted at a high level of generality and others should be interpreted at a high level of specificity. For example, he has criticized *Griswold* and *Roe* on the ground that contraception is not “covered specifically or by obvious implication by any provision of the Constitution,” *id.* at 258, and “the right to abort, whatever one thinks of it, is not to be found in the Constitution,” *id.* at 112. But though he has never explained why, he reads the Free Speech Clause and the Equal Protection Clause at much higher levels of abstraction. See *Ollman v. Evans*, 750 F.2d 970, 996 (D.C. Cir. 1984) (en banc) (Bork, J., concurring) (“[The Framers] gave into our keeping the value of preserving free expression and, in particular, the preservation of political expression, which is commonly conceded to be the value at the core of those clauses. Perhaps the framers did not envision libel actions as a major threat to that freedom. . . . But if, over time, the libel action becomes a threat to the central meaning of the first amendment, why should not judges adapt their doctrines?”); BORK, *supra* note 28, at 82 (Equal Protection Clause); Harrison, *supra* note 42, at 479–80 (noting that Bork’s *Ollman* opinion employs a sort of a “purposivism,” originalism that “tak[es] as normative the original purpose” of the First Amendment); David A.J. Richards, *Originalism Without Foundations*, 65 N.Y.U. L. REV. 1373, 1381–82 (1990) (reviewing ROBERT BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990)) (arguing that Bork’s high-level-of-generality analysis of *Brown* is inconsistent with the originalist methodology that he advocates for other questions); see also Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 432 n.25 (1997) (arguing the same).

defended,<sup>77</sup> and that “Balkin, arguably, is simply a more prodigal practitioner of that method.”<sup>78</sup>

But if new new originalism flows naturally from new originalism, it also sometimes flows in directions that many new originalists do not want—and certainly most old originalists would not have wanted—to go. To be sure, some of the new new originalists, such as Whittington and Solum, have been interested primarily in the theoretical questions that have arisen in the effort to identify a defensible interpretive methodology, rather than in concrete questions about what sorts of results originalism might be likely to produce in practice.<sup>79</sup> But other new new originalists have been interested not only in hermeneutics but also in the likely results of application of the theory. For example, Barnett has addressed the question of level of generality and the distinction between interpretation and construction in the course of arguing that the Constitution, properly understood as an originalist matter, requires libertarianism at both the state and federal level.<sup>80</sup> And Balkin has developed these claims in the course of arguing, among other things, that the result in *Roe v. Wade*<sup>81</sup> is consistent with the original meaning of the Fourteenth Amendment.<sup>82</sup> New new originalism, in other words, claims fidelity to the original meaning—and to new originalism<sup>83</sup>—but can readily be deployed to defend the very results that modern originalism was created to criticize.

Barnett’s and Balkin’s work tends to illustrate rather starkly the central thesis of this Article: that new new originalism is, at least in practice, not meaningfully different from non-originalism.<sup>84</sup> Of course,

77. Steven D. Smith, Reply, *Originalism and the (Merely) Human Constitution*, 27 CONST. COMMENT. (forthcoming 2011) (manuscript at 196) (on file with the Hastings Law Journal); see also Balkin, *supra* note 49, at 295 (“Fidelity to the Constitution as law means fidelity to the words of the text, understood in terms of their original meaning, and to the principles that underlie the text.”).

78. Smith, *supra* note 77.

79. See WHITTINGTON, *supra* note 10, at xi (“I develop an explanation and defense of a theory of constitutional interpretation by the judiciary.”); SOLUM, *supra* note 41, at 2 (“This Article offers a theory of constitutional meaning that [] provides a theoretical foundation for *original public meaning originalism*.”). To be sure, Solum has used real cases to give context for the application of his theory, see, e.g., Solum, *supra* note 55, but his interest appears to be mostly theoretical.

80. See BARNETT, *supra* note 55, at 118–21 (level of generality), 121–30 (construction), 355 (libertarianism).

81. 410 U.S. 113 (1973).

82. Balkin, *supra* note 49, at 311–52.

83. Barnett appears to have coined the term “new originalism,” Barnett, *supra* note 68, at 620–22; Colby, *supra* note 30, at 1 n.2, and clearly identifies as a new originalist, see Randy E. Barnett, *Underlying Principles*, 24 CONST. COMMENT. 405, 405–09 (2007) (describing his embrace of this form of original-meaning originalism). Balkin has tended to eschew the term, but his focus on the original semantic meaning of the text, see Balkin, *Framework Originalism*, *supra* note 53, at 552, places him squarely in the new originalist tent. See Barnett, *supra*, at 410–11.

84. Balkin has been quite aware of this implication of his work. He has argued that the “choice

just as originalism is more a family of theories than one coherent and unified interpretive approach,<sup>85</sup> non-originalism, as Justice Scalia and others have eagerly pointed out, is not easy to capture in a brief description.<sup>86</sup> For present purposes, however, I use Mitchell Berman's description of non-originalism as the "thesis that facts that occur after ratification or amendment can properly bear—constitutively, not just evidentially—on how courts should interpret the Constitution . . . ."<sup>87</sup> Notwithstanding the caricature of non-originalism that many originalists have offered,<sup>88</sup> most non-originalists—or at least most scholars or judges who do not readily identify as originalists<sup>89</sup>—believe that the original meaning is highly relevant and often dispositive.<sup>90</sup> Few, if any, non-originalists would claim, for example, that a thirty-year-old person is eligible to be President,<sup>91</sup> or that the Republican Form of Government

between original meaning and living constitutionalism . . . is a false choice," Balkin, *supra* note 49, at 293, and that the project of living constitutionalism (a synonym for non-originalism) is essentially a project of construction and thus entirely consistent with a commitment to the original meaning. Balkin, *supra* note 53, at 559–60. Barnett similarly originally described his version of originalism as an "originalism for nonoriginalists." Barnett, *supra* note 68; *see also* Solum, *supra* note 41, at 164–67 (discussing the relationship between living constitutionalism and originalism).

85. *See* Colby & Smith, *supra* note 6, at 244–45.

86. *See, e.g.*, John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 101 Nw. U. L. REV. 383, 391 n.36 (2007) ("[J]udges of various ideologies cannot be expected to reach agreement on any alternative method."); Scalia, *supra* note 35, at 45 ("[Non-originalists] divide into as many camps as there are individual views of the good, the true, and the beautiful."); Scalia, *supra* note 24, at 855 ("[I]t is not very helpful to tell a judge to be a 'non-originalist,' [because non-originalism] represents agreement on nothing except what is the wrong approach.").

87. Berman, *supra* note 49, at 24; *see also* DENNIS J. GOLDFORD, *THE AMERICAN CONSTITUTION AND THE DEBATE OVER ORIGINALISM* 139 (2005) ("The characteristic and controversial move of originalism . . . [is] that the original understanding of the constitutional text always trumps any contrary understanding of that text in succeeding generations.").

88. *See, e.g.*, SOURCEBOOK, *supra* note 31, at 7 ("[A]ll [non-originalists] reject original meaning as relevant to constitutional interpretation . . .").

89. *See* Powell, *supra* note 29.

90. *See, e.g.*, Berman, *supra* note 49, at 24–25 ("Not a single self-identifying non-originalist of whom I'm aware argues that original meaning has no bearing on proper judicial constitutional interpretation. To the contrary, even those scholars most closely identified with non-originalism . . . explicitly assign original meaning or intentions a significant role in the interpretive enterprise."); Richard H. Fallon, Jr., *The Political Function of Originalist Ambiguity*, 19 HARV. J.L. & PUB. POL'Y 487, 488 (1996) ("[M]ost views—my own included—assume that original understanding and purposes are relevant to constitutional interpretation. Differences emerge only over how, and how weightily, these considerations enter the interpretive matrix."); Farber, *supra* note 37, at 1086 ("Almost no one believes that the original understanding is wholly irrelevant to modern-day constitutional interpretation."); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 880–81 (1996) (noting that "[v]irtually everyone agrees" that text and original meaning matter in constitutional interpretation).

91. *See* U.S. CONST. art. II, § 1, cl. 5 ("[N]either shall any person be eligible to that Office who shall not have attained to the Age of thirty five Years . . ."); *see also* Balkin, *supra* note 49, at 305 (offering this example); Barnett, *Trumping Precedent*, *supra* note 53, at 263 (same); Richard Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*,

Clause<sup>92</sup> could plausibly be read to guarantee the modern Republican Party a constitutional monopoly on power at the state level. In other words, most non-originalists treat the original meaning as the starting point for any interpretive inquiry, but are willing to look elsewhere—to history, precedent, structure, and policy, to name a few of Phillip Bobbitt’s famous modalities of constitutional argument<sup>93</sup>—to construct constitutional meaning when the text is vague or indeterminate.

If this is a fair description of non-originalism, then if nothing else it should be clear that new new originalism is not very different from non-originalism in practice.<sup>94</sup> For both, the original meaning generally provides the starting point for any act of constitutional interpretation, but because of the level of generality at which much of the constitutional text is expressed, it rarely alone provides the conclusion.<sup>95</sup> For both, the types of constitutional questions that are most likely to be litigated—those for which the relevant constitutional text is capacious and abstract—require tools of judicial decisionmaking beyond mere reference to the original

82 Nw. U. L. REV. 226, 263 (1988) (same).

92. U.S. CONST. art. IV, § 4 (“The United States shall guarantee to every State in this Union a Republican Form of Government . . .”).

93. PHILLIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 7–8 (1982); see Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1189–90 (1987).

94. As noted above, Balkin has recognized this implication of his work. See *supra* note 84. Others have observed in passing that new new originalism tends to collapse the distinction between originalism and non-originalism. See James E. Fleming, *The Balkanization of Originalism*, 67 MD. L. REV. 10, 10–11 (2007) (“[Balkin’s originalism] is for all intents and purposes equivalent to Dworkin’s moral reading [of the Constitution.]”); Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343, 1371 (2009) (“An interpretive approach that can so readily produce such diametrically opposite results dissolves the distinction between originalism and living constitutionalism.”); Smith, *supra* note 77 (“[On the Balkin view,] [t]he difference between originalism and ‘living Constitutionalism’ has vanished . . .”). Solum anticipated these developments years ago, during the early days of original-meaning originalism, when he argued that there is “no meaningful distinction between originalist and nonoriginalist theories of constitutional interpretation.” Lawrence B. Solum, *Originalism as Transformative Politics*, 63 TUL. L. REV. 1599, 1603 (1989). Solum recognized that non-originalist theories still inevitably pay substantial attention to the original meaning, and that any plausible originalist theory, including one that seeks the original meaning at the level of “general principle,” *id.* at 1612, in practice, will be forced to use non-originalist tools to decide cases. *Id.* at 1621–22; accord Solum, *supra* note 41, at 166–67 (discussing the “compatibilist account” of the relationship between living constitutionalism and originalism); cf. Fallon, *supra* note 90, at 488 (“[His version of non-originalism] stands as a stark alternative to some versions of originalism, but is rather close to several others that have claimed the designation.”).

95. See Farber, *supra* note 37, at 1087 (“[Originalists] who focus on the framers’ general principles . . . may be difficult to distinguish from non-originalists . . .” (footnote omitted)); see also Eric J. Segall, *A Century Lost: The End of the Originalism Debate*, 15 CONST. COMMENT. 411, 432–33 (1998) (“This move from specific intentions to general principles . . . eliminates any meaningful distinction between originalism and nonoriginalism because the Constitution’s broad phrases are defined at a level of generality that makes them useless in hard cases for anything other than symbolic purposes.”).

meaning of the text.<sup>96</sup> And for both, the abstractness of the constitutional text and the indeterminacy inherent in the process of construction mean that there can be no perfectly predictable template for constitutional decisionmaking and thus, that there is a range of plausible and defensible results.<sup>97</sup>

This is not to say that new new originalism and non-originalism are identical. Some non-originalists, for example, reject the premise that judges necessarily owe fidelity to the original meaning, even when it is expressed at a very high level of specificity; these non-originalists seek constitutional meaning in, among other things, “the argumentative norms of a culture and of a practice”<sup>98</sup> or in the evolving norms of society.<sup>99</sup> These forms of non-originalism remain meaningfully different from new new originalism, because (at least in theory) they deny that the original meaning even of straightforward constitutional text expressed at a high level of specificity—such as the minimum age requirement for eligibility for the presidency—necessarily constitutes constitutional meaning today.<sup>100</sup> But these forms of non-originalism are hardly typical of persons who do not identify as originalists.<sup>101</sup>

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96. See *supra* note 64 and accompanying text; see also Balkin, *supra* note 67, at 483–85, 511 (referring to Bobbitt’s modalities); Lawrence Solum, *Legal Theory Lexicon 063: Interpretation and Construction*, LEGAL THEORY BLOG, [http://lsolum.typepad.com/legal\\_theory\\_lexicon/2008/04/legal-theory-lex.html](http://lsolum.typepad.com/legal_theory_lexicon/2008/04/legal-theory-lex.html) (last modified May 16, 2010) (“[T]he interpretation-construction distinction opens the door for a partial reconciliation of originalism with living constitutionalism: the Constitution can live in the ‘construction zone’ where the linguistic meaning of the Constitution underdetermines results.”).

97. See *supra* notes 58–64 and accompanying text.

98. Berman, *supra* note 49, at 66.

99. See Leib, *supra* note 45, at 359–60. It is also possible for a focus on the principles underlying the text to lead to conclusions that are inconsistent with the text itself, an approach that arguably is inconsistent with new new originalism as well. See Barnett, *supra* note 83, at 413–14.

100. See Leib, *supra* note 45, at 356–61 (arguing that even Balkin’s originalism is fundamentally different from living constitutionalism, because it places dispositive weight on history in some cases); cf. SOTIROS A. BARBER & JAMES E. FLEMING, *CONSTITUTIONAL INTERPRETATION: THE BASIC QUESTIONS* 79–116 (2007) (arguing that Ronald Dworkin’s moral reading of the Constitution is meaningfully different from all forms of originalism).

101. See Colby, *supra* note 30, at 46–47 (arguing that non-originalists generally invoke the Constitution’s underlying principles in order to “give the indeterminate text a meaning (or if you prefer, construction) that is suitable for modern circumstances”). It is perhaps more useful to conceive of approaches to constitutional interpretation as falling along a spectrum based on the weight accorded to the original meaning. Mitchell Berman, for example, has noted that non-originalism is “modest,” and generally “does not hold that original meaning, when discoverable, should be irrelevant to judicial interpretation, or even that its relevance should be slight.” Berman, *supra* note 49, at 24. Similarly, he notes that originalists vary in the strength of their claims about the role of original meaning in interpretation. See *id.* at 10–12. He concludes that what distinguishes Originalism (with a capital *O*) from non-originalism is the “thesis that original meaning either is the *only* proper target of judicial constitutional interpretation or that it has at least lexical priority over any other candidate meanings that the text might bear,” and that “nothing that transpires after ratification of a particular constitutional provision, save a subsequent constitutional amendment, has operative (as opposed to evidential) bearing on what courts ought to identify as constitutional meaning.” *Id.* at 22. As Berman

## II. THE NEW NEW ORIGINALISM AND THE OLD NEW ORIGINALISM (AND THE NEW OLD ORIGINALISM)

My point, in any event, is not that new new originalism and non-originalism are identical, but instead that the differences between the two approaches are modest in practice.<sup>102</sup> Perhaps for this reason, not all originalists—indeed, not even all self-described “new originalists”—have embraced new new originalism’s refinements to originalist theory. Indeed, modern originalism arose as a response to the perceived excesses of non-originalism, and its proponents have long promoted it as a distinctive alternative to the interpretive approaches that justified *Griswold*, *Roe*, and similar decisions.<sup>103</sup> It must be disconcerting, to say the least, for many originalists to have a parade of scholars embrace new new originalism and then apply it to justify the results in those cases. It thus is not surprising that many originalists have resisted refinements to their theory that would tend to collapse the distinction between originalism and non-originalism.

As noted above, some of these originalists agree with the new new originalists, in theory, that we should sometimes seek the original meaning at a high level of generality—that is, when the reasonable reader at the time of ratification would objectively have understood the text to express broad principles rather than narrow, rule-like injunctions—but nevertheless conclude that the Constitution, in fact, contains limited and determinate provisions that accordingly do not confer broad discretion on judges.<sup>104</sup> Steven Calabresi and Livia Fine, for example, agree that judges should be faithful to the objective original meaning of the text<sup>105</sup> and thus, that judges should enforce constitutional provisions that embody general, open-ended standards, even though “different reasonable constitutional interpreters will differ on how the standard should be applied.”<sup>106</sup> But Calabresi and Fine also contend that

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acknowledges, however, one can be a “strong” originalist and still conclude that some constitutional provisions were “originally understood at a level of generality too high to permit effective resolution of disputes.” *Id.* at 30. It is with these originalists that I am concerned here. And to the extent that some of those originalists believe that there is a nontrivial number of constitutional provisions whose original meaning was objectively expressed at a high level of generality, their approach to interpretation tends to shrink the gap between originalism and non-originalism that Berman so astutely describes.

102. See Fallon, *supra* note 90, at 491 (“In its moderate versions, originalism appears to differ from its competitors mostly as a matter of degree . . .”).

103. See *supra* notes 18–20 and accompanying text.

104. See GREGORY BASSHAM, ORIGINAL INTENT AND THE CONSTITUTION: A PHILOSOPHICAL STUDY 73 (1992) (“[T]he historical record is clear that the framers often employed abstract language to express quite concrete or specific conceptions or rules.”).

105. Calabresi & Fine, *supra* note 68, at 669 (“What judges must be faithful to is the enacted law, not the expectations of the parties who wrote the law.”).

106. *Id.* at 672–73.

“the Constitution contains fewer open-ended, evolutionary clauses” than most new new originalists think.<sup>107</sup> Indeed, they conclude, somewhat startlingly, that the objective original meaning of the Due Process, Privileges or Immunities, and Equal Protection Clauses of the Fourteenth Amendment can readily be identified at a high level of specificity, and thus those provisions are not, in fact, susceptible to a broad range of meanings.<sup>108</sup> Others have made such claims about other ostensibly open-ended provisions, such as the Ninth Amendment<sup>109</sup> and the Free Speech Clause of the First Amendment.<sup>110</sup> Given such conclusions, these originalists usually have had little to say about the propriety of judicial construction of the Constitution. But even if they do not object to the notion of constitutional construction in theory, they presumably see little need for it in practice, given their insistence that not many provisions of the Constitution are, properly understood, open-ended statements of principle phrased at a very high level of generality.

Other originalists categorically reject the claim that the original meaning of some constitutional provisions—even those phrased in vague or abstract terms—should be ascertained at a high level of generality. These originalists have argued that judges instead should always seek the original meaning at a high level of specificity. They have sometimes reasoned that the original meaning, even when understood at a high level of generality, is generally sufficient to resolve constitutional questions

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107. *Id.* at 698.

108. *Id.* at 692–98. Gregory Bassham has made a similar claim about the Due Process Clause of the Fifth Amendment. In his view, although the language “may be abstract,” its original meaning “was as fixed and definite as the common law could make a phrase.” BASSHAM, *supra* note 104, at 73–74 (quoting Charles P. Curtis, *Review and Majority Rule*, in EDMUND N. CAHN, SUPREME COURT AND SUPREME LAW 170, 177 (1968)) (internal quotation marks omitted).

109. See Paulsen, *supra* note 47, at 2046–48 (rejecting the view that the Ninth Amendment might protect particular unenumerated rights, and arguing that the “proper” textualist meaning of the Amendment is that the specification of rights in the Constitution did not “work a pro tanto repeal of state law rights possessed against state governments”). In addition, Justice Scalia has suggested that the Equal Protection Clause speaks with the requisite specificity to overcome the objection that *Brown* was wrong because segregation was accepted at the time of the ratification of the Fourteenth Amendment. In *Rutan v. Republican Party of Illinois*, he argued that “when a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down.” 497 U.S. 62, 95 (1990) (Scalia, J., dissenting). He then responded to Justice Stevens’s charge that such an approach would have mandated the conclusion that segregation does not violate the Equal Protection Clause by arguing that *Brown v. Board of Education* does not demonstrate “the dangerous consequences of this principle,” because tradition has a role “in giving content only to ambiguous constitutional text.” *Rutan*, 497 U.S. at 95, n.1 (citing 347 U.S. 483 (1954)). In his view, the Equal Protection Clause and “the Thirteenth Amendment’s abolition of the institution of black slavery [left] no room for doubt that laws treating people differently because of their race”—and in particular laws segregating on the basis of race—“are invalid.” *Id.*

110. See BASSHAM, *supra* note 104, at 74 (arguing that the Free Speech Clause contains a “clear and reasonably determinate standard”).

that arise today.<sup>111</sup> More frequently, these originalists have reasoned that judges ought to read even ostensibly vague provisions at a narrow level of abstraction, because unconstrained construction, which becomes necessary when original meaning is discerned at a high level of generality, is inconsistent with the judicial role or with democratic values. For example, Bork—who was once an old originalist and then seamlessly became a new originalist<sup>112</sup>—famously analogized the Privileges or Immunities Clause of the Fourteenth Amendment to an “ink blot,” because its “meaning cannot be ascertained” and argued that “[n]o judge is entitled to interpret an ink blot on the ground that there must be something under it.”<sup>113</sup> Michael Stokes Paulsen, who considers himself a new originalist,<sup>114</sup> has developed this claim, arguing that “[w]ith certain texts thought to be highly general or vague, the answer might simply be that the text in fact does not supply a rule or a standard.”<sup>115</sup> Paulsen has acknowledged that “textual imprecision or generality often admits of a range of choices,”<sup>116</sup> but he has contended that “if the meaning of the Constitution’s language fails to provide [a determinate] rule or standard—if it is actually indeterminate (or under-determinate) as to the specific question at hand—then a court has no basis for displacing”

111. See Paulsen, *supra* note 47, at 2056 (“The rules of originalism] do not answer all questions, but they answer a lot of them.”); Scalia, *supra* note 35, at 45 (“Often—indeed, I dare say usually—[the original meaning of the text] is easy to discern and simple to apply.”). Justice Scalia has tempered this claim by acknowledging that “[s]ometimes (though not very often) there will be disagreement regarding the original meaning; and sometimes there will be disagreement as to how that original meaning applies to new and unforeseen phenomena.” Scalia, *supra* note 35, at 45; see also Scalia, *supra* note 24, at 856 (“[Originalism’s] greatest defect . . . is the difficulty of applying it correctly. . . . [I]t is often exceedingly difficult to plumb the original understanding of an ancient text.”). But Justice Scalia and others expect these instances to be “exceedingly rare.” SOURCEBOOK, *supra* note 31, at 28. As Justice Scalia has stated, the “originalist, if he does not have all the answers, has many of them.” Scalia, *supra* note 35, at 46; see also Kay, *supra* note 91, at 258 (“The good faith application of original intentions will resolve many cases in ways which are relatively free from doubt.”).

112. Although Bork began as an old originalist, see Bork, *supra* note 22, at 826 (urging fidelity to the original intentions), he eventually appears to have embraced many of the tenets of the new originalism, a shift that he described as simply a clarification of his earlier work, see BORK, *supra* note 28, at 144. He rejected the quest for original intent and instead urged a focus on the objective original understanding, *id.*, and he argued that an originalist should seek the original meaning at “the level of generality that interpretation of the words, structure, and history of the Constitution fairly supports.” *Id.* at 150; see also *supra* note 76 and accompanying text. Notwithstanding his arguments about the level of generality, however, Bork apparently concluded that certain provisions of the Constitution were so abstract (and thus obscure) that judges should simply decline to enforce them.

113. BORK, *supra* note 28, at 166.

114. See Kesavan & Paulsen, *supra* note 5, at 1127, 1134–48 (defending “original public meaning textualism” and describing its place in the evolution of originalism); *id.* at 1139 (using the term “new originalism” to describe “original meaning textualism”).

115. Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Construction?*, 103 NW. U. L. REV. 857, 881 (2009).

116. Michael Stokes Paulsen, *A Government of Adequate Powers*, 31 HARV. J.L. & PUB. POL’Y 991, 995 (2008).

political decisions.<sup>117</sup> On this view, textual “indeterminacy implies broader *political*, democratic discretion, not broader *judicial* discretion.”<sup>118</sup> It naturally follows, as Paulsen explains, that the “power of constitutional construction within the boundaries of a general text is for Congress, not the courts.”<sup>119</sup>

Not surprisingly, originalists who have resisted the move to objective-original-meaning originalism have also rejected the new new originalists’ claims that abstractly phrased constitutional provisions should be interpreted at a high level of generality, and that judges can properly engage in construction to give concrete meaning to such provisions in application. Richard Kay, for example, has lamented that new originalism—and particularly new new originalism<sup>120</sup>—is likely to “generate more cases of constitutional indeterminacy than will the originalism of original intentions,”<sup>121</sup> because there is no objective, a priori way to determine the appropriate level of generality at which a hypothetical fictional person would understand the text’s objective meaning.<sup>122</sup> Because such indeterminacy inevitably will lead to

117. Paulsen, *supra* note 47, at 2057; *accord* Paulsen, *supra* note 115, at 881 (“[T]he Constitution’s text itself suggests, as a practical matter, a default rule of interpretation where the constitutional text is unspecific: popular republican self-government.”); *see also* Lino A. Graglia, *Constitutional Interpretation*, 44 SYRACUSE L. REV. 631, 633 (1993) (“The absence of a clear constitutional basis for invalidation of a political choice should mean that the choice is not invalid . . .”); Michael W. McConnell, *On Reading the Constitution*, 73 CORNELL L. REV. 359, 361 (1987) (“If the judge . . . concludes that he cannot *tell* whether a challenged governmental action is forbidden by the Constitution, then he is free to leave the determination of the legal rule to the elected authorities.”).

118. Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289, 296 n.18 (2005); *accord* Kesavan & Paulsen, *supra* note 5, at 1129–30 n.54 (“[W]here there is a range of equally legitimate interpretations, and the political branches have chosen one of them, there is no basis for the courts to invalidate the political branches’ choice.”); Paulsen, *supra* note 116, at 995 (“[T]he more indeterminate or under-determinate the range of a constitutional provision, the broader the duty of the courts to defer to what the legislature has enacted.”); Paulsen, *supra* note 115, at 882 (“Unspecific texts do not warrant abstracting more specific principles. The Constitution’s structure suggests the opposite rule: Unspecific texts, to the extent of their un-specificity, permit a range of legitimate interpretation and application by *political* decisionmakers.”). Paulsen bases this “rule against abstraction” on the fact that the Constitution is written and specifically identifies “this Constitution” as supreme law. Paulsen, *supra* note 115, at 881–82. Nelson Lund similarly has recognized that the constitutional text often does not resolve concrete questions, and that in such cases, there is no “algorithm” for deciding the question. Lund, *supra* note 94, at 1372. Unlike Paulsen and Bork, however, Lund argues that “a conscientiously originalist court has no choice but to decide the issue in light of the purpose of the provision as that purpose was understood by those who adopted it.” *Id.* Lund has nevertheless criticized Balkin’s new new originalism, because a “moderately clever and determined practitioner of such ‘originalism’ should be able to get just about any result that a living constitutionalist might desire.” *Id.* at 1371.

119. Paulsen, *supra* note 116, at 995.

120. Kay, *supra* note 40, at 723–24 (discussing Balkin’s work).

121. *Id.* at 721.

122. *See id.* at 725 (“[R]elying on an artificial concept instead of on an actual historical event inevitably enlarges the field of such imaginative reconstructions.”).

unconstrained judicial decisionmaking, Kay rejects the propriety of interpreting constitutional text at a high level of generality, and he concludes that unguided judicial construction is inconsistent with any proper account of originalism.<sup>123</sup> Steven Smith, who has urged a return to “that old-time originalism,”<sup>124</sup> has similarly argued that “understanding constitutional provisions as embodiments of principles”<sup>125</sup>—that is, interpreting vague constitutional text at a high level of generality—enables the very sort of instrumentalism that originalism originally was devised to resist.<sup>126</sup> And John McGinnis and Michael Rappaport, who have advanced a more eclectic version of originalism,<sup>127</sup> have rejected the new new originalists’ embrace of construction, arguing that the construction is inconsistent with the original interpretive rules embraced by the Framers<sup>128</sup> and is likely to produce “inconsistent and ad hoc results.”<sup>129</sup>

To all of these originalists, there is still a significant (and fundamental) difference between originalism and non-originalism. Their versions of originalism, either in practice or by design, do not entail judges’ drawing on extra-constitutional sources in the course of exercising broad discretion to assign meaning to vague constitutional

123. *Id.* at 721 (“The discovery of indeterminacies in otherwise originalist interpretation has been the ‘little gap’ through which a broad range of judicial choice has been perceived.”); *id.* at 721 n.76 (“The absence of determinate meaning has been explicitly linked to the practice of ‘constitutional construction’ whereby interpreters are obliged to extend the binding force of the Constitution beyond its linguistic meaning.”).

124. Smith, *supra* note 40, at 1.

125. Smith, *supra* note 77.

126. *See id.* at 189 (“[Jack Balkin] has advocated . . . an approach which, by interpreting the Constitution’s original meaning to embrace a set of open-ended principles, is able to justify pretty much any results that the most ardently progressive constitutional heart could desire.”). Smith instead suggests an approach that would limit constitutional meaning to “what the human beings who enacted the provision thought it meant,” *id.* at 198, which is quite similar (even if not necessarily identical) to the original-expected-applications approach that most new originalists have rejected. *See supra* note 77.

127. McGinnis and Rappaport have promoted “original methods originalism,” an approach that requires the interpreter to use “the interpretive methods that the constitutional enactors would have deemed applicable to it.” McGinnis & Rappaport, *supra* note 51, at 751. This approach mediates between original-intent originalism and original-meaning originalism, *see id.* at 752, 758–65, and rests for its normative justification in large part on the fact that the Constitution is the product of a “strict supermajoritarian process.” *Id.* at 755; *see also* McGinnis & Rappaport, *supra* note 86, at 384–91.

128. McGinnis & Rappaport, *supra* note 51, at 773 (“[A]dvocates of construction have not provided evidence that anyone embraced construction at the time of the Constitution’s enactment, and we have been able to find none. To the contrary, the evidence that we have found suggests that interpreters believed that ambiguity and vagueness could be resolved through the applicable interpretive rules, and thus through originalist methods.”).

129. *Id.* at 784; *see also id.* at 783 (“Because there is no legally required or even accepted method for determining how to resolve questions of construction, judges are likely to determine how to engage in construction based on their own views.”).

text. In deciding how different originalism and non-originalism are, in other words, it depends a good deal on which originalists we ask.

### III. WHERE DOES ORIGINALISM GO FROM HERE?

In one respect, there is nothing new in this state of affairs. As Tom Colby and I have shown elsewhere, originalism has long been more a collection of loosely related interpretive theories than one coherent approach to interpretation.<sup>130</sup> Originalists have long disagreed about the proper object of the interpretive inquiry,<sup>131</sup> about the relevant evidence for assigning constitutional meaning,<sup>132</sup> and about the role of precedent in constitutional decisionmaking,<sup>133</sup> to name just a few areas of debate. Even questions about levels of generality and the propriety of judicial construction of broadly phrased text are not new.<sup>134</sup> New new originalism, in this sense, is perhaps no more different from new originalism (or old originalism) than was any other theory that claimed the label originalism over the years.

But in another respect, the schism that new new originalism is provoking in the originalist camp is quite different from the intramural disagreements of the past and, consequently, is profoundly important for originalism's continuing viability. Originalism was originally offered—and continues to be offered today by many of its adherents—as a neutral and objective antidote to what many viewed as the unprincipled instrumentalism of other approaches to constitutional decisionmaking. In collapsing much of the distinction between originalism and non-originalism, however, the new new originalists have threatened to explode what has long been at the core of originalism's appeal.

Much of the force of the case for originalism has traditionally derived from its claims to neutrality and objectivity, characteristics that its proponents contend are lacking in non-originalist alternatives. In one of the earliest defenses of modern originalism, for example, Bork

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130. See Colby & Smith, *supra* note 6, at 258.

131. See *id.* at 248–55.

132. See Kesavan & Paulsen, *supra* note 5, at 1145–48.

133. See Colby & Smith, *supra* note 6, at 260–62.

134. See, e.g., Raoul Berger, *Some Reflections on Interpretivism*, 55 GEO. WASH. L. REV. 1, 6–8 (1986) (“I would caution against judicial choices of levels of generality. Ascending the ladder of generality obliterates those limits [on judicial power].”); *id.* at 10–11 (“Frequently there will be cases where general language is not illuminated by legislative history, where the evidence of original intention is ambiguous, looks both ways, or is altogether lacking. There the judge must, as Justice Holmes observed, legislate ‘interstitially,’ or as Cardozo put it, fill ‘the open spaces in the law.’” (footnotes omitted) (quoting *S. Pac. Co. v. Jensen*, 244 U.S. 205, 221 (1917)); BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 113 (1921)); see also BERGER, *supra* note 21, at 99–116 (criticizing the “‘open-ended’ phraseology theory” of interpretation); Kay, *supra* note 91, at 264 (discussing the relationship between the level of generality of the constitutional text and original intentions).

maintained that if we are to insist that judges be controlled by “neutral principles,” then we must insist that they be faithful to “the text and the history, and their fair implications.”<sup>135</sup> McConnell similarly has argued that originalism “supplies an objective basis for judgment that does not merely reflect the judge’s own ideological stance,” whereas “constitutional interpretation based on the judge’s own assessment of worthy purposes and propitious consequences lacks that objectivity.”<sup>136</sup> It is “this potential for neutrality that accounts for the visceral appeal of originalism.”<sup>137</sup>

Originalists’ frequent claim that their approach is uniquely effective at constraining judges flows directly from this premise regarding neutrality and objectivity.<sup>138</sup> At bottom, originalists have advanced their claims about neutrality and objectivity, and their claim about constraint, to underscore that originalism is uniquely legitimate—and thus fundamentally different—from non-originalism.<sup>139</sup> Of course, these claims have long been met with skepticism.<sup>140</sup> When Berger contended in the

135. Bork, *supra* note 21, at 2, 8; *see also* Maltz, *supra* note 15, at 789 (“[U]nlike nonoriginalist theories, at its core originalism does not depend on extralegal, nonneutral justifications. Instead, it is premised on internal legal conventions developed without regard to some specific political agenda unrelated to the nature of judging itself.”); *cf.* Lillian R. BeVier, *The Integrity and Impersonality of Originalism*, 19 HARV. J.L. & PUB. POL’Y 283, 286 (1996) (“Integrity characterizes a judicial process based on originalism, [whereas] its lack is one of the chief deficiencies of its alternatives.”).

136. Michael W. McConnell, *Active Liberty: A Progressive Alternative to Textualism and Originalism?*, 119 HARV. L. REV. 2387, 2415 (2006) [hereinafter McConnell, *Active Liberty*] (reviewing STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005)); Michael W. McConnell, *The Role of Democratic Politics in Transforming Moral Convictions into Law*, 98 YALE L.J. 1501, 1525 (1989) [hereinafter McConnell, *Role of Democratic Politics*] (reviewing MICHAEL J. PERRY, *MORALITY, POLITICS AND LAW* (1988)) (“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.”); *see also* Tara Smith, *Why Originalism Won’t Die—Common Mistakes in Competing Theories of Judicial Interpretation*, 2 DUKE J. CONST. L. & PUB. POL’Y 159, 161 (2007) (“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.”).

137. Maltz, *supra* note 15, at 794.

138. *See, e.g.*, Bork, *supra* note 21, at 6 (“[A] legitimate Court must be controlled by principles exterior to the will of the Justices.”); Scalia, *supra* note 24, at 863–64 (arguing that originalism limits the likelihood that “judges will mistake their own predilections for the law,” because it relies on historical facts outside of any judge’s particular preferences, whereas non-originalism “plays precisely to this weakness”); Steven D. Smith, *Law Without Mind*, 88 MICH. L. REV. 104, 106 (1989) (“A central concern of originalism is that judges be *constrained* by the law rather than be left free to act according to their own lights, a course that originalists regard as essentially lawless.”).

139. *See, e.g.*, BeVier, *supra* note 135, at 286 (“Integrity characterizes a judicial process based on originalism, and its lack is one of the chief deficiencies of its alternatives.”); Scalia, *supra* note 24, at 854 (“The principal theoretical defect of nonoriginalism . . . is its incompatibility with the very principle that legitimizes judicial review of constitutionality.”); McConnell, *Active Liberty*, *supra* note 136, at 2387–88 (arguing that originalists “offer a principled justification for the pattern of decisions they favor,” but that non-originalists “have yet to propound a comparable theory”).

140. *See, e.g.*, JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE*

1970s that originalism would prevent judges from imposing their values under the “guise of interpretation,”<sup>141</sup> critics responded by noting that originalism itself was not neutral or apolitical.<sup>142</sup> After Edwin Meese launched the Reagan administration’s campaign in favor of originalism in the 1980s, stressing that the approach was “not a jurisprudence of political results” but instead, was an effort “to depoliticize the law,”<sup>143</sup> critics responded by noting that textual and historical ambiguities inevitably would lead judges to make political and normative choices.<sup>144</sup> And the “campaign to change the label from the Doctrine of Original Intent to the Doctrine of Original Meaning”<sup>145</sup> initially did little to answer those criticisms.<sup>146</sup>

But the embrace by most originalists of the idea of objective original meaning and the growing recognition, on the part of many prominent originalists, that the original meaning sometimes must be ascertained at a broad level of generality, produced increasing acceptance of originalism in the academy. As Tom Colby has explained, the scholars at the vanguard of the new originalist movement have helped to earn originalism, which was once regularly derided in the academy,<sup>147</sup> “a respectable place in the pantheon of constitutional theory.”<sup>148</sup> Of course, it is hyperbole to suggest, as has Barnett, that originalism, as traditionally understood, “is now the prevailing approach to constitutional interpretation.”<sup>149</sup> But originalism, at least, has increasingly earned grudging respect as a viable, even if not wholly convincing, theory of constitutional interpretation.

CONSTITUTION 10–11 (1996) (explaining that historical ambiguities complicate any effort to establish one fixed constitutional meaning); Paul Finkelman, *The Constitution and the Intentions of the Framers: The Limits of Historical Analysis*, 50 U. PITT. L. REV. 349, 397 (1989) (same).

141. Berger, *supra* note 134, at 1.

142. See, e.g., Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 498 (1981) (“[J]udges cannot discover [the original] intention without building or adopting one conception of constitutional intention rather than another, without, that is, making the decisions of political morality they were meant to avoid.”).

143. Edwin Meese III, *Construing the Constitution*, 19 U.C. DAVIS L. REV. 22, 29 (1985).

144. See, e.g., Fallon, *supra* note 93, at 1213 (“[P]articulate interpretations of the framers’ group intent . . . embody implicit or explicit normative judgments.”).

145. Scalia, *supra* note 31, at 106.

146. See, e.g., Fallon, *supra* note 90, at 492 (“[Originalism is] perhaps most often a political or rhetorical stalking horse for a set of substantive positions with respect to a relatively narrow set of constitutional issues in the current age.”); Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right’s Living Constitution*, 75 FORDHAM L. REV. 545, 561 (2006) (“As a political practice that developed in the 1980s, originalism seeks, more or less blatantly, to alter the Constitution so as to infuse it with conservative political principles.”).

147. Jonathan R. Macey, *Originalism as an “Ism,”* 19 HARV. J.L. & PUB. POL’Y 301, 301 (1996) (“[A]mong constitutional law scholars at elite schools, the idea of being an originalist is tantamount to being some sort of intellectual Luddite.”); Maltz, *supra* note 15, at 773.

148. Colby, *supra* note 30, at 34.

149. Barnett, *supra* note 68, at 613.

Colby has convincingly argued that originalism's increasing intellectual respectability has come at the cost of its longstanding (if suspect) claims to judicial constraint.<sup>150</sup> But the costs have been even greater than that. As noted above, the versions of originalism that have become increasingly popular in the academy tend to collapse the distinction between originalism and non-originalism.<sup>151</sup> This has forced other originalists to reject—selectively or categorically—the very refinements that have made originalism a more respectable, coherent, and logically consistent approach. Because many of the new new originalists have built on the theoretical refinements of other originalists, while defending sometimes substantively liberal results, the originalists who have criticized or rejected their work have jeopardized, once again, originalism's longstanding claims to political neutrality.<sup>152</sup>

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150. Colby's account, which is devastating, relies in large part on the theoretical refinements described above. But although Colby acknowledges that "[o]n the ground . . . it is getting harder and harder to tell originalism and nonoriginalism apart," he resists the claim that these refinements have collapsed the distinction between originalism and non-originalism, stressing that "[i]n theory . . . 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." Colby, *supra* note 30, at 41. This is surely correct, if one excludes new new originalism from "New Originalism." But Colby treats essentially *all* of the developments in originalist theory since the days of Berger—including the claims by new originalists such as Lawson and Paulsen and the more capacious claims by Barnett, Balkin, and Solum about levels of generality and construction—as the accepted wisdom of new originalism. *See id.* at 6–7 (acknowledging that "only a few [originalists] have explicitly embraced all of" the "significant theoretical moves" that marked the evolution from the old to the new originalism, but focusing on the "collective[]" effects of these theoretical moves); *id.* at 67 (noting that not all originalists have endorsed "the full New Originalist theoretical package"). He is not necessarily wrong to do so; it is, after all, becoming almost impossible to keep track of all the variations in originalist thought, and in any event, there is "no official gatekeeper" to apply a test for originalist (or new originalist) purity. *See* Colby & Smith, *supra* note 6, at 258. But as I have explained, new originalism itself is becoming a deeply contested concept, and many (and perhaps most) new originalists have distanced themselves from the broader implications of the new new originalists' claims. *See* Jamal Greene, *Selling Originalism*, 97 *Geo. L.J.* 657, 672 (2009) ("I am not convinced that an originalist 'school' can be identified that has all of [the] characteristics [of the new originalism] . . .").

151. *See supra* notes 89–101 and accompanying text.

152. There is some debate over whether the new new originalists are intentionally trying to be subversive, hoisting new originalists on their own petard and forcing them to acknowledge the logical consequences of their theory. *See* Barnett, *supra* note 83, at 414, 416 (predicting that some originalists will charge that Balkin is trying to preserve "an unvarnished living constitutionalism" while claiming the "mantle of originalism" (internal quotation marks omitted)); Colby, *supra* note 30, at 40 ("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 owned decidedly nonoriginalist purposes."); Smith, *supra* note 77, at 194–95 (questioning whether Balkin's conversion to originalism is "sincere or . . . strategic"). It is true that some of the new new originalists did not identify as originalists until recently. *See* J.M. Balkin, *Constitutional Interpretation and the Problem of History*, 63 *N.Y.U. L. Rev.* 911, 915 (1988) ("I do not agree with Berger's theory of constitutional interpretation . . ."); Barnett, *supra* note 83, at 405 ("All the time I was doing my earliest writings on

Originalism, in other words, has come full circle. It arose in response to non-originalism and its perceived vices. It claimed the virtue of neutrality, but was criticized as unavoidably political and theoretically unsound. It changed, gradually working towards theoretical legitimacy. Those changes made it more attractive to scholars from across the ideological spectrum, which, in turn, helped to substantiate its claims of neutrality. But in doing so, it started to look like non-originalism, the approach that it was created to criticize. And to many of its long-time proponents, this was too high a cost. But in rejecting new new originalism—even though its claims follow naturally from the central tenets of new originalism—originalists risk ceding, once again, any genuine claim to neutrality.

Originalism is thus at a crossroads. Steven Smith has summed up the dilemma that he and other originalists face: Originalists “must of necessity view constitutional provisions as expressing principles, or at least general categories of some sort, if the provisions are to have any current and useable meaning at all,” but such an approach “opens up originalism to precisely the sort of open-ended, licentious interpretations . . . that Balkin offers.”<sup>153</sup> Originalists can join the new new originalists in acknowledging that originalism is a limited theory of interpretation that alone cannot answer many questions of constitutional law, and thus accept that the project of constitutional interpretation sometimes requires judicial creativity to implement the Constitution’s abstract principles. Or they can continue to claim that originalism is capable of answering all constitutional questions without any need for broad judicial discretion—or at least that the Constitution, properly understood, does not in fact confer any substantial judicial discretion. Thus far, most self-described originalists (both new and old) seem to have decided that the costs of the former are simply too much to bear. After all, if they acknowledge originalism’s limits, they risk collapsing the distinction between their approach and the alternatives.

But there are also substantial costs in continuing to claim that originalism can provide answers to most constitutional questions without vesting judges with broad discretion. When originalists claim neutrality but apply originalism to vague text to produce almost exclusively results that are popular among political conservatives, they risk inviting the charge that their approach is in fact a political philosophy, not an

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the Ninth Amendment and the Second Amendment, I considered myself a nonoriginalist.”). But precisely because the versions of originalism that they offer are modest and not significantly different than most versions of non-originalism, there is perhaps little reason to doubt the sincerity of their commitments.

153. Smith, *supra* note 77, at 195, 196.

interpretive methodology.<sup>154</sup> One can be forgiven for questioning originalism's neutrality, for example, when originalists contend that the Constitution's ostensibly broad, rights-granting provisions in fact carry narrow, determinate meanings—and thus, that conservative bugaboos such as *Lawrence v. Texas*<sup>155</sup> and *Roe v. Wade*<sup>156</sup> are clearly wrong<sup>157</sup>—but that much of the modern administrative state (which is unpopular among political conservatives) is unconstitutional because of an unenumerated nondelegation principle.<sup>158</sup> Similar doubts arise when originalists assert that judges should simply decline to enforce underdeterminate rights-granting provisions in order to increase the space for democratic decisionmaking<sup>159</sup>—a respectable even if contestable view—but that the capaciously phrased Free Speech Clause of the First Amendment clearly prohibits Congress's authority to limit the influence of money in elections.<sup>160</sup> If the “true” originalism—that is, anything but new new originalism—somehow almost always produces conservative results from indeterminate text, then originalism's claim to political neutrality becomes significantly more difficult to sustain.

#### CONCLUSION

If originalism is as much a political philosophy as an interpretive methodology, then it will by definition continue to be quite different from non-originalism. Modern originalism was conceived, in the words of Edwin Meese, one of its most prominent early political patrons, as a

154. Several commentators have argued that originalism is more a political movement than an interpretive methodology. *See, e.g.*, Fallon, *supra* note 90, at 492; Greene, *supra* note 150, at 702; Post & Siegel, *supra* note 146, at 561.

155. 539 U.S. 558 (2003).

156. 410 U.S. 113 (1973).

157. *See* Calabresi & Fine, *supra* note 68, at 692–98; Steven G. Calabresi, *Substantive Due Process After Gonzales v. Carhart*, 106 MICH. L. REV. 1517, 1531–41 (2008); Steven G. Calabresi, *Lawrence, the Fourteenth Amendment, and the Supreme Court's Reliance on Foreign Constitutional Law: An Originalist Reappraisal*, 65 OHIO ST. L.J. 1097, 1107–15 (2004); *cf.* Paulsen, *supra* note 47, at 2047–48 (arguing that the Ninth Amendment is a narrow provision that makes clear that the enumeration of rights running against the federal government does not “work a pro tanto repeal of state law rights possessed against state governments”).

158. *See* Steven G. Calabresi & Nicholas Terrell, *The Fatally Flawed Theory of the Unbundled Executive*, 93 MINN. L. REV. 1696, 1704 n.45 (2009); *see also* Lawson, *supra* note 72, at 395 (arguing that the Necessary and Proper Clause “textually embodies a nondelegation principle”).

159. *See* Paulsen, *supra* note 116, at 995; *supra* notes 116–19 and accompanying text.

160. *See* *Citizens United v. FEC*, 130 S. Ct. 876, 925–29 (2010) (Scalia, J., concurring) (discussing the original meaning of the First Amendment); *see also* Paulsen, *supra* note 116, at 993 & n.9 (describing *McConnell v. FEC*, 540 U.S. 93 (2003), as an “atrocit[y]”). To be fair, Paulsen has been unusually willing to follow his approach to open-ended provisions, even when it leads to results that are generally anathema to political conservatives. *See id.* at 991–95 (arguing that the faithful application of his version of original public meaning textualism requires the conclusion that “the powers conferred on the national government are huge, sweeping, overlapping, and, when taken together, very nearly comprehensive”).

project to curtail “the radical egalitarianism and expansive civil libertarianism of the Warren Court.”<sup>161</sup> Its self-conception has long been developed largely in contrast to those perceived (liberal) excesses of non-originalism.<sup>162</sup> The response of most originalists to the new new originalists suggests that, to them, originalism’s core identity continues to depend on its rejection of interpretive approaches that vest judges with discretion to inject substantively liberal values into the Constitution—and thus, depends on the maintenance of a sharp demarcation between originalism and non-originalism. It is for this reason that new new originalism’s challenge has been particularly subversive. In rejecting new new originalism, originalists might preserve the distinction between originalism and non-originalism. But they may do so at the expense of their claims to political neutrality and objectivity.

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161. Edwin Meese, III, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 S. TEX. L. REV. 455, 464 (1986).

162. See, e.g., Scalia, *supra* note 35, at 38–39 (discussing the “Great Divide” in constitutional interpretation between originalists and non-originalists).